

ORIGINAL



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

RECEIVED-FPSC
01 SEP 13 PM 3:16
COMMISSION
CLERK

September 13, 2001

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 010409-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' First Motion to Compel and Request for *In Camera* Inspection of Documents. A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck
Deputy Public Counsel

CJB:bsr

- APP _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- LEG
- OPC _____
- PAI _____
- RGO _____
- SEC
- SER _____
- OTH _____

RECEIVED & FILED
RJM
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

11417 SEP 13 01

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by the Citizens of)
Florida to Investigate TALK.com Holding) Docket No. 010409-TP
Company and The Other Phone)
Company For Willful Violation of) Filed September 13, 2001
Rule 25-4.118, Florida Administrative)
Code)

**CITIZENS' FIRST MOTION TO COMPEL AND REQUEST FOR *IN CAMERA*
INSPECTION OF DOCUMENTS**

The Citizens of Florida (Citizens), by and through Jack Shreve, Public Counsel, file this motion requesting the Prehearing Officer to conduct an *in camera* inspection of certain documents Talk America claimed to be privileged in response to Citizens' first request for production of documents; to determine which, if any, of the documents qualify as privileged; and to order Talk America to produce all such documents which are not privileged.

1. Citizens served our first set of requests for production of documents to Talk America on April 17, 2001. Among other things, the requests asked for all documents in the company's possession related to complaints received at the Florida Public Service Commission that Consumer Affairs initially categorized as "slamming." Talk America felt that it would be burdensome to provide the documents for every complaint, so after some discussion, Citizens compromised with Talk America by agreeing to initially accept the documents related to every fifth such complaint instead of every complaint. In addition, Citizens agreed to

give the company more time to respond to the requests, extending the May 22, 2001 deadline to July 20, 2001.

2. In its response filed on July 23, 2001, Talk America raised attorney-client privilege and attorney work product in its response to document request #3. That request asked for all documents analyzing, evaluating, or otherwise commenting on the extent or causes of slamming customers in Florida. The request excluded documents specifically related to other states, but included documents related to Florida, the nation as a whole, or any group of which Florida is a part. The response said that the company would provide a log of privileged documents once the log was completed.

3. On August 7, 2001, Talk America provided a privilege log (attachment 1) identifying 14 documents it had withheld from production. On August 8, Citizens sent an e-mail (attachment 2) to the attorney for Talk America asking them to reconsider their claim based on the test contained in the case of *Southern Bell Telephone and Telegraph Company, v. J. Terry Deason, et. al.*, 632 So.2d 1377 (Fla. 1994). Talk America responded by letter dated September 6, 2001 (attachment 3).

4. Citizens request the Prehearing Officer to conduct an *in camera* inspection of 7 documents described on attachment 3 where a person named Benjamin Serzo is indicated as the author of the document. According to the attachment,

Mr. Serzo is not an attorney -- his position with the company is Director of Operations. Each of the documents claimed as privileged had "multiple corporate employees" as recipients in addition to company attorneys.

5. The *Southern Bell* case makes it clear that claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny in order to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery. The Court set forth the following test to determine whether a communication is covered by the privilege:

- (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 contents.

6. From the privilege log provided to Citizens, it appears these communications exemplify the concern of the court about corporations cloaking information with the attorney-client privilege in order to avoid discovery. Each of these documents was created by a person who was not an attorney and was

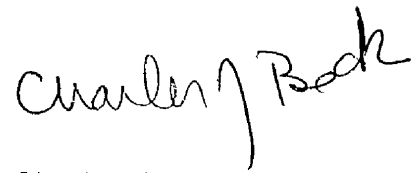
distributed to some undisclosed number of "multiple corporate recipients." The mere inclusion of one or two attorneys among the "multiple corporate recipients" does not make the communication privileged.

7. Citizens note that, aside from the documents claimed to be privileged, Talk America provided nothing of substance in response to our request for all documents analyzing, evaluating, or otherwise commenting on the extent or causes of slamming customers in Florida. The company provided little more than some documents from their trade association generally providing news about the FCC, but they provided nothing specifically analyzing or commenting on their own slamming problems. It doesn't make sense that a company that has received so many complaints about slamming would have so little information documenting their efforts to reduce or eliminate slamming.

8. Citizens therefore request the Prehearing Officer to conduct an in camera inspection of the seven documents authored by Mr. Serzo; determine which, if any, of the documents qualify as privileged; and order Talk America to produce all such documents which are not privileged.

Respectfully submitted,

JACK SHREVE
PUBLIC COUNSEL

A handwritten signature in black ink that reads "Charles J. Beck". The signature is written in a cursive style with a large, sweeping "C" and "B".

Charles J. Beck
Deputy Public Counsel
Fla. Bar No. 217281

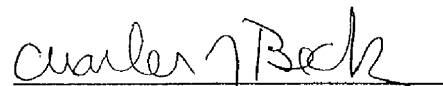
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-
1400

(850) 488-9330

Attorney for Florida's
Citizens

DOCKET NO. 010409-TP
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S.
mail or hand-delivery to the following parties on this 13th day of September, 2001.


Charles J. Beck

Mary Ann Helton
Division of Legal Services
Fla. Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Norman H. Horton, Jr.
Messer, Caparello & Self, P.A.
215 S. Monroe St., Suite 701
P.O. Box 1876
Tallahassee, FL 32301-1876

Steven A. Augustino
Kelly Drye & Warren, L.L.P.
Suite 500
1200 19th Street, NW
Washington, DC 20036

Francie McComb
6805 Route 202
New Hope, PA 18938

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Citizens of State of)
Florida for investigation of Talk.com)
Holding Corp. d/b/a Network Services d/b/a)
The Phone Company 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
Filed: August 7, 2001

RECEIVED
AUG 08 2001
Office of
Public Counselor

**TALK AMERICA, INC.'S SUPPLEMENTAL OBJECTIONS AND
RESPONSES TO FLORIDA'S CITIZENS FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

COMES NOW, Talk America, Inc. f/k/a Talk.com Holding Corp. d/b/a Network Services
d/b/a The Phone Company and The Other Phone Company, Inc. d/b/a Access One Communications
(collectively "Talk America") and submits this supplemental response to the Citizen's First Set of
Requests for Production of Documents and states as follows:

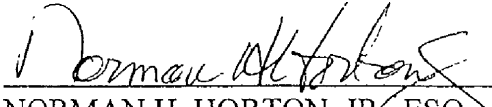
REQUEST NO. 3.

Please provide all documents in your possession, custody or control analyzing, evaluating,
or otherwise commenting on the extent or causes of slamming customers in Florida. This request
excludes documents specifically related to states other than Florida, but the request includes
documents related to Florida, the nation as a whole, or any group of which Florida is a part.

RESPONSE

Subject to the objections stated in the response filed July 23, 2001 a copy of the privileged
log referenced in the initial response is attached.

Respectfully submitted,


NORMAN H. HORTON, JR., ESQ.
Messer, Caparello & Self, P.A.
P. O. Box 1876
Tallahassee, Florida 32302
(850) 222-0720

TALK AMERICA FLORIDA PUBLIC COUNSEL, Docket No. 010409-TP: PRIVILEGE LOG

August 7, 2001

Doc. Type	Date	Author/ Sender	Recipient(s)/ CC:	Basis of Privilege	Subject Matter of Document	Privilege
Electronic Mail Message	10/09/00	Francie McComb, Associate General Counsel, Talk America	Tina Tecce, Talk America (f/k/a/ Talk.com) Regulatory Director	Attorney/Client Communication; Attorney Work Product	Regulatory matters pertinent to the company's operations	Communication between corporation's attorney and corporate employee regarding regulatory liability issues
Electronic Mail Message	10/16/00	Francie McComb, Associate General Counsel, Talk America	George Vinall, Vice-President of Regulatory and External Affairs; Tina Tecce; Steven A. Augustino, Attorney, Kelley, Drye & Warren, LLP, Counsel to Talk America	Attorney/Client Communication	Ordering and sign-up procedures for customers	Communication between corporation's attorney, corporate employees, and outside counsel for purpose of obtaining legal advice re: alleged regulatory violations
Electronic Mail Message	11/6/00	Francie McComb, Associate General Counsel, Talk America	Al Lawn, General Counsel; George Vinall; Tina Tecce; Kevin Griffo, President, Talk America	Attorney/Client Communication; Attorney-Work Product	Regulatory status update	Communication between corporation's attorney and corporate employees re: legal discussion and analysis of regulatory investigations
Meeting Minutes	1/3/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Customer Service Issues	Communication between corporate employees and corporation's attorneys re: types of customer service inquiries
Meeting Minutes	1/12/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Customer Service Issues	Communication between corporate employees and corporation's attorneys to obtain legal advice re: analysis of customer service inquiries
Electronic Mail Message	1/18/01	Brad E. Mutschelknaus, Attorney, Kelley Drye & Warren, LLP Counsel to Talk America	Al Lawn; Francie McComb; George Vinall	Attorney/Client Communication	Customer Service Operational Issues	Communication between attorney and client for purpose of obtaining legal advice regarding operational relationship with ILECs on slamming issues
Meeting Minutes	1/26/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Customer Service Communications and Operational Issues	Communication between corporate employees and corporation's attorneys analyzing customer service inquiries

TALK AMERICA FLORIDA PUBLIC COUNSEL, Docket No. 010409-TP: PRIVILEGE LOG

August 7, 2001

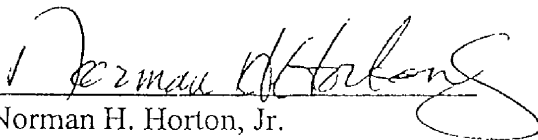
Doc. Type	Date	Author/ Sender	Recipient(s)/ CC:	Basis of Privilege	Subject Matter of Document	Privilege
Electronic Mail Message	3/02/01	Steven A. Augustino, Attorney, Kelley, Drye & Warren, LLP, Counsel to Talk America	Francie McComb; George Vinall; Brad E. Mutschelknaus	Attorney/Client Communication; Attorney-Work Product	Federal Communications Commission rules and regulations	Communication between attorney and client for the purpose of providing information and legal analysis regarding implementation of new FCC slamming rules
Meeting Minutes	04/06/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Information Technology (IT) Issues	Communication between corporate employees and corporation's attorneys for the purpose of obtaining legal advice re: efforts to prevent slamming.
Meeting Minutes	4/13/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Information Technology (IT) Issues	Communication between corporate employees and the corporation's attorneys discussing progress regarding efforts to prevent slamming
Electronic Mail Message	4/22/01	Francie McComb	Al Lawn; George Vinall; Sharon Thomas, Regulatory Director, Talk America; Jeff Earhart, Vice-President, Operations, Talk America; Steven A. Augustino	Attorney/Client Communication	Federal Communications Commission rules and regulations	Communication between corporation's attorney, corporate employees, and corporations' outside counsel for the purpose of obtaining legal advice regarding implementation of new FCC slamming rules
Meeting Minutes	4/27/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/Client Communication	Information Technology (IT) Issues	Communication between corporate employees and corporation's attorney regarding implementation of new verification procedures
Meeting Minutes	5/4/01	Benjamin Serzo	Multiple Corporate Employees; Al Lawn; Francie McComb	Attorney/ Client Communication	Information Technology (IT) Issues	Communications between corporate employees and corporation's attorney's regarding status of new verification procedures.
Advisory Memo from Outside Counsel	Undated	Heather Hendrickson, Summer Associate; Kelley, Drye & Warren, LLP, Counsel to Talk America	Unknown	Attorney/ Client Communication; Attorney-Work Product	Talk America Scripts	Draft script for disputes group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Talk America, Inc.'s Supplemental Objections and Responses to Florida's Citizens First Set of Requests for Production of Documents in Docket No. 010409-TP have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 7th day of August, 2001.

Mary Ann Helton, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Charles Beck, Esq.*
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400


Norman H. Horton, Jr.

BECK.CHARLES

From: BECK.CHARLES
Sent: Wednesday, August 08, 2001 10:41 AM
To: Doc Horton (E-mail)
Subject: Talk America Claims of Privilege

Doc, I have received the privilege log mentioned in your earlier discovery responses.

I am not at all convinced that all of the documents withheld qualify for the attorney-client privilege. Is Benjamin Serzo, the author/sender of a number of documents, an attorney? When you list the recipients as including "multiple corporate employees," that would tend to make me think that the communication does not qualify for attorney-client privilege. Just because an attorney is one of a number of recipients of a document does not mean that the document is privileged.

You probably recall that we litigated claims of corporate privilege with BellSouth a number of years ago. The resulting Florida Supreme Court opinion, *Southern Bell Telephone and Telegraph Company, v. J. Terry Deason, et. al.*, 632 So.2d 1377 (Fla. 1994), states that the burden of establishing the attorney-client privilege rests on the party claiming it. It sets forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

- (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 contents.

Would you please ask Talk America to reconsider its claims of privilege in light of this test?

Thanks.

Charlie

Charles J. Beck
Deputy Public Counsel

Office of Public Counsel
111 West Madison Street, room 812
Tallahassee, FL 32399-1400

Tel: 850-487-8240
Fax: 850-488-4491
e-mail: beck.charles@leg.state.fl.us

— ATTACHMENT 2 —

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
TELECOPIER (850) 224-4329
INTERNET: www.lawfla.com

September 6, 2001

RECEIVED

SEP 07 2001

Office Of
Public Counsel

BY HAND DELIVERY

Charles J. Beck, Deputy Public Counsel
Office of the Public Counsel
State of Florida
c/o the Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, Florida 32399-1400

FILE COPY

Re: Docket No. 010409-TP - Office of Public Counsel Discovery Requests

Dear Mr. Beck:

On August 7, 2001, Talk America, Inc. (f/k/a "Talk.com", hereinafter "Talk America" or "the Company") provided the State of Florida's Office of the Public Counsel ("Public Counsel") with documents responsive to Question #3 of the Public Counsel's First Set of Requests for Production of Documents to Talk.com and the Other Phone Company. The documents produced included a Privilege Log ("August 7, 2001 Privilege Log") identifying fourteen (14) documents the Company considers privileged and, thus, subject to Talk America's right to assert an attorney-client confidentiality privilege.

Subsequent to that filing, you expressed some doubt as to whether all the documents identified in the August 7, 2001 Privilege Log qualify for the attorney-client privilege. In particular, you identified those listing the recipients as "multiple corporate employees" (Documents 4, 5, 7, 9, 10, 12, and 13 on the log, or collectively, "Meeting Minutes"). Talk America maintains its claim of privilege for the "Meeting Minutes" documents for the following reasons:

First, the Meeting Minutes reflect a record of conversations between Talk America employees and attorneys for the Company. The communications between the employees and the Company's attorneys would not have occurred, but for the presence of the attorneys.

Second, the attorneys, including Talk America's General Counsel and Executive Vice-President, the Company's Associate General Counsel for Regulatory Affairs, and a Corporate Counsel, attended and participated in the meetings for the primary purpose of providing specific legal advice regarding the issues raised in the meetings. Notably, the discussions during these meetings were not limited to the specific analysis, evaluation, or comments regarding the extent or causes of "slamming" customers in Florida, but included an analysis of multiple issues for which the corporate employees requested and received legal advice and counsel. Therefore, although every aspect of the meeting did not concern slamming, the collective subject matter of the meeting was considered significant enough to warrant oversight and analysis by attorneys from the Company's legal department.

Third, in response to your query, Mr. Benedict (Benjamin) P. Serzo, the author of the Meeting Minutes documents, is not an attorney. Rather, he is an employee of the Company who is responsible for collecting and organizing requests for legal advice generated by other corporate employees. His official title is Director of Operations. Given that the purpose of the meetings was to obtain advice from counsel regarding different legal issues as they arose, the corporate employees attending the meeting, including Mr. Serzo, initiated their discussions with counsel at the specific request of, and with knowledge of, their corporate superiors. Thus, the descriptions contained in the documents are requests by corporate employees for legal advice regarding job-related activities.

Fourth, Mr. Serzo, in his role as a recorder of the requests for legal advice and the substantive conversations between the Company's employees and its attorneys, created records which reflect the notes of a client seeking advice from his or her counsel. These documents should not be subject to disclosure in light of the stated privilege. Moreover, the Meeting Minutes were only distributed to a limited number of persons, namely the attendees of the meetings and the Company's attorneys. Attendance at the meeting is limited and restricted and access to the meeting minutes is similarly controlled and restricted.

Finally, it is important to note that the presence of Talk America's attorneys during these meetings is instructive regarding the seriousness with which the Company considers its legal obligations and its desire to ensure that its employees comply with all regulatory requirements. Talk America's attorneys attended and participated in these discussions for the purpose of providing legal advice in light of multiple agency investigations active at the time of the meetings.

We hope this explanation is helpful in better understanding Talk America's claim of privilege regarding the Meeting Minutes. As a related matter, we have also expanded our research of documents in response to your request that we make certain that there were no other non-privileged documents which would be responsive to your initial request. Although we performed an initial

Charles J. Beck, Deputy Public Counsel
September 6, 2001
Page 3

search and analysis and provided a response, we initiated a re-inspection and expansion of the initial research to insure that all relevant documents were identified. Should our search produce additional documents, Talk America will supplement its response as necessary.

Please feel free to contact me if you have any questions regarding any of the issues in this correspondence or if you need further assistance in this matter.

Respectfully submitted,


Norman H. Horton
Counsel for Talk America Inc.

cc: Steven A. Augustino, Kelley Drye & Warren LLP
Francie McComb, Associate General Counsel, Talk America Inc.