

**IV.**  
**FACTUAL BACKGROUND**

7. Houston Cellular is licensed by the FCC as the exclusive provider of cellular communications services on its authorized frequencies in the Houston Metropolitan Statistical Area, which includes Harris, Liberty, Montgomery, Waller, Fort Bend and Brazoria Counties.

8. Defendants are engaged in the process of altering, manipulating, or emulating the Electronic Serial Numbers on cellular telephones in violation of the FCC's ESN Orders.

9. The Electronic Serial Number ("ESN") is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. It is separate and distinct from the phone's 10-digit telephone number. One purpose of the ESN in a cellular telephone is similar to the Vehicle Identification Number in an automobile. Specifically, it uniquely identifies the equipment to assist in recovery, if it is stolen. More importantly, the ESN is designed to identify an authorized subscriber and enable cellular licensees, like Houston Cellular, to authorize system usage and to properly bill for calls made to and from a cellular telephone.

10. The alteration of a cellular telephone's ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular phone to emulate, or imitate, another cellular phone. This allows a person to make a call on one cellular telephone while actually charging the call to another. Alteration of an ESN facilitates fraudulent and unauthorized cellular calls. An unauthorized user of a cellular phone that has an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration enables one cellular phone to emulate another cellular phone beyond the detection abilities of cellular licensees. This enables a customer to use more than one telephone for the same telephone number, thereby avoiding monthly access charges charged by Houston Cellular and other cellular licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular phones, resulting in a significant loss of revenues to Houston Cellular.

11. Furthermore, Houston Cellular has recently offered a special long distance program whereby, for a monthly fee, Houston Cellular will allow free air time on all long distance calls in the State of Texas. Use of this long distance program will allow a customer to call long distance from his cellular telephone and pay only the rate charged by the customer's pre-selected long distance carrier. Houston Cellular will not charge for air time on such calls. Alteration of an ESN allows a customer to have multiple cellular phones covered by a single monthly fee payment for the long distance program, resulting in a substantial loss of revenue to Houston Cellular.

12. As more fully described in the affidavit of Robert Edwards, attached and incorporated as Exhibit "A," defendants John C. Nelson, individually and doing business as Cell Time Cellular and as Action Cellular, have been engaged in the unauthorized practice of altering, transferring, emulating or manipulating the ESN of cellular telephones to emulate other phones subscribed to Houston Cellular. Specifically, on or about September 29, 1994, for a \$225.00 fee, John Nelson altered an ESN on a cellular phone provided to him to emulate a Houston Cellular subscribed phone. In December of 1994, Robert Edwards returned to John Nelson and received a quote of \$250.00 for the alteration of an additional cellular telephone.

13. Furthermore, as more fully described in the affidavit of Robert Edwards, attached and incorporated herein as Exhibit "A," defendants Danny Hart, individually and doing business as Action Cellular and Action Cellular Extension are also engaged in the unauthorized practice of altering, transferring, emulating or manipulating the ESN of cellular telephones. Specifically, on or about February 8, 1995, Houston Cellular received an ad on Adverfax. The ad specifically advertises "two cellular phones, one cellular number." Entities not licensed by the FCC to provide cellular service cannot provide this service set forth in the advertisement. Houston Cellular has not authorized any person or entity to alter or emulate ESNs for cellular phones subscribed to its service. See Affidavit of Mike Hanafin. The Affidavit of Robert Edwards describes a conversation with Danny Hart wherein he admitted that for \$250.00 he would alter the ESN of a cellular phone to emulate a Houston Cellular subscriber's phone.

V.  
FCC REGULATIONS

14. On May 4, 1981, the FCC released an Order entitled "An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems," 86 F.C.C.2d 469 (1981) in which it, among other things, adopted technical specifications for the use of cellular telephones, including a requirement that each phone have a unique ESN. See 86 F.C.C.2d at 508 & n.78, 573, and 593. This FCC Order (the "First ESN Order") was published in the Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417.) A copy of this First ESN Order is attached as Exhibit "B." On September 9, 1994, the FCC released an Order entitled "Revision of Part 22 of the Commission Rules Governing the Public Mobile Services." This FCC Order (the "Second ESN Order") was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502). (The First ESN Order and Second ESN Order are collectively referred to herein as the ESN Orders.) A copy of the Second ESN Order is attached as Exhibit "C."

