

LAW OFFICES
MESSER, CAPARELLO & SELF
A PROFESSIONAL ASSOCIATION

215 SOUTH MONROE STREET, SUITE 701
POST OFFICE BOX 1876
TALLAHASSEE, FLORIDA 32302-1876
TELEPHONE: (850) 222-0720
TELECOPIERS: (850) 224-4338; (850) 428-1842

ORIGINAL
RECEIVED-FPSC

98 SEP 24 PM 4:35

RECORDS AND
REPORTING

September 24, 1998

BY HAND DELIVERY

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

Re: Docket No. 951232-TI

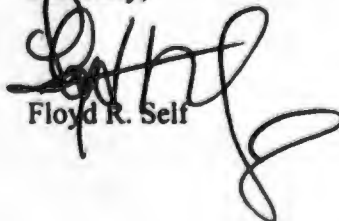
Dear Ms. Bayo:

Enclosed for filing in the above captioned docket are an original and fifteen copies of Transcall America, Inc.'s Posthearing Brief. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 6.0/6.1 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,



Floyd R. Self

cc: Mr. Brian Sulmonetti
Parties of Record

RECEIVED & FILED

dB
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

10079 SEP 24 88

FPSC-RECORDS/REPORTING

ACK
AFA 3
APP _____
CAF _____
CMU FRS/amb
CTR _____ Enclosures
EAG _____
LEG 1
LIN 3
OPC _____
RCH _____
REC 1
VAS _____
OTH _____

ORIGINAL

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
Filed: September 24, 1998

POSTHEARING BRIEF OF TRANSCALL

Transcall America, Inc., d/b/a ATC Long Distance for itself and its former subsidiary Telus Communications, Inc. (hereinafter collectively "Transcall"), hereby submits this posthearing brief.

I. BASIC POSITION

Transcall provided billing and provisioning services to TSI pursuant to the terms of the July 7, 1989 written agreement ("Agreement"), the modifications agreed to by both parties, and the applicable tariff provisions. The billing and provisioning of services provided to TSI, for itself and its customers, was timely and generally accurate. Transcall freely gave TSI credits for disputed issues. The cumulative credits TSI received from 1989-1992 exceeded the total credit evidence provided by TSI as well as any billing errors that occurred from time to time including those that resulted from system limitations. After accounting for all credits, payments, and other factors, TSI owes Transcall \$659,992.88, plus interest through May 1998 of \$\$222,045.85, for a total of \$882,038.73

DOCUMENT NUMBER-DATE

10619 SEP 24 88

FPSC-RECORDS/REPORTING

A. Billing and Provisioning

Count I of TSI's Counterclaim¹ is a breach of contract claim that charges Transcall with various matters, including wrongful termination of service to TSI, direct billing and solicitation of customers, improper billing for incomplete and other calls not made, billing in incorrect increments, and billing for services not requested, all of which resulted in "damages, including special damages and a loss of profits, a loss of income, and a loss of earnings both past and future." TSI Counterclaim, at 5-8. Count III of TSI's Counterclaim is an action for unjust enrichment that tracks the same allegations as Count I. Both of these counts unquestionably fall within this Commission's exclusive jurisdiction to resolve all billing and provisioning matters.

Clearly the Commission has exclusive jurisdiction with respect to intrastate rates and billing and provisioning of services related thereto. §§ 364.03, 364.035, 364.04, 364.05, and 364.08 Fla. Stat. (1997). The Legislature has specifically required that the "rates, tolls, contracts, and charges of, and all rules and regulations of, telecommunications companies for messages, conversations, services rendered, and equipment and facilities supplied" must be "fair, just, reasonable, and sufficient, and the service rendered . . . shall be performed in a prompt, expeditious, and efficient manner." § 364.03, Fla. Stat. The United States Supreme Court has recently confirmed the integrated relationship of billing and provisioning to rates, and ruled that common law claims may not be pursued in situations such as this one. AT&T v. Central Office Telephone, Inc., 118 S.Ct.

¹ Restated Third Amended Answer, Affirmative Defenses, Counterclaims and Third Party Claims, filed by TSI August 27, 1998 in the Circuit Court for the 11th Judicial Circuit in and for Dade County, Florida (hereinafter "TSI's Counterclaim").

1956, 1963 (1998). Thus, all billing and provisioning claims are subject to the exclusive jurisdiction of this Commission. Central Office, 118 S. Ct. at 1963.

The Commission's exclusive jurisdiction over rates and provisioning includes both end user customers and the terms and conditions of telecommunications service contracts between telecommunications companies. § 364.19, Fla. Stat.(1997) Indeed, the Legislature specifically authorized this Commission "to adjudicate disputes among telecommunications companies regarding such contracts or the enforcement thereof." § 364.07(2), Fla. Stat.(1997).

Although the Commission is primarily concerned with intrastate rates and services, the Commission also has jurisdiction with respect to interstate rates. The Legislature has directed that this Commission:

shall investigate all interstate rates, fares, charges, classifications, or rules of practice . . . where any act relating to the transmission of messages takes place within this state, and when such rates, fares, charges, classifications, or rules of practice are . . . excessive or discriminatory or are levied or laid in violation of . . . 'The Communications Act of 1934,' and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders, or regulations of the Federal Communications Commission

§364.27, Fla. Stat. (1997). Thus, the Commission not only has exclusive jurisdiction with respect to intrastate rates and service but also has the authority and is required by law to investigate matters surrounding interstate rates and report to the FCC regarding such investigations. §364.27, Fla. Stat. (1997). The PSC should present to the FCC all of the information at its disposal in this case, to be approved by the FCC and then incorporated into the final response to the Circuit Court.

Certainly, this promotes judicial economy and is the best approach to resolving this dispute. As the record here demonstrates, both TSI and Transcall indiscriminately provide intrastate and

interstate services. These calls were routinely commingled in Transcall's bill to TSI and TSI's bill to its customers. The calls were timed and billed using the same systems. There is no disputing that the allegations regarding intrastate calls are equally applicable to interstate calls. Were the PSC to address only intrastate calls while ignoring interstate ones, needless relitigation of the same issues in a different forum would result.

In this proceeding, this Commission has heard the evidence and arguments of the parties regarding the intrastate and interstate claims raised by TSI in Counts I and II of its Counterclaim. In addition, the Commission's auditors have prepared a comprehensive Audit Report that also addresses intrastate and interstate rates and provisioning. On the basis of chapter 364 and the supporting case law, it is this Commission's duty to fully and completely resolve, by final order, all matters pertaining to billing and provisioning that relate to intrastate claims. Further, on the basis of sections 364.07 and 364.27, this Commission should transmit to the FCC the record in this case along with this Commission's findings with respect to interstate claims with the request that the FCC review such information, conduct such necessary further proceedings, and issue a final order regarding the interstate claims. The FCC's final order should be returned to this Commission, whereupon this Commission should return its final order and the FCC's final order to the Circuit Court for any further action required by the Court.

B. Tort Claims

Count II of TSI's Counterclaim asserts tortious interference with contractual or business relationships by claiming that TSI lost customers, profits, and reputation and good will through a shorter list of allegations limited to direct billing, direct solicitation, and wrongful termination. Transcall admits that the PSC does not have exclusive jurisdiction over any viable intentional tort

action in this case. Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc., 291 So. 2d 199 (Fla. 1974). Importantly, no independent actionable tort has arisen from the business relationship and any claim or dispute is derived from the contracts and agreements that have existed between the parties. The Agreement's limitation of liability language combined with the filed-rate doctrine and the economic loss rule independently operate to bar intentional tort causes of action that are not independent of the contract between the parties. Pursuant to such authority, Count II should be dismissed by this Commission leaving all remaining issues, except those left for the FCC, to be resolved by the Commission.

1. Limitation of Liability Clause.

The Agreement between the parties expressly provides as follows:

In no event shall Telus or T.S.I. be liable to the other for any incidental, indirect, consequential or special damages, or loss of revenues or profits, whether or not either party has been notified of the possibility of such damages.

Exh. 7 at (Agreement, at Indemnification paragraph). This limitation is clear and unambiguous on its face, and should be enforced on its plain terms.

The Commission's authority to resolve the Count II tort claims on the basis of the Agreement itself lies in the fact that the Agreement between TSI and Transcall is solely subject to the Commission's exclusive jurisdiction over rates and charges. Specifically, section 364.04 requires all telecommunications carriers to file with the Commission schedules or tariffs reflecting the rates, terms, and conditions of service. However, in section 364.07, the Commission has been granted the authority to permit the use of individually negotiated contracts between carriers. While the execution of a contract may substitute for certain tariff provisions, it is not a legal substitute for, but

an adjunct to, the tariff itself. Again, section 364.07(2) makes it clear that the Commission is authorized to review such contracts, and disapprove them if detrimental to the public interest. Moreover, by Rule 25-24.485(1)(a), Fla. Admin. Code, the contract authority of a carrier must be identified in the carrier's tariff, thus making the contract authority a tariff service. Finally, section 364.07(2) authorizes the Commission "to adjudicate disputes among telecommunications companies regarding such contracts and the enforcement thereof."

The Commission has the power to review rates and service provisioning to determine what should have happened between the parties; in other words, to provide an accounting. See Florida Power Corp. v. Zenith Industries Co., 377 So. 2d 203 (Fla. 2nd DCA 1979); see also Richter v. Florida Power Corp., 366 So. 2d 798 (Fla. 2nd DCA 1979). Here, the Commission itself, through its Audit Report, has conducted a full review of the billing and provisioning relationship between TSI and Transcall. Under the statutes and cases, it is through this accounting process that TSI and Transcall will have their claims addressed, not through tort actions.

In view of the specific limitation of liability language in the Agreement, the Commission should find that the Agreement falls within its exclusive jurisdiction and declare the limitation of liability language valid and enforceable. On the basis of this finding, the Commission should conclude TSI is barred from recovering on Count II.

2. Filed Rate Doctrine.

The "filed rate doctrine" is a well-established legal principle that prohibits suits brought to enforce agreements inconsistent with the services and terms listed in a tariff. The United States Supreme Court in Central Office, recently affirmed the "filed-rate doctrine." The Supreme Court held that carriers may not pursue any action in tort stemming from alleged improper billing and

provisioning claims already subject to scrutiny under the filed tariff. Central Office, 118 S.Ct. at 1964-65.

Count II's allegations go to the heart of those matters within the Commission's jurisdiction: direct billing in violation of the Agreement, use of customer information obtained from TSI to solicit TSI's customers, and wrongful termination. These claims specifically flow from billing and provisioning, which are matters within this Commission's exclusive jurisdiction and which the Court in Central Office made clear may not be maintained as torts because they are wholly derivative of the contract claims. Id. at 1964. Thus, TSI can no more "obtain lawful preferences under the cloak of a tort claim than it can by contract." Id. Although pleading its claims in the alternative, under Central Office, the issues TSI raises in tort under Count II are identical to those contract claims raised in Counts I and II, and all are properly resolved through the exclusive jurisdiction of the PSC as claims in contract.

In this case, the fact that an Agreement partially governs the relationship does not change the outcome under Central Office and the filed rate doctrine. As has already been discussed, the Agreement at issue legally equates to a tariff between the parties. Moreover, as is more fully discussed under Issue 2 in this brief, part of the relationship is directly governed by tariff since most of the specific billing and provisioning requirements are not detailed in the Agreement. For example, billing of international calls, the definition of completed calls, and the definition of billable call duration are all matters defined by either the Transcall tariff or the TSI tariff. Although Central Office addresses contracts not authorized by law or tariff, under Florida law, such contracts are an extension of the tariff, especially when supplemented by tariff provisions. Thus, the Agreement at issue here must be treated like the tariff in Central Office.

3. Economic Loss Rule.

TSI is also prohibited from maintaining its Count II intentional tort claims because of the economic loss rule. Under Florida law, the "economic loss rule" provides that a party cannot sue in both contract and tort for the same conduct. AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So. 2d 180 (Fla. 1987). Unless some separate act independent of the contract results in personal injury or property damage, the remedies available are simply in contract. *Id.*

Each of the torts alleged in TSI's complaint involves acts specifically addressed in the TSI-Transcall Agreement or derived from the parties' business relationship. None of the alleged acts involve either personal injury or property damage; all of them relate in some way to the claims for breach of contract. Thus, on the basis of the economic loss rule, Count II should be barred by this Commission.

C. Estoppel

Because TSI's sole remedy is in contract, and because the PSC has exclusive jurisdiction to resolve billing and provisioning of services issues and contractual disputes among carriers, the PSC should issue a final order resolving all matters raised in Counts I, II, and III of TSI's Counterclaim, whether litigated or not by TSI.

Florida law establishes that to the extent a party chooses not to litigate an issue within the jurisdiction of the Commission, that party has waived that right and is estopped from litigating the issue piece-meal in other forums. Hawkins v. Mass. Bonding & Ins. Co., 29 So. 2d 694 (Fla. 1947). In International Telephone and Telegraph Co. v. United Telephone Co. of Fla., 550 F.2d 287 (5th Cir. 1977), ITT failed to put before this Commission certain factual matters and legal theories it placed before the District Court. *Id.* The Fifth Circuit, finding that the Commission had authority

to decide the issues, upheld the Commission's final decision, and barred ITT from raising those omitted factual matters after it had made its determination. Id.

Here, application of estoppel is even more appropriate than in ITT because in our case the Circuit Court specifically referred to this Commission all issues within the Commission's exclusive jurisdiction. Thus, failure to litigate before the Commission would be contrary to the order of the Circuit Court. On the basis of TSI's claims and this record, all of the TSI claims can be concluded by the Commission or handled by the Commission by referral to the FCC.

D. Conclusion

The Commission possesses the complete authority to resolve all the disputes arising out of the TSI-Transcall Agreement. Not only has the Florida Legislature bestowed upon the Commission the jurisdiction to resolve such disputes, but the Commission has been granted the exclusive jurisdiction to resolve these matters. Florida statutory and case law, along with the recent United States Supreme Court ruling in Central Office confirm that all of the issues raised by TSI in its Complaint are appropriately before the Commission for final resolution.

The Commission should issue a final order on all such matters within its exclusive jurisdiction because only when it has undertaken such action can any subsequent unresolved claims or causes of action lying outside its jurisdiction be resolved in the appropriate forum. State ex. rel. McKenzie v. Willis, 310 So. 2d 1, 3 (Fla. 1975). Then, pursuant to section 364.27, the Commission should report to the Federal Communications Commission its findings and conclusions regarding interstate claims. Upon conclusion of the proceedings before the Commission and the FCC, this Commission should report to the Circuit Court that all matters raised by TSI's complaint have been fully and completely adjudicated.

ISSUE 2: Did Telus/Transcall improperly bill TSI in excess of or violation of the contract between the parties, including, but not limited to, the following specific alleged violations:

- **improperly billing for calls not made, not completed, that were busy, or had bad connections;**
- **overcharging calls, double billing calls, or billing for the same call in consecutive bills;**
- **improperly charging TSI for 800 calls;**
- **billing in increments that were in violation of the contract;**
- **improper billing for travel cards and canceled accounts; and**
- **supplying improper and inaccurate billing details to TSI.**

SUMMARY OF POSITION: *All billing and provisioning of services to TSI by Transcall was in accordance with the Agreement, the agreed modifications and the applicable tariff provisions except for the two months with undercharged extension errors in TSI's favor (Audit Disclosure No. 2), the November and December 1990 unbilled minutes adjustment error in TSI's favor (Audit Disclosure No. 4D), and the 9 second error (Audit Disclosure No. 8). *

ANALYSIS AND ARGUMENT: Transcall properly billed TSI as was required by the Agreement and applicable tariff provisions except for the 9 second error and minor bill production errors that did not materially affect TSI's business.

