

While the controversy between the parties is clear, the legal relationship between DSMI and Beehive, and the legal status of SMS/800 access service, has remained unsettled despite substantial litigation and an intervening federal law. That uncertainty gave rise to this case and the need for declaratory relief.

The controversy between DSMI and Beehive stems from the FCC's anomalous attempt to regulate SMS/800 access as a common carrier service under Title II of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. sections 271-276. Beehive, DSMI, and the Bell Operating Companies (the "BOCs") at least agree that SMS/800 access service should not have been subjected to tariff regulation under Title II. DSMI and Beehive disagree sharply, however, on how SMS/800 access must be provided after Congress remedied the FCC's mistake by the passage of the Telecommunications Act of 1996 (the "Telecom Act").

B. The Telecom Act

Under the Telecom Act, access to the SMS/800 could no longer be considered a common carrier service. The SMS/800 is a "network element," which the statute defines as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. section 153(29).²

² The term also includes features, functions, and capabilities that are provided by means of [network elements], including subscriber numbers, databases ... and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. section 153(29).

When it implemented the Telecom Act, the FCC confirmed that "service management systems" ("SMSs") are network elements. See, Local Competition Provisions of the 1996 Telecommunications Act, 4 Com. Reg. (P&F) 1, 136-138 (1996) ("Interconnection Order"). The FCC promulgated rules that specifically require incumbent local exchange carriers ("ILECs") to provide access to SMSs, on an unbundled basis, to requesting telecommunications carriers, such as Beehive. See, 47 C.F.R. sections 51.307 and 51.319(e)(3). The SMS/800 meets the FCC's definition of an SMS.³

The Telecom Act imposes the duty on an ILEC to negotiate in good faith with any requesting telecommunications carrier to provide "nondiscriminatory access" to an SMS under rates, terms, and conditions that are just and reasonable. See, 47 U.S.C. sections 251(c)(1) and (3). See also, 47 C.F.R. section 51.307(a). The rates, terms, and conditions of SMS access are to be set forth in an agreement entered into through voluntary negotiations, mediation, or compulsory arbitration. See, 47 U.S.C. sections 252(a) and (b). See also, 47 C.F.R. section 51.307(a).

C. Count I

DSMI does not contest the legal conclusions that the SMS/800 is a network element and that the BOCs, as ILECs, have a duty to negotiate with Beehive to provide it with non-discriminatory access to the SMS/800. See, Amended Counterclaim, at paras. 55-57.

³ The FCC defines an SMS "as a computer database or system not part of the public switched network that, among other things: (1) interconnects to the service control point and sends to that service control point the information and call processing instructions needed for a network switch to process and complete a telephone call; and (2) provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call." 47 C.F.R. section 51.319(e)(3)(A).

DSMI only claims that it is neither an ILEC nor a common carrier. See, DSMI's "Memorandum in Support of Motion to Dismiss Amended Counterclaim or, in the Alternative, to Refer Certain Claims to the Federal Communications Commission, and to Stay Action Pending Referral (hereafter "DSMI Memorandum"), at 2-8. Therefore, DSMI contends that the Court cannot issue a declaratory ruling that the BOCs must provide SMS/800 access as required by the Telecom Act, because the BOCs are not parties to this case. See, DSMI Memorandum, at 8. Hence, argues DSMI, Count I lacks a "case or controversy." See, DSMI Memorandum, at 9.

DSMI mischaracterizes the relief sought under Count I. The Court is not asked to rule that the BOCs must do anything. Beehive asks for an order declaring that "SMS/800 access must be provided under intercarrier agreements" pursuant to sections 251 and 252 of the Telecom Act. Amended Counterclaim, para. 57. Thus, the BOCs are not needed for an adjudication of the issues under Count I.

By declaring that SMS/800 access must be provided under intercarrier agreements in accordance with the Telecom Act, the Court will resolve the current controversy between the parties. The ruling effectively will invalidate the SMS/800 Tariff, because the rates, terms, and conditions of SMS/800 access cannot be published in a federal tariff if they are to be established by individual negotiations (or arbitrations) and set out in state-approved agreements. See, 47 U.S.C. section 252. And the Court will conclusively establish that access to the SMS/800 is governed by sections 251 and 252 of the Telecom Act, not by the tariff requirement of section 203 of the Act.

Beehive has not asked that DSMI be ordered to enter into an intercarrier agreement. But compare, DSMI Memorandum, at 9. Beehive only asks the Court for a ruling that will set in motion the process of negotiation required by the Telecom Act. As a result, the Court can accord Beehive relief without regard to whether DSMI is a carrier or an ILEC, and without impairing the interests of a non-party.

To meet its duty under the Telecom Act to negotiate in good faith, see 47 U.S.C. section 251(c)(1), an ILEC must "designate a representative with authority to make binding representations" in its negotiations with requesting carriers. 47 C.F.R. section 1.301(c)(7). That representative, of course, can be an agent. See, Interconnection Order, 4 Com. Reg. (P&F), at 48. DSMI is both an agent of the BOCs and their designated representative with respect to the BOCs. If it is not the appropriate party to negotiate with Beehive, DSMI is in the best position to determine the ILEC (the BOC) that can provide Beehive with access to the SMS/800. Therefore, DSMI is the proper party to be bound by the Court's judgment.

D. Count II

DSMI intends to reassign the 10,000 "800" numbers sought by (and previously assigned to) Beehive. DSMI claims that its contract with the BOCs empowers it to administer "800" numbers. See, Complaint, para. 7. Beehive argues that DSMI was barred by the Telecom Act from acting as the "800" number administrator, and in this regard, from "repossessing" the "800" numbers which previously had been given to Beehive; likewise, DSMI would have no right to reassign any of the Beehive "800" numbers. That

is a "substantial controversy" under the familiar test of Maryland Casualty.

Count II seeks a declaratory judgment that DSMI is not an "impartial" entity within the meaning of section 251(e)(1) of the Telecom Act, 47 U.S.C. section 251(e)(1). That judgment will settle the issue of DSMI's authority to administer "800" numbers under the SMS/800 Tariff, and terminate the uncertainty resulting from the FCC's failure to comply with the statutory directive that it "create or designate" an impartial number administrator by August 8, 1996. See, 47 U.S.C. section 251(d)(1); Local Competition Provisions of the 1996 Telecommunications Act, 4 Com. Reg. (P&F) 484, 490 (1996) ("Second Report and Order").

Beehive is not asking the Court to select DSMI's "replacement" or to perform any function which Congress may have delegated to the FCC. See, DSMI Memorandum, at 10-11. Count II presents an issue that requires the Court to determine the meaning of the term "impartial entity" used in section 251(e)(1). The Court has federal question jurisdiction under 28 U.S.C. section 331 to make that determination. See, e.g., Ivy Broadcasting Co. v. AT&T Co., 391 F.2d 486, 493 (2d Cir. 1968). Moreover, this federal question jurisdiction to construe section 251(e)(1), if carefully exercised, will not displace the FCC's governance of numbering administration, since this Court merely would be construing, rather than implementing, the statute or administering "800" numbers thereunder.

DSMI claims that the Telecom Act provides "no criteria" for judging impartiality. See, DSMI Memorandum, at 10. However, the Court can determine the plain meaning

of "impartial" without statutory guidance. See generally, MCI Telecommunications v. AT&T, 114 S.Ct. 2223, 2229-2230 (1994). Nor does the Court need the guidance of the FCC "since the only or principal dispute relates to the meaning of the statutory term, [and] the controversy must ultimately be resolved, not on the basis of matters with the special competence of the [agency], but by judicial application of canons of statutory construction." Barlow v. Collins, 397 U.S. 159, 166 (1970). In any event, the FCC's definition of "impartial" for purposes of section 251(e)(1) is available for consideration by the Court. See, Second Report and Order, 4 Com. Reg. (P&F), at 262.

Finally, the Court should disregard DSMI's dire prediction respecting the "collapse of the 800 number system" when considering this motion to dismiss. See, DSMI Memorandum, at 11. DSMI's claims to that effect are purely speculative. They ignore the ability of this Court narrowly to tailor relief to the issues at hand in this litigation, e.g., by requiring DSMI to restore the "800" numbers previously taken from Beehive. They likewise seem inconsistent with DSMI's prior concession that the SMS/800 itself is not essential to "800" number portability. See, Objections to Proposed Order, at para. 5. In any event, the FCC claims that an impartial numbering administrator has been designated. See, Second Report and Order, 4 Com. Reg. (P&F), at 264. It is reasonable to assume that a declaratory judgment disqualifying DSMI would prompt the FCC to name its successor, which by law the agency should have done, in any event, 7 months ago.

E. Count III

Beehive's third Telecom Act count challenges the legal effectiveness of the SMS/800

Tariff as the means to recover the costs of administering "800" numbers. Beehive alleges that the SMS/800 Tariff does not recover those costs from all "telecommunications carriers on a competitively neutral basis" as required by section 252(e)(2) of the Telecom Act, 47 U.S.C. section 251(e)(2). Beehive clearly has standing to raise that issue.

Beehive alleges facts sufficient to establish the injury, traceability, and redressibility elements of Article III standing. See, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). Beehive alleges that it paid charges (approximately \$7,500 per month) rendered under the SMS/800 Tariff that were discriminatory and not cost-based. See, Amended Counterclaim, at paras. 27, 34, and 49. The payment of such charges constitutes injury in fact.

Beehive's injury is fairly traceable to this alleged violation of section 251(e)(2) and redressable by the court. There certainly is a causal connection between the level of Beehive's payments and the fact that "800" number administrative costs have not been allocated as required under section 251(e)(2). Beehive's injury is easily redressed by a declaratory judgment that the administrative costs are not recoverable under the SMS/800 Tariff and by an award of damages.

Beehive's factual allegations of traceable injury are sufficient for the purpose of a threshold standing inquiry. Beehive's allegations, while general, suffice to withstand DSMI's motion to dismiss, because the Court should presume that "general allegations embrace those specific facts that are necessary to support the claim." Lujan, 504 U.S. at 561 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)).

F. Counts IV and V

DSMI attempts to evade the allegations of Counts IV and V of the Amended Counterclaim by insisting that liability under these claims is predicated upon the status of DSMI as an ILEC or a common carrier, and that DSMI is neither. Moreover, DSMI contends that it merely is acting as agent for the BOCs in administering the SMS/800 Tariff and that this agency status, which is different from the ILEC/common carrier status of the BOCs, immunizes DSMI from legal attack under the relevant provisions of the Act and the Telecom Act. These contentions of DSMI are answered in succession below.

Included in count IV of the Amended Counterclaim is the charge that DSMI violated section 251(c) of the Telecom Act by refusing to negotiate in good faith with Beehive to provide Beehive with nondiscriminatory access to the SMS/800. DSMI does not dispute that Beehive is entitled to obtain such access to the SMS/800 (a network element) pursuant to a negotiated agreement with an ILEC. DSMI only argues that it cannot be held liable under section 251(c), because it is not an ILEC. See, DSMI Memorandum, at 14. DSMI cannot dodge the section 251(c) duty to negotiate by that disclaimer.

DSMI admits that it is the agent of the BOCs and that the BOCs are ILECs. See, DSMI Memorandum, at 14. The SMS/800 is owned jointly by the BOCs. See, e.g., 800 Data Base Access Tariffs and the 800 Service Management System Tariff, 4 Com. Reg. (P&F) 1279, 1286 (1996). Therefore, the Court reasonably can assume that the duty to negotiate with Beehive falls on some BOC or the BOCs jointly. Beehive submits, however,

that the identity of the responsible BOC is immaterial.

The duty to negotiate under section 251(c) includes the duty to provide Beehive with the information necessary to speed the provisioning process. See, Interconnection Order, 4 Com. Reg. (P&F), at 48-49. See also, 47 C.F.R. sections 51.301(c)(8) and 51.307(e). Thus, the BOCs, or their agent, should have come forward to provide Beehive with the relevant information that it would need to reach an agreement to obtain SMS/800 access. At a minimum, Beehive is entitled to know the identity of the representative with whom it would negotiate. Indeed, the FCC has held that a failure to designate such a representative constitutes a failure to negotiate in good faith. See, Interconnection Order, 4 Com. Reg. (P&F), at 48.

The duty to negotiate in good faith under section 251(c) attached when Beehive contacted DSMI to commence the negotiation process. DSMI assumed that duty under section 217 of the Act, 47 U.S.C. section 217, by acting as the agent of the BOCs for the specific purpose of providing SMS/800 access.⁴ At the very least, DSMI could not intentionally obstruct or delay negotiations with Beehive. See, 47 C.F.R. section 51.301(c)(6). Thus, DSMI should have begun negotiations, or referred Beehive to the designated representative of the BOCs.

⁴ Section 217 of the Act states: "In construing and enforcing the provisions of this chapter, the act, omission, or failure of any ... agent ... acting for or employed by any common carrier ..., acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier ..." 47 U.S.C. section 217 (emphasis added). The FCC has recognized that section 217 "merely extend[s] the Title II obligations" from carriers to their agents, and that it was intended to ensure that a carrier could not evade complying with the Act by acting through entities it controls. Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1482 (1994).

Beehive submits that DSMI should be held liable for its failure to comply with section 251(c) of the Telecom Act. DSMI is before the Court as the agent of the BOCs for the administration of the SMS/800 system. See, Complaint, para. 7. DSMI claimed that Beehive was indebted to it, as an agent of the BOCs, for the unpaid charges for SMS/800 services rendered under the SMS/800 Tariff on file with the FCC. See, id., at para. 15. If it can sue in its capacity as an agent for the BOCs, DSMI can be sued as an agent of the BOCs in the course of its employment as the SMS/800 administrator. However, if the Court determines otherwise, then the Court should order that the BOCs be made parties to this case, pursuant to Rules 19(a) and 21, Fed. R. Civ. Pro.

DSMI also attempts to avoid the impact of Counts IV and V of the Amended Counterclaim by insisting that DSMI is not a common carrier, subject to regulation under Title II of the Act. It is true that only common carrier activity is subject to regulation under Title II of the Act. See, Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1483 (D.C. Cir. 1994). The common carrier activity in this case is the provision of SMS/800 access service, which the FCC has held to be a common carrier service. See, Provision of Access for 800 Service, 8 FCC Rcd 1423, 1426 (1993). If SMS/800 is a common carrier service, as DSMI claims, then DSMI must be considered a "carrier" for the purposes of enforcing Title II of the Act.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. section 153(h).

The only identifiable "person" engaged in providing SMS/800 access for hire is DSMI.⁵

In BOC Petition for Waiver to Allow DSMI to Account for Toll Free Database Services, DA 97-316, slip op., at 4 (February 10, 1997) ("DSMI Accounting Order"), the FCC recognized that it is DSMI, not the BOCs, that provides SMS/800 access service:

While most tariffs filed with the Commission are filed by, or on behalf of, the entity that actually performs the service, the toll free database tariff has been filed jointly by the BOCs at the Commission's direction, even though the BOCs as a group cannot and do not directly provide the tariffed service. DSMI provides the central database service on behalf of the BOCs.

As this case demonstrates, access to the SMS/800 must be obtained from DSMI, and DSMI bills and collects payments from SMS/800 customers, such as Beehive. See, Complaint, at para. 7. Moreover, under the FCC's DSMI Accounting Order, all revenues and expenses associated with SMS/800 access are recorded only on DSMI's books; DSMI files an annual audit of its operations with the FCC; and the FCC requires DSMI to refund any profits made on the service by tariff adjustments. See, DSMI Accounting Order, slip op., at 5. Hence, DSMI is the entity "engaged as a common carrier for hire" in providing SMS/800 access service.

As the provider of SMS/800 access service, DSMI is the "carrier" that must provide the service upon "reasonable request" under 47 U.S.C. section 201(a), and without any "unjust or unreasonable discrimination" as required by 47 U.S.C. section 202(a). Moreover, because it receives the revenues from SMS/800 access service, DSMI is the "carrier" that

⁵ Under the Act, the term "person" includes an individual, partnership, association, joint stock company, trust, or corporation. 47 U.S.C. section 153(i).

must pay for damages caused by the unlawful provision of the common carrier service. See, 47 U.S.C. section 206.

Beehive agrees that the status of a common carrier is conferred not by ownership, but by "the functions performed by the entity in question." DSMI Memorandum, at 4. See, Southwestern Bell, 19 F.3d at 1481. The functions performed by DSMI in providing SMS/800 access service make it a common carrier. Therefore, DSMI is fully subject to the obligations and liabilities of a carrier under Title II of the Act.

DSMI relies on Allnet Communications Service, Inc. v. NECA, 741 F. Supp. 983, 985 (D.D.C. 1990), aff'd on other grounds, 965 F.2d 1118 (D.C. Cir. 1992), for the proposition that agents for common carriers are not common carriers. However, Beehive does not contend that DSMI is a common carrier because it is an agent of the BOCs. Beehive submits that DSMI is a common carrier because it is engaged in providing common carrier service (SMS/800 access) for hire. In any event, the Allnet holding cannot be applied to determine DSMI's status as a common carrier.

In Allnet, the plaintiff concluded that NECA was not a common carrier, because it "does not provide communications services and is not a carrier within the meaning of ... 47 U.S.C. section 153(h)." 741 F. Supp. at 984 n.5. The district court simply agreed with that conclusion. 741 F. Supp. at 984.⁶ Here, however, DSMI is the recognized

⁶ The district court concluded that the plaintiff had no federal cause of action, because NECA could not violate section 203 of the Act, 47 U.S.C. section 203, which prescribes tariffs only for common carriers. Allnet, 741 F. Supp. at 984-985. That reasoning was rejected by the D. C. Circuit Court of Appeals, which suggested that "an entity specifically created to collect charges on behalf of common carriers" could be subject to tariff regulation. 965 F.2d at 1120. The FCC subsequently ruled that NECA could file an enforceable tariff. See, Communique Telecommunications, Inc., 10 FCC Rcd 10399, 10403-10404 (Com. Car. Bur. 1995). The FCC also indicated that access customers could file complaints against NECA under

"provider" of SMS/800 access service, see, DSMI Accounting Order, slip op., at 4, and Beehive has shown that DSMI is a carrier within the meaning of 47 U.S.C. section 153(h).