15. In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, and published in the Federal Register July 1, 1992 (57 Fed. Reg. 29260), C2+ Technology, a company that altered ESNs, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 67 of Exhibit "C."

16. The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's

blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.

See paragraph 60 of Exhibit "C."

17. The Commission further concluded:

Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification<sup>1</sup> and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

See paragraph 62.<sup>2</sup> (emphasis added).

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the First ESN Order as codified in Commission rules, and (2) any company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

## VI. REQUEST FOR TEMPORARY RESTRAINING ORDER

18. Pursuant to 47 U.S.C. § 401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, Houston Cellular seeks a temporary restraining order from the court asking the court (1) to enjoin defendants from altering, transferring, emulating or manipulating the ESNs of cellular telephones and (2) that all records, computer disks, and other information concerning altered telephones be preserved in their current state. As shown by the affidavits and evidence attached

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<sup>1</sup>See previous 47 CFR § 22.915, which became new 47 CFR § 22.933, adopted in the Second ESN Order.

<sup>2</sup>The Second ESN Order also revised § 22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephones to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, in new telephones, Houston Cellular and other cellular licensees should not be plagued with companies that alter ESNs in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

hereto and incorporated herein, Houston Cellular would show immediate and irreparable injury will occur to Houston Cellular if an order enjoining defendants from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavit of Mike Hanafin, Vice President of Engineering and Operations, attached as Exhibit "D," Houston Cellular would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendants indicating the names of customers who have received altered telephones, Houston Cellular does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner.

19. In addition, 28 U.S.C. § 401(b) states:

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

20. In *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984) vacated on other grounds 106 S. Ct. 2884. The Fifth Circuit, interpreting § 401(b), stated:

Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience.

*Id.* at 1114-1115.

21. An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable

persons. *Id.* at 1115. On their face, the ESN Orders are “orders” prohibiting individuals, *inter alia*, from using cellular phones with altered ESNs or from altering ESNs in cellular phones.

22. In order to show that an order was duly served, the Fifth Circuit has stated:

Thus, the requirement of “due service” is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public.

*Id.* at 1119 (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making proceedings under the APA, and the referenced ESN Orders were published in the Federal Register.

23. Houston Cellular, through the affidavits and Exhibits attached hereto and incorporated herein, has shown that the defendants have violated “orders” of the FCC which have been “duly served” upon the defendants. Because Houston Cellular has been injured by defendants’ disobedience, it is entitled to a temporary restraining order prohibiting the altering, transferring, emulating or manipulating of ESNs of cellular telephones and enjoining defendants from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

## **VII.** **REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION**

24. By way of this Complaint, Houston Cellular asks the court to set a date, within ten (10) days of the signing of the temporary restraining order, for hearing on the preliminary injunction. At the same time, Houston Cellular asks the court to order defendants to produce certain records relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and/or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones to the court for in camera inspection and safekeeping.

25. Furthermore, after the preliminary injunction hearing, Houston Cellular asks for a trial at the earliest possible setting in order to permanently enjoin defendants from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, or (2) altering or

destroying any record that relates to the altering, transferring, emulating or manipulating of cellular telephones, or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

**VIII.**  
**REQUEST FOR DECLARATORY RELIEF PURSUANT TO**  
**28 U.S.C. 2201 ET SEQ.**

26. Pursuant to 28 U.S.C. 2201(a), Houston Cellular seeks a judgment from this court declaring the rights and obligations of Houston Cellular and the defendants. Specifically, Houston Cellular asks the court to declare:

(1) Defendants' altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.

(2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.

(3) Houston Cellular has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.

(4) Defendants have no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular customers.

27. Pursuant to 28 U.S.C. 2202, Houston Cellular seeks reimbursement of the reasonable and necessary attorneys' fees incurred by Houston Cellular for bringing this declaratory judgment action.

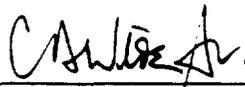
**IX.**  
**PRAYER**

28. Houston Cellular requests this court enter a temporary restraining order, after a hearing, preliminary injunction, and after a trial on the merits, a permanent injunction; that it be

awarded reasonable and necessary attorneys' fees in connection with the prosecution of this action; and for such other relief, at law or in equity, to which Houston Cellular shows itself justly entitled.

29. Pursuant to Fed.R.Civ.P. 38, Houston Cellular respectfully demands a trial by jury.

Respectfully submitted,

By: 

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**EXHIBIT "A"**

1. All lists, files, records or other information containing names, addresses and/or telephone numbers of individuals or entities for whom you altered, transferred, emulated or manipulated the electronic serial number of cellular telephones from January 1, 1990 to the present.
2. All advertisements, brochures or other documents which advertised services you provide to the public for altering, transferring, emulating or manipulating the electronic serial number of cellular telephones.
3. Documents in your possession which identify other individuals or entities which provide services which alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.
4. Documents which evidence any previous or current business relationship or dealings with the entity C2+ Technology.

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of

Revision of Part 22 of the  
Commission's Rules  
Governing the Public  
Mobile Services                    CC Docket No. 92-115

Amendment of Part 22 of  
the Commission's Rules to  
Delete Section 22.119 and  
Permit the Concurrent  
Use of Transmitters in  
Common Carrier and  
Non-Common Carrier  
Service                            CC Docket No. 94-46  
    RM 8367

Amendment of Part 22 of  
the Commission's Rules  
Pertaining to Power  
Limits for Paging Stations  
Operating in the 931 MHz  
Band in the Public Land  
Mobile Service                    CC Docket No. 93-116

REPORT AND ORDER

Adopted: August 2, 1994            Released: September 9, 1994

By the Commission:

INTRODUCTION

1. By this *Report and Order*, we revise in its entirety Part 22 of our Rules, which governs the Public Mobile Services.<sup>1</sup> The new Part 22 is considerably shorter than the existing Part 22 that it replaces, and we believe that Public Mobile Services applicants and licensees will find it better organized and easier to understand and use. In our proposal to rewrite Part 22, we identified rule and policy changes that could eliminate outdated and unnecessary information collection requirements, expedite authorization of service, and promote efficient use of the electromagnetic spectrum. We adopt many of these changes herein. These revisions serve the public

<sup>1</sup> The Public Mobile Services include the following services: Public Land Mobile Service, Rural Radio Service, Domestic Public Cellular Radio Telecommunications Service, Offshore Radio Telecommunications Service, and the 800 MHz Air-Ground Radiotelephone Service.

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interest by streamlining and improving the Commission's licensing procedures in ways that will benefit the providers and ultimately the users of mobile services. These changes will further our goals of stimulating economic growth and expanding access to mobile radio networks and services.

BACKGROUND

2. In the *Notice of Proposed Rule Making (Notice)*,<sup>2</sup> we proposed a comprehensive review and revision of Part 22 of the Rules. We indicated that a revision and update of Part 22 was needed for the following reasons: (1) to ensure that the various rules adopted in individual proceedings since the last major

<sup>2</sup> Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, *Notice of Proposed Rule Making*, 7 FCC Rcd 3638 (1992).



*Cellular Communications Systems*

**Cellular Communications System  
Mobile Radio Service, Cellular  
Rules, Amendment of**

Parts 2 and 22 of rules amended to provide licensing and operation of cellular communications systems. Commission believes it has established a framework to meet the public's needs for mobile communications for the foreseeable future with minimum regulation. CC 79-818

FCC 81-161

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems

CC Docket No.  
79-818

**REPORT AND ORDER  
(PROCEEDING TERMINATED)**

(Adopted: April 9, 1981; Released: May 4, 1981)

BY THE COMMISSION: CHAIRMAN FERRELL NOT PARTICIPATING;  
COMMISSIONER FOGARTY CONCURRING IN PART AND ISSUING A  
STATEMENT IN WHICH COMMISSIONER QUELLO JOINS; COMMISSIONER  
JONES DISSENTING IN PART AND ISSUING A STATEMENT.

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THE STATE OF TEXAS §  
COUNTY OF HARRIS §

KNOW ALL MEN BY THESE PRESENTS:

**AFFIDAVIT OF MIKE HANAFIN**

BEFORE ME, the undersigned authority, personally appeared Mike Hanafin, who after being duly sworn, did state under oath as follows:

“My name is Mike Hanafin. I am over the age of eighteen (18) and I am fully competent to make this affidavit in all respects. The facts and opinions contained herein are true, correct, and based upon my personal knowledge.

I am vice president, engineering and operations at Houston Cellular. I am familiar with the technical aspects of the cellular business, including the process known as “emulation” whereby a factory installed Electronic Serial Number (“ESN”) is altered. The ESN is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. The ESN enables cellular licensees, like Houston Cellular to identify an authorized subscriber and therefore to authorize system usage and to bill properly for calls made from a cellular telephone.

The alteration of a cellular telephone’s ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular telephone to emulate, or imitate, another cellular telephone. This allows a person to make a call on one cellular telephone while actually charging the call to another. Alteration of an ESN facilitates fraudulent and unauthorized cellular calls. An unauthorized user of a cellular phone with an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration allows a customer with two cellular phones to have one phone emulate the other, e.g., to use more than one telephone with the same telephone number, thereby avoiding monthly access charges charged by Houston Cellular and other cellular licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular telephones, resulting in a significant loss of revenue to Houston Cellular.



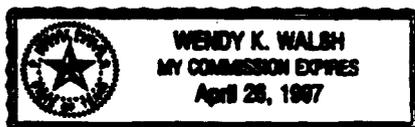
Furthermore, Houston Cellular has recently offered a special long distance program whereby, for a monthly fee, Houston Cellular will allow for free air time on all long distance calls in the State of Texas. Use of this long distance program will allow a customer to call long distance from his cellular telephone and pay only the rate charged by the customer's personal long distance carrier. Houston Cellular will not charge for air time. Alteration of an ESN allows a customer to have multiple cellular telephones covered by a single payment for the long distance program, resulting in a substantial loss of revenue to Houston Cellular.

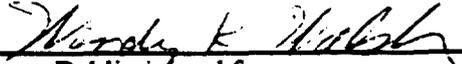
I have reviewed the AdverFax, published by Action Cellular Extensions, which states "Two Cellular Phones, One Cellular Number". Based upon my experience and knowledge, there is no method of achieving two cellular telephones with one number, which has been approved by Houston Cellular. At Houston Cellular's facilities, cellular phones with an altered ESN register as if they were the original cellular phone assigned that particular ESN and therefore Houston Cellular does not have any way to determine if a cellular telephone has been emulated. The only way that Houston Cellular can find customers with emulated telephones is to review the sales records of the emulator. Destruction of the emulator's records will leave Houston Cellular without any recourse against its customers with emulated telephones.

Further affiant sayeth not."

  
Mike Hanafin

27<sup>th</sup> SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this  
day of February, 1995.



  
Notary Public, in and for  
the State of Texas

THE STATE OF TEXAS §  
COUNTY OF HARRIS §

KNOW ALL MEN BY THESE PRESENTS:

**AFFIDAVIT OF ROBERT EDWARDS**

BEFORE ME, the undersigned authority, personally appeared ROBERT EDWARDS who after being duly sworn, did state under oath as follows:

"My name is Robert Edwards. I am over the age of twenty-one (21) and I am competent to make this affidavit which is made upon personal knowledge. The facts set forth in this affidavit are based upon personal knowledge and are in all things true and correct.

I am an investigator with the Guidry Group. At the request of Alan Dear of Houston Cellular Telephone Company, I was requested to obtain evidence which would show that employees of the Cellular Phone Store, located at 1313 S. Loop West, Houston, Texas, were referring Houston Cellular customers to John Nelson for the purpose of emulating cellular phones. I was further requested to see if I could prove that Mr. Nelson was emulating cellular phones provided by Houston Cellular.

On September 26, 1994, I received an activated Motorola flip (portable) phone and a non-activated Motorola bag (transportable) phone, both of which had been provided by Houston Cellular and were on Houston Cellular accounts. I obtained a subscriber agreement from Houston Cellular in my name for the activated Motorola flip phone, bearing the electronic serial number ("ESN") 827SF658. On the same day, I went to the Cellular Phone Store and explained to the receptionist that I wanted an extension for my Motorola flip phone. The receptionist directed me to the shop section of the store. In the shop section, I told a woman in the area that I wanted the same number for my inactivated bag phone which was already on my recently purchased and activated flip phone. This individual told me that this could not be done. Before she could explain why it could not be done, an individual by the name of Chris Torres said that "John" could accomplish this conversion.



Mr. Torres explained that "John" had his own business and did this type of emulation for the Cellular Phone Store. Mr. Torres explained that emulation would take approximately three days. He agreed to call "John" and did so as I waited. Mr. Torres told me that "John" said to leave the bag phone with Mr. Torres and that "John" could have the phone emulated by Thursday, September 29, 1994. I was quoted a price of \$225.00. Mr. Torres copied the phone number and ESN number from the flip phone, along with my name. He then gave me a claim check number and asked me to call his office around midday on Thursday, September 29, 1994.

On September 29, 1994, at approximately 11:00 a.m., I contacted Chris Torres by phone. Mr. Torres stated that "John" wanted to meet me at the store with the emulated phone. I told Mr. Torres that I could meet John at his store between 12:00 and 12:30 p.m.

At approximately 12:15 p.m., I was introduced to Mr. John Nelson by Chris Torres. Mr. Nelson handed me the emulated bag phone and explained that he had performed a "minor tune-up" on it. He then provided me with a typewritten letter, a copy of which is attached hereto as Exhibit "1", addressed to "Dear emulation customer."

I spent approximately 20 minutes with John Nelson in the shop area of the Cellular Phone Store. Mr. Nelson provided me with a one page, printed letter on the letterhead of Cell Time Cellular which explained the availability and advantages of cellular phone emulation. A copy of this letter is attached hereto as Exhibit "2". Mr. Nelson offered to emulate other phones for me and said he had done so to phones on boats and other vehicles. He claimed there was no limit to the number of extension phones that could be on the same number.

Mr. Nelson suggested that I obtain an additional cellular phone emulated for my mother or any other loved one. When I told him that my mother lived in Florida, Mr. Nelson said that the emulated phone would still work in Florida in a "roving-roaming" capacity. Mr. Nelson did not require any identification from me, but asked me to sign a form which had my name printed at the top along with blank spaces for home address, phone number, date of birth and social security number. This form certified that I was the authorized customer for the phone number which Mr.

Nelson emulated. When I asked Mr. Nelson "out of curiosity" how long the emulation procedure took, he replied that it took 4-6 hours.

Mr. Nelson accepted \$225.00 in cash from me as payment for this emulation. This was done after he was asked to test the emulated bag phone with an incoming and an outgoing call in my presence. Both "tests" were successful.

Mr. Nelson gave me an emulation receipt which I saw him write and sign. He explained to me that this receipt could not be on a Cellular Phone Store receipt since the emulation was not theirs but his. A copy of this receipt is attached hereto as Exhibit "3".

Mr. Nelson also indicated that he received emulation referrals from other stores in the Houston area, similar to the Cellular Phone Store, but he did not name any of these stores. Mr. Nelson provided me with several of his business cards, one of which is attached to this affidavit as Exhibit "4".

After leaving the Cellular Phone Store, I returned the two cellular phones involved in this investigation to Mr. Alan Dear of Houston Cellular. I also provided him with copies of the documents received from Mr. Nelson which are referenced above. It is my understanding that the emulated cellular phone is still in the possession of Houston Cellular.

On December 28, 1994, I again received an assignment from Houston Cellular to try to have a phone emulated. On that day, at approximately 11:35 a.m., I returned to the offices of the Cellular Phone Store and met with Victor Torres, the technical manager of the Cellular Phone Store. I explained to Mr. Torres that I had previously had my flip phone emulated with a bag phone by John Nelson at the store. Mr. Torres told me that Houston Cellular did not like the Cellular Phone Store emulating existing cellular phones, but added that he would put me in contact with John Nelson. I gave Mr. Torres my pager number and flip phone number to pass on to Mr. Nelson.

On December 29, 1994, at approximately 10:15 a.m., I was paged by phone number 360-8689. I returned the call which was answered by a male voice who said "Action Cellular." I asked

for John Nelson and the individual answering the phone told me that John Nelson was on another line. I explained that Mr. Nelson had previously emulated a phone for me and that I had another phone to be emulated. I was given the address for Action Cellular as 9100 Southwest Freeway, Suite 150, and was told that John Nelson would be available if I wanted to bring the cellular phone to Action Cellular. On December 29, 1994, at approximately 10:45 a.m., I arrived at 9100 Southwest Freeway, Houston, Texas. A sign on the door of Suite 150 stated "The Harvest Financial Group." After introducing myself to the receptionist in the office, I was greeted by an individual who introduced himself as "Ted", and who told me that he had spoken to me earlier on the phone. Ted reintroduced me to John Nelson, who had been standing nearby with his back to the door. Mr. Nelson appeared to recognize me, and led me to an office located behind and to the right of the reception area.

Mr. Nelson apologized for the condition of his office (numerous papers were strewn about his desk, and several cellular phones in their "bags" were on the desk and the floor). Mr. Nelson explained that he had just joined a new company called "Action Cellular", and that the name of this company would soon appear on the door along with "The Harvest Financial Group." He did not explain the relationship between the two companies.

I reminded Mr. Nelson that he had emulated a bag phone for me in September. Mr. Nelson asked how the phone was working. He then brought up my name on a computer whose screen was filled with the names of other customers in September of 1994. From this screen, he obtained the electronic serial number ("ESN") of my flip phone.

Mr. Nelson advised me that Houston Cellular and other similar phone companies did not appreciate the emulations that he and other small companies were doing. He said that emulations were costing the larger companies money from lost monthly service fees. He further claimed that as long as emulated phone users did not talk simultaneously, no theft of services occurred. Mr. Nelson informed me that the price for the emulation was \$250.00. When I reminded Mr. Nelson

that the previous price was \$225.00, he responded that it had increased to \$250.00, but that he would only charge me \$225.00 as a repeat customer.

Mr. Nelson provided me with eight business cards which read "Two cell phones, one cell number, one cell bill, fast, locally and legal - Call John at 713-360-8689." On one card he wrote 771-6974 in the lower right corner. A copy of this is attached hereto as Exhibit "5". Mr. Nelson also provided me with one sheet of paper from Cell Time Cellular, a copy of which is attached as Exhibit "6", which described the companies emulation service and "important points to remember." A second sheet of paper, also provided to me by Mr. Nelson and attached hereto as Exhibit "7", was an application for emulation with Cell Time Cellular.

Prior to leaving his office, I was required to sign a form which certified that I was the subscriber of the emulated flip phone and that I would not use the extension phone for anything illegal. I asked Mr. Nelson if it was technically feasible to use emulated phones simultaneously. Mr. Nelson replied that it was. He also said that the larger phone companies could detect when emulated phones were being used at the same time. Mr. Nelson suggested using a pager system to indicate periods of availability to co-users of the same emulated phones.

Mr. Nelson concluded by stating that he hoped to have my emulated bag phone ready by midday on December 29, 1994. He added that he could deliver it to me, but I expressed a preference for receiving it from his office.

When I left Mr. Nelson's office, I deliberately left the activated flip phone on his desk. After waiting in the hall for two minutes, I returned to Mr. Nelson's office to reclaim the flip phone, but Mr. Nelson was away from his desk. I then approached the receptionist and explained my problem to her. She said that Mr. Nelson was on the phone and indicated an office across the hall from her whose door was closed. Ted came out of this office and I told him that I had forgotten my flip phone but was not sure if John needed it for the emulation. John came out of this office, told me that he would not need the flip phone, and returned it to me.

On December 29, 1994, at approximately 4:00 p.m., I was paged by John Nelson. I returned his call at 771-6974. Mr. Nelson asked me if I was Bob Edwards with the Guidry Group who was working for Houston Cellular. I denied that I was that individual. I then asked him if my phone was ready and he replied that it was not. Mr. Nelson then asked me for my business phone number. I gave him a previous employer's phone number. I do not know how John Nelson discovered that I was acting as an investigator for Houston Cellular.

On December 30, 1994, I met John Nelson at the offices of Action Cellular. Mr. Nelson told me that he could not emulate my phone because it was "too new", and the emulation technology was not locally available. After appearing to be convinced that I was not an investigator, Mr. Nelson offered to ship my phone to associates in Montgomery, Alabama, who had the technology to emulate it. He claimed that this service would take seven days and an additional \$50.00 to complete. I told Mr. Nelson that I would consider his revised offer, but that I intended to shop around for less expensive and local emulation.

At this time I returned the two involved phones to Houston Cellular.

On or about February 14, 1995, I received an additional assignment from Houston Cellular. I was sent an advertisement which was received by Houston Cellular on their fax machine. The advertisement, a copy of which is attached hereto as Exhibit "8", was advertised in Adverfax and faxed to Houston Cellular. At Houston Cellular's request, I called Action Cellular Extensions at 773-9610 and asked for Danny Hart. During my conversation, I referenced the ad in Adverfax. I claimed that I saw the ad at Gerland's on Highway 6. I told Mr. Hart that I had a Motorola flip phone that I used at work. I also explained that I would like to activate an old Motorola bag phone and have the same phone number as my Motorola flip phone. He indicated that this was "not a problem."

