BEFORE THE
TENNESSEE REGULATORY AUTHORITY

'99 JUL 21 PM 5 03

EXECUTIVE SECRETARY

In the Matter of the Application of	)	
	)	
NA Communications, Inc.	)	
	)	
for a Certificate of Convenience	)	
and Necessity to Provide Local Exchange,	)	Docket No.98-00597
Exchange Access, and Interexchange	)	
Telecommunications Services	)	
Throughout the State of Tennessee	)	

MOTION IN LIMINE AND
REQUEST FOR PRE-HEARING CONFERENCE EN BANC

NA Communications, Inc. ("NACI," "company," or the "Applicant"), by undersigned counsel, hereby submits the following motion in limine and request for pre-hearing conference *en banc* pursuant to T.C.A. Sections 4-5-306 and 4-5-308. NACI requests expedited treatment of the motion and requests that a pre-hearing conference *en banc* be scheduled to take place on Tuesday, July 27, 1999 so that the issues raised herein may be addressed and decided by the Directors prior to the July 28, 1999 hearing on NACI's above-referenced application.

I. Introduction

NACI was established under the laws of Virginia in September 1997 in order to provide telecommunications service in rural, underserved areas of Tennessee and Virginia. NACI is a wholly owned subsidiary of NetAccess, Inc. NetAccess, Inc. was established in July of 1995 to provide high-speed Internet service in remote areas of Tennessee and Virginia that previously did not have access to such service. NetAccess, Inc. provides Internet service to over 13,450 customers in Tennessee and in Virginia. NACI obtained a certificate to provide facilities-based and resold local exchange telecommunications and interexchange service in Virginia on March

31, 1998, and by September 1, 1998 had implemented over 200 phone lines on a resale basis in Virginia. NACI currently provides facilities-based and resold local exchange telecommunications service to over 400 customers in Southwestern Virginia.

NACI has invested a great deal of time and capital both in terms of equipment (including state-of-the-art switching equipment) and extensive technical training in order to provide high-quality telecommunications service to its customers. For example, NACI installed DXC Class 4 Tandem switching equipment with SS7 to provide local exchange telecommunications service in Virginia, and plans to purchase switching equipment in Tennessee as soon as it obtains authority to provide telecommunications service in Tennessee.

NACI has filled a substantial public need in Southwestern Virginia, and looks forward to serving customers in underserved areas of Tennessee. Consumers in these areas traditionally have not had the availability of choice in telecommunications service that has been available to consumers in larger metropolitan areas, and service between communities in these areas has been expensive. NACI's goal is to provide high-quality, lower cost service to Tennessee consumers, with an emphasis on providing service to Tennessee consumers in underserved areas. In this case, NACI also intends to provide advanced telecommunications services that are not currently being offered by any other carrier in rural areas. NACI submits that its entry into the Tennessee local exchange and intrastate interexchange markets will provide Tennessee consumers with a wider array of choices and services, including advanced technology telecommunications services.

II. Background

NACI filed its application with the Tennessee Regulatory Authority ("TRA") on August

28, 1998. Staff reviewed the application and issued data requests to which NACI responded, and a hearing was scheduled to take place on October 27, 1998. On October 19, 1998, Staff informed NACI's attorney that the hearing would not be held on October 27th as scheduled, and requested that the Applicant "waive" the statutory 60-day review period. Staff requested additional information from NACI, and NACI has fully complied with all such requests.

In November 1998, NACI counsel learned that Staff had received an anonymous informal communication from a third party, later identified as an officer of a competitor of NACI. This communication to Staff was not supported by sufficient information to permit staff to evaluate the credibility or context of the informal communications themselves, or the "information" provided by this third party.[1] Staff appropriately treated the communication as confidential and apparently found the communication to be peripheral. Staff has now determined that it will defer the issue of how to handle the communications to the Authority.

III. Argument

This third party communications should be excluded from consideration. The communications lack relevance and materiality to the issues concerning NACI's application and thus should be excluded from consideration by the Authority and from the public record. Specifically, the third party communication by a NACI competitor does not concern the company's current officers or management, does not pertain to the provision of the telecommunications services, nor does it provide probative value to any other issue in this proceeding.

Clearly, gratuitous information offered informally by a non-party competitor may

[1] In addition to oral communications, the third party provided a document containing hearsay of others.

properly be excluded where, as here, that information lacks relevance and is immaterial. The governing Tennessee statute provides that an agency "shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious." T.C.A. § 4-5-313. The TRA's rules of evidence similarly provide that "the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence." T.C.A. § 65- 2-109.

The statements involve a matter that is over ten years old, and which occurred many years before NACI came into existence. The document offered by the non-party competitor lacks a credible context, as the non-party has supplied staff only with selected excerpts from a document whose author is unknown. In sum, the informal communication lacks credibility, is not susceptible to cross-examination or impeachment, and is immaterial. This type of "information" is inadmissible hearsay and should not be considered. Whiting v. Thomas Yount, Commissioner of Employment Security, 1985 Tenn. App. Lexis 2722 (1985). (See Attachment A.)

Information such as that at issue also has no probative value because, as unsworn hearsay, it is impossible to accord it credibility or relevance, and it therefore must be excluded. Show Cause Proceeding v. Minimum Rate Pricing, Inc. (TRA slip opinion) Docket No. 98-00018 (Feb. 1999). (See Attachment B.) In that case, the TRA, recognizing that "the Tennessee legislature has serious reservations about the probative value of hearsay testimony," excluded unsworn hearsay evidence from the record. Id.

Moreover, the TRA has the ability to treat certain information or documents as "confidential" if their disclosure would be injurious to a company. In fact, on several occasions, the Authority has entered protective orders recognizing the confidential nature of certain documents, and prohibiting their disclosure to the public. In most instances, it is the proprietary

nature of information and the potential negative impacts on competition that may result if the information is disclosed to the public that prompt designation of the information as "confidential." In the current case, the manner in which the communications were made to Staff and the source of such communications provides evidence in and of itself that this information is intended to be used against the Applicant for anticompetitive purposes. NACI respectfully requests that, should the Directors request information concerning the substance of the communications, any discussion on the matter be off the record. In the alternative, NACI requests that if any discussion concerning the substance of the communications in question is made on the record, such communications should be redacted from the record, or at the very least, those portions of the transcript reflecting those discussions, or any other documents submitted concerning the substance of these communications, be treated as "confidential" and placed under seal pursuant to a protective order.

In conclusion, NACI has responded fully to all requests for information from the TRA Staff and the record is replete with relevant evidence supporting NACI's application. No parties have intervened in this case and the application is uncontested. The information NACI seeks to exclude does not constitute evidence nor does it inform any issue before the TRA. Indeed, such information, which is based on incomplete and immaterial information and innuendo, was offered for anticompetitive purposes, by a non-party competitor who seeks to prejudice the application of NACI.

IV. Conclusion

For these reasons, and in order to address these issues prior to the hearing on NACI's application, NACI requests that the Authority schedule a prehearing conference *en banc,* with all

Directors in attendance, to take place on Tuesday, July 27, 1999 (after the Authority's regularly scheduled conference) so that NACI may further present its position on the proper exclusion of the informal communications and information at issue. Due to the confidential nature of the issues presented and the danger of competitive harm to the Applicant, NACI requests that the Directors address this issue *en banc*, rather than assigning the matter to a hearing officer or other Authority representative. NACI further requests that the TRA find that the informal communications and information are immaterial and irrelevant. NACI also requests that any discussion on the substance of these informal communications and information be held off the record at the pre-hearing conference; or, in the alternative, that any portion of the transcript reflecting such discussions or any other documents submitted into the record concerning these communications be treated as "confidential" and placed under seal pursuant to a protective order.

Respectfully submitted,

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Counsel for NA Communications, Inc.

Date: July 21, 1999

ATTACHMENT A

LEVEL 1 - 18 OF 21 CASES

ROBERT WHITING, Plaintiff/Appellant, v. THOMAS YOUNT, Commissioner of the Department of Employment Security, and CLEMCO, INC., Defendants/Appellees.

Court of Appeals of Tennessee, Western Section at Jackson

1985 Tenn. App. LEXIS 2722

March 7, 1985

PRIOR HISTORY: [*1]

SHELBY EQUITY

HON. NEAL SMALL, Chancellor

DISPOSITION: REVERSED AND REMANDED

COUNSEL: KAREN P. DENNIS, MEMPHIS AREA LEGAL SERVICES, INC., Attorney for Plaintiff/Appellant.

DIANNE STAMEY, Assistant Attorney General, Nashville, Attorney for Defendants/Appellees.

JUDGES: Tomlin, J. wrote the opinion. CRAWFORD, J. (Concurs), HIGHERS, J. (Concurs)

OPINIONBY: Tomlin

OPINION: TOMLIN, J.

This is an unemployment compensation case. The claimant appeals from a decree of the Chancery Court of Shelby County affirming the decision of the Board of Review that he is disqualified from receiving benefits because of "misconduct connected with his work," more specifically defined in T.C.A. § 50-7-303(2)(B). The principal and controlling issue presented by this appeal is whether or not there is any evidence in the record to support the decree of the chancellor affirming the action of the Board of Review of the Department of Employment Security. We hold that the action of the chancellor is not supported by the evidence.

The claimant was employed by Clemco, Inc. of Memphis from August 6, 1973 to December 21, 1981 when, according to his Separation Notice, he was dismissed for "[k]nowingly mixing scrap parts [*2] with good parts and failure to properly report scrap parts." Some two months before his dismissal, claimant had received one written warning stating that he performed inadequately in a number of areas, including incorrect set-ups, scheduling and paperwork errors, and failure to have jobs inspected properly.

The claimant filed his claim for unemployment compensation benefits shortly after being discharged and alleged that he was fired because he testified in a judicial hearing on behalf of another employee who had been fired earlier. Having been called upon by the Tennessee Department of Employment Security to respond, the employer stated that claimant "was discharged for knowingly mixing scrap parts with good parts and failing to properly report scrap parts." In accordance with DES procedures, the claim was first reviewed and considered at the agency level. The agency denied the claim, finding the claimant guilty of simple misconduct under T.C.A. § 50-1324(B) (2), now codified as T.C.A. § 50-7-303 (2)(B) (Supp. 1983). Section 50-7-303(2)(B) reads in part as follows:

50-7-303. Disqualification for benefits. — An individual shall be disqualified for benefits:

(2) . . . [*3] .

(B) If the commissioner finds that an individual has been discharged from his most recent work for misconduct connected with his work (other than the gross misconduct mentioned in subdivision (2)(A) of this section), he shall be disqualified for the duration of the ensuing period of unemployment and until he has secured subsequent employment covered by an unemployment compensation law of this state, or another state, or of the United States, and earned thereby ten (10) times his weekly benefit amount.

The claimant appealed the agency decision to the Appeals Tribunal who first held a hearing on March 9, 1982. Since the employer had asked for a rescheduling of the hearing, the Appeals Tribunal proceeded to take proof from the claimant alone. Claimant testified that the quality of four axles, specifically as to the length thereof, had been questioned, but that he had talked to the quality control officer, one Jim Minton, who had told him that the axles were all right. Claimant said that later, a fellowemployee, Ed Cloud, and Minton went

through a batch of axles and found eight were too short. The claimant testified that he had denied this had taken place with his knowledge and [*4] that he had always reported scrap to quality control. It should be noted that claimant's position of employment at that time was "shop lead man," and he had some four or five employees, principally lathe operators, working under him. It was his responsibility to set up the lathes for the other employees and to monitor their work from time to time. Claimant testified that he was trying to meet the work schedule the best he could. At the time of his discharge he stated that he was told by another employee that he would not have been laid off had he not testified for another employee who had been fired.

At a subsequent hearing conducted by the Appeals Tribunal, proof was taken from the employer who was represented by the Personnel Manager of the plant. The claimant was present but was not represented by counsel.

From reading the testimony of the Personnel Manager, it is evident that he had no first-hand knowledge whatsoever of the facts surrounding the alleged improper fabrication of the axles or how and why they were found located in a bin containing axles of satisfactory quality. In his testimony, the Personnel Manager quoted statements made to him by Chuck Howard, a foreman, [*5] Jim Minton, a quality control officer, and Ed Cloud, a new employee working under the claimant, concerning the events that led to claimant's dismissal.

The decision of the Appeals Tribunal contained the following findings and conclusions, in part:

FINDINGS OF FACT: The claimant's most recent wage paying work prior to filing this claim on December 28, 1981, was with Clemco, Inc., Memphis, Tennessee, from August 6, 1973 until December 21, 1981. The claimant was discharged for mixing scrap parts with good parts and for failing to report the fact that eight axles did not meet specifications. The claimant received a written warning in October, 1981, for incorrect setups, causing rework, scrap and poor efficiency.

COMMENT: After a review of the record and the testimony offered at the hearing, it is the opinion of the Appeals Tribunal that no error has been shown in the Agency decision hereinabove set out.

DECISION: The determination of the Agency, which disallowed this claim under Section 50-1324 B (2) of the TCA, is in all matters affirmed, as is the non-charge heretofore awarded the above mentioned employer.

In accordance with the provisions of T.C.A. § 50-7-304, the claimant [*6] appealed to the Board of Review. Under the statute above cited, the Board of Review considers the decision of the Appeals Tribunal on the basis of evidence previously submitted in the case, or it may direct the taking of additional proof. A notice of the filing of the appeal was sent to both the claimant and the employer. This form letter inquired of both parties the nature of any new evidence or testimony they might wish to present to the Board of Review and whether there were "any documents, legal briefs or written material" that the parties might wish to present. No additional proof was called for by the Board.

Neither the claimant nor the employer requested to submit to the Board any "new evidence or testimony." However, the employer filed with the Board of Review, as "written material," sworn affidavits of Tim Lawrence, Jim Minton, and James E. Cloud. The cover letter from the employer's attorney to the Board of Review stated that these three men were employed at Clemco at the time of Whiting's discharge. There is nothing in the record to indicate that copies of those affidavits were ever furnished claimant, and claimant states in his brief, that he never received notice [*7] that they were filed, nor did he see the affidavits until after the decision of the Board of Review.

The decision of the Board of Review recited the review procedure that had been followed previously in this claim and then stated:

No further hearing was held by the Board of Review, but a review of the entire record was made.

FINDINGS OF FACT: Based upon the entire record in this cause, the Board of Review finds the Appeals Tribunal correctly found the facts and applied the law. We hereby adopt the findings of fact and decision of the Appeals Tribunal but the same need not be copied herein for the purpose of our decision.

DECISION: The decision of the Appeals Tribunal, which disallowed this claim under TCA 50-1324 B (2), is in all things and matters affirmed . . . .

I. SUFFICIENCY OF THE EVIDENCE.

Our scope of review as set forth in T.C.A. § 50-7-304 (i), reads in part as follows:

(i) COURT REVIEW . . . . In any judicial proceeding under this section, the findings of the board of review as to the facts, if there be any evidence to support the same, shall be conclusive and the jurisdiction of said court shall be confined to questions of law.

The case law of this state [*8] places the burden of proof squarely upon the employer to prove that the claimant is disqualified from receiving unemployment benefits. *Weaver v. Wallace, 565 S.W.2d 867 (Tenn.*

1978). Furthermore, when this Court, as well as the trial court, reviews the findings of fact of a Board of Review, we are to apply the law to facts not in dispute without indulging in any presumption of correctness of the board's conclusion as reached from those facts, and the findings of the Board of Review are conclusive upon this Court only if there is evidence to support them. *Wallace v. Sullivan, 561 S.W.2d 452 (Tenn. 1978)*.

The issue with which we are dealing is in essence whether or not there is evidence to support the findings below that the claimant's actions on the job amounted to misconduct within the meaning of the unemployment compensation statute so as to disqualify him from receiving benefits. The unemployment compensation statute was designed by the General Assembly to have misconduct connected with employment determined on a case-by-case basis. *Wallace v. Stewart, 559 S.W.2d 647 (Tenn. 1977)*.

Our Supreme Court has provided guidelines for state agencies in determining disqualification [*9] for "misconduct connected with his work." In *Weaver v. Wallace, supra,* our Supreme Court stated:

The unemployment compensation statutes were enacted for the benefit of unemployed workmen and are to receive a liberal interpretation by the courts. *Milne Chair Company v. Hake, 190 Tenn. 395, 230 S.W.2d 393 (1950)*. The disqualification because of "misconduct connected with their work" provision, being penal in nature, is to be construed liberally in favor of the employee so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception. (citations omitted).
565 S.W.2d at 869-70.

We agree with the Supreme Court in Weaver when they stated that there are very few reported cases dealing with the scope and meaning of the phrase "misconduct connected with the work." The Court in Weaver cited, with approval, *Boynton Cab Company v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941)*. In Boynton, the Wisconsin Court described "misconduct connected with the work" stating:

If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar [*10] minor peccadilloes must be considered to be within the term "misconduct", and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated, as to many of the freat mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a lay-off, which is apt to be most serious to such workers.
Id. at 640.

In *Babcock v. Employment Division, 550 P.2d 1233 (Ore. Ct. App. 1976)*, the Oregon Appellate Court, discussing misconduct as a disqualification under an Oregon statute containing language almost identical to ours, stated:

"'. . . the term should be construed in a manner least favorable to working a forefeiture so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception. . . .

"'. . . [M]isconduct does not mean mere mistakes, inefficiency, [*11] unsatisfactory conduct, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good-faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, and similar minor pecadilloes. Thus, ordinarily, a single instance of misconduct would not disqualify a claimant . . . .' (Emphasis supplied.)" *24 Or.App. 204-05, 544 P.2d 1067-68*, quoting with approval from 76 Am.Jur.2d, supra at 945-47.
Id. at 1235.

The admissibility of evidence in unemployment compensation cases is governed by T.C.A. § 4-5-313(1) (Supp. 1984), which reads as follows:

Rules of evidence -- Affidavits -- Official notice. -- In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, ~~evidence not admissible~~ thereunder may be admitted if it is of a type commonly relied upon by ~~reasonably prudent men in the conduct~~ of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality [*12] of certain records and shall exclude evidence which in its judgment is irrelevant, immaterial, or unduly repetitious.

As may be seen from the above-quoted language, while this agency must generally follow the same rules of evidence utilized by a court of law, the statute creates an ~~exception allowing more liberal use of~~ evidence. It clearly appears from the record that the three fellow employees of the claimant who observed the activity that formed the basis for claimant's dismissal were still working for the employer and ~~thus would have been~~ available to tes-

rify at the hearing before either the Appeals Tribunal or the Board of Review. Therefore, the facts within their specific knowledge were reasonably susceptible to proof under the rules of court.

These affidavits, nothing more than factual evidence, should not have been allowed to have been filed with any by the Board of Review as additional "written material." The affidavits were not only submitted without the knowledge of the claimant, but were incapable of being cross-examined. We are of the opinion that these affidavits were inadmissible hearsay and should not have been considered by the Board of Review.

Without the [*13] affidavits and the hearsay statements of the Personnel Manager there is no competent evidence in the record of any misconduct on the part of the claimant. Having so found, it is not necessary for us to rule on the additional issues presented. The burden of providing misconduct rests with the employer and, having failed to carry its burden, the decree of the chancery court is reversed and this cause is remanded to the trial court for entry of a decree allowing claimant to draw unemployment benefits. Costs in this cause are taxed to the defendants, for which execution may issue, if necessary.

