

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

ATS Mobile Telephone, Inc.,	)	Formal Complaint No. 1107
Omaha, Nebraska,	)	
Complainant,	)	
	)	
vs.	)	
	)	
General Communications Company,	)	COMPLAINT SUSTAINED
Inc., Omaha, Nebraska,	)	CEASE AND DESIST
Defendant,	)	ORDER
	)	
and	)	
	)	
Northwestern Bell Telephone	)	
Company, Omaha, Nebraska,	)	
Collateral Party.	)	Entered: January 16, 1978

APPEARANCES: Donald H. Erickson  
 Attorney at Law  
 10250 Regency Circle  
 Omaha, Nebraska  
 For the Complainant

Frank Meares  
 Attorney at Law  
 501 Turner Blvd.  
 Omaha, Nebraska  
 For the Defendant

Ronald Slyter  
 Attorney at Law  
 100 South 19th Street  
 Omaha, Nebraska  
 For the Collateral Party

BY THE COMMISSION:

On May 10, 1977, ATS Mobile Telephone, Inc. (hereinafter referred to as ATS) filed a formal complaint against General Communications Company, Inc. (hereinafter referred to as GCC) and Northwestern Bell Telephone Company (hereinafter referred to as NWB) alleging that GCC is offering radio common carrier service without a certificate of public convenience and necessity as required by state law. Both GCC and NWB answered by generally denying that they are engaging in any activity that is contrary to the laws of the State of Nebraska.

The attorney for ATS filed, on June 14, 1977, a Motion for Immediate Cease and Desist Order Pending Final Disposition of Complaint. A temporary and immediate cease and desist order was granted by the Commission and a date for oral argument on said order was set. GCC then filed a Resistance to Motion of ATS Mobile Telephone, Inc. and a Motion to Rescind the Temporary Cease and Desist Order. After hearing arguments on its temporary cease and desist order from all parties the Commission decided, on June 24, 1977, to continue the order.

Both parties availed themselves of pre-hearing discovery, and on one occasion GCC made a motion to compel answers which were refused during the deposition of Frank Rizzuto. An Order on Certified Questions was entered August 29, 1977.

Hearing on this matter was held, after proper notice, on October 13, 1977, in Omaha, Nebraska, with appearances as set forth above.

COMPLAINANT'S EVIDENCE

Complainant's first witness was Neil Johnson, general manager of ATS. As a certified carrier, ATS offers, among other services, one-way tone and voice

messages. Operations are activated by dialing a discreet seven-digit number which causes the correct tone numbers to be encoded over a transmitter, thereby alerting the selected radio receiver. The calling party may then transmit a short verbal message. At one time ATS used a system similar to GCC's whereby after the seven-digit number was dialed, the caller would punch additional numbers either by use of a touch tone or touch tone pad device, thereby activating the paging unit. Mr. Johnson presented several exhibits: 1) a list of the FCC licensees on frequency 152.480 MHz, 2) a list of additional people on the same frequency, and 3) a list of people on the frequency who are presently ATS subscribers or former ATS subscribers.

ATS has between 1,000 and 2,000 subscribers operating 2,000 to 3,000 pagers. In the last three years, however, ATS has only lost ten customers who are now on the 152.480 MHz frequency. No figures on loss dollars were presented, however, Mr. Johnson believed the lost customers did not destroy their business.

Excerpts from the deposition of Ronald Novotny, owner of GCC, were read into the record. GCC is also a licensee of frequency 152.480 MHz and owns an operational tower and equipment for said frequency which is located at 30th and Grover Streets. Several copies of GCC advertisements were then introduced.

Next, the complainant presented the testimony of two subscribers. Both said that they did not have the lock combination or access to the equipment building of GCC.

Joe Beransky, employee and sales manager of GCC, testified as to the demonstrations that he gives a prospective customer. If such solicitation is successful, an order for pagers is taken and an FCC license application is filled out. After his demonstrations several people quit ATS and went to GCC.

Finally, Harold Sherman of Sherman Two-Way Radio testified. He received 31 open tone codes for the GCC system which he has been selling. As a licensee of frequency 152.480, he also did not obtain access to the equipment building. A pager on the GCC system is able to receive its signal in Council Bluffs, Iowa.

#### DEFENDANT'S EVIDENCE

Exerpts from the deposition of Frank O. Rizzuto, Treasurer of ATS, were read into the record. Mr. Rizzuto contacted NWB to report possible unauthorized usage of a paging system by GCC. The telephone company investigated and concluded that GCC was operating a private, and therefore, legal system. Mr. Rizzuto did not know the dollar loss to ATS as a result of the GCC system. The most inexpensive ATS system offered is about \$10 as compared to \$6.50 for GCC.

The next witness, Larry Davis, Sr., both an ATS and GCC subscriber, testified that the seller of the GCC pager told him that it would be illegal to activate a pager from any other point than the control point as stated on his license.

Robert H. Brenneman, a communications consultant for R. B. Associates, testified on behalf of defendant. After inspection of the GCC system, Mr. Brenneman noted that it has two distinguishing units. The first is a Bell System STC coupler which is required for connection of customer owned equipment to the public switched telephone network. Its purpose is to isolate the customer owned equipment and prevent any difficulties with the public network. The incoming impulse, after going through the coupler, goes into an interface device manufactured by GCC. This device answers the telephone and transmits a tone back to the user, at which point the user then dials a security number. Then he dials two more tones which are converted by the GCC interface device and forwarded to the radio transmitter to activate the pager. This interface device is evidently unique to GCC. GCC is further unique in that most shared systems are controlled by radio, and therefore, not connected to the landline system.

Finally, the owner of GCC, Ronald J. Novotny, explained that his interface device has a built-in restrictor address selector which limits access to authorized users. The witness presented a letter from the FCC approving his system. While an RCC provides unrestricted access, the GCC system, as Mr. Novotny explained, is restricted to businesses, individuals who obtain an FCC license, and use by a touch-tone telephone.

#### OPINION AND FINDINGS

Section 75-109 of the Nebraska Revised Statutes confers upon this Commission authority over common carriers including those furnishing communication services. The Supreme Court of the State of Nebraska in reaffirming Commission authority, further defined and held that mobile telephone service in its different aspects is a form of telephone service and subject to all statutes and regulations pertaining to telephone service. Radio-Fone, Inc. v. ATS Mobile Telephone, Inc., 187 Neb. 637, 193 N.W.2d 422 (1972). Rules and Regulations were promulgated to reflect the statutory scheme as it is applicable to mobile telephone communication. Entitled "Radio Common Carriers," such carriers and their service is defined, in Chapter VI of the Rules, as follows:

1.11 Radio common carrier shall mean any firm, person, partnership, cooperative organization, corporation or association engaged in the furnishing of radio common carrier service under the jurisdiction of the Commission.

2.12 Radio common carrier service shall mean all communications services provided by radio common carriers including, but not limited to, mobile telephone and paging service.

Section 2, following statutory law, states that "[n]o radio common carrier shall offer a radio common carrier service to the public, except pursuant to its tariff filed with and approved by order of the Commission."

Additionally, federal pre-emption is not a jurisdictional factor in this case. Commission jurisdiction in the radio common carrier field was affirmatively established in ATS v. Curtain Call Communications, Inc., 194 Neb. 404, 232 N.W.2d 248 (1975).

As it appears to this Commission, the issue in the present case is whether GCC exhibits the fundamental characteristics of a radio common carrier so that it should be considered as such and, therefore, subject to Commission jurisdiction.

A carrier takes on the trappings of a common carrier when it holds out to the public as being ready, willing and able to serve that public. GCC, however, argues that its service is not offered to the public since it is limited to 1) businesses, 2) FCC licensees and, 3) touch-tone telephones. We find such limitations unconvincing and ineffective. The defendant, GCC, is actively soliciting and promoting its services to the general public. Its newspaper and yellow page advertisements clearly express the availability of the service to the public. GCC has made mass mailings to members of the medical profession. Furthermore, FCC licenses and touch-tone telephones are easily obtainable. A carrier, even though it serves a few or limited group of people is nevertheless public if its property is dedicated to public uses. It is our opinion that GCC is offering, and has dedicated, its service for common use by the public.

The Nebraska Supreme Court, in In re Application of American Communications Co., 184 Neb. 220, 166 N.W.2d 116 (1969), said that:

A company furnishing communication service for hire in Nebraska intrastate commerce is a common carrier subject to general control of the commission. Section 75-109 R.R.S. 1943. An essential part of the definition is the phrase "for hire."

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GCC argues that it is not operating "for hire," rather, it is operating a privately shared or cooperative system. Such argument is superficial when ownership is examined. While its customers may own their pagers and FCC licenses, GCC paid for, owns and has total control over all of the base station equipment, the transmitter and the tower. GCC leases a public telephone line, pays for the coupler, all repairs and maintenance. A fee is charged; however, the evidence clearly shows that such fee is not an assessment to cover the actual cost of the total operation. None of the subscribers have access or interest in the base station equipment. Nor do they have any voice in the operation of the "shared" system. GCC does not conform to the traditional characteristics normally attributable to a shared system. Furthermore, the Nebraska Supreme Court appears to believe that even a private mobile system may be a common carrier when it said that:

In common understanding the communication effected by private mobile systems would appear to be a telephone communication. Radio-Fone, Inc. v. ATS Mobile Telephone, Inc., supra, at 645.

It is our opinion that GCC is operating "for hire" as a common carrier.

The Nebraska Supreme Court set the standards for a cooperative telephone company in State of Nebraska v. Southern Elkhorn Telephone Co., 106 Neb 342 (1921). In that case a group of farmers constructed, at their own expense, a telephone line. They purchased and rented other necessary telephone equipment. Each farmer contributed toward the expense of construction. The cooperative made mutual assessments on all members for the cost of repairs. Finally, they had no provisions for taking on new members into their cooperative. The Court determined at 346, that they "[h]ad no idea of rendering service to the public. Their sole purpose was to procure telephone service for themselves."

The GCC system is obviously dissimilar to a true cooperative. Construction cost and expenses are not shared, and they are actively seeking new "members." Their intent is to provide a service to the public.

GCC also asserts that Sherdon v. Dann, 193 Neb. 768, 229 N.W.2d 531 (1975) allows a person to interconnect any equipment onto the public switched telephone network so long as a protective device, a coupler, is in place. We believe defendant's argument is wide of the mark. The Dann decision only allows the in-house interconnection of FCC approved telephone facilities. GCC's facilities are not in-house facilities. It provides a public communication service that is attached to the public switch telephone network and the fact that there is a coupler and interface device is insignificant. The Dann case did not intend to allow such a circumvention of state law such as GCC has done.

In consideration of the evidence adduced and being fully advised of the premise thereof, we are of the opinion, and therefore find, that the defendant, GCC, is operating as a radio common carrier in Nebraska intrastate commerce. GCC is thereby required to satisfy the provisions of Section 75-604 of the Nebraska Revised Statutes. The temporary restraining order should be desolved and a permanent cease and desist order should be issued until such time as GCC has obtained a certificate from this Commission.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Formal Complaint No. 1107, ATS Mobile Telephone, Inc. v. General Communications Company, Inc. and Northwestern Bell Telephone Company be, and it is hereby, sustained.

IT IS FURTHER ORDERED that, pursuant to Commission Rule 8(f), General Communication Company shall permanently cease and desist from operation as a

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radio common carrier in Nebraska intrastate commerce until such time as it has satisfied and fulfilled the requirements of Section 75-604 R.R.S. 1943 and any other applicable Statute or Rule.

IT IS FURTHER ORDERED that Formal Complaint No. 1107 as it pertains to Northwestern Bell Telephone Company be, and it is hereby overruled and that Northwestern Bell Telephone Company is hereby dismissed from this cause of action.

MADE AND ENTERED at Lincoln, Nebraska, this 16th day of January, 1978.

NEBRASKA PUBLIC SERVICE COMMISSION

*Duane D. Gay*

Chairman

ATTEST:

*Ernest M. Green*

Secretary

COMMISSIONERS CONCURRING:

*Harold D. Simpson*  
*Jack Korman*

COMMISSIONERS DISSENTING:

*Duane D. Gay*

DISSENT OF COMMISSIONER DUANE D. GAY

I respectfully dissent from the ruling of the majority of the Commission.

From a jurisdictional standpoint, the present case is similar in nature to the Sherdon v. Dann case. The ruling in that case was that federal regulation preempts any conflicting state regulation. The Federal Communications Commission has exercised jurisdiction over the licensing of shared communications systems. Furthermore, the Federal Communications Commission has decided that General Communications Company, Inc., is operating properly and according to its rules. Counsel for Defendant petitioned this Commission to accept late filed exhibits, being the decision of the Federal Communications Commission to dismiss the identical Complaint before the Federal Communications Commission and finding that the operations of the Defendant, are, in fact, approved by the Federal Communications Commission and said Complaint was dismissed on September 22, 1977, in a communication from Charles A. Higginbotham, Chief, Safety and Special Radio Services Bureau of the Federal Communications Commission. By formal action this Commission arbitrarily and willfully chose to reject the offer of proof, submitted by the Defendant in these proceedings.

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Finally, I cannot support the procedures that the majority of the Commission have followed. Fairness and due process have been lacking throughout this case, particularly at the outset when the majority issued the original Cease and Desist Order on a moments notice as the record will indicate and without due process of notification to the Defendant. The Complaint should have been overruled.

  
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Duane D. Gay  
Commissioner