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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

WC 02-147

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MAY 24 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

**MOTION OF AT&T CORP. AND LUCENT TECHNOLOGIES INC.  
FOR DECLARATORY RULING**

AT&T Corp. ("AT&T") and Lucent Technologies Inc. ("Lucent"), through their attorneys and pursuant to Section 1.2 of the Rules,<sup>1</sup> hereby request the Federal Communications Commission ("FCC") to issue a declaratory ruling on the issues stated below regarding the lease of embedded base Customer Premises Equipment ("CPE"). As support for their Motion, AT&T and Lucent state:

1. A substantial and immediate controversy exists with regard to the FCC's primary jurisdiction and preemptive authority over the embedded base CPE which AT&T was assigned at divestiture and which AT&T and Lucent have provided from 1984 to the present, pursuant to *Computer Inquiry II* and its related orders.

2. Five lawsuits are pending against AT&T and Lucent, which purport to be class actions brought on behalf of customers who have leased embedded base CPE at any time since 1984. Four of these cases are consolidated in Multidistrict Litigation proceedings in the

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<sup>1</sup> 47 C.F.R. §1.2

United States District Court for the Southern District of Alabama, before the Honorable Judge Charles Butler, Jr. *In Re Residential Telephone Lease Program Contract Litigation*, MDL No. 1165, Master Docket No. 97-0309-CB-C. The remaining case is before the Circuit Court of Madison County, Illinois. *Crain, et al. v. Lucent Technologies Inc., et al.*, Cause No. 96-LM-983. Each of these cases makes essentially the same allegation - - that AT&T or Lucent have failed to make adequate disclosures to embedded base CPE lease customers of the fact that they are leasing telephone equipment and that they have the alternative to purchase telephone equipment. In connection with this allegation, the plaintiffs in these cases assert that embedded base CPE rates are excessive and that AT&T or Lucent have misled customers by inadequately informing them it is less expensive to buy a telephone than to lease over the long term.

3. The precise issues raised in these cases have been addressed by the FCC in its *Computer Inquiry II* orders and in informal proceedings initiated in 1995 by the United Homeowners' Association, the Grey Panthers, and other groups. *See Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services*, 77 FCC2d 384 (1984), *aff'd sub nom., Computer & Communications Industry Ass'n v FCC*, 693 F2d 198 (D.C. Cir. 1982); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 99 FCC2d 354 (1984); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 100 FCC2d 1298 (1985); *In the Matter of Procedures for Implementing the Detariffing of CPE*, 3 FCCR 477 (1988). *See also* 1985 Consumer Advisory by FCC and Federal Trade Commission and CPE Lease Advisory on FCC Web Site ([www.FCC.gov](http://www.FCC.gov)). The claims asserted and the relief sought by the plaintiffs in the lawsuits identified above directly conflict with the FCC's prior orders and related actions. As an example, in the Illinois case (*Crain v Lucent Technologies Inc.*), the plaintiffs seek specific injunctive relief which would require re-polling of all embedded

base CPE lease customers to see whether they want to continue leasing or to buy a telephone (this was previously done at the FCC's direction in the 1983-1984 timeframe; *see, e.g.*, 95 FCC2d at ¶¶11, 67, 69, 126, 131, and Appendix B at ¶¶3, 5). The plaintiffs also seek a judicial determination as to the appropriate rates for embedded base CPE in the State of Illinois only, from 1984 to the present (although the FCC specifically set national rates during the price predictability period of 1984-1985, expressly determined that rates should be constrained only by the action of the competitive market thereafter, and left open the option to involve itself with embedded base CPE issues after 1985; *see, e.g.*, 95 FCC2d at ¶¶11, n. 15, 24, 71, 78-79, 1415; 100 FCC2d 1298 at ¶16).

4. In both the Illinois case and the consolidated MDL cases before the Alabama federal court, AT&T and Lucent have filed motions for judgment on the pleadings. AT&T and Lucent have argued that the FCC has primary jurisdiction and preemptive authority with regard to the sorts of embedded base CPE notifications and rates already dealt with by its *Computer Inquiry II* orders. The motion is under submission to the Alabama federal court. In the Illinois case, the Circuit Court entered its order on March 10, 1999, granting AT&T's and Lucent's motion for judgment on the pleadings and dismissing the case. In that order, the court left open the possibility that the plaintiffs could bring a complaint to the FCC. The Illinois plaintiffs have moved for reconsideration of that order, asking the court either to hold that their claims are not preempted or, alternatively, to refer the preemption issue to the FCC under the primary jurisdiction doctrine. Furthermore, one of the federal MDL cases in Alabama was filed by the same attorneys representing the plaintiffs in the Illinois action. However, directly contrary to their position in Illinois that the FCC and federal courts have no authority over embedded CPE,

the plaintiffs attorneys argue in the Alabama MDL proceeding that that the same allegations give rise to a federal claim under section 207 of the Federal Communications Act.

5. AT&T and Lucent understand that the FCC will seek leave this date to file an *amicus curiae* brief in the Illinois lawsuit, taking the position that the FCC has not preempted all state contract and consumer protection laws with regard to CPE generically. While AT&T and Lucent would not necessarily disagree with that broad position, it does not address the particular question of the preemptive effect of the FCC's previous orders concerning embedded base CPE in light of the specific claims raised by the plaintiffs in these cases. Further, the FCC's expected *amicus* filing is based solely on *ex parte* solicitation by plaintiffs' attorneys in the Illinois case rather than a full and fair consideration of the relevant issues based on information and argument from all of the parties to the case.

6. Based on the foregoing and the particular matters raised in the lawsuits identified above, there is a real, immediate, and substantial controversy which is ripe and appropriate for determination by the FCC, concerning the following question: Does the FCC have primary jurisdiction and preemptive authority with regard to matters involving the embedded base CPE assigned to AT&T in 1984 and provided by AT&T and Lucent thereafter and, if so, to what extent?

7. The FCC has authority to entertain this Motion and to consider the question presented under 47 C.F.R. §1.2 and 5 U.S.C. §504.

8. As further support, AT&T and Lucent will promptly provide to the Commission copies of all relevant papers filed in the above-identified cases and stand prepared to provide such additional information as the FCC may request.

WHEREFORE, AT&T Corp. and Lucent Technologies Inc. respectfully request the Commission to examine and provide its declaratory ruling on the question of its primary jurisdiction and preemptive authority regarding embedded base CPE and in particular with respect to the claims asserted by plaintiffs in the above-identified cases, as stated above, and for such other and further relief as the Commission deems just and proper.

Respectfully submitted,

AT&T Corp.  
Lucent Technologies Inc.

By John R. Wilner  
Louis F. Bonacorsi  
Ketrina G. Bakewell  
John R. Wilner

Bryan Cave LLP  
One Metropolitan Square  
211 North Broadway  
Suite 3600  
St. Louis, MO 63102-2750  
(314) 259-2000

Its Attorneys

Date: May 24, 1999

## CERTIFICATE OF SERVICE

I, Vanessa I. Hicks, a secretary in the law firm of Bryan Cave LLP, do hereby certify that a copy of the foregoing "Motion of AT&T Corp. and Lucent Technologies Inc." was mailed, postage prepaid, this 24<sup>th</sup> day of May 1999 to the following:

John E. Ingle, Esq.  
Deputy Associate General  
Office of the General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 8A-741  
Washington, DC 20024

Lawrence E. Strickling, Chief  
Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 5/C450  
Washington, DC 20024

Stephen B. Morris, Esq.  
Kenneth W. Baisch, Esq.  
Clark & Morris  
401 West "A" Street, Suite 2200  
San Diego, CA 92101

Russell J. Drake, Esq.  
Cooper, Mitch, Crawford, et al.  
505 North 20th Street  
1100 Financial Center  
Birmingham, AL 35203

D. Michael Campbell, Esq.  
8603 S. Dixie Highway, Suite 310  
Miami, Florida 33143

Michael Strauss, Esq.  
Bainbridge & Straus  
2210 Second Avenue, North  
Birmingham, AL 35203

S.C. Middlebrooks, Esq.  
P.O. Box Drawer 3103  
Mobile, AL 36652

Frederick T. Kuykendall, III, Esq.  
Joe R. Whatley, Jr.  
1100 Financial Center  
505 20th Street, North  
Birmingham, AL 35203-2605

Thomas L. Krebs, Esq.  
J. Michael Rediker, Esq.  
Steve Gregory, Esq.  
Patricia D. Goodman, Esq.  
Ritchie & Rediker, P.C.  
312 North 23rd Street  
Birmingham, AL 35203

Randall S. Haynes  
Morris, Haynes, Ingram, Hornsby  
P.O. Box 1660  
Alexander City, AL 35011-1660

J.L. Chestnut, Jr., Esq.  
Dewayne L. Brown, Esq.  
Henry Sanders, Esq.  
P.O. Box 1305  
Selma, AL 36702-1305

John Sims, Esq.  
Post Office Box 524  
Heidelberg, Mississippi 39439

S. C. Middlebrooks, Esq.  
Gardner, Middlebrooks, Fleming & Hamilton, P.C.  
64 North Royal Street  
Post Office Drawer 3103  
Mobile, AL 36652

Thomas L. Krebs, Esq.  
J. Michael Rediker, Esq.  
Ritchie & Rediker, Esq.  
312 North 23rd Street  
Birmingham, AL 35203

Randall S. Haynes, Esq.  
Morris Haynes, Ingram & Hornsby  
131 Main Street  
Post Office Box 1660  
Alexander City, AL 35011-1660

Russell Jackson Drake, Esq.  
Cooper, Mitch, Crawford, Kuykendall & Whatley  
1100 Financial Center  
505 North 20th Street  
Birmingham, AL35203-2605

Michael Strauss, Esq.  
Bainbridge, & Strauss  
2210 Second Avenue North  
Birmingham, AL 35203

Frederich T Kuyendall, III, Esq.  
Joe R. Whatly, Jr. Esq.  
Cooper, Mitch, Crawford , Kuykendall & Whatley  
1100 Financial Center  
505 North 20th Street  
Birmingham, Al 35203-2605

Steven P. Gregory, Esq.  
Patricia D. Goodman, Esq.  
Ritchie & Rediker, L.L.C.  
312 North 23rd Street  
Birmingham, AL 35203

J.L.. Chestnut, Jr., Esq.  
Henry Sanders, Esq.  
Post Office Box 1305  
Selma, Alabama 36702

Frederick T. Kuykendsall, Ill. Esq.  
Joe R. Whatley, Jr. Esq.  
Cooper, Mitch, Crawford, Kuykendall, & Whatley  
1100 Financial Center  
505 North 20th Street  
Birmingham, AL 35203-2506

David J. Benner, Esq.  
Pacific Telesis Group  
Legal Department  
525 (B) Street , Room 900  
San Diego, CA 92101

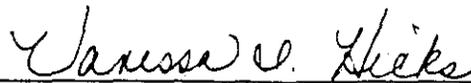
Louis E. Braswell, Esq.  
A. Clay Rankin, III, Esq.  
Henry T. Morrissette, Esq.  
Douglas L. McCoy, Esq.  
P.O. Box 123  
Mobile, AL 36601

Warren B. Lightfoot, Jr., Esq.  
Floyd D. Gaines, Esq.  
505 North 20th Street  
300 Financial Center  
Birmingham, AL 35203

Attorneys for Parties in In re Residential Telephone Lease Program Contract  
Litigation, MDL No. 1165, Master Docket No. 97-0309-CB-C.

Stephen Tillery  
Robert L. King  
Michael B. Marker  
Matthew Armstrong  
Lisa R. Kernan  
Carr, Korein, Tillery, Kunin, Montroy & Glass  
Gateway One Building  
Suite 300  
701 Market Street  
St. Louis, MO 63101

Attorneys for Plaintiffs in Crain, et al. v. Lucent Technologies Inc.,  
Circuit Court of Madison County, Illinois, Cause No. 96-LM-983, and  
In re Residential Telephone Lease Program Contract Litigation, MDL No. 1165,  
Master Docket No. 97-0309-CB-C.



Vanessa I. Hicks