

SECRET FILE COPY
ORIGINAL
FCC MAIL SECTION

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

FCC 93M-509
32136

AUG 9 1 00 PM '93

In the Matter of)	CC DOCKET NO. <u>93-161</u>
DISTRICTED BY)	
Clark-Bader, Inc., d/b/a)	
TMC Long Distance)	
Complainant,)	
)	
v.)	File No. E-89-85
)	
Pacific Bell,)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Issued: August 6, 1993; Released: August 9, 1993

1. Pacific Bell (Pac Bell) seeks a ruling on a "Petition for Clarification" that they filed on July 23, 1993. They want two matters clarified. First, they want the Trial Judge to clarify the legal standard he will apply if, and when, Pac Bell requests immunity for two former TMC employees; i.e. Mitchell Lipkin and Cathy Miller.

2. Secondly, Pac Bell seeks permission to renew their immunity request as early as the September 21, 1993 Prehearing Conference.

3. TMC opposed Pac Bell's request on July 23, 1993; the Acting Chief, Common Carrier Bureau commented on the request on August 2, 1993.

The Immunity Legal Standard

4. 18 U.S.C. §6004 authorizes the FCC to issue immunity orders with the Attorney General's approval if in its judgement the individual's testimony: (1) may be necessary to the public interest; and (2) such individual has refused to testify on the basis of the privilege against self-incrimination.¹

5. The Trial Judge has no authority to grant immunity. But the Commission has delegated to him "who is familiar with the case" the authority to "make the public interest determination required by 18 U.S.C. §6004." See Revised Procedure for Handling Requests for Witness Immunity in Adjudicatory Proceedings, 73 FCC 2d 816 (1979).

¹ On October 1, 1990, via telephone depositions both Mitchell Lipkin and Cathy Miller refused to give sworn testimony based on their privilege against self-incrimination. So the second prong of the 18 U.S.C. §6004 test is not involved in this ruling.

Discussion

6. At this juncture the Trial Judge is in no position to rule that the testimony of Mitchell Lipkin and/or Cathy Miller is needed to advance the public interest in this hearing. The parties have not even exchanged their direct cases. So we don't know whether Mitchell Lipkin and/or Cathy Miller will be sponsoring any factual material or on whose behalf they will sponsor it; i.e., TMC's (who bears both the burden of proceeding and the burden of proof) or Pac Bell's.

7. Nor is the Trial Judge yet convinced that the only way we can find out whether certain former TMC customers cancelled TMC's service because of Pac Bell's defectively engineered equal access tandem switch is through Mitchell Lipkin's and/or Cathy Miller's testimony.²

8. It must be obvious to everyone involved that Pac Bell's allegations go far beyond the parameters of this proceeding. If Pac Bell, through 2 immunized witnesses, proves that TMC falsified certain records to support its complaint and/or shows that TMC has submitted copies of those falsified records to the Commission in the hope of obtaining favorable action on its complaint, then a serious and far-reaching question arises; i.e., whether TMC possesses the necessary character qualifications to remain a long distance carrier.

9. At the present time the question whether TMC possesses the requisite character qualifications is not before the Trial Judge. Nor is the Trial Judge even convinced that the Commission or even the Common Carrier Bureau wants TMC's basic qualifications assessed in this forum. But what alternative will he have if Pac Bell, via two immunized witnesses, presents proof positive of TMC's alleged skulduggery?

10. But, having said that, Pac Bell is assured that the Trial Judge's ruling in his Prehearing Order that the immunity question is premature is no mere bureaucratic evasion. If we reach a stage in this proceeding where (after reviewing the record evidence adduced) Pac Bell can demonstrate that Mitchell Lipkin's and/or Cathy Miller's testimony is a necessary link in their chain of proof, the Trial Judge is perfectly willing to make the public interest determination described in paragraphs 4-5 above.³

² The Trial Judge has already indicated that the best evidence on why any given customer cancelled TMC's service is that given customer's statement on the subject. See FCC 93M-485 released July 23, 1993. If the parties agree that it is overly burdensome to obtain written statements (under penalty of perjury) from those who cancelled TMC's service during the period involved (1985-1988), perhaps they can stipulate to the facts or employ an agreed upon procedure (e.g. a representative sample) that can be accepted into evidence.

³ The Trial Judge recognizes that employing this approach could result in a slight delay in closing the record in this case. But against the four-year predesignation delay that slight delay will be minuscule.

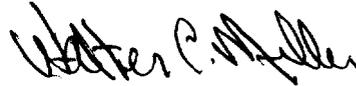
When to Renew the Request

11. This leads to a discussion of Pac Bell's second request. Pac Bell wants to renew their immunity request at the September 21, 1993 Prehearing Conference. That is the day the parties will exchange their direct cases. So the Trial Judge will still not be in a position to rule. Moreover, since the evidentiary admission session isn't until September 30, 1993, we will not have a clear delineation of Mitchell Lipkin's and/or Cathy Miller's role in this proceeding before then. So, unless Pac Bell is willing to support their immunity request with speculative materials that may never become evidence of record, it seems that sometime after September 30, 1993, is a date worth considering.

Ruling

SO the "Petition for Clarification" that Pac Bell filed on July 23, 1993, IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge