

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Dade County Circuit) DOCKET NO. 951270-TI
Court referral of certain issues) ORDER NO. PSC-96-0714-PCO-TI
in Case No. 94-14234-CA-22 (S.H.) ISSUED: May 28, 1996
Dohan & Company, P.A. vs.)
Transcall America, Inc. d/b/a)
ATC Long Distance) that are)
within the Commission's)
jurisdiction.)
_____)

ORDER DISPOSING OF MOTION FOR PROTECTIVE ORDER

On May 15, 1996, Transcall America, Inc., d/b/a ATC Long Distance and LDDS WorldCom, Inc., (hereinafter Defendants) filed a Motion for Protective Order pursuant to Rules 25-22.034 and 25-22.037, Florida Administrative Code and Rule 1.280(c), Florida Rules of Civil Procedure. Defendants seek entry of a Protective Order governing the taking of the deposition of a former employee, Dan Merritt (hereinafter Deponent).

In essence, Defendants allege that during his employment, Deponent came to possess certain confidential and privileged information. Defendants allege that Deponent is currently in litigation against LDDS concerning severance benefits "allegedly withheld" at the termination of his employment. Defendants allege that Plaintiffs' counsel will seek to elicit information from the Deponent which is protected from discovery by the attorney-client or the work-product privilege. Given that the Deponent is currently litigating against his former employer, Defendants argue that his attitude toward them should be considered "adversarial and hostile."

While Defendants state that the Deponent is their witness for purposes of asserting the attorney-client and work-product privileges, they allege "we cannot be certain that instructions given or objections made will be followed by the Deponent. Consequently, disclosure of information protected by the attorney-client and work-product privileges may occur in spite of our efforts to properly invoke such privileges." For this reason, Defendants seek entry of a protective order which directs that the deposition of Deponent be had only upon written questions as provided by Rule 1.320, Florida Rules of Civil Procedure. Alternatively, Defendants request entry of an Order that:

the deposition be restricted in that certain matters not be inquired into, particularly matters involving the attorney-client and work product privileges. In addition, with respect to non-privileged matters but matters which are asserted to be confidential and proprietary business information, Transcall and LDDS request a protective order to preclude the public disclosure of such information pending a specific request and ruling on such matters.

DOCUMENT NUMBER DATE

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FPSC-RECORDS/REPORTING

On May 20, 1996, Class counsel, on behalf of the Plaintiffs, transmitted by facsimile its Response to Motion for Protective Order. This agency's rules do not contemplate facsimile filings; however, due to the emergency nature of Defendants' request, this order considers the arguments of Plaintiffs made in the facsimile transmittal. A hard copy of the response shall be filed immediately. It is Plaintiffs' position that the Deponent has information relevant to prove factual matters at issue in this proceeding. Plaintiffs allege that Defendants have failed to demonstrate that the witness's information is protected from disclosure by either privilege.

I agree with Plaintiffs' argument that Defendants' motion is premature and too restrictive. However, considering that the Deponent may be an adverse and hostile witness, Defendants' concern regarding the protection of privileged or confidential information is not unwarranted. Having weighed the balance of liberal discovery against protecting privileged or confidential material, I deny Defendants' request for deposition on written questions as too restrictive of the discovery process in this instance. I also deny that portion of the motion seeking to protect certain matters from inquiry as premature.

In order to insure the protection of any privileged information, the Deponent shall refrain from answering any question until counsel for Defendants have a reasonable opportunity to assert any objection. Upon request of Defendants, the deposition transcript shall be reviewed in camera and, if necessary, redacted. In addition, should any information be divulged which Defendants believe to be confidential, Defendants may seek protection pursuant to Rule 25-22.006(5), Florida Administrative Code.

As public citizens with a special responsibility for the quality of justice, counsel for all parties to this proceeding should exercise their best efforts to assure the Plaintiffs' right to obtain discovery and Defendants' right to exclude from discovery privileged matters.

Based on the foregoing, it is


ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that Transcall and LDDS's Motion for Protective Order is denied. It is further

ORDERED that Mr. Dan Merritt shall refrain from answering any question until counsel for Transcall and LDDS have a reasonable opportunity to assert any objection. It is further

ORDERED that, upon request of Defendants, the deposition transcript shall be subject to in camera review and, if necessary, redaction.

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By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 28th day of May, 1996.


DIANE K. KIESLING, Commissioner and
Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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.