

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 951232-TI

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 MEMORANDUM OF LAW IN OPPOSITION TO
TRANSCALL'S RENEWED MOTION FOR SANCTIONS**

Defendant, Telecommunication Services, Inc. ("TSI"), pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, files this memorandum in opposition to the renewed Motion of Plaintiff, Transcall America, Inc. ("Transcall"), for Sanctions for Failure to Comply with Discovery Orders.

1. Transcall's motion for sanctions pursuant to Rule 1.380, Florida Rules of Civil Procedure, should be denied on several grounds. First, Transcall has failed to demonstrate that it has been prejudiced in any way. Second, contrary to Transcall's assertions, TSI has in fact produced substantial documentary evidence in support of its claims and allegations. Third, TSI has consistently acted in good faith, and the record is devoid of any evidence indicating a willful or flagrant disregard of the Commission's authority by TSI. However, if, regardless of the foregoing, the Commission still determines that sanctions may be warranted, an evidentiary hearing should be held prior to the imposition of any sanctions affording TSI the opportunity present evidence of explanation or mitigation.

DOCUMENT NUMBER-DATE

~~XXXXXXXXXX~~ JUL 28 8

2. First, TSI was out of compliance with the Commission's Order for only two business days (July 17 and July 20). Even for these two days TSI submitted a motion for enlargement of time that has not yet been ruled upon. It is difficult to credit that Transcall has been prejudiced by this short delay in responding to burdensome discovery the Commission itself has characterized as "substantial". See PSC Order No. 98-0766 at 4. Contrary to Transcall's assertions, counsel for TSI certainly does not "understand" why Transcall feels it will be unable to depose TSI's accountants or its principal, Joel Esquenazi, if it is not immediately provided with TSI's supplemented answers to interrogatories. See Transcall Motion ¶ 8. These depositions have been noticed by Transcall for August 7, 1998. In fact, the hundreds of pages of documentary evidence provided by TSI and its experts have already provided Transcall with all the information it needs to properly depose TSI's accountants and Mr. Esquenazi. Additionally, Transcall's self-serving statement concerning the "day when TSI must pay its debt to Transcall" (see Transcall Motion ¶ 8) also fails to demonstrate why the short delay substantially prejudiced Transcall. Given Transcall's failure to articulate how it has been prejudiced beyond vague and self-serving conclusory statements, sanctions are clearly not warranted. See Santuoso v. McGrath & Assoc., Inc., 385 So. 2d 112, 113 (Fla. 3d DCA 1990).

Most importantly, Transcall has made an appointment to review TSI's documents in Miami on July 28, 1998, thereby acknowledging through its actions the propriety of the terms on which TSI has made its compliance

3. Second, Transcall first attempts to argue that "TSI has failed and refused to produce documentary evidence in support of its claims and allegations." See Transcall Motion ¶ 7. The record of these proceedings do not support Transcall's allegations. TSI has in fact provided Transcall with hundreds of pages of documentary evidence supporting its claims in addition to a

report prepared by Lopez Levi & Associates, P.A., a C.P.A. firm, quantifying in detail the overbilling suffered by TSI. See Notice of Filing Direct Testimony, filed on June 23, 1998; Direct Testimony of William Shulman, Appearing on Behalf of TSI, filed on June 26, 1998. The documents reviewed by TSI's experts have also been made available to Transcall's counsel and accountant. The further discovery ordered by the Commission has been in the nature of reorganization of documents and information. In short, contrary to Transcall's assertions, it has been provided with a detailed statement of TSI's claims and the documentary evidence upon which they are based.

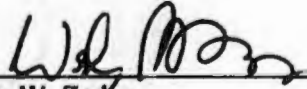
4. Third, TSI made a good faith effort to comply with interrogatory requests. As stated above, TSI has provided Transcall with voluminous documentary evidence as well as its experts' report detailing the basis for its claims against Transcall. Moreover, when TSI has concluded that it simply can not comply with a discovery deadline, it has always filed a timely response for enlargement rather than simply ignoring the deadline. Sanctions are not warranted where a party, like TSI, has made a good faith effort to comply with a discovery order in a timely fashion. See Herold v. Computer Components International, Inc., 252 So. 2d 576, 580 (Fla. 4th DCA 1971)

5. The record is devoid of any evidence indicating a willful or flagrant disregard of the Commission's authority by TSI. A trial court's order striking a party's pleadings is the most severe sanction and can be imposed only where there is "record evidence to support a trial court's finding of a willful or contumacious disregard of its orders." K & K World Enterprises, Inc. v. Union Spol. S.R.O., 692 So.2d 1000, 1001 (Fla. 3d DCA 1997), see also Aller v. Editorial Planeta, S.A., 389 So.2d 321 (Fla. 3d DCA 1980). Moreover, mere noncompliance with a court's orders, in the absence of evidence indicating a wilful and contumacious disregard of the Commission's authority, is not sufficient to evince wilfulness. See K & K World Enterprises, Inc., supra.

6. If, regardless of the foregoing, the Commission still concludes that sanctions may be warranted, TSI should not be sanctioned until a hearing on the merits of the failure is held, including an opportunity to present evidence of explanation or mitigation. See Lazare v. Weiss, 437 So. 2d 211, 212 (Fla. 3d DCA 1983).

Based on the foregoing, TSI respectfully requests that Transcall's motion for sanctions be denied.

ADORNO & ZEDER, P.A.



Jon W. Zeder
Florida Bar No. 98432
Wesley R. Parsons
Florida Bar No. 539414
2601 South Bayshore Drive, Suite 1600
Miami, Florida 33133
Telephone: (305) 858-5555
Telefax: (305) 858-4777

Attorneys for Defendant, Telecommunications
Services, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this

27 day of July, 1998 to:

Albert T. Gimbel
Messer, Caparello & Self, P A
215 South Monroe Street
Suite 701
Tallahassee, Florida 32302-1878
(and telefaxed)

Beth Keating
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32301

Kathy L. Welch, CPA
Regulatory Analyst Supervisor
Florida Public Service Commission
3625 N.W. 82nd Avenue, Suite 400
Miami, Florida 33166-7602

