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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Cable Television Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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In the Matter of Implementation of the Cable Television Television Consumer Protection and Competition Act of 1992 Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	CS Docket No. 97-248 RM No. 9097

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, submits these reply comments in the above-referenced proceeding.

INTRODUCTION AND SUMMARY

Cablevision and its affiliate Rainbow Media Holdings, Inc. ("Rainbow") are pioneers in the development of cable programming services, having successfully launched more than a dozen national and regional cable programming networks, including the nation's first regional news channel, News 12 Long Island. Cablevision's willingness to undertake the substantial risks associated with these ventures reflects its long-standing belief that the timely development of innovative new programming services is critical to retaining existing customers and winning new subscribers.

Cablevision and Rainbow are now planning a new package of terrestrially-delivered local programming services designed to function as the electronic equivalent of a local newspaper.

This new package of programming services, which is expected to cost tens of millions dollars to develop, will combine community-based information and entertainment content with the interactive capabilities made possible by Cablevision's advanced infrastructure. Cablevision's investment in this programming represents its initial foray into a broad array of services that will take advantage of the digitization of video program delivery and the convergence of television and computers. Cablevision aims to develop the next generation of local and regional programming, that will eventually include interactive capabilities, Internet access and other cross-media applications.

The risks associated with the development of this next generation of video services will be substantial. As Cablevision explained in its initial comments, it simply does not make economic or business sense for a firm to incur these risks and make the investments necessary to develop new programming services if it will be forced to share them with competitors.[1/] Extending the reach of the program access rules, as cable's competitors demand, would essentially turn cable programming into a commodity, deterring risky forays into interactive, cross-media services that distributors could use to differentiate themselves from competitors. Such a result surely would not serve the public interest in the development of innovative services that fully exploit the potential for diversity inherent in digital technology.

Predictably, some competitors invoke Cablevision's frank acknowledgment of the importance of exclusivity for new local and regional programming services as evidence of the need to extend the program access rules to terrestrial services.[2/] The Commission should not be

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[1/] Comments of Cablevision Systems Corporation at 6-7, 19-25 ("Cablevision Comments").

[2/] See, e.g., Comments of Bell Atlantic at 10 ("Bell Atlantic Comments"); Comments of DirecTV, Inc. at 12-13 n.30 ("DirecTV Comments"); Comments of RCN Telecom Services, Inc. at 13-14 ("RCN Comments").

swayed by such arguments. Section 628's application to satellite cable programming ensures that competitors have access to all of the popular cable programming services necessary to offer subscribers a viable competitive alternative to the incumbent cable operator.[3/] Excluding terrestrially-delivered programming services from the scope of section 628 gives programmers the economic incentives to invest in risky local and regional programming services. The resulting programming diversity benefits consumers by giving them access to innovative services that would not otherwise be developed and by promoting service competition in addition to price competition among video distributors.

The local telephone monopolies, General Motors' DirecTV, EchoStar and others who have been unwilling to make their own investments in programming urge the Commission to reward their risk-averse strategies by subjecting even more programming to the mandatory access and price control requirements of section 628. In light of the clear congressional decision to exclude terrestrially-delivered programming services from section 628, however, cable's competitors can offer only tenuous legal and statutory arguments in support of such a step. Instead, they reflexively assert that a programmer's use of terrestrial facilities is presumptively evasive, without ever considering the cost, technological and marketing advantages terrestrial delivery offers, particularly for local and regional programming services.

The implications of this position for the development of diverse programming in a digital age are clear. In the short run, the public will be deprived of new local and regional programming that will not be developed without exclusivity. Going forward, if government policy requires programmers to make every innovation available to every distributor, they will

[3/] Cablevision Comments at 12-13 & n.14; Comments of Liberty Media Corporation at 2 & nn.3-4 ("Liberty Comments"); Comments of Comcast Corporation at 14 ("Comcast not be able to make the kind of long-term commitment of money and other resources that success in the video programming marketplace has required in the past and will require more of in the future. Cable's competitors have shown no such commitment, and their only solution is to demand access to the program offerings developed by others. The public interest in program diversity is best served by rejecting calls to extend the program access rules to terrestrially-delivered programming.

