

TC00-105

KC/KS

DOCKET NO.

In the Matter of

IN THE MATTER OF THE APPLICATION OF SERVISENSE.COM, INC. FOR A CERTIFICATE OF AUTHORITY TO PROVIDE TELECOMMUNICATIONS SERVICES, INCLUDING LOCAL EXCHANGE SERVICES, IN SOUTH DAKOTA

Public Utilities Commission of the State of South Dakota

MEMORANDA

*Pages Typed and Docketed;  
Pages of Exhibits Filed;  
Pages of Exhibits Filed Pages;  
Pages of Exhibits Filed C&A;  
Pages of Exhibits Filed.*

**The Helein Law Group, P.C.**

TC00-105

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McLean, VA 22102

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RECEIVED

JUL 29 2000

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Writer's Direct Dial Number

Writer's E-mail Address

(703) 714-1321

lhaddad@helein.com

June 28, 2000

Via Overnight Delivery

Mr. William Bullard  
Executive Secretary  
South Dakota Public Utilities Commission  
State Capitol  
550 E. Capitol Avenue  
Pierre, SD 57501

Re: Application of ServiSense.com, Inc. For a Certificate to Provide Local Exchange, Exchange Access, and Interexchange Resale Service

Dear Mr. Bullard:

On behalf of ServiSense.com, Inc., we hereby submit an original and eight (8) copies of the application for certificate to provide local exchange, exchange access and interexchange resale services. Please find enclosed a check for \$250 to cover the application fee.

Please date-stamp the extra copy and return it to the undersigned in the enclosed postage-prepaid envelope. Should you have any questions with respect to this matter, please contact me.

Respectfully submitted,



Loubna Haddad

Enclosures

BEFORE THE  
SOUTH DAKOTA  
PUBLIC UTILITIES COMMISSION

RECEIVED

JUN 29 2000

Registration of  
Servisense.com, Inc.  
Authority to Provide  
Intrastate Telecommunications  
Services within South Dakota

Docket No. \_\_\_\_\_

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

Pursuant to Rule 20:10:24:02 of the Commission's Telecommunications Services Rules,

Servisense.com, Inc. ("Servisense" or "Applicant") submits the following registration information:

1. The name, address and telephone number of the applicant.

Servisense.com, Inc.  
180 Wells Avenue, Suite 450  
Newton, MA 02459-3302  
Phone: (617) 848-8000  
Toll-Free: (888) 483-3600  
Fax: (617) 848-8100

2. The name under which the Applicant will provide these services if different than in subdivision (1) of this section;

Not Applicable.

3. If the applicant is a corporation:

- (a) The state in which it is incorporated, the date of incorporation and a copy of its certificate of incorporation or, if it is an out-of-state corporation, a copy of its certificate of authority.

The Company was formed as a Corporation under the laws of the State of Delaware in January 2000. Applicant's certificate of authority to transact business in South Dakota is included as Attachment I.

- (b) **The location of its principal office, if any, in this state and the name and address of its current registered agent.**

Principal office in South Dakota: None

Registered Agent: Corporation Service Company  
503 South Pierre Street  
Pierre, SD 57501

- (c) **A copy of its articles of Incorporation.**

See Attachment II for Articles of Incorporation.

- (d) **A list of the names and addresses of the current corporate officers and members of the board of directors.**

ServiSense's officers and directors are as follows:

**Officers:**

Christopher J. McKeown	President and Chief Executive Officer
John Vaneura	Vice President, Finance
Gregory White	Secretary

**Directors:**

Peter G. Bos  
William Hughes  
Christopher McKeown  
Timothy P. McKeown  
Frederick C. Voit

*All Officers and Directors may be contacted at the corporation headquarters address.*

- (e) **The names and addresses of the ten common stockholders who hold 30% or more shares of common stock.**

Christopher J. McKeown	President/Chief Executive Officer	<u>% Ownership</u> 51.3
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*Mr. McKeown may be contacted at the corporation headquarters address.*

**(f) The names and addresses of subsidiaries owned or controlled by the applicant.**

ServiSense.com, Inc. of Virginia located at 180 Wells Avenue, Suite 450,

Newton, MA 02459-3302, is a wholly owned subsidiary of ServiSense.com, Inc.

**4. If the applicant is a partnership, the name, title and business address of each partner, both general and limited.**

Not Applicable.

**5. A specific description of the telecommunications services the applicant intends to offer.**

ServiSense offers inbound and outbound telecommunications services to residential and business customers utilizing switched access. Switched access service is available on a pre-~~subscription~~ basis from equal access originating end offices. ServiSense also offers calling card services. All services are available twenty-four (24) hours per day, seven (7) days a week.

ServiSense operates as a switchless reseller. Calls originate over LEC facilities to the Company's underlying carriers (US West and Qwest) The Company's underlying carrier performs all interexchange switching, routing and call termination functions. Call-detail information is provided to the Company by the underlying carriers for purposes of rating and billing calls.

- 6. A detailed statement of the means by which the applicant will provide its services, including the type and quantity of equipment to be used in the operation, the capacity, and the expected use of the equipment.**

ServiSense does not maintain offices or equipment in the State of South Dakota. The Company does not plan to install any equipment, plant, or facilities within the state of South Dakota.

Applicant operates as a reseller of the underlying carrier's services. Calls originate over local exchange company feature group facilities to the underlying carrier and are switched over that company's long distance network.

- 7. The geographic areas in which the services are, or will be, offered, including a map describing the service boundaries.**

ServiSense intends to offer service throughout the entire state of South Dakota.

- 8. A current balance sheet and income statement; a copy of the applicant's latest annual report; a copy of the applicant's report to stockholders; the terms and conditions of service; the access charges and a copy of the applicant's tariff book.**

ServiSense has the financial resources to successfully provide intrastate resale telecommunications services in South Dakota. In support of ServiSense's financial ability to provide the services it proposes, financial statements are offered at Attachment III.

Applicant considers this information proprietary and confidential and, therefore, files it under seal. See motion at Attachment IV. The terms and conditions of service, as well as all rates and charges are provided in ServiSense's proposed tariff in Attachment V.

9. **The names and addresses of the applicant's representatives to whom all inquiries should be made regarding complaints and regulatory matters.**

For correspondence concerning this application:

Loubna Haddad, Esq.  
The Helein Law Group, P.C.  
8180 Greensboro Drive, Suite 700  
McLean, VA 22102  
Phone: (703) 714-1300  
Fax: (703) 714-1330

For correspondence concerning ongoing operations:

Richard Wheeler, Esq.  
Regulatory Coordinator  
ServiSense.com, Inc.  
180 Wells Avenue, Suite 450  
Newton, MA 02459-3302  
Phone: (617) 848-8107  
Fax: (617) 848-8100      Email: [rwheeler@servisense.com](mailto:rwheeler@servisense.com)

10. Applicant is currently authorized to provide service in Massachusetts, New Hampshire, Pennsylvania, Rhode Island, Montana, Michigan, Vermont and New Jersey. Applicant has applications pending in Maryland, Delaware, New York, Connecticut, Maine, Washington DC, West Virginia, Virginia, Wisconsin and Indiana.

11. **A detailed description of how the applicant intends to market its services, the qualifications of its marketing sales personnel, its target market, whether the applicant engages in any multilevel marketing and copies of any company brochures used to assist in the sale of services.**

Applicant plans to initially market its services in South Dakota through targeted mass media, direct mail programs, and an Internet-based marketing campaign. Company will target the residential and small business market. Copies of company brochures currently in use to sell Applicant's services in other states are attached at Exhibit VI.



are attached at Exhibit VI.

**12. Determination of Competitive Classification.**

ServiSense requests an Emerging Competitive classification for its services. ServiSense will offer competitive resold intrastate service within the State of South Dakota. These services are similar to and substitutes for telecommunications services provided by numerous other carriers in the state.

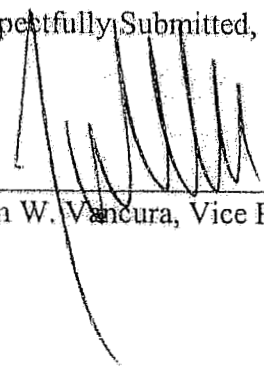
**13. Supporting cost data for Initial Filing.**

Cost support information is provided in Attachment VI.

As evidenced by the foregoing application, ServiSense is fully qualified to offer and provide long distance service within the state of South Dakota. Therefore, ServiSense respectfully requests that the Commission grant this application at its earliest convenience.

Dated this 6<sup>th</sup> day of June 2000.

Respectfully Submitted,

  
\_\_\_\_\_  
John W. Vancura, Vice President, Finance

**ServiSense.com, Inc.**

**ATTACHMENT I**

**Certificate of Authority to Transact Business in South Dakota**

# State of South Dakota



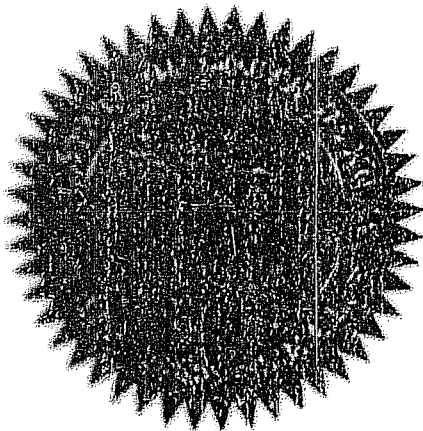
## OFFICE OF THE SECRETARY OF STATE

### Certificate of Authority

I, **JOYCE HAZELTINE**, Secretary of State of the State of South Dakota, hereby certify that the Application for a Certificate of Authority of **SERVISENSE.COM, INC. (DE)** to transact business in this state duly signed and verified pursuant to the provisions of the South Dakota Corporation Acts, have been received in this office and are found to conform to law.

**ACCORDINGLY** and by virtue of the authority vested in me by law, I hereby issue this Certificate of Authority and attach hereto a duplicate of the application to transact business in this state.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this February 22, 2000.



**Joyce Hazeltine**  
Secretary of State

**ServiSense.com, Inc.**

**ATTACHMENT II**

Articles of Incorporation

Office of the Secretary of State

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I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "SERVISENSE.COM, INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF INCORPORATION, FILED THE TWENTIETH DAY OF JANUARY, A.D. 2000, AT 9 O'CLOCK A.M.

CERTIFICATE OF MERGER, FILED THE TWENTY-SECOND DAY OF FEBRUARY, A.D. 2000, AT 9 O'CLOCK A.M.



*Edward J. Freel*

Edward J. Freel, Secretary of State

3184242 8100H

001216521

AUTHENTICATION: 0407332

DATE: 04-28-00

**NEXT**

**DOCUMENT (S)**

**BEST IMAGE**

**POSSIBLE**

## CERTIFICATE OF INCORPORATION

OF

### SERVISENSE.COM, INC.

**FIRST.** The name of the Corporation is ServiSense.com, Inc.

**SECOND.** The address of the Corporation's registered office in the State of Delaware is Corporation Service Company, 1013 Centre Road, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is Corporation Service Company.

**THIRD.** The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

**FOURTH.** The total number of shares of all classes of stock which the Corporation shall have authority to issue is 25,000,000 shares, consisting of (i) 20,000,000 shares of Common Stock, \$0.001 par value per share ("Common Stock"), and (ii) 5,000,000 shares of Preferred Stock, \$0.001 par value per share ("Preferred Stock").

The following is a statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation:

#### I. COMMON STOCK

**A. General.** The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights of the holders of the Preferred Stock of any series as may be designated by the Board of Directors upon any issuance of the Preferred Stock of any series.

**B. Voting.** At all meetings of stockholders (and in actions in lieu of meetings) the holders of the Common Stock are entitled to one vote for each share held. There shall be no cumulative voting.

**C. Dividends.** Dividends may be declared and paid on the Common Stock from funds lawfully available therefor as and when determined by the Board of Directors and subject to any preferential dividend rights of any then outstanding Preferred Stock.

**D. Liquidation.** Upon the dissolution or liquidation of the Corporation, whether voluntary or involuntary, holders of Common Stock will be entitled to receive all assets of the Corporation available for distribution to its stockholders, subject to any preferential rights of any then outstanding Preferred Stock.

#### II. PREFERRED STOCK

## A. General

Preferred Stock may be issued from time to time in one or more series, each of such series to have such terms as stated or expressed herein and in the resolution or resolutions providing for the issue of such series adopted by the Board of Directors of the Corporation as hereinafter provided. Any share of Preferred Stock redeemed, purchased or acquired by the Corporation may be reissued except as otherwise provided by law. Different series of Preferred Stock shall not be construed to constitute different classes of shares for the purposes of voting by classes unless expressly provided.

Authority is hereby expressly granted to the Board of Directors from time to time to issue the Preferred Stock in one or more series, and in connection with the creation of any such series, by resolution or resolutions providing for the issue of the shares thereof, to determine and fix such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, including without limitation thereof, dividend rights, conversion rights, redemption privileges and liquidation preferences, as shall be stated and expressed in such resolutions, all to the full extent now or hereafter permitted by the General Corporation Law of Delaware. Without limiting the generality of the foregoing, the resolutions providing for issuance of any series of Preferred Stock may provide that such series shall be superior or rank equally or be junior to the Preferred Stock of any other series to the extent permitted by law. No vote of the holders of the Preferred Stock or the Common Stock shall be a prerequisite to the issuance of any shares of any series of the Preferred Stock authorized by and complying with the conditions of the Certificate of Incorporation, the right to have such vote being expressly waived by all present and future holders of the capital stock of the Corporation. The Corporation has designated Series A Convertible Preferred Stock, Series B Convertible Preferred Stock and Series C Convertible Preferred Stock, with the rights, preferences and privileges set forth below.

B. Description of Series A Convertible Preferred Stock. All of the rights, preferences and privileges granted to or imposed on the Series A Convertible Preferred Stock and the holders thereof are as follows:

1. Designation. A total of 500,000 shares of the Corporation's Preferred Stock shall be designated the "Series A Convertible Preferred Stock". As used herein, the term "Preferred Stock" used without references to the Series A Convertible Preferred Stock means the shares of Series A Convertible Preferred Stock, and the shares of any series of Preferred Stock of the Corporation issued, authorized and designated from time to time by a resolution or resolutions of the Board of Directors, share for share alike and without distinction as to class, except as otherwise expressly provided for in this Article Fourth of this Certificate of Incorporation or as the context otherwise requires.

### 2. Dividends.

- (a) The Series A Convertible Preferred Stock is entitled to receive, out of funds legally available therefor, when, as and if declared such noncumulative dividends as may be declared by the Board of Directors of the Corporation. No dividends or distributions (other than dividends or



distributions payable solely in shares of Common Stock of the Corporation) shall be paid, declared or set aside, and no other distribution shall be made, on or with respect to the Common Stock of the Corporation in any fiscal year of the Corporation until all declared and unpaid dividends on the Series A Preferred Stock shall have been paid or set apart.

- (b) In the event this Corporation shall declare any other cash dividend or any distribution payable in securities of other persons, evidences of indebtedness issued by this Corporation or other persons, assets (including cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then, in each such case the holders of the Series A Convertible Preferred Stock on the record date fixed for the determination of the holders of the Common Stock of the Corporation entitled to receive such distribution shall be entitled to a proportionate share of any such dividend or distribution as though the holders of the Series A Convertible Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Series A Convertible Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

3. Voting Rights. Each holder of shares of Series A Convertible Preferred Stock shall be entitled to that number of votes equal to the number of shares of Common Stock into which such shares of Series A Convertible Preferred Stock could be converted, on the record date for the vote or consent of stockholders. Each holder of shares of Series A Convertible Preferred Stock shall have voting rights and powers equal to the voting rights and powers of the Common Stock and shall have the right to vote with holders of Common Stock upon any matter except for matters required by law to be submitted to a class vote.

4. Conversion. The holders of the Series A Convertible Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert; Automatic Conversion.

(1) Each share of Series A Convertible Preferred Stock shall be convertible into Common Stock, at the option of the holder thereof, at any time after the date of issuance of such share. Each share of Series A Convertible Preferred Stock shall be convertible at the office of the Corporation or any transfer agent for the Series A Convertible Preferred Stock. The number of shares of Common Stock into which each share of Series A Convertible Preferred Stock may be converted shall be equal to \$0.4175 (divided by the Conversion Price for the Series A Convertible Preferred Stock (as hereinafter defined)). The Conversion Price for the Series A Convertible Preferred Stock shall initially be \$0.4175, subject to adjustment as provided herein. (The number of shares of Common Stock into which each share of Series A Convertible Preferred Stock may be converted is hereinafter referred to as the "Conversion Rate" for such series.) Upon any decrease or increase in the Conversion Price or the Conversion Rate for the

Series A Convertible Preferred Stock, as described in this Section 4, the Conversion Rate or Conversion Price for the Series A Convertible Preferred Stock, as the case may be, shall be appropriately increased or decreased.

(2) Each share of Series A Convertible Preferred Stock shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Rate immediately prior to the closing of an underwritten firm commitment public offering covering the Corporation's Common Stock pursuant to an effective registration statement on Form S-1 pursuant to the Securities Act of 1933; provided that such offering results in gross proceeds to the Corporation of at least \$10,000,000 and that the public offering price (prior to the underwriters' commission and expenses) is at least \$0.4175 per share (adjusted to reflect subsequent stock dividends, stock splits, combinations, recapitalizations and the like). Upon such an automatic conversion event, the outstanding shares of Series A Convertible Preferred Stock will be converted automatically into shares of Common Stock without further action by the holders, whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; provided, however, that the Corporation will not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless certificates evidencing such shares of the Series A Convertible Preferred Stock being converted are either delivered to the Corporation or any transfer agent, as hereinafter provided, or the holder notifies the Corporation or any transfer agent as hereinafter provided that such certificates have been lost, stolen, or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith. Upon the automatic conversion of the Series A Convertible Preferred Stock, the holders will surrender the certificates representing such shares at the office of the Corporation or of any transfer agent for the Common Stock. Thereupon, there will be issued and delivered to each such holder, promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of the Series A Convertible Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred.

(3) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of Series A Convertible Preferred Stock, and any shares of Series A Convertible Preferred Stock surrendered for conversion which would otherwise result in a fractional share of Common Stock shall be redeemed for the then fair market value thereof as determined by the Corporation's Board of Directors, payable as promptly as possible whenever funds are legally available therefor. If more than one share of Series A Convertible Preferred Stock is surrendered for conversion at any one time by the same holder, the number of full shares of Common Stock to be issued upon conversion shall be computed on the basis of the aggregate number of shares of Series A Convertible Preferred Stock so surrendered.

(4) Mechanics of Conversion. Before any holder of Series A Convertible Preferred Stock shall be entitled to convert the same into shares of Common Stock, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Series A Convertible Preferred Stock, and shall give written notice to the Corporation at such office that such holder elects to convert the same and

shall state therein the name or names in which such holder wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series A Convertible Preferred Stock, or to such holder's nominee or nominees, a certificate or certificates for the number of shares of Common Stock to which it shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Series A Convertible Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(c) Adjustment for Subdivision or Combinations of Common Stock. In the event the Corporation at any time or from time to time after the date of filing of these Certificate of Incorporation effects a subdivision or combination of its outstanding Common Stock into a greater or lesser number of shares without a proportionate and corresponding subdivision or combination of its outstanding Series A Convertible Preferred Stock, then in each such event the Conversion Rate for the Series A Convertible Preferred Stock shall be increased or decreased proportionately.

(d) Adjustment for Dividends, Distributions and Common Stock Equivalents. In the event the Corporation at any time or from time to time after the date of filing of this Certificate of Incorporation shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights (hereinafter referred to as "Common Stock Equivalents") convertible into or entitling the holder thereof to receive additional shares of Common Stock without payment of any consideration by such holders for such Common Stock Equivalents or the additional shares of Common Stock, then in each such event the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable in payment of such dividend or distribution or upon conversion or exercise of such Common Stock Equivalents shall be deemed to be issued and outstanding as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date. In each such event the Conversion Rate for the Series A Convertible Preferred Stock shall be increased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Conversion Rate for such series by a fraction,

(A) the numerator of which shall be the total number of shares of Common Stock issued and outstanding or deemed to be issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution or upon conversion or exercise of such Common Stock Equivalents; and

(B) the denominator of which shall be the total number of shares of Common Stock issued and outstanding or deemed to be issued

and outstanding immediately prior to the time of such issuance or the close of business on such record date; provided, however, (i) if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Conversion Rate for such series shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Rate for such series shall be adjusted pursuant to this Subsection 4(d) as of the time of actual payment of such dividends or distribution; (ii) if such Common Stock Equivalents provide, with the passage of time or otherwise, for any decrease in the number of shares of Common Stock issuable upon conversion or exercise thereof, the Conversion Rate for such series shall, upon any such decrease becoming effective, be recomputed to reflect such decrease insofar as it affects the rights of conversion or exercise of the Common Stock Equivalents then outstanding; and (iii) upon the expiration of any rights of conversion or exercise under any unexercised Common Stock Equivalents, the Conversion Rate for such series computed upon the original issue thereof shall, upon such expiration, be recomputed as if the only additional shares of Common Stock issued were the shares of such stock, if any, actually issued upon the conversion or exercise of such Common Stock Equivalents.

(e) No Impairment. The Corporation will not through any reorganization, transfer of assets, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Series A Convertible Preferred Stock against impairment.

(f) Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Rate of the Series A Convertible Preferred Stock pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Series A Convertible Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Convertible Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustments and readjustments, (B) the Conversion Rate for the Series A Convertible Preferred Stock at the time in effect, and (C) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of the Series A Convertible Preferred Stock.

(g) Notice of Record Date. In the event that the Corporation shall propose at any time: (A) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities and whether or not a regular cash dividend; (B) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of

Stock of any class or series or other rights; (C) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or (D) to merge with or into any other corporation, or sell, lease or convey all or substantially all of its assets, to reorganize or to liquidate, dissolve or wind up; then, in connection with each such event, the Corporation shall send to the holders of Series A Convertible Preferred Stock: (i) at least one (1) days' prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote, if any, in respect of the matters referred to in (C) and (D) above; and (ii) in the case of the matters referred to in (C) and (D) above, at least one (1) days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

(b) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock solely for the purpose of effecting the conversion of the shares of the Series A Convertible Preferred Stock such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Series A Convertible Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Convertible Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

### 5. Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of the Series A Convertible Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or moneys funds of the Corporation to the holders of the Common Stock by reason of their ownership thereof, the following amounts on each share of Series A Convertible Preferred Stock then held by them (such amounts are collectively referred to herein as a "Liquidation Preference"): (A) an amount of \$0.4175 per share; and (B) an amount equal to all declared but unpaid dividends on each share, determined in accordance with the provisions of Section 2 above.

(b) After payment has been made to the holders of the Series A Convertible Preferred Stock of the full Liquidation Preference to which they shall be entitled as aforesaid, the holders of Series A Convertible Preferred Stock shall not receive any further portion of the remaining assets of the Corporation available for distribution to its shareholders and all such remaining assets shall be distributed to the holder of the Common Stock.

(c) For purposes of this Section 5, (A) any acquisition of the Corporation by means of merger or other form of corporate reorganization with or into another corporation in which outstanding shares of this Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the other corporation or its subsidiary, in which

transaction this Corporation is not the surviving entity, and, as a result of which transaction, the shareholder of this Corporation own Fifty Percent (50%) or less of the voting power of the surviving entity (other than a mere reincorporation transaction), or (B) a sale, transfer or lease (other than a pledge or grant of a security interest to a bona fide lender) of all or substantially all of the assets of the Corporation (other than to or by a wholly-owned subsidiary of the Corporation), shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Series A Convertible Preferred Stock to receive at the closing of any such transactions their Liquidation Preference.

(d) Whenever the distribution provided for in this Section 5 shall be payable in property other than cash, the value of such distribution shall be the fair market value of such property as determined in good faith by the Board of Directors.

#### 6. Redemption Provisions.

(a) The Corporation may, at any time it may lawfully do so, at the option of its Board of Directors, redeem all (but not less than all) of the outstanding shares of the Series A Convertible Preferred Stock on or at any time after the third calendar anniversary of the issuance of such shares, by paying in cash the original issue price per share compounded at thirty percent (30%) per year from the original issuance date to the redemption date (such amount, as applicable, being referred to in this Subsection 6 and hereafter as the "Redemption Price").

(b)(1) At least ten (10) days prior to the date fixed for redemption of Series A Convertible Preferred Stock (the "Redemption Date"), written notice shall be mailed in the manner provided in Section 4(g) above to each holder of record (at the close of business on the business day next preceding the day on which notice is give) of the Series A Convertible Preferred Stock. Such written notice shall notify each such holder of the redemption to be effected, specifying the Redemption Date, the Redemption Price, and the place at which payment may be obtained, the date on which such holder's Conversion Rights as to such shares shall terminate and calling upon such holder to surrender to the Corporation or the transfer agent for the Series A Convertible Preferred Stock, in the manner and at the place designated, his certificate or certificates representing the shares to be redeemed. Such notice shall hereinafter be referred to as the "Redemption Notice." Except as provided in Subsection 6(b)(2), on or after the Redemption Date each holder of Series A Convertible Preferred Stock to be redeemed shall surrender to the Corporation or the transfer agent, as applicable, the certificate or certificates representing such shares to be redeemed, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares to be redeemed shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled.

(2) From and after the close of business on the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of such shares to be redeemed as holders of Series A Convertible Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates), including without limitation, rights to dividends, shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be

deemed to be outstanding for any purpose whatsoever. If the funds of the Corporation legally available for redemption of shares of Series A Convertible Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Series A Convertible Preferred Stock, the shares of Series A Convertible Preferred Stock shall remain outstanding and entitled to all the rights and preferences provided herein and the Redemption Notice shall be deemed null and void ab initio. At any time thereafter when additional funds of the Corporation are legally available for the redemption of all shares of Series A Convertible Preferred Stock, the Corporation may exercise its rights hereunder.

7. Protective Provisions. So long as any shares of Series A Convertible Preferred Stock are outstanding, this Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of the Series A Convertible Preferred Stock.

(a) amend or repeal any provision of, or add any provision to, this Corporation's Certificate of Incorporation or Bylaws which would materially and adversely affect any of the rights, powers or privileges of the shares of Series A Convertible Preferred Stock; or

(b) authorize or issue shares of any class or series of stock not authorized herein having any preference or priority as to dividends or assets superior to any such preference or priority of the Series A Convertible Preferred Stock, or authorize or issue shares of stock of any class or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having rights to purchase, any shares of stock of the Corporation having any preference or priority as to dividends or assets superior to any such preference or priority of the Series A Convertible Preferred Stock; or

(c) reclassify any shares of Common Stock or any other shares of this Corporation other than the shares of the Series A Convertible Preferred Stock into shares having any preference or priority as to dividends or assets superior to any such preference or priority of the Series A Convertible Preferred Stock; or

(d) pay or declare any dividend on the Common Stock or repurchase any shares of Common Stock (other than repurchases of shares of Common Stock from its officers, directors, employees or consultants as may be, from time to time, approved by the Board of Directors of the Company).

C. Description of Series B Convertible Preferred Stock. All of the rights, preferences and privileges granted to or imposed on the Series B Convertible Preferred Stock and the holders thereof are as follows:

1. Designation. A total of 600,000 shares of the Corporation's Preferred Stock shall be designated the "Series B Convertible Preferred Stock". As used herein, the term "Preferred Stock" used without references to the Series B Convertible Preferred Stock means the shares of Series B Convertible Preferred Stock, and the shares of any series of Preferred Stock of the Corporation issued, authorized and designated from time to time by a resolution or resolutions of the Board of Directors, share for share alike and without distinction as to class, except as

otherwise expressly provided for in this Article Fourth of this Certificate of Incorporation or as the context otherwise requires.

2. Dividends. Dividends on the Series B Convertible Preferred Stock shall be payable when, as and if declared by the Board of Directors of the Corporation. No dividends (other than dividends or distributions payable solely in shares of Common Stock of the Corporation) shall be paid, declared or set aside, and no other distribution shall be made, on or with respect to the Common Stock of the Corporation unless and until there shall have been paid, or declared and set aside for payment dividends with respect to the Series B Convertible Preferred Stock in an amount which the holders of Series B Convertible Preferred Stock would have received if they had converted their Series B Convertible Preferred Stock into Common Stock immediately prior to the record date for such dividend or distribution.

3. Liquidation, Dissolution or Winding Up.

(a) Treatment at Liquidation, Dissolution or Winding Up. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, or in the event of its insolvency, before any distribution or payment is made to any holders of any shares of Common Stock or any other class or series of capital stock of the Corporation designated to be junior to the Series B Convertible Preferred Stock, and subject to the liquidation rights and preferences of any class or series of Preferred Stock designated to be senior to, or on a parity with, the Series B Convertible Preferred Stock, the holders of each share of Series B Convertible Preferred Stock shall be entitled to be paid first out of the assets of the Corporation available for distribution to holders of the Corporation's capital stock of all classes whether such assets are capital, surplus or earnings, an amount (such amount, as so determined, is referred to herein as the "Liquidation Preference") equal to \$0.95 per share of Series B Convertible Preferred Stock (which amount shall be subject to equitable adjustment whenever there shall occur a stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Series B Convertible Preferred Stock).

(b) Insufficient Funds. If upon such liquidation, dissolution or winding up the assets or surplus funds of the Corporation to be distributed to the holders of shares of Series B Convertible Preferred Stock and any other then-outstanding shares of the Corporation's capital stock ranking on a parity with respect to the payments on liquidation with the Series B Convertible Preferred Stock (such shares, being referred to herein as the "Parity Preferred Stock") shall be insufficient to permit payment to such holders of the full Liquidation Preference and all other preferential amounts payable with respect to the Series B Convertible Preferred Stock and such Parity Preferred Stock, then the assets available for payment or distribution to such holders shall be allocated among the holders of the Series B Convertible Preferred Stock and such Parity Preferred Stock, pro rata, in proportion to the full respective preferential amounts to which the Series B Convertible Preferred Stock and such Parity Preferred Stock are each entitled. After payment has been made to the holders of the Series B Convertible Preferred Stock and the Parity Preferred Stock of the full Liquidation Preference and all other preferential amounts to which such holders shall be entitled as aforesaid, the holders of Series B Convertible Preferred Stock shall not receive any further portion of the remaining assets of the Corporation available for distribution to its shareholders and all such remaining assets shall be distributed to



the holders of the Common Stock, the holders of any Parity Preferred Stock designated to participate with holders of Common Stock and any other class or series of capital stock of the Corporation designated to be junior to the Series B Convertible Preferred Stock.

(c) Certain Transactions Treated as Liquidation. For purposes of this Section 3, at the election of a majority of the outstanding holders of Series B Convertible Preferred Stock, (A) any acquisition of the Corporation by means of merger or other form of corporate reorganization with or into another corporation in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the other corporation or its subsidiary, in which transaction this Corporation is not the surviving entity, and, as a result of which transaction, the shareholders of this Corporation own 50% or less of the voting power of the surviving entity (other than a mere reincorporation transaction), or (B) a sale, transfer or lease (other than a pledge or grant of a security interest to a bona fide lender) of all or substantially all of the assets of the Corporation (other than to or by a wholly-owned subsidiary of the Corporation), shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Series B Convertible Preferred Stock to receive at the closing of any such transactions their Liquidation Preference.

(d) Distributions of Property. Whenever the distribution provided for in this Section 3 shall be payable in property other than cash, the value of such distribution shall be the fair market value of such property as determined in good faith by the Board of Directors.

#### 4. Voting Power.

(a) General. Except as otherwise expressly provided in Section 7 hereof or as otherwise required by law, each holder of Series B Convertible Preferred Stock shall be entitled to vote on all matters and shall be entitled to that number of votes equal to the largest number of whole shares of Common Stock into which such holder's shares of Series B Convertible Preferred Stock could be converted, pursuant to the provisions of Section 5 hereof, at the record date for the determination of stockholders entitled to vote on such matter or, if no such record date is established, at the date such vote is taken or any written consent of stockholders is obtained. Except as otherwise expressly provided in Section 7 hereof or as otherwise required by law, the holders of shares of Preferred Stock and Common Stock shall vote together as a single class on all matters.

5. Conversion Rights. The holders of the Series B Convertible Preferred Stock shall have the following rights with respect to the conversion of such shares into shares of Common Stock:

(a) General. Subject to and in compliance with the provisions of this Section 5, any or all shares of the Series B Convertible Preferred Stock may, at the option of the holder thereof (except that upon any liquidation of the Corporation the right of conversion shall terminate at the close of business on the business day fixed for payment of the amounts distributable on the Series B Convertible Preferred Stock), be converted at any time into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series B Convertible Preferred Stock shall be entitled to receive upon conversion shall be the product obtained by multiplying the Series B Applicable Conversion

Rate for the Series B Convertible Preferred Stock (determined as provided in Section 5(b)) by the number of shares of Series B Convertible Preferred Stock being converted at any time.

(b) Applicable Conversion Rate. The conversion rate in effect at any time for the Series B Convertible Preferred Stock (the "Series B Applicable Conversion Rate") shall be the quotient obtained by dividing \$0.95 by Series B Applicable Conversion Value, calculated as provided in Section 5(c). Initially, the Series B Applicable Conversion Rate shall be one (1), and each share of Series B Convertible Preferred Stock shall initially be convertible into one (1) share of Common Stock.

(c) Applicable Conversion Value. The Series B Applicable Conversion Value in effect from time to time, except as adjusted in accordance with Section 5(d) hereof, shall be \$0.95 with respect to the Series B Convertible Preferred Stock (the "Series B Applicable Conversion Value").

(d) Adjustment to Applicable Conversion Value.

(i)(A) Upon Dilutive Issuances of Common Stock or Convertible Securities. If the Corporation shall, while there are any shares of Series B Convertible Preferred Stock outstanding, issue or sell shares of its Common Stock (or Common Stock Equivalents, as defined below) without consideration or at a price per share less than the Series B Applicable Conversion Value in effect immediately prior to such issuance or sale, then in each such case such Series B Applicable Conversion Value upon each such issuance or sale, except as hereinafter provided, shall be lowered so as to be equal to an amount determined by multiplying the Series B Applicable Conversion Value in effect immediately prior to such calculation by a fraction:

(1) the numerator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully-diluted, fully-converted basis assuming the issuance of all shares of Common Stock upon the exercise or conversion of all then exercisable Common Stock Equivalents, as defined in paragraph 5(i)(B)), plus (b) the number of shares of Common Stock which the net aggregate consideration, if any, received by the Corporation for the total number of such additional shares of Common Stock or Common Stock Equivalents so issued would purchase at the Series B Applicable Conversion Value in effect immediately prior to such issuance, and

(2) the denominator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully-diluted, fully-converted basis, assuming the issuance of all shares of Common Stock upon the exercise or conversion of all then exercisable Common Stock Equivalents), plus (b) the number of such additional shares of Common Stock or Common Stock Equivalents so issued.

All calculations shall be rounded to four decimal points. The provisions of this Section 5(i)(A) may be waived in any instance (without the necessity of convening any meeting of

holders of the Corporation) upon the written consent of the holders of a majority of the outstanding shares of Series B Convertible Preferred Stock.

(1)(B) Upon Other Dilutive Issuances of Warrants, Options and Purchase Rights of Common Stock or Convertible Securities.

(1) For the purposes of this Section 5(d)(i), the issuance of any warrants, options, subscription or purchase rights with respect to shares of Common Stock and the issuance of any securities convertible into or exercisable or exchangeable for shares of Common Stock, or the issuance or sale of any warrants, options, subscription or purchase rights with respect to such convertible, exercisable or exchangeable securities (collectively, "Common Stock Equivalents"), shall be deemed an issuance of Common Stock with respect to the Series B Convertible Preferred Stock if the Net Consideration Per Share (as hereinafter determined) which may be received by the Corporation for such Common Stock Equivalents shall be less than the Series B Applicable Conversion Value in effect at the time of such issuance or sale. Any obligation, agreement or undertaking to issue or sell Common Stock Equivalents at any time in the future shall be deemed to be an issuance or sale at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Series B Applicable Conversion Value shall be made under this Section 5(d)(i) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, conversion or exchange of any Common Stock Equivalents if any adjustment shall previously have been made upon the issuance of any such Common Stock Equivalents as above provided.

Adjustments for Cancellation or Expiration of Common Stock Equivalents. Any adjustment of the Series B Applicable Conversion Value with respect to this paragraph which relates to Common Stock Equivalents shall be disregarded, in whole or in part, as applicable, if, at, and when all, or such portion, of such Common Stock Equivalents expire or are cancelled without being exercised, so that the Series B Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Series B Applicable Conversion Value in effect at the time of the issuance of the expired or cancelled Common Stock Equivalents, with such additional adjustments as would have been made to the Series B Applicable Conversion Value had the expired or cancelled Common Stock Equivalents been issued.

(2) Net Consideration Per Share. For purposes of this paragraph, the "Net Consideration Per Share" which may be received by the Corporation shall be determined as follows:

(a) The "Net Consideration Per Share" shall mean the amount equal to the total amount of consideration, if any, received by the Corporation for the issuance or sale of such Common Stock Equivalents, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise, or conversion or exchange thereof, divided by the aggregate number of shares of Common Stock that would be issued if all such Common Stock Equivalents were exercised, exchanged or converted.

(b) The "Net Consideration Per Share" which may be received by the Corporation shall be determined in each instance as of the date of issuance or sale of

Common Stock Equivalents without giving effect to any possible future upward price adjustments or price adjustments which may be applicable with respect to such Common Stock Equivalents.

(X)(C) Stock Dividends for Holders of Capital Stock Other Than Common Stock. In the event that the Corporation shall make or issue, or shall fix a record date for the determination of holders of any capital stock of the Corporation other than holders of Common Stock entitled to receive a dividend or other distribution payable in Common Stock or securities of the Corporation convertible into, exercisable for or otherwise exchangeable for the Common Stock of the Corporation, then, for purposes of determining the Net Consideration Per Share, such Common Stock or other securities issued in payment of such dividend shall be deemed to have been issued for a consideration of \$.001, except for (i) dividends payable in shares of Common Stock payable pro rata to holders of Series B Convertible Preferred Stock and to holders of any other class of stock (whether or not paid to holders of any other class of stock) or (ii) with respect to the Series B Convertible Preferred Stock, dividends payable in shares of Series B Convertible Preferred Stock provided, however, that holders of any shares of Series B Convertible Preferred Stock shall be entitled to receive such shares of Common Stock for which the shares of Series B Convertible Preferred Stock are then convertible.

(X)(D) Consideration Other than Cash. For purposes of this Section 5(d)(i), if a part or all of the consideration received by the Corporation in connection with the issuance of shares of the Common Stock or the issuance of any of the securities described in this Section 5(d)(i) consists of property other than cash, such consideration shall be deemed to have a fair market value as is reasonably determined in good faith by the Board of Directors of the Corporation.

(X)(E) Exceptions to Anti-dilution. This Section 5(d)(i) shall not apply under any of the circumstances which would constitute an Extraordinary Common Stock Event (as described below). Further, this Section 5(d)(i) shall not apply with respect to:

(1) the issuance or sale from time to time of shares of Common Stock or options to purchase such shares of Common Stock, issuable to directors, officers, employees and consultants of the Corporation or any subsidiary pursuant to any qualified or non-qualified stock option or purchase plan approved by the Board of Directors of the Corporation (the "Reserved Employee Shares");

(2) the issuance of shares of Common Stock upon the conversion of any shares of Series B Convertible Preferred Stock;

(3) any shares issued by the Corporation in connection with any strategic alliance, joint venture or licensing agreement where the parties to such venture are not financial institutions, provided that the issuance of such shares does not exceed 15% of the total number of shares issued and outstanding (on a fully diluted and fully converted basis) of the Corporation;

(4) any shares issued pursuant to this Section 5; and

(5) any shares issued upon the exercise or conversion of an option, warrant, preferred stock, debenture or any other convertible security ("Convertible Security"),

provided that the issuance of such Convertible Security was (a) subject to this Section 5(d)(i) regardless of whether the subscriber elected to exercise such rights under this Section 5(d)(i) or (b) exempted under this Section 5(d)(i); provided; however, that any issuance below \$0.95 per share (subject to the Series B Applicable Conversion Rate) with respect to subsection (3) above shall not be exempted from the provisions of this Section 5(d)(i).

(d)(ii) Upon Extraordinary Common Stock Event. Upon the happening of an Extraordinary Common Stock Event (as hereinafter defined), the Series B Applicable Conversion Value (and all other conversion values set forth in Section 5(d)(i) above) shall, immediately with the happening of such Extraordinary Common Stock Event, be adjusted by multiplying the Series B Applicable Conversion Value by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such Extraordinary Common Stock Event and the denominator of which shall be the number of shares of Common Stock outstanding immediately after such Extraordinary Common Stock Event, and the product so obtained shall thereafter be the Series B Applicable Conversion Value. The Series B Applicable Conversion Value, as so adjusted, shall be readjusted in the same manner upon the happening of any successive Extraordinary Common Stock Event or Events.

An "Extraordinary Common Stock Event" shall mean (i) the issue of additional shares of Common Stock as a dividend or other distribution on outstanding shares of Common Stock, (ii) a subdivision of outstanding shares of Common Stock into a greater number of shares of Common Stock, (iii) a combination or reverse stock split of outstanding shares of Common Stock into a smaller number of shares of Common Stock, or (iv) a reclassification of the outstanding shares of Common Stock.

(e) Automatic Conversion Upon Initial Public Offering or Election of Preferred Stock.

(1) Mandatory Conversion of Series B Convertible Preferred Stock. Immediately upon (i) the closing of an underwritten public offering on a firm commitment basis pursuant to an effective registration statement filed pursuant to the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Corporation in which the Corporation actually receives gross proceeds equal to or greater than \$10,000,000 (increased below including underwriter's discounts and commissions but before calculation of expenses), and in which the price per share of Common Stock equals or exceeds \$1.90 (such price subject to equitable adjustment in the event of any stock dividend, stock split, combination, merger, acquisition, recapitalization, reclassification or other similar event involving a change in the capital structure of the Corporation), or (2) the effective date of the conversion of sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series B Convertible Preferred Stock pursuant to the approval of such holders of Series B Convertible Preferred Stock, set forth in a written notice to the Corporation, of an election to convert such Series B Convertible Preferred Stock into Common Stock then all outstanding shares of Series B Convertible Preferred Stock shall be converted automatically into the number of shares of Common Stock into which such shares of Series B Convertible Preferred Stock are then convertible pursuant to Section 3 hereof as of the effectiveness of such underwritten public offering or the stated date of approval of such holders of Series B Convertible Preferred Stock without any further action by

to holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

(4) Surrender of Certificates Upon Mandatory Conversion. Upon the occurrence of the conversion events specified in the preceding paragraph (i), the holders of the Series B Convertible Preferred Stock shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or of its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Common Stock into which the shares of Series B Convertible Preferred Stock so surrendered were convertible on the date on which such conversion occurred. The Corporation shall not be obligated to issue such certificates unless certificates evidencing the shares of Series B Convertible Preferred Stock being converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

(5) Dividends. In the event the Corporation shall make or issue, or shall fix a record date for the determination of holders of Common Stock entitled to receive a dividend or other distribution (other than a distribution in liquidation or other distribution otherwise provided for herein) with respect to the Common Stock payable in (i) securities of the Corporation other than shares of Common Stock, or (ii) other assets (excluding cash dividends or distributions), there shall in each such event provision shall be made so that the holders of the Series B Convertible Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the number of securities or such other assets of the Corporation which they would have received had their Series B Convertible Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the Conversion Date (as that term is hereafter defined in Section 5(j)), retained such securities or such other assets receivable by them during such period, giving application to all other adjustments called for during such period under this Section 7 with respect to the rights of the holders of the Series B Convertible Preferred Stock.

(6) Capital Reorganization or Reclassification. If the Common Stock issuable upon the conversion of the Series B Convertible Preferred Stock shall be changed into the same or different number of shares of any class or classes of capital stock, whether by capital reorganization, recapitalization, reclassification or otherwise (other than a subdivision or combination of shares or stock dividend provided for elsewhere in this Section 5, or the sale of all or substantially all of the Corporation's capital stock or assets to any other person), then and in each such event the holder of each share of Series B Convertible Preferred Stock shall have the right (whether to convert such share into the kind and amount of shares of capital stock and other securities and property receivable upon such reorganization, recapitalization, reclassification or other change by the holders of the number of shares of Common Stock into which such shares of Series B Convertible Preferred Stock might have been converted immediately prior to such reorganization, recapitalization, reclassification or change, all subject to further adjustment as provided herein.

(b) Capital Reorganization, Merger or Sale of Assets. If at any time or from time to time there shall be a capital reorganization of the Common Stock (other than a subdivision, combination, recapitalization, reclassification or exchange of shares provided for elsewhere in this Section 5) or a merger or consolidation of the Corporation with or into another corporation other than a merger or reorganization involving only a change in the state of incorporation of the Corporation or the acquisition by the Corporation of another business where the Corporation survives as a going concern, or the sale of all or substantially all of the Corporation's capital stock or assets to any other person, then, as a part of such reorganization, merger, or consolidation or sale, provision shall be made so that the holders of the Series B Convertible Preferred Stock shall thereafter be entitled to receive upon conversion of the Series B Convertible Preferred Stock the per share kind and amount of consideration received or receivable (including cash) upon such merger, consolidation or sale, to which such holder would have been entitled if such holder had converted its shares of Series B Convertible Preferred Stock immediately prior to such capital reorganization, merger, consolidation or sale. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 to the end that the provisions of this Section 5 (including adjustment of the Series B Applicable Conversion Value then in effect and the number of shares of Common Stock or other securities issuable upon conversion of such shares of Series B Convertible Preferred Stock) shall be applicable after that event in as nearly equivalent a manner as may be practicable.

(c) Certificate as to Adjustments; Notice by Corporation. In each case of an adjustment or readjustment of the Series B Applicable Conversion Rate, the Corporation at its expense will furnish each holder of Series B Convertible Preferred Stock with a certificate prepared by the Treasurer or Chief Financial Officer of the Corporation, showing such adjustment or readjustment, and stating in detail the facts upon which such adjustment or readjustment is based.

(d) Exercise of Conversion Privilege. To exercise its conversion privilege, a holder of Series B Convertible Preferred Stock shall surrender the certificate or certificates representing the shares being converted to the Corporation at its principal office, and shall give written notice to the Corporation at that office that such holder elects to convert such shares. Such notice shall also state the name or names (with address or addresses) in which the certificate or certificates for shares of Common Stock issuable upon such conversion shall be issued. The certificate or certificates for shares of Series B Convertible Preferred Stock surrendered for conversion shall be accompanied by proper assignment thereof to the Corporation or in blank. The date when such written notice is received by the Corporation, together with the certificate or certificates representing the shares of Series B Convertible Preferred Stock being converted, shall be the "Conversion Date". As promptly as practicable after the Conversion Date, the Corporation shall issue and shall deliver to the holder of the shares of Series B Convertible Preferred Stock being converted, or another person on its written order, such certificate or certificates as it may request for the number of whole shares of Common Stock issuable upon the conversion of such shares of Series B Convertible Preferred Stock in accordance with the provisions of this Section 5, and cash, as provided in Section 5(k), in respect of any fraction of a share of Common Stock issuable upon such conversion. Such conversion shall be deemed to have been effected immediately prior to the close of business on the Conversion Date, and at such time the rights of the holder as holder of the converted shares of Series B Convertible Preferred Stock shall cease and the person(s) in whose name(s) any

certificate(s) for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby.

(ii) Cash In Lieu of Fractional Shares. No fractional shares of Common Stock or scrip representing fractional shares shall be issued upon the conversion of shares of Series B Convertible Preferred Stock. Instead of any fractional shares of Common Stock which would otherwise be issuable upon conversion of Series B Convertible Preferred Stock, the Corporation shall pay to the holder of the shares of Series B Convertible Preferred Stock which were converted a cash adjustment in respect of such fractional shares in an amount equal to the same fraction of the market price per share of the Common Stock (as determined in a reasonable manner prescribed by the Board of Directors) at the close of business on the Conversion Date. The determination as to whether or not any fractional shares of Series B Convertible Preferred Stock shall be rounded up shall be made with respect to the aggregate number of shares of Series B Convertible Preferred Stock being converted at any one time by any holder thereof, not with respect to each share of Series B Convertible Preferred Stock being converted.

(i) Partial Conversion. In the event some but not all of the shares of Series B Convertible Preferred Stock represented by a certificate(s) surrendered by a holder are converted, the Corporation shall execute and deliver to or on the order of the holder, at the expense of the Corporation, a new certificate representing the number of shares of Series B Convertible Preferred Stock which were not converted.

(iii) Reservation of Common Stock. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series B Convertible Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series B Convertible Preferred Stock (including any shares of Series B Convertible Preferred Stock represented by any warrants, options, subscription or purchase rights for Series B Convertible Preferred Stock), and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series B Convertible Preferred Stock (including any shares of Series B Convertible Preferred Stock represented by any warrants, options, subscriptions or purchase rights for such Preferred Stock), the Corporation shall take such action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(iv) No Reissuance of Preferred Stock. No share or shares of Series B Convertible Preferred Stock acquired by the Corporation by reason of [redemption,] purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Corporation shall be authorized to issue. The Corporation shall from time to time take such appropriate corporate action as may be necessary to reduce the authorized number of shares of the Series B Convertible Preferred Stock.

6. Redemption. The Series B Convertible Preferred Stock is not redeemable.

7. Restrictions and Limitations.



(a) Corporate Action; Amendment. At any time when shares of Series B Convertible Preferred Stock are outstanding, except where the vote or written consent of the holders of a greater number of shares of the Corporation is required by law or this Certificate of Incorporation, and in addition to any other vote required by law, without the written consent of the holders of at least a majority of the then outstanding Series B Convertible Preferred Stock (with each share being entitled to one vote) given in writing or by vote at a meeting consenting or voting (as applicable) separately as a series, the Corporation will not amend its Certificate of Incorporation or by-laws if such amendment would materially adversely affect any of the rights, preferences, privileges or limitations provided for herein of any shares of Series B Convertible Preferred Stock. Without limiting the generality of the foregoing, the Corporation will not amend its Certificate of Incorporation or by-laws without the approval of at least a majority of the then outstanding shares of Series B Convertible Preferred Stock to:

(i) cause the Corporation to redeem, repurchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose), any share or shares of Common Stock other than a redemption, repurchase or other acquisition for cash of unvested shares under the forfeiture provisions of the Corporation's stock option, restricted stock or other equity compensation plans or agreements or any shares of Series B Convertible Preferred Stock which is offered pro rata to all holders thereof; or

(ii) authorize or issue, or obligate the Corporation to authorize or issue, additional shares of Preferred Stock senior to the Series B Convertible Preferred Stock with respect to liquidation preferences, dividend rights, voting rights or redemption rights; or

(iii) increase or decrease (except retirement following conversion) the authorized number of shares of Series B Convertible Preferred Stock or reissue shares of Series B Convertible Preferred Stock previously converted; or

(iv) adversely affect the liquidation preferences, dividend right or voting rights of the holders of Series B Convertible Preferred Stock; or

(v) pay any dividends on the Common Stock at a time when any shares of Series B Convertible Preferred Stock is still outstanding.

8. No Dilution or Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of capital stock or assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of the Series B Convertible Preferred Stock set forth herein, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such action as may be necessary or appropriate in order to protect the rights of the holders of the Series B Convertible Preferred Stock against dilution or other impairment.

9. Notices of Record Date. In the event of:

(a) any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend or other distribution, or any right to subscribe for, purchase or otherwise acquire any

shares of capital stock of any class or any other securities or property, or to receive any other right, or

(b) any capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger or consolidation of the Corporation, or any transfer of all or substantially all of the assets of the Corporation to any other corporation, or any other entity or person, or

(c) any voluntary or involuntary dissolution, liquidation or winding up of the Corporation.

then and in each such event the Corporation shall mail or cause to be mailed to each holder of Series B Convertible Preferred Stock a notice specifying (i) the date on which any such record is to be taken for the purpose of such dividend, distribution or right and a description of such dividend, distribution or right, (ii) the date on which any such reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up is expected to become effective, and (iii) the time, if any, that is to be fixed, as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up. Such notice shall be mailed by first class mail, postage prepaid, at least one (1) days prior to the date specified in such notice on which such action is to be taken.

10. Issue Tax. The issuance of certificates for shares of Common Stock upon conversion of Series B Convertible Preferred Stock shall be made without charge to the holders thereof for any issuance tax in respect thereof, provided that the Corporation shall not be required to pay any tax in respect of any transfer involved in the issuance and delivery of any certificate in a name other than that of the holder of the Series B Convertible Preferred Stock that is being converted.

D. Description of Series C Convertible Preferred Stock. All of the rights, preferences and privileges granted to or imposed on the Series C Convertible Preferred Stock and the holders thereof are as follows:

1. Designation. A total of 1,476,720 shares of the Corporation's Preferred Stock shall be designated the "Series C Convertible Preferred Stock". As used herein, the term "Preferred Stock" used without references to the Series C Convertible Preferred Stock means the shares of Series C Convertible Preferred Stock, and the shares of any series of Preferred Stock of the Corporation issued, authorized and designated from time to time by a resolution or resolutions of the Board of Directors, share for share alike and without distinction as to class, except as otherwise expressly provided for in this Article Fourth of this Certificate of Incorporation or as the context otherwise requires.

2. Dividends. Dividends on the Series C Convertible Preferred Stock shall be payable when, as and if declared by the Board of Directors of the Corporation. No dividends (other than dividends or distributions payable solely in shares of Common Stock of the Corporation) shall be paid, declared or set aside, and no other distribution shall be made, on or

with respect to the Common Stock of the Corporation unless and until there shall have been paid, or declared and set aside for payment dividends with respect to the Series C Convertible Preferred Stock in an amount which the holders of Series C Convertible Preferred Stock would have received if they had converted their Series C Convertible Preferred Stock into Common Stock immediately prior to the record date for such dividend or distribution.

3. Liquidation, Dissolution or Winding Up.

(a) Treatment at Liquidation, Dissolution or Winding Up. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, or in the event of its insolvency, before any distribution or payment is made to any holders of any shares of Common Stock or any other class or series of capital stock of the Corporation designated to be junior to the Series C Convertible Preferred Stock, and subject to the liquidation rights and preferences of any class or series of Preferred Stock designated to be senior to, or on a parity with, the Series C Convertible Preferred Stock, the holders of each share of Series C Convertible Preferred Stock shall be entitled to be paid first out of the assets of the Corporation available for distribution to holders of the Corporation's capital stock of all classes whether such assets are capital, surplus or earnings, an amount (such amount, as so determined, is referred to herein as the "Series C Liquidation Preference") equal to \$1.30 per share of Series C Convertible Preferred Stock (which amount shall be subject to equitable adjustment whenever there shall occur a stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Series C Convertible Preferred Stock). All shares of Preferred Stock are on a parity with the Series C Convertible Preferred Stock with respect to the Liquidation Preference.

(b) Insufficient Funds. If upon such liquidation, dissolution or winding up the assets or surplus funds of the Corporation to be distributed to the holders of shares of Series C Convertible Preferred Stock and any other then-outstanding shares of the Corporation's capital stock ranking on a parity with respect to the payments on liquidation with the Series C Convertible Preferred Stock (such shares, being referred to herein as the "Series C Parity Preferred Stock") shall be insufficient to permit payment to such holders of the full Series C Liquidation Preference and all other preferential amounts payable with respect to the Series C Convertible Preferred Stock and such Series C Parity Preferred Stock, then the assets available for payment or distribution to such holders shall be allocated among the holders of the Series C Convertible Preferred Stock and such Series C Parity Preferred Stock, pro rata, in proportion to the full respective preferential amounts to which the Series C Convertible Preferred Stock and such Series C Parity Preferred Stock are each entitled. After payment has been made to the holders of the Series C Convertible Preferred Stock and the Series C Parity Preferred Stock of the full Series C Liquidation Preference and all other preferential amounts to which such holders shall be entitled as aforesaid, the holders of Series C Convertible Preferred Stock shall not receive any further portion of the remaining assets of the Corporation available for distribution to its shareholders and all such remaining assets shall be distributed to the holders of the Common Stock, the holders of any Series C Parity Preferred Stock designated to participate with holders of Common Stock and any other class or series of capital stock of the Corporation designated to be junior to the Series C Convertible Preferred Stock.

(c) Certain Transactions Treated as Liquidation. For purposes of this Section 3, at the election of a majority of the outstanding holders of Series C Convertible Preferred Stock, (A) any acquisition of the Corporation by means of merger or other form of corporate reorganization with or into another corporation in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the other corporation or its subsidiary, in which transaction this Corporation is not the surviving entity, and, as a result of which transaction, the shareholders of this Corporation own 50% or less of the voting power of the surviving entity (other than a mere reincorporation transaction), or (B) a sale, transfer or lease (other than a pledge or grant of a security interest to a bona fide lender) of all or substantially all of the assets of the Corporation (other than to or by a wholly-owned subsidiary of the Corporation), shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Series C Convertible Preferred Stock to receive at the closing of any such transactions their Series C Liquidation Preference.

(d) Distributions of Property. Whenever the distribution provided for in this Section 3 shall be payable in property other than cash, the value of such distribution shall be the fair market value of such property as determined in good faith by the Board of Directors.

#### 4. Voting Power.

(a) General. Except as otherwise expressly provided in Section 7 hereof or as otherwise required by law, each holder of Series C Convertible Preferred Stock shall be entitled to vote on all matters and shall be entitled to that number of votes equal to the largest number of whole shares of Common Stock into which such holder's shares of Series C Convertible Preferred Stock could be converted, pursuant to the provisions of Section 5 hereof, at the record date for the determination of stockholders entitled to vote on such matter or, if no such record date is established, at the date such vote is taken or any written consent of stockholders is solicited. Except as otherwise expressly provided in Section 7 hereof or as otherwise required by law, the holders of shares of Preferred Stock and Common Stock shall vote together as a single class on all matters.

5. Conversion Rights. The holders of the Series C Convertible Preferred Stock shall have the following rights with respect to the conversion of such shares into shares of Common Stock:

(a) General. Subject to and in compliance with the provisions of this Section 5, any or all shares of the Series C Convertible Preferred Stock may, at the option of the holder thereof (except that upon any liquidation of the Corporation the right of conversion shall terminate at the close of business on the business day fixed for payment of the amounts distributable on the Series C Convertible Preferred Stock), be converted at any time into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series C Convertible Preferred Stock shall be entitled to receive upon conversion shall be the product obtained by multiplying the Series C Applicable Conversion Rate for the Series C Convertible Preferred Stock (determined as provided in Section 5(b)) by the number of shares of Series C Convertible Preferred Stock being converted at any time.

(b) Applicable Conversion Rate. The conversion rate in effect at any time for the Series C Convertible Preferred Stock (the "Series C Applicable Conversion Rate") shall be the quotient obtained by dividing \$1.30 by Series C Applicable Conversion Value, calculated as provided in Section 5(c). Initially, the Series C Applicable Conversion Rate shall be one (1), and each share of Series C Convertible Preferred Stock shall initially be convertible into one (1) share of Common Stock.

(c) Applicable Conversion Value. The Series C Applicable Conversion Value in effect from time to time, except as adjusted in accordance with Section 5(d) hereof, shall be \$1.30 with respect to the Series C Convertible Preferred Stock (the "Series C Applicable Conversion Value").

(d) Adjustment to Applicable Conversion Value.

(i)(A) Upon Dilutive Issuances of Common Stock or Convertible Securities. If the Corporation shall, while there are any shares of Series C Convertible Preferred Stock outstanding, issue or sell shares of its Common Stock (or Common Stock Equivalents, as defined below) without consideration or at a price per share less than the Series C Applicable Conversion Value in effect immediately prior to such issuance or sale, then in each such case such Series C Applicable Conversion Value upon each such issuance or sale, except as hereinafter provided, shall be lowered so as to be equal to an amount determined by multiplying the Series C Applicable Conversion Value in effect immediately prior to such calculation by a fraction:

(1) the numerator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully-diluted, fully-converted basis assuming the issuance of all shares of Common Stock upon the exercise or conversion of all then exercisable Common Stock Equivalents, as defined in paragraph 5(i)(B)), plus (b) the number of shares of Common Stock which the net aggregate consideration, if any, received by the Corporation for the total number of such additional shares of Common Stock or Common Stock Equivalents so issued would purchase at the Series C Applicable Conversion Value in effect immediately prior to such issuance, and

(2) the denominator of which shall be (a) the number of shares of Common Stock outstanding immediately prior to the issuance of such additional shares of Common Stock or Common Stock Equivalents (calculated on a fully-diluted, fully-converted basis assuming the issuance of all shares of Common Stock upon the exercise or conversion of all then exercisable Common Stock Equivalents), plus (b) the number of such additional shares of Common Stock or Common Stock Equivalents so issued.

All calculations shall be rounded to four decimal points. The provisions of this Section 5(i)(A) may be waived in any instance (without the necessity of convening any meeting of stockholders of the Corporation) upon the written consent of the holders of a majority of the outstanding shares of Series C Convertible Preferred Stock.

(i)(B) Upon Other Dilutive Issuances of Warrants, Options and Purchase Rights to Common Stock or Convertible Securities.

(1) For the purposes of this Section 5(d)(i), the issuance of any warrants, options, subscription or purchase rights with respect to shares of Common Stock and the issuance of any securities convertible into or exercisable or exchangeable for shares of Common Stock, or the issuance or sale of any warrants, options, subscription or purchase rights with respect to such convertible, exercisable or exchangeable securities (collectively, "Common Stock Equivalents"), shall be deemed an issuance of Common Stock with respect to the Series C Convertible Preferred Stock if the Net Consideration Per Share (as hereinafter determined) which may be received by the Corporation for such Common Stock Equivalents shall be less than the Series C Applicable Conversion Value in effect at the time of such issuance or sale. Any obligation, agreement or undertaking to issue or sell Common Stock Equivalents at any time in the future shall be deemed to be an issuance or sale at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Series C Applicable Conversion Value shall be made under this Section 5(d)(i) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, conversion or exchange of any Common Stock Equivalents if any adjustment shall previously have been made upon the issuance of any such Common Stock Equivalents as above provided.

Adjustments for Cancellation or Expiration of Common Stock Equivalents. Any adjustment of the Series C Applicable Conversion Value with respect to this paragraph which relates to Common Stock Equivalents shall be disregarded, in whole or in part, as applicable, if, as, and when all, or such portion, of such Common Stock Equivalents expire or are cancelled without being exercised, so that the Series C Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Series C Applicable Conversion Value in effect at the time of the issuance of the expired or cancelled Common Stock Equivalents, with such additional adjustments as would have been made to the Series C Applicable Conversion Value had the expired or cancelled Common Stock Equivalents not been issued.

(2) Net Consideration Per Share. For purposes of this paragraph, the "Net Consideration Per Share" which may be received by the Corporation shall be determined as follows:

(a) The "Net Consideration Per Share" shall mean the amount equal to the total amount of consideration, if any, received by the Corporation for the issuance or sale of such Common Stock Equivalents, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise, or conversion or exchange thereof, divided by the aggregate number of shares of Common Stock that would be issued if all such Common Stock Equivalents were exercised, exchanged or converted.

(b) The "Net Consideration Per Share" which may be received by the Corporation shall be determined in each instance as of the date of issuance or sale of Common Stock Equivalents without giving effect to any possible future upward price adjustments or rate adjustments which may be applicable with respect to such Common Stock Equivalents.

(i)(C) Stock Dividends for Holders of Capital Stock Other Than Common Stock. In the event that the Corporation shall make or issue, or shall fix a record date for the determination of holders of any capital stock of the Corporation other than holders of Common Stock entitled to receive a dividend or other distribution payable in Common Stock or securities of the Corporation convertible into, exercisable for or otherwise exchangeable for the Common Stock of the Corporation, then, for purposes of determining the Net Consideration Per Share, such Common Stock or other securities issued in payment of such dividend shall be deemed to have been issued for a consideration of \$.001, except for (i) dividends payable in shares of Common Stock payable pro rata to holders of Series C Convertible Preferred Stock and to holders of any other class of stock (whether or not paid to holders of any other class of stock) or (ii) with respect to the Series C Convertible Preferred Stock, dividends payable in shares of Series C Convertible Preferred Stock, provided, however, that holders of any shares of Series C Convertible Preferred Stock shall be entitled to receive such shares of Common Stock for which the shares of Series C Convertible Preferred Stock are then convertible.

(i)(D) Consideration Other than Cash. For purposes of this Section 5(d)(i), if a part or all of the consideration received by the Corporation in connection with the issuance of shares of the Common Stock or the issuance of any of the securities described in this Section 5(d)(i) consists of property other than cash, such consideration shall be deemed to have a fair market value as is reasonably determined in good faith by the Board of Directors of the Corporation.

(i)(E) Exceptions to Anti-dilution. This Section 5(d)(i) shall not apply under any of the circumstances which would constitute an Extraordinary Common Stock Event (as described below). Further, this Section 5(d)(i) shall not apply with respect to:

(1) the issuance or sale from time to time of shares of Common Stock or options to purchase such shares of Common Stock, issuable to directors, officers, employees and consultants of the Corporation or any subsidiary pursuant to any qualified or non-qualified stock option or purchase plan approved by the Board of Directors of the Corporation (the "Reserved Employee Shares");

(2) the issuance of shares of Common Stock upon the conversion of any shares of Series C Convertible Preferred Stock;

(3) any shares issued by the Corporation in connection with any strategic alliance, joint venture or licensing agreement where the parties to such venture are not financial investors; provided that the issuance of such shares does not exceed 15% of the total number of shares issued and outstanding (on a fully diluted and fully converted basis) of the Corporation;

(4) any shares issued pursuant to this Section 5; and

(5) any shares issued upon the exercise or conversion of an option, warrant, preferred stock, debenture or any other convertible security ("Convertible Security"), provided that the issuance of such Convertible Security was (a) subject to this Section 5(d)(i) (regardless of whether the subscriber elected to exercise such rights under this Section 5(d)(i)) or (b) exempted under this Section 5(d)(i); provided; however, that any issuance below \$1.30 per

share (subject to the Series C Applicable Conversion Rate) with respect to subsection (3) above shall not be exempted from the provisions of this Section 5(d)(i).

(d)(ii) Upon Extraordinary Common Stock Event. Upon the happening of an Extraordinary Common Stock Event (as hereinafter defined), the Series C Applicable Conversion Value (and all other conversion values set forth in Section 5(d)(i) above) shall, simultaneously with the happening of such Extraordinary Common Stock Event, be adjusted by multiplying the Series C Applicable Conversion Value by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such Extraordinary Common Stock Event and the denominator of which shall be the number of shares of Common Stock outstanding immediately after such Extraordinary Common Stock Event, and the product so obtained shall thereafter be the Series C Applicable Conversion Value. The Series C Applicable Conversion Value, as so adjusted, shall be readjusted in the same manner upon the happening of any successive Extraordinary Common Stock Event or Events.

An "Extraordinary Common Stock Event" shall mean (i) the issue of additional shares of Common Stock as a dividend or other distribution on outstanding shares of Common Stock, (ii) a subdivision of outstanding shares of Common Stock into a greater number of shares of Common Stock, (iii) a combination or reverse stock split of outstanding shares of Common Stock into a smaller number of shares of Common Stock, or (iv) a reclassification of the outstanding shares of Common Stock.

(e) Automatic Conversion Upon Initial Public Offering or Election of Preferred Stock.

(i) Mandatory Conversion of Series C Convertible Preferred Stock immediately upon (1) the closing of an underwritten public offering on a firm commitment basis pursuant to an effective registration statement filed pursuant to the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Corporation in which the Corporation actually receives gross proceeds equal to or greater than \$10,000,000 (calculated before deducting underwriter's discounts and commissions but before calculation of expenses), and in which the price per share of Common Stock equals or exceeds \$2.60 (such price subject to equitable adjustment in the event of any stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Corporation), or (2) the effective date of the conversion of sixty-six and two thirds percent (66 2/3%) of the then outstanding shares of Series C Convertible Preferred Stock pursuant to the approval of such holders of Series C Convertible Preferred Stock, set forth in a written notice to the Corporation, of an election to convert such Series C Convertible Preferred Stock into Common Stock then all outstanding shares of Series C Convertible Preferred Stock shall be converted automatically into the number of shares of Common Stock into which such shares of Series C Convertible Preferred Stock are then convertible pursuant to Section 3 hereof as of the effectiveness of such underwritten public offering or the stated date of approval of such holders of Series C Convertible Preferred Stock without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.



(ii) Surrender of Certificates Upon Mandatory Conversion. Upon the occurrence of the conversion events specified in the preceding paragraph (i), the holders of the Series C Convertible Preferred Stock shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or of its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Common Stock into which the shares of Series C Convertible Preferred Stock so surrendered were convertible on the date on which such conversion occurred. The Corporation shall not be obligated to issue such certificates unless certificates evidencing the shares of Series C Convertible Preferred Stock being converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

(f) Dividends. In the event the Corporation shall make or issue, or shall fix a record date for the determination of holders of Common Stock entitled to receive a dividend or other distribution (other than a distribution in liquidation or other distribution otherwise provided for herein) with respect to the Common Stock payable in (i) securities of the Corporation other than shares of Common Stock, or (ii) other assets (excluding cash dividends or distributions), then and in each such event provision shall be made so that the holders of the Series C Convertible Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the number of securities or such other assets of the Corporation which they would have received had their Series C Convertible Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the Conversion Date (as that term is hereafter defined in Section 3(f)), retained such securities or such other assets receivable by them during such period, giving application to all other adjustments called for during such period under this Section 3 with respect to the rights of the holders of the Series C Convertible Preferred Stock.

(g) Capital Reorganization or Reclassification. If the Common Stock issuable upon the conversion of the Series C Convertible Preferred Stock shall be changed into the same or different number of shares of any class or classes of capital stock, whether by capital reorganization, recapitalization, reclassification or otherwise (other than a subdivision or combination of shares or stock dividend provided for elsewhere in this Section 5, or the sale of all or substantially all of the Corporation's capital stock or assets to any other person), then and in each such event the holder of each share of Series C Convertible Preferred Stock shall have the right thereafter to convert such share into the kind and amount of shares of capital stock and other securities and property receivable upon such reorganization, recapitalization, reclassification or other change by the holders of the number of shares of Common Stock into which such shares of Series C Convertible Preferred Stock might have been converted immediately prior to such reorganization, recapitalization, reclassification or change, all subject to further adjustment as provided herein.

(h) Capital Reorganization, Merger or Sale of Assets. If at any time or from time to time there shall be a capital reorganization of the Common Stock (other than a subdivision, combination, recapitalization, reclassification or exchange of shares provided for elsewhere in this Section 5) or a merger or consolidation of the Corporation with or into another

corporation other than a merger or reorganization involving only a change in the state of incorporation of the Corporation or the acquisition by the Corporation of another business where the Corporation survives as a going concern, or the sale of all or substantially all of the Corporation's capital stock or assets to any other person, then, as a part of such reorganization, merger, or consolidation or sale, provision shall be made so that the holders of the Series C Convertible Preferred Stock shall thereafter be entitled to receive upon conversion of the Series C Convertible Preferred Stock the per share kind and amount of consideration received or receivable (including cash) upon such merger, consolidation or sale, to which such holder would have been entitled if such holder had converted its shares of Series C Convertible Preferred Stock immediately prior to such capital reorganization, merger, consolidation or sale. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 to the end that the provisions of this Section 5 (including adjustment of the Series C Applicable Conversion Value then in effect and the number of shares of Common Stock or other securities issuable upon conversion of such shares of Series C Convertible Preferred Stock) shall be applicable after that event in as nearly equivalent a manner as may be practicable.

(l) Certificate as to Adjustments; Notice by Corporation. In each case of an adjustment or readjustment of the Series C Applicable Conversion Rate, the Corporation at its expense will furnish each holder of Series C Convertible Preferred Stock with a certificate prepared by the Treasurer or Chief Financial Officer of the Corporation, showing such adjustment or readjustment, and stating in detail the facts upon which such adjustment or readjustment is based.

(j) Exercise of Conversion Privilege. To exercise its conversion privilege, a holder of Series C Convertible Preferred Stock shall surrender the certificate or certificates representing the shares being converted to the Corporation at its principal office, and shall give written notice to the Corporation at that office that such holder elects to convert such shares. Such notice shall also state the name or names (with address or addresses) in which the certificate or certificates for shares of Common Stock issuable upon such conversion shall be issued. The certificate or certificates for shares of Series C Convertible Preferred Stock surrendered for conversion shall be accompanied by proper assignment thereof to the Corporation or in blank. The date when such written notice is received by the Corporation, together with the certificate or certificates representing the shares of Series C Convertible Preferred Stock being converted, shall be the "Conversion Date". As promptly as practicable after the Conversion Date, the Corporation shall issue and shall deliver to the holder of the shares of Series C Convertible Preferred Stock being converted, or another person on its written order, such certificate or certificates as it may request for the number of whole shares of Common Stock issuable upon the conversion of such shares of Series C Convertible Preferred Stock in accordance with the provisions of this Section 5, and cash, as provided in Section 5(k), in respect of any fraction of a share of Common Stock issuable upon such conversion. Such conversion shall be deemed to have been effected immediately prior to the close of business on the Conversion Date, and at such time the rights of the holder as holder of the converted shares of Series C Convertible Preferred Stock shall cease and the person(s) in whose name(s) any certificate(s) for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby.

(k) Cash In Lieu of Fractional Shares. No fractional shares of Common Stock or scrip representing fractional shares shall be issued upon the conversion of shares of Series C Convertible Preferred Stock. Instead of any fractional shares of Common Stock which would otherwise be issuable upon conversion of Series C Convertible Preferred Stock, the Corporation shall pay to the holder of the shares of Series C Convertible Preferred Stock which were converted a cash adjustment in respect of such fractional shares in an amount equal to the same fraction of the market price per share of the Common Stock (as determined in a reasonable manner prescribed by the Board of Directors) at the close of business on the Conversion Date.

(l) Partial Conversion. In the event some but not all of the shares of Series C Convertible Preferred Stock represented by a certificate(s) surrendered by a holder are converted, the Corporation shall execute and deliver to or on the order of the holder, at the expense of the Corporation, a new certificate representing the number of shares of Series C Convertible Preferred Stock which were not converted.

(m) Reservation of Common Stock. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series C Convertible Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series C Convertible Preferred Stock (including any shares of Series C Convertible Preferred Stock represented by any warrants, options, subscription or purchase rights for Series C Convertible Preferred Stock), and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series C Convertible Preferred Stock (including any shares of Series C Convertible Preferred Stock represented by any warrants, options, subscriptions or purchase rights for such Preferred Stock), the Corporation shall take such action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(n) No Reissuance of Preferred Stock. No share or shares of Series C Convertible Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Corporation shall be authorized to issue. The Corporation shall from time to time take such appropriate corporate action as may be necessary to reduce the authorized number of shares of the Series C Convertible Preferred Stock.

6. Redemption. The Series C Convertible Preferred Stock is not redeemable.

7. Restrictions and Limitations.

(a) Corporate Action; Amendment. At any time when shares of Series C Convertible Preferred Stock are outstanding, except where the vote or written consent of the holders of a greater number of shares of the Corporation is required by law or this Certificate of Incorporation, and in addition to any other vote required by law, without the written consent of the holders of at least a majority of the then outstanding Series C Convertible Preferred Stock (with each share being entitled to one vote) given in writing or by vote at a meeting consenting or voting (as applicable) separately as a series, the Corporation will not amend its Certificate of

Incorporation or by-laws if such amendment would materially adversely affect any of the rights, preferences, privileges or limitations provided for herein of any shares of Series C Convertible Preferred Stock. Without limiting the generality of the foregoing, the Corporation will not amend its Certificate of Incorporation or by-laws without the approval of at least a majority of the then outstanding shares of Series C Convertible Preferred Stock to:

(i) cause the Corporation to redeem, repurchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose), any share or shares of Common Stock other than a redemption, repurchase or other acquisition for cash of unvested shares under the forfeiture provisions of the Corporation's stock option, restricted stock or other equity compensation plans or agreements or any shares of Series C Convertible Preferred Stock which is offered pro rata to all holders thereof; or

(ii) authorize or issue, or obligate the Corporation to authorize or issue, additional shares of Preferred Stock senior to the Series C Convertible Preferred Stock with respect to liquidation preferences, dividend rights, voting rights or redemption rights; or

(iii) increase or decrease (except retirement following conversion) the authorized number of shares of Series C Convertible Preferred Stock or reissue shares of Series C Convertible Preferred Stock previously converted; or

(iv) adversely affect the liquidation preferences, dividend right or voting rights of the holders of Series C Convertible Preferred Stock; or

(v) pay any dividends on the Common Stock at a time when any shares of Series C Convertible Preferred Stock is still outstanding.

8. No Dilution or Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of capital stock or assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of the Series C Convertible Preferred Stock set forth herein, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such action as may be necessary or appropriate in order to protect the rights of the holders of the Series C Convertible Preferred Stock against dilution or other impairment.

9. Notices of Record Date. In the event of:

(a) any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend or other distribution, or any right to subscribe for, purchase or otherwise acquire any shares of capital stock of any class or any other securities or property, or to receive any other right, or

(b) any capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger or consolidation of the Corporation, or any transfer of all or substantially all of the assets of the Corporation to any other corporation, or any other entity or person, or

(c) any voluntary or involuntary dissolution, liquidation or winding up of the Corporation,

and in each such event the Corporation shall mail or cause to be mailed to each holder of Series C Convertible Preferred Stock a notice specifying (i) the date on which any such record is to be taken for the purpose of such dividend, distribution or right and a description of such dividend, distribution or right, (ii) the date on which any such reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up is expected to become effective, and (iii) the time, if any, that is to be fixed, as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such reorganization, reclassification, recapitalization, transfer, consolidation, merger, dissolution, liquidation or winding up. Such notice shall be mailed by first class mail, postage prepaid, at least one (1) days prior to the date specified in such notice on which such action is to be taken.

10. Issue Tax. The issuance of certificates for shares of Common Stock upon conversion of Series C Convertible Preferred Stock shall be made without charge to the holders thereof for any issuance tax in respect thereof, provided that the Corporation shall not be required to pay any tax in respect of any transfer involved in the issuance and delivery of any certificate in a name other than that of the holder of the Series C Convertible Preferred Stock that is being converted.

FIFTH. The name and business address of the sole incorporator are Gregory L. White, Esq., c/o Chappell White LLP, 268 Summer Street, Boston, Massachusetts 02210.

SIXTH. In furtherance of, and not in limitation of, powers conferred by statute, it is further provided:

A. The Board of Directors is expressly authorized to adopt, amend or repeal the By-laws of the Corporation.

B. Election of directors need not be by written ballot unless the By-laws of the Corporation shall so provide.

C. The books and records of the Corporation may be kept at such place within or without the State of Delaware as the By-laws of the Corporation may provide or as may be designated from time to time by the Board of Directors.

SEVENTH. Whenever a compromise or arrangement is proposed between the Corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of the Corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for the Corporation under the provisions of section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for the Corporation under the provisions of section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of the Corporation, as the case may be, to be summoned in such manner as the said court directs. If a

majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of the Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of the Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of the Corporation, as the case may be, and also on the Corporation.

**EIGHTH.** Except to the extent that the General Corporation Law of the State of Delaware prohibits the elimination or limitation of liability of directors for breaches of fiduciary duty, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty as a director, notwithstanding any provision of law imposing such liability. No amendment to or repeal of this provision shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment.

**NINTH. 1. Actions, Suits and Proceedings Other than by or in the Right of the Corporation.** The Corporation shall indemnify each person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation), by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (all such persons being referred to hereafter as "Indemnitee"), or by reason of any action alleged to have been taken or omitted in such capacity, against all costs, charges and expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. Notwithstanding anything to the contrary in this Article, except as set forth in Section 6 below, the Corporation shall not indemnify an Indemnitee seeking indemnification in connection with a proceeding (or part thereof) initiated by the Indemnitee unless the initiation thereof was approved by the Board of Directors of the Corporation.

**2. Actions or Suits by or in the Right of the Corporation.** The Corporation shall indemnify any Indemnitee who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer or trustee of, or in a similar capacity with, another corporation,

partnership, joint venture, trust or other enterprise, or by reason of any action alleged to have been taken or omitted in such capacity, against all costs, charges and expenses (including attorneys' fees) and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of such liability but in view of all the circumstances of the case, such person is fairly and unreasonably entitled to indemnity for such costs, charges and expenses (including attorneys' fees) which the Court of Chancery of Delaware or such other court shall deem proper.

3. Indemnification for Costs, Charges and Expenses of Successful Party.

Notwithstanding the other provisions of this Article, to the extent that an Indemnitee has been successful, on the merits or otherwise, in defense of any action, suit or proceeding referred to in Sections 1 and 2 of this Article, or in defense of any claim, issue or matter therein, or on appeal from any such action, suit or proceeding, he shall be indemnified against all costs, charges and expenses (including attorneys' fees) actually and reasonably incurred by him or on his behalf in connection therewith.

4. Notification and Defense of Claim. As a condition precedent to his right to be indemnified, the Indemnitee must notify the Corporation in writing as soon as practicable of any action, suit, proceeding or investigation involving him for which indemnity will or could be sought. With respect to any action, suit, proceeding or investigation of which the Corporation is so notified, the Corporation will be entitled to participate therein at its own expense and/or to assume the defense thereof at its own expense, with legal counsel reasonably acceptable to such Indemnitee. After notice from the Corporation to the Indemnitee of its election so to assume such defense, the Corporation shall not be liable to the Indemnitee for any legal or other expenses subsequently incurred by the Indemnitee in connection with such claim, other than as provided below in this Section 4. The Indemnitee shall have the right to employ his own counsel in connection with such claim, but the fees and expenses of such counsel incurred after notice from the Corporation of its assumption of the defense thereof shall be at the expense of the Indemnitee unless (i) the employment of counsel by the Indemnitee has been authorized by the Corporation, (ii) counsel to the Indemnitee shall have reasonably concluded that there may be conflict of interest or position on any significant issue between the Corporation and the Indemnitee in the conduct of the defense of such action or (iii) the Corporation shall not in fact have employed counsel to assume the defense of such action, in each of which cases the fees and expenses of counsel for the Indemnitee shall be at the expense of the Corporation, except as otherwise expressly provided by this Article. The Corporation shall not be entitled to assume the defense of any claim brought by or in the right of the Corporation or as to which counsel for the Indemnitee shall have reasonably made the conclusion provided for in clause (ii) above.

5. Advance of Costs, Charges and Expenses. Subject to the provisions of Section 6 below, in the event that the Corporation does not assume the defense pursuant to Section 4 of this Article of any action, suit, proceeding or investigation of which the Corporation receives notice under this Article, any costs, charges and expenses (including attorneys' fees) incurred by an

Indemnitee in defending a civil or criminal action, suit, proceeding or investigation or any appeal therefrom shall be paid by the Corporation in advance of the final disposition of such matter, provided, however, that the payment of such costs, charges and expenses incurred by an Indemnitee in advance of the final disposition of such matter shall be made only upon receipt of an undertaking by or on behalf of the Indemnitee to repay all amounts so advanced in the event that it shall ultimately be determined that such Indemnitee is not entitled to be indemnified by the Corporation as authorized in this Article.

**6. Procedure for Indemnification.** Any indemnification or advancement of expenses pursuant to Section 1, 2, 3 or 5 of this Article shall be made promptly, and in any event within 60 days after receipt by the Corporation of the written request of the Indemnitee, unless with respect to requests under Section 1, 2 or 5 of the Corporation determines within such 60-day period that such Indemnitee did not meet the applicable standard of conduct set forth in Section 1 or 2, as the case may be. Such determination shall be made in each instance by (a) a majority vote of a quorum of the directors of the Corporation consisting of persons who are not at that time parties to the action, suit or proceeding in question ("disinterested directors"), (b) if no such quorum is obtainable, a majority vote of a committee of two or more disinterested directors, (c) a majority vote of a quorum of the outstanding shares of stock of all classes entitled to vote for directors, voting as a single class, which quorum shall consist of stockholders who are not at that time parties to the action, suit or proceeding in question, (d) independent legal counsel (who may be regular legal counsel to the Corporation) appointed for such purpose by vote of the directors in the manner specified in clause (a) or (b) above, or (e) a court of competent jurisdiction. The right to indemnification or advances as granted by this Article shall be enforceable by the Indemnitee in any court of competent jurisdiction if the Corporation denies such request, in whole or in part, or if no disposition thereof is made within the 60-day period referred to above. Such Indemnitee's costs, charges and expenses (including attorneys' fees) incurred in connection with successfully establishing his right to indemnification, in whole or in part, in any such proceeding shall also be indemnified by the Corporation. Unless otherwise provided by law, the burden of proving that the Indemnitee is not entitled to indemnification or advancement of expenses under this Article shall be on the Corporation.

**7. Subsequent Amendment.** No amendment, termination or repeal of this Article or of the relevant provisions of the Delaware General Corporation Law or any other applicable laws shall affect or diminish in any way the rights of any Indemnitee to indemnification under the provisions hereof with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the final adoption of such amendment, termination or repeal.

**8. Other Rights.** The indemnification and advancement of expenses provided by this Article shall not be deemed exclusive of any other rights to which an Indemnitee seeking indemnification or advancement of expenses may be entitled under any law (common or statutory), agreement or vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in any other capacity while holding office for the Corporation, and shall continue as to an Indemnitee who has ceased to be a director or officer, and shall inure to the benefit of the estate, heirs, executors and administrators of such Indemnitee. Nothing contained in this Article shall be deemed to prohibit, and the Corporation is specifically authorized to enter into, agreements with officers and directors providing



indemnification rights and procedures different from those set forth in this Article. In addition, the Corporation may, to the extent authorized from time to time by its Board of Directors, grant indemnification rights to other employees or agents of the Corporation or other persons serving the Corporation and such rights may be equivalent to, or greater or less than, those set forth in this Article.

9. Partial Indemnification. If an Indemnitee is entitled under any provision of this Article to indemnification by the Corporation for some or a portion of the costs, charges and expenses (including attorneys' fees), judgments, fines or amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with any action, suit, proceeding or investigation and any appeal therefrom but not, however, for the total amount thereof, the Corporation shall nevertheless indemnify the Indemnitee for the portion of such costs, charges and expenses (including attorneys' fees), judgments, fines or amounts paid in settlement to which such Indemnitee is entitled.

10. Insurance. The Corporation may purchase and maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise against any expense, liability or loss incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.

11. Merger or Consolidation. If the Corporation is merged into or consolidated with another corporation and the Corporation is not the surviving corporation, the surviving corporation shall assume the obligations of the Corporation under this Article with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the date of such merger or consolidation.

12. Savings Clause. If this Article or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify each Indemnitee as to any costs, charges and expenses (including attorneys' fees), judgments, fines and amounts paid in settlement in connection with any action, suit, proceeding or investigation, whether civil, criminal or administrative, including an action by or in the right of the Corporation, to the fullest extent permitted by any applicable portion of this Article that shall not have been invalidated and to the fullest extent permitted by applicable law.

13. Definitions. Terms used herein and defined in Section 145(h) and Section 145(i) of the Delaware General Corporation Law shall have the respective meanings assigned to such terms in such Section 145(h) and Section 145(i).

14. Subsequent Legislation. If the Delaware General Corporation Law is amended after adoption of this Article to expand further the indemnification permitted to Indemnitees, then the Corporation shall indemnify such persons to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

TENTH. The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter

prescribed by statute and this Certificate of Incorporation (as it may, from time to time, be amended, altered or changed), and all rights conferred upon stockholders herein are granted subject to this reservation.

IN WITNESS WHEREOF, the undersigned sole incorporator has executed this Certificate of Incorporation this 20 day of January, 2000.



---

Gregory L. White  
Sole Incorporator

**CHAPPELL WHITE LLP**

COUNSELLORS AT LAW  
248 SUMMER STREET  
BOSTON, MASSACHUSETTS 02210

TELEPHONE (617) 772-5500

FACSIMILE (617) 772-9696

E-MAIL: lawfirm@chappellwhite.com

**FACSIMILE COVER SHEET**

**DATE:** January 20, 2000

**TIME:** 2:00 PM

**FROM:** Maureen T. Golden

**TO:** Ms. Jane Krayer  
Corporations Division  
Secy. of State's Office-Delaware

**PHONE NO.:** 302-739-3073

**FAX NO.:** 302-636-5454

**MESSAGE/COMMENTS/INSTRUCTIONS:**

**Re:** Order No. 559004, Placed by Susan @ CSC Corporation  
Entity to be Incorporated: ServiSense.com, Inc.  
Name Registration No. 3155044, Due to Expire: 2/5/00

The name was reserved by our client, TelEnergy, Incorporated.

This filing is being done by CSC Corporation, which is serving as Registered Agent for ServiSense.com, Inc.

We represent TelEnergy, Incorporated and ServiSense.com, Inc.

As Susan from CSC has indicated, we need this filing to have today's date. **PLEASE CONTACT ME IF YOU DO NOT RECEIVE THIS ENTIRE FAX TRANSMISSION.**

We are sending a total of 38 pages, including this cover sheet. We are transmitting on a XEROX WORK CENTER PRO 657. If you do not receive all of these pages or if there is any difficulty in transmission, please call (617) 772-9600 and ask for the fax operator.

-----Account No. 9999-000 (TelEnergy)-----

**THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL TO WHOM IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THIS ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE UNITED STATES POSTAL SERVICE. THANK YOU.**



**CERTIFICATE OF MERGER**  
**OF**  
**TELENERGY, INCORPORATED**  
**(A MASSACHUSETTS CORPORATION)**  
**INTO**  
**SERVISENSE.COM, INC.**  
**(A DELAWARE CORPORATION)**

\* \* \* \* \*

It is hereby certified that:

1. The constituent business corporations participating in the merger herein certified  
are:
  - (1) TelEnergy, Incorporated, which is incorporated under the laws of the Commonwealth of Massachusetts; and
  - (2) ServiSense.com, Inc., which is incorporated under the laws of the State of Delaware.
2. A Plan and Agreement of Merger has been approved, adopted, certified, executed and acknowledged by each of the aforesaid constituent entities in accordance with the provisions of subsection (c) of Section 252 of the General Corporation Law of the State of Delaware, by TelEnergy, Incorporated in accordance with Section 79 of Chapter 156B of the Massachusetts General Laws of the Commonwealth of Massachusetts and by ServiSense.com, Inc in the same manner as is provided in Section 252 of the General Corporation Law of the State of Delaware.
3. The name of the surviving corporation in the merger herein certified is ServiSense.com, Inc., which will continue its existence as said surviving corporation until amended and changed pursuant to the provisions of the General Corporation Law of the State of Delaware.
4. The Certificate of Incorporation of ServiSense.com, Inc., as now in force and effect, shall continue to be the Certificate of Incorporation of said surviving corporation until amended and changed pursuant to the provisions of the General Corporation Law of the State of Delaware.
5. The executed Plan and Agreement of Merger between the aforesaid constituent entities is on file at the principal place of business of the aforesaid surviving corporation, the address of which is as follows:

180 Wells Avenue, Newton, MA 02459

6. A copy of the aforesaid Plan and Agreement of Merger will be furnished by the aforesaid surviving corporation, on request and without cost, to any shareholder of each of the aforesaid constituent entities.


7. The authorized capital stock of TelEnergy, Incorporated, the only constituent corporation which is not a Delaware corporation, is 500,000 shares of common stock, no par value, and 100,000 shares of preferred stock, no par value, of which 25,000 shares have been designated Series A Convertible Preferred Stock, 30,000 shares have been designated Series B Convertible Preferred Stock, 25,000 shares have been designated Series C Convertible Preferred Stock, 12,000 shares have been designated Series CC Convertible Preferred Stock, and 7,052 shares have been designated Series CCC Convertible Preferred Stock.

8. The Plan and Agreement of Merger between the aforesaid constituent corporations provides that the Merger herein certified shall become effective on the date and at the time when this Certificate of Merger is filed with the Secretary of State of the State of Delaware.

[REMAINDER OF PAGE DELIBERATELY LEFT BLANK]

Dated: February 22, 2000

SERVISENSE.COM, INC.

By:   
Christopher J. McKeown, President

Dated: February 22, 2000

TELEENERGY, INCORPORATED.

By:   
Christopher J. McKeown, President

**ServiSense.com, Inc.**

**ATTACHMENT III**

Financial Information



CONFIDENTIAL

# [ ]

**ServiSense.com, Inc.**

**ATTACHMENT IV**

**Motion for a Protective Order to Preserve  
Confidentiality of Application Exhibit**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

\_\_\_\_\_  
)  
In the Matter of the Application                    )  
of ServiSense.com, Inc.                                )  
For Authority to Provide Local Exchange        )  
Service on a Resale Basis                            )  
\_\_\_\_\_

**MOTION FOR A PROTECTIVE ORDER TO PRESERVE  
CONFIDENTIALITY OF APPLICATION EXHIBITS**

In support of its Application to the Public Utilities Commission of the State of South Dakota ("PUC") for Authority to Provide Local Exchange Service on a Resale Basis in South Dakota, ServiSense.com, Inc. ("ServiSense" or "Applicant"), by its attorneys, hereby moves for a protective order to preserve the confidentiality of Applicant's financial information, to be submitted as Applicant's Attachment III to its Application. In support whereof Applicant incorporates by reference the information set forth in its application and provides the following information and arguments:

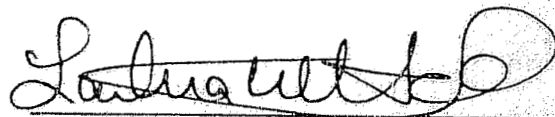
- (1) Financial information requested by the PUC in Attachment III concerns the most recent financial statements for 1999 and projections. Applicant considers such information proprietary and confidential.
- (2) ServiSense is a privately owned company seeking to provide local telecommunications services in South Dakota. Given the competitive environment in which ServiSense must operate, it is imperative that ServiSense be allowed to disclose its financial resources under seal, precluding its numerous competitors from gaining access to this sensitive material.

(3) In addition, the PUC may be guided by the fact that maintaining the confidentiality of ServiSense' financial statements will in no way prejudice ServiSense' competitors. The PUC will have the financial information necessary for it to make an informed decision about granting ServiSense' application to provide resale local telecommunications service. The PUC will, therefore, be able to ensure that ServiSense complies with PUC requirements as have others certified by the PUC. ServiSense will therefore receive no regulatory advantage over its competitors.

WHEREFORE, Applicant respectfully moves the PUC for a protective order to preserve the confidentiality and limit the dissemination of financial information contained in Attachment III to the Commission's members and staff.

Respectfully submitted this 28<sup>th</sup> day of June 2000.

For ServiSense.com, Inc.



Loubna Haddad, Esq.  
The Helein Law Group, P.C.  
8180 Greensboro Drive, Suite 700  
McLean, VA 22102  
(v) (703) 714-1300  
(f) (703) 714-1330

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

\_\_\_\_\_)  
In the Matter of the Application )  
of ServiSense.com, Inc. )  
For Authority to Provide Local Exchange )  
Service on a Resale Basis )  
\_\_\_\_\_)

ORDER

Upon consideration of ServiSense.com, Inc.'s Motion For a Protective Order to Preserve Confidentiality of Application Attachments, it is on this \_\_\_ Day of May, 2000,

ORDERED that Attachment III, regarding financial information, to the above captioned application be protected from public view and held in the strictest confidentiality by the State of South Dakota's Public Service Commission.

\_\_\_\_\_

Administrative Law Judge

**ServiSense.com, Inc.**

**ATTACHMENT V**

Proposed Tariff

**TITLE SHEET**

**RESOLD TELECOMMUNICATIONS TARIFF**

**OF**

**ServiSense.com, Inc.**

180 Wells Avenue, Suite 450  
Newton, MA 02459-3302

This Tariff applies to the Resold Telecommunications Services furnished by ServiSense.com, Inc. ("Carrier") between one or more points in the State of South Dakota. This Tariff is on file with the South Dakota Public Utilities Commission and copies may be inspected during normal business hours at Carrier's principal place of business.

**CHECK SHEET**

The sheets of this Tariff are effective as of the date shown at the bottom of the respective sheets. Original and revised sheets as named below comprise all changes from the original tariff and are currently in effect as of the date on the bottom of this page.

<u>Page</u>	<u>Revision No.</u>	<u>Page</u>	<u>Revision No.</u>	<u>Page</u>	<u>Revision No.</u>
1	Original			36	Original
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3	Original	19	Original	38	Original
4	Original	20	Original	39	Original
5	Original	21	Original	40	Original
6	Original			41	Original
		SECTION 4		42	Original
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8	Original	SECTION 5		45	Original
9	Original	23	Original		
		24	Original	SECTION 6	
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10	Original	26	Original		
11	Original	27	Original		
12	Original	28	Original		
13	Original	29	Original		
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## SYMBOLS

The following are the only symbols used for the purposes indicated below:

- (C) - Signifies a **changed** condition or regulation.
- (D) - Signifies a **deleted** or **discontinued** rate, regulation or condition.
- (I) - Signifies a change resulting in an **increase** to a Customer's bill.
- (M) - Signifies material **moved** from another Tariff location.
- (N) - Signifies a **new** rate, regulation or condition.
- (R) - Signifies a change resulting in a **reduction** to a Customer's bill.
- (T) - Signifies a change in **text** but no change in rate or charge.

Tariff

## TARIFF FORMAT

- A. Sheet Numbering - Sheet numbers appear in the upper right corner of the page. Sheets are numbered sequentially. However, new sheets are occasionally added to the Tariff. When a new sheet is added between sheets already in effect, a decimal is added. For example, a new sheet added between sheets 14 and 15 would be 14.1.
- B. Sheet Revision Numbers - Revision numbers also appear in the upper right corner of each page. These numbers are used to determine the most current sheet version on file with the P.U.C. For example, the 4th revised Sheet cancels the 3rd revised Sheet 14. Because of various suspension periods deferrals, etc. the P.U.C. follows in their Tariff approval process, the most current sheet number on file with the P.U.C. is not always the Tariff page in effect.
- C. Paragraph Numbering Sequence - There are levels of alphanumeric coding. Each level of coding is subservient to its next higher level. The following is an example of the numbering sequence suggested for use in Tariffs.
- 2.1
  - 2.1.A
  - 2.1.A.1
  - 2.1.A.1.a
- D. Check Sheets - When a Tariff filing is made with the P.U.C., an undated check sheet accompanies the Tariff filing. The check sheet lists the sheets contained in the Tariff, with a cross-reference to the current revision number. When new pages are added, the check sheet is changed to reflect the revision. All revisions made in a given filing are designated by an asterisk (\*). There will be no other symbols used on the check sheet if these are the only changes made to it (i.e., the format, etc. remains the same, just revised revision levels on some pages). The Tariff user should refer to the latest check sheet to find out if a particular sheet is the most current on file with the P.U.C.

Board:

---

### APPLICATION OF TARIFF

This Tariff set forth the service offerings, rates, terms and conditions applicable to the furnishing of interstate telecommunication services by means of resold services of ServiSense.com, Inc.

The provision of local exchange, regional toll, and long distance telecommunications services is subject to existing regulations and terms and conditions specified in this Tariff and may be revised, added to or supplemented by superseding issues.

## SECTION 1. TECHNICAL TERMS AND ABBREVIATIONS

Access Line - An arrangement from a local exchange telephone company or other common carrier, using either dedicated or switched access, which connects a Customer's location to Carrier's location or switching center.

Authorization Code - A numerical code, one or more of which may be assigned to a Customer, to enable Carrier to identify the origin of service of the Customer so it may rate and bill the call. All authorization codes shall be the sole property of Carrier and no Customer shall have any property or other right or interest in the use of any particular authorization code. Automatic numbering identification (ANI) may be used as or in connection with the authorization code.

Automatic Numbering Identification (ANI) - A type of signaling provided by a local exchange telephone company which automatically identifies the local exchange line from which a call originates.

Billed Party - The person or entity responsible for payment of the Company's service.

Business Day - Monday-Friday 8:00am-5:00; Saturdays, Sundays and legal holidays are not recognized as business days.

Called Station - The termination point of a call.

Calling Card - A card issued by the Company containing sufficient information to enable charges for calls made to be properly billed on a pre-arranged basis. (see "Travel Card" definition)

Calling Station - The originating point of a call.

Carrier or Common Carrier - An authorized company or entity providing underlying network telecommunications services to the public.

Company or Carrier - Servisense.com, Inc.

Customer - The person or legal entity which subscribes to, utilizes, or enters into arrangements for Carrier's telecommunications services and is responsible for payment of Carrier's services.

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**SECTION I. TECHNICAL TERMS AND ABBREVIATIONS (Cont'd)**

Customer Dialed Calling Card Call - A Calling Card Call which does not require intervention by an attended operator position to complete.

Debit Card - A Calling Card issued by the Company in return for pre-payment of an amount certain by the Customer. (see "Travel Card" definition)

Commission or P.U.C. - South Dakota Public Utilities Commission.

Holiday - New Year's Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day.

ILEC - Incumbent Local Exchange Carrier.

Interruption - The inability to complete calls due to equipment malfunctions or human errors. Interruption shall not include, and no allowance shall be given for service difficulties such as slow dial tone, circuits, busy or other network and/or switching capacity shortages. Nor shall interruption include the failure of any service or facilities provided by a common Carrier or other entity other than the Carrier. Any Interruption allowance provided within this Tariff by Carrier shall not apply where service is Interrupted by the negligence or willful act of the Customer, or where the Carrier, pursuant to the terms of this Tariff, terminates service because of non-payment of bills, unlawful or improper use of the Carrier's facilities or service, or any other reason covered by this Tariff or applicable by law.

LATA - Local Access and Transport Area - A geographical area established by the U.S. District Court for the District of Columbia in Civil Action No. 82-0192, within which a local exchange company provides communications services.

Local Exchange Carrier - A company which furnishes local exchange telecommunications services.

Measured Charge - A charge assessed on a per minute basis in calculation a portion of the charges due for a completed inter-exchange call.

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## SECTION 1. TECHNICAL TERMS AND ABBREVIATIONS (Cont'd)

Residential Rules - The Rules and Regulations Relating to Telephone Service to Residential Customers as adopted by the South Dakota Public Utilities Commission and applicable South Dakota law.

Subscriber - (see "Customer" definition)

Telecommunications - The transmission of voice communications or, subject to the transmission capabilities of the service, the transmission of data, facsimile, signaling, metering, or any other similar communications or form of intelligence.

Travel Card - A pre-paid or post-paid calling card issued by Carrier which allows Customers to make telephone calls and charge the calls to a credit or debit account. Calls charged to a Carrier-issued credit travel card will appear on the Customer's regular monthly bill. Calls charges to a Carrier-issued debit Travel Card will be charged against the debit account.

User - Any person or entity which makes use of services provided under this Tariff.

Verified Account Code - A numerical code used to identify users or groups of users on an account and to allocate the costs of service accordingly. Account codes are verified by a pre-defined list of codes maintained by the Company.

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## SECTION 2. RULES AND REGULATIONS

### 2.1 Undertaking of the Company

- 2.1.A. This Tariff contains the regulations and rates applicable to the resale of local, intrastate and interstate telecommunications services provided by Company to business and residential customers within the State of South Dakota.
- 2.1.B. Company is a pure reseller and as such has no direct control over availability of service switching, operator services, 911 or E911 emergency service. Company is not part of a joint undertaking with any other entity providing telecommunications channels, facilities or services. Company resells the Telecommunications Services of underlying common carriers.
- 2.1.C. The rates and regulations contained in this Tariff apply only to the services furnished by Carrier and do not apply, unless otherwise specified, to the lines, facilities, or services provided by a local exchange telephone company or other common carrier for use in accessing the services of Carrier.
- 2.1.D. The Customer is entitled to limit the use of Carrier's services by End User's at the Customer's facilities.

### 2.2 Use of Services

- 2.2.A. Carrier's Services may be used for any lawful propose consistent with the transmission and switching parameters of the telecommunications facilities utilized in the provision of services.
- 2.2.B. The use of Carrier's services without payment for service or attempting to avoid payment for service by fraudulent means or devices, schemes, false or invalid numbers, or false calling or credit cards is prohibited.



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## SECTION 2. RULES AND REGULATIONS (Cont'd)

### 2.2 Use of Services (Cont'd)

- 2.2.C. Carrier's services are available for use twenty-four (24) hours per day, seven (7) days per week.
- 2.2.D. Carrier does not transmit messages pursuant to this Tariff, but its services may be used for that purpose.
- 2.2.E. Carrier's services may be canceled for nonpayment of uncontested bill charges or for other violations of this Tariff.

### 2.3 Liability of Carrier

- 2.3.A. Due to unavailability of errors incident to the services and to the use of the facilities furnished by the Carrier or connecting carriers, the services and facilities furnished by the Carrier and connecting carriers are subject to the terms, conditions and limitations set forth herein.
- 2.3.B. When service is interrupted for a period of at least twenty-four (24) hours after notice by the Customer to Carrier, an allowance equal to 1/28 of fixed billing cycle charges for service and facilities furnished by the Carrier rendered useless or substantially impaired shall apply to each twenty-four (24) hours during which the interruption continues after notice by the Customer to the Carrier. Credit in any billing period shall not exceed the total non-usage charges for that period for the services and facilities furnished by the Carrier rendered useless or substantially impaired. No allowance shall apply to any non-recurring or usage charges. No credit shall be issued for interruptions of less than six (6) hours.
- 2.3.C. The liability of the Carrier for any loss or damages whatsoever arising out to mistakes, omissions, delays, errors, defects or failures in the service, or in any non-regulated equipment or facilities, shall not exceed an amount equivalent to the proportionate charge to the Customer for the period during which the mistake, omission, delay, defect, or failure existed, or the Tariff charge for the call involved. Under no circumstances shall the Carrier be liable for any consequential, special, indirect, incidental, or exemplary damages.

Resol:

**SECTION 2. RULES AND REGULATIONS (Cont'd)****23. Liability of Carrier (Cont'd)**

- 23.D. Carrier shall not be liable for any act or omission or any connecting carrier, underlying carrier, or local exchange company; for acts or omission of any other providers of connections, facilities, or for service other than the Carrier; or for culpable conduct of the Customer or failure of equipment, facilities or connection provided by the Customer.
- 23.E. Carrier shall not be liable for defacement of, or damage to, the premises of a Customer resulting from the attachment or instruments, apparatus and associated wiring furnished by the Carrier on such Customer's premises or by the installation or removal thereof, when such defacement or damage; is not the result of the Carrier's gross negligence. No agents or employees of the other participating carriers shall be deemed to be agents or employees of Carrier.
- 23.F. Carrier shall not be liable for any failure of performance due to causes beyond its control, including, without being limited to, acts of God, fires, floods or other catastrophes, national emergencies, insurrections, riots or wars, strikes, lockouts, work stoppage or other labor difficulties, acts or omissions of other carriers, and any law, order, regulation or other action of any governing authority or agency thereof.
- 23.G. Carrier shall not be liable for any unlawful or unauthorized use of Carrier's facilities and service, unless such use results solely from the negligence or willful misconduct of Carrier.
- 23.H. The Customer is responsible for taking all necessary legal steps for interconnecting Customer-provided terminal equipment with Carrier's facilities. The Customer shall secure all licenses, permits, rights-of-way, and other arrangements necessary for such interconnection.

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**SECTION 2. RULES AND REGULATIONS (Cont'd)****2. Responsibilities of the Customer**

- 2.1A.** The Customer is responsible for placing any necessary orders for complying with Tariff regulations; for the placement of any stickers or tent cards provided by Carrier or as required by law; and for assuring that End Users comply with Tariff regulations. The Customers shall ensure compliance with any applicable laws, regulations, orders or other requirements (as they exist from time to time) of any governmental entity relating to services provided or made available by the Customer to End Users. The Customer is also responsible for the payment of charges for calls originated at The Customer's numbers which are not collect, third party, calling card, or credit card calls.
- 2.1B.** The Customer is responsible for charges incurred for special construction and/or special facilities which the Customer requests and which are ordered by Carrier on the Customer's behalf.
- 2.1C.** If required for the provision of Carrier's services, the Customer must provide any equipment space, supporting structure, conduit and electrical power without charge to Carrier.
- 2.1D.** The Customer is responsible for arranging access to its premises at times mutually agreeable to Carrier and the Customer when required for Carrier personnel to install, repair, maintain, program, inspect or remove equipment with the provision of Carrier's services.

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**SECTION 2. RULES AND REGULATIONS (Cont'd)****2.4 Responsibilities of the Customer (Cont'd)**

- 2.4E.** The Customer shall ensure that the equipment and/or system is properly interfaced with Carrier facilities or services, that the signals emitted into Carrier's network are of the proper mode, bandwidth, power, and signal level for the intended use of the Customer and in compliance with the criteria set forth in this Tariff and that the signals do not damage equipment, injure personnel, or degrade service to other Customers.
- 2.4E.1** If the Federal Communications Commission or some other appropriate certifying body certifies terminal equipment as being technically acceptable for direct electrical connection with interstate communications service, Carrier will permit such equipment to be connected with its channels without use of protective interface devices.
- 2.4E.2** If the Customer fails to maintain the equipment and/or the system properly, with resulting imminent harm to carrier equipment, personnel, or the quality of service to other Customers, Carrier may, upon written notice, require the use of protective equipment at the Customer's expense. If this fails to produce satisfactory quality and safety, Carrier may, upon five (5) days written notice, via first class U.S. mail terminate the Customer's service.
- 2.4F.** The Customer is responsible for payment of the charges set forth in this Tariff. The Company reserves the right to refuse an application of service made by a present or former Customer who is, or was previously, indebted to the Company.
- 2.4G.** The Customer is responsible for compliance with the applicable regulations set forth in this Tariff.
- 2.4H.** The Customer shall indemnify and save Carrier harmless from all liability disclaimed by Carrier as specified in Section 2.3. above, arising in connection with the provision of service by Carrier.

## SECTION 2. RULES AND REGULATIONS (Cont'd)

### 2.1 Cancellation or Interruption of Services

**2.5.A.** Without incurring liability, Carrier may discontinue services to a customer or may withhold the provision of ordered or contracted services, subject to the procedures set forth in 2.5.B. following:

1. For nonpayment of any sum due Carrier for more than thirty (30) days after issuance of the bill for the amount due;
2. For violation of any of the provisions of this Tariff;
3. For violation of any law, rule, regulation or policy of any governing authority having jurisdiction over Carrier's services; or
4. By reason of any order or decision of a court, public service commission or federal regulatory body or other governing authority prohibiting Carrier from furnishing its services.

### 2.5.B. Procedures for discontinuance of existing service:

1. Carrier may discontinue service without notice for any of the following reasons:
  - a. If a Customer or User causes or permits any signals or voltages to be transmitted over Carrier's network in such a manner as to cause a hazard or to interfere with Carrier's service to others.
  - b. If a Customer or User uses Carrier's services in a manner to violate the law.

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**SECTION 2. RULES AND REGULATIONS (Cont'd)****2.1 Cancellation or Interruption of Services (Cont'd)****2.1.H. Procedures for discontinuance of existing service (Cont'd)**

2. In all other circumstances, Carrier will provide the Customer with written notice via first class U.S. mail stating the reason for discontinuance, and will allow the Customer not less than ten (10) days to remove the cause for discontinuance.
3. In cases of non-payment of charges due, the Customer will be given five (5) days written notice via first class mail that disconnection will take place. Disconnection may take place at any time within five (5) business days of mailing of the notice.
4. Customer may be given an opportunity to make full payment of all undisputed charges by negotiating a mutually agreeable payment plan. If Customer breaks a payment plan with the Company, Company is not obligated to enter into any further plans. Service may be terminated in accordance with these procedures.
5. Service will not be discontinued on any non-business day where Carrier is not prepared to accept payment of the amount due and to reconnect.

**2.1.C.** Without incurring liability, Carrier may interrupt the provision of services at any time in order to perform tests and inspection to assure compliance with tariff regulations and the proper installation and operation of Customer and Carrier's equipment and facilities and may continue such interruption until any items of non-compliance or improper equipment operation so identified are rectified.

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## SECTION 2. RULES AND REGULATIONS (Cont'd)

### 2.5 Cancellation or Interruption of Services (Cont'd)

2.5.D. Service may be discontinued by Carrier, without notice to the Customer, by blocking traffic to certain countries, cities, or NXX exchanges, or by blocking calls using certain Customer authorization codes, when Carrier deems it necessary to take such action to prevent unlawful use of its service. Carrier will restore service as soon as it can be provided without undue risk, and will, upon request by the Customer affected, assist in a new authorization code to replace the one that has been deactivated.

### 2.6 Billing Arrangements

2.6.A. Customers will be billed directly by Carrier or its intermediary.

2.6.B. Carrier will render bills monthly. Payment is due within thirty (30) day after Carrier renders the bills.

2.6.C. Carrier may impose a late payment charge of 1.5% (18% per year) on any bill not paid within thirty (30) days of receipt by the Customer.

2.6.D. Carrier agrees to abide by all rules and regulations imposed upon it by the P.U.C. and applicable South Dakota law.

### 2.7 Validation of Credit

Carrier reserves the right to validate the credit worthiness of Customers.

### 2.8 Contested Charges

All bills are presumed accurate, and will be binding on the Customer unless objection is received by Carrier within thirty (30) days after such bills are rendered. In the case of a billing dispute between the Customer and Carrier for service furnished to the Customer or End User, which cannot be settled with mutual satisfaction, the Customer can take the following course of action within thirty (30) days of the billing date:

Insert:

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## SECTION 2. RULES AND REGULATIONS (Cont'd)

### 2.8 Contested Charges (Cont'd)

2.8.A. First, the Customer may request, and Carrier will provide, an in-depth review of the disputed amount. The undisputed portion and subsequent bills must be paid on a timely basis or the service may be subject to disconnection.

2.8.B. Second, if there is still a disagreement about the disputed amount after the investigation and review by a manager of Carrier, the Customer may file an appropriate complaint with the Commission. The address and the telephone number of the Commission is:

The South Dakota Public Utilities Commission  
State Capitol, 500 East Capitol Street  
Pierre, SD 57501-5070  
Telephone: (605) 773-3201  
Facsimile: (605) 773-3809

### 2.9 Billing Entry Conditions

When billing functions on behalf of Carrier are performed by local exchange telephone companies, or others, the payment conditions and regulations of such companies apply, including any applicable interest and/or late payment charge conditions.

### 2.10 Deposits

Carrier does not generally require a deposit from the Customer. At Carrier's discretion, a deposit may be required in accordance with applicable South Dakota law.

### 2.11 Taxes

All federal excise taxes, FCC charges/fees and state and local sales taxes, are billed as separate line items on periodic bills and are not included in the quoted rates in this Tariff. Customer shall be responsible for all applicable taxes.



### SECTION 3. DESCRIPTION OF SERVICES

#### 3.1 1+ Inbound/Outbound Switched and Dedicated Long Distance Services

The Company offers 1+ inbound/outbound intrastate interexchange long distance service utilizing switched or dedicated access arrangements between the Customers Premises and the Company's facilities for call origination. Call termination is completed through a combination of Company facilities and LEC switched access arrangements.

#### 3.2 Long Distance Service Area

Company's long distance services are available in all equal access exchanges throughout the state.

#### 3.3 Calling Card Service

The Company's Calling Card Service permits Customers to place calls utilizing Company issued Calling Cards for billing purposes.

#### 3.4 Timing of Calls

3.4.A. Long distance, usage charges are based on the actual usage of the Company's service. Chargeable time begins when a connection is established between the Calling Station and the Called Station. Chargeable time ends when either party "hangs up" thereby releasing the network connection.

3.4.B. Unless otherwise specified in this Tariff, the minimum call duration for billing purposes is eighteen (18) seconds for intrastate long distance calls. In addition, unless otherwise specified in this Tariff, usage is measured thereafter in six (6) second increments and rounded to the next higher six (6) second period.

3.4.C. There is no charge for incomplete calls.

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**SECTION 3. DESCRIPTION OF SERVICES (Cont'd)****3.A Local Exchange Service**

The Company provides a Customer with a voice-grade communications channel and unique telephone number address(es) which enable the Customer to:

1. Place calls to any calling station in the local calling area as defined in this tariff;
2. Receive calls from any calling station in the local calling area as defined in this tariff;
3. Access Enhanced 911 Emergency Service of the underlying carrier;
4. Access the interexchange carrier selected by the Customer for interLATA, intraLATA, interstate or international calling;
5. Access Operator Services;
6. Access Directory Assistance Services;
7. Place or receive calls to 800/888/877 telephone numbers;
8. Access Telecommunications Relay Service.

**3.B Local Exchange Service Area**

3.B.A. Unless otherwise indicated in this tariff, the exchange areas for all customers whose premises are located in US West territory, will be the same as US West exchange areas.

3.B.B. The Company concurs with US West exchange areas and exchange maps listed in its respective Local Exchange Tariffs which are on file with the Commission.

Insert:

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**SECTION 3. DESCRIPTION OF SERVICES (Cont'd)****3.7 Emergency Calls (Enhanced 911)**

Allows Customers to reach the appropriate emergency services including police, fire and medical assistance. Enhanced 911 has the ability to selectively route an emergency call to the primary E911 provider so that it reaches the appropriate emergency services provider located closest to the Caller's location. In addition, the Customer's address and telephone information will be provided to the primary E911 provider for display at the Public Service Answering Point (PSAP).

Carrier has no control over the E911 services of its underlying carrier, and shall not be liable for any harm of any kind (including but not limited to damage to person, property or goods) for the failure of any E911 service.

**3.8 Promotions**

Carrier may from time to time offer promotional offerings of its services which may include waiving or reducing the applicable charges for the promoted service. Promotions are subject to P.U.C. Tariff approval.

Verizon

**SECTION 4. LONG DISTANCE RATES AND CHARGES**

**4.1 Long Distance Toll Usage Rates**

The following are usage charges which apply to all 1+, direct dialed intrastate long distance calls. These rates are in effect 24 hours per day, 7 days a week.

4.1.A. Switched and Dedicated Inbound and Outbound Usage Rates     \$.099/minute

**4.2 Calling Card Usage Rates**

Calling Card Usage Rates Calling card calls are billed in 6 second increments with and 18 second minimum.

18 second minimum                      6 second increments

\$0.075                                      \$0.025

**4.3 Directory Assistance**

Per Use                                      \$0.50

[REDACTED]

## SECTION 5 - Local Exchange Service

## 5.1 Service Charges

## 5.1.1 Nonrecurring Charges

## A. General

1. A nonrecurring charge is a one-time charge made under certain conditions, to connect, move or change telephone service or facilities.
2. Nonrecurring charges, where applicable, are specified with services as stated in each section of this Tariff, unless otherwise specified or included in this section.
3. Nonrecurring charges apply, except as specified in this section or in other sections of the Tariff, to customer-initiated moves and changes of service and maintenance of inside wire. A change is when telephone service is changed at the customer's request.
4. Nonrecurring charges for moves or changes apply separately to each unit of service moved or changed.

Where the charge is the estimated cost of all moves, changes or rearrangements made at one time, apply the estimated cost as defined in Section 4.

5. To move items of service subject to Installation Charges, apply the Installation Charge unless otherwise specified, plus the applicable nonrecurring charges specified elsewhere in this Tariff.

## B. Terms and Conditions

1. Nonrecurring charges do not apply for Company initiated work, including, but not limited to the following:
  - a. Public Access Line Service.
  - b. Telephone service located on a customer's premises but used exclusively by the Company for maintenance or training activities.
  - c. Work to move or change customer's telephone service if required and initiated by the Company.
  - d. Hotel Message Rate Trunks.
  - e. Service Stations.

## SECTION 5 - Local Exchange Service

## 5.1 Service Charges (Cont'd)

## 5.1.1 Nonrecurring Charges (Cont'd)

## A. Terms and Conditions (Cont'd)

1. Nonrecurring charges do not apply for the following customer initiated requests providing work is limited to that specified:

- a. Complete termination of service.
- b. Suspension of service without reference of calls.
- c. The "From" portion of work involved in a transfer of service from one to another premises.
- d. The temporarily detaching and subsequently reaffixing interior wiring or connecting block (without a change in location) incident to remodeling or rearrangement of furniture.
- e. The reestablishment of service following destruction of a customer's premises or a portion thereof resulting from explosion, fire, flood, storm, accident or the action of a public enemy. In such cases, and when possible, service up to and including the Network Interface will be reestablished without nonrecurring charges. At the customer's option, the reestablished service may be at an immediately occupied location or a subsequently occupied location.
- f. The establishment of Company-owned main service in place of stations formerly served by Service Station Companies.
- g. Disconnection and/or removal of the following items of service providing no other work subject to nonrecurring charges is involved:
  - o Main or extension station lines.
  - o Other items of service for which a recurring charge applies or substitutions of services that result in a reduction in recurring charges.

Issued:

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SECTION 5 -Local Exchange Service

5.1 Service Charges (Cont'd)

5.1.1 Nonrecurring Charges (Cont'd)

5.1.1.1 Terms and Conditions (Cont'd)

2. (Cont'd)

h. Establishing, changing or discontinuing arrangements for:

- Mail bill Address Arrangements
- Other special Billing Arrangements

i. Cancellation of Orders.

j. Changes in primary listings for either residence or business service due to a change in responsibility provided service and billing are continuous and no final bill is rendered.

k. Nonrecurring Charges apply, as appropriate, for change in class of service.

Tariff

## SECTION 5 - Local Exchange Service

- 5.1 Service Charges (Cont'd)  
 5.1.1 Nonrecurring Charges (Cont'd)  
 5.1.2 Terms and Conditions (Cont'd)

## 4. Nonrecurring Charges

a. A nonrecurring charge is a one-time charge made under certain conditions, to connect, move or change telephone service or facilities.

b. Nonrecurring charges, where applicable, are specified with services as stated in each section of the Tariff, unless otherwise specified or included in this section.

c. Nonrecurring charges do not apply for the following customer initiated requests providing work is limited to that specified:

- \* Changes from one to another grade of service (one-, two-, four-party or rural service) including changes in wiring which may be required by such change in grade.

d. Nonrecurring charges apply as appropriate for change in class of service.

## e. Charges

	NONRECURRING CHARGE	
	RESIDENCE	BUSINESS
* Change due to regrading from business to residence service, each	\$9.55	\$10.00
* Change of any class of local service to any other class of local service[ 1]	\$9.55	\$10.00

(1) Does not apply to residence customers converting from flat rate service to measured service, measured service to flat rate service, or between any Local Measured Service offerings.



