

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

CC Docket No. 94-89

DOCKET FILE COPY ORIGINAL

File No. E-90-393

ORIGINAL

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

Pursuant to Section 1.263(a) of the Commission's Rules, 47 C.F.R. § 1.263(a), and the Order of the Presiding Officer released December 15, 1994 (FCC 94M-644), defendant AT&T Corp. ("AT&T") submits the following proposed findings of fact and conclusions of law in the above-captioned proceeding.

Proposed Findings of Fact ("PF")

PF 1. On May 30, 1988, at approximately 10:30 p.m., complainant Elehue K. Freemon attempted to place a long distance collect telephone call from his home in Gresham, Oregon, to his mother Lucille K. Freemon, in Long Beach California.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], pp. 4, line 13 to p. 125, line 10 p. 174, line 25 to p. 175, line 5; AT&T Exhibit 8 [AT&T Answer, with Attachments], p. 7.

PF 2. Prior to placing his phone call, during the evening of May 30, 1988, Mr. Freemon had consumed at

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least three glasses of wine and had taken a number of sleeping pills.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], pp. 183, lines 4 to 25; p. 189, lines 7 to 16; p. 194, lines 6 to 11, p. 197, lines 19 to 24.

PF 3. Just days before he placed the phone call, Mr. Freemon's long-term relationship with a woman who had been his fiancée, Ms. Janice Liittschwager, ended.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 120, lines 6 to 25.

PF 4. Mr. Freemon attempted to place the collect call, and was connected to an AT&T long distance operator, Ms. Nancy Zolnikov.

See AT&T Exhibit 7 [Complaint, p. 2]; AT&T Exhibit 8 [AT&T Answer, with Attachments], p. 7.

PF 5. When Mr. Freemon was connected to Ms. Zolnikov and began speaking to her, he was breathing heavily, and his speech was confused and disoriented.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 179, lines 7 to 15; p. 202, lines 7 to 18; Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 23, lines 3 to 8; AT&T Exhibit 8 [AT&T Answer, with Attachments], p. 7.

PF 6. Mr. Freemon initially could not state what service or assistance he needed from Ms. Zolnikov, stating only that he wanted to talk to "mom".

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], pp. 191, lines 13 to 19; AT&T Exhibit 8 [AT&T Answer, with Attachments], p. 7.

PF 7. Ms. Zolnikov then asked Mr. Freemon for the telephone number he wished to call. Mr. Freemon provided a seven digit telephone number, but was unable to give Ms. Zolnikov an area code for the telephone number he wished to call.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 191, line 20 to p. 192, line 5; AT&T Exhibit 8 [AT&T Answer, with Attachments], p. 7.

PF 8. Ms. Zolnikov was later able to determine by asking Mr. Freemon to indicate where his mother lived, to determine that the call should be routed to Long Beach, California.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 192, lines 6 to 13; AT&T Exhibit 8 [AT&T Answer, with Attachments, at p. 7.]

PF 9. Ms. Zolnikov then connected the call to complainant Lucille K. Freemon, and announced that Mr. Freemon was attempting to place a collect call.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 199, line 8 to p. 200, line 6; AT&T Exhibit 8 [AT&T Answer, with Attachments], pp. 7-8.

PF 10. Mr. Freemon never heard Ms. Zolnikov say anything after Ms. Zolnikov announced the call.

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], pp. 200, line 7 to line 12, p. 210, lines 10 to 15; AT&T Exhibit 7 [Complaint], p. 2.

PF 11. When Ms. Zolnikov indicated that Mr. Freemon appeared to need help, Mrs. Freemon gave Ms. Zolnikov Mr. Freemon's full name and expressly authorized Ms. Zolnikov to seek assistance for her son.

See Judge's Exhibit 2 [Lucille K. Freemon Deposition, p. 71, line 24 to p. 73, line 24; Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 23, lines 5 to 15.

PF 12. Mrs. Freemon then dropped off, and Ms. Zolnikov then routed the phone call to Oregon Emergency Services ("OES") in Portland, Oregon, simply informing OES that Mr. Freemon needed assistance.

See Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 24, line 23 to p. 25, line 25; p. 41, lines 10 to 19.

PF 13. After receiving the call, personnel at OES, and not Ms. Zolnikov, made an independent determination, based on their experience and training, to send police to the residence of Mr. Freemon.

See Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 24, line 23 to p. 25, line 25; p. 41, lines 10 to 19.

PF 14. According to both Mrs. Freemon and Ms. Zolnikov, at no time did Ms. Zolnikov interrupt the phone call between Mr. Freemon and his mother.

See Judge's Exhibit 2 [Lucille K. Freemon Deposition], p. 71 line 24 to p. 72, line 8; p. 72, lines 16 to 24; p. 73, lines 22 to 24; p. 74, lines 6 to 12; p. 75 line 23 to p. 76, line 2; Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 19, line 20 to p. 20, line 5.

PF 15. Although Mr. Freemon claims that the AT&T operator interrupted his call several minutes after it commenced, and spoke with his mother while he was "blanked out" of that conversation, the undisputed evidence shows that this account is inconsistent with the operational and transmission characteristics of the

Traffic Service Position System ("TSPS") used by AT&T to serve operator-assisted calls from Mr. Freemon's exchange.

See AT&T Exhibit 7 [Complaint], p. 2; AT&T Exhibit B [Testimony of Thomas C. Sharpe ["Sharpe Testimony"], p. 5, line 2 - page 7, line 5; AT&T Exhibit 5 [Typical TSPS-Customer Connection]; AT&T Exhibit 6 [Typical TSPS 2-Wire Bridging Arrangement].

PF 16. If a conversation between Ms. Zolnikov, and Mrs. Freemon had taken place in the manner that Mr. Freemon has claimed (and there is no evidence that it did), due to the technical characteristics of the TSPS equipment that conversation would also have been audible to Mr. Freemon.

See AT&T Exhibit B [Sharpe Testimony], p. 5, line 2 - page 7, line 5; AT&T Exhibit 5 [Typical TSPS-Customer Connection]; AT&T Exhibit 6 [Typical TSPS 2-Wire Bridging Arrangement].

PF 17. The AT&T Code of Conduct, which all AT&T employees are required to review periodically, requires all personnel to protect the privacy of conversations on the AT&T network, and prohibits personnel from listening in on or monitoring customers' communications.

See AT&T Exhibit A [Testimony of Linda Wistermayer ("Wistermayer Testimony"), p. 4, line 27 - p. 5, line 3; AT&T Exhibit 4 [AT&T Code of Conduct].

PF 18. AT&T's operator services practices likewise prohibit its operators from compromising the confidentiality of customer's communications.

See AT&T Exhibit 1 [Traffic Service Position System - Forward], Section 6.03.

PF 19. AT&T's policies and practices described above prohibited its operators from handling Mr. Freemon's May 30, 1988 call in the manner alleged in the complaint. The complainants themselves concede that the interception and divulgence they complain of were "direct violations of AT&T policy . . . ."

See AT&T Exhibit A [Wistermayer Testimony], p. 6, line 21 to p. 7, line 1; AT&T Exhibit 13 [Letter dated May 21, 1989 from Elehue K. Freemon to Maeola Black, FCC], p. 5.

PF 20. AT&T trains its operator personnel to follow these practices and conducts periodic monitoring of their call handling to assure that it complies with applicable methods and procedures. Violation of the policy on secrecy of customer communications described above is subject to disciplinary action, up to and including involuntary termination of employment.

See AT&T Exhibit A [Wistermayer Testimony], p. 4 lines 5-26, and p. 7, lines 2-12.

PF 21. Ms. Zolnikov was familiar with the AT&T Code of Conduct provisions governing privacy of customer communications and the disciplinary consequences of a violation of that policy.

See Judge's Exhibit 3 [Nancy Zolnikov Deposition], p. 20, line 15 to p. 21, line 23.

PF 22. It is undisputed that the May 30, 1988 communication between Mr. Freemon and his mother which is in issue in this case was a wireline voice telephone call.

See AT&T Exhibit 7 [Formal Complaint}, p. 2;  
AT&T Exhibit 8 [Answer], ¶ 2.

PF 23. On or about February 10, 1989, Mr. Freemon filed with the Commission an informal complaint against AT&T concerning these events "in behalf of" himself and Lucille K. Freemon, and the Commission on March 15, 1989 forwarded the informal complaint to AT&T for a response.

See AT&T Exhibit 11 [Letter dated March 15, 1989 from Kathie A. Kneff, FCC, to AT&T (Attention: Michael J. Kmetz), with attached informal complaint].

PF 24. On April 28, 1989, AT&T replied to the informal complaint, denying Mr. Freemon's allegation that AT&T's operator had interrupted a call in progress and stating that, based on AT&T's investigation of this incident (including an interview of the operator) the call had been handled appropriately.

See AT&T Exhibit 12 [Letter dated April 28, 1989 from Michael J. Kmetz, AT&T, to Maeola Black, FCC.]

