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December 13, 2002

BY OVERNIGHT MAIL

Blanca S. Bayo, Director
Division of Records & Recording
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

021246-TX

Re: Joint Letter Application of Yipes Enterprise Services, Inc. and Yipes
Transmission, Inc. for Grant of the Authority Necessary for the Transfer and Sale
Of Assets

Dear Ms. Bayo:

Yipes Enterprise Services, Inc. ("New Yipes") and Yipes Transmission, Inc. ("Old Yipes") (together "Applicants"), through their undersigned counsel and pursuant to Section 364.33, Florida Statutes hereby request that the Florida Public Service Commission ("Commission") grant such authority as may be necessary or required to enable New Yipes to acquire the assets of Old Yipes identified in this letter Application ("Application"). Since April 19, 2002, Old Yipes has been operating under the protection of the Bankruptcy Court for the Northern District of California (San Francisco Division) pursuant to Chapter 11 of the Bankruptcy Code.¹ New Yipes has agreed to acquire and Old Yipes has agreed to sell the authorizations and assets of Old Yipes, subject to necessary approvals. As set forth in greater detail below, the sale will be accomplished by implementation of the Plan of Reorganization ("Plan"), jointly sponsored by Applicants and approved by the Bankruptcy Court on November 8, 2002.

The public interest will be best served by the expeditious approval of this Application. Competition will be increased by reinforcing New Yipes's status as a viable competitor, which will result from the completion of the bankruptcy process. Applicants emphasize that they do not

¹ See *In re Yipes Transmission, Inc. and Yipes Transmission Virginia, Inc.*, Case No. 02-30750-DM.

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currently provide service to customers in Florida and that as a result, the transactions proposed in the Plan will not inconvenience or disrupt service to any Florida customers. Accordingly, Applicants respectfully request that the Commission approve this Application expeditiously in order to allow Applicants to consummate the proposed transactions as soon as possible.²

An original and twelve (12) copies of this Application are enclosed. Please date stamp and return the enclosed extra copy of this filing and return it in the enclosed self-addressed stamped envelope. In support of this Application, Applicants state as follows:

I. Description of the Applicants

A. Yipes Enterprise Services, Inc. (“New Yipes”)

New Yipes is a corporation organized and existing under the laws of the State of Delaware with principal offices located at 114 Sansome Street, 14th Floor San Francisco, CA 94104.³ At the time that the Plan is implemented, New Yipes will be a wholly owned subsidiary of Yipes Holdings, Inc. (“Yipes Holdings”), a corporation formed under the laws of the State of Delaware. Yipes Holdings will, in turn, be owned by a number of institutional investors, the largest of which include affiliates of Norwest Investing Funds, New Enterprise Investing Funds, Sprout Investing Funds and J.P. Morgan Partners Investing Funds (“Investors”). None of the Investors holds a controlling interest in Yipes Holdings or, therefore, in New Yipes and, as a result, ultimate corporate control of New Yipes will remain with Yipes Holdings.⁴

New Yipes has the financial resources required to acquire the assets of Old Yipes and to

² Because Applicants do not provide service to customers in Florida and the Yipes network is not interconnected with the public switched telephone network, Applicants understand that the Commission’s rules on presubscribed carrier changes are not applicable to the Plan described herein.

³ New Yipes’s Certificate of Incorporation and Authority to Transact Business in Florida are provided in Exhibits A and B respectively.

⁴ Although a number of investment companies have made investments in Yipes Holdings, only four entities hold interests greater than ten percent (10%) of Yipes Holdings. Those entities are J.P. Norwest Venture Partners IX, L.P., Sprout Capital VIII, L.P., Morgan Partners (BHCA), L.P. and New Enterprise Associates 10, L.P. Although collectively these entities own nearly eighty percent (80%) of Yipes Holdings, the shares are distributed such that no entity owns or controls more than thirty percent (30%) of Yipes Holdings. The four investors do not act in concert and none of these entities will exercise control over the day to day operations of New Yipes.

provide service in Florida. In particular, New Yipes obtained a commitment on a round of funding from its Investors in the amount of approximately \$57 million. New Yipes has already received more than \$40 million of this funding and New Yipes expects that it will receive the balance of the funds after a second closing scheduled to occur later this year. New Yipes expects that the most recent funding round should suffice to allow the company to operate until New Yipes turns cash flow positive, which is expected to occur near the end of next year. New Yipes is a newly created entity and, as a result, New Yipes does not have extensive historical financial statements. Confidential *pro forma* financial information for New Yipes is submitted under seal as Exhibit C.

New Yipes has the managerial and technical resources necessary to provide service in Florida. Because certain key members of Old Yipes's former senior management team hold comparable management positions with New Yipes, upon closing of the transaction described herein, New Yipes will have the managerial qualifications similar to those of Old Yipes. Biographies of the senior management of Yipes, many of whom have previous experience with Old Yipes, are provided in Exhibit D. In short, New Yipes will be led by a highly qualified management team and thus will have the managerial and technical resources necessary to operate in Florida.

B. Yipes Transmission, Inc. ("Old Yipes")

Old Yipes is a corporation organized and existing under the laws of the State of California. The principal offices of Old Yipes are located at 114 Sansome Street, 11th Floor, San Francisco, CA 94104. Old Yipes is authorized to provide facilities-based competitive local exchange services in more than ten states. In Florida, Old Yipes currently holds authority to operate as an alternative local exchange carrier ("ALEC") pursuant to certification granted by the Commission in Docket No. 000401-TX, Order No. PSC-00-1293-CO-TX, issued on July 18, 2000.

II. Contact Information

Correspondence concerning this Application may be directed to:

Catherine Wang
Edward S. Quill, Jr.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
(202) 424-7500 (Tel)
(202) 424-7645 (Fax)

with copies to:

Larry Bercovich
Yipes Enterprise Services, Inc.
114 Sansome Street, 14th Floor
San Francisco, CA 9410
(415) 901-2206 (Tel)
(415) 677-9846 (Fax)

and,

Stanley J. Moore
Yipes Transmission, Inc.
114 Sansome Street, 11th Floor
San Francisco, CA 94104
(415) 901-2033 (Tel)
(415) 901-2293 (Fax)

III. Description of the Transaction

Through the proposed Plan of Reorganization, Applicants propose to complete a series of transactions whereby New Yipes will acquire the assets and regulatory authorizations of Old Yipes. The transactions contemplated by the Plan will allow the operations of Old Yipes to emerge from bankruptcy into New Yipes.⁵ Through implementation of the Plan, New Yipes will replace Old Yipes as the certificated Yipes entity in Florida and acquire the assets and regulatory authorizations of Old Yipes in Florida. New Yipes will then have the ability to implement the business plan of Old Yipes potentially including initiation of operations in Florida.⁶ Like Old Yipes, New Yipes will be able to provide service under the "Yipes" brand name. As a result, implementation of the Plan will be virtually transparent in Florida.

IV. Public Interest Considerations

Applicants respectfully submit that transactions described in this letter Application serve the public interest. In particular, Applicants submit that although Old Yipes does not currently provide

⁵ A chart illustrating the Transaction is provided in Exhibit E.

⁶ Although Old Yipes does not currently offer service to customers in Florida, New Yipes is continually evaluating opportunities to expand its geographical scope. New Yipes has identified Florida as a potential market for expansion and may enter the Florida market in the intermediate future as business opportunities arise. For that reason, New Yipes seeks through this filing to acquire the Florida authorization of Old Yipes. New Yipes will adopt the tariffs of Old Yipes in conjunction with the proposed transaction in Florida.

service to customers in Florida, (1) consummation of the Plan has the potential to increase competition in the Florida telecommunications market by reinforcing Applicants' status as a viable competitor; and (2) the contemplated transactions will not affect or disrupt any regulated services.

The proposed Plan is expected to invigorate competition in Florida. The reintroduction of "Yipes," through New Yipes, as a viable competitor furthers the public interest by fostering competition. The proposed transaction will allow New Yipes to build on the foundation provided by Old Yipes and position New Yipes to compete effectively as a leading provider of services provided using Gigabit Ethernet and Internet Protocol. In particular, the grant of this request by the Commission will facilitate the ability of New Yipes to offer alternative high-quality, competitively priced services to a substantial number of potential customers, including in Florida, under a refocused business plan and with an ability to compete effectively with the incumbents and other providers of telecommunications services.

Given the financial uncertainty which Old Yipes is experiencing due to its bankruptcy, Applicants seek to complete the transactions proposed in the Plan as quickly as possible. Rapid implementation of the Plan is a critical factor in order to permit New Yipes to emerge as an effective competitor. Accordingly, Applicants respectfully request that the Commission expedite the processing of this Application and grant the requested authority to permit Applicants to consummate the Plan as soon as possible.

V. Conclusion

For the reasons stated above, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by a grant of this Application. In light of the circumstances described herein, Applicants respectfully request expedited treatment to permit Applicants to consummate the proposed transactions described herein as soon as possible.

Respectfully submitted,

By: 

Catherine Wang

Edward S. Quill, Jr.

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K Street, NW, Suite 300

Washington, DC 20007-5116

(202) 424-7500 (Tel)

(202) 424-7645 (Fax)

COUNSEL FOR APPLICANTS

LIST OF EXHIBITS

Exhibit A	-	Certificate of Incorporation
Exhibit B	-	Authority to Transact Business
Exhibit C	-	Financial Information (Confidential)
Exhibit D	-	Management Biographies
Exhibit E	-	Illustrative Chart
Verifications		

Exhibit A

Certificate of Incorporation

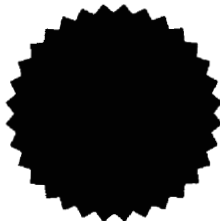
Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "PHX COMMUNICATIONS, INC.", CHANGING ITS NAME FROM "PHX COMMUNICATIONS, INC." TO "YIPES ENTERPRISE SERVICES, INC.", FILED IN THIS OFFICE ON THE THIRD DAY OF JULY, A.D. 2002, AT 9 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

3518948 8100

AUTHENTICATION: 1869532

020434329

DATE: 07-05-02

**CERTIFICATE OF AMENDMENT
OF THE
CERTIFICATE OF INCORPORATION
OF
PHX COMMUNICATIONS, INC.
a Delaware corporation**

The undersigned, Promod Haque and Ted S. Hollifield, hereby certify that:

ONE: They are the duly elected and acting Chairman of the Board and Assistant Secretary, respectively, of said corporation.

TWO: The Certificate of Incorporation of said corporation, filed on April 25, 2002, shall be amended as set forth in this Certificate of Amendment.

THREE: This amendment of the Certificate of Incorporation herein certified has been duly adopted in accordance with the provisions of Sections 228 and 242 of the General Corporation law of the State of Delaware.

FOUR: Article 1 of the Certificate of Incorporation of said corporation is hereby amended to read in its entirety as follows:

ARTICLE 1.

The name of the corporation is Yipes Enterprise Services, Inc. (the "Corporation").

The undersigned further declare under penalty of perjury that the matters set forth in this Certificate of Amendment are true and correct of their own knowledge.

IN WITNESS WHEREOF, the corporation has caused this Certificate of Amendment to be signed by Promod Haque, its Chairman of the Board, and attested by Ted S. Hollifield, its Assistant Secretary, on July 2, 2002.

/s/ Promod Haque

Promod Haque
Chairman of the Board

/s/ Ted S. Hollifield

Ted S. Hollifield
Assistant Secretary

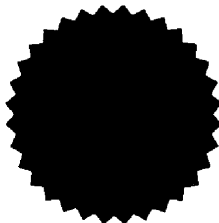
Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "PEX COMMUNICATIONS, INC.", FILED IN THIS OFFICE ON THE TWENTY-EIGHTH DAY OF JUNE, A.D. 2002, AT 9 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

3518948 8100

AUTHENTICATION: 1860186

020422803

DATE: 06-28-02

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
PHX COMMUNICATIONS, INC.

Promod Haque and Ted S. Hollifield hereby certify that:

ONE: They are the duly elected and acting Chairman of the Board and Assistant Secretary, respectively, of PHX Communications, Inc., a Delaware corporation (the "Corporation"). The date of filing of said Corporation's original Certificate of Incorporation with the Delaware Secretary of State is April 25, 2002.

TWO: The amendment and restatement of the Corporation's Certificate of Incorporation as set forth below was duly adopted in accordance with the provisions of Section 241 & 245 of the General Corporation Law by the Board of Directors of the Corporation. The Corporation has not received payment for any of its capital stock.

The Certificate of Incorporation of the Corporation is hereby amended and restated to read in its entirety as follows:

ARTICLE 1.

The name of the Corporation is PHX Communications, Inc.

ARTICLE 2.

The address of the registered office of the Corporation in the State of Delaware and the County of New Castle is 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, and the name of the registered agent at that address is Corporation Service Company.

ARTICLE 3.

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

ARTICLE 4.

A. Classes of Stock. This Corporation is authorized to issue two classes of shares to be designated, respectively, Preferred Stock ("Preferred Stock") and Common Stock ("Common Stock"). The total number of shares of capital stock that the Corporation is authorized to issue is One Hundred Thirty-Five Million (135,000,000). The total number of shares of Preferred Stock this Corporation shall have authority to issue is Fifty-Five Million (55,000,000). The total number of shares of Common Stock this Corporation shall have authority to issue is Eighty Million (80,000,000). The Preferred Stock shall have a par value of \$0.0001 per share and the Common Stock shall have a par value of \$0.0001 per share.

