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Opinion No. 01-115

Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling

QUESTION

Is Tenn. Code Ann. § 65-21-114, in requiring all telephone calls placed between two points in the same county to be toll-free, constitutional as applied to interexchange or long distance carriers?

OPINION

While Tenn. Code Ann. § 65-21-114 is constitutional in most of its applications, it would be unconstitutional to apply this statute to a long distance telephone carrier under circumstances where the carrier does not receive reasonable remuneration for the service it is required to provide.

ANALYSIS

The instant request concerns the constitutionality of Tenn. Code Ann. § 65-21-114, which provides that

> (a) Any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee regulatory authority. However, this section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the authority or the right

of telephone companies to earn a fair rate of return.

The thrust of this statute is to require that all telephone calls made between two points within the same county in Tennessee "shall be classified as toll-free and shall not be billed to any customer." The statute goes on to recognize in subsections (b) and (c) that federal law may prohibit countywide service by some carriers in some areas, and that telephone providers have the right to earn a fair rate of return. The focus of the statute is to make all intracounty calls a part of the local telephone service that is included in subscribers' basic billing and not charged on a toll basis. The latter parts of the statute seem to recognize that this may present certain problems, but the statute fails to address those problems in such a way as to render it fully enforceable.

The underlying principle in analyzing your question is that the State cannot require a telephone company, or any other business for that matter, to render its services for free. That would constitute a "taking" in violation of Article I, §21 of the Tennessee Constitution, as well as the fifth and fourteenth amendments of the United States Constitution. *See Southern Bell Telephone and Telegraph Co. v. Tennessee Public Service Commission*, 202 Tenn. 465, 304 S.W.2d 640 (1957); *Henley v. State*, 98 Tenn. 665, 41 S.W. 352 (1897); *Dolan v. City of Tygard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

There is no problem in enforcing this statute in areas where a subscriber's local exchange carrier can complete a call to all areas of the county. In such instances, the cost of providing countywide service can be included in the basic billing rate as a required service. This is the sort of regulation commonly required by the Tennessee Regulatory Authority. Thus in most areas of the State, Tenn. Code Ann. § 65-21-114 is effective.

Complications arise, however, because approximately a dozen Tennessee counties are divided by LATA (Local Access and Transport Area) boundaries, across which the local exchange carriers that were part of the Bell system generally are not authorized to carry calls. Federal law, as part of the break-up of the telephone monopoly in the 1980's, has prohibited the Bell companies (such as BellSouth in Tennessee) from carrying calls across these LATA boundaries. *See generally MCI Telecommunications Corp. v. Taylor*, 914 S.W.2d 519 (Tenn. Ct. App. 1995). Thus in some counties in Tennessee, the local exchange carrier cannot complete calls to certain other parts of the county. This is a peculiarity caused by the fact that LATA boundaries do not necessarily follow county lines.

As a result, in parts of these affected counties, a long distance carrier must be involved in completing a call to certain areas within the county. Since long distance calls are billed on a toll basis, the requirement of § 65-21-114 that such calls be toll free would mean that the long distance carrier would be required to complete these calls for no remuneration whatsoever. Many subscribers making calls within the county but across a LATA boundary would have no other long distance calls during a billing period, resulting in their long distance carrier's being required by this statute to render a service for free. This

produces the constitutional problems with the statute.

The Court of Appeals reached exactly this conclusion in *AT&T Communications of the South Central States, Inc. v. Cochran*, Tenn. Ct. of Apps., Middle Section, Apr. 26, 1995, a copy of which was enclosed with this request. This decision addressed a requirement imposed by the Public Service Commission before the statute in question was passed, but the enactment of Tenn. Code Ann. § 65-21-114 does not alter the constitutional analysis, for the substance of the statutory requirement is the same as that of the old P.S.C. order. The Court's opinion does note that there are permissible means of accomplishing countywide calling, but the statute in question does not provide for those mechanisms.

The bottom line is that to implement toll-free countywide calling for all customers in the counties divided by LATA boundaries, some mechanism would have to be devised to provide compensation for the long distance telephone carriers for completing such calls. The General Assembly could establish such a mechanism, or the Tennessee Regulatory Authority could do so. It is conceivable that the T.R.A. might identify the necessary compensation as a part of some remuneration that such companies already receive. The more plausible course, however, is to impose a charge to reimburse such carriers for providing toll-free service across LATA boundaries.

In conclusion, Tenn. Code Ann. § 65-21-114 is effective in requiring toll-free countywide calling in most instances, but it cannot be fully enforced in counties divided by LATA boundaries until compensation is provided from some source through some mechanism for the long distance carriers that complete such calls. This, of course, runs the risk of imposing an entirely new regulatory scheme and accompanying fees to support countywide calling. As the Court of Appeals has observed, until a compensating mechanism is provided or identified, it would violate the takings provisions of the Tennessee and federal constitutions to require long distance telephone companies to provide such a toll-free service.

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