DISCUSSION

Extending The Program Access Rules To Terrestrially-Delivered Programming Would Violate Section 628 And Harm Both Competition And Consumers By Discouraging Investment In New Programming Services

Ignoring Congress's explicit decision to limit the application of the program access rules to "satellite cable programming,"[4] a number of commenters assert that the constraints of section 628 can be extended to terrestrially-delivered cable programming services.[5] The lengths to which some commenters go in their effort to shoehorn terrestrial programming into the confines of section 628 illustrate the meritlessness of their position. For example, in stark contrast to the ILEC position asserted in connection with the Eighth Circuit's review of the Commission's Local Competition Order, Ameritech, BellSouth, and SNET all contend that the ancillary authority granted to the Commission in sections 4(i) and 303(r) of the Communications Act can override the express and specific limitation on the scope of the Commission's authority set forth

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Comments").

[4] 47 U.S.C. § 548.

[5] See, e.g., RCN Comments at 12-17; Bell Atlantic Comments at 9-11; Comments of Ameritech New Media, Inc. at 24-26 ("Ameritech Comments"); DirecTV Comments at 19-23; Comments of GE American Communications, Inc. at 6-10 ("GE Americom Comments"); Comments of EchoStar Communications Corporation at 12-15 ("EchoStar Comments"); Comments of The Wireless Cable Association at 19-24 ("WCA Comments").

in section 628.[6] To bolster its position that the rules can be applied to terrestrial programming, Bell Atlantic cites to the legislative history of the Senate program access provisions, whose use of the phrase "national or regional" programming was explicitly rejected by the Conference Committee in favor of the term "satellite cable programming."[7] DirecTV and EchoStar take a bolder approach, counseling the Commission to ignore the plain language of the statute and simply construe the term "satellite cable programming" to include programming which is not delivered via satellite.[8] Likewise, GE Americom claims that the phrase "satellite cable programming" actually means all programming because "Congress wrote section 628 at a time when all material cable programming services were distributed by satellite."[9]

Notwithstanding these meritless arguments, the scope of section 628 clearly cannot be extended to encompass terrestrially-delivered programming. As Cablevision and others explained in initial comments, Congress expressly chose to exclude terrestrial programming from the program access provisions of section 628 and limited their application to "satellite cable programming."[10] In fact, terrestrial delivery of local and regional programming has been used for many years, and Congress was aware of the practice at the time it enacted the 1992 Cable Act.[11] If Congress had wanted to apply the program access rules to non-satellite programming, it could have written a short and simple provision to achieve that result.

6/ Compare Ameritech Comments at 25-26; Comments of BellSouth Corporation, et al. at 25-26 n.52 ("BellSouth Comments"); Comments of SNET Personal Vision at 5 ("SNET Comments") with Iowa Utils. Bd. v. FCC, 120 F.3d 753, 795 (8th Cir. 1997).

7/ Bell Atlantic Comments at 11; see Cablevision Comments at 15-16.

8/ EchoStar Comments at 13; DirecTV Comments at 6-7.

9/ GE Americom Comments at 3-4.

10/ Cablevision Comments at 13-17; see Comcast Comments at 8-10; Comments of National Cable Television Association at 13-16 ("NCTA Comments").

11/ Liberty Comments at 26 n.51.

The congressional decision to exclude terrestrial programming from the restrictions of the program access rules also militates against construing section 628(b) as authorizing the Commission to police so-called "evasive" shifts of programming from satellite to terrestrial delivery.[12/] As a threshold matter, the facial language of the statute only authorizes the Commission to adjudicate disputes concerning access to programming that is distributed via satellite.[13/] Moreover, a programmer's decision to use terrestrial delivery cannot be deemed an evasion of section 628 because Congress explicitly chose to exempt that delivery mechanism from the restrictions of section 628. To rule otherwise would vitiate a statutory exception expressly enacted by Congress.[14/]

The policy arguments offered in support of subjecting terrestrial programming to the program access rules are equally unavailing. EchoStar baldly asserts that a programmer's decision to use terrestrial delivery facilities is rarely, if ever, cost-justified.[15/] Likewise, RCN, which has never developed a programming service, nonetheless touts its "significant experience" as authority for its proclamation that terrestrial delivery cannot be justified on the grounds that it is "less expensive, more efficient, easier to maintain, or provides a higher quality picture than

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[12/] See, e.g., Ameritech Comments at 25-26; Bell Atlantic Comments at 9-11; BellSouth Comments at 19-26; DirecTV Comments at 10-18; EchoStar Comments at 13-15; RCN Comments at 12-17; SNET Comments at 5.

[13/] Liberty Comments at 26; Comcast Comments at 8-10.

[14/] 47 U.S.C. § 548(b); see Cablevision Comments at 6. Several commenters explicitly or implicitly acknowledge the weakness of the argument that current law authorizes the Commission to subject terrestrial programming to the program access rules by arguing in favor of amending section 628 to achieve that result. See, e.g., WCA Comments at 24; Ameritech Comments at 25-26; BellSouth Comments at 21-22; SNET Comments at 5.

[15/] EchoStar Comments at 12.

delivery via satellite."[16] Tellingly, neither RCN nor EchoStar provide any data or materials to support these bald contentions.

There are, of course, compelling cost, technological and marketing factors justifying a programmer's decision to utilize terrestrial delivery facilities, particularly with respect to local and regional programming.[17] The Commission itself recently noted that the "relative advantages of satellite as compared to terrestrial distribution of programming are largely determined by the geographic scope of the distribution involved."[18] In addition, the Commission recognized that "fiber links provide greater programming distribution flexibility and the regional interconnections are used in some instances for the distribution of local or regional advertising sales."[19] Fiber distribution also facilitates the provision of the new, interactive capabilities Rainbow plans to include within its five-channel package of terrestrially-delivered integrated local programming services.[20]

Having dismissed the notion that there may be valid, pro-competitive reasons for a programmer's decision to use terrestrial delivery facilities, several of cable's competitors argue that terrestrial programming should automatically be subject to the constraints of section 628.[21]

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[16] RCN Comments at 15.

[17] Cablevision Comments at 18-24; Comcast Comments at 15 & n.10; NCTA Comments at 16.

[18] The Commission also has noted there is no evidence that terrestrial delivery is hindering competition in the video programming marketplace. <u>See</u> Letter from William E. Kennard to The Honorable W.J. (Billy) Tauzin, Responses to Questions at 6 (Jan. 23, 1998) ("FCC Responses").

[19] <u>Id.</u>

[20] <u>Cf.</u> Cablevision Comments at 18, 20 ("Landline distribution also provides the level of reliability needed for the mix-and-match programming and the inter-network coordination Rainbow envisions for [its new local] channels.").

[21] <u>See</u> EchoStar Comments at 14; RCN Comments at 12 n.36; DirecTV Comments at 12; BellSouth Comments at 23-24; SNET Comments at 5. Not all of cable's competitors go this far. <u>See</u> WCA Comments at 24 ("the program access statute does not give an alternative MVPD access to a local cable news channel that has *never* been distributed via satellite" or to some programming migrated from satellite to terrestrial) (emphasis in original).

No commenter, however, has cited a single, specific instance in which its ability to compete has been hindered due to lack of access to a terrestrially-delivered programming service.[22/] Nonetheless, EchoStar goes so far as to propose that the Commission should "adopt a rebuttable presumption that the primary purpose of using fiber in lieu of satellite feeds is evasive unless proven otherwise."[23/] It even urges the Commission "to extend this presumption . . . to programmers that initially provide their programming on a terrestrial basis."[24/]

EchoStar and others are either unaware of, or indifferent to, the Commission's own recognition that there are circumstances in which terrestrial delivery makes economic and technical sense for programmers.[25/] Their efforts to subject all terrestrial programming to the program access rules not only lack any empirical or factual basis, they also would contravene the public interest by discouraging investment in new regional and local programming services.

As Cablevision has made clear, not only do cost and technological considerations favor landline delivery of its new local and regional programming services, but the terrestrial exception to section 628's restrictions on exclusivity ensures that its new "electronic local newspaper" is supported by appropriate levels of investment, distribution and marketing.[26/] The neighborhood-based information and entertainment content planned for this package is expensive to develop and produce and has both limited geographic appeal and limited revenue potential.[27/] Given these

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[22/] FCC Responses at 6.

[23/] EchoStar Comments at 14.

[24/] Id. at 15 n.27.

[25/] FCC Responses at 6.

[26/] Cablevision Comments at 18-24.

[27/] Cablevision Comments at 19-21; see also New England Cable News, 9 FCC Rcd 3231, 3238 ¶ 36 (1994); NewsChannel, a Division of Lenfest Programming Servs., Inc., 10 FCC Rcd 691, 695 n.27 (1994).

unique and substantial risks, exclusivity is necessary to assure both the level of investment required to develop new, local and regional programming, as well as the type of distribution and marketing necessary for the survival and success of such programming.[28]

Absent the flexibility to offer exclusivity for this new package of local, interactive programming services, Cablevision and Rainbow will not develop these services and consumers will lose access to new, valuable and diverse programming options.[29] The Commission has previously noted that exclusivity promotes regional and local programming diversity by "providing incentives . . . to promote and carry a new and untested programming service."[30] Thus, the ability to offer terrestrially-delivered local and regional programming on an exclusive basis promotes both competition and consumer interests by encouraging investment in the development and distribution of programming services that would not otherwise be available.

The stakes in this proceeding are not limited solely to the consequences of subjecting today's terrestrially-delivered programming services to the constraints of the program access rules. Digital technology and fiber-based, landline delivery networks make possible a whole range of new video programming services with interactive capabilities that reflect the growing convergence of the video and online services businesses. Development of these untested services require programmers to incur new and even riskier investments – investments they are unlikely to make unless they have the opportunity to reap the economic rewards.

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[28] Cablevision Comments at 21-24; Comcast Comments at 12-13.

[29] Although the Commission's rules permit programmers to file a petition for a public interest determination to obtain permission to distribute programming exclusively, 47 C.F.R. § 76.1002(c)(4), there is no assurance that the process would provide either a timely or favorable determination. Making Cablevision's decision to invest in local and regional programming contingent upon the outcome of such a process carries too much uncertainty and effectively denies the company the ability to pursue business opportunities or respond to marketplace changes in a timely and productive manner.

Ignoring this market reality, the comments of EchoStar, DirecTV, and the local telephone monopolies make clear that they are determined to impose program access on every cable programming service. Lacking the ability or the willingness to develop programming on their own, these commenters suggest a policy framework in which cable operators are effectively precluded from using investments in new programming services to distinguish themselves from their competitors in the marketplace. This approach, which will not reward the substantial risks involved in developing programming that takes full advantage of the growing convergence of video and computers, will impede investment and deter innovation.

In furtherance of their objective of subjecting more programming to the strictures of the program access rules, several commenters make unsubstantiated and highly distorted claims about Rainbow's plans to develop its new package of terrestrially-delivered local and regional programming services. Citing newspaper articles and misinterpreting testimony by a Rainbow executive, these commenters suggest that Cablevision plans to move existing sports programming services from satellite to terrestrial delivery.[31/] Bell Atlantic, for example, incorrectly asserts that Cablevision "is moving its most valuable and popular regional sports programming channels in New York from satellite-based delivery to terrestrially-based delivery for the express purpose and with the express effect of preventing [competitors] from providing that programming to their subscribers."[32/] Such statements are wholly inaccurate and represent a transparent effort to enlist the Commission into preventing Rainbow from including any sports programming in its new package of terrestrially-delivered, local and regional programming

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[30/] NewsChannel, 10 FCC Rcd at 695 ¶ 27.

[31/] Bell Atlantic Comments at 10; BellSouth Comments at 20; RCN Comments at 13-14.

[32/] Bell Atlantic Comments at 10.

services. Rainbow has no intention of discontinuing its existing satellite-delivered regional sports networks or positioning its new terrestrial offering as a wholesale substitute for those networks.

As noted in Cablevision's initial comments, Rainbow's plans to offer what is essentially the video and interactive version of a local newspaper must include some sports programming. No one buys the Sunday newspaper without a sports section, and it would be unrealistic for Rainbow to expect consumers or distributors to buy the electronic equivalent of the Sunday paper without a sports component. Consumers undoubtedly will benefit from this new offering, as the past two decades have demonstrated that the onset of new programming delivery mechanisms and services has yielded an abundance of sports programming options for viewers.[33/] Indeed, more sports programming is available today through broadcast television, national cable networks, and regional sports networks than at any other time. Any local sports programming included on Rainbow's terrestrially-delivered programming would be in addition to the games available as a result of Major League Baseball's ("MLB") national television contracts with Fox and ESPN, the National Basketball Association's national television contracts with NBC, TNT and TBS, and the National Hockey Leagues national agreements with Fox and ESPN. Each of those agreements make scores of games available within each sport to viewers of broadcast and national cable programming networks.[34/] There are also hundreds of local professional baseball,

[33/] Even with this growth, there are still instances in the greater New York area in which more local professional games are being played simultaneously (by the NBA's New York Knicks, New Jersey Nets, the NHL's New York Rangers, New York Islanders, and New Jersey Devils, and Major League Baseball's New York Yankees and New York Mets) than there are broadcast stations and cable programming services currently available to telecast them. On a given evening, there may be five local pro basketball and hockey games being played by teams in the New York area, not to mention college games of interest to local fans. In these overflow situations, the addition of a new outlet for local sports events can provide fans with more choices.

[34/] MLB has national distribution contracts with Fox, NBC, and ESPN. Under these contracts, basketball and hockey games available to viewers via satellite-delivered regional sports networks.[35] Moreover, events exhibited by local broadcast stations are available to all cable households as well as to non-cable households.[36] DBS providers also carry thousands of MLB, NBA, and NHL games per year.[37]

Exclusive distribution of sporting events is nothing new, despite what proponents of an expansive program access rule would claim.[38] Exclusivity for sports programming is being used

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NBC and Fox split MLB's playoff and World Series games. Fox also carries approximately 26 games per season. ESPN carries 85 games per season plus 6 to 12 early-round playoff games. *Big Deals for Big Tickets*, BROADCASTING & CABLE, Apr. 28, 1997, at 19 ("*Big Deals*"). A few additional games will be broadcast nationally on Fox Sports net and FX. Paul Kagan Associates, MEDIA SPORTS BUSINESS, Nov. 11, 1996, at 3. The NBA's contracts with NBC, TNT and TBS result in numerous games being distributed on a national basis. NBC also has exclusive broadcast rights to all weekend games, conference finals, and the NBA finals. *Big Deals* at 19. The NHL's national television contracts are with Fox, ESPN and ESPN2. ESPN and ESPN2 carry more than 100 regular-season games per year and up to 50 playoff games. *Big Deals* at 19.

[35] During the 1996-97 season, regional cable networks carried 978 NBA games. Paul Kagan Associates, MEDIA SPORTS BUSINESS, Nov. 11, 1996, at 3. In addition, regional cable networks carried nearly 1,000 NHL games during the 1996-97 season, see Paul Kagan Associates, MEDIA SPORTS BUSINESS, Oct. 25, 1996, at 6, and had rights to nearly 1,700 MLB games during the 1997 season, see Paul Kagan Associates, MEDIA SPORTS BUSINESS, Mar. 31, 1997, at 7.

