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June 4, 2002

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 010409-TP and 010564-TX

Dear Ms. Bayó:

Enclosed for filing on behalf of Talk America, Inc. are an original and fifteen copies of Talk America, Inc.'s Response to Request to Hold Public Hearings in the above referenced dockets.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

FRS/amb
Enclosures

cc: Francie McComb, Esq.
Parties of Record

DOCUMENT NUMBER-DATE

05839 JUN-4 02

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by the Citizens of)
Florida to Investigate TALK.com Holding)
Company and The Other Phone)
Company for Willful Violation of)
Rule 25-4.118, Florida Administrative)
Code)

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.com)
Holding Corp. d/b/a Network Services d/b/a)
The Phone Company, holder of ALEC)
Certificate No. 4692)
_____)

Docket No. 010564-TX
Filed: June 4, 2002

RESPONSE TO REQUEST TO HOLD PUBLIC HEARINGS

1. By Order No. PSC-01-2107-SC-TP, issued October 23, 2001, and Order No. PSC-02-0095-PCO-TP issued January 16, 2002 (collectively the "Orders"), the Commission has initiated proceedings against Talk America for alleged violations of Section 364.604(2), Florida Statutes, and Rules 25-4.118 and 25-22.032(5), Florida Administrative Code. The October 23, 2001 Order No. PSC-01-2107-SC-TP contained a "notice of further proceedings" that advised Talk America of its right to initiate a proceeding under Chapter 120, Fla. Stat.

2. On November 6, 2001, Talk America timely filed its request for hearing in this docket pursuant to Sections 120.569 and 120.57, Fla. Stat. and Rule 28-106.111, F.A.C. The filing of the Petition initiated a proceeding under Chapter 120, Fla. Stat.

3. Subsequent to the initiation of the proceeding in this matter, Talk America has

actively engaged in litigation related activities, including to filing of an Initial Response, together with a Motion to Dismiss and a Motion for Summary Final Order.

4. On March 26, 2002, the Citizens of Florida, by and through Jack Shreve, Office of Public Counsel (hereinafter “Citizens”) filed its Response to the two motions. Through its response, Citizens “urge[d] the Commission to hold public hearings in this case,” with such hearings to be held “in the major metropolitan areas of the state.” The purpose of the hearings would be for the Commission to “take direct evidence in the case.” Subsequently, Staff responded to Citizens’ Response by suggesting that public hearings be held in four different locations.

5. Despite its “urging” of the Commission contained in its Response, Citizens has not yet filed a formal motion requesting “public hearings.” Therefore, there is no present issue before the Commission regarding any hearings beyond those currently scheduled. However, to the extent Citizens’ comment is construed to rise to the level of a formal request, Talk America objects to the scheduling of hearings for the purpose of receiving public comment.

6. Section 120.57(1)(b), Fla. Stat., provides that “[w]hen appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.” There is a general dearth of caselaw construing this section. However, the courts have had an opportunity to reflect upon the general nature and purpose of an adjudicatory proceeding, where public comment is not as appropriate as it would be in a rulemaking context.

7. In *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1989), the First DCA discussed the evidentiary value of the type of information typically received in public testimony at a rulemaking proceeding. In that case, the Court held that:

Proceedings conducted pursuant to Section 120.54(3)(a) are not the same type of proceedings as are provided under Section 120.57 when an agency determines the substantial interests of a party. The rights of a particular individual are not adjudicated in this type of proceeding. Rather, Section 120.54(3) rulemaking proceedings are information-gathering proceedings, much like legislative committee proceedings where testimony is heard, which proceedings are relatively informal. . . . The intention of the Section 120.54(3) proceeding is to facilitate the exchange of information and not to be restrictive through the technical use of evidentiary rules. Such proceedings are designed to inform an agency to its fullest, and are not intended to adjudicate any issues or to be conducted in an adversarial manner. *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063 (Fla.1984). (e.s.)

Adam Smith Enterprises, supra at 1271.

8. In the *General Telephone* case cited in *Adam Smith Enterprises*, the Florida Supreme Court recognized the distinction in the nature of the evidence that may be relied upon in a rulemaking or quasi-legislative forum versus that necessary in an adjudicatory forum. The Court found the more free-form and informal method of providing testimony and evidence used in a rulemaking proceeding is:

not to be restricted to technical rules of evidence. Such a hearing is designed only to allow an agency to inform itself to the fullest extent possible prior to rulemaking, and not to adjudicate any issues or be conducted in the adversarial manner normally associated with quasi-judicial or judicial proceedings.

General Telephone Co. of Florida v. Florida Public Service Commission, 446 So.2d 1063, 1067 (Fla.1984). In that case, the Court further held that:

The standard of review for a quasi-legislative proceeding must differ from that for a quasi-judicial proceeding, as a qualitative, quantitative standard such as competent and substantial evidence is conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting and no factual issues were determined.

Id. at 1067.

9. In this case, the Commission will be making decisions regarding specific violations of Commission rules allegedly committed by Talk America. This type of proceeding is not appropriate for a “come one, come all” session at which the general public, not those who are named as complainants, is called upon to provide “direct evidence” of Talk America’s alleged misfeasance.

10. Through this proceeding, the Staff and Office of Public Counsel will be required to individually prove, by clear and convincing evidence, that Talk America willfully violated the statutes and rules as alleged within the context of each specific customer complaint placed at issue. This is not a rate case or a generic policy making proceeding nor is it akin to area code dockets, as suggested by Staff, wherein the Commission solicits and hears statements from the public generally. Service hearings of this type as suggested by Staff and OPC are not appropriate in an adjudicatory proceeding in which sanctions for specific conduct may be imposed as exists here.

11. In addition to the inappropriate nature of general public hearings in this type of proceeding, the Commission must consider that such a forum would be so unwieldy as to cause virtual paralysis of the proceeding. Section 120.57(1)(b), Fla. Stat., requires that Talk America “be given an opportunity to cross-examine or challenge or rebut the material” that may be introduced at a public comment period. (see also, Section 120.569(2)(j), Fla. Stat.). In addition, Section 120.569(2)(g), Fla. Stat., requires that all testimony be made under oath. Therefore, at each public hearing, every witness would be required to be placed under oath, offer testimony in a form in which Talk America could raise legal objection as to the form or subject of the examination, and be subject to cross examination. The entire Commission panel would have to be present, and would be required to make legal and evidentiary rulings on the testimony. Such a process would result in a proceeding of indeterminate length and scope.

12. In addition to the statutory requirements set forth in this paragraph, and the statutory

notice requirements discussed herein, due process requires that Citizens or Staff provide Talk America with a list of potential witnesses prior to the hearing. Failure to identify those who may be invited by the Commission to provide testimony and “direct evidence” against Talk America prior to their offer of testimony would deprive Talk America of its due process rights to conduct meaningful examination or cross examination of the witnesses. For that reason, public hearings are not appropriate in this adjudicatory proceeding.

13. In addition to the procedural safeguards required by Chapter 120, Fla. Stat., as described above, the Uniform Rules of Procedure applicable to proceedings before the Commission require that:

If a party cross-examining the witness desires to have the witness review documents or other items not reasonably available for the witness to review at that time, then the party shall be given a reasonable opportunity to complete the cross-examination at a later time or date for the purpose of making those documents or other items available to the witness.

Rule 28-106.213(5)(a), F.A.C. Therefore, any witness providing testimony involving any billing or change-of-service practice who did not have the substantiating documents would be subject to recall at a later date to provide further testimony as to the documentary evidence related to their testimony. Such a process would further extend the length and scope of the hearing. For that reason, public hearings are not appropriate in this adjudicatory proceeding.

14. In addition to the general inappropriateness of public hearings in this proceeding, Chapter 120, Fla. Stat. makes it clear that much of the testimony would have no probative value to the Commission. Section 120.57(1)(d), Fla. Stat., provides, in pertinent part, that:

Notwithstanding s.120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

To the extent that Citizens or Staff intend to use “direct evidence” received at the hearings to demonstrate that Talk America’s bad character or propensity, it is inadmissible due not only to Section 120.57(1)(d), Fla. Stat., but also to the fact that any such evidence would be beyond the scope of the Show Cause Order.

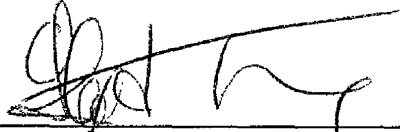
15. Even if Citizens or Staff intended to use the testimony and evidence from the hearings to prove elements allowed under Section 120.57(1)(d), Fla. Stat., all such evidence would be inadmissible due to the improbability of the Commission providing the notice to Talk America required by law. Section 120.57(1)(d), Fla. Stat., further provides that:

When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal. (e.s.)

An open invitation from the Commission to an undetermined number of persons of undetermined identity to provide testimony of undetermined substance would not meet the notice requirement of Section 120.57(1)(d), Fla. Stat. Rather, the Commission must provide specific notice to include the identity of the witness and the substance of their testimony or evidence, with such notice being provided at least 10 days prior to the hearing date. If the Commission cannot provide notice, “with particularity,” as required by Section 120.57(1)(d), Fla. Stat., then public hearings are of no import to this proceeding.

For the reasons set forth herein, "public hearings" as urged by Citizens and supported by Staff will not reasonably be expected to result in any relevant, admissible evidence. Accordingly, Talk America enters its objection to the scheduling of such public hearings, and urges the Commission to reject the request.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Floyd R. Self", written over a horizontal line.

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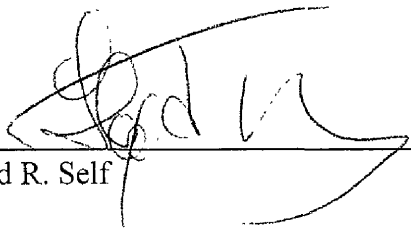
Attorneys for Talk America, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Talk America, Inc.'s Response to Request to Hold Public Hearings in Docket Nos. 010409-TP and 010564-TX have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 4th day of June, 2002.

Patty Christensen, Esq.*
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