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I.

INTRODUCTION

For the first time in AT&T's relationship with MRO (or anyone else as far as we know) AT&T has offered to provide tariffed transport services for existing 900 numbers without a corresponding Billing Services Agreement ("BSA"). AT&T's Opposition ("Opp."), 3:2-7. This, despite repeated oral and written requests by MRO's attorneys over more than one year to AT&T's attorneys for confirmation of this fact. MRO Memo. 5, n. 2. But even this offer is defective, for it's only for the duration of this Action.

This offer is also defective in that it fails to recognize that MRO's ultimate request for relief is that AT&T be restrained "from terminating MRO's existing 900 numbers." AT&T recognizes this issue at one point (2: 4-6) but then restates it: MRO

"has requested that the court issue an injunction requiring AT&T to continue to provide tariffed transport services (i.e., the actual transmission of voice data) to MRO over the specific 900 numbers previously assigned to MRO." 2: 15-17.

What MRO wants is its existing 900 telephone numbers; if they have to be tied to AT&T's tariffed transport service because 900 telephone numbers are not yet "portable", so be it.

Nowhere in AT&T's Opposition does it explain why when AT&T terminates a BSA it requires that its customers lose their existing 900 numbers if they want continued transport services. For example, in arguing that the balance of hardships tips in AT&T's favor, AT&T does not explain how it hurts AT&T to have a customer keep its 900 numbers. Opp. 24. The only reason for AT&T to uniformly require its customers to agree in the BSA that they have no ownership or other interest in their 900 numbers, and that upon termination AT&T

1 will assign different 900 numbers, is to tie AT&T's billing  
2 services to AT&T's tariffed transport services, and therefore the  
3 customer to AT&T. If an AT&T 900 customer finds a carrier with  
4 lower prices, or a provider of billing services with lower prices,  
5 it cannot use it without losing its 900 numbers in which it has  
6 invested its time, money and advertising because of AT&T's illegal  
7 tying and exclusive dealing provisions.

8 Nor does AT&T explain why the provision for terminating MRO's  
9 900 numbers is found in the BSA, not in the tariff, when MRO's 900  
10 numbers are provided pursuant to the tariff. This, even though the  
11 BSA provides that it does not govern tariffed services (which  
12 includes MRO's 900 numbers), and even though the tariff (if valid)  
13 has the force of law. Opp. 21, 15-22.

14 II.

15 AT&T DOES NOT DENY THAT MRO'S SPECIFIC 900 TELEPHONE NUMBERS  
16 AND THE RIGHT TO RECEIVE TARIFFED TRANSPORT SERVICES ON SUCH  
17 900 NUMBERS ARE THE SINGLE MOST IMPORTANT ASSET OF MRO'S  
ESTATE, AND GENERATE IN EXCESS OF 98% OF MRO'S TOTAL REVENUE.

18 III.

19 AT&T IS PROHIBITED FROM CONVERTING OR TERMINATING MRO'S UNIQUE  
20 900 NUMBERS (AND THEREBY TERMINATING TARIFFED TRANSPORT  
21 SERVICES ON MRO'S EXISTING 900 NUMBERS) UNDER §§ 201, 202(a),  
AND 406 OF THE FEDERAL COMMUNICATIONS ACT, NOTWITHSTANDING ANY  
CONTRARY (1) BSA PROVISION, AND/OR (2) TARIFF PROVISION.

22 A. AT&T Does Not Deny That AT&T's Tariff Provides That MRO's 900  
Numbers Are Part of AT&T's 900 Tariffed Transport Services.

23 AT&T's Opposition admits (3: 23-26) that MRO's:

24 "... 900 tariffed transport service ..." that is regulated by  
25 the FCC ... must be made available to MRO under FCC Tariff No.  
1." (Emphasis added.)

26 Such 900 tariffed transport services to MRO are protected from  
27 termination by AT&T by both Tariff No. 1 ("Tariff") and §§ 201(a)  
28 and (b) and 202(a) of the Federal Communications Act ("Act").

1 AT&T's Opposition does not deny that MRO's 900 numbers are  
2 part of AT&T's tariffed transport services. MRO's 900 telephone  
3 numbers are provided through the Tariff 1, not the BSA. Thus,  
4 AT&T's Tariff No. 1 (Exhibit C to the July 5, 1995 Kahn  
5 Declaration) explicitly includes a 900 number as part of AT&T's 900  
6 tariffed transport service. More specifically, § 5.4.3.A. states:

7 "The monthly charges for AT&T MultiQuest Service apply per  
8 Service Arrangement. The Service Arrangement is a combination  
9 of network hardware and software programming which provides  
10 the capability for calls to a Customer's 900 number to be  
11 routed to a Customer-designated AT&T Central Office. Each  
12 Service Arrangement includes one 900 number and one Routing  
13 Capability." (Emphasis added.)

14 Therefore, since AT&T admits that MRO is entitled to 900  
15 tariffed transport services, and since MRO's 900 telephone numbers  
16 are part of those tariffed transport services, it necessarily  
17 follows that pursuant to the Tariff MRO is entitled to 900 tariffed  
18 transport services, including MRO's 900 numbers!

