

DOCKET FILE COPY
ORIGINAL

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

SEP 30 3 14 PM '93

FCC 93M-626
32502

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

DISPATCHED BY

MEMORANDUM OPINION AND ORDER

Issued: September 29, 1993 ; Released: September 30, 1993

1. Clark-Bader, Inc. d/b/a TMC Long Distance (TMC) seeks a ruling on a "Motion for Imposition of Sanctions." They filed their motion on September 14, 1993, and want sanctions imposed against Pac Bell for withholding critical information about post-dialing delay. TMC asserts that Pac Bell has "deliberately and wilfully" withheld information that is "highly relevant and material" to TMC's case. Pac Bell opposed TMC's motion on September 23, 1993.

Background

2. Over two years before this case was designated for hearing, on May 15, 1989, TMC served a set of unauthorized interrogatories on Pac Bell. When it was called to their attention that the interrogatories were unauthorized, they repropounded them at a predesignation status conference on July 28, 1989. The repropounded interrogatories were also unauthorized. But Pac Bell voluntarily responded to them on September 8, 1989.

3. Among the documents TMC asked for were "diagnostic tests" and "access time studies" relating to the use of the 90T tandem switch involved in this proceeding. Pac Bell did produce one study pursuant to TMC's requests. But they did not produce certain call attempt data that had been collected by an automated system known as Service Evaluation System II (SES II). The SES II data had been collected during March and April 1987.

4. Between September 8, 1989 and the June 23, 1993 designation-for-hearing date, TMC gave no indication that they were unhappy with Pac Bell's September 8, 1989 answers. When the Acting Chief, Common Carrier Bureau designated this case for hearing (DA 93-640), she pointed out that Pac Bell had responded to numerous interrogatories, and exchanged thousands of pages of documents. She further noted that TMC had deposed at least six potential witnesses.

5. But even with all that predesignation discovery, the parties indicated they wanted to engage in further discovery. So, in his Prehearing Order (FCC 93M-426 released June 30, 1993, the Trial Judge authorized certain

FCC MAIL SECTION

further postdesignation discovery. Such discovery was to have been initiated on July 26, 1993, conducted pursuant to 47 CFR 1.311 through 1.340 and completed on or before September 17, 1993. See FCC 93M-426 supra. at paras. 9-11.

DISPATCHED BY

6. Neither TMC nor Pac Bell initiated any timely discovery. But on September 8, 1993, TMC counsel Charles Helein contacted Pacific Bell attorney, Nancy Woolf. Helein told Woolf that he had discovered that SES II data (para. 3 supra.) existed, and that he wanted a copy. On September 13, 1989, Ms. Woolf informed TMC that March-April 1987 SES II data is no longer available; that it has been destroyed; and that no SES II data older than January 1, 1989 exists. This Motion followed.

7. TMC asserts that this predesignation SES II data should have been produced, that Pac Bell attorney James Tuthill knew it existed, that Tuthill, in fact, had signed Pac Bell's September 8, 1989 response, but that he had knowingly withheld ". . . highly relevant and material" information.

Ruling

8. TMC's motion will be dismissed. It's unauthorized, untimely, and inaccurate.

9. TMC's original May 15, 1989 interrogatories were unauthorized. So Pac Bell was never under any compulsion to answer them. It's true that Pac Bell voluntarily answered them on September 8, 1989. And the record indicates that Pac Bell did their best to answer TMC interrogatories which were excessive in number, compound, complex, vague and argumentative. So it ill behooves TMC to complain about an unauthorized procedure that they themselves initiated. That's bootstrapping, pure and simple.

10. Secondly, TMC's motion is untimely. Some of the SES II data was filed as part of Pac Bell's direct case in another docket (CC Doc#et No. 88-287) on April 21, 1989. So it's clear that Pac Bell wasn't "deliberately and wilfully" hiding data from TMC. TMC's character attack on Pac Bell attorney James Tuthill (Para. 4 supra.) is as spurious as it is regrettable. Consequently TMC's motion is nothing more than another in a series of untimely discovery pleadings. See FCC 93M-505 released August 5, 1993; FCC 93M-506 released August 6, 1993; FCC 93M-511 released August 9, 1993; and FCC 93M-534, released August 18, 1993.

11. Third, and finally, even assuming that TMC's motion were authorized, and further assuming that it was timely, it would still fail. It's inaccurate.

12. The SES II system is irrelevant to this case. So any SES II data would not have been responsive to TMC's interrogatories. SES II is not a "diagnostic test"; it does not record post-dial delay; and it is not carrier-specific information. SES II merely samples calls for the purpose of showing whether the network is meeting certain high-level technical and reliability standards. In fact, that SES II data that was filed with the CPUC showed that

FCC MAIL SECTION 3

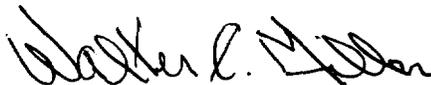
all of Pac Bell's switches, including the tandem, met the standards for which the reports are filed.

SEP 30 3 14 PM '93

13. It's true that some SES II data was destroyed. But it was destroyed by its custodian (who had no knowledge of this case) in accordance with standard document retention practices. TMC's attack lacks sufficiency.

SO the "Motion for Imposition of Sanctions" that Clark-Bader Inc. d/b/a TMC Long Distance filed on September 14, 1993, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge