

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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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

PETITION FOR EXTRAORDINARY RELIEF
AND EXPEDITED CONSIDERATION

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SUMMARY

On July 30, 1993, the Presiding Officer orally informed counsel that because formalistic Notices to Take Depositions were not filed July 26, 1993, he would dismiss any such Notices when filed as in violation of his Pre-Hearing Order (PHO) requiring that discovery "be instituted on July 26, 1993." On August 5, 1993, the Presiding Officer issued an Order dismissing the Notices filed by Complainant TMC. On August 9, 1993, the Presiding Officer denied, as he orally indicated he would, TMC's Request for Leave to Appeal his August 5th Order. In two subsequent interlocutory orders, the Presiding Officer also refused to issue subpoenas for two PacBell witnesses on the same grounds of alleged "tardiness." While the Presiding Officer has acknowledged that depositions and other discovery might proceed by informal agreement of the parties, PacBell has self-servingly asserted that the Presiding Officer "does not want further discovery" and has rescinded its earlier agreement to allow certain discovery.

The basis of the alleged "tardiness" in not having filed formalistic Notices to take depositions is in accordance only with the Presiding Officer's personal interpretation of his own language used in the PHO and otherwise without foundation in the Commission's rules or precedents. Substantively, no delay or other prejudice was created by the filing of the Notices to Take Depositions on August 2 rather than July 26, 1993. Further, the

orderly conduct of the hearing requires no such filing except in the personal view of the Presiding Officer.

The denial of TMC's Request for Leave to Appeal failed to address these deficiencies in the Presiding Officer's logic and reasoning. In addition, the denial of the Request to Appeal failed to consider the direct precedent cited by TMC, that his denial of discovery in these circumstances was arbitrary and capricious and would result in a remand for a trial de novo to avoid denying the complainant a fair hearing. See Bunker-Ramo Corp. v. Western Union Telegraph Company, 32 FCC 2d 860, 26 RR 2d 164 (Rev. Bd. 1972).

From the Presiding Officer's oral advisories and his written statements in his interlocutory orders, it is apparent that his denial of discovery is based in part on a misunderstanding of the predesignation record; in part on his self-induced perception of an apparent need to "protect" the sanctity of the hearing process from TMC "abuses"; and in part on his apparent belief that his discretion is without substantive or sensible boundaries. There is little doubt that reversible error has been committed. The actions of the Presiding Officer have in effect virtually handed the case to Defendant which has no burden of proof, but nearly unlimited resources to continue this litigation indefinitely.

Unless the Review Board grants permission and allows this appeal, TMC will be denied a fair hearing. If forced to retry the complaint after such a hearing, TMC's limited resources may require abandonment of its claims. Such a result not only deprives TMC of its rights under Title II, but will likewise deny the Commission

the record necessary to consider the broad public interest implications raised by the potential denial of equal access that TMC's complaint involves.

in the original conversion of the San Diego LATA to equal access in 1985. That participation turned out to be a particularly bad experience for TMC. At the unquestionably most critical time for the future of its embryonic competitive provision of long distance service, its customers' traffic was being blocked, interrupted and suffered from severe post dial delay and an unacceptable volume of incomplete calls.

2. After significant investigation, TMC determined that the problem most likely arose from the access tandem switch PacBell had installed to provide equal access to the San Diego LATA. TMC notified PacBell of its troubles and TMC's position that it was the access tandem which was causing the hue and cry from TMC's customers, and worse, their rapid and permanent disaffection from TMC's services.

3. PacBell denied TMC's claims. TMC continued to press those claims and eventually in late 1988, early 1989, TMC was granted relief from having all of its traffic routed through the access tandem at which point most of the problems about which it had been complaining were cleared up. Taking these events at face value, TMC requested that PacBell compensate TMC for the damage PacBell's failure to provide equal access had, in TMC's view, caused. PacBell, of course, denied any responsibility, but offered a token amount to settle the matter which TMC was compelled to refuse.

