STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION	)	
On Its Own Motion	)	
	)	**00-0732**
TALK.COM HOLDING CORP	)	
	)	
Application to Amend its Certificate	)	
Of Local and Long Distance Telecom	)	
Services in the State of Illinois	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned matter.

Staff has thoroughly addressed most of the points raised in the Talk America Initial Brief. Talk America (hereinafter "Talk" or "Applicant") and Staff each submitted on February 22, 2002 Initial Briefs ("Talk IB" and "Staff IB) in this proceeding. In the interest of brevity, Staff will not reiterate points previously made in Staff's Initial Brief. Rather, Staff will only comment on several key points raised in the Initial Briefs. To the extent that Staff does not address an argument in this Reply Brief that was raised in Staff's Initial Brief, this should not be deemed a waiver, but rather the Staff's arguments in its Initial Brief should be deemed remade herein. Staff's position remains unchanged. Staff maintains that Talk lacks financial and managerial resources and abilities to provide facilities based local and inter-exchange services in Illinois.

I. LEGAL STANDARDS

A. Standard of Proof

Section 10 –15 of the Illinois Administrative Procedure Act provides that "unless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. As neither the provisions of the Public Utilities Act governing certification, *see, generally* 220 ILCS 5/13-401 *et seq*., nor the Commission's Practice Rules, *see generally*, 83 Ill. Admin. Code 200.200 *et seq*.,

specify any other standard, the standard of proof in this case is the preponderance of the evidence.

B. Burden of Proof

The party seeking relief generally bears the burden of proof. People v. Orth, 124 Ill. 2d. 326, 337 (1988). The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d. 38, 43 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thorton Twp. School Trustees, 274 Ill. App. 3d 676, 690 (1st Dist. 1995), *app. den.*, 164 Ill. 2d 557 (1995); Chicago Board of Trade v. Dow Jones & Co., 108 Ill. App. 3d 681, 686 (1st Dist. 1982).

The general rule that a party seeking judicial relief has the burden of demonstrating his or her right to it, applies with respect to Commission certification cases. Moreover, the provisions of Section 13-403 and 13-405 of the Public Utilities Act, pursuant to which Talk seeks certification, specifically codify this general rule. For instance, Section 13-405 states, in pertinent part:

> Local exchange service authority; approval. The Commission shall approve an application for a Certificate of Exchange Service Authority only **upon a showing by the applicant**, and a finding by the Commission, after notice and hearing, that the applicant possesses sufficient technical, financial, and managerial resources and abilities to provide local exchange telecommunications service.

220 ILCS 5/13-405 (emphasis added)

Section 13-403 includes similar language requiring the applicant to make a showing that it possesses sufficient technical, financial, and managerial resources and abilities to provide inter-exchange telecommunications service. 220 ILCS 5/13-403.

Talk is the party seeking certification here, and consequently it bears the burden of proof and persuasion in this proceeding. As an applicant for the certifications under Section 13-403 and 13-405, it must make a showing, by a preponderance of the evidence, that it possesses sufficient technical, financial, and managerial resources and abilities to provide telecommunications service in Illinois. As Staff has demonstrated in its Initial Brief, and will continue to show in this Reply Brief, Talk has failed to meet this burden, and, accordingly, the Commission must deny certification.

II. TALK'S EXISTING CERTIFICATE TO PROVIDE RESOLD LOCAL SERVICE IS NULL AND VOID AS A MATTER LAW.

Talk is not currently certified to provide resold local telecommunications services in Illinois. Talk maintains that the Company was certified in Illinois to provide resold local service on September 12, 1997 in ICC Docket Number 97-0172. Talk IB at 2. Talk further argues that neither the Commission nor the Commission Staff have sought to revoke this authority nor has the Commission Staff ever suggested in this proceeding that the Company's authority should be revoked. Id. Although Staff does not dispute the fact that Talk was certified to provide local service in the above-mentioned ICC Docket, Staff points out that Talk's certificate is currently null and void. As a result, there was no need for Staff to revoke a certificate that had already lapsed.

Section 13-401 of the PUA states in relevant part:

> "**Unless exercised within a period of two years from the issuance thereof**, authority conferred by a Certificate of Service Authority shall be null and void.". (Emphasis added)

220 ILCS 5/13-401

The statutory language does not require the Commission nor does it require the Commission Staff to take any action to void Talk's certificate. Unless exercised by the holder of the certificate, the authority conferred by the certificate lapses automatically. No reasonable alternative construction can be advanced in good faith. Moreover, Talk has admitted the following: Staff Data Request JRM 1.03 asks, "Please provide a copy of the Company's tariffs for resold local exchange services currently in effect in Illinois". Company witness McComb responds, "As stated in the Amended Application, the Company is not currently offering resold local exchange services in the State of Illinois and has not done so to date. *Accordingly, there is no tariff on file with the ICC*". Staff Ex. 2.0 at 4-5. (Emphasis added).

Additionally, Staff Data Request JRM 1.04 asks, "If no local exchange tariffs are currently in effect in Illinois, please describe any services provided under the authority granted in ICC Docket 97-0172 since September 12, 1997". Id. The applicant's witness McComb responded, "The Company has provided no services under the authority granted in ICC Docket 97-0172 since September 12, 1997. Id. To Date, the Company has provided only resold long distance services in the State of Illinois." Id. Furthermore, upon cross -examination, Talk witness McComb was uncertain whether or not Talk's existing certificate was even valid. TR at 480.

In order to clarify this matter, the Commission should find in this docket that Talk's prior certificate to provide re-sold local exchange services is null and void as a matter of law. As stated above, the plain text of Section 13-401 reveals its clear meaning, which is that when companies do not exercise their local certificates within a period of two years, authority conferred by a certificate of authority becomes null and void. Clearly, no Commission action is necessary. Therefore, the service authority granted in Docket 97-0172 should be considered null and void because it was not exercised within a period of two years as required by the PUA.

III. TALK AMERICA DOES NOT POSSESS SUFFICIENT FINANCIAL RESOURCES AND ABILITIES TO PROVIDE FACILITIES BASED LOCAL EXCHANGE SERVICES AND INTEREXCHANGE SERVICES.

Talk makes various attempts to convince the Commission that it possesses sufficient financial resources and abilities to provide facilities based local exchange services and inter-exchange services. The Commission should give little, if any weight, to its arguments. Staff's analysis of Talk's financial resources and abilities to provide telecommunications service is fully presented in its Initial Brief, *See* Staff IB at 18-28, and Staff's position remains unchanged in its entirety with respect to this issue.

Staff's position that Talk does not possess sufficient financial resources and abilities to provide telecommunications service is not exclusive to the Illinois Commerce Commission Staff. The Applicant argues that the Commission's administrative Staff has taken it upon themselves to engage in a virtual witch-hunt or unfair evaluation of Talk's financial condition. Talk IB at 1 and 7. Clearly, this is not the case. The record contains unbiased information from sources, other than Staff, regarding Talk's financial condition. In fact, the financial community as evidenced by NASDAQ reports has judged Talk's

deteriorating financial condition by reducing the market value of Talk stock from a 2 year high in excess of $13 per share to its current market value of 52 cents per share. TR at 512. NASDAQ also reports negative profitability ratios and a negative 10.69% Interest Coverage ratio for Talk at December 31, 2001. Id. Clearly, Staff is not the sole critic of Talk's financial condition that Talk would have the Commission believe.

Moreover, this docket should be limited to the particular qualifications of Talk to provide the requested financial services. Talk argues that Staff's analysis of Talk's financial resources and ability to provide telecommunications service would preclude SBC, AT&T, WorldCom, Focal and others from providing local exchange services in Illinois. Talk IB at 4 and 9. The financial condition of any other carrier is not at issue in this docket. Furthermore, unlike Talk, none of these carriers are seeking certification and none have let their current certifications lapse. This Commission cannot be expected to monitor the financial ups and downs of each company once they have been certificated. Once in operation, the Commission analyzes the results of their operations. If the financial condition of any of these carriers slips to the extent of harming service quality, then and only then, is the Commission able to step in. Even if, for the purposes of argument, Staff were to modify its 90 days of working capital test to include cash provided by operations (payments of Accounts Receivable) when applied to an on-going concern, Talk does not pass this test. In other words, Talk fails this test even when Talk's recommendations are taken into account and the payment of Accounts Receivable are included. Staff IB at 2.

