THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0766

METRO TRISTATE, INC.,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, and COMMUNITY PASTOR CARE, LLC.,
Respondents.

RESPONDENT COMMUNITY PASTOR CARE, LLC'S BRIEF IN OPPOSITION TO METRO TRISTATE, INC.'S PETITION FOR APPEAL

Submitted By:

R. Booth Goodwin II (W. Va. Bar. No. 7165)
Stephanie H. Daly (W. Va. Bar No. 8835)
Robert S. Pruett (W. Va. Bar No. 12683)
GOODWIN & GOODWIN, LLP
300 Summers Street Suite 1500
Charleston, WV 25301
P: 304-346-7000
F: 304-344-9692
rbg@goodwingoodwin.com
shd@goodwingoodwin.com
rsp@goodwingoodwin.com

Counsel for Respondent,
Community Pastor Care, LLC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WEST VIRGINIA CASES

STATE CASES FROM OTHER JURISDICTIONS

FEDERAL STATUTES

WEST VIRGINIA STATUTES

COURT RULES

REGULATIONS AND OTHER ADMINISTRATIVE MATERIALS

STATEMENT OF THE CASE

Respondent Community Pastor Care, LLC ("CPC") offers the following statement of the case as necessary to correct certain inaccuracies and omissions as presented by Petitioner Metro Tristate, Inc. ("Metro Tristate").

1. Factual and Procedural History

CPC is a service-disabled veteran-owned small business ("SDVOSB"), as defined by federal law.[1] Congress has established a federal objective to create increased opportunities for SDVOSBs to contract with the federal government. In alignment with this goal, the United States Department of Veterans Affairs (the "VA," unless specifically referring to the Huntington location, or the "Huntington VA") awarded CPC a contract on September 11, 2018 (the "Contract") to provide non-emergency medical transportation ("NEMT") services to United States veterans to and from regularly scheduled medical appointments at the Huntington VA and the surrounding network of VA community based outpatient clinics. Applicant Ex. 3, Contract at 3.[2] Eligible destination clinics under the Contract include facilities located in Kentucky and Ohio. *Id.* In addition, the Contract contemplates transporting United States veterans from the Huntington VA to multiple destinations outside West Virginia, including Cleveland, Cincinnati, Dayton, and Chillicothe, Ohio; Lexington and Louisville, Kentucky; Memphis, Nashville, and Mountain

[1] *See* 15 U.S.C. § 632(q)(2) for a full definition for SDVOSB. Metro Tristate does not dispute that CPC qualifies as a SDVOSB. Pet. Brief at 1 ("CPC [is] a SDVOSB[.]"). Because CPC's status as a SDVOSB is uncontested, the standards for qualifying as a SDVOSB are not presented here.

[2] Metro Tristate's citation to exhibits pertain to the exhibits that were admitted into evidence in connection with the Commission's July 9, 2019 hearing on this matter (Item No. 67 in the Commission's Record Index). Pet. Brief at 4, n.1. CPC does the same in this brief.

Home, Tennessee; Pittsburgh, Pennsylvania; and Richmond, Virginia. *Id.* at 16-20. The effective date of the Contract was October 1, 2018. *Id.* at 1.

Metro Tristate is an Ohio corporation that provides taxi service to the general public in the Huntington area. Pet. Brief at 2. Because it serves the general public, Metro Tristate is a "common carrier," as distinguished from a "contract carrier," which provides transportation services restricted to beneficiaries of a specific contract, as defined under W. Va. Code § 24A-1-2.[3] Prior to the VA's decision to contract with CPC, Metro had previously provided NEMT to the Huntington VA through various federal contracts. Pet. Brief at 3.

On October 1, 2018, Metro Tristate filed a complaint with the Public Service Commission (the "Commission"), requesting an order prohibiting CPC from servicing the Huntington VA pursuant to the Contract until it obtains authority from the Commission. *Id.* CPC answered and filed a motion to dismiss, arguing that the Commission lacks jurisdiction to grant Metro Tristate's requested relief on federal preemption grounds. Final Order at 2. The proceeding initiated by Metro Tristate's complaint is referred to as the "complaint case." Pet. Brief at 2.

On January 4, 2019, while the complaint case was pending, CPC applied for a contract carrier permit from the Commission, thus initiating the "permit application case."[4] *Id.* at 3. CPC's

---

[3] Under W. Va. Code § 24A-1-2, a "common carrier" is "any person who undertakes, . . . to transport passengers or property, . . . for the general public over the highways of this state by motor vehicles for hire[.]"

Under the same statute, a "contract carrier," is "any person not included within the definition of 'common carrier by motor vehicle,' who under special and individual contracts or agreements, . . . transports passengers or property over the highways in this state by motor vehicles for hire[.]"

[4] At all relevant times, CPC maintained, and it continues to maintain, that it did not need to seek authority from the Commission to perform its duties under the Contract with the VA to service the Huntington VA. CPC's application for a contract carrier permit was an entirely voluntary measure intended to alleviate potential questions regarding CPC's provision of NEMT and was not an admission that a contract carrier permit was necessary.

application indicated a proposed service area that included the states of West Virginia, Virginia, Ohio, and Kentucky, as well as the District of Columbia. Order at 3. Metro Tristate protested the application, filed a motion to intervene, and was added as an intervening party to the permit application case. Pet. Brief at 4. The permit application case was referred to the Commission's Division of Administrative Law Judges (the "ALJ") and was thereafter consolidated with the complaint case (the "consolidated case"). *Id.*

On July 9, 2019, the ALJ held an evidentiary hearing on the consolidated case. Pet. Brief at 6. CPC and Metro Tristate were present at the hearing and made arguments, along with three other complaining intervenors. Order at 5. On September 4, 2019, the ALJ issued a recommended decision, concluding that the Commission has no jurisdiction over the matter on federal preemption grounds. Pet. Brief at 6.

