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COMMISSION CLERK

December 14, 2004

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

(040000)

**Re: Joint Petition for Approval of Proposed Transfer of Control of A.R.C. Networks, Inc. from ARC Networks, Inc. to InfoHighway Communications Corporation**

Dear Ms. Bayó:

On behalf of our clients, A.R.C. Networks, Inc., ARC Networks, Inc., and InfoHighway Communications Corporation, we file an original and 15 copies of the enclosed "Joint Petition for Approval of Proposed Transfer of Control of A.R.C. Networks, Inc. from ARC Networks, Inc. to InfoHighway Communications Corporation."

Please date-stamp the "Receipt" copy of this filing and return it in the enclosed self-addressed, stamped envelope. Please contact the undersigned if you have any questions or concerns.

Sincerely,

Glenn Richards  
Counsel for A.R.C. Networks, Inc.,  
ARC Networks, Inc., and InfoHighway  
Communications Corporation

- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- RCA \_\_\_\_\_
- SCR \_\_\_\_\_
- SEC 1
- OTH \_\_\_\_\_

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DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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Joint Petition of A.R.C. Networks, Inc., )  
 ARC Networks, Inc., and InfoHighway )  
 Communications Corporation for Approval of ) Case No. \_\_\_\_\_  
 Transfer of Control of A.R.C. Networks, Inc. )  
 from ARC Networks, Inc. to )  
 InfoHighway Communications Corporation )  
 )

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**JOINT PETITION FOR APPROVAL OF PROPOSED TRANSFER OF CONTROL OF A.R.C. NETWORKS, INC. FROM ARC NETWORKS, INC. TO INFOHIGHWAY COMMUNICATIONS CORPORATION**

A.R.C. Networks, Inc. ("A.R.C."), ARC Networks, Inc. ("ARC"), and InfoHighway Communications Corporation ("InfoHighway"), by their attorney, hereby submit this Joint Petition for Approval of Proposed Transfer of Control of A.R.C. Networks, Inc. from ARC Networks, Inc. to InfoHighway Communications Corporation ("Joint Petition").

**Summary**

Under Section 364.33 of the Florida Statutes,<sup>1</sup> any proposed transaction that would result in a transfer of control of a telephone corporation to another entity must receive the prior approval of the Commission. ARC currently controls 100% of the issued and outstanding stock of A.R.C., which is a registered telecommunications provider in Florida. ARC, in turn, is wholly-owned by InfoHighway. In order to realize certain economic efficiencies, InfoHighway wishes to alter its corporate structure to

<sup>1</sup> Fl. Stat. §364.33.

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secure direct control over A.R.C. Although such a transaction would entail no substantive change in control over A.R.C., it constitutes a technical transfer under Section 364.33. Accordingly, the parties have filed this Joint Petition in order to secure Commission approval of this transfer.

### **Status and Relationship of Corporate Entities**

A.R.C. is a New York corporation, with its principle business office located at 175 Pinelawn Road, Suite 408, Melville, NY 11747.<sup>2</sup> A.R.C. provides local and interexchange telecommunications services to customers in Florida, and has obtained all necessary approvals from the Commission to do so.<sup>3</sup>

ARC is a New York corporation with its principle business office located at 175 Pinelawn Road, Suite 408, Melville, NY 11747.<sup>4</sup> ARC directly controls 100% of the outstanding and issued stock of A.R.C., but ARC does not itself provide telecommunications services in Florida.

InfoHighway is a Delaware corporation.<sup>5</sup> InfoHighway's corporate headquarters is located at 175 Pinelawn Road, Suite 408, Melville, NY 11747. InfoHighway directly controls 100% of the outstanding and issued stock of ARC, and indirectly controls 100% of the outstanding and issued stock of A.R.C. InfoHighway does not provide telecommunications services in Florida.

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<sup>2</sup> See Exhibit 1, *infra*.

<sup>3</sup> *Application for Certificates to Provide Alternative Local Exchange Telecommunications Service*, Order No. PSC-96-1987-FOF-TX (Nov. 19, 1996) (granting Certificate No. 4740 to A.R.C.).

Issuing Certificate of Convenience and Necessity, Case 96-C-0149 (May 10, 1996).

<sup>4</sup> See Exhibit 2, *infra*.

<sup>5</sup> See Exhibit 3, *infra*.

InfoHighway's current corporate structure, including its relationship to both A.R.C. and ARC, is shown in Exhibit 4.

### **Designated Contacts**

The parties' designated contact for questions concerning the continuing operations of A.R.C. is:

Ms. Paola Bulloch, Director, Regulatory Affairs  
1333 Broadway  
New York, NY 10018  
(212) 566-6954 (telephone)  
(212) 695-9680 (facsimile)  
pbulloch@InfoHighway.com (e-mail)

The parties' designated contact for questions concerning this Petition is:

Mr. Glenn Richards  
Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037  
(202) 663-8215 (phone)  
(202) 663-8212 (facsimile)  
glenn.richards@shawpittman.com (e-mail)

### **Purpose and Nature of Proposed Transaction**

As noted above, InfoHighway currently controls ARC, which in turn controls A.R.C. In order to improve the efficiency of corporate operations, InfoHighway wishes to assume direct control of A.R.C., essentially removing ARC's role as a corporate intermediary. The transfer of control would be accomplished through a dividend of ARC's holdings in A.R.C. to ARC's sole shareholder, InfoHighway. The effects of the proposed corporate restructuring are captured in Exhibit 5.

While this transaction would result in a technical transfer of control of A.R.C. from ARC to InfoHighway, it would not result in any substantive transfer of control. A.R.C. would continue to hold its original Certificate of Authority, and would continue to

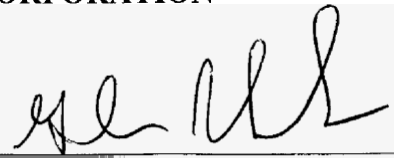
provide telecommunications services to Florida residents. Further, this transfer of control would be entirely transparent to consumers, and would not harm competition in Florida; the transaction would neither increase nor decrease the number of entities offering telecommunications services in Florida, and would not increase A.R.C.'s market power. The efficiencies gained through InfoHighway's reorganization would merely enhance A.R.C.'s ability to provide high quality service. As such, the transaction would undoubtedly serve the interests of Florida residents.

### **Conclusion**

The transfer of control of A.R.C. from ARC to InfoHighway would clearly serve the public interest, and as such the parties urge the Commission to approve the transfer, pursuant to Section 364.33 of the Florida Statutes, so that the proposed transaction may go forward.

Respectfully submitted,

**A.R.C. NETWORKS, INC.  
ARC NETWORKS, INC.  
INFOHIGHWAY COMMUNICATIONS  
CORPORATION**

By: 

Glenn S. Richards  
Their Counsel

Shaw Pittman  
2300 N Street, NW  
Washington, DC 20037  
(202) 663-8215 (phone)  
(202) 663-8212 (facsimile)

Dated: 12/13/04



# EXHIBIT 1

F980222000087

CERTIFICATE OF INCORPORATION  
OF  
A.R.C. NETWORKS CORP.

Under Section 402 of the Business Corporation Law

The undersigned, being a natural person of at least 18 years of age and acting as the incorporator of the Corporation hereby being formed under the Business Corporation Law of the State of New York, DOES HEREBY CERTIFY THAT:

FIRST: A.R.C. NETWORKS CORP. shall be the name of the Corporation.

SECOND: The Corporation is formed for the following purposes:

To engage in any lawful act or activity for which corporations may be organized under the Business Corporations Law. The Corporation is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body.

To enter into, perform and carry out contracts and agreements of every kind and nature, with any person, firm, corporation or other entity, and any State, county, municipal or other governmental body, including all boards, bureaus and agencies thereof.

To carry on any other activities necessary to, in connection with or incidental to the foregoing.

To exercise the powers, in furtherance of the corporate purposes, granted by the New York Business Corporation Law, including without limitation the powers enumerated in Section 202 thereof.

The provisions of this Article shall be construed as purposes and objects, and the matters expressed in each provision hereof shall not be limited in any way, except as otherwise expressly provided herein, by reference to or inference from the terms of any other provision hereof, and shall be regarded as independent purposes and objects. The enumeration of specified purposes and objects shall not be construed to exclude, limit or otherwise restrict in any manner any power, right or privilege given to the Corporation herein or by law, or to limit or restrict in any manner the meaning of the provisions hereof, or the general powers of the Corporation, nor shall the expression of one thing be deemed to exclude another, although it be of like nature, not expressed.

THIRD: The office of the Corporation shall be located in the County of Suffolk and the State of New York.



FOURTH: The aggregate number of shares which the Corporation shall have authority to issue is 200 shares, no par value, all of which shall be of the same class and all of which hereby are designated as common stock. Each share of the common stock of the Corporation shall have one vote for all corporate purposes, with no cumulative voting rights. Each share of common stock shall have equal rights on dissolution, corporate distribution and for all other corporate purposes.

FIFTH: No shareholder of the Corporation, by reason of the holding of shares by such shareholder, shall have any preemptive right to purchase, subscribe to, or have first offered to, any shares of any class of the Corporation, presently or subsequently authorized, or any notes, debentures, bonds or other securities of the Corporation convertible into, or carry options or warrants to purchase, shares of any class, presently or subsequently authorized (whether or not the issuance of any such shares, or such notes, debentures, bonds or other securities would adversely affect the dividend or voting rights of such shareholders), other than such rights, if any, as the Board of Directors in its sole discretion from time to time may grant, at such prices as the Board of Directors in its discretion may fix. The Board of Directors may issue shares of any class of the Corporation, or any notes, debentures, bonds or other securities convertible into, or carrying options or warrants to purchase, shares of any class without offering any such shares of any class, either in whole or in part, to the existing shareholders of any class.

SIXTH: The Secretary of State of the State of New York hereby is designated as the agent of the Corporation upon whom process in any action or proceeding against the Corporation may be served. The post office address to which the Secretary of State shall mail a copy of any process against the Corporation, served upon the Secretary of State, is c/o William J. Reilly, Esq., 396 Broadway, Suite 1001, New York, N.Y. 10013.

SEVENTH: The Corporation, to the fullest extent permitted by Sections 722, 723 and 724 of the New York Business Corporation Law, as the same may be amended and supplemented, shall indemnify any and all persons whom it shall have power to indemnify under said Sections from and against any and all of the expenses, liabilities or other matters referred to in, or covered by, said Sections. The indemnification provided for herein shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of stockholders or directors, or otherwise, both as to action in his official capacity and as to action in any other capacity while holding such office. The indemnification provided for herein shall continue as to a person who has ceased to be a director, officer, employee or agent of the Corporation, and shall inure to the benefit of the heirs, executors and administrators of such person.

IN WITNESS WHEREOF, the undersigned has executed this Certificate on February 1, 1993 and affirms the contents thereof to be true under penalty of perjury:

*William J. Reilly*

William J. Reilly, Esq.  
Incorporator  
398 Broadway, Suite 1001  
New York, N.Y. 10013

F980222000087

CERTIFICATE OF INCORPORATION

OF

A.R.C. NETWORKS CORP.

Incorporator: William J. Reilly, Esq.  
396 Broadway, Suite 1001  
New York, N.Y. 10013

Filed by: WILLIAM J. REILLY, Esq.  
396 Broadway, Suite 1001  
New York, N.Y. 10013  
(212) 219-9866

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STATE OF NEW YORK  
DEPARTMENT OF STATE

FILED FEB 22 1993

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BY: KC

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APPLICATION BY FOREIGN CORPORATION FOR AUTHORIZATION TO TRANSACT BUSINESS IN FLORIDA

IN COMPLIANCE WITH SECTION 607.1503, FLORIDA STATUTES, THE FOLLOWING IS SUBMITTED TO REGISTER A FOREIGN CORPORATION TO TRANSACT BUSINESS IN THE STATE OF FLORIDA:

1. A.R.C. NETWORKS CORP. (Name of corporation: must include the word "INCORPORATED", "COMPANY", "CORPORATION" or words or abbreviations of like import in language as will clearly indicate that it is a corporation instead of a natural person or partnership if not so contained in the name at present.)

2. NEW YORK (State or country under the law of which it is incorporated) 3. 11-3240814 (FEI number, if applicable)

4. February 22, 1993 (Date of Incorporation) 5. PERPETUAL (Duration: Year corp. will cease to exist or "perpetual")

6. JANUARY 1, 1996 (Date first transacted business in Florida. (See sections 607.1501, 607.1502, and 817.155, F.S.))

7. 1300 VETERANS MEMORIAL HIGHWAY HAUPPAUGE, NY 11788 (Current mailing address)

8. TELEPHONE SERVICE RESALE (Purpose(s) of corporation authorized in home state or country to be carried out in the state of Florida)

9. Name and street address of Florida registered agent:

Name: CORPORATION SERVICE COMPANY Office Address: 201 HAYS STREET SUITE 105 TALLAHASSEE, Florida, 32301 (Zip Code)

10. Registered agent's acceptance:

Having been named as registered agent and to accept service of process for the above stated corporation at the place designated in this application, I hereby accept the appointment as registered agent and agree to act in this capacity. I further agree to comply with the provisions of all statutes relative to the proper and complete performance of my duties, and I am familiar with and accept the obligations of my position as registered agent.

By: Lisa G. Kelly (Registered agent's signature)

11. Attached is a certificate of existence duly authenticated, not more than 90 days prior to delivery of this application to the Department of State, by the Secretary of State or other official having custody of corporate records in the jurisdiction under the law of which it is incorporated.

FILED SECRETARY OF STATE DIVISION OF CORPORATIONS 96 MAR 20 AM 7:55

12. Names and addresses of officers and/or directors:

A. DIRECTORS

Chairman: PETER F. PARRINELLO

Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Vice Chairman: JOSEPH G. SICINSKI

Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 17788

Director: LEWIS SCHILLER

Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Director: \_\_\_\_\_

Address: \_\_\_\_\_

B. OFFICERS

President: PETER F. PARRINELLO

Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Vice President: JOSEPH G. SICINSKI

Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Secretary: GRAYZANA WNUK

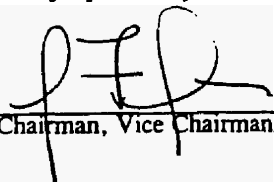
Address: 1300 VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NY 11788

Treasurer: \_\_\_\_\_

Address: \_\_\_\_\_

FILED  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
96 MAR 20 AM 7:55

NOTE: If necessary, you may attach an addendum to the application listing additional officers and/or directors.

13.   
(Signature of Chairman, Vice Chairman, or any officer listed in number 12 of the application.)

14. PETER F. PARRINELLO, PRESIDENT  
(Typed or printed name and capacity of person signing application)

**FILED**  
**May 09, 2001 8:00**  
**Secretary of State**

**APPLICATION FOR REGISTRATION OF FICTITIOUS NAME**  
Note: Acknowledgements/certificates will be sent to the address in Section 1 only.

**Section 1**

1. InfoHighway  
Fictitious Name to be Registered

2. 1770 Motor Parkway  
Mailing Address of Business  
Islandia, NY 11788-5260  
City State Zip Code

3. Florida County of principal place of business: Leon County

4. FEI Number: \_\_\_\_\_

*[Handwritten scribble]*  
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\*\*\*50.00

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**Section 2**

A. Owner(s) of Fictitious Name if Individual(s): (Use an attachment if necessary):

1. <u>[Signature]</u> Last First M.I. Address City State Zip Code SS# _____ (optional)	2. <u>[Signature]</u> Last First M.I. Address City State Zip Code SS# _____ (optional)
--	--

B. Owner(s) of Fictitious Name if other than individuals(s): (Use attachment if necessary):

1. <u>A.R.C. Networks, Inc.</u> Entity Name <u>1770 Motor Parkway</u> Address <u>Islandia, NY 11788-5260</u> City State Zip Code Florida Registration Number <u>F96000001423</u> FEI Number: <u>11-3240814</u> <input type="checkbox"/> Applied for <input type="checkbox"/> Not Applicable	2. _____ Entity Name Address City State Zip Code Florida Registration Number _____ FEI Number: _____ <input type="checkbox"/> Applied for <input type="checkbox"/> Not Applicable
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**Section 3**

I, (we), the undersigned, being the sole (all, the) party (ies) owning interest in the above fictitious name, certify that the information indicated on this form is true and accurate. In accordance with Section 865.09, F.S., I (we) further certify that the fictitious name shown in Section 1 of this form has been advertised at least once in a newspaper as defined in chapter 50, Florida Statutes, in the county where the applicant's principal place of business is located. I (we) understand that the signature(s) below shall have the same legal effect as if made under oath. (At Least One Signature Required)

Joseph P. [Signature] ELP 5/5/01  
Signature of Owner Date  
Phone Number: 851-582-2222

Signature of Owner Date  
Phone Number: \_\_\_\_\_

**Section 4**

FOR CANCELLATION COMPLETE SECTION 4 ONLY:  
FOR FICTITIOUS NAME OR OWNERSHIP CHANGE COMPLETE SECTIONS 1 THROUGH 4:

I (we) the undersigned, hereby cancel the fictitious name \_\_\_\_\_  
which was registered on \_\_\_\_\_ and was assigned registration number \_\_\_\_\_

Signature of Owner Date  
Signature of Owner Date

Mark the applicable boxes  Certificate of Status - \$10  Certified Copy - \$30  
Filing Fee: \$50

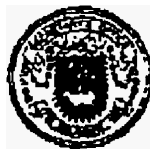
*WJ 5/9/01*

## EXHIBIT 2

*State of Delaware*  
*Office of the Secretary of State* PAGE 1

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I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF INCORPORATION OF "ARC NETWORKS, INC.", FILED IN THIS OFFICE ON THE FIFTEENTH DAY OF JANUARY, A.D. 1997, AT 9 O'CLOCK A.M.



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981331905

Handwritten signature of Edward J. Freel in cursive script.

*Edward J. Freel, Secretary of State*

AUTHENTICATION: 9270794  
DATE: 08-25-98



CERTIFICATE OF INCORPORATION

OF

ARC NETWORKS, INC.

THE UNDERSIGNED, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the General Corporation Law of Delaware, does hereby certify as follows:

ARTICLE FIRST: The name of the Corporation (the "Corporation") is Arc Networks, Inc.

ARTICLE SECOND: The address of the registered office of the Corporation in the State of Delaware is 1013 Centre Road, Wilmington, New Castle County, Delaware 19805. The name of the Corporation's registered agent at such address is Corporate Agents, Inc.

ARTICLE THIRD: 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 FOURTH:

(a) The total number of shares of capital stock which this Corporation is authorized to issue is twenty-one million (21,000,000) shares, of which:

(i) 6,000,000 shares shall be designated as Preferred Stock, and shall have a par value of \$5.01 per share; and

(ii) 15,000,000 shares shall be designated as Common Stock, and shall have a par value of \$5.01 per share.

(b) The Board of Directors is expressly authorized at any time, and from time to time, to provide for the issuance of shares of Preferred Stock in one or more series, with such voting powers, full or limited, or without voting powers and with such designations, preferences and relative, participating, optional or other special rights, qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions providing for the issue thereof adopted by the Board of Directors and as are not stated and expressed in this Certificate of Incorporation, or any amendment thereto, including (but without limiting the generality of the foregoing) the following:

(i) the designation of such series;

(ii) the dividend rate of such series, the conditions and dates upon which such dividends shall be payable, the preference or relation which such dividends shall bear to the dividends payable on any other class or classes or of any other series of capital stock, whether such dividends shall be cumulative or noncumulative, and whether such dividends may be paid in shares of any class or series of capital stock or other securities of the Corporation;

(iii) whether the shares of such series shall be subject to redemption by the Corporation, and, if made subject to such redemption, the times, prices and other terms and conditions of such redemption;

(iv) the terms and amount of any sinking fund provided for the purchase or redemption of the shares of such series;

(v) whether or not the shares of such series shall be convertible into or exchangeable for shares of any other class or classes or series of capital stock or other securities of the Corporation, and, if provision be made for conversion or exchange, the times, prices, rates, adjustment and other terms and conditions of such conversion or exchange;

(vi) the extent, if any, to which the holders of the shares of such series shall be entitled to vote, as a class or otherwise, with respect to the election of the directors or otherwise, and the number of votes to which the holder of each share of such series shall be entitled;

(vii) the restrictions, if any, on the issue or reissue of any additional shares or series of Preferred Stock; and

(viii) the rights of the holders of the shares of such series upon the dissolution of, or upon the distribution of assets of, the Corporation.

(c) No holder of any stock of the Corporation of any class or series now or hereafter authorized, shall, as such holder, be entitled as of right to purchase or subscribe for any shares of stock of the Corporation of any class or any series now or hereafter authorized, or any securities convertible into or exchangeable for any such shares, or any warrants, options, rights or other instruments evidencing rights to subscribe for, or purchase, any such shares, whether such shares, securities, warrants, options, rights or other instruments be unissued or issued and thereafter acquired by the Corporation.

ARTICLE FIFTH: The name and mailing address of the incorporator is Eric Leopold whose address is 160 Broadway, Suite 901, New York, New York 10038.

ARTICLE SIXTH: Election of directors need not be by ballot unless the By-laws of the Corporation shall so provide.

ARTICLE SEVENTH: Elimination of Certain Liability of Directors. 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 or 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 an improper personal benefit.

## ARTICLE EIGHTH:

(a) Right to Indemnification. Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter, a "proceeding"), by reason of the fact that he or she, or a person of whom he or she is the legal representative, is or was a director or officer of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment), against all expense, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith and such indemnification shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of his or her heirs, executors and administrators; provided, however, that, except as provided in Paragraph (b) of this Article EIGHTH, the Corporation shall indemnify any such person seeking indemnification in connection with a proceeding (or part thereof) initiated by such person only if such proceeding (or part thereof) was authorized by the Board of Directors of the Corporation. The right to indemnification conferred in this Article EIGHTH shall be a contract right and shall include the right to be paid by the Corporation the expenses incurred in defending any such proceeding in advance of its final disposition; provided, however, that, if the Delaware General Corporation Law requires, the payment of such expenses incurred by a director or officer in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such person while a director or officer, including, without limitation, service to an employee benefit plan) in advance of the final disposition of a proceeding, shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it shall ultimately be determined that such director or officer is not entitled to be indemnified under this Article EIGHTH or otherwise. The Corporation may, by action of its Board of Directors, provide indemnification to employees and agents of the Corporation with the same scope and effect as the foregoing indemnification of directors and officers.

(b) Right of Claimant to Bring Suit. If a claim under Paragraph (a) of this Article EIGHTH is not paid in full by the Corporation within thirty (30) days after a written claim has been received by the Corporation, the claimant may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim, and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim. It shall be a defense to any such action (other than an action brought to enforce a claim for expenses incurred in defending any proceeding in advance of its final disposition where the required undertaking, if any is required, has been tendered to the Corporation) that the claimant has not met the standards of conduct which make it permissible under the Delaware General Corporation Law for the Corporation to indemnify the claimant for the amount claimed, but the burden of proving such defense shall be on the Corporation. Neither the failure of the Corporation (including its Board of Directors, independent legal counsel or stockholders) to have made a determination prior to the commencement of such action that indemnification of the claimant is proper in the circumstances because he or she has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual

determination by the Corporation (including its Board of Directors, independent legal counsel or stockholders) that the claimant has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that the claimant has not met the applicable standard of conduct.

(c) **Non-Exclusivity of Rights.** The right to indemnification and the payment of expenses incurred in defending a proceeding in advance of its final disposition conferred in this Article EIGHTH shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, by-law, agreement, vote of stockholders or disinterested directors or otherwise.

(d) **Insurance.** The Corporation may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise against any such expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.

**ARTICLE NINTH:** Any action required to be taken at any annual or special meeting of stockholders of the Corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Nothing in this Article NINTH shall be construed in any manner as a waiver or limitation of the provisions of any By-law or stockholders agreement which requires the approval of the holders of all of the issued and outstanding shares of Common Stock or the approval of the holders of a specified percentage of the issued and outstanding shares of Common Stock which is greater than a majority in order for the Corporation to take specified action.

**ARTICLE TENTH:** In furtherance and not in limitation of the powers conferred upon the Board of Directors by law, the Board of Directors shall have power to make, adopt, alter, amend or repeal from time to time By-laws of the Corporation, subject to the right of the stockholders entitled to vote with respect thereto to alter and repeal By-laws made by the Board of Directors and subject to the provisions of any By-law or stockholder agreement limiting the right of the Board of Directors to make certain modifications to the By-laws.

IN WITNESS WHEREOF, I have executed this Certificate of Incorporation this 15<sup>th</sup> day of January, 1997, and DO HEREBY CERTIFY under penalties of perjury that the facts stated in this Certificate of Incorporation are true.

  
Eric Leopold, Sole Incorporator

*State of New York* }  
*Department of State* }<sup>ss:</sup>

*I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.*

*Witness my hand and seal of the Department of State on*

**AUG 28 1998**



A handwritten signature in black ink, appearing to read "J. Glavin", is written over a horizontal line.

*Special Deputy Secretary of State*

# EXHIBIT 3

# Delaware

PAGE 1

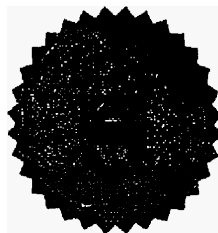
*The First State*

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 "INFOHIGHWAY COMMUNICATIONS CORPORATION", FILED IN THIS OFFICE ON THE EIGHTEENTH DAY OF MARCH, A.D. 2004, AT 6:52 O'CLOCK P.M.

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

2692398 8100

040203843



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

**AUTHENTICATION: 3000281**

**DATE: 03-19-04**

**THIRD RESTATED CERTIFICATE OF INCORPORATION  
OF  
INFOHIGHWAY COMMUNICATIONS CORPORATION**

\* \* \* \* \*  
*Adopted in accordance with the provisions  
of §242 and §245 of the General Corporation Law  
of the State of Delaware*  
\* \* \* \* \*

The undersigned, on behalf of Infohighway Communication Corporation, a corporation duly organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Corporation"), DOES HEREBY CERTIFY as follows:

**FIRST:** The Corporation filed its original Certificate of Incorporation with the Delaware Secretary of State on December 9, 1996 (the "Original Certificate") under the name of Gemini II, Inc.

**SECOND:** The Board of Directors of the Corporation duly adopted resolutions in accordance with §242 and §245 of the General Corporation Law of the State of Delaware authorizing the Corporation to amend, integrate and restate the Restated Certificate of Incorporation in its entirety to read as set forth in Exhibit A attached hereto and made a part hereof (the "Third Restated Certificate").

**THIRD:** In accordance with §228, §242 and §245 of the General Corporation Law of the State of Delaware, the Third Restated Certificate was duly approved and adopted pursuant to a written consent signed by the holders of at least a majority of the issued and outstanding shares of capital stock entitled to vote as a class, whether or not entitled to vote thereon, of the Corporation. Written notice has been given to the stockholders who have not consented in writing.

