BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

In the Matter of Proposed New Rule	)	
4 CSR 240-33.160 Regarding Customer	)	TX-2003-0445
Proprietary Network Information	)	

SOUTHWESTERN BELL TELEPHONE, L.P.,
d/b/a SBC MISSOURI'S COMMENTS REGARDING
PROPOSED NEW RULE 4 CSR 240-33.160
CUSTOMER PROPRIETARY NETWORK INFORMATION

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), and for its Comments Regarding Proposed New Rule 4 CSR 240-33.160 Customer Proprietary Network Information ("CPNI"), states as follows:

SBC Missouri respectfully submits that proposed Rule 4 CSR 240-33.160 is unnecessary. The Federal Communications Commission ("FCC") has already enacted rules regarding telecommunications companies' use of CPNI. See 47 C.F.R. §§ 64.2001-2009. Proposed Rule 4 CSR 240-33.160 goes beyond the FCC's requirements and imposes new requirements that will be administratively burdensome compliance issues for carriers, like SBC Missouri, which operate in multiple states. Moreover, as described in more detail below, many portions of proposed Rule 4 CSR 240-33.160, including several of the state-specific definitions, appear to conflict with and be subject to preemption by the federal Telecommunications Act of 1996 ("the Act") and/or the FCC's implementing rules. Moreover, the fiscal note that was provided with the proposed Rule does not reflect the costs that would be incurred by companies to comply with it. For these reasons, SBC Missouri submits that the Commission should refrain from enacting proposed Rule 4 CSR 240-33.160. In the event the Commission determines to go

forward with this proposed Rule, SBC Missouri further offers the following specific comments.

1. SBC Missouri objects to the following definitions that are contained in proposed Rule 4 CSR 240-33.160(1).

a. "Categories of service", which is defined in proposed Rule 4 CSR 240-33.160(1)(C), provides:

> Categories of service include basic local exchange telecommunications service, telecommunications service, exchange access services, information services typically provided by telecommunications companies, operator services, and directory assistance services.

"Categories of service" in the FCC's rules refers to "local, interexchange and CMRS," all of which are telecommunications services. See 47 U.S.C. §64.2005(a). These three "categories of service" form the basis for the FCC's carefully constructed "total service approach" to when CPNI can and cannot be used without customer approval. Specifically, the FCC has concluded that:

> the language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship.[1]

Following this rationale, the total service approach permits CPNI to be used for marketing purposes to the extent that the telecommunications carrier is selling service offerings that fall within the categories of telecommunications service – local, long

[1] See Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 13 FCC Rcd. 8061, ¶23 (1998), subsequent history omitted ("CPNI Order").

distance, or wireless – to which the customer already subscribes.[2] Although the FCC's rules implementing this approach (47 C.F.R. §64.2005) are closely followed in the Missouri proposed Rules, the proposed creation of additional "categories of service" potentially conflicts with the purpose of the FCC rules.

For example, the FCC has specifically found that §222(c)(1) prohibits a carrier's use of CPNI only where it receives the CPNI "by virtue of its provision of a telecommunications service." Thus, where customer information is derived from the provision of any non-telecommunications services, such as voice mail, internet access or CPE, FCC rules permit the information to be used by the carrier without customer approval to provide or market telecommunications services.[3] To the extent "information services typically provided by telecommunications companies" is a "category of service" under the proposed Missouri definition, it potentially creates a need for customer permission, uniquely placed on telecommunications providers, that unnecessarily and improperly expands on the requirements of §222(c)(1) of the Act and should not be adopted.

Finally, to the extent Missouri defined terms such as "basic local exchange telecommunications service" and "telecommunications service" do not coincide with the use of the term "local" in the FCC's CPNI rules and orders, additional potential conflict exists. As a thirteen state company, SBC's internal processes are set up to follow the FCC's implementing rules. The "categories of service" requirements are central to the

[2] Id at ¶35. See generally, Id. ¶¶21-67.

[3] See e.g. Order on Reconsideration and Petitions for Forbearance, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 14 FCC Rcd. 14490, 92-14493, ¶157-159 (1999) ("CPNI Reconsideration Order"). This places the telecommunications provider on the same footing as the other, non-regulated providers of these services, as competing voice mail providers, internet access providers such as Time Warner's Road Runner, and CPE sellers such as Walmart.

administration of those rules. Having different "categories of service" on a state-by-state basis would be extremely difficult to handle operationally.

For these reasons, SBC Missouri proposes that the definition of "categories of service" be deleted from the Missouri rules altogether. All telecommunications companies should apply that term to its CPNI approval process just as they currently apply the term in connection with the FCC's CPNI rules, based on the interpretation of the "total service approach" spelled out in the FCC's orders. In the alternative, SBC Missouri proposes that proposed Rule 4 CSR 240-33.160(c) be modified to match the use of the term in the FCC's rules as follows:

> Categories of service include **[basic local exchange telecommunications service, telecommunications service, exchange access services, information services typically provided by telecommunications companies, operator services, and directory assistance services] local, interexchange service, and CMRS services**.[4]

b. Proposed Rule 4 CSR 240-33.160(1)(D) defines CMRS as "a provider of commercial mobile radio service." However, other than the definition of CMRS, the term never appears in proposed Rule 4 CSR 240-33.160. SBC Missouri, therefore, recommends that proposed Rule 4 CSR 240-33.160(1)(D) be deleted in its entirety.

c. SBC Missouri objects to the definition of "customer" in proposed Rule 4 CSR 240-33.160(1)(G). Specifically, customer is defined as:

> any person or entity to which the telecommunications company is currently providing services or any person or entity with which the telecommunications company has had a prior service relationship.

It is unclear whether the inclusion of the phrase "or entity with which the telecommunications company has had a prior service relationship," which is not

[4] Language that SBC Missouri proposes to add is noted in **bold**. Language that SBC Missouri proposed to delete is noted in brackets in bold, i.e. **[bold].**

contained in the FCC's rules, would require companies to obtain CPNI approval to use a former customer's CPNI for re-establishing service. Under the FCC's Rules, companies are not currently required to obtain approval to use the CPNI of a former customer to market the same category of service from which CPNI was obtained to that former customer.[5] In promulgating its rules, the FCC specifically concluded:

> . . . that the statute permits a carrier evaluating whether to launch a winback campaign to use CPNI to target valued former customers who have switched service providers. The carrier legitimately obtained that CPNI in its capacity as the customer's telecommunications provider. Importantly, such CPNI use does not impact customer privacy in any substantial respect because the former customer-carrier relationship previously enabled the carrier to use this same telecommunications usage information. We believe this interpretation of section 222(c)(1) best comports with the notions of consumer privacy, competition and customer control.[6]

Thus, SBC Missouri proposes to modify proposed Rule 4 CSR 240-33.160(1)G) as follows:

> Customer is a person or entity to which the telecommunications company is currently providing services**. [or any person or entity with which the telecommunications company has had a prior service relationship.]**

d. SBC Missouri objects to the definition of independent contractor in proposed Rule 4 CSR 240-33.160(1)(J). Specifically, independent contractor is defined as:

> a separate person, firm, or entity providing a telecommunications-related or unrelated service under a contractual relationship to or for the telecommunications company or some other firm or entity capable of gathering or utilizing CPNI.

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[5] See CPNI Reconsideration Order, 14 FCC Rcd. 14446-14449, ¶¶67-74 (1999), setting out the circumstances under which CPNI may be used to re-establish service; and Third CPNI Order and Third Further NPRM, 17 FCC Rcd. 14918-14919, ¶¶131-134 (Jul. 25, 2002), reaffirming that the FCC's rules concerning this matter "properly balance concerns regarding the proper use of CPNI with the goals of promoting competition in the marketplace."

[6] CPNI Reconsideration Order, 14 FCC Rcd. 14447, ¶72.

It is unclear what the phrase "to or for the telecommunications company or some other firm or entity capable of gathering or utilizing CPNI" means. SBC Missouri, therefore, proposes to modify proposed Rule 4 CSR 240-33.160(1)(J) as follows:

> **[a separate person, firm, or entity providing a telecommunications-related or unrelated service under a contractual relationship to or for the telecommunications company or some other firm or entity capable of gathering or utilizing CPNI] a third party who contracts with a telecommunications company for the provision of services to the telecommunications company, but who is not controlled by the telecommunications company, and who receives CPNI in connections with those services.**

e. SBC Missouri objects to the definition of "Joint venture partner" under proposed Rule 4 CSR 240-33.160(1)(M). Specifically, "Joint venture partner" is defined as:

> a third party company that has a financial or other interest in a specific project in which a telecommunications company has an interest.

The concept of "specific project" is too nebulous to be workable, as is the phrase "financial interest." SBC Missouri, therefore, proposes to modify 4 CSR 240-33.160(1)(M) as follows:

> Joint venture partner is **[a third party company that has a financial or other interests in a specific project in which a telecommunications company has an interest] a third party that agrees to share with a telecommunications company in the profits and losses of a business entity formed by the telecommunications company and the third party, and who receives CPNI in connection with the business activity of that entity.**

2. SBC Missouri objects to proposed Rule 4 CSR 240-33.160(2)(C)(4), which provides:

> (C) Approval not required for use of customer proprietary network information.

* * * * *

> 4. A telecommunications company may use, disclose, or permit access to CPNI to public safety answering points (PSAPs) if the PSAP claims it needs the information to respond to an emergency. Information to be released is limited to that CPNI information as defined in 4 CSR 240-33.160(1)(H).

a. Although SBC Missouri does not necessarily object to the cooperative policy embodied in proposed Rule 4 CSR 240-33.160(2)(C)(4), the proposal with respect to CPNI disclosure appears to conflict with Section 222 of the Act and the FCC's rules, which do not provide any specific exception for the disclosure of CPNI to a PSAP. See 47 C.F.R. §§ 64.2001-2009. Under these circumstances, a telecommunications company is unlikely to provide the additional information permitted by the proposed Rule because of the duty to comply with the Act and the FCC's implementing rules. The rule should, accordingly, be modified to avoid the conflict and potential for preemption.

b. The only CPNI disclosure exception in Section 222(g) of the Act with regard to PSAPs simply mandates the disclosure of "subscriber list information," which is defined in Section 222(h)(3)(A) to mean any information:

> (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; . . .

Proposed Rule 4 CSR 240-33.160(2)(C)(4) would apparently allow more disclosure than permitted by the Act and the FCC's rules, and thus potentially conflict with and be subject to preemption.

c. SBC Missouri further notes that although proposed Rule 4 CSR 240-33.160(2)(C)(4) purports to place a limit on the information that may be disclosed to the PSAP, the proposed rule relies on the definition of CPNI contained in proposed Rule 4

CSR 240-33.160(1)(H), which encompasses all information that relates to the quantity, technical configuration, type, destination, location and amount of use of a telecommunications service subscribed to by any customer of a telecommunications company, and information contained in the customer's bills. It is unclear how information related to the length of a call, the destination of a call, and the amount the customer was billed for a call would assist PSAPs in the event of an emergency. Moreover, such information is not contained within the 911 database, is not readily accessible to PSAPs, and would cost telecommunications carriers far in excess of the $500.00 private cost estimate included with the proposed rules, to provide to PSAPs. PSAPs only need subscriber list information, not CPNI, to respond to an emergency. Federal law mandates carriers to provide subscriber list information to PSAPs for the purpose of delivering or assisting in the delivery of emergency services. See Section 222(g) of the Act. SBC Missouri, therefore, proposes that proposed Rule 4 CSR 240-33.160(C)(4) be deleted in its entirety.

3. SBC Missouri objects to proposed Rule 4 CSR 240-33.160(3)(A)(2) which provides in pertinent part:

> A telecommunications company that discloses or provides access to CPNI to its agents, affiliates, joint venture partners or independent contractors shall enter into confidentiality agreements with those agents, affiliates, joint venture partners or independent contractors that comply with the following requirements. . .

a. The FCC Rules require such confidentiality only for joint venture partners and independent contractors. See 47 C.F.R. §64.2007(b)(2). The FCC's decision to require such confidentiality agreements for joint venture partners and independent contractors, and not to require them for affiliates and agents, was made only after very

careful consideration of the protections for consumer privacy embodied in its rules and the impact of those rules on the First Amendment commercial speech rights of both customers and carriers. Most importantly, this review was undertaken in response to the Tenth Circuit's invalidation of the FCC's original requirement for opt-in approval based on its concerns that these requirements impermissibly burdened carriers' and consumers' First Amendment rights to commercial speech.[7]

b. In evaluating intra-company use of CPNI, the FCC found that its new rules providing for "opt-out" approval would:

> . . .adequately protect consumers' privacy interests with respect to disclosure to carrier affiliates based on two important considerations that are dependent upon the underlying carrier-customer relationship. First, likelihood of any potential privacy harm from an inadvertent approval under opt-out is significantly reduced in the intra-company context by the carrier's need for a continuing relationship with the customer.
>
> Second, we find the potential harm to privacy to be much less significant in instances where the entity that uses and shares the CPNI is subject to section 222 and our implementing rules. . . .[8]

In this regard, the FCC found that the privacy interests of consumers also were protected by the notification requirements, including a 30-day waiting period before consent is inferred, and a requirement that notices be provided every two years.

The FCC then evaluated whether these requirements were "narrowly tailored" to burden no more of a carrier's speech than necessary, concluding that:

> . . .an opt-out regime for intra-company use of CPNI to market communications-related services directly and materially advances Congress' intent in ensuring that customers' personal information is not used in unexpected ways without their permission, while at the same time avoiding unnecessary and improper burdens on commercial speech. . .[9]

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[7] See generally, Third CPNI Order and Third Further NPRM, 17 FCC Rcd. 14872-14883, ¶¶26-49.
[8] Id. at ¶¶37-38.
[9] Id at ¶44.

After completing this evaluation of the requirements for intra-company use of CPNI, the FCC next evaluated whether "opt-out" approval was sufficient to enable carriers to share CPNI with joint venture partners, independent contractors and agents. The FCC extended the entities that may use or receive CPNI based on opt-out approval to "all agency relationships and, where certain additional safeguards are met, to joint ventures and independent contractors as well."[10] Carriers are allowed to share CPNI with their agents because:

> . . .the principles of agency law hold carriers responsible for the acts of their agents. Carriers thus remain responsible for improper use or disclosure of consumers' CPNI while in the hands of their agents. Accordingly, carriers have an incentive to maintain appropriate control of CPNI disclosed to agents.[11]

However, because independent contractors and joint venture arrangements are "non-agency relationships,"[12] the FCC required that carriers disclosing CPNI to such entities based on "opt-out" CPNI approval have the additional safeguards of a confidentiality agreement in place to further protect consumers' CPNI from uses beyond those to which they consented.[13] In evaluating the benefits of these additional restrictions as compared to the burden placed on commercial speech, the FCC found that:

> . . .without confidentiality agreements with carriers collecting CPNI, independent contractors or joint venture partners would not have any incentive to restrict their use of CPNI, to refrain from further disclosure to third parties, or to guard against their own employees' use or disclosure of a customer's CPNI. These requirements place independent contractors and joint venture partners on a similar footing as the carriers themselves in terms of incentives, thus obviating the need for more stringent approval requirements such as opt-in.[14]

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[10] Id. at ¶46.
[11] Id.
[12] Id.
[13] Id. at ¶47.
[14] Id. at ¶48.

The FCC's careful analysis on the issue of whether non-disclosure agreements should be required of agents and affiliates should be followed by the Commission as well. The Missouri proposed Rules include opt-out and notification requirements for obtaining customer approval that are almost identical to those contained in the FCC's rules. As such, under the proposed Missouri Rules, opt-out approval by the consumer should be considered sufficient protection for sharing CPNI with agents and affiliates of a telecommunications carrier. The requirement of confidentiality agreements for agents and affiliates is an unnecessary burden on the commercial speech of telecommunications carriers, given the already substantial protections for consumer privacy provided by the "opt-out" and notice requirements already imposed by Missouri's proposed CPNI Rules.

c. For these reasons, SBC Missouri proposes that proposed Rule 4 CSR 240-33.160(3)(A)(2) be modified as follows:

> 2. **[Agent/affiliate/j]J**oint venture/contractor safeguards. A telecommunications company that discloses or provides access to CPNI to its **[agents, affiliates]**, joint venture partners or independent contractors shall enter into confidentiality agreements with **[those agents, affiliates]**, joint venture partners or independent contractors that comply with the following requirements. The confidentiality agreement shall:
>
> A. Require that those **[agents, affiliates]**, joint venture partners or independent contractors use the CPNI only for the purpose of marketing or providing communications-related services for which that CPNI has been provided;
>
> B. Disallow the **[agents, affiliates,]** joint venture partners or independent contractors from using, allowing access to, or disclosing the CPNI to any other party, unless required to make such disclosure under force of law; and
>
> C. Require that the **[agents, affiliates,]** joint venture partners and independent contractors have appropriate protections in place to ensure the ongoing confidentiality of customers' CPNI.

4. SBC Missouri objects to proposed Rule 4 CSR 240-33.160(4)(C)(5) which provides:

> If written notification is provided, the notice must be clearly legible, use at least a 12 point font, and be placed in an area so as to be readily apparent to the customer.

Today, SBC Missouri uses 10 point font to advise most of its customers of their rights to restrict use of, disclosure of, and access to customers' CPNI. If SBC Missouri is required to use 12 point font to advise its customers' of their CPNI rights, it will incur costs far in excess of the $500.00 private cost estimate which accompanied the proposed Rules. Moreover, as SBC Missouri has previously indicated, state-specific rules that differ from the FCC's rules create difficulties for companies that operate in multiple states. Moreover, restriction of the manner in which telecommunications companies may communicate with their customers to a particular font size (rather than requiring that the communication be clearly legible) would run afoul of Missouri case law which uniformly holds that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.[15] For these reasons, SBC Missouri proposes to modify proposed Rule 4 CSR 240-33.160(4)(C)(5) as follows:

> If written notification is provided, the notice must be clearly legible, **[use at least 12 point font] use sufficiently large type**, and be placed in an area so as to be readily apparent to the customer.

This suggested modification tracks the FCC's rule on this subject, 47 C.F.R. 64.2008(c)(5).

[15] State v. Public Service Commission, 406 S.W.2d 5, 11 (Mo. 1966); State v. Bonaker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2s 222, 228 (Mo. App. W.D. 1980).

5. SBC Missouri objects to 4 CSR 240-33.160(4)(C)(7), which provides:

> A telecommunications company may state in the notification that the customer's approval to use CPNI may enhance the telecommunication's company's ability to offer products and services tailored to the customer's needs. Such statement shall not be in a font size larger than the notification requirements.

Telecommunications companies should be able to emphasize to customers that customers' approval to use CPNI may enhance the telecommunications company's ability to offer products and services tailored to the customer's needs. One way to do that is to increase the font size in the notification. Restriction of a telecommunications companies' ability to market its use of CPNI would run afoul of Missouri case law which uniformly holds that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.[16] SBC Missouri, therefore, proposes to modify proposed Rule 4 CSR 240-33.160(4)(C)(7) as follows:

> A telecommunications company may state in the notification that the customer's approval to use CPNI may enhance the telecommunications company's ability to offer products and services tailored to the customer's needs. **[Such statement shall not be in a font size larger than the notification requirements.]**

This suggested modification tracks the FCC's rule on this subject, 47 C.F.R. 64.2008(c)(7).

[16] State v. Public Service Commission, 406 S.W.2d 5, 11 (Mo. 1966); State v. Bonaker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2s 222, 228 (Mo. App. W.D. 1980).

6. SBC Missouri objects to proposed Rule 4 CSR 240-33.160(5), which provides:

> Release of Customer Proprietary Network Information Resulting from Bankruptcy, Cessation of Operation, Merger or Transfer of Assets.
>
> (A) The existing carrier shall provide customers with advance notice of the transfer of CPNI data.
>
> (B) Customer notification shall comply with section (4) of this rule.
>
> (C) Any opt-in/opt-out authorizations the customers previously executed with the exiting carrier shall be transferred to the new carrier automatically, thereby ensuring that customers maintain their privacy interests by protecting this information from disclosure and dissemination.

SBC Missouri's past experience has demonstrated that carriers that file for bankruptcy and/or cease operations do not always provide the new carrier with customer information, let alone with customers' CPNI authorizations. Moreover, SBC Missouri does not have a system in place through which it could accept opt-in/opt-out authorizations from an exiting carrier. Further, if SBC Missouri were to establish a system that would allow SBC Missouri to accept opt-in/opt-out authorizations from exiting carriers, it would incur costs far in excess of the $500.00 private cost estimate which accompanied the proposed rules. For these reasons, SBC Missouri proposes that proposed Rule 4 CSR 240-33.160(5) be deleted in its entirety as it relates to acquisition of customers in the context of a carrier's bankruptcy or cessation of operations. If, however, the Commission desires to address the use of CPNI in that context, SBC Missouri submits that the new carrier should use CPNI in a manner that is consistent with these proposed rules, but with the assumption that the new customer has not separately authorized the use of such CPNI until the customer provides such authorization in accordance with such rules. In contrast, the substance of the proposed rule does make sense as it relates to acquisition of customers in the context of an acquisition of an ongoing business enterprise.

Accordingly, SBC Missouri proposed that proposed Rule 4 CSR 240-33.160(5) be modified as follows:

> Release of Customer Proprietary Network Information **Where Customer Accounts Are Transferred By a Carrier to Another Carrier [Resulting from Bankruptcy, Cessation of Operation, Merger or Transfer of Assets]**.
> **(A) The existing carrier shall provide customers with advance notice of the transfer of CPNI data.**
> **(B) Customer notification shall comply with section (4) of this rule.**
> **(C) [Any opt-in/opt-out authorizations the customers previously executed with the exiting carrier shall be transferred to the new carrier automatically, thereby ensuring that customers maintain their privacy interests by protecting this information from disclosure and dissemination.] In the event that the transfer is made in connection with the transferring carrier's bankruptcy or cessation of business, the acquiring carrier shall use CPNI thereby acquired only in a manner that is consistent with 4 CSR 240-33.160 and shall not rely on any authorization to use CPNI provided prior to such transfer.**
> **(D) In the event that the transfer is made in connection with any transaction other than as specified in section (C) above, any opt-in/opt-out authorizations the customer previously executed with the transferring carrier shall be transferred to the acquiring carrier automatically, if technically feasible, thereby ensuring that customers maintain their privacy interests by protecting this information from disclosure and dissemination. In the event that it is not technically feasible to transfer such authorizations, the acquiring carrier shall use CPNI thereby acquired only in a manner consistent with 4 CSR 240-33.160 and shall not rely on any authorization to use CPNI provided prior to such transfer.**

Wherefore, SBC Missouri prays the Commission consider its comments and eliminate or modify the proposed rules as outlined above, together with any further and/or additional relief the Commission deems just and proper.

Respectfully submitted,

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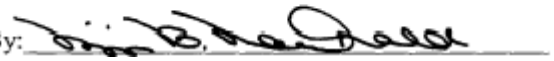
By: 

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on June 2, 2004.


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