

"the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation." *Id.*

B. FEDERAL PREEMPTION PROHIBITS THE COMMISSION FROM IMPOSING A KUSF OBLIGATION ON CMS PROVIDERS

In Paragraph 187 of the December 27 Order, the Commission concludes that Commercial Mobile Service providers must contribute to the KUSF in accordance with Paragraphs 109 and 110 and Operative Paragraph on page 77 of the Order. The Commission relied on Kan. Stat. Ann. § 66-2208(b)'s mandate that all telecommunication carriers contribute to the KUSF fund. The Federal Act, however, expressly preempts state imposition of such obligations. 47 U.S.C. § 332(c).

The Federal Act provides that the Commission may not impose universal service funding obligations on CMS providers in the absence of a finding that CMS providers in Kansas are a substitute for land line telecommunications services provided by incumbent Local Exchange Carriers ("LECs"):

(3) State Preemption. -- (A) Notwithstanding Sections 2(b) and 221 (b), no 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 imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates...

47 U.S.C. § 332(c)(3) (emphasis supplied).

Under the Supremacy Clause of the Constitution, art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of Congress are invalid. *United States v. City of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). "Federal law preempts state law explicitly if the language

of the federal statute reveals an express congressional intent to do so." *Id.*, 100 F.3d 1509, 1512 (10th Cir. 1996) (citing *Barnett Bank v. Nelson*, 116 S. Ct. 1103, 1107-08, 134 L.Ed.2d 237 (1996)). Because the language of the Federal Act conveys an express legislative intent to preempt state law, the Federal Act prohibits any state statute from imposing contrary obligations on CMS providers.

A Connecticut Superior Court recently rendered a similar conclusion in *Metro Mobile CTS of Fairfield County, Inc. v. Connecticut Dep't of Public Utility Control*, No. CV-95-0051275S, 1996 WL 737480 (Conn.Super., Dec. 11, 1996), (Attached at Tab A). The Connecticut Department of Utility Control determined that CMS providers were subject to the state universal fund requirements under a Connecticut statute imposing such requirements on "all telecommunications companies." *Id.* On appeal, the Connecticut Superior Court reversed the agency's decision, determining that the assessment was prohibited under the Supremacy Clause. *Id.* at 3. The court explained that "[b]y 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." *Id.*

The Commission's Order completely ignores the preemption mandate in Section 332(c)(3) of the Federal Act.² The Commission failed to make a finding that CMS is a substitute for land line telephone exchange services for any portion of local land line communications within Kansas in its December 27 Order. The record is devoid of any evidence to support such a finding.

² The Federal Communications Commission recently recognized the applicability of Section 332 to CMS, even noting its intent to enforce Section 332(c)(3). See First Report and Order, CC Docket Nos. 96-98 and 95-185 (Released August 8, 1996), Paras. 1023, 1024-25 (Attached at Tab B).

Indeed, the only evidence offered during the hearing before the Corporation Commission would support a finding that CMS is *not* a substitute. (Lammers Direct, page 27 lines 14-15; TR. 3024 lines 5-14)(attached hereto as Exhibit 1).

The Commission's failure to acknowledge and defer to federal preemption is both unlawful and unreasonable. *See Metro Mobile Control*, 1996 WL 737480 at 3. Accordingly, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE ORDER IS ENFORCED

The assessment of payments to the KUSF will cause Plaintiffs irreparable harm. The KUSF assessments against CMS providers are accruing even now, and have been since March 1, 1997. Because of the substantial nature of these assessments, all of the plaintiffs will be forced to pass those assessments to their customers. Such a substantial increase in the cost of Commercial Mobile Service will have a significant effect on the CMS market. CMS providers will lose *both* customers *and* revenue from those customers that remain. While plaintiffs expect that the assessments paid to the Commission will be returned ultimately, the plaintiffs will never be made whole for their lost customers and revenue.

These severe economic effects justify the entry of a preliminary injunction. By enjoining defendants from implementing the provisions of the Corporate Commission Orders until adjudication of Plaintiffs' claims, the Court can provide Plaintiffs with the ability to receive appropriate relief, without the threat of significant, long-term harm to their businesses.

D. THE THREAT OF HARM TO PLAINTIFFS FAR OUTWEIGHS POTENTIAL HARM TO THE COMMISSION

In contrast to the significant risk of harm to Plaintiffs if the injunction is not issued, the Commission will suffer little harm. Although the KUSF is scheduled to go into effect in April, 1997, the delay caused by the adjudication of this lawsuit will not significantly deter the goals of the fund. Most importantly, adjudication of this lawsuit will allow all of the parties, including the defendants, to proceed with certain knowledge of the legal limitations of the KUSF. In addition, Plaintiffs are prepared to post a bond with this Court in connection with their motion for a preliminary injunction. The bond ensures that the entry of an injunction will not harm the Corporation Commission or the KUSF.

E. ENTRY OF A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The entry of a preliminary injunction ensures that the KUSF will be administered in accordance with the mandates of federal law. This furthers the public's interest in seeing that its laws are enforced. In addition, by issuing an injunction, the Court will further the public interest in providing full relief to injured parties. If the KUSF is allowed to go into effect, Plaintiffs will forever lose their opportunity to obtain an adequate legal remedy. The severe harm caused by the improper charges to KUSF cannot be undone. This Court can ensure the opportunity for full relief by granting Plaintiffs' motion for a preliminary injunction.

III.

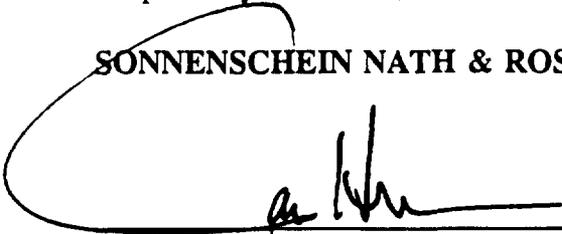
CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court to issue a preliminary injunction, as set forth in Plaintiff's Application, maintaining the status quo until a

hearing on the merits of Plaintiffs' claims can be held, and for such other relief as the Court deems appropriate and necessary under the circumstances.

Respectfully submitted,

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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 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 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

(Cite as: 1996 WL 737480, *3 (Conn.Super.))

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.*

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] ...

§ 16-247c(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.

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 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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Citation
1996 WL 152885 (F.C.C.)

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Federal Communications Commission (F.C.C.)

First Report and Order

IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE
TELECOMMUNICATIONS ACT OF 1996
CC Docket No. 96-98

Interconnection between Local Exchange Carriers and Commercial Mobile Radio
Service Providers
CC Docket No. 95-185

FCC 96-325

Adopted: August 1, 1996

Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong
issuing separate statements.

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the language in section 332(c)(1), stating that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection" expressly limits the Commission's authority to respond to a CMRS provider's request for interconnection and thus does not give the Commission jurisdiction over LEC-CMRS interconnection rates. [FN2425] BellSouth further argues that subjecting CMRS providers' charges for termination of LEC-originated calls to federal preemption would be inconsistent with Congress's determination in the 1996 Act that the terms and conditions of interconnection are to be decided by negotiation among LECs and telecommunications carriers, subject to the state review process. [FN2426]

3. Discussion

1022. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates. [FN2427] Other parties assert that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates. [FN2428] Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other. [FN2429]

1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal

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of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to



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LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

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1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers. [FN2430] We also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection. [FN2431] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

1026. Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may

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constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state. [FN2432] Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to



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FCOM-FCC

obtain the same treatment afforded other telecommunications providers under state law. [FN2433] Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file tariffs with the state commission. [FN2434] We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.



KUSF SUPPORT PAYMENTS

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- Q. Who should receive support?
- A. Per the recommendation in the USWG report, companies that provide service in high cost rural areas should receive support. Rural areas are defined as exchanges which have 10,000 or fewer access lines. The "High Cost" classification for an exchange(s) is declared when the incumbent LEC is a KUSF recipient. The Kansas Act provides KUSF distributions for companies "that are deemed eligible both under subsection(e)(1) of section 214 of the federal act and by the Commission." (Sec.9(c)) That could include Alternative LECs (ALECs) and make them eligible for KUSF to the extent that they provide service in the high cost rural area.
- Q. Should wireless providers be included in the eligibility for KUSF support payments?
- A. Wireless providers have made no showing that wireless service is indeed an equivalent substitution for wireline service. While the Kansas Act certainly leaves the door open for the wireless industry to receive support, there are a number of concerns which Staff should mention. The current problem of rebalancing access rates is tied to the support for wireline service and is not caused by wireless service. The problem is one that is tied to the regulated telecommunications industry. As a result payments should be directed initially to continue the support for universal service. Wireless companies will benefit because they will receive or have already received (through contract arrangements) reductions in the access charges they pay to complete calls terminating outside the local exchange. The Commission must continue to be attuned to the changes in technology and customer preferences which could shift away from wireline. Kansas certainly does not want to support a technology beyond its usefulness. Imagine if we all had telegraph

1 testimony, you address the issue of
2 substitutability of wireless service or wire line
3 service, do you see that?

4 A. Yes, sir.

5 Q. Okay. Do I read this as stating in
6 Staff's opinion, wireless service is not a
7 substitute for wire line service?

8 A. What I was pointing out here is that
9 the industry had not made a case that it was, and
10 at this point in time we are certainly not aware
11 that it is.

12 Q. Okay. And that includes both cellular
13 and PCS?

14 A. Yes.

15 Q. Right? If you go down a little farther
16 on that page, Line 17 through 19, where you
17 testified the current problem of rebalancing
18 access rates is tied to the support for wire line
19 service and is not caused by wireless service.
20 Do you see that testimony?

21 A. Right.

22 Q. So is it, is it your belief that the
23 wireless providers are not to blame for any of
24 the problems that are -- that, that the Staff and
25 other companies are attempting to solve through

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
BY
CLERK
U.S. DISTRICT COURT
DISTRICT OF KANSAS
KANSAS CITY, MO

MOUNTAIN SOLUTIONS, INC.,)
7720 West Jefferson)
Lakewood, CO 80235,)
)
SPRINT SPECTRUM, L.P.,)
4900 Main Street)
Kansas City, MO 64111,)
)
LIBERTY CELLULAR, INC.,)
621 Westport Boulevard)
Salina, KS 67401)
)
TOPEKA CELLULAR TELEPHONE COMPANY, INC.)
10895 Lowell)
Overland Park, KS 66210,)
)
AIRTOUCH CELLULAR)
OF KANSAS, INC.)
10895 Lowell)
Overland Park, KS 66210,)
)
MERCURY CELLULAR OF KANSAS, INC.)
Hilsernia Tower)
One Lake Shore Drive)
19TH Floor)
Lake Charles, LA 70624.)
)
WESTERN WIRELESS CORPORATION)
2001 NW Sammamish Rd.)
Issaquah, WA 98027)
)
CMT PARTNERS,)
10895 Lowell)
Overland Park, KS 66210, and)
)
DCC PCS, INC.,)
13439 North Broadway Extension)
Suite 100)
Oklahoma City, OK 73114)
)

Case No.: 97-2116-KHE

DOBSON CELLULAR OF KANSAS/
MISSOURI, INC.
13439 North Broadway Extension
Suite 100
Oklahoma City, OK 73114

Plaintiffs,

v.

THE STATE CORPORATION
COMMISSION OF THE
STATE OF KANSAS,

Serve:

The Attorney General
of the State of Kansas
Second Floor, Judicial Center
Topeka, KS 66612, and

NATIONAL EXCHANGE
CARRIER ASSOCIATION, INC.

