

ORIGINAL  
M

FCC MAIL SECTION

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

JUL 4 2 56 PM '93

FCC 93M-426

DISPATCHED BY

31890

CC DOCKET NO. 93-161 ✓

In the Matter of )  
)  
CLARK-BADER, INC., d/b/a )  
TMC LONG DISTANCE )  
Complainant, )  
)  
v. )  
)  
PACIFIC BELL, )  
Defendant )

File No. E-89-85

PREHEARING ORDER

Issued: June 28, 1993 ; Released: June 30, 1993

1. We will hold the Prehearing Conference on September 21, 1993, and the hearing will begin November 1, 1993.<sup>1</sup> Both will start at 8:30 a.m. and will be held in the Commission's offices in Washington, D.C. The parties will exchange their direct case exhibits at the September 21st Prehearing.<sup>2</sup>

2. Appearances. On or before July 23, 1993, the parties must show that they have complied with 47 CFR 1.221(c). See DH 93-640 released June 23, 1993, at para.9.

3. Clarification of Issues. The Acting Chief, Common Carrier Bureau has designated a 47 USC 201(b) just and reasonable issue, and a 47 USC 202(a) unjust and unreasonable discrimination issue for hearing. See DA 93-640 supra. at para.1 and Issues 2 and 3. Both the burden of proceeding and the burden of proof is on TMC. So they will proceed first, Pac Bell will then proceed, followed by the Bureau (if the Bureau feels any presentation is necessary).

4. However, the HDO does mention one topic; i.e., an affirmative defense on which Pac Bell must bear the evidentiary burdens. At para.4 of the HDO Pac Bell claims that no unjust or unreasonable discrimination has occurred ". . .because to the extent TMC experienced difficulties with the switch, so did all the other ICs." (AT&T, MCI, US Sprint, etc.) The facts and records

<sup>1</sup> The Trial Judge has blocked off 14 days for hearing: November 1, 1993-November 19, 1993. A courtroom has been reserved for those days. Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.

<sup>2</sup> This includes Common Carrier Bureau counsel. If the Bureau believes there are documents in its possession that will contribute to our search for the truth, they should exchange them on the date set.

underlying this contention are peculiarly within Pac Bell's possession. Accordingly they are assigned the evidentiary burden on that affirmative defense.

5. In addition, and without in any way impinging on the evidence each party will introduce, certain important background information should be made part of the evidentiary record. The Review Board and ultimately the Commission must have a clear picture of what has occurred. Such background should include, but not necessarily be limited to the following evidentiary items:

(a) a detailed description and analysis of the alleged ". . . defectively engineered equal access tandem switch. . ."; when it was installed, by whom, how often it malfunctioned between 1985 and 1988; the nature of the malfunction(s); how long the defective switch was in operation; and how many times major repairs were performed on it;

(b) a copy of the publicly filed access tariff that was in effect during the period covered by the complaint (1985-1988);

(c) an agreed upon definition of what constitutes "blocked calls" and "excessive post-dial delay." If those terms are defined in a public tariff, the appropriate tariff pages should be introduced into evidence.

6. The Acting Chief indicates that it is within the Trial Judge's discretion to bifurcate this proceeding into separate liability and damages phases. Upon analysis, and in this instance, bifurcation would not conduce to the orderly dispatch of the Commission's business. Thus TMC will assume its burden of proceeding and burden of proof on both the liability and damages aspects in their direct presentation.

7. The HDO also refers to a Motion for Granting Immunity that Pac Bell filed on March 21, 1991. See DA 93-640 supra at footnotes 15 and 18. Given the procedural posture of this case, that motion is denied as being premature. However that denial is without prejudice to its being refiled if the Trial Judge later determines that the testimony of the two former TMC employees is absolutely essential to the resolution of the proceeding.<sup>3</sup>

8. All counsel should be prepared to discuss any other questions about clarification of existing issues.

9. Discovery. As the HDO points out, the parties have already conducted substantial predesignation discovery ". . . including interrogatories, document requests and witness depositions. . ." However,

---

<sup>3</sup> It may be that the TMC principal referred to in Footnote 18 of the HDO can provide sufficient information on the purported falsified records, negating any need for the testimony of the two former TMC employees.

both TMC and Pac Bell want to engage in further discovery. See DA 93-360, supra. at para.5.

10. Such further discovery will be initiated on July 26, 1993, conducted pursuant to 47 CFR 1.311 through 1.340, and completed on or before September 17, 1993.<sup>4</sup>

11. No 47 CFR 1.315 or 1.323 written interrogatories will be employed,<sup>5</sup> and any depositions will be taken in San Diego, California, (unless otherwise agreed upon). Please don't notice a witness for any other place unless your opponent agrees to the location change. Moreover, any individual deposed during the predesignation phase will not be redeposed.

12. Settlement. This case could prove long and costly. Financially, the possibility exists that both parties will lose. At best one of you will have squandered substantial amounts of time and money prosecuting this case. Moreover, there is a direct relationship between the length of trial and the costs involved. The general rule is the longer the trial, the greater the cost. So from your client's viewpoint this prospective litigation is a mistake. Being merely another form of warfare it should be avoided where possible. So engage in settlement dialogue now. The post-designation meter is now running. Don't wait to argue before the Commission three and one-half years from today. Keep your settlement channels open and use them.

