BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JANUARY 5, 2000

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

ORDER DENYING MINIMUM RATE PRICING, INC.'S PETITION FOR RECONSIDERATION

This matter came before the Tennessee Regulatory Authority at an regularly scheduled Authority Conference held on October 26, 1999, for consideration of Minimum Rate Pricing, Inc.'s Petition for Reconsideration of September 16, 1999 Final Order ("Petition"). After reviewing the Petition, the Responses filed thereto and the evidentiary record in this matter, the Directors of the Authority voted unanimously to deny the Petition.

Background

The merits of this case were heard by the Directors of the Tennessee Regulatory Authority ("Authority" or "TRA") on November 24 and 25 and December 10 and 11, 1998, pursuant to the Show Cause Order entered against Minimum Rate Pricing, Inc. ("MRP") on July 27, 1998. On February 26, 1999, MRP filed a petition under 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. MRP notified the Authority of the filing of that bankruptcy petition

only after this case had been scheduled for deliberation on the merits by the Directors at the April 6, 1999 Authority Conference. Notification from MRP came in the form of a letter from MRP counsel, Walter Diercks, received by the Authority on April 5, 1999. In his letter, Mr. Diercks expressed his opinion that this matter "has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362." In that letter, Mr. Diercks specifically requested the Authority to direct all correspondence regarding the MRP bankruptcy or the automatic stay to MRP's bankruptcy counsel: Bruce Frankel, Esq., Angel and Frankel, P.C., 460 Park Avenue, New York, NY 10022-1906 Telephone (292) 752-8000.

Upon receiving the notice of MRP's bankruptcy status, the Authority decided not to deliberate on the merits of the case on April 6, but rather to provide a procedure whereby an initial determination could be made regarding the TRA's jurisdiction to consider the merits and to decide on the applicability of the automatic bankruptcy stay. At the April 6th Conference, the Directors instructed the parties to file briefs by April 14, and appointed Chairman Melvin Malone to serve as the Hearing Officer to render an initial decision on the issue of whether, given MRP's filing of the petition in bankruptcy, the TRA had jurisdiction to deliberate this matter on the merits. MRP did not have a representative in attendance at the April 6th Conference.

The Consumer Services Division of the TRA and the Consumer Advocate Division of the Office of the Attorney General ("Consumer Advocate") filed briefs with the Authority on April 14, 1999. MRP counsel, Walter Diercks, sent a letter to the TRA dated April 13, 1999 and declined to brief the issues; this occurred after the briefing schedule had been put into place at the request of MRP's bankruptcy counsel. In his letter dated April 13, 1999, Mr. Diercks repeated statements from his letter of April 2, 1999 and offered no new arguments or

legal support for his position that the automatic stay would prevent the Authority from taking action in this matter. On April 16, 1999, Chairman Malone rendered his decision that not only did the TRA have the jurisdiction to decide the question of the applicability of the bankruptcy stay, but also that the bankruptcy stay did not apply to this regulatory proceeding. Without any objections having been filed, that Initial Order became a Final Order on April 26, 1999 pursuant to Tenn. Code Ann. § 4-5-318.

The Directors deliberated on the merits of this case at a Special Authority Conference held on April 27, 1999. Notice of the Special Authority Conference was provided to all parties on April 19, 1999. MRP failed to appear at the April 27th Conference. In their public deliberations at the April 27th Conference, the Directors 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. Based on these findings of violations, the Authority revoked the Certificate of MRP as an operator service provider and a reseller of telecommunications services in Tennessee, effective April 27, 1999.

At the April 27th Conference, the Authority requested that the parties file a joint agreement providing an implementation plan for transitioning MRP's intrastate long distance customers to new service providers; such plan was to be considered by the Directors at the May 4, 1999 Authority Conference. The Directors also discussed concern over MRP's ability to shift its customer base to an affiliate in an effort to continue to do business in Tennessee. In the context of this discussion, the Consumer Advocate's Motion for Exercise of Regulatory and Police Power to Protect the Public Interest (filed on March 24, 1999) was discussed and an issue was raised concerning whether MRP witness Drew Keena had truthfully testified

about the existence of MRP affiliates. At that point, the Directors instructed the Consumer Services Division to look into the question of MRP affiliate activity in Tennessee.

The parties did not reach an agreement relative to an implementation plan, so at the May 4th Authority Conference, the Directors examined the individual plans submitted by the parties. MRP filed a proposed plan but did not attend the Conference. After reviewing the proposed plans, the Authority did not adopt an implementation plan. The Authority entered an Order on May 11, 1999 affirming the Authority's Notice of Revocation issued on April 27, 1999 and reflecting the action taken by the Authority at its May 4, 1999 Conference. On May 21, 1999, MRP filed a petition to reconsider the May 11, 1999 Order. No action was taken on the Petition because it did not address the substance of the May 11th Order and because a subsequent final order, reflecting the Authority's findings of fact and conclusions of law, would be issued providing MRP full opportunity for reconsideration.

On September 16, 1999, the Authority issued its Final Order reflecting Findings of Fact and Conclusions of Law, as deliberated and pronounced by the Authority at the April 27, 1999 Conference. On September 27, 1999, MRP filed its Petition for Reconsideration of the Authority's September 16, 1999 Final Order. The Authority issued a Notice on October 5, 1999, requesting that responses be filed by the parties to MRP's Petition. On October 12, 1999, the Consumer Services Division and the Consumer Advocate each filed a Response to MRP's Petition.

MRP's Petition for Reconsideration

In its Petition for Reconsideration, MRP seeks reconsideration and rescission of the Authority's April 27, 1999 decision and Notice revoking MRP's certificate, of the Authority's May 11, 1999 Order affirming the April 27, 1999 Notice, and of the Authority's September

16, 1999 Final Order. MRP suggests that the issue of the automatic stay should be submitted to the United States Bankruptcy Court for the District of New Jersey. MRP also raises issues of conflict of interest and ex parte communication between the Attorney General's Office and the TRA and as a result of this alleged activity, asks the Authority to dismiss the Consumer Advocate as an intervenor in this action and exclude all evidence, testimony, oral argument and filings submitted by the Consumer Advocate. As part of its reconsideration, MRP requests the Authority to render a decision in favor of MRP from the record finding that MRP did not engage in material violations of Authority rules or Tennessee statutes that would require the revocation of MRP's certificate or the imposition of substantial fines.

Findings and Conclusions Relative to MRP's Petition

The substance of MRP's Petition can be broken down into a discussion of five major areas: MRP's claims of denial of due process, MRP's claim that the Authority did not adequately address the issue of burden of proof in its Final Order, MRP's allegations of improper conduct on the part of the TRA in the form of conflict of interest and ex parte communications, MRP's assertion that the TRA has acted in violation of the automatic bankruptcy stay, and MRP's argument that the TRA's actions in revoking MRP's certificate violate the preemption provisions of the federal Telecommunications Act of 1996.

I. MRP's Claims of Denial of Due Process

MRP's contentions of a denial of due process focus on events that occurred after the hearing in this matter. The two express claims of due process violations center around the Authority's discussion of the Consumer Advocate's Motion to Exercise Police Power which took place at the April 27, 1999 Conference and MRP's petition for reconsideration of the

Authority's May 11, 1999 Order, which reflected activity at the May 4, 1999 Conference. MRP elected not to be in attendance at either the April 27th or the May 4th Conference.

The protections guaranteed by due process prohibit administrative agencies such as the TRA from depriving any regulated entity of its liberty or property interests without first having provided a forum in which the regulated entity has appropriate notice of the contemplated action of the State and the ability to address the contemplated action in an appropriate and meaningful manner. In *Lee v. Ladd,* 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992), the Court of Appeals affirmed that the due process clause was "intended to secure the individual from the arbitrary exercise of the powers of government."[1] At a minimum, due process requires that persons whose rights are to be affected are entitled to notice and to be heard. The right to notice and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.[2] The Authority finds that both of these elements have been afforded to MRP in a meaningful manner throughout this proceeding.

