

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

TALK AMERICA, INC.)	
)	
Application to Amend its Certificate)	Docket No. 00-0732
to Operate as a Facilities-Based Carrier)	
of Local and Long Distance Telecommunications)	
Services in the State of Illinois)	

**INITIAL BRIEF OF
TALK AMERICA, INC.**

Counsel for Talk America, Inc.

Henry T. Kelly
Joseph E. Donovan
O’Keefe, Ashenden, Lyons and Ward
30 N. LaSalle St., Suite 4100
Chicago, Illinois 60602
(312) 621-0400
hkelly@oalw.com
jedonovan@oalw.com

Steven Augustino
Erin Swansinger
Katherine E. Barker
Kelley Drye & Warren, LLP
1200 19th Street, NW Suite 500
Washington, DC 20036
(202) 955-9669
(202) 955-9792 (Facsimile)

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Talk America, Inc., by its attorneys, pursuant to Part 200.800 of the Commission's Rules of Practice, 83 Ill.Adm.Code Part 200.80, states as follows for its initial brief in support of its application to amend its certificate of service authority to be permitted to provide facilities based local exchange and interexchange telephone service.

When Talk America filed its application to become certified to provide local exchange services in Illinois, there was an inherent belief that the state of Illinois actually wanted local exchange competition in Illinois. Indeed, Sections 13-101 and 13-102 of the Illinois Public Utilities Act, 220 ILCS 5/13-101, 13-102, provide that the Commission shall take the necessary steps to promote competition, and to provide alternatives to the incumbent local exchange carrier for consumers. One of the criticisms of the Illinois Legislature has been that too many competitive local exchange carriers focus on business customers, rather than residential customers. (*See e.g.* pending H.B. 4181.)

It has been shocking to discover that in fact, the Commission's administrative staff have taken it upon themselves to engage in a virtual witch hunt with respect to 1 of only 2 local exchange carriers in the country that are in a position to provide services to

residential customers on a mass market basis. (Tr. 205) Staff's approach in this case has been to delay the proceedings unnecessarily to achieve its predetermined objective to deny Talk America's certification. While Staff's motives are unclear, it is clear that Staff's opinions regarding the company had their genesis from gossip at NARUC meetings (Tr. 204), and continued based on off-record discussions with staff members from other Commissions. (Tr. 425.)

Talk America is a publicly traded company that currently operates in 49 states, including Illinois. As of the second quarter of 2001, the Company provided telecommunications services to more than 300,000 local exchange access lines in Alabama, California, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, New York, North Carolina, Pennsylvania, South Carolina, Tennessee and Texas. In addition, Talk America had approximately 1.5 million long distance customers nationwide, including almost 35,000 in Illinois, the vast majority of whom are residential customers. (McComb Direct, p. 4; Rebuttal p. 15.)

Notably, Talk America has already been judged by this Commission to possess sufficient technical, managerial and financial resources and ability to provide telecommunications services. Talk America was certified to provide resold long distance services on December 20, 1995 in Docket Number 95-0447, and to provide resold local service on September 12, 1997 in Docket Number 97-0172. (McComb Direct, p. 3.) Neither the Commission nor the Commission Staff have sought to revoke this authority. And, despite all of the alleged wrongful acts (which are shown below to have been grossly blown out of proportion), the Commission Staff never suggested in this proceeding that the Company's authority should be revoked.

The operative provisions of the Illinois Public Utilities Act provide that the Commission shall grant a certificate of local exchange authority and interexchange service authority where the applicant provides evidence that it possesses sufficient technical, financial and managerial resources and abilities to provide services. Sections 13-403 and 13-405. Talk America is currently certified by the Commission to provide resold local exchange services,¹ and resold interexchange services

The Illinois Commerce Commission has never formally adopted regulations or rules that define the parameters by which the Commission will measure a company's "technical, financial and managerial resources and abilities." However, as Joseph Gillan testified, the staff of the Commission has adopted a clearly "unreasonable view" of whether Talk America possesses those qualities. (Gillan Rebuttal p. 5.):

Q. Do you believe that the Staff has applied an unreasonable view of "managerial expertise" to Talk America's application?

A. Yes. While I understand that Staff may have concerns about Talk America, it is difficult to reach the conclusion, based on the facts presented in their testimony, that Talk America does not have the managerial expertise to warrant certification and entry.

It is important that the Commission not review this application in a vacuum. There is no "tried and true" formula for local competition – *every* entrant to this market is attempting to learn, as they grow, the complete set of skills, rules and support systems needed to compete. Moreover, this process has been made all the more difficult by the substantial resources that must be diverted in each state to obtain (more accurately, attempt to obtain) the facilities and services they need from the incumbent. A sometimes messy learning process is an inevitable consequence of opening a complex market to *relatively* inexperienced entrants – after all, the only truly experienced providers of local services, the incumbents, want no part of entry in each other's regions.

