

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Citizens of State) DOCKET NO. 010409-TP
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.)

In re: Investigation of possible) DOCKET NO. 010564-TX
Violation of Commission Rules 25-4.118)
And 25-24.111, F.A.C. or Chapter 364,) Filed: March 19, 2002
F.S., by The Other Phone Company, Inc.)
D/b/a Access One Communications,)
Holder of ALEC Certificate No. 4099,)
And Talk America Inc., holder of)
ALEC Certificate No. 4692)

MOTION TO DISMISS OF TALK AMERICA INC.

COMES NOW Talk America, Inc., f/k/a Talk America Holding Corp. d/b/a Network Services d/b/a The Phone Company and The Other Phone Company d/b/a Access One Communications, Inc. (“Talk America” or “Company” collectively), by its attorneys, and provides this *Motion to Dismiss* certain complaints contained in the *Talk America Master Violation List* (“Master Violation List”), appended as *Attachment A* to the Florida Public Service Commission’s (the “FL PSC” or “Commission”) January 16, 2002 *Order Granting in Part and Denying in Part Motion for Clarification, Amending Order No. PSC-01-2107-SC-TP and Granting Amended Request for Extension of Time*, Order No. PSC-02-0095-PCO-TP (“Jan. 16

Order”).¹

Specifically, Talk America moves that the PSC dismiss, for lack of subject matter jurisdiction, thirty-six (36) complaints² cited in the *Master Violation List*, as incorporated by the *Show Cause Order*, for which the PSC alleges the Company to be in violation of FLA. STAT. ANN. §364.604(2). The specific complaints that Talk America moves to dismiss are identified in the spreadsheet appended hereto as *Exhibit A*.³

In support of this Motion, Talk America states as follows:

Introduction and Summary

1. By its *Show Cause Order* in this docketed proceeding, the PSC directed Talk America to show cause why it should not be penalized for alleged apparent violations of Section 364.604(2), Florida Statutes, and Rules 25-4.118 and 25-22.032(5)(a), Florida Administrative Code. Among the allegations in the *Master Violation List*, which have been incorporated into the *Show Cause Order* through the *Jan. 16 Order*, are thirty-six (36) complaints for which the PSC has alleged that Talk America billed and collected charges for telecommunication services not authorized by Florida customers in violation of FLA. STAT. ANN. §364.604(2).

¹ The *Jan. 16 Order* amended the *Order to Show Cause*, No. PSC-01-2107-SC-TP (Oct. 23, 2001) (hereinafter referred to as the “Show Cause Order”) entered against Talk America, which required the Company to show cause within twenty-one (21) days as to why it should not be fined for apparent violations of Section 364.604(2), Florida Statutes, and Rules 25-4.118 and 25-22.032(5)(a), Florida Administrative Code.

² Please note that a substantive response for three complainants listed in the *Master Violation List* as alleged rule violations of FLA. STAT. ANN. §364.604(2) have been provided in the *Initial Response of Talk America* filed simultaneously with this Motion.

³ Please note that although this list actually contains only 35 names, it contains 36 complaint numbers because Roger Rhodes is listed by the PSC as having 2 complaint numbers – 338011T and 335914T. As a point of fact, however, the complaints for Mr. Rhodes are for the same facts based on the same complaint and thus should be considered one complaint. As a further point, this same complaint was investigated by two different staff members with the inconsistent result that one staff member found an apparent rule violation while one did not.

As discussed herein, Talk America respectfully requests that the Commission dismiss these thirty-six (36) complaints from the *Show Cause Order* due to the lack of subject matter jurisdiction of the PSC over such complaints.⁴ It is the Federal Communications Commission (“FCC”), not the PSC, which has exclusive jurisdictional authority over the billing and collection practices of carriers relating to interstate communications services or to jurisdictionally-mixed bundles of interstate and intrastate communications services such as those contained in these thirty-six (36) billing complaints. Accordingly, these thirty-six (36) billing complaints should be dismissed from the *Show Cause Order*.⁵

ARGUMENT

THIRTY-SIX (36) BILLING COMPLAINTS CONTAINED IN THE MASTER VIOLATION LIST AGAINST TALK AMERICA SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OF THE PSC OVER THESE COMPLAINTS

2. The *Show Cause Order* incorporates from the *Master Violation List* thirty-six (36) complaints filed against the Company for which the Commission alleges various acts that apparently violate Fla. Stat. Ann. §364.604(2). Such alleged acts include the duplication of charges for services, fees or taxes on customer bills, the billing of customers prior to

⁴ There are three (3) alleged billing violations contained in the PSC’s *Master Violation List* that relate to the billing of purely intrastate services and thus are not subject to this Motion, which addresses complainants who were provided service by Talk America of jurisdictionally-mixed calling plans or bundled packages of service. The Company’s specific responses to these complaints, *No. 369087T, Complaint of Tropical Park Shell; No. 358506T, Complaint of Dennis Berg; and No. 323416T, Complaint of John Levin*, are appended to its *Initial Response to the Show Cause Order* as *Exhibit I*.

⁵ In the *Show Cause Order*, the PSC refers to 105 billing complaints filed against Talk America. With the exception of the thirty-six (36) complaints that are the subject of this Motion, and three (3) complaints that are the subject of the Company’s *Initial Response*, the Company has moved for summary final order of all remaining billing complaints, given that PSC Staff previously determined that these complaints involved no apparent violations of Florida rules. For a list of those complaints, please see *Exhibit B* to the *Memorandum in Support of a Motion for Summary Final Order*, which has been filed concurrent with this Motion.

provisioning services, the billing of customers for calling features not ordered or authorized, failed to provide customers with credits or refunds for unauthorized charges or services, and the sending of erroneous bills to casual callers – all in apparent violation of Fla. Stat. Ann. §364.604(2).

3. In relevant part, Fla. Stat. Ann. §364.604 requires that:

(1) Each billing party must clearly identify on its bill the name and toll-free number of the originating party, the telecommunications service or information service billed; and the specific charges, taxes and fees associated with each telecommunications or information service. . . .

(2) A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or provide. . . .

1. The PSC's jurisdiction, however, applies solely to intrastate charges within the State of Florida.⁶ The PSC's rules are not applicable to thirty-six (36) of the apparent violations of Fla. Stat. Ann. §364.604 cited by the PSC in the *Master Violation List* to the *Show Cause Order* because none of these complaints relate to charges for intrastate services provided by the Company pursuant to tariffs on file in the State of Florida. Rather, all of these complaints relate to the Company's billing of jurisdictionally-mixed bundled package of intrastate and interstate services – either in the form of an intrastate and interstate long distance telephone service plan or in the form of a bundled package of intrastate and interstate local and long distance services,

⁶ See FLA. STAT. ANN. §364.27 (obligating the Commission to refer to the FCC any “interstate rates, fares, charges, classifications or rules of practice . . . [taking] place within this state . . . [where] such rates, fares, charges, classifications, or rules of practice are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the [Telecommunications] Act.

such as Talk America's United Calling Plan.⁷ The billing of these jurisdictionally-mixed services is not separated into intrastate and interstate services. As a result, the Company's billing practices for such services and the cramming complaints filed against the Company with respect to such billing practices are not severable into separate intrastate and interstate actions.

2. Accordingly and as demonstrated in this Motion, the FCC -- not the PSC -- has the exclusive jurisdictional authority to regulate the Company's billing and collection practices with respect to jurisdictionally-mixed services. Indeed, the Florida statutes expressly acknowledge that the FCC has jurisdictional authority over interstate rates, fares, charges, classifications or rules of practice taking place within the State of Florida where such rates, fares, charges, classifications, or rules of practice are regarded by the Commission as excessive or discriminatory or are levied or laid in violation of the Telecommunications Act.⁸ Accordingly, the thirty-six (36) complaints that are the subject of this Motion should be dismissed for lack of subject matter jurisdiction.

Talk America Offers Only Jurisdictionally-Mixed Bundles of Communications Services To Its Customers

3. The FCC, among others, long has recognized the inherent value in a carrier's ability to offer bundled packages of services and products to its customers.⁹ The FCC specifically has

⁷ Under this bundled plan, a customer receives the following features: basic local telephone service, unlimited local calling, unlimited regional (intraLATA) calling (the rates for which vary from state to state), interstate calling at 5¢ per minute and free member-to-member long distance calling (up to 1000 minutes per month) for a total monthly fee ranging from \$39.95 to \$45.95, depending on the zone, plus applicable taxes and regulatory surcharges.

⁸ *Supra* n.5.

⁹ *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, CC Dockets 96-61, 98-183 at ¶ 1 (rel. Mar. 30, 2001) (stating that allowing common carriers to offer consumers bundled packages of telecommunications services and customer premises equipment at a discounted price benefits consumers by

found that bundling, the offering of two or more products or services at a single price, typically less than the sum of separate prices, “encourages competition by giving carriers flexibility both to differentiate themselves from their competitors and to target segments of the consumer market with product offerings designed to meet the needs of individual customers.”¹⁰ Talk America has designed its calling plans precisely for these reasons. In order to satisfy consumer demand for quality communications services at affordable prices and in attractive packaged offerings, Talk America offers its customers a variety of bundled packages of local and long distance telephone services.

4. For example, in the State of Florida, Talk America offers two bundled calling plans, both of which include local exchange, intraLATA and interstate long distance services. The first plan, the “Freedom Plan,” which no longer is marketed by the Company, includes 200 free domestic long distance minutes for a higher price than the Company’s more recent plan, the “United Plan,” which does not include any free long distance minutes but has lower monthly rates. These packages are not jurisdictionally severable – *i.e* they cannot be separated into intrastate calling plans versus interstate calling plans – because, as with all service offerings by Talk America, these bundled packages contain both interstate *and* intrastate service elements, which are not separately priced or offered. Talk America has specified in its local exchange tariffs, including in its Florida price list that it offers local exchange service “only as part of a bundle or package of telecommunications services to residential Customers.”¹¹

enabling them to take advantage of innovative and attractive packages of services and equipment).

¹⁰ *Id.* at ¶ 14.

¹¹ See *Exhibit B, Florida Price List of Talk America Inc.* at pg. 60 (effective date Mar. 31, 2001) (“Florida Price List”). For informational purposes, Talk America also has set forth the bundled packages available to customers in the State of Florida in the Company’s Florida Price List, the relevant sections of which are appended hereto as *Exhibit C*. See *Florida Price List* at pgs. 60.1-65. The bundled services set forth in this tariff, however, are provisioned pursuant to Talk America’s interstate service offerings

5. Talk America's bundled offerings, because they include jurisdictionally-mixed services, are offered pursuant to the Company's interstate rate and service offerings. The FCC has required non-dominant interexchange carriers to detariff their domestic interexchange service offerings.¹² Accordingly, Talk America's bundled service plans are set forth on the Company's web site at www.talk.com, in its Rates, Terms and Conditions ("RTC") document and also in its local and long distance calling plan hypertext links on the web site, through which a customer may determine whether a particular calling plan is offered in its area and select the plan of his/her choosing.

¹² 47 C.F.R. § 61.19(a).

**The FCC Has Exclusive Authority Over Billing Regulations Associated with
Jurisdictionally Mixed Communications Services**

Background of Federal/State Dual Regulatory Scheme

6. Pursuant to the bifurcated federal and state regulatory structure in the United States, jurisdiction over interstate and international commerce constitutionally is vested in Congress,¹³ which in turn has delegated its authority over communications largely to the FCC. Regulation of intrastate commerce, reserved to the states under the United States Constitution, and of communications in particular, has been delegated to state regulatory authorities, including the PSC, pursuant to each state's own statutory authority. The Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act") further established a system of dual state and federal regulation over telephone service, granting to the FCC the broad authority to regulate "interstate and foreign commerce in wire and radio communication,"¹⁴ while reserving for the states the Commission to regulate charges, classifications, practices, services, facilities, or regulations "for or in connection with *intrastate* communication service by wire or radio . . ."¹⁵

7. The FCC has jurisdiction under both Title I and Title II of the Communications Act to regulate the manner in which common carriers such as Talk America bill and collect for their own interstate services offerings.¹⁶ Congress clearly vested the FCC with exclusive jurisdiction

¹³ U.S. CONST. art. I, § 8.

¹⁴ 47 U.S.C. § 151.

¹⁵ 47 U.S.C. § 152(b) (emphasis added).

¹⁶ 47 U.S.C. §§ 151, 201(b). *See also In re Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, 14 FCC Rcd. 7492 at ¶ 25 (rel. May 11, 1999) ("Truth-in-Billing Order"); *In re Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 12 FCC Rcd 1632 at ¶¶ 31-32 (1997); *In re*

over the regulation of interstate communications charges pursuant to 47 U.S.C. § 201(b), which authorizes the FCC to prescribe rules and regulations necessary to ensure that “all charges, practices, classifications and regulations for and in connection with [interstate and foreign] communications service, shall be just and reasonable.”¹⁷ The FCC has emphasized that “[a] carrier’s provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of Section 201(b) of the Act,”¹⁸ and, to this end, has used its express authority under the Act on many prior occasions to address allegations of unreasonable billing practices of telecommunications carriers.¹⁹ Moreover, Talk America has records of multiple instances in which Florida customers filed billing complaints against the Company with the FCC with respect to jurisdictionally-mixed services -- oftentimes in addition to complaints filed with the PSC for the same allegations.²⁰ In none of these cases did the FCC choose not to review the billing complaint and instead to refer it to the PSC.

8. In addition to its jurisdictional authority over billing practices for purely interstate services, the FCC also has exclusive jurisdiction over the billing of jurisdictionally mixed packages of communications services, such as those offered by Talk America to customers in the

Detariffing of Billing and Collection Services, 102 FCC 2d. 1150 at ¶ 2 (1986).

¹⁷ 47 U.S.C. § 201(b). *See also Federal Communications Commission, Consumer Facts: Unauthorized, Misleading or Deceptive Charges Placed on Your Telephone Bill – Cramming*, www.fcc.gov/cib/consumerfacts/cramming.html (Sept. 21, 2001) (stating that “for charges related to telephone services between two states or internationally, you should contact the FCC”).

¹⁸ *See Truth-in-Billing Order* at ¶ 24; *see also* 47 C.F.R. § 64.2400 *et seq.*

¹⁹ *See Kiefer v. Paging Network*, 24 CR 1213 (2001); *Halprin, Temple, Goodman and Sugrue v. MCI Tel. Corp.*, 14 FCC Rcd 21092 (1999); *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 (1997).

²⁰ *See, e.g.*, billing complaints filed against Talk America by Vivkie Givens, BTN (321) 255-5587; Kathleen Mackay, BTN (954) 474-9090; Catherine J. Danjean, BTN (954) 473-0367; Milton Hurwitz, BTN (561)-241-7378; and Ernest and Christine Rover, BTN (561) 663-3847.

State of Florida. In the seminal case of *Louisiana Pub. Serv. Comm'n v. FCC*, the Supreme Court made it clear that: (1) where the FCC is acting within the scope of its exclusive authority and (2) where state regulation stands as an obstacle to valid federal communications policies, the FCC may preempt state regulation where it is not possible to separate the interstate and intrastate components of the asserted FCC regulation.²¹ Each prong of this test is addressed below.

9. First, the FCC has used its express authority under Section 201(b) of the Act to establish specific *Truth In Billing* rules governing common carrier billing practices in general and cramming in particular.²² The FCC's Consumer Information Bureau established a Cramming Consumer Fact Sheet, <http://www.fcc.gov/cib/consumerfacts/cramming.html>, which specifies that "for charges related to telephone service between two states or internationally, you should contact the FCC," and an on-line complaint form, FCC Form 475, to assist consumers with filing general complaints against carriers regarding billing disputes and cramming, among

²¹ *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 374-75 and n.4 (1986) ("Louisiana PSC"). See also *California v. Federal Communications Comm'n*, 39 F.3d. 919 (9th Cir. 1994) ("California v. FCC") (declaring that the FCC was entitled to preempt state regulations because it had met its burden of showing that its regulatory goals of authorizing the integration of services would be negated by the state regulations it had preempted); *Maryland Pub. Serv. Comm'n v. Federal Communications Comm'n*, 909 F.2d. 1510 (D.C. Cir. 1990) (finding that the Communications Act permits the FCC to preempt the states from setting rates charged by local exchange carriers to interexchange carriers for disconnection of local telephone bills); *North Carolina Utils. Comm'n, v. Federal Communications Comm'n*, 552 F.2d. 1036 (4th Cir. 1977) (holding that the FCC has jurisdiction to prescribe the conditions under which terminal equipment may be interconnected with the interstate telephone line network even though such equipment also is used for local communication and despite the contention that federal control of interconnection over the national network will deprive the states of meaningful rate-making power); *North Carolina Utils. Comm'n, v. Federal Communications Comm'n*, 537 F.2d. 787 (4th Cir. 1976) (holding that the FCC's declaratory statement of its primary authority over interconnection of customer-provided telephone terminal equipment within the national telephone network was a proper and reasonable assertion of its jurisdiction that unavoidably affects intrastate as well as interstate communication, and that Section 152(b) of the Communications Act does not sanction any state regulation that encroaches substantially upon the FCC's authority under Sections 201-205 of the Communications Act).

²² *Id.* See also *Telecommunications – State and Federal Actions to Curb Slamming and Cramming*, GAO Report (July 27, 1999).

other issues. As established above, the FCC clearly is acting within the scope of its Congressionally-delegated authority under 47 U.S.C. § 201(b) where it regulates the billing practices of common carriers, including those relating to “cramming,” the placing of unauthorized charges on a consumer’s telephone bill for services and products.

10. Second, it is not possible to sever the billing aspects of bundled services into interstate and intrastate components. As previously stated, Talk America bills all of its calling plan features at a single price – interstate and intrastate services are not separately billed. Because the Company’s billing practices are not severable into interstate and intrastate actions, it is impossible to simultaneously apply separate sets of billing rules – state and federal – to its jurisdictionally-mixed service plans.

11. The FCC has established *Truth In Billing* regulations expressly designed to further the important federal policy of reducing the recent, substantial increase in cramming complaints nationwide, which the FCC has found to have risen out of customer confusion concerning charges on their telephone bills.²³ These *Truth In Billing* regulations apply to both bundled and unbundled services and to local as well as long distance carriers. Significantly, both the states as well as the FCC found federal action over carrier billing practices to be imperative: “Virtually every state and consumer advocacy group that commented in this proceeding urges us to take action to address the growing problem of consumer confusion with their telephone bills.”²⁴

12. Permitting states to regulate the billing of bundled services necessarily would conflict with the FCC’s jurisdictional authority over billing of communications services. The particular

²³ See *Truth In Billing Order* at ¶ 3.

²⁴ *Id* at ¶ 4 and n.10.

conflict between the state and federal policies in this area stems from the fact that the FCC specifically has chosen to regulate the billing and collection practices of telecommunications carriers offering both unbundled and bundled telecommunications services, while the PSC also is attempting to regulate such practices for the same type of services, including interstate service. To permit such a system of dual regulation would result not only in the unnecessary and burdensome duplication of regulation of the same services, but also in the imposition of innumerable conflicting billing and collection requirements on communications carriers from potentially fifty one (51) different regulatory authorities, with which it simply would be impossible for carriers to comply. Moreover, such a situation could result in the creation of different cramming standards at the state and federal level based on differing definitions of “cancellation,” “violation” and “knowledge” of improper billing practices. Further, this situation also could negate the FCC’s valid regulatory goal of eliminating customer confusion with respect to their telephone bill charges.²⁵

13. Of equal importance, the FCC found that its authority to enact the *Truth In Billing* rules was derived not only from Section 201(b) of the Act, but also from Section 258 of the Act, which governs unlawful changes in subscriber carrier selections.²⁶ This is important because while states are free to adopt additional regulations for intrastate services *consistent with* the guidelines and principles established by the FCC in the *Truth In Billing Order*, the FCC did not choose expressly to delegate any jurisdictional authority to the states with respect to cramming,

²⁵ See *California v. FCC* at 933 (permitting the FCC to preempt state regulations where it had shown that conflicting state rules regarding access to CPNI would negate the FCC’s goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers).

²⁶ 47 U.S.C. § § 201(b), 258.

as it did with respect to slamming.²⁷ This lack of parallel delegation of statutory authority over cramming confirms that states may regulate billing and collection in general and cramming in particular only with respect to intrastate services. As noted above, the PSC's own rules acknowledge that the PSC has no authority over interstate communications services.²⁸ The converse is not true, as the FCC has jurisdictional authority over intrastate communications service where the test established by the Supreme Court in *Louisiana Pub. Serv. Comm'n v. FCC* has been met.

14. In sum, the FCC has chosen to exercise its lawful authority under the Act to establish rules that serve as the final authority for the billing and collection of telecommunications carrier services. With state authority limited to the regulation of intrastate services only, any attempt by the PSC to regulate the interstate services of Talk America, including those services that are bundled and thus, jurisdictionally inseverable, causes clear conflict with federal regulation in this area. Accordingly, the first two (2) prongs of the Supreme Court's preemption test as set forth in *Louisiana Pub. Serv. Comm'n v. FCC* have been met.

15. While the precise nature of the billing of jurisdictionally-mixed bundles of communications service offerings has not heretofore been addressed by the FCC or the courts, such services logically must be considered interstate in nature under either one of two tests established by the FCC to address instances of jurisdictionally-mixed traffic or service: (1) the "ten percent (10%)" rule; and (2) the "jurisdictional inseverability" rule.

²⁷ See 47 C.F.R. § 64.1110.

²⁸ *Supra* n.5.

The Jurisdictional Inseverability Rule

16. First, under the “jurisdictional inseverability” test set forth the *BellSouth Memory Call* decision, the FCC determined that where a service, such as voice mail, is a jurisdictionally-mixed service that cannot be separated into distinct jurisdictional portions, state regulations over such a service will be preempted.²⁹ In the *BellSouth Memory Call* decision, the FCC preempted an order by the Georgia commission that froze BellSouth’s voice mail service and prevented BellSouth from providing its voice mail service to new customers in the State of Georgia.

17. In the *BellSouth Memory Call* decision, the Georgia commission contended that the voice mail service was purely an intrastate service offering because it could be separated into two (2) distinct jurisdictional transactions: (1) one from the caller to the telephone company switch that routes the call to the intended recipient’s location (a transaction that could be intrastate or interstate); and (2) one from the switch forwarding the call to the voice mail apparatus and service, a transaction that purely is intrastate.³⁰ The FCC disagreed, finding that BellSouth’s voice mail service was jurisdictionally-mixed, and that it was impossible to separate the interstate and intrastate provision of the service without impermissibly barring the interstate provision of the service.³¹ Accordingly, the FCC preempted the Georgia commission’s “freeze” of BellSouth’s voice mail service offering as thwarting the FCC’s public interest objectives of adopting a comprehensive regulatory framework for enhanced services . In doing so, the FCC

²⁹ *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619 at ¶¶ 4, 7 (rel. Feb 14, 1992).

³⁰ *Id.* at ¶ 8.

³¹ *Id.* at ¶ 7.

noted that it has jurisdiction over and regulates charges for the local network “when it is used in conjunction with origination and termination of interstate calls,” and made it clear “[t]hat it had not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tarified.”³²

18. Additional FCC case law also supports the preemption of state regulation in instances of jurisdictional severability and where federal public interest objectives would be thwarted if the state regulation was permitted to govern. For instance, in the *Caller ID* proceeding, the FCC preempted state regulation of Caller ID that prohibited the offering of interstate CPN (Calling Party Number)-based services, required blocking alternatives on interstate calls that differed from those adopted by the FCC and required blocking systems that interfered with the FCC’s adopted method of using *67 to achieve blocking.³³ The FCC did so because it found CPN-based services to be “jurisdictionally-mixed services,” and that it is impractical and uneconomic to require the development and implementation of a dual blocking capability on the same line that would permit both the federal per call blocking system adopted by the FCC and state per line blocking systems.”³⁴

19. Likewise, in its *Intercarrier Compensation* proceeding, the FCC also found that where interstate and intrastate traffic components cannot reliably be separated, traffic properly is

³² *Id.* at ¶ 12. Accordingly, the mere fact that Talk America has tarified its bundled packages of service in its local tariff for informational purposes is legally insufficient to provide the PSC with any jurisdictional authority over the billing of these bundled services.

³³ *In re Rules and Policies Regarding Calling Number Identification Service – Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-281 at ¶ 16 (rel. May 5, 1995) (“Caller ID Order”).*

³⁴ *Id.* at ¶ 62.

classified as interstate and falls under the Commission's Section 201 jurisdictional authority.³⁵ Moreover, in the universal service context, the FCC specifically has acknowledged the problems inherent in a carrier's ability to distinguish and allocate revenue between different types of bundled services.³⁶

20. In this case, it is impossible to jurisdictionally separate Talk America's billing practices where complaints regarding those practices are based upon a jurisdictionally-mixed bundle of intrastate and interstate services, and where the allegations contained therein are not and cannot be limited to either the intrastate or the interstate service purchased by the customer from Talk America. Rather, such billing complaints relate in general to the billing practices of Talk America and as such, cannot be separated by jurisdiction.

21. For example, at least five (5) of the complaints listed in *Exhibit A* relate to allegations of billing by Talk America prior to provisioning service to the customer. *See No. 337070T, Complaint of James Allen; No. 370606T, Complaint of John Dunnigan; No. 352659T, Complaint of John French;*³⁷ *No. 372270T, Complaint of Maurice Perkins; and No. 369597T, Complaint of Bobby Powers.* Such complaints do not allege that the Company failed to provision the customer's intrastate service(s) only. Another nine (9) complainants received a bundled package of local and long distance services from the Company. *See No. 337070T,*

³⁵ *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 and Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket No. 99-68, at ¶ 52 (rel. Apr. 27, 2001).*

³⁶ *FCC Takes Next Step to Reform Universal Service Fund Contribution System, News Release at 1 (Feb. 14, 2002).*

³⁷ Please note that the PSC's proposed apparent rule violation for this complaint relates to a late-filed response to the customer's complaint and not to a billing issue.

Complaint of James Allen; No. 351075T, Complaint of Frank Freiman; No. 339252T, Complaint of Edilberto Gonzalez; No. 370375T, Complaint of Lisa Jones; No. 372270T, Complaint of Maurice Perkins; No. 369597T, Complaint of Bobby Powers; No. 368532T, Complaint of Treasure Coat Montessori; No. 370719T, Complaint of Carter Walsh. Because such packages contain an interstate component, the complaints at issue here do not and cannot relate only to intrastate service and as such, cannot be jurisdictionally severed.

22. Given that all of these thirty-six (36) complaints relate to billing practices for calling plans consisting of both intrastate and interstate communications services (or billing for plans for purely interstate long distance services, which clearly are within the primary jurisdiction of the FCC), and that, as such, the Company's billing practices for such complaints are incapable of being jurisdictionally severed, the FCC lawfully may preempt the regulation of the billing practices relating to such services, where the FCC's public interest objectives would be thwarted if the PSC otherwise was permitted to regulate.

The Ten Percent Rule

23. Second, under the ten percent (10%) rule established by the FCC in the *MTS/WATS Order* (also known as the “mixed-use facilities rule”) the costs of “mixed use” lines carrying both state and interstate traffic are assigned to the interstate jurisdiction where such lines carry more than a *de minimis* amount (*i.e.* more than 10%) of interstate traffic on the line.³⁸ To this end, Section 36.154 of the FCC’s rules characterizes as jurisdictionally interstate those private lines and WATS lines that carry both state and interstate traffic “[i]f the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.”³⁹

24. The *GTE ADSL Order* likewise supports this proposition. This case involved GTE’s tariffing of a service in its federal special access tariff designed to allow ISPs to provide their end user customers with high-speed access to the Internet.⁴⁰ The FCC investigated the tariff offering to determine whether it constituted an interstate access service and thus was properly tariffed at the federal level.⁴¹ The FCC agreed with GTE that its ADSL service was similar to a traditional private line service in that both services may carry interstate and intrastate traffic.⁴² Because GTE’s ADSL service offering necessarily involved more than a *de minimis* amount of Internet Traffic destined for websites in other states or countries, even though it may not be

³⁸ *In re MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, Decision and Order, CC Docket Nos. 78-72, 80-286 (rel. July 20, 1989) (“*MTS/WATS Order*”); *see also* 47 C.F.R. § 36.154.