A. MRP's May 21, 1999 Petition for Reconsideration

MRP's argument of a denial of due process in connection with its first Petition for Reconsideration (filed May 21, 1999) is without merit. The May 11, 1999 Order, was not the final order from which appellate rights would originate. MRP claims that its ability to file a timely and complete petition for reconsideration of the May 11, 1999 Order was curtailed when it did not receive a copy of that Order until May 17, 1999. Further, MRP complained that the Authority did not act on that Petition for Reconsideration. The Notice of Revocation, issued on April 27, 1999, specifically stated that "a written order memorializing this action of

[1] Quoating from *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 668 (1986).
[2] *See Baldwin v. Hale*, 68 U.S. 223, 233 (1863); *Palmer v. Columbia Gas of Ohio, Inc.* 479 F.2d 153, 165 (6th Cir. 1973); *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed. 2d 62, 85 S.Ct. 1187 (1965).

the agency and advising the parties of rights of reconsideration and judicial review will be forthcoming." The Authority's May 11, 1999 Order reflected action taken at the May 4, 1999 Conference concerning the implementation plans. That Order affirmed the Notice of Revocation, but did not set forth any of the findings of fact and/or conclusions of law upon which the Authority relied in its decision to revoke MRP's certification at the April 27, 1999 Conference.

The May 11, 1999 Order provided for reconsideration, but reconsideration of the May 11th Order would go toward the matters set forth within that Order. Further, MRP's petition for reconsideration filed on May 21, 1999 did not address the substantive matters set forth in May 11, 1999 Order, to wit: the Authority's consideration of an implementation plan for transitioning MRP's intrastate long distance customers to new intrastate long distance service providers. Tenn. Code Ann. § 4-5-317(c) provides 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." MRP's petition for reconsideration of the May 11, 1999 Order did not seek to address the issues that were the subject of that Order. When no action was taken on MRP's May 21st Petition within twenty days, it was deemed denied.

The Petition for Reconsideration filed by MRP on September 27, 1999 reiterates the grounds set forth in MRP's May 21st Petition, but it does address the substantive matters that are set forth in the Authority's September 16, 1999 Final Order. Thus, MRP has filed a petition for reconsideration of the Final Order which contains the findings of fact and conclusions of law from the April 27, 1999 Conference. MRP's allegations of a denial of due process in connection with reconsideration of the May 11, 1999 Order have become moot.

B. The Authority's Discussion of the Credibility of the Testimony of MRP witness, Drew Keena

In its Petition for Reconsideration, MRP asserts that the Authority improperly considered the allegations made against MRP and an MRP witness, Drew Keena, in a document filed by the Consumer Advocate Division, 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."[3] As pointed out in the Response filed by the Consumer Services Division, the discussion between the Directors of the Consumer Advocate's Motion was held after the Directors fully deliberated the merits of the case and voted to revoke MRP's certificate.[4]

The transcript of the April 27th Authority Conference demonstrates that after the Directors deliberated on the merits of MRP's violations, the discussion turned to whether MRP, after revocation of its certificate, could continue to serve customers in Tennessee through affiliates that might exist. The discussion of the Consumer Advocate's Motion and of the credibility of Mr. Keena's testimony during the hearing took place in the context of the discussion of possible affiliates of MRP.

In its letter filed with the Authority on April 5, 1999, MRP expressly declined to respond to the Consumer Advocate's Motion. MRP has never addressed the merits of the Consumer Advocate's Motion. MRP declined to attend the April 27th Authority Conference, when its interests were being determined, and thereby refused to avail itself of an opportunity to present its position on matters that were discussed at that Conference. Notwithstanding the aforementioned events, the Authority's Final Order of September 16, 1999 demonstrates that

[3] MRP's Petition for Reconsideration, (September 27, 1999), p. 4.
[4] See Transcript of April 27, 1999 Authority Conference, pp. 31-50.

the evidentiary record itself contains sufficient basis for calling into question the credibility of Mr. Keena's testimony.

