

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

In the Matter of )  
)  
Motion of AT&T Corp. and )  
Lucent Technologies Inc. )  
)  
For a Declaratory Ruling )  
)  
Before The Commission )

WC 02-147

File No.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**SUPPLEMENT TO MOTION FOR DECLARATORY RULING  
BY AT&T CORP. AND LUCENT TECHNOLOGIES INC.**

AT&T Corp. ("AT&T") and Lucent Technologies Inc. ("Lucent") hereby supplement their Motion for Declaratory Ruling filed on May 24, 1999.

1. In their Motion for Declaratory Ruling filed on May 24, 1999,<sup>1</sup> AT&T and Lucent seek the Commission's declaratory ruling with regard to application of past Commission orders on particular claims asserted by the plaintiffs in five separate class action lawsuits. All of these cases involve the lease of that embedded base equipment assigned to AT&T at divestiture in 1984. Four of the cases are consolidated for MDL proceedings before the United States District Court for the Southern District of Alabama (*In re: Residential Telephone Lease Program Contract Litigation*, Consolidated MDL No. 1165; Master Docket No. 97-0309-C13-C). One case is before the Circuit Court of Madison County, Illinois (*Crain v Lucent Technologies Inc.*, No. 96-LM-983).

AT&T and Lucent informed the Commission in the Motion that they would supplement the record with copies of relevant papers filed in the cases discussed in the Motion. This Supplement is filed for that purpose.

2. The Motion for Declaratory Ruling does not raise a theoretical issue of FCC preemption. Rather, it presents the pointed question of whether specific claims asserted by the plaintiffs in these lawsuits conflict with and are therefore preempted by Commission orders.

3. Typical claims in these lawsuits include allegations that AT&T and Lucent defrauded embedded base lease customers by inadequately informing them that they have options other than continuing to lease their embedded base telephones, failing to advise that customers do not have to lease a telephone to continue receiving local telephone service, and failing to maintain fixed rates since 1984. These purported class actions assert claims on behalf of millions of customers who have leased embedded base equipment from AT&T or Lucent at any point from 1984 to the present. The time period covered by these cases and the specific claims asserted come squarely within the scope of the Commission's orders in the *Second Computer Inquiry*, which dictated requirements on AT&T for leasing embedded base CPE.

4. To aid the Commission in addressing the Motion, copies of the current complaints in each of the five lawsuits are provided in Appendix A attached hereto. An index of additional filings in each of these cases is provided herewith as Appendix B. Rather than file copies of the voluminous pleadings in these cases, AT&T and Lucent stand prepared to provide copies of any items the Commission may request from Appendix B.

5. The pleadings, on their face, show key points of conflict between the plaintiffs' claims and the Commission's past orders. As an example, just on the subject of customer notifications and information, the following conflicts are apparent:

#### Plaintiffs' Claims

Alleged that AT&T and Lucent failed to disclose that customers would be "better off" canceling their lease and buying "alternative equipment". *Carey v AT&T Corp.*, First Amended Complaint, ¶¶(c), Appendix A, Tab. 1.

Plaintiffs demand an injunction to prevent continued leasing of embedded base CPE until AT&T and Lucent obtain customers' "affirmative assent" based on disclosures prescribed by plaintiffs *Crain v. Lucent Technologies Inc.*, Second Amended Complaint, p. 5 and 7, Volume A, Tab 3; *Brown v. Lucent Technologies Inc.*, Complaint, p. 11, 14, 16, Appendix A, Tab 5.

Alleged that AT&T and Lucent failed to inform plaintiffs they could "purchase" CPE. *Jackson v. Lucent Technologies Inc.*, Complaint, ¶24(c), Appendix A, Tab 2.

Alleged that AT&T failed "to adequately disclose" that there were "meaningful alternatives" in lieu of leasing CPE. *Crain v. Lucent Technologies Inc.*, Second Amended Complaint, ¶¶21(e), 42(h), 60(d)(xii), Appendix A, Tab 3; *Brown v. Lucent Technologies Inc.*, Complaint, ¶¶34(d)(xii), 54(h), 73(e), Appendix A, Tab 5.

Alleged that plaintiffs did not know leasing embedded base CPE was "optional". *Brown v. Lucent Technologies Inc.*, Complaint, ¶54(a), Appendix A, Tab 5.

Alleged that AT&T failed to adequately inform customers that leasing was not condition to receiving "regular utility telephone service". *Crain v. Lucent Technologies Inc.*, Second Amended Complaint, ¶¶21(f), 42(b), 60(d)(viii), Appendix A, Tab 3.

Alleged that AT&T and Lucent did not "adequately disclose that leasing was not required in order to receive "regular utility telephone service". *Brown v. Lucent Technologies Inc.*, Complaint, ¶¶34(d)(viii), 54(b), 73(f), Appendix A, Tab 5.

