

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INQUIRY INTO THE PROVISION AND REGULATION)
OF CELLULAR MOBILE TELEPHONE SERVICE IN) ADMINISTRATIVE
KENTUCKY) CASE NO. 344

O R D E R

INTRODUCTION

This proceeding was initiated by the Commission on October 9, 1992 pursuant to KRS 278.512 to determine what, if any, changes are needed in the regulation of cellular telephone services in the Commonwealth. The Commission has previously determined that its approval of the retail rates charged by cellular companies was not required but has asserted its jurisdiction over construction of facilities and wholesale rates.¹ The Commission continues to require prior approval of transfers of cellular utilities and financing applications pursuant to KRS 278.020 and KRS 278.300 and to require cellular companies to file annual reports. Although cellular telecommunications providers have been required to file wholesale tariffs of rates and conditions of services, the Commission has not required cost studies to support the tariffed rates.

¹ Case No. 9851, The Application of Bluegrass Cellular, Inc. For Commission Approval to Operate and Charge Rates, Order dated May 11, 1987.

On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993, Public Law 103 [H.R. 2264] ("Omnibus Act") amending Section 332 of the Communications Act of 1934 ("Communications Act"), Subsection (C)(3)(A) of which provides:

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 regulation of the other terms and conditions of commercial mobile services.

A "commercial mobile service" is defined by the Federal Communications Commission ("FCC") in its Second Report and Order in G. N. Docket No. 93-252 effective July 18, 1994, to include domestic public cellular radio telecommunications service (Part 22, subpart K). Therefore, the cited amendment to the Communications Act precludes the Commission from regulating entry into the cellular market or cellular rates.

The FCC will grant the Commission authority to regulate cellular wholesale or retail rates only if specific criteria are met. Subsection (C)(3)(A) of the Omnibus Act provides that a state must demonstrate that:

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within a state.

CELLULAR MARKET

The previously discussed statutory amendments to the Federal Communications Act therefore require this Commission to review and assess the Kentucky cellular market. The following discussion of market conditions establishes the basis for the Commission's decision regarding cellular regulation in Kentucky.

As designed by the FCC, the cellular market consisted of two primary licensed cellular companies in each market: a wireline or 'B side' carrier, and a non-wireline or 'A side' carrier. In each market, the B side was awarded to the local exchange company, while the A side was awarded through a lottery. In RSA #6, RSA #7, and Evansville/Owensboro MSA, the wireline license has been divided between separate companies. Responses to Commission information requests indicate that there are only two cellular resellers operating in Kentucky.

To obtain service, a customer is typically required to pay an activation fee and a deposit for equipment rental, unless these are waived through a promotional program. Promotional efforts may also include free or discounted customer premises equipment or free minutes of use. Various calling plans are available extending from one month to more than a year. Calling plans longer than one month often carry a higher monthly service charge, prepaid or "free" minutes of use, and lower per minute of use rates.

A duopoly neither guarantees that the market will behave competitively, nor precludes it from doing so. In markets where

firms exercise market power, a customer might encounter unreasonably high prices, or discriminatory contracts or business practices. Competition in a duopoly depends on many factors. The availability of adequate substitute services is crucial; when customers have adequate choices in the marketplace, firms are prevented from exercising any great degree of market power.

Although cellular telephone companies are utilities and possess franchised territories, their services are generally not regarded as essential. Their market penetration does not approach that of virtually ubiquitous land line telephones. Rather the local exchange carriers ("LECs") provide essential basic telecommunications services and often assume the role of carrier of last resort. Thus, they assist in fulfilling universal service goals. While future technological advances and evolving business methods may alter perceptions of cellular telephones, they are today more a convenience than a necessity.

Cellular companies provide communication services by selling air time over their networks. All cellular company service combinations seek to increase the frequency and duration of network usage but substitutes exist for any particular cellular company's services. There is at least one alternate cellular provider in each market. Customers may also combine the services of remote pay telephones, other land line telephones, radio telephone technologies, answering services, and paging services as substitutes. Technological advances are also increasing the ability of substitute services to compete with cellular telephones.

The FCC has begun the process of introducing personal communication system ("PCS") technology which will compete directly with current cellular technology. Thus, a customer willing to pay for the convenience of cellular communication services can go to a competing cellular carrier if dissatisfied with his current cellular carrier. Customers unwilling to pay for cellular conveniences, may use some combination of the other, less expensive, substitute services to fill his communication needs. Thus the ability of cellular carriers to exercise market power is in part limited.

Within a market, firms will engage in price, as well as non-price, competition. Nominal cellular service rates have not declined significantly since the industry's beginning. Higher cellular rates are, in part, understandable. While there may be price fluctuations to find the "right" market price, initial prices must be set to cover high startup costs. As economies of scale and scope are achieved, high initial service prices will tend to fall. Vigorous price competition in relatively new markets may serve to drive price down to marginal cost, but firms will likely incur losses if they write off high fixed (sunk) costs.

Cellular companies have been competing for customers by increasing the value and quality of service offerings. Customers have a choice of service contract lengths; service prices, including prepaid minutes of use; customer premises equipment rental or purchase; and ancillary services, such as call forwarding, paging, call waiting, and voice mail. Cellular

companies have also enhanced their service value by lowering roaming charges and expanding the calling areas not subject to roaming charges. Cellular companies' and agents' promotional efforts may include free or discounted cellular telephones, waived activation fees or deposits, or free minutes of use.² For the average customer, the varied promotional offerings and complex service contract options may make it difficult to determine and compare the actual, as opposed to monetary, prices for cellular services.

One gauge of price reasonableness and the quality of service is customer complaints to the Commission. To date, there have been very few complaints. Those received usually stem from a customer's failure to understand adequately various contractual prices or service conditions. However, these contracts are not discriminatory and are equally available to all customers.³

Price reasonableness may also be gauged by cellular companies' rates of return. Excessive rates of return would strongly indicate that prices are unreasonable. Currently, most companies are earning a very small or negative rates of return on capital.

² Competition in the complementary customer premises equipment and ancillary service markets, such as voice mail, may enhance a cellular company's ability to compete in the provision of communication services. However, such competitive behavior is neither the same as nor a substitute for competition in primary communication services.

³ As with all contracts freely signed, parties are expected to abide by their terms. A cellular customer is responsible for understanding the contract before the signing. "Caveat emptor" is always a sound principle to follow when entering into a purchase contract.

Based upon information request responses to the Commission and this assessment of the Kentucky market in view of the criteria set forth in the Omnibus Act, the Commission has determined that the conditions required by the federal statute do not exist in Kentucky. Therefore, the Commission will not regulate wholesale or retail rates after August 10, 1994.

Construction of Cellular Towers and Facilities

KRS 278.020 requires that utilities obtain a Certificate of Public Convenience and Necessity ("CPCN") prior to constructing cellular towers or other facilities. Because utilities are exempt from local planning and zoning oversight,⁴ the Commission is solely responsible for reviewing the location, construction, and safety of all cellular towers.

To fulfill its obligation to the public, the Commission promulgated regulations which mandate that cellular utilities meet minimum standards in the construction phase. All towers must be designed by a professional engineer to ensure structural stability. Utilities must file geotechnical reports to ensure proper foundation support and substrata strength.

In order to obtain input from persons who may be affected by cellular tower construction, the Commission requires cellular companies to notify residents and property owners within 500 feet of the proposed tower. Property owners and residents are informed of their right to participate by filing letters of protest,

⁴ KRS 100.324(1) exempts utilities from local planning and zoning commissions.

requesting intervention in the proceeding, and requesting a public hearing.

807 KAR 5:061 requires annual inspections of cellular facilities under the Commission's jurisdiction to review safety procedures, outside plant maintenance, emergency operations, trouble reports, and general operating procedures. Through these inspections, the Commission maintains direct contact with individual cellular operators which assists it in processing trouble reports.

Tower construction and utility inspection are two areas of critical importance to the Commission. Without Commission oversight, both would go unchecked for safety and reliability.

Reporting Requirements

Currently, cellular utilities, like all other utilities, file an Annual Report and a Gross Operating Report. The necessity of these reports was reviewed in this proceeding along with the appropriateness of any changes in the report formats. Several responses to the Commission's information requests cited the Annual Report as unnecessary considering the limited regulation currently performed by the Commission.

The Commission finds that the present relaxed regulatory framework supports the need for Annual Reports. Annual Reports are easily generated as they require basic information readily obtainable from normal company accounting procedures. As the industry is still emerging, the Commission must not be left without information pertaining to the financial resources of its

jurisdictional companies given the significance of revenues and assets associated with the industry. However, the Commission after reviewing the current Annual Report finds that its revision is warranted. The Commission has revised the report and will significantly reduce the requirements contained therein beginning with the 1994 report. A copy of the revised cellular Annual Report is attached as Appendix A.

Like the Annual Report, the Gross Operating Report should continue to be filed. It generates the information for determining annual assessment fees from which Commission operations are funded. As cellular utilities require the Commission's oversight, they must continue to be assessed and this report is essential for calculation of the annual assessment. No modification of this report is necessary.

The Commission will continue to review reporting requirements and will relax the requirements when warranted. In the meantime, utilities may request permission to deviate from regulations on a case-by-case basis if they can be shown to be overly burdensome.

Transfers and Financing

KRS 278.020 requires prior Commission approval of the acquisition of or transfer of utility ownership or control. KRS 278.300 requires utilities to request permission prior to entering into various financial transactions. Although a cellular license may not be transferred without the FCC's approval of such transfer and the Commission is bound by the FCC's initial decision, it will continue to require cellular utilities to comply with KRS 278.020.

Likewise, the Commission finds that it is necessary to monitor the financial transactions of its jurisdictional utilities. Therefore, cellular utilities shall continue to comply with KRS 278.020 and 278.300.

Tariffs

Congress has preempted state utility commissions from regulating the rates charged for cellular services unless market conditions fail to protect subscribers adequately. The information obtained from this proceeding does not support a finding to this effect. Like Congress, the Commission desires to encourage competition in the cellular market and therefore finds that increased flexibility for cellular companies which respond to competition by changing prices for services is necessary and in the public interest. For these reasons the Commission will not require cellular utilities to file tariffs containing wholesale or retail rates. However, it will continue to require cellular utilities to file tariffs describing their wholesale and retail conditions of service in accordance with Kentucky statutes and Commission regulations to assist the Commission in monitoring cellular services. The Commission will continue to investigate and assist in the resolution of customer complaints against cellular companies.

The Commission, having reviewed the responses to its Orders dated October 9, 1992 and June 21, 1993, and being further advised of the statutory amendments and regulatory developments at the federal level, HEREBY ORDERS that:

1. After August 10, 1994, cellular utilities shall not be required to file wholesale or retail tariffs of their rates.

2. Cellular utilities under the jurisdiction of this Commission shall continue to file tariffs relating to their wholesale conditions of service and to retail conditions of service.

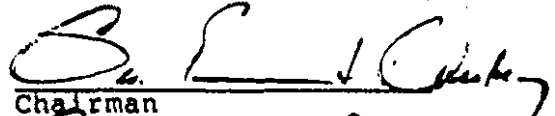
3. Cellular utilities shall continue to file applications for CPCNs pursuant to KRS 278.020.

4. On the next annual reporting date, March 31, 1995, cellular utilities shall file annual reports using the amended format attached as Appendix A.

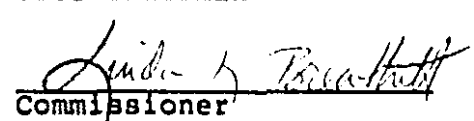
5. Except for the modifications contained in this Order, cellular utilities shall continue to comply with all applicable statutes, regulations, and orders of this Commission.

Done at Frankfort, Kentucky, this 5th day of August, 1994.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION
IN ADMINISTRATIVE CASE NO. 344 DATED AUGUST 5, 1994

CELLULAR TELEPHONE UTILITIES

ANNUAL REPORT

OF

Exact Legal Name of Reporting Utility

(If name was changed during the year, also show the
previous name and date of change)

(Address of Utility)

FOR THE
CALENDAR YEAR ENDED DECEMBER 31, 19 ____

TO THE
KENTUCKY PUBLIC SERVICE COMMISSION

* KENTUCKY OPERATIONS ONLY *

GENERAL INFORMATION

Are your financial statements examined by a Certified Public Accountant? (Yes) _____ (No) _____

If yes, which service was performed?

Audit _____ Compilation _____ Review _____

PLEASE ENCLOSE A COPY OF THE ACCOUNTANT'S REPORT WITH THE ANNUAL REPORT

1. List the RSA's, MSA's, SMSA's, etc., in which you operate:
(If additional space is required, add additional sheet)

2. List of Resellers:
(If additional space is required, add additional sheet)

3. List all Cell Sites and Cellular Antenna Addresses:
(If additional space is required, add additional sheet.
Attach a Legible Map with Cell and Antenna Sites Marked)

4. PSC Case # granting/transferring certificate to provide service:

GENERAL INFORMATION (continued)

Company Name Information:

- a. The current actual name as reflected on the company's articles of incorporation or partnership agreement.

- b. The current operating name (as advertised to the public).

- c. Any other business names used by the company with an explanation of that use.

- d. Former name(s) and the date(s) of change of owners of the FCC license.

- e. Listing of the persons or entities with an equity or partnership interest in the company.

- f. The name, address, and phone number of the person to be contacted regarding this report.

- g. If different than above, the correct name, address, and phone number of the person to whom correspondence should be sent.

SIGNIFICANT CHANGES DURING THE YEAR

Give particulars of:

1. Changes in franchise rights.

2. Significant changes in plant.

3. Changes in ownership or control.

4. Other significant changes. Include rate changes.

5. Identify and explain any injections of capital into the company (i.e. capital calls, debt financing, equity financing)

*** KENTUCKY OPERATIONS ONLY ***

Customers / Revenues		
<u>Kentucky Customers and Revenues Only</u>		
	Customers	Revenues
Wholesale		
Retail		
Totals		

List total Kentucky investment at year-end (based on original cost) _____

Comments:

ANNUAL REPORT OF _____ CALENDAR YEAR 19 _____

State of _____)
County of _____) ss. 1

_____ makes the oath and
(Insert here the name of the affiant)

says that he/she is _____ of
(Insert the official title of the affiant)

(Insert here the exact legal name or title of the respondent)

that it is the duty to have supervision over the books of account of the respondent and to control the manner in which such books are kept; that he/she knows that such books have during the period covered by the foregoing report, been kept in good faith in accordance with the accounting and other orders of the Public Service Commission of Kentucky, effective during the said period; that he/she has carefully examined the said report and to the best of his/her knowledge and belief the entries contained in said report have, so far as they relate to matters of account, been accurately taken from said books of account and are in accordance therewith; that he/she believes that all other statements of fact contained in the said report are true; and that the said report is a correct and complete statement of the business and affairs of the above name respondent during the period of time from and including

_____, 19 ___ to and including _____, 19 ___

(Signature of affiant)

Subscribed and sworn before me, a _____
in the and for the state and county named, this _____ day of _____,
19____. (Apply Seal)
(Here)

My Commission expires _____.

(Signature of officer authorized to administer oath)