Finally, DSMI cannot rely on the FCC's "order in Beehive's own case." DSMI Memorandum, at 7. That order was vacated by the D. C. Circuit Court of Appeals. See, Beehive Telephone, Inc. v. FCC, No. 95-1479 (D.C. Cir., December 27, 1996). In any event, the FCC found that DSMI was not a carrier, because the BOCs "control all fundamental aspects of [SMS/800] access through Bellcore." Beehive Telephone, Inc. v. The Bell Operating Companies, 100 FCC Rcd 10562, 10568 (1995). That ruling was made before the FCC put DSMI in control of the most fundamental aspects of SMS/800 access, and subjected DSMI to regulations applicable to common carriers under Title II of the Act and Part 32 of the FCC's rules. See, DSMI Accounting Order, slip op., at 1 and 2 and nn. 2 and 5.

G. Count VI

Count VI of the Amended Counterclaim, in essence, alleges that DSMI violated the SMS/800 Tariff which it is charged with administering. This is because, prior to "repossessing" the "800" numbers previously assigned to Beehive, DSMI did not follow the Tariff requirements of particular notice, good faith negotiations, and an opportunity for a hearing. Indeed, even after DSMI had initiated this litigation, with opportunity aplenty to present the "stockpiling" dispute for judicial resolution, DSMI proceeded unilaterally,

section 208 of the Act, 47 U.S.C. section 208, which permits complaints against common carriers. See, id., at 10405 and n.64.

without notice, and literally "in the dead of night," electronically to take back the numbers. This was in direct contravention of that same Tariff which, in pleading after pleading, and in hearing after hearing, before this Court, DSMI has argued that it may not deviate from one iota. So "sacred" and unbending is this Tariff.

In response to these allegations, DSMI does not dispute that it proceeded high-handedly to repossess the numbers, without notice, negotiation, or hearing, thus violating the SMS/800 Tariff for which it acts as guardian. Instead, DSMI creates a "strawman." DSMI mischaracterizes the Beehive allegations in Count VI as claims to a "proprietary" interest in the "800" numbers, lasting in perpetuity. Then DSMI contends that these allegations, as thus mischaracterized, do not state a claim for relief, because the Tariff grants no proprietary interest in the "800" numbers which were assigned to Beehive.

For purposes of Count VI of the Amended Counterclaim, however, Beehive may concede that it has no "proprietary" interest in the "800" numbers previously held by it. Beehive simply alleges that the 800 numbers which it held, whether on a proprietary or non-proprietary basis, could not be repossessed by DSMI in violation of the provisions of the Tariff, without prior notice, good faith negotiations, and an opportunity for hearing. The SMS/800 Tariff, as interpreted by DSMI, deals only with non-proprietary "800" numbers; nevertheless, as to these non-proprietary numbers, the Tariff forbids repossession without some form of due process. Count VI of the Amended Counterclaim alleges that exactly this occurred: DSMI breached the Tariff in re-taking the "non-proprietary" "800" numbers previously given to Beehive, without compliance with the requirements of that

Tariff for notice, negotiation, and hearing. DSMI's "strawman" of proprietary or non-proprietary numbers is irrelevant to these allegations and has nothing to do with the claim Beehive makes in Count VI.

H. Count VII

Count VII of the Amended Counterclaim, in essence, alleges that DSMI, acting as an arm of government, offended the due process clause of the Fifth Amendment to the United States Constitution when it unilaterally terminated the access rights of Beehive to SMS/800 service, and in the act of repossessing certain "800" numbers.

DSMI contends that Count VII fails to state a claim upon which relief may be granted because it omits to allege (1) any "state action,"⁷ and (2) any constitutionally protectible property interest under the Fifth Amendment due process clause.

1. State Action. Count VII does allege "state action," directly and sufficiently in paragraph 90 of the Amended Counterclaim. Other allegations in the Amended Counterclaim likewise speak to the question of the nexus between DSMI, the SMS/800 Tariff, and the FCC, showing that the behaviour of DSMI under the circumstances of this case rises to the level of governmental action.

The leading opinion on this score may be Public Utilities Commission of the District

⁷ "State action," of course, is needed to invoke the due process clause of the Fourteenth Amendment which applies to state governments, rather than the federal government. The Fifth Amendment, which is at stake in this litigation, applies to the federal government, rather than state governments. The concepts are related if not the same, and DSMI undoubtedly is using the rubric of "state action" to mean governmental action which brings the Fifth Amendment into play where a private entity is acting under some form of governmental authority. The question is whether the relation between governmental and private activity is sufficient to trigger certain constitutional protections.

of Columbia v. Pollak, 343 U.S. 451 (1951). In Pollak, a private railway company, acting pursuant to the regulations of the Public Utilities Commission of the District of Columbia, piped amplified music through loudspeakers installed on transit vehicles. Certain passengers complained that this program violated their First and Fifth Amendment rights, especially their right to privacy and against the "indoctrination" of radio programming. The threshold issue was whether the PUC's involvement in this innovative system was a governmental nexus with the private service sufficient to warrant the invocation of these constitutional rights. In other words, was there "state action."

The United States Supreme Court ruled that there was, finding "a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those [Constitutional] Amendments." Pollak, 343 U.S. at 462. The grounds for this conclusion were (1) that the private railway had transit authority in the District of Columbia which was controlled by Congress; (2) that pursuant to this federal franchise, the private railway had a substantial monopoly of this type of transportation in the regulated area; (3) that the railway company operated under the regulatory auspices of the PUC which is an agency authorized by Congress; and (4) because that agency specifically had investigated the radio programming in question, hearing protests from customers, opening a docket for investigation, and after formal public hearings, resolving and ruling on the issues at stake. These last two considerations especially were important to the court in Pollak. See, id., 343 U.S. at 462.

DSMI's administration of the SMS/800 Tariff meets all of these criteria for governmental, or "state" action. The administration of "800" numbers is a matter of national concern which has been addressed recently and specifically in section 251 of the Telecom Act. DSMI has a complete (not merely a substantial) monopoly in terms of administering these "800" numbers. DSMI was granted the "franchise" to monopolize the administration of "800" numbers through the auspices of a federal agency, namely the FCC. The FCC has established the regulatory parameters of that number administration through numerous rulings and regulations, many of them cited in this pleading. Congress itself, in section 251 of the Telecom Act, has defined certain conditions for this number administration. The "appointment" of DSMI as the "800" number administrator was at the invitation of the FCC, and after detailed investigations, public hearings, entertainment of objections, and the like by the FCC. The SMS/800 Tariff is not a general, boilerplate tariff which went into effect without question or controversy, but only after public input and deliberate agency resolution. Under these circumstances, the "state" action threshold has been crossed; application of the Fifth Amendment due process guarantees may be considered.

2. A Protectible Property Interest. On this issue, DSMI has one note to sing; the "800" numbers (as though they were all that is at stake) are "non-proprietary" under the SMS/800 Tariff, and hence, they are not protectible under the Fifth Amendment due process clause. But the question, "what is property which is protectible under the Fifth Amendment due process clause," is a federal constitutional question, to be answered by

this Court, not something to be determined by a bureaucratic agency, or concluded by the language in an FCC tariff. Here are the reasons for deciding that DSMI's actions deprived Beehive of property within the meaning of the due process clause of the Fifth Amendment.

a. DSMI focuses too narrowly on the "800" numbers. It has deprived Beehive of much more, that is, an entire bundle of services and entitlements which are available to customers such as Beehive under the SMS/800 Tariff. Indeed, in the view of DSMI, the "800" numbers, standing alone, have no meaning without access to the database of DSMI. By taking "800" numbers from a customer, DSMI deprives them of input to the system. Or by shutting off access into the system, the numbers alone may have no use. Speaking conceptually, the rights of a customer to employ the SMS/800 Tariff is like a contract right. These contract rights presumably have value, because Beehive has paid enormous fees to DSMI in the past year in order to preserve them. Contract rights, of course, are rights of property for due process purposes. And there are numerous United States Supreme Court and federal court rulings which so hold.

b. Even if one adopts the "strawman" position of DSMI, and looks exclusively at the deprivation of the "800" numbers, on the facts as alleged in the amended counterclaim, one can see property which is protectible under the Fifth Amendment. As noted above, the language of the SMS/800 Tariff, stating that these numbers are "non-proprietary" is inconclusive, if not meaningless, for due process purposes. These numbers are assigned or licensed to customers under terms and conditions, like any other form of property.

They have value, as property does, otherwise there would be no sense to the care with which the FCC regulates their distribution pursuant to the Tariff, and there would be no consideration for the fees which customers must pay in order to acquire the numbers and to employ them through the system of DSMI. This value is implied in the very act of repossession by DSMI, and in the energy with which it has resisted the injunction in this case, appealing to the Tenth Circuit Court of Appeals, prosecuting the present motion. Finally, the value of the number is much, much more than a metaphysical reality, as one can see from the Telecom Act itself. Congress specifically recognizes the value of the number in this new legislation, by emphasizing the need for number portability.

c. The amended counterclaim alleges that Beehive obtained its 10,000 "800" numbers from the BOCs, with a promise that they were assigned irrevocably to Beehive, and prior to the advent of the SMS/800 Tariff. It may be an open question whether the Tariff retroactively can impose conditions which lead to the dispossession of those numbers. The amended counterclaim alleges that, in reliance upon this promise of irrevocable assignment, Beehive created a system for the employment and marketing of these numbers, which consumed time, energy, ingenuity, and considerable capital. This investment is tangible property, all of which is lost if DSMI may override the procedures of the SMS/800 Tariff as well as the due process of the Fifth Amendment.⁸

⁸ The "goodwill" generated by this investment is a form of property which is recognized on the balance sheets of many enterprises.

d. As alleged in the amended counterclaim, the series of "800" numbers which Beehive asked for and obtained from the BOCs were endowed with the prefix "MAX." It is no secret that, through the magic of advertising, certain telephone numbers may develop "name recognition," and thus become valuable commodities. This in fact was the intention of Beehive in acquiring the MAX numbers. This is why Beehive has spent so many years and so much capital in building a computer system and marketing strategy to exploit the MAX prefix. Beehive is not alone in realizing the merit of this form of "number advertising." For example, one can see ATT as a number prefix in advertisements. Moreover, certain "boutique numbers" may be trademarkable under the federal trademark statute. See, e.g., Dial-A-Mattress Franchise Corporation v. Page, 880 F.2d 675 (2nd Cir. 1989). See generally, Smith, "Telephone Numbers that Spell Generic Terms: A Protectable Trademark or an Invitation to Monopolize a Market?" 28 U S. FRAN. L. REV. 1079 (1994).

In short, DSMI deprived Beehive of a bundle of rights, including without limitation the "800" numbers. These rights, taken together, are rights of contract, rights of investment, rights of good will, rights of name recognition, rights which Congress has recognized through the provisions for impartial number administration and number portability in the Telecom Act, rights which the FCC has recognized by authorizing the SMS/800 Tariff which forbids the repossession of these numbers absent the satisfaction of certain procedural safeguards, rights which DSMI recognizes by its efforts in this litigation. Surely these rights amount to property which may not be taken without due process of

law.

II. Beehive's Claims Should Not Be Referred to the FCC

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experience of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight. Far East Conference v. United States, 342 U.S. 570, 574 (1952). Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a particular agency. See, National Communications Associations, Inc. v. AT&T, 46 F.3d 220, 223 (2d Cir. 1995).

No fixed formula has been established for determining whether an agency has primary jurisdiction. See, United States v. Western Pacific Railroad Co., 352 U.S. 59, 65 (1965). However, 3 factors have been the focus of analysis: (1) whether the issues of fact raised in the case are not within the conventional experience of judges; (2) whether the issues of fact require the exercise of administrative discretion, or require uniformity and consistency in the regulation of business entrusted to a particular agency; and (3) whether there is the potential for inconsistent rulings by the district court and the agency. See, e.g., Mical Communications v. Sprint Telemedia, 1 F.3d 1031, 1036 (10th Cir. 1993). The court also must balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings. See, e.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 321 (1973).

Beehive will show that the issues presented by its claims are not appropriate for

referral to the FCC.

A. Telecom Act Claims

Beehive's Telecom Act claims (Counts I, II, and III of the Amended Counterclaim) do not present issues of fact. The issues are purely legal. It is well established that the courts need not resort to an agency "where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding prowess." Board of Education v. Harris, 622 F.2d 599, 607 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981). See, National Communications, 46 F.3d at 223; FTC v. Feldman, 532 F.2d 1092, 1096 (7th Cir. 1976).

DSMI effectively concedes that Beehive's Telecom Act claims do not present issues of fact or require an interpretation of the SMS/800 Tariff which "might need the FCC's technical or policy expertise." National Communications, 46 F.3d at 223. Noting that there have been few judicial interpretations of the Telecom Act, because it is "so new," DSMI simply contends that "the FCC should have the opportunity to render the initial interpretation of the statute it is charged to administer." DSMI Memorandum, at 26. However, the Court does not need FCC assistance to construe the Telecom Act; the FCC already has spoken on section 251 of the Telecom Act, and Congress has not charged the FCC exclusively with administering section 251.

As DSMI implicitly admits, Beehive's Telecom Act claims present legal issues of statutory construction. Count I turns entirely on whether the SMS/800 is considered a

"network element" under the Telecom Act definition. See, 47 U.S.C. section 153(29).⁹ Count II calls on the Court to determine whether DSMI is an "impartial entity" under the statute. See, 47 U.S.C. section 251(e)(1). And Count III requires the Court to construe the "competitively neutral basis" language of section 251(e). See, 47 U.S.C. section 251(e). Primary jurisdiction does not extend to these Telecom Act issues.

Statutory construction is manifestly "within the conventional competence of the courts." Trans-Allied Audit Co., Inc. v. Ram Trans., Inc., 760 F. Supp. 848, 851 (D. Col. 1989) (quoting Nader v. Allegheny Airlines, 426 U.S. 290, 305 (1976)). See, Barlow, 397 U.S. at 166; Morrell v. Harris, 505 F. Supp. 1063, 1068 (E.D. Pa. 1981). The Court is clearly competent to determine, for example, whether DSMI's description of the SMS/800 as a "database" containing information for the billing and routing of 800 calls fits the statutory definition of a network element. See, Complaint, para. 6. The Court need not defer to the FCC to construe the relevant Telecom Act provisions, especially since the FCC already has done so.

The FCC implemented section 251 of the Telecom Act in August, 1996, and it exercised its expertise to rule that call-related databases (including the "toll-free calling databases"), and SMSs are network elements. See, 47 C.F.R. sections 51.319(e)(2) and (3); Interconnection Order, 4 Com. Reg. (P&F), at 133-134 and 136. The FCC also ruled that nondiscriminatory access to such databases and SMSs must be provided as required by sections 251 and 252 of the Telecom Act. See, 47 C.F.R. section 51.307(a);

⁹ See, supra, at note 2 and accompanying text.

Interconnection Order, 4 Com. Reg. (P&F), at 68-69. In effect, the FCC has confirmed what Congress made clear -- access to the SMS/800 must be provided in accordance with sections 251 and 252 of the Telecom Act.

The Court should be "very reluctant" to refer a legal question to the FCC when the FCC already has spoken on the issue and its position is "sufficiently clear." Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757, 761 (N.D. Ga. 1992) (quoting Mississippi Power & Light v. United Gas Pipe Line, 532 F.2d 412, 419 (5th Cir. 1976)). The FCC has spoken with sufficient clarity to establish its position with respect to the status of the SMS/800 under the Telecom Act. The Court simply can adopt "the [FCC's] position, finding it sound as a matter of statutory construction." Id. at 761. If so, it must issue the declaratory judgment that access to the SMS/800 must be pursuant to a state-approved agreement, not under the federal SMS/800 Tariff.

A referral to the FCC also is inappropriate because the FCC lacks primary jurisdiction under sections 251 and 252 of the Telecom Act. The FCC's role in administering the local competition provisions of sections 251 and 252 is clearly subordinate to that of state commissions. Congress only gave the FCC the authority to "establish regulations to implement the requirements" of section 251. See, 47 U.S.C. section 251(d)(1). However, state commissions were empowered to mediate, arbitrate, and approve access agreements for network elements, see 47 U.S.C. sections 252(a) and (e), to adopt arbitration standards (including rates for network elements), see 47 U.S.C. section 252(c), to determine pricing standards on network elements charges, see 47 U.S.C. section

252(d), and to enforce state standards in the approval of inter-carrier agreements, see 47 U.S.C. section 252. Because the regulation of SMS/800 access is not "entrusted to a particular agency," see, Nader, 426 U.S. at 303-304, a referral to the FCC is not essential to secure uniformity in its regulation of telecommunications. See, National Communications, 46 F.3d at 224-225.

Finally, there is a need to resolve the Telecom Act issues quickly and fairly. Resolution of the issues already is overdue. The FCC should have implemented section 251 by August 8, 1996. Further delay will deny Beehive access to the "800" numbers it needs to compete in the "800" service market. Moreover, if delay stretches to the end of this year, the sale of Bellcore (DSMI's parent) by the BOCs further may interrupt and forestall a resolution of the issues, thereby prolonging regulatory uncertainty. See, DSMI Memorandum, at 4 n. 5. Under these circumstances, the fair administration of justice weighs substantially against referral.

B. The Section 201(a) Claim

Primary jurisdiction does not apply to cases involving the enforcement of an FCC tariff, as opposed to a challenge to the reasonableness of the tariff. See, National Communications, 46 F.3d at 223. Accordingly, the doctrine does not apply to Beehive's "refusal-to-serve" claim under section 201(a) of the Act, 47 U.S.C. section 201(a). The Court can enforce the SMS/800 Tariff to the extent of ordering DSMI to reinstate Beehive as a RespOrg.

Without conceding the legality of the SMS/800 Tariff, Beehive formally applied to