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July 10, 1998

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Via Federal Express

Ms. Blanca Bayó, Director
Public Service Commission
Division of Records and Reporting
Room 110, Easley Building
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

ATC v. TSI
Docket No.: 951232-TI

Dear Ms. Bayó:

Enclosed for filing with the Public Service Commission are an original and fifteen copies of TSI's Response to Transcall's Motion to Strike Prefiled Testimony and Motion for Fees and Costs.

Also enclosed is an additional copy to be stamped filed and returned to us in the enclosed self-addressed stamped envelope.

Sincerely,



Juan C. Antúnez

ACK _____
AFA 4
APP _____
CAF _____ ICA:lrđ
CMU _____ Enclosures
CTR _____
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BEFORE THE STAFF OF THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 951232-T1
FILED: October 17, 1995

In Re: Dade County Circuit Court referral of)
certain issues in Case No. 92-11654 CA 11)
(Transcall America, Inc. vs. Telecommunications)
Services, Inc. and Telecommunications Services,)
Inc. vs. Transcall America, Inc. and Advanced)
Telecommunications Corp.) that are within the)
Commission's jurisdiction.)
_____)

**TSI'S RESPONSE TO TRANSCALL'S MOTION TO STRIKE
PREFILED TESTIMONY AND MOTION FOR FEES AND COSTS**

Defendant, Telecommunication Services, Inc. ("TSI"), files this (1) response to the motion of Plaintiff, Transcall America, Inc. ("Transcall"), to strike the prefiled direct testimony (collectively, the "Prefiled Testimony") of Jerry Bir, Mary Jo Daurio, Joseph Holop, Ruddy McGlashan, David Resposo, Dennis Sickle, Joseph Signorelli and Brian Sulmonetti (collectively, the "Employees") and (2) motion for fees and costs. The motion should be denied because:

1. Transcall filed its motion to strike on or about July 1, 1998. Citing Rules 1.150 and 1.140(f), Florida Rules of Civil Procedure, and Rule 25-22.035(3), Florida Administrative Code, Transcall seeks to strike the Prefiled Testimony on the purported grounds that such prefiled testimony is redundant, immaterial, impertinent and unauthorized in its form.
2. The motion filed by Transcall is frivolous, contrary to binding precedent, unsupported by the facts or the law and should be denied. Moreover, TSI should be awarded its costs and attorneys' fees incurred in defending the motion filed by Transcall.

3. Rule 1.150, Florida Rules of Civil Procedure, provides, in part:

(b) Contents of Motion. The motion to strike shall be verified and shall set forth fully the facts on which the movant relies and may be supported by affidavit.

Rule 1.150(b), Fla.R.Civ.P.

4. The motion filed by Transcall is not verified and sets forth no facts supporting a characterization of the Prefiled Testimony as a "sham". Although not relied on for this purpose, the one and only case cited by Transcall in its motion defines sham pleadings as pleadings that are "inherently false and must have been known by the interposing party to be untrue." Pentecostal Holiness Church, Inc. v. Mauney, 270 So. 2d 762, 769 (Fla. 4th DCA 1973). In addition to failing to recognize that the Prefiled Testimony is not a "pleading", Transcall's motion fails to set forth any facts supporting a conclusion that the Prefiled Testimony, consisting entirely of the testimony of Transcall's own current and former employees, is both inherently false and known by the Employees and TSI to be untrue.

5. Pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, Transcall also moves to strike the Prefiled Testimony on the ground that the testimony is redundant, immaterial and impertinent. Here again Transcall incorrectly relies on a rule of civil procedure intended to address "pleadings" -- not proposed evidence. More importantly, however, Transcall fails to state which "discussions" contained in the Prefiled Testimony are redundant, immaterial and impertinent, thereby depriving TSI and the Commission of any basis upon which to address Transcall's blanket generalizations. See Transcall Motion ¶ 4. The law in Florida is clear that where a party objects to the admission of testimony, the party should designate which part of the testimony is objectionable. See Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 59 (Fla. 1919).

6. As the non-moving party, TSI does not have the burden of demonstrating admissibility, however, the fact is that the Prefiled Testimony is clearly admissible under the broad rubric of Rule 25-22.048(3), Florida Administrative Code, as "relevant evidence . . . which is normally admissible in civil trials in Florida." Fla. Admin. Cod. R. 25-22.048(3). Pursuant to Section 90.803(18)(d), Florida Statutes, the Prefiled Testimony is admissible as an exception to the hearsay rule, even if the declarants are available, because it consists of statements made by Transcall's current and former employees concerning matters within the scope of their employment during the existence of their employment by Transcall. See § 90.803(18)(d), Fla. Stat. (1997); Azar v. Richardson Greenshields Sec., 528 So. 2d 1266, 1270 (Fla. 2d DCA 1988). Transcall's assertion that admitting this evidence "is misleading and unfair to [the Employees]" (see Transcall Motion ¶ 3) flies in the face of basic Florida evidentiary law and the express provisions of Rule 25-22.048(3), Florida Administrative Code.

7. Transcall provides absolutely no binding law or precedent to support its assertion that deposition transcripts may not be submitted as prefiled testimony. Moreover, no such stricture is included in the Order Establishing Procedure filed in these proceedings (the "Order"). In support of its argument Transcall does cite to the transcript of a status conference in an unrelated case, but fails to explain why these alleged conference discussions would have any bearing on these proceedings or even provide a copy of the allegedly supporting transcript. See Transcall Motion ¶

8. Transcall also attempts to exclude the Prefiled Testimony by blatantly misconstruing the Order. The Order simply states that each party must prefile, in writing, all testimony that it intends to sponsor in accordance with Rule 25-22.048, Florida Administrative Code. The Prefiled Testimony complies with this requirement. TSI, as noted in its notice of filing, is filing this testimony

as the adverse testimony of Transcall employees.

9. Additionally, TSI had no choice but to submit the Prefiled Testimony in the form of deposition transcripts. See Order at 2. While TSI did have the authority to subpoena the Employees, it does not have the authority to require the Employees to cooperate in the preparation of prefiled testimony. Accordingly, TSI has no choice, in order to comply with the Order, it must prefile the deposition transcripts of the Employees' testimony.

10. Moreover, TSI, through PSC counsel, attempted to enter into a stipulation with Transcall providing for the filing of deposition transcripts as exhibits, but Transcall refused. The Prefiled Testimony contains damaging evidence that Transcall wants to exclude from the record on whatever grounds it can.

11. Based on the foregoing, it is apparent that the motion to strike filed by Transcall should be denied. It is equally apparent that the motion was filed with absolutely no basis in law or fact. In short, the motion is frivolous. TSI's undersigned counsel has been required to expend considerable time and resources preparing this response to Transcall's motion. Accordingly, TSI requests that the Commission award TSI its attorneys' fees and costs incurred in defending the motion to strike filed by Transcall.

ADORNO & ZEDER, P.A.



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Attorneys for Defendant/Counter-Plaintiff/
Third Party Plaintiff, Telecommunications
Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and telefaxed this 10 day of July, 1998 to:

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