

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal	)	Application No. FC-1343
Complaint of Tom E. Nesbitt,	)	
Lincoln, alleging violation of	)	
the Automatic Dialing-	)	
Announcing Devices Act by	)	COMPLAINT SUSTAINED IN PART
Anthony W. Fulton, Lincoln,	)	DISMISSED IN PART
Tony Fulton Committee, Lincoln	)	
and Communication Strategies,	)	
Inc., St. Louis, Missouri.	)	Entered: December 14, 2010

BY THE COMMISSION:

B A C K G R O U N D

On June 24, 2010, a Formal Complaint was filed with the Nebraska Public Service Commission ("Commission") by Tom E. Nesbitt, Lincoln, Nebraska, against Anthony W. Fulton ("Fulton"), and the Tony Fulton Committee ("Fulton Committee", collectively "Fulton Respondents"), both of Lincoln, Nebraska, and Communications Strategies, Inc. ("CSI"), located in St. Louis, Missouri. An Answer was timely filed by the Fulton Respondents. No Answer was filed by Respondent CSI.

A planning conference was held in the above-captioned dockets on August 24, 2010, with representatives of the parties and the Commission, with the exception that no representative of CSI participated in the conference. During the planning conference the parties agreed to a procedural schedule including a hearing date of November 18, 2010. The Hearing Officer issued an order on August 26, 2010, memorializing the agreements and establishing the procedural schedule for the docket. On October 8, 2010, the Hearing Officer entered an order rescheduling the hearing to December 8, 2010.

On November 24, 2010, the Complainant and Fulton Respondents filed a Stipulation agreeing to certain facts.

On December 6, 2010, the Fulton Respondents filed a Motion for Summary Judgment.

On December 8, 2010, prior to the hearing, the Fulton Respondents and the Complainant filed a Letter Agreement with the Commission. The Agreement stated that the Complainant and the Fulton Respondents had reached agreement whereby Anthony Fulton and the Tony Fulton Campaign Committee take responsibility for Communication Strategies, Inc.'s and the Tony Fulton Campaign's violation of Nebraska's auto-dialing statutes and the regulations of the Public Service Commission. The parties to the Letter Agreement requested that the Commission

issue a warning to the Respondents Fulton and Fulton Committee in satisfaction of the Complaint regarding the Fulton Respondents.

A Hearing in this matter was held on December 8, 2010. Respondent CSI failed to appear.

#### E V I D E N C E

The Complainant and Respondent Fulton were both running for the same elected office in May, 2010. As part of Fulton's campaign, his campaign committee, Fulton Committee, contracted for the services of an automatic dialing-announcing device to send messages on behalf of the Fulton Committee. The Fulton Committee engaged the services of CSI, a Corporation located in St. Louis, Missouri to operate an automatic dialing-announcing device in Nebraska on its behalf.

CSI, prior to April 30, 2010, was a duly registered company operating an automatic dialing-announcing device in Nebraska under and by virtue of a registration heretofore granted by this Commission on April 30, 2008.<sup>1</sup> Pursuant to the Order issuing CSI's registration and Commission rules and regulations, CSI's registration was good for two (2) years from the date the registration was entered.<sup>2</sup>

On or about May 10, 2010, CSI, on behalf of the Fulton Committee, placed certain calls in Nebraska with its automatic dialer. CSI was not duly registered with the Commission at the time the calls were placed. Further, the message disseminated by the automatic dialer did not state the calls were on behalf of the Fulton Committee at the beginning of the message.<sup>3</sup>

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

The Automatic Dialing-Announcing Devices Act<sup>4</sup> ("ADAD Act") grants regulatory authority to the Commission over automatic dialing-announcing devices in Nebraska. The ADAD Act states, "Any person using a automatic dialing-announcing device other than for telephone solicitations shall register the device with the Commission."<sup>5</sup> Additionally, Commission Rules and Regulations

---

<sup>1</sup> See Authority No. AD-435r, *In the Matter of the Application of Communication Strategies, Inc., Clayton, Missouri, seeking authority to register the connection of an automatic dialing-announcing device*. Granted, (April 30, 2008).

<sup>2</sup> Id. and Neb. Admin. Code, Title 291, Ch. 11 § 002.06 (2000).

<sup>3</sup> See Application No. FC-1343, Stipulation, Exhibit A, (November 24, 2010).

<sup>4</sup> See Neb. Rev. Stat. § 86-236 et seq. (Reissue of 2008).

<sup>5</sup> Neb. Rev. Stat. § 86-256(1)(Reissue of 2008).

provide that all permits and registrations issued by the Commission pursuant to the ADAD Act shall remain in effect for two years from the date of issuance.<sup>6</sup> The automatic dialer message that was the subject of the above-captioned complaint was for political purposes, not solicitation purposes, and therefore, would require any automatic dialer making such calls to be registered with the Commission before placing such calls in Nebraska. CSI's registration with the Commission to operate its automatic dialer in Nebraska expired on April 30, 2010, therefore CSI was not authorized to be placing automatic dialer calls in Nebraska when it placed the calls on May 10, 2010.

The ADAD Act further requires certain information be included in any message disseminated by a registered automatic dialer, including stating the identity of those responsible for the call at the beginning of the message.<sup>7</sup> The message at issue in this matter did not place the required identification of the party responsible for the call, the Fulton Campaign, at the beginning of the message.<sup>8</sup> The message was therefore in violation of the ADAD Act.

Finally, the ADAD Act holds both a person contracting with a third party to operate an auto dialer on their behalf and the operator of the automatic dialer liable for violations of the ADAD Act and Commission rules and regulations.<sup>9</sup> Thus, both the Fulton Committee and CSI were responsible for the violations of the ADAD Act and Commission rules discussed above.

On December 8, 2010, prior to the hearing, the Fulton Respondents and the Complainant filed a Letter Agreement stating they had reached a settlement and requesting Commission issue a warning to the Fulton Respondents in satisfaction of the Complaint. With the filing of the Letter Agreement, the prior Motion for Summary Judgment filed by the Fulton Respondents is moot. The Letter Agreement states:

Anthony Fulton and the Tony Fulton Campaign Committee take responsibility for Communication Strategies, Inc.'s and the Tony Fulton Campaign's violation of Nebraska auto-dialing statutes and the regulation of the Public Service Commission, and shall receive a letter of warning from the Public Service Commission."<sup>10</sup>

---

<sup>6</sup> Neb. Admin. Code, Title 291, Ch. 11 § 002.06 (2000).

<sup>7</sup> Neb. Rev. Stat. § 86-256(2)(a)(Reissue of 2008).

<sup>8</sup> See Application No. FC-1343, Stipulation, Exhibit A, (November 24, 2010).

<sup>9</sup> See Neb. Rev. Stat. § 86-256(4) (Reissue of 2008).

<sup>10</sup> See Application No. FC-1343, Letter Agreement, (December 8, 2010).

The Commission finds the Letter Agreement reasonable and hereby approves the settlement of the Complainant and the Fulton Respondents. Therefore, the Commission finds that this Order shall constitute written warning to Anthony W. Fulton and the Tony Fulton Committee for violations of the ADAD Act and Commission Rules and Regulations.

Regarding Respondent CSI, A copy of the complaint was served on CSI via certified mail return receipt requested on or about August 11, 2010. No Answer to the above-captioned complaint was received from CSI. "Except where good cause shown . . . failure to answer will be construed as an admission of the allegations in the complaint."<sup>11</sup> CSI operated an automatic dialing-announcing device in Nebraska without a valid registration and is jointly and severally liable for failure to include the required message components in the script that was the subject of the above-captioned formal complaint.

As CSI's registration expired with the Commission, CSI currently has no authority to operate in Nebraska, making revocation of CSI's registration impossible. However, CSI does have an application for a new registration pending in front of the Commission.<sup>12</sup> The Commission shall take into account the findings in this docket in making its determination on CSI's current application for a registration to operate in Nebraska. Therefore, the Commission finds that the Complaint against CSI should be sustained and the Commission hereby finds that this Order constitutes a written warning to Communications Strategies, Inc. for violations of the ADAD Act and Commission rules and regulations.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Agreement between Anthony W. Fulton, the Tony Fulton Campaign and Tom E. Nesbitt be, and it is hereby, approved.

IT IS FURTHER ORDERED that this Order shall constitute an official warning to Anthony W. Fulton and the Tony Fulton Campaign for violating provisions of the Automatic Dialing-Announcing Devices Act and the rules and regulations of the Nebraska Public Service Commission.

---

<sup>11</sup> Neb. Admin. Code, Title 291, Ch. 1 § 5.08D (1992).

<sup>12</sup> See Application No. AD-504r, *In the Matter of the Application of Communication Strategies, Inc., St. Louis, Missouri, seeking authority to register and connect an automatic dialing-announcing device*. Pending.

IT IS FURTHER ORDERED that the Complaint against Anthony W. Fulton and the Tony Fulton Campaign be, and is hereby, dismissed.

IT IS FURTHER ORDERED that the Complaint against Communications Strategies, Inc., be, and is hereby, sustained.

IT IS FURTHER ORDERED that this Order shall constitute an official warning to Communications Strategies, Inc., for violating provisions of the Automatic Dialing-Announcing Devices Act and the rules and regulations of the Nebraska Public Service Commission.

MADE AND ENTERED at Lincoln, Nebraska, this 14<sup>th</sup> day of December, 2010.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Deputy Director