IN THE SUPREME COURT OF FLORIDA

FLORIDA CABLE TELEVISION ASSOCIATION, INC.,	)	
Appellant,	)	CASE NO. 82,281
v.	)	
J. TERRY DEASON, ETC., ET AL.,	)	
Appellees.	)	

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, The Public Service Commission, is referred to in this brief as the "Commission". Appellant, Florida Cable Television Association, Inc., is referred to as FCTA. Citations to the record on appeal are designated (R.), while citations to the transcript of the hearing are designated (Tr.).

STATEMENT OF THE CASE AND FACTS

The Commission disagrees with FCTA's statement of the issue in paragraph one of its Statement of the Case and Facts. Instead, the issue is whether the Commission was clearly erroneous in finding that the terms "competitive", "effectively competitive", and "subject to effective competition" "have identical meanings when used in Sections 364.338 and 364.3381." Order No. PSC-93-1015-FOF-TP at 18, R. 624.

The Commission objects to the inclusion of paragraphs two and three of FCTA's Statement because it contains inappropriate argument.

The Commission disagrees with the remainder of FCTA's statement to the extent that it selects certain fact and omits other information relevant to the case. The Commission, therefore, submits the following additional information.

Although FCTA states that it is only challenging two findings by the Commission, to gain a better understanding of this case, it is necessary to recognize the Commission's other interrelated findings. The order on appeal, Order No. PSC-93-1015-FOF-TP, contains discussion and findings related to: (1) the definition of cross-subsidization (Order at 4, R. 610); (2) the detection of cross-subsidization (Order at 8, R. 614); (3) the proper standard for detecting the presence or absence of cross-subsidization (Order at 8, R. 614); (4) the behaviors that constitute cross-subsidization (Order at 12, R. 618); (5) the meaning of the terms "competitive", "effectively competitive" and "subject to effective

competition" (Order at 15, R. 621); (6) whether a determination that a service is effectively competitive is required before the provisions of section 364.3381, Florida Statutes, apply (Order at 18, R. 624); (7) other forms of anti-competitive behavior besides cross-subsidization (Order at 19, R. 624); and (8) the methodology the Commission must use to decide how to ensure the requirements of section 364.3381 are met (Order at 21, R. 627).

In the order, the Commission found that the term "cross-subsidization", as contained in section 364.3381, should be defined as the pricing of competitive services below their incremental cost, with the resulting revenue shortfall recovered through the rates for monopoly services. Order at 7, R. 613. The Commission also found that the appropriate standard for detecting cross-subsidization is whether a service is priced below its incremental cost. Order at 11, R. 617. After hearing argument that the terms "effectively competitive," "subject to effective competition," and "competitive," as used in section 364.338 and 364.3381, have separate and distinct meanings, the Commission found that all three terms have identical meanings when used in section 364.338 and 364.3381. In making this finding, Commission noted that the three terms are inextricably interwoven through the repeated use of the term "competitive." The order explained that "[t]his fact, coupled with a clear lack of definition for any of the three terms in Section 364.02," led the Commission to conclude that all three terms have identical meanings when used in sections 364.338 and 364.3381, Florida Statutes (1991). Order at 18, R. 624.

SUMMARY OF THE ARGUMENT

The Commission properly interpreted sections 364.338 and 364.3381, Florida Statutes as a unified whole and correctly determined that the terms "competitive", "subject to effective competition" and "effectively competitive" are used interchangeably in sections 364.338 and 364.3381, Florida Statutes (1991). This is the only logical construction of the terms' meaning; it unifies the two statutes and effectuates the Legislature's intent to encourage competition if it is in the public interest. FCTA's construction, on the other hand, produces an absurd result and ignores the Commission's role in furthering the public interest. The Commission's decision is not clearly erroneous and must be upheld.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF THE TERMS IN SECTIONS 364.338 AND 364.3381, FLORIDA STATUTES (1991), MUST BE UPHELD BECAUSE IT IS NOT CLEARLY ERRONEOUS

FCTA incorrectly identifies the standard of review applicable to the Commission's construction of terms in sections 364.338 and 364.3381, Florida Statutes (1991). FCTA supposes that the meaning of statutory terms poses a factual question which the Commission must decide on the basis of testimony and dictionary definitions. Thus, FCTA incorrectly argues that this Court must determine whether the Commission's interpretation of terms departs from the essential requirements of law and is supported by competent, substantial evidence.

An agency's construction of the statutes it is charged to enforce is not, however, limited by the opinions of those who come before it. The agency itself must construe and interpret its legislative authority, and its construction is entitled to deference from the courts. Florida law is well settled that the proper standard of review of an agency's construction of its statutes is whether the decision is "clearly erroneous". State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 823 (Fla. 1973).

Indeed, this Court has reaffirmed that principle in connection with the Commission's construction of its statutes. In P. W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988), this Court noted:

> the well established principle that the contemporaneous construction of a statute by

> the agency charged with its enforcement and interpretation is entitled to great weight.

In that case, Commission construed the phrase "to the public", to mean "to any member of the public". Even though the Court acknowledged that "the issue is not without doubt", it upheld the Commission's decision because it was not clearly erroneous.

FCTA disagrees with the Commission's construction of the terms "competitive", "effectively competitive" and "subject to effective competition", but has not shown the construction to be clearly erroneous. In fact, the Commission's construction of the terms is the only one that makes sense and achieves the legislative intent to encourage competition while regulating telecommunications services in the public interest. FCTA's construction makes no sense upon reading the statute and fails to fulfil the Legislature's intent.

II. THE TERMS "COMPETITIVE", "EFFECTIVELY COMPETITIVE" AND "SUBJECT TO EFFECTIVE COMPETITION" ARE USED SYNONYMOUSLY IN SECTIONS 364.338 AND 364.3381, FLORIDA STATUTES (1991).

The terms "competitive", "effectively competitive" and "subject to effective competition" appear frequently in sections 365.338 and 364.3381, Florida Statutes (1991).[1] They are not defined in Chapter 364. At hearing, FCTA's witness contended that the terms have separate and distinct meanings:

> FCTA witness Cicchetti testified that the term "competitive" means a service experiencing

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[1] The terms also appear in other sections of Chapter 364. See, s. 364.01(c), (d), (e) and (f); 364.02(3); 364.036(1) and (2)(f); 364.183(3)(e); 364.335(3); 364.3376(2) and (10); and 364.386(1) and (2), F.S.

> some form of competition, "subject to effective competition" means having the potential to become effectively competitive, and "effective competition" means a service experiencing true and fair competition between two or more providers.

Order No. PSC-93-1015-FOF-TP at 15; R. 621. In this testimony, FCTA sets up the existence of three separate categories of competitive services, which may be described as slightly competitive, somewhat competitive, and truly competitive. A reading of the statutes, however, discredits this theory, and leads to the conclusion that the Legislature intended the terms to be equivalent.

A. The Commission properly interpreted sections 364.338 and 364.3381 as a whole.

Chapter 364 does not specifically define any of these three terms. The lack of specific definition, however, does not necessitate resort to testimony or a dictionary to determine their meaning. Instead, several basic rules of statutory construction provide guidance. First, an agency's primary duty in enforcing its statutes is to give effect to the Legislature's intent. S.R.G. Corp. v. Dept. of Revenue, 365 So. 2d 687 (Fla. 1987). Legislative intent must be gleaned from the language of the statute as a whole, rather than from an isolated dissection of individual terms or phrases. Forsythe v. Longboat Key Beach Erosion Control District, 239 So. 2d 256 (Fla. 1992). Further, in order to avoid a strained or artificial interpretation, statutory language must be given its plain and obvious meaning. Citizens v. Public Service Commission,

425 So. 2d 534 (Fla. 1982); Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987).

As explained in its order, the Commission followed these rules of statutory construction, and properly examined the statute itself to determine the Legislature's intent:

> [E]ven apparently plain words may not convey the meaning the drafters intended to impart; it is only within the full context of a statute that a word can convey an idea.

Order No. PSC-93-1015-FOF-TL at 17, R. 623. FCTA's constricted focus on the dictionary definition of the term "competitive" disregards these basic principles of statutory interpretation and distorts, rather than effectuates, the plain meaning and design of the statute as a whole. In effect, FCTA asks this Court to concentrate on one word and ignore the surrounding statute.

B. The Commission's construction of sections 364.338 and 364.3381 is reasonable while FCTA's construction would produce an absurd result.

The Commission was obliged to interpret sections 364.338 and 364.3381 so as to produce a reasonable, rather than absurd, result. Carawan v. State, 515 So. 2d 161 (Fla. 1987). An analysis of the Legislature's plan for regulation of competitive telecommunications services demonstrates that the Commission's construction of the term "competitive" is the only one that produces a reasonable result.

In section 364.338, Florida Statutes (1991), the Legislature recognized the emergence of competition in the telecommunications area and authorized the Commission to loosen the regulatory reins

for certain services when competition reaches the point where the market can effectively set prices:

> It is the legislative intent that, where the commission finds that a telecommunications service is **effectively competitive**, market conditions be allowed to set prices so long as predatory pricing is precluded, monopoly ratepayers be protected from paying excessive rates and charges, and both ratepayers and competitors be protected from regulated telecommunications services subsidizing **competitive** telecommunications services. (emphasis supplied)

Sec. 365.338(1), Fla. Stat. (1991). Next, the Legislature specified seven criteria which the Commission must consider in determining whether a service is subject to effective competition. Sec. 364.338 (2)(a)-(g), Fla. Stat. 1991. If, after notice and opportunity for hearing, the Commission finds the service to be effectively competitive, the Commission is authorized to impose different regulatory treatment on that service:

> (3)(a) If the commission determines, after notice and opportunity to be heard, that a service provided by a local exchange telecommunications company is **subject to effective competition**, the commission may:
> 1. Exempt the service from some of the requirements of this chapter and prescribe different regulatory requirements than are otherwise prescribed for a monopoly service; or
> 2. Require that the **competitive** service be provided pursuant to a fully separated subsidiary of affiliate. (emphasis supplied)

Sec. 364.338(3)(a), Fla. Stat. 1991. This section is obviously intended to allow the Commission to impose regulatory requirements on a service which it has found to be effectively competitive. The Legislature's interchangeable use of the terms "subject to

effective competition" and "competitive service" leads to the conclusion that they are intended to mean the same thing. This unambiguously shows that a "competitive service" does not represent a separate category of service in itself, as argued by FCTA.

Next, the statute instructs the Commission on those safeguards it must employ when authorizing different regulatory treatment for a service which it has found to be effectively competitive:

> (b) When authorizing different regulatory requirements . . . the commission:
> 1. Shall require that the **competitive** service be provided on a nonseparate basis . . .
> 2. Shall require that the **competitive** service be provided pursuant to such safeguards necessary to ensure that the rates for monopoly services do not subsidize **competitive** services.
> 3. Shall require that the **competitive** service be provided pursuant to anticompetitive safeguards, which may include imputing the price of the monopoly services used in providing a **competitive** service as a cost of providing such service, or offering the tariff rates for such monopoly services separately and individually and on a nondiscriminatory basis to all persons . . .
> 4. Shall require that the rates for **competitive** services provided by the local exchange telecommunications company cover the cost of providing the service.
> 5. May require that the **competitive** service be provided pursuant to any other requirement that the commission determines is necessary to ensure the protection of the ratepayer. (emphasis supplied)

Sec. 364.338(3)(b), Fla. Stat. (1991). These subsections all use the term "competitive service" in describing the regulatory treatment the Commission may impose on a service that it has determined is subject to effective competition. The term "competitive service" is clearly used as a shorthand reference for

any service which the Commission has found to be subject to effective competition.

Taken as a whole, section 364.338 is coherent only as construed by the Commission: the Legislature used the terms "competition" and "effective competition" interchangeably. Under the process described by the statute, the Commission is unquestionably required to review the specific statutory criteria found in section 364.338(2) (a) - (g) to determine if a service is subject to competition sufficient to control price and quality. If so, the Commission makes a finding that the service is "subject to effective competition". The service is then properly deregulated as a "competitive" service and the Commission may impose different regulatory standards on that service. It must also ensure that the service is not subsidized by monopoly revenues.

This approach unifies the various parts of the statute and produces a sensible, rational result. The statutory terms are used to refer to one category of service: that which is effectively competitive.

Acceptance of FCTA's argument that the terms refer to more than one statutory category of competitive service renders the entire section nonsensical and circular. Under FCTA's reasoning, once the Commission determines that a service is "subject to effective competition" (and thus falls into most competitive category) it would then impose different regulatory requirements on some unidentified service that falls into the least competitive category. Under this theory, the determination that a service is

"subject to effective competition" triggers no regulatory response, and is therefore a nullity. As the Commission noted in its order, FCTA's interpretation simply does not work. Order No. PSC-93-1015-FOF-TL at 17, R. 623. It cannot be upheld because it produces an absurd result. Carawan v. State, supra.

The result is equally absurd when FCTA's theory is applied to section 364.3381. There, the Legislature further emphasizes the prohibition stated in section 364.338 against artificially lowering the price of competitive services through subsidization of funds derived from monopoly services:

> 1) The price of a **competitive** telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by customers of monopoly services subject to the jurisdiction of the commission. (2) A local exchange telecommunications company which offers both monopoly and **competitive** telecommunications services shall segregate its intrastate investments and expenses in accordance with allocation methodologies as prescribed by the commission to ensure that **competitive** telecommunications services are not subsidized by monopoly telecommunications services. (emphasis supplied)

Sec. 364.3381(1) and (2), Fla. Stat. (1991). Under the Commission's construction of these two sections, a formal determination under section 364.338(2) that a service is effectively competitive triggers a regulatory duty to prevent cross-subsidization of that service. In contrast, FCTA believes that the mere presence of some form of competition triggers the cross-subsidization prohibition. In so arguing, FCTA again posits the existence of three separate categories of competition, the

existence of which is not supported by statute. (p. 6 - 7, supra) This strained construction renders the determination that a service is "subject to effective competition" a nullity, because there is no regulatory significance attached to it. It also assumes that there is no relationship between sections 364.338 and 364.3381.

The result FCTA wishes to achieve is the opposite of what the Legislature intended. The Legislature clearly stated its desire to let the market set prices for certain types of telecommunications services **once that service becomes effectively competitive**. Sec. 364.338(1), Fla. Stat. (1991). The Legislature also explicitly instructed the Commission to continue its regulatory oversight until that threshold of effectiveness is reached. Sec. 364.338(3)(a), Fla. Stat. (1991). Only when the competition becomes effective must the Commission ensure that the service is not subsidized, and only then may it impose other regulatory treatment.

FCTA would require the Commission to take steps to prevent cross-subsidies whenever a competitor appears on the scene, regardless of whether the competition was effective to regulate prices. Under FCTA's theory, the Commission would be required to continue to regulate competitive service as a monopoly until it gives notice, offers the opportunity for hearing, considers the seven factors listed in section 364.338(2), and makes a formal determination that the competition is effective, after which it may prescribe different regulatory treatment. In the meantime, the somewhat competitive service presumably would be regulated as fully

competitive service for pricing purposes, but as a monopoly for all other purposes. Nothing in the chapter suggests this result.

Had the Legislature intended to create different categories of competitive services, it could have done so simply by specifically defining those terms in section 364.02. The fact that it did not do so must lead this court to conclude that it did not intend the result urged by FCTA.

III. THE COMMISSION'S CONSTRUCTION OF THE TERMS FURTHERS THE LEGISLATIVE GOAL AND STATUTORY SCHEME TO ENCOURAGE COMPETITION IF IT IS IN THE PUBLIC INTEREST.

The Legislature directed the Commission to regulate telecommunications services in the public interest. Germane to this duty are sections 364.01(3)(a) and 364.01(3)(b), Florida Statutes (1991), conspicuously omitted from FCTA's brief, which provide the statutory framework within which the Commission must regulate both competitive and monopoly services:

> The commission shall exercise its exclusive jurisdiction in order to:
> (a) Protect the public health, safety, and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices.
> (b) Protect the public health, safety, and welfare by ensuring that monopoly services provided by a local exchange company continue to be subject to effective rate and service regulation.

The Commission's role of encouraging competition is secondary to its overall duty to regulate telecommunications in the public interest. Section 364.01(3)(c), Florida Statutes (1991), requires the Commission to:

> (c) Encourage cost effective technological innovation and competition in the telecommunications industry **if doing so will benefit the public by making modern and adequate telecommunications services available at reasonable prices.** [emphasis supplied.]

The Legislature has directed the Commission to use its exclusive jurisdiction to regulate telecommunications companies in order to, first, ensure that modern and adequate telecommunications services are available at affordable prices, and second, to encourage cost effective competition if doing so helps to achieve the first goal. FCTA's claim that the provisions in section 364.01 "expressly direct the Commission to foster competition in the public interest" is incomplete and thus misleading. FCTA Initial Brief at 25.

The Legislature also gave the Commission specific instructions on how to monitor and respond to the emergence of competition while still achieving the general goal of regulating telecommunications in the public interest. Section 364.338(1) announces the legislative finding that competition in the telecommunications area may be beneficial:

> [C]ompetitive offerings of certain types of telecommunications services may under certain circumstances be in the best interest of the state.

Accordingly, the Legislature directed the Commission to ease its regulatory control and let the market set prices for those telecommunications services which the Commission finds to be "effectively competitive." The Commission's role in the regulation of competitive services, as defined by the Legislature, is to

preclude predatory pricing, protect monopoly ratepayers from excessive rates and charges, and prevent subsidization of competitive services by regulated services. The statute is clear, however, that the Commission should allow market conditions to substitute for traditional regulation if, and only if, the market can effectively regulate price and quality. Sec. 364.338(1), Fla. Stat. (1991).

In section 364.338(2), Florida Statutes (1991), the Legislature directs the Commission to consider certain enumerated criteria in determining whether a specific service provided by a local exchange company is "subject to effective competition", such that the market is able to effectively control price and quality. If, after notice and opportunity to be heard, the Commission finds that a service is subject to effective competition, it may prescribe different regulatory requirements than are otherwise prescribed for a monopoly service, or it can require that the service be provided by a fully separated subsidiary or affiliate. Sec. 364.338(3)(a), Fla. Stat. (1991). Whatever regulatory treatment is chosen, however, the Commission must ensure that LEC monopoly services do not subsidize competitive offerings. Sec. 364.338(3)(b), Fla. Stat. (1991).

Section 364.3381 is entitled "Cross-subsidization." The section prohibits cross-subsidization between monopoly and competitive services by use of the following language:

> (1) The price of a competitive telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by

customers of monopoly services subject to the jurisdiction of the commission.

Section 364.3381(2) requires a LEC that offers both competitive and monopoly telecommunications services to segregate costs as prescribed by the Commission to prevent cross-subsidization. Section 364.3381(3) prohibits charging the cost allocation expenses to regulated rates and charges, except in certain circumstances.

A. The Commission's interpretation of sections 364.338 and 364.3381 furthers the public interest by requiring agency scrutiny before a service may be deregulated.

The fact that the Legislature recognized that certain market conditions must be met before the Commission could relax its regulatory oversight of price and service quality indicates that the Legislature also intended for certain services to be offered by the LEC as monopoly services, even though there may be one or more competitors that could offer similar services. In certain instances, the public interest is better served by having one provider of a natural monopoly service because it is a more efficient utilization of resources. This efficiency is realized through economies of scale and scope, which work to bring down the cost of providing an additional unit of a good or service.[2] In other instances, where consumers would receive a benefit from the provision of a particular service on a competitive basis, it is in the public interest to allow competitive market forces to work.

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[2]See Order No. PSC-93-1015-FOF-TL at 6 - 7; R. 612 - 613 for a thorough discussion of economies of scale and scope regarding fiber optics and cable services.

Section 364.338 clearly requires the Commission to maintain its regulatory scrutiny until market forces are sufficient to provide the benefits of competition.

The Commission's finding that the terms "competitive", "subject to effective competition", and "effectively competitive" are used interchangeably in Sections 364.338 and 364.3381, and therefore have identical meanings within the context of the sections, is in harmony with goal of encouraging competition if it is in the public interest. If the public interest is served by the offering of a particular LEC service on a competitive basis, then section 364.338 provides a path to make that happen. Section 364.3381, in turn, prevents that service from being cross-subsidized by the LEC's monopoly services. Conversely, if the public interest is not served by offering a service on a competitive basis, then the statute contemplates that the service should be offered on a monopoly basis, and cross-subsidization between monopoly services is not prohibited. It really makes no difference what one calls it i.e., competitive, subject to effective competition, or effectively competitive. The role of the Commission is to determine when competition is in the public interest.

B. FCTA's argument ignores the Commission's role in furthering the public interest.

FCTA correctly points out that the Commission's order would permit LECs to use monopoly revenues to subsidize services which could possibly be offered by an alternative supplier. This is, in fact, the case now and has been for years. LECs are not required

to isolate the costs of their monopoly services, even those which are experiencing some form of competition. For example, cellular telephone service provides some competition for local exchange services, as does pay telephone service and even the U.S. mail. Under FCTA's theory, the mere existence of a some form of competition requires LECs to change their pricing structure, regardless of the actual ability of the alternative supplier to make a functionally equivalent service available, and regardless of the effect on consumers. In effect, it transfers the Commission's regulatory role to potential competitors, by allowing them to determine the basis on which LECs must price their services. This result is not contemplated by section 364.338 and interferes with the Commission's ability to regulate telecommunications in the public interest.

FCTA argues that the Commission's order would permit the LEC's to improperly cross-subsidize their competitive services, and that this would impede competition and harm consumers by shutting competitors out of the market. This argument completely fails to recognize that sections 364.338 and 364.3381, and the Commission's order, provides competitors a remedy if competition which benefits consumers is allegedly, or in fact, being impeded. Section 364.338(2) provides:

> (2) A determination as to whether a specific service provided by a local exchange telecommunications company is subject to effective competition may be made on motion by the commission **or on petition of the telecommunications company or any interested party**. In determining whether a specific service provided by a local exchange

> telecommunications company is subject to effective competition, **the commission shall consider all of the following:**
> (a) The effect, if any, on the maintenance of basic local exchange telecommunications service.
> (b) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.
> (c) The ability of competitive providers in the relevant geographic or service market to make functionally equivalent or substitute services available at competitive rates, terms and conditions.
> (d) The overall impact of the proposed regulatory change on the continued availability of existing services.
> (e) **Whether the consumers of such service would receive an identifiable benefit from the provision of the service on a competitive basis.**
> (f) The degree of regulation necessary to prevent abuses or discrimination in the provision of such service.
> (g) Such other relevant factors as are in the public interest. [emphasis supplied.]

The criteria above direct the Commission to consider the specific issues involved in determining if a service is effectively competitive. Like every decision the Commission makes, the primary goal in this determination is to decide what is in the public interest. Accordingly, if a particular service is claimed to be competitive, or potentially competitive, in a way that ratepayers would benefit, then a showing can be made by an alternative supplier that the service is subject to effective competition. If that supplier succeeds in making that showing then the service would be offered on a competitive basis and cross-subsidization restrictions would apply. Therefore, the Commission's interpretation of the statute as a whole, including the meaning and effect of the terms "competitive", "subject to effective

competition", and "effectively competitive", does nothing to impede the legislative goal of encouraging competition which serves the public interest.

CONCLUSION

The Commission's interpretation of statutes which it is charged to enforce is entitled to great weight and must be upheld unless it is clearly erroneous. The Commission properly applied standard rules of statutory construction and its resulting interpretation is reasonable, within the Legislature's intent, and furthers the public interest. FCTA has shown no error, and the Commission's order should be upheld.

Respectfully submitted,

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Dated: December 13, 1993.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following parties on this 13th day of December, 1993.

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