SUPREME COURT, STATE OF COLORADO

CASE NO. 87SA253

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

STATE OF COLORADO, DEPARTMENT OF REVENUE AND ALAN N. CHARNES, as Executive Director of the Department of Revenue,

Defendants-Appellants,

v.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,

Plaintiff-Appellee.

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I. STATEMENT OF ISSUE

Whether the District Court was correct in finding that the sale of local network access services used in connection with interstate telephone calls is not subject to sales taxation under section 39-26-104(1)(c), C.R.S. because such services are not "intrastate" telephone services.

II. STATEMENT OF THE CASE

The League hereby adopts and fully incorporates by reference the statement of the case in the opening brief submitted by Appellant, Colorado Department of Revenue.

III. STATEMENT OF FACTS

The League hereby adopts and fully incorporates by reference the statement of facts in the opening brief submitted by Appellant, Colorado Department of Revenue.

IV. SUMMARY OF ARGUMENT

The District Court was incorrect in characterizing local network access services, which are provided entirely within the State of Colorado, as interstate merely because such services are used in connection with interstate telephone calls. The District Court's focus of the interstate nature of the call is misplaced; these local network services are intrastate regardless of the nature of the call. This Court should accord the term

"intrastate" its plain and ordinary meaning, and find that local network services provided entirely within the State of Colorado are "intrastate" telephone services properly subject to sales taxation pursuant to section 39-26-104(1)(c), C.R.S.

V. INTRODUCTION

At issue in this case is whether the sale of local network access by a local telephone company to an interstate telephone service provider is subject to sales taxation, both by the State and by Colorado municipalities that have sales tax collected on their behalf by the Colorado Department of Revenue.

The Colorado sales tax statute permits application of the sales tax to intrastate telephone services. Section 39-26-104(1)(c), C.R.S. provides in pertinent part:

> There is levied and there shall be collected and paid a tax in the amount stated in section 39-26-106 as follows: . . . (c) on telephone and telegraph services, whether furnished by public or private corporations or enterprises for all intrastate telephone and telegraph service. (Emphasis added)

Accordingly, this Court's ruling on the major issue in the present case will determine whether sales of access to the local, intrastate telephone network will be subject to sales taxation on behalf of the State and local governments.

VI. ARGUMENT: Local network services are intrastate telephone services and are subject to sales taxation under section 39-26-104(1)(c), C.R.S.

A. Access services are provided entirely within the State of Colorado.

The sole question in this case is whether the access service sold by Mountain Bell to appellee is "intrastate telephone service" and thus subject to sales taxation under section 39-26-104(1)(c), C.R.S. A brief description of the operation of the telephone system after the break-up of the national AT&T system is key to understanding the issue in the present case.

Local Operating Companies (BOCs)

Pursuant to the modified final judgment in United States v. American Telephone and Telegraph Co., 552 F.Supp. 131 (D.D.C. 1982), aff'd, sub nom., Maryland v. United States, 103 S.Ct. 1240 (1983) [hereinafter MFJ], AT&T was ordered to divest itself of the local Bell operating companies (BOCs), such as Mountain States Telephone & Telegraph Company, also known as Mountain Bell.

Local Access and Transport Areas (LATAs)

As part of the implementation of the MFJ, the United States was divided into 161 Local Accesss and Transport Areas (LATAs). Colorado consists of two LATAs; one includes Colorado Springs, Pueblo, and the southeast quarter of the state, the other covers the remainder of the state. The MFJ directed that, except with approval of the court, no LATA "located in one state shall include any point located within another state." MFJ, supra, 552 F. Supp. 229. The Colorado LATAs include only very small portions of neighboring states. These portions of other states were included in the Colorado LATAs for convenience, to assure that pre-divestiture toll-free local calling areas were not broken up when the LATA boundaries were established.

Service Areas

The MFJ restricted the BOCs, such as Mountain Bell, to providing telephone service within the LATAs. Since both Colorado LATAs are located almost entirely within Colorado, this means that virtually all of Mountain Bell's local network provides intrastate telephone service.

Appellee, and other similar providers, are limited to providing telephone service between the LATAs. A major portion of this service is interstate service. Since the BOCs control the phone networks within the LATAs, interstate phone service providers must purchase from the BOCs the services of the local

intraLATA network to originate or complete their customers' interstate calls. Interstate carriers pay an "access charge" for the access to the local network; it is the sales taxation of these access charges which is at issue in this case.

Points of Presence (POPs)

Carriers such as Appellee maintain "points of presence" (POPs) within the LATAs. The POP is a switch within the interstate carrier's network which picks up a call from the local BOC network or transfers a call coming in on the interstate network to the local network. What Appellee purchases from the BOC (Mountain Bell, in Colorado) is telephone service within the LATA between Appellee's POP and the end user (the person making or receiving the call). The MFJ requires that the BOC provide this "exchange access"* to all "interexchange carriers", such as Appellee.

The issue presented in the instant case, the characterization of local access service used in connection with an interstate telephone call as inter- or intrastate service, is one of first impression in Colorado. However, the definition of "exchange access" in the MFJ makes it clear that these must be intraLATA services. In Colorado this means that virtually all

*In the MFJ the court referred to what were to become known as LATAs as "exchange areas".

access services are intrastate telephone service, since the Colorado LATAs contain only miniscule portions of neighboring states. The MFJ requires that "exchange access" services

> . . . shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area of interexchange traffic originating or terminating within the exchange area and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within the exchange area designated by the interexchange carrier for the connection of its facilities with those of the BOC. (emphasis added) MFJ, supra, 552 F. Supp. at 228

Since the access services which the BOC provides to Appellee are rendered entirely within the state of Colorado, these services are intrastate telephone services subject to taxation pursuant to section 39-26-104(1)(c) C.R.S.

In its Order the District Court focuses on the role of access services in interstate calling, and concludes that "[b]ecause interstate access services are an integral part of interstate telephone service . . . they are not taxable under C.R.S. 39-26-104(1)(c)." (Order, page 5.)

It is true that local access services are integral to a caller's ability to make an interstate telephone call. It is also true that the rates which a BOC may charge appellee for access used in connection with inter- or intrastate calls are subject to FCC or PUC tariffs, respectively. But these facts do not change the fundamental reality that access services in Colorado take place completely within a LATA and are intrastate telephone service.

Access service is an intrastate service (end user to POP), whether the purchaser uses it in connection with inter- or intrastate calling. The issue here is not whether the call itself is interstate, the issue is whether the access service, sale of which is the object of taxation, is intrastate telephone service.

The Michigan Court of Appeals concluded that access services are intrastate telephone services in MCI Telecommunications Corp. v. Department of Treasury, 355 NW.2d 627 (Mich. App. 1984), a case remarkably similar to the case at bar. At issue in the Michigan case was whether access charges paid by MCI (like AT&T, an interstate service provider) for local network services used in connection with interstate calls were subject to taxation. The Michigan statute provided for a tax on "intrastate" telephone communications.

The Michigan court upheld a state tax tribunal finding which was based upon evidence that the service which MCI purchased was necessarily located and delivered solely in Michigan. MCI had claimed that the local network services which it purchased from Michigan Bell were an integral part of its interstate telephone service and not taxable. This argument, which was the basis for the District Court's decision in the present case, was rejected by the Michigan court.

> We believe that petitioner's argument overlooks the crucial distinction between the service which it provides to its own customers and that which it purchased from Michigan Bell. Respondent does not propose to tax revenue from interstate calls made by petitioner's Michigan customers. Instead, respondent proposed only to tax the amounts which petitioner has paid to Michigan Bell in order to facilitate its customers' calls. The fact that its customers make calls using parts of the interstate network does not change the fact that petitioner has purchased an exchange service which was in all respects provided and located in Michigan. (Emphasis added) MCI Telecommunications, supra, 355 NW2d at 629.

The Michigan court correctly identified the distinction between the local network service, an intrastate telephone service, and the interstate service which interstate carriers, such as AT&T and MCI, provide to their customers. As in Michigan, the object of taxation under Colorado's statute is not the sale of interstate service by the interstate carrier. The object of taxation is the sale of intrastate, local network service by Mountain Bell to AT&T. This service, provided between AT&T's POP within Colorado and an end user within Colorado is clearly an "interstate" telephone service subject to taxation under section 39-26-104(1)(c), C.R.S.

The District Court decision

The District Court cited several decisions as authority for its holding that local network services are interstate services when used in connection with interstate telephone calls. These cases involve different factual or legal

considerations from those in the present case, and are thus distinguishable.

The cases relied upon by the District Court are: Cooney v. Mountain States Telephone Company, 294 U.S. 384 (1935); New Jersey Bell Telephone Company v. State Board of Taxes and Assessment, 280 U.S. 338 (1930); Western Union Telegraph Company v. Alabama, 132 U.S. 472 (1889); Ealey v. Bureau of Revenue 89 N.M. 160, 548 P.2d 440 (1976); State ex rel Utilities Commission v. Southern Bell Telephone & Telegraph Company, 288 N.C. 201, 217 SE.2d 543 (1975); United States v. Southwestern Cable, 392 U.S. 157 (1968); Idaho Microwave Inc. v. FCC, 352 F.2d 729 (8 Cir. 1965) and Illinois Bell Telephone Company v. Allphin, 93 Ill. 2d 241, 443 NE.2d 580 (1982).

Cooney, supra, New Jersey Bell, supra, and Western Union, supra, were commerce clause (U.S. Const., art I § 8; hereinafter "commerce clause") challenges to state taxing statutes which levied taxes on telecommunications equipment or receipts. The Supreme Court's findings in these commerce clause cases, that various telecommuncation services were part of "interstate commerce", should not determine the issue in the instant case. This is not a commerce clause case.

The broad purposes of the commerce clause have resulted in a long line of cases which have included virtually every form of commercial intercourse within its scope. Generally, purposes of the commerce clause:

> . . . are to create an area of free trade among the several states, to assure the unrestricted flow of commerce throughout the several states, to insure a national economy free from unjustifiable local intanglement, to assure to the commercial enterprises in every state substantial equality of access to a free national market, to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. It was designed to establish equality among the states as to commerce rights and to prevent complications which local jealousies or interest might bring about. 15A Am. Jur. 2d, Commerce § 2 (1976).

The reach of the commerce clause has been held to extend not just to strictly interstate matters, but also to "those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." Katzenbach v. McClung, 379 U.S. 294, 302 (1964). As Professor Laurence Tribe has written: "Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authority for congressional action is largely a formality." L. Tribe, American Constitutional Law, page 242 (1978).

As noted above, however, this is not a commerce clause case. This Court is not restricted to finding as intrastate telephone services only those services which would not qualify as part of interstate commerce, were this a commerce clause case.

Idaho Microwave, supra, and Southwestern Cable, supra, involved the extent of FCC jurisdiction pursuant to the

Communications Act of 1934 § 1 et seq., 47 USC § 151 et seq. The Michigan court in MCI Telecommunications, supra distinguished these two cases:

> These cases hold only that companies which limit their service to a single state are still part of a interstate or broadcasting communications industry and thus still subject to FCC regulation. The cases do not hold that such companies are providing only interstate services nor do they preclude the possibility that such companies could also be providing certain intrastate services which might be appropriate subjects to state regulation or taxation. MCI Telecommunications, supra, 355 NW.2d at 630.

It is also worth noting that neither of these cases dealt with telephone service and neither case involved application of a state tax statute.

Ealey, supra involved the application of a New Mexico gross receipts tax to the transmission of telegraph messages within New Mexico which were ultimately to be sent to a receiving party in another state. The New Mexico statute allowed deduction of receipts on transactions "in interstate commerce . . . to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution." Ealey, supra, 548 P.2d at 441. The focus of the New Mexico Court's attention was the statutory deduction and thus whether the service in question could be considered part of interstate commerce under the commerce clause of the U.S. Constitution.

As has been noted above, the issue in the present case is not whether intraLATA access services used in connection with the

interstate call are exempt from local taxation on commerce clause grounds. Neither is the issue whether these services would be considered part of interstate commerce if this were a commerce clause case. The sole issue in this case is whether such services are "intrastate", as that term is commonly understood, and thus subject to sales taxation under section 39-26-104(1)(c) C.R.S.

Similarly, State Utilities Commission, supra, involved a commerce cause challenge to a reporting requirement in a North Carolina Securities statute. The reporting requirement affected pre-divestiture Southern Bell's issuance of securities for the benefit of its telephone service operations in four different states. Unlike State Utilities Commission, supra, the present case concerns local taxation of services rendered completely within Colorado, and does not involve a commerce clause challenge to the tax statute. The North Carolina court's discussion of whether its state's securities regulation passes constitutional muster is thus outside the scope of the issue before the Court here.

In Allphin, supra, the Supreme Court of Illinois applied a variety of statutory construction devices to a statute which imposed a gross receipts tax on "persons engaged in the business of transmitting messages in this state" Allphin, supra, 443 NE.2d at 582 and concluded that access services were subject to the tax. The Court relied on predecessor statutes, and

regulations issued pursuant to those prior statutes, to decide that the tax could only be applied to messages which originated and terminated within Illinois. No comparable statutes or regulations are involved in this case.

The Allphin, supra, court also found that the proper objects of taxation under the statute considered in that case were limited to those permitted under the commerce clause in 1945, when the statute was enacted. Whatever the applicability of this rule in Colorado, section 39-26-104(1)(c), C.R.S. was reenacted by the Colorado legislature in 1983. See: section 2-5-125(1)(h), C.R.S. Thus, the statute at issue in the present case was reenacted after Complete Auto Transit v. Brady, 430 U.S. 274 (1977), when, as the Allphin, supra, court conceded "the rule that a state tax on the privilege of doing business is per se unconstitutional when applied to interstate commerce finally collapsed". Allphin, supra, 443 NE.2d at 585.

B. This court should accord the term "intrastate" its plain and ordinary meaning.

The League respectfully urges that what should control the Court's decision in the present case is the commonly understood meaning of the word "intrastate", as used in section 39-26-104(1)(c) C.R.S.

Section 2-4-101, C.R.S. provides that: "words and phrases shall be read in context and construed according to the rules of

grammer and common usage." In People v. District Court, Second Judicial District, 718 P.2d 918 (Colo. 1986), this Court recently restated the well established rules of statutory interpretation that:

> [w]ords and phrases should be given effect according to their plain and ordinary meaning. (citations omitted) If the language is clear and the intent appears with reasonable certainty, there is no neeed to resort to other rules of statutory construction. (citations omitted) Id. at 921.

As this Court said in Trinity Universal Insurance Co. v. Hall, 690 P.2d 227 (Colo. 1984): "Our responsibility is to give effect to a legislative enactment according to its plain and obvious meaning." Id., at 230.

The plain and obvious meaning of the word "intrastate" is "existing within a state". Webster's Third New International Dictionary (1961). The American Heritage Dictionary of the English Language (8th ed. 1970) defines "intrastate" as "within the boundaries of a state."

As discussed above, the access service which AT&T purchases from Mountain Bell is provided entirely within the state of Colorado. Such service is therefore "intrastate telephone service" under the plain and ordinary meaning of section 39-26-104(1)(c) C.R.S., and should thus be subject to sales taxation.

VII. CONCLUSION

The local network access services which AT&T purchases from Mountain Bell are provided entirely within the State of Colorado. As such, these services are "intrastate telephone services" and subject to sales taxation under section 39-26-104(1)(c) C.R.S. These services are "intrastate", under the plain and ordinary meaning of that term, regardless of whether such services are ultimately used in connection with an interstate telephone call.

VIII. REQUEST FOR RELIEF

WHEREFORE, the League requests that this Court reverse the District Court's Order of September 4, 1986, and lift the injunction imposed on the Department of Revenue by the District Court on October 3, 1986.

Respectfully submitted this 4th day of August, 1987.

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CERTIFICATE OF MAILING

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