

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 TO DISMISS

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 (Talk America or Company) Motion to Dismiss, and as grounds therefore states:

1. On March 19, 2002, Talk America filed its Motion to Dismiss for lack of subject matter jurisdiction, thirty-six (36) complaints of the complaints attached to Order No. PSC-02-0095-PCO-TP, issued January 16, 2002, 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 on

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Clarification). By the Order on Clarification, the specific complaint numbers were made an attachment and incorporated into Order No. PSC-01-2107-SC-TP, issued October 23, 2001 (Show Cause Order). Talk America argues that since these 36 complaints involve customers who ordered its bundled service, which includes interstate and intrastate components, and since these services were billed together at a single price, the Commission does not have jurisdiction over these complaints; but rather the Federal Communications Commission (FCC) has exclusive jurisdiction.

2. Specifically, Talk America argues that FCC has exclusive authority over billing regulations associated with jurisdictionally-mixed communication services. Talk America asserts that the FCC's *Truth in Billing* regulations apply to both bundled and unbundled services and to local as well as long distance carriers. Talk America concedes that in FCC's *Truth in Billing Order*, the states are free to adopt additional regulations for intrastate services consistent with the guidelines and principles established. However, Talk America argues that the FCC did not choose expressly to delegate any jurisdictional authority to the states with respect to cramming as it did with slamming.

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Talk America asserts that any attempt by the Commission to regulate the interstate services of Talk America, including those services that are bundled and thus, jurisdictionally inseverable, cause clear conflict with federal regulation in this area thereby meeting the first two prongs of the Supreme Court's preemption test set forth in Louisiana Pub. Serv. Comm'n v. FCC, 476 US. 355, 374-75 and n. 4 (Louisiana case). Talk America states that in the Louisiana case, the Supreme Court held 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. Talk America concedes that while the precise nature of the billing jurisdictionally-mixed bundles of communications service offerings has not been addressed by the FCC or the courts, it argues that such services must be considered interstate in nature under either of the two tests established by the FCC to address instance of jurisdictionally-mixed traffic or service: (1) the "ten percent" rule; and (2) the "jurisdictional inseverability" rule.

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3. Staff disagrees with Talk America's analysis regarding whether the Commission has jurisdiction over the complaints at issue in this motion. Talk America was found in apparent violation of Section 364.604(2), Florida Statutes, which states that:

A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer.

In other words, the customer is not required to pay for unauthorized charges and the company should not bill for unauthorized charges or services that were not in fact provided. Further, staff notes that Section 364.02(11), states that "'Service' is to be construed in its broadest and most inclusive sense." Staff believes that the Commission has clear jurisdiction over **bills** rendered to Florida customers regarding **telecommunication services**.

A list of the complaints at issue in Talk America's Motion is attached to this Response and incorporated by reference. Staff notes that the Commission found 105 apparent violations of the

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cramming rules by Talk America, however, the Company is only disputing 36 of those apparent violation in this motion.

In 20 complaints, the customer used a one-time, dial-around service and then continued to receive bills after the call. In its Motion, the company admits it had a prior problem of "sending erroneous bills to certain casual calling customers." Motion at p. 21. In three complaints, Talk America billed Florida customers prior to provisioning service. In two complaints, Talk America initiated billing but the service was never provisioned. In four complaints, Talk America set up multiple accounts in error causing the customers to be billed multiple times for the same service. In two complaints, Talk America billed customers for fees and taxes associated with services that were never provided. In two complaints, Talk America billed the customer in error after cancellation. In two complaints, Talk America entered the customer into its billing system in error. In one complaint, Talk America billed for extended area calling in error. In all of these complaints, Talk America billed Florida customers for telecommunications services that they were not receiving. Staff believes that it is irrelevant what type of calls these customers

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made or what type of plan was at issue, what is relevant is that these Florida customers were billed for telecommunications services which Talk America was not providing. Staff believes that the Commission has jurisdiction over these complaints because the complaints involve bills rendered for telecommunications services to Florida customers. Staff notes that the Commission in this proceeding would not be attempting to enforce a FCC tariff rate or charge, because in these complaints no services were being received. Thus, it is irrelevant what services were being billed or how the company charged for the services.

4. As noted above, Talk America's argument hinges on the "type" of service billed and the "method" by which those services are billed to determine who has jurisdiction. Staff believes that Talk America's argument that the Commission is divested of jurisdiction regarding cramming violations simply because Talk America chose to bundle its services and charge a single price is without merit. Even though Talk America argues that the FCC has exclusive jurisdiction, Talk America concedes that the states may make regulations consistent with the FCC's *Truth in Billing Order* for intrastate services. In fact regarding slamming and other

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telecommunication frauds, 47 U.S.C. Section 64.2400 (c), states that:

Preemptive effect of rules. The requirements contained in this subpart are **not intended to preempt** the adoption or **enforcement** of consistent truth-in-billing requirements by the states.

Talk America has not argued that the Florida statutes or rules are inconsistent with the FCC's *Truth in Billing Order* or the *Truth in Billing* regulations. Further, Talk America concedes that the FCC and the courts have not made a determination that the FCC has exclusive jurisdiction regarding cramming complaints involving bundled interstate and intrastate services. Staff believes that it is clear that had the FCC chosen to preempt the states based on the type of service or method of billing, the FCC would have indicated such in 47 U.S.C. Section 64.2400 (c), which is not the case.

Further, Talk America argues that it has satisfied the two-pronged test set forth in the Louisiana case because the regulation of billing by both the state and the FCC would create confusion and thwart the FCC stated purpose in the *Truth in Billing Order* and

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regulations. However, in the Louisiana case the Supreme Court stated that:

While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.

Id. at 374-75. Contrary to Talk America's position, staff believes that the state regulation of telephone service billing does not create an obstacle to the accomplishment and execution of the *Truth in Billing* regulations. The FCC's own regulations contemplate that the states may make regulations regarding slamming and other forms of telecommunications fraud. Further, the FCC's *Truth in Billing* regulations make no distinction between interstate and intrastate services relating to slamming and other telecommunications fraud. Thus, staff believes that the analysis of whether the states are pre-empted from regulating telecommunications services billing

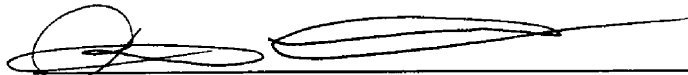


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regarding cramming ends once a determination is made the FCC has chosen not to pre-empt consistent state regulations. Clearly, it had not done so in the case of cramming complaints. Thus, staff does not believe that the "ten percent" rule or the "jurisdictional inseverability" rule are applicable to the instant case.

**WHEREFORE**, Commission staff requests that the Commission deny Talk America's Motion to Dismiss as discussed above.

Respectfully Submitted this 26<sup>r</sup> day of March, 2002.



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Name	Service	CATS	Comments
Allen	CLEC	337070	Order for provisioning was not completed - billing was initiated.
Ancrum <sup>1</sup>	IXC	335256	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Ancrum <sup>1</sup>	IXC	335264	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Barr <sup>1</sup>	IXC	332996	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Carr <sup>1</sup>	IXC	335557	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Chin <sup>1</sup>	IXC	335017	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Dale <sup>1</sup>	IXC	335897	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Davis <sup>1</sup>	IXC	352263	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Devine <sup>1</sup>	IXC	336543	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Dunnigan	CLEC	370606	An additional local account was set up in error on second line. Billing was initiated without provisioning service. (Double billing)
Fedorczyk <sup>1</sup>	IXC	335589	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Freiman	IXC	351075	Two accounts were generated in error (double billing)
French	CLEC	352659	Provisioning was never completed - billing was initiated.

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Gonzales	IXC	339252	Due to processing error, customer was billed for nominal fees for a calling card.
Hagins <sup>1</sup>	IXC	335628	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Jones	CLEC	370375	Company continued to bill for two months after cancellation. Multiple accounts were set up.
June <sup>1</sup>	IXC	339178	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Kearney	CLEC	329317	Access One - Account was set up in error.
Luna <sup>1</sup>	IXC	334659	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Mitchell <sup>1</sup>	IXC	336008	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Nordheimer <sup>1</sup>	IXC	336399	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
O'Neil <sup>1</sup>	IXC	339216	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Perkins	CLEC	372270	Billed for service prior to provisioning service.
Powers	CLEC	369597	Billed for service prior to provisioning. Customer cancelled service since provisioning took so long, but the billing was not discontinued.
Rhodes <sup>1</sup>	IXC	338011 335914	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around. <b>Complaints are duplicate.</b>
Richardson <sup>1</sup>	IXC	335192	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.

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Ryder	CLEC	362344	Closed as a slamming violation - no TPV provided. Customer apparently authorized service but cancelled 2 days later. Cancellation order was processed - billing continued in error.
Seville Mobile Home	CLEC	375095	Company reported that customer was entered into billing system in error.
Simpson <sup>1</sup>	IXC	335147	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Sublin <sup>1</sup>	IXC	339207	Customer was billed in error for fees and taxes - billed as 1+ customer after dial around.
Treasure Coast Montessori	CLEC	368532	Billing for service prior to provisioning
Van Horn	CLEC	354802	Company reported that extended area calling plan was not provisioned properly and customer was billed in error.
Warmblod	IXC	363232	Multiple accounts were established causing multiple billings for the same service. Company also billed customer incorrectly for a NXX the customer previously owned.
Wash	CLEC	370719	Company stated in its report to CAF that customer was billed in error after cancellation.
Wiener	IXC	320046	Billed for 911, FCC Network fee, USF, Excise tax, and Telecom access charge in error. Customer was not provided service associated with these fees.

<sup>1</sup> In these cases, Talk America sent erroneous bills to consumers who were not presubscribed customers of Talk America. Talk America reported that on at least three occasions, during the period June 2000 through September 2000, and again in March of 2001, the company mailed out thousands of erroneous bills to consumers who reportedly used Talk America's 101XXXX code. The company billed the consumers for recurring charges and taxes that are customarily billed to presubscribed customers.

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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 TO DISMISS has been furnished by regular U.S. Mail and facsimile to Norman H. Horton, Jr., Esquire, P.O. 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 day 26 of March, 2002.



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