BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

HERBERT SHERDON, Director Communications and Accounting Department, Nebraska Public Service Commission, Complainant,	)	Formal Complaint No. 1078
vs.	)	SUSTAINED
JERRY DANN and WILLARD FRIEDMAN, d/b/a BEN FRANKLIN MOTEL, Omaha, Nebraska, Defendants.	)	Entered: April 15, 1974

APPEARANCES: For the Complainant
W. James Wochner, Attorney
1342 "M" Street
Lincoln, Nebraska

For Defendants
Einar Viren, Attorney
904 City National Bank Building
Omaha, Nebraska

For Intervener, Neb. Lodging Assn.
Charles P. Huff, Attorney
525 Stuart Building
Lincoln,

OPINION AND FINDINGS

BY THE COMMISSION:

On October 29, 1973, Herbert J. Sherdon, Director of Communications and Accounting Departments of the Nebraska Public Service Commission, filed a complaint with the Nebraska Public Service Commission alleging Jerry Dann and Willard Friedman d/b/a/ Ben Franklin Motel, Omaha, Nebraska were offering telephone service without having obtained a certificate of convenience and necessity in violation of the terms of Section 75-604 of the Nebraska Revised Statutes. The complaint also alleges violations of Commission Rules and Regulations which holders of such a certificate of convenience and necessity are obligated to comply with.

A copy of the complaint was sent by certified mail to the defendant on October 29, 1973.

Notice of hearing was sent to all parties interested in this proceeding on November 20, 1973, and hearing thereon held January 10, 1974 at 9:30 a.m. in the Commission Hearing Room, Lincoln, Nebraska with appearances as set forth above.

The defendants are a co-partnership operating a motel known as the Ben Franklin Motel within the Omaha service area of Northwestern Bell Telephone Company, which company provides lines into the motel which are connected to the defendant's switchboard which is leased from RCA.

Testimony of complainant's first witness indicated the Ben Franklin Motel is within the area for which Northwestern Bell has authority from this Commission to provide service. (T13)

Complainant's second witness, Nebraska marketing manager for Northwestern Bell, testified Northwestern Bell would be able to provide the communications services in question.

Furthermore, defendant has no certificate of public convenience and necessity.

The telephone facilities in the motel are furnished to guests for their use and not just restricted for use by the motel administrative personnel. The testimony indicates that only the registered or paying guests of the motel may use the telephone service.

Defendant accounts for revenue and expenses of its telephone department, it furnishes telephone service to paying guests but not to others, and it uses its own telephone equipment instead of that furnished by Northwestern Bell Telephone Company for economic reasons.

The facts presented in this complaint hearing are precisely those, the Commission contemplated in requesting an opinion from the Attorney General concerning the status of a telephone subscriber who purchases his own telephone terminal equipment for his own use and for the use of guests or tenants, and interconnects such a system with the telephone company.

In response to this request, the office of the attorney general issued an opinion dated July 18, 1973.

The relevant part of this opinion reads as follows:

> "You have raised a question relating to interconnection in a situation where a telephone company subscriber purchases his own telephone terminal equipment for his own use and for the use of guests or tenants, and interconnects such system with the telephone company. We believe that a business such as a hotel or motel which provides privately owned communication equipment whereby, through interconnection, there may be out-going and in-coming telephonic communication is a common carrier within the meaning of Section 75-109, assuming it may be said that the communication services are furnished 'for hire.'
>
> In the case of toll calls it is common practice for a service charge to be assessed in addition to the toll which goes to the telephone company, or to receive a commission from the telephone company. Likewise, it is common practice to make a charge for all out-going local calls. Clearly, such charges constitute the furnishing of a service for hire. Furthermore, even if no such direct and identifiable charges were made, we believe the mere fact that a charge is made to occupy the space within which the communications equipment is available implicitly constitutes a 'built-in' charge for the communications service and in reality creates a for hire situation.
>
> Accordingly, it is our opinion that such a privately owned communications system cannot be maintained and operated without appropriate certification by the Public Service Commission. Furthermore, in accordance with the regulated monopoly concept with which the telephonic communication business is imbued, as recently reenunciated in Radio-Phone, Inc. v. A.T.S. Mobile Telephone, Inc., 187 Neb. 637, such a certificate should be issued only upon a showing that the existing telephone company in the area in question 'refuses or has failed to provide adequate service on notice, hearing, and order of the Commission.'"

Section 75-604 NebraskaRevised Statutes prohibits any person, firm, partnership, corporation, cooperative or association from offering telephone service in the territory of another telephone company without first making an application for and receiving from this Commission a certificate of convenience and necessity.

It appears from the evidence that the defendant is operating a system which the above quoted Attorney General's opinion states would require such a certificate of convenience and necessity.

Having considered the formal complaint, the evidence adduced at the hearing, briefs of the parties and the Attorney General's opinion, this Commission must find that the defendant is in violation of Section 75-604 R.R.S. of 1943 as amended, that the complaint should be sustained and defendants should be ordered to cease and desist from the violation set forth in the complaint herein.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Formal Complaint No. 1078 be and it is hereby sustained and Jerry Dann and Willard Friedman, d/b/a Ben Franklin Motel be and they are hereby ordered to cease and desist from offering telephone service without a certificate of convenience and necessity.

MADE AND ENTERED at Lincoln, Nebraska this 15th day of April, 1974.

NEBRASKA PUBLIC SERVICE COMMISSION

Robert T. Marland

Acting Chairman

ATTEST:

Everett H. Green

Secretary

COMMISSIONERS CONCURRING:

Jim F. Merrill

CONCURRING OPINION OF COMMISSIONER DUANE GAY

The purpose of Commission control of common carriers is to secure adequate sustained service for the public at the lowest reasonable cost, and to protect and conserve investments made for that purpose. Chambers Rural Telephone Company, Inc. v. K&M Telephone Company, Inc., 179 Neb. 73S, 140 N.W. 2d 400; Northwestern Bell Telephone Company v. Consolidated Telephone Company, 180 Neb. 268, 142 N.W. 2d 324 (1966). Permitting the use of customer provided terminal equipment in instances where a charge is made to occupy the space within which the communications equipment is available will be counterproductive to the attainment of both of these objectives.

Intrastate rates have been traditionally priced according to the concepts of value of service and statewide rate averaging, so that subscribers pay comparable rates for comparable service and higher rates for more used and useful service. Competition from unregulated terminal equipment suppliers erodes contributions to common costs from other than basic exchange service and if revenue requirements are to be met, rates for basic exchange service would have to be raised. The end result of such unregulated competition will be increases in the cost of basic residence telephone service.

In addition, exclusion of customer provided terminal equipment from control of this Commission will also exclude the control of the quality of service provided by such equipment from the control of this Commission.

Under the traditional approach, the certified carrier had control of and responsiblity for the transmission from sender to receiver. The use of customer provided terminal equipment fragmentizes responsibility for the quality of the transmission which can have a detrimental effect on the quality of service the telephone subscriber receives. This affects not only the users of such private equipment, but also to members of the public attempting to call those using private equipment.

The Defendants in this case admit the Ben Franklin Motel is credited by Northwestern Bell for 15% and 15 cents on calls placed from the Motel's system. The Defendants further admit that any losses in the Motel's telephone department are made up out of the revenues from room rents.

In view of these facts, a portion of the rates charged to patrons of the Motel must be considered a hidden charge for telephone service, bringing the Ben Franklin Motel within the scope of the Attorney General's opinion.

Section 75-604, Nebraska Revised Statutes, prohibits any person, firm, partnership, corporation or association from offering telephone service in the territory of another telephone company without first making an application for and receiving from the Commission, a Certificate of Public Convenience and Necessity.

The opinion of the Attorney General, dated July 18, 1973, indicates that when as is the case in this complaint, telephone company subscribers such as a hotel or motel purchases his own terminal equipment for his own use and for the use of his guests or tenants, such a subscriber is within the jurisdiction of this Commission and required to comply with Section 75-604.

For this Commission to hold otherwise would ultimately result in higher prices to the resident subscribers and lower quality service.

Duane D. Gay

DUANE D. GAY, Commissioner