



Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417).

5. On September 9, 1994, after notice in the Federal Register, the FCC issued the Revision of Part 22 of the Commission Rules Governing the Public Mobile Services (9 FCC Rod 6513 (1994)). This FCC order was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502).
6. Houston Cellular has suffered irreparable damage as a consequence of defendants' emulation of the electronic serial numbers of cellular telephones for which it is the carrier. The defendants' actions have deprived Houston Cellular of monthly access charges and other per unit charges its customers would owe for additional connections.
7. Although the damage is describable, Houston Cellular cannot reliably quantify it, making the legal remedy inadequate.
8. The acts of the defendants are analogous to their having installed unauthorized access to a cable television network. This piracy injures the utility and its legitimate customers.
9. No unrepresented third-party nor any diffuse public interest is adversely affected by the restrictions this injunction imposes on Nelson and Hart.

**B. Conclusions.**

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. § 552(a)(1). See also, *Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947).
2. These orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.
3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc., violates the two FCC orders.
4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisite of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *Crawshaw v. Windrush Partners*, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available at common law.

**C. Injunction.**

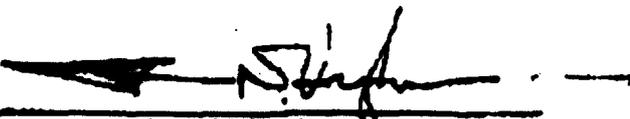
Based on these findings and conclusions, John C. Nelson, Jr., Daniel K. Hart, and Action Cellular Extensions, Inc., are enjoined permanently from emulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

This restriction binds them and all those who may knowingly act in concert with them, including employees, agents, and consumers.

1. Specifically, the defendants are enjoined from altering, transferring, emulating or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FCC orders.
2. The defendants shall produce immediately to Houston Cellular those documents, including those seized by the United States Marshal and others in their possession or within their access:
  - A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they altered, transferred, emulated, or manipulated the electronic serial numbers of cellular telephones from January 1, 1990, to March 15, 1995.
  - B. All advertisements, brochures, or other documents that advertised services to the public for altering, transferring, emulating, or manipulating the electronic serial numbers of cellular telephones.
  - C. Documents in their possession that identify other entities which offer services to alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.
  - D. Documents evincing a business relation or transaction with Technology, Inc.
  - E. A complete copy of all data on any storage medium, including paper-based, fixed-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM). Houston Cellular will reimburse the defendants for copying costs incurred in producing a hard copy.
3. With the exception of Houston Cellular subscribers' service orders or contracts, the defendants are entitled to retain the originals of those documents, providing Houston Cellular with photocopies. The defendants may retain photocopies of the Houston Cellular subscribers' service orders or contracts only for the purpose of assisting in re-emulation. The defendants will surrender to Houston Cellular all photocopies at the completion of the re-emulation or upon written request of Houston Cellular.

4. This order does not require that the defendants produce C2+ Technology, Inc., proprietary information, equipment, or accessories in any form.
5. This is a final judgment. The court retains jurisdiction to enforce the injunction and the settlement from which it arose.

Signed March 15, 1995, at Houston, Texas.

  
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Lynn N. Hughes  
United States District Judge

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alter, transfer, emulate or manipulate the ESNs of cellular telephones in violation of the FCC's ESN Orders.

NYNEX Mobile is licensed by the Federal Communications Commission ("FCC") to be a cellular telephone carrier in certain geographic regions including the State of New York.

CELLULAR EMULATION is not licensed by the FCC to be a cellular telephone carrier.

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

A cellular telephone is a wireless transmitter and receiver that allows a person to place and receive telephone calls without being connected directly to the wire-lined telephone system.

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 <sup>TO IDENTIFY THE CELLULAR TELEPHONE</sup> 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 NYNEX MOBILE, to authorize system usage and to properly bill for calls made to and 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 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 NYNEX MOBILE and other 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 NYNEX MOBILE.

As more fully described in the affidavit of John F. Talt, (annexed to the Complaint as Exhibit "A"), CELLULAR EMULATION has been engaged in the unauthorized practice of altering, transferring, emulating, or manipulating the ESN of cellular telephones to emulate other phones subscribed to NYNEX MOBILE. Specifically, at the beginning of May 1995, for the sum of \$289.95, Alan Gedachian, President of CELLULAR EMULATION altered an ESN on a cellular phone to emulate a NYNEX MOBILE subscribed phone.

#### FCC REGULATIONS

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 Part 2 and 22 of the Commission's Rule 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 to the Complaint 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 to the Complaint as Exhibit "C."

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 the second ESN Order, Exhibit "C" to the Complaint.

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 303 of the Act."

See paragraph 60 of the Second ESN Order, Exhibit "C" of the complaint.

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 (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."

<sup>1</sup> See previous 47 CFR 522.915, which became new 47 CFR 522.933, adopted in the Second ESN Order.

47.  
REQUEST FOR TEMPORARY RESTRAINING ORDER

Pursuant to 27 U.S.C. §401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, NYNEX Mobile seeks a temporary restraining order from the court asking the court (1) to enjoin defendant 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 complaint affidavits and evidence attached hereto and incorporated herein, NYNEX Mobile would show immediate and irreparable injury will occur to NYNEX Mobile if an order enjoining defendant from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavit of Gary Sutcliffe, Project Manager - Technology of NYNEX Mobile, NYNEX Mobile 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 defendant indicating the names of customers who have received altered telephones NYNEX Mobile 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. NYNEX Mobile 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, NYNEX Mobile 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.