The billing process is described at length in the record by Ms. Daurio and is not disputed by Mr. Esquenazi. Tr. 147. Based upon this evidence and the express terms of the Agreement, there are three critical factors to consider when determining whether TSI was properly billed. First, all billing to TSI was derived from billing done to TSI's customers. Thus, TSI should be billed for each completed call made by the TSI customer.

Second, while TSI is responsible for each completed call made by a TSI customer, the billing increments and rates applicable to TSI for such calls may be different from those applicable to the

TSI customer. For example, a TSI customer might be billed in one minute increments and at one rate, while TSI is billed in 6 second increments and at a lower rate.

Third, the bill to TSI was calculated from the calls and minutes data summarized on the "Resellers' - Traffic Summary" (greenbar summary) multiplied by the rate applicable for each category of call (i.e., international, travel, inbound 800, intraLATA, etc.) less any discounts, payments, or other adjustments. Copies of bills reflecting these computations are contained in Exh. 7 (MJD-7, pages 1-47).

The Commission Staff Auditor, Kathy Welch, undertook a comprehensive review of all billing by Transcall to TSI. Ms. Welch traced all the TSI bills back to the green bar summaries and other supporting documentation. In the final analysis, Ms. Welch generally found only computational or human errors and only 3 months (September 1991, November, 1991 and December 1991) where the summaries did not appear to match the bills and no contemporaneous credits were issued. (Tr. 223-24; Exh. 16, Audit Disclosure No. 4, Item A). Transcall concurs in all of the findings and conclusions of the Staff Audit except for the items identified in Mr. Metcalf's rebuttal testimony and which are more fully discussed below.²

In Section A, below, Transcall shall address each of the allegations itemized by Mr. Esquenazi at pages 154 to 155 of the Hearing Transcript and the corresponding Audit findings and record evidence. In Section B, below, Transcall will address the Staff Audit Report. Since many of TSI's allegations potentially impact both TSI's customers and TSI, all of TSI's allegations shall

² Mr. Metcalf originally disputed four items in the Audit, but at the hearing Ms. Welch agreed with one of these items and she withdrew her finding on that issue, thus concurring with Mr. Metcalf's position.

be discussed under Issue 2 so a complete presentation of the evidence can be made. Consequently under Issue 3, Transcall shall cross reference and incorporate the Issue 2 discussion as appropriate.

The net effect of the Staff Audit and the evidence submitted by both Transcall and TSI is that TSI's claims of improper billing are unsupported by any evidence of record, let alone competent substantial evidence. After examining each of the allegations identified by Mr. Esquenazi and the record evidence that accounts for all billings, payments, credits, and other adjustments, TSI still owes Transcall \$659,992.88 plus interest.

A. The TSI Allegations.

1. Direct Billing of TSI Customers.

A few of TSI's customers were subject to direct billing by Transcall due to an inadvertent computer error. To the extent customers were direct billed by Transcall, the customer might receive a different rate and TSI would not receive its margins (the difference between what the TSI customer paid TSI and what TSI paid Transcall). However, there was no competent substantial evidence of any impropriety or that TSI's business was damaged.

Ms. Daurio testified that there was some limited direct billing that affected TSI customers who were former or then current Transcall customers. This evidence demonstrates that this situation certainly did not arise from an intent to steal TSI's customers. Once this problem was tracked down, computer software changes were written and implemented in October 1990, and thereafter the direct billing ceased. Indeed, Transcall took the extraordinary step of issuing credits to customers and to TSI and reprocessing Transcall's billing to screen out TSI customers so that the customer would be exclusively identified as a TSI customer.

TSI offered no evidence to dispute or refute either Ms. Daurio's statement of the facts or Transcall's assertion that no negative business impact resulted on TSI. Indeed, the Staff Audit determined that the financial consequences of this billing were nominal. Thus, the Commission should conclude that the limited direct billing was not intentional or improper and Transcall did not breach the Agreement.

2. Direct Advertising and Solicitation of TSI Customers.

There is no evidence of record indicating this as a problem or that TSI's business suffered as a consequence of Transcall advertising and soliciting of TSI customers. The accusation in TSI's complaint is that TSI's customers received advertisements and solicitations from Transcall. While the anecdotal evidence suggests that TSI's customers may have received such materials, there certainly was nothing improper or wrong in any such solicitations.

First and foremost is the fact that the Agreement did not prohibit or address this subject. There also is no evidence of a "gentleman's agreement" to refrain from this practice, and even if there was, the merger clause in the Agreement would make it unenforceable. The absence of both explicit language or an implicit "deal" is understandable -- advertising and solicitations are not just a routine part of doing business but a vital component to advancement in a competitive market. Notwithstanding Transcall's inability to generally penetrate the Hispanic market, Transcall was not without some independent success in that market. Indeed, the direct billing problem existed precisely because some of TSI's customers were former or then current Transcall customers.

The only possible basis for a valid complaint by TSI would be if TSI demonstrated that Transcall used TSI information as a basis for direct marketing to TSI's customers. Transcall did not, and TSI introduced no evidence on this issue. On the basis of these facts and evidence, the

Commission should find that, to the extent there was any advertising and solicitation of TSI customers by Transcall, such marketing was not intentional or improper and was not a violation of the Agreement.

3. Incomplete Calls and Bad Connections.

There was nothing improper with respect to TSI's third allegation of billing TSI and TSI's customers for incomplete calls and bad connections. This allegation involves two basic issues: (a) billing for incomplete calls (identified by TSI as "calls not made, that were not completed [or] had busy signals"); and (b) bad connections. The record conclusively demonstrates that TSI's methodology and conclusions for defining and calculating damages are completely wrong.

First, the TSI tariff, which governed how TSI's customers were to be billed, specifically put customers on notice regarding possible billing for incomplete calls. The TSI tariff was clear:

Billing for all completed calls (as defined in Section 1) will commence from the time a customer utilizes originating access facilities. The measured use of service is then based upon the total time the customer utilizes such facilities.

TSI Tariff, §3.3.4, effective Nov. 9, 1989. Billing for "completed calls" under the tariff further advised customers of other billing limitations:

When a calling party allows the distant end to ring in excess of 60 seconds or approximately 8 to 10 rings, the call will be considered a completed call. This only applies when hardware answer supervision is absent on the terminating end.

TSI Tariff, §3.3.4, effective November 9, 1989. Thus, the TSI tariff specifically put customers on notice regarding the potential of being billed for incomplete calls.

Second, TSI's customers understood these tariff limitations because they, like TSI, requested and received credits. The customer is in the best position to know whether a call was not completed

or had a bad connection. If the customer paid for the call, it must be assumed the customer considered it a valid call because over time TSI customers requested \$51,486.96 in credits for incomplete calls, bad connections, and any other problem calls.

Third, the switch tapes confirm the limited extent of the incomplete calls issue. The Staff Audit found that "a very small portion of the calls were billed because a customer held the line open for more than set in the switch." Exh. 16 (KLW-1 Page 19 of 79). This Audit finding is true under the tariff for either busy signals, long rings, or any other billing for an incomplete or unanswered call. On the basis of this evidence, the Audit concluded:

Extrapolating the percent found in the sample to the whole population resulted in under \$1000. Staff did not believe these to be in error based on the TSI tariff. . . .

Id. Indeed, the total error found by staff for incomplete, duplicate, and overlapping calls was only 1.3%. This error rate is well within the 1% to 2% range specified in the tariffs. *Id.*

Finally, as the Staff Audit recognized, it is necessary to consider the credits given by Transcall to TSI. While not broken out, TSI received a total of \$74,751.79 for unanswered (busy), duplicate, and overlapping calls, most of which were calculated at retail, not wholesale rates. *Id.*; Tr. 85. On the other hand, the Staff Audit determined that the total potential value of these errors amounted to only \$26,409.49. In view of the actual credits given, the Staff Audit concluded that TSI has "been given credit for these problems." Exh. 16 (KLW-1, page 19 of 79).

Standing alone, the tariffs, the actual credits issued, and the findings and conclusions of the Staff Audit fully demonstrate the absence of any impropriety or breach with respect to this allegation.

TSI offered no direct evidence of the incomplete call claim and absolutely no evidence of billing for bad connections. The only evidence TSI offered on the incomplete call issue was the Lopez Levy & Associates ("LLA") Report and Mr. Shulman's corresponding testimony. There are fatal problems with the competency of the LLA Report and Mr. Shulman's testimony, as well as the credibility, reliability, and usefulness of the findings and conclusions rendered by LLA.

As a general proposition, the LLA Report and testimony do not constitute an expert report or expert testimony. Mr. Shulman admitted he was not an expert in telecommunications and that he and the company did not hold themselves out as such. Tr. 189-90; Exh. 10, at 27 and 52. Mr. Shulman admitted not only that he had no prior training or experience in telecommunications, but that he failed to conduct any study or investigation of telecommunications networks, billing systems, or industry practices or standards prior to undertaking his report. Tr. 188-190; Exh. 10, at 29, 30, 31 and 34. Indeed, Mr. Shulman's complete lack of understanding of telephony was reflected in his misreading of tenths of a minute on a bill as actual duration in seconds. Tr. 194. The LLA Report and Mr. Shulman fail to meet the most basic qualification standards of expert reports and testimony, and on this basis alone they should be totally rejected as offering no relevant or probative value to these proceedings. See Moton v. State, 697 So. 2d 1271 (Fla. 4th DCA 1997) (finding irrelevant evidence inadmissible in a proceeding).

To the extent the Commission grants any consideration to the LLA Report and testimony, the LLA findings and conclusions regarding incomplete calls were developed in a complete vacuum. On the basis of LLA's underwhelming experience, Mr. Shulman went through a sample of bills identifying calls he alone decided were incomplete, duplicate, stuck clock and double billed calls, and he put them on TSI's wish list for credit. LLA's criteria was simple: an incomplete call was

every call of one minute in duration or less. Exh. 10, at 34. This criteria has absolutely no basis in fact, law, common sense, or real world experience. There are unquestionably numerous calls with a duration of a minute or less that are perfectly valid, complete calls.³ LLA's assumptions are groundless and its resulting findings worthless.

Comparing the results of the LLA analysis to actual customer experience presents an even more unrealistic picture. The total claimed credits by LLA for the incomplete, duplicate, stuck clock, and other errors was \$314,817.92. Tr. 187. (At the time of the Staff Audit, it was \$294,285.75. Exh. 16. (KLW-1, at 19 of 79).) On the other hand, customers received from TSI total credits of \$51,486.96 and TSI itself received corresponding credits of \$74,751.79. In short, the LLA list of claimed credits has absolutely no relationship to what customers actually complained of or received credits for — or even what TSI complained of and was credited. The Staff Audit was correct in rejecting the LLA proposed adjustment.

In the final analysis, TSI customers were billed properly for complete calls. To the extent TSI customers were billed for incomplete calls, such events were disclosed and handled consistent with the TSI tariff. Consistent with the tariffs, TSI and its customers were more than fairly and properly compensated for such incomplete calls. The Commission should therefore find that TSI and its customers were not improperly billed for incomplete calls or bad connections, and that they were properly credited for any incomplete calls or any connections billed in error.

4. Stuck Clocks, Double Billing, and Overlapping Calls.

³ An examination of the CDR printouts analyzed by Ms. Welch only confirms this — there are numerous calls of 1 minute or less in duration that have the hardware answer qualifier. This means the terminating LEC told the Transcall switch it was an answered call.

TSI's lengthy fourth allegation of overcharges, double billing, and overlapping calls is not supported by competent substantial evidence of record. The basic problem TSI attempts to raise in this count is similar to that raised in the third allegation -- that customers were billed either for calls they did not make or for longer call durations, thus causing TSI to be billed for more and longer calls as well. However, the evidence TSI offered with respect to "stuck clocks," double billing, and overlapping calls is totally lacking in credibility and relevancy, and fails to prove TSI's claims.

Like with the incomplete calls claim, TSI offered the LLA Report and Mr. Shulman's testimony on this issue. For the reasons previously discussed, the LLA Report and testimony are not proper expert testimony, and therefore offer no relevant or probative information to these proceedings. To the extent that the Commission wishes to consider the LLA Report and testimony, the specific definitions that LLA applied are also entirely inappropriate and wrong, as they were developed and applied without any consideration of industry standards and practices or even the TSI tariff.

Stuck Clock. LLA defined a "stuck clock" as every call over one hour and declared them all to be improper. Exh. 10, at 39. Generally, the industry views stuck clocks, or, more appropriately, hung ports, as calls with very long durations, at least 8 hours or more. Exh. 1, at 12. As Staff Auditor Welch found, the longest call LLA removed was 3 hours. Moreover, as a sanity check, Ms. Welch compared the TSI bills to the PSC's bills and found that the Commission today has a much higher percentage of calls over one hour than LLA found in the TSI bills. The evidence simply does not support LLA's definition.

Like with incomplete calls, the customer is in the best position to know if a call was billed excessively long. A call that was 8 hours, or 1 hour, or even 30 minutes too long is likely to be

noticed. The fact that LLA calculated a credit of \$124,084.16 for stuck clock calls only reinforces the absurdity of LLA's methodology. Exh. 17 (Sheet 1, "TSI vs. ATC Analysis, Daily Analysis of Errors, Months of March 1992 & August 1991"). Ms. Welch properly concluded that if a customer complained of this, it was credited in the April 1992 credit of \$51,486.96. Exh. 20, (KLW-1, at 18 of 79). Thus, there were no stuck clocks, and no such calls requiring further credit.

Double Billing. For a number of reasons, LLA's definition of duplicate or double billed calls as two calls made at the same time to the same recipient also is inappropriate and unreasonable. Exh. 10, at 30. First, this definition only further reflects LLA's complete lack of understanding of telephony. It ignores, for example, that a person could terminate one call and start a second call, all within the same minute as recorded by the switch. Similarly, it ignores the fact that if the LEC returns hardware answer supervision and the call is then immediately terminated, for whatever reason, that call is treated by the system as a completed call. Again, both the TSI and Transcall tariffs address this situation.

Second, LLA's lack of experience with these issues is exacerbated by the fact that LLA misapplied its own definition. For example, LLA applied this label to successive calls in successive minutes to different numbers. Tr. 192 - 194; Exh. 18. LLA also included as duplicate calls two calls of 1.1 minute in duration that began nine minutes apart! Exh. 15 (billing page number 948). These calls could have been to answering machines, voice mail, fax machines, or simply two short calls nine minutes apart. These errors by LLA admittedly magnified LLA's methodology, and inappropriately increased its requested recovery. Tr. 202-203. Exhibits 15 and 17 are full these types of errors by LLA.

Third, the Staff Audit analysis of switch tapes and bills indicated "a very small portion of such calls were billed." Again, on the basis of this finding and the tariff language discussed under TSI's third allegation, the Staff properly concluded that any such calls were not in violation of the tariff. Exh. 20 (KLW-1, page 19 of 79).

Fourth, Ms. Welch took the time to analyze each and every call LLA claimed was a duplicate call. However, applying her knowledge of billing systems and switches, she removed each call which reasonably could follow one after the other based upon the call duration of both calls. Likewise, if this analysis indicated they could have overlapped, she did not remove them. Ms. Welch then recalculated the potential duplicate calls and compared them to the actual credits already given to TSI. Again, the Staff Audit concluded that the credits TSI had already received exceeded the recomputed total contained in the TSI analysis, and that no further adjustments or credits were due for these calls. Thus, LLA's computation of double billed calls is completely wrong.

Overlapping Calls. LLA's definition of an overlapping call as a second call to the same or different number that originated in the same minute as the first call terminated is even more absurd than its definition of duplicate calls. TR. 192-202; Exh. 10, at 47; Exh. 18; Exh. 19. As the Staff Audit found, and cross-examination at the hearing only emphasized, LLA did not understand the billing it was examining.

In responding to cross-examination regarding two calls to directory assistance, Mr. Shulman explained that he rejected both calls "because the one started at 2:50 p.m., it lasted one minute and a fraction, which would make it 2:51 and a fraction, and the second call started at 2:51." Tr. 201; Exh. 19. As the Staff Audit found, LLA's problem was that it "did not take into account second increments" and the fact that origination times shown on bills ignore seconds. Exh. 20 (KLW-1,

Page 18 of 79). Mr. Shulman went so far as to find it “highly unlikely” that a person could terminate one call and start a second call all within one minute. Tr. 201. On the basis of this faulty premise, LLA calculated a credit of \$202,054.41! Exh. 17 (Sheet 1, “TSI vs. ATC Analysis, Daily Analysis of Errors, Months of March, 1992 & August 1991”). Commissioner Garcia was indeed correct in not seeing Mr. Shulman’s point because Mr. Shulman simply has it dead wrong.

Notwithstanding the errors of LLA’s approach, the Staff Audit again analyzed each alleged duplicate call and found some that appeared to overlap. Ms. Welch then removed the call with the longest duration, which only increased TSI’s potential recovery. While Ms. Welch recognized 3-way calling, speed dialing, and the 9 second error, she nevertheless recalculated the potential and compared her sum to the credits already given. She correctly concluded that no further credit was appropriate. Thus, LLA’s overlapping calls analysis is also wrong.

Conclusion. TSI did not introduce any other evidence with respect to its third allegation. As for the evidence that was submitted, the billing errors alleged by TSI simply are not supported by competent substantial evidence of record. Stuck clocks, double billing, and overlapping calls may have occurred, but they were not improper or unusual to the times. To the limited extent these errors occurred, such billing was within the tariff standards and more than fully credited. Accordingly, the Commission should find that TSI and its customers were not improperly billed for stuck clock, duplicate, or overlapping calls and that Transcall did not breach the Agreement.

5. 800 Calls.

There is no evidence of record that there were improper charges on 800 calls for calls made outside the marketing area or billing for calls not received by 800 customers. TSI offered no evidence pertaining to this allegation. Tr. 281, 316.

The Staff Audit identified the billing of the wrong rates to TSI and to TSI customers for 800 calls. However, the Audit refused to make any adjustment for this error. The Audit estimated that as a result of this error, TSI was underbilled \$3,539.42 and TSI's lost profits (or margin) would not be materially different because of this error. Exh. 20 (KLW-1, at 44 of 79). Thus, due to the absence of any evidence regarding TSI's specific 800 calls allegations and the separate findings and conclusions of the Staff Audit regarding the usage error, the Commission should conclude that there were no improper 800 charges and Transcall did not breach the Agreement.

6. Billing Increments.

Transcall did not improperly bill TSI in one minute increments instead of 6 or 30 second increments. While the Agreement provided for billing in 6 second increments, there was an early verbal agreement to modify the contract and provide special credits that overcompensated TSI for Transcall's inability to bill in 6 second increments. There is absolutely no basis for TSI's contention that it was entitled to these discounts in addition to the shorter billing increments.

Transcall does not dispute that the Agreement provides that domestic calls would be billed to TSI in "6 second increments" and that international calls would be billed to TSI with "full minute rounding for the first minute and 6 second increments for each additional minute." Exh. 12 (MJD-1, at 4-5 of 12). As Ms. Daurio testified, when she began to prepare the first bill to TSI, she "realized that we would not be able to bill international calls to TSI in six second increments." Tr. 43. Quite simply, to comply with the Agreement would require the manual rerating and recalculation of each and every international call — a tremendously time consuming and labor intensive task that was all but impossible to complete. Tr. 43., 291-92; Exh. 8, at 53-55. After advising Mr. Sickel of this problem, he renegotiated this provision with Mr. Esquenazi to provide TSI with a 40% discount off

of the total international billing to TSI customers (which was at the Transcall tariff rate). Tr. 43-44, 291-92. TSI offered no evidence to rebut this testimony.

For domestic calls, the problem was not as complicated as the international calls. Here, the problem was that Transcall found it could not bill TSI in 6 second increments for calls less than 30 seconds in duration. Tr. 44. Again, Mr. Sickle renegotiated this provision of the Agreement with Mr. Esquenazi such that TSI ultimately received a 15% discount off all domestic usage. Tr. 44, 291-92. TSI offered no evidence in rebuttal to this testimony.

The unrefuted evidence of record is that the 40% and 15% discounts in lieu of 6 second increments resulted in a much better deal for TSI than that provided for in the Agreement. Tr. 43, 292. This is verified by the Staff Audit. In Audit Disclosure No. 5, the Audit found that the total value of the 40% and 15% discounts was \$494,730.37 and \$143,000.90, respectively, for international and domestic calls, for a total credit of \$637,731.27. Exh. 20 (KLW-1, at 14-15 of 79). Accepting, arguendo, LLA's calculation that the value of the 6 second increments was \$91,578.42, TSI received a \$546,152.85 discount over and above that contemplated in the Agreement. Tr. 187. This windfall represents almost a doubling of TSI's profit even if TSI paid all of the other amounts due to Transcall during the term of the Agreement. Tr. 314.

TSI has indirectly claimed that it is entitled to both the 6 second increments and the 40% and 15% discounts, but there is no evidence to support this assertion. Exh. 20 (KLW-1, at 15 of 79). First, the Agreement itself has a merger clause that bars any provisions outside of the written terms from being included in the Agreement. Exh. 12 (MJD-1, at 9 of 12). Fed. Deposit Ins. Corp. v. Hemmerle, 592 So. 2d 1110 (Fla. 4th DCA 1991) (holding that merger clause bars evidence beyond the written contract). Second, Mr. Esquenazi was quite vocal in requesting credits or other actions

that he believed were required under the Agreement, and yet he never complained that he was entitled to both. See, e.g., Tr. 82. Finally, accepting for argument's sake LLA's \$91,578.42 valuation for the 6 second increments, this would have increased TSI margins to some 40% which would be an unusually high return in a competitive market. Combined with TSI's lack of rebuttal testimony to Ms. Daurio and Mr. Sickie, there simply is no basis to conclude that the 40% and 15% discounts are in addition to 6 second increments.

That there are no written amendments to the Agreement acknowledging the 40% and 15% discounts with the express Agreement language that amendments are to be in writing. Exh. 13 (MJD-1, at 9 of 12). The fact that these amendments are in TSI's favor by some \$546,152.85, and that Transcall does not object to this benefit to TSI, should demonstrate that these credits were indeed amendatory to the express written Agreement. However, if TSI insists on enforcing the 6 second increments language in the Agreement, then the Agreement must be enforced on its written terms. As such, the total amount due to Transcall is not \$659,992.88 per Mr. Metcalf's calculation, but rather \$1,206,145.73. Even the Staff Auditor Ms. Welch agrees that if the Agreement is to be enforced as written, none of these 3 verbal amendments should be included, thus significantly increasing the amount due from TSI to Transcall. Tr. 273-74.

The only conclusion from the evidence of record is that there were verbal amendments to the Agreement that substituted the 40% and 15% discounts for international and domestic calls, respectively, for the 6 second increments requirements in the Agreement. As a result of these amendments, there was no violation of the Agreement of the parties and there was no continuing obligation to bill the 6 second increments in the Agreement. Accordingly, no violation of the Agreement should be found.

7. Travel Cards.

There is no evidence of record that there was any billing for travel cards that customers did not have. TSI offered no evidence pertaining to this allegation. Tr. 316. Indeed, Mr. Esquenazi never raised this issue with Ms. Daurio, and there is no evidence that TSI ever raised this with anyone else at Transcall. Tr. 281-82. More to the point, because travel cards required an authorization code from Transcall to TSI, that TSI subsequently gave its customers, this problem simply could not occur. Tr. 282. On the basis of this record, the Commission should find that Transcall did not bill TSI customers for travel cards that they did not have and that there was no violation of the Agreement.

8. Billing After Termination.

Transcall did not improperly bill TSI or TSI customers after termination of service by TSI or the customer. TSI did not introduce any evidence of this problem, and there was no other evidence demonstrating any systemic problem. Tr. 316.

Ms. Daurio described in detail the service activation and disconnect process, and while there were occasional problems, generally customers were connected or disconnected on the same day of receipt. Tr. 282. The Staff Audit investigated this issue and found the possible impact of untimely disconnects to be only \$149.57, an immaterial amount. Exh. 20 (KLW-1, at 48 of 79). Indeed, any delay in disconnecting a customer from the system was more likely due to TSI not providing sufficient information. Tr. 282. To the extent customers received a "late" bill after termination, it was a problem of terminating early in the billing cycle. Tr. 282.

The record does not contain any evidence from TSI documenting this allegation; however, Transcall fully detailed the service provisioning process and its prompt disconnection practices, both

of which are borne out by the Staff Audit. Accordingly, the Commission should conclude that Transcall did not improperly bill TSI or TSI's customers after service termination and that there was no violation of the Agreement.

9. Billing Detail vs. Summaries.

Transcall did not improperly supply billing detail that did not match the summaries. Indeed, TSI did not refute Ms. Daurio's testimony that this was never raised by TSI as an issue until this litigation. Tr. 283.

Transcall does not dispute that the billing detail does not match the summaries — they are not supposed to match. Tr. 312-13. As Ms. Daurio testified, the summaries would show the same calls but fewer billable minutes because of the differences in billing increments between TSI customers and TSI.⁴ Moreover, as Mr. Metcalf testified, Mr. Esquenazi may not know how to read the reports due to the fact that one report lumps together "international calls," whereas the other breaks out calls by "011" and NPAs, with some NPAs containing both international and domestic calls. Tr. 313. Thus, there simply will not be agreement between the summary and detail.

The Staff Audit incorrectly concluded that for three months, September 1991, November 1991, and December 1991, the summaries did not agree with the TSI bills, so she recomputed the bills. Exh. 20 (KLW-1, at 10-11 of 79). Given the lack of objection by TSI to the original billed amounts, it is only appropriate to use the originally billed amounts. Tr. 82.

⁴ While there were some limitations in Transcall's billing system for 6 second increments for domestic calls of 30 seconds or less in duration, calls longer than 30 seconds were billed in 6 second increments to TSI. Tr. 44.

On this record, there was nothing improper about the difference between the bill summaries and the detail. Accordingly, the Commission should find no error regarding the variance between the bill summaries and detail, no adverse consequences to TSI, and no violation of the Agreement.

10. 800 numbers.

Transcall did not bill TSI or TSI customers for 800 usage where the TSI customer did not have an 800 number. TSI offered no evidence of this allegation. Tr. 316. As Ms. Daurio testified, the only potential 800 number issue related to turning on or off 800 service, which was handled in the ordinary course of business. Tr. 281. Accordingly, the Commission should find that there is no evidence of billing 800 use where there was no 800 service, no improper billing for 800 service, and no violation of the Agreement.

11. 9 Second Error.

Transcall does not deny the 9 second error. Transcall further agrees with the Staff Audit calculation of the value of this error and not the incorrect, and lower, calculation made by LLA. Tr. 80, 84, 225, 310; Exh. 20 (KLW-1, at 25 of 79).

B. Staff Audit Allegations.

Transcall agrees with, and endorses, the methodology, findings, and conclusions of the Commission Staff Audit Report and the Testimony of Ms. Welch except for the three issues raised by Mr. Metcalf. Tr. 78, 133-34, 305-307. Transcall notes that with respect to Mr. Metcalf's disagreement with Audit Disclosure No. 7, at the hearing, Ms. Welch withdrew that finding on the basis of the documentation provided by Transcall. Tr. 81, 219; Exh. 13. On the basis of this action, there remain only three points of disagreement between the Staff Audit and Transcall.

1. TP1 to TP7 Billing.

Staff was in error when it determined in the Audit Report that Transcall should have billed TSI for conversation time for the period December 1990 to May 1992. Tr. 83. The Staff adjustment is predicated on a misunderstanding of the effect of the 1993 settlement in Order No. PSC-93-1237-AS-TI.

In that Order, Transcall voluntarily agreed to refund to its own tariff customers the call setup plus ring time (referred to as TP1 to TP6), so as to bill customers only for conversation time (referred to as TP6 to TP7). Tr. 306. By its terms, that Order pertained only to those Transcall customers subject to the billable call duration language in Transcall's tariff. This language did not apply to TSI because TSI was a contract customer and the billing to TSI was to be derived from the billing to TSI's customers. Tr. 83, 306.

TSI's Florida intrastate tariff clearly provided that TSI's customers were to be billed for TP1 to TP7, a point recognized by the Audit Report. Exh. 20(KLW-1, at 30-31 of 79). As discussed earlier, the billing to TSI was a product of the billing to TSI's customers. Tr. 83. Thus, to bill TSI for only TP6 to TP7 would require Transcall to unilaterally change the TSI tariff, which it could not do, or to radically recalculate the billable duration for TSI, a task equally as vexing as that posed by the original provisions on international call billing. Tr. 307. Given Mr. Esquenazi's persistence in pointing out errors or requesting rate reductions, TSI's silence on this can only mean that it, too, agreed with the continuation of the TP1 to TP7 billing.

It is also worth noting that in response to an extensive interrogatory on this very issue, TSI admitted, under oath, that this issue was not in question. When answering Transcall's Interrogatory No. 1, TSI stated:

TSI does not contend that T/ATC (Transcall/ATC) violated Transcall's tariff; TSI contends T/ATC breached its Agreement with TSI.

TSI's Supplemental Responses to Interrogatories Pursuant to Order of May 20, 1998, page 2.

As a final point about this Audit Report finding, Transcall notes that the testimony of Ms. Welch regarding this issue is more neutral. Ms Welch testified that, "[b]ased on TSI's tariff, the calls appear to be correctly billed." Tr. 226. Moreover, Ms. Welch provided no rebuttal to Mr. Metcalf on this issue.

On the basis of this record, the Commission should conclude that TSI and its customers were not subject to such Order since they were not billed under Transcall's tariff and Transcall could not unilaterally have changed its billing to TSI and its customers and that Transcall properly billed TSI on the basis of TP1 to TP7, just like TSI's tariff provided.

2. Excess Credits.

The Staff Audit incorrectly failed to account for an excess credit of \$20,777.91. Tr. 82-83. Since the purpose of these proceedings is to conduct a full accounting, and since the Audit Report accounted for other excess credits, these too should not be omitted. Ms. Welch and TSI offered no rebuttal to this adjustment by Mr. Metcalf. Accordingly, these excess credits should be included by the Commission in any final accounting in order to fully address the complete relationship between the parties. Tr. 306.

3. Bill Summaries.

Audit Disclosure No. 4, regarding billing for September 1991, November 1991, and December 1991 has already been discussed in connection with TSI's ninth allegation, and Transcall adopts that argument here.

C. Conclusion.

Based upon this record, the only improper billing was the 9 second error, which Transcall has not disputed. As the Staff Audit found, while the billing was not perfect, it was consistent with the tariffs and Agreement, and Transcall more than fully compensated TSI for any other billing that occurred. Accordingly, the Commission should find no other improper billing.

ISSUE 2.A.: If Telus/Transcall improperly billed TSI in excess of or violation of the contract, did the improper billing result in overcharges.

SUMMARY OF POSITION: *No. A complete accounting of all billing indicates that any billing errors were more than offset by undercharges and credits.*

ANALYSIS AND ARGUMENT: The only improper billing that occurred was the 9 second error. Tr. 80, 84, 225, 310; Exh. 20 (KLW-1, at 25 of 79). No party disputes this error.

As Transcall fully discussed at Issue 2, there were no other improper billings. TSI has failed to provide any evidence with regard to several of its allegations and has, overall, failed to provide competent substantial evidence of any other improper charges or improper billings that were in excess of or in violation of the Agreement or applicable tariffs.

Transcall acknowledges that the Commission Staff Audit determined that there were some billing errors, but these were human error types of mistakes, most of which were contemporaneously addressed. To the extent these were billing errors, in the aggregate these were more than offset by undercharges and credits already given. Tr. 316-17. Accounting for the three Audit Disclosures disputed by Transcall results in a further increase of the amounts due to Transcall. Tr. 318; Ex. 13.

ISSUE 2.B.: If overcharges occurred, what is the amount of such overcharges, including any applicable interest?

SUMMARY OF POSITION: *TSI was overcharged by \$37,714.59 for the 9 second error. Interest from June 1992 through May 1998 is \$12,688.57, for a total of \$50,403.16. After accounting for credits and other adjustments, however, there were net undercharges to TSI of \$178,756.43. Interest on this amount through May 1998 using the Commission's formula is \$60,140.23.*

ANALYSIS AND ARGUMENT: Transcall agrees with the Commission Staff Audit's findings and conclusions regarding the valuation of the 9 second error. Tr. 80, 84, 225, 310; Exh. 13; Exh. 20 (KLW-1, at 25 of 79). TSI's own, lower calculation has utilized the wrong methodology and should be rejected. The value of the 9 second error to TSI is \$36,714.59. Tr.310; Exh. 20 (KLW-1, at 25 of 79). With interest of \$12,688.57, through May, 1998, the total value to TSI is \$50,403.16.

As Transcall extensively discussed at Issue 2, a complete accounting of all billings, payments, credits, overcharges, and undercharges results in net undercharges including the 9 second error, to TSI of \$178,756.43.⁵ Interest on this amount is \$60,140.23.

ISSUE 2.C.: Did TSI make any payments on any amount overcharged under the contract? If so, how much?

⁵ The calculation originated from Exhibit 13, using the following:

9 seconds	(37,714.59)
Staff Disclosure 12	3,935.95
Staff Disclosure 4	12,898.03
Good Credits Given	(51,486.96)
Excess Credits	169,753.25
Total Transcall's Adjustments to Staff Audit	<u>81,370.76</u>
Total Undercharges	\$178,756.43

SUMMARY OF POSITION: *During the entire period, TSI made payments of \$857,999.83 on total billings of \$1,665,364.41. The accounting for these amounts is further detailed in Exhibit 13 and the supporting testimony of Ms. Welch and Mr. Metcalf.*

ANALYSIS AND ARGUMENT: Only the Staff Audit and Mr. Metcalf provided a complete accounting of all billings, payments, credits, overcharges, and undercharges. See Exhs. 13 and 20. Ms. Welch and Mr. Metcalf determined that TSI made total payments of \$857,999.83, whereas Mr. Shulman found total payments of \$857,999.77. Compare Exh. 13 and Exh. 20 (KLW 1, at 51) with Exh. 16 (Schedule II). This difference is not material.

ISSUE 2.D: After accounting for any overbilling, refunds, settlements or other credits that may be applicable, what amount, if any, does TSI owe Transcall for the services it received?

SUMMARY OF POSITION: *After fully accounting for all transactions between the parties, TSI owes Transcall a total of \$882,038.73, consisting of a principle amount of \$659,992.88 and interest through the end of May 1998 of \$222,045.85.*

ANALYSIS AND ARGUMENT: Exhibit 13 summarizes the complete accounting of all billings, payments, credits, undercharges, overcharges, and other adjustments detailed in Issue 2 above. The result is that TSI still owes Transcall \$659,992.88, plus interest. Applying interest per the Commission's interest rule results in an additional \$222,045.85 through May 1998. Tr. 86. The total of principal plus interest (through May 1998) is \$882,038.73. Tr. 86. In view of the accumulation of interest over time, the Commission's order should provide for the interest to be updated through the date of TSI's eventual payment to Transcall.

Ms. Welch has determined that net of all accounting, TSI still owes Transcall \$519,259.03. (\$501,368.89 + 17,890.14) plus interest. Exh. 20 (KLW-1, at 51) plus Tr. 217, using Mr. Metcalf's

adjustment from Tr. 81 (Ms. Welch did not calculate interest). For the reasons discussed in Issue 2, there are three exceptions to Ms. Welch's report that should be made, which take the total due from TSI to Transcall to \$659,992.88 plus interest. Tr. 82-84; Exh. 13. As was also discussed in Issue 2, there is no competent substantial evidence of record to support the LLA Report or any of the adjustments proposed therein.

ISSUE 3: Did Telus/Transcall improperly bill TSI's customers in excess of or violation of the applicable tariff for intrastate traffic, including, but not limited to, the following specific alleged violations:

- **improperly billing for calls not made, not completed, that were busy, or had bad connections;**
- **over charging calls, double billing calls, or billing for the same call in consecutive bills;**
- **improperly charging of 800 calls and 800 customers;**
- **billing in increments that were in violation of the applicable tariff;**
- **improperly billing for travel cards and canceled accounts; and**
- **supplying improper and inaccurate billing details to TSI's customers.**

SUMMARY OF POSITION: *Except for the 9 second error, TSI's customers were billed as instructed by TSI. The Staff Audit indicates that in some cases TSI improperly instructed Transcall on the billing of TSI customers. Any errors in the billing instructions to Transcall are TSI's responsibility.*

ANALYSIS AND ARGUMENT: The bills received by TSI's customers involved preparation work by both TSI and Transcall. The record conclusively demonstrates that, except for the 9 second error, Transcall properly fulfilled its responsibilities in the preparation of TSI customer bills consistent with the technology available, industry standards and tariff obligations. On the other hand, TSI's bill preparation responsibilities resulted in TSI violating its own tariff, which resulted in improper billing to TSI's customers.

In pursuing its claims against Transcall, TSI has offered almost nothing in the way of proof to substantiate any of its claims. In his direct testimony, Mr. Esquenazi enumerated his allegations against Transcall, but then directed the Commission to Mr. Shulman's testimony for the documentation and proof of his claims. Turning to Mr. Shulman's testimony, he completely omits any discussion of four of the claims and ultimately offers no credible evidence regarding the remaining allegations.

