

Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417)

5. On September 9, 1994, after notice in the Federal Register, the FCC issued the Revision of Part 22 of the Commission Rules Governing the Public Mobile Services (9 FCC Rcd 6513 (1994)). This FCC order was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502).
6. Houston Cellular has suffered irreparable damage as a consequence of defendants' emulation of the electronic serial numbers of cellular telephones for which it is the carrier. The defendants' actions have deprived Houston Cellular of monthly access charges and other per unit charges its customers would owe for additional connections.
7. Although the damage is describable, Houston Cellular cannot reliably quantify it, making the legal remedy inadequate.
8. The acts of the defendants are analogous to their having installed unauthorized access to a cable television network. This piracy injures the utility and its legitimate customers.
9. No unrepresented third-party nor any diffuse public interest is adversely affected by the restrictions this injunction imposes on Nelson and Hart.

B. *Conclusions.*

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. § 552(a)(1). See also, *Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947).
2. These orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.
3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc., violates the two FCC orders.
4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisites of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *Gresham v. Windrush Partners*, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available at common law.

C. *Injunction.*

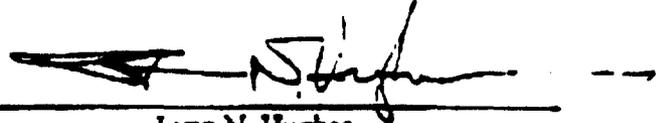
Based on these findings and conclusions, John C. Nelson, Jr., Daniel K. Hart, and Action Cellular Extensions, Inc., are enjoined permanently from emulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

This restriction binds them and all those who may knowingly act in concert with them, including employees, agents, and consumers.

1. Specifically, the defendants are enjoined from altering, transferring, emulating or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FCC orders.
2. The defendants shall produce immediately to Houston Cellular these documents, including those seized by the United States Marshal and others in their possession or within their access:
  - A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they altered, transferred, emulated, or manipulated the electronic serial numbers of cellular telephones from January 1, 1990, to March 15, 1995.
  - B. All advertisements, brochures, or other documents that advertised services to the public for altering, transferring, emulating, or manipulating the electronic serial numbers of cellular telephones.
  - C. Documents in their possession that identify other entities which offer services to alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.
  - D. Documents evincing a business relation or transaction with Technology, Inc.
  - E. A complete copy of all data on any storage medium, including paper-based, fixed-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM). Houston Cellular will reimburse the defendants for copying costs incurred in producing a hard copy.
3. With the exception of Houston Cellular subscribers' service orders or contracts, the defendants are entitled to retain the originals of those documents, providing Houston Cellular with photocopies. The defendants may retain photocopies of the Houston Cellular subscribers' service orders or contracts only for the purpose of assisting in re-emulation. The defendants will surrender to Houston Cellular all photocopies at the completion of the re-emulation or upon written request of Houston Cellular.

4. This order does not require that the defendants produce C2+ Technology, Inc., proprietary information, equipment, or accessories in any form.
5. This is a final judgment. The court retains jurisdiction to enforce the injunction and the settlement from which it arose.

Signed March 15, 1995, at Houston, Texas.



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Lynn N. Hughes  
United States District Judge

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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CELLULAR TELEPHONE COMPANY, d/b/a :  
CELLULAR ONE® : 95 Civ. 1666 (SJ)

Plaintiff, :

-against- :

CELLULAR TWO, INC., TONY YANKOVSKY, :  
CELLULAR EMULATION SYSTEMS, INC., :  
and ALAN J. GEDACHIAN, :

Defendants. :

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**PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF  
ITS MOTION FOR A PRELIMINARY INJUNCTION**

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Attorneys for Plaintiff  
Cellular Telephone Company

June 15, 1995

## PRELIMINARY STATEMENT

In clear and unmistakable language, the FCC has declared that the emulation of cellular telephone ESNs violates the rules requiring each phone to have a unique ESN. Under settled principles of law -- principles defendants never address -- the Court should accept the FCC's interpretation of its own rules, and enjoin defendants' ongoing emulation activities.

