

IP needs to have tariffed transport services on the IP's 900 telephone numbers.

Otherwise, the IP's customers will call one or more of the IP's 900 telephone numbers, only to find that there is no information being provided, and no forwarding number given. Customers may try one or more of the IP's other 900 telephone numbers, only to find that no information is being provided for each, and no forwarding number given. Customers will, therefore, come to believe that the 900 IP is out of business, which as a result it most probably will be! Those 900 IP customers will switch to a competitor of the IP, and will be lost.

### **III.**

#### **CONCLUSION.**

Therefore, as long as 900 telephone numbers are not portable, the AT&T IP (which constitutes 70% of the national 900 market) remains totally dependent upon AT&T for the provision of transport services for its unique 900 telephone numbers because of AT&T's illegal "tie-in" provisions. AT&T's termination of the IP's unique 900 telephone numbers upon termination on thirty days notice of AT&T's billing services, by either party, for any reason whatsoever significantly and adversely affects the IP's entire significant past investment in advertising over many years in the past to generate demand for the IP's particular telephone numbers, and deprives the IP of very substantial revenues from the residual response to such advertising for many years in the future.

Because of (i) the very severe consequences of such anticompetitive illegal practices by AT&T during the time period it takes to implement 900 portability, (ii) the overwhelmingly economic power of AT&T, and their dominate 70% share of the national 900 market, (iii) the ability of AT&T to destroy an IP or service bureau's entire business on thirty days notice by terminating 900 billing services without cause, and at the same time terminating all of the IP's and/or service bureau's 900 numbers, gives AT&T a strangle hold on an IP's and/or service bureau's business to discourage them from instituting any litigation with AT&T, and (iv) the cost and expense of litigating with AT&T, the FCC should implement 900 portability as soon as possible because of the following anticompetitive evils caused by AT&T's illegal "tying" of their 900 billing services for a particular 900 number to AT&T's transport services for that same 900 number:

1. AT&T refuses to provide tariffed transport services on the same 900 telephone numbers after the termination, by either party, of billing services on those 900 numbers; even though AT&T knows that the 900 numbers are a part of AT&T's 900 tariffed transport services pursuant to §5.4.3. A. of AT&T's Tariff No. 1.

2. Notwithstanding AT&T's knowledge of the applicable law [such as the FCC's prior decision Matter of Investigation of Access & Divestiture Related Tariffs, 97 F.C.C.2d 1082 (1984)] that tariff provisions, such as § 5.4.2.E. of the AT&T Tariff No. 1 are unenforceable, AT&T filed and/or maintained a Tariff for 900

MultiQuest services which states:

"Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right to any AT&T MultiQuest Service 900 telephone number."

3. Notwithstanding AT&T's knowledge of the applicable law that § 5.4.3. A. of AT&T's Tariff No. 1 supersedes and controls 900 MultiQuest tariffed transport services (including the 900 number), AT&T's enforces its standard BSA provisions; which are legally unenforceable because they are overridden by § 5.4.3. A. of AT&T's Tariff No. 1, and by the Federal Communications Act. Namely, AT&T enforces Sections 8.G. and 9. (or Sections 7.E. and 6. of AT&T's newer version) of AT&T's standard BSA which provide:

"8.G. The Premium Billing Arrangement for MultiQuest Dial-It 900 Service provided for in this agreement will automatically terminate if Network Services [i.e., tariffed transport services] are not subscribed to for a period of ninety (90) days...

9...upon termination of this [billing services] Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services [i.e., transport services]."

4. Notwithstanding AT&T's knowledge that the FCC "detriffed" AT&T's Dial-It 900 service in part because there supposedly was no "tie-in" between AT&T's billing services and transport services in that case, AT&T "ties" their 900 MultiQuest billing services to AT&T's transport services for the same 900 numbers.

Dated: September 11, 1995

Respectfully submitted,

  
David L. Kahn

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

In the Matter of )  
Telephone Number Portability ) CC Docket No 95-116  
RM 8535  
)

DECLARATION UNDER PENALTY OF PERJURY OF DAVID L. KAHN  
IN SUPPORT OF HIS COMMENTS.

David L. Kahn  
c/o Bellatrix International  
4055 Wilshire Blvd., Suite 415  
Los Angeles, CA 90010  
(213) 736-5600

Dated: September 11, 1995

**DECLARATION UNDER PENALTY OF PERJURY OF DAVID KAHN**

STATE OF CALIFORNIA        }  
                                  }  
COUNTY OF LOS ANGELES    } ss.

David L. Kahn hereby declares under penalty of perjury:

1. I have personal knowledge of the facts set forth herein, and if called as a witness could testify competently thereto.

2. I am the President of several service bureau and information provider companies.

3. Three of these companies have had to institute litigation against AT&T in order to vindicate their rights against AT&T, including the right to continue to have 900 tariffed transport services on the same 900 telephone numbers once AT&T's billing services on those 900 numbers are terminated. As a result of a preliminary injunction motion by the plaintiff against AT&T in one such lawsuit, when AT&T sent a Billing Services Agreement termination letter to one of those companies on September 7, 1995, AT&T made a temporary, limited exception to AT&T's standard policy and agreed: "However, in light of court proceedings, transport services to ...[the IP] shall continue to be provided at this time on the 900 numbers previously assigned." (Emphasis added.) See Exhibit C attached hereto.

4. I am familiar with (i) the importance of information providers' particular 900 telephone numbers, and (ii) AT&T's practices of "tying" their 900 transport services to their 900 billing services for the same 900 telephone numbers through AT&T's standard Billing Services Agreement ("BSA"), by virtue of my past

seven years of experience as an owner of 900 telephone number information providers ("IP's") dealing with AT&T, as well as my prior several years experience in negotiating, implementing and supervising the performance of 900 telephone number ventures involving AT&T 900 telephone numbers.

5. AT&T offers 900 MultiQuest tariffed transport services and the contractually "tied" (through Sections 8.G. and 9. of AT&T's Billing Services Agreement) 900 billing and collection services for the same 900 numbers. AT&T not only makes available the telephone transmission services (i.e., the tariffed transport services, also known as the utility or telecommunication services) for the 900 telephone numbers, but AT&T also provides the contractually "tied" (through Sections 8.G. and 9. of AT&T's Billing Services Agreement) billing and collection services for such 900 telephone numbers to its customers, including service bureaus and IP's, such as MRO Communications, Inc. ("MRO"), which I control.

6. MRO's Billing Services Agreement with AT&T is Contract No. 111448 QJ effective June 1, 1989 ("MRO BSA"), Exhibit D attached to this Declaration.

7. AT&T's normal practice upon termination of a BSA (as set forth in the last sentence of Section 9. of the MRO BSA) is to also terminate the customer's unique 900 number(s). Thus, when AT&T terminates a BSA, AT&T refuses to provide tariffed transport services on the same 900 numbers on which AT&T has terminated billing and collection services. At that point in time, AT&T will

only provide tariffed transport services to MRO on different 900 numbers.

8. In short, AT&T will only continue to provide utility services (i.e., tariffed transport services) to the IP, upon termination of the IP's BSA, if the IP gives up its single most important asset, its unique 900 telephone numbers; which typically generate virtually all of the IP's 900 total revenue.

9. The reason the IP's 900 telephone numbers generate such revenues is because of the significant investment of past advertising expenditures and associated good will over many years in the past. If the IP's 900 telephone numbers are converted or terminated by AT&T upon AT&T's termination of the IP's BSA, without cause, and AT&T thereby refuses to provide the IP with tariffed transport services on such 900 telephone numbers, the IP will suffer irreparable injury because the IP's 900 business will probably be destroyed since the IP's 900 callers will have no practical way to contact the IP, but instead will call a competitor's 900 telephone number. As a result, the 900 IP will most probably not be in existence.

10. The overwhelming majority of MRO's approximately one-hundred thirty 900 numbers have not been advertised for at least two or three years. Even in the absence of additional advertising, MRO's telephone numbers would continue to receive a substantial volume of calls for many years to come! Based on MRO's experience with other similar 900 telephone numbers for which advertising ceased but the 900 number continue to operate, MRO's 900 numbers

will continue to receive considerable volumes of calls for many years from cessation of all advertising and promotion of the 900 telephone numbers.

11. Upon AT&T's termination with thirty days notice, without cause, of the IP's BSA, AT&T will terminate (pursuant to the last sentence of Section 9. of the IP's BSA) transport services on the IP's unique 900 telephone numbers, which typically generate virtually all of the IP's 900 revenue. Unless the IP has essential tariffed transport services on its existing 900 telephone numbers, the IP's 900 business will most probably be destroyed.

12. Further, unlike 800 numbers, 900 telephone numbers are not yet portable, and therefore cannot easily be transferred from AT&T to another 900 billing company. Thus, the IP remains totally dependent upon AT&T for provision of transmission (i.e., transport) services for its unique 900 telephone numbers. AT&T's termination of the IP's unique 900 telephone numbers significantly and adversely affects the IP's entire substantial past investment of very significant monies in advertising to generate demand for these particular 900 telephone numbers, and will deprive the IP of substantial revenues from the residual response to such advertising for many years in the future.

13. In addition to providing billing and collection services to MRO pursuant to the MRO BSA, AT&T also provides tariffed transport services (i.e., the basic telephone "utility" or "communications" service) for MRO's approximately one-hundred thirty 900 telephone numbers on the terms set forth in AT&T's

Tariff filed with the Federal Communications Commission.

14. After receiving AT&T's written threat to terminate the MRO BSA, MRO's attorneys on three separate occasions over the past year have written AT&T letters requesting that AT&T immediately confirm in writing that, notwithstanding any termination by AT&T of the MRO BSA, AT&T will continue to provide tariffed transport services on MRO's existing 900 numbers. Until after receipt of MRO's Motion for a Preliminary Injunction, AT&T had repeatedly refused to confirm to MRO until August, 1995 that it would even consider providing tariffed transport services on MRO's existing 900 telephone numbers if AT&T terminated MRO's 900 billing services pursuant to the MRO BSA.

15. AT&T's normal practice pursuant to their illegal exclusive dealing and tying provisions of their BSA (i.e., Sections 8.G. and 9.) is to terminate tariffed transport services on the same 900 numbers when AT&T terminates billing and collection services for those 900 telephone numbers. In other words, upon AT&T's termination, without cause, on thirty days notice of the IP's BSA, AT&T will only provide utility services (i.e., tariffed transport services) to the IP for the IP's unique 900 telephone numbers if the 900 IP gives up its single most important asset, its unique 900 telephone numbers!

16. The IP's unique 900 telephone numbers generate significant revenues because of substantial past advertising expenditures and associated good will. If the IP's 900 telephone numbers are terminated by AT&T, or if AT&T thereby refuses to

provide tariffed transport services for such 900 telephone numbers, the IP's 900 business will most probably be destroyed because the IP's 900 callers will have no practical way to immediately contact the IP, but instead will simply call a competitor's 900 telephone number.

17. The IP's specific 900 telephone numbers, and the tariffed transport services therefore, are critical and essential to the IP's business. More specifically, the loss to the IP of tariffed transport services for the IP's specific 900 telephone numbers results in a loss of the IP's unique property, its customer list, because (1) the IP's 900 numbers are the only means for IP's customers of those numbers to do business with the IP, and (ii) there is no practical economic way for such customers to contact the 900 IP, a significant number of whom are repeat customers, other than through a referral message on each of the IP's 900 numbers. In order to leave such a referral message, the IP needs to have tariffed transport services on the IP's 900 telephone numbers.

18. Otherwise, the IP's customers will call one or more of the IP's 900 telephone numbers only to find that there is no information being provided, and no forwarding number given. Customers may try one or more of the IP's other 900 telephone numbers, only to find that no information is being provided for each, and no forwarding number given. Customers will, therefore, come to believe that the 900 IP is out of business, which as a result it most probably will be! Those IP customers will switch to

a competitor of the IP, and will be lost.

19. At the time AT&T first provided MultiQuest 900 services, AT&T utilized different telephone prefixes for different billing prices to the caller. Therefore, at that point in time pursuant to Section 9. of the MRO BSA "in order to effectively provide billing services" in the event of a change in the price of MRO's offer, AT&T might require a change in the MRO 900 telephone number prefix. Currently, AT&T does not utilize different 900 prefixes for different prices to the caller. In other words, AT&T now permits all of its 900 numbers to have price changes without requiring a change in the 900 telephone number prefix.

20. AT&T has an approximate 70% market share of the estimated \$650 million national U.S. 900 market. Strategic Telemedia, in its July, 1994 Telemedia News and Views newsletter estimated AT&T's 1994 market share would be about 70% of an estimated \$650 million dollar national U.S. market. Strategic Telemedia is regularly relied on in the trade for 900 industry statistics. Thus, their estimates were accepted by the overwhelmingly dominant magazine covering the 900 industry, Infotext, in its 1994 Service Bureau Review issue. See also p.20 of Strategic Telemedia's February, 1994 one-hundred thirty page study of the U.S. Market for 900 Services, which estimates AT&T's 1993 market share at 69%. Exhibit E attached hereto.

21. A true and correct copy of AT&T's July 28, 1995 Opposition to MRO's Motion for Preliminary Injunction which was filed in the U.S. District Court in Las Vegas, Nevada is attached

hereto as Exhibit A.

22. A true and correct copy of MRO's August 9, 1995 Reply Memorandum which was filed in the U.S. District Court in Las Vegas, Nevada is attached hereto as Exhibit B.

23. A true and correct copy of AT&T's September 7, 1995 letter terminating MRO's BSA is attached hereto as Exhibit C.

EXECUTED UNDER PENALTY OF PERJURY THIS 11TH DAY OF SEPTEMBER,  
1995 AT LOS ANGELES, CALIFORNIA.



---

David L. Kahn

**EXHIBIT A**

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11 Attorneys for Defendant AT&T CORP.

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF NEVADA

17 MRO COMMUNICATIONS, INC., a Nevada ) CV-S-95-503 PMP (RLH)  
corporation, )  
18 ) Bk. No. Bk-S 92-25253 LBR  
Plaintiff, ) Bk Adv. No. 932096  
19 )  
20 vs. ) DEFENDANT AT&T'S OPPOSITION TO  
MRO'S MOTION FOR PRELIMINARY  
21 AMERICAN TELEPHONE AND ) INJUNCTION  
TELEGRAPH COMPANY, now AT&T )  
22 CORP., )  
23 )  
Defendant. )  
24 )  
25 ) DATE: September 1, 1995  
26 ) TIME: 2:30 p.m.  
27 ) COURTROOM: 2  
28 )

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1 AT&T Corp., the defendant in the above-captioned action ("AT&T"), hereby  
2 submits its Opposition to the "Motion for Temporary Restraining Order Pursuant To  
3 F.R.C.P. 65, an Order Pursuant to Section 406 of the Federal Communications Act, and/or  
4 for a Preliminary Injunction Pursuant to the Federal Antitrust Laws (1) Restraining AT&T  
5 from Terminating MRO's Existing 900 Telephone Numbers, and/or (2) Compelling AT&T to  
6 Provide Tariffed Transport Services to MRO on MRO's Existing 900 Telephone Numbers"  
7 filed by the plaintiff, MRO Communications, Inc. ("MRO"), as follows:  
8  
9

10 I

11 PREFATORY STATEMENT

12 In connection with the Motion now before this court, plaintiff MRO  
13 Communications, Inc. has requested that the court issue an injunction requiring AT&T to  
14 continue to provide tariffed transport service (i.e., the actual transmission of voice data) to  
15 MRO over the specific 900 numbers previously assigned to MRO.  
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20 Under the Billing Services Agreement between AT&T and MRO, the parties  
21 specifically agreed that if that contract is terminated, MRO would still be entitled to  
22 continued transport services but on different 900 number lines. In this case, MRO wishes to  
23 "keep" the 900 numbers previously assigned to it, and is unwilling to accept new 900  
24 numbers. In addition, MRO also seeks to restrain AT&T from exercising its contractual  
25 right to terminate the Billing Services Agreement in accordance with its terms, on 30 days  
26 written notice.  
27  
28

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There is no basis to grant any of the forms of injunctive relief requested by MRO. However, in the interests of avoiding protracted litigation, AT&T is prepared to withdraw its objection to MRO's request for continued transport services on the existing 900 lines, through the trial of this action, if and only if AT&T is not restrained from exercising its contractual right to terminate the Billing Services Agreement and to thereby terminate any further obligation by AT&T to provide billing services to MRO.

II  
INTRODUCTION

Plaintiff MRO is the debtor in a Chapter 11 bankruptcy case currently pending before the Honorable Linda B. Riegler. This action was originally filed in the bankruptcy court. Subsequently, the action was transferred to this court pursuant to an Order entered on May 25, 1995 which granted AT&T's Motion for Withdrawal of Reference.

MRO's complaint in this action involves various disputes that have arisen in connection with a contractual relationship between AT&T and MRO pursuant to a Billing Services Agreement and addenda thereto (the "Agreement"). Under this contract, AT&T has provided unregulated billing services to MRO with respect to MRO's pay-per-call business. MRO's pay-per-call business utilizes 900 tariffed transport service (i.e., the actual transmission of voice data) that is regulated by the FCC and that must be made available to MRO under FCC Tariff No. 1. The billing service is a matter of contract which is separate and distinct from the tariffed transport service.

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By its Motion, MRO seeks a preliminary injunction to rewrite and modify the specific terms of the Agreement. MRO wants to escape its prior written promise to accept and use new 900 numbers after billing services terminate. Specifically, MRO is seeking to eliminate paragraph 9 of the Billing Services Agreement, which states:

"You have no ownership or other interest in the telephone number(s) assigned to you in connection with AT&T's provision of Billing Services . . . . You recognize and agree that upon termination of this Agreement, AT&T will assign you a different telephone number(s) if you elect to continue Network Services."

Instead, MRO wants the Court to make a new agreement which AT&T has never agreed to. By excusing MRO from its contractual promise and restraining AT&T from exercising its contractual right to designate new 900-numbers for MRO's continued use with 900 tariffed transport services, MRO is seeking a major modification and change of the terms of the Agreement. Although MRO seeks refuge under the applicable tariff, FCC Tariff No. 1, the tariff unequivocally states:

"Nothing herein or elsewhere in this tariff shall give any customers, assignee, or transferee any interest or proprietary right to any AT&T MultiQuest Service 900 telephone number."

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1                    Additionally, MRO is also seeking an order restraining AT&T from exercising  
2 its basic right under the Agreement to terminate its contractual relationship with MRO by  
3 providing the 30 day written Notice of Termination provided under the Agreement.  
4 Effectively, MRO is seeking to chain AT&T to its contract with MRO, and to force AT&T  
5 to continue providing MRO with the billing services provided under the contract in  
6 perpetuity.<sup>1/</sup>

9                    There is no basis in either fact or law for the issuance of an order prohibiting  
10 AT&T from exercising its contractual right to terminate the Agreement, nor to force AT&T  
11 to continue providing MRO with the billing services in perpetuity. AT&T cannot be forced  
12 into involuntary servitude under the contractual relationship with MRO—a relationship which  
13 MRO has consistently exploited as an ongoing source of allegations and claims against  
14 AT&T. Indeed, in its moving papers, MRO acknowledges that it does not require continued  
15 billing services from AT&T to continue its business operations. [Motion, page 20, lines 9-  
16 10.]

19                    Additionally, MRO is not entitled to an order restraining AT&T from  
20 assigning new 900 telephone numbers to MRO following the termination of billing services.

23                    <sup>1/</sup> Although MRO's Motion contains a brief section in which MRO argues that it  
24 is "entitled" to continue receiving billing services under the Agreement, MRO's Motion does  
25 not request that the court issue an injunction precluding AT&T from exercising its  
26 termination rights under the Agreement. However, following service of its Motion on  
27 AT&T, MRO orally requested such relief at the hearing on the temporary restraining order,  
28 and later served an Amended Notice of Motion which stated that MRO was seeking such  
additional relief. AT&T will object to any effort by MRO to belatedly "supplement" its  
moving papers with respect to this issue through additional argument and/or evidence  
contained in its reply papers. Any effort by MRO to supplement its papers in that fashion  
would deprive AT&T of a proper opportunity to respond to the new argument and evidence.

1 The governing law regarding that issue--the federal tariff--specifically states that MRO has no  
2 proprietary or ownership interest whatsoever in any 900 numbers assigned to it. Further,  
3 MRO is estopped from denying the reasonableness or appropriateness of that tariff provision  
4 by reason of the fact that it has previously acknowledged and agreed, in the Agreement, that  
5 upon termination of the Agreement MRO will not retain the 900 numbers previously assigned  
6 to it, and will be assigned new 900 numbers. Under such circumstances, together with the  
7 fact that MRO has not established any likelihood that it will suffer any irreparable injury,  
8 MRO has failed to sustain its heavy burden of demonstrating that it is entitled to a  
9 preliminary injunction.  
10  
11

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12  
13 III  
14 FACTUAL BACKGROUND  
15

16 A. The Relationship of the Parties.  
17

18  
19 As previously emphasized, MRO's complaint in this action involves disputes  
20 that have arisen in connection with the contractual relationship between AT&T and MRO  
21 under the Agreement. Under the Agreement, AT&T provides a billing mechanism by which  
22 AT&T tracks and bills incoming "end-user" calls to a given 900 number and attempts  
23 collection from the end-users. AT&T is one of several companies that provide such a  
24 service.  
25

26  
27 The services provided to MultiQuest customers such as MRO have two distinct  
28 aspects. Under one aspect, AT&T provides transport service (i.e., network service) under

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1 the applicable federal tariff--AT&T FCC Tariff No. 1. AT&T's provision of network  
2 services to MRO and other customers is subject to comprehensive regulation by the Federal  
3 Communications Commissions ("FCC"). However, AT&T's MultiQuest premium billing  
4 services are not regulated by the FCC because it is not a network service.<sup>2/</sup> Under the  
5 second aspect of its services, as mentioned above, AT&T provides premium billing services  
6 under private, unregulated contracts which create a billing mechanism for AT&T to track and  
7 bill incoming calls on behalf of the companies maintaining 900 numbers. Thus, by private  
8 contract, AT&T tracks and bills incoming calls to each "900" number and arranges collection  
9 from the callers on behalf of the "information providers" or "sponsors" who offer pay-per-  
10 call programs over the 900 telephone lines.

11  
12  
13  
14 When AT&T originally entered into the Agreement with MRO, a single  
15 program was provided for, to be operated through a single 900 telephone number. Later, by  
16 written agreement AT&T provided premium billing services to MRO for hundreds of  
17 additional 900 numbers. The additional offers were addendums to the original Billing  
18 Services Agreement, and the Billing Services Agreement, as supplemented by the various  
19 addenda, sets forth the mutual agreement and understanding of MRO and AT&T regarding  
20 premium billing services for MRO's offers  
21  
22  
23

24  
25 <sup>2/</sup> Although network service is governed by Tariff, AT&T's provision of  
26 premium billing services is a private contract matter that is not governed by the Tariff or the  
27 Federal Communications Act. In the Matter of Audio Communications, Inc. Petition for a  
28 Declaratory Ruling that the 900 Service Guidelines of U.S. Sprint Communications Co.  
Violate Sections 201(a) and 202(a) of the Communications Act, 8 FCC Rcd.8697 (1993); In  
the Matter of AT&T 900 Dial-It Services and Third Party Billing and Collection Services, 4  
FCC Rcd 9, 3429 (1989); and In re Paul Ondulich v. AT&T Communications, Inc., 5 FCC  
Rcd 11, 3190 (1990).