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March 15, 2006

Blanca S. Bayó, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 041269-TP - Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law, by BellSouth Telecommunications, Inc.

Dear Ms. Bayó:

Enclosed for filing in the above-referenced Docket on behalf of Supra Telecommunications and Information Systems, Inc. (Supra) is the original and fifteen copies of Supra's Motion for Reconsideration, as well as the original and fifteen copies of Supra's Request for Oral Argument.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

Thomas A. Range

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Enclosures

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	
Petition to Establish Generic Docket	)	Docket No. 041269-TP
To Consider Amendments to	)	Filed: March 15, 2006
Interconnection Agreements	)	
Resulting from Changes of Law, by	)	
BellSouth Telecommunications, Inc.	)	
_____	)	

MOTION FOR RECONSIDERATION

Pursuant to Rule 25-22.060, Florida Administrative Code, Supra Telecommunications and Information Systems, Inc. ("Supra") hereby files this Motion asking the Florida Public Service Commission ("the Commission") to reconsider portions of its decision in Order No. PSC-06-0172-FOF-TP, issued March 2, 2006, in Docket No. 041269-TP. Specifically, Supra seeks reconsideration of the Commission's decision with regard to Issue 7 (inclusion of §271 elements in interconnection agreements) and asks the Commission to reach a different conclusion on this issue. Supra respectfully suggests that the Commission erred in concluding that it is without jurisdiction to require the inclusion of 271 network elements in §251/252 agreements, and, consequently, that it does not have authority to set rates for such elements. To the contrary, the Commission has clear authority under both state and federal law, as more fully set forth below, and therefore, reconsideration is necessary to correct this error. Furthermore, Supra respectfully suggests that the Commission erred by not providing for consideration of this issue by the full Commission in accordance with Sections 350.01(5) and (6), Florida Statutes.

I. Standard of Review

As the Commission has recognized time and again, the standard of review in Florida for reconsideration is whether or not the Commission made a mistake of fact or law, or overlooked a point of fact or law, in rendering its decision. See Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla.1962); and Pingree v. Quaintance, 394 So. 2d 362 (Fla. 1st DCA 1981).

II. Bases for Reconsideration

A. Misapplication of Federal Law

By Order No. PSC-06-0172-FOF-TP, the Commission concluded that it is without jurisdiction to require BellSouth to include §271 elements in §252 agreements, specifically determining that the inclusion of §271 elements in §252 agreements would be contrary to the regulatory regime set forth by the FCC in the TRO[1] and the TRRO[2]. See Order No. PSC-06-0172-FOF-TP at p. 53. The Commission based its decision entirely upon an analysis of Sections 251, 252, and 271 of the Federal Telecommunications Act of 1996 (the "Act"), and neglected to consider its independent state authority, as set forth in Sections 364.16 and 364.162, Florida Statutes.

The Commission specifically concluded in its Order that "[t]his is a complex issue, the resolution of which is burdened by the lack of a clear declaration by the FCC and the existence of a significant, yet inconsistent body of law." Nevertheless, in sole reliance upon an interpretation of

[1] Order No. FCC 03-36, released August 21, 2003, CC Docket Nos. 01-2338, 96-98, and 98-147.

[2] Order No. FCC 04-290, released February 4, 2005, WC Docket No. 04-313 and CC Docket No. 01-338.

federal law, the Commission determined that requiring inclusion of §271 elements in §251 interconnection agreements amounts to "enforcement" of §271 obligations.

To begin with, the Commission has incorrectly equated requiring the inclusion of §271 elements in §§251/252 agreements with "enforcing" the §271 requirements.[3] This is simply not the case. The issue before the Florida Commission is not a matter of whether BellSouth has violated any of the conditions required to establish or maintain §271 approval. Rather, this is a question as to the logical, and legally required, inclusion of the terms evidencing compliance with §271 in a §252 agreement. In order to comply with §271, an RBOC must provide access to unbundled network elements on the competitive checklist set forth within the statute at just and reasonable rates.[4] As acknowledged by the Georgia Public Service Commission in its March 8, 2006 Order Setting Rates Under Section 271, §252 agreements are the vehicle through which an RBOC demonstrates its compliance with §271:

> The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Section 251 and 252. Therefore the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement.[5]

In other words, regardless of whether network elements are provided to a CLEC as "UNEs" pursuant to §§251/252 or whether they are leased pursuant to §271, the result is the same – to the extent that the network elements are provided in satisfaction of an RBOC's obligation to provide