¹ Section 13-401 of the Illinois Act provides that if a carrier does not use its certificate of service authority within 2 years, the certificate of authority shall be null and void. Talk America acknowledges that it has not used its resale of local exchange service authority. There has been no Commission proceeding relating to the Company's certificate of service authority.

Q. Are the difficulties of entry even more pronounced in the market segment – residential services – that Talk America competes in?

A. Yes. The residential market is characterized by a large number of smaller users. To serve this market profitably means that entrants must try to quickly attract a relatively large customer base, to offset the relatively low margin associated with each individual sale. In addition to the very significant problems *unique* to telecommunications – such as learning UNE-P, new billing arrangements, complex state-by-state regulatory rules -- entrants must also overcome traditional problems, such as the high costs of mass-market advertising and sales support. As a practical matter, the entry strategy that enables competitors to serve this market – the Unbundled Network Element Platform – has only recently become available, even here in Illinois where it was invented. This is a *young* industry and mistakes are inevitable.

(Gillan Rebuttal, p. 2-3.)

What has been clear in this proceeding is that the Staff has engaged in a campaign to discredit the company based on hearsay, gossip and speculation. Virtually all of the Staff's objections to the Company's application have been based either on inadmissible hearsay, or a standard that, if applied to all local exchange carriers, would preclude SBC, AT&T, WorldCom, Focal Communications and others from providing local exchange services in Illinois.

Putting aside Staff's intentions in vigorously opposing the application, Talk America requests that the Commission consider the *evidence* of record, and make its own evaluation of whether the Company possesses sufficient technical, managerial and financial resources to provide facilities based local exchange and interexchange services in Illinois. The Company possesses sufficient resources and abilities to provide these services, and the Company requests that the Commission grant the application.

I. TALK AMERICA POSSESSES SUFFICIENT TECHNICAL RESOURCES AND ABILITIES TO PROVIDE FACILITIES BASED LOCAL EXCHANGE SERVICES AND INTEREXCHANGE SERVICES.

The first prong of the test to determine whether the Commission should grant this application, is whether the Company has sufficient technical resources and abilities to provide services. There is no dispute that the Company possesses sufficient technical resources and abilities to provide services. However, the Company's technical expertise cannot be examined in a vacuum. The fact that the Company possesses sufficient technical expertise is also a reflection on the managerial qualifications of the Company.

Talk America will initially offer its facilities-based local exchange services through UNE-P. In a UNE-P arrangement, all facilities are provided to the customer by the local exchange company ("LEC") on a disaggregated wholesale basis. The facilities then are recombined by the LEC on behalf of CLECs such as Talk America. Eventually, the Company may move to its own facilities-based network, through which it will serve customers in Illinois via UNEs connected to a Company-provided switch. The Company will offer basic local service, PBX trunk service, direct inward dialing, optional calling features and listing services, and inbound and outbound long distance services utilizing switched and dedicated access. Switched access will be available on a presubscribed basis from equal access originating end offices. Talk America also will offer operator-assisted services and access to 911 services. All services will be available 24 hours a day/ 7 days per week. (McComb Direct, p. 8.)

Talk America will bill its customers directly in regular intervals using its in-house billing systems. The Company currently is developing a customized bill for Illinois customers that will be available prior to the time that the Company begins to market local

exchange services in Illinois. Talk America's customer service representatives are trained to handle all billing errors, complaints and trouble reports received from customers. Talk America will be directly responsible for all customer service and billing inquiries and complaints. Talk.com will provide repair services either using its own agents, independent third-party contractors, or third parties contracted by the incumbent local exchange carrier. (McComb Direct, p. 9.)

The Company's technical expertise, and managerial qualifications, are also reflected in its ability to create innovative services for its customers. In February 1997, the Company became the first telecommunications company to offer its services via an online "paper-less" sign-up program. Through this arrangement, America Online's customers and those that signed up directly for Talk America's services on-line have been charged for telephone calls on their credit card in lieu of receiving a phone bill in the mail. In addition to saving billing-related costs, this "paper-less" billing system has enabled customers to view their call detail and telephone billing information through the Internet in "real time" – that is, within minutes of placing a call, customers may view a call's details on-line. Such "real time" monitoring assists customers in keeping track of their monthly telephone bills and of the individuals making calls from their billing telephone numbers ("BTN's"), etc. (McComb Direct, p. 5.)

