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Opinion No. 09-87

Allocation of Emergency Communications Fund; "SafeLink" Program

QUESTIONS

1. May the State government use for general purposes the Emergency Communications Fund (ECF), given the prohibition in Tenn. Code Ann. § 7-86-303(d)?

2. Does access to the ECF and/or the interest derived from it require specific and explicit repealing language, given the clear statement of intent by the General Assembly in Tenn. Code Ann. § 7-86-303(d) that prohibits such a diversion, and, if so, is the general reference language in the 2008 State budget act legally sufficient to override the prohibition in Tenn. Code Ann. § 7-86-303(d) and other expressions of legislative intent in Title 7, Chapter 86 concerning the use of 911 funds for 911 purposes only?

3. Does the recently enacted federal law, ENHANCE 911, prohibit the use and/or diversion of 911 funds for non-911 purposes by the State?

4. If the answer to Question 3 is yes, is the interest on the ECF affected by the federal law prohibition?

5. Is the State's recently implemented "SafeLink" program, which distributes prepaid cellular phones, defined by Tenn. Code Ann. § 7-86-103(3) as commercial mobile radio service (CMRS), subject to the funding requirement applicable to prepaid CMRS users set forth in Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

6. If the answer to Question 5 is yes, does the Executive Director of the Tennessee Emergency Communications Board have the authority to waive the requirements of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

OPINIONS

1. The prohibition contained in Tenn. Code Ann. § 7-86-303(d) is not sufficient by itself to prevent the General Assembly from using the ECF for other purposes. Subsection 4-3-1016(d)(44) expressly authorizes transfers from the ECF. Chapter No. 1191 of the 2008 Public Acts, codified in Tenn. Code Ann. § 4-3-1016, permits the transfer of certain funds, including the ECF, to the general fund. This section applies "notwithstanding any provision of law to the

contrary." Tenn. Code Ann. § 4-3-1016(a). Although Tenn. Code Ann. § 7-86-303(d) prohibits use of the ECF for other purposes, Tenn. Code Ann. § 4-3-1016 supersedes and controls. However, as explained in response to Questions 3 and 4, except as to the interest earned on the ECF, federal law preempts and prevents such use of the ECF and renders these State statutory issues moot.

2. Applying State law only, the answer is that because Tenn. Code Ann. § 4-3-1016 controls, no additional specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in Tenn. Code Ann. § 4-3-1016(d)(44) is legally sufficient to allow the diversion of ECF funds to the general fund. Because of federal preemption, however, the State may not use the ECF for general purposes, notwithstanding Tenn. Code Ann. § 4-3-1016(d)(44), except that preemption does not affect the interest earned on the ECF.

3. Yes. Federal law prohibits the use of fees charged as part of the State's 911 or enhanced 911 program for other purposes. The specific legislation named in the request, the ENHANCE 911 Act of 2004, enacted as Public Law 108-494, penalizes grantees if a state diverts 911 fees for other use. In addition, the New and Emerging Technologies 911 Improvement Act of 2008, enacted as Public Law 110-283, expressly preempts a State from using fees charged as part of the State's 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the ECF to the general fund.

4. No. Neither federal law cited in response to Question 3 applies to the interest earned on the collected fees. The interest may be transferred to the general fund.

5. No. The emergency telephone service charge does not apply to users of mobile phones provided through the "SafeLink" program, since those persons are not billed or charged for their mobile phone use and thus do not come within the provisions implementing the service charge at Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv).

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

ANALYSIS

1 The Emergency Communications Board (the "Board") was established and operates under Tenn. Code Ann. §§ 7-86-301, *et seq.* The Board is funded through a charge on all commercial mobile radio service providers, established pursuant to Tenn. Code Ann. § 7-86-108(c). Tenn. Code Ann. § 7-86-303(d) provides in relevant part:

> Any funds collected by the board shall be deposited in the state treasury in a separate interest-bearing fund to be known as the 911 Emergency Communications Fund. ***Disbursements from this fund shall be limited solely to the operational and administrative expenses of the board and the purposes as expressed in this part. At no time during its existence shall the 911 Emergency***

> ***Communications Fund be used to fund the general expenses of the state of Tennessee.***

Tenn. Code Ann. § 7-86-303(d)(emphasis added). The rest of subsection (d) lists several purposes for which the funds may be used. All of these purposes relate to 911 service.

Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, authorizes the Commissioner of Finance and Administration to transfer monies from various accounts to defray the expenses of state government. The statute provides in relevant part:

> (a) ***Notwithstanding any provision of the law to the contrary,*** subject to the specific provisions of an appropriation act, the commissioner of finance and administration is authorized to deny carry forwards for, and to transfer funds from, the funds, reserve accounts or programs identified in this section to the state general fund for the purpose of meeting the requirements of funding the operations of state government for the fiscal year ending June 30, 2006, and subsequent fiscal years. ***The authorization provided for in this subsection (a) shall not apply to allow the transfer of any fund balances that are mandated by federal law to be retained in such fund.*** This authority shall only apply to transfers and carry forwards necessary to fund the expenditures for the state for the fiscal year ending June 30, 2006, and subsequent fiscal years.
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> (b) No funds shall be transferred unless specifically appropriated in an appropriations act and such funds shall only be expended in accordance with the provisions of such act.
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> (d) In the fiscal years ending June 30, 2008, and June 30, 2009, transfers are authorized from the following funds, reserve accounts and programs:
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> (44) Department of commerce and insurance, emergency communications funds, created or referenced in title 7, chapter 86, part 1;
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> * * *

Tenn. Code Ann. § 4-3-1016 (a), (b), and (d)(emphasis added). The question concerns whether, in light of the limitation on the use of emergency communications funds in Tenn. Code Ann. § 7-86-303(d), these funds may be transferred under Tenn. Code Ann. § 4-3-1016. By its terms, Tenn. Code Ann. § 4-3-1016 applies, "[n]otwithstanding any provision of law to the contrary." Although the limitation in Tenn. Code Ann. § 7-86-303(d) is expressed in absolute terms, it is subject to amendment by the General Assembly. Tenn. Code Ann. § 7-86-303 has not been

amended since 1998. In contrast, Tenn. Code Ann. § 4-3-1016(d) was amended to include emergency communications funds in 2008. 2008 Tenn. Pub. Acts Ch. 1191. A statute adopted later in time controls over a conflicting statute adopted earlier in time. *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987); *Stewart Title Guaranty Co. v. McReynolds*, 886 S.W.2d 233, 236 (Tenn. Ct. App. 1994). In this case, to the extent these two statutes conflict, Tenn. Code Ann. § 4-3-1016 controls. Thus, insofar as Tennessee law is concerned, these funds may be used for the purposes specified in § 4-3-1016.

2. Because Tenn. Code Ann. § 4-3-1016 controls, no specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in the 2008 act is sufficient under Tennessee law to allow the diversion of ECF funds to the general fund.

3. The request refers to the ENHANCE 911 Act of 2004, which became Public Law 108-494. This Act provides for federal matching grants to eligible entities, which include state and local governments. The Act penalizes certain grantees if a state diverts 911 fees for some other use. An applicant for a grant must certify:

> that no portion of any designated E-911 charges imposed by a State or other taxing jurisdiction within which the applicant is located are being obligated or expended for any purpose other than the purposes for which such charges are designated or presented during the period beginning 180 days immediately preceding the date of the application and continuing through the period of time during which the funds from the grant are available to the applicant.

47 U.S.C. § 942(c)(2). The term "designated E-911 charges" means

> any taxes, fees, or other charges imposed by a State or other taxing jurisdiction that are designated or presented as dedicated to deliver or improve E-911 services.

47 U.S.C. § 942(c)(1). As a condition of the grant, grantees must agree that grant funds will be returned if the State or other taxing jurisdiction obligates or expends designated E-911 charges for any purpose other than the purposes for which such charges are designated or presented. 47 U.S.C. § 942(c)(3). The ENHANCE 911 Act, therefore, places strict limitations on states' use of their E-911 charges. Use of E-911 charges for other purposes would prevent a State from receiving the federal matching grants.

A later provision in federal law has an even more direct preemptive effect. Effective July 23, 2008, Congress passed the New and Emerging Technologies 911 Improvement Act of 2008, PL 110-283. Among other provisions, that act added 47 U.S.C. § 615a-1 to the federal code. Subsection (f) of this statute provides:

> (f) State authority over fees
>
> (1) Authority

> Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 *et seq*.), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services, ***provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge.*** For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.
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> (2) Fee accountability report
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> To ensure efficiency, transparency, and accountability in the collection and expenditure of a fee or charge for the support or implementation of 9-1-1 or enhanced 9-1-1 services, the Commission shall submit a report within 1 year after July 23, 2008, and annually thereafter, to the Committee on Commerce, Science and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives detailing the status in each State of the collection and distribution of such fees or charges, and including findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.

