

**GREENSFELDER, HEMKER & GALE, P.C.**

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AFFILIATE OFFICE  
GREENSFELDER, HEMKER & GALE  
BELLEVILLE, ILLINOIS

April 18, 2000

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
301 West High Street, Room 530  
Jefferson, City, MO 65102

**FILED<sup>2</sup>**  
**APR 19 2000**  
Missouri Public  
Service Commission  
TA-2000-664

**Re: Application for Certificate of Service Authority**

Dear Mr. Roberts,

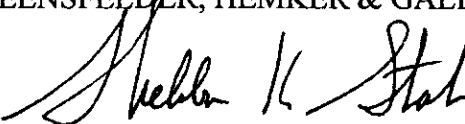
Enclosed please find an original and fourteen (14) copies of the Application for Certificate of Service Authority to provide interexchange and local exchange telecommunications services filed on behalf of Pathnet, Inc. In addition, I have included an extra copy of the Application which I request be file stamped and returned to me in the enclosed self-addressed envelope.

In the event you need any additional information or have any questions concerning any of the information set forth in these Applications, please contact the undersigned.

Yours very truly,

GREENSFELDER, HEMKER & GALE, P.C.

By



Sheldon K. Stock

SKS/sdd  
Enclosures

cc: Office of Public Counsel  
Gerard J. Waldron, Esq.

387019v1

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

APR 19 2000

Missouri Public  
Service Commission

In the matter of the application )  
of Pathnet, Inc. for a )  
certificate of service authority to )  
provide interexchange and local )  
exchange telecommunications services )

Case No. TA-2000-664

APPLICATION

Pathnet, Inc. (Applicant or Pathnet), a Delaware corporation, files this verified application respectfully requesting that the Missouri Public Service Commission (Commission) issue an order that:

- (a) grants Applicant a Certificate of Service Authority to provide interexchange and local exchange telecommunications services pursuant to Chapter 392 of the Missouri Revised Statutes.
- (b) grants competitive status to Applicant.
- (c) waives certain Commission rules and statutory provisions pursuant to Section 392.429, RSMo (Cumm. Supp. 1994).

In support of its request, Applicant states:

1. The legal name and principal office or place of business of the Applicant are:

Pathnet, Inc.  
11720 Sunrise Valley Drive  
Reston, VA 20191  
(703) 390-1000  
(877) PATHNOC

A copy of Applicant's Articles of Incorporation and certificate of authority from the Missouri Secretary of State to transact business in Missouri are attached hereto as **Appendix I**.

2. The name and address of Applicant's in-state attorney is:

Sheldon K. Stock  
MBE 18581  
Greensfelder, Hemker & Gale, P.C.  
2000 Equitable Building  
10 South Broadway  
St. Louis, MO 63102  
(314) 241-9090

3. Applicant proposes to provide interexchange and local exchange telecommunications service within Missouri including (1) point-to-point private line services ranging from DS-0 to OC-n, using TDM technology; (2) TDM-based special access services; (3) data services, including digital subscriber line (xDSL) services; (4) exchange services consisting of dedicated link and extended link (including transport) services connecting other telecommunications providers' switches to their end users. Applicant intends to offer these dedicated private line, special access and data services primarily to other carriers and Internet service providers. Any local exchange services Applicant provides pursuant to a certificate of service authority granted under this application will be limited to the provisioning of dedicated, local exchange private line services. At this time, Applicant does not propose to provide dial tone or operator services. Applicant proposes to provide service to prospective customers throughout the State of Missouri.

Applicant plans to provide the proposed interexchange and local exchange services through its own facilities or in combination with facilities leased or purchased from other facilities-based telecommunications providers. Applicant will own the following types of equipment and facilities in Missouri: fiber optic cables, optronics equipment, microwave radio systems, multiplexors, digital cross connect equipment, D-SLAM equipment (some of which will be installed in ILEC central office collocation facilities), customer premise equipment, POP

facilities, fiber optic and microwave shelters, batteries, generators, converters, chargers and HVAC support systems.

4. Pathnet requests a temporary waiver of 4 CSR 240-2.060(4)(H), which requires that an application for a certificate of service authority to provide interexchange, local exchange or basic local exchange service shall include a proposed tariff with a forty-five day effective date.

Pathnet finds it impossible at this time to develop tariffs to fully comply with this rule since Pathnet has not yet executed or received Commission approval of any interconnection and/or resale agreements with the incumbent local exchange companies in Missouri. At such time as all facts necessary for the development of such tariffs are known to Pathnet, it will promptly file said tariffs bearing no less than a 30 day effective date with the Commission in a manner consistent with recent Commission practice in similar cases.

5. Applicant requests classification as a competitive telecommunications company within the State of Missouri. Applicant believes that its proposed services will be subject to sufficient competition to justify a lesser degree of regulation. Granting of this application will allow greater price and service options for telephone users. Although Applicant, at this time, does not plan to offer services directly to residential end users, the services Applicant plans to offer as a carrier's carrier will assist other carriers in providing competitive service to end users.

6. Applicant also requests, pursuant to Section 392.420, RSMo (Cumm. Supp. 1994), that the Commission waive the application of the following rules and statutory provisions as they relates to the regulation of the Applicant:

Statutes:

392.210.2	Uniform System of Accounts
392.240(1)	Just and Reasonable Rates
392.270	Property valuation
392.280	Depreciation accounts
392.290	Issuance of securities
392.300.2	Acquisition of Stock
392.310	Issuance of stocks and debt
392.320	Stock dividend payment
392.330	Issuance of securities, debts & notes
392.340	Reorganization

Commission Rules:

4 CSR 240-10.020	Depreciation fund income
4 CSR 240-30.010(2)(C)	Rates schedules posted at central offices.
4 CSR 240-30.040	Uniform System of Accounts
4 CSR 240-32.030 (1)(B)	Exchange boundary maps
4 CSR 240-32.030 (1)(C)	Record of access lines
4 CSR 240-32.030 (2)	Records kept within state
4 CSR 240-32.050 (3)	Keep tariffs, maps at public business office
4 CSR 240-32.050 (4)-(6)	Telephone directories
4 CSR 240-32.070 (4)	Coin telephones
4 CSR 240-33.030	Inform customers of lowest price
4 CSR 240-33.040 (5)	No finance or penalty fee

The above-referenced rules and statutory provisions have been waived with respect to other interexchange and local exchange carriers in prior cases.

7. Applicant, pursuant to Section 386.570, RSMo (Cumm. Supp. 1994), will comply with all applicable Commission rules except those which are specifically waived by the Commission pursuant to a request filed by the Applicant.

8. Correspondence or communications pertaining to this Application should be addressed to:

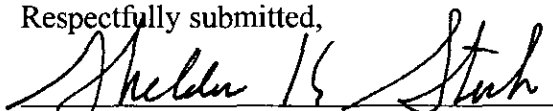
Gerard J. Waldron  
Covington & Burling  
1201 Pennsylvania Ave., N.W.  
Washington, DC 20004-2401  
Telephone: 202-662-5360  
Facsimile: 202-778-5360  
E-mail: [gwaldron@cov.com](mailto:gwaldron@cov.com)

OR

Sheldon K. Stock  
MBE 18581  
Greensfelder, Hemker & Gale, P.C.  
2000 Equitable Building  
10 South Broadway  
St. Louis, MO 63102  
(314) 241-9090  
(314) 241-8624 (fax)  
E-mail: [sks@greensfelder.com](mailto:sks@greensfelder.com)

**WHEREFORE**, Applicant respectfully requests that the Missouri Public Service Commission grant it a certificate of service authority to provide interexchange and local exchange telecommunications services within the State of Missouri. If granted local exchange authority, such authority will be limited to the provisioning of dedicated, non-switched local exchange private line services. Applicant also requests classification as a competitive telecommunications company. In addition, Applicant requests a waiver of the above-referenced rules and statutory provisions.

Respectfully submitted,



Sheldon K. Stock

MBE 18581

Greensfelder, Hemker & Gale, P.C.

2000 Equitable Building

10 South Broadway

St. Louis, MO 63102

(314) 241-9090

(314) 241-8624 (fax)

Gerard J. Waldron

Mary Newcomer Williams

Covington & Burling

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2401

(202) 662-5360

(202) 778-5360 (fax)

*Its Attorneys*

Dated: April 18, 2000

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the matter of the application )  
of Pathnet, Inc. for a )  
certificate of service authority to )  
provide interexchange and local )  
exchange telecommunications services )

Case No. \_\_\_\_\_

VERIFICATION

DISTRICT )  
OF ) SS.  
COLUMBIA )

The undersigned, being under oath, says that he has read the foregoing Application and  
has personal knowledge that the facts in it are true.

*Mary McDermott*

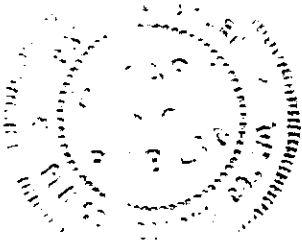
Mary McDermott  
Senior Vice President, General Counsel and  
Secretary of Pathnet, Inc.

Signed and sworn before me this 12th day of April, 2000 by Mary McDermott.

My commission expires: \_\_\_\_\_

(SEAL)

PATTY O'BRIEN  
NOTARY PUBLIC STATE OF MARYLAND  
My Commission Expires August 1, 2001



*Patty O'Brien*  
Notary Public



## **APPENDIX I**

### **Articles of Incorporation and Certificate of Authority to Transact Business**

*State of Delaware*  
*Office of the Secretary of State*      PAGE 1

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I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "PATNET, INC.", FILED IN THIS OFFICE ON THE EIGHTH DAY OF DECEMBER, A.D. 1998, AT 9 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



  
\_\_\_\_\_  
Edward J. Freel, Secretary of State

2533940 8100

981470391

AUTHENTICATION: 9446961

DATE: 12-08-98

CERTIFICATE OF AMENDMENT  
OF  
RESTATED CERTIFICATE OF INCORPORATION  
OF  
PATHNET, INC.

*Adopted in accordance with the provisions of Section 242 of  
the General Corporation Law of the State of Delaware*

We, William R. Smedberg, V, Vice President, Finance and Corporate Development, and Michael A. Lubin, Vice President, General Counsel and Secretary, of Pathnet, Inc., a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Corporation"), DO HEREBY CERTIFY as follows:

FIRST: The Restated Certificate of Incorporation of the Corporation is hereby amended by deleting the current Section 10 thereof in its entirety and renumbering Section 11 as new Section 10.

SECOND: This Amendment has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by William R. Smedberg, V, Vice President, Finance and Corporate Development, and attested to by Michael A. Lubin, Vice President, General Counsel and Secretary, on this 8th day of December, 1998.

PATHNET, INC.

By: William R. Smedberg, V  
William R. Smedberg, V  
Vice President,  
Finance and Corporate Development

ATTEST

By: Michael A. Lubin  
Michael A. Lubin  
Vice President,  
General Counsel and Secretary

CERTIFICATE OF AMENDMENT  
OF  
RESTATED CERTIFICATE OF INCORPORATION  
OF  
PATHNET, INC.

*Adopted in accordance with the provisions of Section 242 of  
the General Corporation Law of the State of Delaware*

We, William R. Smedberg, V, Vice President, Finance and Corporate Development, and Michael A. Lubin, Vice President, General Counsel and Secretary, of Pathnet, Inc., a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Corporation"), DO HEREBY CERTIFY as follows:

FIRST: The Restated Certificate of Incorporation of the Corporation is hereby amended by deleting the current Section 10 thereof in its entirety and renumbering Section 11 as new Section 10.

SECOND: This Amendment has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by William R. Smedberg, V, Vice President, Finance and Corporate Development, and attested to by Michael A. Lubin, Vice President, General Counsel and Secretary, on this 8th day of December, 1998.

PATHNET, INC.

By: William R. Smedberg, V  
William R. Smedberg, V  
Vice President,  
Finance and Corporate Development

ATTEST

By:

Michael A. Lubin  
Michael A. Lubin  
Vice President,  
General Counsel and Secretary

*State of Delaware*  
*Office of the Secretary of State*      PAGE 1

---

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "PATHNET, INC.", FILED IN THIS OFFICE ON THE TWELFTH DAY OF AUGUST, A.D. 1998, AT 9 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



  
\_\_\_\_\_  
Edward J. Freel, Secretary of State

2533940 8100

981316829

AUTHENTICATION:

9250282

DATE:

08-12-98

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF  
PATHNET, INC.

Pathnet, Inc., a corporation duly incorporated under the laws of the State of Delaware, hereby certifies as follows:

**FIRST:** The name of the corporation is Pathnet, Inc. (the "Corporation"). The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on 25th day of August, 1995, under the name PathNet, Inc.

**SECOND:** This Amended and Restated Certificate of Incorporation has been duly adopted in accordance with Sections 242 and 245 of the Delaware General Corporation Law (the "General Corporation Law").

**THIRD:** This Amended and Restated Certificate of Incorporation hereby restates, integrates and amends the Certificate of Incorporation, as amended, of the Corporation as follows:

1. **Name.** The name of the corporation is PATHNET, INC. (the "Corporation").
2. **Address: Registered Office and Agent.** The address of the Corporation's registered office is 1013 Centre Road, Wilmington, New Castle County, Delaware 19805. The name of its registered agent at such address is The Prentice-Hall Corporation System, Inc.
3. **Purpose.** The purpose of the Corporation is to engage in, carry on and conduct any lawful act or activity for which corporations may be organized under the General Corporation Law.
4. **Number of Shares.** The total number of shares of stock that the Corporation shall have authority to issue is 75,470,595, divided as follows: 10,000,000 shares of Preferred Stock, par value of \$0.01 per share (the "Preferred Stock"), 1,000,000 shares of Series A Convertible Preferred Stock, par value of \$0.01 per share (the "Series A Preferred Stock"), 1,651,046 shares of Series B Convertible Preferred Stock, par value of \$0.01 per share (the "Series B Preferred Stock"), 2,819,349 shares of Series C Convertible Preferred Stock, par value of \$0.01 per share (the "Series C Preferred Stock," and together with the Series A Preferred Stock and the Series B Preferred Stock, the "Series Preferred Stock"); and 60,000,000 shares of Common Stock, par value of \$0.01 per share (the "Common Stock").

5. Designation of Classes: Relative Rights, Etc. The designation, relative rights, preferences and limitations of the shares of each class are as follows:

5.1 Preferred Stock. The shares of Preferred Stock may be issued from time to time in one or more series of any number of shares, provided that the aggregate number of shares issued and not canceled of any and all such series shall not exceed the total number of shares of Preferred Stock hereinabove authorized, and with such powers, preferences and rights and qualifications, limitations or restrictions thereof, and such distinctive serial designations, all as shall hereafter be stated and expressed in the resolution or resolutions providing for the issue of such shares of Preferred Stock from time to time adopted by the Board of Directors of the Corporation (the "Board of Directors") pursuant to authority so to do which is hereby vested in the Board of Directors. Each series of shares of Preferred Stock (a) may have such voting rights or powers, full or limited, or may be without voting rights or powers; (b) may be subject to redemption at such time or times and at such prices; (c) may be entitled to receive dividends (which may be cumulative or non-cumulative) at such rate or rates, on such conditions and at such times, and payable in preference to, or in such relation to, the dividends payable on any other class or classes or series of stock; (d) may have such rights upon the voluntary or involuntary liquidation, winding up or dissolution of, or upon any distribution of the assets of, the Corporation; (e) may be made convertible into or exchangeable for, shares of any other class or classes or of any other series of the same or any other class or classes of stock of the Corporation at such price or prices or at such rates of exchange and with such adjustments; (f) may be entitled to the benefit of a sinking fund to be applied to the purchase or redemption of shares of such series in such amount or amounts; (g) may be entitled to the benefit of conditions and restrictions upon the creation of indebtedness of the Corporation or any subsidiary, upon the issue of any additional shares (including additional shares of such series or of any other series) and upon the payment of dividends or the making of other distributions on, and the purchase, redemption or other acquisition by the Corporation or any subsidiary of, any outstanding shares of the Corporation and (h) may have such other relative, participating, optional or other special rights, qualifications, limitations or restrictions thereof; all as shall be stated in said resolution or resolutions providing for the issue of such shares of Preferred Stock. Any of the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of any such series of Preferred Stock may be made dependent upon facts ascertainable outside of the resolution or resolutions providing for the issue of such Preferred Stock adopted by the Board of Directors pursuant to the authority vested in it by this Section 5.1, provided that the manner in which such facts shall operate upon the voting powers, designations, preferences, rights and qualifications, limitations or restrictions of such series of Preferred Stock is clearly and expressly set forth in the resolution or resolutions providing for the issue of such Preferred Stock. The term "facts" as used in the next preceding sentence shall have the meaning given to it in Section 151(a) of the General Corporation Law. Shares of Preferred Stock of any series that have been redeemed (whether through the operation of a sinking fund or otherwise) or that if

convertible or exchangeable, have been converted into or exchanged for shares of any other class or classes shall have the status of authorized and unissued shares of Preferred Stock undesignated as to series and may be reissued as a part of the series of which they were originally a part or as part of a new series of shares of Preferred Stock to be created by resolution or resolutions of the Board of Directors or as part of any other series of shares of Preferred Stock, all subject to the conditions or restrictions on issuance set forth in the resolution or resolutions adopted by the Board of Directors providing for the issue of any series of shares of Preferred Stock.

5.2 Common Stock. Subject to the provisions of any applicable law or of the Bylaws of the Corporation, as from time to time amended (the "Bylaws"), with respect to the closing of the transfer books or the fixing of a record date for the determination of stockholders entitled to vote and except as otherwise provided herein with respect to any shares of Series Preferred Stock, by law or by the resolution or resolutions providing for the issue of any series of shares of Preferred Stock, the holders of outstanding shares of Common Stock shall exclusively possess voting power for the election of directors and for all other purposes, each holder of record of shares of Common Stock being entitled to one vote for each share of Common Stock standing in his or her name on the books of the Corporation. Except as otherwise provided herein with respect to any shares of Series Preferred Stock or by the resolution or resolutions providing for the issue of any series of shares of Preferred Stock, the holders of shares of Common Stock shall be entitled, to the exclusion of the holders of shares of Preferred Stock of any and all series, to receive such dividends as from time to time may be declared by the Board of Directors. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, after payment shall have been made to the holders of shares of any Series Preferred Stock and any Preferred Stock of the full amount to which they shall be entitled pursuant to this Amended and Restated Certificate of Incorporation or the resolution or resolutions providing for the issue of any series of shares of Preferred Stock, the holders of shares of Common Stock shall be entitled, to the exclusion of the holders of shares of Series Preferred Stock and Preferred Stock of any and all series, to share, ratably according to the number of shares of Common Stock held by them, in all remaining assets of the Corporation available for distribution to its stockholders.

### 5.3 Series Preferred Stock.

#### 5.3.1 Shares.

(a) Authorized Shares. The Corporation shall have authority to issue Five Million Four Hundred Seventy Thousand Five Hundred Ninety-Five (5,470,595) shares of Series Preferred Stock, of which One Million (1,000,000) shares shall be designated the Series A Preferred Stock, One Million Six Hundred Fifty One Thousand Forty Six (1,651,046) shares shall be designated the Series B Preferred Stock and Two Million Eight Hundred Nineteen Thousand Five



Hundred Forty-Nine (2,819,549) shares shall be designated as the Series C Preferred Stock.

(b) Dividends. The holders of the Series Preferred Stock shall be entitled to receive, out of funds legally available therefor, dividends (other than dividends paid in additional shares of Common Stock) in preference to and at the same rate as dividends are paid with respect to the Common Stock (treating each share of Series Preferred Stock as being equal to the number of shares of Common Stock into which each such share of Series Preferred Stock could be converted pursuant to the provisions of Section 5.3.4 hereof, with such number determined as of the record date for the determination of holders of Common Stock entitled to receive such dividend).

### 5.3.2 Liquidation, Dissolution or Winding Up.

(a) Distributions to Holders of Series Preferred Stock. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the Series A Preferred Stock, the Series B Preferred Stock and the Series C Preferred Stock shall rank on a parity with each other and shall rank prior to the Common Stock or any class of stock ranking junior to the Series Preferred Stock. Upon such liquidation, holders of each share of Series Preferred Stock outstanding shall be entitled to be paid, out of the assets of the Corporation available for distribution to stockholders and before any payment shall be made to the holders of any class of Common Stock or of any stock ranking on liquidation junior to the Series Preferred Stock, an amount in cash equal to the original purchase price paid by such holder for each such share of Series Preferred Stock held (appropriately adjusted for stock splits, stock dividends and the like) plus any declared but unpaid dividends thereon. If upon any liquidation, dissolution or winding up of the Corporation, the assets to be distributed to the holders of the Series Preferred Stock under the foregoing sentence shall be insufficient to permit payment to such stockholders of the full preferential amounts aforesaid, then all of the assets of the Corporation available for distribution to such holders under such sentence shall be distributed among the holders of Series Preferred Stock, pro rata in accordance with the total amount of preference which would have been payable to such holders if funds had been available to pay the full preference under the previous sentence. After such payment shall have been made in full to such holders of Series Preferred Stock, or funds necessary for such payment shall have been set aside by the Corporation in trust for the account of such holders so as to be available for such payment, the holders of the outstanding shares of Common Stock and any class of stock ranking junior to the Series Preferred Stock shall share ratably in the distribution of the remaining assets and funds of the Corporation available for distribution to shareholders.

(b) Deemed Liquidations. In the case of (i) a consolidation or merger of the Corporation (other than a consolidation or merger upon

consummation of which the holders of voting securities of the Corporation immediately prior to such transaction, continue to own directly or indirectly not less than a majority of the voting power of the surviving corporation) or a sale of all or substantially all of the assets of the Corporation or other similar transaction and (ii) either receipt by the Corporation of (x) consideration less than the equivalent of \$1.00 per share (appropriately adjusted for stock splits, stock dividends and the like) of Series A Preferred Stock plus any declared but unpaid dividends, (y) consideration less than the equivalent of \$3.28 per share (appropriately adjusted for stock splits, stock dividends and the like) of Series B Preferred Stock plus any declared but unpaid dividends, or (z) consideration less than the equivalent of \$10.64 per share (appropriately adjusted for stock splits, stock dividends and the like) of Series C Preferred Stock plus any declared but unpaid dividends, such event shall be regarded, at the option of the holders of a majority of the then outstanding shares of Series Preferred Stock, as a liquidation, dissolution or winding up of the affairs of the Corporation within the meaning of this Section 5.3.2.

Notwithstanding the foregoing, each holder of Series Preferred Stock shall have the right to elect the benefits of the provisions of Section 5.3.4(h) hereof in lieu of receiving payment in liquidation, dissolution or winding up of the Corporation pursuant to this Section 5.3.2(b). For purposes of this Section 5.3.2 and Section 5.3.6 hereof, a sale of substantially all of the assets of the Corporation shall mean (x) the sale or other disposition other than in the ordinary course of business of more than 50% of such assets, as determined by reference to either (A) the book value or (B) the fair market value, of such assets, or (y) any issuance of Common Stock by the Corporation or transfer of Common Stock by the holder thereof to any person or persons acting in concert or a group of affiliated persons, which issuance or transfer results in such person or persons or group holding in the aggregate more than 50% of the issued and outstanding Common Stock after giving effect to such issuance or transfer.

(c) Non-Cash Distributions. In the event of a liquidation, dissolution or winding up of the Corporation resulting in the availability of assets other than cash for distribution to the holders of the Series Preferred Stock, the holders of the Series Preferred Stock shall be entitled to a distribution of cash and/or assets equal in value to the liquidation preference and other distribution rights stated in Section 5.3.2(a) and Section 5.3.2(b) hereof. In the event that such distribution to the holders of the Series Preferred Stock shall include any assets other than cash, the following provisions shall govern. The Board of Directors shall first determine the value of such assets for such purpose, and shall notify all holders of shares of Series Preferred Stock of such determination. The value of such assets for purposes of the distribution under this Section 5.3.2(c) shall be the value as determined by the Board of Directors in good faith and with due care, unless the holders of a majority of the outstanding shares of Series Preferred Stock shall object thereto in writing within 15 days after the date of such notice. In the event of such objection, the valuation of such assets for purposes of such distribution shall be

determined by an arbitrator selected by the objecting stockholders and the Board of Directors, or in the event a single arbitrator cannot be agreed upon within 10 days after the written objection sent by the objecting stockholders in accordance with the previous sentence, the valuation of such assets shall be determined by arbitration in which (i) the objecting stockholders shall name in their notice of objection one arbitrator, (ii) the Board of Directors shall name a second arbitrator within 15 days from the receipt of such notice, (iii) the two arbitrators thus selected shall select a third arbitrator within 15 days thereafter, and (iv) the three arbitrators thus selected shall determine the valuation of such assets within 15 days thereafter for purposes of such distribution by majority vote. The costs of such arbitration shall be borne by the Corporation or by the holders of the Series Preferred Stock (on a pro rata basis out of the assets otherwise distributable to them) as follows: (i) if the valuation as determined by the arbitrators is greater than 95% of the valuation as determined by the Board of Directors, the holders of the Series Preferred Stock shall pay the costs of the arbitration, and (ii) otherwise, the Corporation shall bear the costs of the arbitration.

### 5.3.3 Voting Rights.

(a) General. Except as otherwise expressly provided herein or as required by law, the holder of each share of the Series Preferred Stock shall be entitled to vote on any matters presented to the holders of the Common Stock. Each share of Series Preferred Stock shall entitle the holder thereof to such number of votes per share as shall equal the number of shares of Common Stock into which such share of Series Preferred Stock is convertible in accordance with the terms of Section 5.3.4 hereof at the record date for the determination of stockholders entitled to vote on such matter or, if no record date is established, at the date such vote is taken or any written consent of stockholders is solicited. Except as otherwise expressly provided herein (including, without limitation, the provisions of Section 5.3.6 hereof) or as required by law, the holders of shares of Series Preferred Stock and the Common Stock shall vote together as a single class on any matters presented to the holders of the Common Stock.

### (b) Board of Directors.

(i) Investor Directors. The holders of the Series A Preferred Stock shall be entitled to vote as a class separately from all other classes of stock of the Corporation in any vote for the election of directors of the Corporation, and shall be entitled to elect by such class vote two directors (the "Series A Investor Directors"), one of which Series A Investor Directors to be designated by Spectrum Equity Investors, L.P. ("Spectrum") for so long as it owns shares of Series A Preferred Stock and thereafter by the holders of a majority of the issued and outstanding shares of Series A Preferred Stock, and the other to be designated by New Enterprise Associates VI, Limited Partnership or its affiliates (collectively, "NEA VI") for so long as it owns shares of Series A Preferred Stock

and thereafter by the holders of a majority of the issued and outstanding shares of Series A Preferred Stock. The holders of the Series B Preferred Stock shall be entitled to vote as a class separately from all other classes of stock of the Corporation in any vote for the election of directors of the Corporation, and shall be entitled to elect by such class vote one director (the "Series B Investor Director") to be designated by Grotech Capital Group IV, LLC ("Grotech IV") for so long as it owns shares of Series B Preferred Stock and thereafter by the holders of a majority of the issued and outstanding shares of Series B Preferred Stock. The holders of the Series C Preferred Stock shall be entitled to vote as a class separately from all other classes of stock of the Corporation in any vote for the election of directors of the Corporation, and shall be entitled to elect by such class vote one director (the "Series C Investor Director") to be designated by the holders of a majority of the issued and outstanding shares of Series C Preferred Stock; provided, however, that if the holders of a majority of the issued and outstanding shares of Series C Preferred Stock designate for election as the Series C Investor Director an individual who is not a partner or associate of a Series C Investor or an entity under substantially the same management as a Series C Investor, such designee shall be elected as a director only with the vote of a majority of the Common Stock Directors and Investor Directors, voting together. Initially, the Series C Investor Director will be designated by Toronto Dominion Capital (U.S.A.), Inc. In no event shall the Series C Investor Director be (i) a partner or associate of Spectrum or an entity under substantially the same management as Spectrum for so long as Spectrum has designation rights under this Section 5.3.3(a), (ii) a partner or associate of NEA VI or an entity under substantially the same management as NEA VI for so long as NEA VI has designation rights under this Section 5.3.3(a), and (iii) a partner or associate of Grotech IV or an entity under substantially the same management as Grotech IV for so long as Grotech IV has designation rights under this Section 5.3.3(a).

(ii) Common Stock Directors. For so long as any Series Preferred Stock remains outstanding, the holders of Common Stock shall be entitled to vote as a class separately from all other classes in any vote for the election of directors of the Corporation, and shall be entitled to elect by such class vote two directors (the "Common Stock Directors").

(iii) Appointment of Chief Executive Officer/Officer Director. Upon the termination or resignation of the Chief Executive Officer of the Corporation, the Corporation will select and hire a successor Chief Executive Officer (and any successor thereto) by the affirmative vote of a majority of the Common Stock Directors, the Series A Investor Directors, the Series B Investor Director and the Series C Investor Director, voting together. The Chief Executive Officer (and any replacement or successor Chief Executive Officer) as so selected and hired shall be elected to the Corporation's Board of Directors by the holders of the Series Preferred Stock and the Common Stock voting together as a single class (the "Officer Director"). David Schaeffer may serve as Chief Executive Officer of the

Corporation in the discretion of the Board of Directors, but in no event shall David Schaeffer be elected as the Officer Director.

(iv) Removal of Directors. The removal of any director of the Corporation shall be as set forth in the Bylaws of the Corporation.

(c) Special Voting Rights. The holders of the Series Preferred Stock shall be entitled to the special voting rights set forth in Section 5.3.6 hereof.

**5.3.4 Conversion.** The holders of the Series Preferred Stock shall have the following conversion rights:

(a) Right to Convert. Subject to and in compliance with the provisions of this Section 5.3.4, any shares of the Series Preferred Stock may, at any time or from time to time at the option of the holder, be converted into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock to which a holder of the Series Preferred Stock shall be entitled upon conversion shall be the product obtained by multiplying the Applicable Conversion Rate (determined as provided in Section 5.3.4(c)) by the number of shares of Series Preferred Stock being converted.

(b) Automatic Conversion.

(i) Each share of the Series Preferred Stock outstanding shall automatically be converted into the number of shares of Common Stock into which such shares are convertible upon application of the then effective Applicable Conversion Rate (determined as provided in Section 5.3.4(c)) immediately upon the closing of an underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, or under such other applicable securities regulations covering the offer and sale of capital stock of the Corporation (other than a registration relating solely to Rule 145 under such Act (or any successor thereto) or to an employee benefit plan of the Corporation) (i) immediately prior to the consummation of which, the Corporation is valued (based on the per-share price paid in such public offering, but without regard to any proceeds to be received by the Company in connection with such offering) at greater than \$50,000,000, (ii) in which the gross proceeds received by the Corporation exceed \$20,000,000, and (iii) in which the Corporation uses a nationally recognized underwriter approved by holders of a majority in interest of the Series Preferred Stock (a "Qualified Public Offering").

(ii) Upon the occurrence of an event specified in Section 5.3.4(b)(i), the outstanding shares of Series Preferred Stock shall be converted automatically 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; provided, however, that the Corporation shall not be obligated to issue certificates evidencing such shares of the Common Stock unless certificates evidencing such shares of the Series 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 occurrence of the automatic conversion of all of the outstanding Series Preferred Stock, the holders of the Series Preferred Stock shall surrender the certificates representing such shares at the office of the Corporation or of any transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to each such holder, promptly at such office and in his 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 Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred and cash as provided in Section 5.3.4(k) below in respect of any fraction of a share of Common Stock issuable upon such automatic conversion.

(c) Applicable Conversion Rate. The conversion rate in effect at any time for the applicable series of Series Preferred Stock (the "Applicable Conversion Rate") shall equal the quotient obtained by dividing \$1.00 in the case of Series A Preferred Stock, \$3.28 in the case of Series B Preferred Stock or \$10.64 in the case of the Series C Preferred Stock by the Applicable Conversion Value, calculated as hereinafter provided.

(d) Applicable Conversion Value. The Applicable Conversion Value in effect initially, and until first adjusted in accordance with Section 5.3.4(e) or Section 5.3.4(f) hereof, shall be \$1.00 in the case of Series A Preferred Stock, \$3.28 in the case of Series B Preferred Stock and \$10.64 in the case of the Series C Preferred Stock.

(e) Adjustment for Common Stock Dividends, Subdividends and Combinations of Common Stock, Etc. Upon the happening of any of the following: (i) the issuance of additional shares of Common Stock of any class as a dividend or other distribution of outstanding Common Stock, (ii) the subdivision of outstanding shares of Common Stock of any class into a greater number of shares of Common Stock, or (iii) the combination of outstanding shares of Common Stock of any class into a smaller number of shares of Common Stock (each an "Extraordinary Common Stock Event"), the Applicable Conversion Value shall, simultaneously with the happening of such Extraordinary Common Stock Event, be adjusted by dividing the then effective Applicable Conversion Value by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding (excluding treasury stock) immediately after such Extraordinary Common Stock Event and the

denominator of which shall be the number of shares of Common Stock outstanding (excluding treasury stock) immediately prior to such Extraordinary Common Stock Event, and the quotient so obtained shall thereafter be the Applicable Conversion Value. The 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.

(f) Adjustments for Diluting Issues.

(i) Except as provided in Section 5.3.4(e) above or for Excluded Shares (as defined below), if the Corporation shall issue any additional shares of Common Stock of any class for no consideration or at a price per share less than the Applicable Conversion Value in effect for each applicable series of Series Preferred Stock immediately prior to such issuance or sale, then in each such case such Applicable Conversion Value shall be reduced to such lower price.

For purposes of this Section 5.3.4(f), "Excluded Shares" shall mean (i) shares issued or delivered from treasury or stock options (and shares of Common Stock issued upon the exercise thereof) granted by the Corporation, with the approval of the Board of Directors, to directors, officers, employees, agents or consultants of the Corporation for up to an aggregate of 1,325,212 shares of the Common Stock (as adjusted for stock splits, stock dividends and the like); (ii) warrants to purchase shares of Common Stock (and any shares of Common Stock issued upon the exercise thereof) issued by the Corporation in connection with the Corporation's offering of units, each such unit consisting of \$1,000 principal amount at maturity of Senior Notes due 2008 (the "Notes") of the Corporation and warrants to purchase shares of Common Stock; and (iii) warrants to purchase shares of Common Stock (and any shares of Common Stock issued upon the exercise thereof) issued by the Corporation in connection with the credit facilities among the Corporation and/or its subsidiaries, its equipment vendors and certain other senior lenders.

For purposes of this Section 5.3.4(f), 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 below in paragraph (ii) of this Section 5.3.4(f) consists of property other than cash, such consideration shall be deemed to have the same value as is determined by the Corporation's Board of Directors with respect to receipt of such property so long as such determination was made reasonably and in good faith, and shall otherwise be deemed to have a value equal to its fair market value.

(ii) For the purpose of this Section 5.3.4(f), the issuance of any warrants, options or other subscription or purchase rights with respect to shares of Common Stock of any class and the issuance of any securities convertible into shares of Common Stock of any class (or the issuance of any

warrants, options or any rights with respect to such convertible securities) shall be deemed an issuance at such time of such Common Stock if the Net Consideration Per Share which may be received by the Corporation for such Common Stock (as hereinafter determined) shall be less than the Applicable Conversion Value at the time of such issuance and, except as hereinafter provided, an adjustment in the Applicable Conversion Value shall be made upon each such issuance in the manner provided in paragraph (i) of this Section 5.3.4(f) as if such Common Stock were issued at such Net Consideration Per Share. No adjustment of the Applicable Conversion Value shall be made under this Section 5.3.4(f) upon the issuance of any additional shares of Common Stock which are issued pursuant to the exercise of any warrants, options or other subscription or purchase rights or pursuant to the exercise of any conversion or exchange rights in any convertible securities if any adjustment shall previously have been made upon the issuance of such warrants, options or other rights. Any adjustment of the Applicable Conversion Value with respect to this paragraph (ii) of this Section 5.3.4(f) shall be disregarded if, as and when the rights to acquire shares of Common Stock upon exercise or conversion of the warrants, options, rights or convertible securities which gave rise to such adjustment expire or are canceled without having been exercised, so that the Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Applicable Conversion Value in effect immediately prior to the time of the issuance of the expired or canceled warrants, options, rights or convertible securities, with such additional adjustments as would have been made to that Applicable Conversion Value had the expired or canceled warrants, options, rights or convertible securities not been issued; provided, however, that no such readjustment of the Applicable Conversion Value shall have the effect of increasing the Applicable Conversion Value to an amount which exceeds the lower of (x) the Applicable Conversion Value on the original adjustment date, or (y) the Applicable Conversion Value that would have resulted from any issuance of any additional shares of Common Stock pursuant to such warrants, options, rights or convertible securities between the original adjustment date and such readjustment date. In the event that the terms of any warrants, options, other subscription or purchase rights or convertible securities previously issued by the Corporation are changed (whether by their terms or for any other reason) so as to change the Net Consideration Per Share payable with respect thereto (whether or not the issuance of such warrants, options, rights or convertible securities originally gave rise to an adjustment of the Applicable Conversion Value), the Applicable Conversion Value shall be recomputed as of the date of such change, so that the Applicable Conversion Value effective immediately upon such change shall be equal to the Applicable Conversion Value in effect at the time of the issuance of the warrants, options, rights or convertible securities subject to such change, adjusted for the issuance thereof in accordance with the terms thereof after giving effect to such change, and with such additional adjustments as would have been made to that Applicable Conversion Value had the warrants, options, rights or convertible securities been issued on such changed terms. For purposes of this paragraph (ii), 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 of such warrants, options, rights or convertible securities, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise or conversion thereof, divided by the aggregate number of shares of Common Stock that would be issued if all such warrants, options, subscriptions, or other purchase rights or convertible securities were exercised or converted at such net consideration per share.

(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 of warrants, options, rights or convertible securities without giving effect to any possible future price adjustments or rate adjustments which may be applicable with respect to such warrants, options, rights or convertible securities and which are contingent upon future events; provided that in the case of an adjustment to be made as a result of a change in terms of such warrants, options, rights or convertible securities, the Net Consideration Per Share shall be determined as of the date of such change.

(g) Adjustments for Reclassification. If the Common Stock issuable upon the conversion of the Series Preferred Stock shall be changed into the same or different number of shares of any class or classes of stock, whether by reclassification or otherwise (other than an Extraordinary Common Stock Event, or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 5.3.4), then and in each such event the holder of each share of Series Preferred Stock shall have the right thereafter to convert such share into the kind and amount of shares of stock and other securities and property receivable upon such reorganization, reclassification or other change by holders of the number of shares of Common Stock into which such shares of Series Preferred Stock might have been converted immediately prior to such reorganization, reclassification or change. All subject to further adjustment as provided herein. Without limiting the generality of the foregoing, the Applicable Conversion Rate, as defined in this Section 5.3.4, in respect of such other shares or securities so receivable upon conversion of shares of Series Preferred Stock shall thereafter be adjusted, and shall be subject to further adjustment from time to time, in a manner and on terms as nearly equivalent as practicable to the provisions with respect to Common Stock contained in this Section 5.3.4, and the remaining provisions herein with respect to the Common Stock shall apply on like or similar terms to any such other shares or securities.

(h) Adjustments for Reorganizations. If at any time or from time to time there shall be a capital reorganization of the Common Stock (other than a subdivision, combination, reclassification or exchange of shares provided for elsewhere in this Section 5.3.4) or a merger or consolidation of the Corporation with or into another corporation or the sale of all or substantially all of the Corporation's properties and assets to any other person, then, as a part of and as a

condition to the effectiveness of such reorganization, merger, consolidation or sale, lawful and adequate provision shall be made so that if the Corporation is not the surviving corporation, the Series Preferred Stock shall be converted into preferred stock of the surviving corporation having equivalent preferences, rights and privileges except that in lieu of being able to convert into shares of Common Stock of the Corporation or the successor corporation the holders of the Series Preferred Stock (including any such preferred stock issued upon conversion of the Series Preferred Stock) shall thereafter be entitled to receive upon conversion of the Series Preferred Stock (including any such preferred stock issued upon conversion of the Series Preferred Stock) the number of shares of stock or other securities or property of the Corporation or of the successor corporation resulting from such merger or consolidation or sale, to which a holder of the number of shares of Common Stock deliverable upon conversion of the Series Preferred Stock immediately prior to the capital reorganization, merger, consolidation or sale would have been entitled on such capital reorganization, merger, consolidation, or sale. In any such case, appropriate provisions shall be made with respect to the rights of the holders of the Series Preferred Stock (including any such preferred stock issued upon conversion of the Series Preferred Stock) after the reorganization, merger, consolidation or sale to the end that the provisions of this Section 5.3.4 (including, without limitation, provisions for adjustment of the Applicable Conversion Value and the number of shares purchasable upon conversion of the Series Preferred Stock or such preferred stock) shall thereafter be applicable, as nearly as may be, with respect to any shares of stock, securities or assets to be deliverable thereafter upon the conversion of the Series Preferred Stock or such preferred stock.

Each holder of Series Preferred Stock upon the occurrence of a capital reorganization, merger or consolidation of the Corporation or the sale of all or substantially all of its assets and properties as such events are more fully set forth in the first paragraph of this Section 5.3.4(h), shall have the option of electing treatment of his shares of Series Preferred Stock under either this Section 5.3.4(h) or Section 5.3.2(b) hereof, and except as otherwise provided in said Section 5.3.2(b), notice of which election shall be submitted in writing to the Corporation at its principal offices no later than 10 days before the effective date of such event, provided that any such notice shall be effective if given not later than 15 days after the date of the Corporation's notice, pursuant to Section 5.3.8, with respect to such event.

(i) Certificate as to Adjustments. In each case of an adjustment or readjustment of the Applicable Conversion Rate, the Corporation will promptly furnish each holder of Series Preferred Stock with a certificate, prepared by the 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.

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

(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 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 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 Preferred Stock, the Corporation shall 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.

### 5.3.5 Redemption.

#### (a) Optional Redemption.

(i) Optional Redemption of Series A Preferred Stock and Series B Preferred Stock. In the event that there shall not have occurred a closing of a Qualified Public Offering (as defined in Section 5.3.4(b) hereof) prior to December 23, 2000, at the election of any holder of shares of Series A Preferred Stock or any holder of Series B Preferred Stock outstanding as of December 24, 2000, the Corporation shall redeem all (but not part) of the shares of Series A Preferred Stock and Series B Preferred Stock then held by such holder. Payment of the Series A Redemption Price (as defined below) to the holders of Series A Preferred Stock and the Series B Redemption Price (as defined below) to the holders of shares of Series B Preferred Stock, shall be made by the Corporation on January 23, 2001, for a cash price equal to the original purchase price paid by such holders for each share of Series A Preferred Stock and Series B Preferred Stock outstanding, adjusted for any stock split, combined consolidation or stock distribution or stock dividends with respect to such shares (the "Series A Redemption Price" and the "Series B Redemption Price," respectively). On or prior to December 24, 2000, the Corporation shall give written notice (the "Series A and Series B Redemption Notice") by mail, postage prepaid, to the holders of the then outstanding shares of Series A Preferred Stock and Series B Preferred Stock at the address of each such holder appearing on the books of the Corporation or given by such holder to the Corporation for the purpose of notice. Such notice shall set forth the Series A Redemption Price and the Series B Redemption Price, as the case may be, and shall further state that any holder of shares of Series A Preferred Stock or Series B Preferred Stock who intends to request redemption of its Series A Preferred Stock or Series B Preferred Stock, respectively, pursuant to this Section 5.3.5(a) must give written notice to the Corporation of its request for redemption on or before January 11, 2001. On or after January 11, 2001, each holder of shares of Series A Preferred Stock and Series B Preferred Stock who requested that such holder's shares of Series A Preferred Stock and Series B Preferred Stock be so redeemed, shall surrender the certificate or certificates evidencing such shares to the Corporation. In the case of any certificate or certificates which have been lost, stolen or destroyed, the holder of such certificate or certificates shall make and deliver an affidavit of that fact to the Corporation without the necessity of giving the Corporation a bond.

(ii) Mandatory Redemption of Series A Preferred Stock and Series B Preferred Stock. If after sending the Series A and Series B Redemption Notice, the Corporation receives requests for redemption on or prior to January 11, 2001 from the holders of at least sixty-seven percent (67%) of the Series A Preferred Stock and Series B Preferred Stock taken together, it shall give written notice by mail, postage prepaid, to the holders of Series A Preferred Stock and Series B Preferred Stock that all shares of the Series A Preferred Stock and Series B Preferred Stock then outstanding will be redeemed on January 23, 2001 (the "Series A and Series B Redemption Date") for a per share cash price equal to the Series A Redemption Price and the Series B Redemption Price, as the case may be. The notice shall further call upon such holders to surrender to the Corporation on or before the Series A and Series B Redemption Date at the place designated in the notice such holder's certificate or certificates representing the shares to be redeemed. On or after the Series A and Series B Redemption Date, each holder of shares of Series A Preferred Stock and Series B Preferred Stock called for redemption shall surrender the certificate or certificates evidencing such shares to the Corporation. In the case of any certificate or certificates which have been lost, stolen or destroyed, the holder of such certificate or certificates shall make and deliver an affidavit of that fact to the Corporation without the necessity of giving the Corporation a bond.

(iii) Optional Redemption of Series C Preferred Stock. In the event there shall not have occurred a closing of a Qualified Public Offering (as defined in Section 5.3.4(b) hereof) prior to November 3, 2001, at the election of each holder of shares of Series C Preferred Stock outstanding as of November 4, 2001, the Corporation shall redeem all (but not part) of the shares of Series C Preferred Stock then held by such holder. Payment of the applicable Series C Redemption Price (as defined below) to the holders of Series C Preferred Stock shall be made by the Corporation on December 3, 2001, for a cash price equal to the original purchase price paid by such holders for each share of Series C Preferred Stock outstanding, adjusted for any stock split, combined consolidation or stock distribution or stock dividends with respect to such shares (the "Series C Redemption Price"). On or prior to November 4, 2001, the Corporation shall give written notice (the "Series C Redemption Notice") by mail, postage prepaid, to the holders of the then outstanding shares of Series C Preferred Stock at the address of each such holder appearing on the books of the Corporation or given by such holder to the Corporation for the purpose of notice. The Series C Redemption Notice shall set forth the Series C Redemption Price and shall further state that any holder of shares of Series C Preferred Stock who intends to request redemption of its Series C Preferred Stock pursuant to this Section 5.3.5(a) must give written notice to the Corporation of its request for redemption on or before November 21, 2001. On or after December 3, 2001, each holder of shares of Series C Preferred Stock who requested that such holder's shares of Series C Preferred Stock be so redeemed, shall surrender the certificate or certificates evidencing such shares to the Corporation. In the case of any certificate or certificates which have been lost, stolen or destroyed,

the holder of such certificate or certificates shall make and deliver an affidavit of that fact to the Corporation without the necessity of giving the Corporation a bond.

(iv) Mandatory Redemption of Series C Preferred Stock. If after sending the Series C Redemption Notice, the Corporation receives requests for redemption on or prior to November 21, 2001 from the holders of at least sixty-seven percent (67%) of the Series C Preferred Stock, it shall give written notice by mail, postage prepaid, to the holders of Series C Preferred Stock that all shares of Series C Preferred Stock then outstanding will be redeemed on December 3, 2001 (the "Series C Redemption Date") for a per share cash price equal to the Series C Redemption Price. The notice shall further call upon such holders to surrender to the Corporation on or before the Series C Redemption Date at the place designated in the notice such holder's certificate or certificates representing the shares to be redeemed on or after the Series C Redemption Date, each holder of shares of Series C Preferred Stock called for redemption shall surrender the certificate or certificates evidencing such shares to the Corporation. In the case of any certificate or certificates which have been lost, stolen or destroyed, the holder of such certificate or certificates shall make and deliver an affidavit of that fact to the Corporation without the necessity of giving the Corporation a bond.

(v) Extension of Redemption Dates. Notwithstanding the foregoing clauses (i) through (iv), in the event any indebtedness under the Notes remains outstanding, the holders of shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall not have the right to require the Corporation to redeem any of such shares until ninety (90) days after the later of (x) the date on which such Notes shall be indefeasibly paid in full and (y) the applicable Redemption Date.

(b) Termination of Rights. From and after the Series A and Series B Redemption Date or the Series C Redemption Date (each a "Redemption Date"), as the case may be, unless there shall have been a default in payment or tender by the Corporation of the Series A Redemption Price and the Series B Redemption Price or the Series C Redemption Price (each a "Redemption Price"), as the case may be, all rights of the holders with respect to such redeemed shares of the Series Preferred Stock (except the right to receive the applicable Redemption Price upon surrender of their certificate) shall cease and such shares shall not thereafter be transferred on the books of this Corporation or be deemed to be outstanding for any purpose whatsoever.

(c) Insufficient Funds. If the funds of the Corporation legally available for redemption of shares of the Series Preferred Stock on the applicable Redemption Date are insufficient to redeem the total number of shares of Series A Preferred Stock and Series B Preferred Stock or Series C Preferred Stock, as the case may be, on such Redemption Date, the Corporation will use its best efforts to engage in a recapitalization or the sale of its business or businesses to

generate sufficient funds to redeem all of the shares of the Series A Preferred Stock and Series B Preferred Stock or the Series C Preferred Stock, as the case may be. The Corporation shall use those funds which are legally available to redeem the maximum possible number of such shares ratably among the holders of such shares to be redeemed. At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of the Series Preferred Stock, such funds will immediately be used to redeem the balance of the shares which the Corporation has become obligated to redeem on the applicable Redemption Date but which it has not redeemed at the applicable Redemption Price. If any shares of the Series Preferred Stock are not redeemed for the foregoing reason or because the Corporation otherwise failed to pay or tender to pay the aggregate applicable Redemption Price on all outstanding shares of Series Preferred Stock, all shares which have not been redeemed shall remain outstanding and entitled to all the rights and preferences provided herein, and the Corporation shall pay interest on the applicable Redemption Price for the unredeemed portion at an aggregate per annum rate equal to the greater of (i) twelve percent (12%) or (ii) the Base Rate or any similar lending rate announced from time to time by The First National Bank of Boston or any successor entity plus five percent (5%), increased, in each case, by one percent (1%) at the end of each calendar quarter thereafter. All provisions hereof are hereby expressly limited so that in no contingency or event whatsoever shall the amount paid or agreed to be paid to the holders of the Series Preferred Stock exceed the maximum amount which the holder is permitted to receive under applicable law. If fulfillment of any provision hereof shall involve exceeding such amount, then the obligation to be fulfilled shall automatically be reduced to the limit of such maximum amount. As used herein, the term "applicable law" shall mean the law in effect as of the date hereof, provided, however, that in the event that there is a change in the law which results in a higher permissible rate of interest, then these provisions shall be governed by such new law as of its effective date.

**5.3.6 Restrictions and Limitations.** The Corporation shall not without the affirmative vote or written consent of the holders of a majority of the then outstanding shares of the Series Preferred Stock:

(i) Redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose), any share or shares of Series Preferred Stock other than pursuant to Section 5.3.5 hereof;

(ii) Redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose) any of the Common Stock of any class or any other capital stock of the Corporation other than the Series Preferred Stock or any of the Corporation's options, warrants or convertible or exchangeable securities, except that these provisions will not prohibit the Corporation from repurchasing or redeeming any shares of capital stock from individuals and entities who have entered into stockholder agreements, stock option agreements, employment agreements or other similar agreements with the Corporation in each case

approved by a majority of the Series A Investor Directors, Series B Investor Director and Series C Investor Director under which the Corporation has the option to repurchase such shares upon the occurrence of certain events, including the termination of employment and involuntary transfers by operation of law (and their permitted transferees); provided, however, that any such agreement between such individual and the Corporation under which the Corporation has such options to repurchase, must be approved by the affirmative vote or written consent of the holders of a majority of the then outstanding Series Preferred Stock before such agreement is executed by the Corporation;

(iii) Authorize or issue, or obligate itself to issue, any other debt or equity security, other than as provided in that certain Investment and Stockholder's Agreement, by and among the Corporation and the Investors named therein, dated as of October 31, 1997 (the "Investment Agreement");

(iv) Increase or decrease (other than by conversion as permitted hereby) the total number of authorized shares of Series Preferred Stock;

(v) Pay or declare any dividend or distribution on any of its capital stock;

(vi) Authorize any merger, consolidation of the Corporation with or into any other company or entity, or authorize the reorganization or sale of the Corporation or the sale of substantially all of the assets of the Corporation;

(vii) Amend the charter documents of the Corporation or amend the Bylaws of the Corporation in any manner that adversely affects the preferences, powers, rights or privileges of the holders of Series Preferred Stock;

(viii) Authorize any reclassification or recapitalization of the outstanding capital stock of the Corporation;

(ix) Approve the annual operating budget of the Corporation;

(x) Change the composition or compensation of management of the Corporation except as provided in the Investment Agreement; or

(xi) Incur, create, assume, become or be liable in any manner with respect to, or permit to exist, any new or additional indebtedness or liability in excess of \$50,000, except as provided in the Investment Agreement.

**5.3.7 No Reissuance of Series Preferred Stock.** No share or shares of the Series Preferred Stock acquired by the Corporation by reason of



redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be canceled, retired, and eliminated from the shares which the Corporation shall be authorized to issue. The Corporation may from time to time take such appropriate corporate action as may be necessary to reduce the authorized number of shares of the Series Preferred Stock accordingly.

**5.3.8 Notices of Record Date.** In the event (i) the Corporation establishes a record date to determine the holders of any class of securities who are entitled to receive any dividend or other distribution, or (ii) there occurs 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 company, or any other entity or person, or any voluntary or involuntary dissolution, liquidation or winding up of the Corporation, the Corporation shall mail to each holder of Series Preferred Stock at least 20 days prior to the record date specified therein, a notice specifying (a) the date of such record date for the purpose of such dividend or distribution and a description of such dividend or distribution, (b) the date on which any such reorganization, reclassification, transfer, consolidation, merger, dissolution, liquidation or winding up is expected to become effective, and (c) 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, transfer, consolidation, merger, dissolution, liquidation or winding up.

**5.3.9 Other Rights.** Except as otherwise provided in this Amended and Restated Certificate of Incorporation shares of each series of the Series Preferred Stock and shares of Common Stock shall be identical in all respects (each share of Series Preferred Stock having equivalent rights to the number of shares of Common Stock into which it is then convertible), shall have the same powers, preferences and rights, without preference of any such class or share over any other such class or share, and shall be treated as a single class of stock for all purposes.

**5.3.10 Ranking.** Each series of Series Preferred Stock shall rank on a parity with the other series of Series Preferred Stock as to the distribution of assets on liquidation, dissolution and winding up of the Corporation. The Series Preferred Stock shall rank senior to the Common Stock as to the distribution of assets on liquidation, dissolution and winding up of the Corporation.

**5.3.11 Miscellaneous.**

(a) All notices referred to herein shall be in writing, and all notices hereunder shall be deemed to have been given, upon the earlier of delivery thereof by hand delivery, by courier, or by standard form of telecommunication, addressed: (i) if to the Corporation, to its principal executive

office (Attention: President) and to the transfer agent, if any, for the Series Preferred Stock or other agent of the Corporation designated as permitted hereby or (ii) if to any holder of the Series Preferred Stock or Common Stock, as the case may be, to such holder at the address of such holder as listed in the stock record books of the Corporation (which may include the records of any transfer agent for the Series Preferred Stock or Common Stock, as the case may be) or (iii) to such other address as the Corporation or any such holder, as the case may be, shall have designated by notice similarly given.

(b) The Corporation shall pay any and all stock transfer and documentary stamp taxes that may be payable in respect of any issuance or delivery of shares of Series Preferred Stock or shares of Common Stock or other securities issued on account of Series Preferred Stock pursuant hereto or certificates representing such shares or securities. The Corporation shall not, however, be required to pay any such tax which may be payable in respect of any transfer involved in the issuance or delivery of shares of Series Preferred Stock or Common Stock or other securities in a name other than that in which the shares of Series Preferred Stock with respect to which such shares or other securities are issued or delivered were registered, or in respect of any payment to any person with respect to any such shares or securities other than a payment to the registered holder thereof, and shall not be required to make any such issuance, delivery or payment unless and until the person otherwise entitled to such issuance, delivery or payment has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid or is not payable.

(c) The Corporation may appoint, and from time to time discharge and change, a transfer agent of the Series Preferred Stock. Upon any such appointment or discharge of a transfer agent, the Corporation shall send notice thereof by hand delivery, by courier, by standard form of telecommunication or by first class mail (postage prepaid), to each holder of record of the Series Preferred Stock.

5.4 Subject to the provisions of this Amended and Restated Certificate of Incorporation and except as otherwise provided by law, the stock of the Corporation, regardless of class, may be issued for such consideration and for such corporate purposes as the Board of Directors may from time to time determine.

6. Compromise, Arrangement or Reorganization. Whenever a compromise or arrangement is proposed between this 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 this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 291 of the General Corporation Law or on the application of trustees in dissolution or of any receiver or receivers appointed

for this Corporation under the provisions of Section 279 of General Corporation Law order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this 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 this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as a 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 stockholders or class of stockholders of this Corporation, as the case may be, and also on this Corporation.

7. Limitation of Liability. No director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (a) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (c) under Section 174 of the General Corporation Law or (d) for any transaction from which the director derived any improper personal benefits. If the General Corporation Law is hereafter amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

#### 8. Indemnification.

8.1 Indemnity Undertaking. To the extent not prohibited by law, the Corporation shall indemnify any person (an "Eligible Person") who is or was made, or threatened to be made, a party to any threatened, pending or completed action, suit or proceeding (a "Proceeding"), whether civil, criminal, administrative or investigative, including, without limitation, an action by or in the right of the Corporation to procure a judgment in its favor, by reason of the fact that such person, or a person of whom such person is the legal representative, is or was a Director or officer of the Corporation, or, while a Director or officer of the Corporation, is or was serving, at the request of the Corporation, as a director or officer of any other corporation or in a capacity with comparable authority or responsibilities for any partnership, joint venture, trust, employee benefit plan or other enterprise (an "Other Entity"), against judgments, fines, penalties, excise taxes, amounts paid in settlement and costs, charges and expenses (including attorneys' fees, disbursements and other charges).

8.2 Payment of Expenses. The Corporation shall, from time to time pay to an Eligible Person the funds necessary for payment of expenses, including attorneys' fees and disbursements, incurred by or on behalf of such Eligible Person in connection with any Proceeding, as such expenses are incurred in advance of the final disposition of such Proceeding; provided, however, that, if required by the General Corporation Law, such expenses incurred by or on behalf of such Eligible Person may be paid in advance of the final disposition of a Proceeding only upon receipt by the Corporation of an undertaking, by or on behalf of such Eligible Person, to repay any such amount so advanced if it shall ultimately be determined by final judicial decision from which there is no further right of appeal that such Eligible Person is not entitled to be indemnified for such expenses.

8.3 Certain Exclusions. Section 8.1 and 8.2 shall not include any Proceeding commenced by any Eligible Person without the advance approval of the Board of Directors.

8.4 Binding Effect. The provisions of this Section 8 shall be a contract between the Corporation, on the one hand, and each Eligible Person, on the other hand, pursuant to which the Corporation and each such Eligible Person intend to be, and shall be, legally bound. No repeal or modification of this Section 8 shall affect any rights or obligations with respect to any state of facts then or theretofore existing or any proceeding theretofore or thereafter brought or threatened based in whole or in part upon any such state of facts.

8.5 Procedural Rights. The rights to indemnification and payment of expenses provided by, or granted pursuant to, this Section 8 shall be enforceable by an Eligible Person entitled to such indemnification or payment of expenses in any court of competent jurisdiction. The burden of proving that such indemnification or payment of expenses is not appropriate shall be on the Corporation. Neither the failure of the Corporation (including the disinterested Directors on its Board of Directors, a committee of such disinterested Directors, the Corporation's independent legal counsel and its stockholders) to have made a determination prior to the commencement of such action that such indemnification or payment of expenses is proper in the circumstances, nor an actual determination by the Corporation (including the disinterested Directors on its Board of Directors, a committee of such disinterested Directors, the Corporation's independent legal counsel and its stockholders) that such person is not entitled to such indemnification or payment of expenses shall constitute a defense to the action or create a presumption that such person is not so entitled. Notwithstanding anything to the contrary in Section 8.3, such Eligible Person shall also be indemnified for any expenses incurred in connection with successfully establishing his or her right to such indemnification or payment of expenses, in whole or in part, in any such proceeding.

8.6 Service Deemed at Corporation's Request. Any Director or officer of the Corporation serving (a) as a director or officer of another corporation

of which a majority of the shares entitled to vote in the election of its directors is held, directly or indirectly, by the Corporation or (b) any employee benefit plan of the Corporation or any corporation referred to in clause (a) shall be deemed to be doing so at the request of the Corporation.

8.7 Election of Applicable Law. Any person entitled to be indemnified or to payment of expenses as a matter of right pursuant to this Section 8 may elect to have the right to indemnification or payment of expenses interpreted on the basis of the applicable law in effect at the time of the occurrence of the event or events giving rise to the applicable Proceeding, to the extent permitted by law, or on the basis of the applicable law in effect at the time such indemnification or payment of expenses is sought. Such election shall be made, by a notice in writing to the Corporation, at the time indemnification or payment of expenses is sought; provided, however, that if no such notice is given, the right to indemnification or payment of expenses shall be determined by the law in effect at the time indemnification or payment of expenses is sought.

8.8 Rights Not Exclusive. The rights to indemnification and reimbursement or advancement of expenses provided by, or granted pursuant to, this Section 8 shall not be deemed exclusive of any other rights to which a person seeking indemnification or reimbursement or advancement of expenses may have or hereafter be entitled under any statute, this Restated Certificate of Incorporation, the By-laws, any agreement, any vote of stockholders or disinterested Directors or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office.

8.9 Continuation of Benefits. The rights to indemnification and reimbursement or advancement of expenses provided by, or granted pursuant to, this Section 8 shall continue as to a person who has ceased to be a Director or officer (or other person indemnified hereunder) and shall inure to the benefit of the executors, administrators, legatees and distributees of such person.

8.10 Insurance. The Corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of an Other Entity, against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such liability under the provisions of this Section 8 or under Section 145 of the General Corporation Law or any other provision of law.

9. Directors. This Section is inserted for the management of the business and for the conduct of the affairs of the Corporation and it is expressly

provided that it is intended to be in furtherance of and not in limitation or exclusion of the powers conferred by applicable law.

**9.1 Number, Election, and Terms of Office of Board of Directors.** The business of the Corporation shall be managed by a Board of Directors consisting of not less than three or more than 15 members. The exact number of directors within the minimum and maximum limitations specified in the preceding sentence shall be fixed from time to time by resolution adopted by a majority of the entire Board of Directors then in office, whether or not present at a meeting. Directors need not be stockholders of the Corporation. The directors shall be divided into three classes of approximately equal size with the term of office of the first class to expire at the first annual meeting of stockholders of the Corporation next following the end of the Corporation's fiscal year ending December 31, 1998, the term of office of the second class to expire at the first annual meeting of stockholders of the Corporation next following the end of the Corporation's fiscal year ending December 31, 1999 and the term of office of the third class to expire at the annual meeting of stockholders of the Corporation next following the end of the Corporation's fiscal year ending December 31, 2000. At each annual meeting of stockholders following such initial election as specified above, directors elected to succeed those directors whose terms expire shall be elected for a term of office to expire at the third succeeding annual meeting of stockholders after their election.

Notwithstanding the foregoing, whenever, pursuant to the provisions of Section 5.1 of this Amended and Restated Certificate of Incorporation, the holders of any one or more series of Preferred Stock shall have the right, voting separately as a series or together with holders of other such series, to elect Directors at an annual or special meeting of stockholders, the election, term of office, filling of vacancies and other features of such directorships shall be governed by the terms of this Amended and Restated Certificate of Incorporation and any certificate of designations applicable thereto.

During any period when the holders of any series of Preferred Stock have the right to elect additional Directors as provided for or fixed pursuant to the provisions of this Amended and Restated Certificate of Incorporation or any certificate of designation related thereto, then upon commencement and for the duration of the period during which such right continues: (i) the then otherwise total authorized number of Directors of the Corporation shall automatically be increased by such specified number of Directors, and the holders of such Preferred Stock shall be entitled to elect the additional Directors so provided for or fixed pursuant to said provisions, and (ii) each such additional Director shall serve until such Director's successor shall have been duly elected and qualified, or until such Director's right to hold such office terminates pursuant to said provisions, whichever occurs earlier, subject to such Director's earlier death, disqualification, resignation or removal. Except as otherwise provided by the Board in the resolution or resolutions establishing such series, whenever the holders of any series of Preferred Stock having such right

to elect additional Directors are divested of such right pursuant to the provisions of such stock, the terms of office of all such additional Directors elected by the holders of such stock, or elected to fill any vacancies resulting from the death, resignation, disqualification or removal of such additional Directors, shall forthwith terminate and the total and authorized number of Directors of the Corporation shall be reduced accordingly.

9.2 Tenure. Notwithstanding any provisions to the contrary contained herein, (i) each director shall hold office until his or her successor is elected and qualified, or until the earlier of such director's death, resignation or removal and (ii) the term of any director who is also an officer of the Corporation shall terminate if he or she ceases to be an officer of the Corporation.

9.3 Newly Created Directorships and Vacancies. Subject to the rights of the holders of any series of Preferred Stock then outstanding, newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board of Directors resulting from death, resignation, retirement, disqualification, removal from office or other cause shall be filled by a majority vote of the remaining directors then in office although less than a quorum, or by a sole remaining director and directors so chosen shall hold office for a term expiring at the annual meeting of stockholders at which the term of the class to which they have been elected expires or, in each case, until their respective successors are duly elected and qualified. No decrease in the number of directors constituting the Board of Directors shall shorten the term of any incumbent director. When any director shall give notice of resignation effective at a future date, the Board of Directors may fill such vacancy to take effect when such resignation shall become effective. In the event of a vacancy in the Board of Directors, the remaining Directors, except as otherwise provided by law, may exercise the powers of the full Board of Directors until the vacancy is filled.

9.4 Removal of Directors. Any one or more or all of the directors may be removed, at any time, but only for cause by the stockholders having at least a majority in voting power of the then issued and outstanding shares of capital stock of the Corporation.

10. Action by Stockholders. Notwithstanding the provisions of Section 228 of the General Corporation Law (or any successor statute), any action required or permitted by the General Corporation Law to be taken at any annual or special meeting of stockholders of the Corporation may be taken only at such an annual or special meeting of stockholders and cannot be taken by written consent without a meeting. At any annual meeting or special meeting of stockholders of the Corporation, only such business shall be conducted as shall have been brought before such meeting in the manner provided by the By-laws.

11. Adoption, Amendment and/or Repeal of Bylaws. The Board of Directors may from time to time adopt, amend or repeal the Bylaws; provided, however, that any Bylaws adopted or amended by the Board of Directors may be amended or repealed, and any Bylaws may be adopted, by a vote of the stockholders having at least two-thirds of the voting power of the then issued and outstanding shares of capital stock of the Corporation.

IN WITNESS WHEREOF, the undersigned has executed this Restated

Certification of Incorporation this 10<sup>th</sup> day of August, 1998.

PATNET, INC.

By: Richard A. Luthin  
Richard A. Luthin  
President and Chief Executive Officer

Attest:  
By: Michael A. Luthin  
Michael A. Luthin  
Vice President, General Counsel and Secretary



# STATE OF MISSOURI



**Rebecca McDowell Cook**  
**Secretary of State**

## CORPORATION DIVISION

### CERTIFICATE OF CORPORATE GOOD STANDING - FOREIGN CORPORATION

I, REBECCA MCDOWELL COOK, SECRETARY OF STATE OF THE STATE OF MISSOURI, DO HEREBY CERTIFY THAT THE RECORDS IN MY OFFICE AND IN MY CARE AND CUSTODY REVEAL THAT

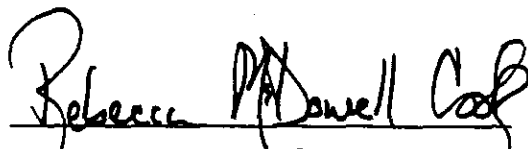
PATHNET, INC.

USING IN MISSOURI THE NAME

PATHNET, INC.

A DELAWARE CORPORATION FILED ITS EVIDENCE OF INCORPORATION WITH THIS STATE ON THE 10TH DAY OF JULY, 1998, AND IS IN GOOD STANDING, HAVING FULLY COMPLIED WITH ALL REQUIREMENTS OF THIS OFFICE.

IN TESTIMONY WHEREOF, I HAVE SET MY HAND AND IMPRINTED THE GREAT SEAL OF THE STATE OF MISSOURI, ON THIS, THE 14TH DAY OF AUGUST, 1998.

  
Secretary of State

