PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 4th day of September 2020.

CASE NO. 18-1315-MC-FC

METRO TRISTATE, INC.,
a corporation,

Complainant,

v

COMMUNITY PASTOR CARE, LLC,
a limited liability company,

Defendant.

and

CASE NO. 19-0006-MC-CC

COMMUNITY PASTOR CARE, LLC
a limited liability company,

Application for a permit to operate as a contract carrier in the transportation of passengers for the Department of Veterans Affairs in West Virginia.

COMMISSION ORDER

The Commission denies the Exceptions filed by Metro Tri-State, Inc., and adopts the Administrative Law Judge's Recommended Decision with modification. Chairman Charlotte R. Lane dissents.

BACKGROUND

Case No. 18-1315-MC-FC

On October 1, 2018, Metro Tristate Inc. (Metro) filed a verified Complaint and Motion for Interim Relief (Complaint) against Community Pastor Care (CPC) alleging that CPC is unlawfully providing transportation of passengers for hire by transporting

veterans in Cabell and Wayne Counties to the Huntington VA Medical Center (HVAMC). Metro requested an interim order requiring CPC to cease and desist from providing HVAMC transportation services until such time that it obtains authority from the Commission.

On October 12, 2018, CPC filed an Answer and Motion to Dismiss. CPC admitted that it entered into a contract with the United States Department of Veterans Affairs (VA) for the sole purpose of providing non-emergency medical transportation (NEMT) exclusively and on behalf of the VA. CPC asserted that the Commission lacks jurisdiction to regulate the transportation of veterans on behalf of the VA because of (i) the "Supremacy Clause" of United States Constitution citing, United States v. Carter, 121 So. 2d 433 (FL 1960) (Carter), which relies on Public Utilities Commission of the State of California v. United States of America (California), 355 U.S. 534, 78 S. Ct. 446, 2 L.Ed. 2d 470 (1958) (California); (ii) federal preemption under 49 USCS § 14501 (federal authority over intrastate transportation) as recognized by W. Va. Code § 24A-1-3, and; (iii) the holding in Wil-Care Transportation Service Inc., that the Commission does not have authority to regulate NEMT service for veterans. Wil-Care Transportation Service, Inc., Case No. 17-0245-MC-C (Wil-Care), Administrative Law Judge (ALJ) Recommended Decision (Sept. 14, 2017), Concl. of Law No. 5.

On October 16, 2018, Metro filed a Motion for Cease and Desist Order (Motion) and a Response in Opposition to Defendant's Answer and Motion to Dismiss Complaint (Metro Response in Opposition). In support of its motion, Metro argued that CPC's illegal activity is depriving Metro of revenue on which it relies to provide service to the public at reasonable rates, thus causing immediate and irreparable injury. In addition, Metro asserted that it is contrary to state law, public safety and the public interest to allow CPC to operate illegally without proper authority from this Commission. Metro cited W. Va. Code § 24A-1-1 that confers on the Commission the power, authority and duty to supervise and regulate the transportation of persons and property for hire by motor vehicles upon or over the public highways of this State.

Metro argued that:

(i) CPC's business of transporting veterans is not "non-emergency medical transportation of Medicaid members" as set forth in the exemptions to Commission authority under W. Va. Code § 24A-1-3(13);

(ii) CPC's service does not fall under the exception to this Commission's jurisdiction under the Wil-Care case because CPC is a private, for-profit carrier that owns its vehicles and provides services to the VA under contract with set pricing; and

(iii) CPC's reliance on the "Supremacy Clause" is misplaced. The issue in the Carter case was whether the Florida Public Utilities Commission has jurisdiction over

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rates charged by a common carrier for the Florida intrastate transportation of property for the United States government. Rates are not the issue in this case.

On October 26, 2018, CPC filed a Preliminary Response to Metro's Motion, a Reply to Metro's Response and a motion for referral to the Division of Administrative Law Judges (ALJ). CPC stated that Metro moved for the same interim relief in a prior case and the request was denied because Metro did not allege extraordinary facts of immediate and irreparable injury or public interest. CPC also asserted that Metro asserted facts not included in its Complaint that require further evidentiary development and generally incorporated the same arguments made in its Motion to Dismiss. CPC requested that the case be immediately referred to the ALJ if the Complaint is not dismissed.

On November 5, 2018, Staff filed an Initial Joint Staff Memorandum. (Staff Memo). Staff recommended that CPC be ordered to immediately cease and desist operations and that the matter be referred to the ALJ.

On December 28, 2018, Staff filed a Final Joint Staff Memorandum. Staff recommended that CPC be required to cease and desist providing services until it obtains a certificate from the Commission.

On January 3, 2019, Metro filed a letter stating that Metro concurred with the Staff recommendation. Metro also stated that if CPC were allowed to continue to operate illegally the ability of Metro to continue to provide service to the public could be impaired because CPC was depriving Metro of revenue.

Case No. 19-0006-MC-CC

On January 4, 2019, CPC filed an Application for a permit to operate as a contract carrier for NEMT of United States veterans to and from the HVAMC and outpatient clinics in Charleston and Lenore, West Virginia, Gallipolis, Ohio, and Prestonsburg, Kentucky, under the terms of its contract with the VA. The proposed service area included the States of West Virginia, Kentucky, Ohio, Virginia and the District of Columbia. The Commission Executive Secretary designated CPC's Application filing as Case No. 19-0006-MC-CC.

On January 4, 2019, the Commission issued an Order referring Case No. 19-0006-MC-CC to the Commission's ALJ.

On January 9, 2019, Metro protested the CPC Application, petitioned to intervene and moved for an order directing CPC to cease operation.

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On January 11, 2019, the ALJ issued an Order granting Metro's petition to intervene and set the matter for hearing on May 9, 2019.

On January 15, 2019, CPC filed a Motion to Consolidate Case No. 18-1315-MC-FC and Case No. 19-0006-MC-CC.

By Orders issued in February through April, 2019, the ALJ granted motions to intervene filed by C&H Company, D&L Limousine, Inc., R and R Transit, Inc., and Motown Taxi, LLC. Comm'n Orders dated February 22, 2019, March 15, 2019, April 16, 2019, and April 23, 2019.

Both Cases

On January 18, 2019, the Commission issued an Order granting the Motion to Consolidate filed by CPC and referred the cases to the ALJ.

On February 4, 2019, the ALJ issued an Order denying interim relief because Metro did not allege extraordinary facts of immediate and irreparable injury or public interest justifying interim relief. Order Regarding Interim Relief dated Feb. 4, 2019, Concl. of Law No. 1.

On February 20, 2019, Metro filed a Motion to Rescind Commission Referral Orders (Motion to Rescind), Request for Expedited Consideration and Motion requesting that the Commission direct CPC not to operate until it has a permit. Metro requested expedited treatment. Metro stated that its performance of wheelchair lift services for other commercial customers and the general public is impaired by CPC operations because the volume of orders is too low to cover fixed costs and Metro has reduced its vehicles and suspended service to outlying areas. Motion to Rescind at 6. Metro argued that it is not likely that CPC will meet its burden of proof to obtain a contract carrier permit because it is clear that CPC's operation would impair existing service. Id. at 8.

On February 26, 2019, CPC filed a Response to the Metro Motion to Rescind (Response). CPC argued that Metro made conclusory allegations that it is harmed by CPC's NEMT services and provided no evidence to support a conclusion of immediate and irreparable harm. CPC also asserted that Metro failed to address the implications of the federal law and that the Veterans Administration has directly requested immediate temporary authority for CPC. CPC stated that it published notice of the May 9, 2019 hearing in newspapers of general circulation. Response at 2-4.

On March 12, 2019, Metro filed a Reply to CPC's Response (Metro Reply). Metro reiterated the arguments made in its October 16, 2018 Response to Defendant's Answer that federal preemption does not apply in this case and that CPC is providing intrastate service not subject to exemption under W. Va. Code § 24A-1-3. Metro also

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asserted that CPC has acknowledged that it must be in compliance with all state rules. Metro Reply at 2-5.

On March 27, 2019, the Commission issued an Order denying Metro's Motion to Rescind.

On July 9, 2019, the ALJ held an evidentiary hearing. All parties except Motown Taxi, LLC, appeared.

On September 4, 2019, the ALJ issued a Recommended Decision making the following Conclusions of Law:

> 1. The VA has a comprehensive purchasing mechanism including a mandated statutory preference for contracting with service-disabled veteran-owned small businesses whenever two or more qualified businesses are available to provide a particular service. (38 U.S.C. §8127, Kingdomware Technologies. Inc., v. United States, 136 S. Ct. 1969, 195 L. Ed 2d 334 (2016).)
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> 2. West Virginia requires that contract carriers meet a number of requirements including that the contract carrier permit does not (i) endanger the public, (ii) unduly interfere with highway use or impair highway maintenance or (iii) impair existing common carriers serving the same territory. (W. Va. Code § 24A-3-3.)
>
> 3. The state contract carrier regulatory system to protect existing common carrier services conflicts with the federal contracting mechanism to promote federal contracting with service-disabled veteran-owned small businesses in this matter.
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> 4. This Commission has no jurisdiction to regulate intrastate transportation services procured exclusively by VA for its use and must dismiss these cases because the state regulatory mechanism conflicts with federal contracting goals. (United States v. Virginia, 139 F. 3d 984 (4th Cir., 1998)).

On September 19, 2019, Metro filed Exceptions to the ALJ's Recommended Decision asserting that Conclusions of Law No. 3 and No. 4 were erroneous. Metro argued that (i) the Recommended Decision did not cite to any evidence of congressional intent to preempt state law, (ii) the cases relied upon in the Recommended Decision do not support federal preemption because those cases involved rate regulation, (iii) the actions of the VA and CPC confirm that they intended to be in compliance with state law

and, (iv) the ALJ erroneously concluded that the federal scheme is designed to employ veterans.

CPC responded by referring to its Initial and Reply Post-Hearing Briefs. CPC asserted that Commission jurisdiction is preempted by the Supremacy Clause and the principle of implied conflict preemption.

Metro's Argument on Exceptions

Metro asserted the ALJ erroneously concluded at Conclusion of Law No. 3, that the state contract carrier regulatory system to protect existing common carrier services conflicts with the federal contracting mechanism to promote federal contracting with service-disabled veteran-owned small businesses (SDVOSBs). Metro also asserted that Conclusion of Law No. 4 erroneously found that the Commission has no jurisdiction to regulate intrastate transportation services procured exclusively by the VA for its use and must dismiss these cases because the state regulatory mechanism conflicts with federal contracting goals.

Metro argued that the Recommended Decision cites to no statute, regulation, case law or any evidence of congressional intent that would suggest that a SDVOSB like CPC is exempt from West Virginia motor carrier law simply because it is a SDVOSB or that its transportation of West Virginia veterans is being paid for by the federal government.

In support of its no preemption argument Metro cited the West Virginia Supreme Court decision in Morgan v. Ford Motor Company, 680 S.E. 2d 77 (W.Va. 2009) (Morgan).[1] In Morgan, the Court discussed the guidelines for federal preemption, the differences between express preemption and implied preemption and the two types of implied preemption, implied field preemption and implied conflict preemption. Metro stated that the Recommended Decision inferred that implied conflict preemption applied in this case but the Decision did not provide a proper analysis and did not cite to any congressional intent to preempt state law. Metro also pointed to regulations governing SDVOSBs that require SDVOSBs to "obtain any and all required permits, licenses and charters required to operate the business" and to adhere to state laws regarding super majority voting requirements. 13 C.F.R. §§ 125.13(g) and 125.12(e)(1)(iii) and (f).

Metro also asserted that the Recommended Decision generally references 38 U.S.C. § 8127[2], the law governing VA preferences for SDVOSBs, but provides no analysis, supporting regulations or evidence of congressional intent that federal law preempts state regulation of VA contracting for SDVOSB services. Metro contended

[1] In the Morgan case, the Court was addressing whether Federal Motor Vehicle Safety Standard 205 preempted a window glass and glazing defect claim under state common law.

[2] 38 U.S.C. §8127 is commonly referred to as the Veterans Benefits Act.

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that, although the United States Supreme Court held in Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976-1977 (2016), a case interpreting 38 U.S.C. § 8127, that the VA shall prefer veteran-owned small businesses when the "Rule of Two" is satisfied, such preference does not expressly or impliedly exempt the SDVOSB from complying with state licensing requirements.[3]

Metro contended that the Fourth Circuit case relied on by the ALJ has no similarities to the case at hand.[4] Metro argued that enforcement of motor carrier qualifications is not an issue in this case as it was in the Virginia case. The Virginia case is also distinguishable because the agency (the Federal Bureau of Investigation) brought the case instead of the contractor. Whereas, in the present case the VA chose not to get involved and restricted its employees from testifying.

In addition, Metro pointed out that the West Virginia Code contains no explicit exception to Commission jurisdiction over intrastate service provided to the VA.

Community Pastor Care Response to Metro Exceptions

CPC responded that the Exceptions present no new legal arguments and it adopted its Initial and Reply Briefs as its response to Metro's Exceptions.

In its prior briefs, CPC argued that the Commission lacks jurisdiction in this case under the Supremacy Clause of Article VI of the United States Constitution, citing Carter, which relies on California. In California, the United States Supreme Court struck down a California statute that prohibited common carriers from granting the U.S. government reduced rates until those rates were approved by the California Commission.

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[3] 38 U.S.C. §8127(d) sets forth what is hereafter referred to as the "Rule of Two": Except as provided 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 shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns 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.

[4] United States v. Virginia, 1139 F.3d 984 (4th Cir.1998). In the Virginia case, the State of Virginia attempted to enforce its private investigator licensing and registration requirements on federal contractors conducting background checks for the FBI, resulting in contractors ceasing to provide services to the federal government. The Court of Appeals affirmed the injunction against Virginia, determining that Virginia's regulation conflicted with the federal statutes governing the FBI background checks.

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> As Chief Justice Marshall said in McCulloch v. Maryland, 4 Wheat. 316, 427, 4 L.Ed. 479, 'It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'

California at 355 U.S. 534, 544, 78 S. Ct. 446, 453 (1958).

CPC pointed out that the Carter court held that the Supremacy Clause, along with the imposition upon the federal government of the responsibility of maintaining the national defense, precluded the state agency from regulating the intrastate rates and services of common carriers transporting property of the United States government. See Carter. In reaching this conclusion the Court found that "the agreement of the government to move the household goods of servicemen is a part of the government contract with the men at the time of their enlistment. It is an inducement to attract them to join and remain in the military service." Id. at 435. CPC asserted that this is analogous to the obligation of the VA to provide care for veterans.

CPC also asserted that a more specific type of conflict preemption is triggered when the application of state and federal law creates a conflict that is impossible to reconcile, or the application of state and federal law would result in a frustration of the purpose of the federal law, citing Lafferty Enters. v. Commonwealth, 572 S.W.3d 85 (Ct. Ap. Ky. 2019). CPC noted that in Lafferty, the Kentucky Court of Appeals held that Kentucky's certificate of need laws do not apply to a VA contract for the provision of ambulance service to veterans because of federal conflict preemption. The Court explained: "[s]ince there is a clear conflict, federal procurement laws – the FAR (Federal Acquisition Regulations) and VAAR (VA Acquisition Regulations) – as they pertain to the VA contracts for ambulance services to veteran patients of its facility, preempt Kentucky's CON (Certificate of Need) and licensing laws." Lafferty, 572 S.W.3d at 91 (parentheses added). The Kentucky Court also stated that traditional defenses against preemption, based on the historic police powers of the states, do not apply to the "unique nature of the VA" because "an assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." Lafferty, 572 S.W.3d at 90 (quoting U.S. v. Locke, 529 U.S. 89, 108, 120 S. Ct. 1135 (2000)).

CPC cited an Arkansas Supreme Court decision holding that Arkansas licensing requirements were preempted because the Armed Services Procurement Act included factors to be used to determine "responsibility." Leslie Miller, Inc. v. State of Arkansas, 352 U.S. 187, 77 S. Ct. 257 (1956).

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> Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder.

Miller, 352 U.S. at 189-190.

CPC asserted that the state's power to regulate motor carriers directly conflicts with the VA's right to choose contractors based on federal set-asides and preferences established by Congress to provide certain transportation services for veterans. Commission jurisdiction would impede federal contracting goals by adding qualification requirements to those required by the VA contract.

DISCUSSION

The pertinent facts of this case are not in dispute. CPC is a qualified SDVOSB. The VA awarded CPC a contract to provide NEMT services exclusively for veterans in the Cabell County, West Virginia, area for transportation primarily to and from the HVAMC. Applicant Exs. 1-3, Tr. at 24-25, 37. CPC provides some transportation service in other parts of the state. Tr. at 52-53, 65-68, 90-93. All assignments are made by the HVAMC. Tr. at 101. The VA awarded CPC the contract as part of a federal set-aside program for SDVOSBs governed by federal statutes and regulations. Applicant Ex. 4-Sherrin statement, Tr. at 104. CPC does not have a contract carrier permit in West Virginia.

Metro is an authorized common carrier that previously provided NEMT under contract with the VA for veterans receiving care at the HVAMC. Tr. at 113, 116-121. Metro is a registered contractor but did not qualify for the solicitation that was awarded to CPC because Metro is not a SDVOSB and the "Rule of Two", as provided in section 8127(d) of the Veterans Benefit Act, applied because at least two SDVOSBs submitted bids. Tr. at 135-136, 143-146, Applicant Ex. 4-Sherrin statement.

Federal Preemption

The issue for determination is whether federal law governing NEMT services for veterans preempts state regulation of a SDVOSB providing NEMT services under contract with the VA. Based on applicable law and case precedent and for the reasons explained in this Order, we conclude that implied conflict preemption applies in this case and Commission jurisdiction over the permitting of contract carriers does not apply to CPC.

The West Virginia Supreme Court of Appeals discussed federal preemption principles in the Morgan case cited by Metro.

> There are two recognized types of implied preemption: field preemption and conflict preemption. Implied field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to supplement it. Implied conflict preemption occurs when compliance with federal and state regulations is physically impossible, or when the state regulation is an obstacle to the accomplishment or execution of congressional objectives. To prevail on a claim of implied preemption, evidence of a congressional intent to pre-empt the specific field covered by state law must be pinpointed.

Morgan at 84-85, citing Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986).

