

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

NEBRASKA RADIO TELEPHONE )  
SYSTEMS, Grand Island, Nebraska, )  
Complainant, )  
)  
vs. )  
)  
G & S and ASSOCIATES, Grand )  
Island, Nebraska, )  
Defendant, )  
)

Formal Complaint No. 1116

COMPLAINT SUSTAINED

Entered: April 3, 1978

APPEARANCES: Gailyn L. Larsen  
Attorney at Law  
P.O. Box 81849  
521 South 14th Street  
Lincoln, Nebraska 68501  
For the Complainant

Scott E. Daniel  
Attorney at Law  
P.O. Box 82028  
Lincoln, Nebraska  
For the Defendant

BY THE COMMISSION:

On November 30, 1977, Nebraska Radio Telephone Systems (hereinafter referred to as Complainant) filed a formal complaint against G & S Associates (hereinafter referred to as Defendant) alleging that Defendant is offering and providing Radio Common Carrier Service in Complainant's authorized territory without a certificate of public convenience and necessity as required by state law. G & S answered by generally denying the allegations.

Pursuant to proper notice, the hearing on this matter was held January 18, 1978 in the Commission Hearing Room, in Lincoln, Nebraska, with appearances as set forth above.

COMPLAINANT'S EVIDENCE

Complainant's first witness was Charles P. Oden who is the owner and general manager for Nebraska Radio Telephone Systems. Complainant, Nebraska Radio Telephone Systems, operates in Grand Island, Norfolk, Fremont and O'Neill under a Nebraska certificate of public convenience and necessity. The company also has a FCC license. The witness testified that the annual Revenue for the company in Grand Island is approximately \$30,000. Eventhough there was conflicting testimony, it appears that only two or three of about 100 customers have left Complainant for Defendants system. Mr. Oden presented as Exhibit No. 7 a stick-on label which Defendant uses as a form of advertising.

The second and final witness was the service manager for the Complainant, John W. Morgan. For the purpose of investigation, Mr. Morgan contacted the Defendant, and asked for and received a Tone and Voice paging service. No mention of association membership was made to him, however, he was informed that there was a sharing of cost of the equipment, pager and service. A \$25.00 deposit on the equipment was required. The witness explained that the transmitting frequency was open to the public and can be monitored by CB equipment.

DEFENDANTS EVIDENCE

Defendants first witness was Harold M. Fleharty. The witness sales and services mobile equipment for Commercial Electronics, Inc.. Mr. Fleharty advised and sold to the Defendant its equipment. The system was designed to provide business communication services for the original associations. Messages can be sent from either 1) the base station or 2) via the public telephone lines. A pager can be reached by dialing, on a touch tone telephone, a specific telephone number and then an access code number which will then activate the pager. The Defendants system is monitered manually. The maximum number of pagers on the system is sixty-four.

Finally one of the partners of G & S and Associates, Mr. Gary L. Ellermeier, testified. Mr. Ellermeier explained that because of cost and the fact that he needed some form of communication between himself and his employees he formed the association. The \$25.00 deposit is a membership fee and damage deposit. The monthly billing is to defray cost. This monthly charge is flexible. If there are any profits they will go to retire debts. If any loss exist then maybe he will make an assesment. Mr. Ellermeier claimed that the Defendant make no profit and does not advertise. However, he did admit that the Defendant Association paid part of the cost of the labels.

## 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."

The central issue to this case is not the frequency the Defendant uses or the type of federal license he has, but rather, it is whether G & S exhibits the fundamental characteristics of a Radio Common Carrier. If it does exhibit such characteristics then it should be subject to Commission jurisdiction.

A carrier comes into the purview of Commission jurisdiction when it holds out to the public as being ready, willing and able to serve that public. The defendant is promoting its services to the public by use of stick-on labels (Exhibit No. 7) Furthermore it operates similar to other Radio Common Carriers. Access to the system can be gained through any touch tone telephone by dialing a seven-digit number plus an access code number. A carrier, eventhough it serves a few or limited group of people is nevertheless public if its property is dedicated to public use.

The Nebraska Supreme Court, in In re Application of American Communications Co., 184 Neb. 220, 166 N.W.2d 115 (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."

The Defendant argued that it is not operating "for hire" but rather it is operating a shared system as an association. When control and ownership are examined, such argument does not hold up. The equipment, base station and pagers, appear to be under the control of G & S and Associates.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Formal Complaint No. 1116

Page 3

The individual members lease their pagers and put down a deposit on those pagers. Eventhough a fee is charged the evidence shows that it does not necessarily cover the actual cost of the operation. Additionally, the Defendants are willing to, and in fact, take on new customers. We beleive that G & S 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 mutal 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 Defendant's system is, obviously dissimilar to that of 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.

It is our oponion that G & S and Associates is in violation of Section 75-604 of the Nebraska Revised Statutes and the Rules and Regulations of the Nebraska Public Service Commission. They are providing Radio Telephone service without a certificat of convenience and necessity. Even if G & S were a true cooperative they are inviolation of this statute since they have invaded the territory of an existing Radio Common Carrier without the authority or consent to do so.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Formal Complaint No. 1115, Nebraska Radio Telephone Systems vs. G & S and Associates be, and it is hereby, sustained.

IT IS FURTHER ORDERED that pursuant to Commission Rule 8 (f), G & S and Associates shall permanently cease and desist from operation as a Radio Common Carrier in Nebraska intrastate commerce until such time as it has satisfied and fullfilled the requirments of Section 75-604 R.R.S. 1943 and other applicable Statutes and Rules.

MADE AND ENTERED in Lincoln, Nebraska this 3rd day of April, 1978.

NEBRASKA PUBLIC SERVICE COMMISSION

*Duane D. Gay*  
Chairman

ATTEST

*Carl H. He*  
Secretary

COMMISSIONERS CONCURRING:

*Harold D. Simpson*  
*Jack Remans*