increased cost of providing service within the State of Kansas resulting from the KUSF assessment will severely inhibit the PCS Plaintiffs' ability to enter and compete in the Personal Communication Service market. The damages that will arise from the KUSF assessment required under the Corporation Commission's Order cannot be recovered from the Defendants; therefore, there is no adequate remedy at law.

47. The threatened injury to Plaintiffs outweighs any injury to Defendants.

48. An injunction will further the public interest in that it will ensure that the State of Kansas and the Corporation Commission do not continue to violate the Supremacy Clause in Article VI, Cl. 2 of the Constitution of the United States, because the actions of the Defendants enumerated herein interfere with, and are preempted by, Section 332(c) of the Communications Act.

49. There exists a substantial likelihood that Plaintiffs will prevail on the merits of their complaint by demonstrating that the State Act and the Corporation Commission's Orders of December 27, 1996 and February 3, 1997, are contrary to the Supremacy Clause in Article VI, Cl. 2 of the Constitution of the United States because they interfere with, and are preempted by, Section 332(c) of the Communications Act..

WHEREFORE, Plaintiffs request that this Court:

(i) Issue a Preliminary Injunction pursuant to Fed R. Civ. Pr. 65 ordering Defendants, The State of Kansas and The State Corporation Commission of the State of Kansas, the National Exchange Carrier Association, Inc., and all those in active concert or participation with them, to refrain from implementing Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service

providers, including the Plaintiffs, are required to contribute to the Kansas Universal Service Fund;

(ii) Issue a Permanent Injunction perpetually enjoining and restraining defendants, The State of Kansas, The State Corporation Commission of the State of Kansas, The National Exchange Carriers Association, Inc., and all those acting in active concert or participation with them, from implementing Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service providers, including the Plaintiffs, are required to contribute to the Kansas Universal Service Fund; and

(iii) Issue an order granting such other and further relief as this Court deems just and proper.

COUNT II - DECLARATORY JUDGMENT

50. Plaintiffs incorporate by this reference the allegations in paragraphs 1 through 49 as though fully set forth herein.

51. The State Act is invalid as it is contrary to the Supremacy Clause in Article IV, Cl. 2 of the United States Constitution because it interferes with, and is preempted by, Section 332(C) of the Communications Act.

52. The Corporation Commission Order of December 27, 1996 is invalid as it is contrary to Supremacy Clause in Article VI, Cl. 2 of the United States Constitution because it interferes with, and is preempted by, Section 332(c) of the Communications Act.

53. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that K.S.A. § 66-2008(b) of the State Act and the Corporation Commission's December 27, 1996 and February 3, 1997 Orders, as they pertain to the dispute outlined herein, are invalid.

54. A judicial determination is necessary and appropriate at this time under all of the circumstances so that Plaintiffs may determine their duties and obligations under federal and state law, and any rules duly adopted by the Corporation Commission.

55. A judicial determination is further necessary and appropriate at this time in order to avoid substantial potentially unnecessary, unrecoverable and devastating costs associated with participating and entering the Commercial Mobile Services industry within the State of Kansas.

WHEREFORE, Plaintiffs request that this Court:

(i) Issue an order declaring that K.S.A. § 66-2008(b) of the State Act invalid and preempted by Section 332(C) of the Communications Act;

(ii) Issue an order declaring that Paragraph 187 of the Corporation Commission's December 27, 1996 Order and any other paragraph related thereto, under which Commercial Mobile Service providers are ordered to contribute to the Kansas Universal Service Fund is preempted by Section 332(c) of the Communications Act;

(iii) Issue an order declaring that Plaintiffs are not required to submit Kansas Universal Service Fund payments to the National Exchange Carrier Association, Inc. until such time as the FCC finds that Commercial Mobile Services are a substitute for a substantial portion of land line telephone exchange services in Kansas;

(iv) Issue an order declaring that Plaintiffs are not required to account for intrastate revenue received within the State of Kansas for the purpose of contributions to the Kansas Universal Service Fund until such time as the FCC finds that Commercial Mobile Services are a substitute for a substantial portion of land line telephone exchange services in Kansas; and

(v) Issue on order declaring that Plaintiffs are not subject to late payment fees under the February 19, 1997 Order of the Corporation Commission

(vi) Issue an order granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

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ATTORNEYS FOR PLAINTIFFS MOUNTAIN SOLUTIONS, INC., SPRINT SPECTRUM, L.P., LIBERTY CELLULAR, INC., MERCURY CELLULAR OF KANSAS, INC., WESTERN WIRELESS CORPORATION, DCC PCS, INC., and DOBSON CELLULAR OF KANSAS/MISSOURI, INC.

-and-

MORRISON & HECKER, L.L.P.

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ATTORNEY FOR PLAINTIFFS AIRTOUCH CELLULAR OF KANSAS, INC., TOPEKA CELLULAR TELEPHONE COMPANY, INC. and CMT PARTNERS

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

VERIFICATION

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, manager of Topeka Cellular Telephone Company, Inc., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

E. Kirk Golbach

E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

Teresa C. Hamblin

Notary Public

TERESA C. HAMBLIN
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Expires 10/27/1999

My Commission Expires:

October 27, 1999

MEE177.KCM/bjd

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

VERIFICATION

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

E. Kirk Golbach

E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

Teresa C. Hamblin

Notary Public

TERESA C. HAMBLIN
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Expires 10/27/99

My Commission Expires:

October 27, 1999

MEE177.KCM/bjd

STATE OF KANSAS)
) SS:
COUNTY OF JOHNSON)

VERIFICATION

E. Kirk Golbach, Director of Finance and Administration of CMT Partners, manager of AirTouch Cellular of Kansas, Inc., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

E. Kirk Golbach

E. Kirk Golbach

Subscribed and sworn to before me this 4th day of March, 1997.

Teresa C. Hamblin

Notary Public

TERESA C. HAMBLIN
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Expires 10/27/99

My Commission Expires:

October 27, 1999

NEE177.KCR/bjd

STATE OF WASHINGTON)
) SS:
COUNTY OF KING)

VERIFICATION

Gene DeJordy, Director of Regulatory Affairs of Western Wireless Corporation, being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

Gene DeJordy

Subscribed and sworn to before me this 3 day of March, 1997.

ANGELA R. SCHWAB
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES 10-25-99

Notary Public

My Commission Expires:

STATE OF Missouri)
) SS:
COUNTY OF Jackson)

VERIFICATION

Charles McKee, Attorney of Sprint Spectrum, L.P., being duly sworn upon his oath, says that the facts stated in this Verified Complaint above are true and correct to the best of his knowledge, information and belief.

CHARLES McKEE

Subscribed and sworn to before me this 4th day of March, 1997.

Carolyn Lee Wendler
Notary Public

My Commission Expires:

" NOTARY SEAL "
Carolyn Lee Wendler, Notary Public
Jackson County, State of Missouri
My Commission Expires 10/31/2000

Attention: LISA CREIGHTON

State of California)
County of San Francisco)

On 3/4/97 before me, Cesar B. Viajar, Jr., notary public personally appeared E. CLARKE GARNETT

( ) personally known to me
(✓) proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Cesar B Viajar Jr

Cesar B. Viajar, Jr., Notary Public
COMMISSION #1111682 COMMISSION EXP. DEC. 13, 2000

CESAR B. VIAJAR JR
COMM. #1111682
Notary Public-California
SAN FRANCISCO
My Comm. Expires DEC. 13, 2000

CAPACITY CLAIMED BY SIGNER:
( ) Individual (✓) Corporate PRESIDENT officer/title _____ officer/title
( ) Partner(s) ( ) Limited ( ) General
( ) Attorney-in-Fact 2 ( ) Trustee(s) ( ) Guardian/Conservator
( ) Other Signer is representing: (Name of person(s) or entity(ies) _____
Title or type of document AFFIDAVIT
No. of pages 1 Date of document 3/4/97 Signer(s) other than named above NONE

VERIFICATION

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN FRANCISCO

E. Clarke Garnett, being of lawful age, being first duly sworn, on oath deposes and states: That he is the President of Liberty Cellular, Inc., a Kansas corporation, d/b/a Kansas Cellular, the plaintiff in the above-captioned action; that he is authorized to make this verification on behalf of said corporation; that he has read the above and foregoing Affidavit; knows and understands the contents thereof, and states that the statements and allegations contained therein are true and correct, according to his knowledge, information, and belief.

E Clarke Garnett

E. Clarke Garnett
President

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 4TH day of March, 1997.

Cesar B Viajar Jr

Notary Public

My Appointment Expires: 12-13-2000

CESAR B. VIAJAR JR
COMM. #1111682
Notary Public-California
SAN FRANCISCO
My Comm. Expires DEC. 13, 2000

METRO MOBILE CTS OF FAIRFIELD COUNTY, INC. et al.
v.
Connecticut DEPARTMENT OF PUBLIC UTILITY CONTROL.

Nos. CV950051275S, CV950550096S.

Superior Court of Connecticut.

Dec. 11, 1996.

MEMORANDUM OF DECISION

LEVINE

*1 The two captioned matters are appeals from decisions of the Department of Utility Control ("DPUC"). Because they have the same parties and turn on the same issues, they have been consolidated for argument and decision, and this decision applies to both.

Each of the six plaintiff-appellants (one of whom was joined as a plaintiff- appellant after the filing of these appeals) is a cellular mobile telecommunications provider ("cellular provider") which is licensed to provide cellular telephone services by the Federal Communications Commission ("FCC") (the plaintiff-appellants are hereinafter referred to, collectively, as "Metro Mobile"). Pursuant to the Omnibus Budget Reconciliation Act of 1993, Pub.L. 103-66 § 6002, 107 Stat. 394 (1993) (the "Budget Act"), Congress has preempted the DPUC from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers. The DPUC has not challenged the authority of Congress, under the supremacy clause of the United States Constitution (Article VI), to preempt those aspects of state regulation of cellular telephone service. In 1994, the General Assembly adopted P.A. 94-83 which, in its amendments to § 16-247e, C.G.S.:

1) Permits the DPUC, if necessary, to "establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the department, to ensure the universal availability of affordable, high quality basic telecommunication services to all residents and businesses throughout the state regardless of location" (the "Universal Service Program"); and,

2) Requires the DPUC to "establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the department, sufficient to provide low-income households or individuals with a level of communications service or package of telecommunications services that supports participation in the economy and society of the state" (the "Lifeline Program").

Pursuant to the authority granted to it by P.A. 94-83 to establish a Universal Service Program, the DPUC, by its March 31, 1995 decision in its Docket No. 94-07-08 (the "Universal Decision"), determined that cellular providers will be required to make payments toward the funding of a Universal Service Program. Also pursuant to the authority granted to it in P.A. 94-83, the DPUC, by its May 3, 1994 decision in its Docket No. 94-07-09 (the "Lifeline Decision"), determined that cellular providers will be required to make payments toward the funding of a Lifeline Program. It is from those decisions that Metro Mobile has appealed.

P.A. 94-83 was adopted against the backdrop of the Budget Act, which provides, in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements ... to insure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A) (the "Preemption Clause").

*2 Subsequent to the taking of these appeals, Congress adopted, and the President signed, the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (the "1996 Act"), which provides, in relevant part:

> Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

The 1996 Act, § 254(f) (to be codified at 47 U.S.C. § 254[f]).

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The 1996 Act goes on to provide: "A State may adopt regulations not inconsistent with the (Federal Communications) Commission's rules to preserve and advance universal service ..." 1996 Act, § 254(f). The FCC has not yet adopted such rules, and therefore Connecticut has not yet adopted any such regulations.

It is found that Metro Mobile is aggrieved by each of the appealed decisions because of the financial impact each would have on it, if implemented, and it is held that Metro Mobile has standing to maintain these appeals.

ISSUES PRESENTED

These appeals present the following issues:

1) Does the Budget Act preempt Connecticut from assessing Metro Mobile for Universal Service and Lifeline Programs?

2) Are the authorities granted to the DPUC by P.A. 94-83 to assess telecommunications companies for Universal Service and Lifeline Programs on an "equitable basis" delegations of legislative authority which violate Article Second (separation of powers provision) of The Connecticut Constitution?

3) Are the assessing authorities granted to the DPUC by P.A. 94-83 unconstitutionally vague in violation of due process requirements? and,

4) What effect, if any, does the 1996 Act have on the decisions appealed from?

PREEMPTION

The DPUC acknowledges that the Budget Act preempts it from licensing, and from regulating the rates of, cellular providers. However, the DPUC contends that its assessments on cellular providers for the Universal Service and Lifeline Programs have been exempted from preemption by the following portion of the Preemption Clause: "... except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Thus the preemption issue turns on whether assessments on cellular providers for Universal Service and Lifeline Programs are "other forms and conditions of commercial mobile services."

In support of its argument that these assessments are "other terms and conditions" of service, the DPUC cites the legislative history of the Budget Act, in particular the House Report, which states:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or other such matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

*3 H. Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S.Code Cong. & Admin.News at 588.

Under the rules of statutory construction, legislative history may be reviewed to resolve an ambiguity in a statute, but it may not be relied on to create an ambiguity which is not apparent on the face of a statute. Therefore, the question is whether the Preemption Clause is facially ambiguous as to the authority of the states to assess cellular providers for programs such as the Universal Service and Lifeline Programs.

While the DPUC claims an ambiguity exists in that portion of the Preemption Clause which states:

> ... this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services ...

the court finds the following portion of the same subparagraph more to the point:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

The rules of statutory construction require that no language in a statute be read to be redundant. Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a

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significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.

By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

ARTICLE SECOND STANDARDS FOR DELEGATION

Article Second of the Constitution of Connecticut, as amended by Article XVIII of its Amendments, provides:

> The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

*4 The leading Connecticut case in which a delegation of authority by the legislature to the executive branch was voided for lack of sufficient standards is State v. Stoddard, 126 Conn. 623 (1940). In Stoddard, the court found that the challenged statute did not contain sufficiently definite standards for the exercise of the delegated authority, with the result that the executive branch was exercising an essentially legislative function in violation of Article Second. Stoddard dealt with a statute which authorized the state's milk administrator "to establish, from time to time, a minimum price for the different milk areas of the state for each class and grade of milk or milk products ..." The statute in issue contained only the following standard to guide the exercise of the delegated authority: "In establishing minimum prices for milk under the provisions of [the statute in issue], the milk administrator shall take into consideration the type of container used and other cost factors which should influence the determination of such prices." The court said that, in order to comply with the provisions of Article Second, a statute which delegates authority must establish "primary standards" for the exercise of that authority. Finding no such standards in the milk price act, the Court held it unconstitutional. Our courts have decided a number of cases sustaining legislative delegations to the executive branch, of which the following are examples:

> Biz v. Liquor Control Commission, 133 Conn. 556 (1947), in which the court found sufficiently definite the standards in a statute which authorized the Liquor Control Commission to refuse to grant a liquor permit if the commission:

has reasonable cause to believe ... that the number of permit premises in the locality is such that the granting of a permit is detrimental to public interest, and, in reaching a conclusion in this respect, the commission may consider the character of, the population of, the number of like permits and number of all permits existent in, the particular town and the immediate neighborhood concerned, the effect which a new permit may have on such town or neighborhood or on like permits existent in such town or neighborhood ...;

Id., 721; and,

Roan v. Conn. Industrial Building Comm., 150 Conn. 333 (1963), in which the court found sufficiently definite, for constitutional purposes, the standards governing the making of mortgage loans by a commission of the executive branch to private sector borrowers, which the court paraphrased as follows:

> The commission ... has ... to decide that the mortgage (1) is one made and held by an approved mortgagee, responsible and able to service the mortgage properly; (2) involves a principal obligation not in excess of $5,000,000 for any one project and not exceeding 90 percent of the cost of the project; (3) has a maturity within three-quarters of the remaining useful life of the property but not more than twenty-five years; (4) contains complete amortization provisions requiring periodic payments within the ability of the mortgagor to pay; and (5) contains essential provisions as to property insurance, repairs, taxes, default and similar matters.

Id., 344; and,

*5 University of Connecticut Chapter, AAUP v.

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Governor, 200 Conn. 386 (1986), in which the court upheld a statute authorizing the governor to reduce budgetary allotments, in the court's words:

> if (1) due to a change in circumstances since the budget was adopted certain reductions should be made in various allotments of appropriations, or (2) the estimated budget resources during such fiscal year will be insufficient to pay all appropriations in full ...

Id., 398.

The Connecticut case which, on its facts, is closest to these appeals is Kellems v. Brown, 163 Conn. 478 (1972), which concerned a statute creating a tax on dividend income and authorizing the tax commissioner to adopt regulations for the operation and enforcement of that tax. The authority of the commissioner to adopt regulations was challenged on Article Second grounds, and the court noted that:

> The power granted to an administrative board or official may include, but is not limited to, the establishment of filing requirements, the hearing of administrative appeals, the finding of facts, and the determination of when as opposed to how a tax may be imposed.

Id., 499.

In Kellems the court went on to describe the separate legislative and administrative functions under the statute at issue, as follows:

> The General Assembly specifically levied the tax, the rate prescribed and defined the income subject to taxation as well as the persons who are required to pay. 12-505, 12-506. It then authorized the tax commissioner to (1) prescribe the information required of the taxpayer, (2) to design forms for returns, (3) to require the submission of copies of federal income tax returns and supporting records, (4) to extend time limitations, and (5) to promulgate regulations for enforcement of the act and collection of the prescribed tax.

Id., 500.

In holding the above-described statutory standards sufficiently definite, the Kellems court observed that:

> As long as revenue legislation sets out with specificity the rate of the tax, the instances where it is to be imposed and those who will be liable to pay it, there is no impermissible delegation of legislative power merely because the details of regulation and enforcement are left to administrative action.

Id., 501.

While Kellems concerned a tax statute, the analysis employed by the Kellems court is the same as that which appears in the other decisions cited above. Accordingly, the court concludes that Kellems is another in the line of well established Article Second delegation cases, and that Kellems is not a separate genre of tax case which deals, incidentally, with delegation issues. Therefore, it is not necessary for the court to decide whether, in a technical sense, assessments for the Universal Service and Lifeline Programs would constitute taxes in order to determine whether the Kellems analysis applies to these appeals.

The view that it does not matter, for Article Second purposes, whether payments made pursuant to P.A. 94-83 are denominated taxes or assessments is confirmed by an analysis of the elements of those types of imposition. Each involves a taking by government of money from a party in order to fund expenditures which have a presumed public purpose. (Since the constitutionality of the disbursement by the DPUC, outside of the legislative appropriation process, of monies raised by its assessments has not been raised in these appeals, and since a determination of the constitutionality of those disbursements is not necessary to a decision in these appeals, that issue is not addressed here.) In a constitutional sense, it makes no difference whether the authority for such a taking is characterized as a tax, an assessment or otherwise, because the consequence is the same; a lighter purse. One has a right to know that such a fiscal invasion is authorized by a constitutionally sufficient legislative directive. Accordingly, the standards laid out in Kellems apply to the delegation provisions of P.A. 94-83.

*6 The authority for the DPUC, under P.A. 94-83, to establish and fund the Universal Service Program is as follows: The [DPUC] may, if necessary, establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the [DPUC] ...

§ 16-247e(b), C.G.S.

The authority for the DPUC, under P.A. 94-83, to establish and fund the Lifeline Program is as follows:

> y(3)27 The [DPUC] shall ... establish a lifeline program funded by all telecommunications

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companies on an equitable basis, as determined by the [DPUC] ...

§ 16-247e(a), C.G.S.

The narrow issue before the court is whether the language "on an equitable basis, as determined by the [DPUC]," as used in the legislative delegation of authority to the DPUC to fund the Universal Service and the Lifeline Programs, "sets out with specificity the rate of the [assessment], the instances where it is to be imposed and those who will be liable to pay it ...," as required by Kellems. Id., 501.

The determination of what is "equitable" is subjective, and therefore one person may find equitable what another finds distinctly inequitable. Because "equitable" is subject to many interpretations, it is the DPUC, in determining what is equitable, which "sets out with specificity the rate of the [assessment]," which determines "the instances where it is to be imposed" and which determines "those who will be liable to pay it." Because, according to Kellems, those determinations can only be made by the legislature, the grant of funding authority to the DPUC in P.A. 94-83 does not pass Kellems muster. Further, the single word "equitable" does not meet the criteria for primary standards developed by Stoddard, Biz and Roan. Accordingly, the funding mechanisms established by P.A. 94-83 violate Article Second.

The grant of authority to the DPUC, in P.A. 94-83, to establish the Universal Service Program "if necessary" raises a similar Article Second issue. However, that issue has not been raised by the parties, and its determination is not necessary to a decision in these appeals. Accordingly, that issue is not addressed here.

VOID FOR VAGUENESS DUE PROCESS STANDARDS

In State Mgmt. Assn. of Connecticut, Inc. v. O'Neill, 204 Conn. 746 (1987), a statute was challenged on due process vagueness grounds. The Court upheld the challenged statute and noted: Courts have derived the void for vagueness doctrine from the constitutional guarantee of due process. Civil statutes must be definite in their meaning and application, but may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes. Due process of law requires that statutes must be sufficiently definite and precise to enable a person to know what conduct is permitted and what is prohibited. An imprecise statute, however, may be sufficiently definite if it provides reasonably distinct boundaries for its fair administration.

Id., 757-58. (Citations and quotation marks omitted.)

*7 In Bottone v. Westport, 209 Conn. 652 (1989), the court, after citing State Management Assn., refined the due process standard to be applied to void for vagueness challenges, as follows: Specifically, the standard is whether the statute afford[s] a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited.

Id., 667. (Citations and quotation marks omitted.)
Void for vagueness challenges on due process grounds are raised most frequently against criminal statutes, and therefore the test of whether a statute allows one to discern what is permitted or prohibited is framed for analysis of a criminal statute. However, the concept underpinning the standard, that is, whether a statute is drafted with the clarity or specificity needed to allow one to know to what it applies, can be applied as readily to challenges to legislative delegations as it can to legislative declarations of forbidden behavior.

Applying this due process test to P.A. 94-83, the question is whether the language "on an equitable basis, as determined by the [DPUC]" affords a person of ordinary intelligence a reasonable opportunity to know against whom assessments for the Universal Service and Lifeline Programs can be levied, and in what amounts. Those questions are answered in the negative, and it is held that the funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83 are void for vagueness under the due process clause of the Connecticut Constitution, Article First, Section 8, as amended by Article XVII of its Amendments.

EFFECT OF THE 1996 ACT

As noted above, the 1996 Act provides: "A state may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." As the parties stipulated at argument, the FCC has not yet adopted any such rules, and Connecticut has not adopted any such regulations. Accordingly, neither the 1996 Act, nor anything done by Connecticut pursuant to it, negates the Budget

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Act's preemption of Connecticut's ability to assess Metro Mobile for the Universal Service and Lifeline Programs.

CONCLUSION

It is held that:

1) Substantial rights of Metro Mobile have been prejudiced by the DPUC decisions appealed from;

2) The DPUC's declared intent to assess Metro Mobile for the Universal Service and Lifeline Programs violates the Budget Act; and,

3) The funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83, on which the decisions appealed from are based, violate Article Second and the due process clause of The Connecticut Constitution. These appeals are sustained.

END OF DOCUMENT

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METRO MOBILE CTS OF FAIRFIELD COUNTY, INC. et al.
v.
Connecticut DEPARTMENT OF PUBLIC UTILITY CONTROL.

Nos. CV950051275S, CV950550096S.

Superior Court of Connecticut.

Dec. 11, 1996.

MEMORANDUM OF DECISION

LEVINE

*1 The two captioned matters are appeals from decisions of the Department of Utility Control ("DPUC"). Because they have the same parties and turn on the same issues, they have been consolidated for argument and decision, and this decision applies to both.

Each of the six plaintiff-appellants (one of whom was joined as a plaintiff-appellant after the filing of these appeals) is a cellular mobile telecommunications provider ("cellular provider") which is licensed to provide cellular telephone services by the Federal Communications Commission ("FCC") (the plaintiff-appellants are hereinafter referred to, collectively, as "Metro Mobile"). Pursuant to the Omnibus Budget Reconciliation Act of 1993, Pub.L. 103-66 § 6002, 107 Stat. 394 (1993) (the "Budget Act"), Congress has preempted the DPUC from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers. The DPUC has not challenged the authority of Congress, under the supremacy clause of the United States Constitution (Article VI), to preempt those aspects of state regulation of cellular telephone service. In 1994, the General Assembly adopted P.A. 94-83 which, in its amendments to § 16-247e, C.G.S.:

1) Permits the DPUC, if necessary, to "establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the department, to ensure the universal availability of affordable, high quality basic telecommunication services to all residents and businesses throughout the state regardless of location" (the "Universal Service Program"); and,

2) Requires the DPUC to "establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the department, sufficient to provide low-income households or individuals with a level of communications service or package of telecommunications services that supports participation in the economy and society of the state" (the "Lifeline Program").

Pursuant to the authority granted to it by P.A. 94-83 to establish a Universal Service Program, the DPUC, by its March 31, 1995 decision in its Docket No. 94-07-08 (the "Universal Decision"), determined that cellular providers will be required to make payments toward the funding of a Universal Service Program. Also pursuant to the authority granted to it in P.A. 94-83, the DPUC, by its May 3, 1994 decision in its Docket No. 94-07-09 (the "Lifeline Decision"), determined that cellular providers will be required to make payments toward the funding of a Lifeline Program. It is from those decisions that Metro Mobile has appealed.

P.A. 94-83 was adopted against the backdrop of the Budget Act, which provides, in relevant part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements ... to insure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A) (the "Preemption

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Clause").

*2 Subsequent to the taking of these appeals, Congress adopted, and the President signed, the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (the "1996 Act"), which provides, in relevant part:

> Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.

The 1996 Act, § 254(f) (to be codified at 47 U.S.C. § 254[f]).

The 1996 Act goes on to provide: "A State may adopt regulations not inconsistent with the (Federal Communications) Commission's rules to preserve and advance universal service ..." 1996 Act, § 254(f). The FCC has not yet adopted such rules, and therefore Connecticut has not yet adopted any such regulations.

It is found that Metro Mobile is aggrieved by each of the appealed decisions because of the financial impact each would have on it, if implemented, and it is held that Metro Mobile has standing to maintain these appeals.

ISSUES PRESENTED

These appeals present the following issues:
1) Does the Budget Act preempt Connecticut from assessing Metro Mobile for Universal Service and Lifeline Programs?
2) Are the authorities granted to the DPUC by P.A. 94-83 to assess telecommunications companies for Universal Service and Lifeline Programs on an "equitable basis" delegations of legislative authority which violate Article Second (separation of powers provision) of The Connecticut Constitution?
3) Are the assessing authorities granted to the DPUC by P.A. 94-83 unconstitutionally vague in violation of due process requirements? and,
4) What effect, if any, does the 1996 Act have on the decisions appealed from?

PREEMPTION

The DPUC acknowledges that the Budget Act preempts it from licensing, and from regulating the rates of, cellular providers. However, the DPUC contends that its assessments on cellular providers for the Universal Service and Lifeline Programs have been exempted from preemption by the following portion of the Preemption Clause: "... except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Thus the preemption issue turns on whether assessments on cellular providers for Universal Service and Lifeline Programs are "other forms and conditions of commercial mobile services."

In support of its argument that these assessments are "other terms and conditions" of service, the DPUC cites the legislative history of the Budget Act, in particular the House Report, which states:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or other such matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

*3 H. Rep. No. 103-111, 103d Cong., 1st Sess. at 261, reprinted in 1993 U.S.Code Cong. & Admin.News at 588.

Under the rules of statutory construction, legislative history may be reviewed to resolve an ambiguity in a statute, but it may not be relied on to create an ambiguity which is not apparent on the face of a statute. Therefore, the question is whether the Preemption Clause is facially ambiguous as to the

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authority of the state to assess cellular providers for programs such as the Universal Service and Lifeline Programs.

While the DPUC claims an ambiguity exists in that portion of the Preemption Clause which states:

> ... this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services ...

the court finds the following portion of the same subparagraph more to the point:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

The rules of statutory construction require that no language in a statute be read to be redundant. Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.

By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs.

ARTICLE SECOND STANDARDS FOR DELEGATION

Article Second of the Constitution of Connecticut, as amended by Article XVIII of its Amendments, provides:

> The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

*4 The leading Connecticut case in which a delegation of authority by the legislature to the executive branch was voided for lack of sufficient standards is State v. Stoddard, 126 Conn. 623 (1940). In Stoddard, the court found that the challenged statute did not contain sufficiently definite standards for the exercise of the delegated authority, with the result that the executive branch was exercising an essentially legislative function in violation of Article Second. Stoddard dealt with a statute which authorized the state's milk administrator "to establish, from time to time, a minimum price for the different milk areas of the state for each class and grade of milk or milk products ..." The statute in issue contained only the following standard to guide the exercise of the delegated authority: "In establishing minimum prices for milk under the provisions of [the statute in issue], the milk administrator shall take into consideration the type of container used and other cost factors which should influence the determination of such prices." The court said that, in order to comply with the provisions of Article Second, a statute which delegates authority must establish "primary standards" for the exercise of that authority. Finding no such standards in the milk price act, the Court held it unconstitutional. Our courts have decided a number of cases sustaining legislative delegations to the executive branch, of which the following are examples:

> Biz v. Liquor Control Commission, 133 Conn. 556 (1947), in which the court found

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sufficiently definite the standards in a statute which authorized the Liquor Control Commission to refuse to grant a liquor permit if the commission:

has reasonable cause to believe ... that the number of permit premises in the locality is such that the granting of a permit is detrimental to public interest, and, in reaching a conclusion in this respect, the commission may consider the character of, the population of, the number of like permits and number of all permits existent in, the particular town and the immediate neighborhood concerned, the effect which a new permit may have on such town or neighborhood or on like permits existent in such town or neighborhood ...;

Id., 721; and,

Roan v. Conn. Industrial Building Comm., 150 Conn. 333 (1963), in which the court found sufficiently definite, for constitutional purposes, the standards governing the making of mortgage loans by a commission of the executive branch to private sector borrowers, which the court paraphrased as follows:

The commission ... has ... to decide that the mortgage (1) is one made and held by an approved mortgagee, responsible and able to service the mortgage properly; (2) involves a principal obligation not in excess of $5,000,000 for any one project and not exceeding 90 percent of the cost of the project; (3) has a maturity within three-quarters of the remaining useful life of the property but not more than twenty-five years; (4) contains complete amortization provisions requiring periodic payments within the ability of the mortgagor to pay; and (5) contains essential provisions as to property insurance, repairs, taxes, default and similar matters.

Id., 344; and,

*5 University of Connecticut Chapter, AAUP v. Governor, 200 Conn. 386 (1986), in which the court upheld a statute authorizing the governor to reduce budgetary allotments, in the court's words:

if (1) due to a change in circumstances since the budget was adopted certain reductions should be made in various allotments of appropriations, or (2) the estimated budget resources during such fiscal year will be insufficient to pay all appropriations in full ...

Id., 398.

The Connecticut case which, on its facts, is closest to these appeals is Kellems v. Brown, 163 Conn. 478 (1972), which concerned a statute creating a tax on dividend income and authorizing the tax commissioner to adopt regulations for the operation and enforcement of that tax. The authority of the commissioner to adopt regulations was challenged on Article Second grounds, and the court noted that:

The power granted to an administrative board or official may include, but is not limited to, the establishment of filing requirements, the hearing of administrative appeals, the finding of facts, and the determination of when as opposed to how a tax may be imposed.

Id., 499.

In Kellems the court went on to describe the separate legislative and administrative functions under the statute at issue, as follows:

The General Assembly specifically levied the tax, the rate prescribed and defined the income subject to taxation as well as the persons who are required to pay. 12-505, 12-506. It then authorized the tax commissioner to (1) prescribe the information required of the taxpayer, (2) to design forms for returns, (3) to require the submission of copies of federal income tax returns and supporting records, (4) to extend time limitations, and (5) to promulgate regulations for enforcement of the act and collection of the prescribed tax.

Id., 500.

In holding the above-described statutory standards sufficiently definite, the Kellems court observed that:

As long as revenue legislation sets out with

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specificity the rate of the tax, the instances where it is to be imposed and those who will be liable to pay it, there is no impermissible delegation of legislative power merely because the details of regulation and enforcement are left to administrative action.

Id., 501.

While Kellems concerned a tax statute, the analysis employed by the Kellems court is the same as that which appears in the other decisions cited above. Accordingly, the court concludes that Kellems is another in the line of well established Article Second delegation cases, and that Kellems is not a separate genre of tax case which deals, incidentally, with delegation issues. Therefore, it is not necessary for the court to decide whether, in a technical sense, assessments for the Universal Service and Lifeline Programs would constitute taxes in order to determine whether the Kellems analysis applies to these appeals.

The view that it does not matter, for Article Second purposes, whether payments made pursuant to P.A. 94-83 are denominated taxes or assessments is confirmed by an analysis of the elements of those types of imposition. Each involves a taking by government of money from a party in order to fund expenditures which have a presumed public purpose. (Since the constitutionality of the disbursement by the DPUC, outside of the legislative appropriation process, of monies raised by its assessments has not been raised in these appeals, and since a determination of the constitutionality of those disbursements is not necessary to a decision in these appeals, that issue is not addressed here.) In a constitutional sense, it makes no difference whether the authority for such a taking is characterized as a tax, an assessment or otherwise, because the consequence is the same; a lighter purse. One has a right to know that such a fiscal invasion is authorized by a constitutionally sufficient legislative directive. Accordingly, the standards laid out in Kellems apply to the delegation provisions of P.A. 94-83.

*6 The authority for the DPUC, under P.A. 94-83, to establish and fund the Universal Service Program is as follows: The [DPUC] may, if necessary, establish a universal service program, funded by all telecommunications companies or users in the state on an equitable basis, as determined by the [DPUC] ...

§ 16-247e(b), C.G.S.

The authority for the DPUC, under P.A. 94-83, to establish and fund the Lifeline Program is as follows:

y(3)27 The [DPUC] shall ... establish a lifeline program funded by all telecommunications companies on an equitable basis, as determined by the [DPUC] ...

§ 16-247e(a), C.G.S.

The narrow issue before the court is whether the language "on an equitable basis, as determined by the [DPUC]," as used in the legislative delegation of authority to the DPUC to fund the Universal Service and the Lifeline Programs, "sets out with specificity the rate of the [assessment], the instances where it is to be imposed and those who will be liable to pay it ...," as required by Kellems. Id., 501.