4. Finally, in early 1989, TMC decided to file a formal complaint with the FCC which it did in February, 1989. See FCC File No. E-89-85. Over four years later, TMC's complaint was designated for hearing and the instant docket created. However, in

the short time that this docket has been open, TMC's rights to prosecute its complaint have come under constant attack, not by PacBell, but by the Presiding Officer. In a consistent series of rulings, all based on the same fanciful thread of "tardiness," TMC's attempts to conduct reasonable post-designation discovery have been negated.

5. Several factors in TMC's view contribute to the present state of affairs. Several of these will be addressed herein. First, however, it is important to summarize TMC's predesignation efforts to prosecute this complaint. By so doing, TMC will illustrate the serious mistakes of fact the Presiding Officer has made about the predesignation period and how those mistakes, in part, have contributed to his pronounced bias against TMC's discovery efforts. Perhaps, if the Presiding Officer had an accurate understanding of the facts surrounding predesignation discovery and assuming his familiarity with the limits on discovery under the Formal Complaint rules, TMC's post-designation discovery efforts would not have been denied nor TMC's rights to a fair hearing eradicated.

6. In the predesignation stages of this proceeding, PacBell resisted discovery from the outset. Responses to TMC's Interrogatories had to be compelled. The depositions of PacBell's personnel were also vigorously resisted. Once depositions were ordered and completed, follow up requests for documents were refused by PacBell. These efforts consumed the better part of two years. In the Spring of 1991, having completed depositions of only

a handful of lower management personnel, and reviewed mountains of irrelevant documents, TMC decided to attempt a settlement which it did by letter dated July 2, 1991.

7. Discovery was of course suspended as the parties discussed settlement. Because PacBell wanted a demonstration of the foundation for TMC's proposed settlement, TMC expended substantial sums over a ten month period to provide PacBell the information it requested. In late April of 1992, PacBell rejected a revised settlement offer made by TMC.

8. About mid-May 1992, TMC braced to resume its discovery efforts so as to be able to continue to prosecute its complaint. Shortly thereafter, the Common Carrier Bureau's Formal Complaint Branch posed to the parties the possibility of having the case designated for hearing. A meeting to formally explore this procedure was set by the Chief of the Formal Complaints Branch for July, 1992. At that meeting, no chance of settlement being possible, the parties were invited to submit the issues to be designated for hearing. Over the next several weeks between July, 1992 and September, 1992, both TMC and PacBell worked on a consensual specification of the issues to be designated. On September 15, 1992, a list of issues agreed to for designation by the parties (as requested by the Enforcement Division) was sent to the Common Carrier Bureau.

9. During this same time period, TMC orally informed PacBell of its need to take further depositions and in October of 1992 wrote PacBell identifying the individuals desired to be deposed and

the reasons therefore.^{1/} Ultimately PacBell refused to voluntarily produce the individuals.

10. In the meantime, both parties were being reassured that the complaint would soon be designated for hearing. Based on the understanding that the designation order was to be issued by the end of September, 1992, and in anticipation of PacBell's further resistance to depositions or document production,^{2/} TMC's counsel sought to determine from the Bureau if a motion to compel the taking of additional depositions should be filed immediately. The Bureau advised TMC that it would not oppose or reject such a motion, but would await the issuance of the promised designation order and let the Presiding Officer appointed thereby rule on the motion.

11. Being assured in September, 1992 that the case would quickly be designated for hearing, TMC decided to withhold its motion for leave to take additional depositions. Beginning in September, 1992, TMC's counsel was in continuing contact with the Bureau about when the designation order would be issued. He was repeatedly assured that the release of such an order was imminent. Six months after having agreed to allow the matter to be designated

1/ See copies of correspondence attached hereto as Exhibit A.

2/ TMC actually wrote PacBell earlier in 1992 requesting certain documents identified in testimony in the predesignation depositions. PacBell refused to provide most of the documents requested. See copies of correspondence attached hereto as Exhibit B. On August 13, 1993, TMC filed a Motion to Produce Documents with the Presiding Officer seeking an order against PacBell to produce the documents requested over a year ago. That Motion remains pending.

for hearing and four months after having submitted a joint agreement on the issues to be designated, no action having been taken, on January 29, 1993 TMC filed its "Motion for Leave to Take Additional Depositions" which PacBell opposed.

