

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of: )  
)  
Clark-Bader, Inc., d/b/a )  
TMC Long Distance )  
)  
Complainant, )  
)  
v. )  
)  
Pacific Bell Telephone Company, )  
)  
Defendant )

CC Docket No. 93-161  
File No. E-89-851

To: The Honorable Walter C. Miller  
Administrative Law Judge

REPLY OF TMC TO RESPONSE TO MOTION  
FOR CLARIFICATION AND/OR ENLARGEMENT OF ISSUES

Complainant Clark-Bader, Inc., d/b/a TMC Long Distance ("TMC"), by its attorneys and pursuant to Section 1.229 of the Commission's Rules, hereby replies to the "Response" of Pacific Bell ("PacBell") to the "Motion for Clarification and/or Enlargement of Issues" ("Motion") filed by TMC.

1. On July 27, 1993 TMC filed a Motion requesting that the Presiding Judge clarify that the Common Carrier Bureau in its Hearing Designation Order 58 Fed. Reg. 37481 (July 12, 1993) intended that the §§201(b) and 202(a) issues designated for hearing include an inquiry into whether, with respect to PacBell's provision of access services to TMC, PacBell's conduct during the relevant period (1) was in violation of its equal access obligations; and (2) amounted to wilful misconduct. As TMC's Motion explained, the clarification request was premised on the fact that all of the parties to this proceeding had agreed, both prior to and

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after designation, that these two issues were to be considered in the hearing. Indeed PacBell, in a pre-designation submission to the Chief of the Common Carrier Bureau's Enforcement Division, agreed that these issues should be included in the Hearing Designation Order.<sup>1/</sup> Further, PacBell's counsel, James Tuthill, participated in a post-designation conference call with the undersigned counsel for TMC and the Chief of the Enforcement Division on July 15, 1993, during which the Chief agreed that the Bureau and the Commission intended that these issues be encompassed within the designated issues.

2. Given this background, PacBell's Response is as disingenuous as it is brief. PacBell has actively participated in the identification of the "equal access" and "willful misconduct" issues as among those topics which are properly the focus of this proceeding. Notwithstanding PacBell's involvement in this regard, its Response nevertheless attempts to challenge the validity of TMC's request for clarification.

3. PacBell's Response fails to provide any basis upon which the Presiding Judge should deny TMC's Motion for Clarification. PacBell's Response does not debate that the clarification TMC requests is necessary or appropriate. Rather, PacBell's Response is limited to the alternatively pleaded portion of TMC's Motion, i.e., a request that if the Presiding Judge does not view clarification as an appropriate procedural vehicle, that the request then

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<sup>1/</sup> See Letter of September 15, 1992 from TMC's counsel Charles Helein, Esq. to Nancy Woolf, Esq., attorney for Pacific Bell attached to TMC's Motion as Exhibit 1. In that correspondence TMC's counsel writes "[t]he Commission expressly sought to make sure that insofar as equal access obligations were concerned . . . the FCC . . . [was] determined to enforce the equal access requirement . . . . TMC need not and is not relying on the MFJ with respect to this issue and the issue is one proper for determination at hearing. If you now agree, we may submit the attached revised list to the FCC." Following receipt of this letter, PacBell agreed to submit a list of issues which included both the equal access and the willful misconduct issues.

be considered a motion for enlargement of issues. PacBell challenges TMC's Motion on the grounds that it is not "supported either by facts of which official notice may be taken, or by an affidavit showing specific facts which support the request." Response at 1-2.

4. Thus, rather than challenging the merits of TMC's Motion, PacBell merely argues that TMC has provided no factual support for its Motion. This ignores the fact that no factual support is required for a motion for clarification. TMC's Motion clearly sets forth that it primarily seeks to obtain a legal clarification from the Presiding Judge concerning the issues which are the subject of this proceeding. Insofar as TMC's request concerns a clarification of legal issues, not factual ones, no additional allegations of fact are set forth in the motion and therefore an affidavit supporting factual allegations is not required.

5. TMC's belief that these issues are of such fundamental importance to this proceeding, led it, as a procedural failsafe, to file its Motion alternatively as a Motion for Enlargement of Issues. Although PacBell's Response lacks specificity on this point, apparently it is this portion of TMC's Motion which PacBell is challenging. Contrary to PacBell's assertion, however, should TMC's Motion be viewed as one for Enlargement of Issues, TMC's Motion still does not require the consideration of any additional facts so as to require a supporting affidavit. Rather, TMC's alternative request for enlargement is exclusively based on and fully supported by the factual showing set forth in TMC's Complaint. As the Presiding Judge has recognized, official notice may be taken of TMC's Complaint.<sup>2/</sup> Therefore, TMC's motion is proper under Section 1.229 of the Rules, and accordingly PacBell's Response is without merit and should be disregarded.

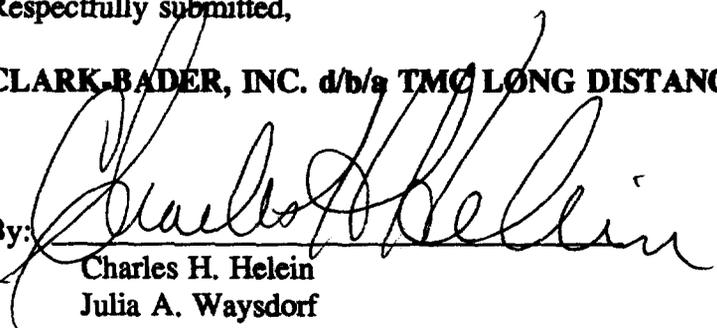
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<sup>2/</sup> See Prehearing Order, FCC 93M-426, at fn. 8.

7. As PacBell has failed to provide any legitimate substantive or procedural reason for the denial of TMC's Motion, TMC respectfully requests that the Presiding Judge grant its Motion for Clarification and/or for Enlargement of Issues.

Respectfully submitted,

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

By: 

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CERTIFICATE OF SERVICE

I, Suzanne Helein, hereby certify that on this 11th day of August, 1993, I caused a true and correct copy of the foregoing "Reply of TMC to Response to Motion for Clarification and/or Enlargement of Issues" in CC Docket No. 93-161, File No. E-89-85, to be sent to the following in the manner indicated:

Via Facsimile and  
First Class Mail to:

James P. Tuthill, Esquire  
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and by hand delivery to:

Thomas D. Wyatt, Esquire  
Chief  
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The Honorable Walter C. Miller  
Administrative Law Judge  
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Suzanne Helein