

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FCC MAIL SECTION

FCC 94M-481
42658

In the Matter of

Elehue Kawika Freeman and
Lucille K. Freeman,
Complainants,

v.

American Telephone and Telegraph Company
Defendant

AUG 19 2 47 PM '94

DISPATCHED BY

CC Docket No. 94-89

File No. E-90-393

PREHEARING ORDER

Issued: August 17, 1994 ; Released: August 19, 1994

1. We will hold the Prehearing Conference on November 10, 1994, and the hearing will begin on December 12, 1994.¹ Both will start at 8:30 a.m. and will be held in the Commission's office in Washington, D.C. The parties will exchange their direct case exhibits at the November 10th conference.²

2. Appearances. On or before September 1, 1994, the parties must show that they have complied with 47 CFR 1.221(c). See FCC 94-192 released August 12, 1994 at para.13.

3. Clarification of Issues. The Commission has placed both the burden of proceeding and the burden of proof on all six issues on the Freemons. See FCC 94-192 supra. at para. 12.

4. However, the Hearing Designation Order also makes it clear that AT&T's version of what transpired on the evening of May 30, 1988, differs substantially from the Freemons' version. Since the facts and records supporting AT&T's version are peculiarly within the Company's possession, they are assigned the evidentiary burden of making that affirmative showing.

5. In addition, and without in any way impinging on the evidence each party will introduce, certain important background and corroborating information should be made part of the evidentiary record. The Review Board and ultimately the Commission must have a clear picture of what has occurred. That information should include, but not necessarily be limited to the following evidentiary items:

- (a) copies of Lucille Freeman's telephone bills for May, June, and July 1988;
- (b) the telephone operator's detailed statement of what occurred at or about 10:30 p.m. on May 30, 1988;
- (c) copies of any contemporaneous notes or memos the telephone operator made regarding her intervention;
- (d) copies of any contemporaneous notes or memos her supervisor made about the incident;

¹ The Trial Judge has blocked off 8 days for hearing, November 12-21, 1994. A courtroom has been reserved for those days. Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.

² This includes the Common Carrier Bureau counsel. If the Bureau believes there are documents in its possession that will contribute to our search for the truth, they can exchange them on the date set.

- (e) copies of relevant statements of local emergency service personnel in Gresham, Oregon that the AT&T operator contacted, along with any relevant notes, memos, and other contemporaneous writings related to their statements;
- (f) copies of any relevant statements and/or police reports of the responding local Gresham police officers who went to Elehue Freemon's residence on the evening of May 30, 1988.
- (g) copies of the "suicide note";
- (h) copies of examination report of the Gresham emergency medical technicians;
- (i) copies of any reports of Portland Adventist Hospital personnel who treated Elehue Freemon during his four day stay there;
- (j) copies of any tariff provisions which authorize the AT&T operator to act in the manner she did;
- (k) Lucille Freemon's detailed statement about what happened on the evening of May 30, 1988 and what happened the next four days;
- (l) Elehue Freemon's detailed statement about what happened on the evening of May 30, 1988, and what happened the next four days;
- (m) Lucille Freemon's cancelled checks for telephone service she received in May, June, and July, 1988;
- (n) any documents, memos, or notes that corroborate Elehue and Lucille Freemon's statements or help prove their claim for damages.

6. The Commission indicates (FCC 94-192 supra. at Fn.6) that it is within the Trial Judge's discretion to bifurcate this proceeding into separate liability and damages phases. Upon analysis, and in this instance, bifurcation would not conduce to the orderly dispatch of the Commission's business. So the Freemons will assume their burden of proceeding and their burden of proof on both the liability and damages aspects in their direct presentation.

7. Both parties should be prepared to discuss any other questions about clarification of existing issues.

8. Discovery. In the HDO the Commission refers to certain predesignation discovery that has already taken place. See FCC 94-192 supra. at para.3 and Fn.6. So it appears that no postdesignation discovery will be needed.

9. However, in the interest of caution, we'll allow postdesignation discovery. Any further discovery will be initiated on September 7, 1994, conducted pursuant to 47 CFR 1.311 through 1.340, and completed on or before November 7, 1994.

10. No 47 CFR 1.315 or 1.323 written interrogatories will be employed,³ and any depositions will be taken in either Gresham, Oregon or Long Beach, California (unless otherwise agreed upon). Please don't notice a

³ However, the already completed predesignation interrogatories (para. 8 supra.) can be exchanged as part of a party's direct case if they so choose.

witness for any other place unless your opponent agrees to the location change.

11. Settlement. This already extended case could prove long and costly. Financially, the possibility exists that both parties will lose.⁴ At best one of you will have squandered substantial amounts of time and money prosecuting this case. Moreover, there is a direct relationship between the length of trial and the costs involved. The general rule is the longer the trial the greater the cost. So you face the prospect that this prospective litigation is a mistake. Being merely another form of warfare it should be avoided where possible. So engage in settlement dialogue now. The post-designation meter is now running. Don't wait to argue before the Commission three and one-half years from today. Keep your settlement channels open and use them.

12. To this end a negotiating principal from each party, along with their counsel of record (if any), are directed to attend a disposition conference on October 24, 1994, at 2:00 p.m.⁵ This face-to-face conference will be held at a prearranged agreed-upon location. There the parties should decide whether this case can be settled.

13. On or before October 31, 1994, the settlement conferees will submit a Joint Memorandum to the Trial Judge. There they will outline the results of the October 24, 1994 conference. That Memorandum should indicate whether the case has been settled and, if it has, how soon the settlement papers can be submitted for approval.

14. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit their direct affirmative cases in writing. See 47 CFR 1.243(f); and Equal Employment Opportunity Commission, 25 RR 2d 813(1972) at para.7. So, at the November 10, 1994 Prehearing Conference the parties will exchange their direct affirmative cases. This will include the sworn written testimony and the exhibits to be offered in support of their direct cases.

15. The Hearing Designation Order points out that in addition to the written interrogatories (See para.8 supra.), both parties have filed numerous pleadings and related motions in which the facts and circumstances surrounding the Freeman's claims are sharply disputed. Consequently counsel for both parties should go over these materials and select that which is relevant and material to their direct presentations. Then they will assemble it, properly identify it by source, give it a tentative exhibit number and also exchange it on the date set.

16. If either party intends to request that official notice be taken of any materials in the Commission's files, they should assemble that material, identify it by source, give it a tentative exhibit number and exchange it on the date set.⁶

⁴ The Presiding officer is aware that the Freemons are proceeding pro se. That is their election. But we've reached a stage of the proceeding where their need for a trial attorney is paramount. If they're contemplating hiring an attorney, they'd better do so quickly. We're not going to delay this extended proceeding while one of the parties scouts around for a lawyer to represent them.

⁵ The parties needn't wait until October 24, 1994, to talk settlement. Nor should the mandatory face-to-face conference be the only effort at settlement. The mandatory October 24, 1994 conference date has been set because of its proximity to the November 10, 1994 Prehearing Conference.

⁶ For example, the Freemons should have official notice taken of their August 16, 1990 formal complaint. AT&T should get official notice taken of its September 20, 1990 answer.

17. Each party will assemble their exhibits in a binder(s). Each exhibit will bear a number preferably by means of a tab on each document. The exhibit will be accompanied by the sponsoring witnesses' affidavit - if such an affidavit is required (See Para.16 supra.). Please pre-number the exhibits serially starting with the number 1. Use an appropriate prefix to indicate who is sponsoring the exhibits; e.g. Freemons Ex.1; and AT&T Ex.1.

18. Evidentiary Admission Session. We'll hold an Evidentiary Admission Session on November 28, 1994, starting at 8:30 a.m. There each party (starting with the Freemons) will formally identify and offer the direct case exhibits they exchanged on November 10, 1994. The Trial Judge will rule on any objections to all or parts of those exhibits. Immediately after the evidentiary admission session concludes, each party will notify his opponent of those witnesses they need to cross-examine and the exhibits or areas to be covered by that cross-examination.

19. Hearing Procedures. As previously noted (Paras.3 and 6 supra.) the Freemons bear both the burden of proof and the burden of proceeding on the designated issues. So they will proceed with their direct case witnesses first. AT&T is entitled to cross-examine each witness (See para.18 supra.) Then the Freemons are entitled to redirect examination of that witness followed by a recross examination.

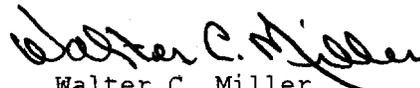
20. After the Freemons have completed their direct case, AT&T will present its direct case; the Freemons can cross-examine each AT&T witness, followed by redirect and recross.

21. Rebuttal is not a matter of right. But if during the hearing either party believes a rebuttal showing is vital to their ultimate position, they may request a rebuttal session. Such a request will only be granted upon a compelling showing.

22. Extensions of Time. All parties must meet all of their procedural deadlines. In a case where the facts are as old as in this one, we can't afford procedural slippage. So any requests for extensions of time must be made in writing and must be consent extensions.⁷ Captive extension requests; i.e., those made on the day the responsive pleading is due (or even the day before the response is due) will not be entertained.

23. Hearing Dates. The December 12-21 hearing dates are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended because counsel have agreed to a settlement.

FEDERAL COMMUNICATIONS COMMISSION


Walter C. Miller
Administrative Law Judge

⁷ Even then there is no guarantee the extension will be granted. If other cases on the Trial Judges' docket would suffer if the extension were granted, it won't be.