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

In the Matter of CLARK-BADER, INC. d/b/a TMC LONG DISTANCE, Complainant, vs. PACIFIC BELL, Defendant.	CC Docket No. 93-161 File No. E-89-85

To: Presiding Judge Walter C. Miller

OPPOSITION TO PETITION FOR CLARIFICATION

Complainant CLARK-BADER, INC. d/b/a TMC LONG DISTANCE ("TMC"), by its attorneys, hereby opposes the Defendant's request that the Presiding Judge clarify his Prehearing Order as released on June 30, 1993 ("PHO") insofar as the Presiding Judge denied Defendant's previous Motion for Granting Immunity as "premature." See PHO at ¶ 7. Defendant claims that the Presiding Judge somehow opined upon the standard and timing for requests for immunity under 18 U.S.C. § 6004. The Presiding Judge's ruling simply reflected the need to facilitate these proceedings to hearing in an "orderly fashion," and that in doing so unnecessary motions should not be considered unless "absolutely essential."

Recognizing the need to expedite these proceedings, the Presiding Judge states in the PHO that "[t]rial [c]ounsel 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." PHO at n.7. In this

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spirit, the Presiding Judge denied Defendant's Motion for Granting Immunity as premature "[g]iven the procedural posture of this case" although the Motion may be refiled if it is determined that a ruling on the Motion is "absolutely essential."

A literal reading of the use of the words "absolutely essential" demonstrates that the Presiding Judge cannot reasonably be said to be referring to the standard under 18 U.S.C. § 6004. Indeed, 18 U.S.C. § 6004 is not even mentioned in the PHO.[1] The Presiding Judge simply states that if testimony from other sources can "negate" the need for the testimony of the witnesses in issue, then the need for a ruling on the Motion for Order Granting Immunity will be obviated (note 3 of the PHO). Under such circumstances, it certainly detracts from these proceedings to litigate an unnecessary motion at this time. The Presiding Judge therefore is not issuing a ruling on the public interest requirement under 18 U.S.C. § 6004 or any other requirement in the statute. Rather, the Presiding Judge is considering only the orderly resolution of these proceedings.[2]

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[1] In addition, a literal reading of 18 U.S.C. § 6004(b) shows that before the public interest determination is properly considered, the agency must first be considering whether to issue an order of immunity. Since the Presiding Judge does not reach this issue in the PHO, he can not reasonably be interpreted as opining on the public interest requirement of the statute.

[2] Defendant's suggestion that the Presiding Judge "obviously relies" on what Defendant calls a misinterpretation slights the intelligence of the President Judge. See Petition at 2. In addition to not making reference whatsoever to 18 U.S.C. § 6004 in using the words "absolutely essential," the Presiding Judge also made no reference whatsoever to the Acting Chief's use of the word "essential" in note 18 of the Hearing Designation Order.

Defendant is attempting to create confusion over the PHO that a reasonable and literal reading clearly does not support.

In addition to requesting clarification of words that do not need clarification, Defendant also requests "clarification of the timing of a renewed request for immunity." See Petition at 2. In support thereof, Defendant states that the PHO "apparently requires Pacific to subpoena these witnesses to the hearing, and then renew the request if they invoke their 5th Amendment rights." See Petition at 3. Once again, Defendant would create confusion out of thin air because the PHO requires nothing of the kind. Simply, the witnesses at this juncture are not requested to participate in these proceedings at all -- by subpoena or otherwise -- unless and until the Presiding Judge makes the determination that these witnesses' testimony is in fact necessary and proper under the Presiding Judge's established evidentiary standards. See PHO at ¶ 7.

Moreover, Defendant claims that clarification of the timing to renew a request is needed to avoid disruption of the hearing schedule. See Petition at 3. However, granting the request for immunity would disrupt the hearing schedule in a much more significant fashion. Attached hereto is TMC's Partial Opposition to Defendant's Motion for Order Granting Immunity (with supporting exhibits) in which no less than twelve reasons are presented why granting an order would, inter alia, drain unnecessarily judicial resources, prejudice needlessly the rights of TMC, and lead inevitably to irrelevant and immaterial

evidence. As emphasized in TMC's Partial Opposition, such concerns are matters of repeated emphasis by federal tribunals. See e.g., Alimenta, Inc. v. Stauffer, 598 F. Supp. 934, 941 (N.D. Ga. 1984)(counsels against admission of duplicative evidence which creates undue delay, prejudicial delay, prejudicial emphasis and a focus on irrelevant issues.) (cited at 5-6 of TMC's Partial Opposition.)

At the very least, because the testimony of the witnesses implicate only the damages aspect of these proceedings, yet is so heavily tainted with prejudice to TMC, bifurcation of the issues of liability and damages herein would clearly be needed if the Motion is granted. See Partial Opposition to Motion at ¶ 5. Yet, bifurcation of the liability and damages issues would run squarely counter to "the orderly dispatch of the Commission's business." See PHO at ¶ 6.[3]

Thus, for the foregoing reasons, TMC simply sees no need to burden these proceedings with clarifications that are not only

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[3] TMC concurs with the Defendant's statement that these proceedings are under a "rigorous schedule." Such a schedule would certainly be encumbered by the inclusion of Defendant's Motion for

unnecessary, but would do more harm than good. Defendant's Petition for Clarification should be denied.

Respectfully submitted,

CLARK-BADER, INC. d/b/a TMC LONG DISTANCE

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Dated: July 23, 1993

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

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By: Presiding Judge Walter C. Miller

ORDER

Upon consideration of the Motion to Accept and the Motion for Clarification filed by Pacific Bell on July 14, 1993, the Presiding Judge hereby finds that the Motions should be DENIED.

Accordingly, it is ORDERED that the Motions to Accept and Motion for Clarification filed by Pacific Bell are hereby DENIED.

_____ _____

Date Presiding Judge

CERTIFICATE OF SERVICE

I, Michael R. Carithers, Jr., hereby certify that on this 23rd day of July, 1993, I caused a true and correct copy of the foregoing Opposition to Petition for Clarification to be sent by regular, first-class mail, postage prepaid, to:

James P. Tuthill, Esquire
Nancy C. Woolf, Esquire
Pacific Bell
140 New Montgomery Street, Room 1530-A
San Francisco, CA 94105

and by hand delivery to:

Thomas D. Wyatt, Esquire
Chief
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Administrative Law Judge
Walter C. Miller
Federal Communications Commission
Room 213
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Michael R. Carithers, Jr.