B. The Preferred Stock. All of the shares of Preferred Stock shall be designated "Series A Preferred Stock." The powers, preferences, rights, restrictions, and other matters relating to the Series A Preferred Stock are as follows:

1. Dividends.

(a) The "Original Issue Price" of the Series A Preferred Stock shall be \$1.00. The holders of the Series A Preferred Stock shall be entitled to receive dividends at the rate of eight percent (8%) of the Original Issue Price per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) per annum payable out of funds legally available therefor. Such dividends shall be payable only when, as, and if declared by the Board of Directors and shall be non-cumulative. No dividends (other than those payable solely in the Common Stock of the Corporation) shall be paid on any Common Stock of the Corporation during any fiscal year of the Corporation until all dividends as set forth in this Section 1(a) on the Series A Preferred Stock shall have been paid or declared and set apart during that fiscal year, except that in no instance shall the following be construed as dividends:

(i) Acquisitions of Common Stock by the Corporation pursuant to agreements which permit the Corporation to repurchase such shares at cost (or the lesser of cost or fair market value) upon termination of services to the Corporation; or

(ii) Acquisitions of Common Stock in exercise of the Corporation's right of first refusal to repurchase such shares.

(b) In the event the Corporation shall declare a distribution payable on any shares of Common Stock of the Corporation (other than those payable solely in the Common Stock of the Corporation), then the holders of Series A Preferred Stock shall be entitled to a proportionate share of any such distribution as though the holders of Series A Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Series A Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(c) The holders of the Series A Preferred Stock expressly waive their rights, if any, as described in the California General Corporation Law (the "California Code") Sections 502, 503 and 506 as they relate to repurchases of shares of Common Stock upon termination of services by an employee, consultant or non-employee director.

2. Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of the Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation legally available for distribution or the consideration received in such transaction to the holders of the Common Stock by reason of their ownership thereof, the amount of \$1.00 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares),

plus all declared but unpaid dividends on such share for each share of Series A Preferred Stock then held by them. If upon the occurrence of such liquidation, dissolution or winding up, the assets and funds thus distributed among the holders of the Series A Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets, consideration and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock at the time outstanding in proportion to the preferential amount each such holder is otherwise entitled to receive.

(b) After payment to the holders of the Series A Preferred Stock in the amounts set forth in Section 2(a) above, the entire remaining assets, consideration and funds of the Corporation legally available for distribution, if any, shall be distributed among the holders of the Series A Preferred Stock and Common Stock in proportion to the shares of Common Stock then held by them and the shares of Common Stock which they then have the right to acquire upon conversion of the shares of Series A Preferred Stock then held by them.

(c) For purposes of this Section 2, unless otherwise determined by written consent of the holders of two-thirds (2/3) of the outstanding Series A Preferred Stock (i) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary (other than a mere reincorporation transaction) and pursuant to which the holders of the outstanding voting securities of the Corporation immediately prior to such merger or other form of corporate reorganization fail to hold equity securities representing a majority of the voting power of the Corporation or surviving entity immediately following such merger or other form of corporate reorganization, or any transaction or series of related transactions to which the Corporation is a party in which in excess of fifty percent (50%) of the Corporation's voting power is transferred (a "Change in Control"), provided a Change of Control does not include any consolidation or merger effected exclusively to change the domicile of the Corporation or any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Corporation or indebtedness of the Corporation is cancelled or converted or a converted or a combination thereof; or (ii) a sale of all or substantially all of the assets of the Corporation, in each case whether accomplished in a single transaction or a series of related transactions, shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Preferred Stock to receive at the closing in cash, securities or other property (valued as provided in Section 2(d) below) amounts as specified in subsections (a) and (b) above.

(d) Whenever the distribution provided for in this Section 2 shall be payable in securities or property other than cash, the value of such distribution shall be the fair market value of such securities or other property as determined in good faith by the Board of Directors.

(e) The Corporation shall not, without the vote or written consent by the holders of at least two-thirds (2/3) of the then outstanding Series A Preferred Stock, enter into a transaction described in Section 2(c) above that does not provide for the allocation of consideration as set forth in this Section 2. In the event that the requirements of this

Section 2 are not complied with, the Corporation shall forthwith either (i) cause the closing of such transaction to be postponed until such times as the requirements of this Section 2 have been complied with or (ii) cancel such transaction, in which case the rights, privileges, preferences and powers of the holders of the Preferred Stock shall revert to and be the same as such rights, privileges, preferences and powers existing immediately prior to such proposed transaction.

3. Redemption.

(a) Redemption of Series A Preferred Stock. Subject to the terms and conditions of this Section 3(a), the Corporation shall, upon receiving, at any time prior to the fourth anniversary of the Original Issue Date (as defined below) (the "Redemption Availability Date"), a written request for the redemption of the Series A Preferred Stock signed by the holders of at least two-thirds (2/3) of the then outstanding shares of Series A Preferred Stock (the "Redemption Request") redeem from any source of funds legally available therefor at the Redemption Price (as defined below) therefore, on the Redemption Availability Date, or if such Redemption Request is received within sixty (60) days of the Redemption Availability Date, on a date within sixty (60) days of receipt of the Redemption Request (the "First Redemption Date"), and on each of the two successive yearly anniversaries of the First Redemption Date (each of such three redemption dates is referred to herein generically as a "Redemption Date"), that number of shares of Preferred Stock that is equal to thirty-three and thirty-three hundredths percent (33.33%), rounded downward to the nearest whole share (except that the third redemption installment shall be for any remaining balance) of the shares of Series A Preferred Stock that are outstanding on the date the Corporation receives such first written Redemption Request, until all outstanding shares of Series A Preferred Stock have been redeemed, purchased or converted to Common Stock as provided in Section 5 hereof; provided, however, that the Corporation, with the written consent of the holders of at least two-thirds (2/3) of the then remaining outstanding shares of Series A Preferred Stock may, at its option and discretion, upon reasonable notice, redeem greater numbers (including all) of the outstanding shares of Series A Preferred Stock, at the Redemption Price at any time on or after the Corporation's receipt of such written Redemption Request, to the extent permitted by law.

(b) Redemption Price. The redemption price for each share of Series A Preferred Stock shall be an amount equal to the sum of: (i) all declared and unpaid dividends on such share of Series A Preferred Stock and (ii) the product determined by multiplying \$1.00 and $(1.10)^n$, where "n" equals the number of years elapsed since the Original Issue Date with any fractional year calculated based on the number of days elapsed since the last full year and a 360 day year. Such amounts are hereinafter referred to as the "Redemption Price." The Redemption Price shall be adjusted for stock splits, recapitalizations, and the like.

(c) Partial Redemption. If upon any Redemption Date, the funds and assets of the Corporation legally available to redeem such stock shall be insufficient to redeem all shares of Series A Preferred Stock then scheduled to be redeemed, then any such unredeemed shares shall be carried forward and shall be redeemed (together with any other shares of Series A Preferred Stock then scheduled to be redeemed) at the earliest date upon which the Corporation lawfully has funds available to continue redemption of such unredeemed shares, to the full extent of legally available funds of the Corporation at such time, and any such unredeemed shares shall continue to be so carried forward until redeemed. Shares of Series A

Preferred Stock that are subject to redemption hereunder but that have not been redeemed due to insufficient legally available funds and assets of the Corporation shall continue to be outstanding and entitled to all dividend, liquidation, conversion and other rights, preferences, privileges and restrictions of the Series A Preferred Stock until such shares have been converted or redeemed. In the event any redemption scheduled to be made under this Section 3 hereof shall be made of only a part of the then outstanding Series A Preferred Stock to be so redeemed, the Corporation shall effect such redemption ratably among all holders of then outstanding Series A Preferred Stock on a *pari passu* basis.

(d) Redemption Notice. At least twenty (20) but no more than sixty (60) days prior to the relevant Redemption Date, written notice shall be mailed by the Corporation, postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the Series A Preferred Stock to be redeemed on such relevant Redemption Date, at the address last shown on the records of the Corporation for such holder or given by the holder in writing to the Corporation for the purpose of notice or, if no such address appears or is given, at the place where the principal executive office of the Corporation is located, notifying such holder of the redemption to be effected, the relevant Redemption Date, the applicable redemption price, the number of such holder's shares of Series A Preferred Stock to be redeemed, the place at which payment may be obtained and the date on which such holder's conversion rights (as set forth in Section 5 hereof) as to such shares terminate (which date shall in no event be earlier than the day immediately prior to the relevant Redemption Date) and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, the certificate or certificates representing the shares to be redeemed (each such notice is referred to herein as the "Redemption Notice").

(e) Surrender of Certificates. On or before each relevant Redemption Date, each holder of Series A Preferred Stock to be redeemed on such Redemption Date shall (unless such holder has previously exercised such holder's right to convert such shares of Series A Preferred Stock into Common Stock as provided in Section 5 hereof), surrender the certificate(s) representing such shares of Series A Preferred Stock to be redeemed to the Corporation, in the manner and at the place designated in the relevant Redemption Notice, and thereupon the redemption price for such shares shall be payable to the order of the person whose name appears on such certificate(s) as the owner thereof, and each surrendered certificate shall be canceled and retired. If less than all of the shares represented by such certificate are redeemed, then the Corporation shall promptly issue a new certificate representing the unredeemed shares.

(f) Effect of Redemption. If the relevant Redemption Notice has been duly given, and if on the relevant Redemption Date the redemption price is either paid or irrevocably set aside for payment, then notwithstanding that the certificates evidencing any of the shares of Series A Preferred Stock so called for redemption shall not have been surrendered, all dividends with respect to such shares shall cease to accrue after the relevant Redemption Date, such shares shall not thereafter be transferred on the Corporation's books and all of the rights of the holders of such shares with respect to such shares shall terminate after the relevant Redemption Date, except only the right of the holders to receive the redemption price therefor without interest upon surrender of their certificate(s) therefor.

(g) Failure to Redeem. In addition to any other remedies available to the holders of the Series A Preferred Stock, if the Corporation fails, for any reason, to redeem any shares of Series A Preferred Stock scheduled for redemption on a relevant Redemption Date, then the number of shares of Common Stock issuable upon conversion of the Series A Preferred Stock in accordance with Section 5 hereof shall be increased by an amount equal to five percent (5%) of the number of shares of Common Stock previously issuable upon conversion of such Series A Preferred Stock for each full three (3) month period that such redemption shall not have occurred.

4. Voting Rights. Each holder of shares of Series A Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series A Preferred Stock could be converted immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent and shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise expressly provided herein or as required by law, voting together with the Common Stock as a single class) and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Series A Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

5. Conversion. The holders of Series A Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert. Each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$1.00 (as adjusted for stock dividends, stock splits, recapitalizations and the like payable in or applicable to the Series A Preferred Stock) by the conversion price applicable to such share, determined as hereinafter provided (the "Conversion Price"), in effect on the date the certificate is surrendered for conversion. The Conversion Price with respect to Series A Preferred Stock (the "Series A Conversion Price") shall initially be the lesser of (i) \$1.00, or (ii) the quotient obtained by dividing (x) the aggregate consideration actually received by this Corporation in exchange for its shares of Series A Preferred Stock by (y) \$53,966,929. Such initial Series A Conversion Price shall be adjusted as hereinafter provided, including pursuant to Section 5(g)(v).

(b) Automatic Conversion. Each share of Series A Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Series A Conversion Price upon the earlier of (i) the date specified by written consent or agreement of holders of at least two-thirds (2/3) of the shares of Series A Preferred Stock then outstanding, or (ii) immediately upon the closing of the sale of the Corporation's Common Stock in a firm commitment, underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act), the public offering price of which is not less than \$4.00 per share (as adjusted to reflect any stock dividends, combinations, stock splits, recapitalizations and the like and prior to underwriting commissions and expenses) and which generates aggregate

proceeds to the Corporation (before deduction for underwriters' discounts and expenses relating to the issuance, including without limitation fees of the Corporation's counsel) of at least Thirty Million Dollars (\$30,000,000).

(c) Mechanics of Conversion.

(i) Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such stock, and shall give written notice to the Corporation at such office that he elects to convert the same and shall state therein the number of shares of Series A Preferred Stock being converted and the name or names in which he wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which he shall be entitled as aforesaid. The Corporation shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock (at the Common Stock's fair market value determined by the Board of Directors as of the date of such conversion), any declared and unpaid dividends on the shares of Preferred Stock being converted and (ii) in cash (at the Common Stock's fair market value determined by the Board of Directors as of the date of conversion) the value of any fractional share of Common Stock otherwise issuable to such holder of Preferred Stock. If less than all of the shares represented by such certificates are surrendered for conversion, the Corporation shall issue and deliver to such holder a new certificate for the balance of the shares of Preferred Stock not so converted. Subject to Section 5(c)(2), such conversion shall be deemed to have been made immediately prior to the close of business on the date of surrender of the shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(ii) If the conversion is in connection with an underwritten offering of securities pursuant to the Securities Act, the conversion may, at the option of any holder tendering shares of Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities. If the conversion is in connection with any liquidation or other specified event, the conversion may, at the option of any holder tendering shares of Preferred Stock for conversion, be conditioned upon the consummation of such liquidation or other specified event, in which case the person(s) entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the consummation of such liquidation or other specified event.

(d) Adjustments to Conversion Prices for Stock Dividends, Distributions, Subdivisions, Combinations or Consolidation of Common Stock. In the event that this Corporation at any time or from time to time after the date on which a share of Series A Preferred Stock was first issued shall declare or pay, without consideration, any dividend on the Common Stock payable in Common Stock or in any right to acquire Common Stock for no

consideration, or shall effect a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock (by stock split, reclassification or otherwise than by payment of a dividend in Common Stock or in any right to acquire Common Stock), or in the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, then the Conversion Price for any series of Preferred Stock in effect immediately prior to such event shall, concurrently with the effectiveness of such event, be proportionately decreased or increased, as appropriate. In the event that this Corporation shall declare or pay, without consideration, any dividend on the Common Stock payable in any right to acquire Common Stock for no consideration then the Corporation shall be deemed to have made a dividend payable in Common Stock in an amount of shares equal to the maximum number of shares issuable upon exercise of such rights to acquire Common Stock.

(e) Adjustments for Reclassification, Exchange, Substitution and Reorganization. If the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification, exchange, substitution or otherwise (other than a subdivision or combination of shares provided for in Section 5(d) above or a merger or other reorganization referred to in Section 2(c) above), the Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted so that the Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Preferred Stock immediately before that change.

(f) Pay-to-Play Conversion Provisions.

(i) For purposes of this Section 5(f) the following definitions shall apply:

(A) "Pro Rata Share" shall mean for each stockholder the percentage determined by the ratio of (x) the number of shares of Common Stock issued to such stockholder upon the conversion of any shares of Preferred Stock then held by such stockholder plus the number of shares of Common Stock issuable upon the conversion of any shares of Preferred Stock held by such stockholder to (y) the total number of shares of Common Stock issued upon the conversion of Preferred Stock plus the total number of shares of Common Stock issuable upon the conversion of all issued shares of Preferred Stock;

(B) "Qualifying Issuance" shall mean either:

(I) any issue of securities deemed an issue of Additional Shares of Common Stock (as defined in Section 5(g) below) at a consideration per share (determined pursuant to Section 5(g)(vi) below) the Original Issue Price pursuant to a transaction in which each holder of Series A Preferred Stock is offered the opportunity to purchase its Pro Rata Share, provided, however, that once holders of Preferred Stock have purchased Additional Shares of Common Stock pursuant to this paragraph (I) valued

at Twenty-Five Million Dollars (\$25,000,000) in one or more Qualifying Issuances the terms of this Section 5(f) will no longer apply; or

(II) beginning on the date thirty (30) days from the Original Issue Date, any issuance of Series A Preferred Stock until such time as Fifty-Three Million Nine Hundred Sixty-Six Thousand Nine Hundred Twenty-Nine (53,966,929) shares of its authorized Series A Preferred Stock is issued or until such earlier time as a written consent of the holders of at least two-thirds (2/3) of the outstanding shares of Series A Preferred Stock authorize to change the number of authorized shares of Series A Preferred Stock.

(C) "Participating Shares" shall mean the number of shares of Preferred Stock obtained by multiplying (i) the total number of shares of Preferred Stock held by all holders of Preferred Stock (calculated on an as-converted basis) immediately prior to a Qualifying Issuance by (ii) a fraction, the numerator of which is the actual amount of such holder's or such holder's affiliates, investment in a Qualifying Issuance and the denominator of which is the total dollar amount of a Qualifying Issuance actually offered to all holders of Preferred Stock; provided, however, that (i) no investment in any share or shares of Preferred Stock in a Qualifying Issuance shall be counted as made by more than one holder and (ii) that in the event that the allocation of an investment made by an affiliate of more than one holder would effect the share ownership of such holders, the investment made by such affiliate shall be allocated on an as-converted, pro rata basis unless all such holders and affiliates instruct the Corporation otherwise prior to such Qualifying Issuance.

(D) "Non-participating Shares" shall mean the total number of shares of Preferred Stock held by a holder of Preferred Stock, minus the "Participating Shares" of such holder.

(ii) In the event the Corporation proposes to undertake a Qualifying Issuance, it shall give each holder of Series A Preferred Stock a written notice (the "Issuance Notice") of its intention, describing the type of securities to be issued in the Qualifying Issuance, the price and the terms upon which the Corporation proposes to issue the same and each holder's Pro Rata Share of the amount of the Qualifying Issuance being offered to holders of Preferred Stock. Each holder of Series A Preferred Stock shall, within fifteen (15) days from the date of the Issuance Notice, provide written notice to the Corporation that (i) such holder, or such holder's affiliates, agrees to invest and purchase securities in the Qualifying Issuance for the price and upon the terms specified in the Issuance Notice or (ii) such holder, or such holder's affiliates, will not purchase securities in the Qualifying Issuance and such holder's Preferred Stock shall be deemed Non-participating shares; provided, however, that the fifteen (15) day period set forth in this Section 5(f)(ii) may be reduced or waived upon the written consent of the holders of two-thirds of the then-outstanding Series A Preferred Stock. Any holder of Series A Preferred Stock who fails to provide such notice within such fifteen (15) day period shall have such holder's shares of Preferred Stock deemed Non-participating Shares, provided, that the Corporation subsequently consummates such offering within sixty (60) days following the expiration of such fifteen (15) day period.

(iii) Mandatory Conversion. Each share of Series A Preferred Stock deemed to be a Non-participating Share shall be automatically converted into

Common Stock effective immediately prior to the closing of the Qualifying Issuance based on a then-effective Conversion Price equal to the greater of (x) the then-effective Series A Conversion Price or (y) the Original Issue Price of the Series A Preferred Stock.

(iv) Certificates, Stockholder Records. The holder of any shares of Series A Preferred Stock converted pursuant to this Section 5(f) shall deliver to this Corporation during regular business hours at the office of any transfer agent of this Corporation for the Series A Preferred Stock, or at such other place as may be designated by this Corporation, the certificate or certificates for the shares so converted, duly endorsed or assigned in blank or to this Corporation. As promptly as practicable thereafter, this Corporation shall issue and deliver to such holder, at the place designated by such holder, a certificate or certificates for the number of full shares of the Common Stock to be issued as well as a certificate or certificates for the number of full shares of Series A Preferred Stock not subject to conversion, if any, and such holder shall be deemed to have become a stockholder of record of Common Stock on the date of the Qualifying Issuance.

(g) Adjustments for Issuance of Additional Equity Securities:

(i) Special Definitions. For purposes of this Section 5(g), the following definitions shall apply:

(A) "Option" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(B) "Original Issue Date" shall mean the date on which a share of Series A Preferred Stock was first issued.

(C) "Convertible Securities" shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock.

(D) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section 5(g)(iii) below, deemed to be issued) by the Corporation after the Original Issue Date, other than shares of Common Stock issued or issuable:

(I) upon the conversion of shares of Preferred Stock or as a dividend or distribution on Preferred Stock; or

(II) pursuant to the acquisition of another corporation or entity by the Corporation by way of merger, purchase of all or substantially all of the assets of such corporation, stock for stock exchange or other reorganization or recapitalization approved by the Board of Directors of the Corporation; or

(III) shares of Common Stock issued to directors or employees of, or consultants to, the Corporation or any direct or indirect subsidiary of the Corporation under a stock option or other equity incentive plan or other arrangement approved by and in a manner determined by the Board of Directors, (including restricted stock grants to directors, employees or consultants); or

(IV) shares issued to financial institutions, corporate partners, real estate landlords, lenders, equipment financiers, lessors, or other parties in connection with commercial credit arrangements, equipment financings, technology licensing, strategic partnerships or similar transactions on terms approved by the Board of Directors; or

(V) pursuant to the written consent of the holders of two-thirds (2/3) of the then outstanding shares of Preferred Stock agreeing to waive the provisions of this Section 5(g); or

(VI) by reason of a dividend, stock split, split-up or other distribution on shares of Common Stock for which adjustment is otherwise made pursuant to Sections 5(d) or 5(e).

(ii) **No Adjustment of Conversion Price.** No adjustment in the applicable Conversion Price shall be made, unless the consideration per share (determined pursuant to Section 5(g)(vi)) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the applicable Conversion Price in effect on the date of, and immediately prior to, the issue of such Additional Shares.

(iii) **Issue of Securities Deemed Issue of Additional Shares of Common Stock.** If the Corporation at any time after the Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto without regard to any provision contained therein designed to protect against dilution) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that Additional Shares of Common Stock shall not be deemed to have been issued unless the consideration per share (determined pursuant to Section 5(g)(vi) hereof) of such Additional Shares of Common Stock would be less than the applicable Series A Conversion Price in effect on the date of, and immediately prior to, the deemed issuance, or such record date, as the case may be, provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(A) No further adjustment in any Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(B) If such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Corporation, or decrease in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof the applicable Conversion Prices computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities;

(C) Upon the expiration of any such Options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Conversion Prices to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and convertible or exchangeable securities which remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities;

(D) No readjustment pursuant to clause (C) above shall have the effect of increasing any Conversion Price to an amount which exceeds the lower of (a) the applicable Conversion Price on the original adjustment date and (b) the applicable Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date; and

(E) If such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefore, the adjustments previously made in the Conversion Price which became effective on such record date shall be cancelled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this Section 5(g)(iii) as of the actual date of their issuance.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock. The Conversion Price of the Preferred Stock shall be subject to adjustment from time to time as follows:

(A) If, prior to the first anniversary of the Original Issue Date, the Corporation shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 5(g)(iii), but excluding shares issued as a dividend or distribution or upon a stock split or combination as provided in Section 5(d), without consideration or for a consideration per share less than the Conversion Price applicable to a series of Preferred Stock in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced concurrently with such issue to equal the per share price at which such Additional Shares of Common Stock were issued (or deemed to be issued).

(B) If, on or after the first anniversary of the Original Issue Date, the Corporation shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 5(g)(iii), but

excluding shares issued as a dividend or distribution or upon a stock split or combination as provided in Section 5(d), without consideration or for a consideration per share less than the Conversion Price applicable to a series of Preferred Stock in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced concurrently with such issue to a price (calculated to the nearest cent) determined by multiplying the applicable Conversion Price by a fraction, (x) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at the applicable Conversion Price and (y) the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common Stock so issued, provided that for the purposes of this subsection 5(g)(iv), the "number of shares of Common Stock outstanding" shall be deemed to include all shares of Common Stock issuable upon exercise, conversion or exchange of all outstanding Options, Warrants and Convertible Securities.

(C) Notwithstanding the foregoing, the applicable Conversion Price shall not be so reduced pursuant to this Section 5(g)(iv) at such time if the amount of such reduction would be an amount less than \$.01, but any such amount shall be carried forward and reduction with respect thereto made at the time of and together with any subsequent reduction which, together with such amount and any other amount or amounts so carried forward, shall aggregate \$.01 or more.

(v) Additional Adjustment of Series A Conversion Price. Immediately following the date on which the Corporation shall have issued and sold shares of Series A Preferred Stock for aggregate consideration of at least Forty-Five Million Dollars (\$45,000,000), the Series A Conversion Price shall be adjusted to equal \$1.00 per share (as adjusted for any stock dividends, combinations or splits with respect to the Series A Preferred Stock), and all adjustments to the Series A Conversion Price shall be recomputed using such adjusted Series A Conversion Price as the initial Series A Conversion Price.

(vi) Determination of Consideration. For purposes of this Section 5(g), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(A) Cash and Property. Such consideration shall:

(I) insofar as it consists of cash, be computed at the aggregate of cash received by the Corporation, excluding amounts paid or payable for accrued interest or accrued dividends;

(II) insofar as it consists of property other than cash, be computed pursuant to Section 2(d); and

(III) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the

Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (I) and (II) above, as determined in good faith by the Board of Directors.

(B) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 5(g)(iii), relating to Options and Convertible Securities, shall be determined by dividing:

- (x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by
- (y) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(h) No Impairment. The Corporation will not, without the approval required by Section 6, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Preferred Stock against impairment.

(i) Certificates as to Adjustments. Upon the occurrence of each adjustment or readjustment of any Conversion Price pursuant to this Section 5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Preferred Stock a certificate executed by the Corporation's Chairman of the Board, President or a Vice President setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price for such series of Preferred Stock at the time in effect, and (iii) the number of shares of Common Stock and the

amount, if any, of other property which at the time would be received upon the conversion of the Preferred Stock.

(j) Notices of Record Date. In the event that the Corporation shall propose at any time: (i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus; (ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights; (iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or (iv) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all of its assets, or to liquidate, dissolve or wind up;

Then, in connection with each such event, the Corporation shall send to the holders of Preferred Stock: (1) at least twenty (20) days prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote, if any, in respect of the matters referred to in (iii) and (iv) above; and (2) in the case of the matters referred to in (iii) and (iv) above, at least twenty (20) days prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

(k) Issue Taxes. The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

(l) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Certificate.

(m) Fractional Shares. No fractional share shall be issued upon the conversion of any share or shares of Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of a fraction of a share of Common Stock, the

Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction a sum in cash equal to the fair market value of such fraction on the date of conversion (as determined in good faith by the Board of Directors).

(n) Notices. Any notice required by the provisions of this Section 5 to be given to the holders of shares of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

6. Protective Provisions.

(a) The Corporation shall not, without the vote or written consent by the holders of at least two-thirds (2/3) of the then outstanding shares of the Series A Preferred Stock:

(1) change the number of authorized shares of Common Stock or Preferred Stock, or alter, change, repeal or amend the rights, preferences, privileges or powers of, or the restrictions provided for the benefit of, the Preferred Stock;

(2) authorize or issue, or obligate itself to issue, any new class or series of equity security (including any security convertible into or exercisable for such new class or series of equity security) senior or on a parity with the Series A Preferred Stock as to any rights, preferences or privileges, whether such rights are established in the Corporation's Certificate of Incorporation or Bylaws, or by contract;

(3) change the number of directors on the Board of Directors of the Corporation to other than five (5) directors, unless such change is approved by the Board of Directors including each of the directors elected by the holders of Preferred Stock;

(4) authorize or enter into any agreement regarding a Change of Control;