[3] Section 271(d)(6) clearly grants the FCC the authority to enforce §271 and prescribes the actions that the FCC may take if it finds that a regional Bell operating company ("RBOC") has ceased to meet its §271 obligations.
[4] 47 U.S.C. §271 (c)(2)(B)(i).

interconnection and access to unbundled network elements under the Act, the relevant obligations should be included in a §252 interconnection agreement. Further, pursuant to §252(e)(1), "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval by the State commission." [Emphasis added]. Section 252(e)(1) contains no indication that Congress intended to limit this requirement to §251 elements. Congress did not say, "Interconnection agreements entered into in accordance with this Section," nor did it give any other similar indication. In fact, use of the word "any" should be given its plain meaning, which results in a much broader interpretation of this provision than that afforded by the Commission in its Order.[6]

In reaching its conclusions on the interpretation of federal law, the Commission relies, in part, on ¶664 of the Triennial Review Order, wherein the FCC indicated it could consider the propriety of §271 rates in the context of either an application for interLATA authority or in a §271(d)(6) enforcement proceeding. The Commission erred, however, when it considered ¶664 in a vacuum. Specifically, the Commission overlooked two important points. First, the immediately preceding paragraph (¶663) provides that pricing of §271 elements will be ". . . reviewed utilizing the basic just, reasonable and non-discriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes. . . . " The FCC's use of the word "reviewed" indicates that the FCC does not intend to

[5] Georgia Public Service Commission Order Setting Rates Under Section 27, released March 8, 2006, Docket No. 19341-U at page 2.

[6] The Florida Supreme Court has "repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction." Stoletz v. State, 875 So.2d 572, 575 (Fla. 2004) (citing State v. Bradford, 787 So.2d 811, 817 (Fla. 2001)). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and

actually set §271 rates in the first instance. Second, as noted by the Georgia Commission in its Order Initiating Hearing to Set a Just and Reasonable Rate Under Section 271, the FCC clearly recognizes in this paragraph the application of the "just, reasonable, and non-discriminatory standard" at both the federal and state level, which must be read as an acknowledgement that states have a role in establishing rates consistent with this standard. See Docket No. 19341-U. The fact that the FCC sets the pricing standards does not relinquish or otherwise diminish the state commissions' responsibility to apply these standards in the rate setting process.

To misapply the provisions of the Act in any manner that limits a state commission's authority to establish just and reasonable rates for access and interconnection to the RBOC's network elements not only undermines the purpose of §271, it also frustrates the state commission's ability to effectively fulfill its obligation to exercise its jurisdiction over intrastate services which are unquestionably subject to the jurisdictional authority of state commissions. The Kentucky Public Service Commission recognized its authority regarding §271 network elements in its March 14, 2006, Order in Case No. 2004-00044. Specifically, the Kentucky Public Service Commission determined that:

> . . . [T]he network facilities used by BellSouth to provide access to its competitors pursuant to Section 271 are located within this Commonwealth and are used to provide in-state or intra-state service, and, as such, the Commission has jurisdiction over those facilities and services.
>
> Nothing in Section 271 or in any FCC order deprives the state commission of jurisdiction over the elements required to have been met as a condition of entry into

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obvious meaning." A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (1931), quoted in Holly v.Auld, 450 So.2d 217, 219 (Fla. 1984).

> the in-region long-distance market. The FCC has set pricing standards for Section 271 elements. The standard is just, reasonable, and nondiscriminatory rates.[7]

It is critical that the Commission give weight to the fact that the FCC has never stated that state commissions are precluded, preempted, or otherwise relieved of their obligation to apply federal pricing standards and to establish rates for intrastate services. Further, the FCC has never stated that state commissions are precluded or exempt from requiring the inclusion of §271 network elements in interconnection agreements, or from setting rates for §271 network elements. Certainly, if they had, the debate on this point would be largely moot. As acknowledged by state commissions in Georgia, Kentucky, and Tennessee, state commissions' authority to establish §271 rates under the just and reasonable pricing standard and to include these rates in a §252 interconnection agreement is resolute and explicit under the federal and state statutory authority. Nothing the FCC has said previously with regard to §271 elements indicates (1) an intent to act to set rates or (2) that states are precluded, or excused of their obligation to do so pursuant to federal and state statutory authority.

B. Failure to Consider State Authority

Without question, the Florida Commission derives its authority from the specific direction of the Florida Legislature. As set forth in Florida Public Service Commission v. Bryson, 569 So. 2d 1253, 1254-1255 (Fla. 1990):

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[7] In the Matter of: Joint Petition for Arbitration of NewSouth Communications, Corp., Nuvox Communications, Inc., KMC telecom V., Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252 (B) of the Communications Act of 1934, As Amended, March 14, 2006, page 11.

> The PSC has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and to issue orders accordingly. PW Ventures, Inc. v. Nichols, 533 So. 2d 182 (Fla. 1988). It follows that the PSC must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute.

In this instance, the Commission's claim of authority is much more than "colorable." As set forth below, the Florida Statutes provide, in part:

> **364.16 Connection of lines and transfers; local interconnection; telephone number portability.--** . . . .
>
> (2) Each competitive local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices, terms, and conditions after 60 days, either party may petition the commission and the commission shall have 120 days to make a determination after proceeding as required by s. 364.162(2) pertaining to interconnection services.
>
> (3) Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, rates, terms, and conditions established by the procedures set forth in s. 364.162.
>
> **364.162 Negotiated prices for interconnection and for the resale of services and facilities; commission rate setting.—**
>
> (1) A competitive local exchange telecommunications company shall have 60 days from the date it is certificated to negotiate with a local exchange telecommunications company mutually acceptable prices, terms, and conditions of interconnection and for the resale of services and facilities. If a negotiated price is not established after 60 days, either party may petition the commission to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and **facilities**. The commission shall have 120 days to make a determination after proceeding as required by subsection (2). Whether set by negotiation or by the commission,

> interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions. [Emphasis added].
>
> (2) In the event that the commission receives a single petition relating to either interconnection or resale of services and facilities, it shall vote, within 120 days following such filing, to set nondiscriminatory rates, terms, and conditions, except that the rates shall not be below cost. If the commission receives one or more petitions relating to both interconnection and resale of services and facilities, the commission shall conduct separate proceedings for each and, within 120 days following such filing, make two separate determinations setting such nondiscriminatory rates, terms, and conditions, except that the rates shall not be below cost.

As clearly stated above, the Legislature contemplates that the Commission will act to set rates and conditions for facilities and services to be included in interconnection agreements.

Furthermore, as explained above, nothing in §271 plainly precludes the state commissions from setting rates for elements that continue to be unbundled pursuant to this section of federal law. This is a critical point and should give the Commission great comfort in implementing its own state law. Plainly speaking, if the Commission acts pursuant to its state authority, such action will not conflict with federal law nor is it likely to be subject to preemption. See Southwest Bell Wireless, Inc. v. Johnson County, 199 F.3d 1185 (10th Cir. 1999)(setting forth analysis of various forms of preemption). Notably, the courts have recognized that a state law may impose a stricter standard than a federal law, as long as it does not conflict with the federal provisions. Atherton v. Federal Deposit Insurance Corp., 519 U.S. 213 (1997).

The U.S. Supreme Court has affirmed the states' authority to act pursuant to state law in situations such as this. Specifically, in considering the Public Utilities Regulatory Policies Act of

1978 (PURPA), the Court addressed the Mississippi Commission's ability to entertain claims under PURPA, and therein acknowledged that federal and state policies sometimes overlap. The Court found that the State Commission has jurisdiction to entertain claims pursuant to its own state law authority and could fulfill its federal obligations simply by acting on the state law claims and resolving them in accordance with, the federal standards. FERC v. Mississippi, 456 U.S. 742 (1982).[8] Here, Supra is asking the Commission to enforce state provisions that are similar to, and certainly do not conflict with the federal law. FERC v. Mississippi, 456 U.S. 742 (1982). See FCC 02-214, 17 FCC Rcd. 14860 at ¶69 (wherein the FCC stated that it will only preempt state law when the regulation would interfere with FCC authority). See also Docket No. 970882-TI (wherein the Commission adopted its "slamming rules," which are generally more restrictive than those implemented by the FCC); and Order Setting Rates Under Section 271, released March 8, 2006, in Docket No. 19431-U (wherein the Georgia Commission recognized its own state law authority to set rates for elements still required to be offered to CLECs at wholesale).

Finally, the Commission references ¶193 of the Triennial Review Order as the basis for its conclusion that ". . .the FCC did not envision state regulation of §271 elements or their inclusion in interconnection agreements." Order No. PSC-06-0172-FOF-TP, at p. 53. This argument overlooks entirely the fact that this paragraph, and in fact the entire section, was addressing the FCC's unbundling requirements and the states' role in implementing §§251/252 of the Act. The discussion

[8] To be clear, Supra does not argue that the Commission can act to enforce §271 provisions. Petersburg Cellular Partnership d/b/a 360° Communications v. Bd., 205 F.3d 688 (4th Cir. 2000).

does not contemplate or reference §271.[9] Thus, the Commission's conclusion drawn from this reference in the TRO is an inaccurate over-extension of the FCC's statement.

Moreover, this particular analysis in the Commission's Order also indicates a fundamental misapprehension of what CLECs requested. Supra does not seek additional unbundling, whether under §271 or state law; rather, Supra asks only that the terms and conditions applicable to those network elements that BellSouth is explicitly required to offer pursuant to §271 be included in interconnection agreements filed in accordance with both federal and state law; that the Commission acknowledge its state law authority to set rates for network elements; and that it proceeds to do so in a timely manner.[10] As such, Supra respectfully requests that the Commission reconsider its decision on Issue 7, as set forth at p. 53, Section VI of Order No. PSC-06-0172-FOF-TP, and amend its decision as suggested herein.[11]

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[9] Furthermore, in the previous paragraph, the FCC even notes that, "We do not agree with incumbent LECS that argue that the states are preempted from regulating in this area as a matter of law." ¶192.

[10] Supra also notes that on the same page of the Order, the Commission states that its finding that §271 elements need not be included in §252 agreements will "bolster the FCC's stated policy of encouraging strong facility-based competitors." There is simply no economic evidence in the record to support this assertion, nor does it recognize the directives of the Florida Legislature. Notably, the Georgia Commission recognized in its March 8 Order Setting Rates Under Section 271 that, ". . . given that the rates are substantially above what the Commission determined to be BellSouth's costs, there is nothing in the record to reflect that the rates proposed by CompSouth would result in providing competitive local exchange carriers with a distorted incentive to buy instead of make." Supra knows of no reason why the same economic rationale would not apply in Florida.

[11] Similarly, Supra notes that in its March 10, 2006, Order Setting Rates Under Section 271, the Georgia Commission recognized that, "The setting of just and reasonable rates does not assume any of the responsibilities that the Federal Act reserves for the FCC under Section 271(d)(6)." Order at p. 2, Docket No. 19341-U.

C. Error in Consideration of Procedural Requirements

The Commission should also reconsider this issue in light of its clear misapplication of Section 350.01(5), Florida Statutes, which resulted in failure to have the full panel consider this issue.

Section 350.01(5), Florida Statutes, states in pertinent part:

> (5) . . . Only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding; provided, if only two commissioners are assigned to a proceeding requiring hearings and cannot agree on a final decision, the chair shall cast the deciding vote for final disposition of the proceeding. If more than two commissioners are assigned to any proceeding, a majority of the members assigned shall constitute a quorum and a majority vote of the members assigned shall be essential to final commission disposition of those proceedings requiring actual participation by the commissioners. If a commissioner becomes unavailable after assignment to a particular proceeding, the chair shall assign a substitute commissioner. In those proceedings assigned to a hearing examiner, following the conclusion of the hearings, the designated hearing examiner is responsible for preparing recommendations for final disposition by a majority vote of the commission. A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding.

At the Commission's February 7, 2006, Agenda Conference, Commissioner Arriaga expressed concern about having three Commissioners decide policy issues of great import, particularly Issue 7 and the other issues directly impacted by the Commission's decision on Issue 7. Commissioner Arriaga thus inquired as to the legality of allowing the full Commission to consider Issue 7. (2/7 Agenda Transcript at 7, lines 19-24). Misconstruing Section 350.01(5), Florida Statutes, to require the Commission to proceed with its consideration of Issue 7 with the current

panel assigned, the three-member panel continued with its consideration of the substance of the issue. In doing so, the Commission overlooked the fact that Section 350.01(5) also requires that, "If a commissioner becomes unavailable after assignment to a particular proceeding, the chair shall assign a substitute commissioner." The original panel assigned to this Docket consisted of five Commissioners, who participated in at least two substantive decisions involving this case.

The Commission also failed to consider that its decision on Issue 7 could have been deferred from the February 7, 2006, Agenda Conference, and the two new Commissioners could have been assigned to this Docket for the limited purpose of considering this issue. The new Commissioners would have been required to read the record as it pertains to this issue, but then could have participated in the final disposition of this issue. On this point, Supra anticipates that an argument may be raised that it is impractical at this point in the proceeding to require that the full Commission consider this issue, particularly in view of the likelihood that the transition date will have come and gone by the time the Commission takes up this Motion for Reconsideration. However, that argument should be summarily rejected in light of the fact that the provision and pricing of §271 elements is an ongoing requirement that extends beyond the TRRO transition date.