CRAWFORD, J. (Concurs), HIGHERS, J. (Concurs)

ATTACHMENT B

1ST DECISION of Level 1 printed in FULL format.

PUBLIC UTILITIES REPORTS - FOURTH SERIES

TENNESSEE

Show Cause Proceeding v. Minimum Rate Pricing, Inc.

Docket No. 98-00018

Tennessee Regulatory Authority

Slip Opinion

February 19, 1999

SYNOPSIS:

BY THE COMMISSION:

MINIMUM RATE PRICING, INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW n1

This matter comes before the Tennessee Regulatory Authority ("TRA") as a result of an Order to Show Cause issued by the TRA on July 27th 1998, against Minimum Rate Pricing, Inc. ("MRP"). Based on the evidence in the record and the applicable law, the TRA should determine that MRP should not have its Certificate of Authority to operate in Tennessee revoked based on the allegations set forth in the Order and that MRP should not be found liable for any significant penalty.

The Order to Show Cause entered by the TRA alleged that MRP had violated the following TRA rules: 1220-4-2-.56, 1220-4-2-.13(3) and 1220-4-2-.57. As fully addressed below, the record in this proceeding demonstrates that MRP has not violated these rules to the extent alleged by the Staff and its few mistakes do not justify revocation of its certificate of authority in Tennessee or the imposition of any significant penalty.

FINDINGS OF FACT

MRP is in the business of selling long distance telephone services to business and residential customers in Tennessee and many other states. MRP provides long distance service to approximately 17,000 customers in Tennessee. MRP's Pre-filed Rebuttal Testimony at 3. MRP buys long distance telephone time from facilities-based carriers and resells this long distance time to its business and residential customers. In the parlance of the telecommunications industry, MRP is a "reseller." MRP is located at 150 Commerce Road, Cedar Grove, New Jersey. MRP's Pre-Filed Direct Testimony at 1.

When MRP solicited customers, it did so by making telephone solicitations to

business and residential telephone customers. MRP hired telemarketing companies to conduct the solicitation. Employees of MRP were not used to make telephone solicitations. MRP's Pre-Filed Direct Testimony at 1; Transcript at 321, lines 3-8. During the solicitation process, the telemarketer followed a script specified by MRP in making the marketing presentation to the potential customer. MRP's Pre-Filed Direct Testimony at 1. MRP trained and instructed the telemarketers to strictly adhere to the script. MRP's Pre-Filed Direct Testimony at 1. MRP assured compliance with the scripts provided to the telemarketers by MRP by randomly monitoring the telephone conversations of the telemarketers. MRP's Pre-Filed Direct Testimony at 1.

After an order for MRP long distance service was taken by a telemarketer, the consumer was customarily transferred to another individual employed by the telemarketing agency to confirm that the order was properly taken and that the customer was given correct information. MRP required the telemarketers to record the confirmation portion of a telemarketing solicitations for quality assurance purposes. Transcript at 301, lines 14-18. The majority of confirmation tapes were listened to by MRP's quality assurance department to ensure that orders were properly taken. Transcript at 302, lines 10-13. MRP employed over two hundred individuals to listen to the confirmation tapes and determine whether the telemarketers had adhered to the script and whether the customers had affirmatively answered the questions posed to them in the confirmation portion of the solicitation. Transcript at 302, lines 9-22. If the order had not been properly taken, it would have been rejected by MRP and would not have been processed. MRP's Pre-Filed Direct Testimony at 1; Transcript at 302, lines 13-22.

Once the MRP quality assurance department accepted the order, a written "verification" package was sent to the new customer. MRP's Pre-Filed Direct Testimony at 3. Included therein was a mailer by which the customer could cancel the new service by mailing the card to MRP within 14 days. MRP's Pre-Filed Direct Testimony at 3. MRP's internal policy was not to activate the customer until 15 days had elapsed. MRP's Pre-Filed Direct Testimony at 3. The written package also provided the new customer with a rate chart for intrastate long distance calls and international long distance calls. MRP's Pre-Filed Direct Testimony at 3. Each verification package contained a Business Reply postcard which a customer could use to cancel the change before it occurred. The postcard provided a box for checking the following statement: "I've changed my mind. Please cancel my order." That statement was in the same large font as the other possible responses on the postcard. MRP's Pre-Filed Direct Testimony at 3. In addition, MRP included, underneath that statement, the following language for emphasis: "To prevent MRP long distance service conversion, this card must be returned within 14 days of this mailing." MRP's Pre-Filed Direct Testimony at 3.

If a customer called in to MRP to cancel the order before the order had been processed, an MRP customer service representative would key in the phone number of the caller and press a preassigned "hotkey." When the data entry department later attempted to enter this order, the computer would not allow the order to be processed. MRP's Pre-Filed Direct Testimony at 3.

Since its inception, MRP has utilized the "verification" package method of verification. MRP's Pre-Filed Direct Testimony at 1; Transcript p. 333, lines 6-11. MRP determined that the "verification" package was the best method of verification because it allowed for a "cooling off" period for the customer.

Transcript at 333, lines 19-22. MRP has never used an independent third party verifier to meet the regulations of the FCC or the TRA. Transcript at 301, lines 14-18. As such, MRP never indicated or represented to the TRA that it used independent third party verification.

MRP ceased soliciting customers across the country in mid-July. MRP gave notice on July 8, 1999 to the telemarketing agencies to cease soliciting customers on behalf of MRP. Transcript at 312, lines 17-22; 322, lines 4-17; 1058, line 21 to 1059, line 10; 1065, lines 20-22.

In its original federal tariff filed with the FCC MRP included the following provision:

A Customer may cancel Service by giving written or verbal notice to the Company. Such notice should be addressed to the Company's Customer Service organization at the address specified in Section 2.8.1 of this tariff. The Company requires such notification to protect the Customer from unauthorized account transfer or "slamming." If the Company is not notified accordingly, the Company may reinstate Customer's account by implementation of its automatic provisioning system. The Company will confirm all cancellations within five (5) business days. Additionally, in the event that the automatic polling system determines the Customer is no longer receiving Service, the Customer may be reinstated and a written reinstatement notice will be sent to the Customer within five (5) business days. Section 2.9 of MRP's original FCC Tariff, Exhibit 17.

The FCC never made a finding of liability with regard to the immediately preceding provision. MRP's Pre-Filed Direct Testimony at 4; Transcript at 307, line 23 to 308, line 1. On November 24, 1997, MRP voluntarily amended its FCC tariff to withdraw the provision authorizing its practice of reinstating a subscriber with MRP's long distance service unless the subscriber informed MRP directly, in writing. Since MRP had withdrawn that provision from the FCC tariff on November 24, 1997, it terminated the practice of reprovisioning in every state on that date. MRP's Pre-Filed Direct Testimony at 4; Transcript at 704, line 19 to 705, line 5. Despite Mr. Roberson's statement accusing Mr. Keena of misrepresenting the FCC's position with regard to MRP, Mr. Roberson had no knowledge of whether problems persisted at the FCC with regard to MRP or that the FCC had determined liability on the part of MRP. Transcript at 921, lines 14-21. Indeed, the FCC entered a Consent Decree with MRP on December 18, 1998, under which MRP will continue to provide long distance service. Exhibit 10A.

MRP altered its marketing strategy significantly in January 1998, including its pricing method. Transcript at 327, line 19 to 328, line 3. MRP significantly altered its telemarketing scripts in January 1998. Transcript at 329, line 21 to 330, line 2. The majority of complaints referenced by the Staff in this proceeding were based on solicitations which took place in 1997. Exhibit 28.

As soon as a subscriber's complaint is received by MRP, it is reviewed to determine the customer's concern. MPR's Pre-filed Testimony at 5. If the complaint concerns allegations of an unauthorized Primary Interexchange Carrier (PIC) change or a representation which can be investigated by listening to the verification tape, the tape is retrieved, if possible. Id. At that point, a customer service representative at MRP contacts the customer and discusses the concern with the customer. Id. If the tape is available, the customer service representative may ask the customer to listen to the tape in order to clear up

any misunderstandings. Id.

At that point, the MRP representative generally attempts to satisfy the customer, regardless of the actual merit of the complaint, by reimbursing the customer for change charges or other charges that the customer feels were excessive or inappropriate. MRP's Pre-Filed Direct Testimony at 6; Transcript at 111, lines 3-19; 145, lines 2-7; 195, lines 22-25 to 196, lines 1-4; 230, lines 13-18. MRP reimbursed Mr. Igor Popovic (witness offered by TRA Staff) for the rate difference between MRP's rate and that of Mr. Popovic's previous carrier. Transcript 268, lines 8-10. MRP reimbursed Mr. Nicolas Kubli (witness offered by TRA Staff) for any amount he was charged by MRP after his long distance service provider was erroneously switched by MRP. Transcript at 195, lines 22-25. MRP offered to reimburse Mr. Ronald Highsmith (witness offered by TRA Staff) for the difference in rates between MRP's rates and the rates he had been paying for his previous carrier. Transcript at 111, lines 11-19. MRP credited Ms. Betty Collins (witness offered by TRA Staff) for her charges for the time after she notified MRP that she did not wish to use MRP as her long distance service provider. Transcript at 142, lines 23-24 and 145, lines 2-4. MRP reimbursed Captain George Helm (witness offered by TRA Staff) for the PIC change fee he incurred and the rate difference between MRP's rate and that of Mr. Helms' previous carrier. Transcript at 244, lines 2-13.

Subsequently, in any complaint forwarded to MRP by the TRA Staff, MRP sent letters to both the Tennessee Regulatory Authority (TRA) and the customer documenting the investigation and the outcome, including the reimbursement of the agreed-upon amount of money to be reimbursed by MRP. See files referenced in Exhibit 28.

On every occasion when MRP sent a letter to the TRA, MRP stated the reason for switching the customer's long distance provider. See files referenced in Exhibit 28. On those occasions when MRP made an obvious mistake and made an erroneous PIC change because of a typographical error, MRP admitted that fact immediately and proceeded to rectify the mistake and reimburse the customer for inappropriate charges. See complaint files of Tiffany Swanson, George Perry, Faye Gallagher, John Mathis and T. Doughlas Couch, referenced in Exhibit 28.

The Staff did not establish that MRP has failed to respond to a single complaint brought to its attention by the TRA, despite the fact that the Staff accused MRP of that very thing in both the Order to Show Cause and the testimony pre-filed by the Staff. Pre-filed Direct Testimony of Vivien Michael-Wilhoite at 3; Exhibit 28. In fact, Ms. Wilhoite admitted, after her attempts to obscure the facts failed, that the TRA was in possession of the responses that she had alleged MRP had never sent. Transcript at 1030, line 12 to 1037, line 23.

The Staff did not establish that MRP has failed to respond in a timely manner to the complaints sent to MRP by the TRA. In the vast majority of the complaints sent to MRP by the TRA, MRP responded to promptly to the TRA and the consumer. Exhibit 28. In his chart attempting to show MRP's tardiness in responding to the consumer complaints, Mr. Roberson erroneously represented that MRP had responded to a complaint at a later date than it had. Exhibit A to Eddie Roberson's Pre-filed Direct Testimony; Transcript at 858, line 16 to 860, line 12.

The record clearly reveals that MRP received authorization to change the

long distance service of the majority of the consumers who filed complaints about MRP, referenced in the Order.

An individual asserting that his name was Wesley Moore and that he had the authority to change the long distance service of the telephone at Full Cycle Woodworks gave a telemarketer soliciting customers for MRP the authorization to provide Full Cycle Woodworks with MRP's long distance services. Transcript at 78, lines 4 to 84, line 12. When asked if the name on the local telephone bill was "Full Cycle Woodworks," the individual on the telephone answered in the affirmative. Transcript at 80, lines 8-11; Tape of Highsmith Confirmation, attached to MRP's Pre-filed Direct Testimony. Despite Mr. Highsmith's allegations of fabrication on the part of MRP, there is no proof whatsoever that the confirmation tape reflecting the authorization given by Mr. Wesley Moore for Full Cycle Woodworks was fabricated. Transcript at 113, line 24 to 114, line 2. Indeed, MRP cannot be held responsible for the malicious conduct of the individual who gave authorization for a change of long distance service for Full Cycle Woodworks.

During the confirmation portion of the tape, Captain George Helm (TRA witness) was told the following information: "This is not MCI, Sir. The name of the company is Minimum Rate Pricing. We are a discount provider. We compare the base rates of AT&T, MCI and Sprint on each and every phone call you make. We select the lowest rate and then apply a 25 percent discount. So your company wouldn't be MCI. The name of the company is Minimum Rate Pricing. That's who your carrier would be." Transcript at 236, lines 11-18; Exhibit 32 attached to MRP's Pre-filed Rebuttal Testimony. The telemarketer could not have been clearer in informing Captain Helm that he would be using a different long distance provider. Additionally, the accuracy of Captain Helm's memory concerning the solicitation is put into greater doubt by the fact that he testified in his affidavit that he told the telemarketer that he probably would not use the calling cards, but the tape revealed that he asked for

two of them. See Affidavit of George Neville Helm; Transcript at 240, lines 7-14.

Despite the fact that Mr. Popovic (TRA witness) asserted that he "declined the free pager" which was offered during the confirmation portion of the solicitation call from MRP, the confirmation tape clearly shows that he plainly asked for the pager and provided the telemarketer with his address to which the pager was to be sent. Transcript at 256, lines 17-20 and 262, line 2 to 263, line 11. Based on the discrepancy between his testimony and the information gleaned from listening to the taped confirmation portion of the solicitation, Mr. Popovic's credibility is highly suspect with regard to his recollection of the solicitation.

Contrary to the assertions in the Order to Show Cause, MRP keeps records of each of the PIC changes of its customers for at least one year. Transcript at 633, lines 10-14. MRP also maintains a computer file for each customer which contains the customer service representative's narrative of a customer's inquiries, if any. Transcript at 364, lines 7-18; 633, 10-14. Although MRP's maintenance of records complies with TRA Rule 1220-4-2-.56(1)(e), MRP has been accused of violating that rule. Mr. Roberson testified that the TRA regulations require items in addition to what the rule actually requires. He testified that Rule 1220-4-2-.56(1)(e) requires long distance carriers to maintain records of

the receipt by customers of verification packages and complaints by customers despite the fact that the rule clearly does not state such requirements. Transcript at 884, lines 19-23; 911, line 21 to 914, line 12.

Contrary to the assertions of the Staff and the CAD, MRP has attempted to provide the Staff with the information it sought both with reference to the individual complaints filed with the TRA and since the Order to Show Cause was issued. Also, contrary to the assertions of the Staff and the CAD, MRP has not failed to provide records requested because it is withholding information, but because MRP simply does not maintain its records in the manner requested by the Staff. Transcript at 599, lines 12-14. Additionally, MRP supplied information which the CAD and the Staff contended MRP had not provided. Transcript at 603, line 18 to 604, line 12.

Several times during the proceeding, the Staff in its overzealous attempt to prove that MRP has been violating TRA regulations made misrepresentations and blatant errors of its own.

In his pre-filed testimony, Mr. Roberson misstated the date of an MRP response letter in his chart, the purpose of which was to establish MRP's tardiness in responding to complaints, a misstatement he conceded on cross-examination. Exhibit A to Eddie Roberson's Pre-filed Direct Testimony; Transcript at 858, line 16 to 860, line 12. Mr. Roberson also asserted that his "survey" of the bills of fifteen customers could establish the "total number of Tennesseans wrongfully charged for county-wide calls by MRP." Transcript at 876, lines 5-10; 877, line 25 to 878, line 23. When pressed on cross-examination as to the validity of this statement, however, he amended his statement to contend that the bills of fifteen customers could help "estimate" the number of customers charged for intracounty calls. Transcript at 878, lines 5-19. Additionally, Mr. Roberson attempted to represent a twenty person survey as probative of his claim that MRP had overstated the number of MRP's Tennessee customers. On cross-examination, however, he admitted that this "survey" was not statistically valid and that a statistically valid survey would include at least one hundred individuals. Transcript at 789, lines 23-25.

Ms. Curran also let her animosity toward MRP cloud and distort her view of the facts. Like Mr. Roberson, Ms. Curren molded her perception of the facts to fit her belief that MRP has been violating TRA regulations. Ms. Curran focused her testimony on an individual, Mr. Robinson, who was clearly mistaken as to his experience with the telemarketer for MRP. Even after hearing Mr. Robinson ask for "just one" pager and provide his mailing address for delivery of the pager on the tape, Ms. Curran refused to admit that she and Mr. Robinson were incorrect when they accused MRP of having sent Mr. Robinson a product he did not order. Transcript at 953, line 5 to 958, line 15. Contradicting herself, Ms. Curran refused to believe that the voice on the tape was that of Mr. Robinson, but then stated that the tapes could be credible if the script was changed. Transcript at 962, lines 3-10. Additionally, despite the overwhelming evidence that MRP stopped telemarketing in mid-July, Ms. Curran testified that she had received complaints indicating that the customers had been solicited after mid-July, 1998. Transcript at 966, line 24 to 967, line 4. Determined to assume that MRP has not honestly represented that it ceased soliciting in mid-July, 1998, Ms. Curran appears to have erroneously confused the billing dates of the bills accompanying the complaints with the solicitation dates, which necessarily would have been earlier. Transcript at 967, lines 7-10.

Ms. Wilhoite exhibited the same bias against MRP when she testified. She accused MRP of failing to respond to the complaints sent to it by the TRA Staff, in violation of TRA Rule 1220-4-2-.13(3), based on her statement that MRP had not responded to three (3) complaints. Pre-filed Testimony of Vivienne Michael-Wilhoite. Upon cross-examination and further questioning by Director Greer, Ms. Wilhoite admitted that the responses had been in the possession of the TRA Staff at the time she filed her testimony and that although she had had knowledge of them two weeks prior to the hearing, she had failed to correct her testimony. Transcript at 1030, line 12 to 1037, line 23.

MRP continues to operate in the twenty states where it entered into Consent Agreements with the Attorneys General of those states. Exhibit 10-10A. MRP has had its certificate to operate revoked only in Wisconsin. Transcript at 344, lines 8-20.

MRP is currently considering various marketing plans in order to attract new customers, but does not yet have any concrete plans. Transcript at 341, lines 4-23.

CONCLUSIONS OF LAW

Procedure Issues

According to T.C.A. § 65-2-109, Under the Order to Show Cause, MRP Carried the Burden of Production of Evidence While the Staff and the CAD Carried the Burden of Persuasion During the Proceeding.

T.C.A. § 65-2-109 provides that "[t]he 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." Although this provision, at first glance, may appear to clearly set forth the burdens of parties, depending on the case at bar, the key term within the provision, "burden of proof," is, in fact, ambiguous. As discussed at length by the Supreme Court of the United States in a recent opinion, the term "burden of proof" has caused a great deal of confusion throughout the years because it has played a dual role as "burden of persuasion" and "burden of production of evidence." *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 114 S.Ct. 2251, 2255-56 (1994)*. As the Supreme Court noted, the "burden of persuasion" means that "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id. at 2255*. The "burden of production," on the other hand, is "a party's obligation to come forward with evidence to support its claim." Id. The use of one term, "burden of proof" has confused the issue for years. See id.; see also 4 J. Wigmore, Evidence §§ 2486-87 (1905).

As to be expected, there is a dearth of cases in Tennessee before the Public Service Commission or the TRA which have directly addressed the issue of the burden of persuasion as opposed to the burden of production. However, at least one case addressing the "burden of proof" in the context of an order to show cause affirms the confusion created by the "burden of persuasion"/"burden of production" dichotomy. In

State v. Hartley, 1989 WL 44905 (Tenn. App.), the Court of Appeals noted that "the burden of proof, the 'burden of the evidence' and the 'burden of persuasion' is upon the party seeking to establish a fact."

Id. at 3 (citations omitted) Although the Court's statement is of little help in clarifying this convoluted issue, it is clear that Tennessee courts, like the courts of many other states and federal circuits have not seen their way clear to distinguish between these concepts. Some clarity prevails, however, where the Court of Appeals goes on to set forth the well-recognized tenet that "the burden of proof rests upon him who affirms and not upon him who denies." Id. In

Hartley, the Court was asked to determine who carried the burden of proof in a show cause proceeding regarding the destruction of a dog.

Id. The Court found that "it is the State which initiated the action, alleged the grounds and sought the relief. Therefore, the burden was upon the State. It offered no evidence and was entitled to no relief." Id.

Prior to the decision in Hartley, the Tennessee Supreme Court had considered the "burden of proof" issue in a show cause proceeding before the Public Service Commission in *Illinois Central Gulf Railroad Co. v. Tennessee Public Service Commission, 736 S.W.2d 112 (Tenn. 1987)*. The Court noted that the "burden of proof" was on the railroad because the Commission had properly issued the show cause order against the railroad. *Id. at 117*. The issue is clarified in the ultimate finding for the Commission when the Court states that "the facts alleged in the show cause order were not controverted in the proof" and, as such, the Court determined that "the record fully supports the facts alleged in the show cause order." *Id. at 119*. In this finding, the Court clearly perceived the burden upon the railroad as one to produce evidence to controvert the allegations, while the burden upon the Commission was to persuade the trier of fact by "supporting the facts alleged in the show cause order." Id.

In the instant case, the parties which seek to "affirm" are the Staff and the CAD, which affirmatively seek to show MRP's violations of TRA Rules and to have the TRA take the action of revoking the Certificate of Authority of MRP and impose fines. As such, pursuant to T.C.A. § 65-2-109, MRP carries the "burden of production" to show why the allegations in the Order to Show Cause are false and the Staff and the CAD carry the "burden of persuasion" to convince the trier of fact that the action sought should be taken.

In addition to the "burden of proof" provision set forth in T.C.A. § 65-2-109, that section also addresses the applicability of the rules of evidence in a proceeding before the TRA. Section 65-2-109 provides that "[t]he authority shall not be bound by the rules of evidence applicable in a court but it may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs. . . ." While it is true that this provision relieves the TRA of the strict limitations of the hearsay rule and other well-established rules of evidence, it does not permit the agency to admit evidence wholesale without first determining if the evidence "possesses probative value."

During the hearing, the TRA admitted approximately 130 complaints regarding MRP which the Staff had produced to MRP during the discovery process. MRP maintains, as it did in the hearing, that this boxcar approach to admitting

evidence falls outside even the relaxed evidentiary standards of section 65-2-109. Initially, it is important to point out that the standards for that material which is discoverable and that which is admissible into evidence are very different. Material is discoverable if it is "reasonably calculated to lead to the discovery of admissible evidence." T.R.C.P. Rule 26.02. On the other hand evidence which is "admissible" must run the gauntlet of evidentiary barriers which have been created to ensure that such evidence is credible, relevant and probative without being overly prejudicial. Permitting all material which has been produced by the parties in discovery takes none of these factors into consideration. The importance of ascertaining the credibility and probative value of certain evidence is established in the provisions of T.C.A. § 4-5-313(2) and T.C.A. § 65-2-109.

Section 313(2) provides the following in pertinent part: "[i]f an opportunity to cross-examine an affiant is not afforded after a proper request is made as herein provided, the affidavit shall not be admitted into evidence." T.C.A. § 4-5-313(2)(1998). This provision expresses the reluctance of the legislature to admit sworn evidence into an administrative proceeding if the individual who swore to it cannot be there for cross-examination, giving the administrative body the opportunity to assess the credibility of the affiant. The above section indicates that the Tennessee legislature has serious reservations about the probative value of hearsay testimony. Given such reluctance to trust even sworn hearsay testimony, it seems incongruous for the TRA to accept a mass of hearsay material - most of it unsworn - based on the fact that it was provided during discovery without any thought to its probative value or credibility. By admitting numerous documents containing hearsay evidence without first reviewing them for their probative value, the TRA failed to abide by its own evidentiary rules. As such, the "hearsay" documents contained in the complaint files listed in Joint Exhibit 28 should be excluded from consideration by the TRA. The inherent fallacy of admitting hearsay testimony is exhibited by considering the testimony of Captain Helm and Mr. Popovic, as well as the tape of Mr. Robinson. The discrepancies between the affidavits and the testimony of Captain Helm and Mr. Popovic became clear during cross-examination, indicating the questionable nature of hearsay testimony. Additionally, Mr. Robinson's affidavit was controverted by the confirmation tape played during Ms. Curran's cross-examination.

The Affidavits of Linda Ford, Kenneth Robinson, and Gilber Wayne Senter must be excluded based on the express provisions of T.C.A. § 4-5-313(2). MRP requested in accordance with that provision that the witnesses whose affidavits were tendered would be made available for cross-examination. See Requests to Cross Examine Linda Ford, Kenneth Robinson, and Gilbert Wayne Senter, filed on November 20, 1998. None of the above individuals were made available at the hearing, thus, according to section 4-5-313(2), each of those "affidavit[s] shall not be admitted into evidence."

Issues Raised by the Consumer Advocate Division upon Intervention are not Properly Before this Tribunal and may not be Considered.

The hearing before the Directors of the TRA on November 24 and 25 and December 10 and 11, 12998 was conducted for the purpose of permitting MRP to show cause why it has not engaged in the specific violations alleged by the TRA Staff in the Show Cause Order. As TCA §§ 65-4-122 and 125 are not even referenced in the Order to Show Cause, MRP is not alleged in the Order to have

violated those statutes. There was certainly no evidence submitted at the hearing indicating that MRP has violated those provisions, but MRP raises the issue in this brief because the CAD erroneously raised the statutes when it intervened in this proceeding.

There are numerous issues precluding the TRA from considering these alleged violations. In order to be provided due process, MRP must have notice of each and every allegation against it. See T.C.A. § 4-5-307 (1998). MRP does not have a fair opportunity to be heard if it does not have knowledge of the allegations against it and the scope of the proceeding and the relief sought. An additional problem for the CAD concerns the burden of persuasion and the burden of producing evidence for establishing a violation of these provisions.

Even if the TRA considered the allegations stated by the CAD (Statement of Issues of Consumer Advocate Division, filed November 2, 1998), the burden of establishing that MRP has violated these statutes clearly is on the CAD, which has both the burden of persuasion and the burden to produce evidence, not MRP. In order for the TRA to find that MRP violated T.C.A. § 65-4-122(b), the CAD would have to have successfully carried both the burden of persuasion and the burden to produce evidence that MRP had "charge[d], collect[ed], or receive[d] more than a just and reasonable rate of toll or compensation for service" in Tennessee. T.C.A. § 65-4-122(b). Likewise, for MRP to be found liable under T.C.A. § 65-4-125 the CAD would have to have successfully carried both the burden of persuasion and the burden to produce evidence that MRP knew or reasonably should have known that MRP did not have authorization to change a Tennessee consumer's long distance service or that MRP billed and collected for charges for which services MRP knew or should have known a Tennessee consumer did not subscribe. T.C.A. § 65-4-125(a)-(b). The CAD did not present any evidence establishing these elements during the hearing. As such, even if the TRA considers these issues, MRP cannot be found in violation of these statutes.

Furthermore, even if the TRA considers the provisions of T.C.A. § 65-4-125 and determines that MRP violated those provisions, the TRA cannot order MRP to disorge its interstate revenues in violation of its federal tariff. The "filed tariff doctrine," discussed

infra., states that no cause of action may be had against a carrier to enforce rates, terms of service or billing practices which are not contained in or in conflict with a carrier's published tariff.

American Telephone and Telegraph Company v. Central Office Telephone, Inc., no. 97-769, 66 U.S.L.W. 4483, 1998 WL 309066 (U.S. June 15, 1998).

The Supreme Court of the United State's June 15, 1998 decision in

Central Office, conclusively affirmed that the filed-tariff doctrine absolutely bars all causes of action that seek to enforce rates, terms of service or billing practices that are either not contained in or conflict with a telecommunications carrier's filed tariff. Stressing the comprehensive nature of the filed tariff doctrine, the Central Office Court, stated that this doctrine bars even those claims that are based on intentional misrepresentations by a telecommunications carrier of the terms and conditions contained in its filed tariff, stating: [E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the

promised rate if it conflicts with the published tariff.

Central Office, 1998 WL 309066 at *6, citing, *Kansas City Southern R. Co. v. Carl, 227 U.S. 639 (1913).*

The basis for the reseller's breach of contract claim in Central Office was that its contracts with AT&T were not limited to the rates contained in AT&T's tariff, but also included other promises made to the reseller by AT&T. The lower court had found the filed-rate doctrine to be inapplicable because, it concluded, Central Office "does not involve rates or ratesetting, but rather involves the provisioning of services and billing." *Central Office Telephone, Inc. v. American Telephone and Telegraph Company, 108 F.3d 981 (9th Cir. 1997).* However, the Supreme Court easily refuted the lower court's holding, stating. Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.

Central Office, 1998 WL 309066 at *6. Thus, pursuant to Central Office, the filed tariff doctrine serves to preempt from judicial and administrative review both the rates charged and the terms and conditions of service offered pursuant to a filed tariff.

At all times relevant to the conduct alleged in the Order to Show Cause, MRP has been offering long distance telephone service in Tennessee in accordance with a tariff MRP filed with the FCC pursuant to Section 203 of the Communications Act. Pursuant to Section 203(a) of the Communications Act, MRP's FCC tariff details all charges that MRP makes to its customers and provides all classifications, practices and regulations affecting such charges. Section 203(c) of the Communications Act makes it unlawful for MRP, or any other telecommunications carrier, to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." These provisions serve to prevent telecommunications carriers from engaging in unreasonable and discriminatory practices. Pursuant to Central Office, the century-old "filed-tariff doctrine" provides that the only recourse available to a customer affected by conduct governed by a filed tariff is enforcement of the terms and conditions contained in the tariff itself. Any other claims or representations made, if different from those made in the filed tariff, are simply not actionable.

The filed tariff doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981).* A long line of Supreme Court decisions have consistently held that the filed tariff doctrine's rate restriction standard prohibits a court from imposing any form of damages when the measure of such damages is determined by comparing the approved rate and the rate that allegedly would have been approved absent the allegedly wrongful conduct. See, e.g., *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951);*

Arkansas-Louisiana Gas Co., supra, Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986); and *Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922).* Most recently, several courts have conclusively held that because an award of damages would implicate both the nondiscrimination and

nonjusticiability principles inherent in the filed tariff doctrine, this doctrine conclusively precluded an award of monetary damages in any form. See *Marcus v. AT&T Corp., 138 F.3d 46, 60-61 (2d Cir. 1998)*; see also *Day v. AT&T Corp., 74 Cal.Rptr.2d 55, 64-65 (1st DCA 1998)*.

In Marcus, the Second Circuit dismissed as preempted by the filed tariff doctrine a complaint filed against AT&T's unadvertised practice of rounding long distance telephone calls up to the next minute, n2 a practice that AT&T had set out in its FCC tariff. The plaintiffs sought injunctive relief and compensatory damages.

The plaintiffs in Marcus claimed, among other things, that AT&T had engaged in fraud and deceit, negligent misrepresentation, deceptive acts and practices and false advertising. *Marcus, 138 F.3d at 57-58*. Upon review, the Court of Appeals affirmed the lower court's dismissal of these claims as "barred by the filed rate doctrine."

Id. at 57. The Court noted the long-established principle that "'[i]gnorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate file,'" *Id. at 59* (quoting *Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915)*). After considering the long history of the filed tariff doctrine, the Court analyzed each of the plaintiff's claims and determined that they all must fail in light of such strong precedent.

Id. at 58-60.

In dismissing the compensatory damage count, the Marcus court ruled that allowing the imposition of damages would be impermissibly discriminatory, because "[p]laintiffs who were able to prove their claims and recover damages would effectively receive a discounted rate for phone service over other AT&T customers," a practice that is contrary to the filed tariff doctrine's core principle of requiring uniform rates as a means of preventing price discrimination. Id. Similarly, Marcus held that permitting judicially determined damages would violate the nonjusticiability strand of the filed tariff doctrine. The nonjusticiability strand would be violated, Marcus held, because a core principle of the filed tariff doctrine is that an FCC-approved tariff is, by definition reasonable, "unless and until the FCC, as the legislatively appointed regulatory body with institutional competence says otherwise." Id. at 61 (internal quotations and citations omitted). The Marcus court concluded that an order excusing the payment of the tariff specified rate would subvert the authority of the FCC and undermine the regulatory regime." Id. (internal quotations and citations omitted).

In Day, the California Court of Appeals, in reversing a trial court's dismissal of an almost identical complaint, conclusively held that the filed tariff doctrine prohibited the plaintiffs from seeking restitution and prohibited the trial court, on remand, from ordering a disorgement of any monies that defendants might have obtained through their allegedly deceptive advertising practices. In so holding, the

Day court stated: [T]he notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep. Because the filed rates

charged by respondents are presumptively correct, a consumer who uses a pre-paid phone card obtains the full value of what was paid for and therefore has given up nothing, regardless of whether he or she was improperly induced to purchase the card in the first place. Any attempt to calculate a monetary amount to be paid on behalf of those who purchased the cards would necessarily result in a refund or rebate of properly collected fees for services. This would enmesh the court in the rate setting process, and directly contravene the filed [tariff] doctrine. Appellants are not entitled to seek restoration of any money. . .

Day, 63 Cal.App.4th at 340.

Accordingly, pursuant to the doctrines explained in Marcus and Day, because MRP at all times acted pursuant to the terms and conditions filed in its tariff, the filed tariff doctrine prohibits the TRA from assessing any form of monetary damages against MRP, including disgorgement or other forms of consumer redress. Central Office preempts any action to enforce a different rate as such action would constitute the defendant offering a discriminatory rebate which the filed rate doctrine was designed to prohibit.

A long distance provider cannot be required to act contrary to its filed tariff. Reimbursing consumers n3 for all their long distance charges would result in MRP having provided free long distance service. The filed tariff doctrine strictly prohibits such a result.

MRP's Conduct Is Also Subject to Exclusive Federal Regulation Pursuant to the Communications Act's General Preemptive Provisions Such that the TRA has no Jurisdiction over the Interstate Activities of MRP.

As noted above, the TRA is prohibited from placing requirements on MRP which are supplemental to the federal regulations because the Communication Act preempts such action. That preemption also has the effect of prohibiting a state agency from exercising jurisdiction over the interstate activities of a reseller. 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.

Although the Communications Act appears to give power to the states over those activities which were clearly intrastate, such a delineation turned out to be much less clear in practice than in theory. n4 The Supreme Court has recognized that realities of technology and economics" make "such a clean parceling of responsibility" impossible. See *Louisiana Public Service Commission v. FCC, 476 U.S. 355, 360 (1986)*. Because the same telecommunications facilities are frequently used to provide both intrastate and interstate services, determining whether a type of telecommunications service is purely intrastate and therefore subject to state regulation or whether it touches on interstate commerce and is therefore subject to federal regulation has resulted in the development of two rules of law.

The first rule of law stems from the Fourth Circuit's decision in

North Carolina Utility Commission v. FCC, 537 F.2d 787, 791 (4th Cir.) cert.

denied, *429 U.S. 1027 (1976)*. In North Carolina, the Fourth Circuit ruled that since the "practical effect" of a proposed state regulation that restricted the attachment of certain customer-provided telephone equipment to the interstate telephone network was to deprive the state's telephone customers of their federally-protected right to interstate interconnection, the FCC had the authority to preempt the state regulation at issue in order to avoid being "frustrated in the exercise of that plenary jurisdiction over the rendition of interstate and foreign communication services that the [Communications]. Act has conferred upon it." *Id. at 793*.

The second rule of law is best summarized by the Supreme Court's holding in *Louisiana Public Service Commission v. FCC, 476 U.S. 355*. In Louisiana, the Supreme Court struck down at FCC order that precluded states from adopting methods of depreciation for intrastate components of telephone company equipment that were different than the methods prescribed by the FCC for the interstate component of that equipment. The Court declared that, with respect to such accounting issues, Section 2(b)(1) of the Communications Act "fences off from FCC reach or regulation intrastate matters." *Id. at 370*. This was because, unlike the situation in North Carolina, in the situation confronting the Louisiana Court, the state regulations did not serve to frustrate the purpose of the federal regulations and therefore, the state regulations were not preempted by the FCC's rules.

Thus, in situations like that in North Carolina, where a state's policy with respect to intrastate regulation of telecommunications is inextricably intertwined with n5 and would serve to thwart the FCC's policies with respect to interstate regulation, n6 then, pursuant to the Supremacy Clause of the United States Constitution, the FCC regulations will preempt even the purely intrastate components of the state's regulations. However, in situations similar to that in

Louisiana, 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, then both the state regulation of purely intrastate matters and the federal regulation of interstate matters can coexist.

MRP provides to its customers in Tennessee and in the over forty other states where it conducts business both interstate and intrastate long distance telephone services. It is impossible for MRP to know in advance if a potential subscriber will be making interstate long distance calls, intrastate long distance calls, or a combination of the two. Thus to the extent that the State's laws affect MRP's practices of changing a telephone subscriber's telephone toll service, it is impossible to classify the conduct that these laws seeks to restrict as being clearly

interstate or clearly intrastate. In fact, the interstate and intrastate components of the selection and changing of a telephone subscriber's toll services in Tennessee are so inextricably intertwined that, pursuant to North Carolina, all state law causes of action regarding the changing a telephone subscriber's telephone toll service must necessarily be preempted.

The Record Does Not Establish Violations of TRA Rules by MRP to Justify Revocation of MRP's Certificate of Authority or Imposition of Heavy Fines or Penalties.

Neither the Staff nor the CAD established that MRP has violated TRA Rule 1220-4-2-.13(3) by failing to conduct investigations or respond to complaints made by Tennessee customers in a timely manner. The record clearly shows that the complaints sent to MRP by the Staff of the TRA, the great majority were responded to promptly by MRP, ultimately resolved and the consumer reimbursed. See Exhibit 28. Mr. Roberson's attempt to establish that MRP has been extremely neglectful in this area represented just a sprinkling of a few complaints which MRP failed to respond to within the ten working day limit set forth by the rule. In light of the 17,000 customers in Tennessee and the number of inquiries MRP deals with on a daily basis nationwide, the sixteen tardy responses addressed by Mr. Roberson hardly seem to merit revocation of MRP's Certificate or the imposition of heavy fines. Furthermore, if that small number of tardy responses is considered in light of the great number of telemarketing solicitation calls made to Tennesseans which did not result in MRP's obtaining a new customer, that number becomes even less significant. See Transcript at 393, lines 20-25. Indeed, even with that small number of alleged violations of Rule 1220-4-2-.13(3), Mr. Roberson incorrectly claimed one of MRP's responses to have been fourteen (14) days later than it was actually sent to the TRA. Exhibit A to Eddie Roberson's Pre-filed Direct Testimony; Transcript at 858, line 16 to 860, line 12.

With regard to the allegation that MRP has violated TRA Rule 1220-4-2-.56(1)(c), there was no evidence to show that MRP ever attempted to comply with or rely on this rule, and indeed, MRP has stated numerous times that it has never used an independent third party verifier to meet the regulations of the FCC or the TRA. Transcript at 301, lines 14-18. Under TRA Rule 1220-4-2-.56(1) and 47 C.F.R. § 64.1100, a reseller may choose any one of four methods of verification. As such, MRP cannot be found to have violated a rule upon which it has never attempted to rely.

As neither the Staff nor the CAD produced any evidence that MRP violated Rule 1220-4-2.56(1)(e), the TRA should not find that MRP has acted in violation of the Rule. In fact, Mr. Keena explained in his testimony, the MRP record maintenance system in detail, establishing that each customer has a computer file which contains all vital information about the PIC change order. Transcript at 364, lines 7-18; 633, 10-14.

Counsel for the Staff spent a substantial amount of time at the hearing asking MRP about its record-keeping practices and the record-keeping practices of other IXCs or resellers. Transcript at 363-78. No evidence was introduced indicating that MRP fails to maintain evidence of change orders for at least one year. Indeed, MRP's representative explained how evidence of change orders is maintained. Transcript at 363-369. The Staff's allegation of a violation of this rule is without merit, as the Staff has submitted no evidence to show that MRP fails to comply with the rule, while MRP introduced evidence on how MRP does comply with the rule.

The record does not reflect that MRP has violated TRA Rule 1220-4-2-.56(1)(d). It is clear from the testimony of the Staff that the "welcome package" method of verification retains least favored method status among the TRA Staff, however, it is a method of verification

expressly permitted by TRA regulations and was substantially complied with by MRP during the period that MRP was soliciting new customers. See Pre-filed

Direct Testimony of Jean Curran at 3.

The Authority contends that MRP has or is violating Rules 1220-4-2-.57(7) and/or (11) because the company has charged a toll for a very small number of intracounty calls. MRP does not dispute that it occasionally charges for intracounty calls, but asserts that the issue is not one of financial benefit, but an issue of technological ability of its facility-based service provider, Wiltel. MRP's bills are generated by Wiltel which does not possess the type of equipment technologically advanced enough to determine when a call is between two points in the same county. MRP's Pre-filed Rebuttal Testimony at 4. Indeed, MRP's role is that of provider of services. All that are seen by the company are bills indicating the distance, measured in airline miles, between the originating and terminating points of the telephone call. Neither Wiltel nor QAN, the company which generates MRP's bills for it, states on the bill where the points are and neither company has the technological ability to call out the intracounty calls, precluding MRP from distinguishing between appropriate charges for intercounty and inappropriate charges for intracounty.

In order to accommodate this rule in the face of the technological barriers, MRP determined that it would address the issue by allowing calls within a forty mile radius of the originating call to be toll-free. With few exceptions, a call of a distance greater than forty miles away will be between two counties. Id. Because it is not exact science, however, there may be the few calls made from one end to the other of a large county which may exceed the forty mile limit. By using this forty mile limit, a great many calls within the forty mile limit will be between at least two counties, permitting those customers to benefit from toll-free calls, even though the regulations provide that they may be charged for such calls. Clearly, this method of calculation does not provide an economic boon to MRP. It is a matter of attempting to comply with the regulations without the proper technology to do so. The record reflects, however, that MRP always reimburse customers for intracounty calls when they are brought to the attention of the company and given MRP's desire to comply with the law, even to its economic detriment, these few incidents hardly represent the violations of the law necessitating revocation of the company's certificate to operate. Neither the TRA Staff nor the CAD presented any evidence that, contrary to the evidence submitted by MRP, established that charges for intracounty calls are a significant problem. See id.

The Order to Show Cause includes a number of references to consumer complaints which dispute MRP's previous practice of reprovisioning customers with MRP service until the customers notified MRP of their desire not to use MRP's services. Despite allegations regarding this practice, the Staff and the CAD failed to establish that this practice violated a TRA rule. Indeed, federal law prohibits a finding of liability for a practice which a long distance carrier has placed in its filed tariff. As demonstrated above, the "filed tariff doctrine" precludes a successful cause of action against a carrier to enforce rates, terms of service or billing practices which are not contained in or in conflict with a carrier's published tariff. *American Telephone and Telegraph Company v. Central Office Telephone, Inc., no. 97-769, 66 U.S.L.W. 4483, 1998 WL 309066* (U.S. June 15, 1998).

MRP has worked hard to meet the demands of the regulations while convincing individuals that its service offers real benefits for the consumer. In so doing, MRP has abided by federal and state regulations in the solicitation of consumers

and changing of services. That is not to say that MRP, like any company providing services to thousands of consumers, does not make mistakes occasionally. Of course MRP makes mistakes.

The testimony and taped confirmation of Mr. Kubli is an example of just such a mistakes. The tape clearly identifies Mr. Kubli as stating that he has no interest in switching to MRP's services at this time, yet Mr. Kubli's long distance service was switched anyway. Indeed, MRP admits that this was an unauthorized switch and offered Mr. Kubli reimbursement, as it does all consumers who contend that MRP has acted erroneously. See transcript at 452. While this error is evident, what is not borne out is a practice of slamming on the part of MRP justifying the revocation of MRP's Certificate of Authority in Tennessee or the imposition of substantial penalties or fines. Indeed, the testimony of the other five public witnesses who testified for the Staff evidenced that they had authorized the change of their long distance provider to MRP.

Catherine Elizabeth Hagan (witness offered by the TRA Staff) and Ms. Collins both testified that they sent back the postcard within the required time to cancel the orders that had been made. Transcript at 42 and 141. It is difficult to know what happened in these situations because a variety of scenarios could have occurred. It is possible that the cards were not mailed within the fourteen day period or that the postal service did not deliver them within the required time period. It is also possible that the personnel at MRP failed to properly record the cancellation. Again, MRP does not contend that its track record is perfect. However, even assuming that Mrs. Hagan and Ms. Collins sent the postcards to MRP within the required time period and MRP erroneously switched their long distance carriers to MRP, those errors represent a tiny percentage of the nearly 17,000 subscribers to whom MRP provides service in Tennessee.

TRA witness Ronald Ray Highsmith testified that he never spoke with an MRP solicitor before his long distance provider was switched to MRP. Transcript at 84. He contends that he did not authorize such a switch. While MRP clearly does not intend for the owner of a business to have his long distance service switched without his consent, it is equally clear from listening to the confirmation part of the solicitation that the MRP solicitor had every right to believe that he was receiving authorization to provide Full Cycle Woodworks with MRP's services. Furthermore, although MRP had received authorization from an individual claiming to have authority to change the long distance carrier of Full Cycle Woodworks, Mr. Highsmith was offered a reimbursement, which he declined. See transcript at 78-84, and 111. In the rare case in which a mistake is made because an individual misrepresents his or her authority to MRP, the company is prepared to immediately remedy the situation. These situations do not constitute "slams" and do not represent violations of TRA regulations.

The evidence also establishes that MRP switched the service of Captain Helms in compliance with regulations. Captain Helms responded affirmatively to the questions asked by the MRP solicitor. He testified that he had no intention of changing service - but the tape established that after hearing a lengthy explanation about MRP and the fact that he would be using a different carrier, he answered affirmatively to the questions posed. See transcript at 236-37. As it has noted previously, MRP does not want to change the long distance providers of individuals who do not want the benefits of using MRP's services. However, the telemarketers could not be asked to divine the intention of a consumer or second guess someone who indicates that he or she wants to change service.

Igor Popovic also stated that he did not intend to have service switched to MRP. His confirmation tape, however, clearly established that he provided authorization to the MRP solicitor. See transcript at 278-81. Mr. Popovic answered affirmatively the questions put to him by the solicitor and even ordered a pager. He stated in his complaint to the TRA that he received the packet from MRP shortly after the solicitation call, but did not state that he sent in the cancellation postcard. Again, a consumer's intentions cannot be determined if they remain unknown to the telemarketer.

The approximately 17,000 satisfied MRP customers in Tennessee evidence that these questions are not misleading and convey and elicit the necessary information to determine whether the prospective customer chooses to use MRP's services. As noted previously, MRP has utilized sophisticated procedures and computer software designed to avoid confusion and the unauthorized PIC changes. The evidence shows that these mechanisms resulted in very few mistakes. However, human interaction is necessary to facilitate these mechanisms, and thus, the possibility of human error is injected into the process. As a result, some mistakes were made and a very few individuals may have misunderstood the purpose of the call or the nature of MRP's services. These situations constitute an extremely small percentage of MRP's customer base in Tennessee.

MRP does not assert that every consumer complaint is spurious. Indeed, the testimony clearly shows that MRP makes every effort to remedy the situation and satisfy the needs of the consumer. Each of the Staff's citizen witnesses testified that MRP had either offered and/or reimbursed the individual after MRP became aware of the individual's concerns. MRP's Pre-Filed Direct Testimony at 6; Transcript at 111, lines 3-19; 145, lines 2-7; 195, lines 22-25 to 196, lines 1-4; 230, lines 13-18.

Of great concern to MRP is that it may be held to greater requirements than those actually set forth in the TRA's regulations. See transcript at 461-62. Director Greer asked Mr. Keena whether the MRP script contained the following question: "Did you authorize the transfer of your service from one carrier to another?" Transcript at 461, lines 20-21. Nowhere in the regulations is MRP required to ask a potential subscriber outright in one phrase whether the individual is choosing a new service. MRP is permitted under the regulations to solicit subscribers and provide them with MRP's services as long as the individuals authorize the change in service and MRP follows the federal regulations and the applicable regulations of the TRA with regard to the verification process. Neither the FCC nor the TRA set forth regulations concerning the exact wording of telemarketing scripts or solicitation methods.

Additionally, accusations were made in both the Order to Show Cause and the testimony of Mr. Roberson that MRP violated TRA Rule 1220-4-2-.56(1)(e) because it failed to maintain certain information in its records. See Transcript at 884, lines 19-23; 911, line 21 to 914, line 12. In its operations in Tennessee, MRP is obligated only to ensure that its practices meet the requirements set forth in FCC regulations and the TRA rules. MRP showed throughout the proceeding that it complies with applicable regulations; MRP cannot be determined to have violated regulations for failing to comply with additional requirements which the Staff "infers" the regulations include, but clearly are not present in the rules themselves. During this proceeding, the Staff appears to have been informally rewriting rules to contain the provisions they would prefer to be

included therein, rather than limiting themselves to enforcing the TRA Rules which actually exist.

Since MRP complies with the FCC rules, it cannot be in violation of the TRA's Rules because any requirements which the TRA places on resellers over and above the FCC's regulations are preempted. Accordingly, any the standards to which MRP's actions must be held are limited to those set forth by the federal regulations for interstate activity and the Tennessee regulations which mirror the federal regulations for intrastate activity. MRP submitted substantial evidence that it has never engaged in a concerted policy of slamming, and that its tariffs and marketing practices have been in compliance with the Authority's regulations and conform to industry norms. Nonetheless, as noted in pleadings and evidenced by testimony heard during the hearing, MRP has responded to the concerns of consumers and regulatory entities by taking affirmative action to improve its business practices and increase customer satisfaction. The testimony bears out the fact that even after revising its tariffs and script and changing its pricing format, MRP ceased all telemarketing solicitation in July as it took a step back to review its business practices. Transcript at 312, lines 17-22; 322, lines 4-17; 1058, line 21 to 1059, line 10; 1065, lines 20-22.

CONCLUSION

Having addressed each of these allegations in its testimony, MRP has established that it has not violated these rules to the extent stated by the Staff and its few mistakes do not justify revocation of its certificate of authority in Tennessee. In the past year MRP has altered a substantial number of its practices in an attempt to maintain a high level of quality and the lowest possible level of customer dissatisfaction.

In their unwavering belief that MRP was violating TRA regulations at every turn, the members of the Staff made several errors and false and misleading factual assertions concerning MRP's business practices. Mr. Roberson, in his pre-filed testimony represented a "survey" to "establish" his allegation that MRP had overstated the number of MRP customers in Tennessee, but when pressed, admitted that the "survey" had no statistical validity whatsoever. Mr. Robinson, who was relied upon by Ms. Curran in supporting her allegations against MRP, can clearly be heard on the tape responding that he would like "[j]ust one" pager. Yet Ms. Curran used his case as an example of why MRP should have its Certificate revoked. In her testimony to the TRA, Ms. Wilhoite made no less than twenty-nine (29) corrections in six (6) pages of testimony. Transcript at 1012-19. Furthermore, she alleged that MRP had failed to respond to consumer complaints for which she had found the responses in the TRA's own files, but did not bother to correct her error immediately. Transcript at 1021, lines 6-10. There can be no dispute that the accusations of the Staff were of the most serious nature for MRP. That the Staff permitted their animosity to cloud judgment in making representations about those accusations must be taken into account in terms an appropriate resolution of this matter.

MRP has demonstrated its desire to be responsive to the Authority, and other regulatory agencies, by rectifying concerns that have been expressed to the Company. Additionally, it has established that MRP's relatively few violations of the TRA's rules do not justify the revocation of its Certificate of Authority or the imposition of heavy fines.

Without the Certificate of Authority, MRP is not permitted to resell intrastate telecommunications services to its Tennessee customers. While the revocation of the Certificate does not effect MRP's interstate telecommunication services in theory, current technology does not permit one company to provide interstate long distance services to customers while another company provides the intrastate long distance service. Thus, prohibiting MRP from reselling intrastate long distance service effectively prohibits it from selling service at all in Tennessee. The result of this prohibition, of course, is the loss of its entire customer base in the state. Almost 17,000 Tennessee customers, having had their long distance service terminated, would turn immediately to another provider for alternative service and would not be likely to return, if MRP were to succeed on appeal or be re-certified at a future date. The tremendous detriment to MRP aside, 17,000 Tennesseans who chose MRP as their long distance provider, and who have chosen to remain with MRP, would suddenly have their choice overridden and would be without a long distance provider at all.

Even if the TRA finds that MRP has violated TRA Rules, damages do not represent an appropriate remedy. First, as discussed in detail in the previous section, the filed tariff doctrine precludes an award of damages as such an award would represent customers obtaining long distance telephone service at a rate which would be different than that set forth in the filed tariff. Second, as there are no damages sought in the Order to Show Cause, they cannot be imposed without appropriate application of due process protections, without notice or an opportunity to be heard.

In light of the record in this proceeding it is evident that the Staff failed to prove allegations of substantial violations of TRA Rules by MRP worthy of revocation of MRP's Certificate of Authority or the imposition of heavy fines. In addition, MRP has demonstrated that there have been no substantial violations of the TRA rules. Instead, the record reflects hypocrisy on the part of the TRA Staff. The members of the Staff have required perfection of MRP - a company with thousands customers nationwide - seeking what is essentially the economic death penalty for MRP in Tennessee and yet, they have been unable to meet their own standard of perfection. Upon review of the many inconsistencies, misstatements and mistakes made by the Staff in this proceeding, it is clear that they have overstated the alleged violations by MRP of TRA Rules.

MRP disagrees that it has committed violations to the extent asserted by the Staff and the CAD, but notwithstanding that disagreement, MRP has demonstrated its good faith, as well as a clear resolve to continually evaluate its business and to institute changes that are responsive to regulatory concerns. Furthermore, the consumers of Tennessee will suffer no harm by MRP being permitted to retain its Certificate of Authority as MRP is not marketing and the record clearly shows the effort on MRP's part to increase its level of customer satisfaction. MRP is dedicated to the concept of satisfying its Tennessee consumers and has expressed its desire to work with the TRA to that end.

Based on the foregoing, MRP respectfully asserts that the record does not establish that MRP engaged in material violations of TRA Rules that require the revocation of MRP's Certificate of Authority or the imposition of substantial fines. Dated February ___, 1999 Respectfully submitted, By: Jerry C. Colley, Tenn. BPR #2375 Colley and Colley P.O. Box 1476 Columbia, TN 38401 Telephone: 931.388.8564 Local Counsel for Minimum Rate Pricing, Inc. Walter E. Diercks Eric M. Rubin Sarah B. Colley, Tenn. BPR #17302 Rubin, Winston, Diercks, Harris

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CERTIFICATE OF SERVICE

I, Jerry C. Colley, Attorney for MRP, do hereby certify that I have hand-delivered a copy of this document to Carla Fox, Attorney for the Staff of the Tennessee Regulatory Authority and sent a copy by first class, postage pre-paid through the U.S. Mail to L. Vincent Williams for the Consumer Advocate Division of the Office of the Attorney General of Tennessee. This the 19 day of February, 1999. Jerry C. Colley FOOTNOTES

n1 MRP hereby incorporates its Pre-Hearing Brief by reference.

n2 AT&T's rounding practice results in a telephone conversation of one minute and one second being billed as a two minute telephone call. The gravamen of the Marcus complaint was that AT&T's failure to disclose this rounding up was deceptive.

n3 Even if MRP is found to be in violation of T.C.A. § 65-4-125, the disgorgement provision can be applied only to those subscribers whose long distance service was switched to MRP after April 6, 1998. Additionally, as noted above, since disorgement was not addressed in the Order to Show Cause, it is not an appropriate remedy in this action.

n4 General Williams in his Post Hearing Brief requested that the TRA take judicial notice of a recent opinion of the Supreme Court of the United States concerning FCC preemption of state competition regulations. See Brief on Selected Issues and Request for Judicial Notice of U.S. Supreme Court [sic] Decision at 1; AT&T Corp. v. Iowa Utilities Bd.,. While the substance of the local competition regulations addressed in that case are immaterial to the instant action, it is notable that the Supreme Court again affirmed the FCC's proper jurisdiction over numerous intrastate issues. Id. at 3-4.

n5 See, e.g., *Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 114 (D.C. Cir. 1989)* ("[W]here it [is] not possible to separate the interstate and intrastate components of the . . . FCC regulation involved . . . the [Communications] Act sanctions federal regulation of the entire subject matter.") (emphasis in original).

n6 See, e.g., *People of the State of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990)*; accord *National Association of Regulatory Utilities v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1990)* (holding that FCC preempted state regulations if such regulations would "frustrate" or "interfere with the Commission's valid goal[s]");

Computer & Communications Industry Association v. FCC, 693 F.2d 198, 214 (D.C. Cir. 1982), cert. denied, *461 U.S. 938 (1983)* (holding that FCC preempted state regulations where state regulation "would interfere with achievement of a federal regulatory goal.") /frf