S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

March 19, 2001

Opinion No. 01-036

Preemption of Tenn. Code Ann. § 65-4-201(c) and/or (d) by 47 U.S.C. § 253

QUESTION

Are the provisions of Tenn. Code Ann. § 65-4-201(c) and (d) lawful and enforceable in view of 47 U.S.C. § 253?

OPINION

It is the opinion of this Office that the provisions of Tenn. Code Ann. § 65-4-201(c) are lawful and enforceable. The Federal Communications Commission has preempted enforcement of the provisions of Tenn. Code Ann. § 65-4-201(d) pursuant to the authority granted to it under 47 U.S.C. § 253(d). Accordingly, Tenn. Code Ann. § 65-4-201(d) is not enforceable.

ANALYSIS

You have requested this Office to analyze whether the provisions of 47 U.S.C. § 253, enacted as part of the Telecommunications Act of 1996, preempt the provisions of Tenn. Code Ann. § 65-4-201(c) & (d), enacted as part of Chapter 408 of the Tennessee Public Acts of 1995. Both of these acts embody similar goals of fostering competition among telecommunications providers and loosening the previous regulatory regime.

The Tennessee courts have already decided that 47 U.S.C. § 253 does not implicitly preempt Tenn. Code Ann. § 65-4-201. *See BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997)(application for permission to appeal denied June 15, 1998). Congress, however, has expressly granted the Federal Communications Commission (the "FCC") the power, under 47 U.S.C. § 253(d), to preempt the provisions of any state telecommunications act, such as Tenn. Code Ann. § 65-4-201, if the state act violates 47 U.S.C. §§ 253(a) or (b). The exercise by the FCC of its power to preempt portions of state telecommunications acts under 47 U.S.C. § 253(d) has been expressly approved by the Court of Appeals for the Tenth Circuit. *See RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

The FCC has exercised its authority under 47 U.S.C. § 253(d) to preempt enforcement of Tenn. Code Ann. § 65-4-201(d).[1] The FCC preempted this portion of the Tennessee act in a memorandum opinion and order adopted May 14, 1999, in *In re AVR, L.P. d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999) (the "Hyperion Preemption Order"). On January 3, 2001, the FCC affirmed this order in response to a petition for stay and rehearing by the Tennessee Regulatory Authority (the "TRA"). After consultation with this Office, the TRA determined that it will not challenge the Hyperion Preemption Order through an appeal to the Sixth Circuit Court of Appeals. Therefore, Tenn. Code Ann. § 65-4-201(d) has been authoritatively preempted by the FCC and is unenforceable. Because the FCC has not preempted enforcement of Tenn. Code Ann. § 65-4-201(c), this portion of the Tennessee act is valid and enforceable.[2]

CONCURRENT FEDERAL AND STATE JURISDICTION.

The decision that the Telecommunications Act of 1996 does not implicitly preempt the provisions of Chapter 408 of the Tennessee Public Acts of 1995, codified, in part, in Tenn. Code Ann. § 65-4-201, was announced by the Court of Appeals, Middle Section, in *BellSouth v. Greer, id.* at 669-72. We find the analysis of the court in this decision compelling and persuasive and have found no authority that limits or alters this decision since it was rendered. Absent a showing of actual conflict between the federal and state law, the state and federal governments exercise concurrent jurisdiction over the regulation of telecommunications. Moreover, the federal and Tennessee acts are similar in their goals of furthering competition in the telecommunications field.

The structure of 47 U.S.C. § 253 expressly permits state regulation of telecommunications and provides a means for resolution of any conflict between state law and the federal act. 47 U.S.C. § 253(b) states:

---

[1] Tenn. Code Ann. § 65-4-201(d) provides:

> (d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

[2] Tenn Code Ann. § 65-4-201(c) provides:

> (c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:
> (1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and
> (2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.
> An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

> (b) Nothing in this section shall affect the ability of a State to impose, ***on a competitively neutral basis*** and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication services, and safeguard the rights of consumers. [emphasis added]

These provisions of § 253(b) clearly contemplate that state laws, such as Tenn. Code Ann. § 65-4-201, shall co-exist with the Telecommunications Act of 1996 and operate to regulate telecommunications in a manner not inconsistent with federal law.