On September 19, 2019, Metro Tristate filed exceptions to the ALJ's recommended decision, arguing that federal law does not preempt state regulation of intrastate transportation services. Order at 6. In making that argument, Metro Tristate was silent on the fact that both the Contract and the contract carrier permit application call for CPC to provide transportation services between the Huntington VA and destinations in multiple other states. Metro Tristate further argued that the ALJ cited no law evidencing a congressional intent to preempt states from interfering with contracts by the VA with SDVOSBs for the benefit of United States veterans. *Id.*

On September 4, 2020, the Commission entered its Final Order (the "Order"). In the Order, the Commission rejected Metro Tristate's objections and adopted the ALJ's recommended decision, with some minor modifications that are immaterial to the issues raised in this appeal. Pet. Brief at 7. The Commission correctly noted in the Order that it does not have jurisdiction on federal preemption grounds to grant Metro Tristate the relief that it seeks, and so, it did not address

CPC's application for a contract carrier permit. Order at 17-19. Accordingly, both the complaint case and the permit application case were dismissed in their entirety and removed from the Commission's docket. Order at 20. It is from this September 4, 2020 Order that Metro Tristate appeals.

SUMMARY OF ARGUMENT

This appeal presents a question of implied conflict preemption, which prohibits enforcement of a state law that presents an obstacle to the full accomplishment or execution of a federal objective. Syl. Pt. 7, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009). Here, the federal law in question is 38 U.S.C. § 8127. By its plain language, this statute, in large part, restricts contract awards by the VA to VOSBs or SDVOSBs under the objective of increasing business opportunities for United States veterans. Pursuant to this statute and in concert with federal objectives, CPC, a SDVOSB, was awarded the Contract to provide transportation services to the Huntington VA.

Metro Tristate seeks to have the Court apply a state statute, W. Va. Code § 24A-3-3 to undo a contracting decision of the VA. According to Metro Tristate, W. Va. Code § 24A-3-3 protects common carriers from competition by restricting, or at least severely limiting, market entry by contract carriers – to include NEMT services performed by SDVOSBs chosen and paid exclusively by the VA. Essentially, Metro Tristate complains because it alleges that CPC's provision of services to the Huntington VA hurts its profit margins, and therefore, is impermissible under W. Va. Code § 24A-3-3, notwithstanding 38 U.S.C. § 8127.

There is a clear conflict between 38 U.S.C. § 8127 and W. Va. Code § 24A-3-3. Under the federal law, a business opportunity is granted to CPC. Under the state law (at least under Metro Tristate's reading of it), that same business opportunity may be taken away. Accordingly, the

Commission reached the correct result when it found that Metro Tristate's requested relief is not available on preemption grounds. As explained in greater detail below, the Court should affirm the Order.

Importantly, Metro Tristate's *four* argument sections do not correspond with its *six* assignments of error, in violation of West Virginia Rule of Appellate Procedure 10(c)(7). *Compare* Pet. Brief at 1-2 *with id.* at 9-23. For example, Metro Tristate's third assignment of error states that:

> The Majority erred in determining that Commission state contract carrier permitting requirement to protect existing common carrier services interferes with federal contracting goals by applying state regulatory requirements that could leave the VA with no [veteran-owned small businesses ("VOSBs")] or SDVOSBs to choose in West Virginia. Majority Opinion, *Conclusion of Law No. 5.*

Pet. Brief at 1 (brackets added). In addition, its fifth assignment of error complains that:

> The Majority erred in determining that because it is the federal objective to increase contracting opportunities for VOSBs and SDVOSBs, implied conflict preemption does not apply in the case of a contract carrier that is not a qualified VOSB or SDVOSB. Majority Opinion, *Conclusion of Law No. 7.*

Id.

None of the argument sections in Metro Tristate's brief appear to address these assignments of error, even tangentially. What is more, it is unclear how the fifth assignment of error applies to this case because it is undisputed that CPC is a SDVOSB. And confusingly, the fifth assignment of error, as written, appears to suggest that preemption applies where the contract carrier is not a SDVOSB, which conflicts with Metro Tristate's broader argument against preemption.

Simply put, this manner of briefing violates West Virginia Rule of Appellate Procedure 10(c)(7) and thereby complicates and hinders the review process. Rule 10(c)(7) requires that the brief's argument sections "correspond with the assignments of error." The Court has been clear

that it may disregard arguments that fail to comply with this rule. *See, e.g., Grimmett v. Wiseman Excavating, Inc.*, No. 19-0061, 2020 W. Va. LEXIS 553, at *10 (July 30, 2020) ("[W]e can find no argument corresponding with the assignment anywhere in the brief. Accordingly, due to [petitioner's] failure to comport with the Court's rules, we refuse to address the second assignment of error asserted in the brief's table of contents and opening."); *Kevin D. v. Beth G.*, No. 19-0775, 2020 W. Va. LEXIS 325, at *13 (May 26, 2020) ("Because petitioner's arguments as to these assignments of error are inadequate and fail to comply with Rule 10(c)(7), we decline to address them on appeal.").

This manner of briefing also complicates CPC's task of responding to the arguments in Metro Tristate's brief. CPC is aware that its arguments must "specifically respond to each assignment of error[.]" W. Va. R. App. P. 10(d). However, the arguments in Metro Tristate's brief – the arguments CPC must address – do not correspond to the assignments of error. To fully address Metro Tristate's arguments, CPC structures its argument section to correlate with that of Metro Tristate and will indicate the specific assignment of error the argument responds to where necessary.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has already set this case for oral argument. Nevertheless, the Rules of Appellate Procedure require that this brief contain a statement on whether oral argument is necessary – with no explicit exception for where oral argument has already been scheduled. W. Va. R. App. 10(c)(6). Accordingly, CPC includes this statement on oral argument to comply with the Rules of Appellate Procedure and not out of disrespect for the Court's docketing decision.