PF 25. Following their receipt of AT&T's April 28 letter denying their informal complaint, the Freemons did not promptly initiate a formal complaint for their claim. Instead, Mr. Freemon commenced a series of letters to the Commission and/or AT&T, disputing AT&T's denial of liability for the Freemons' claim.

See AT&T Exhibit 13 [Letter dated May 21, 1989 from Elehue K. Freemon to Maeola Black, FCC]; AT&T Exhibit 15 [Letters dated October 3, 1989 from Elehue K. Freemon to Michael J. Kmetz, AT&T, and Maeola Black, FCC]; AT&T Exhibit 18 [Letter

dated January 30 from Elehue K. Freemon to Michael J. Kmetz, AT&T].

PF 26. Like the informal complaint itself, none of these letters requested any specific relief from AT&T, and thus AT&T was precluded from satisfying the complainant as contemplated by the Commission's informal complaint rules.

See AT&T Exhibit 13 [Letter dated May 21, 1989 from Elehue K. Freemon to Maeola Black, FCC]; AT&T Exhibit 15 [Letters dated October 3, 1989 from Elehue K. Freemon to Michael J. Kmetz, AT&T, and Maeola Black, FCC]; AT&T Exhibit 18 [Letter dated January 30 from Elehue K. Freemon to Michael J. Kmetz, AT&T].

PF 27. In the course of this correspondence, Mr. Freemon notified the Commission on October 3, 1989 that "I would like to formally request a change to formal complaint" within fifteen days after AT&T furnished citations to federal statutes sanctioning its operator's actions. The Commission forwarded this information request to AT&T on December 11, 1989, and AT&T provided the pertinent information on December 26, 1989.

See AT&T Exhibit 16 [Letter dated December 11, 1989 from Cynthia D. Brown, FCC to Michael J. Kmetz, AT&T, with attached October 3, 1989 letter from Elehue K. Freemon to Keith Nichols, FCC]; AT&T Exhibit 17 [Letter from Michael J. Kmetz, AT&T to Maeola Black, FCC].

PF 28. During the period between August 16, 1989 and March 14, 1990, the Commission on three occasions forwarded Mr. Freemon's correspondence to AT&T for further response, and in each instance AT&T replied to

those requests denying both the Freemons' account of events and any liability on AT&T's part to the Freemons.

See AT&T Exhibit 14 [Letter dated September 8, 1989 from Michael J. Kmetz, AT&T to Maeola Black, FCC]; AT&T Exhibit 16 [Letter dated December 11, 1989 from Cynthia D. Brown, FCC, to Michael J. Kmetz, AT&T]; AT&T Exhibit 17 [Letter dated December 26, 1989 from Michael J. Kmetz, AT&T, to Maeola Black, FCC]; AT&T Exhibit 19 [Letter dated March 14, 1990 from Maeola Black, FCC, to Philip L. Hartfield, AT&T]; AT&T Exhibit 20 [Letter dated April 3, 1990 from Philip L. Hartfield, AT&T to Maeola Black, FCC].

PF 29. The formal complaint in this matter was not filed with the Commission until August 10, 1990.

See AT&T Exhibit 7 [Formal Complaint].

PF 28. Mr. Freemon's apparent motive for filing and continuing to prosecute this complaint has been an attempt to extort a settlement from AT&T with the threat of publicizing his claim to generate adverse publicity for AT&T. For example, while his claim was still pending as an informal complaint Mr. Freemon told AT&T's manager, Michael J. Kmetz, that if he filed a lawsuit against AT&T this matter "would become a big item in the press."

See Judge's Exhibit 1 [Elehue K. Freemon Deposition], p. 72, line 17 - p. 72, line 21.

PF 29. After the formal complaint was filed, Mr. Freemon filed a motion for "Discovery Through Use of Public Opinion," seeking to have his action publicized for the purported purpose of securing the views of other government agencies and the general public regarding his claim.

See AT&T Exhibit 10 ["Discovery Through Use of Public Opinion"].

PF 30. On May 20, 1993, Mr. Freemon wrote the AT&T Advertising Department, stating that he had "decided to go public with this issue" and that "The PUBLIC NEEDS TO KNOW [sic] what ever the outcome may be, what kind of company AT&T is really about . . . . Trust AT&T?" Mr. Freemon admitted at the hearing that this letter was intended as a threat against AT&T's business reputation.

See Judge's Exhibit 1 [Elehue K. Freemon deposition], p. 73, line 12 through p. 74, line 4, and Deposition Exhibit 1; Transcript of Proceedings, p. 217, line 23- p. 218, line 4.

#### **Proposed Conclusions of Law ("PC")**

PC 1. Section 705 of the Communications Act, 47 U.S.C. § 605, prohibits the unauthorized interception and divulgence of interstate communication. The statute is violated only if a communication is both unlawfully intercepted and divulged.

See Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 258-60 (9th Cir. 1977); Use of Recording Devices in Connection with Telephone Service, 2 FCC Rcd 502, 503, 506 (1987) (¶ 12 and n.18).

PC 2. Neither Ms. Zolnikov nor any other authorized AT&T employee or representative unlawfully intercepted the telephone call in violation of Section 705.

See 47 U.S.C. § 605; PF 11, PF 12, and PF 13.

PC 3. Neither Ms. Zolnikov nor any other AT&T employee or representative unlawfully divulged an

interstate communication between the Freemons in violation of Section 705.

See 47 U.S.C. § 605; PF 12 and PF 14.

PC 4. The independent determination of OES to send assistance to Mr. Freemon's home is a superseding cause which cuts off the chain of causation, and relieves AT&T of any liability for any harm that Mr. Freemon is alleged to have later suffered.

See Restatement of Torts 2d 440, 442, 442B, 448 (1986); Heitsch v. Hampton, 167 Mich. App. 629, 423 N.W. 2d 297 (Mich. Ct. App. 1988); Urbach v. United States, 869 F.2d 829 (5th Cir. 1989); Spears v. United States, 266 F. Supp. 22 (S.D. W.Va. 1967).

PC 5. Even if complainants' allegations about the handling of the May 30, 1988 call were supported by the evidence, AT&T could not be found liable for such conduct because complainants have not shown that the AT&T operator, Nancy Zolnikov, acted within the scope of her employment.

See Communications Act Section 217, 47 U.S.C. § 217.

PC 6. All of the record evidence, moreover, establishes that the conduct alleged by complainants violated applicable AT&T policy, and was therefore beyond the scope of the operator's employment.

See PF 17 to PF 21; Restatement of Agency 2d, § 219

PC 7. The complaint fails to state a claim under the first sentence of Section 705 of the Communications Act because the prohibition there against improper

divulgences by persons "assisting in receiving [or] transmitting" certain interstate communications applies solely to record carrier communications, not to voice traffic.

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).

PC 8. In any case, moreover, the AT&T operator's referral of the call to emergency authorities, based on her reasonable belief that Mr. Freemon was experiencing difficulty breathing, qualifies as an exception to the first sentence of Section 705 because that action was a necessary incident to the rendition of AT&T's service.

See PF 1 to PF 13; 47 U.S.C. § 605; 18 U.S.C. § 2511(2)(a)(i).

PC 9. The Freemons' claim also is not actionable under the second sentence of Section 705 because that portion of the statute, as amended in 1968, applies only to interception and divulgences of radio communications, and not to communications by wire such as the one involved in this case.

See PF 22; S. Rep. No. 1097, 90th Cong., 2d Sess. 107, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, 2196; Korman v. United States, 486 F.2d 926, 931-932 (7th Cir. 1973); Use of Recording Devices in Connection with Telephone Service, 2 FCC Rcd 502, 503 (1987) (¶ 12); Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 258-260 (9th Cir. 1977).

PC 10. Complainants were required to file their complaint within two years from the date their claim

arose (i.e., on or before May 30, 1990). The complaint was not filed until more than ten weeks after the statute of limitations on their claim expired, and thus it is timebarred.

See PF 1, PF 29; Communications Act Section 415, 47 U.S.C. § 415; Armstrong Utilities, Inc. v. GTE of Pennsylvania, 25 F.C.C.2d 385, 389 (1970); 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).

PC 11. The complaint does not satisfy Section 1.718 of the Commission's Rules, which permits a formal complaint to "relate back" to the filing date of a related informal complaint, because the complaint was not filed within six months after AT&T returned the informal complaint unsatisfied on April 28, 1989.

See PF 24; Section 1.718 of the Commission's Rules, 47 C.F.R. § 1.718.

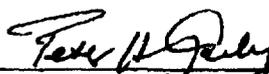
PC 12. Mr. Freemon's subsequent correspondence to AT&T and the Commission did not serve to extend that deadline. Mr. Freemon's letters not only did not request any specific relief, but in fact acknowledged the need to immediately interpose a formal complaint to pursue his claim.

See PF 25 to PF 28.

WHEREFORE, AT&T requests that the Presiding Officer adopt the foregoing proposed findings of fact and conclusions of law.

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 "Proposed Findings of Fact and 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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