19 B. AT&T Does Not Deny That (i) AT&T's Tariff Supersedes the BSA  
20 With Reference to AT&T's 900 Tariffed Services, and (ii) There  
21 Is No Provision in the Tariff Permitting AT&T to Terminate  
22 MRO's 900 Telephone Numbers (or Tariffed Services Thereon),  
23 Except for Non-Payment of Tariff Charges.

24 AT&T's Opposition does not deny that there is no provision in  
25 AT&T's Tariff which permits AT&T to terminate MRO's 900 numbers  
26 simply because AT&T terminates the BSA for such numbers.

27 Since MRO's 900 numbers are part of AT&T's 900 transport  
28 services under Tariff, those numbers can only be terminated

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29 1 AT&T's Opposition also does not deny that its Tariff has other  
30 provisions dealing with 900 telephone number changes, such as (i)  
31 "once a 900 number has been disconnected by the Customer, it will  
32 be unavailable for use for six months, unless waived by the  
33 previous Customer" (Section 5.4.1), and (ii) the nonrecurring  
34 charge for changing a 900 telephone number is \$175 (Section 5.4.3).

1 pursuant to the provisions of that Tariff; such as for nonpayment  
2 of tariff charges, or voluntarily by MRO. MRO's 900 numbers cannot  
3 be terminated pursuant to the BSA. As stated in § 4 of the BSA:

4 "This Agreement does not govern or affect tariffed services."

5 C. AT&T, As a Common Carrier, Is Required Under the Act to  
6 Provide Tariffed Transport Services on MRO's Existing 900  
7 Numbers, Regardless of Any Termination of the MRO BSA.

8 Although AT&T proposes to terminate MRO's single most valuable  
9 asset, its unique 900 numbers, pursuant to the MRO BSA, AT&T's 900  
10 tariffed transport services (including MRO's 900 numbers) are not  
11 governed by the MRO BSA; they are governed exclusively by the  
12 Tariff and the Act. Therefore, regardless of any contract  
13 provision between AT&T and MRO concerning AT&T's termination of  
14 MRO's 900 numbers, such contract provisions are null and void  
15 because they are superseded by the Tariff and the Act. As stated  
16 by AT&T in its January 13, 1995 Response to MRO's Motion for  
17 Authority to Assume Executory Contracts (21: 4-8):

18 "For services provided under the Tariff, no express or implied  
19 contractual obligations or fiduciary duty can arise from the  
20 relationship between AT&T and its tariff customer because the  
21 Tariff is the law 2. Carter v. AT&T, 365 F.2d 486, 494 (5th  
22 Cir. 1966)." (Emphasis in original.)

23 Thus, the Tariff and the Act exclusively control and determine  
24 the terms on which MRO's 900 numbers may be terminated; and there  
25 is no provision in the Tariff which permits AT&T's "tie-in"  
26

27 2 Therefore, the following AT&T unsubstantiated assertion is  
28 frivolous because a valid tariff controls and supersedes any  
agreement of the parties. AT&T asserts (6: 3-11) that "MRO is  
estopped from denying the reasonableness or appropriateness of that  
tariff provision by reason of the fact that it has previously  
acknowledged and agreed, in the Agreement, that upon termination of  
the Agreement MRO will not retain the 900 numbers previously  
assigned to it, and will be assigned new 900 numbers." (Emphasis  
added.)

1 practice of terminating transport services for MRO's existing 900  
2 numbers, or the terminating of MRO's 900 numbers, merely because of  
3 AT&T's termination of billing services for MRO's 900 numbers.

4 AT&T's Tariff cannot be modified by the BSA contract or usage.  
5 Yet, AT&T intends to terminate tariffed transport services on MRO's  
6 900 telephone numbers for a reason not found in the Tariff, namely  
7 AT&T's termination of MRO's BSA.

8 D. The Provision in AT&T's Tariff Stating MRO Has No Interest in  
9 Its 900 Numbers (1) Does Not Permit AT&T's Arbitrary  
10 Termination of MRO's 900 Numbers, and (2) Is Unenforceable.

11 AT&T refers (3: 23-26) to a Tariff provision which states:

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

15 AT&T does not deny that there is nothing in that provision, or  
16 elsewhere in the Tariff 3, that provides for AT&T's termination of  
17 MRO's 900 numbers, other than for non-payment of tariff charges.

18 First, even assuming arguendo that the above Tariff provision  
19 was valid and enforceable 4, such Tariff provision does not by its  
20 terms permit the arbitrary termination of MRO's unique 900 numbers,

21 Nor is the fact that the MRO BSA also states that MRO has no  
22 ownership or other interest in its assigned 900 numbers  
23 controlling. AT&T may not by contract alter the rights defined by  
24 the tariff. American Broadcasting Companies, Inc. v. FCC, 643 F.2d  
25 818, 819, 823-24 (D.C. Cir. 1980).

26 AT&T does not deny that, when challenged, the FCC has held that  
27 the burden of proof is upon the carrier to justify restrictions in  
28 a tariff as being "just and reasonable" under § 201. Tariffs are  
not presumed to be in compliance with the Act simply because they  
are filed and effective. The FCC does not review and approve all  
tariffs in advance. Rather, the FCC authorizes the carriers to  
file tariffs which are subject to review for lawfulness in the  
event of a challenge by a subscriber. As the U.S. Supreme Court  
held: "the Act requires the filed tariffs to be 'just and  
reasonable' and declares that otherwise they are unlawful."  
Ambassador v. United States, 325 U.S. 317, 323 (1945).

1 which is MRO's most valuable asset.

2 Second, AT&T makes the audacious assertion (21: 6-9) that MRO  
3 "...does not provide any persuasive authority to support its  
4 position that the above tariff provision is unenforceable..." AT&T  
5 completely ignores the authority cited in MRO's Memo (15-16) that  
6 the FCC has struck down such tariff provisions holding:

7 "We find this provision so broad and vague that it would  
8 accord the telco unrestricted discretion to change its  
9 customers' number assignments. Customers may have significant  
10 financial interests in the stability of these assignments....  
11 We also find that the [provision] that customers have no  
12 "property rights" in these number assignments is gratuitous  
13 [and] must be deleted." (Emphasis added.)

14 Matter of Investigation of Access & Divestiture Related Tariffs, 97  
15 F.C.C.2d 1082 (1984). 6 Further, AT&T does not deny that the FCC  
16 has said that any tariff limitations that would restrict such  
17 rights must be justified by the carrier, 7 and AT&T has failed to  
18 do so. AT&T does not deny that it has no "just and reasonable"  
19 basis whatsoever for the termination of MRO's 900 numbers, thereby  
20 terminating transport services on MRO's existing 900 numbers.

21 \_\_\_\_\_  
22 5 For the Court's convenience a copy of the FCC decisions referred  
23 to by MRO are being submitted in a separate Appendix.

24 6 In that same case, the FCC noted that "customers may use a common  
25 carrier's services or facilities as they choose as long as the use  
26 (1) is lawful, (2) will not harm the network, and (3) is not  
27 otherwise publicly detrimental." (Emphasis added.)

28 7 AT&T's Opposition does not deny that in reviewing such tariff  
language, the FCC has set forth the following standard:

29 "It is clear...that the prohibitions restrict subscribers' use  
30 of their communication service, and that carriers must justify  
31 the restrictions as just and reasonable under § 201(b) of the  
32 Communications Act, and the case law based thereon... The  
33 burden of proof of establishing the justness and  
34 reasonableness of the restrictions and discrimination  
35 associated therewith is squarely on the carriers in whose  
36 tariff the restriction exceptions are found." (Emphasis  
37 added.) Resale & Shared Use, 60 F.C.C.2d 261 at par. 4.

1 AT&T also does not deny that courts have recognized that the  
2 mere statement in a tariff that a customer has no proprietary right  
3 in a telephone number can not serve as a basis for a phone company  
4 to circumvent its obligations under applicable law. 8

5 Thus, the statement in AT&T's 900 Tariff, or the BSA, that MRO  
6 has no proprietary interest in its unique 900 numbers (i) is  
7 unenforceable, and (ii) is not a basis to permit AT&T to act in  
8 violation of the Act by terminating MRO's unique 900 numbers.

9 E. AT&T's Intended Termination of MRO's Unique 900 Numbers Is Not  
10 "Just and Reasonable" as Required by § 201(b) of the Act.

11 Sections 201(a) and (b) of the Act require that AT&T continue  
12 to provide MRO's 900 numbers for MRO's usage, and transport  
13 services thereon, on a "just and reasonable" basis.

14 The language of AT&T's Tariff that a customer has no  
15 proprietary right to a 900 number does not mitigate the requirement  
16 of § 201(b) of the Act that AT&T, as a common carrier, must act in

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19 8 Such a tariff provision has been consistently interpreted by  
20 courts to prevent telephone companies from engaging in such  
21 conduct, whose sole effect is to harm the subscriber. More  
22 specifically, courts have held that a tariff provision (virtually  
23 identical to AT&T's 900 Tariff) stating that a user has no  
ownership right in a telephone number, could not be construed to  
authorize a telephone company to exercise arbitrary dominion over  
the telephone number so as to cause harm and injury to another.

24 For example, AT&T also does not deny that in Shehi v. Southwestern  
25 Bell Tel. Co., 382 F.2d 627, (10th Cir. 1967), the U.S. Court of  
26 Appeals for the Tenth Circuit reasoned that if it were to follow  
27 the telephone company's interpretation of the tariff concerning  
28 reservation of property rights to the telephone numbers, tariff  
provisions, such as the transfer of service between subscribers,  
would be rendered meaningless, and changes in subscriber's numbers  
could be made at the slightest whim of the company, regardless of  
the consequences to subscribers. See also, Price v. South Cent.  
Bell, 313 So.2d 184 (Ala. 1975).

1 a "just and reasonable" manner.<sup>9</sup> Thus, simply because AT&T's  
2 Tariff states that MRO allegedly has no proprietary interest in its  
3 900 numbers (i) does not ipso facto result in the Tariff complying  
4 with the Act, and (ii) certainly is not a basis upon which to  
5 terminate MRO's numbers for an unjust and unreasonable cause.  
6 AT&T's termination of MRO's existing 900 telephone numbers simply  
7 because AT&T terminates MRO's BSA constitutes an unjust and  
8 unreasonable practice under § 201(b) of the Act. Certainly, the  
9 Tariff does not permit AT&T to terminate MRO's 900 transport  
10 services (including MRO's 900 numbers) based on the fact that AT&T  
11 terminated MRO's BSA for the same 900 telephone numbers -- nor, we  
12 submit could it under § 201(b).<sup>10</sup>

13 IV.

14 MRO IS ENTITLED TO AN ORDER RESTRAINING AT&T FROM TERMINATING  
15 THE BSA FOR AT LEAST ONE-HUNDRED EIGHTY DAYS.

16 A. AT&T Has Received Adequate Notice of MRO's Requested Relief.

17 As to AT&T's argument that MRO has not requested this relief  
18

19 <sup>9</sup> See In the Matter of Regulatory Policies Concerning Resale &  
20 Shared Use of Common Carrier Services & Facilities, 60 F.C.C.2d 261  
at paragraph 5 (1976).

21 <sup>10</sup> The fact that AT&T offers MRO new 900 numbers does not make  
22 AT&T's act of terminating MRO's existing 900 numbers, when AT&T  
23 terminates MRO's BSA, "just and reasonable". This argument is  
24 bolstered further by AT&T's refusal to provide referral messages on  
25 MRO's existing unique 900 numbers after they are terminated by  
26 AT&T. A referral message advises callers that the number has been  
27 changed and provides the new number. Without a referral message,  
28 callers to all of MRO's existing 130 AT&T 900 telephone numbers  
would hear a message stating that the numbers are no longer in  
service. Callers would thereby conclude that MRO is simply no  
longer in business. AT&T may not terminate MRO's tariffed  
transport services, including MRO's particular 900 numbers, for  
reasons that are not "just and reasonable." To permit such conduct  
is to make a mockery of the Act's legislative mandate that AT&T  
provide transport services to MRO on a "just and reasonable" basis.

1 (Opp. 10-11), MRO's July 16, 1995 Reply Memorandum to AT&T's TRO  
2 Opposition (personally served on AT&T the same day) stated:

3 "Section V. of MRO's Motion (pages 20 through 23) is  
4 specifically limited to MRO's request that AT&T be enjoined  
5 pursuant to the Federal Communications Act from terminating  
6 billing and collection services on MRO's existing 900  
7 telephone numbers because such services are 'for or in  
8 connection' with common carrier communication services under  
9 the Federal Communications Act." (Emphasis in original.)

10 Also, this subject was adequately covered at the oral argument  
11 on July 17, 1995 for MRO's temporary restraining order. Further, on  
12 July 18, 1995 AT&T was personally served with an Amended Notice of  
13 Motion seeking this relief; which was filed on July 19, 1995.  
14 Thus, AT&T has had more than adequate notice.

15 B. AT&T's Billing Services for MRO's 900 Numbers Are Subject to  
16 the Act Because They Are "In Connection With (AT&T's 900)  
17 Communications Services" Since AT&T's Billing Services for  
18 MRO's 900 Numbers Are Tied to AT&T's Tariffed Transport  
19 Services for MRO's 900 Numbers.

20 As to the argument that Title II of the Act does not apply to  
21 the BSA, AT&T correctly points out that with reference to § 202(a)  
22 [as compared to § 201(a), which is broader] the FCC has refused to  
23 follow People of California v. FCC, 905 F.2d 1217 (9th Cir. 1990)  
24 and National Association of Reg. Utility Comm. ("NARUC") v. FCC,  
25 880 F.2d 422 (D.C. Cir. 1989). Opp. 15-17. Likewise is the  
26 decision in Mical Communications v. Sprint Telemedia, 1 F.3d 1031  
27 (10th Cir. 1993). The reason for their refusal to follow such  
28 cases was that although those cases interpreted the virtually  
identical language as in § 202(a) of the Act, the language (i.e.,  
"for or in connection with") was in § 152(b) of the Act, and was  
not controlling because of the broadness of § 152(b)(1). However,  
§ 201(b), as compared to § 202(a), is extremely broad.

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Thus, the Mical court concluded:

"...none of these cases resolve the precise issue here -- whether Sprint's billing and collection for its 900 area code customers is a service in connection with a communications service under § 202." Id. at 1036, 1037, n.3. (Emphasis added.)

It is undisputed that § 201(b) of the Act applies not only to AT&T's 900 transport services (including the 900 numbers) to MRO, but also to AT&T's services which are "for or in connection with" such common carrier's 900 "communication services." The only remaining issue then is whether under § 201(b)<sup>11</sup>, AT&T's 900 billing services to MRO are "for or in connection with such communications (i.e., AT&T's 900 transport) services" to MRO.

