

ORIGINAL

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

MAR 31 2000

In the Matter of)
)
MCI WORLDCOM, INC.)
)
Petition for Expedited Declaratory Ruling)
Regarding the Process for Adoption of Agreements)
Pursuant to Section 252(i) of the Communications)
Act and Section 51.809 of the Commission's Rules)

CC Docket No. 00-45

JOINT COMMENTS OF
FOCAL COMMUNICATIONS, CORP., LEVEL 3 COMMUNICATIONS, LLC,
MPOWER COMMUNICATIONS CORP., ADELPHIA BUSINESS SOLUTIONS
AND CORECOMM LTD.

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March 31, 1999

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Summary

Joint Commenters fully support each clarification sought by MCI. The Commission must ensure that the purpose of Section 252(i) of enabling new entrants to expeditiously enter new markets by adopting previously approved interconnection agreements is not negated by actions of the State commissions or the incumbent local exchange carriers. As detailed in these Joint Comments incumbents have been very slow in responding to notifications of Section 252(i) adoptions and have used the adoption process to attempt to make substantive changes to the agreements. Numerous and inconsistent state requirements have resulted in significant delay and unnecessary expense for the new entrants.

When a competitive carrier notifies an incumbent that it is adopting an approved agreement, the incumbent has no right to reject that adoption or demand changes to the underlying agreement. The Commission should clarify that notification of adoption is all that is necessary to make the agreement effective and the agreement is effective as of the date of notification.

While there are specified, limited reasons that an incumbent may raise to excuse it from complying with certain portions of an adopted agreement, the Commission must make clear that any ILEC that has not promptly raised such issues must honor each and every portion of an adopted agreement. The Commission should also make clear that, during the expedited review of any challenge, the incumbent must provide all remaining elements of the agreement and must provide the disputed elements subject to true up consistent with any subsequent State commission decision.

Finally, the Commission should also require all incumbents to post Commission-accepted interconnection agreements and all amendments thereto on their websites. The ability of a competitive carrier to analyze its options would be greatly enhanced should the Commission require all ILECs to post all currently effective agreements on their websites in rich text format. This would enable competitive carriers (and State commissions) to compare agreements easily.

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MPOWER COMMUNICATIONS CORP., ADELPHIA BUSINESS SOLUTIONS
AND CORECOMM LTD.**

Focal Communications, Corp., Level 3 Communications, LLC, MGC Communications, Inc. d/b/a Mpower Communications Corporation, Adelphia Business Solutions, and CoreComm Ltd., pursuant to Public Notice DA-00-592, released March 16, 2000, file their initial Joint Comments in the above-captioned proceeding. Joint Commenters are providers of services competitive with incumbent local exchange carriers ("ILECs") that must interconnect with the ILECs for the provision of those services. These comments are filed to emphasize to the Commission the seriousness of the issues raised by MCI in its petition, the effect that an inability to quickly adopt an existing interconnection agreement can have on a competitive carrier, and the need for an expeditious ruling from the Commission to ensure that one of the primary statutory methods of encouraging the rapid expansion of competitive provision of local services is not negated.

I. INTRODUCTION AND SUMMARY

The fact that MCI felt the need to file the instant petition with the Commission four years after the adoption of the Telecommunications Act of 1996 speaks volumes about the lengths to which ILECs, through simple foot dragging and delay, have impeded and denied competitive carriers the rights that they gained under the Telecommunications Act of 1996. Section 252(i) is one of the simplest and most straightforward sections of the 1996 Act. It provides that if a competitive carrier decides, for whatever reason, that it wants the same interconnection agreement, or parts thereof, that another competitive carrier has negotiated or arbitrated and a State commission has approved, it can adopt that agreement, or the parts thereof, that it desires. Such a provision ought to be of benefit to both carriers (incumbent and competitive) as it should spare each the time and expense of repeatedly negotiating or arbitrating every aspect of an interconnection agreement. Clearly, however, the incumbents do not see it that way and see an opportunity to both delay additional competition in their region and engage in a “revisionist” exercise with respect to the contracts they have already signed. Unfortunately, most incumbents and State commissions treat a competitive carrier’s decision to adopt an agreement as a “request” to adopt an agreement that somehow must be responded to, agreed to, and/or approved. In fact, an ILEC is required by statute to accept an election to adopt another carrier’s agreement (except for any portions of the agreement for which the ILEC has demonstrated a change in its costs, technical unfeasibility or that related provisions have not been adopted), and a State commission could not reasonably or lawfully reject such an adoption.

The Commission should make clear that the right to adopt an existing agreement is absolute (except in very limited specific circumstances) and that notification to the incumbent

and the appropriate State commission is all that is necessary for the competitive carrier to exercise that right. As the Commission recognized in 1996, one of the primary purposes of Section 252(i) is the prevention of discrimination by ILECs against requesting competing carriers. Another equally important purpose of Section 251(i), however, is to enable carriers to commence (or continue) the provision of service without the lengthy delays inherent in the negotiation (and perhaps arbitration) of interconnection agreements when there is an existing interconnection agreement that will satisfy the competitive carrier's needs and that agreement has already been approved by a State commission as being in the public interest. The Commission must act quickly and decisively to ensure that a requesting carrier can commence or continue the provision of service without delay.

Joint Commenters firmly support each clarification sought by MCI. Joint Commenters suggest that implicit in the MCI request is an additional request that the Commission should also clarify that when a carrier seeks to exercise its Section 252 (i) rights, the incumbents have no right to seek or insist upon any changes or "clarifications" to the adopted agreement. Competitive carriers are opting to take the agreements "as written." They recognize that this means that they will be subject to any State commission or court ruling on the meaning of the agreement. Likewise, the incumbent may not unilaterally seek or insist upon any changes or "clarifications" to the agreement.

Finally, the Commission should also require all incumbents to post Commission-accepted interconnection agreements and all amendments thereto on their websites. The ability of a competitive carrier to analyze its options would be greatly enhanced should the Commission require all ILECs to post all currently effective agreements on their websites in rich text format. This would enable competitive carriers (and State commissions) to compare agreements easily.

II. A DECLARATORY RULING IS APPROPRIATE IN THIS CASE

Sections 4(i) and (j) of the Communications Act bestow upon the Commission the broad power to issue orders consistent with the Act “as may be necessary in the execution of its functions” and to “conduct its proceedings in such a manner as will best conduce to the proper dispatch of business.” The Commission’s Rules provide that the “Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”¹

The determination of whether to issue a declaratory ruling in a particular proceeding is a matter within the Commission's discretion.² The Commission historically has issued declaratory rulings when there is no substantial factual issue but the moving party has shown that there is a need for the Commission to clarify the meaning of its rules or orders. The Commission has properly issued declaratory rulings when actions by State commissions have been the source of controversy and confusion for carriers or other interested parties has resulted. North Carolina Utilities Commission v. FCC, 537 F.2d 787, 790 n.2 (4th Cir.), cert. denied, 429 U.S. 1027 (1976). Although the Commission is not required to issue a declaratory order merely because an entity asks for one, it is clearly appropriate for the Commission to issue such an order in response to the MCI petition. The lack of agreement between the ILECs, CLECs and the State commissions as to the rights and responsibilities of the carriers and the State commissions in Section 252(i) situations has led to confusion, uncertainty and unnecessary expenditures by all parties.

¹ 47 C.F.R. Section 1.2. See also Section 554 of the Administrative Procedure Act, 5 U.S.C. Section 554(e), which provides that the Commission “may issue a declaratory order to terminate a controversy or remove uncertainty.”

² Yale Broadcasting Corp. v. FCC, 478 F.2d 594 (D.C. Cir. 1973); Competitive Telecommunications Association, 4 FCC Rcd 5364 (1989).

III. AGREEMENTS THAT HAVE BEEN ADOPTED PURSUANT TO SECTION 252(i) SHOULD NOT BE SUBJECT TO STATE COMMISSION APPROVAL

As recognized by the Commission and the Supreme Court, while states have an important role to play in the implementation of the local competition provisions of the 1996 Act, that role is not unlimited.³ Under Section 252(e), parties to a negotiated or arbitrated agreement are required to submit their agreements to the appropriate State commission. The State commissions are directed to “approve or reject” any “interconnection agreement adopted by negotiation or arbitration.” That section further provides a limited number of grounds for which an agreement adopted by negotiation or arbitration may be rejected.

The Act contains no similar requirement that the parties submit agreements adopted pursuant to Section 252(i) to the State commissions for approval. Nor is there any indication that Congress intended that State commissions review agreements entered into pursuant to Section 252(i). To the contrary, Section 252(i) does not mention State commissions. Rather, Section 252(i) addresses only the responsibilities of local exchange carriers to make available to other carriers the agreements or portions thereof that have already been approved by a State commission.

In its Local Competition rulemaking, the Commission recognized that Section 252(i) procedures should be a means for carriers to quickly commence providing service without the timely and expensive approval procedures that apply to negotiated or arbitrated agreements.

There the Commission found:

A carrier seeking interconnection, network elements or services pursuant to section 252(i) need not make such requests pursuant to the

³ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), aff'd in part and vacated in part sub nom, Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded AT&T v. Iowa Util. Bd., 119 S. Ct. 721 (1999).

procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition . . . and that we should adopt measures that ensure that competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.⁴

The Commission left to State commissions only the "details of the procedures for making agreements available to requesting carriers on an expedited basis." The "procedures for making agreements available to requesting carriers" would include only limited administrative procedures such as how and when to file agreements with the State commissions.

A process under which a State commission reviews and then approves adopted interconnection agreements is wasteful and can result in a barrier to entry. If a carrier is forced to submit an adopted agreement to a State commission for approval, the carrier may incur not only the legal expenses of appearing before the Commission,⁵ but employees and facilities may sit idle while the State commission "considers" an agreement that it has already found to be in the public interest. In one case, Adelphia Business Solutions estimated its costs to be \$100,000 a week when Bell Atlantic unilaterally determined an agreement that it sought to adopt was not available for adoption under Section 252(i).⁶ An additional hidden cost may occur if a CLEC

⁴ 11 FCC Rcd at para. 1321.

⁵ Those expenses include not only the cost of submitting the agreement, but sometimes additional costs such as publishing the agreement (Delaware is an example of a state that requires publication), and responding to discovery from the commission staff (Arkansas is an example of a state in which the staff routinely submits discovery to a CLEC that has submitted an interconnection agreement for Commission approval. As indicated in MCI's petition, states have differing and sometimes unclear or confusing requirements. Thus, additional costs are incurred when the new entrant is required to discern and comply with each state's different procedures.

⁶ See letter to Chairman Glenn Ivey, Maryland PSC from Eric J. Branfman, Feb. 5, 1999, attached hereto as Exhibit A. (At that time, Adelphia Business Solutions was known as Hyperion Communications.)

knows that a state will require an agreement to be approved, and agrees to “clarifying” terms it otherwise would not agree to just to get the process started.

There should be no hesitation on the part of the Commission to clarify that agreements adopted pursuant to Section 251(i) are not subject to State commission approval based upon some mistaken belief that the Commission would somehow be taking something away from the states’ jurisdiction relating to local competition. First, of course, as noted above, the statute clearly does not anticipate or allow for state approval of interconnection agreements adopted through the Section 251(i) procedure. In addition, there is simply nothing that the states would be prevented from doing on a substantive level that they do today. All interconnection agreements and all amendments thereto will continue to be reviewed and approved by the State commissions as the negotiating/arbitrating parties initially file them. The State commissions will retain their jurisdiction to rule on issues arising out of interconnection agreements and, under principles of *stare decisis*, State commission interpretation of language in one agreement necessarily will apply to language in all other (adopted) agreements. Finally, as long as the State commissions are notified of the adoption of the agreement, they will have as much information about the competitive landscape as they would if contracts were submitted for “approval.”

IV. A REQUESTING CARRIER’S ADOPTION SHOULD BE EFFECTIVE ON THE DATE OF NOTICE OF ADOPTION TO THE INCUMBENT LOCAL EXCHANGE CARRIER

Once an ILEC has received notification that a carrier has decided to adopt an existing agreement, an incumbent must accept that adoption except when there is a valid challenge based upon differing costs, technical feasibility or (in situations involving adoption of less than a full agreement) legitimately related terms. The ILEC must accept the adoption in all other cases. For this reason the FCC rules specifically state that an incumbent LEC must make

available any agreement to which it is a party “without unreasonable delay.”⁷ Since adoption of the Commission rule, however, when Joint Commenters and others have sought to exercise their Section 252(i) rights to adopt an existing (already approved) agreement, the incumbent telephone companies often have managed to drag out the process so that it is far from the “expedited” process envisioned by the Commission in 1996. There have been numerous instances in which incumbents have taken many weeks to respond to requests and sometimes the process has taken almost as long as negotiating an entirely new agreement. Sometimes this is caused by the ILEC’s decision to retype an agreement and sometimes there is no explanation for the delay.⁸

For example, in Maryland it took Bell Atlantic almost six weeks to produce a contract document when Adelphia Business Solutions wanted to opt into AT&T’s contract. In New Hampshire, Bell Atlantic did not respond to a Sprint request to opt into a Freedom Ring Communications contract for almost four weeks and then requested new language for the contract. The New Hampshire Commission finally had to order Bell Atlantic to produce a contract without modifications for Sprint within seven days.⁹

In addition to simply taking an inordinate amount of time to respond to competitive carriers’ notification of the exercise of their rights to adopt an existing approved agreement, a great deal of time has been wasted when incumbents have attempted to make changes to the agreements. This they may not do. Often this comes in the form of a demand that the competitive carrier agree to additional terms and conditions or “clarifications” not contained in the original agreement. This has occurred frequently with respect to the issue of whether the

⁷ 47 C.F.R. § 51.809.

⁸ Although Joint Commenters do not believe that there is any need to retype agreements, we note that an ILEC ought to be able to “retype” an agreement of several hundred pages in less than a day with modern word processing equipment.

⁹ Sprint Communications Co., DE 98-211 (N.H. PUC, Jan. 25, 1999) available at www.puc.state.nh.us/2311t.html.

agreements provide for reciprocal compensation payments for traffic delivered to Internet service providers.

When Adelphia Business Solutions notified Bell Atlantic-Vermont that it was exercising its right to opt into the KMC Telecom, Inc. agreement, Bell Atlantic-Vermont forwarded to Adelphia Business Solutions an agreement that contained terms and conditions that had not been agreed to by KMC. In particular, Bell Atlantic-Vermont sought to have Adelphia Business Solutions agree that it would amend its tariffs to provide residential local exchange service within 60 days of signature of the agreement.¹⁰ Of course, this proposed requirement of Bell Atlantic-Vermont did not come with any guarantee that collocation would be available to Adelphia Business Solutions within that period of time.

In several recent cases of which Joint Commenters are aware, the ILEC forwarded to the requesting carrier a contract that did not even indicate that changes had been made. Perhaps this was inadvertent on the part of the incumbent, but perhaps the incumbent was hopeful that the requesting carrier would sign the contract without noticing. Because of tactics (or mistakes) like those, the Commission should clarify (again) that incumbents have no right to seek or insist upon any changes or “clarifications,” whether or not identified, to the adopted agreement. This should be clear from the statutory language, the Commission’s Rule and the Global NAPs decision, but apparently the Commission needs to reiterate this basic concept.¹¹

¹⁰ The clarifications sought also included a clarification that “The reciprocal compensation provisions set forth in this Agreement do not apply to Internet-bound traffic because such traffic is not local traffic.” In Wisconsin, when Adelphia sought to adopt the MCI agreement Ameritech sought to insert a footnote into the agreement stating that there had been no meeting of the minds of the original parties with respect to reciprocal compensation for Internet traffic and that “SBC/Ameritech does not believe that this Agreement provides local reciprocal compensation for Internet traffic.”

¹¹ In the Global NAPs decision, the Commission stated: “Negotiation is not required to implement a Section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying arrangement.” Para. 4.

Level 3 has had several experiences of this nature with incumbents seeking to modify the terms of underlying contracts. For example, when Level 3 notified U S West of its adoption of the AT&T Agreement in Nebraska, U S West responded with a letter asking Level 3 to sign an agreement “if [Level 3] concur[s] with U S West’s position that reciprocal compensation applies only to local traffic.”¹² While some of these provisions may be intended as reservations of rights, others clearly are aimed at modifying the parties’ substantive rights under the agreements. Such actions can hardly be deemed consistent with the intent of Section 252(i) to provide each carrier with the opportunity to obtain precisely the same terms and conditions as another carrier.

An additional delaying tactic used by some ILECs has been to assert that certain agreements are not available for adoption. Often ILECs have asserted that agreements are either too old or have too little time remaining in them for a requesting carrier to adopt the agreement. ILECs appear to have pulled back on their claims that some agreements are “too old” but continue to assert that some agreements can not be adopted because the time remaining is “too short.” This is not a valid reason for an ILEC to escape its obligation to allow carriers to adopt existing agreements. While generally it would not be in the interest of a competitive carrier to adopt an agreement that terminates in a relatively short time, there may be circumstances in which a competitive carrier would want or need to adopt such an agreement. That is the competitive carrier’s right and the ILEC cannot refuse such an adoption.

Because of the various means by which incumbents can “slow roll” the process, the Commission must clarify that any agreement that is adopted pursuant to Section 252(i) is

¹² Thus in this particular case, U S West sought to obtain Level 3’s agreement to a “clarification” or change to the agreement through a cover letter, rather than with an actual change to the agreement.

effective as of the date of sufficient notice¹³ to the incumbent of the requesting carrier's election to adopt a particular agreement. This is by far the simplest way of dealing with ILEC intransigence. Were the Commission to try to articulate specific rules to address specific actions that the incumbents have taken to delay opt-ins (e.g., a rule that the ILEC must respond within a certain number of days), the Commission would be encouraging ILECs to take the maximum time allowable to comply with such rules. In addition, such rules would be inconsistent with the principle that an ILEC must accept an election to adopt an existing agreement.

There is simply no reason, absent a demonstration by the incumbent that cost, technical or related provision issues exist, that an agreement should not be effective immediately. Competitive carriers often decide to use the Section 252(i) opt-in procedure not because they have made a decision that the agreement is everything that they might want, but that, considering the need to act quickly (perhaps because of customer demand), they are willing to accept a less than desirable agreement to order services or UNEs from the incumbent. As soon as the competitive carrier has notified an ILEC and the relevant State commission of its decision to adopt an existing approved agreement, the agreement should be effective and the competitive carrier must be allowed to order service and UNEs pursuant to that agreement.¹⁴

¹³ Sufficient notice would identify the agreement the requesting carrier will be using and to whom notices and invoices regarding the agreement should be sent. Global NAPs at n.25.

¹⁴ ILECs have told new entrants that they cannot order facilities or UNEs until the new entrant has participated in a forecasting session and the ILEC will not schedule the forecasting session until the new entrant has an "approved contract." Thus, it can take up to four months to get the first local interconnection trunks operational.

V. THE COMMISSION SHOULD CLARIFY THAT AN ILEC CAN BE EXCUSED FROM COMPLYING WITH ANY PORTION OF AN AGREEMENT THAT HAS BEEN ADOPTED BY A REQUESTING CARRIER ONLY WHEN IT PROMPTLY CARRIES ITS BURDEN OF PROVING THAT ONE OF THE THREE CONDITIONS CONTAINED IN SECTION 51. 809 (b) OF THE COMMISSION'S RULES EXISTS.

MCI has asked the Commission to rule that an ILEC will be excused from complying with the adopted terms only when it promptly carries its burden of proving (1) that the cost of providing interconnection is greater than the costs of providing it to the carrier that originally negotiated the agreement; (2) that the proposed adoption, or parts thereof, are technically feasible or, in the case in which less than the entire agreement is adopted, (3) that the carrier has failed to adopt legitimately related terms and conditions. Again, the statutory language and Commission rules fully support this request.

As indicated above, ILECs have sometimes raised irrelevant and legally insufficient arguments to competitive carriers' attempts to adopt certain agreements. The only issues properly raised by an ILEC concerning a requesting carrier's adoption of an existing agreement are those detailed above relating to increased cost, technical infeasibility, and legitimately related terms. The Commission has required the ILECs to bear the burden of proving that they should be excused from meeting its general obligations under Section 251(i).

Accordingly, the Commission should also clarify that an ILEC that has not promptly raised such issues at a State commission¹⁵ must honor each and every portion of an adopted

¹⁵ The Commission should impose a reasonable deadline (such as the California Public Utility Commission's 15-day deadline) by which an ILEC must voice any objection to an opt-in. Joint Commenters are somewhat reluctant to seek a deadline by which ILECs must voice an opposition because of the possibility that this will encourage ILECs to raise meritless objections rather than lose the ability to raise objections in the future and the process could be abused. Nonetheless we believe that it is the appropriate course and provides more certainty for all parties as long as there is a requirement that during the pendency of any proceeding, the ILEC is required to provide service subject to true up.

agreement. If and when an objection based upon any of the three legitimate issues is raised, the ILEC should be required to specify precisely which terms or portions of the agreement are being challenged. During the pendency of a State commission review of those challenges, the ILEC should continue to provide all remaining elements of the agreement to the requesting carrier. And the Commission should clarify that, with respect to challenges based upon increased costs or legitimately related terms, if the requesting carrier signs an agreement that it will abide by any Commission determination as to the appropriate costs or legitimately related terms retroactive to the date of adoption, the ILEC must also provide that element or service during the pendency of the State commission review of any objections raised by the ILEC. When an issue as to technical feasibility is raised, the ILEC should be required to provide a reasonable substitute during the pendency of the expedited State commission proceeding.

VI. THE COMMISSION SHOULD ENCOURAGE STATE COMMISSIONS TO RULE EXPEDITIOUSLY ON ANY SECTION 51.809(b) ISSUE RAISED BY AN ILEC

When an ILEC has raised specific objections to portions of an adopted agreement, the State commissions must be encouraged to rule on those objections as expeditiously as possible. Because the objections that may be raised are limited and presumably in all cases would involve only a small portion of any agreement, a State commission should be able to conclude its investigation into those issues in substantially less time than a State commission concludes review of an entire agreement.

Joint Commenters recognize that the Commission's rules leave to the State Commission's the authority to rule on ILEC objections to the adoption of any portions of an agreement. Nonetheless, because of the delays that have been encountered and the fact that a Section 252(i) adoption is a means to rapidly encourage competitive entry the commission

should make it clear that a state must adopt procedures designed to expeditiously review and rule on any ILEC objections made to an adoption of an agreement.

VII. THE COMMISSION SHOULD REQUIRE ALL ILECS TO POST APPROVED AGREEMENTS ON THEIR WEBSITES

Finally, the Commission should require all incumbents to post Commission approved interconnection agreements and all amendments thereto on their websites. One of the biggest problems and most time consuming aspects of the Section 252(i) process has been to determine precisely what contracts have been negotiated or arbitrated and accepted by the State commissions. All agreements and amendments are, of course, supposed to be filed with the State commissions and, therefore, are public documents. However, competitive carriers have often found it difficult to determine precisely what agreements exist and what provisions are contained in the currently effective agreements. Amendments either do not get filed or, perhaps, become associated with the wrong agreement. In addition, virtually all contracts are filed with the State commissions in paper, rather than electronic form. The ability of a competitive carrier to analyze its options would be greatly enhanced should the Commission require all ILECs to post all currently effective agreements on their websites in rich text format. This would enable competitive carriers (and State commissions) to easily compare agreements.

CONCLUSION

The Commission should expeditiously consider and rule on the MCI petition.

Unless and until the Commission rules, the ability of competitive carriers to quickly commence service will be denied and extraordinary and unnecessary expense will be incurred by the new entrants.

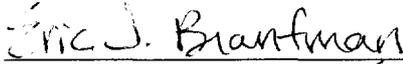
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Certificate of Service

I hereby declare that on this 31st day of March, 2000, I served the attached Joint Comments via first class mail or by hand delivery to the following:

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