The Commission has, in fact, "spun off" issues in other situations in which further consideration by the Commission or a full panel appeared appropriate. In Order No. PSC-01-1577-FOF-TP, issued July 31, 2001, the Commission employed rationale similar to that expressed by Commissioner Arriaga when deferring consideration of rate center consolidation, stating:

> In order to achieve a finding which will endure and withstand both the legal and policy challenges which may follow, our staff is directed to expeditiously open a

> separate generic docket in which we can conduct a more in-depth analysis of the legal and technical aspects of rate center consolidation, in isolation of other distractions.

Order No. PSC-01-1577-FOF-TP at p. 5. See also Docket No. 030001-EI, and related Docket No. 031033-EI.

Clearly, the Legislature contemplated that issues such as this would be considered by the full Commission, as set forth in Section 350.01(6), Florida Statutes, which provides that when considering a request to have the full panel hear a case:

> [T]he commission shall consider the overall general public interest and impact of the pending proceeding, including but not limited to the following criteria: the magnitude of a rate filing, including the number of customers affected and the total revenues requested; the services rendered to the affected public; the urgency of the requested action; the needs of the consuming public and the utility; value of service involved; the effect on consumer relations, regulatory policies, conservation, economy, competition, public health, and safety of the area involved. If the petition is denied, the commission shall set forth the grounds for denial.

It is only logical that the same standard of consideration must apply when a Commissioner asks to have the full panel assigned. Certainly, under the criteria set forth in the statute, if any issue should be considered by the full panel, it is this one, in view of the value of the services at issue, the rapidly approaching TRRO transition date, the magnitude of the potential impact on telecommunications competition in this state, and ultimately, on Florida's consumers and economy.[12]

In addition, such action would have corrected, at least as to this issue, the Commission's error in failing to assign substitutes for those Commissioners that left the Commission just prior to the

[12] While the timing of the hearing in this matter in conjunction with the timing of certain Commissioners' resignations prior to the end of 2005 may have been problematic, Section 350.01(5), Florida Statutes, provides no exceptions to the requirement that the Chair must assign a substitute when an assigned Commissioner becomes unavailable.

hearing in this matter, as specifically required by Section 350.01(5), Florida Statutes.[13]

The Commission, therefore, erred in its interpretation of the requirements of Chapter 350, Florida Statutes, as they apply to the issue of whether the full Commission could and should participate in the final disposition of Issue 7, which is set forth at Section VI of its Order. Reconsideration is necessary to amend this error.[14]

CONCLUSION

For all the foregoing reasons, Supra respectfully suggests that the Commission has erred with regard to its interpretation of its authority to require the inclusion all terms of interconnection, including those associated with elements that are no longer subject to the unbundling requirements of §§251/252 of the federal Act, and has also erred by concluding, consequently, that the question of its ability to set rates for §271 elements is moot. Supra, therefore, requests that the Commission reconsider its decision on this point in Order No. PSC-06-0172-FOF-TP, and reach the alternative conclusion suggested herein that it does, in fact, have sufficient authority in this regard.

In the alternative, if the Commission determines that the errors identified herein do not rise to the level requiring reconsideration under the Diamond Cab standard, Supra respectfully suggests that the Commission, on its own motion, reconsider its decision on Issue 7 (Section VI of Order No.

[13] The failure to assign new Commissioners in order to provide a full panel for the hearing is not a mere procedural defect. Instead, the requirements of Section 350.01(5), Florida Statutes, constitute obligations and duties of the Commission itself. In other words, Section 350.01(5), Florida Statutes, does not set forth a right or procedural requirement that inures to the benefit of a particular party or that can be exercised or declined by any party; consequently, the requirements therein cannot be waived by the actions or inactions of any party.

[14] This should not be construed to be a waiver of this argument as it may apply to any other issue not specifically identified in this Motion for Reconsideration.

PSC-06-0172-FOF-TP) so that it can give full and complete consideration to its authority under state law.

To the best of Supra's knowledge, no CLEC party to this proceeding is opposed to this Motion.

Respectfully submitted this **15th** day of March, 2006.

Supra Telecommunications and Information Systems, Inc.

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DOCKET NO. 041269-TP
MARCH 15, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail* and U.S. Mail First Class to the persons listed below this 15th day of March, 2006:

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