A. Introduction

There is no dispute between the parties as to how TSI's customers were billed. TSI advised Transcall of the billing requirements for each of its billing products (the rate, billing increments, etc.), each of which was assigned a billing product code. When TSI signed up a customer, TSI sent Transcall a service order form containing the applicable billing product code for that customer along with the customer's name, telephone and other relevant information. Transcall would enter the customer's information, including the billing product code, into its billing system. Thereafter, Transcall's reseller billing system would generate the detailed usage bill for each customer which was delivered to TSI. TSI would take the usage bill for each customer and add its own cover sheet reflecting any monthly charges, payments, taxes, etc., and send a complete bill out to the customer. The customers then would remit any payments directly to TSI, and TSI would have the only contact with the customer.

B. Transcall Billing Actions

Each of TSI's eleven allegations, excepting Allegation 6 (6-second increments) and Allegation 9 (billing detail not matching summaries) potentially impacted both TSI's customers and TSI. As Transcall fully discussed under Issue 2, Transcall did not improperly bill TSI's customers

except for the 9-second error. Accordingly, Transcall incorporates herein its analysis and argument at Issue 2 on the TSI allegations impacting TSI's customers.

The net result is that other than the 9 second error, TSI's customers were not improperly billed. There were some billing problems experienced by customers, but TSI's customers requested credits to a maximum amount of \$51,486.96. Tr. 85. These credits represent the credits that TSI documented it gave to its customers. Mr. Esquenazi tried to argue at the hearing that customers unilaterally took credits by not paying their bills and cancelling service. Tr. 162-164. However, in early 1991 when Transcall asked TSI to document all credits, TSI provided documentation of only \$51,486.96. To the extent TSI gave credits for bad debt, TSI would have to document those write offs somewhere, which it could have provided to Transcall, but did not. Tr. 163-64. Mr. Esquenazi's implication that Hurricane Andrew impacted his ability to document credits is also wrong because this request by Transcall was prior to Hurricane Andrew. Tr. 162-63. In this proceeding TSI produced no other evidence. Thus, the only competent substantial evidence of record is that TSI had billing problems to the maximum amount of \$51,486.96 (assuming Mr. Esquenazi passed all of these through to his customers).

With respect to the three disputed billing issues between Transcall and the Staff Audit, those issues would impact only TSI and not TSI's customers, so they are not relevant here. Transcall otherwise agrees with and adopts the balance of the Staff Audit, and accepts and adopts those remaining Staff Audit findings and conclusions that impact TSI's customers.

C. TSI Billing Actions


TSI played a very important role in the billing of TSI's customers. As Mr. Esquenazi acknowledged, TSI was responsible for the preparation and delivery of the final bill to its customers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Transcall America, Inc.'s Posthearing Brief in Docket No. 951232-TI has been furnished by Hand Delivery (*) and/or U.S. Mail to the following parties of record this 24th day of September, 1998:

Beth Keating, Esq.*
Division of Legal Services
Room 370, Gunter Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Jon W. Zeder
Mr. Wesley R. Parsons
2601 South Bayshore Drive, Suite 1600
Miami, FL 33133


Floyd R. Self

The record indicates that TSI is responsible for at least three different kinds of improper billings to its own customers.

First, the Commission Staff Audit in Disclosure Number 10 determined that some of the billing instructions given to Transcall by TSI for the different product types did not agree with TSI's tariff. Second, the Staff Audit further found evidence that at least some of TSI's marketing literature (the "slicks") were not consistent with TSI's tariff. Third, cross-examination of Mr. Esquenazi revealed that TSI reduced or waived monthly charges for some customers, contrary to TSI's tariff. Finally, credits given to TSI by Transcall were not passed along to TSI's customers.

Mr. Esquenazi, as the Chief Executive Officer of TSI and its primary salesperson, was responsible for ensuring TSI's compliance with all applicable regulatory requirements. These actions by TSI, which resulted in the preparation of improper bills by Transcall and by TSI, can only be the full responsibility of TSI. TSI offered no evidence to refute these misbillings or their improper nature. Accordingly, in Staff Audit Disclosure Numbers 10, it is recommended that the Commission undertake a separate independent investigation of TSI's billing practices to its customers.

ISSUE 3.A.: If Telus/Transcall improperly billed TSI's customers in excess of or in violation of the applicable tariff, did the improper billing result in overcharges?

SUMMARY OF POSITION: *No, except for the 9 second error.*

ANALYSIS AND ARGUMENT: The only improper billing that occurred was the 9 second error. Tr. 80, 84, 225, 310; Exh. 20 (KLW-1, at 25 of 79). No party disputes this error.

As Transcall fully discussed at Issue 2, there were no other improper billings. TSI has failed to provide any evidence supporting some of its allegations and has failed to provide competent

substantial evidence of any other improper charges or improper billings that were in excess of or in violation of the Agreement or applicable tariff.

Transcall also notes that customers may have experienced other billing problems. However, the evidence of record is that such problems totaled a maximum amount of \$51,486.96, assuming the problems documented by this credit were passed along to TSI's customers.

ISSUE 3.B.: If overcharges occurred, what is the amount of such overcharges, including any applicable interest?

SUMMARY OF POSITION: *The value of the 9 second error to TSI is \$37,714.59 with interest of \$12,688.57. The amount TSI would have to refund to customers would be higher since TSI's customers were billed at a higher rate.*

ANALYSIS AND ARGUMENT: Transcall adopts the findings and conclusions made in Audit Disclosure Number 3. Exh. 20, KLV-1, at 25 of 79. Transcall notes that the difference between the \$37,714.59 and the amount overcharged to TSI's customers was collected and retained by TSI (i.e., it would have been the profit or TSI's margin on the value of the 9 seconds).

ISSUE 3.C.: Did TSI's customers make any payments on any amount overcharged? If so, how much was paid and to whom were payments made?

SUMMARY OF POSITION: *TSI's customers paid TSI directly, so any overcharges would have been collected by TSI and not Transcall. Thus, any required refund would need to be made by TSI to its own customers.*

ANALYSIS AND ARGUMENT: As Mr. Esquenazi acknowledged, TSI collected all amounts billed to the TSI customers, less the documented credits and any bad debt (of which TSI has never produced documentation). Thus, any overcharges were collected and retained by TSI. Accordingly, any refund to TSI customers should be made by TSI.

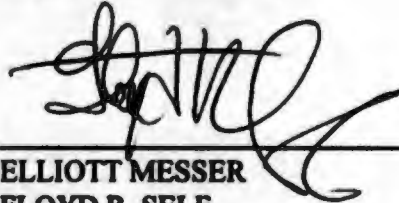
ISSUE 3.D.: After accounting for any overbilling, refunds, settlements or other credits that may be applicable, are TSI's customers due any refund amount? If so, who should pay the refund and how should it be implemented?

SUMMARY OF POSITION: *TSI may owe its customers a refund for the 9 second error, as well as the \$169,753.25 in credits it received that should have been passed on to its customers.*

ANALYSIS AND ARGUMENT: Accounting for amounts that may be due from TSI to TSI's customers is difficult because TSI did not respond to the Staff Audit requests for such data. Based upon the information of record, TSI may owe its customers a refund for the 9 second error plus the \$169,753.25 in credits it received from Transcall that were not passed along to customers.

Dated this 24th day of September, 1998.

Respectfully submitted,



ELLIOTT MESSER
FLOYD R. SELF
ALBERT T. GIMBEL
THOMAS A. SUTER
Messer, Caparello & Self, P.A.
Post Office Box 1876
Tallahassee, FL 32302-1876
(850) 222-0720

ATTORNEYS FOR TRANSCALL AMERICA, INC.