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March 28, 2011

Opinion No. 11-30

Constitutionality of limitation of intrastate telephone switched access charges

## QUESTION

Does the proposed "Uniform Access, Competition and Consumer Fairness Act of 2011," filed as Senate Bill 598/House Bill 574, violate the provisions of the state or federal constitutions as an unlawful regulatory taking of property by the state without just compensation?

## OPINION

Based on a facial review of Senate Bill 598/House Bill 574, as amended, nothing in the bill leads to the conclusion that the bill is an unconstitutional confiscatory regulation of private utilities. Any "as-applied" determination of the effect that the legislation will have on any covered entity would necessarily entail a factual analysis for each affected entity and is beyond the scope of this opinion.

## ANALYSIS

Your request for an Opinion from this Office was accompanied by the text of proposed SB 598/HB574, as amended, and your question will be analyzed in that context. SB 598/HB574, which is titled as the "Uniform Access, Competition and Consumer Fairness Act of 2011," introduces a new regulatory scheme for the fees that telecommunication utilities may charge for access to switching and related services for the origination or termination of intrastate toll telephone calls and related services generated by other telecommunication utility service providers. The bill as currently amended proposes to phase-in over a period of five years the requirement that entities offering switched access service in Tennessee charge no more for intrastate calls and services than they currently are allowed to charge for interstate calls and services.

A brief overview of the basis for Tennessee's regulation of public utilities is helpful in placing the new regulation proposed by SB 598/HB574 in context. The regulation of public utilities in Tennessee, including telephone utilities, is delegated to the Tennessee Regulatory Authority ("TRA") by statute at Tenn. Code Ann. § 65-4-101, et seq. The powers of the TRA extend only to public utilities that furnish their product within the state. See Tenn. Code Ann. § 64-4-103. The power of the TRA to set rates for public utilities within its jurisdiction and the procedures it must follow are found at Tenn. Code Ann. § 65-5-101, et seq. The TRA has the power to fix just and reasonable rates. See Tenn. Code Ann. § 65-5-101(a). Specifically, the

price regulation plan for telecommunication utilities is found at Tenn. Code Ann. § 65-5-109.

The more traditional price regulation plan, found at Tenn. Code Ann. § 65-5-109(a)-(k) provides the process for covered telecommunication utilities to file with the TRA proposed rates and for the TRA to evaluate those proposed rates and convene a contested case hearing to evaluate evidence on the justness and reasonableness of the proposed rates. With the advent of more competition in the telecommunications industry, a second method for price regulation of telecommunication companies was added. Tenn. Code Ann. § 65-5-109(l)-(t) provides the mechanism for telecommunication utilities to opt to operate under market regulation with the forces of the market driving their costs, prices and returns. SB 598/HB574 proposes to place a legislative limit on one aspect of the services for which telecommunication utilities may charge, namely the switched access service charges for intrastate telephone calls and services.

The Fifth Amendment to the United States Constitution ("…nor shall private property be taken for public use, without just compensation.") and Article I, §21 of the Tennessee Constitution ("[t]hat no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefore.") provide protections against the government taking property rights of its citizens for a public use without providing just compensation in return.

These principles have been applied to the context of regulation of public utilities and the United States Supreme Court has determined the "regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible." *Federal Communication Commission v. Florida Power Corporation,* 480 U.S. 245, 253 (1987). As long as the rates charged are not so unjust as to be confiscatory, the Fifth Amendment does not bar their imposition. *Duquesne Light Company v. Barasch*, 488 U.S. 299, 307 (1989).

An examination of SB 598/HB574 to determine if the proposed limitation of the charges for intrastate switched access is confiscatory necessarily begins with an examination of whether a facial reading of the proposed statute leads to the conclusion that it would be unconstitutional. Such a review reveals nothing on the face of SB 598/HB574 that would necessarily lead to the conclusion that the rates it allows are confiscatory and that it is unconstitutional. Specifically, it ties the rates for intrastate switched access to the same rate currently allowed for interstate switched access. The interstate rate, which is not under the jurisdiction of the TRA, cannot be confiscatory on its face as it is the rate that affected telecommunication utilities currently charge for interstate switched access. Whether it is confiscatory in practice requires the specific company analysis discussed below.

Additionally, the legislation in its proposed Section 65-5-302(e) provides a mechanism for affected utilities to recoup any revenue lost because of the imposition of the limit on intrastate switched access charges. It allows any entity that must transition its rates as called for in the legislation to unilaterally raise its retail rates each year to recover any revenue lost resulting from the revision of the intrastate switched access rates. This changing of retail rates is not subject to any review or regulation by the TRA. Thus, the proposed bill provides a way for affected entities to have the opportunity to be made whole. Again, whether it will actually

provide relief from the limitation of rates required by the legislation requires a specific company analysis.

SB 598/HB574 sets the intrastate switched access rate at the same level as that currently allowed for interstate switched access. It also provides a mechanism for affected telecommunication utilities to recoup any revenue lost as a result of the phasing in of those restrictions. Accordingly, nothing on the face of SB 598/HB574 leads to the conclusion that its implementation will impose an unconstitutional confiscatory setting of utility rates.

Any further analysis of the constitutionality of SB 598/HB574 requires a review of the actual effect the proposed legislation would have on the utilities covered by the bill. This would entail determining the costs each utility incurs in providing intrastate switched access services and whether the terms of the legislation allow each utility to recover those costs. Because each telecommunication utility that provides intrastate switched access services is unique and has its own transmission lines, equipment, overhead and other costs associated with those services, any such analysis of the effect of the implementation of SB 598/HB574 would necessarily entail a case by case review of each affected utility. Because the ultimate outcome of any such challenge would depend on the facts of each individual review, this Office cannot give an opinion on the outcome of any such challenges to the constitutionality of SB 598/HB574.

In summary, regulation of public utilities by government is constitutionally allowable as long as the rates imposed are not confiscatory. Nothing on the face of SB 598/HB574 as amended leads to the conclusion that it is an unconstitutional confiscatory regulation of private utilities. Any determination of the actual effect that the legislation will have on any covered entity will necessarily entail a factual analysis for each affected entity.

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