\* \* \* \* \*

State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 06:52 PM 03/18/2004  
FILED 06:52 PM 03/18/2004  
SRV 040203843 - 2692398 FILE



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FROM NRAI-DE

(FRI) 3.19.04 16:52/ST. 16:51/NO. 4863623870 P 4  
(FRI) 3.19.04 12:52/ST. 12:52/NO. 4863613550 P 5

IN WITNESS WHEREOF, the undersigned on behalf of the Corporation for the purpose of amending and restating the Restated Certificate of Incorporation of the Corporation pursuant to the General Corporation Law of the State of Delaware, under penalties of perjury does hereby declare and certify that this is the act and deed of the Corporation and the facts stated herein are true, and accordingly has hereunto signed this Third Restated Certificate of Incorporation this 18<sup>th</sup> day of March, 2004.

Information Highway Corporation,  
a Delaware corporation

By: /s/ Joseph Gregori  
Name: Joseph Gregori  
Title: Chief Executive Officer

**EXHIBIT A**

**THIRD RESTATED CERTIFICATE OF INCORPORATION  
OF  
INFOHIGHWAY COMMUNICATIONS CORPORATION**

**ARTICLE ONE**

The name of the Corporation is InfoHighway Communications Corporation.

**ARTICLE TWO**

The address of the Corporation's registered office in the State of Delaware is 2711 Centreville Road, Wilmington, Delaware 19808, in the county of New Castle. The name of its registered agent at such address is Corporation Service Company.

**ARTICLE THREE**

The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

**ARTICLE FOUR**

**Part A. Authorized Capital Stock.**

The total number of shares of stock which the Corporation has authority to issue is 40,250,000, consisting of:

- (A) 170,000 shares of Class A Preferred Stock, par value \$0.001 per share (the "Class A Preferred");
- (B) 30,000 shares of Class B Preferred Stock, par value \$0.001 per share (the "Class B Preferred");
- (C) 50,000 shares of Class C Preferred Stock, par value \$0.001 per share (the "Class C Preferred"); and
- (D) 40,000,000 shares of Class A Common Stock, par value \$0.001 per share (the "Class A Common").

The Class A Preferred, Class B Preferred and Class C Preferred are hereafter collectively referred to as the "Preferred Stock."

**Part B. Powers, Preferences and Special Rights of the Preferred Stock.**

**Section 1. Series Issuance of Shares of Class C Preferred.**

The Class C Preferred may be issued from time to time in one or more series designated as Series C-1, C-2, C-3, *etc.* (each, a "Class C Series"). Each Class C Series shall have the same rights, preferences and privileges and qualifications as the other Class C Series; provided that the Board of Directors of the Corporation is hereby authorized to (a) determine the conversion price of each Class C Series, (b) determine any limitations (including limitation on duration) on the conversion rights of each Class C Series, (c) determine the per share Liquidation Value of each Class C Series (for purposes of what such Share is eligible to receive in a liquidation of the Corporation), (d) determine the redemption rights, including the amount each share of a Class C Series is entitled to receive upon redemption, of such Class C Series (e) determine the number of authorized shares constituting each Class C Series and the designation thereof, (f) determine the dividend rights of each Class C Series, (g) determine the issuance date of shares of each Class C Series (for purposes of the calculation of dividends thereon), and (h) increase or decrease (but not below the number of Shares of such Class C Series then outstanding) the number of shares of any Class C Series subsequent to the issue of shares of such Class C Series. In the event that the number of shares of any Class C Series is so decreased, the shares constituting such reduction shall resume the status which such shares had prior to the adoption of the resolutions originally fixing the number of shares of such Class C Series. With respect to a Class C Series, the per share conversion price thereof, any limitations (including limitation on duration) on the conversion rights of such Class C Series, the per share Liquidation Value thereof, the redemption rights, including the amount each share of a Class C Series is entitled to receive upon redemption, of such Class C Series, the number of authorized shares thereof, the dividend rights thereof, and the initial issuance date of such series (for purposes of the calculation of dividends thereon) shall be specified in a Class C Certificate of Designation.

**Section 2. Dividends.**

**2A. General Obligation.** When and as declared by the Corporation's Board of Directors and to the extent permitted under the General Corporation Law of Delaware, the Corporation shall pay preferential dividends to the holders of the Preferred Stock (except for any Class C Series that does not have dividend rights) as provided in this Section 2. Dividends on each share of Preferred Stock (each, a "Share") shall accrue (except for any Class C Series that does not have dividend rights) on a daily basis at the Dividend Rate (as defined below) of the Liquidation Value thereof plus all accumulated and unpaid dividends thereon from and including the date of issuance of such Share to and including the first to occur of (i) the date on which the Liquidation Value of such Share plus all accrued and unpaid dividends thereon is paid to the holder thereof in connection with the liquidation of the Corporation, (ii) the date on which the applicable amount payable with respect to such Share in a redemption is fully paid in connection with such a redemption, (iii) the date on which such share is converted into Common Stock or (iv) the date on which such share is otherwise acquired by the Corporation. Such dividends shall accrue whether or not they have been declared and whether or not there are profits, surplus or other funds of the Corporation legally available for the payment of dividends. The date on which the Corporation initially issues any Share (or, in the case of (i) any Class C Series, the date specified as the date of issuance in the corresponding Class C Certificate of Designation and (ii)

any Share of Class A Preferred issued upon the exercise of a preferred stock option award issued pursuant to the Company's 2004 Senior Management Preferred Stock Option Plan, September 6, 2000) shall be deemed to be its "date of issuance" regardless of the number of times transfer of such Share is made on the stock records maintained by or for the Corporation and regardless of the number of certificates which may be issued to evidence such Share. The "Dividend Rate" means, for the Class A Preferred and Class B Preferred, a rate of 8.0% per annum, and for each series of Class C Preferred, such rate as set forth in corresponding Class C Certificate of Designation.

2B. Dividend Reference Dates. To the extent not paid on March 31, June 30, September 30 and December 31 of each year, beginning September 30, 2000 (the "Dividend Reference Dates"), all dividends which have accrued on each Share outstanding during the three-month period (or other period in the case of the initial Dividend Reference Date) ending upon each such Dividend Reference Date shall be accumulated and shall remain accumulated dividends with respect to such Share until paid to the holder thereof.

2C. Distribution of Partial Dividend Payments. Except as otherwise provided herein, if at any time the Corporation pays less than the total amount of dividends then accrued with respect to the Preferred Stock, such payment shall be distributed pro rata among the holders thereof based upon the aggregate accrued but unpaid dividends on the Shares held by each such holder.

### Section 3. Liquidation.

(i) Upon any liquidation, dissolution or winding up of the Corporation (whether voluntary or involuntary), each holder of Preferred Stock shall be entitled to be paid, before any distribution or payment is made upon any Junior Securities, an amount in cash equal to the aggregate Liquidation Value of all shares of Preferred Stock held by such holder (plus all accrued and unpaid dividends thereon), and the holders of Preferred Stock shall not be entitled to any further payment with respect thereto.

(ii) If, upon any such liquidation, dissolution or winding up of the Corporation (whether voluntary or involuntary), the Corporation's assets to be distributed among the holders of the Preferred Stock are insufficient to permit payment to such holders of the aggregate amount which they are entitled to be paid under this Section 3 with respect to such Preferred Stock, then the entire assets available to be distributed to the Corporation's stockholders shall be distributed pro rata among such holders of Preferred Stock based upon the aggregate Liquidation Value of the Preferred Stock (plus accrued and unpaid dividends thereon) held by each such holder. Not less than 60 days prior to the payment date stated therein, the Corporation shall mail written notice of any such liquidation, dissolution or winding up to each record holder of Preferred Stock, setting forth in reasonable detail the amount of proceeds to be paid with respect to each Share and each share of Common Stock in connection with such liquidation, dissolution or winding up.

Section 4. Priority of Preferred Stock on Dividends and Redemptions. So long as any Preferred Stock remains outstanding, without the prior written consent of the holder (or holders) of a majority of the then outstanding shares of Preferred Stock voting together as a

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single class, the Corporation shall not, nor shall it permit any Subsidiary to, redeem, purchase or otherwise acquire directly or indirectly any Junior Securities, nor shall the Corporation directly or indirectly pay or declare any dividend or make any distribution upon any Junior Securities; provided that the Corporation may repurchase shares of Common Stock from present or former employees of the Corporation or its Subsidiaries in accordance with the provisions of the Senior Management Agreements.

Section 5. Redemptions.

5A. Optional Redemption by the Corporation.

(i) The Corporation may at any time and from time to time redeem all or any portion of the Shares of Class A Preferred then outstanding. Upon any such redemption, the Corporation shall pay a price per Share equal to the Liquidation Value thereof plus all accrued and unpaid dividends thereon.

(ii) The Corporation may at any time and from time to time redeem all or any portion of the Shares of any Class C Series then outstanding upon thirty days prior notice (or such other period as may be specified in the corresponding Class C Certificate of Designation) to the holders of such Class C Series. Upon any such redemption by the Corporation of Shares of a Class C Series, unless otherwise provided in the corresponding Class C Certificate of Designation, the Corporation shall pay a price per Share for such Class C Series equal to the Liquidation Value thereof plus all accrued and unpaid dividends thereon. In connection therewith, the holder (or holders) of such Class C Series may, unless otherwise limited by the applicable Class C Certificate of Designation, elect that all, but not less than all, of such Shares be converted into Common Stock pursuant to Section 6C hereof by delivering notice of such election to the Corporation prior to the Redemption Date specified in the Corporation's notice of redemption, provided that such election shall only be effective if actually received by the Corporation prior to the Redemption Date.

5B. Redemption in connection with a Public Offering. In connection with a Public Offering, the Corporation shall, at the request (by written notice given to the Secretary of the Corporation with a copy thereof to the President) of the holder (or holders) of a majority of the Class A Preferred (which redemption request shall be deemed irrevocable upon consummation of such Public Offering) apply the net cash proceeds from such Public Offering remaining after deduction of all discounts, underwriters' commissions and other reasonable expenses to redeem all (or such lesser portion as requested by the holder (or holders) of a majority of the Class A Preferred) of the Shares of the Class A Preferred at a price per Share equal to the Liquidation Value thereof plus accrued and unpaid dividends thereon. Such redemption shall take place on a date fixed by the Corporation, which date shall be not more than five days after the Corporation's receipt of such proceeds.

5C. Optional Redemption by Holders of Class C Preferred.

(i) If so provided in the corresponding Class C Certificate of Designation (and only to the extent so provided), to the extent assets of the Corporation are available, the Corporation shall, at the request (by written notice given to the Secretary of the Corporation at



least sixty days (or such other period as may be specified in the corresponding Class C Certificate of Designation) prior to the requested effective time of such redemption) of a holder (subject to any restrictions and limitations thereon as may specified in the corresponding Class C Certificate of Designation) of then outstanding shares of such Class C Series, redeem all (or, if so provided in the Class C Certificate of Designation, such lesser portion as requested by such holder) of such holder's Shares of such Class C Series at a price per Share specified in the Class C Certificate of Designation corresponding to such Class C Series.

(ii) Any request for redemption pursuant to this Section 5C shall be null and void (and deemed withdrawn) upon the timely delivery of a request for redemption of Shares of Class A Preferred and Class C Preferred pursuant to Section 5J prior to the Redemption Date established for such Shares of Class C Preferred under this Section 5C; provided that if a request for redemption of Shares of Class A Preferred and Class C Preferred pursuant to Section 5J is rescinded, any request for redemption pursuant to this Section 5C that was nullified and voided by such rescinded request for redemption of Shares of Class A Preferred and Class C Preferred pursuant to Section 5J shall be automatically reinstated.

5D. Redemption Payments and Application of Available Funds.

(i) For each Share which is to be redeemed hereunder, the Corporation shall be obligated on the Redemption Date to pay to the holder thereof (upon surrender by such holder at the Corporation's principal office of the certificate representing such Share) the amount specified in the relevant redemption section of this Section 5 (and, to the extent applicable, the corresponding Class C Certificate of Designation) in immediately available funds (each, a "Redemption Amount"). If the funds of the Corporation legally available for any redemption of Shares pursuant to Section 5A are insufficient to redeem the total number of such Shares to be redeemed pursuant to Section 5A on the applicable Redemption Date, such redemption pursuant to Section 5A shall be made pro rata among the holders of the Shares of Preferred Stock to be redeemed based upon the aggregate Liquidation Value of such Shares of Preferred Stock held by each such holder plus all accrued and unpaid dividends thereon.

(ii) If the net cash proceeds from a Public Offering remaining after deduction of all discounts, underwriters' commissions and other reasonable expenses are insufficient to redeem the total number of Shares of Class A Preferred to be redeemed pursuant to Section 5B, such net cash proceeds shall be used to redeem the maximum number of Shares of Class A Preferred pro rata among the holders of Shares of Class A Preferred based on the aggregate Liquidation Value of such Shares of Class A Preferred Stock held by each such holder plus all accrued and unpaid dividends thereon.

(iii) If the funds of the Corporation legally available for any redemption of Shares pursuant to Section 5C are insufficient to redeem the total number of such Shares to be redeemed pursuant to Section 5C on the applicable Redemption Date, such redemption pursuant to Section 5C shall be made pro rata among the holders of the Shares of each series of Class C Preferred Stock to be redeemed based upon the aggregate Liquidation Value of such Shares of such series of Class C Preferred Stock held by each such holder plus all accrued and unpaid dividends thereon.

(iv) In connection with simultaneous (or overlapping) elections for redemption (e.g., demands for redemption of Shares pursuant to Section 5B and 5C), if the funds of the Corporation legally available for the redemption of such Shares are insufficient to redeem the total number of such Shares to be redeemed pursuant to this Section 5 on the applicable Redemption Date, such redemptions shall be made pro rata among the holders of the Shares of Preferred Stock to be redeemed based upon the aggregate Liquidation Value of such Shares of Preferred Stock held by each such holder plus all accrued and unpaid dividends thereon.

5E. Notice of Redemption. Except as otherwise provided herein or, in the case of a Class C Series, herein or in the corresponding Certificate of Designation, the Corporation shall mail written notice of each redemption of any shares of Preferred Stock to each record holder of the class of Preferred Stock being redeemed not more than 45 nor less than 15 days prior to the date on which such redemption is to be made and also, in the case of any redemption of Shares of Class C Preferred, all holders of Class A Preferred. In case fewer than the total number of Shares represented by any certificate are redeemed, a new certificate representing the number of unredeemed Shares shall be issued to the holder thereof without cost to such holder within five business days after surrender of the certificate representing the redeemed Shares.

5F. Determination of Pro Rata Participation. Except as otherwise provided herein or in an applicable Certificate of Designation, in connection with the redemption of a particular class or series of a class of Preferred Stock hereunder, the number of Shares of such class or series of Preferred Stock to be redeemed from each holder thereof in redemptions hereunder shall be the number of Shares determined by multiplying (x) the total number of Shares of such class (or series) of Preferred Stock to be redeemed by (y) a fraction, the numerator of which shall be the aggregate Liquidation Value of Shares of such class (or series) of Preferred Stock then held by such holder (plus accrued and unpaid dividends thereon) and the denominator of which shall be the aggregate Liquidation Value of Shares of such class (or series) of Preferred Stock then outstanding (plus accrued and unpaid dividends thereon). Except as otherwise explicitly provided herein, in the case of a redemption of a specific series of a class of Preferred Stock (as opposed to a redemption of the entire class), any holdings of other series of such class of Preferred Stock shall be disregarded for purposes of calculating the participation rights of the holders of the series of such class of Preferred Stock being redeemed hereunder.

5G. Dividends After Redemption Date. No Share shall be entitled to any dividends accruing after the date on which the Redemption Amount is paid to the holder of such Share. On such date, all rights of the holder of such Share shall cease, and such Share shall no longer be deemed to be issued and outstanding.

5H. Redeemed or Otherwise Acquired Shares. Any Shares which are redeemed or otherwise acquired by the Corporation shall be canceled and retired to authorized but unissued shares and shall not be reissued, sold or transferred.

5I. Other Redemptions or Acquisitions. The Corporation shall not, nor shall it permit any Subsidiary to, redeem or otherwise acquire any Shares of Preferred Stock, except as expressly authorized herein.

### 5J. Special Redemptions.

(i) If a Change in Ownership has occurred or the Corporation obtains knowledge that a Change in Ownership is proposed to occur, the Corporation shall give prompt written notice of such Change in Ownership describing in reasonable detail the material terms and date of consummation thereof to each holder of Preferred Stock, but in any event such notice shall not be given later than five days after the occurrence of such Change in Ownership, and the Corporation shall give each holder of Preferred Stock prompt written notice of any material change in the terms or timing of such transaction.

(ii) Upon receipt of notice of a Change in Ownership (or proposed Change in Ownership), the holder (or holders) of a majority of the Class A Preferred then outstanding may require the Corporation to redeem all (or such lesser portion of the Class A Preferred and Class C Preferred taken together as a single class as requested by the holder (or holders) of a majority of the Class A Preferred then outstanding) of the Class A Preferred and Class C Preferred at a price per Share equal to the Liquidation Value of such Share, plus all accrued and unpaid dividends thereon, by giving written notice to the Corporation of such election prior to the later of (a) 21 days after receipt of the Corporation's notice of a Change in Control (or proposed Change in Control) and (b) five days prior to the consummation of the Change in Ownership. The Corporation shall give prompt written notice of any such election to all other holders of Class A Preferred and Class C Preferred within five days after the receipt thereof, and each such holder shall be obligated to tender for redemption a number of Shares of Class A Preferred and Class C Preferred owned by such holder equal to such holder's pro rata share of the total number of Class A Preferred and Class C Preferred being redeemed pursuant to this Section 5J, such redemption to be effective upon the occurrence of the Change in Ownership and dividends shall stop accruing on such Shares of Class A Preferred and Class C Preferred as of the effectiveness of such redemption (regardless of whether or not such Shares are tendered). In connection therewith, the holder (or holders) of a majority of a Class C Series may, unless otherwise limited by the applicable Class C Certificate of Designation, elect that all, but not less than all, of such Shares of such Class C Series be converted into Common Stock pursuant to Section 6C hereof by delivering notice of such election to the Corporation prior to the applicable Redemption Date, provided that such election shall only be effective if actually received by the Corporation prior to the Redemption Date. If any proposed Change in Ownership does not occur, the request for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, the holder (or holders) of a majority of the Class A Preferred may rescind the request for redemption of Class A Preferred and Class C Preferred by delivering written notice thereof to the Corporation prior to the consummation of the transaction.

(iii) If a Fundamental Change is proposed to occur, the Corporation shall give written notice of such Fundamental Change describing in reasonable detail the material terms and date of consummation thereof to each holder of Preferred Stock not more than 45 days nor less than 20 days prior to the consummation of such Fundamental Change, and the Corporation shall give each holder of Preferred Stock prompt written notice of any material change in the terms or timing of such transaction.



(iv) Upon receipt of a notice of a Fundamental Change, the holder (or holders) of a majority of the Class A Preferred then outstanding may require the Corporation to redeem all (or such lesser portion of the Class A Preferred and Class C Preferred taken together as a single class as requested by the holder (or holders) of a majority of the Class A Preferred then outstanding) of the Class A Preferred and Class C Preferred at a price per Share equal to the Liquidation Value of such Share, plus all accrued and unpaid dividends thereon, by giving written notice to the Corporation of such election prior to the later of (a) ten days prior to the consummation of the Fundamental Change or (b) ten days after receipt of notice of a Fundamental Change from the Corporation. The Corporation shall give prompt written notice of such election to all other holders of Class A Preferred and Class C Preferred (but in any event within five days prior to the consummation of the Fundamental Change), and each such holder shall be obligated to tender for redemption a number of Shares of Class A Preferred and Class C Preferred owned by such holder equal to their pro rata share of the total number of Class A Preferred and Class C Preferred being redeemed pursuant to this Section 5J. In connection therewith, the holder (or holders) of a majority of a Class C Series may, unless otherwise limited by the applicable Class C Certificate of Designation, elect that all, but not less than all, of such Shares of such Class C Series be converted into Common Stock pursuant to Section 6C hereof by delivering notice of such election to the Corporation prior to the applicable Redemption Date, provided that such election shall only be effective if actually received by the Corporation prior to the Redemption Date. If any proposed Fundamental Change does not occur, the request for redemption in connection therewith shall be automatically rescinded, or if there has been a material change in the terms or the timing of the transaction, any holder (or holders) of a majority of Class A Preferred may rescind the request for redemption of Class A Preferred and Class C Preferred by delivering written notice thereof to the Corporation prior to the consummation of the transaction.

(v) The rights of the holders of each Class C Series are subject to any additional obligations or restrictions thereon, if any, that are set forth in the corresponding Class C Certificate of Designation.

(vi) If the funds of the Corporation legally available for redemption of Shares of Class A Preferred and Class C Preferred pursuant to this Section 5J are insufficient to redeem the total number of shares of Class A Preferred and Class C Preferred to be redeemed on the Redemption Date, those funds of the Corporation which are legally available shall be used to redeem the maximum possible number of shares of Class A Preferred and Class C Preferred pro rata among the holders of Shares of Class A Preferred and Class C Preferred to be redeemed (after giving effect to any conversion of Shares of Class C Preferred into Common Stock) based upon the aggregate Liquidation Value of such shares of Preferred Stock held by such holders, plus all accrued and unpaid dividends thereon, and the holders of such Shares shall not be entitled to any further payment with respect to the Shares for which redemption was requested pursuant to this Section 5J.

## Section 6. Conversion of Preferred Stock.

### 6A. Automatic Conversion at the Option of the Corporation.

(i) In connection with a Public Offering, to the extent not otherwise requested to be redeemed pursuant to a redemption request pursuant to Section 5B (which redemption request shall be deemed irrevocable upon consummation of such Public Offering) or converted pursuant to Section 6B below, any Shares of Class A Preferred and Class B Preferred (including any fractional Shares) then issued and outstanding shall automatically be converted into such number of shares of Class A Common equal to (x) the Liquidation Value of such Shares of Class A Preferred and/or Class B Preferred being converted, plus all accrued and unpaid dividends thereon, divided by (y) the price per share of Class A Common in such Public Offering. Any such conversion pursuant to this Section 6A(i) shall be subject to and effective upon the consummation of such Public Offering.

(ii) In connection with a Public Offering, to the extent not otherwise redeemed pursuant to Section 5C or converted pursuant to Section 6C, any Shares of any Class C Series (including any fractional Shares) then issued and outstanding shall automatically be converted into such number of shares of Class A Common equal to (x) the Liquidation Value of such Shares of Class C Series being converted divided by (y) the conversion price per share of such Class C Series as specified in the corresponding Class C Certificate of Designation. Any such conversion pursuant to this Section 6A(ii) shall be subject to and effective upon the consummation of such Public Offering. In connection therewith, to the extent specifically permitted by Section 5C hereof and by the applicable Certificate of Designation (and subject to any restrictions and limitations on redemption set forth therein), a holder (or holders) of Shares of such Class C Series may elect that all, but not less than all, of such Shares held by such holder be redeemed pursuant to Section 5C hereof by delivering notice of such election to the Corporation no later than 5 business days prior to expected conversion date specified in the Corporation's notice of conversion; provided that such election shall only be effective if actually received by the Corporation at least 5 business days prior to expected conversion date specified in the Corporation's notice of conversion.

**6B. Conversion at the Request of a Stockholder in Connection with Public Offering.** In connection with and effective upon the declaration by the United States Securities and Exchange Commission of the effectiveness of a registration statement for the Company's common stock, any holder of Class A Preferred may convert all or any portion of such Preferred Stock (including any fraction of a Share) held by such holder into such number of shares of Class A Common equal to (x) the aggregate Liquidation Value of such Shares being converted plus all accrued and unpaid dividends thereon divided by (y) the price per share of Class A Common in such Public Offering. Any such conversion pursuant to this Section 6B shall be subject to and effective upon the declaration by the U.S. Securities and Exchange Commission of the effectiveness of a registration statement for the Company's common stock that provides for the registration of at least the number of shares of Class A Common into which such Shares are being converted.

**6C. Conversion of Shares of a Class C Series.** To the extent not otherwise limited by the Class C Certificate of Designation corresponding to such Class C Series, any

holder of Shares of a Class C Series may convert all (but not less than all) of such Class C Series (including any fraction of a Share) held by such holder into such number of shares of Class A Common equal to (x) the aggregate Liquidation Value of such Shares being converted divided by (y) the applicable conversion price for such Class C Series as specified in the corresponding Class C Certificate of Designation.

6D. Conversion Procedures. For each Share of Preferred Stock which is to be converted into shares of Class A Common hereunder, the Corporation shall be obligated to deliver to any holder of Preferred Stock being converted pursuant to this Section 6, a certificate representing such number of duly authorized, fully paid and non-assessable shares of Class A Common the number of shares issuable upon conversion of such Share of Preferred Stock as set forth in Sections 6A, 6B and 6C above. If any fractional interest in a share of Class A Common would, except for the provisions of this subsection, be delivered upon any conversion of Preferred Stock, the Corporation, in lieu of delivering the fractional share therefor, shall pay an amount to the holder thereof equal to the applicable conversion price thereof multiplied by the fractional interest the holder would otherwise be entitled to as of the date of conversion. Each conversion of a Share shall be deemed to have been effected as of the close of business on (i) the closing date of such Public Offering in the case of a conversion in connection with a Public Offering in the case of a conversion pursuant to Section 6A or (ii) the date of issuance of the Common Stock in the case of a conversion pursuant to Section 6B or 6C above. At such time as such conversion has been effected, the rights of the holder of such Preferred Stock as a holder of such Preferred Stock shall cease and the Person or Persons in whose name or names any certificate or certificates for shares of Class A Common are to be issued upon such conversion shall be deemed to have become the holder or holders of record of the shares of Class A Common represented thereby.

6E. Notice of Conversion by Corporation. Except as otherwise provided herein or, in the case of a Class C Series, herein or in the corresponding Certificate of Designation, the Corporation shall mail written notice of any proposed conversion pursuant to Section 6A of any Shares of Preferred Stock to each record holder of such Shares proposed to be converted not more than 45 nor less than 15 days prior to the date on which such conversion is expected to be consummated.

Section 7. Voting Rights. Except as otherwise provided herein and as otherwise required by applicable law, no class of the Preferred Stock shall have any voting rights; provided that each holder of Preferred Stock shall be entitled to notice of all stockholders meetings at the same time and in the same manner as notice is given to all stockholders entitled to vote at such meetings.