³⁹ 47 C.F.R. § 36.54.

⁴⁰ *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79 (rel. Feb. 26, 1999) at ¶ 1 (“*GTE DSL Order*”).

⁴¹ *Id.* at ¶ 3.

⁴² *Id.* at ¶ 25.

possible to ascertain the destination of any particular transmission, the FCC concluded that GTE's ADSL service was subject to federal jurisdiction under the FCC's "mixed-use facilities" or ten percent rule.⁴³

25. As discussed previously, every one of the complainants included in this Motion accepted service from Talk America pursuant either to an intrastate and interstate long distance calling plan, or to a bundled packaged offering of intrastate and interstate local and long distance services from the Company. Because the Company does not assess a per minute value to its local exchange service offerings, but instead offers them as part of the overall monthly price of the bundled plan, the Company does not bill customers on total usage measurements. However, using the standard set forth in the *GTE ADSL Order*, there is a likelihood that more than ten percent (10%) of the value of the calling plan chosen by each customer is jurisdictionally interstate.

26. For example, as previously noted in para. 25, *supra*, nine (9) of these complainants selected to receive a bundled package of local and long distance services from Talk America. In the overwhelming majority of these cases, the complainant received, as part of its package, 200 minutes of interstate long distance service. This offering has a stand-alone market value of 9.5 cents per minute for a total of \$19.00. The monthly cost of this package ranged from \$39.95-45.95, depending on zone. Accordingly, viewed as a percentage of total revenue, the interstate value of this packaged service offering was anywhere from 41% to 47% of the total value of the service offered – a percentage that is far more than is necessary to classify the bundled services

⁴³ *Id.* at ¶ 26.

as jurisdictionally interstate under the FCC's ten percent (10%) rule.

27. At least six (6) other complainants elected to receive a purely long distance calling plan (consisting of interstate and intrastate toll service) from Talk America. *See No. 336549T, Complaint of Karl and Jean Bernholtz; No. 370606T, Complaint of John Dunnigan; No. 352659T, Complaint of John French; No. 362344T, Complaint of Victoria Ryder; No. 354802T, Complaint of Robert Van Horn;*⁴⁴ *No. 363232T, Complaint of Herman Warmbold.* Unlike its local bundled packages, for long distance calling plans, the Company bills customers on total usage measurements and therefore is able to determine that for those customers with interstate usage, the interstate component of their long distance service likewise satisfies the ten percent (10%) rule.

28. In addition, more than 50% of the complainants listed in *Exhibit A* were not presubscribed customers, but rather, purchased dial-around interstate and intraLATA toll services from Talk America. *See No. 335914T, Complaint of Roger Rhodes; No. 335256T, Complaint of Carolyn Ancrum; No. 336399T, Complaint of John Nordheimer; No. 335017T, Complaint of Victor Chin; No. 339207T, Complaint of Julio Sublin; No. 339216T, Complaint of Sara O'Neil; No. 335628T, Complaint of Ola Hagins; No. 336008T, Complaint of Rebecca Mitchell; No. 334659T, Complaint of Blanca Luna; No. 335192T, Complaint of Marilyn Richardson; No. 352263T, Complaint of Robert Davis; No. 335589T, Complaint of Henry Fedorczyk; No. 335897T, Complaint of Wayne Dale; No. 335557T, Complaint of John Carr;*

⁴⁴ Please note that this customer's complaint determination form states that "This inquiry is closed without infraction. Credit issued and account cancelled." Accordingly, this complaint also could be contained in the *Motion for Summary Final Order* and dismissed on the basis of no apparent rule violation against the Company.

No. 335147T, Complaint of Julie Simpson; No. 329317T, Complaint of Patrick Kearney; No. 336543T, Complaint of Donna Devine; No. 375095T, Complaint of Seville Mobile Home; No. 332996T, Complaint of Frederick Barr. These complaints likewise are not alleging actions relating to intrastate service(s) as, by definition, these casual callers purchase only interstate, interLATA and intraLATA toll services from the Company. Moreover, the Company finds it somewhat inappropriate for the PSC to have included in this proceeding complaints relating to Talk America's prior problem of sending erroneous bills to certain casual calling customers, because the Company *voluntarily* has provided, on at least three separate, prior occasions, the PSC with extensive information regarding this problem and its remedy.⁴⁵

29. Finally, at least one complainant alleged that Talk America charged in excess for federal services, fees and taxes on the customer's bill, such as the FCC Network surcharge, Universal Service Fund surcharge, Federal Excise Tax and Telecom Access Surcharge. *See No. 320046T, Complaint of Ida Wiener.* There is no allegation in this complaint about the billing of purely intrastate charges.

30. While such analysis undoubtedly addresses the value of jurisdictionally-mixed services billed to the customer, as compared with the jurisdictionally-mixed Traffic usage identified in the *MTS/WATS Order* and *GTE ADSL Order*, the FCC has made it clear that jurisdictional separations "[i]s not an exact science and the procedures involved must reflect

⁴⁵ See *Talk America Analysis of Customer Complaints Filed with the Florida Public Service Commission* at pp. 7-8 (filed June 4, 2001) ("Analysis") (explaining two different internal billing programming errors that occurred in August/September 2000 and again in March 2002, which caused some "casual caller" customers to receive incorrect bills for dial-around service that contained the monthly fees commonly applied to presubscribed customers. As indicated in the *Analysis*, the PSC was informed of the problem on both occasions. The Company is unaware of any recurrence of these problems since that time.

administrative and other practical concerns . . . between the jurisdictions.”⁴⁶ In the absence of direct precedent as to the jurisdictional nature of the billing of jurisdictionally-mixed bundled services, it is evident that subjecting the billing services provided in the Interstate Cramming Allegations to the FCC’s jurisdictional authority is both logical and consistent with case law precedent where the value of the interstate portion of such jurisdictionally mixed services clearly exceeds ten percent (10%).

31. For all of the reasons previously set forth in paragraphs 13-17 of this Motion, the FCC’s objectives in establishing a comprehensive framework to govern the billing and collection practices of common carriers providing intrastate, interstate and bundled services would be hindered if the PSC or any state commission was permitted to regulate the billing practices of jurisdictionally-mixed bundled services. Indeed, as the Fourth Circuit has noted, the Communications “[A]ct must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.”⁴⁷

32. Accordingly, all prongs of the test established in *Louisiana Pub. Serv. Comm’n v. FCC* have been met and the thirty-six (36) complaints addressed herein should be dismissed from the Commission’s *Show Cause Order*.

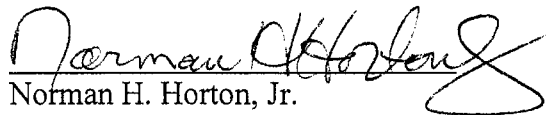
⁴⁶ *MTS/WATS Decision* at ¶ 7.

⁴⁷ *See General Telephone Co. of California v. Federal Communications Comm’n*, 413 F.2d. 390, 398, *cert den.* 396 U.S. 888 (1969).

Conclusion

WHEREFORE, for the reasons cited, Talk America requests that the Commission dismiss from its *Show Cause Order* against Talk America the thirty-eight (38) complaints identified in the *Master Violation List*, as incorporated by the *Show Cause Order*, for which the PSC alleges the Company to be in violation of Fla. Stat. Ann. §364.604(2). These complaints should be dismissed due to the Commission's lack of subject matter jurisdiction over billing complaints arising from interstate and jurisdictionally mixed bundles of communications services.

Respectfully submitted,



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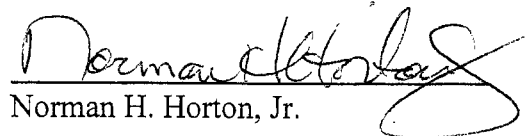
Attorneys for Talk America Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Talk America, Inc.'s Motion to Dismiss in Docket Nos. 010409-TP and 010564-TP have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 19th day of March, 2002.

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

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


Norman H. Horton, Jr.

Last Name	First Name	Phone No.	Complaint Number
Allen	James	9047409468	337070T
Ancrum	Carolyn	3057574731	335256T
Ancum	Willie	3057577159	335264T
Barr	Frederick	9547604196	332996T
Carr	John	9042559360	335557T
Chin	Victor	3052798831	335017T
Dale	Wayne	8507854141	335897T
Davis	Robert	5617311483	352263T
Devine	Donna	9544509788	336543T
Dunnigan	John	9549691100	370606T
Fedorczyk	Henry	5617331289	335589T
Freiman	Frank	9549789597 9549783383	351075T
French	John	9547332724	352659T
Gonzales	Edilberto	4073591605	339252T
Hagins	Ola	5614669790	335628T
Jones	Lisa	9046459840	370375T
June	Bradley	3054769150	339178T
Kearney	Patrick	9453859772	329317T
Luna	Blanca	3053853746	334659T
Mitchell	Rebecca	3052893045	336008T
Nordheimer	John	5612830388	336399T
O'Neil	Sara	3058616732	339216T
Perkins	Maurice	9043988897	372270T
Powers	Bobby	4073513671	369597T
Rhodes	Roger	9043450087	338011T 335914T
Richardson	Marilyn	5612312865	335192T
Ryder	Victoria	9547215929	362344T
Seville Mobile Home		9544585292	375095T
Simpson	Julie	9419239746	335147T
Sublin	Julio	3059310482	339207T
Treasure Coat Montessori		5617700312	368532T
Van Horn	Robert	9044478183	354802T
Warmbold	Herman	3058597278	363232T
Wash	Carter	5612874347	370719T
Wiener	Ida	5619660754	320046T

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued***6.2 Residential Bundled Local Service****6.2.1 General**

A. The Company offers basic local exchange service only as part of a bundle or package of telecommunications services to residential Customers.

B. *End-User Common Line (EUCL) Recovery Charge*

A monthly recurring charge applies to recovery of End User Common Line charges billed to the Company by the Incumbent LEC pursuant to the Company's Federal Rate Schedules.

C. *Combination Charge*

A Combination Charge applies to each line to allow the Company to combine elements into a service offering available to Customers in the State of Florida.

	<u>Monthly</u>
UNE-P Combination Charge	\$10.00
Total Resale Combination Charge	\$10.00

D. *Additional Lines*

Bundled Service Customers may purchase multiple lines or add lines to existing services. The bundle rates below apply to the primary line. Each additional line will be billed at the rate specified for additional lines in the local bundle packages below.

(T)
(T)

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New Hope, PA 18938

FLL0105

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.2 Local Bundle I

A. Local Bundle I includes the following services:

200 minutes of long distance service;

(T)

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis); and

(T)

Unlimited Local Calling.

(D)

B. Usage Charges

(T)

For toll calls in excess of allowance, see the Company's Florida Tariff No. 1 for Long Distance Bundle No. 1.

C. Monthly Recurring Charge: Zone 1: \$94.95
 Zone 2: \$99.95
 Zone 3: \$99.95

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 New Hope, PA 18938

FLL0102

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.3 Local Bundle II

A. Local Bundle II includes the following services:

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

Unlimited IntraLATA Calling; and

(D)

Unlimited Local Calling.

B. Usage Charges:

Usage charges for InterLATA calling are found in the Company's Florida Tariff No. 1 for Long Distance Bundle No. 2.

C. Monthly Recurring Charge: Zone 1: \$39.95
 Zone 2: \$45.95
 Zone 3: \$45.95

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(R)

(R)

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FLL0102

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.4 Local Bundle III (T)

A. Local Bundle III includes the following services:

200 minutes long distance service; (T)

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis); and (T)

Unlimited Local Calling. (D)

B. Usage Charges

For calls in excess of allowance, see the Company's Florida Tariff No. 1 for Long Distance Bundle No. 3. (T)

C. Monthly Recurring Charge: (T)
Zone 1: \$54.95
Zone 2: \$59.95
Zone 3: \$59.95

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New Hope, PA 18938

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SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.5 Local Bundle IV

A. Local Bundle IV includes the following services:

200 minutes of long distance service;

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

Unlimited Local Calling; and

Unlimited IntraLATA Calling.

B. Usage Charges

For interLATA toll calls in excess of allowance, see the Company's Florida Tariff No. 1 for Long Distance Bundle No. 4.

C. Monthly Recurring Charge:

Zone 1: \$ 59.95

Zone 2: \$ 64.95

Zone 3: \$ 64.95

D. Additional Lines are available to Local Bundle VI Customers at rates specified below. Usage on additional lines is provided at the supplemental usage rate specified in the Company's Florida tariff No. 1. This line may be equipped with the same Custom Calling and CLASS features which are ordered for the primary line.

Rate per month for each additional line:

Zone 1: \$25.00

Zone 2: \$25.00

Zone 3: \$25.00

(N)

(N)

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New Hope, PA 18938

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SECTION 6 - LOCAL SERVICES PRICE LIST, *continued***6.2 Residential Bundled Local Service, *continued***

(N)

6.2.5 Local Bundle VI

- A. Local Bundle VI includes the following services:

1000 minutes of interLATA long distance service to any other Customer who subscribes to local services from the Company;

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

Unlimited Local Calling; and

Unlimited IntraLATA Calling.

- B. Usage Charges

For interLATA toll calls in excess of allowance, see the Company's Florida Tariff No. 1 for Long Distance Bundle No. 6.

- C. Monthly Recurring Charge:

Zone 1:	\$59.95
Zone 2:	\$64.95
Zone 3:	\$64.95

- D. Additional Lines are available to Local Bundle VI Customers at rates specified below. Usage on additional lines is provided at the supplemental usage rate specified in the Company's Florida tariff No. 1. This line may be equipped with the same Custom Calling and CLASS features which are ordered for the primary line.

Rate per month for each additional line:

Zone 1:	\$25.00
Zone 2:	\$25.00
Zone 3:	\$25.00

(N)

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SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

(N)

6.2.6 Local Bundle VII (Independence Plan)

A. Local Bundle VII includes the following services:

Local dial tone;

1000 minutes per line per month of Local Calling and intraLATA (local toll) calling;

All Custom Calling and CLASS features (excluding the features that are used and billed on a per call basis);

Voice Mail;

In addition to the local and intraLATA call allowance, the Customer will receive an additional 1000 minutes per line per month of local, intraLATA and interLATA (including intrastate and interstate) member-to-member calling when the Customer calls any other Customer who subscribes to a bundle of local and long distance services from the Company. The member-to-member call allowance applies before the local/intraLATA call allowance applies.

B. Usage Charges

1. For interLATA (including intrastate and interstate) toll calls in excess of the member-to-member allowance, see the Company's Florida Long Distance Bundle No. 7.

2. For local and intraLATA toll usage in excess of the allowance, the following per minute rate applies:

	<u>Per Minute</u>
Local/IntraLATA Usage	\$0.01

(N)

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FLL0110

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.6 Local Bundle VII (Independence Plan), *continued*

C. Monthly Recurring Charge Main Line:

Zone 1: \$39.95

Zone 2: \$49.95

D. Additional Lines

Additional lines are available to Local Bundle VII Customers at rates specified below. Usage on additional lines is subject to the same usage allowance and rates described above. Additional lines may be equipped with the same Custom Calling and CLASS features that are ordered for the primary line.

Rate per month for each additional line

Zone 1: \$20.00

Zone 2: \$23.00

(N)

(N)

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FLL0112

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

6.2.7 Local Bundle VIII (Freedom Plan)

A. Local Bundle VIII (Freedom Plan) includes the following services:

- 200 minutes of interLATA long distance interstate or intrastate calling;
- All Custom Calling and CLASS features, including Voice Mail, Three Way Calling and Custom Ringing and excluding the Custom Calling features that are priced on a per call basis;
- Unlimited IntraLATA Calling;
- Unlimited Local Calling; and
- 1000 minutes member to member calling.

B. Usage Charges

For interLATA toll calls in excess of allowance, see the Company's long distance tariff for Bundle No. 8.

C. Monthly Recurring Charge:

Zone 1	-	\$59.95
Zone 2	-	\$64.95
Zone 3	-	\$64.95

(D) Additional Lines

Zone 1	-	\$25.00
Zone 2	-	\$25.00
Zone 3	-	\$25.00

(N)

 (N)

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FLL0112

SECTION 6 - LOCAL SERVICES PRICE LIST, *continued*

6.2 Residential Bundled Local Service, *continued*

(T)

6.2.8 Local Bundle IX (United Plan)

(N)

A. Local Bundle IX (United Plan) includes the following services:

- All Custom Calling and CLASS features, including Voice Mail, Three Way Calling and Custom Ringing and excluding the Custom Calling features that are priced on a per call basis;
- Unlimited IntraLATA Calling;
- Unlimited Local Calling; and
- 1000 minutes of interLATA long distance service, per line, per month, to any other Customer who also subscribes to bundled local services from the Company.

B. Usage Charges

For interLATA toll calls in excess of allowance, see the Company's long distance tariff for Bundle No. 9.

C. Monthly Recurring Charge:

Zone 1	-	\$39.95
Zone 2	-	\$45.95
Zone 3	-	\$45.95

D. Additional Lines

Zone 1	-	\$25.00
Zone 2	-	\$25.00
Zone 3	-	\$25.00

(N)

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