The Morgan Court also addressed federal and state agency regulations:

> [T]he U.S. Supreme Court has recognized that an agency regulation with the force of law can explicitly or implicitly preempt conflicting state regulations. See, e.g., Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000); Hillsborough County, Fla. v. Automated Medical Labs., Inc., 471 U.S. at 713. In such cases, a court must not rely on mere agency proclamations that the federal regulation preempts state law, but must perform its own conflict determination, relying on the substance of state and federal law. Wyeth v. Levine, 555 U.S. 555,___, [sic] 129 S. Ct. 1187, 173 L. Ed. 2d 51 (Slip. Op. at 19) (2009).

Id. at 85.

Metro argued that the Recommended Decision did not cite to any evidence of congressional intent to preempt state law.

Although the record in this case does not reflect any federal agency pronouncements, or statements of express intent of Congress, or the VA, to preempt state law, we need not look far to find the congressional policy and objectives. The first section of the Veterans Benefits Act, 38 U.S.C § 8127, states:

> a) Contracting Goals –
>
> (1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns

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owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

Additional evidence of federal objectives is found at 48 C.F.R. § 19.1401(b), "The purpose of the Service-Disabled Veteran-Owned Small Business Program is to provide Federal contracting assistance to service-disabled veteran-owned small business concerns."

The United States Supreme Court Kingdomware decision also provides insight regarding the background and objectives of the Veterans Benefits Act. The Court explained that in 1999, Congress expanded small-business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act which established a three percent government-wide contracting goal with SDVOSBs. The government continually fell behind in meeting that goal. Congress enacted the Veterans Benefits Act to correct that situation. The Veterans Benefits Act requires the Secretary of

Veterans Affairs to set specific annual goals as set forth in section 8127(a) and established the Rule of Two.[5] See Kingdomware 136 S. Ct. at 1973.

> [T]hat §8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals.

Id. at 1975.

In Morgan, the West Virginia Supreme Court of Appeals held that federal regulations on motor vehicle safety standards preempted a glass defect claim against Ford Motor Company under state common law. The Court noted that the defendant Ford presented little agency history to suggest that the federal regulation at issue was intended to preempt state common law, and no agency explanations identified a clear federal objective that would be corrupted by allowing the plaintiff's claim. Id. at 93. The Court found the federal government policy to be that manufacturers could choose to install either tempered or laminated glass in side windows. An intent to preempt state common law tort actions was implied because permitting a state tort action would foreclose that choice and interfere with federal policy. Id. at 94.

We also find the Lafferty case decided by the Court of Appeals of Kentucky to be instructional and persuasive with regard to application of implied conflict preemption. Lafferty is a recent decision and is analogous to the case at hand. The Kentucky Court stated:

> Enforcing Kentucky's CON 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.

Lafferty 572 S.W. 3d at 91.

The Veterans Benefits Act, the associated federal regulations and the Kingdomware decision make it clear that the congressional objective is to increase contracting opportunities for veteran-owned small businesses (VOSBs) and SDVOSBs. Because the burden of proof for a contract carrier permit is significant, state regulation of

[5] The "Rule of Two" is found at 38 U.S.C. § 8127(d) cited above at footnote 2.

market entry of veteran-owned contract carriers would stand as an obstacle and interfere with the accomplishment of Congress' objective. Specifically, the "impairment" test of W. Va. Code § 24A-3-3(a) protects common carriers from unfettered competition and can be a difficult requirement to meet. The Commission has acknowledged the high burden of proof faced by an applicant:

> A review of the law and precedent on contract carriers reveals that the Commission clearly has an obligation to protect common carriers from unreasonable competition by contract carriers. The showing required to obtain a permit to operate as a contract carrier is significantly greater than that required to obtain a certificate to operate as a common carrier (footnote omitted). W.Va. Code §24A-3-3(a), 24A-3-5 and 24A-3-6; Weirton Ice & Coal Co. v. Public Service Commission, 240 S.E.2d 686 (1977); Mountain Trucking Co. v. Public Service Commission, 216 S.E.2nd 566 (1975); Webb Trucking, M.C. 21703-CC (April 27, 1984).

Bates Recycling, LLC, Case No. 13-0554-MC-CC, Recommended Decision final Nov. 4, 2013.

The Supreme Court of Appeals of West Virginia recognized the high burden as well in the Weirton Ice and Coal case cited above:

> One applying for a common carrier certificate, pursuant to W.Va. Code, 1931, 24A-2-5(a) however, need only establish to the satisfaction of the Commission that public convenience and necessity require the proposed service. He is not required to assume the burden of proof imposed upon the seeker of a contract carrier permit. The former need only show an affirmative need; the latter must show, not only a need, but must show that his proposed service will not be a negative influence in certain areas. We think this is a significant difference. It should be noted that this Court reversed in *Mountain Trucking, supra*, a contract carrier case, for the principal reason that the applicant had not proved its case. The applicant had not proved that the granting of the permit would not impair the efficient public service of authorized common carriers serving the same territory. *See*, Points 1 and 2 of the Syllabus in that case [216 S.E.2d 566].

Weirton Ice & Coal Supply Co. v. Public Serv. Comm'n, 240 S.E.2d 686, 689

State regulation of NEMT market entry by VOSBs or SDVOSBs for the VA would interfere with federal contracting objectives by applying regulatory requirements that could leave the VA with no VOSBs or SDVOSBs to choose in West Virginia.

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Furthermore, the requirement of 13 C.F.R. § 125.13, that all firms obtain and keep any and all required permits, licenses and charters required to operate the business, is a Small Business Administration (SBA) regulation, effective in 2018, directed at providing guidance about when the SBA may find that a non-service-disabled veteran controls the firm. See 83 FR 48908. There is no indication that this amendment to the regulation was directed at requiring VOSBs and SDVOSBs to obtain authority from a state to operate as contract carriers, especially when such requirement would frustrate the objectives of the Veterans Benefits Act. Implied conflict preemption, therefore, applies in this matter.

Having found that implied conflict preemption applies in this case we will address other arguments made by Metro.

Metro's Attempt to Distinguish Cases Cited in Recommended Decision

Metro argued that the cases cited in the Recommended Decision do not support federal preemption because the cases involve the states' assertion of jurisdiction over rates charged for services provided to the federal government and rates are not the issue in this case. Metro's attempt to distinguish cases cited in the Recommended Decision on the basis that the issue in those cases was rate regulation is a distinction without a difference. The cases are relevant because they analyze state agency enforcement of state regulations that interfered with federal programs, as is the case here.

For example, the issue in the Carter case cited by CPC was whether the Florida Commission had jurisdiction over rates for intrastate transportation of household goods of U.S. military service personnel when the United States government pays for the service. Transportation of household goods for military personnel, however, was the subject of the federal Career Compensation Act of 1949.[6] The Court summarized the goals of the Career Compensation Act.

> [T]he property is being moved by the federal government in the fulfillment of its required responsibility to provide for the national defense. In executing this function and in an obvious effort to preserve high morale among servicemen, as well as to provide reasonable compensation for them in order to maintain their families, the Congress, by statutory enactment, has made provision for the transportation of their household goods at government expense.

Carter, 121 So. 2d 433, 437. The Carter court determined that the rate requirements of the Florida regulations would interfere with the goals of the Career Compensation Act.

[6] The Career Compensation Act provides, among other things, for the transportation of household goods for servicemen. 37 U.S.C. § 253(c).

The goals of the Veterans Benefit Act are also clearly stated and the permitting requirements of West Virginia law would frustrate the goals of the Veterans Benefit Act.

The Supreme Court of Florida, relying on the California case, held that, "when so acting within the scope of its delegated constitutional powers the conduct of the federal government should not be unduly burdened or circumscribed by the imposition of state-imposed restrictions." Carter at 436. The Florida Court went on to state that, [i]f a state could control the manner or method of the exercise of a strictly federal power it could prevent its exercise altogether. Such interference is precluded by the United States Constitution." Id. There was no indication by the Florida Court that federal preemption of the "state-imposed restrictions" would apply only to rates.

Metro argued that United States v. Virginia, 139 F. 3d 984 (4th Cir. 1998), cited in the Recommended Decision, has no similarity with the case at hand and is distinguishable because enforcement of qualifications for licensure is not the issue in this case. Metro also places importance on the fact that the federal agency, the FBI, was the plaintiff in the Virginia case. Again, these are distinctions without a difference. The overarching issue in Virginia was application of state regulations that interfered with a federal contracting program. The fact that the contractor is the complainant, and not the agency, does not affect the application of the law to the facts. For example, in the Lafferty case the contractor, not the federal agency (VA), was the plaintiff.

Metro's Argument Regarding the Actions of CPC and the VA

Metro argued that the actions of both CPC and the VA confirm that they intended to be in compliance with all state rules and licensing requirements and that the communications and actions taken by the VA are contrary to CPC's assertion of preemption.

CPC has asserted from the beginning of this case that federal law, federal regulations and court decisions support a finding that Commission jurisdiction is preempted. Metro's interpretation of certain actions and/or statements made by the VA contracting officer and CPC and the fact that the VA is not a party, do not bear on the ultimate legal conclusion in this case. As pointed out by CPC in its Omnibus Reply Brief, we cannot infer legal conclusions from the actions (or inactions) of the VA in this case. Also, contrary to Metro's contention, the provision of the VA contract requiring bidders to comply with all codes regarding operation of vehicles is not evidence that the VA intended to require contract carriers to obtain state required contract carrier permits. That provision of the contract specifically addresses "operation of vehicles", not licensing requirements for operation of a business.[7]

[7] Applicant Exh. No.3, Section 12.a.

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Metro's Argument Regarding Conclusion of ALJ

Finally, contrary to Metro's exception, the Recommended Decision did not conclude as a matter of law that the federal contracting scheme is explicitly designed to employ military veterans in a system serving veterans. Instead, the ALJ made that statement in the Discussion section of the Recommended Decision. It would have been more accurate to state that the federal scheme is designed to increase contracting opportunities for VOSBs and SDVOSBs, as provided in the Veterans Benefits Act. The Conclusions of Law, however, are not affected by any perceived inaccuracy in the Administrative Law Judge's discussion.

Scope of Decision

Having determined that implied conflict preemption applies, we must consider the scope of that preemption. The United States District Court for the Southern District of West Virginia has recently addressed preemption principles stating:

> Once Congress's intent to preempt is determined, the focus turns to the scope of that preemption. *See Duvall v. Bristol-Myers-Squibb Co.*, 103 F.3d 324, 328 (4th Cir. 1996). Two presumptions guide this inquiry. *See id.* First, 'the purpose of Congress is the ultimate touchstone' in every pre-emption case.' *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963)). Second, a court 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). [**8] 'This presumption is strongest when Congress legislates 'in a field which the States have traditionally occupied.' *S. Blasting Servs., Inc. v. Wilkes Cnty., N.C.*, 288 F.3d 584, 590 (4th Cir. 2002) (quoting *Lohr*, 518 U.S. at 485).

Huskey v. Ethicon, Inc., 29 F. Supp. 3d 736, 740 (2014).

Congress was not attempting to legislate in the field of motor carrier regulation, which is traditionally occupied by the states. Congress, instead, passed the Veterans Benefits Act to increase contracting opportunities for VOSBs and SDVOSBs. In this case, however, the Veterans Benefit Act intersects the field of West Virginia contract carrier regulation. Working under the assumption that Congress did not intend to displace all state law applicable to intrastate commercial carriers, we must narrow the scope of implied conflict preemption to retain the fullest extent of state regulation possible without conflicting with the intent of Congress. Preemption should only apply in those cases in which state market entry regulation frustrates or conflicts with the purpose of the federal

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law, that is, increasing contracting opportunities for VOSBs and SDVOSBs. Implied conflict preemption will apply only if the VA is awarding a NEMT contract to a VOSB or SDVOSB. Any other carrier providing service to the VA for this purpose must be a permitted contract or common carrier.

Permit Application

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.

Conclusion

Implied conflict preemption applies in this case to the permitting requirements of W.Va. Code § 24A-3-3 because requiring a VOSB or SDVOSB to prove that its provision of service to the VA would not impair the service provided by any other contract or common carrier would interfere with the goals of the Veterans Benefit Act. This conclusion does not preempt VOSB or SDVOSB contract carriers for the VA, however, from Commission safety and insurance requirements which do not interfere with the goals of the Veterans Benefit Act. Many types of carriers are exempt from market-entry or rate regulation but are subject to the safety and/or insurance rules promulgated by the Commission. See W.Va. Code § 24A-1-3(1), (3), (7)-(13). In addition, there is precedent for the Commission to exert limited safety and insurance jurisdiction when the Commission lacks market entry and/or economic jurisdiction. In the Investigation of Solid Waste Motor Carriers, Case No. 06-0722-MC-GI, Staff advised the Commission that the Commission Rules Governing Motor Carriers, Private Commercial Carriers, and the Filing of Evidence of Insurance and Financial Responsibility by Motor Carriers 150 C.S.R. 9 (Motor Carrier Rules) apply to both in-state and out-of-state motor carriers. Parties to that proceeding agreed that all motor carriers must abide by Commission safety and insurance requirements.[8] As discussed above, the VA contract requires qualified bidders to follow all codes with regard to operation of vehicles. Requiring a VOSB or a SDVOSB to comply with Commission financial responsibility (insurance) and vehicle registration and safety rules does not interfere with the federal objective to increase contracting opportunities for VOSBs and SDVOSBs.

[8] The Investigation of Solid Waste Motor Carriers, Case No. 06-0722-MC-GI, Comm'n Order dated Dec. 13, 2010 at 10. The General Investigation was instituted to review Commission procedures in the regulation of motor carriers following a decision by the United States District Court for the Southern District of West Virginia. In Harper v. Public Service Commission, Case No. 2:03-CV-00516. The Court found that the Commission could not require a garbage hauler that picked up waste in West Virginia and disposed of it in another state to obtain a certificate of convenience and necessity as required by W.Va. Code §24A-2-5.

