

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

RECEIVED

SEP 14 1993

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-89-85

To: Honorable Walter J. Miller
Administrative Law Judge

MOTION FOR EXTENSION OF TIME

Prepared by:

Charles H. Helein
Julia A. Waysdorf
Donald H. Manley
Michael R. Carithers
GALLAND, KHARASCH, MORSE
& GARFINKLE, P.C.
1054 Thirty-first Street, N.W.
Washington, D.C. 20007-4492
Telephone: (202) 342-5200

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

September 14, 1993

No. of Copies rec'd 04
List A B C D E

TABLE OF CONTENTS

SUMMARY i

MOTION FOR EXTENSION OF TIME 1

I. INTRODUCTION 2

II. PACBELL HAS WITHHELD INFORMATION THAT IS HIGHLY
RELEVANT AND MATERIAL TO TMC'S CASE 3

III. TMC'S MOTION SHOULD BE GRANTED UNTIL PACBELL
DETERMINES WHETHER ANY SES II DATA OR RELATED
INFORMATION REMAINS. 9

IV. CONCLUSION 13

SUMMARY

During the process of preparing its Direct Case, TMC's counsel's research has revealed the existence of an automated system which Pacific Bell ("PacBell") employs to monitor its network. Among other things, this monitoring system known as Service Evaluation System II ("SES II") provides data on the timing of calls as they progress through PacBell's network. One of the purposes of this system is to monitor the quality of exchange access provided to interexchange carriers. Indeed, one component of this system, the Incoming Trunk Service Evaluation report, tracks the progress of calls through the access tandem to their final destination.

Despite the fact that this information is directly responsive to no fewer than three of the interrogatories the TMC served on PacBell in 1989 and vital to TMC's case, TMC had to discover the existence of this information from its own research. Moreover, PacBell cannot deny that it knew of the existence of this information inasmuch as its lead attorney at the time in this case filed a report with the Commission based in part on the SES II data two weeks before TMC served its interrogatories.

Yesterday, PacBell's counsel informed TMC's counsel that all of the SES II data prior to January, 1989 had been destroyed. Nevertheless, as set forth herein, some of the SES II data may still exist. Moreover, TMC has requested that PacBell also provide any internal documents which analyze or discuss the SES II data.

Accordingly, TMC requests that the Presiding Judge grant its Motion for Extension of Time to file its Direct Case until PacBell determines if any of the request documents still exist. If PacBell produces the requested documentation, TMC also requests that it be granted an additional seven days so that it may have time to review the information and incorporate it into its Direct Case.

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

In the Matter of)	
)	
Clark-Bader, Inc. d/b/a)	
TMC Long Distance)	
)	
Complainant,)	CC Docket No. 93-161
)	File No. E-89-85
v.)	
)	
Pacific Bell Telephone Company,)	
)	
Defendant.)	
<hr style="border: 0.5px solid black;"/>		

To: Honorable Walter J. Miller
Administrative Law Judge

MOTION FOR EXTENSION OF TIME

Clark-Bader, Inc. d/b/a TMC Long Distance ("TMC"), by its attorneys, hereby files a Motion for Extension of Time requesting that the date for submission of its Direct Case be extended until Defendant, Pacific Bell ("PacBell") produces certain critical documents relevant and material to the proof of TMC's case and seven additional days thereafter so that TMC has time to review the documentation and incorporate it into its Direct Case. As set out in detail below, TMC has discovered over the last few days that PacBell has destroyed years' worth of critical records and reports which were clearly within the scope of TMC's 1989 Interrogatories. There is a possibility, however, that some of the records are still available. Accordingly, TMC is filing this Motion requesting an extension of time until the documents, if available, are produced. If the requested documentation exists,

TMC also requests an additional seven days so that it may incorporate the data from the documents into its Direct Case. In support whereof, the following is shown.

I. Introduction

TMC submitted its first set of interrogatories in this case to PacBell on May 15, 1989. In its interrogatories TMC requested, inter alia, the following items of information:

Interrogatory 4

Itemize all . . . diagnostic tests applied from PacBell's Anaheim Network Control Center and/or any other location to the Northern Telecom DMS-200 90T tandem switch (hereinafter the "Tandem") or to any central office that feeds the Tandem, beginning on the date the Tandem first became operational and continuing through the end of 1988. . . .

Interrogatory 6

Identify each carrier . . . that presently has, or has had at any time, access traffic routed through the Tandem [and] . . . the length of any post-dial delay experienced by callers of that carrier. Id.

Interrogatory 16

Identify . . . any . . . access time studies relating to the use of the Tandem in LATA 732. . . .¹

PacBell responded to these Interrogatories on September 8, 1989. PacBell's Answers to these Interrogatories made mention only of a single diagnostic test which PacBell provided at TMC's

^{1/} A copy of TMC's First Set of Interrogatories is appended hereto as Attachment A and a copy of PacBell's Answers is appended hereto as Attachment B.

request.² No further information concerning diagnostic tests, post-dial delay or access time studies were provided. PacBell did not file any supplemental responses to these three interrogatories.

II. PacBell Has Withheld Information That is Highly Relevant and Material to TMC's Case.

During the process of preparing its Direct Case, TMC's counsel's research revealed the existence of a study commissioned by PacBell concerning post-dial delay. This study is titled "The Effects of Changing Post-Dial Delay on Customer Abandonments and Perceptions of Service" (the "PacBell Study"), and is co-authored by Dr. Robert Mercer of Hatfield Associates and Drs. Frederick Chang and William Edwards of Pacific Bell. The PacBell Study was provided as an attachment to PacBell's Direct Case that was filed with the FCC on April 21, 1989. in an unrelated Commission proceeding, in CC Docket No. 88-287. A copy of the PacBell Study is appended hereto as Attachment C.

A review of the PacBell Study shows that it was based, in part, on data provided by an automated system known as the

^{2/} The one diagnostic test which PacBell documented was one in which TMC was a participant and which PacBell, therefore, could not deny the existence of. PacBell did not acknowledge the existence of any other diagnostic capabilities. As TMC will demonstrate in its Direct Case, the test which PacBell documented was a sham. PacBell's test was not conducted during the tandem switch's "busy hour," i.e., the time during which the tandem handles the most calls and therefore is most likely to exhibit problems. Moreover, TMC experienced difficulties from 1985 to 1988, yet PacBell's documented test was performed on only one day.

Service Evaluation System II ("SES II") and which was collected during March and April, 1987. According to the PacBell Study at page 3,

SES II is a mechanized process by which call attempts are monitored from the time the customer goes off-hook until the attempt is either completed or abandoned. The time sequence of several events during the attempt is recorded, including end of dialing, first network response, answer by called party, and customer abandonment on unsuccessful attempts. The dialed digits are also recorded, and the attempt is classified into Intra-LATA, Inter-LATA/Intra-State, and Inter-LATA/Inter-State. . . . SES II has a sophisticated and accurate ability to recognize network tones and speech, and is thus able to record the call disposition as well.

The PacBell Study further states that, "[i]n Pacific Bell, SES II data is . . . collected in 500 end offices. With a bogey of 500 dial line observations per office per month, in excess of 250,000 observation per month are recorded." Id. In other words, the SES II system continually monitors call attempts from the 500 end offices within the PacBell system. In the CC Docket No. 88-287 proceeding, the PacBell Study referred to above was based on call attempt data collected during March and April, 1987, a period covered by the instant TMC complaint (i.e., 1985 to 1988).

Additionally, one particularly critical component of the SES II reporting system is the Incoming Trunk Service Evaluation ("ITSE") report, which provides data "in which call attempts are picked up at the point they are incoming to a terminating tandem switch and followed from there to their final disposition." Id. at fn 1.

The information provided by the SES II reporting system and its component ITSE report are directly relevant and material to TMC's case. According to a Bell Laboratories technical journal article entitled "Taking the Pulse of the Network," Bell Laboratories Record, March 1982 at pp. 70-74³ the SES II system can "efficiently pinpoint too many unsuccessful attempts to a large business customer, such as an airline or hotel. That business could then be informed of the problem and of ways to eliminate it. The No. 2 system could also measure service from toll offices to exchange offices, a useful gauge of the quality of exchange access." Pulse Article, Attachment D hereto, p. 73 (emphasis added).

