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July 16, 1998

Federal Express

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 for Reconsideration 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,

Scott G. Schildberg

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_ SGS/msa
- CAF \_\_\_\_\_ Enclosures
- cc: Eric M. Rubin, Esquire
- CMU \_\_\_\_\_ Jeffrey Harris, Esquire
- CTR \_\_\_\_\_ William P. Cox, Esquire
- EAG \_\_\_\_\_ Charles Beck, Esquire
- LEG \_\_\_\_\_ Michael Gross, Esquire
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- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC \_\_\_\_\_
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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:
	)	July 16, 1998
	)	

**MOTION FOR RECONSIDERATION  
BY MINIMUM RATE PRICING, INC.**

In accordance with Rule 25-22.060, Florida Administrative Code, Minimum Rate Pricing, Inc. ("MRP" or "Respondent"), files this Motion for Reconsideration, and states as follows:

1. On February 23, 1998, the Florida Public Service Commission ("Commission") issued Order No. PSC-98-0313-FOF-TI ("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.

2. On April 7, 1998, 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 by Minimum Rate Pricing, Inc. ("Motion to Dismiss").

3. On April 24, 1998, the Attorney General ("AG") and the Office of Public Counsel ("OPC") filed a Joint Response of the Attorney General and Public Counsel to Minimum Rate Pricing, Inc.'s Motion to Dismiss or Quash, or, In the Alternative, Motion for More Definite Statement or Partial Response to Show Cause Order ("AG/OPC Response").

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4. On July 7, 1998, the Commission issued Order No. PSC-98-0908-PCO-TI, Order Denying Motion to Dismiss Or Quash Or, In the Alternative, Motion for More Definite Statement ("MRP Order").

5. In the MRP Order, the Commission overlooked several dispositive points, and, therefore, rendered an erroneous decision.

6. The Commission overlooked its limitations in reviewing a motion to dismiss by improperly looking outside the four corners of the pleading sought to be dismissed (i.e., the Show Cause Order). The Order relies on the provision of copies of customer complaints outside of the Show Cause Order (e.g., "our staff has provided MRP with sufficient notice and information regarding the individual complaints contained in the Order") as grounds for stating that the Commission has provided "more than adequate information, notice, and opportunity to respond." MRP Order, pp. 6-7. However, as noted in a case relied upon by the Commission in the Order,

The function 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... In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (Citations omitted and emphasis added).

The Commission can not rely on materials outside the Show Cause Order in evaluating the sufficiency of the Show Cause Order. The Show Cause Order does not provide sufficient factual allegations on its own, and, therefore, it should be dismissed.

7. The Commission also overlooked the actual holding of Commercial Ventures, Inc. v. Beard, 595 So.2d 47 (Fla. 1992). In the AG/OPC Response, the AG and OPC argued that the minimum standards for a show cause proceeding were established by Commercial Ventures. The Commission's Order accepts that position. However, the issue in Commercial Ventures was not minimum standards for factual allegations in show cause orders. The issue was much more limited. In Commercial Ventures, the company argued that the order initiating show cause proceedings or the prehearing order for the show cause proceedings must include the phrase "refused to comply with" or "willfully violated". Id. at 48. In response to the company's argument that the order must include one of the two phrases, the Florida Supreme Court first cited the following portion of the Order:

Commercial Ventures, Inc. ...repeatedly failed to comply with the above-identified rules (Rule 25-24.515(4)(5)(7)(10), Florida Administrative Code). This Commission will not tolerate cavalier disregard of our rules by regulated utilities. Section 364.285, Florida Statutes, gives this Commission authority to impose a fine of up to \$5,000 per day for violation of Commission rules, each day constituting a separate offense.

Next, the Court stated that the Order:

[c]learly set forth that Commercial Ventures repeatedly failed to comply with the Commission's rules. Both the statutory authority and the rule were specified in the order. Id.

Finally, the Court concluded:

[t]he 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.

The Court did not find that the order must contain one of the two phrases. The Court found that the allegations in the order were adequate to give the company notice that a show cause proceeding against it had been initiated and the basis for the Commission's statutory and rule authority. The Court was not asked to, did not consider, and issued no finding as to whether the order contained adequate factual allegations as to the company's conduct to provide the company with sufficient information to satisfy due process requirements. In the Motion to Dismiss, MRP has pointed out that the Show Cause Order does not contain sufficient factual allegations to allow MRP to adequately ascertain what it has allegedly done in violation of Commission rule nor to fashion an adequate defense. MRP knows that a show cause proceeding against it has been initiated and the Show Cause Order sets forth the Commission's authority under Section 364.285, Florida Statutes, to issue fines. However, except for a few general allegations about the fifty (50) complaints and some additional details about four (4) of the complaints, the Show Cause Order does not inform MRP how it violated Commission rules. Commercial Ventures does not hold that an agency does not have to provide sufficient factual allegations to inform a regulated entity in the Show Cause Order how the entity's conduct violated a statute or an agency rule.

8. Even if Commercial Ventures established minimum standards for show cause orders, the MRP Order overlooked that the Show Cause Order does not meet such standards.

For example,

- a. In Commercial Ventures, the order only involved one complainant and the complainant was identified by name and address in the order. In the Show Cause Order, only four (4) of the fifty (50) complainants were identified.
- b. In Commercial Ventures, the order provided factual details such as the location and number of phones. While the Show Cause Order provided some factual details as to four of the complaints, it provided no factual details as to ninety-two percent (92%) of the complaints.
- c. In Commercial Ventures, there was an evaluation of the regulated entity's service performed by an independent third party. There is no similar evaluation of MRP's services identified in the Show Cause Order.
- d. In Commercial Ventures, the order included a summary of the complainant's statements and a chronology of events. No such information is provided in the Show Cause Order for ninety-two percent (92%) of the complaints.
- e. The only "precise" information for most of the complaints in the Show Cause Order is that they are one of fifty (50) complaints.

9. The MRP Order overlooks that the Show Cause Order fails to satisfy statutory requirements for due process. In order to satisfy due process requirements for a show cause order, the Commission's Show Cause Order must, at a minimum, comply with Section 120.60(5), Florida Statutes (1997), which provides, in part, as follows:

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or

certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action. (Emphasis added).

The Show Cause Order does not meet the minimum statutory standards. It does not provide sufficient factual allegations as to facts or MRP's conduct. As stated by the Court in Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996):

Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint.

In Cottrill, the Court further stated:

[E]ven though the administrative complaint contained references to these statutory provisions, it did not allege any act or omission in violation of either provision. Id.

Simply put, "the Department never pleaded facts that constituted violation of [the sections]." Id. Therefore, the Court ruled that,

the administrative complaint did not afford 'reasonable notice to the licensee of facts or conduct which warrant' disciplinary action, as required by ... section 120.60(5), Florida Statutes." Id.

10. As noted in Dyson v. Dyson, 483 So.2d 546 (Fla. 1st DCA 1986):

The function of a complaint is to notify a defendant of the plaintiff's charges of wrongdoing 'which constitute the real basis for the plaintiff's complaint so that the defendant may intelligently answer.' The pleadings 'must be sufficiently clear and direct to make it unnecessary for the

respondent or the court to be clairvoyant in ascertaining the nature of the claim.' In this context, the factual allegations are an essential. (Citations omitted).

The Commission has overlooked the fact that it did not provide any factual allegations of any level of detail to forty-six (46) of the fifty (50) complaints.

11. In the MRP Order, the Commission stated:

we 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. MRP Order, p. 7.

The Commission overlooks that MRP never asked the Commission to 'prove the specific facts.' MRP only requested the Commission to allege the specific facts which state the cause of action for each of the fifty (50) complaints, including the facts showing the "willfulness" of the alleged violation. For example, is it the Commission's view that each of these consumers were never contacted by MRP before their service was changed? If so, is it the Commission's position that these consumers were contacted but told MRP not to change their service, that MRP nevertheless proceeded without such authorization? The Show Cause Order does not classify the complaints by category of prohibited activity (e.g., no contact before charging) or even identify the complainants. The Show Cause Order does not meet the requirements of notice pleading. It is not possible based on this Show Cause Order for MRP to respond other than through a general denial without more factual allegations. It is incumbent upon the Commission for its show cause orders to



cause orders to provide sufficient factual allegations to enable regulated entities to respond.

12. Except for discussions about four (4) of the fifty (50) complaints, the only language in the Show Cause Order as to the content of the complaints is as follows:

- a. "Customers complained that the telemarketing activities of MRP led them to believe that they were signing up for a discount plan, not switching their long distance provider."
- b. "Some customers have also indicated that they did not receive the company's welcome package which is a required verification procedure."
- c. "[o]ur Division of Consumer Affairs has closed a total of fifty (50) complaints from consumers for slamming infractions in apparent violation of Rule 25-4.118, Florida Administrative Code."
- d. "[t]he fifty (50) complaints closed as apparent unauthorized carrier change (slamming) infractions."
- e. "[a]ll 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."

The last three statements are mere conclusions which do not have sufficient factual detail necessary to state a cause of action. The first two statements do not provide sufficient information.

13. Furthermore, the statement "all of the complaints in the Show Cause Order result from bonafide allegations that customers' long distance carriers were changed without their permission in violation of Rule 25-411, Florida Administrative Code," is clearly erroneous. The Show Cause Order provided that in two (2) of the four (4) examples the customer's long distance carrier was not switched.


14. For the grounds set forth above, the Commission should reconsider the MRP Order, and then dismiss or quash the Show Cause Order, or, in the alternative, provide a more definite statement.

Respectfully submitted,

RUBIN, WINSTON, DIERCKS, HARRIS &  
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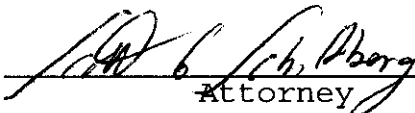
And

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

By:   
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Motion to Reconsideration 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 Federal Express, this 16th day of July, 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 and Charles Beck, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, #812, Tallahassee, Florida 32399-1400; by U.S. Mail, this 16th day of July, 1998.

  
\_\_\_\_\_  
Attorney

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