

Mike Knell, dba JTR Publishing,  
Complainant,  
vs.  
Pacific Bell and AT&T,  
Defendants.

Case No. 01-07-034

SUPPLEMENTAL REPLY BRIEF  
OF PACIFIC BELL TELEPHONE COMPANY (U 1001 C)

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August 23, 2002

Pursuant to a Ruling issued by Administrative Law Judge ("ALJ") Janice Grau on August 6, 2002, Pacific Bell Telephone Company ("Pacific") hereby submits this supplemental reply brief. As directed by the ALJ's Ruling, the scope of this supplemental reply brief is limited to addressing the procedural appropriateness of any new material that other parties may have submitted with their July 26, 2002 reply briefs in this proceeding. The ALJ Ruling explicitly notes that parties' supplemental briefs "may not introduce new documents or other new material."

## I. INTRODUCTION

In his opening and reply briefs, Complainant Mike Knell attempts to introduce new evidence and documentation into the record that was not included in his prefiled testimony. His briefs explicitly rely on this extra-record evidence and ask the Commission to afford weight to this new information. As set forth below, the Commission should decline to do so. Complainant's opportunity to submit evidence supporting his claims was with his prefiled testimony. In fact, Complainant amply availed himself of this opportunity, submitting over one hundred (100) attachments with his prefiled testimony. A party may not pad the record with new evidence that he or she failed to include after the evidentiary record has closed. The attachments to Complainant's opening and reply brief constitute extra-record facts that must be afforded no weight whatsoever.<sup>1</sup>

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<sup>1</sup> Although it appears that some of those attachments are duplicative of documents that Complainant included with his prefiled testimony, Complainant's opening and reply briefs should have referenced those documents by citing back to Complainant's prefiled testimony, rather than attaching them anew. As such, they should be ignored and the only evidence upon which the Commission should rely is the evidence submitted with prefiled testimony.

II. THE COMMISSION MUST IGNORE THE EXTRA-RECORD EVIDENCE ATTACHED TO COMPLAINANT'S OPENING AND REPLY BRIEFS.

As Pacific explained in its opening brief, by ruling dated May 1, 2002 the ALJ directed the parties to appear at an evidentiary hearing on June 5, 2002 for the purpose of submitting their testimony into evidence. At that hearing, Complainant submitted, and the Commission received, his testimony into the evidentiary record as Exhibit 1. Likewise, Pacific submitted its testimony as Exhibits 2 and 3, while AT&T submitted its testimony as Exhibit 4. After receiving Exhibits 1 through 4 into evidence, the ALJ directed that, "[i]n briefs, the parties are to cite to the testimony [received into the record] where factual issues or other issues that are raised in the testimony are cited in the brief."<sup>2</sup> The ALJ then adjourned the hearing, thereby closing the evidentiary record.

Complainant now attempts to introduce new evidence into the record by submitting ten (10) attachments with his opening brief and another fifteen (15) with his reply brief. Among other things, those attachments include two declarations that Complainant obtained after testimony had been submitted and after the record was closed (See Attachments 9 and 10 to Complainant's opening brief). Similarly, Complainant attempts to introduce new information in the body of his briefs. For example, on page 1-42 of his reply brief, Complainant quotes an excerpt of a conversation between himself and a Pacific Bell attorney named Mike Sasser that he says he recorded and which was not included in the evidence he submitted with his prefiled testimony.<sup>3</sup>

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<sup>2</sup> EH Tr. 10 (June 5, 2002).

<sup>3</sup> As set forth in Section III below, not only does the transcript of this conversation constitute extra-record facts upon which the Commission should not rely but also Complainant's actions in recording this conversation constitute serious violations of California's penal and civil codes.

Absent a motion to reopen the record and a ruling granting that motion, a party may not submit additional evidence after the record has closed. Similarly, a party may not rely on extra-record evidence, nor may the decision-maker afford any weight to any such evidence. Yet this is exactly what Complainant has done. The ten attachments to his opening brief, the fifteen attachments to his reply brief, and the new information referred to in the body of his briefs constitute extra-record evidence. It would be legal error to afford any weight to this extrinsic evidence, and the Commission should ignore it.

**III. THE COMMISSION MUST IGNORE THE TRANSCRIPTS OF CONVERSATIONS ATTACHED TO OR REFERRED TO IN COMPLAINANT'S PREFILED TESTIMONY AND OPENING AND REPLY BRIEFS.**

In his prefiled testimony, his opening brief, and his reply brief, Complainant attaches numerous documents purportedly constituting accurate transcriptions of conversations that Complainant recorded between himself and others. In many (though admittedly not all) instances, nothing in those transcripts gives any indication that Complainant notified the participants to those conversations that they were being recorded. Additionally, none include any certification under penalty of perjury that they constitute true and correct transcripts of the conversations that they purport to transcribe.<sup>4</sup>

Sections 631 et seq. of the California Penal Code prohibits any person from recording or otherwise electronically intercepting a communication without the consent of all parties to that communication. Further, Section 1708.8 of the California Civil Code provides that such an action is an illegal invasion of privacy.

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<sup>4</sup> Cal. Pub. Util. Code section 1710.

Although Complainant claims that he informed the persons whose conversations he recorded, there is no evidence to support this claim. For example, in his reply brief, although Complainant claims he informed Pacific Bell's Mr. Sasser that their conversation was being recorded, nothing in the transcript from their telephone conversation set forth in Complainant's reply brief indicates any such thing. Complainant's actions in recording a telephonic conversation without the knowledge of the person being recorded is a violation of California Penal Code section 631 and section 1708.8 of the California Civil Code. As such, the Commission should decline to afford any weight not only to the transcripts attached to or referred to by Complainant's opening and reply briefs but also to those transcripts submitted into evidence with Complainant's prefiled testimony.

Even if these transcripts and recordings did not constitute egregious violations of California's Penal and Civil codes, they still could not be afforded any weight because they have not been properly certified. Specifically, none of the transcripts that Complainant has attached to or referred to in his prefiled testimony and his briefs includes any certification that they constitute true and correct transcripts of the conversations that they purport to transcribe. For this reason alone, even if they did not violate California's penal and civil codes, they still could not be imparted any consequence.<sup>5</sup>

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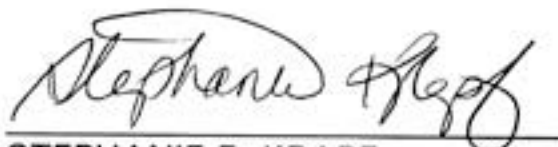
<sup>5</sup> Pacific Bell's review indicates that the following attachment numbers to Complainant's prefiled testimony contain transcripts of recorded conversations: 1, 13, 17, 18, 36, 44, 46, 48, 50, 51, 53, 54, 56, 57, 67, 72, 73, 74, 76, 78, 92, 93, 94, 96, 97, 98, 109, 110. Additionally, Attachment 7 to Complainant's opening brief and Attachment 3 to his reply brief also contain transcripts of recorded conversations.

**IV. CONCLUSION**

For the reasons stated herein, the Commission should ignore the extra-record evidence that Complainant attempts to submit with his opening and reply briefs. Additionally, the Commission should afford no weight to any of transcribed conversations attached to or referred to in Complainant's prefiled testimony and opening and reply briefs, as many of those transcripts were obtained in violation of California's Penal and Civil code and because none of those transcripts have been properly certified.

Dated at San Francisco, California, this 23<sup>rd</sup> day of August 2002.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Stephanie Krapf", written over a horizontal line.

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