12. By the second quarter of 1993, no designation order having issued, TMC advised the Bureau that should there be further delays, the possibility of having to seek mandamus to protect the rights of the TMC had to be considered. The Bureau continued to assure TMC that the case was ready to be designated. Finally, TMC was advised that some internal approval within the Bureau for designation had been received. TMC, therefore, once again withheld taking additional action and on June 23, 1993, nearly a year after the original meeting in July, 1992, the Designation Order was finally released. (FCC DA-640, adopted June 1, released June 23, 1993).

13. The foregoing account of the last four years during which this complaint has been pending shows that the Presiding Officer's belief that "the parties have had over four years to perfect their trial preparations." Memorandum Opinion and Order, 93M-506, (rel. August 6, 1993), is mistaken.^{3/} The foregoing also demonstrates that TMC pursued discovery diligently until settlement discussions were opened. Thereafter, TMC was unable to reinstitute discovery due to its cooperation with the Bureau in having the complaint

3/ PacBell has nonetheless benefitted from the Presiding Officer's misunderstanding of the predesignation phase of this case as TMC's rights to engage in adequate and fruitful discovery have been stifled.

designated for hearing and the Bureau's reluctance to act on any requests by TMC to compel discovery until the Presiding Officer was appointed along with the issuance of the much belated Designation Order.

Post-Designation Background

14. In the Pre-Hearing Order, FCC 93M-426 (rel. June 30, 1993) ("PHO"), the Presiding Officer granted Complainant's "Motion for Leave to Take Additional Depositions," which was filed by TMC with the Common Carrier Bureau on January 29, 1993.^{4/} Pursuant to the grant of TMC's Motion to take these depositions, TMC immediately contacted PacBell's counsel to arrange for the scheduling of the five depositions. The first call to PacBell following the release of the PHO was placed July 6, 1993, immediately after the Fourth of July weekend. Then commencing July 15, 1993, TMC and PacBell engaged in focused discussions on the specifics of scheduling, in an attempt to accommodate each witness

^{4/} See discussion at ¶¶ 10-11, supra. This Motion requested permission to take additional depositions of five individuals employed by PacBell and demonstrated in detail that the need for those additional depositions had been revealed during testimony taken in earlier predesignation depositions. TMC had actually readied its Motion for these depositions months previously and had actually discussed their need with PacBell counsel and the Common Carrier Bureau as early as July, 1992. After the initial discussion, TMC was informed to make an informal written request to PacBell to depose these individuals which it did in October, 1992. PacBell refused TMC's request and thereby compelled TMC to file its Motion. Because it had been decided to designate the complaint for hearing however, TMC was advised to wait for the designation as the Presiding Officer would rule on the Motion instead of the Bureau. After repeatedly being assured from August, 1992 onward that issuance of the designation order was imminent, after nearly five months with no action, TMC filed its Motion on January 29, 1993. Nevertheless, it took another 5 months for the Motion to be acted upon.

as much as possible.^{5/} These discussions led to the scheduling of three of the PacBell witnesses originally identified in the January 29th Motion and which TMC had been attempting to depose since at least October, 1992 - Wheatley, Bandler, and Lockton).^{6/}

5/ TMC's counsel's telephone log shows contacts or attempted contacts after July 6th, on July 8th and 14th until the more specific discussions started July 15th, followed by discussions on July 19, 20, and 22, 1993. The last discussion on the 22nd of July asked PacBell about consecutive depositions during the week of August 16, 1993. PacBell agreed to check on this, but did not get back to TMC counsel until July 29th with a final answer. However, calls were placed to PacBell to check on status between July 22 and 29. (N.B. This final statement is not meant to imply any dilatoriness on the part of PacBell at this stage.)

6/ Frank Biava had, according to PacBell, been reassigned to Japan. Mr. C.L. Cox was no longer employed by PacBell directly, but by a sister affiliate and PacBell denied having the authority to make him available. Given the expense and inconvenience of having Mr. Biava return to this country, TMC postponed a decision on calling on him to be deposed until it could reevaluate the need for his testimony.

With regard to Mr. Cox, after several discussions and exchanges of correspondence, it became clear that it would be necessary to subpoena Mr. Cox in order to depose him. TMC filed a request for the issuance of a subpoena with the Presiding Officer on August 2, 1993. This request was denied by the Presiding Officer in an Order, 93M-506 (rel. August 6, 1993) on essentially the same grounds as that stated in the August 2, 1993 Order for which leave was denied to file an appeal.

It is submitted that as no useful purpose would be served by appealing to the Presiding Officer to reverse his denial of the requested subpoena for Mr. Cox, TMC seeks to overturn the Presiding Officer's adverse ruling on this request as well.

Similarly, having decided against deposing Mr. Biava, on August 4, 1993, TMC requested that PacBell agree to substitute its employee Helga Post which PacBell quickly denied asserting that the Presiding Officer intended to permit depositions only of the five named individuals in TMC's January, 1993 Motion. TMC therefore filed its Notice of Deposition and request for subpoena for PacBell's Helga Post. This Notice and request was dismissed by Order 93M-511 (released Aug. 9, 1993). The basis of the Presiding Officer's ruling on the Post deposition was once again that the
(continued...)

15. On August 2, 1993, TMC filed the Notices of Deposition specifying that the agreed-upon depositions were to be conducted in San Diego and San Francisco during the week of August 16, 1993. In his Order issued on August 2, 1993, the Presiding Officer dismissed TMC's Notices of Deposition, and ruled that despite the agreement of the parties, the depositions may not be conducted as scheduled by the parties. The basis of this ruling is that the Notices were not filed with the Presiding Officer on July 26, 1993 as "required" by Paragraph 10 of the PHO which stated: "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."

ARGUMENT

I. Interlocutory Rulings Constitute Reversible Error

16. The first of the series of IOs that have made the filing of this Petition necessary was orally announced on July 30, 1993, orally reaffirmed on August 2 and affirmed by written Order issued August 5, 1993^{7/}. In these initial oral and written rulings,

6/(...continued)

request was "untimely" in accordance with the Officer's singular understanding of, and personal intent in using the terms "discovery will be initiated on July 26, 1993" in the PHO. The denial of the Post subpoena is therefore also encompassed by the instant Petition.

7/ The Presiding Officer first informed TMC counsel of his ruling that he would disallow notices to take depositions on July 30, 1993 and orally reaffirmed this ruling on August 2, 1993 when counsel, finding nothing in the rules to support such a ruling, sought to confirm that the Presiding Officer had actually so ruled on July 30th. The Presiding Officer's written order of his oral ruling was
(continued...)

Officer Miller dismissed, as late filed, notices to take depositions of three PacBell witnesses.

17. In two subsequent IOs, Officer Miller dismissed TMC requests for the issuance of subpoenas for two witnesses.^{8/} One subpoena sought to depose a former PacBell officer who now works for a PacBell sister or affiliated company. The other subpoena is for a PacBell employee.^{9/}

18. Officer Miller's first IO dismissing the notices of depositions were for three witnesses PacBell had agreed to make available because Officer Miller granted TMC's predesignation Motion of January 29, 1993.^{10/} The dismissal was based on Officer Miller's interpretation of his statement in the PHO as to what "initiation of discovery on July 26, 1993" was intended to mean. Despite several admonitions to counsel "to read the rules" and

7/(...continued)
made on August 5, 1993. FCC 93M-505.

8/ As explained and described with specificity hereinafter, Officer Miller issued two other interlocutory Orders which TMC submits underscore the arbitrary nature of his rulings and which if not reversed will certainly result not only in the denial of TMC's fundamental right to a fair hearing, but also the denial of effective investigation and determination of the serious public interest issues involved, such as PacBell's compliance with its equal access obligations. TMC requests permission to have these two related rulings on the requested subpoenas, copies of which are attached hereto, overruled as well.

9/ The need for and relevance of the testimony TMC sought from these two witnesses was, of course, documented in its Motions. Officer Miller dismissed the first Motion for a subpoena by Order 93M-506, issued August 6, 1993. Officer Miller dismissed the second request for subpoena by Order 93M-511 (August 9, 1993).