13. To this end, a negotiating principal from each party, along with their counsel of record are directed to attend a disposition conference on September 10, 1993 at 2:00 p.m..<sup>6</sup> This face-to-face conference will be held at a prearranged agreed-upon location. There the parties should determine whether this case can be settled.

14. On or before September 17, 1993, the settlement conferees will submit a Joint Memorandum to the Trial Judge. There they will outline the results of the September 10th conference. That Memorandum should indicate whether the case has been settled and, if it has, how soon the settlement papers can be submitted for approval.

---

<sup>4</sup> Both TMC and Pac Bell have pending predesignation motions for extraordinary discovery. Those motions are granted subject to paras. 9-11 above.

<sup>5</sup> However, the already completed predesignation interrogatories (para.9 supra.) can be exchanged as part of a party's direct case if they so choose.

<sup>6</sup> The parties needn't wait until September 10, 1993 to talk settlement. Nor should the mandatory face-to-face conference be the only effort at settlement. The mandatory September 10, 1993 conference date has been set because of its proximity to the September 21, 1993 Prehearing Conference.

15. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit their direct affirmative cases in writing. See 47 CFR 1.243(f); and Equal Employment Opportunity Commission, 25 RR 2d 813 (1972) at para.7. So, at the September 21, 1993 Prehearing Conference the parties will exchange their direct affirmative cases. This will include the sworn written testimony and the exhibits to be offered in support of their direct cases.

16. As the Acting Chief notes "the parties have already responded to numerous written interrogatories, exchanged thousands of pages of documents and obtained the deposition testimony of at least six potential witnesses." See DA 93-640 supra., Footnote 5. Consequently counsel for all three parties should go over this mass of material and select that which is relevant and material to their direct presentations. Then they will assemble it, properly identify it by source, give it a tentative exhibit number and exchange it on the date set.<sup>7</sup>

17. If any party intends to request that official notice be taken of any materials in the Commission's files, they should assemble that material, identify it by source, give it a tentative exhibit number and also exchange it on the date set.<sup>8</sup>

18. Each party will assemble their exhibits in a binder(s). Each exhibit will bear a number preferably by means of a tab on each document. The exhibit will be accompanied by the sponsoring witnesses' affidavit-if such an affidavit is required (See para.17 supra.) Please number the exhibits serially starting with the number 1. Use an appropriate prefix to indicate who is sponsoring the exhibits; e.g. TMC Ex.1; Pac Bell Ex.1; and CC Bur Ex.1.

19. Evidentiary Admission Session. We'll hold an Evidentiary Admission Session on September 30, 1993, starting at 8:30 a.m. There each party (starting with TMC) will formally identify and offer the direct case exhibits they exchanged on September 21, 1993. The Trial Judge will rule on any objections to all or parts of those exhibits. Immediately after the conclusion of the evidentiary admission session, each party will notify his opponents of those witnesses they need to cross-examine and the exhibits or areas to be covered by that cross-examination.

20. Hearing Procedures. As previously noted (Para.3 supra.), TMC bears the burden of proceeding and the burden of proof on the designated

---

<sup>7</sup> Trial Counsel should not squander their own time and abuse the Court's time by presenting as much evidence as possible without considering its relevancy, let alone its materiality.

<sup>8</sup> For example, TMC should have official notice taken of its February 1989 complaint. However, Exhibit B attached to its complaint should be exchanged as a separate exhibit with the affidavit of the appropriate sponsoring witness. Pac Bell should have official notice taken of its March 31, 1989 Answer and Motion to Dismiss.

issues. So they will proceed with their direct case witnesses first. Pac Bell and the Bureau are entitled to cross-examine each witness. Then TMC is entitled to redirect examination of that witness followed by recross-examination.

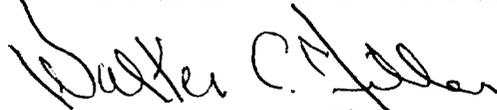
21. After TMC has completed its direct case, Pac Bell will present its direct case; TMC and the Bureau will cross-examine each of the Pac Bell witnesses, followed by redirect and recross. After Pac Bell has completed its case the Bureau will present its direct case, if any. TMC and Pac Bell can cross-examine, followed by redirect and recross.

22. Rebuttal is not a matter of right. But, during the hearing, if any party believes a rebuttal showing is vital to their ultimate position, they may request a rebuttal session. Such a request will only be granted upon a compelling showing.

23. Extensions of Time. All parties must meet all of their procedural deadlines. We can't afford the luxury of procedural slippage. Otherwise other dockets suffer. So any requests for extensions of time must be made in writing and must be consent extensions. In addition, any requests for an extension for more than four working days must also be signed by the client.<sup>9</sup> Captive extension requests; i.e., those made on the day the responsive pleading is due (or even the day before the response is due) will not be entertained.

24. Hearing Dates. The November 1-19, 1993 hearing dates are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended merely because counsel have agreed to recommend a settlement.

FEDERAL COMMUNICATIONS COMMISSION

  
Walter C. Miller  
Administrative Law Judge

---

<sup>9</sup> In the case of the Common Carrier Bureau the Bureau Chief's signature will suffice.