### FCC Orders

**Written Notices.** AT&T was required to provide all customers with written notice of their option to continue leasing their telephones from AT&T or to purchase telephone equipment. The FCC dictated the substance of these notifications and required that they be provided as inserts with the bills sent by the BOCs to customers. *In the Matter of Procedures for Implementing the Deterioration of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)* ("Implementation Order"), 95 F.C.C.2d 1276, ¶ 67 ("Customers will be notified shortly before deteriorating that they have an option to purchase or to continue leasing their single line CPE. Materials included in BOC bill inserts will request customers to choose between buying and leasing. The steps necessary to make either choice will be the same."); *see also id.* at Appendix B (Summary of Requirements), ¶¶13, 5.

**Notice that Customers Need Not Continue Leasing to Receive Basic Telephone Service.** The FCC required AT&T to provide written notification in customer bills sent by BOCs that would be "at least as informative" as a proposed notice stating that customers could "choose another company for [their] customer premises equipment while still receiving [their] local telephone services from [the local BOC]." *Id.* at ¶131.

**National Advertising Campaign.** The Commission approved a nationwide \$12 million advertising campaign by AT&T to inform customers of their telephone equipment options. The campaign "includes prime-time television network spots as well as advertisements in national magazines, [and] is a further step toward aiding consumers in making informed choices regarding their telephone equipment." *Id.* at ¶69; *see also id.* at ¶11.

**Monthly Reports.** AT&T was required to submit monthly reports regarding its compliance with customer information requirements, including providing "model customer notification" and details about its notification efforts. *Id.* at ¶126 and n.108.

6. As just these examples show, the lawsuits challenge actions that were contrived by the Commission in connection with the initial offering of embedded base CPE. The cases purport to cover the two-year transition period (1984 and 1985) laid out in the *Implementation Order*. The suits also cover the time period after 1985 and, in some of the cases, the plaintiffs argued that the FCC's orders have no effect beyond 1985, when the two-year predictability period ended. This is incorrect for two reasons.

First, certain actions required by the Commission and complied with by AT&T in 1983 and 1984 - - such as polling of embedded base CPE customers regarding their options to lease or buy equipment, the issuance of approved notifications, the establishment of billing formats, a customer information program - - did not lose their effect when the predictability period ended. The information deemed adequate and required by the Commission had already been provided to those customers. Actions taken with the Commission's oversight and approval cannot be open to question fifteen years later by reason of individual lawsuits.

Second, the Commission did not divorce itself from issues involving telephone equipment leasing - - particularly the lease of embedded base CPE - - after 1985. Examples of the Commission's continued oversight and exercise of authority in this area include the following:

a. On August 7, 1986, the FCC, in discussing structural separation requirements applied to the embedded base CPE assigned to AT&T in 1984, expressed its continued oversight of the leasing of such CPE, stating:

“The competitive conditions prevailing in the telecommunications market are well documented. AT&T has lost more than 70 percent of its CPE market share from monopoly days, and the competitive alternatives to its CPE are numerous and well-known. Further, AT&T’s dramatic loss of market share demonstrates that the vast majority of CPE customers are aware of, and in many cases are taking advantage of, their alternatives to AT&T. [In light of these developments in the marketplace, we find it difficult to accept the view of CPE customers suggested by some parties in this proceeding as uninformed consumers willing to accept the first bid that is provided to them, or to purchase from AT&T because it is, or was, ‘the telephone company.’]” *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company*, 104 F.C.C.2d 739, ¶151, n. 73 (1986).

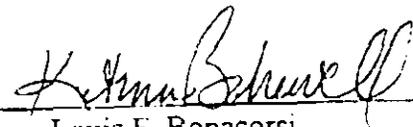
b. In 1995 and 1996, the FCC acted jointly with the Federal Trade Commission (“FTC”) to review complaints by various groups, including the United Homeowners Association and the Gray Panthers, concerning AT&T’s provision of leased CPE service. These complaints involved many of the same allegations made in the lawsuits identified herein. The complaints gave particular attention to the leasing of embedded base CPE. The FCC received information from the groups bringing the complaints, and from AT&T, concerning the provision of leased CPE. Among the materials provided by AT&T was a collection of information provided to Mary Beth Richards, then head of the Common Carrier Bureau. A copy of this collection is attached hereto as Appendix C. The result of this inquiry was a consumer advisory, jointly issued by the FCC and FTC, which provided information about telephone leasing and was mailed to all AT&T and Lucent lease customers. A copy of the advisory is attached hereto as Appendix D.

c. The FCC's Web Site (www.FCC.gov) contains a telephone lease information statement, which is apparently modeled on the consumer advisory identified above (Appendix D). A copy of the statement is attached hereto as Appendix E.

7. AT&T and Lucent stand prepared to provide any further information the Commission may request with regard to their Motion for Declaratory Ruling.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I, Barbara Lawrence, a secretary in the law firm of Bryan Cave LLP, do hereby certify that a copy of the foregoing Supplement to Motion for Declaratory Ruling by AT&T Corp. and Lucent Technologies Inc. was mailed, postage prepaid, this 16th day of June, 1999, to the following:

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