

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Citizens of State of Florida for investigation of Talk America Inc. and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications, for willful violation of Rule 25-4.118, F.A.C.

DOCKET NO. 010409-TP  
ORDER NO. PSC-02-0131-PCO-TP  
ISSUED: January 30, 2002

ORDER DETERMINING STATUS OF DOCUMENTS PURSUANT TO IN-CAMERA INSPECTION

BACKGROUND

On September 13, 2001, Citizens of Florida (Citizens or Office of Public Counsel) filed their "First Motion to Compel and Request for In Camera Inspection of Documents" (Request) concerning Talk America, Inc.'s (Talk America) assertion of attorney-client privilege and attorney work product. These assertions were made by Talk America in response to Citizens' First Request for Production of Documents #3. Citizens noted that Talk America provided a privilege log identifying 14 documents that had been withheld from production. Citizens further noted that seven of these documents were authored by a non-attorney, Mr. Benjamin Serzo, Talk America's Director of Operations, and that "multiple corporate employees" were recipients of the documents claimed as privileged in addition to company attorneys. It is these seven documents that were the object of Citizens' Request.

On September 26, 2001, Talk America filed its "Response to Citizens' First motion to Compel and Request for In Camera Inspection of Documents" (Response). The Response incorporated by reference a letter dated September 6, 2001, on the same subject from Talk America to the Office of the Public Counsel. These pleadings debate the issue of whether the facts establish that the seven documents authored by Mr. Serzo are protected from discovery based on attorney-client privilege pursuant to the standards established by the Florida Supreme Court in Southern Bell v. Deason, 632 So. 2d 1377, 1383 (1994):

DOCUMENT NUMBER-DATE

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- 1) the communication would not have been made but for the contemplation of legal services;
- 2) the employee making the communication did so at the direction of his or her corporate superior;
- 3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- 4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
- 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its content.

#### DISCUSSION

On December 7, 2001, I granted Citizens' Request for an In Camera Inspection of the seven documents in question. Order No. PSC-01-2374-PCC-TP. The In Camera inspection was held on January 18, 2002. Pursuant to that inspection, I find that the material contained in Document #13 on the bottom half of pg. 5 thereof and on the entirety of pg. 6 is protected from discovery by the attorney-client privilege. As to the remaining materials, I find that while they may have been presented to Talk America's attorneys, they do not appear to contemplate legal services as opposed to advice concerning business operations. As noted in Southern Bell,

When a corporation seeks the advice of an attorney, it is difficult to differentiate the role of a legal advisor from the role of a business advisor.

632 So. 2d at 1385. I have adjudicated this matter based on the Florida Supreme Court's analysis stated above that communications seeking legal advice, rather than business advice, are privileged.

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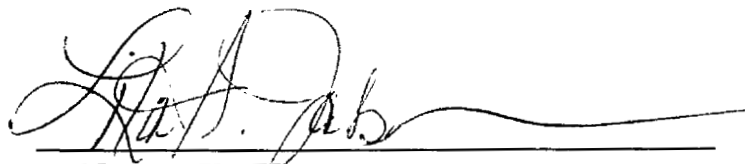
While I do not find that the remaining materials meet the test for attorney-client privilege, I note that Talk America is not precluded from filing a request for confidential classification for those materials pursuant to the requirements of Section 364.183, Florida Statutes and Rule 25-22.006, Florida Administrative Code. I also note that Talk America maintains that some of this material may be beyond the scope of Citizens' discovery requests. I make no findings here as to the issue of confidentiality or the issue of the scope of discovery.

Based on the above, it is

ORDERED by Chairman Lila A. Jaber as Prehearing Officer, that the bottom half of pg. 5 and the entirety of pg. 6 of Document #13 on the Privilege Log identified in Order No. PSC-01-2374-PCO-TP are protected from discovery by the attorney-client privilege. It is further

ORDERED that Documents 4, 5, 7, 9, 10, 12 and the remainder of Document #13 are not protected from discovery by the attorney-client privilege.

By ORDER of Chairman Lila A. Jaber, as Prehearing Officer, this 30th day of January, 2002.



LILA A. JABER  
Chairman and Prehearing Officer

( S E A L )

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any

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administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.