To forestall the entry of an injunction, defendants offer three arguments: 47 C.F.R. §§ 22.919(a) and 22.933 do not, in fact, bar emulation; the Court should stay its hand pending the FCC's resolution of pending petitions for reconsideration; and Cellular One® cannot prove irreparable harm. Each of these points is simply wrong:

- Even on its face, the long-standing requirement that each phone have a unique ESN is flatly inconsistent with emulation, which causes multiple phones to have the same ESN. But more important, the FCC has interpreted its unique-ESN rule to bar emulation. Even if defendants could construct a colorable argument that §§ 22.919(a) and 22.933 should not be interpreted to prohibit their activities, it is the FCC's interpretation which, as long as it is reasonable, controls.
- Remarkably, defendants simply ignore the controlling statutory and regulatory provisions providing that a petition for reconsideration does not excuse compliance with an FCC rule or in any way impede its enforcement.
- Similarly, defendants ignore the case law holding that where an injunction is sought pursuant to a statute expressly authorizing such relief, irreparable harm need not be shown. Moreover, as the FCC has itself recognized, emulation

interferes with cellular system operation and causes unquantifiable economic loss -- both of which give rise to irreparable harm.

As we further discuss below, and as every court to consider the matter has held, the FCC's rules prohibit emulation, and cellular licensees such as Cellular One® are entitled to injunctive relief enforcing obedience to that prohibition.

### ARGUMENT

#### I.

#### **ANOTHER FEDERAL COURT HAS ENJOINED EMULATION**

After a fully litigated hearing, the United States District Court for the Eastern District of Missouri joined the United States District Court for the Southern District of Texas in enjoining the "altering, transferring, emulating or manipulating [of] ESNs on cellular telephones."

Southwestern Bell Mobile Systems, Inc. v. Cell Phone Extensions, Inc., No. 4:95-CV-796-CAS (E.D. Mo. May 24, 1995).<sup>1</sup> The Court held that 47 C.F.R. § 22.933 (formerly § 22.915) has mandated unique ESNs since 1981; that newly-enacted § 22.919(a) contains a similar requirement; that ESN emulation is inconsistent with the uniqueness requirement; and that plaintiff could enforce the FCC's rules in a private action under 47 U.S.C. § 401(b).

The issues in Southwestern Bell were in every respect identical to the issues before this Court. The

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<sup>1</sup> A copy of the Court's Findings of Fact, Conclusions of Law and Final Order is annexed as Appendix A.

cases are indistinguishable, and the conclusions of the District Court in Missouri provide additional persuasive authority for the issuance of an injunction here.

II.

47 C.F.R. §§ 22.919(a) and 22.933 PROHIBIT EMULATION

Defendants argue that the unique-ESN rule -- and thus the prohibition on emulation -- apply only to cellular phones "type-accepted" after January 1, 1995. This is wrong for two reasons. First, even the new uniqueness rule, § 22.919(a), applies to all cellular telephones. Prior to final issuance of the revised Part 22, cellular equipment manufacturers complained that immediate application of § 22.919(c), which requires phones to have "hardened" ESNs -- ESNs that cannot be altered -- would require the immense burden and expense of retrofitting every one of the millions of phones already in service. The FCC agreed and responded that:

We are not requiring that cellular equipment that is currently in use or has received a grant of type-acceptance be modified or retrofitted to comply with the requirements of this rule. Thus, the ESN rule will apply only to cellular equipment for which initial type-acceptance is sought after the date that our rules become effective.

Part 22 Revision Report ¶ 62 at 28. Plainly, the FCC was merely providing that existing phones could still be used and would not have to be retrofitted to "harden" their ESNs; the Commission was not delaying effectiveness of the uniqueness requirement of § 22.919(a), which requires no retrofitting and imposes no burden or expense.

