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June 11, 2002

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**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:

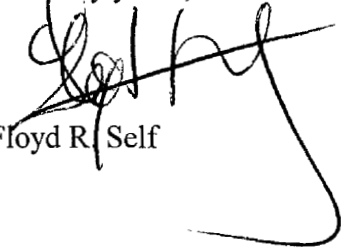
Enclosed for filing on behalf of Talk America Inc. are the following documents:

1. An original and fifteen copies of Talk America Inc.'s Motion for Summary Final Order; and (06078-02)
2. An original and fifteen copies of the redacted copy of Talk America Inc.'s Offer of Settlement. (06076-02)

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

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P. V. N.  
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FRS/amb  
Enclosures  
cc: Francie McComb, Esq.  
Parties of Record

DOCUMENT NUMBER 0104  
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FPSC-COMMISSION CLERK

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sec-1

**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

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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 11, 2002

**MOTION FOR SUMMARY FINAL ORDER**

Talk America Inc., f/k/a Talk.com Holding Corp., d/b/a Network Services, d/b/a The Phone Company, d/b/a The Other Phone Company, d/b/a Access One Communications (hereinafter collectively "Talk America"), pursuant to Rule 28-106.204(4), F.A.C., files this Motion for Summary Final Order regarding certain discrete elements of the Order to Show Cause, as amended, and as grounds therefore states:

1. On October 23, 2001, the Commission entered an Order to Show Cause in which it alleged 657 individual instances in which Talk America violated statutory or regulatory provisions, with each violation constituting a separate offense. The Commission sought the imposition of penalties in the amount of \$10,000 per "apparent violation" for a total of \$6,570,000. The authority for the Order was set forth as Section 364.285, Florida Statutes.

2. Section 364.285(1), Florida Statutes, provides, in pertinent part, as follows:

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The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than \$25,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it.

The Order to Show Cause set out a series of unnumbered paragraphs in which violations were grouped by statutory or regulatory offense. The Order to Show Cause did not provide any specific information as to any individual violation. Under current case law, the failure to allege multiple violations in separate counts precludes the imposition of multiple offense penalties.

3. In *McGann v. Florida Elections Commission*, 803 So.2d 763, 766 (Fla. 1st DCA 2001), the First District recently considered the authority of an agency to impose penalties for multiple statutory or regulatory infractions. In *McGann*, the Elections Commission charged Dr. McGann with multiple violations of Florida elections law. The “order of probable cause” entered in that case “set out eight unnumbered paragraphs, one for each statutory provision Dr. McGann allegedly violated.” *McGann* at 765.

4. In its analysis, the Court stated that:

[W]e hold that a statute authorizing a maximum fine “per count” does not authorize a fine in excess of that maximum for (a) violation(s) set out in a single paragraph in a charging document, which gives no indication that separate counts are intended. Any agency seeking fines in excess of a statutory maximum “per count” would do well to set out discrete allegations in multiple counts, so designated.

*McGann, supra* at 766.

5. In *McGann*, the charging document consisted of an order of probable cause, which alleged in unnumbered paragraphs that Dr. McGann violated specified statutory provisions on

“multiple occasions.” *McGann* at 765. The Court noted that the Order of Probable Cause “listed, again in a single paragraph, seven contributions . . .” *McGann* at 766, fn. 3. Thus, even though the individual contributions constituting the basis for the separate counts was set forth in the charging paragraph, the Court found such a procedure of alleging multiple counts in a single paragraph to be insufficient.

6. In the instant case the Order to Show Cause alleged, in unnumbered paragraphs, each statutory or regulatory provision that Talk America violated and the number of times of each alleged violation. The unnumbered paragraphs span 6 pages. A representative example of the nature of the allegations in the Order to Show Cause is as follows:

For 154 complaints, while the company maintains that the customer did authorize the service provider change, Talk America failed to verify the switch. We find that these 154 complaints are apparent violations because Talk America did not provide any proof such as an LOA or TPV that the customers authorized the carrier switch as required by Rule 25-4.118(2).

Each of the other charging paragraphs in the Order to Show Cause similarly allege that Petitioner violated a specific statutory or regulatory provision on a specified number of occasions. The only difference between the order of probable cause in *McGann* and the Order to Show Cause in this case is replacement of “multiple occasions” with, e.g., “154 complaints.” As a matter of law the Order to Show Cause does not allege separate counts.

7. On January 16, 2002, the Commission entered an Order amending the October 23 Order to Show Cause. With regard to the Commission’s allegations, the January 16, 2002 Order provided as follows:

To clarify Talk America’s apparent violations, Order No. PSC-01-2107-SC-TP is hereby amended to include the list provided in

Attachment A of this Order. This is the list that was included in hearing Staff's response which sets forth Talk America's apparent violations by complaint number and categorizes the complaints under the applicable violation.

Hearing staff shall provide the customer complaint forms generated by the Division of Consumer Affairs that correspond to the customer complaints set forth in Attachment A within 10 days of the issuance of this Order. Talk America can cross-reference the customer complaint number, found in Attachment A, with the customer complaint forms to obtain the information it desires. Thus, we deny Talk America's request for separate list detailing the company's apparent violations by billing telephone number and customer name, as such a list is unnecessary if Attachment A and the customer complaint forms generated by the Division of Consumer affairs are provided to Talk America.

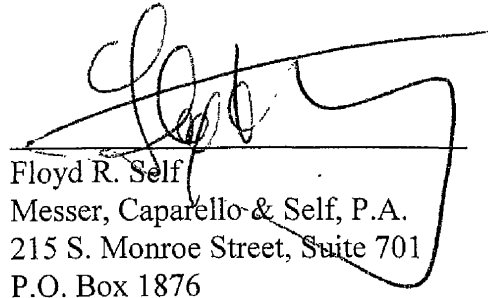
Further, Order No. PSC-01-2107-SC-TP is hereby amended to clarify that each complaint forms the basis for a single violation. As mentioned above, Attachment A categorizes Talk America's apparent violations by complaint number under the applicable violation. Therefore, amending Order No. PSC-01-2107-SC-TP with Attachment A will also clarify that each complaint forms the basis for a single violation.

The Amended Order was accompanied by a 15 page list containing 6 digit "CATS" numbers and received dates for each "CATS" entry. All of the information to be "provided" by the Commission was and is freely available as a public record.

8. The Amended Order, which does nothing more than provide a list, and invite Talk America to "figure it out" on its own, does not rise to the level of discrete allegations in separate counts as required in *McGann*. Therefore, assuming that the Commission can establish, by the required burden of proof and required *mens rea*, that the identified provisions of law were violated, the maximum fine under the Order to Show Cause is \$110,000 for the 11 unnumbered paragraphs in which specified "apparent violations" are alleged.

WHEREFORE, for the reasons set forth herein, Talk America requests that the Commission enter a Final Order applying the appropriate standard for pleading established by the First DCA in *McGann*, deleting those elements of the Order to Show Cause that seek penalties in the total amount of \$6,570,000 for 657 statutory or regulatory violations, and correctly and lawfully seeking penalties in the maximum amount of \$110,000 for 11 pled counts.

Respectfully submitted



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and

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Kelley Drye and Warren. LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, DC 20036

Attorneys for Talk America Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (\*) and/or U.S. Mail this 11<sup>th</sup> day of June, 2002.

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

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



Floyd R. Self