FCC POWER TO PREEMPT PROVISIONS OF STATE TELECOMMUNICATIONS ACTS.

If any provisions of state law are inconsistent with or violate subsections (a) or (b) of 47 U.S.C. § 253, § 253(d) expressly authorizes the FCC to preempt the enforcement of such provisions of state law. 47 U.S.C. § 253(d) states:

> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Tenn. Code Ann. § 65-4-201(d) was challenged in this regard because it protects from competition incumbent telephone carriers with fewer than 100,000 total access lines in the state, unless such a carrier voluntarily enters into competition outside its service area. On May 14, 1999, the FCC adopted its order. The FCC determined that because §201(d) "favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral." Hyperion Preemption Order, at 9. As a result, the FCC found that Tenn. Code Ann. § 65-4-201(d) is in conflict with 47 U.S.C. § 253(a) and does not qualify for the exemption provided in 47 U.S.C. § 253(b) and, accordingly, ordered that enforcement of Tenn. Code Ann. § 65-4-201(d) is preempted. In response to a petition by the TRA for reconsideration and stay of the Hyperion Preemption Order, the FCC affirmed its Order on January 3, 2001.

The Hyperion Preemption Order is consistent with two other orders by the FCC that preempt provisions of state telecommunications acts in Texas and Wyoming that are similar to Tenn. Code Ann. § 65-4-201(d). *See Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (the "Texas Preemption Order"); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (the "Wyoming Preemption Order"). Both the Texas Preemption Order and the Wyoming Preemption Order were decided on similar grounds as the Hyperion Preemption Order. All three orders hold that state

statutory provisions that prohibit competition in rural areas are not "competitively neutral" and therefore conflict with the provisions of 47 U.S.C. § 253(a) and (b).

The Wyoming public service commission filed a challenge to the Wyoming Preemption Order in the Court of Appeals for the Tenth Circuit on the grounds that the controversy before the FCC had become moot prior to the rendering of the order. On January 13, 2000, the Court denied the challenge to the Wyoming Preemption Order. *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000). While the Tenth Circuit's decision in this case is not controlling legal precedent in the Sixth Circuit, this decision does address the preemption by the FCC of telecommunications act provisions in Wyoming that are quite similar to Tenn. Code Ann. § 65-4-201(d). The court stated that it must defer to the FCC's interpretation of the term "competitively neutral" because the term is ambiguous and nowhere defined in the United States Code:

> When the statute is silent or ambiguous, however, deference is due to the agency's interpretation, so long as it is reasonable and not otherwise arbitrary, capricious or contrary to the statute. Since the FCC's order in this case involved the interpretation of the ambiguous phrase "competitively neutral", we review with deference.

Id. at 1268 (citations omitted). The Tenth Circuit expressly upheld the FCC's finding that the Wyoming law was not "competitively neutral" and, therefore, was not permissible under 47 U.S.C. §253(b) and, accordingly, could be lawfully preempted by the FCC under 47 U.S.C. § 253(d).

After consultation with this Office, the TRA decided not to file an appeal from the Hyperion Preemption Order with the Court of Appeals for the Sixth Circuit. Because the order is now final, the FCC's preemption of Tenn. Code Ann. § 67-4-201(d) is authoritative and binding.

In conclusion, this Office finds that the FCC has expressly preempted enforcement of Tenn. Code Ann. § 65-4-201(d) pursuant to authority granted thereto under 47 U.S.C. § 253(d). Accordingly, this Office is of the opinion that Tenn. Code Ann. § 65-4-201(d) is no longer valid or enforceable. In addition, this Office finds that, because Tenn. Code Ann. § 67-4-201(c) has not been preempted by the FCC and is not in conflict with federal law, Tenn. Code Ann. § 67-4-201(c) is valid and enforceable.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WINSTON B. SITTON
Assistant Attorney General

Requested by:

The Honorable Bobby G. Wood
State Representative
104 War Memorial Building
Nashville, Tennessee 37243

The Honorable David Fowler
State Senator
304 War Memorial Building
Nashville, Tennessee 37243