Talk tries to provide in its Initial Brief some evidence to support its position, *See* Talk IB at 9, nevertheless the evidence is either irrelevant or incorrect. The only

financial statements of other carriers included in the record of this case are those of SBC, See Talk Cross Ex. 4, and Focal. See Talk Cross Ex. 5. While Staff believes that any analysis of these carriers is totally irrelevant to this case, Staff notes that SBC satisfies the 90 days of cash working capital test when payments on Accounts Receivable are included. Focal was required to meet the same test that Staff applies to Talk in this docket prior to providing service in Illinois. (*See* Focal Communications Corporation Docket 96-0373 at 3-6 and Ex. F) While Staff witness Marshall expressed concern with Focal's current financial condition in response to cross examination, Focal's current financial position is not at issue in this case. Accordingly, the Commission must reject Talks arguments.

Talk, in its Initial Brief, has misquoted Staff. Talk states, "Ms. Marshall's opinion that the Commission should consider the financial implication 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." Talk IB at 10 and 11. Contrary to Talk's assertion, Staff did not, under cross-examination, state a position as to whether it is within her authority or the Commission's authority to make determinations regarding whether to report settlements with other state public utilities commissions as contingent liabilities on the company's financial statements as contingent liabilities. TR at 549. Indeed, due to the confusing way the question was asked to Ms. Marshall at the hearing, Staff refrained from answering the question for purposes of keeping the record free from inaccurate or incorrect information. TR at 550-551.

Additionally, the Applicant misquoted Ms. Marshall in its Initial Brief when the Applicant stated, "Ms. Marshall further admits that Generally Accepted Accounting Principles, and Financial Accounting Board Statement No. 5, in particular, governs whether to account for these items in the financial statements." Talk IB at 10. To the contrary, when the Applicant asked whether Ms. Marshall believed the company should report its financial statements to take into account the potential contingent liability related to the Tennessee and Florida investigations, Ms Marshall responded the following way: " As a certified public accountant and in view of the fact that the dollar amount that the states are at least seeking, I would think that certainly at a minimum the footnote disclosure would be required." TR at 548.

Clearly, Ms. Marshall did not state GAAP and FASBE should govern whether the Company should record contingent liabilities in their financial statements. Rather, Ms. Marshall was giving her expert opinion, as a certified public accountant, that the Company should have a record in its financial statements regarding litigation in other states. Moreover, common sense would certainly indicate that litigation with state public utility commissions should be recorded in companies' formal financial records.

Nevertheless, Article V of the Public Utilities Act confers the Commission authority to set the forms of accounts to be kept by public utilities. 220 ILCS 5/5-102. Section 5-102 states, in part:

> "Sec. 5-102. It [the Commission] may also, in its discretion, prescribe the forms of accounts to be kept by public utilities, including records of service, as well as accounts of earnings and expenses, and any other forms, records and memoranda which in the judgment of the Commission may be necessary to carry out any of the provisions of this Act."

220 ILCS 5-102.

Talk attempts to convince the Commission that the Company decides whether to account for the Tennessee and Florida investigations as a contingent liability. Talk IB at 11. However, the Commission should give no weight to this argument because this issue is clearly governed by Article 5 of the PUA. For these reasons, Staff requests that the Commission find that the Applicant does not possess sufficient financial resources and abilities to provide telecommunications services in Illinois.

IV. TALK AMERICA DOES NOT POSSESS SUFFIENT MANAGERIAL RESOURCES AND ABILITIES TO PROVIDE FACILITIES BASED LOCAL EXCHANGE SERVICE AND INTEREXCHANGE SERVICES.

Because Staff's Initial Brief, *See* Staff IB at 4-18, extensively covered many the issues pertaining to managerial resources and abilities and Talk's Initial Brief was fairly summary in its approach, Staff's position remains that Talk lacks sufficient managerial resources and abilities to provide telecommunications service.

The Applicant has mischaracterized the factors Staff uses to evaluate managerial qualifications. Talk asserts that the factors Staff generally applies to judging a company's managerial qualifications are 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. Talk IB at 13. Staff disagrees.

As discussed in Ms. Marshall's direct testimony, many factors affect whether or not the Applicant possesses sufficient managerial resources and abilities. Staff Ex. 2.0 at 8. First, the company must provide management biographies or resumes showing that managers of the company have managerial experience within the telecommunications industry. Id. Additionally, the Applicant must display managerial competence by providing a complete and correct record on which Staff can provide a recommendation to the Commission. Id. This would include the Applicant submitting an accurate and complete application, showing that it possesses basic financial management skills, providing a Certificate of Authority to Transact Business in the State of Illinois,[1] and providing testimony of a key member of management to support the application. Id. Although this is not an inclusive list, this description illustrates the basic review process to determine if the Applicant possesses the required managerial abilities and resources. Id. Given the fact that the Applicant was able to review, evaluate, and cross-examine Ms. Marshall's testimony, the Applicant should be well aware that Staff takes many factors in account when determining whether the company's management is well qualified. Indeed, the review process is not as straightforward as Talk argues it to be.

Additionally, Talk attempts to support the argument that its management has sufficient resources and abilities by listing the key officers of the company and identifying former affiliations with other telecommunications carriers. Talk IB at 13. Talk further states, "even the Commission Staff, who oppose the application, believe that the

[1] If the Applicant is incorporated outside the State of Illinois, it must provide its Articles of Incorporation as well as the Certificate of Authority to Transact Business in Illinois.

Company's officers and directors have sufficient managerial qualification to become certified by the Commission." Talk IB at 14 citing TR at 412. Talk mischaracterizes Staff testimony. Staff testified that, independent of other factors, the Company's telecommunications experience weigh in favor of granting the Company's certificate on the basis of employee qualifications that indicate managerial experience. TR at 413. Clearly, Staff is stating that the Company's managerial experience is one factor that weighs in her evaluation. Staff is not stating that, all factors considered, the Company's officers and directors have sufficient managerial resources and abilities to become certified in Illinois.

Furthermore, the Applicant attempts to mislead the Commission that it has the requisite managerial competence through the testimony of Mr. Zahka, the Chief Financial Officer of the Company, who was brought in as an expert to testify on the Company's financial abilities. TR at 580-589. 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 possess sufficient managerial abilities to operate as a local exchange carrier in Illinois."

Talk Ex. 6.0 at 1-2.

Mr. Zahka, at the time he gave this opinion, had been with the Company for merely 5 weeks! TR 581. Five weeks is just not enough time to make such an opinion. His opinion simply is not credible. Moreover, Mr. Zahka was brought into this proceeding as an expert to testify on the company's financial resources and abilities. Talk Ex. 6.0 at 1. He was not brought in to testify as an expert about the Company's managerial

capabilities. Id. Consequently, his opinion with respect to the Company's managerial capabilities is unsupported by any analysis or factual basis and, therefore, it should be given no weight in this matter.

With respect to the Applicant's history of operating under a variety of different names, Staff believes that this type of business practice is likely to confuse the customer. Talk argues that Staff speculates that the Company changed its name to confuse customers. Talk IB at 16. To the contrary, Staff is not speculating as to the Company's intent. Staff is analyzing whether Talk's marketing strategies (using numerous business names) resulted in customer confusion. At the hearing, the Applicant stated that Talk has had only two corporate name changes but has done business under ("d/b/a") other names TR at 467. The Applicant explained that the reason for the many names is in relation to the marketing strategies of the company TR at 469. However, the Applicant failed to provide an explanation regarding whether or not consumers were informed of all Talk's name changes. The applicant stated:

> The Company also has d/b/a's. The Phone Company was the d/b/a of the Company, Network Services was another one, and the other one is New Hope of Pennsylvania. That's separate – that's the company, though, the applicant in this situation. In the year 2000, I think it was August of 2000, Talk.com Holding Corp's, which was then its name, parent company, Talk.com, Inc., purchased another company named Access One, and it had separate names, it was known as – it's actual name is the Other Phone Company, doing business as Access one.

TR at 468

Staff asserts that, under the totality of circumstances, a customer will think his telecommunications carrier is Access One or The Other Phone Company. In other words, the customer will be confused as to which company is providing him service. In

instances where slamming is alleged, a consumer attempting to identify the carrier to which his service has been changed encounters even greater difficulties in his efforts to correct the alleged problem when that carrier operates under a variety of names and may even bill consumers under program rate names it was only supposed to use in marketing. Moreover, there is no evidence that the Applicant took measures to prevent potential customer confusion given the many names it used. Certainly one would think a strong management team would have taken such measures. This indicates an almost total lack of managerial control on Talk's part.

In Staff's opinion, companies work hard to establish their corporate name and logo in the minds of existing and potential customers. In this proceeding, Staff believes the Applicant has relied heavily upon the many different names under which it has operated as a way to remain as anonymous as possible. In Staff's view, this is an example of an extremely poor management team. Accordingly, this Commission should not take this lightly.

Talk argues that because there have been no findings in other state proceedings that the Company has violated any law, the Commission should give no weight to the fact that other states have initiated investigations against the company. Talk RB at 19. Talk further maintains that complaints, indictments or mere allegations are not admissible as evidence of wrongdoing. People v. Franklin, 167 Ill. 2d 1, 24, 656 NE 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 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)). Talk's argument is both legally and conceptually flawed for the following reasons.

First, the rules of practice before this Commission are more relaxed with respect to the admittance of evidence than in a court of law. 83 Ill. Admin. Code § 200.610. The Commission seeks to develop a full record and objections to evidence tend to speak to the probative value of such evidence but not to its admission. Second, Talk apparently misunderstands or mischaracterizes the criteria for supporting a successful petition for certification. Although evidence of prior complaints, indictments and other such evidence against the company may be relevant to indicating a lack of managerial resources, a company's "good character", as Talk asserts, is not a certification requirement in Illinois. However, a systemic failure of the company to handle consumer complaints in a manner which resulted in an increased filing of formal complaints and indictments against the company, would definitely be probative of whether the company should be doing business in Illinois. Third, The rules of evidence as applied in civil cases in the Circuit Courts of this State shall be followed.

> **Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs**. Objections to evidentiary offers may

> be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form. (Emphasis added)

5 ILCS 100/10-40 (a) (2000)

Forth, the Illinois Administrative Procedure Act instructs each agency to adopt its own rules of practice for formal hearings and this Commission has adopted the catchall evidence standard set forth in 83 Ill. Admin. Code §200.610 (b). This section not only incorporates the rules of evidence in civil cases and circuit courts, but also specifically provides that "[h]owever, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs." In addition, it is well-established practice at the Illinois Commerce Commission that exceptions to the rules of evidence are made when a party can establish that the evidence makes the record more factually complete.

Even with respect to hearsay, the Commission proceedings are more lenient with respect to the admittance of evidence than is typically the case in civil cases and circuit courts. While hearsay evidence has generally been held to be inadmissible in an administrative hearing, subsection (a) of 5 ILCS 100/10-40 appears to create an exception to the rule when the hearsay is reliable. Metro Util. V. Illinois Commerce Comm'n, 193 Ill. App. 3d 178, 140 Ill. Dec. 455, 549 N.E.2d 1327 (2 Dist. 1990). Investigations from other state commissions and allegations made in other state proceedings would be an example of such an exception. Since Staff must determine if the applicant possesses the required financial, technical, and managerial resources to conduct business within the State of Illinois, *See* 220 ILCS 13-403 and 13-405, it is Staff's duty to review all evidence that might pertain to the completion of the record.

In the course of certification proceedings, when information from other administrative proceedings involving the applicant is available, Staff commonly relies on such evidence to aide in forming its opinion. Furthermore, "an administrative tribunal may take judicial notice of matters of record in another administrative order, determination, or judgment, especially where these proceedings are related and involve the same parties. All Purpose Nursing Serv. v. Human Rights Comm'n, 205 Ill. App. 3d 816, 150 Ill. Dec. 717, 563 N.E. 2d 844 (1 Dist. 1990). Clearly, Talk America is involved in matters of record in other administrative orders, determinations, or judgments involving public service commissions in other states. *See* Staff Ex. 1.0,1.1,2.0,and 3.0. In fact, Talk America has provided such information to Staff throughout the process of data requests. *See* Staff Ex. 2.0.

Lastly, Talk argues that Mr. Gillan's 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 qualifications. Talk IB at 22. Specifically Mr. Gillan states:

> "And I think it is 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 at 207-208.

Staff would agree that if Talk had shown a good track record of resolving problems quickly and efficiently, Staff's position with respect to this application would have been much different. Nevertheless, Staff has based its position on the inability of Talk to resolve the same problems that arise time and time again. Consequently, the

Commission should give no credence to the testimony of Mr. Gillan. He attacks Staff's position with mere unsupported assertions. The credibility of expert witnesses and weight to be given to their testimony are matters for the Illinois Commerce Commission to decide as a finder of fact [in electric rate proceeding] People ex. Rel. Hartigan v. Illinois Commerce Commission, App. 3 Dist. 1991, 158 Ill. Dec. 45, 213 Ill.App.3d 222. Similarly, although uncontradicted and unimpeached testimony of an expert cannot be rejected arbitrarily, subjective and unclear testimony need not be given credence by a trier of fact enjoined by law to avoid speculation, guess, or conjecture in its verdict. Outboard Marine Corp. v. Liberty Mut. Ins. Co, 283 Ill. App. 3d 630, 670 NE2d 740, (1996).

Mr. Gillan did not perform any analysis specific to Talk prior to filing his testimony. *See* Talk Ex. 4.0. Specifically, he performed no analysis of whether Talk was correcting its slamming and cramming acts to improve its managerial resources and ability to provide service. TR at 226. Mr. Gillan also performed no analysis of the financial condition of Talk. TR at 233. Staff considers his testimony to be full of speculations and assumptions. In fact, considering the lack of evidence supporting his statements, it is outright unclear why Mr. Gillan actually filed testimony in this proceeding in the first place.

Additionally, in Staff's opinion, Mr. Gillan's testimony appears extremely subjective. For example, Mr. Gillan states that the purpose of his testimony is to address the "reasonableness" of Staff's standard for certification. Talk Ex. 4.0 at 2. "Staff's standard for certification" is the standard mandated by the Illinois General Assembly and is clearly not at issue in this proceeding. Likewise, Mr. Gillan provides no

support to show that he is even qualified to testify regarding the reasonableness of this standard for certification. He also states:

> "Talk America has undoubtedly made mistakes (and clearly been asked to pay for them). But I again emphasize that this is a *very* young industry with no place to practice with training wheels. There is no question that Talk America is attempting an incredibly difficult transition (from long distance provider to an integrated provider of local and long distance services). *Every* company attempting this transition has stumbled, including industry giants such as AT&T, MCIWorldCom, and Sprint."

Talk Ex. 4.0 at 8.

Again, Mr. Gillan provides absolutely no support for the above assertions. Particularly he provides no support or analysis for the statement pertaining to the past behavior of industry giants in the telecommunications arena. One would think such a strong statement would be, at the very least, backed with some sort of verification. Clearly, his statements are subjective assumptions that are not supported by any analysis or facts. Accordingly, his testimony should not be given weight in this proceeding.

Furthermore, for purposes of clarification, Staff has no disagreement with respect to the Applicant's assertion that investigations by other state public utility commissions do not denote that the Company has violated a state law. Rather, Staff believes that the real issue has to do with the number, and repetitious similarity, of the complaints, findings, and orders and how this information, in the aggregate, shows blatant managerial incompetence. Therefore, Staff stands by its position, as expressed in its Initial Brief, that the Applicant just does not have the managerial resources and abilities to become certified to provide local and inter-exchange telecommunications service in Illinois.

V. A DECISION TO DENY TALK AMERICA'S APPLICATION WOULD NOT BE PREEMPTED BY SECTION 253 OF THE FEDERAL TELECOMMUNICATIONS ACT.

Talk's assertion that a decision to deny its Application would be preempted by federal law, See Talk IB at 22-23, is misplaced. Talk states that if the Commission denies its application to provide local exchange service in Illinois, such a decision by the Illinois Commerce Commission would be preempted by Section 253 of the Federal Telecommunications Act. Id. Section 253 of the Federal Telecommunications Act provides that,

> " No 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).

However, in advancing this argument, Talk avoids any reference to the text of Section 253(b). In fact, Section 253(b) states the following:

> (b) STATE REGULATORY AUTHORITY – Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b)

This provision is clear and not ambiguous in any way. Its plain text reveals its clear meaning is that States are given the authority to enact laws and regulations for purposes of, *inter alia*, ensuring the continued quality of telecommunications services and to safeguard the rights of consumers. Furthermore, where state law traditionally

governs, the Supreme Court has held that "[i]n the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. CSX Transp. v. Easterwood, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387, (1993). Thus, preemption will not lie unless it is "the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947). Evidence of preemptive purpose is sought in the text and structure of the statute at issue. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983).

Clearly, the provisions of Section 13-403 and 13-405 of the Illinois Public Utilities Act, which establish the requirements for the Commission's approval of an application for local and inter-exchange service authority, were enacted to ensure that companies possess the required managerial, financial, and technical abilities and resources to operate a telecommunications company in the Illinois market. *See, generally,* 220 ILCS 13-403 and 13-405. Moreover, considering the importance of providing to end-users high quality telephone service, as well as the importance of maintaining the integrity of the telecommunications network, Section 253(b) gives the State of Illinois authority to enact laws to further such concerns. No reasonable alternative construction can be advanced in good faith.

When a statute is plain and unambiguous, as is the case here, a court or tribunal should not construe it to include exceptions or limitations that depart from its plain meaning, even if such exceptions or limitations are beneficial or desirable. Inland Real Estate Corp. v. Village of Palatine, 107 Ill. App. 3d 279, 283 (1st Dist. 1982).

Furthermore, this is consistent with the well-established rule of statutory construction that requires a court or tribunal to ascribe some reasonable meaning to each provision, clause and word of a statute if possible. People v. Fabing 143 Ill. 2d 48, 54 (1991). Accordingly, the Commission should construe Section 253(b) of the Federal Telecommunications Act to mean precisely what it clearly does mean – that the Illinois Commerce Commission is not preempted from enforcing an Illinois law that ensures the continued quality of telecommunications service and is intended to safeguard the rights of consumers.

Additionally, while Talk can make any federal preemption argument it cares to make regarding its right provide any interstate or intrastate telecommunications service, the passage of PA 92-22 by the General Assembly prevents it from making such arguments before the Commission. As Talk will doubtless agree – the Commission is a creature of state law, and bound by the acts of the General Assembly. City of Chicago v. Illinois Commerce Commission, 79 Ill. 2d 213, 217-18 (1980); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 203 Ill. App. 3d 424, 438 (1990).

Of course, to the extent that Talk believes that the General Assembly has acted in a manner that is preempted by federal law, it has a remedy available to it. Specifically, Talk may petition the FCC under Section 253(d) of the federal Telecommunications Act of 1996, to preempt Section 13-403 and 13-405 , on the grounds that it violates, or is inconsistent with, the federal Act. 47 USC 253(d). Consequently, Talk cannot hope to successfully raise a preemption argument here. The Illinois Commerce Commission has no authority to declare an Act of

the Illinois General Assembly preempted. Accordingly, Talk's preemption argument should be thoroughly rejected.

VI. STAFF ASKS THE COMMISSION TO DISREGARD TALK'S RENEWED OBJECTIONS TO STAFF'S TESTIMONY AND RENEWED MOTIONS TO STRIKE.

This Commission should disregard, in its entirety, Talk's renewed objections and renewed motions to strike Staff's testimony. Talk objects to the admission of Staff witness Judith Marshall's Supplemental Direct Testimony filed on January 11, 2002, for the reasons set forth in the Company's January 15, 2002 pleading. *See* Talk IB at 23. Talk's objection should be discarded. This matter was resolved during the hearing on January 25, 2002. The Administrative Law Judge ruled on this issue, in Staff's favor, and admitted Ms. Marshall's Supplemental Direct Testimony into the record. TR at 527. For the Commission to consider this issue, as well as other issues that have already been ruled upon, would be improper.

To the extent the Administrative Law Judge has denied Talk's objections and motions to strike, Staff asks that her rulings remain intact. Moreover, Talk's remedy pertaining to any rulings made by the Administrative Law Judge would be to seek interlocutory review pursuant to the Illinois Administrative Procedure Act. Ill. Admin. Code Part 200. Section 200.520 states, in part,

> Section 200.520 Interlocutory Review of a Hearing Examiner's Ruling
> (a) Any ruling by a Hearing Examiner, including rulings of the Chief Hearing Examiner under Sections 200.510 and 200.870, may be reviewed by the Commission, but failure to seek immediate review shall not operate as a waiver of any objection to such ruling. Unless good cause is shown or unless otherwise ordered by the hearing examiner

> or the Commission, **the party or Staff seeking review of the ruling shall file a petition for interlocutory review within 21 days after the date of the action that is the subject of the petition**.

83 Ill. Admin. Code § 200.520(a) (emphasis added).

However, Talk has waived its right to interlocutory review. Talk had up to 21 days after the date of all the Administrative Law Judge's rulings to petition for interlocutory review. Talk did not take such action, consequently, it waived this right. Similarly, Talk has not shown good cause for such rulings to be reexamined and for its objections to be reheard. Accordingly, Staff asks the Commission to disregard Talk's request to renew objections and motions to strike.

VII. Conclusion

For all the reasons stated in its Initial Brief and the arguments made above, Staff asks that Talk's Application be denied.

Respectfully submitted,

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