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September 23, 1998

*Via Federal Express*  
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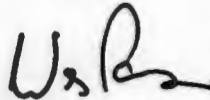
ATC v. TSI  
Docket No.: 951232-TI

Dear Ms. Bayó:

Enclosed for filing with the Public Service Commission are an original and fifteen copies of TSI's Post-Hearing Memorandum.

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

Sincerely,



Wesley R. Parsons

ACK \_\_\_\_\_  
AFA 2  
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DOCUMENT NUMBER-DATE

~~10574~~ SEP 24 98

FPSC-RECORDS/REPORTING

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 POST-HEARING MEMORANDUM**

Defendant, Telecommunication Services, Inc. ("TSI"), submits this post-hearing memorandum to the Florida Public Service Commission (the Commission). This matter is on referral to the Commission from the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida. TSI proposes that the Commission report to the Court the following amounts and calculation on the claims of TSI and Plaintiff, Transcall America, Inc. ("Transcall").

**Computation of Amount Owed by TSI**

Item	Amount	Source
Beginning Balance	\$677,048	Transcall Complaint
Credit for Checks Paid by TSI	(6,737)	Lopez Levi Report ["LLR"], Exhibit 16, Schedule II (Discussed in Staff Audit Disclosure ["AD"] No. 3)
Credit for Misbilling of 6 Seconds on Calls	(91,578)	LLR Schedule V (Discussed in AD No. 5)
Credit for Stuck Clock, Duplication & Overlapping Calls	(314,817)	LLR Schedule VI (Discussed in AD No. 6)
Credit for New Billing Format	(8,776)	AD No. 7
Credit for Nine Second Overbilling	(37,714)	AD No. 8

DOCUMENT NUMBER-DATE

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Credit for Time Point Overbilling	(111,521)	AD No. 9
Credit for 800 Calls	(3,539)	AD No. 11
Credit for Disconnected Calls	(150)	AD No. 13
Credit for Busy Signals, Long Ring, and Silence	<u>(47,557)</u>	AD No. 15
Total	\$54,669	

TSI suggests there are five principal areas of disagreement at the hearing.

**A. Billing Calls in Six Second Increments.**

The agreement between Telus and TSI required TSI to be billed in six-second increments, after the first minute. Nevertheless, it is undisputed that Transcall billed TSI in full minutes intervals. Transcall contends that the original arrangement was altered by way of an oral modification to the agreement, even though the agreement required that "amendments hereto must be made in writing and signed by both parties." The alleged modification was that TSI would receive a 40% discount in lieu of six-second billing. Transcall has failed to point to any written amendment to the contract providing that the 40% discounts superseded that six-second increment billing. Mary Jo Daurio, the account executive who testified for Transcall in support of the claimed amount due, had no personal knowledge of any arrangement between Transcall and TSI regarding Transcall's inability to do six-second increment billing. (Transcript of Hearing on August 19, 1998 ["Tr.,"] at 59-60).

Transcall's claim of modification is based solely on the testimony of Dennis Sickel. Although Mr. Sickel was the person at Transcall who originally brought Transcall and TSI together, he had little to do with the relationship thereafter. (Tr. at 298-99). Other individuals worked out the

specifics of the parties' deal. (Tr. at 153). Mr. Sickle did not execute the agreement on behalf of Telus or implement the billing system. (Tr. at 299). Despite his limited role in the parties' relationship, Mr. Sickle testified that he was responsible for modifying the agreement. Indeed, on cross-examination he claimed there was an amendment to the written agreement between TSI and Transcall, which he characterized as "important". But he could not identify the amendment, state where it could be found, or identify in whose possession it is. (Tr. at 293-97).

TSI submits that Transcall's attempt to alter the parties' agreement should be rejected and Transcall should be held to the parties' written agreement. First, TSI's principal, Joel Esquenazi, denied that the 40% discount was a substitute for the six-second increment billing. He complained constantly about the six-second problem, and was put off. (Exhibit 9, at 23-24, 114). He was entitled to both the 40% discount and six-second billing, which were inducements to TSI as part of Transcall's attempt to secure a foothold in the Hispanic market in South Florida. (Tr. at 168-73). In no way, shape, or form was it TSI's fault that Transcall could not live up to the provisions in the agreement calling for six-second increment billing. (Tr. at 58). Transcall was simply unable to bill six-second increments even though the switch was actually recording the data in a format which would allow for such billing. (Tr. at 58).

In is noteworthy that Ruddy McGlashan, the officer of Telus who actually negotiated and signed the agreement with TSI, could not recall any amendments to the agreement. (Exhibit 2, at 23) TSI suggests that the Commission credit Mr. Esquenazi's testimony and not credit Mr. Sickle's.

Second, the 40% discount was simply not a substitute for six-second billing. Since the amount of international billing was about \$900,000, a ten percent credit would be about \$90,000,

which is indeed the amount computed by Lopez Levi. Believing in the 40% discount would lead to a \$360,000 credit, which is clearly untenable. The Commission Staff Auditor, Ms. Kathy Welch, acknowledged that the appropriate credit for the lack of six-second billing would have been much nearer 10% for the international calls than 40%. (Tr. at 242). Transcall would have been grossly over-compensating TSI if the 40% discount were a substitute.

Third, the Commission should disregard Ms. Welch's audit report to the extent she failed to find sufficient evidence to make an adjustment in either parties' favor on the 6-second issue. Ms. Welch essentially readjusted the burden of proof between the parties to favor Transcall.<sup>1</sup> It is Transcall's burden to prove its case, and certainly Transcall's burden to prove up an oral modification to the parties agreement. If Ms. Welch is correct that evidence is lacking on this issue, then the finding must be against Transcall. Instead, Ms. Welch acknowledged in cross-examination that her finding of no adjustment was in fact a finding in favor of Transcall. (Tr. at 236). She had not seen evidence that TSI had "proven it was entitled to an adjustment for the six-second problem," (Tr. at 236) even though the original agreement called for billing in 6-second increments. (Tr. at 237-38).

Moreover, Ms. Welch also exceeded the scope of her audit duties by making a credibility determination: she believed Mr. Sickle and did not believe Mr. Esquenazi. (AD No. 5).<sup>2</sup> This is error. It is not Ms. Welch's job to be weigh the credibility of the witnesses; that duty is

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<sup>1</sup> Obviously, Transcall, as plaintiff, has the burden of proof to establish TSI owes it money. In re Ziy's Estate, 223 So.2d 42 (Fla. 1969).

<sup>2</sup> Ms. Welch's conclusion seems to mostly be based upon a letter Mr. Esquenazi wrote in which he mentioned a 40% discount. However, Ms. Welch acknowledged in cross-examination that the 40% mentioned in the letter was not the same as the 40% discount referred to by Mr. Sickle. (Tr. at 244). Indeed, the letter referred to requested adjustments that were not provided

relegated to the finder of fact, the Commission. (Indeed, Transcall's attorney stated "it's not her job to value the credibility of the witnesses or the testimony that has been heard." (Tr. at 240-241).) The danger of prematurely determining credibility before hearing live testimony is demonstrated in this proceeding, where Mr. Sickle had credibility problems in his cross-examination explaining the absence of the purported amendment to the parties' agreement. (Tr. at 293-97).

The amount to be credited to TSI's bill on the six-second issue is \$98,100. Ms. Welch testified that if an adjustment due to the lack six-second increment billing was appropriate, this amount was right. (Tr. 239-40). Enforcement of the parties' agreement compels this credit. The law is that the written agreement between the parties is presumptively enforceable. Fletcher v. Laguna Vista Corp., 275 So.2d 579, 580 (Fla. 1st DCA 1973) ("Once the parties have reduced their understanding to a written contract, their conduct is governed by the agreement and the contract is looked to in determining the rights and obligations of the parties."). A written contract may be modified by an oral agreement only if it "would work a fraud on either party to refuse to enforce it." Professional Insurance Corp. v. Cahill, 90 So.2d 916, 918 (Fla. 1956).

**B. Stuck Clocks, Duplicate Billings, and Overlapping Calls.**

Lopez Levi accountant credited TSI with \$314,817 for stuck clock, duplicate, and overlapping calls. Ms. Welch, however, concluded that no credit above those already provided TSI by Transcall at the time of their relationship was due.

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by Transcall. (Tr. at 244).

1. The Difference Between Ms. Welch and Lopez Levi.

There is no doubt that the Telus switch that handled TSI's traffic generated erroneous billings. Joseph Signorelli, a Transcall programmer, testified about errors at the switch that caused duplicate billings. (Exhibit 4, at 20-passim) Indeed, a computer program that attempted to eliminate some of the duplicates had to be written and executed. (Exhibit 4, at 20-30). Many errors were not caught. Even using Ms. Welch's methodology, there were clearly call's that can only be described as overlapping, and in fact, Ms. Welch provided credit for them. (Tr. at 256-57). She also found considerable duplicate calls. (Tr. 257-58). Ms. Welch characterize the duplicated amount between the September and December 1990 invoices as a "out and out error" (Tr. at 265) and noted other invoices where the amount on the invoice did not match the greenbar information, as it should have. (Tr. at 263).

The main difference between what Ms. Welch was willing to allow as credits and what Lopez Levi allowed, though, arose from their divergent treatment of billings that could be were not necessarily erroneous.<sup>3</sup> Simply put, where there was a theoretical possibility that two calls could be sequential rather than overlapping or duplicates, Ms. Welch and Transcall's expert Douglas Metcalf, gave the benefit of the doubt to Transcall. (Tr. at 247-54; 103-04) On the other hand, Lopez Levi gave the benefit of the doubt to TSI. (Tr. at 195-196).

2. Why Transcall Should Not Have the Benefit of the Doubt.

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<sup>3</sup> TSI also suggests that it had the benefit of superior data. While Lopez Levi utilized a sampling technique covering two months of billing and over 47,000 calls (Tr. at 205-06), Transcall did not perform any sort of statistical sampling technique (Tr. at 105), and Ms. Welch only analyzed a few days' worth of traffic sampling that was not provided to TSI in electronic form and thus was not subject to independent analysis. (Tr. at 225-26).

TSI's position is that, in this situation, where there is often not definitive evidence, the inference should be made against Transcall due to the pervasive and material mistakes in its billing:

- Mr. Shulman identified over \$300,000 in extension in beginning balance errors which, while they did not affect the total balance, demonstrated the unreliability of the billing system. (LLR Schedule VII; Tr. at 209).

- Transcall could not control its billing and allowed errors to slip into the system. (Tr. at 207-08). Transcall had problems with software, hardware, extension errors, and balances being brought forward. (Tr. at 208).

- The minutes listed on the greenbar summaries for two months were approximately 16% less than the calls listed on the invoices rendered to TSI. (Tr. at 212). The minutes in the detail for these months reflected similar discrepancies. (Tr. at 212). These errors were pervasive throughout international calls, day calls, evening calls, and night/weekend calls. (Tr. at 212).

- Ms. Daurio testified that TSI's account was properly handled when she was in charge of it, and when she left the account TSI was current. (Tr. at 50) She was unable to testify that TSI's account was properly handled when she was not in charge of it, and acknowledged that an account should not go well or poorly depending on the person that is handling the account, but rather on the merit of the account and the service provided. (Tr. at 56-57).

- Ms. Welch testified that she did not believe there were checks and balances over the calculation of TSI's invoices, and concluded that there was "very little internal control over that process. . . ." (Tr. at 266).



Ms. Welch disregarded the evidence of pervasive and material misbilling by Transcall, and imposed upon TSI the burden of proving conclusively that any apparent error--for example two apparently overlapping calls--could not even have a theoretical illegitimate explanation. For example, for the overlapping calls, Ms. Welch acknowledged the possibility that they could have been sequential and the possibility they could have been overlapping. (Tr. at 247). She declined to give credit because she put the burden on TSI to "prove" they were overlapping. In her own words "I don't believe there was any reason to indicate that they were overlapping," (Tr. at 247, ll. 13-14) and "I saw no evidence" that they were overlapping. (Tr. at 248). Ms. Welch "assumed [the overlapping calls] were sequential absent proof that they were at the same time." (Tr. at 249-50, ll. 24-25, 1-3). In another words, if it was mathematically possible that calls were sequential, Ms. Welch assumed they were sequential, despite there was also a possibility that they were overlapping. (Tr. at 253-54). Mr. Metcalf, also, acknowledged that there are entries that appeared to be true duplicate calls, but persisted in maintaining that there was a theoretical possibility they were not. (Tr. at 103-04).

On the subject of the stuck clocks, Mr. Metcalf acknowledged their existence in his testimony. (Tr. at 95). However, even when faced with a nine hour and forty minute phone call, Mr. Metcalf chose to believe in the theoretical possibility the call was legitimate, and was unwilling to call the call a stuck clock. (Tr. at 95-96).<sup>4</sup>

Ms. Welch's and Mr. Metcalf's conclusions should be rejected. They are untenable and distort and reverse the burden of proof on this case.

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<sup>4</sup> It is noteworthy that the average length of calls from TSI's customers was only 4.1 minutes. (Tr. 211).

3. **Other Points are Unavailing.**

TSI submits that other points made by Transcall do not undermine TSI's entitlement to a credit for overbilling. Mr. Metcalf claimed that a standard of 2% allowable error applied, but acknowledged that these standard appeared in TSI's and Telus's end-user tariffs, not in the parties' agreement, which governs their relationship. (Tr. at 92). However, he acknowledged that the 2% error standard did not reduce Transcall's liability. No matter what the size of the error, even if it were only a 1% error, the customer should receive credit if entitled. (Tr. at 117).

Mr. Metcalf also claimed that TSI had not passed along credits to its customers. But Mr. Esquenazi testified that he had uncollectible accounts in excess of \$400,000 (Tr. at 178-179), which were de facto credits to customers.

Finally, for purposes of preserving the record, TSI's position is that Transcall should be ordered to produce the 517 back-up tapes containing the raw call detail of the Telus switch as it pertains to TSI's customers, which is the best evidence of the actual traffic across the switch, and that TSI and the Staff should be allowed to analyze the data on these tapes.

C. **Other Credits Found by the Staff Auditor.**

TSI urges the Commission to accept other credits found by Ms. Welch in favor of TSI.<sup>5</sup> These are:

1. **Credit for New Billing Format.** In AD No. 7, Ms. Welch found a credit

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<sup>5</sup> By way of explanation, TSI is not generally critical of the methodology or data used in Ms. Welch's audit. TSI does believe she implicitly misapplied the concept of burden of proof to require TSI to prove facts that were not its responsibility. Where TSI met this extraordinary and unnecessary burden, and Ms. Welch found a credit, TSI has no objection to her finding.

appropriate on this matter in the amount of \$8,776.

2. Credit for Nine Second Overbilling. In AD No. 8, Ms. Welch found a credit appropriate in this matter in the amount of \$37,714.

3. Credit for Time Point Overbilling. In AD No. 9, Ms. Welch found a credit appropriate in this matter in the amount of \$111,521.

4. Credit for 800 Calls. In AD No. 11, Ms. Welch found a credit appropriate in this matter in the amount of \$3,539.

5. Credit for Disconnected Calls. In AD No. 13, Ms. Welch found a credit appropriate in this matter in the amount of \$150.

6. Credit for Busy Signals, Long Ring, and Silence. In AD No. 15, Ms. Welch found a credit appropriate in this matter in the amount of \$47,557.

**D. Award of Interest.**

Transcall is not entitled to prejudgment interest on its claim. First, the agreement between the parties did not provide for interest on unpaid amounts after termination. Instead, the agreement, in the section "Suspension and or Termination of Service," provided for either late fees or termination of service. Transcall chose termination. No other provision allows for late fees or interest.

Second, prejudgment interest cannot accrue unless and until payment becomes due under the contract. See Parker v. Brinson Construction Co., 78 So.2d 873, 874 (Fla. 1955); Lumbermens Mut. Cas. Co. v. Percefull, 653 So.2d 389 (Fla. 1995); United States Automobile Ass'n v. Smith, 527 So.2d 281, 283 (Fla. 1st DCA 1988). Awarding prejudgment interest prior to the date

any payment became due provides the receiving party with an unbargained-for windfall and unjustly prejudices the paying party. See Metropolitan Dade County v. Bouterse, Perez & Fabregas Architects Planners, Inc., 463 So.2d 526, 527 (Fla. 3d DCA 1985). Here, TSI properly was skeptical of the invoices tendered it by Transcall, which this proceeding have shown to have been riddled with errors. In these circumstances, Transcall was in breach of the agreement, which called for it to properly "bill and receive revenue" ("General Scope of Services"). Accordingly, payments did not become due, and interest does not begin to run.

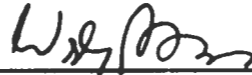
Third, prejudgment interest should not be awarded in this case because it would be unjust and a windfall. The Florida courts are clear on this point: "Depending on the equities of a given case, an award of prejudgment interest may be a windfall to the plaintiff and an unfair burden on the defendant." Volkswagen of America, Inc. v. Smith, 690 So.2d 1328, 1330 (Fla. 1st DCA 1997). Citing Flack v. Graham, 461 So.2d 82 (Fla. 1984) and its quotation from Board of Commissioners v. United States, 308 U.S. 343 (1939), the Florida Supreme Court held in Broward County v. Finlayson, 555 So.2d 1211 (Fla. 1990), that "[i]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." Id. at 1213 (emphasis added).

The facts of this case clearly demonstrate that it would be inequitable to grant Transcall interest on the amount due. TSI was correctly skeptical of the erroneous bills submitted to it by Transcall. Nevertheless, TSI offered Transcall \$250,000 to settle their account, which was refused by Transcall. (Exhibit 15; Tr. at 174-75). Tender of an amount due stops the running of interest. S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632, 634 (Fla. 2d DCA 1981).

**E. The Form of the Report to be Made by the Commission**

This proceeding was referred to the Commission solely on Transcall's complaint and TSI's counterclaim and third party claim, to the extent they are within the Commission's jurisdiction. The Commission does not have jurisdiction in this proceeding to act upon other criticisms of TSI voiced in the Staff Audit Report. The Commission does not have jurisdiction to hear or determine TSI's tort or lost profit claims against Transcall. The report to the Circuit Court to be issued by this Commission should pass upon each of the amounts and credits claimed by the parties, and should determine an amount due to Transcall as of the termination of services. TSI proposes that this amount should be \$54,669.

ADORNO & ZEDER, P.A.



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**CERTIFICATE OF SERVICE**

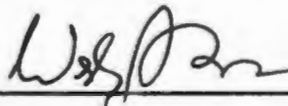
I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S.

Mail this 23 day of September, 1998 to:

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