10/ See also, ¶ 18, following.

self-serving assertions that the Presiding Officer's meaning about "initiation of discovery" couldn't be clearer, nothing in the rules supports the ruling that the notices filed August 2, 1993 were late because not filed on July 26, 1993.^{11/}

19. Officer Miller's rulings also conflict with the rulings of this Review Board which clearly recognize that the arbitrary interdiction of discovery vitiates any semblance of a fair hearing and requires a trial de novo.^{12/} Such a conclusion is all the more compelled when, as here, to deny TMC a fair hearing, is to deny the Commission the record evidence needed to evaluate important public interest considerations.^{13/}

11/ As already indicated, counsel for TMC had actually instituted discovery efforts in early July by contacting PacBell counsel to arrange convenient scheduling of witnesses. As early as July 15th, TMC first suggested the week of the August 9th and through further negotiations settled on the week of August 16th. However, this was not finalized until July 29th. Moreover, in order to expedite matters, TMC even accommodated PacBell's desire that some of the depositions be taken in San Francisco rather than in San Diego as ordered by the Presiding Officer in the PHO (at ¶ 11).

12/ TMC relies on the perceptive and unequivocal ruling in Bunker-Ramo Corp. v. Western Union Telegraph Company, 32 FCC 2d 860, 26 RR 2d 164 (Rev. Bd. 1972). Indeed, the teachings of that decision have special and precise application here as will be discussed more fully herein. For now, it may be noted, Officer Miller's rulings have destroyed even "voluntary" discovery efforts. On August 9, 1993, PacBell refused to engage in the voluntary discovery it previously agreed to based on the Presiding Officers consistent rejections of TMC's discovery efforts. PacBell's counsel stated that "it is clear that the Presiding Officer doesn't want any more discovery in this case." Significantly, the Presiding Officer's reliance on voluntary discovery in the Bunker-Ramo case was quick to draw the sharp criticism of the Review Board as procedurally ineffective to prevent the denial of a fair hearing.

13/ In this case, the important public interests concern whether PacBell complied with its equal access obligations in the San Diego LATA in and about 1985 and following - the critical time of initial conversion to equal access in that LATA.

20. What is obvious from the record is that no rational basis exists for the conclusion that the so-called "tardiness" of failing to file meaningless formalistic notices by July 26, 1993 involved substantive or procedural prejudice to any party.^{14/} Nor does the record support how such filing or the denial of discovery will aid the orderly conduct of this hearing.

21. What the record does show is that Presiding Officer's discretion to ensure the orderly conduct of the hearing is not and will not be based on standards of procedure, which the parties, even with fair latitude for the Presiding Officer's discretion, can be deciphered and compliance attempted. Rather, the parties will have to analyze each pronouncement of the Presiding Officer and attempt to determine what personal standard or personal predilection of procedure is actually intended.

22. Compounding the problem, it is clear that the Presiding Officer sees no necessity to expressly articulate his standards until after he decides to apply them. The parties will have to grope as best they can in their attempt to interpret the meaning of the language the Presiding Officer decides to use. A party's

^{14/} When first orally explaining his decision to dismiss the August 2nd Notices filed by TMC, the Presiding Officer advised TMC counsel that blank notices, that is, notices without date, place or time for depositions should have been filed on July 26, 1993. These then, under the approach of the Presiding Officer, were to be later amended with these particulars specified. Other than the Presiding Officer's personal preference for so proceeding, no rule or decision, and importantly no rational policy, is known to exist requiring such an emphasis of form over substance. Nor has the Presiding Officer offered one basis or sound theory as to how the filing of such a formalistic notice would serve other than to assuage the Presiding Officer's heightened dislike for lawyers he believes are "tardy."

failure to grasp the correct meaning is sure to bring about immediate prejudice, be it substantive or procedural. It would be difficult to provide a clearer example of abuse of discretion.

