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Before ~~FCC~~ MAIL SECTION
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-515

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In the Matter of

Clark-Bader, Inc., d/b/a
TMC Long Distance
Complainant,

v.

Pacific Bell,
Defendant.

) CC DOCKET NO. 93-161
) DISPOSED BY _____

) File No. E-89-85
)
)
)

MEMORANDUM OPINION AND ORDER

Issued: August 9, 1993; Released: August 10, 1993

1. TMS Long Distance (TMC) seeks a ruling on a "Request For Permission to File Appeal From Order of the Presiding Judge." They filed their request on August 4, 1993, and apparently want permission to appeal an interlocutory ruling (FCC 93M-505) that wasn't released until August 5, 1993.¹
² There the Trial Judge dismissed three Notices to Take Depositions that TMC had filed on August 2, 1993. He did so on basically two grounds: the Notices were untimely filed; and they failed to meet the 21 day notice requirement of 1.315(a).

Ruling

2. TMC's request will be disallowed. They have failed to meet either of 47 CFR 1.301(b)'s two tests. First TMC has failed to show that their appeal would present a new or novel question of law or policy. Indeed TMC hasn't made any attempt to do so.

3. The Order TMC complains about dismissed three late-filed notices to take depositions that failed to meet 47 CFR 1.315(a)'s notice requirements. There's nothing new or novel about that. Tardy lawyers who

¹ Obviously TMC didn't even have before them the text of the interlocutory ruling they want to appeal at the time they prepared their request. In addition TMC has filed subsequent discovery requests with the Trial Judge. See e.g., FCC 93M-506 released August 6, 1993. Presumably TMC isn't appealing those subsequent interlocutory rulings.

² The type of interlocutory TMC wants to appeal is governed by 47 CFR 1.301(b). That subsection provides that "[t]he Presiding Officer shall determine whether the showing is such as to justify an interlocutory appeal and, in accordance with his determination, will either allow or disallow the appeal or modify the ruling. If the Presiding Officer allows or disallows the appeal, his ruling is final."

fail to abide by the Commission's deposition rules are just one of the causes of inefficient trials. But they aren't novel.

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4. Assuming that TMC had presented a new or novel question of law or policy, their Request would still be denied. They have failed to comply with 47 CFR 1.301(b)'s second test; i.e., they have failed to demonstrate that the ruling complained of is such that error would be likely to require remand should the appeal be deferred and raised as an exception. Again TMC hasn't made any attempt to make such a demonstration.

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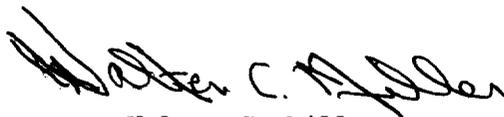
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5. Probably the reason TMC has ignored this second test is because they couldn't meet it if they did try. Even assuming that dismissing the three deposition notices was error, it would scarcely require a remand. The deposition procedure simply advances the stage at which disclosure can be compelled from the time of trial to the period preceding it.

6. Moreover, the Trial Judge has indicated to both TMC and Pac Bell that they could engage in informal discovery if they so desire. Thus, for example, if Pac Bell agrees, TMC could informally interview J. D. Lockton, M. L. Bandler, and/or Dennis Wheatley. Via these interviews they should be able to obtain the factual data they need to properly prepare for trial; i.e., they will know whether they need to call one or more of the three as adverse witnesses. About the only thing they won't be able to do is to officially lock-in any future testimony of these three people.

SO the "Request For Permission to File Appeal From Order Of the Presiding Judge" that TMC Long Distance filed on August 4, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge