



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 25, 1998

The Honorable Keith Oakley
Chair, Committee on Public Safety
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-078

Re: Whether the Texas Department of Licensing and Regulation must defer enforcing general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers (RQ-1141)

Dear Representative Oakley:

You ask whether the Texas Department of Licensing and Regulation ("TDLR") must defer enforcing general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers. We conclude that the TDLR has the discretion to defer enforcement.

The State of Texas has adopted a policy to eliminate, as far as possible, "unnecessary barriers" that needlessly restrict a disabled individual's ability to achieve "maximum personal independence."¹ To this end, the Commissioner of Licensing and Regulation ("commissioner") is authorized to adopt standards regulating "a privately funded building or facility" that the Americans with Disabilities Act² ("ADA") defines either as a public accommodation³ or as a commercial facility.⁴ A gasoline pump apparently may fit into either category: 42 U.S.C. § 12181(7)(F) defines "public accommodation" explicitly to include a gasoline station whose operations affect commerce;⁵ and 42 U.S.C. § 12181(2)(B) defines "commercial facility" to include a facility whose operations

¹See V.T.C.S. art. 9102, § 1.

²42 U.S.C. ch. 126.

³See 42 U.S.C. § 12181(7)(F) (defining "public accommodation").

⁴See *id.* § 12181(2) (defining "commercial facility"); V.T.C.S. art. 9102, § 2(a)(4), (5).

⁵See also 28 C.F.R. § 36.104 (defining "public accommodation").

affect commerce.⁶ A facility includes “all or any portion of . . . equipment, . . . or other real or personal property . . .”⁷

Under the TDLR’s maximum high reach requirements, if an individual in a wheelchair may approach controls or operating mechanisms that are generally required to be accessible only from the front, the “high forward reach” may be no higher than forty-eight inches.⁸ Similarly, if an individual in a wheelchair may approach an object only from the side, the “maximum high side reach” is fifty-four inches.⁹ The TDLR’s reach-range requirements appear to be consistent with federal law.¹⁰

You question only whether the department must defer enforcing its reach-range standard against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers. We believe it has the discretion to defer enforcement,¹¹ so long as the TDLR does not selectively enforce its regulations in violation of due-process standards.¹² An agency with enforcement authority is free to determine when it will enforce the law, balancing numerous factors that are peculiarly within the agency’s expertise.¹³

⁶See also *id.* (defining “commercial facilities”). “Commerce” includes interstate travel, trade, traffic, or transportation. See *id.*

⁷*Id.* (defining “facility”); Texas Accessibility Standards rule 3.5.31.

⁸See Texas Accessibility Standards rules 4.2.5, 4.27.3.

⁹See Texas Accessibility Standards rules 4.2.6, 4.27.3. We express no opinion here as to whether the maximum high forward reach or maximum high side reach allowance applies to a gasoline pump credit-card reader, access to which may be limited when a car is parked beside it.

¹⁰*Cf.* 28 C.F.R. ch. 36 app. A, §§ 4.2.5, 4.2.6, 4.27.3 & figs. 5(a), (b).

¹¹See *State v. Malone Serv. Co.*, 829 S.W.2d 763, 769 (Tex.), *cert. denied*, 506 U.S. 974 (1992).

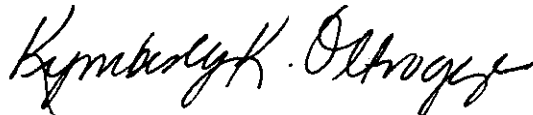
¹²*Cf. Meisner v. State*, 907 S.W.2d 664, 668 (Tex. App.--Waco 1995, no writ) (stating that law-enforcement officers’ discretion limited by certain recognizable boundaries to ensure due process for all individuals).

¹³See *State v. Malone Serv. Co.*, 829 S.W.2d 763, 767 n.6 (Tex. 1992) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). We understand that the federal government presently may be considering specific proposals for regulating gas pump credit-card readers. We have received copies of letters from the United States Architectural and Transportation Barriers Compliance Board and the United States Department of Justice, Civil Rights Division, inviting comment on the issue you raise as it considers revisions to the federal accessibility guidelines. See Letter from Lawrence W. Roffee, Exec. Dir., United States Architectural & Transportation Barriers Bd., to Mr. John L. Oberdorfer, Patton Boggs, L.L.P. (Mar. 30, 1998) (on file with Office of the Attorney General Opinion Comm.); Letter from John Wodatch, Chief, Disability Rights Section, Civil Rights Div., United States Dep’t of Justice, to Mr. John L. Oberdorfer, Esq., Patton Boggs, L.L.P. (Apr. 22, 1998).

S U M M A R Y

The Texas Department of Licensing and Regulation has the discretion to defer enforcement of general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge". The signature is written in a cursive style with a large, stylized initial "K".

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee