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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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ELEHUE KAWIKA FREEMON and)
LUCILLE K. FREEMON,)
)
Complainants,)
)
v.)
)
AT&T CORP.,)
)
Defendant.)

CC Docket No. 94-89

File No. E-90-393

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

MEMORANDUM IN SUPPORT OF
PROPOSED CONCLUSIONS OF LAW

Pursuant to Section 1.263(a) of the Commission's Rules, 47 C.F.R. § 1.263(a), defendant AT&T Corp. ("AT&T") submits this memorandum in support of its proposed conclusions of law being submitted concurrently in accordance with the Order in this proceeding released December 15, 1994 (FCC 94M-644).

As shown in AT&T's proposed findings of fact, there is no evidence that AT&T's operator intercepted or divulged the contents of Elehue K. Freemon's May 30, 1988 call to his mother, Lucille K. Freemon. To the contrary, all of the record evidence demonstrates that no such interception or divulgence occurred. For this reason alone, AT&T is entitled to a decision in its favor.

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Even if there were any admissible evidence to support complainants' allegations, however, the accompanying conclusions of law demonstrate that AT&T is still entitled as a matter of law to a decision in its favor on three grounds. First, Section 705 of the Communications Act, which the sole basis upon which the Commission has permitted complainants to assert liability here,¹ is limited exclusively to radio communications, and provides no relief for interception and disclosure of a wireline telephone call. Second, even if the alleged interception and divulgence had taken place, such conduct was flatly contrary to AT&T's corporate policies and thus cannot be a basis for liability on AT&T's part. Finally, the claim is absolutely barred by Section 415 of the Communications Act prescribing the statute of limitations, because the complaint was not filed within two years after their cause of action arose. Each of the foregoing grounds, standing alone, requires a decision in AT&T's favor.

¹ The Hearing Designation Order expressly found that neither the complainants' claims under the United States Constitution nor their claims under the federal wiretap statute are cognizable before the Commission. See Freemon v. AT&T, 9 FCC Rcd 4032 (1994) (n. 1) ("Hearing Designation Order").

I. THE COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 705 OF THE COMMUNICATIONS ACT.

The Freemons' claim is exclusively predicated on Section 705 of the Communications Act (codified as 47 U.S.C. § 605), which prohibits the unauthorized interception and disclosure of certain interstate or foreign communications. However, that statute has no bearing here, because Section 705 does not apply to wireline telephone calls such as the Freemons' May 30, 1988 call.²

The first sentence of Section 705 prohibits improper divulgences by persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate . . . communications by wire or radio." However, the federal courts have held this portion of the statute is solely applicable to record carrier communications transmitted or received by "persons such as telegram or radiogram operators, who must either learn the content of the message or handle a written record of

² By addressing the applicability of Section 705 to the instant complaint, AT&T does not intend to waive its contention that the Commission erroneously found it has jurisdiction over that claim (see Hearing Designation Order, 9 FCC Rcd. at 4033 (¶ 8)), because Section 705(e)(3)(A) provides that civil actions for alleged violations of that statute shall be brought "in a United States district court or in any other court of competent jurisdiction" (emphasis added).

communications in the course of their employment."³ By contrast, the courts have held that because telephone company personnel can only learn the contents of a communication by interception, the first sentence of Section 705 is inapplicable to such personnel.⁴

Even if the first sentence of that section could somehow be deemed applicable to AT&T personnel, Section 705 excepts from its prohibition on divulgences acts which are authorized by the federal wiretap statute (18 U.S.C. §§ 2511 et seq.). In turn, 18 U.S.C. § 2511(2) (a) (i) permits an AT&T operator to "disclose or use [a] communication in the normal course of [her] employment while engaged in any activity which is a necessary incident to the rendition of [AT&T's] service" In the instant case, the AT&T operator's referral of Mr. Freemon's call to the Portland 911 emergency services was clearly incident to AT&T's normal service; for example, under AT&T's Operator Services Practice on emergency calls, its personnel are directed to "take whatever action appears necessary" when a caller displays

³ See United States v. Russo, 250 F. Supp. 55, 59 (E.D. Pa. 1966); accord, United States v. Covello, 410 F.2d 536 (2d Cir. 1969); Snider Communications Corp. v. Cue Paging Corp., 840 F. Supp. 664 (E.D. Ark. 1994).

⁴ See, e.g., United States v. Russo, 250 F. Supp. at 59.

symptoms such as the difficulty breathing that Mr. Freemon concedes he exhibited.⁵

Similarly, nothing in the remainder of Section 705 provides a basis for liability in this action. As amended by the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., the second sentence of Section 705 prohibits any person from "intercept[ing] any radio communication and divulg[ing] . . . such intercepted communication to any person" (emphasis supplied). The 1968 amendment eliminated all references to wire communications from the portion of Section 705 prohibiting interceptions. Congress made these changes in Section 705 because it intended "[t]he regulation of the interception of wire or oral communications . . . to be governed by proposed new chapter 119 of title 18, United States Code."⁶

Federal courts have long recognized that, since the enactment of the 1968 amendments, Section 705's prohibition against interception applies solely to radio communications, not to wire (i.e., telephone)

⁵ See Proposed Finding ("PF") 5.

⁶ See S. Rep. No. 1097, 90th Cong., 2d Sess. 107, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, 2196

communications such as those at issue here.⁷ Moreover, the prohibition on divulgence in the first sentence of Section 705(a) applies only if there has also been an interception of a radio communication prohibited by the second sentence of that subsection, as both the Commission and federal courts have recognized.⁸

It is undisputed here that complainants' alleged communication on May 30, 1988 was conducted as a wireline telephone call.⁹ Even if interception and divulgence of that call had taken as alleged in the complaint (and there is no evidence that it did), for the reasons shown above that conduct is not actionable under Section 705.

⁷ See Korman v. United States, 486 F.2d 926, 931-932 (7th Cir. 1973) ("the clear intent of Congress would seem to be that the interception of wire communications would be governed solely by [18 U.S.C. § 2510 et seq.]"); see also United States v. New York Telephone Co., 434 U.S. 159, 168 n. 13 (1977); United States v. Clegg, 509 F.2d 605, 611 (5th Cir. 1975); United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974).

⁸ See Use of Recording Devices in Connection with Telephone Service, 2 FCC Rcd 502, 503 (1987) (¶ 12) (noting that Congress "narrow[ed] Section 705's] scope to unauthorized interception and divulgence of radio communication"); Hodge v. Mountain States Tel & Tel Co., supra, 555 F.2d 254, 258-260 (9th Cir 1977).

⁹ See PF 22.

II. ANY UNLAWFUL CONDUCT, EVEN IF IT HAD BEEN PROVEN,
CANNOT BE ATTRIBUTED TO AT&T.

Complainants have also offered no evidence that AT&T may be held responsible for the violation of the Communications Act that they allege, even if it is assumed (contrary to fact) that such conduct took place and that it is actionable under Section 705. Section 217 of the Communications Act, 47 U.S.C. § 217, provides that a carrier may be held liable for an employee's violation of the Communications Act only if the employee is shown to have acted within the scope of his employment. There has been no such showing in this case.¹⁰ Instead, the record demonstrates that AT&T's policy, enforced by periodic monitoring its operators' call handling and disciplinary action where necessary, absolutely prohibits the conduct alleged in the Complaint.¹¹ Moreover, complainants themselves acknowledged that the operator's alleged conduct violated applicable AT&T policy.¹² Accordingly, complainants cannot ascribe these alleged

¹⁰ See Restatement of Agency 2d, § 229 (in assessing whether conduct is within the scope of employment, factors include whether the act complained of is commonly performed by the party's employees, or instead represents a significant departure from the normal method of operation).

¹¹ See PF 17 - PF 20. Moreover, the AT&T operator who handled the Freemons' May 30, 1988 telephone call was familiar with that policy and the serious disciplinary consequences for any violation. See PF 21.

¹² See PF 19.

unauthorized acts to AT&T, and there is thus no basis for imposing liability on AT&T for the claim in this proceeding.

III. COMPLAINANTS' ACTION IS TIMEBARRED UNDER SECTION 415 OF THE COMMUNICATIONS ACT.

Section 415(b) of the Communications Act, 47 U.S.C. § 415(b), requires that any complaint against a carrier not based on overcharges must be brought within two years from the time the claim accrues.¹³ In the instant case, complainants allege that their telephone conversation was unlawfully intercepted and divulged on May 30, 1988. Thus, under Section 415(b) the Freemons were required to file any complaint based on these events on or before May 30, 1990. The complaint, however, was not filed with the Commission until August 16, 1990, more than ten weeks after the statutory deadline. Their action is therefore timebarred.

This result is not altered by the fact that these complainants had previously filed with the

¹³ This limitations period is a substantive and jurisdictional bar to prosecution of the complaint. See Tele-Valuation, Inc. v. AT&T, 73 F.C.C.2d 450, 453-54 (1979); Thornell-Barnes Co. v. Illinois Bell Tel. Co., 1 F.C.C.2d 1247, 1251 (1965). The lapse of time beyond the limitation period therefore extinguishes both the complainant's remedy and the defendant carrier's underlying liability. See, e.g., Armstrong Utilities Inc. v. GTE of Pennsylvania, 25 F.C.C.2d 385, 389 (1970).

Commission an informal complaint (IC-89-03060) based on the same claim. Although Section 1.718 of the Commission's Rules, 47 C.F.R. § 1.718, in certain narrow circumstances permits formal complaints to "relate back" to the filing date of a prior informal complaint, the Freemons cannot satisfy the requirements of Section 1.718. Under that rule, the formal complaint can "relate back" only if it is filed within six months after the informal complaint is returned unsatisfied by the carrier. However, here AT&T replied to the informal complaint in a letter dated April 28, 1989, in which AT&T refuted the claim of unauthorized interception or divulgence and categorically denied any liability under the informal complaint.¹⁴ This event commenced the six month period within which complainants could have filed a formal complaint relating back to AT&T's report but, as the record shows, they failed to institute such a proceeding until August 10, 1990 -- more than fifteen months after AT&T's report denying liability -- by which time their action was already timebarred.¹⁵

¹⁴ See PF 24.

¹⁵ The fact that Mr. Freemon continued to bombard AT&T with letters questioning AT&T's denial of liability does not permit a further extension of the limitations period. Any other construction of the Commission's rule would eviscerate Section 415, because informal complainants could successfully extend the statute of limitations ad infinitum simply by repeatedly

(footnote continued on following page)

Contrary to an earlier suggestion by the Common Carrier Bureau, the Presiding Officer is not precluded from considering the Section 415(b) issue merely because that issue was not specified in the Hearing Designation Order.¹⁶ As shown above, the limitations period of the Communications Act, like the Interstate Commerce Act on which it is based, is jurisdictional in nature. The subject matter jurisdiction of a tribunal may be raised at any point in case (including after verdict or judgment, or even on appeal).¹⁷ Thus, AT&T is not foreclosed from raising the Section 415(b) issue before the Presiding Officer.

(footnote continued from previous page)

disputing the defendant carrier's denial of liability for their informal claim.

- ¹⁶ It is likewise incorrect that, as the Bureau has suggested, the Hearing Designation Order somehow disposed of the Section 415(b) issue; indeed, the Commission's decision there made no mention whatever of the statute of limitations.
- ¹⁷ See 1 Moore's Federal Practice, § 0.60[4]; Business Buyers of New England, Inc. v. Gurham, 754 F.2d 1, 2 (1st Cir. 1985); City of Long Beach v. Dept. of Energy, 754 F.2d 379, 374 (Temp. Emer. Ct. App. 1986). This jurisdictional principle is equally applicable to courts and administrative agencies such as the Commission. See, e.g., Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission, 838 F.2d 536, 542 (D.C. Cir. 1988).

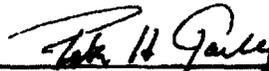
CONCLUSION

For the reasons stated above, the Presiding Officer should enter a decision in favor of AT&T.

Respectfully submitted,

AT&T CORP.

By



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January 30, 1995

CERTIFICATE OF SERVICE

I, Viola Carlone, hereby certify that a true copy of the foregoing "Memorandum in Support of Proposed Conclusions of Law" of AT&T Corp. was this 30th day of January, 1995, served by first class mail, postage prepaid, upon each of the following persons:

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