(5) enter into any transaction, contract, agreement or commitment outside the ordinary course of business without the approval of the Board of Directors, including a majority of the directors elected by the holders of Preferred Stock;

(6) enter into any transaction, contract, agreement or commitment that involves, or is reasonably likely to involve, aggregate payments or borrowings by or of the Corporation over the entire maximum term of such transaction, contract, agreement or commitment equal to or greater than Five Hundred Thousand Dollars (\$500,000) without the approval of the Board of Directors, including a majority of the directors elected by the holders of Preferred Stock;

(7) authorize or effect a liquidation, dissolution or winding up of the Corporation or an event treated as a liquidation, dissolution or winding up of the Corporation pursuant to Section 2(c);

(8) authorize or approve any amendment, alteration or repeal of all or a portion of the Corporation's Certificate of Incorporation or Bylaws; or

(9) redeem, repurchase or declare a dividend on any security of the Corporation. This subsection (a)(9) shall not apply to the Corporation's repurchase of capital stock granted pursuant to a stock benefit plan or the repurchase of capital stock pursuant to the terms of a right of first refusal or right of repurchase granted in favor of the Corporation in connection with the provision of services to the Corporation.

7. No Reissuance of Preferred Stock. No share or shares of Preferred Stock acquired by the Corporation by reason of purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Corporation shall be authorized to issue.

C. Election of Board of Directors. The holders of a majority of the Preferred Stock, voting as a separate class, shall be entitled to elect four (4) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors. The holders of a majority of the Common Stock and Preferred Stock, voting together as a single class on an as-if converted basis, shall be entitled to elect the remaining member or members of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

1. Cumulative Voting. No person entitled to vote at an election for directors may cumulate votes to which such person is entitled, unless, at the time of such election, the Corporation is subject to Section 2115 of the California Code. During such time or times that the Corporation is subject to Section 2115(b) of the California Code, every stockholder entitled to vote at an election for directors may cumulate such stockholder's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which such stockholder's shares are otherwise entitled, or distribute the stockholder's votes on the same principle among as many candidates as such stockholder desires. No stockholder, however, shall be entitled to so cumulate such stockholder's votes unless (i) the names of such candidate or candidates have been placed in nomination prior to the voting and (ii) the stockholder has given notice at the meeting, prior to the voting, of such stockholder's intention to cumulate such stockholder's votes. If any stockholder has given proper notice to cumulate votes, all stockholders may cumulate their votes for any candidates who have been properly placed in nomination. Under cumulative voting, the candidates receiving the highest number of votes, up to the number of directors to be elected, are elected.

2. Removal. During such time or times that the Corporation is subject to Section 2115(b) of the California Code, the Board of Directors or any individual director may be removed from office at any time without cause by the affirmative vote of the holders of at least a majority of the outstanding shares entitled to vote; provided, however, that unless the

entire Board of Directors is removed, no individual director may be removed when the votes cast against such director's removal, or not consenting in writing to such removal, would be sufficient to elect that director if voted cumulatively at an election which the same total number of votes were cast (or, if such action is taken by written consent, all shares entitled to vote were voted) and the entire number of directors authorized at the time of such director's most recent election were then being elected.

ARTICLE 5.

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived any improper personal benefit. If the Delaware General Corporation Law is amended after approval by the stockholders of this Article to authorize corporate action further eliminating or limiting the personal liability of directors then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law as so amended.

Any repeal or modification of the foregoing provisions of this Article 5 by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

The Corporation is authorized to provide indemnification of agents (as defined in Section 317 of the California Code) for breach of duty to the Corporation and its stockholders through bylaw provisions or through agreements with the agents, or through stockholder resolutions, or otherwise, in excess of the indemnification otherwise permitted by Section 317 of the California Code, subject, at any time or times that the Corporation is subject to Section 2115(b) of the California Code, to the limits on such excess indemnification set forth in Section 204 of the California Code.

The Corporation shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation.

ARTICLE 6.

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute and Section 6 of Article 4(B) hereof, and all rights conferred on stockholders herein are granted subject to this reservation.

ARTICLE 7.

Election of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

ARTICLE 8.

The number of directors which shall constitute the whole Board of Directors shall be fixed from time to time by, or in the manner provided in, the Bylaws or in an amendment thereof duly adopted by the Board of Directors or by the stockholders.

ARTICLE 9.

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

ARTICLE 10.

Except as otherwise provided in this Certificate of Incorporation, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, repeal, alter, amend and rescind any or all of the Bylaws of the Corporation.

ARTICLE 11.

The Corporation expressly elects not to be governed by Section 203 of the Delaware General Corporation Law.

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be signed by Promod Haque, its Chairman of the Board, and attested by Ted S. Hollifield, its Assistant Secretary, on June 28, 2002.

PHX COMMUNICATIONS, INC.

By: /s/ Promod Haque
Name: Promod Haque
Title: Chairman of the Board

Attest: /s/ Ted S. Hollifield
Name: Ted S. Hollifield
Title: Assistant Secretary

Exhibit B

Authority to Transact Business



FLORIDA DEPARTMENT OF STATE

Jim Smith
Secretary of State

August 23, 2002

CSC
ATTN: NORMA
TALLAHASSEE, FL

Re: Document Number F02000003356

The Amendment to the Application of a Foreign Corporation for PHX COMMUNICATIONS, INC. which changed its name to YIPES ENTERPRISE SERVICES, INC., a Delaware corporation authorized to transact business in Florida, was filed on August 23, 2002.

Should you have any questions regarding this matter, please telephone (850) 245-6050, the Amendment Filing Section.

Cheryl Coulliette
Document Specialist
Division of Corporation

Letter Number: 302A00049685

Account number: 072100000032

Amount charged: 35.00

Delaware

PAGE 1

The First State

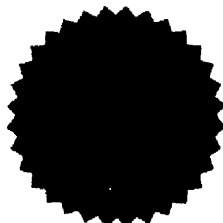
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THAT THE SAID "PHX COMMUNICATIONS, INC." FILED A CERTIFICATE OF AMENDMENT, CHANGING ITS NAME TO "YIPES ENTERPRISE SERVICES, INC.", ON THE THIRD DAY OF JULY, A.D. 2002, AT 9 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "YIPES ENTERPRISE SERVICES, INC.", IS THE LAST KNOWN TITLE OF RECORD OF THE AFORESAID CORPORATION.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "YIPES ENTERPRISE SERVICES, INC." WAS INCORPORATED ON THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE NOT HAVING BEEN CANCELLED OR DISSOLVED SO FAR AS THE RECORDS OF THIS OFFICE SHOW AND IS DULY AUTHORIZED TO TRANSACT BUSINESS.



