

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	
v	)	Docket No. 05-0202
	)	
City of Princeton	)	
	)	
Removal of Carriers from List of	)	
Telecommunications Carriers for failure	)	
To file tariffs for the provision of local	)	
Exchange telecommunications services	)	

**MOTION TO DISMISS**

NOW COMES the City of Princeton (“Princeton” or “City”) Inc., by and through its attorneys, Troy A. Fodor and E.M. Fulton Jr., respectfully requests that this proceeding against Princeton be dismissed, and in support thereof states as follows:

1. On March 23, 2005, the Commission entered a citation order, based on a report from its Staff, requesting Princeton and other named respondents to show cause, if any, why the Commission should not rescind their Certificates of Service Authority and take other action because they had failed to file any tariffs for interexchange telecommunications service or not otherwise exercised their authority.

2. Princeton received its Certificate of Exchange Service Authority to provide competitive interexchange telecommunication service on or about May 19, 1999 in ICC Docket 99-0020. Princeton’s certificates were for facilities based interexchange service and for resold interexchange service.

3. Section 13-401(a) of the Public Utilities Act provides in relevant part, that:

“Unless **exercised** within a period of two years from the issuance thereof, authority conferred by a Certificate of Service Authority

shall be “null and void.” Emphasis added. 220 ILCS 5/13-401(a)

3. Section 13-501 of the Act further provides that:

“No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided”. 220 ILCS 5/13-501.

5. “Exercised” is the active word in the relevant statute. “Exercise” when used as a noun, means “the discharge of an official function or professional occupation.” “Exercise” when used as a transitive verb means, “to bring to bear, to use repeatedly in order to strengthen or develop.” Webster’s Seventh New Collegiate Dictionary, G & C Merriam Co., 1966, p. 291. Princeton has repeatedly exercised the authority from its certificate by transacting business in Illinois.

6. Princeton’s certificate of authority authorized doing business in the State of Illinois. Section 5/13-401(a) of the Public Utilities Act provides in part:

“No telecommunications carrier not possessing a certificate of public convenience and necessity or certificate of authority from the Commission at the time this Article goes into effect shall transact any business in this State until it shall have obtained a certificate of service authority from the Commission pursuant to the provisions of this Article”. Emphasis added 220 ILCS 5/13-401(a).

7. Princeton’s certificate of competitive service authority authorizes the provision of interexchange telecommunications service. Section 5/13-401(a) of the Public Utilities Act provides in part:

“No telecommunications carrier offering or providing, or seeking to offer or provide, any interexchange telecommunications service shall do so until it has applied for and received a Certificate of

Exchange Service Authority pursuant to the provisions of Section 13-403". 220 ILCS5/13-401(a)

8. As will be shown, Princeton has been lawfully exercising its certificate by transacting business in the state, pursuant to its certificate, since May 19, 1999, but has not provided interexchange telecommunications service or filed tariffs.

9. The Commission's Order on page two expresses the Staff of the Illinois commerce Commission's belief that the failure to file tariffs is evidence of a failure "to lawfully exercise the certificates."

10. Princeton believes it has lawfully exercised the authority conferred by its certificate of service authority and has done so within two years from May 19, 1999 by constructing facilities, discharging official functions, and conducting business.

### **CONSTRUCTION OF FACILITIES**

1. The City of Princeton has "exercised" its authority conferred by its Certificate by constructing facilities. Princeton exercises its facilities based interexchange service by building facilities. The Commission knows that the City of Princeton has conducted business in the state by constructing facilities. On February 11, 2002, the City of Princeton reported to Mr. James Zolnierrek, Telecommunications Division, Illinois Commerce Commission as follows:

"In response to the Competition data request for the City of Princeton, telecommunications system, the city has installed approximately 2 miles of fiber optic cable between our substation and the power plant. This fiber was put in service 2/4/2002 and is being used by the city electric system only, for a peer to peer computer network and will soon be used for the city's electric system, (scada) for supervisory control and data acquisition. No Customers on system."  
Princeton Municipal Utilities letter 2/11/2002.

2. The engineering for this fiber was commenced in January, of 2001 and the bid for materials was awarded in April of 2001. Make ready work and construction commenced shortly thereafter. Therefore, Princeton exercised its authority within two years of the granting of the Certificate on May 19, 1999 by building the interexchange facilities it was authorized by its certificate to build. .

3. City of Princeton conducted an official business transaction, which “exercised” its authority conferred on it by its certificate of authority from the Commission. As the Appellate Court, First District said, “under the authority of the Certificates issued pursuant to the Act, Bell and other telephone companies have the right to erect facilities for the purpose of delivering authorized services....” Radio Relay Corp. v. Illinois Commerce Commission, 43 Ill. App. 3d 719, 357N.E.2d144, 148 (1976). It would be poor public policy and unfair to make Princeton build the facility before it received a certificate.

4. Courts have, thus recognized the right conferred by the Certificate to exercise its authority by constructing facilities.<sup>1</sup> This of course is the authority to “transact business in this State” under the first sentence of Section 5/13-401(a) previously cited. It seems clear that the City’s authority is not “null and void” because it exercised the property right conferred by the Certificate within two years. Cf. Quantum Pipeline Co. et. al. v. Illinois Commerce Commission, 398 Ill. 542, 76 NE 2d 478, 486 (1947)

#### **CITATION CASE**

1. The Commission has previously recognized Princeton’s authority to do business in Illinois. On January 24, 2002, the Commission issued a citation order against the city of Princeton for failure to file its 2000 Annual Report by April 2, 2001. City of

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<sup>1</sup> See also 220 ILCS 5/8-406(b)

Princeton was ordered to appear and “failure of the respondent to appear may result in the entry of an order revoking or suspending the Certificates of Service Authority previously granted to respondent.” ICC Order in Docket 02-0080. The City of Princeton exercised its authority under the certificates and filed a Motion to Dismiss saying the City “has now filed its 2000 Annual Reports, as well as its 2001 Annual Report” and “[t]he City of Princeton has now constructed certain telecommunications facilities and intends to utilize to the extent necessary its Certificates.” Motion to Dismiss, pp.1 and 2. On March 13, 2002, in recognition of the City exercising its authority under the certificates the commission dismissed the citation docket. Clearly, the City exercised its authority by answering the Citation Order and showing cause why the Commission should not rescind its certificate.<sup>2</sup> The City of Princeton thus discharged an official function, answering the Citation, lawfully exercising the certificates as required by Section 13-401(a) of the Public Utilities Act.

2. The Commission recognized the City’s certificated authority to do official business by dismissing the docket.

### **FILING REPORTS**

1. The City of Princeton repeatedly discharged an official function by filing reports, lawfully exercising the certificates as required by Section 13-401(a) of the Public Utilities Act. Such reports were filed within two years exercising the authority of the certificates as part of transacting business in the State of Illinois in the sense of 13-401(a) of the Public Utilities Act, 220ILCS13-401(a).

2. As recognized by the Commission Order in Docket 99-0020, the authority of the City has not lapsed because it has made annual filings with the Commission

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<sup>2</sup> City of Princeton’s Certificate was issued May 19, 1999 in ICC Docket No. 99-0020:

showing its intent to continue to exercise its authority under the act. The first sentence of Section 13-401(a) has to do with transacting business and a certificate is required to do business. The filing of required ICC reports is a part of transacting business. The second part of Section 13-401(a) applies to the providing or seeking to provide local exchange telecommunication service. It has been shown that there is more than one way to fully exercise the authority conferred by a certificate within two years other than filing a tariff. Moreover, Section 13-401(a) does not require telecommunications services or filing of a tariff.

3. The City has continued to file all the required forms exercising the authority under its certificate.

### **CHICAGO RAILWAY DISTINGUISHED**

1. Chicago Railways Company et al. v. The Commerce Commission ex rel. The Chicago Motor Coach Company, 336 Ill. 51 (1929), relied on by the Commission, may not be good law in the present competitive environment because it was predicated on facts that have changed. The Court there said “It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is, that through regulation of an established carrier occupying a given field and protection of it from competition the public will be serviced more efficiently and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory” Chicago Railway supra 336 Ill at 76.

2. The new law effective in 1986 has changed the policy to a competition friendly telecommunications regulation. Sections 13-102(e) (f) and (g) of the Public Utilities Act provides:

(e) it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible;

(f) the competitive offering of all telecommunications service will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new businesses to Illinois; and

(g) protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications service markets. 220ILCS5/13-102(e) (f) (g).

3. This obvious shift in emphasis detracts from the importance of the anticompetitive language in the Chicago Railways case. Chicago Railways was cited by the Commission in this docket as its authority for the position that “failure to lawfully exercise the certificates as evidenced by the failure to file tariffs, has caused the authorities to lapse as a matter of law. No revocation is necessary to revoke the certificate.” However, the Commission seemingly recognized the shift to a competitive friendly market by allowing City of Princeton “to adduce evidence with respect to matters stated hereinabove and to show cause, if any there be, why the Commission should not rescind the certificates of service authority...” ICC Order Docket 05-0201.

4. As previously shown, and as apparently recognized in the Order in Docket 05-0201, there is more than one way to exercise the authority granted by a certificate of service authority.

5. But assuming that the 1929 Chicago Railways case still has viability, there are some significant distinguishing aspects. First, the Supreme Court found there were no facts to support the certificate of convenience and necessity and the order “is therefore void” Chicago Railways, supra 336/Ill. at 66. Second, the Commission amended Chicago Railway’s certificate to grant authority in the territory where they were competing with Chicago Motor Coach Company without notice to Chicago Motor Coach Company. “They were entitled to notice before the amendment was made, and since none was given, the order making the amendment was void.” Chicago Railways, supra, 336 Ill. at 67. The Court went on to say that where two routes are authorized by a Certificate “the service of motor buses carrying passengers on one street or by one route is a different service from .... carrying passengers on another street by another route...” Chicago Railways 336 Ill. at 69. The Court concluded that failure to use the other route caused the certificate for that route to be null and void even though they had used the first route. The Chicago Railways case does not interpret the word “exercise,” and it did not involve the filing of a tariff.

6. There are other distinguishing characteristics, which make the strict interpretation of Chicago Railways inapplicable to the City of Princeton:

A. There is a difference between telecommunication certificates and ones for railways and buses.

B. Princeton has constructed facilities within two year.

C. Princeton's citation case Docket 02-0080, was dismissed March 13, 2002, in recognition of the exercise of the authority under their certificate by filing their 2000 and 2001 Annual Reports.

D. Princeton has continued to transact business in exercise of its authority under its certificate by filing Annual Reports and tax forms with the Commission.

E. Chicago Railway supra 336 Ill. 51 (1929) was decided at a time when it was not the policy of the Public Utilities Act to promote competition, but the policy has changed to competitive friendly regulation. Moreover, Princeton is certificated for competitive interexchange telecommunications service "in the State of Illinois." See ICC Order in Docket 99-0020 at p.6.

F. Princeton was given a certificate to do what the Chicago Railway case said they could not do, i.e. compete with carriers anywhere in Illinois. Chicago Railway supra 336 Ill. at 77.; Sec 220 ILCS 5/13-103(b).

WHEREFORE, the City of Princeton respectfully requests that the proceeding against it be dismissed.

Respectfully submitted,

CITY OF PRINCETON

By:           /s/ Troy A. Fodor            
One of Its Attorneys

Troy A. Fodor  
E. M. Fulton, Jr.  
TROY A. FODOR, P.C.  
913 South Sixth Street  
Springfield, IL 62703

STATE OF ILLINOIS        )  
  ) SS  
COUNTY OF BUREAU        )

VERIFICATION

The undersigned, Jason L. Bird, being first duly sworn on oath, deposes and states that he is the Superintendent of Electric Distribution for The City of Princeton; that he has read the above and foregoing Motion and has knowledge of the statements of fact contained therein; and that the contents of said Motion are true and correct to the best of his knowledge, information and belief.

\_\_\_\_\_  
JASON L. BIRD

Subscribed and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 2005

\_\_\_\_\_  
Notary Public

CERTIFICATE OF SERVICE

05-0202

The undersigned, Troy A. Fodor hereby certifies that on the 27<sup>TH</sup> day of April, 2005, he served a copy of the foregoing instrument by personally delivering a copy thereof and/or mailing a copy thereof by electronic mail and/or United States Mail, postage prepaid, at Springfield, Illinois, to the individuals named on the attached Service List.

