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June 20, 2007

Debra Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301-7319

**RE: DT 07-027 TDS**

Dear Ms. Howland:

Enclosed for filing with the Commission, please find an original and seven copies of the Reply Brief of New Hampshire Legal Assistance (NHLA) and the Office of Consumer Advocate's (OCA) in the above captioned matter.

Pursuant to the Puc rules copies have been served on all parties in this docket electronically.

Respectfully,

Christina Martin
On Behalf of Meredith A. Hatfield, Consumer Advocate

NHPUC JUN20'07 PM 2:36

Attachments

cc: service list

Before the New Hampshire Public Utilities Commission

DT 07-027

Kearsarge Telephone Company, Wilton Telephone Company,
Hollis Telephone Company and Merrimack County Telephone Company
Petition for an Alternate Form of Regulation

**REPLY BRIEF OF THE OFFICE OF CONSUMER ADVOCATE**
**AND**
**NEW HAMPSHIRE LEGAL ASSISTANCE ON BEHALF OF ROSS PATNODE**

## I. Introduction

The Office of Consumer Advocate ("OCA") and New Hampshire Legal Assistance ("NHLA"), in accordance with the Secretarial Letters dated May 29, 2007 and June 5, 2007, from the Executive Director of the Public Utilities Commission ("Commission"), submit this Reply Brief. Both the TDS Companies and Granite State Telephone argue that products other than basic local exchange service should qualify as "competitive" services under RSA 374:3-b, III (a).[1] The Commission should reject this argument, and instead undertake a market based analysis to determine whether "[c]ompetitive wireline, wireless, or broadband service" exists in the relevant product market of basic local exchange service as required by the statute. [2]

[1] Note that TDS actually impliedly argues the Commission should undertake a fact-intensive economic evaluation and define the relevant product market for basic local exchange service through its repeated discussion of "substitutes" and substitutability.

[2] The Commission must use its expertise and make findings. *See* RSA 374:3-b(III) ("...if it [the Commission] finds that:"). The Commission should undertake an economic analysis in an attempt to find competition and not accept the mere assertions that competition exists.

## II. Intermodal products[3] are not economic substitutes[4] for consumers of wireline services across all market segments.

In determining relevant product markets, one must determine which products represent economic substitutes. One textbook states:

> The ideal definition of a market must take into account substitution possibilities in both consumption and production. On the demand side, firms are competitors or rivals if the products they offer are good substitutes for one another in the eyes of buyers. But how, exactly, does one draw the line between 'good' and 'not good enough' substitutes?[5]

For example, to a Bostonian, a ticket to a Yankees game might not be a good enough substitute for a ticket to a Red Sox game. Yet, to a resident of Seattle, tickets to see the Yankees or the Red Sox could be interchangeable. The TDS Companies rely on intermodal services (*i.e.*, telecommunications services through different modes of access such as wireless and VoIP[6]) as evidence of local competition but fail to demonstrate that these services are "good enough" substitutes for wireline services, particularly basic local exchange service.

In addition, a meaningful substitution effect depends upon the similarity of the goods involved and the ease with which the consumer can shift from one good to its purported substitute (e.g. the ease with which a person can switch from basic local exchange service to VoIP)[7]. This analysis must include a review of transaction costs

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[3] The OCA and NHLA do not use the word "alternative" to describe products other than basic local exchange service provided by TDS' companies and CLECs. To do so might assume these other products are within the relevant product market for basic local exchange service, which, absent an analysis by the Commission, has not been shown.

[4] As an example, if Product A is an economic substitute for Product B, Product A is within the relevant product market of Product B. For a short discussion of substitutes in relevant product markets, see In the Matter of Johnson & Johnson and Pfizer Inc., File No. 061-0220, Docket No. C-4180, 2006 FTC LEXIS 85 (2006).

[5] *Industrial Market Structure and Economic Performance*, F. M. Scherer (Chicago: Rand McNally & Company, 1970), at 53

[6] VoIP is a technology that allows a customer to obtain telephone service over the Internet.

[7] *See R. Miller, Intermediate Microeconomics: Theory, Issues and Applications*, 76, 99-100 (McGraw Hill

(e.g. buying a computer or a cell phone) as well as product cost differentials (e.g. cell phone plans are approximately 400% of the price for basic local phone exchange for MCT[8]). The OCA and NHLA believe TDS bears the burden of illustrating that a majority of customers, including those with low-income consumers and the elderly on fixed incomes, have access to products that are affordable substitutes for basic local exchange service. Importantly, both the TDS and Granite State briefs ignore the pricing and transaction costs of such products to consumers.[9]

Notably, the most valuable and unbiased evidence about consumers' preferences are consumers' actual purchasing decisions.[10] Consumers attribute high "utility" or value to the ability to reach medical, safety, and emergency assistance in a reliable, timely manner, whether to meet the needs of young children, the elderly, or other household members and business employees. Society's investment in substantial resources to deploy state-of-the-art emergency response systems and public safety officials' widespread efforts to geocode consumers' addresses to enable prompt public safety response are compelling evidence of the utility (or value) that consumers ascribe to E911. That a tiny percentage of the population may choose to abandon wireline service entirely does not alter the fact that the vast majority of households and small businesses place a

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Higher Education, 1982)(The more similar two products are in function and use, the more likely they are to be nearly "perfect" substitutes. For perfect substitutes, an X% increase in the price of one product leads to an identical X% increase in the other.)

[8] *See* OCA and NHLA Brief at 10.

[9] *See* TDS Brief and Granite State Brief in their entirety.

[10] Consumers, through their purchasing decisions, seek to maximize their utility, and in so doing show their "preferences." *See generally*, Mas-Colell, Andreu, Michael D. Whinston and Jerry R. Green, *Microeconomic Theory* (New York: Oxford University Press, 1995). As defined in one textbook, "it is possible to show formally that people are able to rank in order all possible situations from the least desirable to the most. Following the terminology introduced by the nineteenth-century political theorist Jeremy Bentham, economists call this ranking utility. We will also follow Bentham by saying that more desirable situations offer more utility than do less desirable ones." Walter Nicholson, *Microeconomic Theory: Basic Principles and Extensions*, seventh edition, (The Dryden Press, 1998), at 70 (footnotes omitted; emphasis in original).

high value on the public safety characteristics of wireline telephone service.

Nevertheless, because RSA 374:3-b, III (a) requires defining of the relevant product market for basic local exchange service, the Commission may not simply rely on whether consumers or TDS "perceive" products to be substitutes.[11] In its analysis, the Commission should not ascribe to the faulty doctrine of speculative competition[12] in accepting TDS' assertion of competition based on the mere "presence" of other firms.[13] Instead, the Commission should use a market-based analysis to determine if other products are truly within the market for basic local exchange service, and create benchmarks for meaningful competition to guide its findings.[14]

The Commission should also analyze whether intermodal products can truly discipline the actions of the TDS Companies in the wake of price deregulation. The TDS Companies' reliance on intermodal products to satisfy the requirement of competition in RSA 374:3-b(III)(a) is mistaken because the option to subscribe to intermodal products sheds no light on the impact of the proposed AFOR plan on the market for plain old telephone service ("POTS") offered to residential customers.

The TDS Companies contend that intermodal products are substitutes for POTS lines. However, wireless, facilities-based VoIP, and "over-the-top" VoIP services do not constrain the TDS Companies' prices for basic voice grade service.

Residential consumers' increasing reliance on DSL and intermodal products for *additional* lines does not provide evidence of facilities-based competition in the provision of mass market consumers' *primary* lines. Intermodal products do not discipline

[11] *See* TDS Brief at 3 and 5.
[12] *See* Discussion in OCA and NHLA Brief, Item 2E, at 12-13.
[13] *See* TDS Brief at 6.
[14] *See* OCA and NHLA Brief, Item 2G, at 13-14.

dominant carriers' prices, service quality or service innovation.

### A. "Over the top" VoIP services are not substitutes for basic local exchange service.[15]

The Commission should not give much weight to "over the top" VoIP products in its analysis. The product supplied by "over the top" providers, such as Vonage, for example, requires that subscribers first have broadband Internet access. In its *Verizon/MCI Merger Order*, the FCC excluded over-the-top VoIP services from the relevant product market.[16] In so doing, the FCC noted that the various over-the-top services:

> . . . differ significantly in their service characteristics, including quality of services and price. The extent to which consumers view these services as substitutes for traditional wireline local service may vary based on these differences. In addition, the requirement that a customer have broadband access to be able to use certain over-the-top VoIP services affects the substitutability of those services with wireline local services.[17]

Regarding the issue of broadband access, the FCC noted that such a requirement made substitution "uneconomical" and further concluded that even those consumers who already subscribed to broadband services may still not be willing to view over-the-top services as substitutes depending on "the attributes of the service and the consumer's willingness to trade off service characteristics for lower prices."[18] The Commission should similarly exclude over-the-top VoIP services from the relevant product market in its review of the petitions in this proceeding and, more specifically, should reject the TDS Companies' position that all VoIP services should be included in the Commission's

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[15] "Over the top" VoIP services refer to Internet telephony services provided by companies such as Vonage that require users to provide their own broadband Internet access in order to use the service.
[16] *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75, *Memorandum Opinion and Order*, Rel. November 17, 2005 ("Verizon/MCI Merger Order"), at para. 89.
[17] *Id.* (citation omitted).
[18] *Id*.

analysis.

### B. Facilities-based VoIP services[19] are not substitutes to wireline basic exchange services due to differences in consumer needs and to variances among VoIP offerings.

VoIP services provided by facilities-based firms such as the cable companies do not limit TDS Companies' market power in basic local exchange service. The Commission cannot consider facilities-based VoIP services (*i.e.*, I.P. or cable telephony) a substitute to wireline services for residential consumers for at least two reasons.

First, cable telephony may not operate during power failures, particularly extended power failures.[20] Second, the competitive threat faced by the telephone companies is in the provisions of *bundles* of services (often referred to as the "triple play", *i.e*., phone, video, and Internet access). This is an entirely different market than the market for basic local exchange service. Such services are usually more expensive than a single, local wireline connection that low-income or elderly consumers may require. For example, the Time Warner Cable website includes the following language in its FAQ section:

> Q: Do I have to subscribe to other services from Time Warner Cable to get Digital Phone Service?
>
> A: No, customers who are only interested in subscribing to Digital Phone Service from Time Warner Cable can receive the service for one low rate of $49.95 per month. If you subscribe to video or high-speed Internet service from Time

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[19]Facilities-based VoIP services, refers to VoIP services provided by cable companies, who use their own network.

[20] Time Warner Cable provides the following FAQ on its website: "Q: Can I call 911 using Digital Phone? A: Yes, absolutely. Safety is an important consideration and enhanced 911 service is provided. *Please note that Digital Phone Service does not include back-up power and, as is the case with a cordless phone, should there be a power outage, Digital Phone Service, including the ability to access 911 services, will not be available until the power is restored*." (emphasis added) Available at: http://www.timewarnercable.com/nc/products/digitalphone/faq.html. Comcast makes the following statement on its website: "Comcast Digital Voice service uses the electrical power in your home. If there is an electrical power outage, 911 calling may be interrupted if the battery backup in the associated multimedia terminal adapter is not installed, fails, or is exhausted after several hours."

> Warner Cable you'll pay just $44.95 per month for Digital Phone Service. If you subscribe to video and high-speed Internet services from Time Warner Cable, you'll receive a discount of $10.00 per month and pay just $39.95 per month for Digital Phone Service.[21]

Similarly, Comcast advertises bundle discounts on its website. A customer subscribing to Comcast Digital Voice faces a price of $39.95 per month. A customer subscribing for twelve months to cable and high-speed Internet access, each for $33.00 per month, can receive phone service for $33.00 a month.[22] Thus, to qualify for a rate that is more comparable to a typical wireline rate,[23] cable telephony customers typically must also subscribe to, and pay for, an entire bundle of services they may not need or desire. In a 2006 survey of VoIP customers, eighty percent of cable VoIP customers indicated that they subscribed to VoIP and high-speed Internet access as a bundle.[24] Because of the high prices associated with such a bundle, these are likely not customers who are dependent on POTS.

### C. Other issues to consider when deciding whether VoIP is in the same relevant market as POTS: service quality and price.

A gap in the quality of service exists between VoIP and POTS. A study conducted by Brix Networks concluded that based on approximately one million VoIP connections tested through its Web site, 20 percent had unacceptable quality, which was an increase from 15 percent approximately a year ago.[25]

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[21] *See* http://www.timewarnercable.com/nc/products/digitalphone/faq.html.
[22] *See* https://www.comcast.com/shop/buyflow/default.ashx.
[23] The FCC noted at footnote 268 of its *Verizon/MCI Merger Order* that the average monthly household expenditure for billed wireline local telephone service is $37. Of course, rates vary widely among states for a plethora of reasons and many households subscribe to discretionary services. A basic exchange line that provides access to the network, but no bells and whistles will be substantially less. Thus, the cable telephony option will not be price-competitive for the consumer seeking a bare-bones service that provides access to the public switched telephone network.
[24] Brian Santo, "Survey: Cable VoIP subs more satisfied than pure-play VoIP customers," *CED*, May 25, 2006, available at http://www.cedmagazine.com/index.asp?layout=articlePrint&articleID=CA6338178.
[25] "Study: Net telephony quality worsening," Marguerite Reardon, C/Net News.com, July 25, 2006,

To the extent that some customers are willing to trade service quality for a lower price, the price advantage of VoIP service may also be diminished in the future. In 2006, the FCC issued an order wherein, among other things, it requires VoIP providers to contribute to universal service.[26]

**D. Wireless service is not an economic substitute for basic wireline service.**

Wireless telecommunications services indisputably are prevalent. However, wireless services are not an economic substitute for wireline services, particularly basic local exchange service.

In its order approving the merger of Verizon and MCI, the FCC found that approximately six percent of households rely on wireless services for all of their telecommunications needs.[27] The FCC concluded that "the record does not present credible evidence that mobile wireless services have a price constraining effect on all consumers' demand for primary line wireline services."[28] In addition, the FCC observed that the "average cost for mobile wireless services appears to be higher than for wireline local service"[29] which "may make it not price competitive for consumers."[30]

Even wireline carriers view wireline and wireless services as complements, rather than perfect substitutes. One of reasons for the SBC and AT&T merger touted by the Applicants was the simplified governance of Cingular and the facilitation of "the merged firm's ability to *jointly market wireline and wireless services to mass market and*

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http://news.com/2102-7352_3-6097912.html?tag=st.util.print.

[26] *In the Matter of Universal Service Contribution Methodology*, FCC WC Docket No. 06-122, *Report and Order and Notice of Proposed Rulemaking*, Rel. June 27, 2006, paras. 16, 34-62.

[27] *Verizon/MCI Merger Order*, at para. 91.

[28] *Id.*, at fn 276.

[29] *Id.*, at para. 90.

[30] *Id.*, at fn 268.

*business customers*."[31] Similarly, Verizon NH offers bundles which include its own wireline and wireless services together in one package. In August 2006, Verizon Communications reported to investors that Verizon Freedom packages "have been instrumental in retaining retail wireline customers."[32]

## III. To the extent that a telco/cable duopoly is emerging, these products do not protect the residential, basic local exchange customer.

A cable/telco duopoly,[33] where both industries are competing to offer a bundle of voice, data, and video services to their customers, is irrelevant to the customer of basic local exchange services who does not seek a bundled offering. Also, even for those customers who want bundled offerings, a duopoly does not represent effective competition.

A 2006 Congressional Research Report concluded: "With only limited alternatives to the cable and telephone broadband duopoly for the foreseeable future, and with the cable and telephone companies both pursuing largely the same business plan, the broadband providers might have both the incentive and the ability to exploit their control

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[31] *In the Matter of BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of Bellsouth Corporation to AT&T Inc*, WC Docket No. 06-74, Application for Consent of Transfer of Control, filed March 31, 2006, Declaration of Dennis W. Carlton and Hal S. Sider, at para. 10 (emphasis added). *See, also, Id.*, at para. 52, stating "The proposed transaction eliminates impediments to developing innovating marketing strategies involving wireless services. Such bundles enable customers to have a single point of contact for a broader range of services."

[32] Verizon Communications, *Investor Quarterly: VZ Second Quarter 2006,* August 1, 2006, at 6.

[33] A duopoly, which is an extreme form of an oligopoly, is only one step away from a monopoly. In an oligopoly, a number of firms compete in a market, and the firms' behavior, cost functions, and strategic interaction, as well as consumers' demand functions, affect the market structure. One textbook describes the behavior of firms in an oligopoly as follows:

> Any realistic theory of oligopoly must take as a point of departure the fact that when market concentration is high, the pricing decisions of sellers are interdependent, and the firms involved can scarcely avoid recognizing their mutual interdependence. If they are at all perceptive, the managers of oligopolistic firms will recognize too that profits will be higher when cooperative policies are pursued than when each firm looks only after its own narrow self-interest. As a result, we should expect oligopolistic industries to exhibit a tendency toward the maximization of collective profits, approximating the pricing behavior associated with pure monopoly.

over access to end users to restrict competition (and the innovation it might bring) and harm consumers."[34] FCC Commissioner Copps cited this conclusion in his dissent in the 2006 Order approving the cable deal essentially splitting Adelphia assets among Time Warner and Comcast as well as transferring current licenses between the two cable giants.[35]

The cable companies primarily compete on the basis of bundled pricing. The competition among between ILECs and cable providers appears to be for the "high value" triple-play customer, not the customer who only wants a low-cost basic exchange telephone line. This is an entirely different market than the market for basic local exchange service. Furthermore, this emerging rivalry between companies which seek to offer customers bundles of video, data, and voice, represents at best a duopoly. A duopoly is not an effective form of competition for either basic customers or for customers seeking advanced services.

In the first instance, cable companies do not discipline the prices, quality, and terms of conditions of basic telecommunications services offered to customers who do not seek bundles.[36] Furthermore, even those customers who are willing and able to pay for bundled packages of voice, data, and/or video services confront high transaction costs

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[34] Charles B. Goldfarb, *Access to Broadband Networks*, Congressional Research Service, CRS Report for Congress, Order Code RL33496, June 29, 2006, at 17.

[35] Dissenting Statement of Commissioner Michael J. Copps, Re: *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc., Transferee; Time Warner Inc., Transferor to Comcast Corporation, Transferee, Memorandum Opinion and Order*, FCC MB Docket No. 05-192, July 13, 2006; *See, also*, Statement of Commissioner Michael J. Copps, Re: *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line; Carrier Current Systems Including Broadband over Power Line Systems, Memorandum Opinion and Order*, August 3, 2006.

[36] *See* earlier discussion of rates for cable telephony with and without the purchase of bundles.

to migrate from one supplier to another. Transaction costs include the time and financial outlay for service installation, equipment, and an e-mail address change. Moreover, telecommunications service providers use various tactics to lock-in customers. Although some of these tactics may offer short-term consumer benefits, they also impose transaction costs if customers later wish to change service providers.

Some of the tactics that deter migration include:

- offering discounts for one-year contracts, instead of month-to-month agreements,
- bundling necessary equipment with a long-term commitment,
- imposing early termination fees, and
- enforcing non-portability of features.

In addition to the business goal of seeking to attract customers in the high revenue segment of the market, the desire to lower customer "churn" is one of the industry's key motivating reasons for marketing bundled offerings to customers. The FCC stated in reviewing the Verizon/MCI merger:

> Verizon's documents reveal that its research and development, marketing, and corporate strategies focus upon service offerings designed to encourage consumers to subscribe to a local and long distance service bundle. Verizon's incentive is to drive consumers to purchase all telephone services from Verizon to reduce its marketing costs and churn, as well as to increase its average revenue per user.[37]

Recent regulatory decisions have increased the likelihood of a telco/cable duopoly. A landmark FCC decision in 2005, which determined that wireline broadband Internet access services are information services, and which eliminated ILECs' requirement to share their DSL lines, further reinforced the emerging telco/cable

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[37] *Verizon/MCI Merger Order,* at note 296. The Commission also stated, "[m]oreover, these strategies are revealed in their marketing." *Id.*, citing, Verizon Second Quarter 2005 Earnings Conference Call at 6, wherein it was stated: "In consumer, our approach to the marketplace is to focus on customer retention and loyalty, while increasing the average monthly revenue per customer through these new services and higher penetration of bundles and packages."

duopoly.[38] The Commission should not rely on this duopoly to protect consumers from the TDS Companies' exercise of its monopoly power.

At a 2006 analyst conference, AT&T Chairman and CEO Ed Whiteacre suggested that there would not be a "price war" between cable and telephone companies, stating "We're not going to chase that down."[39] Instead, Whiteacre suggested that the companies would compete on the basis of who offers more services in their packages.[40] This is hardly comforting to consumers that rely on access to relatively inexpensive POTS telephone lines for basic local exchange service.

## IV. A service provided by an affiliate of an ILEC does not qualify as competitive under RSA 374:3-b, III (a).

Through inadvertence, the OCA and NHLA failed to specifically respond in their initial brief to the Commission's directive that address whether service provided by an affiliate of an ILEC qualifies as competitive service for purposes of the statute,[41] and discussed generically the pricing impacts on competition of affiliates, including TDS' control of US Cellular.[42] On this question, the OCA and NHLA concur with the positions and arguments of segTEL and Staff.

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[38] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review –Review of Computer III and ONA Safeguards and Requirement*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, *Report and Order and Notice of Proposed Rulemaking*, Rel. September 23, 2005 ("FCC Broadband Sharing Order").

[39] Roger Chang, "AT&T CEO Backs View of Double-Digit Adjusted EPS Growth," *The Wall Street Journal Online*, May 31, 2006.

[40] *Id.*

[41] Secretarial Letter dated May 29, 2007.

[42] *See* OCA and NHLA Brief at 10-11.

## IV. Conclusion

The Commission must find that "competitive wireline, wireless, or broadband service" is within the same relevant product market of basic local exchange service, and is available to a majority of customers in each TDS exchange in order to approve the TDS AFOR plan.

Respectfully submitted,
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**Certification of Service**

I certify that on this date a copy of this document was provided to all persons on the service list in this docket.

Date: June 20, 2005

Meredith A. Hatfield

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