After asking him how this process worked, Mr. Hart claimed that his company emulated the phone through an "encrypted software process". He indicated that the process was computer generated and would do nothing to alter my phone. He claimed that they were "duplicating

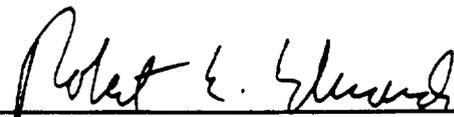
electronic serial numbers." He indicated that the fee for the emulation was \$250.00 plus tax. He further stated that you could not make a call between the two phones and you could only use one of the cellular phones at a time.

Mr. Hart indicated that the turnaround time for emulating a phone would take one day. He guaranteed that the "two phones were going to work" and that they would continue to work throughout the life of my phone.

I asked Mr. Hart if there was a place where I could come to him. He indicated that he would come to pick up my phone.

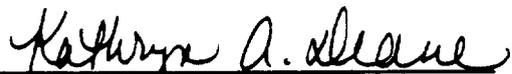
Mr. Hart indicated that he was not associated with GTE or Houston Cellular. He claimed that he had a parent company out of Alabama that he worked with. He claimed that he could emulate phones from any cellular company in the world.

Mr. Hart told me to call for an appointment and that he would come pick up the phone. I asked him if this process was legal and he stated that it was "perfectly, perfectly legal." Further affiant sayeth not."

  
\_\_\_\_\_  
ROBERT EDWARDS

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 17th day of February, 1995.



  
\_\_\_\_\_  
Notary Public in and for  
the State of Texas

Dear Emulation Customer,

Attached you will please find a form to fill out to complete the emulation of your secondary cellular phone and an information sheet about both phones.

We noted upon receipt of your secondary phone, that the antenna was not properly secured, we have rectified this situation. Also, your satisfaction level will increase greatly with all of your cellular phones if you annually get a "tune up" on each phone. You really will be surprised how a tune up will reduce your frustration with your local cellular provider (Inasmuch as in many cases, it is not the cellular companies fault that your conversation is not up to your expectations because of the need of equipment tune up).

Thank you once again for your interest in and participation of our services.

Sincerely,

John C. Nelson, Jr.

EXHIBIT

1

BE, 9-29-94

## CELL TIME CELLULAR (CTC)

5202 SYCAMORE VILLAS DR • KINGWOOD TEXAS, 77345 • PHONE & FAX 713-360-8689

### THANK YOU FOR YOUR INQUIRY

At CTC we have the technology to enable you to have more than one phone on the same number. This technology has been available for several years, but is expensive for a carrier to provide. CTC now makes that technology affordable!!

Your CTC serviced phone will maintain its original security. The original manufacturer's software will not have been changed nor will anything be physically added to your phone which might violate your phone's FCC type approval.

### IMPORTANT POINTS TO REMEMBER

Due to deficiencies in the established system, ONLY ONE UNIT can be on at a time. If more than one phone is on, you may be in violation of your carrier's tariffs. In some instances your service may be interrupted or even terminated due to the electronic security measures utilized by the carrier.

This service is available to you from information provided by you and at your request. CTC will not assume liability for:

1. the use or nonuse of the phones; or,
2. any failure to observe any laws or regulations; or,
3. any use which might constitute either theft of services; or,
4. any use for fraudulent purposes whatsoever.

Should your Primary (activated) phone be stolen, report it to your carrier immediately. Do not attempt to use the secondary phone since it may be blocked by the carrier. Any attempt to use the phone may result in investigation for using a reportedly stolen phone.

Should your secondary (emulated) phone be stolen, request a number change from your carrier. After this change has been made your phone may have the number programmed. THEN call CTC. We will advise you of the procedure to have the new phone work with the existing phone.

Should you decide to sell your secondary (emulated) phone, or return it to the manufacturer for warranty work, call us and we will reset it to its original parameters. There will be a nominal charge plus freight for this service.

Time Cellular - Making tomorrow's technology affordable TODAY!

EXHIBIT

2

9-29-94

5

EMULATION RECEIPT

✓ MR. EDWARDS PAID \$225.00 CASH  
FOR THE EMULATION OF  
TELEPHONE # 516-5233

JOHN NELSON



C2 + TECHNOLOGY

EXHIBIT
<u>3</u>

BC, 9-29-94