

MEMORANDUM

August 7, 1998

RECORDS AND
REPORTING

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RECEIVED-FPSC

TO: DIVISION OF RECORDS AND REPORTING

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

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.

98-1058-PCO

Attached is an ORDER DENYING SECOND MOTION TO COMPEL, to be issued in the above referenced docket. (Number of pages in order - 6)

BK/anr
Attachment
cc: Division of Communications
I: 951232c2.bk

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8/7/98.*

MUST GO TODAY

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-98-1058-PCO-TI
ISSUED: August 7, 1998

ORDER DENYING SECOND MOTION TO COMPEL

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.

On June 15, 1998, TSI filed a Motion to Compel Production of Raw Call Detail Records. By its Motion, TSI sought an order compelling Transcall to produce all raw call detail records from the switch handling TSI's traffic. TSI asserted that Transcall had located magnetic tapes of raw call detail records (CDR tapes), and had provided this information to Commission staff, but not to TSI. TSI further asserted that data from the tapes had been used by the Commission staff in compiling the audit report that is now an exhibit to staff witness Welch's testimony. Thus, TSI asked that the tapes and the staff audit workpapers be produced, because they

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

ORDER NO. PSC-98-1058-PCO-TI
DOCKET NO. 951232-TI
PAGE 2

contain information relevant to TSI's case. In its response, Transcall argued that the information that TSI sought is confidential information, the disclosure of which is prohibited by Section 364.24, Florida Statutes.

By Order No. PSC-98-0954-PCO-TI, issued July 15, 1998, I granted, in part, and denied, in part, TSI's Motion to Compel. I determined that the CDR tapes are exempt from the public records presumption by Section 119.07(3)(r), Florida Statutes, in accordance with Section 364.24, Florida Statutes. I also found that the information on the tapes regarding TSI's customers is relevant to the issues in this proceeding and subject to discovery. As for the information on the tapes regarding other customers, I found that such information is not relevant to this proceeding, nor is it likely to lead to the discovery of relevant, admissible evidence. Therefore, I did not require that the entire CDR tapes be produced. I required only that the information pertaining to TSI's customers that had been extracted by Commission staff be produced to TSI.

On July 23, 1998, TSI filed a Second Motion to Compel Production of Raw Call Detail Records. On July 27, 1998, Transcall filed its Response to TSI's Second Motion to Compel.

In its second motion, TSI argues that Order No. PSC-98-0954-PCO-TI required Transcall to either produce all of the TSI customer information on all of the CDR tapes available or to produce the tapes themselves. TSI asserts that Commission staff only reviewed 5 CDR tapes and provided only the information obtained from those tapes to TSI. TSI argues, however, that there are 517 CDR tapes. TSI asserts that there is TSI customer information on all of these tapes, and that Transcall should be required to provide this information. Citing Donaldson v. Pillsbury Co., 554 F.2d 825, 832, (8th Cir. 1976), TSI further asserts that this information should be produced so that it can be analyzed by computer.

In its response, Transcall argues that TSI's motion is improper, because TSI is attempting to get information that it was unable to obtain by Order No. PSC-98-0954-PCO-TI. Transcall further argues that it was not required to produce additional information by Order No. PSC-98-0954-PCO-TI. Transcall asserts that Order No. PSC-98-0954-PCO-TI only directed Commission staff to produce the TSI customer information that had been extracted from the CDR tapes. In addition, Transcall argues that TSI wants Transcall to produce information that has not been maintained, is

not a business record, and that is not currently a record that exists. Transcall asserts that this request is beyond the scope of discovery. Transcall adds that it will allow TSI to review the CDR tapes, if TSI will agree that only TSI's counsel or an independent third party will have access to the tapes. Transcall states that TSI has refused to agree to these terms.

I shall address the arguments presented by the parties to clarify my prior ruling and to address the additional arguments presented in TSI's second motion. Upon consideration, TSI's Second Motion to Compel is denied. In accordance with Rules 1.280 and 1.350, Florida Rules of Civil Procedure, the scope of discovery does not include the discovery of irrelevant information. See Travelers Indemnity Company v. Salido, 354 So. 2d 963(Fla. 3rd DCA 1978). Furthermore, Rule 1.350, Florida Rules of Civil Procedure, requires that the party from whom production is sought must have possession, custody or control of the documents. See also Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991). It is not proper to seek production of documents that do not exist and would, therefore, require preparation. See Bissell Bros. v. Fares, 611 So. 2d 620(Fla. 2nd DCA 1993) (discovery of nonexistent records cannot be had); Balzebre v. Anderson, 294 So. 2d 701(Fla. 3rd DCA 1974) (" . . . a party may not be required to produce documents which it does not have. . ."); and Henry P. Trawick, Florida Practice and Procedure, § 16-10, (1991).

In this case, I have not compelled production of all of the CDR tapes, because the tapes contain information that pertains to customers other than TSI's customers. That information is not only proprietary, confidential information, but it is also irrelevant to this case; thus, it is not subject to discovery. As such, I have required only that the TSI customer information which had already been extracted from the tapes be produced to TSI. Order No. PSC-98-0954-PCO-TI at p. 3. I shall not require Transcall to produce the CDR tapes to TSI, nor shall I require Transcall to provide TSI with a record or computer file of the customer information on all of the CDR tapes. Information beyond that which was produced in response to Order No. PSC-98-0954-PCO-TI has not been extracted from the tapes. I shall not require Transcall to prepare a record or computer file that does not currently exist.¹ I note that

¹Donaldson v. Pillsbury Co., 554 F.2d 825, 832, (8th Cir. 1976), cited by TSI, may be distinguished from this case. In Donaldson, the court referred to cases in which information in

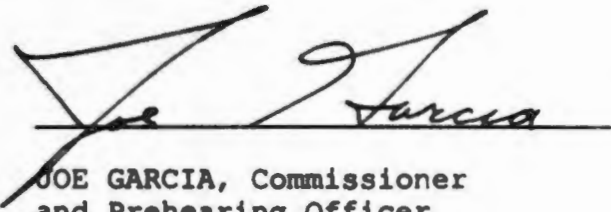
ORDER NO. PSC-98-1058-PCO-TI
DOCKET NO. 951232-TI
PAGE 4

Transcall has agreed to make the CDR tapes available to TSI's counsel or an independent third party under a protective agreement. In view of the information on the tapes, this restriction appears reasonable.

It is, therefore

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that the Second Motion to Compel Production of Raw Call Detail Records filed by Telecommunication Services, Inc., is denied. It is further

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 7th Day of August, 1998.



JOE GARCIA, Commissioner
and Prehearing Officer

(S E A L)

BK

computer-readable form had been compelled, although hard-copy readouts had previously been provided. In this case, the information requested has not been compiled in any form. Furthermore, I note that the court in Donaldson did not require that the information requested in that case be compiled in computer-readable form, as was suggested by TSI in its motion. See Donaldson v. Pillsbury Co., 554 F.2d at 832 (" . . . we need not decide whether the Court abused its discretion in refusing discovery of material in Pillsbury's data base in computer-readable form.")

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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.