In addition, 47 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."

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. 2284, 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.

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.

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.

NYNEX Mobile, 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 NYNEX Mobile has been injured by defendant's disobedience, it is entitled to a temporary restraining order prohibiting the altering, transferring,

emulating or manipulating of ESNs of cellular telephones and enjoining defendant from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

In early 1995, Houston Cellular Telephone Company brought an action virtually identical to this one against two ESN emulators. The action, Houston Cellular Telephone Company v. John C. Nelson et al. (Civil Action H-95-617) was brought in the United States District Court for the Southern District of Texas, Houston Division.

22. The Court, by order dated March 15, 1995, granted a permanent injunction (annexed hereto as Exhibit "E") holding as follows:

"B. Conclusions.

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. §552(a) (1). See also Fed. Crop Ins. v. Merritt, 332 U.S. 380, 384-85 (1947).
2. These orders adopted by the FCC constitute orders within the meaning of §401(b) (47 U.S.C. §401(b)) of the Communication Act of 1934.
3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc. [defendant emulators] violates the two FCC orders.
4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisite of irreparable injury need not be

established where such injunctive relief is expressly authorized by statute. United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969); Gresham v. Windrush Partners, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available at common law."

#### REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

NYNEX Mobile 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, NYNEX Mobile asks the court to order defendant 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 telephone to the court for in camera inspection and safekeeping. In particular, plaintiff asks for the following records:

1. All lists, files, records or other information containing names, addresses and/or telephone numbers of individuals or entities for whom defendant 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 defendant provide to the public for altering, transferring, emulating or manipulating the electronic serial number of cellular telephones.

- 3. Documents in defendant's 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.

Furthermore, after the preliminary injunction hearing, NYNEX Mobile asks for a trial at the earliest possible setting in order to permanently enjoin defendant from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, - (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.

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

Additionally, pursuant to 28 U.S.C. 2201(a), NYNEX Mobile seeks a judgment from this court declaring the rights and obligations of NYNEX Mobile and the defendant. Specifically, NYNEX Mobile asks the court to declare:

- a. Defendant's 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.

- b. The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.
- c. NYNEX Mobile 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.
- d. Defendant has no right to alter, transfer, emulate or manipulate cellular telephones of NYNEX Mobile customers.

Plaintiff's request for injunctive relief complies with all the requirements of this court for an injunction:

- a) the summons and complaint annexed hereto demonstrate clearly that defendant violated the ESN Orders;
- b) there is no adequate remedy at law since plaintiff's damages are not calculable; and
- c) there is every likelihood of success on the merits as both the FCC and the courts have held that the alteration of ESN numbers is a violation of law.

No prior application for relief has been made herein.

For the foregoing reasons plaintiff respectfully request that defendant, CELLULAR EMULATION SYSTEMS, INC., be enjoined from altering, transferring, emulating or manipulating the ESNs of cellular telephones and altering or destroying any records, computer disks, and other information that relates to the altering, transferring, emulating or manipulating of cellular telephones or servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

Dated: New York, New York  
June 5, 1995

Carol R. Abramson  
CAROL R. ABRAMSON (CRA-2144)

Sworn to before me this  
5<sup>th</sup> day of June 1995

John J. Collins  
NOTARY PUBLIC

JOHN J. COLLINS  
Notary Public, State of New York  
No. 01C05037445  
Qualified in Queens County  
Certificate Issued in New York County  
Commission Expires December 27, 1996

CRA:jjc

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
NYNEX MOBILE COMMUNICATIONS COMPANY,

Plaintiff,

- against -

CELLULAR EMULATION SYSTEMS, INC.,

Defendant.  
-----X

OFFICE  
COPY

MEMORANDUM OF LAW  
OF PLAINTIFF,  
NYNEX MOBILE COMMUNICATIONS COMPANY

CAROL R. ABRAMSON, ESQ.  
Attorney for plaintiff  
NYNEX MOBILE COMMUNICATIONS COMPANY  
1095 Avenue of the Americas  
New York, New York 10036  
(212) 395-0198

## PRELIMINARY STATEMENT

Plaintiff submits this memorandum of law in support of NYNEX Mobile's application for a temporary restraining order, a preliminary injunction and ultimately, a permanent injunction barring defendant from violating the FCC's ESN orders and for an order pursuant to 28 U.S.C. 2201 (a) declaring that defendant cannot alter, transfer, emulate or manipulate the ESNs of cellular telephones in violation of the FCC's ESN Orders.

## STATEMENT OF FACTS

NYNEX Mobile is licensed by the Federal Communications Commission ("FCC") to be a cellular telephone carrier in certain geographic regions including the State of New York. CELLULAR EMULATION is not licensed by the FCC to be a cellular telephone carrier.

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

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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 NYNEX MOBILE and other 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 NYNEX MOBILE.

As more fully described in the affidavit of John F. Talt, (annexed to the Complaint as Exhibit "A"), CELLULAR EMULATION has been engaged in the unauthorized practice of altering, transferring, emulating, or manipulating the ESN of cellular telephones to emulate other phones subscribed to NYNEX MOBILE. Specifically, at the beginning of May 1995, for the sum of \$289.95, Alan Gedachian, President of CELLULAR EMULATION altered an ESN on a cellular phone to emulate a NYNEX MOBILE subscribed phone.



## ARGUMENT

### FCC Regulations

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