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We also want to be clear that, because it is the federal objective to increase contracting opportunities for VOSBs and SDVOSBs, implied conflict preemption does not apply to State market entry regulations for contract or common carriers that are not qualified VOSBs or SDVOSBs.

The Commission will adopt the September 4, 2019 Recommended Decision as modified and supplemented by our Discussion and Conclusions of Law herein.

FINDINGS OF FACT

1. CPC is a qualified SDVOSB. Tr. at 24-26.

2. The VA awarded CPC a contract to provide NEMT services exclusively for veterans primarily in the Cabell County area for transportation to and from the HVAMC. Applicant Exs. 1-3, Tr. at 37.

3. The VA awarded the contract to CPC consistent with a federal set-aside program for VOSBs and SDVOSBs that is governed by federal statutes and regulations. Applicant Ex. 4-Sherrin statement, Tr. at 104.

4. CPC does not have a contract carrier permit in West Virginia.

5. A carrier that is required to obtain a West Virginia contract carrier permit is required to show that its operations will not impair existing common carriers serving the same territory. W.Va. Code § 24A-3-3(iii).

6. Metro did not qualify for the solicitation that was awarded to CPC because Metro is not a VOSB or SDVOSB and the "Rule of Two" as provided in section 8127(d) of the Veterans Benefit Act eliminated Metro from consideration because at least two SDVOSBs submitted bids. Tr. at 135-136, 143-146, Applicant Ex. 4-Sherrin statement.

CONCLUSIONS OF LAW

1. Implied conflict preemption applies when state regulation is an obstacle to the accomplishment or execution of congressional objectives. Morgan v. Ford Motor Co., 680 S.E.2d 77, 84-85.

2. State regulation of market entry of VOSBs or SDVOSBs seeking to contract with the VA to provide NEMT for veterans would stand as an obstacle and interfere with the accomplishment of the objectives of the Veterans Benefits Act. The "impairment" test of W. Va. Code § 24A-3-3(a) is an obstacle that protects common carriers from competition by requiring permit applicants to show that their operations will not impair existing common carriers. Case law reflects that the test is difficult to meet.

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Bates Recycling, LLC, Case No. 13-0554-MC-CC, Recommended Decision final Nov. 4, 2013, Weirton Ice & Coal Supply Co. v. Public Serv. Comm'n, 240 S.E.2d 686 (1977) Mountain Trucking Co. v. Public Service Commission, 216 S.E.2nd 566 (1975).

2. The showing required to obtain a permit to operate as a contract carrier is significantly greater than that required to obtain a certificate to operate as a common carrier. Bates Recycling, LLC, Case No. 13-0554-MC-CC, Recommended Decision final Order of the Commission, Nov. 4, 2013 at 6.

4. Commission permitting requirements for CPC's operation as a SDVOSB are preempted by federal law. Morgan v. Ford Motor Company, 680 S.E. 2d 77 (W.Va. 2009), the Veterans Benefits Act, 38 U.S.C § 8127, 48 C.F.R. § 19.1401(b), Lafferty Enters. v. Commonwealth, 572 S.W.3d 85 (Ct. Ap. Ky. 2019), United States v. Carter, 121 So. 2d 433 (FL 1960), United States v. Virginia, 1139 F.3d 984 (4th Cir.1998), Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969 (2016), 38 U.S.C. § 8127.

5. Conclusion of Law No. 3 of the Recommended Decision should be modified as follows:

> 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.

6. Conclusion of Law No. 4 of the Recommended Decision should be modified as follows:

> The Commission does not have jurisdiction to regulate market entry of non-emergency medical transportation services for veterans provided exclusively for the VA by a VOSB or SDVOSB under contract with the VA because implied conflict preemption applies.

7. 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.

8. The Exceptions filed by Metro Tri-State, Inc. should be denied and the Recommended Decision, as modified and supplemented herein, should be adopted as the Final Order of the Commission.

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ORDER

IT IS THEREFORE ORDERED that the Exceptions filed by Metro Tri-State, Inc. are denied and the Recommended Decision, as modified and supplemented herein, is adopted as the Final Order of the Commission.

IT IS FURTHER ORDERED that upon entry of this Order, Case No. 18-1315-MC-FC and Case No. 19-0006-MC-CC are dismissed and shall be removed from the Commission's docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

Chairman Charlotte R. Lane dissents from the decision of the majority in this case and will file a dissenting opinion at a later date.

A True Copy, Teste,

Connie Graley

Connie Graley, Executive Secretary

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