



Ernie Fletcher
Governor

Teresa J. Hill, Secretary
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Christopher L. Lilly
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Department of Public Protection

Joseph Harold Durbin
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Mark David Goss
Chairman

John W. Clay
Commissioner

October 12, 2006

CERTIFICATE OF SERVICE

RE: Case No. 2005-00379
American Cellular Corporation

I, Beth O'Donnell, Executive Director of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the addressee by U.S. Mail on October 12, 2006.

A handwritten signature in black ink, appearing to read "Beth O'Donnell", written over a horizontal line.

Executive Director

BOD/jc
Enclosure



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Honorable Holland N. McTyeire, V
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3300 National City Tower
101 South Fifth Street
Louisville, KY 40202-3197

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Ronald Ripley
American Cellular Corporation
14201 Wireless Way
Oklahoma City, OK 73134

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|----------------------|---|------------|
| JOSEPH HAROLD DURBIN |) | |
| |) | CASE NO. |
| COMPLAINANT |) | 2005-00379 |
| |) | |
| V. |) | |
| |) | |
| CELLULAR ONE |) | |
| |) | |
| DEFENDANT |) | |

O R D E R

This matter is before the Commission on the complaint of Joseph Harold Durbin ("Mr. Durbin") against American Cellular Corporation d/b/a Cellular One in Kentucky ("ACC").

Mr. Durbin filed his complaint on September 19, 2005. He succinctly summarizes his complaint where he states, "I am paying for service that I am not getting."¹ Mr. Durbin's complaint thereafter sets forth five specific problems: three plainly relate to service and the remaining two relate to the terms of the contract existing between Mr. Durbin and ACC. ACC filed its answer and a motion to dismiss on October 20, 2005. On October 24, 2005, Mr. Durbin switched service providers from ACC to Cingular. Mr. Durbin did not file a response to the motion to dismiss.

¹ Complaint at 1.

The Commission issued data requests on July 24, 2006. ACC filed its responses on August 8, 2006. Mr. Durbin did not immediately respond, which prompted the Commission to enter an Order on August 29, 2006, giving Mr. Durbin 10 additional days to file his responses. Mr. Durbin filed his responses on September 11, 2006 – three days late.

The threshold question in this case is whether the Commission has been authorized by the Kentucky General Assembly to exercise jurisdiction over the issues raised by Mr. Durbin. In 2005, the General Assembly enacted KRS 278.54611(1), which states:

The provision of commercial mobile radio services shall be market-based and not subject to Public Service Commission regulation. Notwithstanding any other provision of law to the contrary, except as provided in subsections (2) to (5) of this section, the commission shall not impose any requirement upon a commercial mobile radio services provider with respect to the following:

- (a) The availability of facilities or equipment used to provide commercial mobile radio services; or
- (b) The rates, terms, and conditions for, or entry into, the provision of commercial mobile radio service.

KRS 278.54611(1).

In enacting the statute, however, the General Assembly saw fit to retain a role for the Commission in the regulation of commercial mobile radio service providers. “The [C]ommission shall retain jurisdiction to assist in the resolution of consumer complaints.”²

ACC is a commercial mobile radio service provider. As such, the plain and ordinary language of the statute prevents the Commission from imposing any requirement upon ACC regarding the availability of facilities or equipment used to

² KRS 278.54611(3).

provide commercial mobile radio service or the rates, terms, and conditions for, or entry into, the provision of such service. The precise demarcation of the Commission's jurisdiction between KRS 278.54611(1) and (3) has not yet been tested in the Courts.

Despite this, the record confirms that the complaint must be dismissed as moot. The service problems experienced by Mr. Durbin are as much the product of his own usage patterns outside the ACC service area as they are the technological upgrade of ACC's network. Given that Mr. Durbin is no longer a customer of ACC, any relief authorized by KRS 278.54611 and granted by the Commission would not inure to his benefit. Likewise, it is well established that the Commission is not authorized to award damages. See Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, 128 (ky. App. 1983). Accordingly, Mr. Durbin's contractual claims for unliquidated damages are also beyond the scope of the Commission's authority.

IT IS THEREFORE ORDERED that the complaint is dismissed and this action shall be stricken from the Commission's docket.

Done at Frankfort, Kentucky, this 12th day of October, 2006.

By the Commission

ATTEST



Executive Director