The determination of what is "equitable" is subjective, and therefore one person may find equitable what another finds distinctly inequitable. Because "equitable" is subject to many interpretations, it is the DPUC, in determining what is equitable, which "sets out with specificity the rate of the [assessment]," which determines "the instances where it is to be imposed" and which determines "those who will be liable to pay it." Because, according to Kellems, those determinations can only be made by the legislature, the grant of funding authority to the DPUC in P.A. 94-83 does not pass Kellems muster. Further, the single word "equitable" does not meet the criteria for primary standards developed by Stoddard, Biz and Roan. Accordingly, the funding mechanisms established by P.A. 94-83 violate Article Second.

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The grant of authority to the DPUC, in P.A. 94-83, to establish the Universal Service Program "if necessary" raises a similar Article Second issue. However, that issue has not been raised by the parties, and its determination is not necessary to a decision in these appeals. Accordingly, that issue is not addressed here.

VOID FOR VAGUENESS DUE PROCESS STANDARDS

In State Mgmt. Assn. of Connecticut, Inc. v. O'Neill, 204 Conn. 746 (1987), a statute was challenged on due process vagueness grounds. The Court upheld the challenged statute and noted: Courts have derived the void for vagueness doctrine from the constitutional guarantee of due process. Civil statutes must be definite in their meaning and application, but may survive a vagueness challenge by a lesser degree of specificity than in criminal statutes. Due process of law requires that statutes must be sufficiently definite and precise to enable a person to know what conduct is permitted and what is prohibited. An imprecise statute, however, may be sufficiently definite if it provides reasonably distinct boundaries for its fair administration.

Id., 757-58. (Citations and quotation marks omitted.)

*7 In Bottone v. Westport, 209 Conn. 652 (1989), the court, after citing State Management Assn., refined the due process standard to be applied to void for vagueness challenges, as follows: Specifically, the standard is whether the statute afford[s] a person of ordinary intelligence a reasonable opportunity to know what is permitted or prohibited.

Id., 667. (Citations and quotation marks omitted.)

Void for vagueness challenges on due process grounds are raised most frequently against criminal statutes, and therefore the test of whether a statute allows one to discern what is permitted or prohibited is framed for analysis of a criminal statute. However, the concept underpinning the standard, that is, whether a statute is drafted with the clarity or specificity needed to allow one to know to what it applies, can be applied as readily to challenges to legislative delegations as it can to legislative declarations of forbidden behavior.

Applying this due process test to P.A. 94-83, the question is whether the language "on an equitable basis, as determined by the [DPUC]" affords a person of ordinary intelligence a reasonable opportunity to know against whom assessments for the Universal Service and Lifeline Programs can be levied, and in what amounts. Those questions are answered in the negative, and it is held that the funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83 are void for vagueness under the due process clause of the Connecticut Constitution, Article First, Section 8, as amended by Article XVII of its Amendments.

EFFECT OF THE 1996 ACT

As noted above, the 1996 Act provides: "A state may adopt regulations not inconsistent with the [FCC's] rules to preserve and advance universal service." As the parties stipulated at argument, the FCC has not yet adopted any such rules, and Connecticut has not adopted any such regulations. Accordingly, neither the 1996 Act, nor anything done by Connecticut pursuant to it, negates the Budget Act's preemption of Connecticut's ability to assess Metro Mobile for the Universal Service and Lifeline Programs.

CONCLUSION

It is held that:
1) Substantial rights of Metro Mobile have been prejudiced by the DPUC decisions appealed from;
2) The DPUC's declared intent to assess Metro Mobile for the Universal Service and Lifeline Programs violates the Budget Act; and,
3) The funding mechanisms for the Universal Service and Lifeline Programs contained in P.A. 94-83, on which the

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decisions appealed from are based, violate Article Second and the due process clause of The Connecticut Constitution. These appeals are sustained.

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Copy to: Steve Bowen

Copy to: Richard Nelson, Thomas Rutledge, Lesley Southard

EYI

Good Decision!

NO. CV-95-0051275S

METRO MOBILE CTS OF FAIRFIELD COUNTY, INC., METRO MOBILE CTS OF HARTFORD, INC., METRO MOBILE CTS OF NEW HAVEN, INC., METRO MOBILE CTS OF NEW LONDON, INC., AND METRO MOBILE CTS OF WINDHAM INC.

: SUPERIOR COURT

V.

: JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

NO. CV-95-0550096S

METRO MOBILE CTS OF FAIRFIELD COUNTY, INC., METRO MOBILE CTS OF HARTFORD, INC., METRO MOBILE CTS OFF NEW HAVEN, INC., METRO MOBILE CTS OF NEW LONDON, INC. AND METRO MOBILE CTS OF WINDHAM, INC.

: SUPERIOR COURT

V.

: JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

: DECEMBER 9, 1996

MEMORANDUM OF DECISION

INTRODUCTION

The two captioned matters are appeals from decisions of the Department of Utility Control ("DPUC"). Because they have the same parties and turn on the same issues, they have been consolidated for argument and decision, and this decision applies to both.

OFFICE OF THE CLERK SUPERIOR COURT

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In 1994, the General Assembly adopted P.A. 94-83 which, in its amendments to §16-247a, C.G.S.:

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