It is absolutely clear that the SES II data is exactly the type of diagnostic testing information that was sought by TMC's pre-designation Interrogatories over four years ago as discussed above. Specifically, Interrogatory 4 requested information concerning "diagnostic tests applied from PacBell's Network Control Center and/or any other location to the . . . 90T . . . or any central office . . . beginning on the date the Tandem first became operational and continuing through the end of 1988"

According to the PacBell Study, the SES II data is used "on a routine basis to monitor and try to correct situations where

^{3/} Bell Laboratories Record, March 1982, pages 70-74 (hereinafter referred to as "Pulse Article"). A copy of the Pulse Article is appended hereto as Attachment D.

high rates of Equipment Blockage and Failure dispositions are occurring. PacBell Study at 3 (emphasis added). Also, the Pulse Article (Attachment D) lists three reports provided by the SES II system, including "[r]eports targeted to the Network Service Centers that provide an up-to-date view of how each Center's area of the network is performing." Pulse Article at 74.

Further, Interrogatory 16 requested information concerning "any other access time studies relating to the use of the Tandem in LATA No. 732" This again is precisely the type of information that the PacBell Study indicates is provided by the Incoming Trunk Service Evaluation report. See PacBell Study at fn 1.

Finally, Interrogatory 6 requested information concerning "the length of any post-dial delay" experienced by callers of any carrier whose traffic was routed through the access tandem. The SES II data was used in the PacBell Study precisely because it provided information concerning post-dial delay.⁴ Thus again, although PacBell's 1989 response to this interrogatory provided no data regarding post-dial delay, the SES II data clearly existed at that time and was directly called for by this Interrogatory.

^{4/} TMC recognizes that the SES II reporting system surveys the progress of calls through end offices and tandem offices throughout PacBell's service territory in California some of which may not be relevant to this case. Nevertheless, it cannot be seriously disputed that that portion of the SES II and the ITSE reports which provided information concerning the performance of the 90T and its associated end offices from 1985 to 1988 was and is relevant to TMC's case.

On September 8, 1993 TMC notified PacBell's counsel by telephone conversation that he had discovered the existence of the SES II monitoring system in the course of his research of the PacBell Study that was submitted to the Commission in CC Docket No. 88-287. TMC's counsel stated to PacBell's counsel that he desired to obtain the underlying SES II information for the entire period covered in the instant complaint (1985 to 1988), since the existence of such critical data should have been disclosed to TMC by PacBell. PacBell's attorney indicated that she could not spend a great deal of time to locate this information and that TMC has had over four years to obtain this data. By letter dated September 9, 1993, appended hereto as Attachment E, TMC's counsel requested that PacBell provide the SES II and ITSE data. TMC also requested that PacBell provide "any documents which discuss and/or analyze the results of both the SES II and the Incoming Trunk Service Evaluation data for LATA 6." TMC's counsel contacted PacBell's counsel by telephone again on September 13, 1993, about consenting to an extension of time to file Direct Cases until PacBell produced this vital evidence and TMC had time to review it and incorporate it into its direct case. PacBell's attorney responded that she would not agree to such an extension. Approximately one hour later, PacBell's attorney called to notify TMC that the data it requested has been destroyed and that no data prior to January 1, 1989 exists. TMC's counsel informed PacBell that it nevertheless wanted PacBell to determine whether the more limited information

for the two months in 1987 that the PacBell Study was based upon is still available from the researchers who produced the study. PacBell's attorney agreed to inquire about the requested information with the researchers and indicated she would contact TMC's counsel when she determined whether or not the information still exists. PacBell's attorney did not indicate whether her client would provide any documents analyzing or discussing the SES II and ITSE data for LATA 6.

PacBell cannot reasonably claim that it or its attorneys had no knowledge of the SES II monitoring system or the PacBell Study at the time TMC's Interrogatories were filed and answered in 1989. The PacBell attorney who filed the Direct Case with the Commission in CC Docket No. 88-287 on April 21, 1989 was James Tuthill. Insofar as the PacBell Study which relied upon the SES II system data was an attachment to PacBell's Direct Case in that Docket, Mr. Tuthill obviously knew of the existence of the SES II system. Mr. Tuthill was also the lead counsel for PacBell in TMC's formal complaint proceeding. Less than a month after the Direct Case in Docket No. 88-287 was filed later, on May 15, 1989, Mr. Tuthill was served with a copy of TMC's Initial Interrogatories in the instant case. Further, Mr. Tuthill's name appeared on PacBell's September 8, 1989, response to TMC's Interrogatories, which contain the false answers that no monitoring information existed. There can, therefore, be no doubt that PacBell deliberately and wilfully withheld crucial information from TMC and this tribunal.

III. TMC's Motion Should Be Granted Until PacBell Determines Whether Any SES II Data or Related Information Remains.

TMC's rights to discovery and its ability to develop its case have been seriously and irreparably harmed by PacBell's destruction of evidence. TMC requests that the Presiding Judge grant TMC an extension of time for filing its Direct Case until PacBell produces the March and April 1987 SES II and ITSE data or any related documents, or alternatively until PacBell notifies TMC that the data has been destroyed. If the March/April 1987 SES II and ITSE data or any documents analyzing or discussing this data still exist, then TMC also requests that the Presiding Officer grant it seven additional days after receipt of the data in order to review the data and to incorporate it into its Direct Case.

The data provided in these reports and any analysis of it by PacBell are clearly within the scope of the Interrogatories filed by TMC over four years ago. This type of information is directly relevant and material to the factual determination of whether: (1) the access tandem or other parts of PacBell's network created excessive post-dial delay; (2) whether a significant number of calls directed toward or handled by the tandem received treatment messages; (3) the frequency with which the access tandem autonomously terminated calls; and (4) the frequency with which PacBell applied network controls to the network facilities leading to the access tandem from various central offices.

This type of detailed information, if available, is essential to the development of an analysis by TMC's expert witness of the problems experienced by PacBell's access tandem. Indeed, the Presiding Judge has specifically requested such an analysis in his Prehearing Order. See Prehearing Order, CC Docket No. 93-161, File No. E-89-85, released June 30, 1993 at paragraph 5(a).

Further, this information is vitally important to TMC's proof of PacBell's liability and its wilful cover-up of the problems the 90T access tandem was experiencing. The Commission in its Investigation into the Quality of Equal Access Services, 60 RR 2d 417 (1986) identified three possible sources of blocked calls: (a) insufficient trunks between the interexchange carrier's point of presence and the local exchange carrier's access tandem or end office; (b) traffic congestion between the end office and the access tandem; and (c) malfunctions in the local exchange carrier's switches. Id. at 431 - 434.

Attached hereto as Attachment F is a copy of the access time study which PacBell provided in response to TMC's Interrogatories as described in footnote 2 supra. Item 2 of that report, prepared by PacBell, states "[o]ur records indicate that TMC is presently utilizing a trunk group of 48 trunks . . . to the SNDGCA90T tandem, of which 37 are required thus presently no overflow conditions [sic]."

Thus, PacBell's own technicians' report indicates that TMC had more than sufficient trunks to handle the traffic being sent

from the access tandem. Considered in light of the Commission's analysis of the three possible sources of blocked calls, it is therefore apparent that any source of call blocking was not due to TMC. Therefore, it can reasonably be assumed that the source of the blocked calls which TMC's customers experienced was either insufficient trunking in PacBell's network which caused traffic congestion between the end offices and the access tandem, or malfunctions in the access tandem itself.

The SES II and ITSE data requested and any reports or other documents analyzing this data, if it still exists, will provide invaluable proof as to the extent of the problems experienced by PacBell's network facilities and/or access tandem. It is therefore imperative that TMC be provided with an opportunity to determine whether any of this documentation still exists and if it does, to analyze and incorporate it into TMC's expert's testimony.

