

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS.

Federal Communications Commission resolves all preemption questions regarding possible statutory violation of § 253(a) of Telecommunications Act of 1996. Matter is not subject to review by Attorney General.

The Honorable Clifton A. Woodrum

Member, House of Delegates

November 5, 1998

You ask whether the amended version of § 15.2-1500 of the *Code of Virginia*, which prohibits the ability of any entity, including a local governmental unit, to provide intrastate telecommunications services, violates or is preempted by § 253(a) of the Telecommunications Act of 1996 ("Telecommunications Act").

The 1998 Session of the General Assembly amended § 15.2-1500 as follows:

Notwithstanding any other provision of law, general or special, no locality shall establish any department, office, board, commission, agency or other governmental division or entity which has authority to offer telecommunications equipment, infrastructure, other than pole or tower attachments including antennas or conduit occupancy, or services, other than intragovernmental radio dispatch or paging systems shared by adjoining localities, for sale or lease to any person or entity other than (i) such locality's departments, offices, boards, commissions, agencies or other governmental divisions or entities or (ii) an adjoining locality's departments, offices, boards, commissions, agencies or other governmental divisions or entities, so long as any charges for such telecommunications equipment, infrastructure and services do not exceed the cost to the providing locality of providing such equipment, infrastructure or services. However, any town which is located adjacent to Exit 17 on Interstate 81 and which offered telecommunications services to the public on January 1, 1998, is hereby authorized to continue to offer such telecommunications services, but shall not acquire by eminent domain the facilities or other property of any telephone company or cable operator. Any locality may sell any telecommunications infrastructure, including related equipment, which such locality had constructed prior to September 1, 1998, and such locality may receive from the purchaser or purchasers, as full or partial consideration for the sale of such infrastructure, communications services to be used solely for internal use of the locality. Any locality which sells such infrastructure, including related equipment, may, at its option, exclude the incumbent local exchange carrier from the bid or other sale process.^[1]

Section 253(a) of the Telecommunications Act provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.^[2]

Section 253(d) provides:

If, after notice and an opportunity for public comment, the [Federal Communications] 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.^[3]

The Federal Communications Commission (the "F.C.C."), therefore, is responsible for determining whether any state statute violates § 253(a) or (b). A prior opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure.⁴ Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.⁵ The Congress mandates that the F.C.C. resolve all preemption questions regarding whether state law violates § 253(a). Consequently, I must respectfully decline to interpret the matter raised by your question. I am of the opinion that the F.C.C. is the appropriate agency to make such determinations.⁶

¹These provisions became effective July 1, 1998, and will expire July 1, 2000. 1998 Va. Acts ch. 906, cl. 2, at 2540.

²47 U.S.C.A. § 253(a) (West Supp. 1998).

³*Id.* § 253(d) (West Supp. 1998).

⁴1987-1988 Op. Va. Att'y Gen. 69, 72, and opinions cited therein.

⁵Op. Va. Att'y Gen.: 1997 at 10, 12; *id.* at 133, 134; 1987-1988 140, 141; *id.* at 352, 352.

⁶The F.C.C., in its September 26, 1997, Memorandum Opinion and Order, addressed whether certain provisions of the Texas Public Utility Regulatory Act of 1995 are contrary to §§ 253, 251 and 252 of the Telecommunications Act. See *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3460 (1998). The F.C.C. did not preempt the enforcement of § 3.251(d) of the Texas Act prohibiting municipalities from providing telecommunications services. *Id.* at 3544. Furthermore, the F.C.C. comments that Texas municipalities are not entities separate and apart from the State for the purpose of applying § 253(a) of the Telecommunications Act. *Id.* Finally, the

F.C.C. concludes that preempting the enforcement of the prohibition would insert the F.C.C. into a relationship between Texas and its political subdivisions that was not intended by § 253. *Id.*