[36] Local broadcast stations were scheduled to carry more than 1,700 MLB games during the 1997 season. Paul Kagan Associates, MEDIA SPORTS BUSINESS, Mar. 31, 1997, at 7. Local broadcast stations had the rights to broadcast more than 800 NBA games during the 1996-97 season, Paul Kagan Associates, MEDIA SPORTS BUSINESS, Nov. 11, 1996, at 3, and carried 335 NHL games during the 1996-97 season. Paul Kagan Associates, MEDIA SPORTS BUSINESS, Oct. 25, 1996, at 6.

[37] DirecTV offers MLB Extra Innings, a package of as many as 1,000 games per season and as many as 35 games per week. DirecTV and Primestar distribute NBA League Pass, a package of as many as 1,000 NBA games per season, with as many as 40 games per week. DirecTV and Primestar also offer NHL Center Ice, a package of up to 500 games per season and 30 games per week. See http://www.directv.com/sports/index.html (describing sports packages); http://www.primestar.com/ezwatch/exwtch-f.htm (same).

[38] The rights to distribute sports programming are already divided among many distribution media – broadcast television, satellite-delivered national cable networks, satellite delivered regional sports networks, DBS, pay-per-view, and other providers. Professional sports teams have historically granted local telecast rights to one or two outlets – a broadcaster and/or a regional sports network – in each community. A broadcast station exhibiting a local game does not make it available to regional sports networks for the benefit of DBS or MMDS subscribers residing in the outer portions of the home team's territory who cannot view the off-air signal. Nor is a regional sports network required to make a local MLB, NHL or NBA game that it carries available to a broadcast station for the benefit of fans who lack cable.

to great effect by DirecTV, one of the most vocal critics of terrestrial exclusivity. DirecTV emphasizes that it has "more sports . . . programming than any other multichannel video service available today."[39/] On its Internet web site, DirecTV's comparison of its sports program offerings to those of other DBS companies and cable appears to confirm this claim.[40/] DirecTV has exclusive rights to a sports programming package with the NFL – NFL Sunday Ticket – and other DBS distributors have exclusivity arrangements with the NBA, NFL, and Major League Baseball that denies cable operators access to the games covered by those arrangements.[41/] The addition of one more sports programming delivery mechanism does not change the fact that in today's market no consumer can view all sports through any one distributor or distribution medium.[42/]

39/ Testimony of Eddy Hartenstein, President of DirecTV, Inc., before the Subcommittee on Antitrust, Business Rights and Competition, United States Senate at 2 (Oct. 8, 1997) ("Hartenstein Testimony").

40/ See http://www.directv.com/programming/compare.html (visited February 21, 1998) (comparing DirecTV's offering to those of its competitors).

41/ Hartenstein Testimony at 2. "Sunday Ticket" has been DirecTV's best-selling subscription service and has been touted by a company spokesman as "a very strong acquisition tool for us." DirecTV recently renewed its DBS-exclusive arrangement for out-of-market NFL games for several more years. See R. Thomas Ulmstead, "DirecTV, NFL Extend Carriage Deal," MULTICHANNEL NEWS, Oct. 20, 1997, at 28.

42/ Cablevision agrees with NCTA and others that there is no support for granting program access complainants an automatic right to discovery or authorizing damage awards for complaints brought under section 628. See, e.g., NCTA Comments at 7-12. Given the widespread availability to competing technologies of virtually all popular cable programming networks under the existing program access procedural regime, automatic discovery and damages awards are clearly unnecessary to accomplish the objectives of section 628. Indeed, such steps would be counterproductive because they would further distort the programming marketplace by discouraging private resolution of programming negotiations and deterring the kind of market-based differential pricing for programming expressly permitted by Congress. See Cablevision Comments at 25-28.

CONCLUSION

For reasons stated herein and in Cablevision's initial comments, the Commission should reject proposals to extend the program access rules to terrestrially-delivered local and regional programming and to amend its program access complaint procedures or impose damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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