BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
SHOW CAUSE PROCEEDING	)	**DOCKET NO. 01-00216**
AGAINST TALK.COM, INC.	)	
d/b/a TALK AMERICA, INC.	)	

CONSUMER SERVICES DIVISION'S RESPONSE TO TALK.COM'S MOTION TO COMPEL CONSUMER SERVICES DIVISION TO RESPOND TO CERTAIN DISCOVERY REQUESTS

Pursuant to Tenn. Comp. R. & Reg. 1220-1-2-.11(7) and Tenn. Comp. R. & Reg. 1220-1-2-.06(2) the Consumer Services Division ("CSD") hereby responds to *Talk.com's* ("Talk.com") *Motion to Compel Consumer Services Division to Respond to Certain Discovery Requests* ("*Motion*").

On January 7, 2002, Talk.com filed its *First Set of Interrogatories to the Staff of the Consumer Services Division of the Tennessee Regulatory Authority and the Staff of the Tennessee Regulatory Authority.* On January 22, 2002, the Consumer Services Division ("CSD") filed its *Responses and Objections to Talk.com's First Set of Interrogatories.* On February 19, 2002, Talk.com filed its *Motion* together with its *Initial Response of Talk.com* ("*Initial Response*"). For the reasons stated below, Talk.com's *Motion* should be denied.

Notwithstanding the CSD's opposition to the *Motion,* the CSD will assist Talk.com in obtaining certain requested materials that are otherwise publicly available. In so doing, the CSD intends no suggestion that said materials are in any way relevant to these proceedings.

In its *Motion*, Talk.com seeks to compel responses to three interrogatories and four document requests. These interrogatories and document requests are identified and discussed sequentially below.

Interrogatory No. 5. asks the CSD to "identify each and every complaint filed in Tennessee that concerns the use of a promotional check issued by a telecommunications service provider other than Talk.com" and to "identify the person(s) who participated in the analysis, investigation, review and summary of the complaints filed concerning promotional checks" and to "describe the activities [each] person performed and the conclusion, if any, reached by the staff concerning the merits of the complaint."

Talk.com answers the CSD's relevance-based objection in its motion to compel with the suggestion that the above-referenced interrogatory is relevant to its contention that the violations regarding promotional check solicitations cited in the *Show Cause Order* result from errors "common in promotional check solicitations" and are "to some extent, unavoidable."[1] As explained below, material which, at most, might show that "everybody else is doing it too" is simply not relevant to these proceedings and therefore not a legitimate object of discovery.

The first part of this interrogatory seeks publicly available information. To the extent that it asks the CSD to "identify" complaints which concern "the use of a promotional check issued by" other service providers, Talk.com has asked the CSD to perform a task it could do itself. It is no less a burden on the CSD to analyze and sort the complaints on file by the category suggested in this interrogatory than it would be for Talk.com. Nevertheless, and without waiving any objection or conceding the relevance or admissibility of any material identified or produced in this regard, the CSD has agreed to make available and allow Talk.com

[1] Talk.com's Motion to Compel Consumer Services Division to Respond to Certain Discovery Requests, p. 4, Docket No. 01-00216 (February 19, 2002) (*Motion*).

to review all "promotional check complaints" filed against other service providers on file with the TRA dating back as far as January 1, 2000 and to make the same available for copying by Talk.com. The CSD has agreed to segregate the "promotional check complaints" for Talk.com. Talk.com has agreed to cover the associated copying costs.

Rule 26.02(1) limits discovery to material that is relevant to the claims and defenses of "the subject matter *involved* in the *pending action*" and is "reasonably calculated to lead to the discovery of admissible evidence." [2] With this interrogatory, Talk.com seeks information relating to complaints filed against service providers *other than Talk.com.* It follows that this type of information will never lead to admissible evidence relating *to Talk.com.* It also follows that the identity of persons who investigated these other complaints, as well as the analysis, etc. of these other complaints is far beyond the scope of that which is reasonably calculated to lead to the discovery of admissible evidence. For example, there is no suggestion in Talk.com's *Initial Response* to the *Show Cause Order* that it surveyed the common practices utilized by other service providers engaging in promotional check solicitations and relied on such a survey in implementing its own promotional check program. There is likewise no suggestion that Talk.com contacted the TRA or the CSD to find out how it analyzed past complaints in an effort to modify its own practices accordingly. There is also no suggestion in the record that Talk.com reviewed these sorts of complaints prior to formulating and implementing its own promotional check program. The acts or misdeeds of other service providers identified in other complaints in other dockets are simply not relevant to the acts or misdeeds of Talk.com and the complaints which gave rise to this proceeding, nor is evidence of such likely to lead to admissible evidence relating to a finding made in the *Show Cause Order* or a defense raised by Talk.com in its *Response.*

Regardless of the validity of the various defenses Talk.com offers to explain violations that it characterizes as "errors", i.e., that "many of the 15 alleged instances of improper promotional check solicitations involve good faith errors resulting from mismatches of customer names, addresses and telephone numbers," material relating to other complaints will not lead to discoverable evidence relating to Talk.com's activities in these 15 instances. Absent a showing by Talk.com that it somehow relied in the past on the information it now seeks to discover, material relating to other complaints against other companies is simply irrelevant.

The second part of this interrogatory asks for the identities of persons who participated in the analysis, investigation, etc. of the requested complaints and a description of their activities regarding the complaints including any conclusions they might have reached regarding the complaints. This material is irrelevant for the same reasons offered above with regard to the first part of the interrogatory and is objectionable for additional reasons as well. The second portion of this interrogatory is also burdensome and overly broad. Because practical realities require the allocation of limited public resources, the courts afford public agencies and officials substantial discretion with regard to law enforcement decisions.[3] Thus the analysis, investigation, and review of other complaints and any conclusions reached by this Agency with regard to the same are not relevant absent a showing by the Respondents that they are the subject of selective prosecution that exceeds constitutional constraints.[4] Requiring the CSD to produce this material would place a heavy burden on the CSD and would not lead to the discovery of evidence admissible in support of a claim or defense which is the subject of this proceeding. In order to be

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[2] Tenn. R. Civ. P. 26.02 (2001) [emphasis added].
[3] *421 Corporation v. Metropolitan Government of Nashville and Davidson County*, 36 S.W.3d 469, 480 (Tenn. April 2000) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).
[4] "Persons making selective enforcement claims have a heavy burden to overcome because the courts, in recognition of the doctrine of separation of powers, presume that public officials have discharged their duties in good faith and in accordance with the law." Id. (citing Williams v. American Plan Corp., 392 S.W.2d 920, 923 (Tenn. 1965)).

entitled to this discovery Talk.com "must come forward with some credible evidence tending to show the existence of discriminatory effect and discriminatory intent."[5] To make out a prima facie case of selective enforcement Talk.com must show that it has been singled out for enforcement and the decision to prosecute rests on an impermissible consideration related to the equal protection origins of this claim, such as race, gender, religion or some other arbitrary classification such as the exercise of statutory or constitutional rights.[6] Talk.com has presented no evidence breaking the threshold directed by *National Loan, Inc.*

The discretion entertained by the CSD is privileged information and not an appropriate subject for review by the Pre-hearing Officer. The material sought constitutes the consultative, deliberative, decisional and policy-making processes of the government.[7] The doctrine supporting this privilege was given classic expression by Justice Frankfurter in the case of *United State v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.E. 1429 (1941). In that case, marketing agencies at the Kansas City stockyards challenged a rate-making action by the Secretary of the United States Department of Agriculture. The agencies had alleged that the Secretary was biased, because of a letter written to the *New York Times* criticizing an earlier decision of the Supreme Court on related aspects of the case. Over the government's objection, the district court allowed the taking of the Secretary's deposition, and he was also questioned at trial about the reasons for his decision. The Supreme Court strongly denounced this practice. Justice Frankfurter wrote:

> [T]he short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding."

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[5] *National Loan, Inc. v. Tennessee Dept. of Fin. Ins.*, No. 01A01-9506-CH-00241, 1997 WL 194992 at *5 (Tenn. Ct. App. April 23, 1997).
[6] *Id.* at *4.
[7] *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed 1429 (1941); *Green v. I.R.S.*, 556 F.Supp. 79, 84 (N.D. Ind. 1982), *aff'd* 734 F.2d 18 (7th Cir. 1984).

> . . . Such an examination would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' . . . [Just as a judge cannot be subject to such scrutiny, . . . so the integrity of the administrative process must be equally respected . . . It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of the courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. (All citations omitted).]

The "*Morgan* doctrine" is the basis for the evidentiary privilege known as the "executive," "deliberative process" or "governmental" privilege. The *Morgan* privilege was designed to protect the integrity of administrative decision-making by promoting frank expression and discussion among those charged with the responsibility for making determinations that enable government to operate and by shielding from disclosure the mental processes of executive and administrative personnel exercising quasi-judicial functions. This privilege is vital to the public interest.[8]

In *Green v. Internal Revenue Service*, the court explained the dual policies supporting the privilege:

> The governmental privilege is based upon two important policy considerations. First, it was developed to promote frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable the Government to operate. (citation omitted). Second, the privilege is also designed to shield from disclosure the mental processes of executive and administrative personnel.[9]

> As to the scope of the privilege, in *Carl Zeiss Stiftung*, the district court wrote:

> The judiciary, the courts declare, is not authorized 'to probe the mental processes' of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters

[8] *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966) *aff'd*, 384 F.2d 979 (D.D. Cir.), *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).
[9] 556 F.Supp. at 84.

> considered, the contributing influences, or the role played by the work of others — results demanded by exigencies of the most impressive character.[10]

This privilege has also been applied in Tennessee. In *Ray v. Blanton*, Davidson County Chancery No. 84-810-III (July 21, 1977) (copy attached), Chancellor Brandt recognized the importance of this privilege. In pertinent part, the court stated:

> In deciding the same question when raised in relation to cabinet officials or heads of large executive departments of the government of the United States, the federal courts have consistently held that such officials should not be compelled to testify if the purpose is to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter.

The rule had its genesis in suits filed against the federal government or its officials which sought review of quasi-judicial administrative determinations made by the officials. The Supreme Court has consistently held in such cases that it is improper to inquire into the extent of the official's knowledge of the issues he decided and improper to inquire into the methods by which he reached his decision.[11] The same rule has been applied in administrative review suits when an attempt has been made to take the discovery deposition of the official pursuant to the Federal Rules of Civil Procedure.[12]

Federal courts have extended the rule against compelling such testimony to suits which are not administrative decision review cases. In *United States v. Northside Realty Assoc.*, 324 F.Supp. 287 (N.D. Ga. 1971), a civil suit brought to enforce compliance with the Civil Rights Act of 1968 (42 U.S.C. § 3601, *et seq.*), the defendants sought to take the discovery deposition of the Attorney General of the United States and the Secretary of Housing and Urban Development.

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[10] Carl Zeiss Stftung, 40 F.R.D. at 326.
[11] *See United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), *DeCambra v. Rogers*, 189 U.S. 199, 23 S.Ct. 519, 47 L.Ed. 734 (1903).
[12] *Schicke v. United States*, 346 F.Supp. 417 (D. Conn. 1972).

The district court held that the defendants were not entitled to depose these officials to inquire why they exercised their discretion as they did in the matter.

Like the case discussed above giving rise to the *Morgan* doctrine, this proceeding has a quality resembling that of a judicial proceeding and discovery regarding the analysis, investigation, review and decisions made regarding each and every complaint filed in Tennessee that concerns the use of a promotional check issued by a telecommunications service provider other than Talk.com is inappropriate, irrelevant, and burdensome.

Interrogatory No. 16 asks the CSD to "identify all communications and/or presentations to the FCC, NARUC, or any other state regulatory or consumer services representative body (public service commission, public utilities commission, attorney general's office etc.) in which Talk.com is the subject of the communication" and to "identify each person(s) who participated in the communication, the type of communications [sic] (i.e., letter, meeting, phone call, etc.), the date of the communication and the specific subject of the communication."

As noted above, Rule 26 of the Tennessee Rules of Civil Procedure limits discovery to material relevant to the subject matter of either a claim, or defense in the proceeding.[13] Talk.com asserts that this material "may" be relevant for purposes of impeachment.[14] The CSD respectfully suggests that discovery that amounts to a fishing expedition for "impeachment" evidence has never been allowed in this forum or any other. A party may properly seek the statements of its own witnesses that are in the possession of an opposing party which the opposing party seeks to introduce for impeachment purposes at trial. However, Talk.com seeks the opposite type of material. Talk.com seeks "all communications" to the "FCC, NARUC" etc.

[13] Tenn. R. Civ. P. 26 (West 2001).
[14] *Motion*, p. 7, Docket No. 01-00216 (February 19, 2002).

made by CSD witnesses for the purpose of trying to use the material for impeachment purposes at trial. This is simply improper and not provided for by any rule.

Talk.com also mysteriously suggests that this material "may be used to demonstrate admissions"[15] without further explanation. This mysterious contention is not sufficient to amount to a contention that the material is relevant to a claim or defense in this proceeding or reasonably calculated to lead to discoverable evidence of the same. It is also overly broad in that specific statements are not identified and thus amounts to nothing more than a fishing expedition.

Finally, Talk.com asserts that this material may be used to demonstrate bias and/or improper motives.[16] It is important to note that nowhere in Talk.com's *Initial Response* is a suggestion, much less a defense, of bias or improper motive offered. As noted above, Rule 26 requires that discovery be relevant to the subject matter involved in the pending action, be it a claim or defense. Also, as noted above, the courts presume that public officials have discharged their duties in good faith and in accordance with the law.[17]

Talk.com's remaining justifications for discovery of this material amount to the suggestion that it "may be relevant" to Talk.com's defenses in this case "to the extent that the subject of any communications [sic] relates to the use of promotional checks, common problems in connection with such checks, or relates to disputes of the nature alleged with respect to the telemarketing solicitations."[18] Here, Talk.com once again indulges in suggesting a connection between its activities with regard to the persons identified as complainants in this action and the activities of *other* companies and persons (other than the complainants identified in this proceeding) making complaints against them. Specifically, Talk.com refers to communications

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[15] *Motion*, p. 8, Docket No. 01-00216 (February 19, 2002).
[16] *Id.*
[17] *421 Corporation v. Metropolitan Government of Nashville and Davidson County*, 36 S.W.3d 469, 480 (Tenn. April 26, 2000) (citing *Williams v. American Plan Corp.*, 392 S.W.2d 920, 923 (Tenn. 1965)).

relating generally to the use of promotional checks, "common problems" in connection with such checks, and telemarketing solicitations generally. Here the CSD respectfully suggests that this discovery is not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 17 asks the CSD to "identify all proceedings, formal or informal, in which the TRA has examined or investigated billing errors, including but not limited to double billing and mistaken billing, by BellSouth or by unaffiliated local or long distance carriers." Talk.com justifies this interrogatory by stating that "many of the instances of alleged cramming are caused by BellSouth's failure to deliver timely and accurate billing information to CLECs, including particularly, 'line loss' reports" and that a response to this interrogatory will enable Talk.com to "investigate the extent to which BellSouth's delays are attributed to similar billing problems experienced by other CLECs, as well as to the reasonableness of Talk.com's billing based upon information received from BellSouth."[19]

Enabling Talk.com to investigate the extent to which BellSouth's delays are attributed to billing problems experienced by other CLECs is not reasonably calculated to lead to the discovery of admissible evidence. The billing problems experienced by other CLECs, if any, are not the subject of this proceeding and were Talk.com able to demonstrate that such problems are experienced by other CLECs, such evidence would not be relevant to Talk.com's own violations it chooses to characterize as "billing problems."

Document Request No. 13 seeks "any and all documents used by the Consumer Services Division to calculate the number of complaints received in the "billing" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category."

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[18] *Motion*, p. 8, Docket No. 01-00216 (Feb. 19, 2002).
[19] *Id.* at p.5.

This interrogatory requests publicly available information. Talk.com has asked the CSD to perform a task it could do itself. It is no less a burden on the CSD to analyze and sort the complaints on file by the category suggested in this interrogatory than it would be for Talk.com.

In its *Motion* Talk.com implies that "billing" complaints lodged against other companies will demonstrate "problems with receiving BellSouth 'line loss reports,' . . . ."[20] The *Motion* does not state that these complaints will demonstrate specific problems **Talk.com experienced** in receiving "line loss reports" from BellSouth. With this request, the most Talk.com may discover is material supporting the proposition that **other** companies experienced difficulties receiving "line loss reports" from BellSouth on some **other** occasion than the 15 instances of violation at issue in this proceeding. Thus, this discovery is not reasonably calculated to lead to the discovery of admissible evidence that relates to the subject matter of any claim or defense regarding the subject matter (i.e., the 15 instances referenced above) of this proceeding.

Similarly, Talk.com implies that "billing" complaints lodged against other companies will demonstrate "problems in implementing purported cancellations of local, intraLATA or long distance service through the incumbent LEC."[21] Here, Talk.com may discover material supporting the proposition that *other* companies experienced problems in implementing purported cancellations, etc., but it is not conceivable that this discovery will lead to admissible evidence that Talk.com experienced these problems in the 15 instances of violation at issue in this proceeding.

Nevertheless, and without waiving any objection or conceding the relevance or admissibility of any material identified or produced in this regard, the CSD has agreed to make available and allow Talk.com to review all "billing category complaints" filed against other

[20] *Motion*, p.5, Docket No. 01-00216 (Feb. 19, 2002).
[21] *Id.*

service providers on file with the TRA dating back as far as January 1, 2000 and to make the same available for copying by Talk.com. The CSD has agreed to segregate the billing category complaints for Talk.com's convenience. Talk.com has agreed to pay the copying costs.

Document Request No. 14 seeks "any and all documents used by the Consumer Services Division to calculate the number of complaints received in the "delayed installation" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category."

Document Request No. 15 seeks "any and all documents used by the Consumer Services Division to calculate the number of complaints received in the "service" category for the Consumer Services Division monthly report for each month during 2000 and 2001, including, but without limitation, copies of all complaints included in this category."

These interrogatories request publicly available information. Talk.com has asked the CSD to perform a task it could do itself. It is no less a burden on the CSD to analyze and sort the complaints on file by the category suggested in these interrogatories than it would be for Talk.com.

Here Talk.com contends in its *Motion* that complaints in the "delayed installation" and "service" categories are "potentially relevant to the cramming allegations."[22] The assertion that this discovery is "potentially relevant" is, in this regard, itself an admission that these requests are something other than actually relevant and requires no further discussion on this point.

Talk.com also contends in its *Motion* that these complaints "are relevant to the CSD's calculations of the number of days of each slamming violation . . . to the extent a number of days calculation is relevant at all."[23] The *Motion* offers no explanation of how complaints lodged

[22] *Motion*, p. 5, Docket No. 01-00216 (Feb. 19, 2002).
[23] *Id.*

against *other* companies are relevant to the CSD's calculations of the number of days of each of Talk.com's slamming violations. This assertion is nothing more than an unsupported conclusion analogous to stating that material is relevant because it is relevant and should be rejected.

Finally, Talk.com asserts in its *Motion* that these complaints "could reveal information that supports Talk.com's claim that delays of these types [sic] are outside of its control."[24] Talk.com again has made an unsupported conclusion that the complaints of the customers of *other* service providers about the activities of *other* service providers are somehow relevant to Talk.com's activities with regard to the complainants associated with this proceeding.

Nevertheless, and without waiving any objection or conceding the relevance or admissibility of any material identified or produced in this regard, the CSD has agreed to make available and allow Talk.com to review all delayed installation and service category complaints filed against other service providers on file with the TRA dating back as far as January 1, 2000 and to make the same available for copying by Talk.com. The CSD has agreed to segregate the delayed installation and service category complaints for Talk.com's convenience. Talk.com has agreed to pay the copying costs.

Document Request No. 16 seeks "any and all notices, memoranda, or other records relating to billing errors by other telecommunications service providers in Tennessee, including, but not limited to, errors by AT&T or BellSouth." Talk.com suggests that these requests are "relevant to determine both the extent and type of billing errors that commonly occur in Tennessee and the legal standard that the CSD applies to the investigation of such errors."[25]

[24] *Motion*, p. 5, Docket No. 01-00216 (Feb. 19, 2002).
[25] *Id.* at p. 6.

As an initial matter, Talk.com has made no showing that it is unable to get some of the information it requests here from AT&T, BellSouth, and the other telecommunications providers and, as such, is overly broad and unduly burdensome.

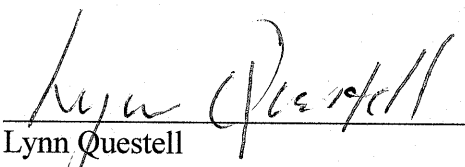
While these requests may be, as Talk.com suggests, relevant to "the extent and type of billing errors experienced by other telecommunications service providers"[26] they do not, as such, become relevant to the violations noted in the *Show Cause Order* Talk.com characterizes as "billing errors." Put simply, the extent and type of billing errors of *other* telecommunications service providers are not at issue in this proceeding.

The standards the CSD uses in deciding how and when to conduct its investigation are, as discussed above, not an appropriate subject of discovery. Also, absent some suggestion from Talk.com that it has relied on a review of past CSD investigations in engaging in the conduct cited in this proceeding or some suggestion that the CSD has engaged in behavior analogous to prosecutorial misconduct, these requests are improper and seek material that is irrelevant and not reasonably calculated to the discovery of admissible evidence. Again, the standards, legal or otherwise, the CSD utilizes in performing its functions within the TRA are simply not at issue in this proceeding. The only events at issue in this proceeding are those which form the basis for the complaints identified in the *Show Cause Order*.

[26] *Motion*, p. 6, Docket No. 01-00216 (Feb. 19, 2002).

Based on the reasons as stated above, *Talk.com's Motion to Compel Consumer Services Division to Respond to Certain Discovery Requests* should be denied.

Respectfully submitted,



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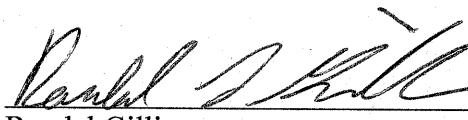

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CERTIFICATE OF SERVICE

I, Randal Gilliam, hereby certify that I have served a copy of the foregoing Response To Talk.Com's Motion To Compel Consumer Services Division To Respond To Certain Discovery Requests on the following person(s) by hand delivery or by depositing a copy of the same in the United States Mail, postage prepaid, addressed to them at the addresses shown below, this 26 day of February, 2002:

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