BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Thomas M. White, Omaha, vs. Mark Quandahl, Omaha, and the Nebraska Republican Party, Lincoln, alleging the use of an automatic dialing-announcing device to place telephone calls in violation of Nebraska Law and Commission Regulations.	)	Application No. FC-1328
	)	ORDER ISSUING FINDINGS AND DISMISSING COMPLAINT
	)	Entered: September 18, 2007

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

On August 3, 2007, Thomas M. White filed a complaint with the Nebraska Public Service Commission (Commission) alleging that Mark Quandahl and the Nebraska Republican Party (Respondents) had connected and operated an automatic dialing-announcing device (ADAD) in violation of Nebraska Law and Commission Rules and Regulations. An answer by the Respondents was timely filed on August 24, 2007. Jurisdiction over this subject matter is proper pursuant to the Automatic Dialing-Announcing Devices Act (Act)[1] and Rules and Regulations promulgated by the Nebraska Public Service Commission (Commission).[2]

The Act and Commission Rules and Regulations give the Commission authority to conduct an investigation upon receipt of a written complaint and supporting affidavit alleging a violation of applicable law, rule or regulation.[3] Pursuant to the Act the Commission conducted an investigation into the written complaint. The complaint alleged that telephone calls were placed by an ADAD on August 2, 2007, with a recorded message from an individual identifying himself in the message as Mark Quandahl, Chairman of the Nebraska Republican Party, to parties in and around the Omaha metro area.

A review of Commission records showed no automatic dialing-announcing device registrations or permits with scripts corresponding to the messages alleged in the complaint was filed with the Commission. Further, no corresponding script was filed by a current permitted or registered ADAD operator within the five (5) day deadline as required by Commission regulations.[4]

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[1] See Neb. Rev. Stat. § 86-236 et seq.
[2] See 291 Neb. Admin. Code, Ch. 11.
[3] Neb. Rev. Stat. § 86-253 (2006 Cum Supp.); 291 Neb. Admin. Code, Ch. 11, Section 003.03.
[4] See 291 Neb. Admin. Code, Ch. 11, Section 002.06.

In the course of the investigation, the Commission received information that the Nebraska Republican Party had contracted with a third party to place ADAD calls on its behalf. The Republican Party contracted with GOTV Strategies to place certain calls on their behalf. Subsequent contact with GOTV Strategies through owner/operator Art Murray confirmed that the services of his company had been employed by the Republican Party; however, Mr. Murray's company does not have a current registration or permit from the Commission to place ADAD calls in Nebraska. Furthermore, Mr. Murray stated that he had subcontracted out the ADAD calls for the Nebraska Republican Party to another ADAD firm. Subsequent subcontracting occurred and the Commission was unable to determine how many subcontracted entities were involved between the initial third party contractor, GOTV Strategies and the entity that actually connected and operated the ADAD.

On August 13, 2007, the Commission received an ADAD Application for a registration from Smartcall Media Inc. (Smartcall) headquartered in Ladera Ranch, California. A copy of the application is attached and is hereby incorporated by reference. The Application included information that calls had been made by Smartcall on behalf of the Nebraska Republican Party and contained a transcript of a recorded message similar to the message that is the subject of the above-captioned complaint. Subsequent communication with the applicant, Smartcall, by Commission Staff ascertained that Smartcall had subcontracted with another third party subcontractor and initiated the calls that were made on or around August 2, 2007.

The Act requires persons using ADADs for solicitation purposes to receive a permit from the Commission.[5] Those persons using an ADAD for non-solicitation purposes are required to receive a registration. The Act provides, "Any person using an automatic dialing-announcing device other than for telephone solicitations shall register the device with the commission."[6] The Act defines telephone solicitation as calls for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.[7] Calls with non-solicitation subject matter, such as public interest messages, those sent on behalf of non-profit organizations, or political messages require a registration under the Act. The content of any message sent by a registered ADAD operator is not regulated by the Commission.

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[5] Neb. Rev. Stat. § 86-250 (2006 Cum Supp.).
[6] Neb. Rev. Stat. § 86-256 (2006 Cum Supp.).
[7] Neb. Rev. Stat. § 86-242 (2006 Cum Supp.).

The Commission concludes that based on the information gathered during the investigation, it is most likely that calls were placed by Smartcall Media Inc. to Nebraska citizens without a proper registration. Smartcall has since come into compliance with Nebraska Law and Commission Rules and Regulations. The Commission issued an order on August 21, 2007, granting the application for a registration by Smartcall Media Inc. in Docket AD-391r. However, on the date the calls were placed to Nebraska citizens, Smartcall did not have a current registration with the Commission on file.

While we find that a violation of the Act and Commission Rules and Regulations most likely occurred, and the calls that are the subject of the complaint were placed as alleged by the Complainant, the party responsible for the violation is not a party to the above-captioned complaint. The calls at issue in this complaint were made on behalf of the Republican Party; however, our investigation shows that the connection and operation of the ADAD responsible for the calls was done by Smartcall.

The plain meaning of the Act imposes the obligations of the Act on the person or entity connecting and operating the ADAD. Although Smartcall placed the offending telephone calls on behalf of the Nebraska Republican Party, we find no provision under the Act that grants this Commission authority to impose the duties of the Act upon a person or entity that contracts for the services of an ADAD, but does not actually connect and operate such a device on their own behalf.

The Act, in its current form, limits the scope of the Commission’s authority to the entity that connected and operated the ADAD, in this case, Smartcall, therefore, the Commission finds it has no authority to grant the relief prayed for in the Complaint against Mr. Quandahl and the Nebraska Republican Party.

The Commission’s policy for first offenses of the Act’s registration provisions has traditionally been to allow the offending entity to remedy the first offense and come into compliance with the Act’s requirements. The Commission will be closely scrutinizing Smartcall’s activities in Nebraska to ensure compliance with Nebraska Law in the future. Further violations of Nebraska Law and/or Commission Rules and Regulations by Smartcall could result in administrative fines and/or registration revocation.

The Commission is disturbed by the circumstances surrounding the calls placed by Smartcall on behalf of the Nebraska Republican Party. The Act places no obligations on parties or entities contracting for the services of an ADAD to ensure that the ADAD operator is in compliance with Nebraska law. Neither does the Act make the contracting party legally responsible for violations of Nebraska Law by a third party ADAD operator. The Commission finds that significant public policy issues exist in the Act as it is currently drafted that may make it worthwhile for the Legislature to consider modifications to the Act. It is the opinion of this Commission that further Legislative consideration of the provisions of the Act in light of recent events would be beneficial to the State of Nebraska.

The Commission finds that the complaint in Docket FC-1328 should be dismissed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the complaint in the above-captioned docket, be, and it is hereby, dismissed.

MADE AND ENTERED at Lincoln, Nebraska, this 18th day of September, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Deputy Director