

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
2000 Biennial Regulatory Review	)	WT Docket No. 01-14
Spectrum Aggregation Limits	)	
for Commercial Mobile Radio Services	)	

**COMMENTS OF WORLDCOM, INC.**

WorldCom, Inc. (“WorldCom”) hereby submits its Comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> WorldCom is the largest reseller of Commercial Mobile Radio Service (“CMRS”) in the United States and is the only wireless reseller providing service on a nationwide basis. With over 2 million resale customers, WorldCom is by far the largest *consumer* of wireless services in the United States. As a result, WorldCom’s interest in maintaining the Commission’s spectrum aggregation limits aligns closely with the interests of individual consumers – *i.e.*, the retention of a vibrant and competitive CMRS market that results in more choices and lower prices for the American public.

American consumers, the wireless industry and the public interest have been well served by the Commission’s spectrum aggregation limits. These limits have been a highly effective mechanism for forging and maintaining a competitive CMRS marketplace with multiple service providers. The price of wireless services has steadily declined with the introduction of more CMRS providers, while the variety of service offerings and features, and

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<sup>1</sup> *In the Matter of 2000 Biennial Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, Notice of Proposed Rulemaking, FCC 01-28 (rel. Jan. 23, 2001) (“*Notice*”).

the quality of service continues to increase. At the same time, the “bright-line” spectrum cap limits have enabled the Commission to keep a largely “hands-off” approach to regulating CMRS service and rates while furthering the Commission’s policies in favor of CMRS resale.

The Commission’s spectrum aggregation limits must be maintained in order for American consumers to continue to reap the benefits of a competitive CMRS market. Any wholesale modification or elimination of these limits will inevitably result in further consolidation of the wireless industry and less competition. By maintaining its spectrum cap regulations, the Commission would be utilizing a minimally intrusive structural mechanism for ensuring that the CMRS market remains competitive.

## **I. BACKGROUND**

Prior to the award of Personal Communications Service (“PCS”) licenses and before digital Specialized Mobile Radio (“SMR”) service was introduced, there were only two cellular providers offering mobile services in any given market. In 1994, the Commission established a 45 MHz CMRS spectrum cap in order to prevent incumbent cellular licensees from aggregating sufficient spectrum at the upcoming PCS auction to exclude new competitors, thereby reducing service options or increasing prices to customers.<sup>2</sup> These rules were later modified in favor of a consolidated CMRS spectrum cap, which applied to cellular, broadband PCS, and SMR licensees, to “avoid excessive concentration of licenses and promote and

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<sup>2</sup> *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, 8104 ¶ 248 (1994) (“*CMRS Third Report and Order*”). At that time, there was also a rule limiting licensees to 40 MHz of the total spectrum allocated to broadband PCS (120 MHz). See *In the Matter of Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7728 ¶ 61, 7745 ¶ 106 (1993).

preserve competition,” and to maintain incentives for innovation and efficiency, while discouraging anticompetitive behavior.<sup>3</sup>

In September 1999, as part of its 1998 biennial regulatory review, the Commission decided to retain the 45 MHz spectrum cap in most areas of the country, while increasing the cap to 55 MHz for rural areas. Although there were four or more facilities-based competitors in many areas by this time, the Commission concluded that the spectrum cap was still necessary “... to ensure long-term competition within the CMRS sector.”<sup>4</sup> The Commission found that the cap had resulted in lower prices, improved service quality, and product innovation and differentiation, citing data that showed that the entry of a fourth and fifth competitor into a market was having a significant impact on prices.<sup>5</sup> It therefore rejected requests to raise the spectrum cap to 60 MHz, which could have resulted in as few as three CMRS competitors in a market. The Commission also determined that a “bright-line” limit was the simplest, most effective means of balancing its objectives and furthering the public interest. Nevertheless, for those carriers that considered the spectrum cap to adversely affect their ability to provide advanced services in any given geographic market, the Commission established a waiver process for the review of applications to exceed the cap.<sup>6</sup>

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<sup>3</sup> Notice at ¶ 4 (citing *In the Matter of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule*, Report and Order, 11 FCC Rcd 7824, 7869 ¶ 94 (1996)).

<sup>4</sup> *In the Matter of 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, 15 FCC Rcd 9219, 9234-35 ¶ 31 (1999) (*First Biennial Review Order*).

<sup>5</sup> *Id.* at ¶¶ 43-44, 48.

<sup>6</sup> *Id.* at ¶ 82.

Just last year, the Commission again was asked to reconsider its spectrum cap rules as they applied to the reauctioning of various C and F Block licenses. In that proceeding, the Commission affirmed the propriety of applying its spectrum cap rules to the upcoming auction, which resulted in multiple competitors bidding almost \$17 billion for the available PCS licenses.<sup>7</sup>

In the *Notice*, the Commission once again seeks comment on whether to retain or modify its spectrum cap rules. For the reasons noted herein, WorldCom urges the Commission to maintain its spectrum aggregation limits and apply them proportionately to any new spectrum made available for CMRS services.

## **II. THE PUBLIC INTEREST IS BEST SERVED BY MAINTAINING THE COMMISSION'S CMRS SPECTRUM CAP**

Section 11 of the Communications Act requires that the Commission conduct periodic comprehensive reviews of its regulations for telecommunications services in order to ensure that its rules continue to be in the public interest. According to the Commission, its “fundamental inquiry in the *Notice* is whether, as a result of meaningful economic competition among providers of telecommunications services, spectrum aggregation limits are no longer necessary... to prevent harmful concentration of spectrum ownership or to ensure meaningful opportunities for broadband CMRS market entry.”<sup>8</sup> WorldCom firmly believes that these limits must be maintained under this standard of review.

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<sup>7</sup> *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Licensees*, Sixth Report and Order and Order on Reconsideration, 16 FCC Rcd 16266, 16275 ¶57 (2000); *see also C & F Block Broadband PCS Auction Closes*, Public Notice, DA 01-211 (2000).

<sup>8</sup> *Notice* at ¶ 12.

**A. Spectrum Caps Have Promoted an Increasingly Competitive CMRS Marketplace**

There is no doubt that the CMRS marketplace is more competitive today than it was just a few years ago, in large part due to the Commission's highly successful efforts to promote competition through its structural and auction rules, including its spectrum aggregation limits. According to the most recent annual report from the Commission gauging the state of CMRS competition, the industry "...continues to benefit from the effects of increased competition as evidenced by lower prices to consumers and increased diversity of service offerings."<sup>9</sup> As of August 2000, upwards of 202 million people, or approximately 80 percent of the total U.S. population, had four or more different operators (cellular, PCS, and/or digital SMR) offering mobile telephone service in the counties in which they live.<sup>10</sup> Over 173 million people, or 69 percent of the U.S. population, live in areas with five or more mobile telephone operators competing to offer service.<sup>11</sup> And 11 million people, or 4 percent of the population,

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<sup>9</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd 17660 at 4 (2000) ("*Fifth Report*").

<sup>10</sup> *Id.* at 18. As the Commission acknowledges, "[t]here are several important caveats to note when considering this data. First, to be considered as 'covering' a county, an operator need only be offering service in a portion of that county. Second, multiple operators shown as covering the same county are not necessarily providing service to the same portion of that county. Consequently, some of the counties included in this analysis may have only a small amount of coverage from a particular provider. Third, the POPs and square miles figures in this analysis include all of the POPs and all of the square miles in a county considered to have coverage. Therefore, this analysis overstates the total coverage in terms of both geographic areas and populations covered." *Id.*

<sup>11</sup> *Id.*

can choose from among seven different mobile telephone operators.<sup>12</sup> Moreover, according to the U.S. Department of Labor's Bureau of Labor Statistics, the price of mobile telephone service declined by 11.3 percent between the end of January 1999 and the end of January 2000.<sup>13</sup>

While the CMRS market is clearly more competitive today, there are ominous signs of consolidation in the industry that could jeopardize the gains that have been made to date. Over the past two years, over a dozen of the top 25 wireless operators by subscribership have combined with other carriers.<sup>14</sup> While much of this consolidation has been driven by carriers seeking to establish or fill holes in national footprints (as opposed to in-region acquisitions), the resulting reduction in the number of wireless providers substantially increases the risks associated with further consolidation of the CMRS industry. In order to be fully competitive in today's wireless marketplace, a carrier must have a national footprint. This requirement further raises the barriers to entry for new carriers, particularly since it will be difficult, if not impossible, for new carriers (beyond the four to six existing national CMRS carriers) to establish such a national footprint.<sup>15</sup> Consequently, further consolidation will likely involve carriers with a national presence, and the result will be the elimination of one (or more) competitors in hundreds of geographic markets.

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<sup>12</sup> *Id.*

<sup>13</sup> U.S. Department of Labor, Bureau of Labor Statistics databases, Bureau of Labor Statistics' Internet site at <[www.bls.gov/sahome.html](http://www.bls.gov/sahome.html)> (cited in *Fifth Report* at 4-5).

<sup>14</sup> *Fifth Report* at 10.

<sup>15</sup> The availability of new spectrum for wireless services is unlikely to reduce this entry barrier, since it is doubtful that a new provider, lacking existing infrastructure and customers, would actively bid on new spectrum.

It is reasonable to expect that without the spectrum aggregation limits currently placed on CMRS providers, consolidation is likely to accelerate and result in greater concentration of spectrum ownership and fewer meaningful opportunities for CMRS market entry. In the *CMRS Third Report and Order*, the Commission explained that it devised the spectrum cap rule out of concern “that excessive aggregation by any one or several CMRS licensees could reduce competition by precluding entry [of] other service providers and might thus confer excessive market power on incumbents.”<sup>16</sup> Indeed, the elimination of the Commission’s spectrum cap could very well lead to these prior concerns becoming a reality. The ultimate outcome of consolidation will be a reduction of pricing pressures and fewer innovative services, to the detriment of American consumers.

**B. Spectrum Caps are Minimally Intrusive**

The spectrum cap rules have enabled the Commission to keep a largely “hands-off” approach to regulating CMRS rates and services. The establishment of a “bright-line” rule that requires little interpretation has been very easy to administer. As set forth below, to date there have been very few requests to waive the spectrum cap rules and little, if any, adverse impact on the provision of services by wireless providers. The current market structure has also resulted in a vibrant resale market, with one national reseller (WorldCom) and a number of regional and local resellers providing further competition to the facilities-based CMRS carriers. As a result, prices have steadily declined while innovative service offerings and service quality have increased, all without the heavy hand of tariff requirements or rate regulations. Without question, the Commission’s spectrum cap rules have been essential in forging a competitive marketplace of multiple CMRS providers.

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<sup>16</sup> *CMRS Third Report and Order*, 9 FCC Rcd 7988, 8101 ¶ 240.

### **C. Spectrum Caps Have Been Used Around the World to Promote Competition**

The United States is not alone in establishing spectrum aggregation limits as a means of promoting competition in the mobile services market. As the Commission sets forth in its *Notice*, most major countries have recognized the need for policies, including spectrum caps, to limit aggregation of spectrum and to promote competition. Virtually all of the Western European countries that have completed their 3G licensing process have awarded authorizations to four or more operators, with a number of countries having licensed five or more 3G operators.<sup>17</sup> Indeed, all of these countries have assured a minimum number of competitors either by using spectrum aggregation limits analogous to the Commission's spectrum cap rules or by fixing the size and number of licenses and limiting each operator to one national license.<sup>18</sup> While carriers in some of these countries may now hold more than 45 MHz of spectrum, this is more a function of the amount of new spectrum recently made available for 3G services than any real differences in regulatory approaches.

### **III. THE SPECTRUM CAP MUST BE RETAINED TO FURTHER THE COMMISSION'S POLICIES FAVORING CMRS RESALE**

The Commission has long maintained a policy in favor of unrestricted resale of telecommunications services, including CMRS. The Commission has found resale to be in the public interest because it exerts pressure on carriers to "provide service at cost-based prices, promote efficient utilization of communications capacity and better management of communications networks, and encourage the development and implementation of new

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<sup>17</sup> *Notice* at ¶ 40.

<sup>18</sup> *Id.*

technology.”<sup>19</sup> The Commission has further recognized that “...resale of wireless services can speed the development of competition by permitting new entrants to begin offering service to the public before they have built out their facilities.”<sup>20</sup> The CMRS spectrum cap furthers these policies by ensuring that there are at least four facilities-based providers in each market from which resellers can negotiate for wholesale minutes. Increased competition results in greater service choices and lower prices for resellers and, in turn, for their customers.

Elimination of the spectrum cap rules would place the CMRS resale market at great risk. As the Commission is well aware, the CMRS resale obligations will sunset in November 2002. This decision was based upon the expectation that within five years from 1997 there would be up to six facilities-based broadband PCS carriers (after the D, E, and F block broadband PCS licenses were awarded), as well as potentially one or more digital SMR providers, competing with two cellular licensees in every geographic market.<sup>21</sup> Given the flurry of merger activity and consolidation in the wireless sector over the past two years and the imminent sunset of the wireless resale obligation, retention of the spectrum cap is even more essential to ensure that there are a sufficient number of facilities-based competitors to maintain a vibrant resale market. Removal of the spectrum cap rules now will inevitably result in further industry consolidation, which in turn will result in fewer choices and less incentive for facilities-based CMRS providers to offer lower wholesale rates to resellers.

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<sup>19</sup> *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18457 ¶ 3 (1996) (“*First Report and Order*”) (citing *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 FCC 2d 261, 298-303 (1976)).

<sup>20</sup> *First Report and Order* at ¶ 10.

<sup>21</sup> *Id.* at ¶ 24.

#### **IV. THE COMMISSION'S WAIVER PROCESS PROVIDES AN APPROPRIATE SAFETY VALVE FOR CMRS PROVIDERS THAT MIGHT REQUIRE ADDITIONAL SPECTRUM IN SPECIFIC MARKETS**

Less than two years ago, the Commission held that its "spectrum cap rule has not significantly constrained carriers in their ability to provide service at low cost, deploy new services, or commit to innovation."<sup>22</sup> According to the Commission, PCS carriers had not deployed their spectrum holdings up to the limits of their licensed capacity and few carriers had acquired spectrum up to the permissible limit.<sup>23</sup> WorldCom believes that today there are still few, if any, markets where CMRS carriers face spectrum exhaustion or are constrained from introducing advanced services because of the spectrum caps. Charles Levine, President of Sprint PCS, recently asserted that Sprint, which has 30 MHz of spectrum in most of its markets, has "ample spectrum to deploy next-generation high-speed data services..."<sup>24</sup> Similarly, Nextel's Treasurer, John Brittain, recently noted that Nextel is not in any way spectrum-constrained and that the wireless industry's introduction of advanced services is still many years in the future:

For now, though, [Nextel] has enough spectrum to serve nearly five times its current customer base... The wireless industry will begin implementing "third-generation" technology in 2003 or 2004 at the earliest.<sup>25</sup>

To the extent that a carrier can demonstrate that the spectrum cap is having a significant adverse effect on its ability to provide 3G or other advanced mobile services in a

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<sup>22</sup> *First Biennial Review Order* at ¶26.

<sup>23</sup> *Id.* To the best of WorldCom's knowledge, the same would have held true for cellular carriers as well.

<sup>24</sup> *RCR Wireless News*, March 26, 2001, p. 34.

<sup>25</sup> Comments of Nextel Treasurer, John Brittain, as reported by Sarah Schafer, Nextel's Loss Narrows, Subscriber List Grows, *Washington Post*, July 19, 2000, at E1-E2.

particular geographic area, the Commission has already stated that it would grant a waiver for that geographic area.<sup>26</sup> Such a case-by-case, market-by-market waiver process better serves the public interest than the wholesale elimination of the Commission's spectrum aggregation limits. For example, the fact that one wireless provider might need additional spectrum to meet anticipated demand in New York City does not justify eliminating the spectrum cap for all wireless providers in all geographic markets. The Commission must continue to recognize these differences between markets and carriers and act accordingly.

While some of the industry's largest wireless carriers (*e.g.*, AT&T Wireless, BellSouth, Bell Atlantic Mobile) have filed waiver requests, to date, none has provided any proof that they are in immediate need of more spectrum. Instead, these carriers opted to support their waiver requests with general assertions of future business plans to provide advanced services on a national basis and accordingly their waiver requests were denied.<sup>27</sup> WorldCom can only assume that no market-specific waiver requests have been forthcoming from these carriers because they do not currently face spectrum constraints.

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<sup>26</sup> *First Biennial Review Order* at ¶ 82. More specifically, the Commission stated that, where carriers possessed an "immediate need" to access additional existing CMRS spectrum to offer new services, it would grant waiver requests if the carrier could "...credibly demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse effect on its ability to provide 3G or other advanced services." Carriers seeking such waivers were asked to "...clearly identify what additional services they would provide if the spectrum cap were waived, and why such services cannot be provided without exceeding the cap." *Id.*

<sup>27</sup> *See Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corp. and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, Public Notice, 15 FCC Rcd 15696 (2000); *see also* Petition for Waiver and Expedited Action of AT&T Wireless Services, Inc. (filed Feb. 15, 2000); Petition for Waiver and Expedited Action of BellSouth Corp.; Petition for Limited Forbearance of Bell Atlantic Mobile, Inc. (filed Feb. 17, 2000).

As the single largest consumer of CMRS services, WorldCom shares the Commission's interest in ensuring that the spectrum cap is not a barrier to those carriers that face spectrum exhaustion or that seek to deploy advanced broadband services in a specific market, but are unable to do so without exceeding the cap. If the spectrum aggregation limits are having an adverse effect on a carrier's ability to provide 3G or other advanced services, WorldCom would expect that carrier to request a waiver of the rules for the affected geographic area. WorldCom is confident that through the waiver process those carriers with a *bona fide* need for additional spectrum in a particular market will get the relief they seek, and WorldCom encourages the Commission to grant promptly any such *bona fide* waiver request.

**V. ANY NEW SPECTRUM MADE AVAILABLE FOR CMRS SERVICES MUST BE SUBJECT TO A PROPORTIONAL SPECTRUM CAP**

Consistent with the existing CMRS spectrum cap on cellular, broadband PCS and digital SMR services, any additional spectrum made available by the Commission for mobile services must be subject to a proportional aggregation limit. A total of 180 MHz of spectrum designated for CMRS services is currently subject to the 45/55 MHz spectrum cap. In effect, only 25 percent of available CMRS spectrum currently is available to any one carrier in a licensed non-rural service area. In order to avoid excessive concentration of CMRS spectrum, and in order to promote and preserve competition among existing and potential new entrants, WorldCom proposes that no carrier be allowed to capture more than 25 percent of the total available CMRS spectrum, including any new spectrum made available by the Commission. Moreover, the Commission should maintain its 45/55 MHz spectrum cap on all existing CMRS spectrum for a sufficient period of time so as to ensure that as new spectrum is made available, and the cap is adjusted, incumbents do not simply buy other incumbents. Instead, the

Commission's spectrum cap policy should be carefully structured to encourage incumbents to bid on, develop and build independent networks for advanced services – again, so that there are at least four active competitors. By maximizing the number of facilities-based providers of nascent wireless Internet access services, the Commission can maximize service innovation and CPE innovation.

By way of example, if the Commission initially makes available 80 MHz of new CMRS spectrum, no carrier would be allowed to hold more than 45 MHz of existing CMRS spectrum and 65 MHz of total CMRS spectrum (old and new). In other words, if a carrier already had access to 35 MHz of PCS and/or cellular spectrum, it would be able to obtain another 10 MHz of existing spectrum and 20 MHz of new spectrum or alternatively an additional 30 MHz of new spectrum. A new entrant, on the other hand, could purchase 65 MHz of the new spectrum without exceeding the aggregate limit. If an additional 60 MHz of spectrum were later made available by the Commission, then the total aggregate limit would be increased to 80 MHz. In this way, the Commission would ensure that at least four competitors would be maintained in any given market, enabling vibrant competition while at the same time allowing carriers to increase their spectrum holdings in order to meet anticipated demand for their services.

Any suggestion of a larger proportionate spectrum cap should once again be rejected by the Commission. As the Commission stated in its *Notice*, “if mobile voice markets were to stabilize as three-firm oligopolies, recently observed price competition could be reduced or eliminated.”<sup>28</sup> Moreover, history has proven that in the wireless industry (where barriers to entry are very high) at least four competitors per market are needed to foster competition and

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<sup>28</sup> *First Biennial Review Order* at ¶ 44.

create an environment that is beneficial to both the wireless industry and consumers. Clearly, the duopoly cellular market did not perform competitively prior to entry by the PCS carriers.<sup>29</sup>

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<sup>29</sup> *Id.* at ¶ 83 (“...the introduction of new providers and the end of the cellular duopoly has led to substantial consumer benefits through reductions in the price of service and in new and enhanced services.”); *see also In the Matter of Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband PCS*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16867 ¶ 21 (1998) (“...broadband PCS providers are operating in an increasingly competitive environment. Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source.”)

## VI. CONCLUSION

The Commission's spectrum aggregation limits have been critical in achieving a more competitive CMRS market, with at least four facilities-based carriers and a number of resale carriers serving most population centers. They have also allowed the Commission to forbear from directly regulating prices and service offerings, instead allowing the competitive marketplace to promote innovation and to create pricing pressures. The elimination of the spectrum cap at this time inevitably will result in further consolidation of the wireless industry and have a significant negative impact on the competitive CMRS market. Accordingly, pursuant to Section 11 of the Communications Act, the Commission must find that the public interest would be best served by maintaining the current spectrum aggregation limits for existing CMRS spectrum and proportionately increasing these limits as new spectrum is made available for CMRS services.

Respectfully submitted,

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Dated: April 13, 2001

**CERTIFICATE OF SERVICE**

I, Tally Frenkel, hereby certify that on this 13<sup>th</sup> day of April 2001, a true and correct copy of the foregoing Comments was served via U.S. Mail upon the following:

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