Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Digital and Wireless Television, LLC, Assignor	)	File Numbers: 0002098626
	)	and 0002069066
American Telecasting of Denver, Inc., Assignee	)	
	)	WT Docket No. 05-63
Application for Consent of Licenses for Partitioned Broadband Radio Service Basic Trading Area B110 and for Broadband Radio Service Stations KNSC838, KNSC838H01, KNSC839, KNSC840, KNSC840H01, KNSE324, KNSE325, KNSE326, and KNSE327	)	

JOINT OPPOSITION TO PETITION TO DENY

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May 11, 2005

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EXECUTIVE SUMMARY

Digital and Wireless Television, LLC ("D&W") and American Telecasting of Denver, Inc. ("ATID") oppose the Consolidated Petition to Deny filed by Community Technology Centers' Network ("CTCN") against the instant applications for routine assignment of Broadband Radio Service authorizations in the Denver, CO area (the "Denver Applications"). The Denver Applications should be granted immediately, subject to whatever conditions, if any, the Commission may in the future impose in connection with the merger of ATID's parent company, Sprint Corporation ("Sprint"), and Nextel Communications, Inc. ("Nextel").

At the outset, CTCN has failed to satisfy the threshold requirement of Section 1.939(d) of the Commission's Rules that a petitioner must show by affidavit or declaration that it is a "party in interest" under Section 309(d) of the Communications Act of 1934, as amended. A membership organization must supply an affidavit or declaration from at least one individual member that would otherwise have standing in his or her individual capacity demonstrating that such member will in fact be adversely affected by grant of the assignment applications. CTCN has failed to provide any such affidavit or declaration.

At this juncture, it is speculative, at best, as to whether the Commission will impose conditions upon the Sprint Nextel merger, and even more speculative that those conditions would require the combined entity to divest the spectrum at issue in the Denver Applications. The Commission should promptly grant the Denver Applications, leaving it to WT Docket No. 05-63 to address the concerns raised by CTCN. This proceeding is neither the time nor the place to debate the merits of the merger between Sprint and Nextel. As is clear from even a cursory review of the Wireless Telecommunications Bureau weekly public notices, secondary market transactions in the 2.5 GHz band are conducted routinely as operators (including Sprint and Nextel, but also including a variety of other entities accumulating spectrum positions) seek to rationalize their spectrum holdings and to position those holdings for the band plan transition recently mandated by the Commission's *Report and Order* in WT Docket No. 03-66. Sprint will be placed in a serious disadvantage relative to its competitors, and the deployment of wireless broadband services by Sprint potentially impacted, if during the pendency of the Commission's consideration of the Sprint Nextel merger, petitions such as CTCN's here can frustrate Sprint's ability to engage in the sorts of routine secondary market transactions that other competitors are free to engage in. Moreover, failure to act promptly on the Denver Applications would prove fundamentally unfair to D&W, which has no involvement in the proposed merger of Sprint and Nextel. CTCN's petition has already delayed, and may ultimately deny, D&W of the benefit of its bargain with ATID.

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JOINT OPPOSITION TO PETITION TO DENY

Digital and Wireless Television, LLC ("D&W") and American Telecasting of Denver, Inc. ("ATID") (D&W and ATID collectively, the "Denver Applicants") hereby oppose the Consolidated Petition to Deny (the "Denver Petition") filed by Community Technology Centers' Network ("CTCN") against the above-referenced applications (the "Denver Applications").[1] For the reasons set forth below, the Denver Applications should be granted immediately.

I. INTRODUCTION.

D&W currently is the licensee for Broadband Radio Service ("BRS") Basic Trading Area ("BTA") No. 110. The Denver Applications propose: (i) a partitioning of the Denver BTA under which the BTA would be bisected along 106° West Longitude from its northern-most border to its southern-most border; (ii) the assignment of the BRS geographic authorization for the eastern partition from D&W to ATID; and (iii) the assignment to ATID of the site-based licenses currently held by D&W for individual BRS stations within the eastern partition. As CTCN

[1] This Consolidated Opposition is submitted pursuant to Section 1.939(f) of the Commission's Rules and is timely-filed in accordance with Section 1.45 of the Rules.

recognizes, the spectrum to be acquired by ATID pursuant to the Denver Applications currently is available to ATID under a long-term leasing arrangement between ATID and D&W.[2]

CTCN does not allege that acquisition by ATID of the partitioned BRS authorization or associated site-based licenses currently held by D&W will violate any existing Commission rule. However, CTCN asks the Commission either to deny the Denver Applications outright, to process the Denver Applications in conjunction with the Sprint Nextel merger applications, or to hold the processing of the Denver Applications in abeyance pending the outcome of the Commission's consideration of the Sprint Nextel merger.[3]

CTCN's attempt to hold hostage the routine assignment of BRS authorizations proposed in the Denver Applications is improper. It presupposes an outcome for which it has no basis in the separate merger review involving Sprint Corporation ("Sprint") and Nextel Communications, Inc. ("Nextel"). Furthermore, it presupposes that any decision in that separate merger review would have an affect on the spectrum at issue here.[4] The Commission should grant the Denver

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[2] *See* Consolidated Petition of Community Technology Centers' Network to Deny, File Nos. 0002098626, *et al.*, WT Docket No. 05-63, at 3 (filed April 28, 2005) ("Denver Petition")("CTCNet acknowledges that pursuant to an existing lease agreement, Sprint already controls the stations and the BTA for which it now seeks authority to receive assignments of license from DWT.").

[3] *See* Denver Petition at 2-3. In WT Docket No. 05-63 (where the Commission is evaluating the applications submitted by Sprint and Nextel for Commission consent to their proposed merger) CTCN has petitioned the Commission to condition its consent to the merger upon divestiture by the combined entity of certain 2.5 GHz band licenses and/or spectrum leases. *See* Petition of Community Technology Centers' Network to Deny, WT Docket No. 05-63, at 21 (filed March 30, 2005)("Merger Petition").

[4] For example, assuming *arguendo* that the Commission adopts CTCN's proposal to limit any entity to just 5 BRS channels in the Upper Band Segment in a given geographic area (*see* Merger Petition at 21), it is certainly possible that the combined entity would elect to retain some or all of the spectrum that is the subject of the Denver Applications and divest other spectrum. CTCN does not even acknowledge that a grant of the Denver Petition would foreclose Sprint Nextel this

Applications forthwith, allowing D&W and ATID to consummate their proposed transaction promptly and permitting D&W (which is not a party to the Sprint Nextel merger proceeding) to enjoy the benefit of its bargain with ATID. There is no need to delay the routine processing and approval of the Denver Applications. Indeed, failure to act promptly could deny D&W the benefit of its bargain with ATID.[5] To the extent, if any, the Commission were to impose conditions upon the combined Sprint Nextel entity in the future that would affect Sprint's Denver holdings, the combined company will comply as appropriate.

II. DISCUSSION.

A. CTCN Has Failed To Establish That It Is A Party In Interest To The Denver Applications.

As a preliminary matter, CTCN has failed to satisfy the threshold requirement of Section 1.939(d) of the Commission's Rules that a petitioner must show by affidavit or declaration that it is a "party in interest" under Section 309(d) of the Communications Act of 1934, as amended.[6] CTCN was required by law to present "specific allegations of fact sufficient to demonstrate that grant of the challenged assignment applications would cause the petitioner to suffer a direct injury" and "must establish that it is likely, as opposed to merely speculative, that the alleged

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opportunity, much less explain what public interest is advanced were the Commission to do so. In other analogous situations, the Commission has permitted license acquisitions to move forward, subject to later divestiture of other assets if required. *See, e.g., Amendment of Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band,* Third Order on Reconsideration, 13 FCC Rcd 4856, 4875-4877 (1998)(permitting local exchange carriers and incumbent cable companies to participate in Local Multipoint Distribution Service auction, subject to future divestiture of other interests).

[5] *See* discussion *infra* at note 21.

[6] *See* 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.939(d).

injury would be prevented or redressed if these. . . applications are denied."[7] Where, as here, the petitioner is a membership organization,[8] it must supply an affidavit or declaration from at least one individual member that would otherwise have standing in his or her individual capacity demonstrating that such member will in fact be adversely affected by grant of the Denver Applications.[9] CTCN has not satisfied these threshold requirements.

While CTCN pays lip service to the standing requirement, it does not supply the requisite affidavit or declaration by a member establishing that the member has individual standing (*i.e.* that he or she will be adversely affected by grant of the Denver Applications). Rather, CTCN merely asserts standing to petition to deny the Denver Applications "for the same reasons set

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[7] *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570, 2579-80 (2004)(citations omitted); *see also Alaska Native Wireless L.L.C.*, Order, 18 FCC Rcd 11640, 11644 (2003). Comments objecting to an application also do not meet this standard and constitute only an informal objection. *See Knox Broadcasting, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3337, 3338 (1997); *see also Infinity Holdings Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 17813, 17816 n.10 (1996); *National Broadcasting Co.*, Memorandum Opinion and Order, 11 FCC Rcd 10779, 10779 (1996).

[8] CTCN identifies itself as "a national non-profit organization . . . comprised of more than one thousand local community organizations . . .." Merger Petition at 2.

[9] *See Friends of the Earth, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23622, 23623 (2003)(*citing Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)); *Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, Memorandum Option and Order, 5 FCC Rcd 4893, 4893 (1990)("To establish associational standing, an organization must submit the statement of one of its members who would otherwise have standing to sue in his or her individual capacity.")(citations omitted); *United States Telecommunications Association v. FCC*, 359 F.3d 554, 593-94 (D.C. Cir. 2004)(*citing Hunt*, 432 U.S. at 344-45; *Sierra Club v. EPA*, 292 F.3d 895, 899-901 (D.C. Cir. 2002)); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *American Legal Foundation v. FCC*, 808 F.2d 84, 89-90 (D.C. Cir. 1987).

forth in CTCNet's Petition and related pleadings in WT Docket No. 05-63."[10] What CTCN conveniently ignores, however, is that the two boilerplate declarations it utilized to support its claim of standing to oppose the Sprint Nextel merger were provided by CTCN members in San Diego, CA and Oklahoma City, OK, not Denver.[11] Neither of those declarations addresses at all the transaction between ATID and D&W contemplated by the Denver Applications, much less establish factually that the declarant will be adversely impacted if ATID is permitted to acquire a partitioned section of the Denver BTA and associated stations from D&W. Indeed, the discussion in each of the declarations submitted by CTCN in WT Docket No. 05-63 is limited to the effect of the merger "in our area" (*i.e.* in San Diego and Oklahoma City), and cannot reasonably be read to suggest that the declarant would suffer injury by virtue of a Commission grant of the Denver Applications.[12]

As a result, the Commission should find that CTCN has failed to establish through the requisite affidavit or declaration that even one of its members has standing to oppose grant of the

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[10] Denver Petition at 3.

[11] As demonstrated by Sprint and Nextel in responding to the CTCN Merger Petition, those two declarations "do not allege the type of direct consequences needed to confer standing to challenge the proposed merger." Joint Opposition of Sprint Corporation and Nextel Communications to Petitions to Deny and Reply to Comments, WT Docket No. 05-63, at 6 n.14 (filed April 11, 2005)("Sprint Nextel Joint Opposition")(citation omitted).

[12] *See* 47 U.S.C. § 309(d)(1). Affidavits that consist of "ultimate, conclusionary facts or more general allegations . . . are not sufficient" to establish a *prima facie* case under the first prong of the Section 309(d) analysis. *Gencom Inc. v. FCC,* 832 F.2d 171, 181 n.11 (1987)(citation omitted). Petitioners "bear[] the burden of pleading sufficient facts to establish a *prima facie* case and these facts must be supported by an affidavit from persons with personal knowledge." *Nextband Communications, L.L.C.*, Order on Reconsideration, 14 FCC Rcd 7647, 7650 (PSPWD, WTB 1999)(*citing* 47 U.S.C. § 309(d)(2); 47 C.F.R. § 1.2108(b)). Congress specifically amended Section 309(d) "to significantly heighten the burden a petitioner must satisfy...." *Gencom,* 832 F.2d at 180.

Denver Applications.[13] Indeed, CTCN appears to implicitly acknowledge this failure, asking that the Commission treat its filing as an "informal objection" should the Commission find that CTCN lacks standing.[14] While the Denver Applicants appreciate that the Commission often grants such requests, the Wireless Telecommunications Bureau is under no obligation to consider the merits of CTCN's filing.[15] If the Bureau does elect to consider the merits, it is under no obligation to draft a detailed analysis of CTCN's informal arguments, but only must give a clear

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[13] The record to date in the Sprint Nextel merger proceeding establishes the wisdom of requiring an organization such as CTCN to provide appropriate affidavits or declarations from its members to establish standing. There, CTCN specifically listed KCPT Public Television ("KCPT") as a member, yet KCPT felt compelled to oppose the position taken by CTCN, to "express its support for the merger of Sprint and Nextel," and to note that "KCPT was never asked, nor did it give permission to list its name in CTCN's FCC filing." Letter from William T. Reed, President and CEO, KCPT Public Television 19, to Marlene H. Dortch, Secretary, FCC, WT Docket 05-63, at 1 (filed April 8, 2005). As this demonstrates, the Commission cannot merely assume that CTCN speaks on behalf of any members in the Denver area. Indeed, even where CTCN has provided a declaration, questions abound. Specifically, although CTCN relied upon a declaration given by the YMCA of San Diego, that organization has repudiated its support. *See* Letter from John Merritt, IT Director, YMCA of San Diego County, to Sharon E. Hilliard, President, Via/Net Companies, Inc. (dated April 11, 2005)(noting that "[t]he signed declaration does not represent the views or opinions of the YMCA of San Diego County, nor does Mr. Marcano [the signatory on the declaration] have any authority to make statements or declarations on behalf of the YMCA of San Diego County. Furthermore, Mr. Marcano made these statements without seeking guidance or approval from appropriate YMCA authorities."). A copy of this letter was attached to Via/Net's Opposition to Petitions to Deny in WT Docket 05-63. *See* Opposition of Via/Net Companies to Petitions to Deny, WT Docket 05-63, at Attachment (filed April 11, 2005).

[14] *See* Denver Petition at 3 n.3.

[15] *See Licenses of National Science and Technology Network, Inc.*, Order on Further Reconsideration, 17 FCC Rcd 11133, 11135 (WTB 2002)(noting that "the Commission is not obligated to consider the merits of an informal objection"). *See also Automobile Club of Southern California*, Order on Reconsideration, 16 FCC Rcd 2934, 2936 (WTB 2001)("we may consider informal pleadings, though we are not required to consider them.")(citation omitted).

indication that CTCN's informal objection was considered.[16] In other words, while it is troubling that CTCN has already unnecessarily slowed Commission processing of the Denver Applications, the Commission need not allow CTCN's informal objection to further slow approval of the proposed transaction.

B. The Commission Should Grant The Denver Applications Expeditiously.

In the April 11, 2005 "Joint Opposition to Petitions to Deny and Reply to Comments" submitted by Sprint and Nextel in WT Docket No. 05-63, they effectively refute suggestions by CTCN and others that the public interest will best be served by requiring the combined entity to divest itself of 2.5 GHz band licenses and/or leases.[17] Sprint and Nextel have demonstrated, among other things, that notwithstanding their holdings in the 2.5 GHz band, ample spectrum is available for others to provide wireless broadband services.[18] D&W and ATID will not repeat the arguments regarding the merits of the proposed merger of Sprint and Nextel here, but instead incorporate them by reference. Repetition of those arguments in this proceeding is unnecessary, as the proceeding involving the Denver Applications is neither the time nor the place for the Commission to decide the issues presented by the proposed merger of Sprint and Nextel.

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[16] *See, e.g.*, *Hispanic Broadcast System*, Memorandum Opinion and Order, 16 FCC Rcd 8072, 8073 (2001); *Wendell & Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998).

[17] *See* Sprint Nextel Joint Opposition at 20-34.

[18] *Id.* at 23-24. In addition, as CTCN has conceded, Sprint and Nextel do not control all of the spectrum within even the Denver "major market" area that CTCN has conjured up for analysis. *See* Reply of Community Technology Center's Network, WT Docket No. 05-63, at Ex. 3-D p.1 (filed April 19, 2005)("CTCN Merger Reply")(acknowledging that 24 MHz of 2.5 GHz band spectrum in the Denver area is not owned or leased by Sprint). Moreover, CTCN's recitation of Sprint's current Denver holdings is flawed, which Sprint may address in more detail in the merger proceeding.

Further, as is clear from even a cursory review of the Wireless Telecommunications Bureau weekly public notices, secondary market transactions in the 2.5 GHz band are conducted routinely as operators (including Sprint and Nextel, but also including a variety of other entities accumulating spectrum positions) seek to rationalize their spectrum holdings and to position those holdings for the band plan transition recently mandated by the Commission's *Report and Order* in WT Docket No. 03-66.[19] Licenses are routinely being bought and sold and spectrum is routinely being leased as existing agreements expire and new leases entered into.[20] Sprint will be placed in a serious disadvantage relative to its competitors, and the deployment of wireless broadband services by Sprint potentially impacted, if during the pendency of the Commission's consideration of the Sprint Nextel merger, petitions such as CTCN's here can frustrate Sprint's ability to engage in the sorts of routine secondary market transactions that other competitors are free to engage in.

Moreover, failure to act promptly on the Denver Applications would prove fundamentally unfair to D&W, which has no involvement in the proposed merger of Sprint and Nextel. The filing of the Denver Petition has already delayed, and may ultimately deny, D&W of the benefit of its bargain with ATID.[21] These harms can be avoided by the simple expedient of grant of the

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[19] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14194-14208 (2004).

[20] Since March 2004, for example, the Commission has accepted for filing applications by Fixed Wireless Holdings, Inc., a subsidiary of Clearwire Communications, for authority to acquire or lease 667 channels.

[21] As is commonplace with agreements of this sort, the Asset Purchase Agreement between D&W and ATID (the "Agreement") contains a "drop dead" provision designed to avoid a situation in which the parties remain obligated in perpetuity while closing is delayed for some

Denver Applications immediately.[22] This approach will allow D&W and ATID to consummate their proposed transaction promptly and afford D&W the benefit of its bargain with ATID, without prejudice to Commission processes.

There is ample precedent for such an approach. Indeed, earlier this year, while the Commission was considering the adoption of a rule by which television joint sales agreements would be fully attributable in conducting competitive analyses, the Media Bureau refused to delay a proposed transaction involving such a joint sale agreement until completion of the rulemaking:

> We will not hold this lawful transaction in abeyance pending the outcome of the JSA rulemaking. Until the Commission makes a definitive conclusion about how it will treat television JSAs, any adverse finding or delay based on the existence of a television JSA would be speculative and prejudicial.[23]

In another similar case, the Commission allowed the acquisition of a newspaper/broadcast cross-ownership interest at the same time it had pending before it a notice of proposed rulemaking that would have required divestiture of that interest. The Commission reasoned that:

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reason. Under the terms of Section 8.1(a) of the Agreement, ATID has the right to terminate the Agreement if the transaction does not close by August 1, 2005. D&W's ability to enjoy the benefit of its bargain should not be held hostage to CTCN's efforts to secure conditions on the Sprint Nextel merger.

[22] It is worth noting that the analysis of the Denver market submitted by CTCN in WT Docket No. 05-63 treats the spectrum at issue in the Denver Applications as already owned by Sprint. *See* CTCN Merger Reply at Ex. 3-D p.1. Apparently, CTCN wants to have it both ways – there treating the stations as owned by Sprint to advance its efforts to force divestiture, but here trying to prevent Sprint's subsidiary from acquiring ownership of the licenses. In any event, allowing ATID to proceed with the acquisition will in no way prejudice CTCN in WT Docket No. 05-63, since CTCN is already treating the spectrum as licensed to Sprint in that proceeding.

[23] Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to KAAL-TV, LLC, *et al.*, File No. BALCT-20040609AAL, at 6 (dated March 11, 2005).

> We simply do not consider it wise nor equitable to examine this acquisition on the basis of a proposed rule that may never be adopted. The proposed rule, if finally adopted, will be applied across the board to this applicant as well as others similarly situated.[24]

The same rationale should hold here. It is speculative, at best, as to whether the Commission will mandate divestiture as a condition to the Sprint Nextel merger, and any condition imposed may or may not affect the licenses at issue here. The Commission should promptly grant the Denver Applications, leaving it to WT Docket No. 05-63 to address the concerns raised by CTCN.

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[24] *Times Herald Printing Co.*, Memorandum Opinion and Order, 25 FCC 2d 984, 989 (1970). In another case, a radio station licensee was granted an extension of time to divest itself of a prohibited station because the Commission was considering elimination of the rule that prohibited its ownership of that station. *See Newhouse Broadcasting Corporation,* Memorandum Opinion and Order, 77 FCC 2d 97, 105 (1980)("Although we continue to express reservations about the use of trusts in such situations, Bonneville will not be required to divest itself of its interest in Times at this time, but the interest is subject to whatever action may be appropriate as a result of the proposed rulemaking in BC Docket No. 78-239, pertaining to voting trusts."). In the only case of note involving the 2.5 GHz band, while the Commission was considering the reallocation of Instructional Television Fixed Service ("ITFS") spectrum to the Multipoint Distribution Service in the early 1980s, the Commission refused to deny applications by the Public Broadcasting Service for the ITFS spectrum being considered for reallocation. *See Public Broadcasting Service*, Memorandum Opinion and Order, 96 FCC 2d 555, 558-561 (1984).

III. CONCLUSION.

In sum, CTCN has failed to meet the statutory obligation of establishing that it is a party in interest to the Denver Applications. Should the Commission nonetheless choose to treat CTCN's filing as an informal objection, it should summarily reject CTCN's call for denial or delay in the processing of the Denver Applications. For the reasons discussed above, the Commission should promptly grant the Denver Applications.

Respectfully submitted,

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May 11, 2005

CERTIFICATE OF SERVICE

I, Jo-Ann G. Monroe, do hereby certify that on this 11th day of May 2005, copies of the foregoing Joint Opposition To Petition To Deny was served by first-class, postage-prepaid United States Postal Service mail, unless otherwise indicated, to the following:

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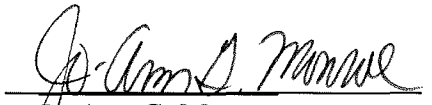
By: 
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*Delivered by hand