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

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MAR 27 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE SECRETARY

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

CC Docket No. 94-89

File No. E-90-393

DOCKET FILE COPY ORIGINAL

MEMORANDUM IN SUPPORT OF INITIAL DECISION  
AND IN SUPPORT OF EXCEPTIONS

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MEMORANDUM IN SUPPORT OF INITIAL DECISION  
AND IN SUPPORT OF EXCEPTIONS

Pursuant to Sections 1.276 and 1.277 of the Commission's Rules, 47 C.F.R. §§ 1.276, 1.277, defendant AT&T Corp. ("AT&T") submits this memorandum in support of the initial decision ("the Initial Decision") of Administrative Law Judge Walter C. Miller (released February 24, 1995) in this proceeding and in support of certain exceptions thereto.

As shown in the Initial Decision, complainants presented no evidence that an AT&T operator intercepted or divulged the contents of Elehue K. Freemon's call to Lucille K. Freemon as alleged in the Formal Complaint.<sup>1</sup> To the contrary, the record evidence demonstrated convincingly that no such interception or divulgence occurred and that, at the time of the call, a medical

<sup>1</sup> See Initial Decision, paras. 24-33.

emergency existed.<sup>2</sup> For these reasons alone, AT&T was entitled to dismissal as granted in the Initial Decision.

STATEMENT OF THE CASE

This is an appeal from the Initial Decision of Administrative Law Judge Walter C. Miller, released February 24, 1995, in the proceeding Elehue K. Freemon, et al., v. AT&T Corp., CC Docket No. 94-89, File No. 90-393. The matter was designated for hearing by the Commission, which requested that Judge Miller resolve six issues:

- (1) to determine the facts and circumstances surrounding AT&T's handling of Elehue Freemon's operator-assisted telephone call to his mother, Lucille K. Freemon, on May 30, 1988;
- (2) to determine whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988 at the time an AT&T operator handled the operator-assisted call at issue;
- (3) to determine whether AT&T, through its operator or otherwise, intercepted and disclosed the contents or meaning of any telephone conversation that may have taken place between Elehue Freemon and Lucille Freemon on May 30, 1988, within the meaning of Section 705 of the Communications Act;
- (4) to determine, in light of the evidence adduced under issues 1 through 3 above, whether AT&T's actions in handling Elehue Freemon's May 30, 1988 operator-assisted call violated Section 705 of the Communications Act;
- (5) to determine, in view of the evidence adduced on the foregoing issues, whether and if so in what

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<sup>2</sup> See id., paras. 34-40.

amounts, AT&T should be required to pay monetary damages to complainants;

(6) to determine, in view of the evidence adduced on the foregoing issues, whether complainants are entitled to an award of prejudgment interest on any damages recovered in this proceeding.<sup>3</sup>

After carefully considering all of the evidence, Judge Miller correctly concluded that there was no merit to complainant Elehue Freemon's allegations that on May 30, 1988, at approximately 10:30 p.m., an AT&T operator listened in on a long-distance call between Mr. Freemon and Mrs. Lucille K. Freemon and that no violation of Section 705 had occurred.<sup>4</sup> Judge Miller's rulings in the alternative -- that the Complaint should be dismissed because (1) complainant Elehue Freemon had not met his burden of proceeding or his burden of proof<sup>5</sup> and (2) the Complaint and supporting documentation contained basic inaccuracies<sup>6</sup> -- were also correct. The evidence fully supports these findings and conclusions of the Initial Decision. AT&T files exceptions, however, to

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<sup>3</sup> See Initial Decision, para. 5; Freemon v. AT&T, 9 FCC Rcd 4032 (1994) ("Hearing Designation Order"), para. 11.

<sup>4</sup> See id., paras. 27-42

<sup>5</sup> See id., paras. 24-26.

<sup>6</sup> See id., paras. 11-23. Based on all of the above findings and conclusions, Judge Miller also held that the complainants were not entitled to compensatory damages or prejudgment interest. See id., paras. 41-42.

the Initial Decision because it did not also hold that the Complaint against AT&T should be dismissed on legal grounds asserted by AT&T. First, Section 705 of the Communications Act, which was the sole basis upon which the Commission permitted complainants to assert liability,<sup>7</sup> 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 could not have been a basis for liability on AT&T's part. Finally, the claim was absolutely barred by Section 415 of the Communications Act prescribing the statute of limitations, because the complaint was not filed within two years after the cause of action arose. Each of the foregoing grounds, standing alone, required a decision in AT&T's favor, and should have been separately identified as a ground for dismissal in the Initial Decision.

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<sup>7</sup> The Hearing Designation Order (n.1) 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.

QUESTIONS OF LAW PRESENTED

This appeal raises the following questions of law, and AT&T submits the following suggested answers:

1. Whether Section 705 of the Communications Act, 47 U.S.C. § 605, applies to the interception and disclosure of wire (i.e., telephone) communications?

Suggested Answer: No.

2. Whether, consistent with Section 217 of the Communications Act, AT&T may be held liable for acts of an employee that are outside the scope of his employment?

Suggested Answer: No.

3. Whether the Formal Complaint in this proceeding, filed more than six months after the Complainants' informal complaint was returned unsatisfied by AT&T, and more than two years after the alleged incident, is barred by statute of limitations established by Section 415 of the Communications Act?

Suggested Answer: Yes.

ARGUMENT

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

The Freemons' claim was 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 had no bearing on the Freemons' claims, because Section 705 does

not apply to wireline telephone calls such as the Freemons' alleged May 30, 1988 call.<sup>8</sup>

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 communications in the course of their employment."<sup>9</sup> 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.<sup>10</sup>

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<sup>8</sup> By addressing the applicability of Section 705 to the instant complaint, AT&T does not 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).

<sup>9</sup> 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).

<sup>10</sup> See, e.g., United States v. Russo, 250 F. Supp. at 59.

Even if the first sentence of that section could somehow have been deemed applicable to AT&T personnel, Section 705 excepts from its prohibition on divulgence 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 . . . ." The record shows that 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 were directed to "take whatever action appears necessary" when a caller displayed symptoms such as the difficulty breathing that Mr. Freemon conceded he exhibited.<sup>11</sup>

Similarly, nothing in the remainder of Section 705 provided 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

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<sup>11</sup> See AT&T Direct Case, Tab A, Exhibit 3; Initial Decision, para. 30.

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."<sup>12</sup>

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) communications such as those at issue here.<sup>13</sup> 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

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<sup>12</sup> See S. Rep. No. 1097, 90th Cong., 2d Sess. 107, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, 2196.

<sup>13</sup> 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).

second sentence of that subsection, as both the Commission and federal courts have recognized.<sup>14</sup>

On the record below, it was undisputed that complainants' alleged communication on May 30, 1988 was conducted as a wireline telephone call.<sup>15</sup> Even if interception and divulgence of that call had taken place as alleged in the complaint (and there was no evidence that it did), for the reasons shown above that conduct was not actionable under Section 705.

II. ANY UNLAWFUL CONDUCT, EVEN IF IT HAD BEEN PROVEN, COULD NOT HAVE BEEN ATTRIBUTED TO AT&T.

Complainants also offered no evidence that AT&T could be held responsible for the violation of the Communications Act that they alleged, even if it had been assumed (contrary to fact) that such conduct took place and that such conduct was 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

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<sup>14</sup> 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).

<sup>15</sup> See Initial Decision, paras. 5, 29.

his employment. There was no such showing made in the record.<sup>16</sup> Instead, the record demonstrated that AT&T's policy, enforced by periodic monitoring of its operators' call handling and disciplinary action where necessary, absolutely prohibited the conduct alleged in the Complaint.<sup>17</sup> Moreover, complainants themselves acknowledged that the operator's alleged conduct violated applicable AT&T policy.<sup>18</sup> Accordingly, complainants could not have ascribed these alleged unauthorized acts to AT&T, and there was thus no basis for imposing liability on AT&T for the claim in this proceeding.

III. COMPLAINANTS' ACTION WAS 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

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<sup>16</sup> 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).

<sup>17</sup> See AT&T Direct Case, Tab A, Exhibits 1-4. 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 id., Testimony of Linda Wistermayer, Tab A.

<sup>18</sup> See AT&T Direct Case, Tab F, Exhibit 7.

two years from the time the claim accrues.<sup>19</sup> The complainants alleged 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 was therefore timebarred.

This result could not have been altered by the fact that these complainants had previously filed with the 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 did not 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

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<sup>19</sup> 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).

the informal complaint is returned unsatisfied by the carrier. However, the record shows that 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.<sup>20</sup> 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.<sup>21</sup>

Contrary to an earlier suggestion by the Common Carrier Bureau, the Presiding Officer was not precluded from considering the Section 415(b) issue merely because that issue was not specified in the Hearing Designation

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<sup>20</sup> See AT&T Direct Case, Tab F, Exhibit 12.

<sup>21</sup> 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 disputing the defendant carrier's denial of liability for their informal claim.

Order.<sup>22</sup> 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 can fairly be raised at any point in the proceeding (including after a verdict, or even on appeal).<sup>23</sup> Thus, AT&T was not foreclosed from raising the Section 415(b) issue before the Presiding Officer.

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<sup>22</sup> 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.

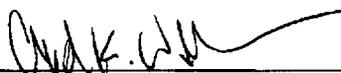
<sup>23</sup> See 1 Moore's Federal Practice, § 0.60[4]; Business Buyers of New England, Inc. v. Gurham, 754 F.2d 1, 2 (1st Cir. 1985); City of Long Beach v. Dept. of Energy, 754 F.2d 379, 374 (Temp. Emer. Ct. App. 1986). This jurisdictional principle is equally applicable to courts and administrative 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 foregoing reasons, the findings and conclusions of the Initial Decision should be adopted, as should the additional grounds for dismissal set forth above.

Respectfully submitted,

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March 27, 1995

CERTIFICATE OF SERVICE

I, Viola Carlone, hereby certify that a true copy of the foregoing "Memorandum in Support of Initial Decision and in Support of Exceptions" of AT&T Corp. was this 27th day of March, 1995, served by first class mail, postage prepaid, upon each of the following persons:

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