Metro Tristate asserts that oral argument is "required" because this case involves an appeal from the Commission. Pet. Brief at 8. This is an incorrect statement of law, as the Court has

provided: "In light of this Court's plenary constitutional authority to articulate procedural rules pursuant to article VIII, section 3 of the West Virginia Constitution, we conclude that *oral argument in appeals of cases originating with the Public Service Commission is discretionary.*" *Tabb v. Jefferson Cty. Comm'n*, No. 15-0323, 2015 WL 6954974, 2015 W. Va. LEXIS 1091, at *1-2 (Nov. 6, 2015) (emphasis added).

It is CPC's position that this case may be disposed of by a memorandum decision and that oral argument is not necessary, much less required, because, among other things, the pertinent facts and legal arguments are well-presented by the record, the Commission's Order was impressively thorough in analyzing the pertinent facts and law and reached the correct result, and this case does not involve legal issues of first impression. Nevertheless, CPC respects the Court's decision to set this case for oral argument and stands ready to provide the Court any information and/or explanation that might be helpful in addressing the issues raised in this appeal.

ARGUMENT

I. Standard of Review

The Court applies a "highly deferential" standard of review for Commission orders. *W. Va. Citizen Action Group v. PSC of W. Va.*, 233 W. Va. 327, 338, 758 S.E.2d 254, 265 (2014) (affirming Commission order "under this Court's highly deferential standard of review[.]"); *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 300 S.E.2d 607, 611 (1982) (noting Court's "deference to the [Public Service] Commission's expertise[.]"). Likewise, the Court's function on appeal is not to "supplant the Commission's balance of . . . interests to one more nearly to its liking." Syl. Pt. 2, *Monongahela Power Co. v. Public Serv. Comm'n*, 166 W. Va. 423, 276 S.E.2d 179 (1981). If the Commission "has given reasoned consideration" to all pertinent factors, its order should stand affirmed. *Id.*

Specifically, the following standard of review applies to this case:

> The detailed standard for our review of an order of the Public Service Commission . . . may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and (3) whether the substantive result of the Commission's order is proper.

Syl. Pt. 1, *Central W. Va. Refuse v. Public Serv. Comm'n*, 190 W. Va. 416, 438 S.E.2d 596 (1993). One of the situations described above must be present for the Commission's Order to be disturbed on appeal. *Jefferson Cty. Citizens for Econ. Preservation v. Public Serv. Comm'n*, 241 W. Va. 172, 174, 820 S.E.2d 618, 620 (2018) ("This Court may reverse an order by the Public Service Commission when: (1) it exceeded its authority; (2) it made factual findings that are not supported by adequate evidence; or (3) the substantive result of its order is not proper. . . . None of these three situations apply to the facts of this case. Therefore, we affirm the Public Service Commission's Order.").

II. The Commission correctly found that implied conflict preemption applies to Commission permitting regulation over SDVOSBs because such state law action would obstruct the federal objective to increase business opportunities for SDVOSBs and create an obstacle to the United States Department of Veterans Affairs' ability to contract with SDVOSBs, like Community Pastor Care.[5]

The core issue presented in Metro Tristate's brief is whether implied conflict preemption applies. *See* Pet. Brief at 11 ("The Majority correctly found that implied conflict preemption is the only standard for determining whether state law is preempted in this case."). Whether implied conflict preemption applies is governed by the following standard:

[5] This argument section specifically responds to at least Metro Tristate's first (regarding conclusion that the state law conflicts with the federal law), second (regarding conclusion that the state law is preempted), third (regarding conclusion that applying state law would leave the Huntington VA with no eligible SDVOSBs), fourth (regarding conclusion that the Commission is without jurisdiction to enforce the state law), and sixth (regarding conclusion adopting the ALJ's recommended decision) assignments of error.

> Implied conflict preemption occurs where compliance with both federal and state regulations is physically impossible, or where the state regulation is an obstacle to the accomplishment or execution of congressional objectives.

Syl. Pt. 7, in part, *Morgan*, 224 W. Va. 62, 680 S.E.2d 77. Under this standard, statutory language explicitly signaling an intent to preempt state law (such as a preemption provision) is *not* necessary. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). All that is required is that the state law stand as an obstacle to fully accomplishing the federal objective. *Id.*

The preemption analysis here involves two statutes – one federal and one state. As explained in greater detail below, 38 U.S.C. § 8127 mandates that certain VA contracts be set aside for VOSBs and SDVOSBs to increase business opportunities for United States veterans. However, Metro Tristate argues that CPC, a SDVOSB, may not perform under the Contract that was awarded under 38 U.S.C. § 8127 until it obtains authorization from the Commission. Pet. Brief at 2. Metro Tristate further contends that, under W. Va. Code § 24A-3-3, the Commission may not grant CPC authorization to perform under the Contract because allowing the Contract would impair Metro Tristate's efficient public service and effectively decrease Metro Tristate's profit margins. Pet. Brief at 19-21 ("The Commission clearly has an obligation to protect common carriers from unreasonable competition by contract carriers."). The necessary result of Metro Tristate's position, if adopted, is that CPC would be foreclosed from performing under the Contract entirely—and seemingly indefinitely—or at least until Metro Tristate is no longer servicing the territory. West Virginia law would effectively preclude CPC from enjoying the business opportunity awarded to it by the VA solely because Metro Tristate already operates in the area as a common carrier.

Assessing whether implied conflict preemption applies presents a two-part inquiry: (1) What is the congressional objective of 38 U.S.C. § 8127; and (2) Would the full accomplishment of that objective be obstructed or frustrated by applying W. Va. Code § 24A-3-3 to preclude CPC

from performing under the Contract. If Metro Tristate's interpretation of W. Va. Code § 24A-3-3 would present an obstacle to accomplishing an objective of 38 U.S.C. § 8127, then preemption applies, and the Commission order must stand affirmed. As explained below, this inquiry leads to the inescapable conclusion that Metro Tristate's appeal must be denied.

