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 v. 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

MOTION FOR PROTECTIVE ORDER

Transcall America d/b/a ATC Long Distance (Transcall), pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, and Rules 25-22.034 and 25-22.037, Florida Administrative Code, seeks entry of a Protective Order, preventing the taking of the deposition of Floyd R. Self, Esq., and as grounds therefor would show:

1. Counsel for TSI has issued a Notice of Deposition, stating TSI's intention to take Mr. Floyd R. Self's deposition on June 1, 1998.

2. Mr. Self is outside counsel for Transcall for purposes of this docket, and a member of the undersigned law firm that is counsel of record for Transcall this docket.

3. Transcall seeks entry of a protective order preventing the taking of Mr. Self's deposition on the grounds that TSI's stated purpose for taking the deposition, i.e., to discover his knowledge of an internal investigation conducted by the company, would necessarily require that Mr. Self disclose information that is protected by the work-product doctrine and the attorney-client privilege.

4. Mr. Self's sole participation in this case has been as an attorney acting on behalf of Transcall. Mr. Self has never been an employee of any party to this proceeding. His participation as an advocate in this case began after the events alleged in the pleadings. Mr. Self is not a fact witness to any of the events alleged to have occurred between the parties or to the internal investigation conducted by the company.

5. *Shelton v. American Motors Corp*, 805 F.2d 1323 (8th Cir. 1986), dealt with a strict liability claim against an automobile manufacturer for a product defect. The *Shelton* plaintiff sought to depose corporate in-house counsel for the automobile manufacturer. The plaintiff wanted corporate counsel to testify as to whether the manufacturer possessed documents showing the results of rollover tests and accidents involving similar vehicles.

6. The corporate in-house counsel for the automobile manufacturer had selected and reviewed such documents during the course of preparing her defense for the specific case in which she was called to testify. The Court of Appeals held that in order to respond to the question of what she knew about the tests, the attorney would have to disclose her mental process of choosing certain documents from the mass of company documents. Therefore, the court ruled that the deposition of counsel would not be permitted.

7. The *Shelton* court held that where the deponent is opposing counsel and that counsel has engaged in the selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product.

8. Moreover, the *Shelton* court viewed the "increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances. . . . [T]he 'chilling effect' that such practice will have on the truthful communications from the client to the attorney is obvious." 850 F.2d *at* 1327.

9. Dealing with a scenario that is directly on point to the current situation before this tribunal, the *Shelton* court stated "in house counsel in this case had nothing to do with this law suit except to represent her client." 805 F.2d *at* 1330.

10. The *Shelton* court further opined that:

> Undoubtedly, counsel's task in preparing for trial would be much easier if he could dispense with interrogatories, document requests, and depositions of lay persons, and simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy. The practice of forcing trial counsel to testify as a witness, however, has long been discouraged, *see Hickman v. Taylor*, 329 U.S. 495, 513, 67 S.Ct. 385, 394 (1947) . . . (Jackson, J., concurring)(Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.)

Id. at 1327. The court concluded that counsel's testimony would be "tantamount to requiring her to reveal her legal theories and opinions concerning that issue." *Id.* at 1328.

11. *Shelton* has been cited with approval by at least one Florida court. *Smith v. Florida Power & Light*, 632 So.2d 696 (Fla. 4th DCA 1994)(holding that process of selecting documents that are relevant to a case is protected as opinion work product).

12. In *Southern Bell v. Deason*, 632 So.2d 1377 (Fla. 1994), the Supreme Court of Florida reiterated the standards for applying the work product doctrine and the attorney-client privilege in Florida. The *Deason* case provides a definitive recitation of the legal status of these privileges enjoy. *Deason* however, did not address the propriety of taking deposition testimony from opposing counsel.

13. *Deason* goes on to tell us that in some instances of "undue hardship," production of "fact work product" is justifiable. Nevertheless, the Court further held: "Whereas fact work product is subject to discovery upon a showing of 'need' or 'undue hardship,' opinion work product generally remains protected from disclosure." 632 *at* 1384 (*citing Upjohn Co. v. United States*, 449 U.S. 383 (1981).

14. Using language similar to that used in *Shelton*, the *Deason* Court noted that:

> . . . one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.

632 So.2d, at 1384 (*citing Dodson v. Persell*, 390 So.2d 704, 708 (Fla. 1980).

15. Transcall believes from prior correspondence and discussions with TSI's counsel that TSI will contend that it will suffer "undue hardship" without Mr. Self's deposition. This is nothing more than a red herring. This position is meritless not only because there is no "undue hardship," but also because Mr. Self's testimony would consist only of "opinion work product" and communications protected by the attorney-client privilege. The "undue hardship" standard is a factor when trying to discover "fact" work product, but undue hardship is irrelevant when trying to discover "opinion" work product and communications protected by the attorney-client privilege.

16. Because counsel for TSI has access to the same information and to the same witnesses that Transcall has, there is no reason for deposing Mr. Self, other than to seek his conclusions or mental impressions of certain information.

17. To the extent that TSI seeks information that Mr. Self obtained from interviewing corporate employees after the fact, such information is also protected by the attorney-client privilege.

18. *Deason* held that statements made in interviews by Southern Bell employees to Southern Bell's counsel, were subject to the attorney-client privilege. Moreover, even the summaries of such interviews were protected as work product. 632 So.2d *at* 1384.

19. The United States Supreme Court reached the same conclusion in *Upjohn Co. v United States*, 449 U.S. 383 (1981). In *Upjohn*, Upjohn's general counsel had conducted an internal investigation of questionable payments to foreign officials. The IRS later tried to obtain the questionnaires, memoranda and notes of the interviews conducted by the attorney. The Supreme Court held, however, that the attorney-client privilege protected the employees' communications from disclosure.

20. Based on the foregoing authorities, counsel for TSI has no right to discover the mental impressions of Mr. Self or any information that Mr. Self may have obtained from interviews with his client's employees.

21. Counsel for TSI has the ability to depose other witnesses that have been disclosed and whose names have surfaced in discovery regarding this same information, the pursuit of which might also lead to the identification of additional witnesses.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by facsimile and by regular U.S. mail to: Wesley R. Parsons, Esq., Adorno & Zeder, P.A., 2601 South

Bayshore Dr., Ste. 1600, Miami, Florida, 33133, and Beth Keating, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850, this 22nd day of May, 1998.

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