In any event, there is no possible argument -- and defendants offer none -- that the uniqueness requirement of § 22.933 applies only to phones type-accepted this year. This section has been in place continuously since 1981 (it is merely a renumbering of prior § 22.915). Thus, even if it could be argued that § 22.919(a) applies only to newly-manufactured phones -- an argument properly rejected by the Southwestern Bell Court -- the fact remains that all cellular phones must have a unique ESN.

Defendants also argue that they can emulate as many phones as they please without running afoul of the uniqueness requirement as long as they instruct their customers not to turn on more than one phone at one time. This argument is absurd; it is akin to saying that one may alter the license plate and VIN of an automobile, to match the license and identification number of another car, as long as both cars are not driven at the same time.<sup>2</sup> Moreover, even if defendants' interpretation of the uniqueness requirement were plausible -- which it is not -- it would be inconsistent with the FCC's interpretation. The FCC has clearly stated that emulation is not compatible with the requirement of a unique ESN. As the authorities cited

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<sup>2</sup> Defendants base the argument on the notion that a phone is not "in service" unless it is turned on. Plainly, any useable phone that is programmed to connect with a cellular system is in service, whether or not it is turned on at any given moment. Moreover, the "in service" language appears only in § 22.919(a), not § 22.933.

in our opening brief (pp. 19-20) -- authorities defendants ignore -- make clear, the FCC's interpretation of its own rules is entitled to great deference.<sup>3</sup>

Finally, defendants argue that Cellular One® is seeking to enforce "interpretive language" in the Part 22 Revision Report that does not constitute an order that can be enforced under 47 U.S.C. § 401(b). This misses the point of Cellular One®'s lawsuit. Plaintiff sues to enforce §§ 22.919 and 22.933, which are unquestionably mandatory rules that can be enforced. Cellular One® does not seek independent enforcement of interpretive language; it seeks the enforcement of FCC rules, and maintains that the Commission's interpretation of those rules is entitled to deference. The very case defendants cite holds such deference appropriate. Drake v. Honeywell, Inc., 797 F.2d 603, 607 (8th Cir. 1986) ("Certainly a court should give great weight to an agency's interpretation . . . of the statute it administers").<sup>4</sup>

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<sup>3</sup> Defendants observe that some cellular carriers themselves offer a "two phones-one number" service, and that they instruct their customers not to use both phones simultaneously. The critical point, however, is that such legitimate service is offered with two phones each of which has its own unique ESN. Only the emulators alter phones to mimic the ESNs of different phones.

<sup>4</sup> Defendants also point to the allegation, contained in a petition for reconsideration (see Point III, infra), that the Commission did not properly document certain ex parte contacts during the Part 22 revision process, and imply that perhaps §§ 22.919(a) and 22.933 were not "regularly made." That suggestion is frivolous. The unique ESN requirement of § 22.933 predates the revision process by

III.

**THE PENDENCY OF A PETITION FOR RECONSIDERATION DOES NOT  
EXCUSE COMPLIANCE WITH AN FCC RULE OR BAR ITS ENFORCEMENT**

Defendants urge the Court to deny enforcement of the FCC's rules because there are petitions for reconsideration pending before the Commission. The law is precisely to the contrary. The Communications Act itself expressly provides that:

No such application [for reconsideration] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.

47 U.S.C. § 405(a). The Commission's rules make the same point:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement.

47 C.F.R. § 1.429(k). The Commission has made no special order. 47 C.F.R. §§ 22.919 and 22.933 are thus in full force and effect. The suggestion that the Court should decline to enforce the rules because of the petitions for reconsideration is a suggestion that the Court ignore the governing statute and regulation.

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a decade, and the recapitulation of that rule in § 22.919(a) was done pursuant to standard notice and comment procedures. Both rules unquestionably satisfy the "regularity" requirement of 47 U.S.C. § 401(b). See Hawaiian Tel. Co. v. Public Util. Comm'n, 827 F.2d 1264, 1272 (9th Cir. 1987).

In re Application of McElroy Electronics Corp.,

1995 WL 127206 (F.C.C.), is not to the contrary. That case merely points out that a private party acting in reliance on a rule that is subject to reconsideration does so with knowledge that the rule may change. McElroy neither holds nor even suggests that a rule subject to a petition for reconsideration need not be obeyed or cannot be enforced. That would be contrary to the statute itself, as well as the FCC regulation on reconsideration.

Nor does the doctrine of primary jurisdiction have any application here. Principles of primary jurisdiction would be implicated if Cellular One® were asking the Court in the first instance to decide whether cellular phones should be required to have unique ESNs, or whether the emulation of ESNs should be prohibited. Those are questions that implicate the expertise of the FCC. But the point is that the FCC has already decided these issues. Cellular One® is not asking the Court to usurp the FCC's role in regulating the cellular industry, but only to enforce the decisions the Commission has already made. As the Court stated in In re Tak Communications, Inc., 138 Bankr. 568 (W.D. Wis. 1992), aff'd, 985 F.2d 916 (7th Cir. 1993):

[T]he doctrine of primary jurisdiction has no applicability here. This is not a case in which the FCC has yet to decide an issue or where its stance is ambiguous; this is a case in which the FCC has established a clear policy . . . .

Id. at 579. See also Hain v. Burlington Northern, Inc., No. 86-2338-S, slip op. (D. Kan. October 15, 1986) (stay denied because "primary jurisdiction doctrine's principal function of acquainting the court with the agency's position concerning the matter has already been satisfied").

Defendants' primary jurisdiction argument is nothing more than a reformulation of their contention that the Court should await the FCC's decision on the petitions for reconsideration before enforcing the decision the FCC made in the original rulemaking. That is the position expressly rejected by the Communications Act and the controlling FCC regulation. The FCC, in the exercise of its primary jurisdiction, has already ruled that each cellular phone must have a unique ESN. The Court, in the exercise of its authority conferred by 47 U.S.C. § 401(b), should enforce that rule.

#### IV.

#### **CELLULAR ONE® IS ENTITLED TO A PRELIMINARY INJUNCTION**

Defendants simply ignore the authorities holding that irreparable harm need not be shown where, as here, injunctive relief is expressly authorized by statute. As we explained in our opening memorandum (pp. 22-23), this rule has been applied repeatedly to grants of preliminary and permanent injunctive relief under 47 U.S.C. § 401(b).

Moreover, Cellular One® has demonstrated irreparable harm. Defendants say that even though emulation

interferes with Cellular One®'s anti-fraud efforts, that is not irreparable harm because the Company can use new, "state-of-the-art" anti-fraud techniques. But defendants cannot illegally emulate ESNs and then insist that Cellular One® invest in and deploy new technologies to undo the damage. Defendants' argument is tantamount to a thief complaining that the victim is at fault for not installing a state-of-the-art burglar alarm. In addition, new technologies are no substitute for the security of unique ESNs, as the FCC has recognized by enacting an anti-fraud rule requiring unalterable "hardened" ESNs on all new phones.

Cellular One® also explained that it plans system capacity based on the number of subscribers it has and expects to add. "Hidden" emulated phones accessing the system tax the system's limited capacity, adversely affecting service and interfering with planning. Defendants' attempted rejoinder to this point is incomprehensible.

Finally, Second Circuit authority holds that immeasurable pecuniary loss constitutes irreparable harm.<sup>5</sup>

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<sup>5</sup> In addition to the authorities cited in our opening memorandum, see Danielson v. Laborers Int'l Union, 479 F.2d 1033, 1037 (2d Cir. 1973); Fonar Corp. v. Deccaid Services, Inc., 787 F. Supp. 44, 48 (E.D.N.Y. 1992), vacated on other grounds, 983 F.2d 427 (2d Cir. 1993), cert. denied, 114 S.Ct. 309 (1993); Rosenfeld v. W.B. Saunders, 728 F. Supp. 236, 244 (S.D.N.Y. 1990), aff'd, 923 F.2d 845 (2d Cir. 1990).