23. The broad discretion given a presiding officer to control the orderly conduct of a proceeding never has encompassed and never was intended to encompass so massive an opportunity for the free play of the officer's personal viewpoints on procedure, let alone his exercise of personal whim, caprice and prejudices as appears to be evidenced here.^{15/} It needs little emphasis that denial of discovery will prevent TMC from adequately preparing its case, will

15/ Attempting to understand the untenably doctrinaire approach assumed by the Presiding Officer leads to little more than frustration and amazement. One clue however may exist in statements made by the Presiding Officer in his discussions with counsel on August 2, 1993, when counsel attempted to learn more about the ruling to dismiss the first deposition notices filed August 2, 1993. In that discussion, TMC's counsel was admonished:

"You are not going to jerk the Commission's hearing process around, like you did the Common Carrier Bureau."

When pressed as to how the Common Carrier Bureau had "been jerked around," no definitive explanation was given. However, based on the comments made by the Presiding Officer in his orders dismissing TMC's attempts to engage in post-designation discovery, it would appear that there may be two misunderstandings which led to such assertions. One, the view that the parties, and particularly TMC, have had four years to prepare for this hearing. See Memorandum Opinion and Order, FCC 93M-505 at page 2 (rel. August 5, 1993); and Memorandum Opinion and Order, FCC 93M-506 at footnote 3, (rel. August 6, 1993).

The second is the not so subliminal impact of aspersions on TMC's character by PacBell's device of seeking immunity for two ex-TMC employees offered as witnesses who allegedly are prepared to testify that they were involved in "falsification" of business records on behalf of TMC. Neither of these "beliefs" are supportable, but the perniciousness of their apparent influence on the mindset of the supposedly impartial trier of fact is potentially (and apparently has had) devastating effect on TMC's right to a fair hearing.

deny the Commission the record it needs to evaluate the overarching public issues about PacBell's compliance with its equal access obligations and will require a totally unnecessary and prejudicial burden on TMC to subpoena all potential witnesses and documents whether or not their examination at hearing is actually necessary. TMC therefore petitioned the Presiding Officer pursuant to the requirements of Section 1.301(b) of the Rules for leave to appeal his August 2, 1993 denial of depositions.^{16/} However, true to his word, the Presiding Officer denied TMC's Petition.^{17/}

24. The denial of TMC's Request for Leave to file an appeal of his dismissal of the notices of the depositions is reversible error. Moreover, the error is so fundamental that reversal cannot

^{16/} TMC filed its Request before the issuance of the written Order of August 5, 1993 dismissing the three deposition notices in the hope that the clear precedent of Bunker-Ramo, and the facts demonstrating TMC's continued diligence, rationally would have to be linked with the Presiding Officer's expressed claims of concern about efficient conduct of the hearing. So linked, the discovery TMC sought was obviously required by fact and law. The case thus presented, TMC believed that the Presiding Officer would be persuaded that his oral announcement of how he intended to proceed would be seen as in need of reconsideration.

^{17/} During discussion with counsel on August 2nd about the oral advisory given July 30th that any filing of deposition notices would be dismissed as "tardy" for failure to file on July 26th, TMC counsel's was challenged to file a request for leave to appeal the intended dismissal - "Go ahead and file. Get it on the record for all to see and I'll deny it anyway." In short, before even seeing the arguments and precedents indicating the reversible error that was about to be and which was perpetrated, the Presiding Officer had already made up his mind to deny TMC's request for leave to appeal. Support for the fact that the Presiding Officer had adversely prejudged the case for such an appeal may be found in the decision denying TMC's request. As detailed later, not one of the substantive arguments presented by TMC was addressed. Rather, the Presiding Officer relies on his own broad, sweeping assertions that TMC had failed to make the showing required by Rule 1.301(b).

await the usual process of appeal of the rulings as exceptions to the initial decision made after hearing. Neither the Commission nor TMC have the resources for multiple trials of this case. Indeed, TMC is a small business entity which has already strapped its financial capabilities to bring the proceeding to this point. Having to waste its resources in participating in what clearly will be an unfair hearing simply does not comport with fair procedure or rudimentary principles of due process.

25. There is little question that in dismissing the deposition notices and the subsequent requests for subpoenas, the Presiding Officer relied on his personal views of procedural requirements and his own interpretation of the language he himself used in the PHO. No rule or decision, despite gratuitous and repeated admonitions "to read the rules," support the fundamental basis for the Presiding Officer's actions. Hence, in addition to the issues of justice and fair play at stake, a novel question is presented - whether the scope of the Presiding Officer's discretion to control the orderly conduct of the hearing extends to the circumstances described herein, namely, the required adherence to exact time frames which are not specified except after the fact, where no evidence exists that any prejudice or delay would be caused if such adherence were not required, but where TMC's rights to a fair hearing will clearly be compromised.

26. Of equal decisional weight, the Presiding Officer's ruling is completely at odds with the ruling of this Review Board in Bunker-Ramo v. Western Union Telegraph Company, 32 FCC 2d 860,

26 RR 2d 164 (Rev. Bd. 1972). However, the Presiding Officer's Order dismissing TMC's request for leave to appeal the dismissal of the notices of deposition, failed to address TMC's showing concerning these requirements of Section 1.301(b).

27. The Presiding Officer simply ignored TMC's entire discussion of relevant Commission precedent to the effect that the error in cutting off all discovery will require a remand. Instead the Presiding Officer issued a cursory proclamation that TMC "hasn't made any attempt to make such a demonstration." Order 93M-515, at ¶5. And, rather than discussing the critical public interest, public policy and due process issues raised by TMC, the Presiding Officer chose to characterize the overriding issue as being one of "inefficient trials" caused by "tardy lawyers." Id. at ¶3.^{18/} Accordingly, the issues raised by the Presiding Officer's rulings clearly are the proper subject for an appeal to the Review Board under the standards set forth in Section 1.301(b) of the Commission's rules. The Presiding Officer's denial of such an appeal, which he disdainfully forecast, is but further evidence of his abuse of his discretion and of an intent to continue to conduct this proceeding according to his personal whims and prejudices.

^{18/} As demonstrated herein, the Officer's claims of tardiness and inefficiency are not only legally insufficient to justify its rulings, but also are factually incorrect. The conduct of discovery as requested by TMC would not create any delays whatsoever, as discovery would have been concluded well before the Officer's deadline for conclusion of discovery of September 17, 1993.

28. The Presiding Officer's rulings denying discovery are either a result of his serious misunderstanding of the Commission's predesignation common carrier discovery rules and the true predesignation procedural history of this proceeding; or a blatant arbitrary abuse of authority based on whatever it is that has persuaded the Presiding Officer to emphasize form over substance with such procedural vitriol. In either event, immediate reversal of the Presiding Officer's rulings denying deposition and refusing to issue requested subpoenas is necessary and essential.

II. The Presiding Officer's "Exercise" of Discretion Will Have the Exact Opposite Effect of Its Claimed Purpose And Is, On this Basis Alone, Arbitrary.

29. While TMC was aware of the language in the PHO requiring that discovery be initiated by July 26 and completed by September 17, 1993, TMC reasonably interpreted that language to mean that as these depositions had already been ordered by the Presiding Officer in the PHO, TMC and PacBell, at the latest, had to initiate making arrangements to commence discovery by July 26th date in order to meet the deadline for close of discovery by September 17, 1993. This they did as detailed elsewhere in this pleading.

30. While a presiding officer in an adjudicatory hearing possesses broad discretion over the conduct of discovery, the exercise of that discretion is to help ensure that unnecessary delays are avoided. See, e.g., Ronald Sorenson, 3 FCC Rcd 5022 65 RR 2d 335 (Rev. Bd. 1988). Here. the exercise of discretion will have the exact opposite result. The rulings by the Presiding Officer denying depositions is so antithetical to the needs and

scheduling of this proceeding as to constitute a clear abuse of discretion and warrant the extraordinary relief sought in the appeal filed herewith. Id.

III. The Presiding Officer's Rulings Ignore The Requirement To Develop the Public Interest Factors And, on this Basis Alone, Are Arbitrary.

31. Although appeals from interlocutory rulings of a Presiding Officer, other than appeals as of right under § 1.301(a), are normally permitted only where the Presiding Officer grants leave to appeal, the Review Board has previously recognized that in certain circumstances, an appeal is warranted when the Presiding Officer has denied leave to appeal. Such appeals generally involve abuses of discretion or proceedings involving basic considerations of public policy or public interest concerns. See e.g., Communications Satellite Corporation, 32 FCC 2d 533 (1971). Both elements are present here. Moreover, the Review Board, confronted with almost identical facts in the Bunker-Ramo case, was compelled to find an abuse of discretion and remand for a trial de novo.

32. It is therefore well-established that in hearings on a common carrier complaint, the discretion of the presiding officer over discovery is more circumscribed than in the context of a mass media comparative hearing. This is because there are overarching public interest concerns that must be protected in the common carrier arena that are not as directly implicated in streamlined comparative hearings.

33. In Bunker-Ramo, the Review Board established that the Commission's discovery rules must be administered by the Presiding

Officer in a manner that will "facilitate preparation, eliminate surprise and promote fairness." It explained that this is particularly required in a situation where one of two adversarial parties possesses information essential to the proof of its adversary's case. Id. at 865 citing, Rules of Practice and Procedure to Provide for Discovery Procedures, 11 FCC 2d 185, 186 (1968).

34. In Bunker-Ramo, the Presiding Officer had denied the complainant's motion for discovery because of the Officer's interpretation that such discovery was not timely because it had not been completed prior to the scheduled pre-hearing conference. In denying discovery, the Officer did, however, encourage the parties to pursue an alternative procedure which depended upon the voluntary cooperation of the parties.^{19/} In ruling on the complainant's appeal of the Officer's denial of the discovery motion, the Review Board found that the Officer had misconstrued

^{19/} Emphasis is provided here because these same elements exist in the appeal now presented to the Board. Discovery has been denied on the bases of "timeliness" or "tardiness" to use the Presiding Officer's favorite mantra. "Voluntary cooperation" to yet obtain some discovery was "permitted" by the Presiding Officer, but not "encouraged" making this case somewhat more egregious. The fact is, that PacBell, like Western Union in the Bunker-Ramo case, has no interest in allowing discovery. Seizing on the truculence of the Presiding Officer, PacBell recanted its cooperation and refused to allow the depositions of Wheatley, Bandler and Lockton that it had previously agreed to before the Presiding Officer issued his dismissals of the deposition notices. In short, the Presiding Officer has been so antithetical to TMC's efforts to conduct discovery, that his "tolerance" of the possibility of cooperative discovery has become a mockery which PacBell has used to its own advantage at the expense of the Commission's duties to conduct a fair and impartial hearing in order to determine the parties' rights and the public interests involved.

the purpose of the discovery rules and the scope of his discretion under those rules. Id. at 864.

35. The Board found no basis for the Officer's interpretation of the discovery rules in the rules themselves or the FCC's Order adopting those rules. The same is true here. The Board held that the Officer's summary denial of the complainant's motion "arbitrarily prevented it from obtaining the full and fair hearing contemplated by the Commission's designation Order." Id. at 865-866. A similar finding is compelled here.

36. In regard to the Presiding Officer's attempted reliance on "alternative" procedures of voluntary disclosure in the Bunker-Ramo proceeding, the Board ruled that such procedure could not result in adequate discovery "because of Western Union's obvious self-interest in preventing Bunker-Ramo from examining documents which might prove damaging to Western Union's interests."^{20/}

37. Further, even though the Officer had assured Bunker-Ramo that "all necessary relevant and material evidence could be produced at the hearing," the Review Board recognized that such a procedure would necessarily require the Complainant to subpoena witnesses and documents, which "would severely limit Bunker-Ramo's

^{20/} The Commission's fears in Bunker-Ramo about the inability of voluntary procedures to protect the rights of a complainant seeking information from a carrier defendant have, in fact, materialized in this case. As a result of the Judge's rulings foreclosing TMC's discovery efforts, on August 9th, PacBell's counsel repudiated its earlier agreement on depositions and abandoned all other efforts to voluntarily exchange documents. As such, TMC must obtain critical documents, that are in PacBell's possession and control, through the subpoena of witnesses and documents for attendance at the hearing to commence in November of this year.