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April 7, 1998

VIA HAND DELIVERY

Blanca Bayo, Director  
Department of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

RE: Initiation of Show cause Proceeding against Minimum Rate Pricing, Inc., for Violation of Rule 25-4.118, Florida Administrative Code, Interexchange Carrier Selection; Docket No. 971482-TL

Dear Ms. Bayo:

In connection with the above-referenced matter, please find enclosed for filing an original and seven copies of a Motion to Dismiss or Quash Order No. PSC-98-0313-FOF-TI, or, in the alternative, Motion for More Definite Statement, or, in the alternative, Partial Response to Order to Show Cause by Minimum Rate Pricing, Inc. Please file the original and distribute the copies in accordance with your usual procedures.

If you have any questions or comments regarding this matter, please do not hesitate to call.

Sincerely yours,

*W O B*  
W. O. Birchfield

- ACK
- AFA
- APP
- CAF
- CMU
- CTR  SGS/msa  
Enclosures
- EAG  cc: Eric M. Rubin, Esquire
- LEG  Jeffrey Harris, Esquire
- LIN  William P. Cox, Esquire
- OPC  Charles Beck, Esquire
- RCH  Michael Gross, Esquire
- SEC  Kenneth A. Hoffman, Esquire
- WAS
- OTH

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## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of Show Cause Proceeding Against Minimum Rate Pricing, Inc., for Violation of Rule 25-4.118, Florida Administrative Code, Interexchange Carrier Selection)	)	
	)	
	)	DOCKET NO. 971482-TL
	)	Date Submitted for Filing:
	)	April 7, 1998
	)	

**MOTION TO DISMISS OR QUASH  
ORDER NO. PSC-98-0313-FOF-TI, OR, IN THE ALTERNATIVE,  
MOTION FOR MORE DEFINITE STATEMENT, OR, IN THE ALTERNATIVE  
PARTIAL RESPONSE TO ORDER TO SHOW CAUSE BY  
MINIMUM RATE PRICING, INC.**

In accordance with Order No. PSC-98-0313-FOF-TI (hereinafter "Show Cause Order" or "Order") and PSC-98-0463-PCO-TI, Minimum Rate Pricing, Inc. (hereinafter "MRP" or "Respondent"), files this Motion to Dismiss or Quash Order No. PSC-98-0313-FOF-TI, or, in the alternative, Motion for More Definite Statement, or, in the alternative, Partial Response to Order to Show Cause by Minimum Rate Pricing, Inc., and states as follows:

1. Respondent provides intrastate interexchange telecommunications service in Florida pursuant to Certificate No. 4417, issued by the Florida Public Service Commission ("Commission").

2. On February 23, 1998, the Commission issued the Show Cause Order and ordered MRP to show cause why its Certificate No. 4417 should not be canceled or why it should not be fined \$10,000.00 per apparent violation for a total fine of \$500,000.00.

3. Rule 25-22.037(2), Florida Administrative Code, ("FAC"), provides, in part, that:

DOCUMENT NUMBER-DATE

03986 APR-78

PSC-APPROVAL/REPORTING

(2) Motions. Motions may be filed in opposition to the proceeding, or for other purposes during the proceeding.

(a) Motions in opposition to an order..., which may be filed by any party, include motions to dismiss, to strike, and for a more definite statement. Such motions shall be filed within the time provided for filing an answer. In the event such a motion is denied, an answer or other responsive pleading may be filed within 10-days after issuance of an order denying the motion.

4. Pursuant to Rule 25-22.037, FAC, this Motion to Dismiss or Quash Order No. PSC-98-0313-FOF-TI, or, in the alternative, Motion for More Definite Statement, or, in the alternative, Partial Response to Order to Show Cause by Minimum Rate Pricing, Inc. do not constitute an admission of any facts set forth in the Show Cause Order.

5. The Florida Legislature has clearly stated the purpose of regulation, including regulation by the Commission.

It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

Section 120.695, Florida Statutes (1997) (emphasis added).

6. In a notice of non-compliance, the agency:  
  
must identify the specific rule that is being violated, provide information on how to comply

with the rule, and specify a reasonable time for the violator to comply with the rule. Id. A notice of non-compliance may not be accompanied with a fine or other disciplinary penalty. Id.

7. Section 120.695, Florida Statutes (1997), also provides that:

A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm.

MRP believes that it is complying with the Commission's rules. MRP believes that its alleged violations of Commission rules, even if true, are minor violations. MRP did not switch long distance service without proper authorization in violation of Rule 25-4.118, FAC. Notwithstanding this fact, MRP made an appropriate refund or credit to each complainant who was a customer of MRP's long distance service, in accordance with its customer satisfaction policy, and not as an admission of any rule violation. There is no economic harm or no physical harm nor is there an adverse affect to the public health, safety or welfare or a significant threat of such harm in connection with the alleged violations.

8. If the events in this matter are not minor violations, MRP should be provided adequate information to respond to the Show Cause Order. The Show Cause Order does not allow MRP to adequately ascertain what it has allegedly done in violation of Commission rule nor to fashion an adequate defense. The Show Cause Order uses four examples in an attempt to impose a \$500,000.00 fine and the loss of MRP's certificate. For forty-six of the fifty complaints, (92%), the Show Cause Order provides no facts, no allegations, and

no showing of how MRP allegedly violated any rule. In fact, the Show Cause Order does not even mention the names of the forty-six complainants. The discussion of the other four complaints is also too brief to provide MRP with sufficient information to adequately respond to the Show Cause Order. The allegations in the Show Cause Order are too vague and ambiguous.

9. The Commission is required to provide MRP with sufficient notice to satisfy the constitutional and statutory due process requirements and allow MRP to respond to the Commission's charges, threat of the loss of its certificate (and business), and the imposition of a \$500,000.00 fine. See e.g. Hargrove v. Fla. Dept. of Corrections, 676 So.2d 63,64 (Fla. 1st DCA 1996) ("[b]ut the circumstances and manner of the charged assault (including the type of weapon used and the identify of the victim), and the appellant's involvement therein, are not otherwise clearly delineated in this report.") Without sufficient information, MRP can not adequately respond.

10. The Florida Supreme Court has recently restated the Commission's need to provide regulated utilities with due process. See Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995). In Cherry, which is a case involving a switchless re-seller of long distance services, the Florida Supreme Court faced the question of whether the same individual who prosecuted a case on behalf of the Commission may also serve to advise the Commission in its deliberations as an impartial adjudicator. Id. Because an "impartial decision maker is a basic constituent of minimum due

process" and the special access to deliberations resulted in an "adjudicatory process [which] 'can hardly be characterized as an unbiased, critical review,'" the Florida Supreme Court held that the reseller's due process rights were violated. Id.

11. Respondent denies that it has engaged in the concerted practice of changing consumers long distance telephone service without authorization in intentional and wilful violation of Florida law and the regulations of the Commission. MRP has neither refused to comply with nor willfully violated any lawful rule or order of the Commission or any provision of Chapter 364, Florida Statutes. However, without more information from the Commission, MRP can not adequately respond to the Order. Accordingly, MRP moves the Commission to dismiss or quash the Show Cause Order or, in the alternative, to provide a more definite statement.

12. In the event the Commission does not dismiss or quash the order, MRP requests that the Commission provide it with a more definite statement including the following information for each of the fifty (50) complainants:

- a. The name, address, and telephone number of each complainant.
- b. The rule which MRP is charged with violating for each complainant.
- c. The facts as to how MRP allegedly violated the rule, including the specific act which shows a "willful violation."
- d. The name of the sales representative.

- e. The name of the verification personnel.
- f. The facts as to how MRP allegedly responded in an untimely manner.
- g. The harm, if any, caused by MRP's violation, including the economic harm to the consumer.

MRP further requests that the more definite statement provide information as to the following:

- a. MRP's safeguards which the Commission finds inadequate to protect consumers from unauthorized carrier changes.
- b. How such safeguards are inadequate.
- c. Safeguards which the Commission finds adequate to protect consumers from unauthorized carrier changes.

#### Partial Response

13. In the event that the Commission does not grant the Motion to Dismiss or Quash, MRP provides this partial response in connection with the four complainants identified in the Show Cause Order.

14. The Show Cause Order mischaracterizes MRP's actions as "willful violations." Order, Page 4. The Order states "willful implies intent to do an act, and this is distinct from intention to violate a rule." Id.

15. MRP intended to follow its scripts, including its verification script, to send out its welcome package, and to record the switched telephone numbers properly. Isolated acts of misconduct by a low level employee does not necessarily equal a willful act of the corporation. MRP's scripts, including its

verification script, and welcome package disclose the purpose in changing PIC service. In fact, the verification script confirms that the customer understands that MRP's long distance service is not affiliated with the customer's local or long distance phone company. MRP did not intend to fail to disclose that the purpose of the call was to solicit a change of the PIC of the customer.

16. In connection with Mr. Barry Wayne Beauford's complaint, the company spoke with Mrs. Ada Beauford, a person with the same last name, and apparently, through inadvertent data entry, the wrong telephone number was recorded as result of the call. The welcome package would have been sent to the wrong address.

17. In connection with Mr. Ernest Jones's complaint, Mrs. Deborah Jones did not recall speaking to the independent sales contractor for MRP on September 3, 1996. MRP states that the tapes and documents provided to Mr. Jones disclose the purpose to solicit a change of the PIC of the customer.

18. In accordance with MRP's customer satisfaction policy, Mr. Beauford and Mr. Jones were provided with an appropriate refund or credit.

19. In connection with the complaints of Mr. David Wilson and Mrs. Vincent Stellato, no switch orders were made and, accordingly, there can be no allegation of unauthorized switching.

20. With respect to Mr. Wilson's complaint, MRP has not been provided with a correct name of an independent contractor sales representative who allegedly called on behalf of MRP. The name provided to MRP is not in MRP's sales representative database,



accordingly, MRP without a more definite statement can not pursue the matter further. Attachment D of the Show Cause Order discusses some of MRP's policies to require the contractors to market in their legal names.

21. Contrary to Mrs. Stellato's complaint, the independent sales representative did not tell Mrs. Stellato that MRP was enforcing a new FCC regulation. Mrs. Stellato was told that MRP's rates and services are tariffed with the FCC.

22. Under Section 364.285, Florida Statutes (1997), the Commission only has the authority to impose penalties or revoke certificates for refusal to comply with or willful violation of lawful rules, orders, or provisions of Chapter 364, Florida Statutes. MRP has not refused to comply. MRP's actions are not "willful violations." In two of the four complaints, the communications did not go past the sales representative level, so the information in the Welcome Package and the verification script were not needed. In the Jones complaint, the full record discloses that the consumer received sufficient information. Only in the Beauford complaint was an error made, and an inadvertent data processing entry error is not a "willful violation."

Respectfully submitted,

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And

MARTIN, ADE, BIRCHFIELD & MICKLER, P.A.

BY:

W O B - y

William O. Birchfield, Esquire  
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Scott G. Schildberg, Esquire  
Florida Bar Number: 0613990  
3000 Independent Square  
Jacksonville, Florida 32202  
(904) 354-2050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Motion to Dismiss or Quash Order No. PSC-98-0313-FOF-TI, or, in the Alternative, Motion for More Definite Statement, or, in the Alternative, Partial Response to Order to Show Cause by Minimum Rate Pricing, Inc., has been furnished to Blanca Bayo, Director of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by hand delivery, this 7th day of April, 1998; and copies of the foregoing have been furnished to William P. Cox, Staff Counsel, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; Michael Gross, Esquire, Department of Legal Affairs, The Capitol, PL-01 Tallahassee, Florida 32399-1050; Charles Beck, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, #812, Tallahassee, Florida 32399-1400; and Kenneth A. Hoffman, Esquire, Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.A., P.O. Box 551, Tallahassee, Florida 32302, attorney representing Preferred Carrier Services, Inc.; by U.S. Mail, this 7th day of April, 1998.

W. S. Bayo  
Attorney