

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
FILED: JUNE 17, 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 June 11, 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. Talk

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COMMISSION STAFF'S RESPONSE TO TALK AMERICA, INC.'S MOTION FOR
SUMMARY FINAL ORDER
DOCKETS NOS. 010409-TP, 010564-TX

America seeks reduction of the elements of the Order to Show Cause, Order No. PSC-01-21-07-SC-TP, issued October 23, 2001, as amended by Order No. PSC-02-0095-PCO-TP, issued January 16, 2002. Talk America cites to McGann v. Florida Elections Commission, 803 So.2d 763, 766 (Fla. 1st DCA 2001) to support its argument that the penalties totalling \$6,570,000 for 657 statutory or regulatory violations should be reduced to a maximum amount of \$110,000 for 11 counts because each violation was not identified in a separately enumerated paragraph.

2. Talk America complains that the Order to Show Cause, as amended, is defective because it fails to adequately apprise them of the number of violations charged and the total amount of fines to which they will potentially be subject. However, the Motion on its face shows that Talk America fully understands that 657 violations are charged and that its maximum exposure is \$6,570,000.

3. Contrary to Talk America's position, McGann does not stand for the proposition that a fine cannot be imposed unless each an every count of a violation is separately identified in an enumerated paragraph. In McGann, the Appellant was unable to determine whether he had incurred six violations, multiple violations, or one violation. The Administrative Law Judge (ALJ)

COMMISSION STAFF'S RESPONSE TO TALK AMERICA, INC.'S MOTION FOR
SUMMARY FINAL ORDER
DOCKETS NOS. 010409-TP, 010564-TX

was similarly uncertain, and therefore, ruled that he should be found guilty of a single violation. The Florida Elections Commission reversed the ALJ order and found six separate violations. However, the First District Court of Appeals reversed the Florida Elections Commission stating:

We 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 the charging document, which gives no indication that separate counts are intended.

McGann, at 766. (emphasis added.) The format of the paragraphs was not at issue in McGann. Rather the question was whether Dr. McGann had adequate knowledge of the charges that were being brought against him.

4. By contrast, the Order to Show Cause in this Docket specifically delineates, by rule and statute, the offenses. Further, under each rule or statute, the number of violations and the reasons for the violations are clearly stated. In addition, the Amending Order, issued in response to Talk America's request for clarification, contains a list of each customer's name, followed by the billing telephone number associated with that complaint and an identification of the apparent rule violation. Therefore, the appropriate standard for pleading has been applied

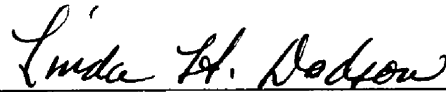
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SUMMARY FINAL ORDER
DOCKETS NOS. 010409-TP, 010564-TX

because Talk America has actual sufficient notice of the number of violations at issue and its total amount of monetary exposure.

5. In addition, Talk America is not entitled to a summary final order. A summary final order shall be granted if it is determined that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a summary final order. Section 120.57(1)(h), Florida Statutes (1999). If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue exists, summary judgment is improper. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla 2nd DCA 1996) (citing Snyder v. Cheezem Dev. Corp., 373 So.2d 719 (Fla. 2nd DCA 1979); Gomes v. Stevens, 548 So. 2d 1163 (Fla 2nd DCA 1989)). At most, Talk America could only seek a partial summary final order because, assuming that Talk America's request was granted, a maximum amount of \$110,000 for 11 counts would still remain. However, there are genuine issues of material fact regarding the facts that support the counts of the violations. Therefore, Talk America has not met the standard for the granting of a Summary Final Order.

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SUMMARY FINAL ORDER
DOCKETS NOS. 010409-TP, 010564-TX

WHEREFORE, Commission staff requests that the Commission deny
Talk America's Motion for Summary Final Order for the reasons
discussed above. Respectfully submitted this 14th day of June,
2002.



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CERTIFICATE OF SERVICE

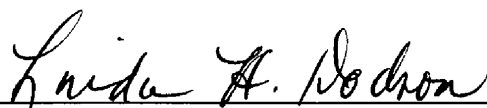
I HEREBY CERTIFY that a true and correct copy of COMMISSION STAFF'S RESPONSE TO TALK AMERICA, INC.'S MOTION FOR SUMMARY FINAL ORDER, has been served VIA-U.S. Mail, upon Mr. Floyd Self, Esquire, Messer Law Firm, Post Office Box 1876, Tallahassee, Florida 32302-1876, on behalf of Talk America, Inc., and that a true and correct copy thereof has been furnished by U.S. Mail, this 17th day of June, 2002.

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