

grants the caller access to the network and bills that customer's account for the call. (Hart Aff. ¶ 3) By FCC regulation, every cellular telephone must have a unique ESN. 47 C.F.R. §§ 22.919(a) and 22.933; see 59 Fed. Reg. 59,564-65 (1994). (Exhs. B and C to Kaplan Aff.)

While each phone is initially programmed with a unique ESN, mechanical and technological methods have been developed by which it is possible to alter a particular telephone's ESN so that it matches the ESN assigned to another phone. This process, known as "emulation," enables a person to make a call on one phone while charging it to another. (Hart Aff. ¶ 4) In some cases, thieves using sophisticated scanning equipment monitor a cellular call and determine the ESN of the transmitting phone. That ESN is then programmed into a different phone (when this is done the victim's phone is said to have been "cloned"). Anyone using the altered phone will then be able to make calls that will be interpreted by the system as originating from the phone that was "cloned." The bill for such calls will be sent to the customer whose ESN was misappropriated. When the fraud is discovered, the victim's bill is adjusted to remove the fraudulent charges and Cellular One® loses all revenue in connection with the unauthorized calls. (Hart Aff. ¶ 5)

In other instances, "emulators," such as the defendants, will, for a fee, alter a phone purchased by an existing Cellular One® customer so that it emulates the ESN of the customer's original, authorized phone. Emulators are able to achieve this result by (1) disassembling the original phone, (2) disengaging and removing the computer chip upon which the ESN is encoded, (3) placing the chip in an electronic device that manipulates the ESN by reprogramming the chip, (4) replacing the chip in the telephone, and (5) reassembling the phone. This provides the customer with an unauthorized "extension" phone -- a second cellular telephone sharing the same phone number as the original, for which the customer pays no monthly access charge. Calls made on such altered phones are billed to the customer's account, but no monthly access charge can be collected because the system cannot distinguish the second phone from the original -- contrary to FCC regulations, both have the same ESN. (Hart Aff. ¶ 7)

The Harm Caused by Emulation

The injury inflicted by "cloning" is obvious. Cellular service is simply being stolen by thieves who make calls that will be billed erroneously to someone else's account. The injury caused by the creation of unauthorized

"extension" phones with emulated ESNs is subtler but no less real.

First, this type of emulation impedes Cellular One®'s ongoing efforts to combat the more pernicious fraud of "cloning." If the same ESN is transmitted to the system from two locations simultaneously, Cellular One®'s fraud investigators can conclude that an emulated phone is in use. Often, however, prompt and vigorous action cannot be taken -- by the police or the Company -- because it is impossible to tell whether the emulated phone is a "clone" being used by a criminal or an "extension" being used by a legitimate customer. In essence, the many unauthorized "extensions" in use act as a smoke screen behind which the thieves can escape detection. (Hart Aff. ¶¶ 9-10)

Second, the "extensions" interfere with the operation of Cellular One®'s network. System capacity is limited; expanding that capacity (which involves, inter alia, the often difficult task of acquiring additional locations for cell sites, obtaining permits, and installing sophisticated equipment) is time consuming and extremely expensive. Cellular One® plans its expansion based upon the number of customers it has and reasonably expects to add. As more and more unauthorized, "hidden" phones access the system, however, system resources are stretched beyond what

the Company has planned for. As a result, legitimate customers experience greater interference, more "blocked" and "dropped" calls, and system performance deteriorates. (Hart Aff. ¶¶ 11-12)

Finally, as discussed above, Cellular One® is losing an incalculable amount of revenue because of unauthorized phones with emulated ESNs. Customers acquiring properly authorized second phones, with unique ESNs, pay a monthly access charge to Cellular One®. Customers with emulated, unauthorized phones do not. The amount of the loss cannot be quantified because Cellular One® has no way of determining how many unauthorized phones are being used on its system. Precisely because these phones emulate the ESNs of other phones, Cellular One®'s system does not know that they are there. (Hart Aff. ¶ 13)

Defendants' Conduct

Defendant Cellular Emulations Systems, Inc. ("CES"), located in Woodbury, New York, is engaged in the emulation of ESNs. CES advertises this service in local newspapers, claiming that individuals can "save money on [their] monthly phone bill by paying for just one number . . . while having two, three or even five phones available when and where [they] need them." (Exh. 2 to Vega Aff.)

As set forth in the affidavit of investigator Salvador Vega, defendant Alan Gedachian, the president of CES, is emulating cellular telephone ESNs, for a fee, at CES's storefront at 8025 Jericho Turnpike in Woodbury, New York. Mr. Vega paid \$290 to Gedachian to alter a cellular telephone so that it would emulate the ESN assigned to another telephone already possessed by Mr. Vega. (Vega Aff. ¶¶ 11-12)

The Importance of Defendants' Records

Because unauthorized phones with emulated ESNs are invisible to Cellular One®'s system, the Company has no way of knowing how many emulated phones are in use, or who is using them. The Company has no way of identifying and contacting those of its customers who are using unauthorized "extensions" in violation of FCC regulations. (Hart Aff. ¶ 13)

Defendants' records -- their lists of customers and of ESNs emulated -- are the only source of information that will enable Cellular One® to contact customers using emulated phones. Accordingly, it is critical that such records be preserved and made available to Cellular One®.

ARGUMENT

Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), expressly authorizes a private right of action for injunctive relief against parties that engage in specific conduct prohibited by an FCC regulation. Indeed, the statute provides that the Court shall issue an injunction if it finds disobedience to a properly issued FCC order. Because defendants here are engaging in prohibited conduct, Cellular One® is entitled to a preliminary injunction under the statute. Moreover, even if the court were to apply the traditional equitable requirements for a preliminary injunction -- irreparable harm and a likelihood of success on the merits -- Cellular One® would be entitled to such relief.

I.

**THE FCC BAN ON ESN EMULATION CAN BE ENFORCED BY
A PRIVATE ACTION UNDER 47 U.S.C. § 401(b)**

Section 401(b) of the Communications Act states, in pertinent part:

If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . the Commission or any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in

obedience to such order by a writ of injunction or other proper process

47 U.S.C. § 401(b) (emphasis added). Although the statute uses the term "order," numerous courts of appeals have held that the statute extends to FCC "rules," and that a private party may obtain an injunction pursuant to § 401(b) to enforce an FCC decision resulting from a rulemaking proceeding. See Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 748 F.2d 879 (4th Cir. 1984) (per curiam), vacated on other grounds, 476 U.S. 445 (1986); South Central Bell Tel Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107 (5th Cir. 1984), vacated on other grounds, 476 U.S. 1166 (1986); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566 (7th Cir. 1984); Southern Western Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901 (8th Cir. 1984), vacated on other grounds, 476 U.S. 1167 (1986). As the Fifth Circuit has explained, the conclusion that FCC rules are privately enforceable makes sense because the FCC is free "to proceed other than by adopting a self-executing rule" when it wants to limit enforcement to a particular individual. South Central Bell, 738 F.2d at 1118.

Furthermore, private enforceability comports with the reality that there will be "situations in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement

proceeding." Id.²

In recent years, two more circuits have held that FCC rules are enforceable, in appropriate circumstances, via private actions under § 401(b). See Alltel Tenn., Inc. v. Tennessee Public Serv. Comm'n, 913 F.2d 305 (6th Cir. 1990); Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). In Alltel Tennessee and Hawaiian Telephone, the Sixth and Ninth Circuits held that FCC decisions resulting from rulemaking procedures constitute "orders" under § 401(b) so long as they "mandate[] specific action" by a party to the litigation. Alltel Tenn., 913 F.2d at 308; see also Hawaiian Tel., 827 F.2d at 1272. Recently, two decisions from the Eastern District of Pennsylvania have adopted this

² There is one case holding that FCC rules should not be considered "orders" for purposes of § 401(b). New England Tel. & Tel. v. Public Util. Comm'n, 742 F.2d 1 (1st Cir. 1984), cert. denied, 476 U.S. 1174 (1986). This decision was based, in part, on the definition of "order" in the Administrative Procedure Act, which excludes final dispositions resulting from a rulemaking. Id. at 5. The New England Telephone court itself, however, acknowledged that definitions provided by the APA do not control interpretation of the Communications Act, which was adopted twelve years before the APA. Id. Subsequently, several courts have criticized New England Telephone for its reliance on the APA, see e.g., Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264, 1271 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988); South Central Bell, 744 F.2d at 1116 n.16, and no later case has followed the New England Telephone precedent.

same approach. See Mallenbaum v. Adelphia Communications Corp., 1994 WL 724981, *4 (E.D. Pa. Dec. 29, 1994) (explaining that the central determination is whether "the regulations sought to be enforced prohibit specific actions by a specific party"); In re Comcast Corp. Cable TV Rate Reg., 1994 WL 622105, *8 (E.D. Pa. Nov. 10, 1994) (holding that "an order requiring or prohibiting specific action by a specific party is enforceable under § 401(b)").³

Accordingly, the overwhelming majority of courts that have considered this issue hold that a private party may seek injunctive relief under § 401(b) to enforce FCC regulations, at least where the regulation in question requires or prohibits specific activity by a party to the litigation. Because the regulations that Cellular One® seeks to enforce here, 47 C.F.R. §§ 22.919(a) and 22.933, do prohibit specific actors from engaging in specific activities -- namely the emulation of cellular telephone ESNs by individuals such as the defendants -- Cellular One®

³ Several cases cite the Supreme Court's decision in Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942), as further support for the enforcement of FCC rules under § 401(b). See, e.g., Hawaiian Tel., 827 F.2d at 1271 n.20; South Central Bell, 744 F.2d at 1117; Comcast, 1994 WL 622105 at *7. In Columbia Broadcasting, the Court held that a private party could seek review of certain FCC regulations under § 402(a) of the Communications Act, which provides the procedure for setting aside "any order of the Commission." 47 U.S.C. § 402(a) (emphasis added).

has a valid cause of action for injunctive relief against the defendants under § 401(b) of the Communications Act.

II.

47 C.F.R. §§ 22.919(a) AND 22.933 PROHIBIT DEFENDANTS FROM EMULATING CELLULAR TELEPHONE ESNs

The regulations that Cellular One® seeks to enforce, 47 C.F.R. §§ 22.919(a) and 22.933, require that each cellular telephone have a unique ESN. Section 22.919 (Exh. B to Kaplan Aff.) states this explicitly: "Each mobile transmitter in service must have a unique ESN." Section 22.933 (Exh. C to Kaplan Aff.) achieves the same result by incorporating the Cellular System Mobile Station-Land Station Compatibility Specification (the "Compatibility Specification") contained in Appendix D to the FCC's Report and Order of May 4, 1981. See 46 Fed. Reg. 27,655, 27,680 (1981). Section 2.3.2 of the Compatibility Specification (Exh. D to Kaplan Aff.) also requires that each phone have a unique ESN by providing that the ESN "uniquely identifies a mobile station to any cellular system." Id. Emulation, which alters a cellular telephone so that it emits the same ESN as another phone, thus violates both of these rules.

A. The FCC Has Interpreted 47 C.F.R. §§ 22.919(a) and 22.933 to Prohibit Emulation of ESNs

By Report and Order dated September 9, 1994,⁴ the FCC substantially revised Part 22 of its rules, the regulations governing cellular telephones. After a long and hard-fought battle, the FCC made its conclusions with respect to ESN emulation explicit: emulation violates the requirement that each phone have a unique ESN and it therefore violates both the newly-enacted § 22.919(a) and the long-standing § 22.933.⁵ In clear and unambiguous language, the FCC declared that individuals such as defendants may not emulate cellular telephone ESNs:

[W]e conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed

* * *

[W]e conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification and thus may not be considered authorized equipment under the

⁴ Report and Order, Revision of Part 22 of Commission's Rules Governing Public Mobile Services, CC Docket No. 92-115 (Sept. 9, 1994) (Exh. E to Kaplan Aff.) (hereinafter Part 22 Revision Report).

⁵ 47 C.F.R. § 22.933 is merely the recodification of old § 22.915, which had to be renumbered as a result of the FCC's revision of the entire Part 22. See Part 22 Revision Report ¶ 62 at 28 n.108. Accordingly, the Compatibility Specification incorporated by § 22.933 has long been applicable via the old § 22.915.

original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules.

Part 22 Revision Report ¶¶ 60 and 62 at 27-28 (footnote omitted). The Report leaves no doubt that the FCC intends its regulations to stop the activities of ESN emulators.⁶

During the proceedings leading up to the revision of Part 22, C-Two-Plus Technology, Inc. ("C2+"), the leading manufacturer of emulation equipment -- including the equipment used by CES and Gedachian -- specifically asked the FCC to permit emulation. C2+ argued that the creation of emulated "extension" phones that share a single ESN should be allowed.⁷ In particular, C2+ argued that emulation using its encrypted data transfer device, which

⁶ The FCC's clear intent is also relevant to the determination that its regulations are enforceable via § 401(b) of the Act. See Hawaiian Tel., 827 F.2d at 1272 ("The language of the particular order in question, and the proceedings leading up to it, demonstrate that the FCC intended [the order] to require particular actions be taken").

⁷ "C2+ Technology (C2+) requests that we allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular phone to have the same telephone number." Id. ¶ 57 at 26.

does not physically alter the ESN, should be approved. The FCC rejected this request outright:

Changing the ESN emitted by a cellular telephone to be the same as that emitted by another cellular telephone does not create an "extension" cellular telephone. Rather, it merely makes it impossible for the cellular system to distinguish between the two telephones.

* * *

[T]he ESN rule should proscribe activity that does not physically alter the ESN, but affects the radiated ESN, including activities that transfer ESNs through the use of an encrypted data transfer device.

* * *

Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

Id. ¶¶ 59, 60 and 62 at 27-28.

In sum, the FCC has unequivocally outlawed the emulation of cellular telephone ESNs. Defendants' emulation activities violate the unique ESN requirement contained in § 22.919(a) and in the Compatibility Specification incorporated into § 22.933.

B. The Court Should Defer to the FCC's Interpretation of Its Own Regulations

The FCC's Part 22 Revision Report could hardly be clearer in stating the FCC's interpretation of its own regulations. See id. ¶ 62 at 28 ("any individual or company that knowingly alters cellular telephones to cause

them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules"). Under well-settled principles of deference to agencies' interpretations of their rules, the Court should give effect to the FCC's clearly articulated intentions by enjoining defendants from emulating cellular phone ESNs.

According to the Supreme Court:

As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945)); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S. Ct. 1835, 1850 (1989); National Medical Enters., Inc. v. Shalala, 43 F.3d 691, 696-67 (D.C. Cir. 1995); Skandalis v. Rowe, 14 F.3d 173, 178 (2d Cir. 1994). Such deference is particularly appropriate where the agency's interpretation concerns a regulation derived from "a small corner of a labyrinthine statute." Skandalis, 14 F.3d at 178.

This simple rule of deference has repeatedly been applied in cases involving the FCC's interpretations of its own regulations. See, e.g., Jersey Shore Broadcasting Corp. v. FCC, 37 F.3d 1531, 1536 (D.C. Cir. 1994) ("When an agency

interprets its own administrative regulation promulgated under the statute charged to its administration, this court owes a high degree of deference to that interpretation."); Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994) ("Reviewing courts accord even greater deference to agency interpretations of agency rules than they do agency interpretations of ambiguous statutory terms."). Additionally, this rule is applicable where the agency's interpretation of its regulation is found in a general statement of policy, rather than in a particular administrative holding tailored to an individual case. See, e.g., Stinson, 113 S. Ct. at 1919 (giving legal effect to commentary accompanying a Sentencing Guideline).

Here, the FCC's interpretation of its rules is eminently reasonable; under no theory can it be deemed "plainly erroneous." The FCC has read its regulations requiring cellular telephone ESNs to be unique to mean just that: individuals and companies are not permitted to alter the ESN of one phone so that it matches the ESN already assigned to another. Thus, even if the Court were to disagree with the FCC's interpretation of its own regulations, that interpretation would be entitled to "controlling weight."

It must be noted that any attempt by defendants to attack the wisdom of the FCC's regulations would be inappropriate at this time. The only issue in this private enforcement action is whether the FCC's rules have been violated, not whether those rules are prudent or even whether they are valid. See South Central Bell, 744 F.2d at 1114. Because the FCC has clearly determined that emulation violates its rules, and because that interpretation of the Commission's rules is perfectly reasonable, the Court should enforce obedience to the rules by enjoining defendants' emulation activities.

C. Other Courts Have Issued Injunctive Relief to Prevent Emulators from Violating 47 C.F.R. §§ 22.919(a) and 22.933.

On March 15, 1995, the United States District Court for the Southern District of Texas issued a permanent injunction against the emulation activities of companies and individuals operating in the Houston area. See Houston Cellular Tel. Co. v. Nelson, Civ. Action H-95-617 (S.D. Tex. May 17, 1995). (A copy of the permanent injunction is attached hereto as Appendix A).

The case brought by Houston Cellular is factually and legally indistinguishable from the present action -- a licensed cellular carrier sought to enforce the anti-emulation requirements of §§ 22.919(a) and 22.933 through an

action under 47 U.S.C. § 401(b). In granting the permanent injunction, the Court expressly held that the emulation of cellular telephone ESNs violates both FCC rules.⁸

III.