II. Burden of Proof

The Authority rendered its finding on the issue of burden of proof on page 9 of the September 16, 1999 Final Order. That finding was based expressly on Tenn. Code Ann. § 65-2-109(5). Though MRP contends that the Final Order should have contained a discussion of whether the burden of producing evidence or the burden of persuasion belonged to MRP, the Final Order sufficiently and succinctly addressed the issue and concluded that the burden of proof under Tenn. Code Ann. § 65-2-109(5) rested with MRP. In its Petition, MRP relies on its arguments in its Proposed Findings of Fact and Conclusions of Law (hereinafter "Proposed Findings") in support of its contention that MRP had only the burden of production in this proceeding.

In its Proposed Findings, MRP asserted that the burden of proof in this show cause action rested with the TRA. MRP argued that the term "burden of proof" in Tenn. Code Ann. § 65-2-109(5) means the burden of production or of going forward with the evidence and not the burden of persuasion. Tenn. Code Ann. § 65-2-109(5) states:

> The burden of proof shall be on the party or parties asserting the affirmative of an issue; **provided, that when the authority has issued a show cause order pursuant to the provisions of this chapter, the burden of proof shall be on the parties thus directed to show cause.** (Emphasis supplied.)

This statute, which sets forth the assignment of burden of proof in conduct of contested case proceedings before the TRA, provides a specific exception to burden of proof in show cause proceedings before the TRA. The Authority complied with the requirements of Tenn. Code Ann. § 65-2-106 in the issuance of the Show Cause Order. It is clear from the face of the

Show Cause Order itself that the order sets forth *fully and specifically* the grounds upon which it is based. Further, MRP cannot assert in good faith that it was denied an opportunity to fully reply to the show cause order. MRP's reliance on the case of State vs. Hartley 1989 WL 44905 (Tenn. App. 1989) in support of its definition of "burden of proof" is misplaced because the Hartley decision was based on a different statute that did not contain the same language as Tenn. Code Ann. § 65-2-109.

MRP has failed to refute the fact that the statute, Tenn. Code Ann. § 65-2-109(5), specifically provides that MRP has the burden of proof in this proceeding, and further, MRP has failed to demonstrate that "burden of proof" as used in Tenn. Code Ann. § 65-2-109(5) means burden of production and not a burden of proof. The Authority's statement in its September 16, 1999 Final Order relative to the burden of proof adequately addresses the issue. MRP's argument that its position was not considered must fail.

III. MRP's Allegations of Conflict of Interest and Ex Parte Communications

In its Petition for Reconsideration, MRP accuses the TRA of having a conflict of interest and of engaging in ex parte communications in connection with legal representation provided by the Office of the Attorney General. MRP's allegations are set forth at paragraphs 3 and 4 of the Petition as follows:

> 3. The Attorney General of Tennessee has participated in this proceeding as an intervener [sic] and also has purported to represent and speak for the Authority in this proceeding. These dual and inconsistent roles were pointed out to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences the Attorney General's dual and inconsistent roles was attached as Exhibit 1 to the April 13, 1999 letter. The Attorney General's representation of the Authority in a proceeding before the Authority in which the Attorney General is an intervener [sic] constitutes an impermissible conflict of interest and has fatally infected

this entire proceeding. Although MRP timely raised this issue, the Authority Final Order does not purport to address or resolve it.

4. The Attorney General and the Authority apparently had *ex parte* communications about matters on which the Authority later made rulings. These apparent *ex parte* communications were pointed to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences these facts was attached as Exhibit 1 to the April 13, 1999 letter. The apparent *ex parte* communications between the Attorney General and the Authority regarding matters to be considered and ruled on by the Authority in a proceeding before the Authority in which the Attorney General is an intervener [sic] has fatally infected this entire proceeding.

On April 5, 1999, the Authority received the Walter Diercks' letter advising the Authority for the first time that MRP had filed a bankruptcy petition and specifically instructing the Authority to direct all correspondence regarding the MRP's bankruptcy or the automatic stay to MRP's bankruptcy counsel.

In accordance with MRP's request, the Authority, through its own bankruptcy counsel, Kathleen Ayres, Chief of the Bankruptcy Division of the Office of the Attorney General, directed its correspondence to MRP's bankruptcy counsel. In her letter of April 5, 1999, Ms. Ayres expressed her position regarding the automatic stay. Instead of receiving a response to Ms. Ayres' letter from MRP's bankruptcy counsel, Mr. Diercks replied to her correspondence by way of his letter of April 13, 1999. Contrary to his own assertions, Mr. Diercks, not MRP's bankruptcy counsel, responded to the bankruptcy issues raised in this proceeding. Further, in his letter of April 13, 1999, Mr. Diercks advised the Authority that MRP was not waiving "...its rights to raise any objection or issue it may have with respect to the conduct of the Authority or of the Tennessee Attorney General taken on behalf of the Authority..." including issues of conflict of interest and ex parte communications.

MRP's allegations of conflict of interest and ex parte communications evidence a lack of understanding on its part of the role of the Office of the Attorney General in Tennessee state government. Tennessee statutes specifically provide that the Attorney General's Office is the legal representative of state agencies and acts in coordination with other state agencies and attorneys. Tenn. Code Ann. § 8-6-301(a) provides as follows:

> (a) The attorney general and reporter, either in person or by assistant, shall represent all offices, departments, agencies, boards, commissions or instrumentalities of the state now in existence or which may hereafter be created. All legal services required by such offices, departments, agencies, boards, commissions or instrumentalities of the state shall be rendered by, or under the direction of, the attorney general and reporter. This section shall not prevent the various offices, departments, agencies, boards, commissions or instrumentalities of the state from employing other attorneys, working solely under the supervision and at the direction of the agency, for the purpose of conducting investigations, advising, consulting, and assisting the office, department, agency, board, commission or instrumentality in the administration of its duties.

In addition, Tenn. Code Ann. § 8-6-109(b), which sets forth the duties of the Attorney General, compels the TRA to involve the Office of the Attorney General in cases where state interests, such as issues of bankruptcy, may arise. Tenn. Code Ann. § 8-6-109(b) provides at subsections (1) and (5) as follows:

> (b) In addition to the duties described in subsection (a), the attorney general and reporter, or assistants acting at the attorney general and reporter's discretion, has the following duties:
>
> (1) The trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality of the state may be interested;
>
> (5) To give the governor, secretary of state, state treasurer, comptroller of the treasury, members of the general assembly and other state officials, when called upon, any legal advice required in the discharge of their official duties;

As the attorney for the State of Tennessee and all instrumentalities thereof, the Attorney General is ultimately responsible for control and supervision of all legal proceedings where the State of Tennessee's interests are involved. The TRA is under specific instructions to notify the Office of the Attorney General in the event that the State may become involved in a bankruptcy proceeding.

The Consumer Advocate's Response to MRP's Petition addresses the issues raised by MRP's assertions of conflict of interest and ex parte communications. Though a part of the Office of the Attorney General, the Consumer Advocate is a separate division of that Office. The TRA, as a state agency, cannot be prevented from obtaining legal representation from the Attorney General merely because the Consumer Advocate is a part the Attorney General's Office. The Consumer Advocate's Response demonstrates that there was no communication between the Attorney General's bankruptcy division and the Consumer Advocate concerning the issues in this case. Apart from its bold allegation, MRP has not demonstrated that any such communication ever took place.

Further, MRP relies on no case law or statute to support its accusations that Ms. Ayres' representation of the TRA in contacting MRP's bankruptcy counsel was in any way improper. The Directors of the Authority find no validity to MRP's allegations; these allegations are simply an attempt by MRP to cloud the real issues in this case.

IV. MRP's Claim that the Authority has Acted in Violation of the Automatic Bankruptcy Stay

In its Petition for Reconsideration, MRP reargues its claim that the Authority, in deciding this case and in revoking the Certificate of MRP, acted in violation of the automatic stay imposed in certain circumstances by Section 362 of the Bankruptcy Code (11 U.S.C. §

362). In its Petition, MRP asserts 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."[5] MRP initially made this assertion in its letter of April 2, 1999 to the Authority wherein it relied on the case of *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). MRP also relied on the *Fugazy* case in Mr. Dierck's letter of April 13, 1999 which informed the Authority that MRP would not be filing a brief on the jurisdictional issues in the case as directed by the Authority's Notice of April 7, 1999.

TRA Chairman Melvin Malone, acting as Hearing Officer, entered his order on April 16, 1999, finding that the TRA is excepted from the provisions of the automatic stay in determining whether MRP has operated in violation of the laws of the State of Tennessee. MRP offered no challenge to that Order and it became final on April 26, 1999. The conclusions of law contained in that Order were based upon legal authority which would bind the bankruptcy court in New Jersey, were this issue to come before it. On the issue of the jurisdiction of the TRA to determine the applicability of the automatic stay, the Hearing Officer noted:

> The United States Court of Appeals for the Third Circuit has determined that "[t]he court in which the litigation claimed to be stayed is pending thus '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.'" The United States Court of Appeals for the Sixth Circuit has reached the same conclusion. (Footnotes omitted.) *Order of Hearing Officer Regarding Jurisdiction*, April 16, 1999, pp. 7-8.

[5] MRP's Petition for Reconsideration (September 27, 1999), pp. 3-4.

Further, on the issue the application of the automatic stay, the Hearing Officer found that the TRA is not barred by § 362 of the Bankruptcy Code from issuing a decision on the merits of the Show Cause Order. Specifically, the Hearing Officer stated:

> the Third Circuit has on many occasions held that § 362 exempts actions "brought by state and federal agencies to correct violations of regulatory statutes enacted to promote health and safety." Virtually each decision repeats the legislative history which states that "paragraph (4) [of § 362(b)] provides an exception to the automatic stay 'where a governmental unit is suing a debtor to stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law.'" (Footnotes omitted.) *Order of Hearing Officer Regarding Jurisdiction*, April 16, 1999, p. 9.

MRP has brought forth nothing new in the way of argument or case law in its Petition for Reconsideration to demonstrate that the automatic stay applies to this proceeding. Therefore, MRP's claim that the Authority acted in violation of the automatic bankruptcy stay, is without merit.

V. MRP's Assertion that the Authority's revocation of MRP's certification violates the preemption provisions of the Federal Telecommunications Act

In its Petition, MRP asserts that it is entitled to have the Authority's Final Order rescinded because the TRA's revocation of its 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)."[6] MRP further contends that "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

[6] MRP's Petition for Reconsideration (September 27, 1999), p. 2.

all state regulation concerning the switching of a telephone subscriber's long distance provider."[7]

The Federal Telecommunications Act of 1996 ("the Act") grants the Federal Communications Commission ("FCC") the authority to regulate "interstate and foreign commerce in wire and radio communication," (47 U.S.C. § 151), while expressly denying the FCC "jurisdiction with respect to ... intrastate communication service ..." (47 U.S.C. § 152(b)). Clearly, Congress intended that there be a delineation between authority over interstate and intrastate service. The Authority's actions in revoking MRP's certification dealt solely with MRP's provision of intrastate long distance service to consumers within the state of Tennessee and did not seek to impinge on interstate services.