MRO contends that since AT&T's billing services for 900 numbers are exclusively "tied" to AT&T's transport services for those 900 numbers <sup>12</sup> that AT&T's billing services are "for or in

<sup>11</sup> MRO's claims are not limited to § 202(a) as suggested by AT&T (13:1-3), but are based primarily on § 201(b) of the Act.

<sup>12</sup> AT&T only offers 900 billing services to customers for whom AT&T provides 900 transport services on the same 900 numbers. Therefore, all AT&T's 900 BSA customers must use AT&T's 900 transport services; then if the BSA is terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical effects are obvious. After operations commence, the AT&T 900 information provider (like MRO) cannot elect to use another 900 billing service without losing its 900 numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 information provider's customers to do business with, or to even be able to contact, the information provider. Therefore, under paragraph 8.G. of the MRO BSA, the 900 information provider must use AT&T's 900 transport services. If an information provider, like MRO, uses AT&T's 900 transport services, the information provider must continue to use AT&T's 900 billing services or lose its unique 900 numbers. These are numbers in which the customer, such as MRO, typically will have invested substantial sums. Thus, the effects of these provisions in the MRO BSA are to "tie" AT&T's tariffed 900 transport services to its 900 billing services, and to prevent AT&T's customers (like MRO) from utilizing billing services of AT&T's competitors. AT&T's "tie-in" is so complete that AT&T contends that its 900 transport services and its 900 billing

1 connection with such communications (i.e., AT&T's 900 transport)  
2 services" pursuant to § 201(b) of the Act. 13 Because of AT&T's  
3 "tie-in", AT&T's 900 billing services to MRO cannot be considered  
4 to be merely "incidental" as in the FCC's Audio Communications  
5 decision (Opp. 15:19-23).

6 Logically, the words "for or in connection with such  
7 communication services" in § 201(b) of the Act must extend to non-  
8 tariffed services, such as AT&T's billing services under the MRO  
9 BSA; otherwise they would be meaningless.

10 This Court need not defer to the FCC's opinion if, as in this  
11 case, the statute's language is clear on its face.<sup>14</sup> Union of  
12 Concerned Scientists v. United States Nuclear Regulatory Comm'n,  
13 824 F.2d 108, 113 (D.C. Cir. 1987). Indeed a court:

14 "need not defer to agency opinion, even if the statutory  
15 provision at issue admits of some ambiguity ...[I]n such  
16 instances, the court is to use traditional tools of statutory  
construction to ascertain congressional intent." Id.

17 See also Ute Distribution Corp. v. United States, 938 F.2d  
18 1157, 1162 (10th Cir. 1991), cert. denied, 1992 WL 51715 (1992).

19 Contrary to AT&T's assertions, People of the State of  
20 California v. FCC, 905 F.2d 1217 (9th Cir. 1990) and National  
21 Ass'n. of Regulatory Utility Commissioners v. FCC, 880 F.2d 422  
22 (D.C. Cir. 1989) do support the proposition that AT&T's 900 billing

23 \_\_\_\_\_  
24 services "constitute a single product". Opp: 23: 16-17.

25 13 If AT&T is required under the Act to provide billing services to  
26 MRO, then the termination provision of the BSA is irrelevant  
because the BSA cannot, and does not, overrule the Act.

27 14 A statute is not ambiguous merely because the parties disagree  
28 as to its meaning. In re George Rodman, Inc., 792 F.2d 125, 12 n.8  
(10th Cir. 1986).

1 services are provided "in connection with communications services"  
2 pursuant to § 201(b) of the Act. AT&T seems to infer that MRO  
3 cites these cases for the proposition that a service that is "in  
4 connection with" an intrastate service for purposes of one Section  
5 of the Act, must also be deemed to be a service "in connection with  
6 communication services" for purposes of § 201(b) of the Act.

7 These cases were cited by MRO to demonstrate that the Courts  
8 of Appeals that have reviewed the "in connection with" language  
9 with respect to § 152(b)(1) of the Act have given that language its  
10 plain meaning and construed it broadly. Thus, under the principle  
11 of parallel construction, the prohibition against unjust and  
12 unreasonable "practices" etc. in § 201(b) must similarly be  
13 construed to extend to AT&T's "tied" billing services, which are  
14 provided "in connection with [AT&T's] communications [i.e., 900  
15 transport] services" under § 201(b) of the Act. See also,  
16 McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F.2d 720  
17 (9th Cir. 1979), cert: denied, 444 U.S. 839 (1979).

18 It should be noted and emphasized that the D.C. and Ninth  
19 Circuits have held billing and similar services to be "in  
20 connection with" communication services without the inextricable  
21 AT&T "tie-in" present in this Case.

22 C. The FCC's Dial-It and Audio Communications Decisions Were  
23 Based on the Fact that the 900 Carrier's Billing and Transport  
24 Services In Those Cases Were Not Inextricably Tied Together,  
25 As They Are in This Case.

26 AT&T does not deny the critical fact that the FCC's Dial-It  
27 decision was based on the fact that AT&T's 900 billing services in  
28 that case were not tied to AT&T's 900 tariffed services, as they  
are in this case (i.e., once AT&T ceases billing and collection

1 services for a particular MRO 900 number, AT&T refuses to  
2 thereafter provide transport services to MRO for that 900 number).

3 Or as the FCC stated in relevant part in paragraph 25 at 3432:

4 "AT&T asserts that sponsor subscribers are not required to  
5 take Premium Billing as a concomitant to tariffed Dial-It 900  
6 services and indeed, tariffed service subscribers are not  
7 'entitled' to receive Premium Billing service. Instead they  
8 are separate services 15." (Emphasis added.)

9 Likewise, the FCC's Audio Communications decision was also  
10 based on the fact that Sprint's billing services for each 900  
11 number were not tied to Sprint's transport services for that 900  
12 number. Or as the FCC stated in par. 6 of its decision:

13 "Sprint Telemedia continues to offer 900 transmission service  
14 on a common carrier basis, but without billing and collection  
15 for all interested I.P.s." (Emphasis added.)

16 In other words, Sprint did not tie its billing services to its  
17 transport services for a particular 900 number.

18 D. In this Case (Unlike the Dial-It and Audio Communications  
19 Cases) AT&T's 900 Billing Services Are Inextricably Tied to  
20 AT&T's 900 Transport Services.

21 It is undisputed that because of AT&T's tying and exclusive  
22 dealing provisions, all AT&T's 900 BSA customers must use AT&T's  
23 transport services; then if the BSA is terminated by either party,  
24 for any reason whatsoever, AT&T's 900 customer loses its unique 900  
25 numbers.

26 If a subscriber, like MRO, uses AT&T's 900 transport services,  
27 the subscriber must continue to use AT&T 900 billing services or  
28 lose its unique 900 numbers; in which the customer, such as MRO,  
typically will have invested substantial advertising sums. Thus,

15 In this case, AT&T contends (23: 16-17) that their 900 billing  
services and their 900 tariffed services are not separate, but  
rather they "constitute a single product".

1 the effects of these provisions in the MRO BSA are to "tie" AT&T's  
2 tariffed 900 transport services to its 900 billing services, and to  
3 prevent AT&T's customers (like MRO) from utilizing billing services  
4 of AT&T's competitors. The "Tie-in" is so complete that AT&T says  
5 they "constitute a single product".

6 E. If AT&T's 900 Billing and AT&T's 900 Transport Services  
7 "Constitute a Single Product", They Are Subject to § 201(b) of  
8 the Act, and Cannot be Terminated Pursuant to the BSA.

9 AT&T's "tying" provisions so inextricably connect AT&T's  
10 tariffed transport services for MRO's 900 numbers and AT&T's  
11 billing services for MRO's 900 numbers, that AT&T alleges that its  
12 900 transport and billing services "constitute a single product"  
13 (23: 16-17). If they "constitute a single product", then clearly  
14 they are subject to the provisions of §§ 201(a) and (b) and 202(a)  
15 of the Act, and must be provided to all subscribers, including MRO,  
16 pursuant to the Act on "just and reasonable" terms. In such a  
17 case, AT&T's 900 billing services are more than "in connection  
18 with" AT&T's tariffed 900 "communication services"; since they  
19 "constitute a single product", they are part of AT&T's tariffed  
20 "communications services" under § 201(b). Therefore, such billing  
21 services cannot be terminated pursuant to the BSA.

22 F. The Purpose of the Federal Communications Act Would Be  
23 Emasculated if AT&T's 900 Billing Services Were Not Subject to  
24 the Act Because AT&T's 900 Billing Services Are Inextricably  
25 "Tied" to AT&T's 900 Transport Services.

26 It is a basic tenet of statutory construction that in  
27 interpreting the meaning of the words of a statute, the purpose of  
28 the statute is of critical importance (i.e., what "evils" is the  
statute directed to). The purpose of § 201 (b) of the Act is to  
protect subscribers from the unrestricted power of a common

1 carrier, by requiring the common carrier's services to be provided  
2 to all subscribers on a "just and reasonable" basis. Therefore,  
3 the words "for or in connection with such communication services"  
4 in § 201(b) of the Act, should be interpreted to include AT&T's  
5 billing services; at least when those services are tied to AT&T's  
6 tariffed transport services. This is necessary in order to prevent  
7 the evil that is present in this case. Namely, AT&T's exclusive  
8 dealing and "tying" provisions in its BSA, which provide that once  
9 AT&T ceases billing services for a particular MRO 900 number, AT&T  
10 refuses to thereafter provide tariffed transport services to MRO  
11 for that 900 number; even though the 900 number is part of those  
12 tariffed transport services. In other words, AT&T is using the  
13 leverage of its tariffed transport services to MRO (i.e., MRO's 900  
14 numbers which are part of such tariffed services) to exact a  
15 confiscatory penalty on MRO (i.e., the loss of MRO's 900 numbers),  
16 if MRO chooses a competitor of AT&T to do MRO's billing services.

17 Indeed, AT&T notes (14: 4-6) that one of the elements of the  
18 FCC's Audio Communications decision was that:

19 "the provision of such services is subject to competition or  
20 the likelihood of competition." Id at paragraph 33.

21 This rationale is especially applicable in this case since  
22 (unlike the situations in the FCC's Dial-It and Audio Communication  
23 decisions) AT&T's billing services for each MRO 900 number are tied  
24 to AT&T's transport services for that 900 number, which precludes  
25 MRO from going to a competitive 900 billing company, unless MRO is  
26 willing to lose its most valuable asset, its unique 900 numbers.

27 The FCC in these decisions reasoned that where the  
28 interexchange carrier acts merely as a conduit for the billing of

1 a non-carrier third party, it is not a common carrier communication  
2 service subject to the provisions of Title II. These FCC decisions,  
3 however, are especially inapposite to this case, where (i) AT&T's  
4 900 billing services are expressly tied (in the BSA) to AT&T's  
5 tariffed transport services for the same 900 numbers (i.e., because  
6 of the "tie-in" under the FCC's rationale they become a  
7 "communication service"), and (ii) AT&T contends that they  
8 "constitute a single product" (i.e., AT&T's 900 billing services  
9 are part of AT&T's 900 "communications services").

10 Since the purpose of the Act is to protect subscribers, such  
11 as MRO, from unreasonable or unjust practices by a common carrier  
12 (such as AT&T's "tie-in" of their 900 billing services to their 900  
13 transport services for the same 900 number) the words "for or in  
14 connection with such communication services" in § 201(b) should  
15 include AT&T's billing services, where AT&T (with 70% of the  
16 national 900 market) "ties" them together; especially when that  
17 common carrier contends that their inextricably "tied" 900 billing  
18 and transport services "constitute a single product". To do  
19 otherwise would be to eviscerate the protections of the Act. Thus,  
20 pursuant to the reasoning of the Court of Appeals for the Ninth  
21 Circuit in California, the FCC's reliance on the distinction  
22 between common carrier and non-common carrier service is improper.  
23 (at least where the common carrier's billing services are tied to  
24 its transport services as in this case). In California, the Ninth  
25 Circuit Court of Appeals rejected the FCC's distinction as a basis  
26 for circumventing Title II's provisions! The Court stated that the  
27 application of Title II:  
28

1 "Does not turn on whether the services are provided on a  
2 common carrier or non-common carrier basis."

3 905 F.2d. at 1242. Thus, because of AT&T's tying and exclusive  
4 dealing provisions, AT&T's billing services are provided "in  
5 connection with communications services." Moreover, it is  
6 respectfully submitted that this Court should follow the decision  
7 of the Ninth Circuit in California, and not the FCC's Dial-It and  
8 Audio Communications decisions, which are based upon the critical  
9 fact that the 900 billing services in those cases were not tied to  
10 the transport services for the same 900 numbers.16

11 Furthermore, Mical and these FCC decisions do not deal with  
12 the difference between the FCC's power to regulate utilities and  
13 the purpose of § 201(b) of the Act, which is to protect subscribers  
14 like MRO. See the broad private rights that are granted to  
15 subscribers under §§ 201, 202, 206, 207 and 406 of the Act. Since  
16 the purpose of §§ 201 (a) and 202 (b) of the Act is to protect  
17 subscribers, such as MRO, from a common carrier's refusal to  
18 provide services on a "just and reasonable" basis, §§ 206, 207, and  
19 406 give subscribers a private remedy for AT&T's failure to provide  
20 tariffed services as required by §§ 201 and 202 of the Act.

21 G. The Bankruptcy Court Recently Approved MRO's BSA Assignment

22 On July 13, 1995 the Bankruptcy Court entered an order

23 \_\_\_\_\_  
24 13 If the Court permits AT&T to terminate the MRO BSA prior to the  
25 trial of MRO's Adversary Action, AT&T should be ordered to give MRO  
26 at least 180 days notice by AT&T because MRO does not currently  
27 have an adequate alternative billing arrangement for MRO's existing  
28 900 numbers. Because 900 numbers are not yet "portable", (the FCC is  
currently considering several Petitions to make them "portable"),  
AT&T's transport services on MRO's existing 900 numbers may be  
necessary in order for another company to do the billing for MRO's  
existing 900 numbers.

1 permitting MRO to assign its BSA to MicroVoice Applications, Inc.,  
2 a company similar to MRO which, because of its volume discounts,  
3 will result in a substantial savings to MRO. This order is subject  
4 to certain conditions, and there will be a hearing on September 8,  
5 1995 as to whether those conditions have been met. Whether the BSA  
6 would still be open to unilateral termination by AT&T after the  
7 assignment (which was approved by the U.S. Bankruptcy Court) may be  
8 open to question.

9 V.

10 MRO IS ENTITLED TO AN INJUNCTION PROHIBITING THE TERMINATION  
11 OF ITS 900 NUMBERS AND/OR REQUIRING AT&T TO CONTINUE TO  
12 PROVIDE TRANSPORT SERVICES ON MRO'S EXISTING 900 NUMBERS.

13 A. AT&T's Intended Termination of MRO's 900 Numbers, Thereby  
14 Terminating Transport Services on Those Numbers, Violates the  
15 Tariff and the Federal Communications Act.

16 As stated previously, MRO would prefer to have an injunction  
17 prohibiting AT&T from terminating MRO's existing 900 numbers. AT&T  
18 has stated that it has no objection to providing 900 transport  
19 services to MRO; AT&T just objects to providing transport services  
20 on MRO's existing 900 numbers; on which hundreds of thousands of  
21 dollars have been spent advertising them over many years, and which  
22 are the only way for MRO's customers to do business with MRO. AT&T  
23 makes the audacious assertion (26: 24-28 through 27: 1-2) that:

24 "Assigning new 900 numbers is different than denying transport  
25 services, and there is no provision of the FCA nor any other  
26 applicable law relating thereto which establishes that MRO is  
27 entitled to retain the use of specific 900 numbers."

28 In effect, AT&T argues that even though AT&T places, without  
any justification whatsoever, an economically prohibitive penalty  
on the obtaining of 900 transport services (i.e., termination of  
MRO's existing 900 numbers), this is not a discontinuation of

1 transport services.

2 In short, AT&T argues that placing a confiscatory condition on  
3 the continuation of AT&T's 900 transport services to MRO does not  
4 constitute a discontinuation of such transport services.

5 First, this ignores the fact that MRO's 900 numbers are part  
6 of AT&T's transport services for MRO's numbers pursuant to §  
7 5.4.3.A. of AT&T's Tariff; and there is no provision in the Tariff  
8 which permits AT&T's termination of MRO's 900 numbers (or transport  
9 services thereon), except for non-payment of tariff charges.

10 Second, it is difficult to imagine a more flagrant ruse by a  
11 common carrier in an attempt to avoid its obligations under the Act  
12 to provide transport services to MRO (whose 900 numbers generate  
13 virtually all of MRO's revenues, and are the only practical way for  
14 its customers to contact MRO) than to in effect say:

15 "Yes, we will continue to provide MRO with 900 transport  
16 services, but we will arbitrarily change MRO's 900 numbers,  
17 thereby exacting an economically prohibitive penalty; since  
18 the only way that MRO will be able to generate revenue, or  
even be able to have its customers contact MRO, is through  
MRO's 900 numbers -- which will be arbitrarily terminated!"

19 It is as if an electric utility would say, "Yes, we will continue  
20 to provide you with services, but only at a different address", or  
21 only on other conditions which exact such an economically  
22 prohibitive penalty as to be equivalent to a denial of services.

23 Third, since § 5.4.3.A. of AT&T's Tariff explicitly makes  
24 MRO's 900 numbers part of AT&T's tariffed transport services, under  
25 §§ 201(a) and (b) of the Act AT&T cannot change such numbers unless  
26 it is pursuant to a Tariff provision, which is "just and  
27 reasonable"; and under § 202(a) of the Act it must also be non-  
28 discriminatory. It is for these reasons that both the FCC, as well

1 as the courts, have held that the provision in the MRO BSA (and in  
2 AT&T's tariff) which says that MRO has no interest in its 900  
3 numbers is unenforceable under the Act or other applicable law.

4 B. MRO Is Entitled to Relief Under § 406 of the Federal  
5 Communications Act Without Showing Irreparable Harm.

6 As pointed out in MRO's Memorandum, 47 U.S.C. § 406 authorizes  
7 district courts to issue orders compelling carriers providing  
8 services under Title II of the Act to furnish such facilities to  
9 any person. Here again, the issue is whether AT&T can rely on § 9  
10 of the BSA or on the Tariff provision regarding user's rights in  
11 particular 900 numbers. As previously stated, the BSA itself and  
12 the Act prevent the BSA from affecting tariffed services (which  
13 includes MRO's 900 numbers). AT&T has simply ignored the FCC  
14 decision and case law that the tariff provision relied on by AT&T  
15 cannot be enforced, and is not "just and reasonable".

16 MRO need not show irreparable harm pursuant to § 406 of the  
17 Act. In MRO's opening memorandum, MRO pointed out that under Rule  
18 65 Fed.R.Civ.Pro. if the defendant is about to engage in activity  
19 prohibited by a statute, irreparable harm need not be shown, citing  
20 Mical Communications v. Sprint Telemedia, 1 Fed.3d 1031 (10th Cir.  
21 1993). MRO Memo. 19-20. Although AT&T discusses this case at  
22 length (Opp. 26-27) it does not dispute its holding that no showing  
23 of irreparable harm is required. This is because this is the law  
24 generally; see, cases cited in Mical and Burlington Northern v.  
25 Department of Revenue, 934 F.2d 1064 (9th Cir. 1991); United States  
26 v. Odessa Union Warehouse Co-Op., 833 F.2d 172 (9th Cir. 1987).  
27 Or as stated in Moore's Federal Practice (Second Edition 1991),  
28 Vol. 7-Part 2, p. 65-78: