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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Application of )  
)  
MOBILE COMMUNICATIONS )  
HOLDINGS, INC. )  
)  
For Authority to Construct, )  
Launch and Operate the Ellipso )  
Elliptical Orbit Satellite System )  
\_\_\_\_\_ )

File Nos. 11-DSS-P-91(6)  
18-DSS-P-91(18)

To: The Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Loral/QUALCOMM Partnership, L.P. (LQP), hereby applies for review of the Order on Reconsideration (the "Order") released by the International Bureau on December 21, 1994 (DA 94-1566). In the Order, the International Bureau reversed its earlier decision, which denied a request for confidentiality filed by Mobile Communications Holdings, Inc. (MCHI) for certain materials submitted with respect to MCHI's financial showing as required to obtain a license in the 1.6/2.4 GHz MSS service.<sup>1</sup> See Order, DA 94-1322 (released Nov. 25, 1994). As demonstrated below, the Order is inconsistent with applicable regulations, precedent and established Commission

<sup>1</sup> LQP filed an opposition to MCHI's original request for confidentiality in a letter dated November 22, 1994.

policy. Accordingly, review should be granted, and MCHI's request for confidentiality denied.

### BACKGROUND

In its initial decision on MCHI's request for confidentiality, the International Bureau denied MCHI's request for confidential treatment of five letters submitted to the Commission on November 16, 1994, with MCHI's amended application for a license in the 1.6/2.4 GHz MSS service.<sup>2</sup> Order, DA 94-1322 (released Nov. 25, 1994); see Letter to Scott Harris from Jill Abeshouse Stern (dated Nov. 18, 1994). In an "Application for Review" of that decision, filed December 2, 1994, MCHI stated that two of these letters could be placed in the public record. However, it sought authority to redact information from the three remaining letters, and attached the proposed, redacted versions in Exhibit 2 of its

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<sup>2</sup> LQP opposed MCHI's initial request for confidentiality because MCHI had failed to demonstrate either that (1) disclosure of the information would impair the Commission's ability to obtain similar information in the future or (2) disclosure of the information would result in a substantial likelihood of competitive harm to MCHI. See Letter to Scott Blake Harris from William D. Wallace (filed Nov. 22, 1994). See generally MTS-WATS Market Structure, 66 RR 2d 1668, 1670 (1989); New York Telephone Co., 67 RR 2d 567, 567-68 (1990).

LQP also pointed out that the Commission generally requires that an applicant must place in the public record information which bears on a significant and material fact at issue in a proceeding. See, e.g., Knoxville Broadcasting Corp., 50 RR 2d 531, 533 (1981); MTS-WATS Market Structure, 66 RR 2d 1671 n.14. MCHI has not disputed that information concerning whether MCHI has met the Commission's financial standard for the 1.6/2.4 GHz MSS service is significant and material to its application, nor that the letters at issue contained such information.

Application for Review.<sup>3</sup> LQP filed an opposition to MCHI's "Application for Review" on December 12, 1994, objecting to the proposed redaction of the remaining three letters, and requesting that complete copies of all three letters be placed in the public file.<sup>4</sup> Before the Commission could act on MCHI's Application for Review, the International Bureau, on its own motion, reconsidered MCHI's request and issued the Order on December 21, 1994.

### ARGUMENT

The Bureau claims that MCHI's arguments in its Application for Review establish "by a preponderance of the evidence, that confidential treatment of the material it seeks to redact is warranted." Order at 3. The Bureau's rationale is apparently based on its recent conclusion that the redacted material is "the type of detailed cost and pricing information in which there is a legitimate interest in confidentiality." Id. (footnote omitted). The Bureau states that the "information submitted by MCHI indicates that its vendors do not disclose the prices for their equipment/services outside a confidential process of negotiations with individual purchasers." Id. The Bureau concludes that "[d]isclosure of this information could result in competitive harm to both MCHI (since it might disadvantage MCHI in

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<sup>3</sup> The letters from AEC-Able Engineering Co. ("AEC-Able"), Satellite Transmission Systems, Inc. ("STS"), and Spectrum Network Systems, Inc. ("Spectrum") are described at page 2 of the Bureau's Order on Reconsideration.

<sup>4</sup> A copy of LQP's "Opposition to Application for Review" is attached as Attachment A. The arguments made therein are hereby incorporated by reference.

negotiations with foreign distributors) and MCHI's vendor/shareholders (since buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations)." Id. at 3-4.

### The Bureau's Rationale Contradicts Applicable Policy

The Bureau's rationale must be rejected as inconsistent with established Commission policy regarding such requests. First, as its Order makes clear, the Bureau granted MCHI's request, in part, because of a perceived potential for harm to MCHI's "vendor/shareholders." But, it is well-established that competitive harm to third parties is irrelevant in reviewing requests for confidentiality and cannot form the basis for a grant of such a request. "The policy of maintaining the confidentiality of financial information rests upon consideration of competitive harm that would result to the party supplying the data if it were made available to the public." Classical Radio for Connecticut, Inc., 44 RR 2d 1063, 1067-68 (1978) (emphasis supplied).

Second, with respect to alleged competitive harm to MCHI, the Bureau cites only a concern for MCHI's position in "negotiations with foreign distributors." Order at 3. But, neither AEC-Able nor STS appears to be a foreign distributor, and as MCHI concedes (MCHI Application for Review, at 6), the AEC-Able and STS letters concern financing related to particular satellite components, not negotiations for distribution rights. The only information for which redaction was sought is specification of the satellite component. Moreover, contrary to the

Bureau's concern for disclosure of competitive pricing information, according to MCHI these two letters disclose "the total amount and the relevant terms." MCHI Application for Review, at 6. Thus, these two letters do not appear to bear any relation to negotiations with foreign distributors which would justify a grant of confidentiality under the Bureau's reasoning. And, the Bureau has not pointed to any new arguments by MCHI that disclosure of the satellite components would disadvantage MCHI.<sup>5</sup>

On the other hand, the redactions from the Spectrum letter apparently do concern foreign distribution rights. But, as LQP pointed out in its "Opposition to Application for Review" (at page 4), and in its "Petition to Deny" MCHI's Application (at 12-14 & nn. 7-8) filed on December 22, 1994, the redacted information is necessary to evaluate Spectrum's alleged commitment of funds to the Ellipso project. For example, Item 2 of the Spectrum letter contains certain contingencies which affect the level of financing allegedly to be provided by Spectrum. The Commission's Rules governing the relevant financial showing require that there be no contingencies in financing agreements which are used to demonstrate financial qualifications. See 47 C.F.R. § 25.140(d)(2)(iv) ("Any financing arrangements contingent on further performance by either party, such as marketing of satellite capacity or raising additional financing, will not satisfy

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<sup>5</sup> Indeed, it apparently did not prejudice MCHI to disclose this information. After submitting the redacted STS letter and claiming the need for confidentiality with respect to the services provided by STS, MCHI disclosed in the public record that STS's commitment concerned MCHI's ground control station. See MCHI's Consolidated Opposition, at 18 (filed Jan. 3, 1995).

the requirements of paragraph (c) of this section"). Thus, in order for interested parties to evaluate and comment on whether Spectrum's alleged commitment supported MCHI's financial showing, it is necessary to review the conditions and contingencies under which the letter was provided. See LQP's Opposition to Application for Review, at 4-5 (Attachment A). A Commission decision on MCHI's financial qualifications also could not rely upon this "commitment" without an analysis of this contingency, as required by its rule.

Thus, information which MCHI seeks to withhold from public scrutiny bears directly on the critical question as to whether the \$100 million from Spectrum claimed as "committed" by MCHI is actually committed given the contingencies in the letter.<sup>6</sup> See LQP's Petition to Deny, at 12-13 (filed Dec. 22, 1994). If these contingencies vitiate the availability of the funds within the meaning of the Commission's standard, then MCHI cannot use the Spectrum letter to demonstrate its financial qualifications.

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<sup>6</sup> In its "Consolidated Opposition" responding to petitions to deny its application, MCHI continues to claim that the \$100 million from Spectrum is committed, but it does not even address the contingencies raised by LQP. See MCHI's Consolidated Opposition, at 18 and Ex. 1, at 2 (filed Jan. 3, 1995). MCHI also claims that the attacks on its purported financing from vendors and service providers are "irrelevant" because it has demonstrated sufficient available funds from "internal" financing. Id. at 24. However, MCHI's internal financing rests on letters from shareholders with very minor interests in the applicant, and there is a question whether such financing should be reviewed under the standard for internal or external financing. Moreover, LQP and other parties have argued that there are deficiencies in all of MCHI's alleged financing commitments, whether evaluated under the standard for internal or external financing. See LQP's Petition to Deny, at 7 (filed Dec. 22, 1994); see also TRW's Petition to Deny Application of MCHI (filed Dec. 22, 1994).

In similar situations, the Commission has recognized the need for disclosure of information claimed to be confidential. Disclosure of financial information is justified "when the financial information is relevant to a significant and material question of fact arising in a Commission proceeding." Knoxville Broadcasting Corp., 50 RR 2d 531, 533 (1981); see also MTS-WATS Market Structure, 66 RR 2d at 1671 n.14. "Disclosure in such cases has been found necessary in order to assure a fair adjudication of the open factual issue and a just resolution of the public interest question." Knoxville Broadcasting Corp., 50 RR 2d at 533.

This is one of these situations, for as the Commission itself stated when it adopted rules for this service, "[i]n light of the enormous costs involved in constructing and launching a satellite system, we have always considered financial ability a significant factor in determining whether an applicant is qualified to hold a license." Report and Order, 76 RR 2d 202, ¶ 26 (1994).

The Bureau's apparent response to LQP's argument in this regard ignores the Commission's prior determination of the significance of matters pertaining to an applicant's financial ability. The Bureau states that "[w]hile the information that MCHI seeks to protect 'might be helpful,' it falls far short of 'necessary' to the other Big LEO applicants' participation in the licensing process." Order, at 4. But, MCHI is relying on the alleged commitment from Spectrum, and, as shown above, the undisclosed contingencies in the Spectrum letter are necessary to decide whether the allegedly committed funds are truly available to MCHI.

## The Order Is Inconsistent with the APA

In the Order, the Bureau also erroneously rejected disclosure of significant and material information despite the fact that action on MCHI's application is a restricted adjudicative proceeding. In this regard, the Bureau's position is inconsistent with the Commission's ex parte rules and its obligations under the Administrative Procedure Act (APA).

Pursuant to the Commission's FOIA procedures, if information bearing on MCHI's financial qualifications is deemed to deserve confidentiality, then the information is simply not placed in the public file. See 47 C.F.R. § 0.457. Such material may or may not be available to interested parties. See 47 C.F.R. § 0.459; Commission Requirements for Cost Support, 7 FCC Rcd 1526, 1531 (CCB 1992).

But, the FOIA rules only address issues related to the public availability of material submitted to the Commission.<sup>7</sup> They do not address the distinct issue of whether the Commission has complied with its obligations under the Administrative Procedure Act to make a decision based on the record before it, from which ex parte matters are precluded.<sup>8</sup> See 5 U.S.C. § 557. With regard to the latter issue, the Commission's ex parte rules quite clearly preclude one party

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<sup>7</sup> As the Bureau notes later in the Order, Congress intended that FOIA would give every member of the public the same right to disclosure as persons with a particular interest. Order, at 5, quoting United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989).

<sup>8</sup> Without addressing requirements of the APA, the Bureau takes the position that the Commission "sometimes need[s] to see and act on information that should not be made public." Order, at 4.



from submitting a written presentation on the merits to decision-making personnel which "is not served on the parties to the proceeding." 47 C.F.R. § 1.1202(b).<sup>9</sup> To decide MCHI's financial qualifications based on information which was not disclosed to "the parties to the proceeding" would be in conflict with this principle.

This "inherent dilemma" cannot be resolved automatically in favor of nondisclosure, as the Bureau suggests in the Order. See Commission Requirements for Cost Support, 7 FCC Rcd at 1531; Robert J. Butler, 69 RR 2d 1521, 1527-29 (1991). The mere existence of the FOIA exemptions for proprietary information does not permit use of such material ex parte by decision-making personnel. Rather, as the Bureau recognizes, it must conduct an analysis which balances the competing interests. See Robert J. Butler, 69 RR 2d at 1527-29; Commission Requirements for Cost Support, 7 FCC Rcd at 1532.

Here, as discussed above, the information is necessary to the decisionmaking process on the merits of MCHI's financial qualifications. Accordingly, disclosure is the only alternative based on MCHI's failure to present and the Bureau's failure to show an indication of the substantial likelihood of competitive harm from disclosure, the materiality of the redacted information to the merits of MCHI's claimed financial qualifications, and the Commission's

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<sup>9</sup> As the Commission recognized in adopting these rules, "the object of the ex parte rules is simple -- to assure that the agency's decisions are based upon a publicly available record rather than influenced by off-the-record communications between decisionmakers and outside persons." Ex Parte Communications and Presentations in Commission Proceedings, 62 RR 2d 1755, 1757 (1987) (footnote omitted).

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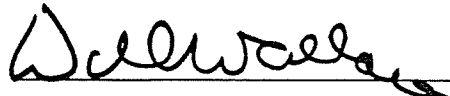
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A handwritten signature in black ink, appearing to read "N. Leventhal", with a long, sweeping underline that extends to the right and then curves downwards.

**ATTACHMENT A**

Before The  
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File Nos. 11-DSS-P-91(6)  
18-DSS-P-91(18)

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, Loral/QUALCOMM Partnership, L.P. (LQP), hereby opposes the "Application for Review" filed by Mobile Communications Holdings, Inc. (MCHI) on December 2, 1994. In its Application, MCHI sought review of the International Bureau's decision denying its request for confidentiality for certain materials submitted with respect to its financial qualifications to obtain a license in the 1.6/2.4 GHz MSS service. See Order, DA 94-1322 (released Nov. 25, 1994). For the reasons stated below, MCHI's Application for Review should be denied.

BACKGROUND

The International Bureau denied MCHI's request for confidentiality with respect to five letters submitted to the Commission on November 16, 1994, with

MCHI's amended application for a license in the 1.6/2.4 GHz MSS service. See Letter to Scott Harris from Jill Abeshouse Stern (dated Nov. 18, 1994) (attached as Exhibit 3 to Application for Review). MCHI now concedes that two of these letters can be placed in the public record; copies of the two letters are attached as Exhibit 1 to the Application for Review. However, on review, MCHI seeks authority to redact information from the three remaining letters, and has attached the proposed, redacted versions in Exhibit 2 of its Application for Review.

LQP opposed MCHI's initial request for confidentiality because MCHI had failed to demonstrate (1) that disclosure of the information would impair the Commission's ability to obtain similar information in the future or (2) that disclosure of the information would result in a substantial likelihood of competitive harm to MCHI. See Letter to Scott Blake Harris from William D. Wallace (filed Nov. 22, 1994); see also MTS-WATS Market Structure, 66 RR 2d 1668, 1670 (1989); New York Telephone Co., 67 RR 2d 567, 567-68 (1990).

LQP also pointed out that the Commission generally requires that an applicant must place in the public record information concerning a significant and material fact at issue in a proceeding. See, e.g., Knoxville Broadcasting Corp., 50 RR 2d 531, 533 (1981); MTS-WATS Market Structure, 66 RR 2d at 1671 n.14. Information concerning whether MCHI has met the Commission's financial standard for the 1.6/2.4 GHz MSS service is significant and material to its application.

## ARGUMENT

MCHI's Application for Review should be denied in toto, and complete copies of the letters from AEC-Able Engineering Company, Inc., Spectrum Network Systems Limited, and Satellite Transmissions Systems, Inc., should be placed in the public record. MCHI's Application for Review contains no refutation of the rationale of the International Bureau's Order. Moreover, the redacted letters themselves reveal the materiality of information proposed for redaction, and demonstrate why these letters should be placed in the public record.

A. The Letters Demonstrate That Redaction Is Not Possible.

The redacted letters demonstrate that the Commission should require to be made public the information concerning the pricing of MCHI's subsystem components and the conditions under which the companies sending the letters will provide financing. The three letters at issue were submitted by MCHI to demonstrate financing for the construction, launch and first-year operating costs of its proposed system. See Report and Order (CC Docket No. 92-166), 59 Fed. Reg. 53294, ¶¶ 30-32 (released Oct. 14, 1994). As required, MCHI has provided a projection for these costs.

MCHI requests authority to redact certain information from the letters. However, this information is necessary to determine whether the alleged funding commitments are relevant to this schedule of projected costs. Moreover, MCHI proposes to redact information concerning conditions under which the financing

may be available. Under the Commission's Rules, this information must also be disclosed.

AEC-Able. MCHI proposes to redact information concerning the materials or services concerning which AEC-Able states: "[W]e have agreed to arrange the financing required to provide these services, the total cost of which is estimated at \$93 million." This information relates directly to whether AEC-Able is providing financing for a cost item in MCHI's satellite system cost schedule. Unless it is revealed what "services" are being provided by AEC-Able, other applicants and the public cannot comment on the significance of the AEC-Able letter to MCHI's financial qualifications, and the Commission cannot determine whether this letter represents a commitment which is even relevant to MCHI's financial showing.

Spectrum. MCHI has proposed to redact information from Items 2, 3 and 5 of the list of "terms of the arrangement" among MCHI, Spectrum and Spectrum Asia. Item 5 states that Spectrum is to receive a certain number of voting shares of MCHI stock in payment for the services specified in Item 3. If MCHI is relying on financing from Spectrum for an item in its construction, launch and first-year operating cost schedule, then such information on these "services" is directly relevant to the issue of whether MCHI is financially qualified, and must be disclosed.

Moreover, Item 2 specifies certain contingencies which affect the level of financing to be provided by Spectrum, but MCHI proposes to redact portions of these details. The Commission's Rules governing the relevant financial showing



require that there be no contingencies in financing agreements which are used to demonstrate financial qualifications. See 47 C.F.R. § 25.140(d)(2)(iv) ("Any financing arrangements contingent on further performance by either party, such as market of satellite capacity or raising additional financing, will not satisfy the requirements of paragraph (c) of this section"). Accordingly, if MCHI desires to use the Spectrum letter for its financial showing, it must disclose Item 2 in order for the Commission and public to evaluate whether the contingency for a certain level of financing from Spectrum has been met.

STS. The information proposed for redaction from the STS letter raises the same issue as that raised by the AEC-Able and Spectrum letters. Unless MCHI discloses the services to be provided by STS (as detailed in the last paragraph of the letter), the Commission and the public cannot evaluate whether those services are relevant to MCHI's cost schedule and material to its financial showing.

MCHI cannot withhold information directly relevant to a significant and material issue regarding its financial qualifications. See Knoxville Broadcasting Corp., 50 RR 2d at 533; MTS-WATS Market Structure, 66 RR 2d at 1671 n.14. Accordingly, MCHI's Application for Review should be denied with respect to the information regarding the services to be provided by AEC-Able, Spectrum and STS as well as any contingencies which may affect whether or at what level MCHI may rely on these companies to provide financing.

Redaction is not an option. The record on which the public submits comments and on which the Commission reviews MCHI's financial qualifications

must be consistent, and the Commission cannot be provided information to evaluate MCHI's financial showing which was shielded from public view. See 47 C.F.R. § 1.1208. Accordingly, MCHI's request for redaction should also be denied.

B. MCHI Has Failed to Justify its Request for Confidentiality.

Even if the information proposed for redaction from the three letters was not directly relevant to MCHI's financial showing (which, as discussed above, it clearly is), MCHI has still failed to justify generally its request for confidentiality. As a defense, MCHI notes that no other MSS Above 1 GHz applicant has submitted similar information to the Commission in its amended application. Application, at 3. This is irrelevant. MCHI submitted the letters voluntarily. It has been aware of the Commission's financial standard since October 14, 1994, and has had more than enough time to obtain letters which explained financial commitments without revealing allegedly proprietary information. In any event, the Commission's Rules require that all terms and conditions of any external financing be revealed if used for an applicant's financial qualifications, and so, MCHI may be required to submit letters in this form. See 47 C.F.R. § 25.140(d)(2).

MCHI also claims that it only needs to demonstrate the existence of competition, not competitive harm, to justify withholding detailed business information submitted to the Commission from public disclosure. Application, at 3. The standard for FOIA Exemption 4 requires more. Under Commission

precedent, "the party claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is disclosed." MTS-WATS Market Structure, 66 RR 2d at 1670. However, even if the standard were as MCHI states, it indicated in its November 18, 1994 letter that it was willing to reveal the complete letters to all its competitors, and there was little assurance of how the information would be used. See Application (Exhibit 3).

Moreover, MCHI claims that, if disclosed publicly, applicants would be reluctant to submit similar information to the Commission in the future. Application, at 3-6. However, contrary to MCHI's stated fears, the Commission's Rules require that the terms and conditions of external financing be submitted with respect to an applicant's financial qualifications. See 47 C.F.R. § 25.140(d)(2). Therefore, if an applicant decides to submit information such as that at issue here in order to demonstrate its financial qualifications, then the applicant must submit the information for public comment.

CONCLUSION

For the above stated reasons, LQP requests that MCHI's Application for Review be denied, and that MCHI be required to place into the public record complete copies of the letters in Exhibit 2 of its Application for Review.

Respectfully submitted,

LORAL/QUALCOMM PARTNERSHIP, L.P.

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Date: December 12, 1994

## CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 12th day of December, 1994, caused copies of the foregoing Opposition to Application for Review to be delivered via hand delivery (indicated with \*) or by U.S. mail, postage prepaid, to the following:

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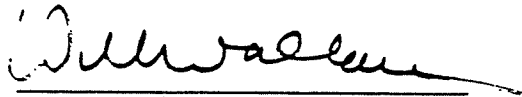
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finding that "financial ability [is] a significant factor in determining whether an applicant is qualified to hold a license."<sup>10</sup> See Report and Order, 76 RR 2d at 212.

### CONCLUSION

For the reasons stated above and in the attached "Opposition to Application for Review," LQP requests that the Commission grant its application for review of the International Bureau's "Order on Reconsideration" in this matter, and order that complete copies of the AEC-Able, Spectrum and STS letters be placed in the public file. Because the Bureau's Order precluded comment on these letters on December 22, 1994, with respect to MCHI's financial showing, LQP requests an

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<sup>10</sup> The Bureau also considers and rejects "limited disclosure" of the information to the other Big LEO applicants, claiming that the material may "conceivably bear on MCHI's financial qualifications," but concluding there is only a slight possibility that it would be necessary to resolve the Commission's public interest determination on the application. Order, at 4-5. As discussed in the text, this conclusion is belied by the nature of the concealed information and the Commission's Rules on the applicable financial standard.



opportunity to submit appropriate comments prior to action on MCHI's application.

Respectfully submitted,

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Date: January 20, 1995

## CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 20th day of January, 1995, caused copies of the foregoing Application for Review to be delivered via hand delivery (indicated with \*) or by U.S. mail, postage prepaid, to the following:

\*Chairman Reed Hundt  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, D.C. 20554

\*Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Room 802  
Washington, D.C. 20554

\*Commissioner Andrew C. Barrett  
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\*Commissioner Rachelle B. Chong  
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