Moreover, if such documentation or data still exists, it will undoubtedly bolster TMC's claims that PacBell knew of the extent of the problems with the 90T and engaged in a cover-up of the truth about the switch's impairments. The SES II data collection system was developed to identify potential network problems and provide information on network performance. This type of information clearly would have indicated to PacBell that a problem with the 90T access tandem or in the San Diego LATA existed. Accordingly if any documents or data concerning the SES II and ITSE systems still exist, that information will provide

invaluable insight into what PacBell knew concerning the condition of the 90T and when PacBell knew it.

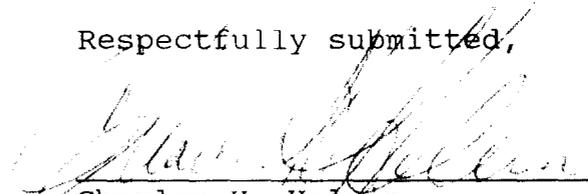
TMC's request for extension of time does not, at this time, include a request that the hearing be rescheduled.⁵ Rather, TMC requests only enough time for PacBell to determine whether it has any of the data and documents TMC has requested and for seven days' time for TMC to review that information. TMC recognizes that if its Motion is granted that some procedural slippage might occur. In particular, the Evidentiary Admission Session scheduled for September 30, 1993 may have to be delayed. Considering the equities of the situation, however, TMC submits that any procedural slippage will be minor and justified in light of the significance of the information being requested for production.

^{5/} TMC's counsel has contacted Thomas Wyatt, Esq. Chief of the Common Carrier Bureau's Formal Complaints Branch. Mr. Wyatt indicated that the Common Carrier Bureau would not oppose TMC's Motion.

IV. Conclusion

For the foregoing reasons, TMC respectfully requests that the Presiding Judge grant its Motion for Extension of Time.

Respectfully submitted,



Charles H. Helein
Julia A. Waysdorf
Donald H. Manley
Michael R. Carithers

GALLAND, KHARASCH, MORSE
& GARFINKLE, P.C.
1054 Thirty-first Street, N.W.
Washington, D.C. 20007-4492
Telephone: (202) 342-5200

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

September 14, 1993

CONSENT

I, Stephen L. Bader, President and Chief Executive Officer of Clark-Bader, Inc. d/b/a TMC Long Distance have read the foregoing "Motion for Extension of Time" and respectfully request that the extension be granted.



Stephen L. Bader
President/CEO
Clark-Bader, Inc., d/b/a
TMC Long Distance

CERTIFICATE OF SERVICE

I, Ma-Li Liang, hereby certify that on this 14th day of September 1993, a true and correct copy of the foregoing "Motion for Extension of Time" in CC Docket No. 93-161, was served on the following in the manner indicated:

Via Federal Express: James P. Tuthill, Esquire
Nancy C. Woolf, Esquire
Pacific Bell Telephone Company
140 New Montgomery Street
Room 1530-A
San Francisco, CA 94105

Via hand delivery to: Thomas D. Wyatt, Esquire
Chief
Formal Complaints and Investigation
Branch
Federal Communications Commission
Room 107
1250 23rd Street, N.W.
Washington, D.C. 20554

The Honorable Walter C. Miller
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20036


Ma-Li Liang

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

FILE COPY

RECEIVED

MAY 15 1989

Federal Communications Commission
Office of the Secretary

File No. E-89-85

CLARK-BADER, INC., d/b/a)
TMC LONG DISTANCE, INC.)
)
Complainant,)
)
v.)
)
PACIFIC BELL TELEPHONE COMPANY,)
A PACIFIC TELESIS COMPANY,)
)
Defendant.)
_____)

To Pacific Bell Telephone Company:

**COMPLAINANT'S FIRST SET OF
INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS**

Clark-Bader, Inc., d/b/a TMC Long Distance, Inc.,
Complainant in the above-captioned proceeding, by its
attorneys and pursuant to Section 1.729 of the FCC Rules,
hereby requests that Defendant Pacific Bell Telephone Company
("PacBell") answer the following interrogatories separately
and fully under oath and produce the documents requested in
the following requests for production at the offices of Dow,
Lohnes & Albertson, 1255 Twenty-third Street, N.W., Suite
500, Washington, D.C. 20037, on or before June 14, 1989.

**GENERAL GUIDELINES,
DEFINITIONS AND INSTRUCTIONS**

A. Each interrogatory shall be deemed continuing
in nature. Therefore, PacBell should update, revise,

110

supplement, or otherwise keep current any information provided in response to these interrogatories, as facts or circumstances change or become known.

B. PacBell is requested to answer each interrogatory fully and completely. Requests for information or documents in each interrogatory or request for production extend to information known or available to, and documents known or available or in the possession or control of, PacBell, its officers, directors, stockholders, other principals, employees, representatives (including legal counsel), agents, servants, and investigators.

1. As used herein, the words "document" or "documents" are used in the customary broad sense and include, but are not limited to, the original and any non-identical copy, and/or amendment thereof, of the following items: any contract, tariff (state or federal), letter, memorandum, report, hand-written note, working paper, summary of data, data compilation sheet, computer printouts, interview report, record, bill, receipt, cancelled check, order, audio and/or video recording, or any other hand-written, typed, printed or graphic materials to which PacBell or any of its agents or representatives have access.

2. As used herein, the words "identify", "identity", or "identification", when used in reference to a document, mean to fully describe each document identified,

including the name of the document, and to provide the following additional information:

(a) the general type of document (e.g., letter, correspondence, note, memorandum, telegram, cable, sound recording, drawing, diagram, blueprint, photograph, data card, data printout, etc.);

(b) the general subject matter(s) of the document;

(c) the date(s) appearing on such document, and, if no date so appears, then to so state and to give the date or best approximate date on which such document was prepared and/or executed;

(d) any identifying label, code number, file number, name, marking or title;

(e) the number of pages of length;

(f) every author and every person (whether an officer, agent or employee of PacBell) who participated in the preparation and/or negotiation of the document, whether such person signed the document or not;

(g) if the document was produced by negotiations, the date on which such negotiations commenced and ended;

(h) every person to whom such document was addressed or to whom a copy was directed;

(i) each person having possession, custody or control of such document; and

(j) the material contents of the document; material contents herein being defined to include, but not be limited to, those provisions relating to the subject matter thereof; any effective dates; the duration of all actions or obligations addressed in the document; directions, instructions or conditions affecting or relating to the facilities, equipment, lines, specifications, and the performance thereof; the directions, instructions or conditions affecting or relating to the performance of any actions or the refraining from actions by PacBell or others; prices; rates; sharing of revenues or obligations; renewal provisions; cancellation or termination provisions; damages, liquidated or compensatory; warranties; representations; restrictive covenants; or conditions precedent or subsequent, or any other subject matter, schedule, drawing, print, readout, output, diagram, blueprint, or text material to the subject matter of the Complaint.

Alternatively, the document may be produced as an attachment to the interrogatory answers.

3. In the event that there existed at any time a document about which information is requested in these interrogatories and which no longer is in existence or cannot be found, this fact should also be provided, plus an

explanation as to why it is no longer in existence or cannot be found. For each such document, identify its last known location, its last known custodian, and state also whether such document is (a) missing or lost; (b) destroyed; (c) transferred to others; or (d) otherwise disposed of; and in any such instance set forth the surrounding circumstances and any authorization for such disposition and state the approximate date of any such disposition, and, if known, also the present location and custodian of such document.

C. Each interrogatory shall be answered under oath or penalty of perjury.

D. As used herein, the words "identify", "identity", or "identification" mean, when referring to natural persons, to state the name, residence address or last known residence address, telephone number(s), business or place of employment of the person to be identified, and during each relevant time period, each of his/her job description(s), position(s), scope of authority, to whom he/she reports, whether as supervisor or officer, such supervisor's or officer's job description, position, scope of authority, and to whom such supervisor or officer reports and the job description, position, and scope of authority of that supervisor or officer; when referring to oral conversations or an event or occurrence, including a meeting or a negotiation session, the term "identify" means to specify the