Section 8. Registration of Transfer. The Corporation shall keep at its principal office a register for the registration of Preferred Stock. Upon the surrender of any certificate representing Preferred Stock at such place, the Corporation shall, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of Shares and class of Preferred Stock represented by the surrendered certificate. Each such new certificate shall be registered in such name and shall represent such number of Shares as is requested by the holder of the surrendered certificate and shall be substantially identical in form

to the surrendered certificate, and dividends shall accrue on the Preferred Stock represented by such new certificate from the date to which dividends have been fully paid on the Preferred Stock represented by the surrendered certificate.

**Section 9. Replacement.** Upon receipt of evidence reasonably satisfactory to the Corporation (an affidavit of the registered holder shall be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing Shares of Preferred Stock, and in the case of any such loss, theft or destruction, upon receipt of indemnity reasonably satisfactory to the Corporation (provided that if the holder is a financial institution or other institutional investor its own agreement shall be satisfactory), or, in the case of any such mutilation upon surrender of such certificate, the Corporation shall (at its expense) execute and deliver in lieu of such certificate a new certificate of like kind representing the number and class of Shares of Preferred Stock represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate, and dividends shall accrue on the Shares of Preferred Stock represented by such new certificate from the date to which dividends have been fully paid on such lost, stolen, destroyed or mutilated certificate.

**Section 10. Definitions.**

**"Change in Ownership"** means any sale, transfer or issuance or series of sales, transfers and/or issuances of Common Stock by the Corporation or any holders thereof which results in any Person or group of Persons (as the term "group" is used under the Securities Exchange Act of 1934), other than GTCR Fund VII, L.P., together with its affiliates, owning more than 50% of the Common Stock outstanding at the time of such sale, transfer or issuance or series of sales, transfers and/or issuances.

**"Class C Certificate of Designation"** means, with respect to each Class C Series, the certificate of designation filed with the Delaware Secretary of State (as such certificate may be amended from time to time pursuant hereto) setting forth for such series of Class C Preferred, the conversion price thereof, any limitations (including limitation on duration) on the conversion rights of such Class C Series, the liquidation value thereof, the redemption rights, including the amount each share of a Class C Series is entitled to receive upon redemption of such Class C Series, the number of authorized shares thereof, the dividend rights thereof, and the initial issuance date of such series (for purposes of the calculation of dividends thereon).

**"Common Stock"** means, collectively, the Corporation's Common Stock and any capital stock of any class of the Corporation hereafter authorized which is not limited to a fixed sum or percentage of par or stated value in respect to the rights of the holders thereof to participate in dividends or in the distribution of assets upon any liquidation, dissolution or winding up of the Corporation.

**"Fundamental Change"** means (a) any sale or transfer of more than 50% of the assets of the Corporation and its Subsidiaries on a consolidated basis (measured either by book value in accordance with generally accepted accounting principles consistently applied or by fair market value determined in the reasonable good faith judgment of the Corporation's Board of Directors) in any transaction or series of transactions (other than sales in the ordinary course of business) and (b) unless waived by the holders of a majority of the Preferred Stock voting

together as a single class, any merger or consolidation to which the Corporation is a party, except for a merger in which the Corporation is the surviving corporation, the terms of the Class A Preferred are not changed and the Class A Preferred is not exchanged for cash, securities or other property, and after giving effect to such merger, the holders of the Corporation's outstanding capital stock possessing a majority of the voting power (under ordinary circumstances) to elect a majority of the Corporation's Board of Directors immediately prior to the merger shall continue to own the Corporation's outstanding capital stock possessing the voting power (under ordinary circumstances) to elect a majority of the Corporation's Board of Directors.

"Junior Securities" means, with respect to the Preferred Stock, any other capital stock or other equity securities of the Corporation, except for the Class A Preferred, Class B Preferred and Class C Preferred.

"Liquidation Value" as of any particular date of any Share of (i) Class A Preferred shall be equal to \$1,000.00; (ii) Class B Preferred shall be equal to \$1,000.00; and (iii) each Class C Series, the liquidation value specified in the Class C Certificate of Designation corresponding to such Class C Series.

"Person" means an individual, a partnership, a corporation, a limited liability company, a limited liability, an association, a joint stock company, a trust, a joint venture, an unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

"Preferred Stock" means, collectively, the Class A Preferred, the Class B Preferred and the Class C Preferred.

"Public Offering" means any offering by the Corporation of its capital stock or equity securities to the public pursuant to an effective registration statement under the Securities Act of 1933, as then in effect, or any comparable statement under any similar federal statute then in force.

"Redemption Amount" as of any particular date, has the meaning given to such term in Section 5D of this Part B of this Article Four.

"Redemption Date" as to any Share means the date specified in the notice of any redemption at the Corporation's option or at the holder's option or the applicable date specified herein in the case of any other redemption; provided that no such date shall be a Redemption Date unless the Redemption Amount of such Share is actually paid in full on such date, and if not so paid in full, the Redemption Date shall be the date on which such amount is fully paid.

"Senior Management Agreements" mean (i) the Senior Management Agreement, dated September 6, 2000, between the Corporation and Joseph A. Gregori, (ii) the Senior Management Agreement, dated September 6, 2000, between the Corporation and Peter F. Parrinello, (iii) the Senior Management Agreement, dated September 6, 2000, between the Corporation and Peter Karoczka, (iv) the Senior Management Agreement, dated September 6, 2000, between the Corporation and Charles N. Garber, (v) the Senior Management Agreement, dated September 6, 2000, between the Corporation and Tony Howlett, (vi) the Senior Management Agreement, dated March 31, 2001, between the Corporation and Edward

FROM NRAI-DE

FROM NRAI-DE.

Seidenberg, (vii) the Senior Management Agreement, dated March 31, 2001, between the Corporation and Robert Iorizzo, (viii) the Senior Management Agreement, dated March 10, 2003 between the Corporation and Michael Kucza and (ix) any other agreement regarding the issuance of capital stock entered into between the Corporation and its employees as approved by the Corporation's Board of Directors.

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity, a majority of the partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by any Person or one or more Subsidiaries of that person or a combination thereof. For purposes hereof, a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, partnership, association or other business entity if such Person or Persons shall be allocated a majority of limited liability company, partnership, association or other business entity gains or losses or shall be or control the managing general partner of such limited liability company, partnership, association or other business entity.

Section 11. Amendment and Waiver. No amendment, modification or waiver shall be binding or effective with respect to any provision hereof without the prior written consent of the holders of a majority of the Preferred Stock outstanding at the time such action is taken, provided that no such modification, amendment or waiver that would adversely affect or otherwise diminish the rights of the holders of one class of Preferred Stock in a manner different from holders of any other class of Preferred Stock (other than as explicitly contemplated herein) shall be effective without the prior written consent of the holders of at least a majority of the class of Preferred Stock adversely affected or otherwise diminished thereby.

Section 12. Notices. Except as otherwise expressly provided hereunder, all notices referred to herein shall be in writing and shall be delivered by registered or certified mail, return receipt requested and postage prepaid, or by reputable overnight courier service, charges prepaid, and shall be deemed to have been given when so mailed or sent (i) to the Corporation, at its principal executive offices and (ii) to any stockholder, at such holder's address as it appears in the stock records of the Corporation (unless otherwise indicated by any such holder).

**Part C. Powers, Preferences and Special Rights of the Common Stock.**

Section 1. Voting Rights. Except as otherwise provided in this Part C or as otherwise required by applicable law, the holders of Common Stock shall be entitled to one vote per share on all matters to be voted on by the Corporation's stockholders.

Section 2. Dividends. As and when dividends are declared or paid with respect to shares of Common Stock, whether in cash, property or securities of the Corporation, the holders of Common Stock shall be entitled to receive such dividends pro rata. The rights of

the holders of Common Stock to receive dividends are subject to the provisions of the Preferred Stock.

**Section 3. Liquidation.** Subject to the provisions of the Preferred Stock, the holders of the Common Stock shall be entitled to participate pro rata at the same rate per share of each class of Common Stock in all distributions to the holders of the Common Stock in any liquidation, dissolution or winding up of the Corporation.

**Section 4. Registration of Transfer.** The Corporation shall keep at its principal office (or such other place as the Corporation reasonably designates) a register for the registration of shares of Common Stock. Upon the surrender of any certificate representing shares of any class of Common Stock at such place, the Corporation shall, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of shares of such class represented by the surrendered certificate and the Corporation shall forthwith cancel such surrendered certificate. Each such new certificate shall be registered in such name and shall represent such number of shares of such class as is requested by the holder of the surrendered certificate and shall be substantially identical in form to the surrendered certificate. The issuance of new certificates shall be made without charge to the holders of the surrendered certificates for any issuance tax in respect thereof or other cost incurred by the Corporation in connection with such issuance.

**Section 5. Replacement.** Upon receipt of evidence reasonably satisfactory to the Corporation (provided, that an affidavit of the registered holder will be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing one or more shares of any class of Common Stock, and in the case of any such loss, theft or destruction, upon receipt of indemnity reasonably satisfactory to the Corporation (provided that if the holder is a financial institution or other institutional investor its own agreement will be satisfactory), or, in the case of any such mutilation upon surrender of such certificate, the Corporation shall (at its expense) execute and deliver in lieu of such certificate a new certificate of like kind representing the number of shares of such class represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate.

**Section 6. Notices.** All notices referred to herein shall be in writing, and shall be delivered by registered or certified mail, return receipt requested, postage prepaid, and shall be deemed to have been given when so mailed (i) to the Corporation at its principal executive offices and (ii) to any stockholder at such holder's address as it appears in the stock records of the Corporation (unless otherwise specified in a written notice to the Corporation by such holder).

**Section 7. Amendment and Waiver.** No amendment or waiver of any provision of this Part C shall be effective without the prior approval of the holders of a majority of the then outstanding shares of Common Stock voting together as a group.

## ARTICLE FIVE

The Corporation is to have perpetual existence.

FROM NRAI-DE

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#### ARTICLE SIX

In furtherance and not in limitation of the powers conferred by statute, the board of directors of the Corporation is expressly authorized to make, alter or repeal the by-laws of the corporation.

#### ARTICLE SEVEN

Meetings of stockholders may be held within or outside of the State of Delaware, as the by-laws of the Corporation may provide. The books of the Corporation may be kept 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 by-laws of the Corporation. Election of directors need not be by written ballot unless the by-laws of the Corporation so provide.

#### ARTICLE EIGHT

To the fullest extent permitted by the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended, a director of this Corporation shall not be liable to the Corporation or its stockholders for monetary damages for a breach of fiduciary duty as a director. Any repeal or modification of this ARTICLE EIGHT shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

#### ARTICLE NINE

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

#### ARTICLE TEN

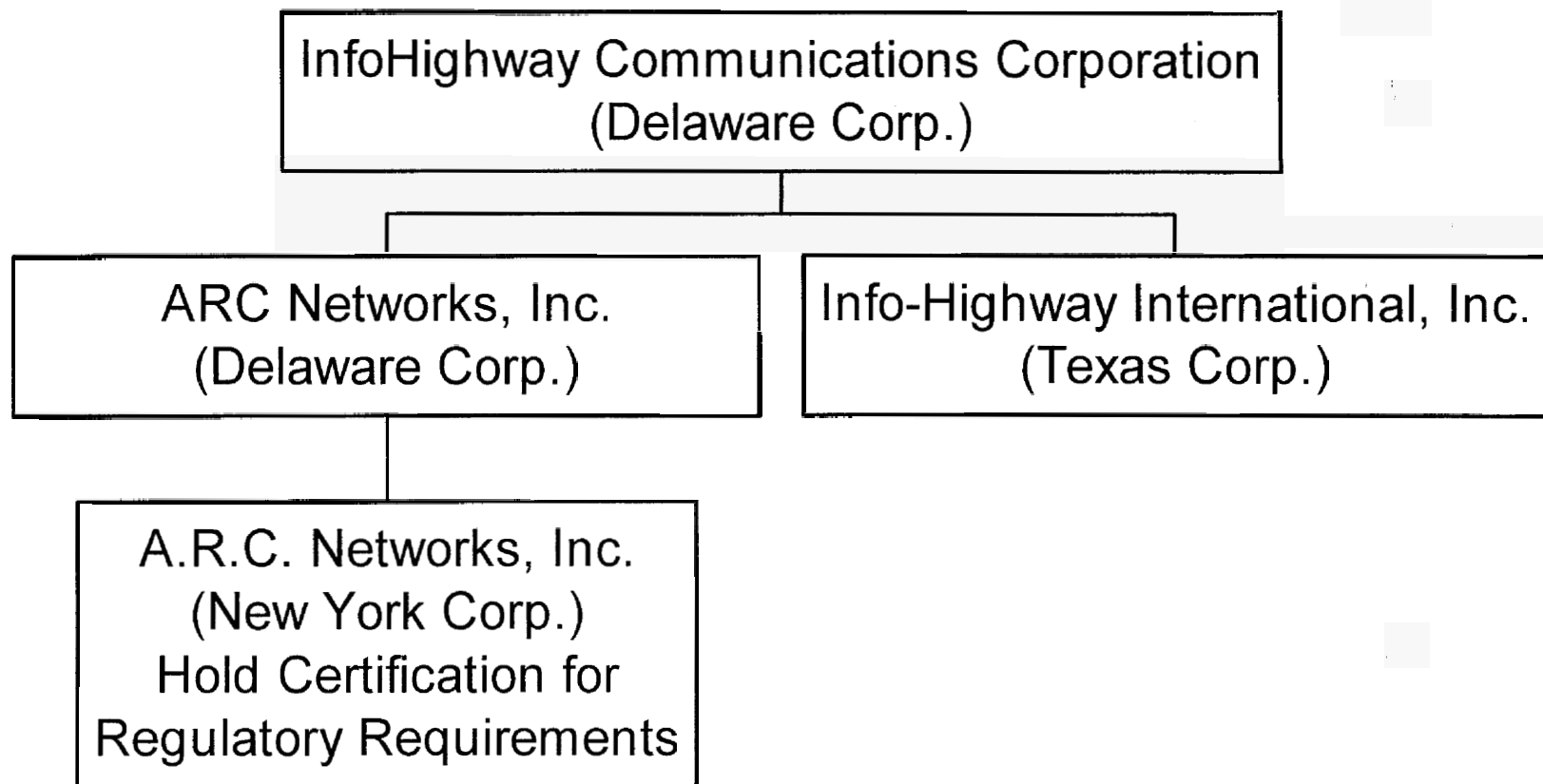
The Corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation in the manner now or hereafter prescribed herein and by the laws of the State of Delaware, and all rights conferred upon stockholders herein are granted subject to this reservation.

\* \* \* \* \*



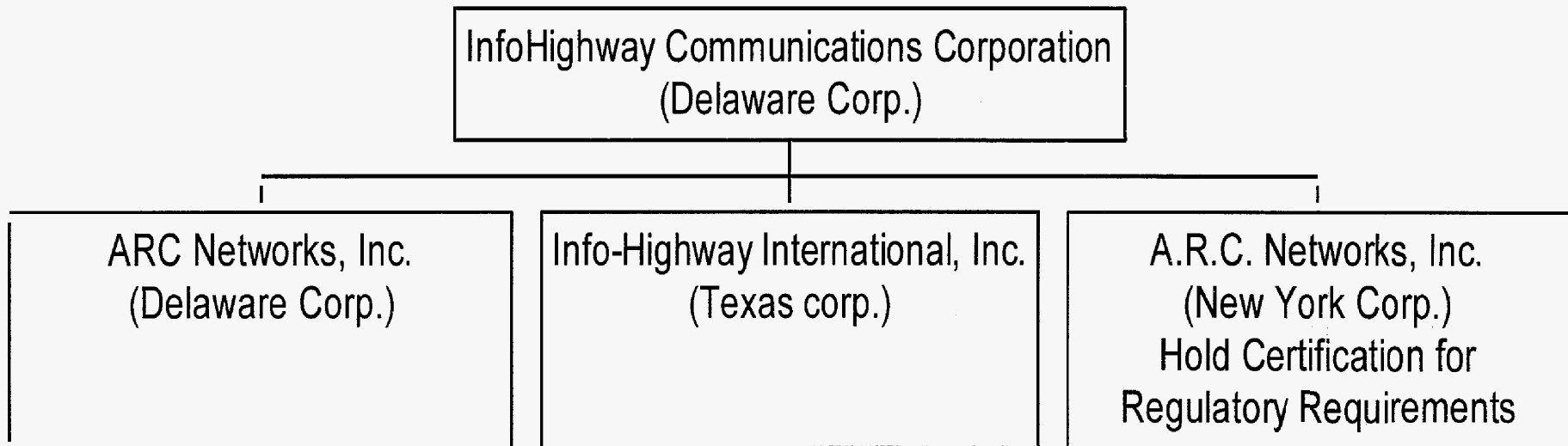
## EXHIBIT 4

# Pre-Transfer Corporate Structure




## EXHIBIT 5

# Post-Transfer Corporate Structure



**VERIFICATION**

I, Michael Kucza, being duly sworn according to law, depose and say that I am the Chief Financial Officer of InfoHighway Communications Corporation; that I am authorized to and do make this Verification for it, and for its subsidiaries, A.R.C. Networks, Inc. and ARC Networks, Inc. (together, the "Joint Applicants"); that the facts set forth in the above Application are true and correct to the best of my knowledge, information and belief, and that I expect the Joint Applicants to be able to prove the same at any hearing hereof; and that the Joint Applicants understand that, if the contents of the Application are found to be false or to contain misrepresentations, any authority granted may be suspended or revoked upon Commission Order. I further depose and say that the authority to submit the Application has been properly granted.

  
Michael Kucza *CFO*

STATE OF NEW YORK )

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SS.

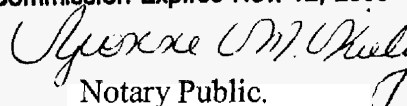
COUNTY OF NEW YORK )

)

SUBSCRIBED AND SWORN to me this 9<sup>th</sup> day of DEC, 2004.

Witness my hand and official seal.

**YVONNE M. KIELY**  
Notary Public, State Of New York  
No. 01KI6083385  
Qualified In Suffolk County  
Commission Expires Nov. 12, 2006

  
Notary Public.