CELLULAR ONE® IS ENTITLED TO A PRELIMINARY INJUNCTION UNDER 47 U.S.C. § 401(b)

Because the preliminary injunction that Cellular One® seeks is expressly authorized by 47 U.S.C. § 401(b), the company need not show irreparable injury resulting from the emulators' illegal activities. It is well-established that when a preliminary injunction is "sought under a statute which expressly authorizes such relief, irreparable injury need not be demonstrated and it is sufficient to show that the statutory conditions have been met." James W. Moore, 7 (Part 2) Moore's Federal Practice ¶ 65.04[1], at 65-78 (1994); see also SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) (holding that the SEC need not prove irreparable injury in suits for preliminary injunctions because such suits are "creatures of statute"). This rule has been applied repeatedly in private actions seeking injunctions, both preliminary and permanent, pursuant to § 401(b). See, e.g., South Central Bell, 744

⁸ The injunction refers to the FCC Report and Order of May 4, 1981 and the Part 22 Revision Report of September 9, 1994. The former contains the Compatibility Specification incorporated by § 22.933. The latter enacted § 22.919(a).

F.2d at 1120; Illinois Bell, 740 F.2d at 571; Southwestern Bell, 738 F.2d at 908; Southwestern Bell Tel. Co. v. Public Util. Comm'n, 812 F. Supp. 706, 711 (W.D. Tex. 1993); cf. Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1035 (10th Cir. 1993) (applying rule to injunction under 47 U.S.C. § 406).

The requirements for obtaining injunctive relief under § 401(b) are straightforward and are easily satisfied here. The court need only find that "the order was (1) regularly made; (2) duly served; (3) disobeyed; and that (4) a party was thereby injured." Southwestern Bell, 738 F.2d at 908; see also Illinois Bell, 740 F.2d at 571. The first requirement, i.e., that the order was regularly made, "simply refers to procedural regularity," and is satisfied because the regulations were adopted pursuant to standard notice and comment procedures. Hawaiian Tel., 827 F.2d at 1272. The "duly served" requirement similarly "refers only to procedural regularity," South Central Bell, 744 F.2d at 1119, and the publication of §§ 22.919 and 22.933 (as well as the Compatibility Specification) in the Federal Register is sufficient. Id. at 1120.

Satisfaction of the third and fourth requirements is established by defendants' clear violation of §§ 22.919(a) and 22.933, and the resulting injury to

Cellular One®. As explained in Point II of this memorandum, the emulation of a mobile telephone's ESN directly contradicts the regulatory mandate, included in both of the cited sections, that no two telephones have the same ESN. The FCC's most recent Report and Order addressing this issue states the Commission's conclusion that individuals engaging in such emulation are "aiding in the violation of our rules." Part 22 Revision Report ¶ 62 at 28.

The resulting injury to Cellular One® and other cellular carriers is also recognized in the FCC's Report. The Commission concluded that the emulation of ESNs should be prohibited because, inter alia,

simultaneous use of cellular telephones fraudulently emitting the same ESN . . . could cause problems in some cellular systems such as erroneous tracking or billing . . . [and] could deprive cellular carriers of monthly per telephone revenues to which they are entitled

Part 22 Revision Report ¶ 60 at 27. Moreover, as discussed above, the use of unauthorized "extension" phones with altered ESNs interferes with Cellular One®'s ability to combat fraud and it drains system resources, adversely affecting service for the Company's subscribers. These injuries constitute harm sufficient to satisfy the final requirement for issuance of an injunction under § 401(b). Cf. Southwestern Bell, 812 F. Supp. at 711 (holding that

injury suffered need not even be "substantial" in order to support injunctive relief under § 401(b)).

IV.

CELLULAR ONE® IS ENTITLED TO A PRELIMINARY INJUNCTION EVEN IF TRADITIONAL EQUITABLE PRINCIPLES ARE APPLIED

Even if the Court were to require Cellular One® to meet the traditional equitable test for a preliminary injunction, the Company would nevertheless be entitled to the relief it seeks. In the Second Circuit, the party seeking such relief must demonstrate "(1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief.'" Able v. United States, 44 F.3d 128, 130 (2d Cir. 1995) (per curiam) (quoting Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991)). Cellular One® satisfies this standard.