/s/ Troy A. Fodor  
Troy A. Fodor

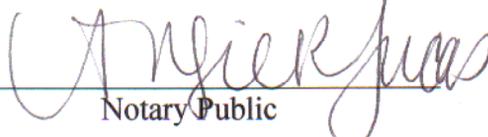
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  ) SS  
COUNTY OF BUREAU         )

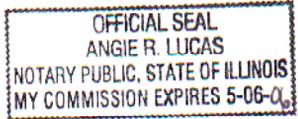
VERIFICATION

The undersigned, Jason L. Bird, being first duly sworn on oath, deposes and states that he is the Superintendent of Electric Distribution for The City of Princeton; that he has read the above and foregoing Motion and has knowledge of the statements of fact contained therein; and that the contents of said Motion are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
JASON L. BIRD

Subscribed and sworn to before me  
this 27<sup>th</sup> day of April, 2005

  
\_\_\_\_\_  
Notary Public



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Ingrid J. Bedoya Director of Operations Easy Call, Inc. 4214 W. Lawrence Ave. Chicago, IL 60630  E-Mail: <a href="mailto:jackie@easycall.com">jackie@easycall.com</a>	RES	Yes	3/24/2005	
Russell M. Blau Atty. for RCN Telecom Services, Inc. Swidler Berlin LLP 3000 K St., NW, Ste. 300 Washington, DC 20007  E-Mail: <a href="mailto:rmbrau@swidlaw.com">rmbrau@swidlaw.com</a>	INT	Yes	4/12/2005	

James F. Booth  
 Vice President, Legal  
 OnFiber Communications, Inc.  
 7887 E. Belleview Ave., Ste. 820  
 Engelwood, CO 80111

RES Yes 3/24/2005

E-Mail: [jim.booth@onfiber.com](mailto:jim.booth@onfiber.com)

---

James W. Broemmer Jr  
 Integrated Solutions, L.L.C.  
 PO Box 217  
 Golden, IL 62339

RES Yes 3/24/2005

E-Mail: [jimbroemmer@adams.net](mailto:jimbroemmer@adams.net)

---

Patrick D. Crocker  
 Atty. for Respondents  
 Early, Lennon, Crocker & Bartosiewicz, P.L.C.  
 900 Comerica Bldg.  
 Kalamazoo, MI 49007-4752

RES Yes 3/24/2005

E-Mail: [tcom1@earlylennon.com](mailto:tcom1@earlylennon.com)

---

Matt C. Deering  
 AccuTel of Texas, Inc.  
 d/b/a 1-800-4-A-PHONE  
 Meyer Capel, a Professional Corporation  
 306 W. Church St.  
 PO Box 6750  
 Champaign, IL 61826-6750

RES Yes 3/24/2005

E-Mail: [mdeering@meyercafel.com](mailto:mdeering@meyercafel.com)

---

Jane Delahanty  
 Asst. Secretary  
 US TelePacific Corp.  
 d/b/a TelePacific Communications  
 515 S. Flower St., 47th Fl.  
 Los Angeles, CA 90071-2201

RES Yes 3/24/2005

E-Mail: [jdelahanty@telepacific.com](mailto:jdelahanty@telepacific.com)

---

Joe DelPreto Universal Access, Inc. 200 S. Wacker Dr., Ste. 1200 Chicago, IL 60606	RES	Yes	3/24/2005
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---

Diann Dixon Local Fiber L.L.C. Illinois Corporation Service Company 801 Stevenson Dr. Springfield, IL 62703-4261	RES	Yes	3/24/2005
--	-----	-----	-----------

E-Mail: [ddixon@csinfo.com](mailto:ddixon@csinfo.com)

---

Joseph E. Donovan Atty. for Respondents Kelley Drye & Warren LLP 333 W. Wacker Dr., Ste. 2600 Chicago, IL 60606	RES	Yes	3/24/2005
---	-----	-----	-----------

E-Mail: [jdonovan@kelleydrye.com](mailto:jdonovan@kelleydrye.com)

---

Dixi Dougherty Director of Operations Ripple Communications, Inc. 2226 W. 24th St. Chicago, IL 60608	RES	Yes	3/24/2005
--	-----	-----	-----------

E-Mail: [info@ripplecomm.com](mailto:info@ripplecomm.com)

---

Steven Fenker Nexus Communications, Inc. 3629 Cleveland Ave., Ste. C Columbus, OH 43224-7168	RES	Yes	3/25/2005
---	-----	-----	-----------

E-Mail: [sfenker1@earthlink.net](mailto:sfenker1@earthlink.net)

---

Brett P. Ferenchak Atty. for RCN Telecom Services, Inc. Swidler Berlin LLP 3000 K St., NW, Ste. 300 Washington, DC 20006	INT	Yes	4/12/2005
--	-----	-----	-----------

E-Mail: [bpferenchak@swidlaw.com](mailto:bpferenchak@swidlaw.com)

---

Barbara Fillinger  
 Senior Manager  
 Regulatory Compliance  
 Birch Telecom of the Great Lakes, Inc.  
 2020 Baltimore Ave.  
 Kansas City, MO 64108

RES Yes 3/24/2005

E-Mail: [bfillinger@birch.com](mailto:bfillinger@birch.com)

---

Shane D. Fleener  
 Atty. for Respondents  
 Kelley Drye & Warren, LLP  
 333 W. Wacker Dr., Ste. 2600  
 Chicago, IL 60606

RES Yes 4/14/2005

E-Mail: [sfleener@kelleydrye.com](mailto:sfleener@kelleydrye.com)

---

Troy A. Fodor  
 City of Princeton  
 Troy A. Fodor, P.C.  
 913 S. Sixth St.  
 Springfield, IL 62703

RES Yes 3/24/2005

E-Mail: [troyafodor@aol.com](mailto:troyafodor@aol.com)

---

Dana Frix  
 US Signal Company, L.L.C.  
 d/b/a RVP Fiber Company  
 Chadbourne & Parke, LLP  
 1200 New Hampshire Ave., N.W.  
 Washington, DC 20036

RES Yes 3/24/2005

E-Mail: [dfrix@chadbourne.com](mailto:dfrix@chadbourne.com)

---

Meredith H. Gifford  
 Advanced Telcom  
 d/b/a Advanced Telcom Group d/b/a ATG  
 3225 Cumberland Blvd., Ste. 700  
 Atlanta, GA 30339

RES Yes 3/24/2005

E-Mail: [meredith.gifford@ge.com](mailto:meredith.gifford@ge.com)

---

John W. Gustaitis III Chief Operations Officer Uni-Tel Communications Group, Inc. 55 S. Main St., Ste. 304 Naperville, IL 60540-8581  E-Mail: <a href="mailto:johng@unitelgroup.com">johng@unitelgroup.com</a>	RES      Yes      3/24/2005
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Linda Haag Maxxis Communications, Inc. 1901 Montreal Rd., Ste. 108 Tucker, GA 30084	RES      Yes      3/24/2005
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---

Larry A. Haynes President New Millennium Telecommunications 2019 W. 95th St. Chicago, IL 60643  E-Mail: <a href="mailto:lghaynesnmt@yahoo.com">lghaynesnmt@yahoo.com</a>	RES      Yes      3/24/2005
--	-----------------------------

---

Richard W. Helmuth President RGT Utilities of California, Inc. 1221 Avenue of the Americas New York, NY 10020  E-Mail: <a href="mailto:rhelmuth@rgts.com">rhelmuth@rgts.com</a>	RES      Yes      3/24/2005
---	-----------------------------

---

James Holmquist Inmark, Inc. d/b/a Preferred Billing 7300 Hudson Blvd., Ste. 265 Oakdale, MN 55128  E-Mail: <a href="mailto:jim.coremarkinc.com">jim.coremarkinc.com</a>	RES      Yes      3/24/2005
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Lisa R. Hood Vice President/Controller FairPoint Communications Solutions Corp. 908 W. Frontview PO Box 199 Dodge City, KS 67801-0199  E-Mail: <a href="mailto:lhood@fairpoint.com">lhood@fairpoint.com</a>	RES      Yes      3/24/2005
--	-----------------------------

---

John Howard  
Interactive Services, Inc.  
Abrams & Jossel  
39 S. LaSalle St., Ste. 1410  
Chicago, IL 60603-1706

RES Yes 3/24/2005

E-Mail: [jhoward@interactive-svs.com](mailto:jhoward@interactive-svs.com)

---

Mark Iannuzzi  
President  
TelNet-IL, LLC  
1017 Naughton Dr.  
Troy, MI 48083

RES Yes 3/24/2005

---

Henry T. Kelly  
Atty. for Respondents  
Kelley Drye & Warren LLP  
333 W. Wacker Dr., Ste. 2600  
Chicago, IL 60606

RES Yes 3/24/2005

E-Mail: [hkelly@kelleydrye.com](mailto:hkelly@kelleydrye.com)

---

Sharon Litke  
AccuTel of Texas, Inc.  
d/b/a 1-800-4-A-PHONE  
7900 John W. Carpenter Fwy.  
Dallas, TX 75247

RES Yes 3/24/2005

E-Mail: [sharon1@accutel.net](mailto:sharon1@accutel.net)

---

Trudy M. Longnecker  
RCN Telecom Services, Inc.  
105 Carnegie Ctr.  
Princeton, NJ 08540

RES Yes 3/24/2005

---

Nelson Lopez  
President  
PersonalOffice, Inc.  
251 Milwaukee Ave., Ste. 2012  
Buffalo Grove, IL 60089-2829

RES Yes 3/24/2005

E-Mail: [nlopez@personaloffice.com](mailto:nlopez@personaloffice.com)

---

Julie Musselman  
Telecommunications Policy Analyst  
Kelley Drye & Warren LLP  
333 W. Wacker Dr.  
Chicago, IL 60606

RES Yes 4/14/2005

E-Mail: [jmusselman@kelleydrye.com](mailto:jmusselman@kelleydrye.com)

---

Bryan W. Neskora  
President  
El Paso Networks, L.L.C.  
1001 Louisiana  
Houston, TX 77002

RES Yes 3/24/2005

E-Mail: [bryan.neskora@elpaso.com](mailto:bryan.neskora@elpaso.com)

---

Douglas D. Orvis II  
Atty. for TelePacific Communications  
Swidler Berlin Shereff Friedman, LLP  
3000 K St., NW, Ste. 300  
Washington, DC 20007-5116

INT Yes 4/15/2005

E-Mail: [ddorvis@swidlaw.com](mailto:ddorvis@swidlaw.com)

---

Kevin Osterbur  
IlliCom Telecommunications, Inc.  
330 W. Ottawa Rd.  
PO Box 328  
Paxton, IL 60957

RES Yes 3/24/2005

E-Mail: [kevino@illicom.net](mailto:kevino@illicom.net)

---

Dan Pak  
SOS Telecom, Inc.  
2485 N. Clark  
Chicago, IL 60614

RES Yes 3/24/2005

E-Mail: [danpak@sostele.com](mailto:danpak@sostele.com)

---

Jacquetta L. Peace  
Director  
Regulatory/Compliance/Special Projects  
Premiere Network Services, Inc.  
1510 N. Hampton Rd., Ste. 120  
DeSoto, TX 75115

RES Yes 3/24/2005

E-Mail: [jaqi@rewireit.com](mailto:jaqi@rewireit.com)

---

B. Peterson  
SMARTSTOP, Inc.  
315 S.W. 5th Ave, Ste. 600  
Portland, OR 97204

RES Yes 3/24/2005

Joshua A. Ploude  
Pacific Centrex Services  
6855 Tujunga Ave.  
N. Hollywood, CA 91605

RES Yes 3/24/2005

E-Mail: [joshp@pcs1.net](mailto:joshp@pcs1.net)

---

Document Processor  
C T Corporation System  
208 S. LaSalle St.  
Chicago, IL 60604

RES Yes 3/24/2005

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Faxon Legal Information Services Inc.  
2501 Chatham Rd., Ste. 110  
Springfield, IL 62704-7100

RES Yes 3/24/2005

E-Mail: [dweber@faxxon.com](mailto:dweber@faxxon.com)

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Corporate Creations Enterprises Inc.  
3023 N. Clark St., Ste. 318  
Chicago, IL 60657

RES Yes 3/24/2005

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422 N. Northwest Hwy., Ste. 150  
Park Ridge, IL 60068

RES Yes 3/24/2005

E-Mail: [info@cgtco.com](mailto:info@cgtco.com)

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Richard M. Rindler Atty. for TelePacific Communications Swider Berlin Shereff & Friedman 3000 K St., NW, Ste. 300 Washington, DC 20007-5116	INT	Yes	4/15/2005
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---

Cathy Roberts  
 Universal Access, Inc.  
 Technologies Management, Inc.  
 PO Drawer 200  
 Winter Park, FL 32790-0200

RES Yes 3/24/2005

E-Mail: [cekern@tminc.com](mailto:cekern@tminc.com)

---

Conrad S. Rubinkowski  
 Office of General Counsel  
 Illinois Commerce Commission  
 527 E. Capitol Ave.  
 Springfield, IL 62701

MIS Yes 3/24/2005

E-Mail: [crubinko@icc.state.il.us](mailto:crubinko@icc.state.il.us)

---

Jim Sacino  
 Illinois Telephone Corporation  
 2021 N. Mannheim Rd.  
 Melrose Park, IL 60160

RES Yes 3/24/2005

E-Mail: [jrs@illinoistelephone.com](mailto:jrs@illinoistelephone.com)

---

Hilda Santiago  
 Ripple Communications, Inc.  
 2226 W. 24th St.  
 Chicago, IL 60608

RES Yes 3/24/2005

E-Mail: [info@ripplecomm.com](mailto:info@ripplecomm.com)

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Kurt Scholle  
 Manager  
 Novacon LLC  
 1895 Rohlwing Rd., Ste. C  
 Rolling Meadows, IL 60008-4803

RES Yes 3/24/2005

E-Mail: [kscholle@novacon.net](mailto:kscholle@novacon.net)

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David J. Segneri  
 President  
 Telecourier Communications Corporation  
 520 N. Center St.  
 Bloomington, IL 61701-2902

RES Yes 3/24/2005

E-Mail: [dsegneri@telecourier.com](mailto:dsegneri@telecourier.com)

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Elizabeth D. Sharp  
Loop Telecom, L.P.  
330 S. Wells St., Ste. 706  
Chicago, IL 60606

RES Yes 3/24/2005

E-Mail: [esharp@scattered.com](mailto:esharp@scattered.com)

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John M. Sheahin  
Communication Discount Services, Inc.  
529 W. Roosevelt Rd.  
Wheaton, IL 60187

RES Yes 3/24/2005

Pamela H. Sherwood  
Vice President  
Regulatory-Midwest Region  
Time Warner Telecom of Illinois LLC  
4625 W. 86th St., #500  
Indianapolis, IN 46268

RES Yes 3/24/2005

E-Mail: [pamela.sherwood@twtelecom.com](mailto:pamela.sherwood@twtelecom.com)

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Mark Shmikler  
President  
EZ RECONNECT, LLC  
7720 W. 99th St.  
Hickory Hills, IL 60457

RES Yes 3/24/2005

E-Mail: [mshmikler@mindspring.com](mailto:mshmikler@mindspring.com)

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Christopher J. Townsend  
Association Management Resources, Inc.  
DLA Piper Rudnick Gray Cary US LLP  
203 N. LaSalle St., Ste. 1500  
Chicago, IL 60601-1293

RES Yes 3/24/2005

E-Mail: [christopher.townsend@dlapiper.com](mailto:christopher.townsend@dlapiper.com)

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Sam Vogel  
Metropolitan Telecommunications of Illinois d/ba MetTel  
44 Wall St., 6th Fl.  
New York, NY 10005

INT Yes 4/1/2005

E-Mail: [svogel@mettel.net](mailto:svogel@mettel.net)

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Jason Wakefield Covad Communications Company 100 Congress Ave., Ste. 2000 Austin, TX 78701	RES	Yes	3/24/2005
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E-Mail: [jason.wakefield@covad.com](mailto:jason.wakefield@covad.com)

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Steve Wicker Illinois IntraNetwork, Inc. 331 Fulton, Ste. 840 Peoria, IL 61602	RES	Yes	3/24/2005
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E-Mail: [steve@w@a5.com](mailto:steve@w@a5.com)

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W. Don Williams V.P. of Operations Comdata Telecommunications Services, Inc. 5301 Maryland Way Brentwood, TN 37027	RES	Yes	3/24/2005
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Ried Zulager Cogent Communications of Illinois, Inc. 1015 31st St. N.W. Washington, DC 20007	RES	Yes	3/24/2005
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E-Mail: [info@cogentco.com](mailto:info@cogentco.com)

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