47 U.S.C. § 615a-1(f)(emphasis added). The committee report on this provision emphasizes Congress's intent to limit the expenditure of state-imposed fees to purposes related to 911 or E-911 services:

> New subsection 6(f) would also provide that fees collected by States or their political subdivisions may only be used for 911 or E-911 services, or enhancements of such services, as specified in the law adopting the fee. States and their political subdivisions should use 911 or E-911 fees only for direct improvements to the 911 system. Such improvements could include improving the technical and operational aspects of PSAPs; establishing connections between PSAPs and other public safety operations, such as a poison control center; or implementing the migration of PSAPs to an IP-enabled emergency network. This provision is not intended to allow 911 or E-911 fees to be used for other public safety activities that, although potentially worthwhile, are not

> directly tied to the operation and provision of emergency services by the PSAPs.

HOUSE REPORT NO. 110-442, 2008 U.S.C.C.A.N. 1011, 1020 (2007).

The Tenth Circuit Court of Appeals summarized the constitutional doctrine of preemption in the following words:

> Congress' power to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. Congressional intent is paramount in preemption analysis. *See Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Preemption may be either (1) expressed or (2) implied from a statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977). Nevertheless, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. " *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999) (footnote omitted). 47 U.S.C. § 615a-1 expressly preempts a State from using fees charged as part of the State's 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the 911 Emergency Communications Fund to the general fund.

4. However, 47 U.S.C. § 615a-1 does not address any interest that may have accrued on fees collected by a State as part of its 911 or enhanced 911 program. The existence of interest on the Emergency Communications Fund is the result of the State's having deposited the fees collected in an interest-bearing account and not the State's having collected the fees pursuant to its 911 or enhanced 911 program. Thus, such monies are not fees charged as part of the 911 program, but are the result of the State's prudent fiscal management. Federal preemption, therefore, does not apply to the interest on this Fund. That being the case, Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, permits the transfer of the interest from the Fund to the general fund, notwithstanding the provisions of Tenn. Code Ann. § 7-86-303(d), as stated above.

5. The Tennessee Department of Safety recently implemented SafeLink Wireless service, a federally-funded program which provides free mobile phones to eligible low-income households. The provided phones permit unlimited access to emergency (911) services, over an hour of air time each month, and other features.

Tenn. Code Ann. § 7-86-108(a)(1)(B) provides that:

> Effective April 1, 1999, commercial mobile radio service (CMRS) subscribers and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A).

Participants in the SafeLink program may not be "subscribers" of mobile phone service in the full sense, but they are "users." Accordingly, one might initially assume that the emergency telephone service charge would apply to them. It would nevertheless seem peculiar for persons who are supplied a free phone to be subjected to a monthly service charge, and the portions of the statute that implement the service charge do indeed tie liability for that charge to those customers who are charged and billed monthly for the service. Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv) provide:

> (iii) For customers who are billed retrospectively, known as standard customers, CMRS providers shall collect the service charge on behalf of the board as part of their monthly billing process and as a separate line item within that billing process.
> (iv) The service charge shall also be imposed upon customers who pay for service prospectively, known as prepaid customers. CMRS providers shall remit to the board the service charge under one of two methods:
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> (a) The CMRS provider shall collect, on a monthly basis, the service charge from each active prepaid customer whose account balance is equal to or greater than the amount of the service charge; or
> (b) The CMRS provider shall divide the total earned prepaid wireless telephone revenue received by the CMRS provider within the monthly 911 reporting period by fifty dollars ($50.00), and multiply the quotient by the service charge amount.

From these provisions, it is apparent that liability for the service charge is indeed tied to payment for the service and is implicitly limited to those who must make such payments. As to standard customers who pay retrospectively, the statute ties liability to the monthly billing process. Similarly, the statute also refers to customers "who pay for service prospectively, known as prepaid customers." In neither instance is there a mechanism for payment of the service charge by someone who is not charged or billed and does not pay at all. Because the users of these phones will not be "customers who pay" for the service, the phones provided under the SafeLink program do not fall within the terms of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) or (iv), and no service charge is due for them.

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

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