



Public Service Commission

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (COX) *WPC MCB RMT*
DIVISION OF COMMUNICATIONS (BIEGALSKI) *KB*

RE: DOCKET NO. 971482-TI - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST MINIMUM RATE PRICING, INC. FOR VIOLATION OF RULE 25-4.118, F.A.C., INTEREXCHANGE CARRIER SELECTION.

AGENDA: 06/16/98 - REGULAR AGENDA - MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: I:\PSC\LEG\WP\971482MD.RCM

CASE BACKGROUND

On May 7, 1996, the Commission granted Minimum Rate Pricing (MRP) Certificate Number 4417 to provide intrastate interexchange telecommunications service. MRP reported gross operating revenues of \$ 164,675,000 on its Regulatory Assessment Fee Return for the period January 1, 1997, through December 31, 1997. As a provider of interexchange telecommunications service in Florida, MRP is subject to the rules and regulations of this Commission.

On October 31, 1997, the Federal Communications Commission (FCC) issued a Notice of Apparent Liability for Forfeiture against MRP. The FCC found MRP apparently liable for a forfeiture in the amount of \$80,000 for apparent violations of Section 258 of the Telecommunications Act of 1996.

On February 23, 1998, we issued Order No. PSC-98-0313-FOF-TI, requiring MRP to show cause why it should not have certificate number 4417 canceled or be fined \$500,000 for 50 apparent

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FPSC-RECORDS/REPORTING

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violations of Rule 25-4.118, Florida Administrative Code. In response to this order, MRP filed 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. On April 24, 1998, Robert A. Butterworth, Attorney General (Attorney General) and the Citizens of the State of Florida, by and through the Office of the Public Counsel (OPC) filed a joint response to MRP's motions.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Minimum Rate Pricing, Inc.'s 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 the Order to Show Cause?

RECOMMENDATION: No. The Commission should deny the Motion to Dismiss or Quash and the Motion for More Definite Statement, and allow Minimum Rate Pricing, Inc. 10 days from the issuance of this Order to complete its response to the Order to Show Cause, Order No. PSC-98-031-FOF-TI. (COX)

STAFF ANALYSIS:

STANDARD OF REVIEW FOR MOTION TO DISMISS OR QUASH

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action or claim. See Augustine v. Southern Bell & Telegraph Co. 91 So.2d 320 (FL 1956). In other words, the issue is whether the petition states a claim upon which the Commission can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords 106 So.2d 229 (1 D.C.A. 1958). The Commission must take all material factual allegations of the petition as true. See Varnes v. Dawkins, 625 So.2d 349, 350 (1 D.C.A. 1993). The moving party must specify the grounds for the motion to dismiss. The Commission must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews 122 So.2d 571 (2 D.C.A. 1960).

MRP'S MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT

In its Motion to Dismiss or Quash the Order to Show Cause, MRP makes several arguments. First, MRP argues that it has not violated the Commission's rules. Second, MRP contends that its alleged violations of Rule 25-4.118, Florida Administrative Code, if true, are minor violations as defined by Section 120.695, Florida Statutes. MRP argues that there has been no financial or economic harm to any customer, nor has there been any adverse affect on the public health, safety, or welfare. MRP states that it has provided a credit or refund to all of its long distance service customers who filed complaints. MRP therefore believes that Section 120.695 entitles it to notices of non-compliance for the minor violations with the allowance of reasonable time for MRP to come into compliance with the appropriate rule.

If the Commission finds that the alleged violations are not minor violations, MRP argues that the Show Cause Order still does not provide sufficient information for MRP to respond to the allegations. MRP notes that the Show Cause Order only provides information regarding four of the fifty complaints addressed in the Show Cause Order. MRP also contends that the information for the four complaints that are addressed is insufficient for MRP to adequately respond and is vague and ambiguous. As result, MRP believes that it has not been given adequate notice and due process regarding the Commission's charges.

Finally, MRP argues that it has not willfully violated any Florida Statute or Commission rule regarding unauthorized changes of a consumer's long distance service. Further, MRP states that it has not refused to comply with any such rule or law.

In the event the Commission does not dismiss or quash the Show Cause Order, MRP requests that the Commission issue a more definite statement that provides MRP with the following information regarding the (50) complaints:

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

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

MRP further requests that the Commission's more definite statement provide the following information:

- MRP's safeguards which the Commission finds inadequate to protect consumers from unauthorized carrier changes;
- how such safeguards are inadequate;
- safeguards which the Commission find adequate to protect consumers from unauthorized carrier changes.

ATTORNEY GENERAL AND OPC'S JOINT RESPONSE

The Attorney General and the OPC urge the Commission to deny MRP's motions in their joint response. First, the Attorney General and the OPC contend that MRP's alleged rule violations are sanctionable through the imposition of fines and the cancellation of MRP's certificate under Section 120.695, Florida Statutes. They believe that the alleged violations are major violations resulting in economic harm, adversely affecting the public health, safety, and welfare, and creating a significant threat of harm. The Attorney General and the OPC contend that MRP's alleged violations are not minor violations. As such, the Commission would not be required to send MRP a notice of noncompliance for each alleged violation.

The Attorney General and the OPC also argue that the alleged violations are not minor violations because Section 120.695 requires that minor violations must involve an instance where it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it. They contend that MRP was very much aware of the Commission's rule that it violated as well as the violations themselves. MRP acknowledged its understanding of the Commission's rules and its corresponding responsibilities through its August 30, 1995, Application Acknowledgment Statement. Further, the Commission staff sent MRP a notice of each complaint/alleged violation that is a subject of the Show Cause Order. Thus, the Attorney General and the OPC contend it is not reasonable to assume that MRP was unaware of the Commission rule or unclear as to how to comply with it.

The respondents also see no merit in MRP's contention that its actions caused no economic harm or adverse effect on the public welfare because MRP has refunded or credited all of the affected customers. They believe that these alleged slamming violations impair consumer choice and competition and result in economic harm for both the consumers and the competing carriers through higher rates and the additional expense of time and money for consumers and the loss of revenues for the victimized companies. Furthermore, the Attorney General and the OPC do not believe that MRP has demonstrated that it has rerated or refunded money to all 50 complainants. Moreover, even when a bank robber returns the money after he has been caught, the respondents contend that there is still an obvious adverse effect on the public welfare as is the case with MRP's alleged violations.

Next, the Attorney General and the OPC argue that the Show Cause Order exceeds the minimum requirements established by the Supreme Court of Florida in Commercial Ventures, Inc. v. Beard, 595 So.2d 47 (Fla. 1992), for giving full and complete notice of the proceedings/alleged violations and the basis for the Commission's authority. In Commercial Ventures, the Florida Supreme Court reviewed a Commission show cause order, Order No. 19085 in Docket No. 880240, involving a payphone certificate holder, Commercial Ventures, Inc. The respondents note that Order No. 19085 did not detail specific complaints, but alleged "repeated violations" of the cited rules. The Florida Supreme Court found that "... the allegations contained in the order are clearly adequate to give Commercial Ventures full and complete notice of the proceedings and the basis for their authority." Id. at 48.

The Show Cause Order here enumerated the precise amount of complaints of the specific anti-slamming rule and also provided detailed information regarding four specific examples of the complaints included. The respondents also note that the Commission has furnished documentation to MRP, including a notice of violation, for all 50 complaints. The AG and the Public Counsel indicate that for these same reasons there is no need for the Commission to make a more definite statement. Furthermore, based on the amount of complaints, the respondents contend that the lack of adequate safeguards to prevent the alleged violations is obvious.

Finally, the respondents contend that MRP's violations were willful under Section 364.285, Florida Statutes, as MRP has used telemarketing scripts approved by its president, Thomas Salzano, that are inherently and facially misleading and calculated to induce an unauthorized switch by misrepresentation of facts. The respondents state that Mr. Salzano has stated in a deposition taken in New Jersey that he approves all telemarketing scripts of MRP. The respondents contend that these scripts misrepresent that MRP offers savings somehow endorsed by the FCC, that MRP is an agent

for underlying carriers, and that MRP is itself a discount or consolidation plan and not a long distance telephone provider. The respondents do not believe that the factual bases provided in MRP's Partial Response to the Show Cause Order regarding the four examples of complaints provide adequate support for a dismissal. The respondents contend that the Partial Response merely offers denials and affirmative defenses raising factual disputes.

CONCLUSION

Taking all of the facts alleged in the Commission's Show Cause Order to be true, staff recommends that the Commission deny MRP's Motion to Dismiss or Quash Order No. PSC-98-0313-FOF-TI (Order to Show Cause) and Motion for More Definite Statement. The Show Cause Order alleged sufficient facts for the Commission to find that MRP has violated Rule 25-4.118, Florida Administrative Code. Staff agrees with the Attorney General and the OPC that the alleged rule violations are major violations that adversely affect consumer and company economic interests and adversely affect the general public interest, safety, and welfare. Section 120.695, Florida Statutes, states in pertinent part:

120.695 Notice of noncompliance.-

(1) 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.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It 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. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or

profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. 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. If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules at the time of licensure and at least annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.

The Commission clearly has charged MRP with a major violation based on the definition of minor violation in this statutory provision. Therefore, a formal notice of non-compliance is not required. A violation of Rule 25-4.118 (slamming) has apparent adverse effects, economic and otherwise, on consumers, companies, and the general public welfare as slamming frequently results in higher rates and a skewing of the competitive marketplace for long distance telephone services.

More importantly, the Commission has provided MRP with more than adequate information, notice, and opportunity to respond to the Show Cause Order and defend its substantial interests, consistent with the Florida Supreme Court's holding in Commercial Ventures, Inc. v. Beard. The Show Cause Order provides sufficiently detailed information, and the Commission staff has provided MRP with sufficient notice and information regarding the individual complaints contained in the Order.

Further, the Commission need not prove that the specific facts supporting the allegations contained in its Order to Show Cause are true and represent "willful" violations in order to survive MRP's Motion to Dismiss or Quash. The Show Cause Order is a preliminary action by the Commission in which MRP is afforded an opportunity to respond to the allegations. The allegations are assumed to be true and must merely state a cause of action for which relief may be granted. A Motion to Dismiss merely tests the legal sufficiency of the violations alleged. All of the complaints in the Show Cause Order result from bona fide allegations that customers' long distance carriers were changed without their permission in violation of Rule 25-4.118, Florida Administrative Code. Accordingly, the Commission should not provide a more definite statement to MRP and should deny the Motion to Dismiss or Quash.

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If the Commission approves this recommendation, MRP should be allowed 10 days to file its response to the Order to Show Cause.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation on Issue 1, this docket should remain open pending resolution of the show cause process. If the Commission denies staff's recommendation on Issue 1, this docket may be closed. (Cox)

STAFF ANALYSIS: If the Commission approves staff's recommendation on Issue 1, this docket should remain open pending resolution of the show cause process. If the Commission denies staff's recommendation on Issue 1, this docket may be closed.