The only contrary authority cited by defendants is a single District Court case from a different circuit.<sup>6</sup>

**CONCLUSION**

Two different FCC rules mandate that each cellular telephone must have a unique ESN. Defendants are creating multiple cellular telephones with the same ESN, a practice the FCC has clearly stated violates these rules. Because defendants' emulation activities interfere with the operation of Cellular One®'s system, and deprive the Company of revenue, Cellular One® is entitled to an injunction under 47 U.S.C. § 401(b) prohibiting defendants from continuing those activities, as two other federal courts have recently ruled in identical cases. Accordingly, Cellular One®'s motion for a preliminary injunction should be granted.

Dated: New York, New York  
June 15, 1995

Respectfully submitted,

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<sup>6</sup> In that case, the Court acknowledged that it was disagreeing with authorities from other circuits. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop, 839 F. Supp. 68, 73 & n.4 (D. Me. 1993).

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

SOUTHWESTERN BELL MOBILE SYSTEMS, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CELL PHONE EXTENSIONS, INC., )  
 )  
 Defendant, )  
 )  
 CYBERTEL CORPORATION, General Partner )  
 of CYBERTEL CELLULAR TELEPHONE COMPANY, )  
 )  
 and )  
 )  
 AMERITECH MOBILE COMMUNICATIONS, INC., )  
 )  
 Plaintiff- )  
 Intervenor, )  
 )  
 v. )  
 )  
 CELL PHONE EXTENSIONS, INC., )  
 )  
 Defendant. )

307 Parties

FILED

MAY 24 1995

U. S. DISTRICT COURT  
EASTERN DISTRICT OF MO  
ST. LOUIS

No. 4:95-CV-796-CAS

DELIVERED MAY 25 1995

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter is before the Court on plaintiff Southwestern Bell Mobile Systems' and plaintiff-intervenors CyberTel Corporation, General Partner of CyberTel Cellular Telephone Company and Ameritech Mobile Communications, Inc.'s (collectively "plaintiffs") separate, but substantially similar, pleadings entitled "Original Complaint and Request for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction" and "Complaint in Intervention"; and defendant Cell Phone Extensions, Inc.'s ("CPE") motion to dismiss.

The parties submitted evidence at a hearing conducted on May 18, 1995, and May 19, 1995. This hearing was originally designated as a hearing on plaintiffs' motions for preliminary injunction. At the conclusion of the hearing, CPE requested that trial of the case be advanced and consolidated with trial on the merits as permitted by Rule 65, Fed.R.Civ.P.

Based upon the pleadings and evidence in support thereof submitted by the parties, the Undersigned finds:

1. Plaintiffs are licensed by the Federal Communications Commission (FCC) to provide cellular communications services in the St. Louis metropolitan area.

2. CPE is a Missouri corporation having its principal office in Des Peres, Missouri. CPE is not licensed by the FCC to operate a cellular telephone network.

3. On September 9, 1994, the FCC published its Report and Order No. 94-210 pertaining to the revision of Part 22 of the FCC's rules. The Report and Order was published in full in the Federal Communications Commission Reporter at 9 FCC Rcd No. 23. Notice of the Report and Order and the Final Rules adopted pursuant to Report and Order No. 94-210 were published in the Federal Register on November 17, 1994.

4. Since 1981, the FCC has continuously required that each cellular telephone have a unique Electronic Serial Number ("ESN") assigned to it by its manufacturer. Originally, this requirement was found at Section 2.3.2 of the FCC's Mobile Station-Land Station Compatibility Specification adopted in FCC Rule 22.915 (now 47

C.F.R. § 22.933). See 46 F.R. 27665 (May 21, 1981). The Requirement is now also set forth at 47 C.F.R. § 22.919 (1995), adopted pursuant to the Report and Order No. 94-210.

5. Licensed operators of cellular networks, such as plaintiffs, authorize their subscribers to use specific cellular telephones on the operator's network and assign a Mobile Identification Number ("MIN") to each of the subscribers to their service. The subscriber's authorized cellular telephone is programmed to respond to the assigned MIN. Licensed cellular network operators, including plaintiffs, rely on the uniqueness of the ESN and MIN in each cellular telephone to enable the operators to accurately transmit calls between callers and their intended recipients and to accurately bill subscribers for their use of the cellular network.

6. Plaintiffs each contract with their subscribers that only one cellular telephone will be programmed to respond to the MIN assigned to the subscriber by the cellular network operator. CPE's president, Raymond Kohout, has entered into agreements with plaintiffs which so provide, and both of CPE's employees (Todd Maleki and Susan Murphy) have entered such agreements with each plaintiff.

7. CPE was organized for the specific purpose of marketing a service by which a cellular telephone's factory assigned and installed ESN is removed from the cellular telephone and replaced with the ESN assigned to a cellular telephone that has been activated for use on plaintiffs' cellular networks. The cellular

telephone with the altered ESN is programmed with the MIN assigned to a cellular subscriber. The altered cellular telephone then "emulates" a cellular telephone authorized for use on a cellular network. In exchange for this "emulation" service, CPE charges a fee, generally Two Hundred Fifty Dollars (\$250.00).

8. Prior to the time CPE commenced its operations (in March 1995), CPE's president, Raymond Kohout, was aware of the FCC's Rule relating to ESN's in cellular telephone and the FCC's conclusion, stated in a January 15, 1993, letter, that:

It is a violation of Section 22.915 of the Commission's Rules for an individual or company to alter or copy the ESN of a cellular telephone so that the telephone emulates the ESN of any other cellular telephone. Moreover, it is a violation of the Commission's Rules to operate a cellular telephone that contains an altered or copied ESN.

9. After CPE commenced operations and began soliciting customers for its "emulation" service, plaintiff Southwestern Bell Mobile Systems Inc.'s attorney's provided written notice to CPE that such emulation is prohibited by the FCC's Rules.

10. CPE persisted in advertising and in providing emulation services to its customers. Prior to the entry of the Temporary Restraining Order in this action, CPE had emulated the cellular telephones of at least 29 subscribers to the cellular telephone services of plaintiffs. Although CPE claims to have ceased to provide emulation services upon service of the temporary restraining order entered in this case, CPE has continued, even through the hearing in this matter, to publicly advertise the availability of such services from it and to identify customers for

whom emulations will be performed in the event that CPE is no longer enjoined from providing such service.

11. Plaintiffs have been and are being injured as a result of CPE's emulation of the ESNs and MINs of cellular telephones authorized by plaintiffs for use on their cellular networks in that:

A. plaintiffs' cellular networks are being used by unauthorized transmitters (cellular telephones) in violation of the terms of plaintiffs' licenses from the FCC;

B. plaintiffs are being deprived of activation fees, monthly access fees and air time charges to which they are entitled for the use of their cellular networks, and their costs of operation are increased; and

C. the goodwill of plaintiffs with their customers is being adversely affected.

12. The injuries that have been, are being and will be sustained by plaintiffs are not quantifiable with reasonable certainty.

#### Conclusions of Law

Plaintiffs seek injunctive relief and bring this action pursuant to 47 U.S.C. § 401(b) and Federal Rule of Civil Procedure 65. 47 U.S.C. §401(b) provides:

(b) If any person fails or neglects to obey any order of the [FCC] other than for the payment of money, while the same is in effect, the [FCC] or any party injured thereby, or the United States, by its Attorney General, 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

disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

CPE moves to dismiss the complaints, arguing (i) the Court lacks subject matter jurisdiction, and (ii) plaintiffs cannot establish an entitlement to injunctive relief under Dataphase Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

A complaint is not to be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The allegations of the complaint must be assumed to be true and construed in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1976). The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence in support of his claims. Id.

In its motion to dismiss, CPE asserts that this Court lacks jurisdiction because plaintiffs are seeking to enforce rules promulgated by FCC and not "orders" as provided in Section 401(b). In support of this assertion, CPE relies upon New England Tel & Tel. Co. v. Public Utilities Commission of Maine, 742 F.2d 1, 2-9 (1st cir. 1984), cert. denied, 476 U.S. 1174 (1986). There, the First Circuit held that an order resulting from a rulemaking proceeding is not a reviewable order under Section 401(b). However, numerous other circuits have reached the opposite conclusion. These courts have found that such an order is

reviewable under section 401(b). See Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n, 913 F.2d 305, 308 (6th Cir. 1990); Hawaiian Tel. Co. v. Public Utils. Comm'n, 827 F.2d 1264, 1270-72 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988); Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n, 748 F.2d 879, 880-81 (4th Cir. 1984), vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 445 (1986); South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 744 F.2d 1107, 1115 (5th Cir. 1984), vacated and remanded for consideration in light of Chesapeake & Potomac, 476 U.S. 1166 (1986); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901 (8th Cir. 1984), vacated and remanded for consideration in light of Chesapeake & Potomac, 476 U.S. 1167 (1986). This Court will follow the majority of circuits. "Congress, rather than attempting to limit §401(b) exclusively to adjudicatory orders, intended that a broad range of orders be reviewable under §401(b)." Alltel Tennessee, Inc., 913 F.2d at 308. The instant FCC rules clearly prohibit emulating the ESN's of cellular telephones. Therefore, the Court finds the rules are a reviewable and enforceable orders under section 401(b)

Alternatively, CPE has moved to dismiss arguing that plaintiffs cannot satisfy the traditional prerequisites for injunctive relief under Dataphase. This Court finds that the Dataphase test is not applicable in this case. Plaintiffs may enforce the instant FCC order under section 401(b) through

injunctive relief if the order was (i) regularly made; (ii) duly served; (iii) disobeyed by CPE; and (iv) plaintiffs were thereby injured. See Southwestern Bell Tel. Co., 738 F.2d at 908. "[O]nly the statutory criteria need be satisfied and that the traditional equitable standard is not applicable where, as in this case, we have a clear violation of a self executing order of an administrative agency, see 47 U.S.C. § 408, which is accorded the same preemptive effect as a federal statute." Id. (citations omitted).

Based upon the findings of fact above, the Court determines that plaintiffs have a right to injunctive relief under 47 U.S.C. § 401(b). Specifically, the Court concludes (i) the FCC's Order was regularly made and duly served upon CPE; (ii) the emulation of the ESNs of cellular telephones and the use of cellular telephones with altered ESNs violates the FCC's Report and Order No. 94-210 and FCC regulation 22-919 adopted pursuant to such Report and Order, and by emulating cellular telephones, CPE is knowingly disobeying such Order; (iii) unless CPE is enjoined, it will continue to violate such Order; and (iv) plaintiffs have been thereby injured. Therefore, defendant's motion to dismiss will be denied, and plaintiffs will be granted injunctive relief.

Accordingly,

**IT IS HEREBY ORDERED** that CPE's motion to dismiss, filed May 17, 1995, is **DENIED**.

**IT IS FURTHER ORDERED** that:

1. CPE, its officers, agents, servants, employees and attorneys and those persons in active participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently enjoined from altering, transferring, emulating or manipulating the ESNs on cellular telephones.

2. The bonds posted by or on behalf of plaintiffs, pursuant to Orders previously issued by the Court, are released and discharged.

3. Plaintiffs are hereby released from the restrictions previously imposed on the use of information obtained in discovery concerning the identities of CPE's customers and its vendors.

4. Plaintiffs shall recover their costs from CPE.

5. Final Judgment is entered accordingly.

  
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CHARLES A. SEAW  
UNITED STATES DISTRICT JUDGE

Dated this 24th day of May, 1995.