MRP's Petition alleges that the Authority is preempted from acting in slamming cases because interstate and intrastate services are so "inextricably intertwined" that federal law controls. The FCC has spoken on the issue of state jurisdiction in cases involving slamming in its *Second Report and Order And Further Notice of Proposed Rulemaking* (In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, Released: December 23, 1998) ("Second Report"). In that Second Report, the FCC commented that

> The states and the Commission have a long history of working together to combat slamming, and we conclude that state involvement is of greater importance than ever before. We conclude that the Commission must work hand-in-hand with the states for the common purpose of eliminating slamming. In the context of this partnership, we expect the states and the Commission to continue sharing information about slamming and to develop together new and creative solutions to combat slamming. See *FCC Second Report*, Par. 86 (1998).

[7] MRP's Petition for Reconsideration (September 27, 1999), pp. 2-3.

The language in this report clearly demonstrates that the FCC allows and encourages state regulation in slamming cases.

MRP's argument that the Authority is attempting to regulate interstate services is without merit. The plain language of 47 U.S.C. § 258, as set forth below, gives the states regulatory authority in slamming cases with respect to intrastate services:

> ILLEGAL CHANGES IN SUBSCRIBER CARRIER SELECTIONS.
>
> (a) Prohibition. - **No telecommunications carrier shall submit or execute a change in a subscriber's selection** of a provider of telephone exchange service or telephone toll service **except in accordance with such verification procedures** as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.
>
> (b) Liability for Charges. - Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation, in accordance with such procedures as the commission may prescribe. **The remedies provided by this subsection are in addition to any other remedies available by law.** (Emphasis supplied.)

Furthermore, Section 258 became a part of the Communications Act of 1934 through the amending provisions of the Act. The Act also included Section 601(c) which expressly states that such amendments do not modify or impair state law unless expressly so provided in the Act.[8]

Moreover, regulation of slamming and enforcement of such laws has been shared with, if not delegated to, the states by the Act. In its Second Report the FCC states at paragraph 89:

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[8] Title VI – Effect on Other Laws
Section 601. Applicability of Consent Degrees and Other Law.

(c) Federal, State, and Local Law
(1) No implied effect. - This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

> Section 258 (of the Act) expressly grants to the states authority to enforce the Commission's verification procedure rules with respect to intrastate services. A state therefore may commence proceedings against a carrier for violation of the Commission's rules governing changes to a subscriber's intrastate service. We conclude that enforcement is another area in which the states and the Commission may work together to eradicate slamming. A single unauthorized change may result in the switching of both a subscriber's intrastate and interstate service in violation of the Commission's verification procedures. In the case of an unauthorized change that results in changes to intrastate and interstate service, a state's proceeding to enforce the Commission's rules with respect to the intrastate violation will yield factual findings regarding the interstate violation as well. The state's factual finding in such a case will be given great weight in the Commission's proceeding to determine whether the carrier violated the Commission's interstate verification procedures. This will help to deter slamming by expediting the resolution of slamming complaints on a nationwide basis. We conclude that state regulation of carrier changes in the intrastate market that is compatible with our rules, along with state enforcement of our rules regarding carrier changes in the intrastate market, will enable states to play a valuable and essential role in the partnership with the Commission to combat slamming and protect consumers. (Pages 58-61) [9]

While the FCC's Second Report was issued after the Authority completed the hearing in this case, it is informative on the issue of whether the TRA's actions should be preempted because MRP's intrastate and interstate operations are allegedly "intertwined." Neither Section 258 of the Act nor FCC orders and reports express or imply absolute federal preemption of state regulatory activity in the area of slamming. MRP has failed to demonstrate that the TRA's actions should be preempted where MRP has been adjudicated and found in violation of Tennessee statutes and Authority rules prohibiting slamming.

Based upon the above findings and conclusions, the Directors of the Authority voted unanimously to deny MRP's Petition for Reconsideration.

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[9] *Second Report and Order And Further Notice of Proposed Rulemaking* (In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, Released: December 23, 1998).

IT IS THEREFORE ORDERED THAT:

Minimum Rate Pricing, Inc.'s Petition for Reconsideration of the Authority's September 16, 1999 Final Order is Denied.

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary