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Opinion No. 10-78

Federal Preemption of Proposed Amendment Related to Eligible Telecommunications Carriers

QUESTION

Does a proposed amendment to SB3880/HB3796, which would automatically extend the Tennessee Regulatory Authority's ("TRA") prior designation of a wireline carrier as an eligible telecommunications carrier ("ETC") to such carrier's wireless services, conflict with federal law and regulations governing the designation of ETCs by state regulatory agencies?

OPINION

The proposed amendment would likely be preempted by federal law. Because it would sidestep the federal requirement that a carrier demonstrate either to the TRA or to the FCC that its designation as an ETC is in the public interest as to each type of service it proposes to use to provide universal service, the proposed amendment would frustrate the purpose of Congress in enacting the federal universal service program.

ANALYSIS

In its opinion in *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007), the United States Court of Appeals for the Tenth Circuit described the federal regulatory background that relates to this question:

> The Telecommunications Act of 1996 significantly changed the federal approach to ensuring that the nation's population has access to "universal service." "Universal service" includes the principles of: quality telecommunications service at "just, reasonable, and affordable rates"; service availability in all regions of the country; and services and rates in rural and high-cost areas that are comparable to other areas. 47 U.S.C. § 254(b).
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> To develop the services and infrastructure to meet these goals, Congress created a federal fund to which telecommunications carriers contribute, 47 U.S.C. § 254(d), often through fees passed on to customers. This funding is distributed as public subsidies to telecommunications carriers who apply for and receive designation as ETCs. 47 U.S.C. § 214(e). ETCs are eligible to receive the subsidy

> by committing to offering the "universal services" prescribed by the Federal Communications Commission ("FCC") in the specified service area. *Id.* The FCC is responsible for processing requests for ETC designation when the telecommunications carrier is not subject to the jurisdiction of a state public utility commission. 47 U.S.C. § 214(e)(6). However, when a carrier wishes to obtain ETC designation for an area within a state, it is the state public utility commission rather than the FCC that is charged with making those designations. 47 U.S.C. § 214(e)(2). The Act instructs that "[b]efore designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." *Id.*

Id. at 1267.

The universal service program does not rely exclusively on traditional wireline services. The designated ETC in a particular area can be a provider of wireline services only, a provider of wireless services only, or a provider of both types of services.

The Tennessee Regulatory Authority is the agency of this State that regulates public utilities, including certain telecommunications carriers. The TRA has broad jurisdiction over wireline carriers but only very limited jurisdiction over wireless carriers. Tenn. Code Ann. § 65-4-101(6)(F). Pursuant to its limited authority and the mandate in federal law, the TRA has designated a number of wireline carriers as ETCs in various service areas.

The proposed amendment to SB3880/HB3796 would grant the TRA jurisdiction over wireless service to the extent necessary to perform the duties of designating ETCs. The amendment would also provide that any provider already designated an ETC by the TRA would not need further approval as to any of its services. The amendment provides:

> The purpose of this part is to grant limited jurisdiction to the Tennessee regulatory authority in designating competing telecommunications service providers as eligible telecommunications carriers for purposes of the federal universal service fund as created by the Telecommunications Act of 1996.

The amendment further provides:

> Nothing in this part shall alter or require action with respect to any designation of eligible telecommunications carrier status granted by the authority prior to the effective date of this act, and any such prior designation shall be deemed to encompass all voice communications provided by the eligible telecommunications carrier, including but not limited to wireless communications services, to the extent such services are recognized by federal law for the purpose of universal service support.

A problematic situation arises in the case of any provider of both wireline and wireless services that had previously received TRA designation as an ETC as to its wireline services only.

Under this amendment, a provider in this situation would not need to submit to further review by the TRA in order to receive ETC designation as to its wireless services and would receive universal service funding for wireless as well as wireline services.

The federal program is expressly aimed at the establishment of quality service in all areas through universal service funding. The federal program presses for ubiquitous universal service coverage, whether by wireline or wireless transmission, by ETCs designated by the appropriate state commission or, in some circumstances, by the FCC itself. Above all, the program conditions universal service funding upon approval as an ETC, which in turn is conditioned upon the carrier's meeting certain requirements. The requirements can be refined by rule, but at the very least the applicant for ETC designation must prove that such designation would be in the public interest. 47 U.S.C. § 214(e)(2).

Federal universal service provisions grant authority to the state commissions without regard to whether the state commissions have jurisdiction over particular carriers and without regard to whether service is provided by wireline or wireless carrier. In those instances in which a carrier seeking designation as an ETC is not regulated by the commission for the state where the service area is located, federal law provides for designation by the FCC. 47 U.S.C. § 214(e)(6).

The TRA has not, heretofore, granted ETC status to wireless carriers. In the case of companies that provide both wireline and wireless service, the TRA has granted ETC status based only on wireline service. The TRA's practice is consistent with state law, which grants jurisdiction to the TRA by type of service and not by carrier. In light of this principle, any attempt to extend such designation to the carrier's wireless service would be invalid as exceeding the TRA's jurisdiction. *See BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 512 (Tenn. 2002) (TRA's authority limited to the express statutory grant thereof).

The proposed amendment would grant the TRA jurisdiction over wireless carriers for the limited purpose of designation of ETCs. However, it would also automatically extend the TRA's prior designation of a wireline carrier as an ETC to that carrier's wireless service. A carrier in this situation would be relieved of the obligation to seek designation from the TRA and, presumably, the FCC as well under the theory that the state commission no longer lacks jurisdiction over the carrier.

The question, therefore, is whether state law can remove the federal law requirement of an evaluation of the requesting carrier by either the state commission or the FCC. We believe that federal law preempts the State from doing this. If a state law conflicts with a federal law, either because compliance with both state and federal law is impossible, or because state law frustrates the purposes and objectives Congress expressed in the federal law, the state law is preempted under the Supremacy Clause in Article VI, § 2, of the United States Constitution. *See, e.g., Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). Through the proposed amendment, the General Assembly would effectively exercise authority that has been placed by

federal law in the state commissions, not in the legislature, and without any assurance that the standards for an ETC's providing wireless service have been met.

The federal universal service program relies on and consistently requires the demonstration of a carrier's ability to provide the necessary level of service. The applicable federal law contemplates that certain types of service may not be within the jurisdiction of a particular state commission. In such situations, the same federal law ensures that a competent regulatory agency, namely, the FCC, will examine the applicant with equal thoroughness. Congress's intent that each carrier will be evaluated and designated as to each type of service, therefore, is inherent in this statutory scheme. Because the proposed amendment would remove this requirement as to a carrier currently having ETC designation for wireline service but seeking to extend such designation to its wireless service, the amendment would conflict with the purpose of the federal law. The proposed amendment would thus impede the achievement of the objectives of the federal universal service program. Under the proposed amendment, implementation of that program by this state would not ensure, as Congress intended, that each carrier fully qualify for such funding for each type of service it provides.

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