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February 2, 2010

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Re: Cause No. D-1-GN-08-003039 *Tracfone Wireless, Inc., and Virgin Mobile USA, L.P., v. Commission on State Emergency Communications and Texas 9-1-1 Alliance*, in the 126<sup>th</sup> Judicial District, Travis County, Texas

Dear Counsel:

What follows is the Court's ruling on the Administrative Appeal heard on November 18, 2009. This correspondence is not to be considered Findings of Fact and Conclusions of Law, nor is it intended to preclude other findings and conclusions that would support my decision. After considering the pleadings, evidence, caselaw, and arguments of counsel, the Court rules as follows:

The Court grants Plaintiffs' Petition for Judicial Review and reverses the Commission's Order.

Though not required, it may be helpful to the litigants for the Court to explain its reasoning. The issue before the Court is whether prepaid wireless services were governed by Chapter 771 of the Texas Health and Safety Code from 2001 – 2005 and whether Plaintiffs, as prepaid wireless service providers, were required to collect and remit fees to the Comptroller to fund 911 services during that time period.

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The relevant statute states in pertinent part:

§771.0711 EMERGENCY SERVICE FEE FOR WIRELESS TELECOMMUNICATIONS CONNECTIONS.

(a) ...the commission shall impose on each **wireless telecommunications connection** a 9-1-1 emergency service fee. \* \* \*

(b) A wireless service provider shall collect the fee in an amount equal to 50 cents a month for each wireless telecommunications from its subscribers and shall pay the money collected to the comptroller not later than the 30<sup>th</sup> day after the last day of the month during which the fees were collected.\* \* \*(emphasis added)

§771.073 COLLECTION OF FEES AND SURCHARGES

(a) A customer on which a fee or surcharge is imposed under this subchapter is liable for the fee or surcharge in the same manner as the customer is liable for the charges for services provided by the service provider. **The service provider shall collect the fees and surcharges in the same manner it collects those charges for service**, except that the service provider is not required to take legal action to enforce the collection of the fees or surcharges. A fee or surcharge **must be stated separately on the customer's bill**. TEX. HEALTH & SAFETY CODE §§ 771.0711 & 771.073 (Vernon 2003)(emphasis added).

The principal objective in the judicial construction of statutes is to determine and give effect to the intent of the Legislature. Legislative intent is evidenced primarily through the language of the statute. The Court must first look at the plain meaning of the whole statute and not just individual provisions. As this is a taxation statute, the Court relies on the general proposition that statutes imposing a tax must be strictly construed against the taxing authority and liberally construed in favor of the taxpayer. *Alon USA, LP v. State*, 222 S.W.3d 19 (Tex. App.–Austin 2005, pet. denied).

The Court first reviewed the plain language of the statute. The plain language states that the 911 fee will be imposed on each wireless telecommunications connection. The plain language then describes the collection and calculation methods to be employed. These methods include a calculation to determine the fee, the manner in which it shall be collected, who shall collect it, and a requirement that the consumer who is paying the fee be informed of the fee on their bill. The evidence before the Court was that prepaid wireless service providers do not charge monthly fees, do not have monthly subscribers and have limited contact, if any, with the consumers. On its face the statute is ambiguous as applied to prepaid wireless service providers.

It is important to note that this particular statute was enacted in 1997 and was silent as to how to calculate or collect the fee in a prepaid wireless context. The Legislature is presumed to know the industry it regulates and understands how it operates. *Texas Health Ins. Risk Pool v. Southwest Serv. Life Ins. Co.*, 272 S.W.3d 797, 802 (Tex. App.–Austin 2008, no pet.) Prepaid wireless services have been available since the mid 1990s and became increasingly popular by the early 2000s. The statute was amended by the Legislature in 1999 and 2002, after prepaid wireless services had become prevalent, but those amendments did not define prepaid wireless services and did not amend the

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collection or calculation provision to address the type of wireless communication services that do not bill monthly or have monthly subscribers.

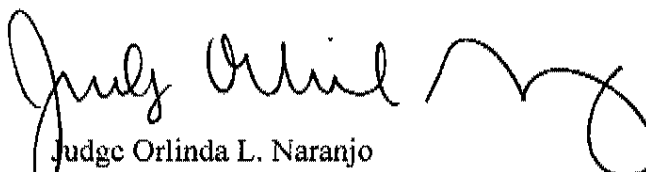
In 2009, the Legislature enacted TEX. HEALTH & SAFETY CODE §771.0712. This statute specifically identifies that it applies to **prepaid** wireless telecommunication services and changes the method of collection (at the time of each transaction); changes who should collect the fee (the seller and not the service provider); and changes the fee (to 2% of the purchase price) for the prepaid wireless service communications business model. This statute, in essence, creates a whole new method of collection and calculation of the fee specifically tailored for prepaid wireless telecommunication services.

In reviewing subsequent legislation, and the effect it has on the interpretation of the original statute, the Court considered the following cases: *Calvert v. Audio Center, Inc.* 346 S.W.2d 420 (Tex. Civ. App. – Austin, 1961, writ ref'd n.r.e.)(holding that subsequent legislation which taxed component parts of a radio, meant the prior statute did not include component parts in the definition of radio); *Ex Parte Ellis* 275 S.W.3d 74 (Tex. App. – Austin 2008, pet. granted)(holding that subsequent legislation which created negotiable instruments as another category of the defined term “funds” changed the statute rather than clarified existing law); and *Sharp v. Caterpillar, Inc.*, 932 S.W.2d 230 (Tex. App.–Austin 1996, writ denied) (holding that the plain language of the statute evidenced legislative intent where the Legislature specifically noted that the amendment to the statute was intended to clarify existing law and not make a substantive change.) When subsequent legislation differs significantly from prior legislation, there is a presumption that the subsequent legislation changed existing law rather than a clarified it. *Ex Parte Ellis*, 275 S.W.3d at 100. This presumption may be rebutted by some showing, Legislative history or otherwise, that the Legislative intent was that of clarification and not change. *Id.* As the Legislature is explicitly silent as to whether TEX. HEALTH & SAFETY CODE §771.0712 is merely a clarification of existing law and not a substantive change, and there is no proper Legislative history to draw upon, the Legislative intent is unclear and the presumption of change rather than clarification has not been rebutted. The Court finds that TEX. HEALTH & SAFETY CODE §771.0712 is a change to existing law and not merely a clarification of existing law.

Therefore, based on the discussion above, the Court finds that Chapter 771 of the Texas Health and Safety Code does not apply to prepaid wireless telecommunication service providers and Plaintiffs are precluded from being subjected to the requirements of Chapter 771 for 2001 – 2005.

The Court will sign the Order submitted by the Plaintiffs and will send the parties a file stamped copy. If you have any questions regarding this matter, please contact my office at (512) 854-4023.

Yours very truly,



Judge Orlinda L. Naranjo  
419th District Court, Travis County

OLN:jad

xc: Ms. Amalia Rodriguez-Mendoza, District Clerk