Issued:

## SECTION 5 - Local Exchange Service

## 5.2 Exchange Areas

## 5.2.1 EXCHANGES AND THEIR EXTENDED AREA SERVICE (EAS) POINTS

## A. General

Extended Area Service entitles the customer to service without other charge to all access lines connected with a designated exchange, commonly called Extended Area Service. EAS refers to such service provided by means of special extended service circuits between the two exchanges.

Extended area service may not be terminated once established except through a termination plan that continues rates for a sufficient period of time after the investment is removed to recover costs. Such consideration may be made on a case-by-case basis.

Where EAS is provided, the exchanges with which it is provided are shown indented below the principal exchange.

EXCHANGE	RATE GROUP
Aberdeen	E
Cresbard[1]	
Frederick[1]	
Mellotte[1]	
Arlington	C
Lake Preston	
Belle Fourche	C
Niand[1]	
W. Belle Fourche	
Canton / Fairview	C
Worthing[1]	
Cavour E	
Huron / Iniquois	
Chamberlain	C
H. Thompson[1]	
Kimball[1]	
Petersana[1]	
Reliance[1]	
Colman	C
Paradiseau	

[1] Non-Company Exchanges.

Exchanged

SECTION 5 - Local Exchange Service

5.2 Exchange Areas (Cont'd)

5.2.1 EXCHANGES AND THEIR EXTENDED AREA SERVICE (EAS) POINTS (Cont'd)

EXCHANGE	RATE GROUP
Deadwood	E
Lead	
Spearfish	
Whitewood	
W. Spearfish	
DeSmet	C
Lake Preston	
Elk Point	A
Flandreau	C
Colman	
Harrisburg	I
Lemmon(1)	
Sioux Falls Tea	
Hill City	G
Herron(1)	
Keystone(1)	
Rapid City	
Huron	E
Cannon	
Hitchcock(1)	
Inspirois	
Wobey(1)	
Inspirois	E
Cannon	
Huron	
Lake Preston	C
Arlington (includes towns of Badger and Hettinger)	
DeSmet	

(1) See Company Exchanges.

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SECTION 5 - Local Exchange Service

2.2 Exchange Areas (Cont'd)

2.2.1 EXCHANGES AND THEIR EXTENDED AREA SERVICE (EAS) POINTS (Cont'd)

Exchange	RATE GROUP
Lead	E
Oakwood	
Spanish	
Whispered	
W. Spanish	
Michigan	D
Lawrence(1)	
Michigan	
Madison	E
Cherry(1)	
Nash(1)	
O'Brien-Kanara(1)	
Westworth(1)	
Windsor(1)	
Minnetonka	C
Kendall(1)	
Northfield(1)	
Summit(1)	
Windsor(1)	
Missoula	C
Missouri	E
Missouri	D
Lawrence(1)	
Michigan	
Monte Pl. Pierre	E
Hazel(1)	
North City	G
Hiram(1)	
Old City Exchange(1)	

(1) Non-Company Exchanges.

Issue:

SECTION 5 - Local Exchange Service

5.2 Exchange Areas (Cont'd)

5.2.1 EXCHANGES AND THEIR EXTENDED AREA SERVICE (EAS) POINTS (Cont'd)

Exchange	RATE GROUP
<b>Sioux Falls</b>	I
Dakota(1)	
Hawley(1)	
Garrison(1)	
Harrisburg/Hartford(1)	
Tea Valley Springs(1)	
<b>Rapid City</b>	C
Dakota(1)	
Dolan(1)	
Cotton(1)	
Crosby(1)	
Dell Rapids(1)	
<b>Spearhead</b>	C
Chlor City(1)	
New Ellington(1)	
Forest(1)	
Rushell(1)	
Vehik(1)	
<b>Spanish</b>	E
Dakota(1)	
Leah	
Whitewood	
W. Spanish	
<b>Sturgis</b>	C
Tea	
Harrisburg/Lemox(1)	
Sioux Falls	
<b>Tadoussac</b>	B
<b>Verillion</b>	C
<b>Verde-Brass</b>	C
Hawley Municipal(1)	
Hawley Rural(1)	
Sioux(1)	

(1) Non-Company Exchanges.

SECTION 5 - Local Exchange Service

5.2 Exchange Areas (Cont'd)

5.2.1 Exchange Areas and Their Extended Area Service (EAS) POINTS (Cont'd)

Exchange Area	RATE GROUP
<ul style="list-style-type: none"> <li>Madison</li> <li>Castroville(1)</li> <li>Platteville(1)</li> <li>Hay(1)</li> <li>Lake Norden(1)</li> <li>South Sioux(1)</li> <li>White Lake(1)</li> </ul>	E
<ul style="list-style-type: none"> <li>Madison</li> <li>Madison</li> <li>Lead</li> <li>Spanish</li> <li>W. Spanish</li> </ul>	E
<ul style="list-style-type: none"> <li>Madison</li> <li>Madison (includes community of Hayfield)(1)</li> <li>Leadville(1)</li> <li>Lead(1)</li> <li>Madison (includes towns of Hayfield and Volin)(1)</li> </ul>	E

(1) Non-Company Exchanges.

## SECTION 5 - Local Exchange Service

## 5.3 Local Exchange Service (Description and Rates)

## A. Application of Business and Residence Rates

## General

- a. This section describes the application of business and residence rates.
- b. Business service is furnished to customers at a location that is primarily used for performing a business, trade or practice.
- c. Residence service is furnished at a location used primarily for domestic purposes.
- d. Where residence service is permitted in non-residential locations, such as at churches or elementary schools, only one-party service shall be provided within the base rate area. Also where shared usage with another party would not be practical, such as fraternity and sorority houses or similar locations, only one-party service shall be provided within the base rate area.
- e. Customers changing from business service to residence service will be assigned a different telephone number. Referral to the new residence number assigned will not be provided.

## 1. Business Service

Business rates apply at the following locations:

- Office, stores, factories and all other places of a strictly business nature.
- Hospitals.
- Administrative locations of nursing homes and homes for the aged.
- Colleges and universities (excluding dormitories).
- Senior High, Junior High Schools and elementary schools.
- Day care centers.
- Administrative offices of church organizations such as denominational state or district headquarters. (Does not include individual churches.)

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

A.2 (Cont'd)

- \* Quarters occupied by charitable organizations, libraries, clubs, civic organizations and fraternal societies. Where the quarters of a club or fraternal society are infrequently used, such as for weekly meetings, and no attendant or administrative staff is provided, residence service may be installed. Fraternal societies, as here used, does not include college fraternity or sorority houses in which members lodge or board.
- \* At any location, including residence, where the customer advertises with a business listing, except when a residence number is an alternative call number in connection with a business telephone number.
- \* At any location provided to or through a reseller of local exchange service.

5.2 Residence Service[ 1]

Residence rates apply at the following locations:

- \* Private residences. This location typically contains cooking and sleeping facilities.
- \* Buildings which are a part of the customer's domestic establishment and used only for domestic purposes such as private garages, stables and boat houses.
- \* Private rooms or apartments including those located in hotels, clubs, nursing homes and homes for the aged where the service is confined.
- \* College dormitories, fraternity and sorority houses where the members lodge or board.
- \* Rooms occupied by clubs or fraternal societies which are infrequently used, such as for weekly meetings, and no attendant or staff is regularly provided (see also definition under Business Service).
- \* Churches, even though the telephone is to be used for church administrative purposes. See "Business Service" for administrative offices of church organizations.

(1) Except for schools and churches, Rotary Service will not be provided on residential service.

## SECTION 5 - Local Exchange Service

### 5.3 Local Exchange Service (Description and Rates)

#### B. Residence Individual Auxiliary Lines

1. During such period as a residence customer has a regular residence individual line in service at their place of dwelling, at the regular rate for the exchange involved, one or more residence individual auxiliary lines may be installed on the same premises and in the same dwelling unit for the use of the immediate family for whose use the initial residence individual line is in service.
2. Such residence individual auxiliary lines may not be numbered consecutively nor served on a rotary (hunting) basis with the primary service. They may be nonlisted or nonpublished according to usual practice, if desired, and are furnished at a monthly rate, equal to the monthly rate for a residence one-party (flat rate) line, as covered following for the exchange in which furnished. In zoned areas or exchanges, the rate is related to the zone rate for such service; otherwise extra exchange line mileage charges apply.

### 5.3.1 Measured Service

#### A. Residence Only Service

##### 1. Description

Residence only service is a local exchange service furnished with rates for an exchange access line and usage. It is an optional offering on a single party basis. It is limited to where facilities and equipment are available. The rates for usage vary based on the number of local messages, the duration (holding time) of each message, the distance between calling and called numbers, and the time of day the call is made.

##### 2. Terms and Conditions

- a. One-party residence subscribers in exchanges with the necessary measuring capabilities will have an option of maintaining their current telephone service or subscribing to Residence only service.
- b. In exchanges where this service is offered, multiparty service will be obsolete, except where limited by outside plant facilities. Those customers who currently subscribe to multiparty service will be allowed to retain such service at their present location.



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SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service

A.2 (Cont'd)

- c. Nonrecurring charges do not apply to residence customers converting from flat rate service to measured service, measured service to flat rate service, or between any Local Measured Service offerings.
- d. Residence only local usage charges will not apply to calls placed on the Measured Service line to the Company Business Office, Repair Service, Directory Assistance, or to 911 or "0" for Emergency Agencies, such as Police, Fire, Rescue or Ambulance.
- e. Residence only and flat rate service will not be allowed for business customers on the same premises, with the exception of
  - (1) The non-administrative, inward terminations at a Telephone Answering Bureau.
  - (2) A flat rate Foreign Exchange line which is switched at a location whose calling area does not include the calling area of the normal service exchange.
  - (3) The selection of either flat rate service or measured service for all administrative lines of a Radio Carrier.
- f. The following services are not offered the option of subscribing to Residence Only.
  - (1) Non-administrative lines of Radio Carriers.
  - (2) Business Service.

Item:

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service (Cont'd)

A. Residence Only Service (Cont'd)

1. Rates and Charges

a. The maximum one-party monthly billing or fixed monthly rates and usage charges for sent paid local calls originating on this service line will not exceed 150 percent of the current one-party residence flat rate charges. Sent paid local calls include Dial Station-to-Station, Operator Station-to-Station and Person-to-Person calls.

b. The following rates and charges are applicable to individual line Residence Only Service.

	NONRECURRING CHARGE	MONTHLY RATE
(1) Rate Groups A, C, E, G and I		
o Each line	\$25.00	\$11.05
(2) Rate Groups B and D[1]		
o Each line		
- BR	25.00	8.00
- OBRA	25.00	11.00

c. The basic monthly rates for Residence only service include usage allowances as follows:

	USAGE ALLOWANCE
o Each line	\$2.50

(1) The method of applying the usage allowance will be as shown following:

- o The usage allowance is applied only toward sent paid usage charges accumulated above.
- o No credit is given for any unused allowance during a billing month, nor is any unused allowance accumulated and/or carried forward over billing months.

(1) See Rates and Charges specified in the following for applicable Touch-Tone charges,

Issued:

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service (Cont'd)

A.3. (Cont'd)

d. The following usage charges apply for local calls over the call allowance:

CALL AREA	DEFINITION[1]	INITIAL MINUTE FRACTION THEREOF	EACH ADD'L MINUTE OR FRACTION THEREOF
A	Intraexchange EAS	\$0.05	\$0.010
B	0 - 22 Miles	\$0.07	\$0.020
C	23 - 30 Miles	\$0.09	\$0.025
D	31 - 40 Miles	\$0.11	\$0.030
E	41 - 55 Miles	\$0.13	\$0.035

Local calls to points within the Residence Areas customer's exchange are considered intraexchange calls.

For this Service, usage charges exceeding twenty dollars (\$20.00) per line within a monthly billing period will be discounted thirty percent (30%).

e. The quotation of "time and charges", duration of messages and the associated charge to be billed the customer, will not be provided on local messages.

[1] Local calls to points outside the measured service customer's exchange are considered Extended Area Service (EAS) calls and are rated according to airline mileage between the rate center of the originating customer's exchange and the rate center of the called exchange. The method of computing this airline mileage is the same as used for long distance message telecommunications service.

## SECTION 5 - Local Exchange Service

## 5.3 Local Exchange Service (Description and Rates)

## 5.3.1. Measured Service (Cont'd)

## A.3. (Cont'd)

## h. Measured Usage Charges

- (1) Measured usage charges are applicable to local messages completed on a dial station-to-station basis.
- (2) The initial period rate is the rate in effect at the time the connection is established. The rate for each additional period is the rate in effect at the beginning of each additional period.
- (3) Measured usage charges accumulate on a monthly basis commencing on the billing date.

## i. Initial and Additional Periods

- (1) Initial period usage charges are for a connection of one minute or any fraction thereof.
- (2) Additional period usage charges are for each additional minute or any fraction thereof that the connection continues beyond the initial period.

## j. Determining Usage Charges

- (1) Refer to the usage charge table.
- (2) If the call is during the discount period as defined in the rate discount and application period table, apply the percent discount.

## k. Discounts

- (1) The discount for the reduced rate period given in the rate discount and application period table following is expressed as a percent reduction of the sum of the initial and additional period charges calculated at the rates published in the usage charges table and is applied to message connections established during the period indicated in the rate discount and application period table.
- (2) The initial period discount is the discount in effect at the time the connection is established. The discount for each additional period is the discount in effect at the beginning of each additional period.

Issued:

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service (Com'd)  
A.A. (Com'd)

1. Rates Applicable on Certain Holidays

On New Year's Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, the holiday rate applicable is the Evening rate unless a lower rate would normally apply.

iii. Local Discount Time Periods

9:00 AM	Mon	Tues	Wed	Thurs	Fri	Sat	Sun	
9:00 PM	Day Rate Period						Full Rate	
9:00 PM	Evening, Night and Weekend Rate Period							
9:00 AM	50% Discount							

- Discounts do not apply to operator service charges.
- Discounts apply to initial minute and additional minutes.

ii. Hourly Usage Package Service (Residence Only)

1. Description

Hourly Usage Package Service is local exchange service for which rates are based upon exchange access and usage.

2. Terms and Conditions

Hourly Usage Package Service is available to residence customers in exchanges where central office facilities are available.

In an exchange where Hourly Usage Package Service is offered, multiparty service will no longer be offered, except where limited by outside plant facilities. Those customers who currently subscribe to multiparty service will be allowed to retain such service at their present location.

Issued:

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service (Cont'd)

5.1.1.1 (Cont'd)

- c. The following services are not offered the option of subscribing to Hourly Usage Package Service:
  - \* Multiparty Service
  - \* Business Service

5.2 Rates and Charges

- a. The following rates and charges are applicable to individual line Hourly Usage Package Service.

(1) Rate Groups A, C, E, G and I

PACKAGE	NONRECURRING CHARGE	MONTHLY RATE
* 3 Hour Package	\$25.00	\$11.05 (I)
* 6 Hour Package	\$25.00	\$13.15
* 9 Hour Package	\$25.00	\$15.25 (I)

(2) Rate Groups B and D(I)

* 3 Hour Package	\$25.00	\$ 8.00
- OBRA	\$25.00	\$11.00
* 6 Hour Package	\$25.00	\$10.10
- BRA	\$25.00	\$13.10
* 9 Hour Package	\$25.00	\$12.20
- BRA	\$25.00	\$15.20
- OBRA	\$25.00	\$15.20

- b. The Hourly Usage Package Service additional usage charge is for each sent paid local calling minute exceeding the package rate. The timing of local messages is as specified in section C.3 following.

USAGE  
C HARGE

\$0.02

\* Additional usage charge, per minute

(I) See Rates and Charges specified in the following for applicable Touch-Tone charges.

SECTION 5 - Local Exchange Service

5.3 Local Exchange Service (Description and Rates)

5.3.1. Measured Service (Cont'd)

B.3. (Cont'd)

c. Hourly Usage Package Service usage charges will not apply to calls placed on an Hourly Usage Package Service line to the Company Business Office, Repair Service, Directory Assistance, or to 911 or "O" for Emergency Agencies, such as police, fire, rescue or ambulance.

d. Each Hour package includes an hourly usage allowance.

The method of applying the hourly usage allowance is the same as additional usage and:

- \* The usage allowance is applied only toward sent paid usage charges.
- \* No credit is given for any unused allowance during a billing month, nor is any unused allowance accumulated and/or carried forward over billing months.

e. Nonrecurring charges do not apply to residence customers converting from flat rate service or measured service, measured service to flat rate service, or between any Local Measured Service offerings.

f. The quotation of "time and charges", duration of messages and the associated charge to be billed the customer, will not be provided on local messages.

Date:

## SECTION 5 - Local Exchange Service

## 5.3 Local Exchange Service (Description and Rates)

## 5.3.1 Measured Service (Cont'd)

## C. Service Business Only

## 1. Description

Business only service is a local exchange service furnished with rates for an exchange access line and usage. It is an optional offering on a single party basis. It is limited to where facilities and equipment are available. The rates for usage vary based on the number of local messages, the duration (holding time) of each message, the distance between calling and called numbers, and the time of day the call is made.

## 2. Terms and Conditions

- a. In exchanges where this service is offered, multiparty business service is no longer offered except where limited by facilities or equipment. Those customers who currently subscribe to multiparty business service will be allowed to retain such service at the current location.
- b. Nonrecurring charges, specified in section 5.1 will not apply for conversion to this service or for conversion back to the previous service within 12 months of the date at which this service is offered in the central office serving the customer. After this 12-month period, nonrecurring charges will apply to conversions from measured to flat-rate services.
- c. Business only service usage charges do not apply to calls placed to the Company Business Office, Repair Service, Directory Assistance, 911 or "O" for Emergency agencies such as police, fire, rescue or ambulance, or to long distance.
- d. Combinations of this service and flat rate service will not be allowed on the same premises, with the exception of
  - \* The non-administrative, inward terminations at a Telephone Answering Bureau.
  - \* A flat rate Foreign Exchange line which is switched at a location whose calling area does not include the calling area of the normal serving exchange for the Measured Service lines.
  - \* The selection of either flat rate service or measured service for all administrative lines of a Radio Carrier.
- e. Usage billing will be on a bulk basis.



Touch

## SECTION 5 - Local Exchange Service

## 5.3 Local Exchange Service (Description and Rates)

## 5.3.1. Measured Service (Cont'd)

## C. Service Business Only (Cont'd)

## 1. Rates and Charges

a. The following rates and charges are applicable to individual line Business Only Service.

	NONRECURRING CHARGE	MONTHLY RATE
(1) Rate Groups A, C, E, G and I		
• Each line	\$47.00	\$28.65
(2) Rate Groups B and D[1]		
• Each line		
• BRA	\$47.00	\$25.00
• OBRA	\$47.00	\$28.00

a. The basic monthly rates for Business only service include usage allowances as follows:

	USAGE ALLOWANCE
• Each line	\$5.00

The method of applying the usage allowance will be as shown following:

- The usage allowance is applied only toward sent paid usage charges accumulated above.
- No credit is given for any unused allowance during a billing month, nor is any unused allowance accumulated and/or carried forward over billing months.

[1] See Rates and Charges specified in the following for applicable Touch-Tone charges.

Issued:

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measured Service (Cont'd)

5.1.1.1 (Cont'd)

- c. The following usage charges apply to business only service in addition to the above rates for completed calls which are originated on the Business Only lines:

CALL AREA	DEFINITION[1]	INITIAL MINUTE FRACTION THEREOF	EACH ADD'L MINUTE OR FRACTION THEREOF
A	Intraexchange EAS	\$0.05	\$0.010
B	0 - 22 Miles	\$0.07	\$0.020
C	23 - 30 Miles	\$0.09	\$0.025
D	31 - 40 Miles	\$0.11	\$0.030
E	41 - 55 Miles	\$0.13	\$0.035

For Business Only Service, usage charges exceeding twenty dollars (\$20.00) per line within a monthly billing period will be discounted thirty percent (30%).

- d. The quotation of "time and charges", duration of messages and the associated charge to be billed the customer, will not be provided on local messages.
- e. The timing of local messages is the same as specified for Residence Only Service.

(ii) The exchange usage charges shown will be discounted based on time of day and day of week originated as specified elsewhere.

(iii) Local calls to points within the Business Only Customer's Exchange are considered intraexchange calls. Local calls to points outside the Business Only Customer's Exchange are considered Extended Area Service (EAS) calls and are rated according to airline mileage between the rate center of the originating customer's exchange and the rate center of the called exchange. The method of computing this airline mileage is the same as used for long distance message telecommunications service.

SECTION 5 - Local Exchange Service

5.1 Local Exchange Service (Description and Rates)

5.1.1 Measurement Service (Cont'd)

5.1.1.1 (Cont'd)

1. Rates Applicable on Certain Holidays

On Christmas Day, New Year's Day, Independence Day, Thanksgiving Day and Labor Day, the holiday rate applicable is the Evening rate unless a lower rate would normally apply.

2. Local Discount Time Periods

	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
6:00 AM	Day Rate Period						
7:00 PM	Full Rate						
6:00 PM	Evening, Night and Weekend Rate Period						
9:00 AM	50% Discount						

\* Discounts apply to initial minute and additional minutes.

\* Discounts do not apply to operator service charges.

XXXXXX

## SECTION 5 - Local Exchange Service

## 5.1 Local Exchange Service (Description and Rates)

## 5.1.1 Measured Service (Cont'd)

## a. Hearing or Speech Impairment Discount

Disabled persons who have been certified to the Company as having a hearing or speech impairment which necessitates that they communicate by a Telecommunications Device for the Deaf (TDD) - sometimes referred to as a teletypewriter or TTY device - will receive, upon written application to the Company, credit on day, evening, and certain night rates intrastate dial station-to-station calls from a certified account premises where a TDD is located.

The credit given for these dial station-to-station calls will be a 35% discount of the full day rates for 9 a.m. to, but not including, 9 p.m. weekdays, a 60% discount of the full day rate for 9 p.m. to, but not including, 9 a.m. weekdays and all hours for weekends. For certain holidays as specified below, the 60% discount will apply unless a lower rate as specified earlier in this paragraph would apply.

For a customer with more than one line or trunk, written application will be required for each line or trunk.

The billing period for this discount will be determined by the toll billing date. The customer will receive the discount at the beginning of the next toll billing period after application approval. The customer has the option of withdrawing at either the beginning or ending of the billing period. A nonrecurring charge does not apply to establish this service.

Section 6

SECTION 6 - CUSTOM CALLING FEATURES

All the following rates are charged on a per month. For any service there is a one-time installation fee. The installation fees are the same for all of the custom calling services except Voice Mail

	<u>Residential</u>	<u>Business</u>
Installation Fees	\$10.00	\$20.00
Call Waiting	\$5.00/month	\$5.00/month
Call Forwarding	\$3.00/month	\$3.50/month
Busy Line	+\$1.85/month	+\$3.00/month
Three Way Calling		\$4.00/month
Per Use	\$0.75	\$0.75
Speed Dialing		\$3.00/month
8 code	\$2.00/month	\$4.00/month
10 code	\$3.00/month	\$1.00/month
Distinctive Ring	\$1.00/month	\$3.50/month
Repeat Dialing	\$3.50/month	\$0.75
Per Use	\$0.75	\$6.95/month
Caller ID with Name	\$6.95/month	
Call Trace		\$1.55
Per Activation	\$1.55	\$3.00/month
Per Use	\$2.95/month	\$0.75
Call Waiting II	\$0.75	\$1.00/month
Voice Mail	\$1.00/month	\$12.75/month
	\$6.95/month	

**ServiSense.com, Inc.**

**ATTACHMENT VI**

**Cost Support Information**



# COST STUDY

## Cost Support Information

The costs and revenues calculated below are based on a projected mix of traffic and current network expenses. All services provided by [REDACTED] are planned and priced to cover costs and generate a reasonable return for the corporation.

### AVERAGE COST BASE:

Carrier Costs	<u>\$ 0.0525</u>	per message
Billing	<u>\$ 0.0020</u>	per message and distribution of funds
Bad Debt Reserve	<u>\$ 0.0050</u>	per message
Sales & Marketing	<u>\$ 0.0200</u>	per message
Administration	<u>\$ 0.0070</u>	per message

Calculated Cost Base \$ 0.0865 per message

### AVERAGE INTRASTATE REVENUE:

Calculated Revenue	<u>\$ 0.1250</u>	per message
NET MARGIN:	<u>30.80 %</u>	

# CONTINUATION

2



**THE HELEIN LAW GROUP, P.C.**

VENDOR ID: SDPUBLICUT

CHECK NO: 00006157

DATE: 06/27/00

PAYEE: SD Public Utilities Commission MEMO:

ACCOUNT

AMOUNT

5200 Client Expenses

250.00

*TC00-105*

CHECK TOTAL: \*\*\*\*\*\$250.00

<b>THE HELEIN LAW GROUP, P.C.</b>		BB&T BRANCH BANKING & TRUST CO. McLEAN, VA 22102	6157
8180 GREENSBORO DRIVE SUITE 700 McLEAN, VIRGINIA 22102		68-531/560	00006157
PAY	TWO HUNDRED FIFTY AND XX / 100 Dollars	DATE 06/27/00	AMOUNT *****\$250.00
TO THE ORDER OF	SD Public Utilities Commission	<i>Robert A. Meade</i>	

Signify balance. Debits on back.

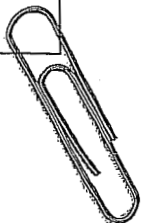
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CONTINUATION

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# of pages

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South Dakota Public Utilities Commission

**WEEKLY FILINGS**

For the Period of June 29, 2000 through July 05, 2000

If you need a complete copy of a filing faxed, overnight expressed, or mailed to you, please contact  
Delaine Kolbo within five business days of this filing.

Phone: 605-773-3705 Fax: 605-773-3809

**CONSUMER COMPLAINTS**

**CT00-081** In the Matter of the Complaint filed by Peter and Dorothy Beaudette, Rapid City, South Dakota, against AmeriVision Communications, Inc. Regarding Unauthorized Billing for Services and Refusal to Cancel Account.

The complainants allege that unauthorized, non-toll charges from AmeriVision Communications began appearing on their telephone bill in August, 1999. Despite numerous requests and efforts to cancel the account and prevent further charges, AmeriVision Communications has continued to send monthly charges to the complainants. The complainants request that AmeriVision Communications stop sending unauthorized charges; they request to be reimbursed for the charges and for money spent on postage and for AmeriVision Communications to pay \$1000.00 in reparation to them for their frustration.

Staff Analyst: Charlene Lund

Staff Attorney: Karen Cremer

Date Docketed: 07/05/00

Intervention Deadline: NA

**CT00-082** In the Matter of the Complaint filed by Greg May, Sioux Falls, South Dakota, against FirstTel, Inc. Regarding Unauthorized Switching of Services.

The Complainant alleges that when his local telecommunications service was switched from U S WEST to FirstTel, FirstTel did not continue his long distance service with AT&T. AT&T continued to transfer billing information to U S WEST. Since U S West was no longer the local carrier, billings were not sent to the Complainant. The Complainant eventually received a long distance billing from AT&T at very high rates. The Complainant seeks \$1000 in compensation, additional compensation for time and effort, and removal of all long distance charges.

Staff Analyst: Leni Healy

Staff Attorney: Karen Cremer

Date Docketed: 07/05/00

Intervention Deadline: NA

**TELECOMMUNICATIONS**

**TC00-195** In the Matter of the Application of ServiSense.com, Inc. for a Certificate of Authority to Provide Telecommunications Services, Including Local Exchange Services, in South Dakota.

South Dakota Network, Inc. is seeking a Certificate of Authority to provide resold interexchange and local exchange telecommunication services in South Dakota. The applicant intends to offer services to residential and business customers utilizing switched access. Services include calling card services.

Staff Analyst: Keith Senger  
Staff Attorney: Karen Cramer  
Date Docketed: 06/29/00  
Intervention Deadline: 07/21/00

**TC99-106 In the Matter of the Establishment of a Switched Transport Rate for South Dakota Network, Inc.**

South Dakota Network filed a cost study revenue requirement and a tariff sheet revision for a rate reduction in Switched Transport. South Dakota Network is requesting an effective date of August 1, 2000.

Staff Analyst: Harlan Best  
Staff Attorney: Karen Cramer  
Date Docketed: 06/29/00  
Intervention Deadline: 07/21/00

**TC99-107 In the Matter of the Filing for Approval of First and Second Amendments to the Interconnection Agreement between McLeodUSA Telecommunications Services, Inc. and U S WEST Communications, Inc.**

A first and second amendment to an interconnection agreement between McLeodUSA and U S WEST Communications, Inc. was filed with the Commission. The First Amendment will add terms, conditions and rates with regard to Unbundled Network Elements and the Second Amendment will add Reciprocal Compensation language to the original agreement.

Any party wishing to comment on the amendments may do so by filing written comments with the Commission and the parties to the amendments no later than July 24, 2000. Parties to the amendments may file written responses to the comments no later than twenty days after the receipt of the original comments.

Staff Attorney: Karen Cramer  
Date Docketed: 07/03/00  
Comments Due: 07/24/00

**TC99-108 In the Matter of the Filing for Approval of a Paging Connection Agreement between U S WEST Communications, Inc. and Arch Paging, Inc. and Mobile Communications Corporation of America.**

A paging connection agreement between U S WEST Communications, Inc. and Arch Paging, Inc. and Mobile Communications Corporation of America was filed with the Commission. The agreement is a negotiated agreement covering both Type 1 and Type 2 paging connection service, which consists only of those one-way facilities and services that are provisioned by

U S WEST for the sole purpose of delivering one-way, land-to-pager traffic sent by U S WEST's end users and Transit Traffic to Paging Providers. The agreement also sets forth the terms, conditions and prices under which the parties agree to interconnect and pay reciprocal compensation for the exchange of local traffic.

Any party wishing to comment on the agreement may do so by filing written comments with the Commission and the parties to the agreement no later than July 25, 2000. Parties to the agreement may file written responses to comments no later than twenty days after the service of the original comments.

Staff Attorney: Karen Cremer  
Date Docketed: 07/05/00  
Comments Due: 07/25/00

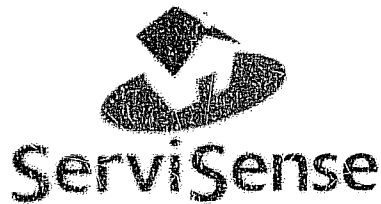
**TC00-109 In the Matter of the Filing for Approval of a Resale Agreement between U S WEST Communications, Inc. and Comm South Companies, Inc.**

An interconnection agreement between U S WEST Communications, Inc. and Comm South Companies, Inc. was filed with the Commission. The agreement is a negotiated agreement setting forth certain arrangements to provide, within the geographical areas where U S WEST is the incumbent local exchange carrier, the resale of local telecommunications services.

Any party wishing to comment on the agreement may do so by filing written comments with the Commission and the parties to the agreement no later than July 25, 2000. Parties to the agreement may file written responses to comments no later than twenty days after the service of the original comments.

Staff Attorney: Karen Cremer  
Date Docketed: 07/05/00  
Comments Due: 07/25/00

You may receive this listing and other PUC publications via our website or via internet e-mail. You may subscribe or unsubscribe to the PUC mailing lists at <http://www.state.sd.us/puc/>



August 9, 2000

RECEIVED

Mr. Keith Senger  
Utility Analyst  
South Dakota Public Utilities Commission  
State Capitol Building  
500 East Capitol Avenue  
Pierre, SD 57501 - 5070

AUG 14 2000

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In re: SDPUC Docket TC00-105 - Application of Servisense.com, Inc. for a  
Certificate of Authority to Provide Interexchange and Local  
Exchange Telecommunications Service in South Dakota

Dear Mr. Senger:

Per your August 1, 2000 letter ("Letter") to Loubna Haddad of the Helein Law Group, P.C. enclosed please find an original and ten (10) copies of pages 10 and 11 of Servisense.com, Inc.'s ("Servisense") tariff. Attorney Haddad forwarded the letter to me for a response, a copy of which is provided for your reference.

The following italicized text has been removed from the Tariff per the instructions in the Letter. The numbering of the remaining paragraphs has been adjusted accordingly.

*The liability of the Carrier for any loss or damages whatsoever arising out to mistakes, omissions, delays, errors, defects or failures in the service, or in any non-regulated equipment or facilities, shall not exceed an amount equivalent to the proportionate charge to the Customer for the period during which the mistake, omission, delay, defect, or failure existed, or the Tariff charge for the call involved. Under no circumstances shall the Carrier be liable for any consequential, special, indirect, incidental, or exemplary damages.*

Please return the copy of this letter, date-stamped, in the self-addressed, stamped envelope provided. If you have any questions, please contact me directly at (617) 848-8107.

Very truly yours,

Richard Wheeler, Esq.  
Regulatory Affairs Coordinator  
servisense.com, Inc.



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**SECTION 2. RULES AND REGULATIONS (Cont'd)****2.1 Use of Services (Cont'd)**

- 2.1C. Carrier's services are available for use twenty-four (24) hours per day, seven (7) days per week.
- 2.1D. Carrier does not transmit messages pursuant to this Tariff, but its services may be used for that purpose.
- 2.1E. Carrier's services may be canceled for nonpayment of uncontested bill charges or for other violations of this Tariff.

**2.2 Liability of Carrier**

- 2.2A. Due to unavailability of errors incident to the services and to the use of the facilities furnished by the Carrier or connecting carriers, the services and facilities furnished by the Carrier and connecting carriers are subject to the terms, conditions and limitations set forth herein.
- 2.2B. When service is interrupted for a period of at least twenty-four (24) hours after notice by the Customer to Carrier, an allowance equal to 1/28 of fixed billing cycle charges for service and facilities furnished by the Carrier rendered useless or substantially impaired shall apply to each twenty-four (24) hours during which the interruption continues after notice by the Customer to the Carrier. Credit in any billing period shall not exceed the total non-usage charges for that period for the services and facilities furnished by the Carrier rendered useless or substantially impaired. No allowance shall apply to any non-recurring or usage charges. No credit shall be issued for interruptions of less than six (6) hours.
- 2.2C. Carrier shall not be liable for any act or omission or any connecting carrier, underlying carrier, or local exchange company; for acts or omission of any other providers of connections, facilities, or for service other than the Carrier; or for culpable conduct of the Customer or failure of equipment, facilities or connection provided by the Customer.

**RECEIVED**

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**SECTION 2. RULES AND REGULATIONS (Cont'd)****2.3 Liability of Carrier (Cont'd)**

- 2.3.D.** Carrier shall not be liable for defacement of, or damage to, the premises of a Customer resulting from the attachment or instruments, apparatus and associated wiring furnished by the Carrier on such Customer's premises or by the installation or removal thereof, when such defacement or damage; is not the result of the Carrier's gross negligence. No agents or employees of the other participating carriers shall be deemed to be agents or employees of Carrier.
- 2.3.E.** Carrier shall not be liable for any failure of performance due to causes beyond its control, including, without being limited to, acts of God, fires, floods or other catastrophes, national emergencies, insurrections, riots or wars, strikes, lockouts, work stoppage or other labor difficulties, acts or omissions of other carriers, and any law, order, regulation or other action of any governing authority or agency thereof.
- 2.3.F.** Carrier shall not be liable for any unlawful or unauthorized use of Carrier's facilities and service, unless such use results solely from the negligence or willful misconduct of Carrier.
- 2.3.G.** The Customer is responsible for taking all necessary legal steps for interconnecting Customer-provided terminal equipment with Carrier's facilities. The Customer shall secure all licenses, permits, rights-of-way, and other arrangements necessary for such interconnection.

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION OF )</b>	<b>ORDER GRANTING</b>
<b>SERVISENSE.COM, INC. FOR A CERTIFICATE )</b>	<b>CERTIFICATE OF</b>
<b>OF AUTHORITY TO PROVIDE )</b>	<b>AUTHORITY</b>
<b>TELECOMMUNICATIONS SERVICES, )</b>	
<b>INCLUDING LOCAL EXCHANGE SERVICES, IN )</b>	<b>TC00-105</b>
<b>SOUTH DAKOTA )</b>	

On June 29, 2000, the Public Utilities Commission (Commission) received an application for a certificate of authority from ServiSense.com, Inc. (ServiSense).

ServiSense proposes to provide resold interexchange and local exchange telecommunications services. A proposed tariff was filed by ServiSense.

On July 6, 2000, the Commission electronically transmitted notice of the filing and the intervention deadline of July 21, 2000, to interested individuals and entities. No petitions to intervene or comments were filed and at its regularly scheduled September 13, 2000, meeting, the Commission considered ServiSense's request for a certificate of authority. Commission Staff recommended granting a certificate of authority, subject to rural safeguards, and subject to the condition that ServiSense not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission.

The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapter 49-31, specifically 49-31-3 and 49-31-69 and ARSD 20:10:24:02, 20:10:24:03 and 20:10:32:03. The Commission finds that ServiSense has met the legal requirements established for the granting of a certificate of authority. ServiSense has, in accordance with SDCL 49-31-3 and 49-31-71, demonstrated sufficient technical, financial and managerial capabilities to offer telecommunications services in South Dakota.

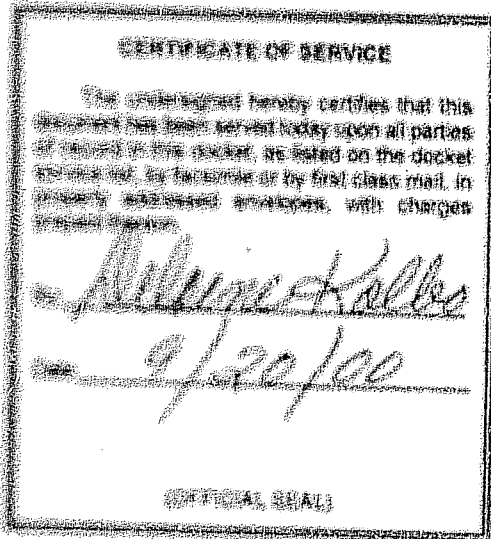
The Commission approves ServiSense's application for a certificate of authority, subject to rural safeguards, and subject to the condition that ServiSense not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission. The certificate of authority for ServiSense shall authorize it to offer local exchange services in South Dakota, except in those areas served by a rural telephone company. In the future, should ServiSense choose to provide local exchange services statewide, with respect to rural telephone companies, ServiSense will have to come before the Commission in another proceeding before being able to provide local service in that rural service area pursuant to 47 U.S.C. § 253(f) which allows the Commission to require a company that seeks to provide service in a rural service area to meet the requirements of 47 U.S.C. § 214(e)(1) for designation as an eligible telecommunications carrier. In addition, the granting of statewide certification will not affect the exemptions, suspensions, and modifications for rural telephone companies found in 47 U.S.C. § 251(f). It is therefore

ORDERED, that ServiSense's application for a certificate of authority to provide telecommunications services, including local exchange services, is granted, subject to the condition that ServiSense not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission; and it is

FURTHER ORDERED, that ServiSense shall file informational copies of tariff changes with the Commission as the changes occur; and it is

FURTHER ORDERED, that the Commission shall authorize ServiSense to offer its local exchange services in South Dakota, except in those areas served by a rural telephone company.

Dated at Pierre, South Dakota, this 19th day of September, 2000.



BY ORDER OF THE COMMISSION:

*James A. Burg*  
JAMES A. BURG, Chairman

*Pam Nelson*  
PAM NELSON, Commissioner

*Laska Schoenfelder*  
LASKA SCHOENFELDER, Commissioner

# SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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## CERTIFICATE OF AUTHORITY

To Conduct Business As A Telecommunications Company,  
Including Local Exchange Services,  
Within The State of South Dakota

Authority was Granted September 13, 2000  
Docket No. TC00-105

*This is to certify that*

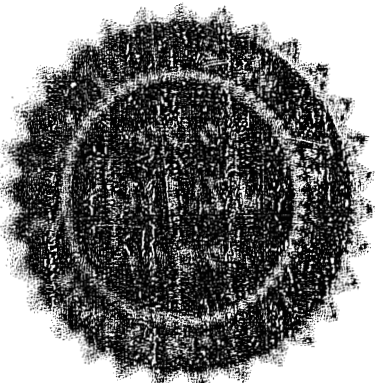
**SERVISENSE.COM, INC.**

*is authorized to provide telecommunications services, including local  
exchange services, in South Dakota.*

This certificate is issued in accordance with SDCL 49-31-3 and 49-31-69  
and ARSD 20:10:24:02 and 20:10:32:03, and is subject to all of the conditions  
and limitations contained in the rules and statutes governing its conduct of  
offering telecommunications services.

Dated at Pierre, South Dakota, this 19<sup>th</sup> day of September, 2000.

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION:



*James A. Burg*  
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JAMES A. BURG, Chairman

*Pam Nelson*  
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PAM NELSON, Commissioner

*Laska Schoenfelder*  
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LASKA SCHOENFELDER, Commissioner