

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 18, 2014

Opinion No. 14-32

Constitutionality of Tenn. Code Ann. § 65-21-114 Mandating County-wide Calling

QUESTIONS

1. Does Tenn. Code Ann. § 65-21-114 (which mandates toll-free county-wide calling) constitute a “taking” of property without just compensation in violation of Article I, § 21, of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution in all circumstances where its application would require a telecommunications carrier to provide a call free of any long-distance toll?

2. If the answer is yes, does the statute have any practical application whatsoever, in light of the option of electing market regulation granted to local phone carriers by Tenn. Code Ann. § 65-5-109(m)?

OPINIONS

1. No. As stated in Tenn. Att’y Gen. Op. 01-115 (July 20, 2001), the application of Tenn. Code Ann. § 65-21-114 to long-distance (interexchange) carriers would be unconstitutional in those circumstances in which parts of a single county are assigned to more than one Local Access and Transport Area (“LATA”) and the local exchange carrier cannot complete a call across the LATA boundary. Only in those limited circumstances would the interexchange carrier be required to provide without compensation an inter-LATA call for a caller to whom it does not otherwise provide service and for which it would otherwise charge a toll. Such an application of Tenn. Code Ann. § 65-21-114 would require a “particular service” without “just compensation,” in violation of Article I, § 21, of the Tennessee Constitution and would constitute an unconstitutional taking under both the Tennessee and United States Constitutions.

2. As also stated in Opinion 01-115, “Tenn. Code Ann. § 65-21-114 is constitutional in most of its applications.” Regardless of whether one or more carriers have elected market regulation, the statute continues to have practical application in those circumstances in which the local exchange carrier can complete a call to all parts of the county.

ANALYSIS

1. In 1995, the General Assembly enacted Tenn. Code Ann. § 65-21-114, which states, in pertinent part:

(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.

In 2001, this Office concluded that “[w]hile 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.” Tenn. Att’y Gen. Op. 01-115 (July 20, 2001). Such circumstances arise in those Tennessee counties where the local exchange carrier cannot complete calls to certain other parts of the county as a result of the location of Local Access and Transport Area (“LATA”) boundary lines.¹

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.

Tenn. Att’y Gen. Op. 01-115 at 2.

A “toll” call is one for which the provider bills a customer separately from its charges for local exchange service.² So “toll-free,” for purposes of § 65-21-114, does not mean that there is no charge for the service; it means only that the carrier will not place a charge in addition to that for basic local service on a call to a location within the same county. But unlike local exchange carriers, which furnish a package of services for a monthly lump-sum charge, long-distance carriers that charge only on a call-by-call basis have no mechanism by which to recoup the cost of completing intra-county, long-distance calls. *See AT&T Communications of the South Central States, Inc. v. Cochran*, No. 01A01-9409-BC-00427, 1995 WL 256662, at *1 (Tenn. Ct. App. May 3, 1995).

To the extent that changes in the telecommunications industry since 2001 have eliminated such circumstances by no longer requiring separation between

¹ LATAs are defined geographic regions that generally correspond to telephone area-code regions but do not necessarily follow county lines. *See* 47 U.S.C. § 153(31); *In re MCI Telecommunications Complaint*, 596 N.W.2d 164, 168 (Mich. 1999).

² *See* 47 U.S.C. § 153(55).

long-distance carriers and local exchange carriers, Tenn. Code Ann. § 65-21-114 may be constitutionally applied. As we opined in Opinion 01-115, “[t]here 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.” Tenn. Att’y Gen. Op. 01-115 at 2.

2. The conclusion reached in Opinion 01-115 is unaffected by the introduction in 2009 of market regulation, codified at Tenn. Code Ann. § 65-5-109(l)-(n). Under those provisions, a provider of local telephone service may elect to be “exempt from all authority jurisdiction, including, but not limited to, state-based regulation of retail pricing or retail operations,” except for those specific grants of jurisdiction to the Tennessee Regulatory Authority (“TRA”) in Tenn. Code Ann. § 65-5-109(n). Tenn. Code Ann. § 65-5-109(m).

In our 2001 opinion, we concluded that there was no “taking” problem created by applying Tenn. Code Ann. § 65-21-114 to local exchange carriers that could complete a call to all parts of the county because the cost of providing county-wide service could be included in a local carrier’s billing rate as a required service, and we noted that “[t]his is the sort of regulation commonly required by the [TRA].” Tenn. Att’y Gen. Op. 01-115 at 2. Unlike a long-distance (interexchange) carrier, a provider of local telephone service does not lack a mechanism for the recovery of costs associated with providing county-wide calling. *See AT&T*, 1995 WL 256662, at *2.

If carriers choose market regulation under Tenn. Code Ann. § 65-5-109, the TRA cannot set new rates to allow them to recover the costs of providing county-wide calling or any other services. But there is still no “takings” problem, because any provider of local telephone service that has elected market regulation can raise its rates as it wishes and is not dependent on the TRA for that purpose. *See* Tenn. Code Ann. § 65-5-109(m). Those providers can charge rates that fully compensate them for providing county-wide calling. Tenn. Code Ann. § 65-21-114 is part of the State’s general statutory scheme affecting public utilities and is not codified with or tied to the specific provisions in Chapters 1 through 5 of Title 65 that define the TRA’s authority. Tenn. Code Ann. § 65-21-114, therefore, continues to have practical application and is fully effective and constitutional, notwithstanding the deregulation provided for by Tenn. Code Ann. § 65-5-109(l)-(n), in counties that are not divided by a LATA boundary, as well as counties divided by a LATA boundary but in which the local exchange carrier can complete calls to all parts of the county.

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