

MEMORANDUM

July 17, 1998

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RECORDS AND  
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *BK  
NCB*

RE: DOCKET NO. 951232-TI - DADE COUNTY CIRCUIT COURT REFERRAL OF CERTAIN ISSUES IN CASE NO. 92-11654 (TRANSCALL AMERICA, INC. D/B/A ATC LONG DISTANCE VS. TELECOMMUNICATIONS SERVICES, INC., AND TELECOMMUNICATIONS SERVICES, INC. VS. TRANSCALL AMERICA, INC. D/B/A ATC LONG DISTANCE) THAT ARE WITHIN THE COMMISSION'S JURISDICTION.

98-1003-700

Attached is an ORDER GRANTING MOTION TO STRIKE AND DENYING MOTION FOR FEES AND COSTS, to be issued in the above referenced docket. (Number of pages in order - 7)

BK/anr  
Attachment  
cc: Division of Communications  
I: 951232ms.bk

*pg. 1, 4, 5*

**MUST GO TODAY**

*4/0*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc., and Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission's jurisdiction.

DOCKET NO. 951232-TI  
ORDER NO. PSC-98-1003-PCO-TI  
ISSUED: July 23, 1998

ORDER GRANTING MOTION TO STRIKE  
AND DENYING MOTION FOR FEES AND COSTS

Transcall America, Inc., d/b/a ATC Long Distance (ATC) filed this complaint with the Dade County Circuit Court on May 21, 1992, against Telecommunications Services, Inc. (TSI) for alleged failure to pay for telecommunications services rendered. On July 5, 1994, TSI filed a counterclaim alleging breach of contract and improper billing of services. On February 24, 1995, the Court issued its Order Staying Action and Referring to the Florida Public Service Commission. Therein, the Court referred to this Commission for review all claims within the Commission's exclusive jurisdiction under Chapter 364. On January 29, 1997, TSI filed a Motion for Reconsideration of Order Staying Action and Referring to the Florida Public Service Commission and Motion for Leave to Amend Counterclaim with the Dade County Circuit Court. Transcall served its response to the motion on February 20, 1997, and the Commission served a response on April 18, 1997. On May 27, 1997, the Circuit Court issued its Order Denying Motion for Reconsideration and to Amend. This matter has, therefore, been set for hearing August 19 and 20, 1998. By Order No. PSC-98-0117-PCO-TI, issued January 21, 1998, I established the procedural dates for this docket. By Order No. PSC-98-0766-PCO-TI, issued June 3, 1998, I extended the dates for filing testimony and prehearing statements.

On June 25, 1998, TSI filed transcripts from the depositions of Jerry Bir, Mary Jo Daurio, Joseph Holop, Rudolph McGlashan, David Resposo, Dennis Sickie, Joseph Signorelli, and Brian Sulmonetti as its prefiled direct testimony. On July 1, 1998, Transcall filed a Motion to Strike TSI's Proposed Prefiled Direct Testimony. On July 13, 1998, TSI filed its Response to Transcall's

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FPSC-RECORDS/REPORTING

Motion to Strike, along with a Motion for Fees and Costs incurred in responding to Transcall's Motion to Strike. On July 15, 1998, Transcall filed its Response to TSI's Request for Attorney's Fees. My determination on this matter is set forth below.

Transcall

In its Motion, Transcall asserts that TSI's filing of deposition transcripts as prefiled direct testimony violates Commission rulings, and Rules 1.150 and 1.140(f), Florida Rules of Civil Procedure. Transcall argues that deposition transcripts are not prefiled testimony. Transcall notes that some of the deposition transcripts submitted by TSI are several years old and have been filed without the consent of the particular individuals. Transcall argues that this is unfair both to the individuals whose deposition transcripts have been submitted, but also to Transcall, because it will not have an opportunity to cross-examine these witnesses at the hearing.

Transcall also argues that the deposition transcripts are lengthy and include information that is irrelevant to the issues in this case. Citing Pentecostal Holiness Church, Inc. v. Mauney, 270 So. 2d 762 (Fla. 4th DCA 1972), Transcall states that the deposition transcripts should not be considered in this proceeding, because they have been improperly submitted and are in violation of Commission orders. Transcall adds that TSI has not sought a stipulation of any portions of the transcripts that may be relevant to this case.

Finally, Transcall asserts that it believes that each of the witnesses lives in Florida. Transcall also asserts that several are Transcall employees. Thus, Transcall argues that TSI should have sought to subpoena these witnesses to appear at the hearing, instead of submitting their deposition transcripts as testimony. Transcall further argues that TSI has not indicated that any of these witnesses are unable to appear.

Regarding TSI's request for attorneys' fees and costs, Transcall argues that its Motion to Strike is not frivolous, because it is based upon the law and upon TSI's mischaracterization of the deposition transcripts as testimony. Transcall also argues that it does not seek to strike pleadings; thus, its Motion need not be verified. For these reasons, Transcall states that TSI's request for fees and costs be denied.

TSI

In its response, TSI argues that Transcall has not verified the facts in its motion, has provided no supporting affidavits to show that TSI's prefiled testimony is a "sham pleading," and has failed to set forth any facts to support such a conclusion. TSI also argues that Transcall has erred in relying upon Rule 1.150, Florida Rules of Civil Procedure, in its Motion, because that rule applies to pleadings, not to proposed evidence. Even so, TSI further argues that Transcall has not identified the portions of the prefiled testimony that are redundant or irrelevant under the rule. Thus, argues TSI, it is impossible to adequately address Transcall's Motion. Citing Atlanta & St. A.B. Ry. Co. V. Kelly, 82 So. 57, 59 (Fla. 1919), TSI asserts that a party must specify what parts of the testimony are objectionable.

TSI also argues that the deposition transcripts are evidence that is clearly admissible in civil trial in Florida in accordance with Rule 25-22.048(3), Florida Administrative Code, and Section 90.803(18)(d), Florida Statutes. TSI states that these transcripts are exceptions to the hearsay rule, and, therefore, they are admissible even if the witnesses are available. TSI adds that Transcall has provided no law or precedent to the contrary.

In addition, TSI argues that it had no option other than to prefile the deposition transcripts as its prefiled direct testimony. TSI asserts that while it could call these witnesses to appear at the hearing, it could not compel the witnesses to prepare testimony on TSI's behalf. Thus, TSI states that it filed the transcripts in order to comply with the filing dates in the Order Establishing Procedure.

Furthermore, TSI states that, with the assistance of staff counsel, TSI sought to enter a stipulation with Transcall whereby the deposition transcripts could be filed as exhibits. TSI states that Transcall refused.

For these reasons, TSI asks that the motion to strike be denied and that TSI be awarded its attorneys' fees and costs for defending this motion.

Determination

In accordance with Commission policy and Rule 25-22.048(4)(a), Florida Administrative Code, I required each party to prefile, in writing, the testimony that it intends to sponsor. The purpose of requiring prefiled testimony is to ensure the case will be presented in an organized manner and to eliminate the use of surprise as a tactic in the hearing. By Order No. PSC-98-0117-PCO-TI, issued January 21, 1998, I established a schedule for the filing of testimony, as well as other procedural dates in this Docket. By Order No. PSC-98-0766-PCO-TI, issued June 3, 1998, I modified the filing dates for testimony and prehearing statements.

It appears that TSI prefiled the deposition transcripts of these witnesses in order to comply with the required filing dates. Deposition transcripts are not, however, properly submitted as prefiled testimony, although they may be properly submitted for some purposes and under certain circumstances at hearing. In order to be admissible at a hearing, a deposition must be submitted in accordance with Rule 1.330, Florida Rules of Civil Procedure.

Rule 1.330(a), Florida Rules of Civil Procedure, states that all or part of a deposition may be used against a party that was at the deposition or had notice of the deposition, as long as the transcript is admissible under the laws of evidence and one of the following situations applies:

1. Deponent is an adverse party;
2. Deponent was, at the time of the deposition, an officer, director, managing agent, or person delegated to respond for an organization that is an adverse party;
3. Deponent is dead;
4. Deponent is more than 100 miles from the place of the hearing;
5. Deponent is out of state;
6. Deponent is unable to attend, because of age, infirmity, illness, or imprisonment;
7. Appearance of deponent cannot be obtained by subpoena;
8. Deposition is being used to impeach the deponent/witness in accordance with the rules on impeaching witnesses;
9. Exceptional circumstances require use of the deposition; or
10. Deponent is an expert or skilled witness.

See also Trawick's Florida Practice and Procedure, § 22-8, pages 334-335 (Harrison 1991).

Due to the specific requirements applicable to the use of deposition transcripts at hearing, it is appropriate that deposition transcripts be submitted and used in strict conformity with those requirements. TSI has not demonstrated that the deposition transcripts that it has submitted are submitted in accordance with Rule 1.330, Florida Rules of Civil Procedure. I note that at least one deponent has prefiled testimony for Transcall and will be scheduled to appear at the hearing. Thus, the deposition transcripts of Jerry Bir, Mary Jo Daurio, Joseph Holop, Rudolph McGlashan, David Resposo, Dennis Sickie, Joseph Signorelli, and Brian Sulmonetti, filed by TSI shall not be considered as prefiled direct testimony for TSI, nor shall TSI present these transcripts at the hearing as such.

Nevertheless, as set forth in Rule 1.330, Florida Rules of Civil Procedure, deposition transcripts are admissible at hearing under certain circumstances. I emphasize, therefore, that I am not precluding TSI from presenting any of these deposition transcripts at hearing in accordance with the applicable rule. I shall, however, require TSI to indicate in its prehearing statement which deposition transcripts it intends to use at the hearing, as well as the basis in Rule 1.330, Florida Rules of Civil Procedure, for its use. This will ensure that the Prehearing Order accurately reflects as much of the testimony and evidence that will be presented at the hearing as possible.

In addition, I do not consider TSI's filing of deposition transcripts to be a sham pleading under Rule 1.150, Florida Rules of Civil Procedure, nor do I believe that Rule 1.140, Florida Rules of Civil Procedure, is applicable. Therefore, I emphasize that I am granting Transcall's Motion to Strike only to the extent that the deposition transcripts filed by TSI are not properly submitted as prefiled testimony. While I have determined that the transcripts filed by TSI have not been properly submitted, I make no determination on their propriety if submitted for other purposes in accordance with Rule 1.330, Florida Rules of Civil Procedure.

Furthermore, I shall not award fees and costs to TSI for defending against Transcall's Motion. In view of the specific requirements applicable to the use of depositions in proceedings, I do not believe that Transcall's Motion is frivolous.

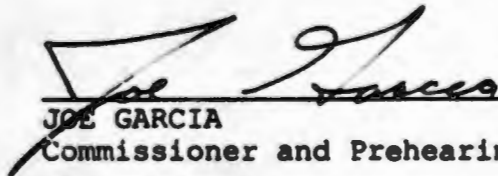
ORDER NO. **PSC-98-1003-PCO-TI**  
DOCKET NO. 951232-TI  
PAGE 6

Based on the foregoing, it is therefore

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that the Motion to Strike filed by Transcall America, Inc., d/b/a ATC Lor., Distance is granted to the extent set forth in the body of this Order. It is further

ORDERED that Telecommunications Services, Inc. shall indicate in its Prehearing Statement what, if any, deposition transcripts it intends to submit as evidence at the hearing, and the basis for such.

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 23rd Day of July, 1998.

  
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JOE GARCIA  
Commissioner and Prehearing Officer

( S E A L )

BK

**NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW**

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

ORDER NO. PSC-98-1003-PCO-TI  
DOCKET NO. 951232-TI  
PAGE 7

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.