

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

In re: Investigation of possible violation of Commission Rules 25-4.118 and 25-24.110, F.A.C., or Chapter 364, 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.

DOCKET NO. 010564-TX
DATED: MARCH 26, 2002

COMMISSION STAFF'S RESPONSE TO TALK AMERICA, INC.'S MOTION FOR SUMMARY FINAL ORDER

Commission Staff (staff), by and through undersigned counsel, pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its response to Talk America Inc.'s Motion for Summary Final Order, and as grounds therefore states:

1. On March 19, 2002, 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 d/b/a Access One Communications ("Talk America" collectively), filed its Motion for Summary Final Order and Memorandum in Support of the Motion for Summary Final Order. Talk America seeks summary final order in favor of Talk America

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with respect to four hundred fourteen (414) complaints included in the Talk America Master Violation List appended as Attachment A to Commission Order No. PSC-02-0095-PCO-TP, issued 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.

2. Order No. PSC-02-0095-PCO-TP amended the Order to Show Cause, Order No. PSC-01-2107-SC-TP, issued October 23, 2001, to include the Master Violation List which sets forth Talk America's apparent violations of Florida law by complaint number. It also categorizes, by applicable rule violation, all complaints that formed the basis of the Show Cause Order.

3. Talk America seeks summary final order of 414 complaints on the grounds that there is no genuine issue as to any material fact associated with these complaints.

4. Specifically, Talk America argues that investigative staff of the Division of Consumer Services (CAF) concluded, after investigation of the 414 complaints, that such complaints involved no apparent rule violation on Talk America's part and the cases should be closed. Talk America argues that those CAF staff

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decisions are final and, therefore, these complaints should not have been included in the Show Cause Order. As evidence of the finality of CAF closing cases, Talk America states that, consistent with FCC rules, such a determination permits Talk America to recommence the collection from these customers of any charges that were in dispute prior to the resolution of these complaints.

5. Staff disagrees that the opinion of CAF staff is in any way binding on the Commission. CAF has "the primary responsibility of handling and resolving consumer complaints, preparing statistical summaries on consumer complaint activity, preparing testimony for rate cases on complaint activity, and participating in, or initiating other dockets on consumer matters." In addition, CAF is responsible for consumer information, media relations, and consumer education. See Public Service Commission Administrative Procedures Manual 1.03-5. The notations on individual complaint forms represent only the opinion of that particular CAF staff person.

Talk America argues that a CAF staff person's indication on the form that "no apparent rule violation" occurred is a final determination. However, staff disagrees because the use of the

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word "apparent" on the form clearly indicates that no definitive decision has been reached by the Commission.

CAF's focus is to propose a resolution of the customer's complaint, rather than to fully investigate whether the company complied with all of the required elements of the slamming rule. If a customer complains that he did not know his long distance service would be switched and the CAF person checks the LOA and verifies he did know, that is the end of the inquiry.

6. The argument Talk America presents is one of estoppel. The elements of estoppel are well established in Florida. All of the following criteria must be met:

- (1) a representation by the party estopped to the party claiming the estoppel as to some material fact;
- (2) which representation is contrary to the condition of affairs later asserted by the estopped party;
- (3) a reliance upon the representation by the party claiming estoppel; and
- (4) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.

Travelers Indemnity Co. v. Swanson, 662 F.2d 1098 (5th Cir. 1981);
Fiorentino v. Dept. of Admin. Div. of Retirement, 463 So.2d 338
(Fla. 1st DCA 1985).

It is further recognized that:

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[A]lthough the State may under certain circumstances be estopped, such circumstances must be exceptional and must include some positive act on the part of some officer of the state upon which the aggrieved party had a right to rely and did rely to its detriment. Under no circumstances may the state be estopped by the unauthorized acts or representations of its officers.

Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517, 524 (Fla. 1st DCA 1971). In Greenhut, the Court stated that appellant Knott,

in effect sought an administrative declaratory judgment from a state functionary who, while eminently qualified in the fields of architecture and engineering, is not shown to possess any of the qualifications necessary to render an authoritative judgment on the legal question posed by Knott, and who certainly is not one on whose opinion Knott had any right to rely. The casual and offhand manner in which the bureau chief indicated that he thought it would be satisfactory for Knott to submit a bid cannot be said to constitute such an affirmative and positive representation of fact as to justify reliance thereon by Knott in determining whether it should submit a bid for construction of the project.

Greenhut, at 20, 21.

Further, administrative officers of the state cannot estop the state through mistaken statements of law. Austin v. Austin, 350 So.2d 102, 105 (Fla. 1st DCA 1977). (The Court held that Division of Retirement issuance of a pamphlet erroneously stating the

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features of the New Florida Retirement System did not bind the state to issue erroneous benefits.)

Greenhut and Austin clearly indicate that estoppel **may** be obtained against the state when error involves material facts, but when the error relates to the law or a misinterpretation of the law, then estoppel **cannot** be invoked against the state. Also see Administration, Division of Retirement v. Flowers, 256 So.2d 14 (Fla. 1st DCA 1978). (Lower court erred in applying estoppel and requiring payment of retirement benefits to appellee when Benefits Calculation Section had mistakenly furnished appellee with incorrect estimate of benefits in response to his inquiry.)

These cases are directly on point in this proceeding. CAF employees are not qualified to render a legal opinion as to whether Talk America has met all the requirements of the rules and statutes.

7. Further, staff believes that to rely solely on the CAF staff would be an improper delegation of authority. In FPSC Opinion No. 94-006.OPN, Re: Commission authority to delegate its powers, duties and responsibilities to staff, the issue was: Can the Commission delegate to a division director, (in this case, the

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Director of Legal Services), the authority to issue orders to show cause based on preliminary findings of staff? The answer was "No."

The Florida Supreme Court has held that an administrative board cannot legally confer authority to its employees to exercise its duties. State v. Apalachicola Northern R. Co., 88 So. 310, 311 (1921). In order to delegate such authority, the delegation must be expressly granted by law. McRae v. Robbins, 9 So.2d 284 (1942). It is the duty of the Commission alone to confer binding decisions.

8. Talk America cites CC Docket No. 94-129, FCC 00-135, In the Matter of Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, First Order on Reconsideration, released May 3, 2000, as supporting their position. However, Paragraph 38, referenced by Talk America, states "If the state commission (or the FCC) determines that the carrier change was authorized, the carrier may re-bill the subscriber for charges incurred." Clearly it is the **state commission**, not a staff opinion on which a company may rely.

8. Further, staff believes a genuine issue of material fact does exist. Talk America in essence argues that an "opinion" from

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a staff member of CAF is a fact. However, an opinion and a fact are not the same. Letters of agency (LOA), recording third party verification (TVP) tapes, or other accepted procedures set out in the rules, are the facts which demonstrate whether there has been compliance with the requirements of statutes and rules. However, Talk America has NOT argued that there is no dispute as to what the LOA, TPV, etc. did show. Therefore, staff believes that there are genuine issues of material fact because Talk America has not met the statutory and rule requirements as shown by the facts.

WHEREFORE, Commission staff requests that the Commission deny Talk America's Motion for Summary Final Order as discussed above.

Respectfully submitted this 26th day of March, 2002.



Linda H. Dodson, Attorney
Patricia A. Christensen, Senior Attorney
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6199

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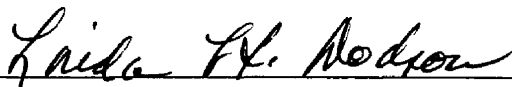
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of COMMISSION STAFF'S RESPONSE TO TALK AMERICA, INC.'S MOTION FOR SUMMARY FINAL ORDER, has been furnished by regular U.S. Mail and facsimile to Norman H. Horton, Jr., Esquire, Post Office Box 1876, Tallahassee, Florida 32302-1876, and to Charles Beck, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Tallahassee, Florida 32399-1400 this 26th day of March, 2002.



Linda H. Dodson, Attorney
Patricia A. Christensen, Senior Attorney

FLORIDA PUBLIC SERVICE COMMISSION
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6199