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

3518948 8321

AUTHENTICATION: 1947241

020529819

DATE: 08-21-02

Exhibit C

Financial Information

(CONFIDENTIAL - SUBMITTED UNDER SEAL)

Exhibit D

Management Biographies

Management Biographies

Dennis Muse – Chief Executive Officer. Mr. Muse is a senior executive with over twenty years of diversified experience within the communications and Internet sector who is recognized for strengths in planning, judgement, functional organization, communications skills and leadership. Mr. Muse is a former President and CEO of Reflex, a company Mr. Muse grew from concept phase with 400 subscribers through proof of concept phase and into scaling phase with 16 operational markets and 9000 subscribers. Prior to that Mr. Muse held positions as President of the Telecom Division of MCI WorldCom and President of MFS Telephone. Mr. Muse holds a B.S. in Business-Marketing from Southern Illinois University.

Kamran Sistanizadeh – Chief Technical Officer. Mr. Sistanizadeh is a world-class communications network architect with over seventeen years of progressive experience within telecom industry. Mr. Sistanizadeh is an inventor/coinventor of 17 U.S. patents who participated in the development of the first large-scale ATM-based voice and data network supporting frame relay and IP multimedia traffic for business and residential customers. Prior to joining the Yipes management team, Mr. Sistanizadeh held positions as the Chief Technical Officer for Bell Atlantic Global Networks, Inc. and Director of Network Systems Engineering for Bell Atlantic. Mr. Sistanizadeh holds a Ph.D. in Electrical Engineering from Virginia Tech and an M.B.A. from Georgetown University.

Tim Mason – Vice President Sales and Operations. Mr. Mason is a former Vice President of Network Reliability and Central Office Operations for Qwest. In that capacity, Mr. Mason led a team of more than 2,000 employees responsible for network surveillance, network management, corporate disaster recovery and central office operations. Mr. Mason's responsibilities also included oversight of a capital budget of more than a billion dollars at US West, where he was responsible for planning, engineering and installing central a broad variety of central office equipment.

Kurt Johnson – Chief Financial Officer. Mr. Johnson is a senior finance professional with twenty years of operational, accounting and finance experience. Prior to joining the Yipes management team, Mr. Johnson held positions as Vice President & Chief Financial Officer of WebsitePros, Inc., Vice President Finance & Administration & Chief Financial Officer of VPNX.com, Vice President & Chief Financial Officer, Corporate Controller of Netcom On-Line Communication Services and Corporate Controller and Accounting Manager of UB Networks.

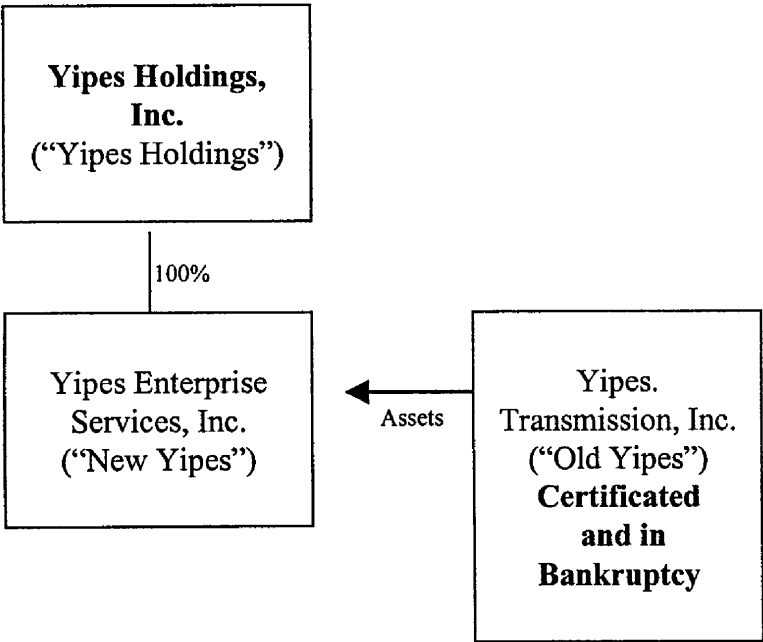
Larry Bercovich – General Counsel. Mr. Bercovich is an experienced technology, transactional, and general attorney, with over fifteen years of broad-based corporate work ranging from capital financing and mergers and acquisitions to IP licensing and sales contracts. Mr. Bercovich's experience includes work on strategic alliances, mergers and acquisitions, private equity and debt financing transactions with an aggregate value in excess of \$15B. Mr. Bercovich is a former general attorney with SBC Communications, Inc. where he lead a group responsible for drafting, negotiating, and approving thousands of agreements with annual value in excess of \$10B. Mr. Bercovich holds an LL.M. in Taxation from New York University, a J.D. from the University of San Francisco, and a B.A. from the University of California, San Diego.

Exhibit E

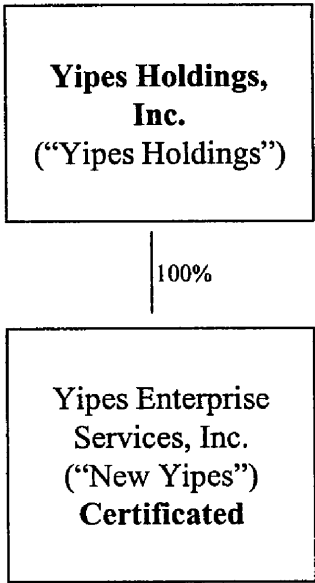
Illustrative Chart

Illustrative Chart

Pre-Plan of Reorganization



Post-Plan of Reorganization




Verifications

VERIFICATION

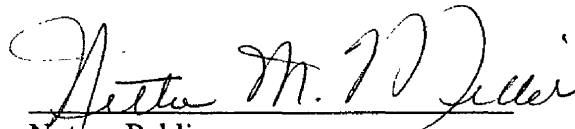
STATE OF CALIFORNIA :
: ss.
CITY OF SAN FRANCISCO :

I, Larry Bercovich, being first duly sworn, state that I am Vice President & General Counsel of Yipes Enterprise Services, Inc.; that I am authorized to make this Verification on its behalf; and that the contents of the foregoing filing are true and correct to the best of my knowledge, information, and belief.

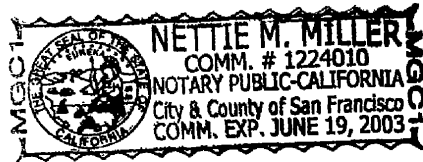
By: 

Title: Vice President & General Counsel

Sworn and subscribed before me this 12th day of November, 2002.


Notary Public

My commission expires 6/19/03



VERIFICATION

STATE OF CALIFORNIA :
: ss.
CITY OF SAN FRANCISCO :

I, Stanley J. Moore, being first duly sworn, state that I am Vice-President, Law and Public Policy of Yipes Transmission, Inc.; that I am authorized to make this Verification on its behalf; and that the contents of the foregoing filing are true and correct to the best of my knowledge, information, and belief.

By: Stanley J. Moore

Title: Vice-President, Law and Public Policy

Sworn and subscribed before me this 12 day of Nov, 2002.

Nettie M. Miller
Notary Public

My commission expires 6/19/03