Serve:

The Corporation
Company, Inc.
515 South Kansas Ave.
Topeka, KS 63603, and

CARLA STOVALL, ATTORNEY GENERAL OF
THE STATE OF KANSAS, IN HER OFFICIAL
CAPACITY

Serve:

The Attorney General
of the State of Kansas
Second Floor, Judicial Center
Topeka, KS 66612, and

TIMOTHY E. MCKEE, COMMISSIONER OF
THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS, IN HIS
OFFICIAL CAPACITY

Serve:

The Attorney General
of the State of Kansas
Second Floor, Judicial Center
Topeka, KS 66612, and

SUSAN M. SELTSAM, COMMISSIONER OF)
 THE STATE CORPORATION COMMISSION)
 OF THE STATE OF KANSAS, IN HER)
 OFFICIAL CAPACITY)
 Serve:)
 The Attorney General)
 of the State of Kansas)
 Second Floor, Judicial Center)
 Topeka, KS 66612, and)
)
 JOHN WINE, COMMISSIONER OF THE)
 STATE CORPORATION COMMISSION OF THE)
 STATE OF KANSAS, IN HIS OFFICIAL)
 CAPACITY)
 Serve:)
 The Attorney General)
 of the State of Kansas)
 Second Floor, Judicial Center)
 Topeka, KS 66612,)
)
)

Defendants.)

VERIFIED COMPLAINT
FOR PRELIMINARY AND PERMANENT INJUNCTION AND
DECLARATORY JUDGMENT

Sprint Spectrum, L.P., Mountain Solutions, Inc., Liberty Cellular, Inc., Topeka Cellular Telephone Company, Inc., AirTouch Cellular of Kansas, Inc., CMT Partners, Mercury Cellular of Kansas, Inc., DCC PSC, Inc. Corporation, Dobson Cellular of Kansas/Missouri, Inc. and Western Wireless Corporation ("Plaintiffs"), for their Complaint against The State Corporation Commission of the State of Kansas; National Exchange Carrier Association, Inc., Carla Stovall, the Attorney General of Kansas, in her official capacity; and Timothy E. McKee, Susan M. Seltsam and John Wine, Commissioners of State Corporation Commission of the State of Kansas, each in their official capacity ("Defendants"), allege and state as follows:

I. INTRODUCTION

This dispute arises from Orders issued by the State Corporation Commission of the State of Kansas (the "Corporation Commission") on December 27, 1996 and February 3, 1997, and the enactment of the Kansas Telecommunications Act, [K.S.A. 66-2000 et seq.] ("The State Act"), on July 1, 1996. The Corporation Commission's Orders ruled on matters related to telecommunications in Kansas, and in particular, to the Kansas Universal Service Fund. Among other things, the Orders directed Commercial Mobile Service ("CMS") providers, also known as wireless providers, to contribute to the Kansas Universal Service Fund. The Corporation Commission also found that neither the State Act, nor the Corporation Commission's rulings were inconsistent with or preempted by the Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq.

But the Corporation Commission was wrong. In the absence of a finding that Commercial Mobile Services are a substitute for a substantial portion of land line telephone exchange services within the State of Kansas, neither the State of Kansas nor the Corporation Commission can require CMS providers to contribute to the Kansas Universal Service Fund.

Plaintiffs in this case are members of the Commercial Mobile Services industry operating within the State of Kansas, and face immediate and irreparable harm if the Corporation Commission's unlawful Orders are not declared invalid.

II. PARTIES

1. Mountain Solutions, Inc. ("Mountain Solutions") is a corporation duly organized and existing under the laws of the State of Colorado with its principal place of business at 7220 West Jefferson in the City of Lakewood, County of Adams, State of Colorado. Mountain Solutions has acquired licenses issued by the Federal Communications Commission ("FCC") to

provide Personal Communication Services in Kansas. Mountain Solutions is a provider of CMS as that term is defined in section 332 of the Communications Act, 47 U.S.C. § 332.

2. Plaintiff Sprint Spectrum, L.P. ("Sprint Spectrum") is a limited partnership duly organized and existing under the laws of the state of Delaware with its principal place of business at 4900 Main Street, in the City of Kansas City, County of Jackson, State of Missouri. Sprint Spectrum does business under the name of Sprint PCS. Sprint Spectrum has acquired licenses from the FCC to provide Personal Communication Services in Kansas. Sprint Spectrum is a CMS provider.

3. Liberty Cellular, Inc. ("Liberty Cellular") is a corporation duly organized and existing under the laws of the State of Kansas with its principal place of business at 621 Westport Boulevard, in the City of Salina, County of Saline, State of Kansas. Liberty Cellular does business under the name of Kansas Cellular and provides Cellular Services within the State of Kansas pursuant to licenses issued by the FCC. Liberty Cellular is a CMS provider.

4. Topeka Cellular Telephone Company, Inc. ("Topeka Cellular") is a Kansas Corporation duly organized and existing under the laws of the State of Kansas, with its principal place of business at 10895 Lowell, City of Overland Park, County of Johnson, State of Kansas. Topeka Cellular is authorized by the FCC to provide cellular services within the State of Kansas. Topeka Cellular is a CMS provider.

5. CMT Partners is a general partnership duly organized and existing under the laws of Delaware with its principal place of business at 10895 Lowell, City of Overland Park, County of Johnson, State of Kansas. CMT is authorized by the FCC to provide cellular services within the State of Kansas. CMT Partners is a CMS provider.

6. AirTouch Cellular of Kansas, Inc. ("AirTouch") is a Kansas Corporation duly organized and existing under the laws of the State of Kansas, with its principal place of business at 10895 Lowell, City of Overland Park, County of Johnson, State of Kansas. AirTouch is authorized by the FCC to provide cellular services within the State of Kansas. AirTouch is a CMS provider.

7. Mercury Cellular of Kansas, Inc. ("Mercury Cellular") is a Kansas Corporation duly organized and existing under the laws of the State of Louisiana, with its principal place of business at Hibernia Tower, One Lake Shore Drive, 19th Floor, City of Lake Charles, Parrish of Calcasieu, State of Louisiana. Mercury Cellular is authorized by the FCC to provide cellular services within the State of Kansas. Mercury Cellular is a CMS provider.

8. Western Wireless Corporation ("Western Wireless") is a corporation duly organized and existing under the laws of the State of Washington with its principal place of business at 2001 NW Sammamish Road, Suite 200, City of Issaquah, County of King, State of Washington. Western Wireless is authorized by the FCC to provide cellular services within the State of Kansas. Western Wireless does business under the name Cellular One in parts of Kansas. Western Wireless is a CMS provider.

9. DCC PCS, Inc. ("DCC PCS") is a corporation duly organized and existing under the laws of the state of Oklahoma, with its principal place of business at 13439 North Broadway Extension, Suite 100, in the city of Oklahoma City, State of Oklahoma, County of Oklahoma. DCC PSC, Inc. has acquired a license from the FCC to provide Personal Communications Services within the State of Kansas. DCC PCS is a CMS provider.

10. Dobson Cellular of Kansas/Missouri, Inc. ("Dobson Cellular") is a corporation duly organized and existing under the laws of the State of Oklahoma with its principle place of

business at 13439 North Broadway Extension, Suite 100, in the city of Oklahoma City, State of Oklahoma, County of Oklahoma. Operating under the business name of Cellular One, Dobson Cellular offers cellular services within the State of Kansas as authorized by the FCC. Dobson Cellular is a CMS provider.

11. Defendant, The State Corporation Commission of the State of Kansas (the "Corporation Commission") is a state agency organized under K.S.A. § 66-101, et seq., for the purpose of regulating public utilities in the State of Kansas. The address of the Corporation Commission is 1500 S.W. Arrowhead, Topeka, Kansas 66604-4027. Pursuant to K.S.A. § 60-304(d)(5), service of process should be made upon the Attorney General of the State of Kansas, Judicial Center, Second Floor, Topeka, Kansas 66612.

12. Defendant National Exchange Carrier Association, Inc. ("NECA") is a Delaware not-for-profit corporation that has been selected by the Defendant Corporation Commission as the administrator of the Kansas Universal Service Fund. NECA's address is: 1001 Craig Road, St. Louis, Missouri 63146. NECA's Registered Agent for service of process is The Corporation Company, Inc., 515 South Kansas Ave., Topeka, Kansas 66603

13. Defendant, Carla Stovall, the Attorney General of the State of Kansas, is named in her official capacity. Service of process on the Attorney General should be made by certified mail to The Attorney General of the State of Kansas, Judicial Center, Second Floor Topeka, KS 66612.

14. Defendant, Timothy E. McKee, a Commissioner of the State Corporation Commission of the State of Kansas, is named in his official capacity. Service of process on Timothy E. McKee should be made by certified mail to The Attorney General of the State of Kansas, Judicial Center, Second Floor Topeka, KS 66612.

15. Defendant, Susan M. Seltsam, a Commissioner of the State Corporation Commission of the State of Kansas, is named in her official capacity as a representative of the the State Corporation Commission of the State of Kansas. Service of process on Timothy E. McKee should be made by certified mail to The Attorney General of the State Corporation Commission of the State of Kansas, Judicial Center, Second Floor Topeka, KS 66612.

16. Defendant, John Wine, a Commissioner of the State Corporation Commission of the State of Kansas, is named in his official capacity as a representative of the State of Kansas. Service of process on Timothy E. McKee should be made by certified mail to The Attorney General of the State of Kansas, Judicial Center, Second Floor Topeka, KS 66612.

III. JURISDICTION AND VENUE

17. This is an action for a preliminary and permanent injunction and declaratory judgment for the purpose of determining a federal question of actual controversy between the parties. This Court has jurisdiction of the claims presented pursuant to 28 U.S.C. §§ 1331 and 2201.

18. Venue is proper pursuant to 28 U.S.C. § 1391 because the Corporation Commission is an agency of the State of Kansas and because a substantial portion of the events giving rise to the claims occurred in this District.

IV. FACTUAL ALLEGATIONS

19. Plaintiffs in this case are members of the CMS industry within the State of Kansas.

20. Regulation of telecommunications services in the United States is largely governed by the Communications Act of 1934, as amended, 47 U.S.C. § 1st, et seq. (the "Communications Act"). The authority to regulate providers of Commercial Mobile Services is conferred upon the Federal Communications Commission. The Communications Act defines Commercial Mobile

Services to include "any mobile service...that is provided for profit and makes interconnected service available (a) to the public or (b) to such classes of such eligible users as to be effectively available to a substantial portion of the public..." 47 U.S.C. § 332(d)(1). Personal Communication Services and Cellular Services fall within the definition of Commercial Mobile Services.

21. The Communications Act provides that state regulatory authorities such as the Corporation Commission may not regulate the rates charged by CMS providers, and that those authorities may not impose universal service funding obligations on CMS providers unless a finding has been made by the FCC that CMS providers are a substitute for a substantial portion of land line telecommunications services provided in Kansas:

(3) State Preemption. -- (A) Notwithstanding Sections 2(b) and 221 (b), no 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 imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates...

47 U.S.C. § 332(c)(3) (emphasis supplied).

22. On April 4, 1996, the Corporation Commission established the Kansas Universal Service Fund ("KUSF") to administer the collection and distribution of universal service support payments. The purported purpose of the KUSF is to ensure the universal availability of telecommunications service in Kansas.

23. On July 1, 1996, the Kansas Telecommunications Act (the "State Act") became effective. The State Act directs the Corporation Commission to require every telecommunications