First, Cellular One® will suffer irreparable harm if the preliminary injunction is not granted. As an initial matter, Cellular One®'s loss of revenue up to the time of trial would be incalculable. See Gerard v. Almouli, 746 F.2d 936, 939 (2d Cir. 1984) (holding that plaintiff demonstrated likelihood of irreparable harm because "it would be impossible to produce an accurate money damages

figure"); Ives Labs., Inc. v. Darby Drug Co., 601 F.2d 631, 644 (2d Cir. 1979) (explaining that a plaintiff can prove irreparable injury by showing that "its interim damages cannot be calculated with sufficient accuracy to make damages an adequate substitute"). Because Cellular One® cannot determine which, or how many, of its customers have had their phones "emulated," it is impossible to calculate how much in per-telephone access charges the Company has lost. Similarly, because there is no way to prevent individual customers from continuing to have their phones "emulated," it is not possible to determine the losses that Cellular One® will suffer as a result of impermissible emulation from now until the time of trial. See 7 (Part 2) Moore's Federal Practice ¶ 65.04[1], at 65-71 ("Losses which are not capable of being calculated or measured will usually be found to constitute irreparable injury.")

Beyond pecuniary loss, continued emulation of ESNs will cause continued interference with Cellular One®'s operations. Emulated "extension" phones will continue to mask fraudulently "cloned" phones, significantly weakening efforts to curtail theft of cellular services and to apprehend the criminals responsible.⁹ The proliferation of

⁹ By inhibiting efforts to stop "cloning," the defendants' emulation activities cause Cellular One® additional, unquantifiable, pecuniary loss.

emulated "extension" phones will also continue to tax Cellular One®'s system capacity, adversely affecting the quality of service for the Company's customers.

Second, given the defendants' certain violation of §§ 22.919(a) and 22.933, there can be little question about Cellular One®'s likelihood of success on the merits. As discussed in detail above, it is clear that §§ 22.919(a) and 22.933 prohibit precisely the activity in which defendants are engaged. In order to satisfy the "likelihood of success" requirement, a plaintiff "need not show that success is an absolute certainty. He need only make a showing that the probability of his prevailing is better than fifty percent." Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985). Where, as here, defendants' conduct so clearly contravenes the language and intent of an agency's regulations, the plaintiff's likelihood of success is actually closer to a certainty than to the fifty percent minimally required.

V.

**DEFENDANTS SHOULD BE PROHIBITED FROM DESTROYING OR
DISCARDING THEIR RECORDS DURING THE PENDENCY OF THIS CASE**

The FCC Report makes clear that use of a cellular phone with an emulated ESN violates the Commission's rules. Part 22 Revision Report ¶ 62 at 28 ("a consumer's knowing use of such altered equipment would violate our rules"). However,

phones with emulated ESNs are invisible to Cellular One®'s system, and the Company cannot, therefore, identify or contact those of its customers who are using emulated phones in violation of FCC regulations.

Defendants' records are the only source of information that will enable Cellular One® to contact customers using emulated phones. Similarly, they are one of the few sources that will allow Cellular One® to gauge the extent of ESN emulation. Accordingly, it is critical to prohibit defendants from destroying or discarding such records while this action is pending.

CONCLUSION

For the foregoing reasons, defendants CES and Gedachian should be preliminarily enjoined from continuing to alter cellular telephone ESNs, and they should be enjoined from destroying or discarding any records relating to their emulation activities.

Dated: New York, New York
May 24, 1995

Respectfully submitted,

FRIEDMAN & KAPLAN LLP

By: 
Robert D. Kaplan (RK3627)
Robert S. Loigman (RL0675)
875 Third Avenue
New York, New York 10022
(212) 833-1100

Attorneys for Plaintiff
Cellular Telephone Company

Of Counsel:

Justin M. Monaghan
Cellular Telephone Company
15 East Midland Avenue
Paramus, New Jersey 07652
(201) 967-8971

United States District Court
Southern District of Texas
Houston Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 17 1995

HOUSTON CELLULAR
TELEPHONE COMPANY,

Plaintiff,

versus

JOHN C. NELSON, Doing Business as Both
Cell Time Cellular and Action Cellular and
DANNY HART, Doing Business as
Action Cellular and
ACTION CELLULAR EXTENSION, Inc.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§

Michael N. Milby, Clerk

CIVIL ACTION H-95-617

PERMANENT INJUNCTION

A. *Findings.*

Based on the stipulations and evidence, the court makes these findings:

1. John C. Nelson, Jr., who has done business as Cell Time Cellular and who is a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since August 9, 1994.
2. Daniel K. Hart, as a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.
3. Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.
4. On May 4, 1981, after notice in the Federal Register, the Federal Communications Commission issued the Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, and Amendment to Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems. (86 F.C.C. 2d 469 (1981)). It adopted the technical specifications for cellular telephones that each telephone have a unique electronic serial number. This order was published in the