



Holland N. McTyeire, V  
Direct (502) 587-3672 Fax (502) 540-2223 E-mail hnm@gdm.com

*Via Hand Delivery*

October 20, 2005

Beth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40602-0615

RECEIVED  
OCT 20 2005  
PUBLIC SERVICE  
COMMISSION

Re: *Joseph Harold Durbin v. Cellular One*, Case No. 2005-00379

Dear Ms. O'Donnell:

Enclosed herewith please find for filing with the Commission the original and ten (10) copies of the Answer Of American Cellular Corporation in the above styled matter.

Please do not hesitate to contact the undersigned should you have any questions concerning this filing.

Sincerely,

Holland N. McTyeire, V

HNM/jh

Enclosures

cc: Herbert Kenney

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

FILED

OCT 20 2005

PUBLIC SERVICE  
COMMISSION

In the Matter of:

JOSEPH HAROLD DURBIN )

COMPLAINANT )

v. )

CELLULAR ONE )

DEFENDANT )

CASE NO. 2005-00379

**ANSWER OF AMERICAN CELLULAR CORPORATION**

**I**

**Defendant's Name Correction**

1. The Defendant in this case is identified as Cellular One. American Cellular Corporation ("ACC") does business using the service mark Cellular One in Kentucky and ACC is the proper Defendant.

**II**

**Motion to Dismiss for Lack of Jurisdiction**

2. ACC is licensed by and is regulated by the Federal Communications Commission ("FCC") as a Commercial Mobile Radio Service ("CMRS") wireless telephone carrier, and ACC is not licensed by or regulated by the Kentucky Public Service Commission ("PSC") or any other agency of the State of Kentucky. There is no Kentucky statute giving the PSC jurisdiction over CMRS carriers.

3. This matter concerns complaints about service quality of CMRS service. The states' ability to regulate CMRS is limited by federal law, 47 U.S.C. §332(c)(3)(A). The

FCC's exclusive jurisdiction over cellular service quality has been recognized by the FCC and the courts many times. In *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000), the Seventh Circuit held that 47 U.S.C. §332(c)(3)(A) completely preempted state law claims alleging that a wireless provider signed up subscribers "without first building the cellular towers and other infrastructure necessary to accommodate good cellular connections." *Id.* at 989. The *Bastien* court found such state law claims were preempted because they challenged the company's entry into the market and rates charged for wireless services, areas which are exclusively reserved for federal law by Section 332(c)(3)(A).

4. A similar result was reached in *Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703 (N.D. Tex. 2000). In *Bryceland*, the plaintiffs asserted State law claims against a wireless provider based on alleged false and misleading statements. *Id.* at 708-09. The court rejected the plaintiffs' claim and held that State law regulation of service quality is "actually an attack on rates because it implies that the service was not worth what the customer paid for it." *Id.* (citing *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998)).

5. The court in *Gilmore v. Southwestern Bell Mobile Systems*, 156 F. Supp. 2d 916, 924-25 (N.D. Ill. 2001), likewise held that claims implicating wireless service quality were challenges to rates charged, and thus preempted by Section 332(c)(3)(A). See also, *Naevus International, Inc. v. AT&T Corp.*, 713 N.Y.S.2d 642, 645 (N.Y. 2000) (plaintiffs "complain of the quality of service furnished by defendants, and unavoidably, the rate, which they find inappropriate for the service"); *Franczyk v. Cingular Wireless, LLC*, No. 03-C-6473, 2004 U.S. Dist. LEXIS 643, \*6 (E.D. Ill. Jan. 21, 2004) ("federal

preemption of wireless telephone service providers 'rates' encompasses a much broader area of conduct than simply how much money a provider charges for services").

6. Consistent with these court decisions, the FCC's interpretation of Section 332(c)(3)(A) does not allow state agencies to regulate the services provided by wireless carriers. See, *In the Matter of Southwestern Bell Mobile Systems, Inc.*, Memorandum Opinion and Order, FCC 99-356 (rel. Nov. 24, 1999).

7. The PSC has recognized there are no performance regulations applicable to CMRS carriers. In *Saeid Shafizadeh v. Cingular Wireless*, Case No. 2003-00400, Kentucky Public Service Commission, 2005 Ky. PUC LEXIS 271, March 23, 2005, the PSC stated:

The Commission's jurisdiction over wireless carriers is less comprehensive than its jurisdiction over other utilities or telecommunication carriers. Wireless carriers are not required to maintain tariffs with the Commission and the Commission has no jurisdiction over the rates that a wireless carrier charges. The Commission also has no performance regulations for wireless carriers, except that they comply with, among other requirements, 807 KAR 5:006, Section 9, KRS 278.130, KRS 278.140, and KRS 278.150. Wireless carriers operate in a competitive environment. [footnote omitted]

8. For all these reasons this complaint should be dismissed for lack of jurisdiction.

### III Voluntary Response

9. ACC has voluntarily entered into the CTIA Consumer Code, [http://www.ctia.org/wireless\\_consumers/consumer\\_code/](http://www.ctia.org/wireless_consumers/consumer_code/). Section nine of that code reads as follows – “Wireless carriers will respond in writing to state or federal administrative agencies within 30 days of receiving written consumer complaints from

any such agency.” Even before the adoption of the Consumer Code, it was ACC’s practice to voluntarily investigate and respond to complaints received from government agencies as well as organizations such as the Better Business Bureau. Subject to and without waiving the Motion to Dismiss for Lack of Jurisdiction, ACC hereby provides the following response to the complaint.

10. The time period of this complaint is not specified but appears to be during the time ACC was engaged in transitioning its network in order to increase GSM channel capacity and add additional GSM data capabilities. GSM provides a number of advantages over the older TDMA technology, especially in the use of wireless data, including wireless internet access. GSM is the most popular wireless transmission standard used throughout the world.

11. The amount of spectrum available to ACC is fixed by its FCC license. When spectrum is reallocated from TDMA to GSM, the number of available TDMA channels does go down. This can result in “blocking”, which means that no channel is available for a TDMA customer to make a call. During the last two weeks of July and the first week of August, TDMA blocking levels in the relevant area (Bardstown) were temporarily higher than normal due to the changeover to GSM. By the third week of August, blocking levels were less than 2%, meaning 98 times or more out of 100 the call would go through. TDMA blocking is reduced when customers migrate from the older TDMA technology to the newer GSM technology, because this increases GSM usage and reduces TDMA usage. Many customers in the relevant area have migrated to GSM. It is not always possible to manage the number of TDMA customers against the

available channels while making the equipment transition. ACC does not have significant blocking at the present time on either TDMA or GSM.

12. Of the 20 customers listed, it appears that customers Dawn Durbin, Damon Jonne and Matt Simpson transferred to other carriers during July and August. Dawn Durbin and Damon Jonne were TDMA customers. Customers Lindsay Rhodus, Bryan Hill, Edith Spaulding, Faye Spaulding, Mary Jewell and Tabitha Spaulding migrated from TDMA to GSM in 2005. Mr. Joseph Durbin remains a TDMA customer. Monthly minutes of usage for the months of July through October, 2005, for the twenty mentioned customers have been analyzed. The data show relatively consistent minutes of usage each month, indicating that the temporary blocking issue did not substantially reduce their usage. It also indicates a level of usage which is not consistent with severe network problems or a substantial inability to make or receive calls.

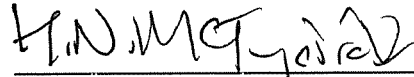
13. ACC received an informal complaint from the PSC regarding Mr. Joseph Durbin on June 30, 2005, and responded on July 11, 2005. ACC has only one trouble ticket related to Mr. Durbin. It is dated July 15, 2005. Mr. Durbin advised that he is a FedEx driver and complained about coverage in Louisville and Bardstown. Louisville is not in ACC's service area, and while in Louisville Mr. Durbin would be roaming on the Cingular network and being supplied service by Cingular. The trouble ticket advises that if the trouble is in both Louisville and Bardstown the problem may be with the handset. Mr. Joseph Durbin had usage of over 900 minutes in September and over 800 minutes in August, and Mr. Durbin clearly is able to make and receive calls at the present time.

14. ACC will be building an additional GSM site in Bardstown by the end of 2005. This will enhance GSM coverage in downtown Bardstown and provide additional GSM channel capacity. It will not affect TDMA coverage.

15. The exact nature of some of the complaints is difficult to determine, the dates of the alleged problems are not specified and the calling location of the alleged problem is not specified. It is not clear whether the handwritten statement attached to the Order is all complaints by Mr. Joseph Durbin or also includes complaints by some of the others listed. Some of the complaints may be about coverage. Coverage is a different issue from blocking. CMRS is a radio based service and the signal level at a specific location is subject to a number of variables such as topography, vegetation and buildings. Communication can also be affected by the type of handset in use. The FCC recognizes the challenges of radio based communication and has never required that coverage be ubiquitous throughout a CMRS carrier's licensed area. Some of the complaining customers may have low RF signal levels in certain areas where they want to use their phone, resulting in marginal coverage in that particular location. All of the complaining customers, however, have substantial amounts of minutes of use indicating that they are using their phone to make and receive calls. ACC wishes to advise the PSC that in accordance with the CTIA Consumer Code (see above ¶9), ACC offers each new customer, and each existing customer who is transitioning from TDMA to GSM, a 14 day trial period during which they can see if the phone works where they want to use it. If they are not satisfied they can return the phone and the contract is voided with no penalty. ACC has several competitors in this area and Kentucky consumers are free to chose among any of the competitive CMRS carriers for service.

16. For all these reasons this complaint should be considered "satisfied".

Respectfully Submitted,



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Holland N. McTyeire, V

Greenebaum Doll & McDonald PLLC  
3500 National City Tower  
101 South Fifth Street  
Louisville, KY 40202  
Telephone: (502) 589-4200  
Facsimile: (502) 587-3695  
E-mail: [hnm@gdm.com](mailto:hnm@gdm.com)

and

Herbert Kenney  
Associate Corporate Counsel

AMERICAN CELLULAR  
CORPORATION  
14201 Wireless Way  
Oklahoma City, OK 73134  
Telephone: (405) 529-8336  
Facsimile: (405) 529-8765  
E-mail: [Herbert.Kenney@dobson.net](mailto:Herbert.Kenney@dobson.net)

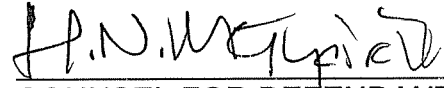
COUNSEL FOR DEFENDANT,  
AMERICAN CELLULAR CORP D/B/A  
CELLULAR ONE IN KENTUCKY



Certificate of Service

The undersigned certifies that a true copy of the above and forgoing was mailed postage prepaid to the following on October 20<sup>th</sup>, 2005.

Joseph Durbin  
771 Hubbards Lane  
Bardstown, KY 40004

  
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COUNSEL FOR DEFENDANT,  
AMERICAN CELLULAR CORP D/B/A  
CELLULAR ONE IN KENTUCKY

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