A. The congressional objective of 38 United States Code § 8127 is to increase business opportunities for United States veterans and to restrict the United States Department of Veterans Affairs from awarding contracts to non-SDVOSBs or VOSBs when SDVOSBs or VOSBs are otherwise available to compete.

The pertinent federal statute is 38 U.S.C. § 8127, which is a provision in the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "Act"). The objective of this statute is explicitly stated in its plain language, which provides:

> **(a) Contracting goals.**
>
> **(1)** . . . [T]o increase contracting opportunities for . . . small business concerns owned and controlled by veterans with service-connected disabilities[.]

38 U.S.C. § 8127(a)(1) (boldface in original).

As explained by the Supreme Court of the United States, Congress has not taken this objective – increasing business opportunities for United States veterans – lightly. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016). In *Kingdomware*, the Court described the corrective measures Congress has taken to ensure that certain VA contract awards are, in large part, restricted to VOSBs and SDVOSBs:

> In 1999, Congress expanded small-business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act, *113 Stat. 233*. That Act established a 3% governmentwide contracting goal for contracting with service-disabled veteran-owned small businesses. *15 U.S.C. § 644(g)(1)(A)(ii)*.
>
> When the Federal Government continually fell behind in achieving these goals, Congress tried to correct the situation. Relevant here,

> Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006, . . . (codified, as amended, at *38 U.S.C. §§ 8127, 8128*). That Act requires the Secretary of Veterans Affairs to set more specific annual goals that encourage contracting with veteran-owned and service-disabled veteran-owned small businesses. § 8127(a). The Act's "Rule of Two," at issue here, provides that *the Department [of Veterans Affairs] "shall award" contracts by restricting competition for the contract to service-disabled or other veteran-owned small businesses.*

Id. at 1973 (emphasis and brackets added). *See also Bayaud Enters. v. United States Dep't of Veteran's Affairs*, No. 17-cv-01903-MSK-KLM, 2019 U.S. Dist. LEXIS 97303, *2 (D. Colo. 2019) ("The VBA seeks to promote veteran-owned businesses, and does so by requiring the Veteran's Administration ('VA') to purchase goods and services from such businesses in certain circumstances.").

Accordingly, and as a corrective measure to previous failures to contract with SDVOSBs and VOSBs, Congress restricted the VA from awarding contracts to businesses that are not SDVOSBs or VOSBs as follows:

> **(d) Use of restricted competition.**
>
> **(1)** Except as provided in paragraph (2) and in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department [of Veterans Affairs] shall award contracts on the basis of competition *restricted to small business concerns or small business concerned owned and controlled by veterans with service-connected disabilities* . . . if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.[6]

---

[6] Metro Tristate has raised no arguments that any of the exceptions contained in 38 U.S.C. § 8127 apply. Paragraph (2) referenced in the quote above applies to contracts for specified goods and services that are not at issue in this case. Subsection (b) referenced in the quote above allows the VA to use alternate procedures in relation to certain contracts for less than a threshold dollar amount, which is not claimed by Metro Tristate. Subsection (c) referenced above allows the VA to use alternate procedures in relation to certain sole source contracts, which similarly, is not contended by Metro Tristate. *See Kingdomware*, 136

38 U.S.C. § 8127(d) (Emphasis, brackets, and footnote added) (boldface in original). That is, absent certain exceptions that do not apply to this case, the VA must restrict its contract awards to VOSBs or SDVOSBs when two or more such entities are available to compete for the award. As a unanimous Supreme Court of the United States recognized, "[The Act's] text requires the [VA] . . . to award contracts to veteran-owned small businesses." *Kingdomware*, 136 S. Ct. at 1976. This requirement is "not discretionary;" it is "mandatory." *Id.*

In sum, the congressional objective behind 38 U.S.C. § 8127 is to increase business opportunities for SDVOSBs – at least in the context of VA contracts. Because CPC is a SDVOSB, the VA was required under federal law to select it over Metro Tristate for transportation services, as intended by Congress. Any state law that presents an obstacle to the full accomplishment of this congressional objective is preempted.

S. Ct. at 1974 (providing an in-depth explanation of the exceptions to § 8127). Finally, the record confirms that "there were at least two interested parties with SDVOSB status." Applicant Ex. 4 at 4. Because these issues were not raised below, any argument Metro Tristate might raise on appeal relating to whether an exception to the requirement in 38 U.S.C. § 8127 that the Huntington VA restrict competition to SDVOSBs is waived. *See State ex rel. Almond v. Murensky*, 238 W. Va. 289, 298-99, 794 S.E.2d 10, 19-20 (2016) (providing that nonjurisdictional questions not raised before the lower tribunal, but raised for the first time on appeal, "will not be considered.").

B. Applying state law in the manner suggested by Metro Tristate would obstruct the objectives of 38 United States Code § 8127.

Metro Tristate argues that, notwithstanding 38 U.S.C. § 8127, the Court should apply W. Va. Code § 24A-3-3 to prohibit CPC from serving the Huntington VA under the Contract with and paid for exclusively by the VA. W. Va. Code § 24A-3-3 provides, in pertinent part, that:

> (a) . . . . No permit shall be granted unless . . . the privilege sought will not . . . impair the efficient public service of any authorized common carrier or common carriers adequately serving the same territory.

Under Metro Tristate's interpretation of this statute, a contract carrier permit may not be granted to CPC for the following two reasons: (1) Metro Tristate, a common carrier, adequately serves the same territory, the Huntington area; and (2) Competition from CPC for service to the Huntington VA would decrease Metro Tristate's profit margins, thus "impair[ing] the[ir] efficient public service." Pet. Brief at 19-21 ("The Commission clearly has an obligation to protect common carriers from unreasonable competition by contract carriers."). Essentially, Metro Tristate is asking for an effective monopoly on this service, and arguing that because the VA contracted with Metro Tristate in the past, that the VA may not later choose to contract with other entities to satisfy federal objectives, namely CPC, a SDVOSB. Adopting Metro Tristate's argument would stymie the VA's ability to choose the parties with whom it contracts because state regulation would dictate—and severely restrict—qualifying service providers.

If adopted, Metro Tristate's interpretation of W. Va. Code § 24A-3-3 would inevitably erect an impossible barrier to entry for any potential market participant, including SDVOSBs, that might be interested in serving the Huntington VA. The Commission recognized this untoward result in its Conclusion of Law No. 5, which stated:

> The state contract carrier permitting requirement to protect existing common carrier services interferes with federal contracting goals by

> applying state regulatory requirements that *could leave the VA with no VOSBs or SDVOSBs to choose in West Virginia.*

Order at 19 (emphasis added).[7] Indeed, under the standard Metro Tristate suggests for West Virginia Code § 24A-3-3, so long as Metro Tristate continues to operate as a common carrier in the Huntington area (which it might for the indefinite future), any new entrant would be denied contract carrier status due to Metro Tristate's ability to demonstrate a considerable loss of revenues from its own (historic) provision of the NEMT VA contract service.[8] Accordingly, it is unclear how it is possible for CPC, or any other VOSB or SDVOSB, to overcome this burden.

Because W. Va. Code § 24A-3-3 and the contract carrier permit requirements contained therein, as interpreted by Metro Tristate, foreclose entry of new competitors, including SDVOSBs, for service to the Huntington VA, the statute presents an obstacle to the full accomplishment of the objective of 38 U.S.C. § 8127. That is, application of W. Va. Code § 24A-3-3 could effectively deprive the VA of its selected provider of NEMT for the Huntington VA, an SDVOSB. It would thereby foreclose a business opportunity for CPC that was awarded pursuant to federal law and objective. Due to this conflict, the state statute, W. Va. Code § 24A-3-3, is clearly preempted under the facts of this case.

In an effort to make it appear that the state contract carrier permit requirements are not at odds with federal law, Metro Tristate cites a regulation promulgated by the Small Business

---

[7] Even though Metro Tristate assigned error to this conclusion, its brief is entirely devoid of *any* explanation as to how its interpretation of W. Va. Code § 24A-3-3, if applied here, would leave the Huntington VA with any VOSBs or SDVOSBs eligible to provide it transportation services. It is evident that this dispute revolves around a simple fact: Metro Tristate wants to be the sole provider of the services at issue.

[8] Notably, the service at issue is provided entirely pursuant to federal contract and paid exclusively by the VA at predetermined rates. Metro Tristate's claims of impairment are only attributed to the VA's decision to discontinue service with Metro Tristate in favor of CPC because Metro Tristate was ***no longer eligible*** for the contract due to the federal objectives previously discussed.

Administration, 13 C.F.R. § 125.13(g). This regulation is of no moment to the Court's analysis for multiple reasons. First, the specific provision to which Metro Tristate cites (subsection (g)), was added to the regulation to "provide guidance on when the SBA may find that a non-service-disabled veteran controls the firm." 83 Fed. Reg. 48908. It was not intended to bind SDVOSBs to state protectionist laws that grant already-existing common carriers an effective monopoly in the disputed territory. Second, it is well-established that an agency cannot promulgate a regulation that conflicts with the congressional intent behind a statute. Syl. Pt. 5, in part, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Rules and Regulations of an agency must faithfully reflect the intention of the legislature[.]") (quotations, citations, and ellipses omitted).

Third, and finally, the intent of *Congress*, as opposed to an administrative agency, is the proper focus of a preemption analysis. *See Morgan*, 224 W. Va. at 69, 680 S.E.2d at 84 ("When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent."); *Retail Clerks Int'l Asso. v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone" of a preemption analysis.).

In sum, Metro Tristate would have the Court use state law as a basis to take a business opportunity away from CPC that was granted under a federal law intended to increase business opportunities for United States veterans, particularly VOSBs and SDVOSBs. Moreover, in so-doing, Metro-Tristate intends to use state regulatory law to eliminate all competition and thereby bind the hands of the VA to choose its own providers through creation of an effective monopoly in favor of itself for the provision of this essential service. Clearly, applying state law in this manner would present an obstacle to the full accomplishment of the objectives of 38 U.S.C. § 8127

– Metro Tristate's citation to inapplicable regulations aside. Therefore, implied conflict preemption applies to this case.[9]

III. The cases relied on by the Commission squarely apply to this case and militate in favor of finding implied conflict preemption.[10]

The cases relied upon by the Commission squarely apply, are remarkably similar to this case, and all militate in favor of finding implied conflict preemption. These cases include, *Leslie Miller, Inc. v. State of Arkansas*, 352 U.S.187, 189 (1956) (holding that Arkansas was barred from enforcing its requirement to obtain a license from its Contractors Licensing Board against a contractor providing services to United States Air Force base); *Lafferty Enters. v. Commonwealth*, 572 S.W.3d 85, 93 (Ct. App. Ky. 2019) (concluding that Kentucky was preempted from subjecting provider of ambulance services to the Huntington, West Virginia VA to state certificate of need and licensing requirements); and *United States v. Virginia*, 139 F.3d 984, 990 (4th Cir. 1998) (affirming district court's determination that Virginia may not require FBI contractors to register

---

[9] As a final note, CPC's provision of NEMT is not entirely intrastate, as suggested throughout Metro Tristate's brief. It is, at least in part, interstate in nature, as the Contract calls for transportation from the Huntington VA to destinations in Ohio, Kentucky, Tennessee, Virginia, and Pennsylvania. This reason is sufficient, in and of itself, to deny Metro Tristate's requested relief in full. Metro Tristate conceded in its briefing before the Commission that provision of interstate transportation services is preempted. Metro Tristate Exceptions at 12 ("[F]ederal law regulates interstate motor carriers.") (Item No. 78 in Commission's Record Index). To pile on a second layer of error, the relief requested by Metro Tristate, to the extent it interferes with CPC providing services across state lines, would violate the Commerce Clause if granted. *See Harper v. PSC*, 396 F.3d 348 (4th Cir. 2005) (holding that, under Commerce Clause, West Virginia Public Service Commission may not enforce certain licensing requirements under Chapter 24A of the West Virginia Code to restrict business from transporting materials between West Virginia and Ohio pursuant to individual contracts). However, for the reasons stated above, Metro Tristate does not prevail regardless of whether CPC provides services across state lines.

[10] This argument section specifically responds to at least Metro Tristate's second (regarding conclusion that the state law is preempted), fourth (regarding conclusion that the Commission lacks jurisdiction to enforce the state law), and sixth (regarding conclusion adopting the ALJ's recommended decision) assignments of error.

and obtain license with state Criminal Justice Services Board). These cases, and their application to the issues raised in this appeal, are discussed below.

In *Leslie*, the federal government hired a contractor to perform construction services at an Air Force base in Arkansas. 352 U.S. at 187. However, the contractor did not obtain authority to perform such services from the state Contractors Licensing Board, as required under Arkansas law. *Id.* at 188. After Arkansas attempted to prosecute the contractor for not complying with state law, a unanimous Supreme Court of the United States held that states are preempted from interfering with the federal government's contracting decisions by enforcing state licensing requirements:

> [T]he immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient.

Id. at 190.

This case is different from *Leslie* in a compelling way. In *Leslie*, there was no indication that the state government attempted to do anything more than require the contractor to submit to state licensing requirements and then let it on its way to work for the federal government – and even that was not permissible. *Id.* Here, Metro Tristate does not stop at asking that CPC be required to go through the process of applying for a permit. Indeed, when CPC applied for a permit, Metro Tristate protested the application. Pet. Brief at 4. What Metro Tristate requests is that the Commission prohibit CPC from providing transportation services to the Huntington VA until it can be shown that competition from CPC would not impact Metro Tristate's bottomline – which is a standard Metro Tristate knows is virtually impossible to meet given its previous VA

contract. *Id.* at 19-23. This case presents a much stronger factual scenario for implied conflict preemption than what was presented for the unanimous Court in *Leslie*.

In *Lafferty*, the VA contracted with Jan-Care, a provider of ambulance services, to transport United States veterans to and from the Huntington VA. 572 S.W.3d at 87. Lafferty Enterprises, a competitor, filed an administrative complaint, seeking a cease and desist order against Jan-Care providing services to the Huntington VA without first complying with state licensing and certificate of need requirements. *Id.* at 87-88. In assessing Jan-Care's argument that the Kentucky requirements were preempted, the *Lafferty* court first noted that the ordinary presumption against preemption does not apply to the VA. *Id.* at 90. Further, the *Lafferty* court recognized that enforcing state licensing and certificate of need requirements against Jan-Care would supplant the decision of the VA for that of Kentucky, which is impermissible:

> Enforcing Kentucky's [certificate of need] and licensure laws would deprive the VA of its right to select the provider of its choice and would effectively allow the Commonwealth of Kentucky to select the provider instead. There is no doubt that requiring Jan-Care – as the VA's chosen provider – to meet Kentucky requirements would frustrate the VA's objectives.

Id. at 92. The *Lafferty* court found that this ground, in and of itself, was sufficient to find preemption, as it stated in the very next sentence, "Since there is a clear conflict, . . . [the federal regulations] preempt Kentucky's [certificate of need] and licensing laws." *Id.*

This case is remarkably similar to *Lafferty*. Both cases involve competitors filing administrative complaints against providers of medical transportation services to the *exact same Huntington VA location* based on state licensing requirements. In both cases, the competitor sought to have the state supplant the federal government's decision for its own. And, in both cases, the requested relief runs afoul of well-established federal preemption precedent. Given the striking similarities between this case and *Lafferty*, its holding cannot be dismissed (as Metro Tristate

attempts to do in a footnote). Pet. Brief at 15. n.2. Accordingly, the Court should follow the *Lafferty* court's example in neighboring Kentucky and reach the same, correct result finding preemption.

And finally, *Virginia* arose from the state government's attempts to enforce its licensing requirements on contractors working for the federal government. 139 F. 3d 984. The State of Virginia imposed licensing and registration requirements on participants in the private security services industry through its Criminal Justice Services Board. *Id.* at 985. Most of the contractors performing such services for the FBI in Virginia were not licensed or registered and would no longer provide their services to the FBI if forced to comply with the license and registration requirements. *Id.* at 986. After Virginia indicated its intent to enforce its license and registration requirements against the contractors, the FBI sought declaratory relief on preemption grounds. *Id.* On appeal, the Fourth Circuit, relying in large part on *Leslie*, stated that:

> A state may not enforce licensing requirements which, though valid in the absence of federal regulation, give the States' licensing board a virtual power of review over the federal determination that a person or agency is qualified and entitled to perform certain functions not contemplated by Congress.

Id. at 988 (internal quotations, citations, and brackets omitted). Accordingly, the Fourth Circuit found that Virginia's license and registration requirements were preempted as to the contractors working for the FBI and were thus unenforceable against them. *Id.* at 990.

The message from the Fourth Circuit in the *Virginia* case was clear: The State cannot second-guess or regulate the contracting decision of the federal government through licensing and registration requirements. This message is particularly applicable where, as in both this case and in *Virginia*, enforcing the subject licensing and registration requirements would effectively undo the federal government's contracting decision. In *Virginia*, the contractors indicated that they

would choose to stop work for the FBI if the licensing and registration requirements were enforced against them. *Id.* at 987. Here, it is not clear CPC would even have that choice under W. Va. Code § 24A-3-3. Pet. Brief 19-23. Because the state government cannot undo a contracting decision by the federal government, the same result that was reached by the Fourth Circuit in *Virginia* should be reached in this appeal as well.

Metro Tristate's attempts to distinguish these cases (except for *Leslie*, which it did not address) fall flat. It argues that the cases relied on by the Commission should be disregarded because one of them concerned rates, not permitting requirements. Pet. Brief at 13. However, the three on-point and remarkably similar cases discussed above concern permitting requirements and militate in favor of preemption. Metro Tristate also erroneously contends that, in the cases cited by the Commission, the federal government was a party. *Id.* at 15. The federal government was not a party in *Lafferty*. And finally, Metro Tristate asserts that the parties in the cases cited by the Commission had certain requisite authority from their respective state commissions. *Id.* at 13. This assertion is obviously not true; otherwise, there would not have been a case to cite.

In short, Metro Tristate can point to no reason to disregard the analogous case law correctly relied upon by the Commission. These cases have a common thread: that states are prohibited from regulating or otherwise interfering with the contracting decisions of federal governmental entities. This prohibition includes enforcement of state licensing and registration requirements against parties that contract with the federal government, especially when the state requirements restrict market entry. Under these cases, the state contract carrier permit requirements in W. Va. Code § 24A-3-3 are preempted by federal law.

IV. The focus of a preemption analysis is the intent of Congress – not the VA or Community Pastor Care.[11]

Next Metro Tristate argues that the VA intended for the Contract to comply with state law and that this intent is evidence that preemption does not apply. Pet. Brief at 16 & 18. In particular, it relies on a December 11, 2018 memorandum by a contracting officer with the VA (the "memorandum") and a provision in the Contract calling for CPC to comply with local laws regarding operation of vehicles. *Id.*

Metro Tristate's interpretation on the intent of the VA is inapposite and makes no difference to the outcome of this case. It is beyond dispute that Congress' intent is what guides a preemption analysis, not the (alleged) intent of an administrative agency. *See Morgan*, 224 W. Va. at 69, 680 S.E.2d at 84 ("When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent."); *Retail Clerks Int'l Asso.*, 375 U.S. at 103 ("The purpose of Congress is the ultimate touchstone" of a preemption analysis.). Simply, the understanding, motives, intent, and the like of the VA has no bearing on what Congress intended when it enacted 38 U.S.C. § 8127. Metro Tristate's apparent position otherwise is simply incorrect.

Moreover, the memorandum does *not* indicate that the VA shares Metro Tristate's view against preemption. Indeed, the first sentence of the memorandum requested "immediate" authorization for CPC to perform under the Contract. Applicant Ex. 4 at 4. The memorandum was believed to be necessary after Metro Tristate filed the complaint case – thus putting CPC's

[11] This argument section specifically responds to at least Metro Tristate's first (regarding conclusion that the state law conflicts with the federal law), second (regarding conclusion that the state law is preempted), third (regarding conclusion that applying state law would leave the Huntington VA with no eligible SDVOSBs), fourth (regarding conclusion that the Commission is without jurisdiction to enforce the state law), and sixth (regarding conclusion adopting the ALJ's recommended decision) assignments of error.

ability to perform under the Contract without interruption by the State into doubt. *Id.* The memorandum explained:

> Within days of the award another complaint was filed by the owner of [Metro Tristate]. This is an essential service, and the VA cannot go any period of time without being able to provide transportation to the veterans. The VA cannot suffer a stop work order, and need to have swift resolution to this matter. This issue directly impacts patient care.

Id. The memorandum was intended to ensure that CPC's services would go uninterrupted after the filing of the complaint case, which was described as an "attempt[] to block any new awardee." *Id.* Metro Tristate's attempt to have the Court read anything more into the memorandum, particularly any concession, is misleading.

And finally, the same arguments Metro Tristate raises regarding the Contract were tried and failed in the *Lafferty* case. The contract at issue in *Lafferty* contained a provision requiring that:

> All vehicles, personnel, and services rendered by the Contractor shall conform to all federal, state, and local statutes, rules, and regulations; specifically, for the states of West Virginia, Kentucky, and Ohio.

572 S.W.3d at 89 (brackets omitted). [12] The competitor plaintiff who filed the administrative action argued that this contractual provision was evidence that the VA intended for Kentucky certificate of need and licensing laws to apply. *Id.* The *Lafferty* court declined to adopt that position, stating that "to the extent the . . . contract impose[s] any Kentucky licensure requirements upon Jan-Care, those are matters for the VA to enforce as a party to the contracts, should it so choose[.]" *Id.* at 93. That is, if CPC breaches a provision of the Contract, that is a matter between

[12] Earlier versions of the *Lafferty* contract, which were also quoted in the opinion, provided substantially the same but with different language.

the VA and CPC. Metro Tristate does not have standing to seek enforcement of this contractual provision in the courts.

V. The Court should not reach the issue whether Community Pastor Care should be granted a contract carrier permit because implied conflict preemption applies and because the Commission did not decide this issue below.[13]

Finally, Metro Tristate argues that the Court should order the Commission to deny CPC's application for a contract carrier permit. Whether CPC is eligible for a permit under W. Va. Code § 24A-3-3 was not addressed by the Commission. Instead, it stated as follows:

> Because the Commission has determined that implied conflict preemption applies in this case to the permitting requirements of W. Va. Code § 24A-3-3 we will not address the permit application filed in Case No. 19-0006-MC-CC.

Order at 17. The Court should deny Metro Tristate's requested relief for at least two reasons: (1) The contract carrier permit requirements are preempted, so addressing this issue is not necessary; and (2) The Court traditionally abstains from addressing issues on appeal that were not decided on by the tribunal below.

First, for the reasons stated in this brief, the Commission was correct that implied conflict preemption applies in this case. Therefore, the state contract carrier permit requirements in W. Va. Code § 24A-3-3 do not apply to CPC in its performance under the Contract. Because the contract carrier permit requirements cannot be enforced against CPC, the issue of whether CPC is eligible for a permit does not affect the outcome of this appeal. Accordingly, it is not necessary for the Court to address this issue.

Second, the Court traditionally abstains from addressing issues on appeal that were not decided on by the tribunal below. As the Court has held: "This Court will not pass on a

[13] This argument section specifically responds to at least Metro Tristate's sixth (regarding conclusion adopting the ALJ's recommended decision) assignment of error.

nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Duquesne Light Co. v. State Tax Dep't*, 174 W. Va. 506, 327 S.E.2d 683 (1984) (quotations and citations omitted). This same rule applies even when an issue is raised below by a party but not decided. *Citibank, N.A. v. Perry*, 238 W. Va. 662, 665 n.2, 797 S.E.2d 803, 806 n.2 (2016) ("Citibank complains that, even though it raised the issue below, the circuit court made no finding of the applicable law. Because Citibank failed to obtain a ruling on this issue, we find it has not been preserved for appeal."); Syl. Pt. 2, *Cameron v. Cameron*, 105 W. Va. 621, 143 S.E.2d 349 (1928) (providing, as to issue that was raised below, "[t]his Court will not review questions which have not been decided by the lower court.").

This traditional rule should be adhered to as to this issue. Here, there are no findings of fact or conclusions of law on which the Court could base a decision that one of the three factors on which a decision by the Commission may be disturbed on appeal. *Jefferson Cty. Citizens for Econ. Preservation*, 241 W. Va. at 174 ("This Court may reverse an order by the Public Service Commission when: (1) it exceeded its authority; (2) it made factual findings that are not supported by adequate evidence; or (3) the substantive result of its order is not proper. . . . None of these three situations apply to the facts of this case. Therefore, we affirm the Public Service Commission's Order.").

To be clear, the primary reason Metro Tristate's requested relief should be refused is because Metro Tristate's position is incorrect – the state contract carrier permit requirements are preempted by federal law. However, even if that were not the case, a remand to the Commission for further proceedings would be more appropriate than the relief Metro Tristate seeks.[14]

[14] As a final note, the Commission's Order, in addition to being comprehensive, thorough and reaching the correct result, was narrow in its application. The Commission was clear that the Order did not apply to "financial responsibility (insurance) and vehicle registration and safety rules," which do not

CONCLUSION

Metro Tristate asks the Court to direct the Commission to prohibit CPC from performing under the Contract until it obtains a permit that it asserts should be denied. This result would, in effect, block the contracting decision of the VA when it selected CPC under a federal law set aside intended to increase business opportunities for United States veterans, in this case, specifically those with service-related disabilities. Such relief must be denied on preemption grounds because it obstructs the full accomplishment of an important federal objective. Accordingly, Metro Tristate's appeal should be denied, and the Court should affirm the Commission's Order.

Respectfully submitted by:

Community Pastor Care, LLC,
Respondent,

By Counsel

R. Booth Goodwin II (W.Va. Bar. No. 7165)
Stephanie H. Daly (W. Va. Bar No. 8835)
Robert S. Pruett (W.Va. Bar No. 12683)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
P: 304-346-7000
F: 304-344-9692
rbg@goodwingoodwin.com
shd@goodwingoodwin.com
rsp@goodwingoodwin.com
Counsel for Respondent

interfere with the congressional objective of increasing business opportunities for United States Veterans in the same way as a restriction on market entry, like W. Va. Code § 24A-3-3. Order at 17.

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

METRO TRISTATE, INC.,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, and COMMUNITY PASTOR CARE, LLC,
Respondents.

Community Pastor Care, LLC's Brief in Opposition to Metro Tristate Inc.'s Petition for Appeal from an Order of the Public Service Commission WV PSC Case Nos. 18-1315-MC-FC and 19-0006-MC-CC

VERIFICATION

I, R. Booth Goodwin II, counsel for Respondent, being duly sworn, depose and say that I have reviewed the foregoing *Community Pastor Care, LLC's Brief in Opposition to Metro Tristate Inc.'s Petition for Appeal* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.

R. Booth Goodwin II (W.Va. Bar. No. 7165)

Taken, subscribed, and sworn to before me this 25th day of November, 2020.

My commission expires: April 26, 2021

NOTARY PUBLIC

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

METRO TRISTATE, INC.,
Petitioner,

v.

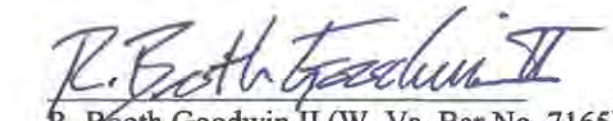
THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, and COMMUNITY PASTOR CARE, LLC,
Respondents.

Community Pastor Care, LLC's Brief in Opposition to Metro Tristate Inc.'s Petition for Appeal from an Order of the Public Service Commission WV PSC Case Nos. 18-1315-MC-FC and 19-0006-MC-CC

Certificate of Service

I, R. Booth Goodwin II, do hereby certify that the foregoing ***"Community Pastor Care, LLC's Brief in Opposition to Metro Tristate Inc.'s Petition for Appeal"*** has been served this 25th day of November, 2020, upon the following by United States mail, addressed as follows:

David B. Hanna, Esq.
Thomas N. Hanna, Esq
P.O. Box 3967
Charleston, WV 25339
(304) 342-1687
(304) 342-8761 (facsimile)
dhanna@hannalawpllc.com
Counsel for Petitioner, Metro Tristate, Inc.



R. Booth Goodwin II (W. Va. Bar No. 7165)
Stephanie H. Daly (W. Va. Bar No. 8835)
Robert S. Pruett (W. Va. Bar No. 12683)