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OFFICE OF THE
EXECUTIVE SECRETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
SHOW CAUSE PROCEEDING AGAINST	)	**DOCKET NO.: 98-00018**
MINIMUM RATE PRICING, INC.	)	
	)	

RESPONSE OF CONSUMER SERVICES DIVISION TO MINIMUM RATE PRICING, INC.'S PETITION FOR RECONSIDERATION

COMES NOW the Consumer Services Division of the Tennessee Regulatory Authority ("Authority's Staff"), by and through its counsel, and files this Response to Minimum Rate Pricing, Inc.'s ("MRP") Petition for Reconsideration of the Authority's September 16, 1999 Final Order (the "Petition"). The Authority's Staff respectfully requests that the Tennessee Regulatory Authority (the "Authority" or "TRA") find that MRP's assertions, as set forth in its Petition, are groundless. As such, MRP's arguments for reconsideration lack merit, and the Authority's Staff respectfully requests that this Petition should be denied.

Procedural History

This matter originally came before the Tennessee Regulatory Authority upon the TRA's *Order Requiring Minimum Rate Pricing, Inc. to Appear and Show Cause Why A Cease and Desist Order, Fine and/or Order Revoking Authority Should Not Be Issued*; such order was entered on July 27, 1998. This matter went to a hearing on the merits before the TRA on November 24, 25, December 10 and 11, 1998. Minimum Rate Pricing, Inc. filed a petition under

FILE

Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.*, with the United States Bankruptcy Court for the District of New Jersey, Newark Division, on February 26, 1999.

On April 1, 1999, this matter was placed on the TRA's *Final Conference Agenda*, which notified the parties that at the regular Authority Conference scheduled for April 6, 1999, certain action would be taken relative to the show cause proceeding against MRP. According to the TRA's *Order Reflecting Action Taken at April 6, 1999, Authority Conference*, at the April 6th Conference the Directors' intended action was to deliberate on the merits and render a decision pursuant to the four days of hearings in November and December 1998, as well as considering all late-filed exhibits, the post-hearing briefs and the proposed findings of fact and conclusions of law of each party. However, on April 5, 1999, the Authority received a letter filing from Walter Diercks, Esq., counsel for Minimum Rate Pricing, Inc., in which Mr. Diercks advised the Authority for the first time that Minimum Rate Pricing, Inc. had filed a petition in bankruptcy on February 26, 1999, and that he was of the opinion that this matter "has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362."

Instead of deliberating on the merits, the Directors appointed Chairman Melvin Malone to serve as Hearing Officer on this issue of jurisdiction, and directed the parties to file briefs in support of their positions relative to the issue of whether the TRA had jurisdiction to proceed to deliberate this matter on the merits in light of the automatic stay under the Bankruptcy Code, 11 U.S.C. § 362. Briefs on the issue of jurisdiction were filed by the Authority's Staff and the Consumer Advocate Division of the Office of the Attorney General (the "CAD"). Instead of filing a brief, MRP submitted a letter from counsel Walter Diercks on April 14, 1999, essentially reiterating Mr. Diercks' statements from his letter of April 2, 1999. Based on the filings

submitted, the Hearing Officer concluded that: a) the TRA has the jurisdiction to determine whether the bankruptcy stay should be applicable to this proceeding, and b) that this TRA proceeding is excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). The Hearing Officer's Initial Order filed on April 16, 1999, became a Final Order on April 26, 1999.

The Directors of the Authority, after proper notice to all parties deliberated on the merits of this case at the April 27, 1999 Special Authority Conference and found MRP in violation of Tenn. Comp R. & Regs. R. 1220-4-2-.13(3); 1220-4-2-.56(1)(d); 1220-4-2-.56(d)(2), (d)(5), (d)(9); 1220-4-2-.56(1)(e); 1220-4-.56(2); and Tenn.Code Ann. § 65-4-125. The Authority, based on these findings of violations, revoked the Certificate of MRP effective April 27, 1999. After the parties failed to enter into a joint agreement relative to an implementation plan for transitioning MRP's intrastate long distance customers to new service providers, the Authority entered an Order on May 11, 1999 which reflected both the action taken at the Authority's May 4, 1999 Conference and affirmed the Authority's Notice of Revocation issued on April 27, 1999. MRP filed a petition to reconsider the May 11, 1999 Order which was not acted on by the Authority. The Final Order reflecting Findings of Fact and Conclusions of Law as deliberated and pronounced by the Authority at the April 27, 1999 Conference was issued on September 16, 1999. On September 27, 1999, MRP filed a Petition for Reconsideration of the Authority's September 16, 1999 Final Order.

MRP's Petition for Reconsideration

In its Petition for Reconsideration, MRP asks the Authority to reconsider: its April 27, 1999 decision and Notice revoking MRP's certificate, its May 11, 1999 Order affirming the April 27, 1999 Notice and its September 16, 1999 Final Order. MRP also asks the Authority to rescind

its April 27, 1999 decision and Notice revoking MRP's certificate, and vacate its May 11, 1999 Order and September 16, 1999 Final Order. MRP suggests that the Authority should submit the issue of the automatic stay to the United States Bankruptcy Court for the District of New Jersey for resolution. MRP further suggests a) that the Authority dismiss the CAD as an intervenor in this action because of a conflict of interest and ex parte communications, b) that the Authority should exclude evidence, testimony, oral argument or written pleading submitted by the CAD and c) that the Authority should render a decision from the record that MRP did not engage in material violations of Authority rules or Tennessee statute that would require the revocation of MRP's certificate or the imposition of substantial fines.

As grounds for the above requests, MRP asserts the following:

1) the Authority did not act on MRP's petition for reconsideration of the May 11, 1999 Order;

2) the Authority did not resolve the threshold issue of burden of proof;

3) the Authority's revocation of MRP's certification to provide intrastate long distance service is an illegal attempt to regulate interstate long distance in violation of the preemption provisions of the federal telecommunications Act;

4) the Attorney General's representation of the Authority in this proceeding is in conflict with the intervenor status of the CAD and creates an impermissible conflict of interest;

5) the Attorney General and the Authority engaged in ex parte communications regarding matters ruled on by the Authority;

6) the Authority, in deciding this case, acted in violation of the automatic stay imposed by Section 362 of the Bankruptcy Code (11 U.S.C. § 362);

7) MRP's due process rights were denied when it did not receive a copy of the May 11, 1999 Order until May 17, 1999 which limited its ability to file a timely and complete petition for reconsideration of that Order; and

8) the Authority's consideration of the CAD's Motion for Exercise of Regulatory and Police Power to Protect the Public Interest during the April 27, 1999 Conference constituted a denial of MRP's due process rights.

ARGUMENT

The Authority's Staff addresses each of MRP's allegations in the discussion that follows and demonstrates that MRP's Petition for Reconsideration is without merit and should be dismissed. In ground number 1 and number 7, as set forth above, MRP asserts that it was not permitted to file a timely and complete petition for reconsideration of the Authority's May 11, 1999 Order and that, when filed, the Authority failed to act on that petition. The May 11, 1999 Order reflected action taken at the May 4, 1999 Authority Conference. The Notice issued on April 27, 1999 specifically stated that "a written order memorializing this action of the agency and advising the parties of rights of reconsideration and judicial review will be forthcoming." While the May 11, 1999 Order affirmed the Notice of Revocation, it did not set forth the findings of fact and conclusions of law upon which the Authority based its decision to revoke MRP's certification.

At the April 27, 1999 Conference, the Authority stated that, at the May 4, 1999 Conference, it would consider a joint agreement relative to an implementation plan for transitioning MRP's intrastate long distance customers to new intrastate long distance service providers. In the absence of a joint agreement, the parties were permitted to and did file

individual plans. The Directors voted not to adopt any of the implementation plans and, thereafter, affirmed the effective date of the Notice of Revocation as April 27, 1999. The May 11, 1999 Order was not the Final Order in this matter. It did not contain findings of fact and conclusions of law and did not contain a paragraph advising parties of the right of judicial review. All of the these features are contained in the September 16, 1999 Final Order. While the Authority's May 11, 1999 Order did provide for reconsideration, such a request for reconsideration would be to address the matters in the May 11, 1999 Order. MRP's petition for reconsideration did not address the matters set forth in May 11, 1999 Order nor the action taken by the Authority at the May 4, 1999 Conference.

Tenn. Code Ann. § 4-5-317, that section of the UAPA which provides for reconsideration, specifically states at subsection (c) that "if no action has been taken on the petition (for reconsideration) within twenty (20) days, the petition shall be deemed to have been denied." While MRP may not have received the May 11, 1999 Order until May 17, 1999, it was not denied due process because it was not the Final Order containing the findings of fact and conclusions of law. MRP's petition for reconsideration of the May 11, 1999 Order did not seek to address the issues of an implementation plan for transitioning customers, which was the subject of that Order. The September 16, 1999 Order contained the findings of fact and conclusions of law from the April 27, 1999 Conference and MRP filed a timely and complete petition for reconsideration as to that Order. Therefore, the argument of the lack of action by the Authority on MRP's petition for reconsideration of the May 11, 1999 Order and the allegations of a denial of due process in connection with that Order are without merit.

Ground number 2 set forth above is equally without merit. The Authority, at page 9 of its September 16, 1999 Order, rendered its finding as to the burden of proof. MRP's argument that there was a need to explain whether the burden of producing evidence or the burden of persuasion belonged to MRP ignores the plain meaning of Tenn. Code Ann. § 65-2-109(5) which specifically provides that the *burden of proof* shall be on the party directed to show cause. MRP had the burden of proof in this action and failed to meet that burden.

In ground number 3, as set forth above, MRP contends that the TRA's revocation of MRP's certification "constitutes an illegal attempt by the Authority to regulate interstate long distance telecommunications service in violation of the preemption provisions of Section 258 of the Communications Act of 1933, as amended by the Telecommunications Act of 1996 (42 U.S.C. Section 258)....The interstate and intrastate aspects of the provision of long distance telephone service are so 'inextricably intertwined' that binding Federal precedent mandates that federal law preempts all state regulation concerning the switching of a telephone subscriber's long distance provider." (MRP's Petition for Reconsideration, pp. 2-3.) Without providing any real discussion in its Petition, MRP refers to its Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") for its argument. In its Proposed Findings, MRP states that two rules of law have developed in determining whether a type of telecommunications service is subject to state regulation or subject to federal regulation where the same facilities are used for provision of both intrastate and interstate services. MRP opted for the imposition of the rule of law which favors preemption in instances "where a state's policy with respect to intrastate regulation of telecommunications is inextricably interwined with and would serve to thwart the FCC (Federal Communications Commission) policies with respect to interstate regulation." (MRP's Proposed

Findings, pp. 24-25.) MRP opted not to foster the rule of law which would not favor preemption in a situation "where the subject of the state's intrastate regulation was not so intertwined with federal regulations and their enforcement on purely intrastate matters would not thwart federal goals..." (MRP's Proposed Findings, p. 25.) By MRP's own characterization of the two rules, it is a far stretch to imagine that the Federal Communications Commission ("FCC") would consider the TRA's efforts to stop slamming activity against Tennessee consumers as serving "to thwart the FCC's policies with respect to interstate regulation." It is more likely that the FCC would view that "both the state regulation of purely intrastate matters and the federal regulation of interstate matters can coexist." (Relying on MRP's characterization of the rule of law not calling for preemption found on p. 25 of its Proposed Findings.)

MRP's use of the federal preemption argument is misplaced in the context of this case and is a blatant attempt to slip between the cracks of state regulation and federal regulation. MRP relies on case law that discusses federal preemption in the instance of conflicting policies and not in the instance of common enforcement. MRP does not point to any FCC rule, order or decision that states that the states are precluded from enforcing their own slamming laws and rules against providers of long distance service within those states. MRP's argument collapses under the weight of law, policy and common sense that a state agency must be afforded the opportunity to protect its citizens from illegal activity by companies that do business in that state. The TRA acted properly and not in violation of any preemptive statutes or rules in revoking MRP's certificate after finding it in violation of Tennessee law and TRA rules.

As to ground number 4 and 5 as set forth above, the Authority's Staff can only assert that the CAD is a separate division of the Attorney General's Office. Through her letter of April 5,

1999, it was evident that Kathleen Ayres was representing the Authority on the issue of the automatic stay in bankruptcy and was establishing contact with MRP's bankruptcy counsel. MRP has not demonstrated in any of its allegations that the CAD's office was representing the Authority or engaged in any ex parte communications with the Authority.

MRP's argument in ground number 6, as set forth above, is that, "Any issue regarding the scope and effect of the automatic stay and any request for relief from the automatic stay must be presented to and resolved by the United States Bankruptcy Court for the District of New Jersey, Newark Division." (MRP's Petition for Reconsideration, pp. 3-4.) MRP's assertion is the same argument it presented in its letter of April 2, 1999 to the Authority. In that letter, MRP relied on *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). That case is not from the same federal circuit as the Bankruptcy Court in New Jersey and further, the Court's decision in that case relies on a provision of bankruptcy code that has subsequently been amended. In its Petition for Reconsideration, MRP has not brought forth any new arguments or case law to support its position. Further, from a procedural standpoint, MRP declined to file a brief addressing the jurisdictional issues, even after it had requested a briefing schedule and did not file a petition to reconsider the Hearing Officer's Initial Order on the jurisdictional issues. MRP persisted in its pattern of disregard for the Authority's notices and orders by not having a representative in attendance before the Authority during the April 6, 1999 Conference when the jurisdictional issues were discussed, nor during the April 27, 1999 Conference when the Directors deliberated the case on the merits, nor during the May 4, 1999 Conference when the Directors considered customer transition implementation plans. In short, MRP has not acted in good faith in asserting its jurisdictional argument before the Authority.

As to the substance of ground number 6, as set forth above, the Authority's Staff contends that the TRA has jurisdiction and was permitted to deliberate on the merits of this matter due to the following: (a) 11 U.S.C. § 362(b)(4) as amended is clear on its face that there is no stay applicable to the TRA, therefore, the TRA never lost jurisdiction, and (b) federal case law, particularly the Sixth Circuit Court of Appeals, has made it equally clear that the forum, not the Bankruptcy Court, is to determine whether the governmental unit's action is precluded by the "automatic stay." As argued in its jurisdictional brief, the Authority's Staff believes that 11 U.S.C. § 362(b)(4) as amended is clear on its face. Upon the filing of a bankruptcy petition, Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, provides debtors with an "automatic stay" against certain collection activities to enable them some breathing room, but Section 362 simultaneously allows governmental units to enforce their police or regulatory power in certain circumstances where the stay is simply inapplicable. In 1998, Congress passed PL 105-277, 112 Stat 2681, which amended § 362 and thereby clarified the boundary between the automatic stay and the rightful exercise of police and regulatory power. Subsections (a) and (b) of § 362 are germane to the instant matter, and paragraphs (a)(1)-(3), (a)(6) and (b)(4)-(5) follow as they existed prior to the 1998 amendment; further, the language that is directly relevant has been emphasized:

> § 362. **Automatic stay**
> (a) **Except as provided in subsection (b)** of this section, **a petition** filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, **operates as a stay, applicable to all entities**, of--
>
> (1) **the commencement or continuation**, including the issuance or employment of process, **of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under**

this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; . . .

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, **does not operate as a stay--**

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, **obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;** . . .

Once the text that is not relevant to the instant matter recedes, Section 362 is clear on its face. Subsection (b) is a good example: "**The filing of a petition . . . does not operate as a stay**" --- provided certain circumstances are met. To clarify those circumstances, Congress acted in October of 1998 by deleting paragraphs (4) and (5) so as to replace them both with one broader paragraph, which follows (the text relevant to the instant matter is underlined, while the new clarifications are emphasized):

Section 362(b) of title 11, United States Code, is amended--
(1) by striking paragraphs (4) and (5); and
(2) by inserting after paragraph (3) the following:

"(4) under paragraph (1), (2), **(3),** or **(6)** of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the

Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, **including** the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;".
PL 105-277, 112 Stat 2681.

With this amendment, Congress extended the circumstances under which the mere filing of a petition does not trigger an automatic stay to include paragraphs (3) and (6), in addition to paragraphs (1) and (2) of subsection (a). Under this amendment, a governmental unit can exercise its police and regulatory power to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate, or to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. Further, with the use of the word "including," this amendment reiterates that a governmental unit can exercise its police and regulatory power to enforce any judgment, other than a money judgment, which it obtained in an enforcement action or proceeding.

The TRA is a governmental unit that is endowed by the Tennessee General Assembly with police and regulatory powers. The purpose of this proceeding all along has been to enforce both state law and the TRA's own rules and regulations. The TRA commenced this show cause proceeding and completed the hearing in this matter months prior to MRP filing its bankruptcy petition.

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362(b)(4) as amended, is clear on its face. The February 26, 1999 filing by MRP of a bankruptcy petition does not, in the instant case with the TRA, operate as an automatic stay. Therefore, if no stay relative to MRP is applicable to the TRA, then the TRA's jurisdiction relative to MRP has never been in question.

Secondly, MRP continues to assert that the TRA was not the proper forum to determine whether this enforcement action was exempted from the automatic stay. The Authority's Staff again asserts that the non-bankruptcy forum, not the Bankruptcy Court, can properly determine whether the governmental unit's action is precluded by the "automatic stay." The Supreme Court of the United States has spoken on the issue of which forum is to determine the applicability of the automatic stay. In *Board of Governors of the Federal Reserve System v. Mcorp Financial, Inc., et al.*, 502 U.S. 32, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991), on page 39-40, Justice Stevens wrote the following (emphasis added):

> The filing of a bankruptcy petition operates as an automatic stay of several categories of judicial and administrative proceedings. [Footnote omitted] The Board's planned actions against MCorp constitute the "continuation ... [of] administrative ... proceeding[s]" and would appear to be stayed by 11 U.S.C. § 362(a)(1). **However, the Board's actions also fall squarely within § 362(b)(4), which expressly provides that the automatic stay will not reach proceedings to enforce a "governmental unit's police or regulatory power."** [FN10]
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> FN10. Title 11 U.S.C. § 362(b)(4) provides:
> "(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay-- . . .
> "(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power...."
>
> MCorp contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the Board's actions and to enjoin those actions. **We disagree. MCorp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts. We therefore reject MCorp's reading of § 362(b)(4).**

The Supreme Court is clear that a governmental unit's administrative proceeding need not defer to the Bankruptcy Court, and the Court is also clear that administrative agencies, like the TRA, have the ability to determine whether the stay is applicable to it's police and regulatory powers under a given set of circumstances. The Sixth Circuit Court of Appeals, the TRA's circuit and the circuit in which MRP's alleged violations of statutes and rules have occurred, is very direct and even more to the point on this issue.

In *National Labor Relations Board v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986), the court opined, on pages 938-941, as follows (emphasis added):

> Respondent contends that the bankruptcy court has exclusive jurisdiction to determine the coverage, modification, or termination of the automatic stay. Therefore, respondent argues, we should "remand" this case to the bankruptcy court for a determination of whether the NLRB proceeding was excepted from the stay. We disagree, because the applicability of the automatic stay to an unfair labor practice proceeding is an issue of law within the competence of this court. See In re Baldwin-United Corp. Litigation, 765 F.2d 343, 347 (2d Cir.1985).
>
> .....
>
> Here, the NLRB contends that its proceeding against the Corporation is excepted from the § 362(a)(1) automatic stay because the NLRB proceeding is "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," and, as such, excepted from the automatic stay by § 362(b)(4).
>
> The decision of the Second Circuit in Baldwin-United Corp. is the only case which has explicitly held that the district and circuit courts have jurisdiction to determine the applicability of the automatic stay. However, in the context of an NLRB petition for enforcement of an unfair labor practice decision and order, two other circuit courts have assumed they had jurisdiction to answer the question and proceeded directly to the merits. See Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23 (1st Cir.1983); NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir.1981). Evans Plumbing was the first circuit court decision to hold that an NLRB unfair labor practice proceeding was excepted from the automatic stay under § 362(b)(4).

We agree with the statement by the court in Baldwin that:

> **"The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay."**

Baldwin-United Corp., 765 F.2d at 347 (footnote omitted). We hold that we have jurisdiction to determine whether the NLRB unfair labor practice proceeding was subject to the automatic stay.

II.

Respondent next argues that the NLRB's order is void because the NLRB failed to petition the bankruptcy court for relief from the automatic stay before it proceeded with the unfair labor practice hearing. It also argues that the NLRB was required to petition the bankruptcy court for relief from the stay even though it believed that its proceeding was excepted from the stay. This contention has no support in the case law, and we conclude that a governmental unit which determines that its police power or regulatory proceeding is excepted from the automatic stay under § 362(b)(4) is not required to petition the bankruptcy court for relief from the stay prior to continuing its proceeding.

Section 362(b)(4) provides that the filing of a petition in bankruptcy "does not operate as a stay ... of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The statute provides that governmental actions to enforce police or regulatory powers are automatically excepted from the operation of the automatic stay. **There is no occasion therefore to seek relief from a stay which has no application to the proceeding in question.**

.....

Section 362(b)(4) explicitly provides that proceedings undertaken by a governmental unit in the exercise of its police power are unaffected by the automatic stay. [FN5] Only if we find the action did not fall within the ambit of the § 362(b)(4) exception to the automatic stay will we declare the governmental unit's action void.

> FN5. Our decision in In re Mansfield Tire & Rubber Co., 660 F.2d 1108 (6th Cir.1981), is not to the contrary. There, the Ohio Bureau of Workers' Compensation sought permission to adjudicate worker's compensation claims filed by employees of the bankrupt debtor. The bureau petitioned the bankruptcy court to lift the automatic stay on the basis of the § 362(b)(4) and (5) exceptions. Whether Ohio could process the worker's compensation claims without petitioning for relief from the stay was not at issue. We reversed the judgment of the bankruptcy court and

> vacated the stay, but **we did not hold that a governmental unit exercising its police or regulatory powers must always petition the bankruptcy court for relief from the stay**. See D. Cowans, 2 Bankruptcy Law & Practice § 11.3 at 255 (1986).
>
> Arguably, a more orderly procedure would require the NLRB to petition the bankruptcy court for permission to proceed. "[C]entralizing construction of the automatic stay in the Bankruptcy Court" would result in "uniformity on issues of law," and would assist that court's effort to "assure equality of treatment among creditors." Baldwin-United Corp., 765 F.2d at 349. However, § 362 does not impose such a requirement, and **the legislative history of that section provides that "[b]y excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay."** S.Rep. No. 989, 95th Cong., 1st Sess. (1978), reprinted in 1978 U.S.Code Cong. & Ad.News at 5837.

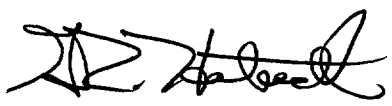
On March 4, 1999, this case was cited for authority by the United States Bankruptcy Appellate Panel of the Sixth Circuit *IN RE Singleton, Jr. v. Fifth Third Bank of Western Ohio, et al.*, 1999 WL 106976 (6th Cir.BAP (Ohio)) and, as such, remains good law in Tennessee. Without question the TRA had the jurisdiction to render a decision on the applicability of the automatic stay under the Bankruptcy Code, 11 U.S.C. § 362 and, upon determining that the automatic stay was not applicable to this proceeding, to deliberate this matter on the merits.

As to ground number 8, as set forth above, MRP asserts that "the Authority improperly considered the allegations made against MRP and an MRP witness, Drew Keena, in a document filed by the Attorney General (the Motion for Exercise of Regulatory and Police Power to Protect the Public Interest)" and that such consideration "after the close of the hearings and the close of the evidentiary record was improper and a denial of MRP's due process rights." (MRP's Petition for Reconsideration, p. 4.) The Authority's Staff can only believe that MRP made a conscious decision not to have a representative in attendance at the April 27, 1999 Conference when the Directors deliberated on the merits of this case. The transcript of that Conference clearly shows

that the discussion between the Directors of the CAD's Motion was held **after** the Directors fully deliberated the merits of the case and voted to revoke MRP's certificate. (See, Transcript of April 27, 1999 Conference, pages 31-50.) The discussion of the CAD's motion involved the question of affiliates of MRP and whether MRP could possibly continue to serve customers in Tennessee, after revocation of its certificate, through affiliates that may exist. By waiving its appearance at that Conference, MRP waived its ability to have input into that discussion. Certainly, MRP was not denied due process when the record shows that the case had been decided before discussion of the CAD's motion. Further, the record shows that MRP waived its appearance at the Conference and therefore waived its ability to contribute to the discussion held between the Directors. Absence of due diligence on the part of MRP cannot equate to a denial of due process.

Wherefore, for the above stated reasons, the Authority's Staff requests that the TRA deny MRP's Petition for Reconsideration of September 16, 1999 Final Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 1999, a copy of the foregoing document was served on the parties of record, via facsimile and U.S. Mail, postage pre-paid, addressed as follows:

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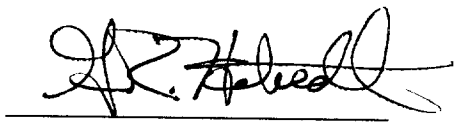

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