In August, 2000, the Company acquired Access One, a local exchange carrier in the southwest. (McComb Direct, p. 6.) However, there were several problems with respect to Access One's provisioning issues. To address those issues, Talk America made significant improvements to its operational systems interfaces with the ILECs, mainly through its hiring of a private database company Mantiss. The Company also

recently has implemented an automated order processing system (“OPS”) that cuts order processing time from placement of an order through service provisioning from five (5) days to five (5) minutes, enabling the Company now to process orders with fewer delays and complete order accuracy. The new OPS permits customer information, such as name, address, telephone number, to be directly inputted into the Company’s system once the customer’s credit history is processed. Talk America increased its provisioning staff from 10 persons in September 2000 to approximately 104 persons in all three of the Company’s customer service centers – Orlando, Florida, Palm Harbor, Florida, and Greenville, South Carolina as of August 15, 2001. Finally, the Company has recently implemented an improved company-wide monitoring and tracking system for customer complaints, the Regulatory Tracker, which the Company uses to comply with the FCC’s new requirements for reporting the number of slamming complaints each carrier receives throughout the calendar year. (McComb Rebuttal, p. 38-39.)

The Company requests that the Commission find that the Talk America possesses sufficient technical resources and abilities to provide facilities based interexchange and local exchange services in Illinois.

II. TALK AMERICA POSSESSES SUFFICIENT FINANCIAL RESOURCES AND ABILITIES TO PROVIDE FACILITIES BASED LOCAL EXCHANGE SERVICES AND INTEREXCHANGE SERVICES.

Under any reasonable measure that the Commission adopts, it is unequivocal that Talk America possesses sufficient financial resources to provide facilities-based local and interexchange services. Talk America is a publicly traded company that, by the end of September 2001, had generated over \$397 million in revenue for the first 9 months of the year. On an annualized basis, Talk America generates over \$525 million in revenue. In

addition, Talk America has over \$187,000,000 in assets. (Talk America Cross Exhibit 1.) As of September 30, 2000, the Company had over \$24 million in cash reserves. (Zahka Rebuttal, p. 2; Tr. 596.)

One significant measure of a company's financial resources is whether a company is EBITDA (earnings before interest, taxes, depreciation and amortization) positive. (Tr. 571.) Excluding a one-time non-cash charge that was taken by the Company on its September 30, 2001 financial statements, the Company was EBITDA positive. Even Ms. Marshall has testified that whether a company is EBITDA positive is a factor that weighs favorably in identifying company's that have sufficient financial resources to provide telecommunications services. Tr. 571.

In Ms. Marshall's original Direct Testimony, Staff was of the opinion that the company had sufficient financial resources and abilities to provide telecommunications services. However, on January 11, 2002, after the hearings in the proceeding had begun, Ms. Marshall amended her opinion and testified that she believed the Company lacked sufficient financial resources to provide services. Ms. Marshall's opinion was based on two factors:

1. She believes the Company lacks sufficient available cash to fund business operations for 90 days (Marshall Supplemental Direct, p. 9); and
2. She believes that because the Company has a negative net worth, it lacks sufficient financial resources (*Id.*)

(Tr. 541.) While not a part of her "test" to determine financial resources, Ms. Marshall further testified that she believes that the pending investigations in other states pose a sufficient contingent liability to impair the Company's financial resources (Marshall Supplemental Direct, p. 5-6). In addition, she believes that the Company's "current

ratio” or the ratio of current assets to current liabilities indicates the company lacks sufficient resources to pay its debts (Marshall Supplemental Direct, p. 10-11.).

Ms. Marshall’s opinions regarding the Company’s ability to pay its bills over the next 90 days is simply not credible testimony. First, Mr. Zahka, the Company’s Chief Financial Officer testified that in fact, the Company did have sufficient resources (when including anticipated revenue to be earned into the future) to pay its accounts. Mr. Zahka testified that the Company has sufficient resources to pay its bills on a going-forward basis, even assuming any additional liabilities relating to other pending investigations. (Tr. 603.). In addition, Ms. Marshall’s “test” to determine financial resources (having sufficient cash to fund 90 days of operations) is not a test that the Commission should adopt. Ms. Marshall admits that the Commission should apply her “test” to all carriers that provide local exchange services. (Tr. 541). However, she also acknowledges that the “test”, if applied, would disqualify SBC from providing services to Illinois consumers. (Tr. 566.) Focal Communications also would not have “financial resources and ability” to be certified under Ms. Marshall’s “test.” (Tr. 567.)

The Commission must also reject Ms. Marshall’s “test” that Talk America’s negative net worth would cause the Commission to find that the Company lacks sufficient financial resources. First, Talk America’s negative net worth was created during the quarter ending September 30, 2001 through a \$168,700,000 non-cash impairment charge of goodwill and other intangibles as required by GAAP pronouncement SFAS 121. This is a one-time event unique to the Company’s 3rd quarter financial statements. (Zahka Rebuttal, p. 3.) According to Mr. Zahka, had this one-time

charge, which related to an accounting entry rather than a business event, not occurred, Talk America would have had a positive net worth. *Id.*

Second, Focal Communications, a company authorized by the Commission, also has a negative net worth (Tr. 567.) Section 13-401(a) of the Act provides:

Any Certificate of Service Authority may be altered or modified by the Commission, after notice and hearing, upon its own motion or upon application of the person or company affected.

220 ILCS 5/13-401. If the Commission denies Talk America a certificate of service authority to provide services on the basis that the Company has a negative net worth, then the Commission must also take action against Focal Communications to revoke its authority, as well as investigate the financial resources of all other carriers. While Ms. Marshall's concern to protect consumers against company's that are not financially fit are admirable, the adoption of standards that apply to only 1 subset of carriers is not permissible to achieve that goal.

Ms. Marshall also provided testimony that, in evaluating the financial resources of the Company, the Commission should make adjustments to the financial statements to account for pending litigation in other states (the Tennessee and Florida investigations.) Ms. Marshall further admits that Generally Accepted Accounting Principles, and Financial Accounting Standards Board Statement No. 5 (SFAS No. 5) in particular, governs whether to account for these items in the financial statements. (Tr. 547.)

Ms. Marshall's opinion that the Commission should consider the financial implications of these other proceedings is rebutted by Ms. Marshall's own testimony. Ms. Marshall acknowledges that the Company, not Ms. Marshall and not the Commission, decides under Generally Accepted Accounting Principles and SFAS No. 5,

whether to account for these cases as a contingent liability. (Tr. 548-550.) The Company has determined based on all facts known to it, that establishing a contingent liability for these matters is not necessary to accurately reports its financial condition. (Zahka Rebuttal, p. 5.) Ms. Marshall further acknowledges that she would not have sufficient information to know how to calculate or estimate a contingent liability for these proceedings because she has not conducted the required investigation into the cases to make an estimate of the contingent liabilities. (Tr. 553.) For example, Ms. Marshall has not reviewed any of the actual complaints filed by consumers that gave rise to the investigations, has not reviewed any discovery relating to the proceedings, or whether the parties have participated in settlement discussions. (Tr. 553-555.) All of these factors would be relevant to make a determination of the Company's contingent liability amount, yet Ms. Marshall knows none of these facts. She has no credible basis to question the Company's decision to not calculate a contingent liability under SFAS No. 5. (Tr. 554.) Because Ms. Marshall has done no investigation of the underlying claims, her testimony that the Commission should consider these claims in evaluating the Company's financial condition must be disregarded.

Talk America, knowing the factors relating to the Florida and Tennessee investigations, has determined under Generally Accepted Accounting Principles and SFAS No. 5, that it is not necessary to identify a contingent liability for these matters. (Zahka Rebuttal, p. 5; Exhibits 6.1 and 6.2.) More to the point, even if the contingent liabilities were calculated, the Company still had sufficient cash reserves (\$24 million) to pay any such judgments that are entered.

Finally, Ms. Marshall indicated that because the Company's "current ratio" was less than 1.0, she speculated that the Company might be unable pay its bills in a timely manner. (Marshall Supplemental Rebuttal, p. 11.) While it is true that the Company's "current ratio" is less than 1.0, this is not an accurate reflection of a company's ability to pay bills when they become due. Also, Mr. Zahka testified, based on his years of evaluating the financial resources of hundreds of companies, that a company's "current ratio" is rarely if ever used in business to measure a company's financial resources. (Tr. 588; 602.)

Ms. Marshall's opinions regarding the financial qualifications of the Company must be disregarded; her opinions are based on inaccurate assumptions regarding the Company's financial qualifications, and Ms. Marshall lacks sufficient information to draw her conclusions. In addition, Ms. Marshall's standards for financial qualification, if applied across all carriers would preclude virtually any operating company from providing telecommunications services. For these reasons, Talk America requests that the Commission find that the Company possesses sufficient financial resources and ability to provide services.

III. TALK AMERICA POSSESSES SUFFICIENT MANAGERIAL RESOURCES AND ABILITIES TO PROVIDE FACILITIES BASED LOCAL EXCHANGE SERVICES AND INTER EXCHANGE SERVICES.

In order to become certified to provide telecommunications services, the Company must also show that it has sufficient managerial qualifications to provide services. As with the other provisions of Sections 13-403 and 13-405, the term "managerial resources and abilities" is not defined in either the statute, or in any Commission regulation. However, it is clear from the testimony, and even from the

factors that the Staff generally uses to evaluate managerial qualifications, that the Company has sufficient managerial resources and ability to become certified.

The factors that Staff generally applies to judging a company's managerial qualifications are not written down (Tr. 408) but generally include the following:

1. Whether the application is complete and accurate;
2. Whether the applicant has attached biographies of the company's officers to the application;
3. Whether the applicant has attached copies of the company's authority to transact business in Illinois; and
4. Whether the applicant has provided testimony of a key employee in support of the application.

(Tr. 409; Marshall Direct, p. 7.) While it is not clear that these are factors that the Commission considers (or should consider), Talk America has complied with each of Staff's requirements.

With its application, the Company submitted the biographies of its key officers, including Gabe Battista, Chairman and Chief Executive Officer, Warren Brasselle, Senior Vice President of Operations, Jeff Earhart, Senior Vice President, Customer Operations, Kevin Griffo, Executive Vice President, Sales / Marketing, and Al Lawn, Executive Vice President, General Counsel. The individuals have over 45 years combined experience in management of telecommunications companies alone. The Company's officers have worked for most of the largest telecommunications companies that have been in operations, most of which have also been certified by the Illinois Commerce Commission. The Company's officers have held senior management positions at Sprint, GTE, General Electric, Network Solutions, Inc., Cable and Wireless, MCI, Williams Telecommunications, AMNEX, and LDDS WorldCom, not to mention the multitude of

non-telecommunication companies which these individuals have managed. Few telecommunications carriers that seek certification from the Commission have the experience and managerial qualifications that Talk America has.

Joe Gillan testified that, based on his experience in the telecommunications field, the Company possesses sufficient managerial resources and ability to provide local exchange services. (Tr. 208.) David Zahka, Talk America's Chief Financial Officer that joined Talk America in December testified that in his opinion, the Company has sufficient managerial resources to operate as a telecommunications carrier. (Zahka Rebuttal, p. 1-2.) Prior to joining Talk America, Mr. Zahka worked for 16 years in the investment banking industry, and was responsible for evaluating, for investment purposes, the management teams of several hundred companies, many of which were considerably larger than Talk America. *Id.* Five of the years, Mr. Zahka was responsible for evaluating management teams in the utility business. Tr. 582. As Mr. Zahka testified:

During my relatively short tenure at Talk America, I have been extremely impressed with the competence and caliber of each member of the management team. I believe they compare very favorably with the management teams I have worked with over the past 16 years. I am of the opinion that the Company possesses sufficient managerial abilities to operate as a local exchange carrier in Illinois.

Id.

Even the Commission Staff, who oppose the application, believe that the Company's officers and directors have sufficient managerial qualification to become certified by the Commission. (Tr. 413.)

Talk America submits that the inquiry regarding the Company's managerial qualifications should end here. Sections 13-403 and 13-405 require the Commission to

determine a company's managerial qualification. The Commission should not consider staff's other "prerequisites" to measure a company's managerial abilities. In addition, the other testimony submitted by Staff relating to consumer complaints in Illinois and pending investigations in other states is immaterial to the question of whether Talk America satisfies the requirements of Section 13-403 and 13-405.

Notwithstanding the Company's position that Staff's other prerequisites should not be considered, the Company notes that it has satisfied the factors that Staff applies in other cases. The Company submitted its authority to transact business in Illinois, and submitted testimony from Francie McComb. In addition, but for a minor and insignificant mistake in the Amended Application, Ms. Jackson testified that the application was accurate and complete. (Tr. 414.) The only mistake in the Amended Application related to the proper way to collect and remit the 911 surcharge. According to Ms. Jackson, this process was described correctly in Ms. McComb's testimony, but not quite correctly in the application. (Tr. 419.)

If the Commission were to measure the managerial expertise of Talk America against an objective standard that has been applied by Staff to other carriers in Illinois, there is no doubt that the Company has sufficient managerial resources and abilities to provide services in Illinois.

Despite the managerial expertise, which the parties acknowledge satisfies the requirements of Sections 13-503 and 13-504, and despite the Company's satisfying the factors that the Commission Staff generally apply to applications, the Staff of the Commission opines that the Company should still be denied certification. Staff opposes the application (with respect to managerial qualification) on three grounds: 1) that the

Company has changed its name, 2) that there have been investigations against the Company in other jurisdictions, and 3) that there have been consumer complaints filed against the Company with the Illinois Attorney General.

The issues raised by Staff are not sufficient reason to deny the application. To be clear, according to Ms. Jackson, the only justification for the Commission to deny the application for a reason related to “managerial qualification” is the fact that the company has been investigated by other state commission. (Tr. 422.) The “name change” issue, and the number of consumer complaints were not, according to Ms. Jackson, sufficient reason to deny the Company’s application. (Tr. 422.) Nevertheless, the Company responds to the Staff’s accusations below.

A. The Company’s Name Change Does Not Show a Lack of Managerial Resources.

Staff witnesses testified that one indicator of a lack of managerial qualifications is that the company had changed its name on numerous prior occasions, and operated under several different names in an attempt to confuse customers. (Agnew Direct, p. 8-9.) Mr. Agnew speculates that the Company changed its name “to confuse customers.” (Agnew Direct, p. 9.) Mr. Agnew’s testimony is again baseless.

First, it is clear that Staff is basing its opinions not on actual corporate documents describing the company’s “intent” on why it changed its name. Mr. Agnew’s testimony is based on speculation of the company’s “intent” derived from alleged complaints filed by consumers. These consumer complaints allegedly identifying this applicant as operating under a different name are not proof that the company operates under a different name. More importantly, the evidence is that the Applicant changed its name twice in its 12-year corporate history. (McComb Rebuttal Testimony p. 4.) On May 17,

1989, Tel-Save, Inc. (“Tel-Save”) was incorporated in the State of Pennsylvania as a closely held corporation. Ten years later Tel-Save changed its name – *for the first time* – to Talk.com Holding Corp. (“Talk.com”), the operating subsidiary of the holding company parent, Talk.com Inc. On April 11, 2001, Talk.com Holding Corp. changed its name -- *for the second time* -- to Talk America Inc. (*Id.*)

There is no evidence that the Company has operated under multiple different names, or that the Company has operated under different names to “confuse customers.” Mr. Agnew’s speculation about the Company’s motives for changing names is just that – speculation (and wrongful speculation at that.) In fact, the Company has changed its name (twice) in an effort to increase the awareness that the Company in providing telecommunications services, not in an attempt to hide from that fact. (McComb Rebuttal, p. 6-7.)

B. The Number of Consumer Complaints in Illinois Does Not Indicate That the Company Lacks Managerial Qualifications.

Mr. Agnew testifies that, in his opinion, the number of consumer complaints filed with the Illinois Attorney General is an indication that the Company lacks managerial qualifications. (Agnew Direct, p. 12.) First, it is clear from their testimony that, to the best of Staff’s knowledge, there has been no finding by the Commission or any other state agency, that Talk America has violated any state law. (Tr. 275; 626) Indeed, there is no evidence in this proceeding that the Company has violated any Illinois (or other state’s) law. An allegation of wrongdoing is not evidence that the Company has committed any wrongful act.²

²MR. KELLY: So if I can kind of understand, Mr. Kelly: your Honor, Mr. Agnew should not be permitted to say that the Illinois Attorney General complaints are evidence of slamming or cramming?

Second, the Illinois Attorney General has received only **20** complaints over the past **7 years** that it has deemed credible enough to forward to Talk America! (Tr. 342; 347.)³ Of these 20, Staff acknowledges that just because a complaint has been filed, that is not an indication that the Company has engaged in any wrongful conduct:

Ms. Stephenson: . . . as we have asserted on numerous occasions, it's not so much for the validity of these complaints, but more or less the fact that they existed and that they -- Mr. Agnew used them in reviewing his entire formation of his opinion for the case.

(Tr. 361.) The complaints filed with the Illinois Attorney General were admitted into evidence only to show the number of complaints filed. (Ruling by Judge King, Tr. 362 “these complaints were to be -- or were intended to be admitted solely for the purpose of showing that there, in fact, has been complaints filed.”

The small number of complaints filed with the Illinois Attorney General's office is not enough for the Commission to find that the Company lacks managerial qualification. Particularly where there has never been a finding that the Company has violated any Illinois law or regulation. Given that there were on average less than 3 complaints per year (over the past 7 years) that were deemed credible enough for the Attorney General to forward to the company, it would be ludicrous for the Commission to conclude, based on this sparse evidence, that the Company lacks sufficient managerial resources and abilities.

JUDGE KING: This is true.

³ To be clear, there were other “complaints” filed with the Illinois Attorney General's office, but the AG believed those complaints were not sufficient or credible enough to even forward to the Company for a response.

C. The Investigations in Other States Do Not Show a Lack of Managerial Resources.

Ms. Jackson has testified that because other state commissions have investigated the marketing practices of the Company, the Illinois Commerce Commission should find that the company lacks managerial resources and abilities to provide services. (Jackson Direct, p. 25.) Ms. Jackson made clear that, but for these other pending investigations, she was of the opinion that the Company had sufficient managerial qualification to become certified:

Ms. Jackson: . . . Other than the cases that are litigated in the other states, that are described in the amended application, taking those out, the remaining parts of the amended application, would that weigh in favor of your recommendation that the Company possesses sufficient managerial qualifications to provide service in Illinois?

A. Yes.

(Tr. 420.)

The question, then, is what weight if any should the Commission give to the fact that other states have initiated (and for the most part) dismissed the investigations against Talk America? Because there have been no findings in these other state proceedings that the Company has violated any law, the answer is clearly -- none.

It has been well documented by the Company that state commissions have initiated investigations relating to the Company's marketing practices. Investigations were initiated in Alabama, Georgia, Florida, Mississippi, Tennessee, North Carolina, and West Virginia. With the exception of Florida and Tennessee, all of these investigations have been resolved. There was no finding in any of these proceedings that the Company violated any law or regulation. Each of the proceedings was resolved in a way that was acceptable to both the Company and the Commission.

Notably, in each of these investigations, the state Commissions found that Talk America was qualified to either begin services as a facilities based carrier, or was able to continue operating as a carrier. Ms. Jackson would impose a penalty (lack of certification) for state proceedings in other states that even those other state jurisdictions did not impose.

Indeed, even Ms. Jackson recognizes that the Company's ability to resolve these pending proceedings is evidence that weighs in favor of the Commission finding that Talk America has managerial expertise. (Tr. 422-23.) Ms. Jackson believes that a company that shows a willingness and ability to work with Commissions to resolve issues is an indication that the Company possesses managerial qualification. (*Id.*) It is surprising and curious then, that Staff *refused* to meet with Talk America during this proceeding, despite Talk America's attempt to resolve certain issues:

Mr. Kelly: Q. And you've indicated that the company's willingness and ability to resolve issues in Illinois, . . . would that be a factor weighing in favor of finding that the Company has sufficient managerial qualifications?

A. Willingness -- I mean is there a specific issue they are willing to look at and resolve, or is it just all issues in general?

Q. I think you indicated that one factor that the Commission looks at, the Commission Staff looks at, is whether a company is willing to work out differences, or work with Staff on certain issues.

A. Yes.

Q. Is that a factor that would weigh in favor . . . of a finding that the Company has sufficient managerial qualifications?

A. Yes.

* * *

Q. Now, to attempt to resolve the issues in this case, did the Company attempt and request the ability to sit down and work with Staff to try to work out some of the differences in this state, in this case?

A. They did make those attempts, yes.

Q. Staff -- did you agree to sit down with the Company to try and work out some of those differences?

A. No.

(Tr. 423-426.) Staff refused Talk America the ability to satisfy one of the factors that even Staff believes shows managerial qualification.

Investigations by other state commissions and allegations made in other state proceedings (like consumer complaints) cannot be used by the Illinois Commerce Commission to deny Talk America its application for a certificate of service authority. Complaints, indictments or mere allegations are not admissible as evidence of wrongdoing. *People v. Franklin*, 167 Ill. 2d 1, 24, 656 N.E.2d 750 (1995); *People v. Hendricks*, 137 Ill. 2d 31, 52 (1990). Only convictions and judgments may be used as evidence related to a person's character; a complaint, an indictment, or a charge is not admissible. *People v. Triplett*, 108 Ill. 2d 463 474, 485 N.E.2d 9 (1985.) (See also, *Fumiko Matsuuchi v. Security-First National Bank of Los Angeles*, 103 Cal. 2d 214, 219, 229 P.2d 376 (1951) where the court stated emphatically, "[s]ince when has an allegation in a pleading ever been regarded as evidence against an opposing party? The answer is never at all in the history of the law. Such an allegation is not only self-serving, but is hearsay as well." *Citing Farmer v. Associated Professors of Loyola College*, 166 Md. 455, 171 A. 361 (1934.))

There is no order, finding, or ruling from any of these other proceedings on which the Commission can base an opinion that the Company lacks managerial resources. Indeed, if anything, the fact that the Company has devoted substantial

managerial resources to resolve issues in other states is evidence that the Company has sufficient managerial resources to become certified in Illinois.

Mr. Gillan sums it up best. He is of the opinion that the Company's ability to resolve and address problems identified by other state Commissions weighs heavily in favor of a Commission finding that the Company has managerial qualification – particularly because Talk America provides residential mass-market services:

Mr. Gillan: I think the fact of what they're trying to accomplish as you judge their management capability, their technical capability and their financial capability, I think you have to do it inside the context of what is reasonable and practical. Is this company perfect? No. Is any company perfect? No.

But as the difficulty of the market you're trying to enter goes up dramatically, and that's the type of market this company is trying to enter, even the most expert company is going to run into some difficulties because they're trying to do something that hasn't been successfully done before.

There isn't some CLEC academy that they can go to and learn all the right answers. So you end up in a process of some trial and error. And trial and error by definition means some things work and some things don't.

And I think important for the Commission in reviewing this company's history isn't whether or not they have a flawless track record because there's going to be problems but, by looking at it, is the management working to solve them and correct them.

(Tr. 207-208.)

Talk America requests that the Commission enter an order finding that the Company has sufficient managerial resources and abilities to provide facilities based local exchange and interexchange services.

IV. A DECISION TO DENY TALK AMERICA'S APPLICATION WOULD BE PREEMPTED BY SECTION 253 OF THE FEDERAL COMMUNICATIONS ACT.

Section 253 of the Federal Communications Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the

effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). If the Commission denies Talk America's application to provide local exchange services in Illinois, such a decision by the Illinois Commerce Commission would be preempted by Section 253 of the Federal Act.

In 1996, two municipalities denied Classic Telephone Company the ability to operate as a local exchange carrier in their municipalities, questioning the company's capabilities to provide local exchange service. *In the Matter of Classic Telephone, Inc. Petition for Preemption , Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, File No. CCBPol 96-10, 11 FCC Rcd 13082, para. 6 (1996) (Classic Telephone Decision.) The FCC concluded that the municipalities, despite state statutes, could not deny Classic Telephone Company from providing local exchange services. *Classic Telephone Decision*, para. 46. Most notably, the FCC ordered that the municipalities to "expeditiously reconsider Classic's franchise applications, i.e. within 60 days from the release of this order." *Classic Telephone Decision*, para. 50.

V. TALK AMERICA RENEWS ITS OBJECTIONS TO THE STAFF'S TESTIMONY AND RENEWS ITS MOTIONS TO STRIKE.

During the course of the proceedings, Staff submitted several pieces of testimony that were improper and objectionable. For example, most of Mr. Agnew's Supplemental Direct Testimony contained objectionable hearsay. In addition, Ms. Marshall's Supplemental Direct Testimony introduced new opinion evidence during the course of the hearings, in violation of Illinois Supreme Court Rule 213. Talk America renews its objections to the admission of the following testimony and incorporates by reference the

arguments set forth in its formal pleadings relating to the testimony, as well as the motions to strike the testimony and other arguments made in open court:

Talk America objects to the admission of the Supplemental Direct Testimony of Judith Marshall filed on January 11, 2002, for the reasons set forth in the Company's January 15, 2002 pleading;

Talk America objects to the admission of Supplemental Direct Testimony James Agnew filed on January 11, 2002 on the basis that the testimony was late filed, and sought to introduce opinion evidence withheld by the Staff for over 6 months, as set forth in the Company's January 6, 2002 Objection to the admission of Mr. Agnew's testimony and Motion to Strike;

Talk America's Objections to the Staff's Motion for Leave to File the Testimony of Mr. Hurley, and the Motion to Strike Testimony of Mr. Agnew for failure to comply with Illinois Supreme Court Rule 213, as set forth in Talk America's January 7, 2002 Motion;

Talk America renews its Motion to Strike portions of Mr. Agnew's Supplemental Direct Testimony, as set forth at pages 615 to 620 of the transcript.

Talk America renews its Motion to Strike portions of Mr. Agnew's Supplemental Direct Testimony, as set forth at pages 632 to 633 and 640 to 641 of the transcript;

Talk America renews its Motion to Strike portions of Mr. Agnew's Supplemental Direct Testimony, as set forth at pages 360 to 366 of the transcript;

To the extent the Administrative Law Judge has denied Talk America's motions to strike, and objections to the filing of testimony, the Company again requests that the testimony be stricken.

CONCLUSION

Wherefore, for each of the foregoing reasons, Talk America respectfully requests that the Commission grant Talk America's Application to Amend its Certificate of Service Authority to Provide Facilities Based Local Exchange and Interexchange Services.

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Respectfully submitted,



One of the attorneys for Talk America

Henry T. Kelly
Joseph E. Donovan
O'Keefe, Ashenden, Lyons and Ward
30 N. LaSalle St., Suite 4100
Chicago, Illinois 60602
(312) 621-0400
hkelly@oalw.com
jedonovan@oalw.com

Steven Augustino
Erin Swansinger
Katherine E. Barker
Kelley Drye & Warren, LLP
1200 19th Street, NW Suite 500
Washington, DC 20036
(202) 955-9669
(202) 955-9792 (Facsimile)