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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Columbus Southern Power Company	)	Case No. 10-1072-EL-RDR
And Ohio Power Company to Adjust	)	
Their Economic Development Cost	)	
Recovery Rider Rates.	)	

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**MEMORANDUM CONTRA ERAMET AND AEP OHIO'S  
MOTIONS FOR PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") represents the approximately 1.2 million residential electric consumers of the Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio or the "Companies"). OCC files this Memorandum Contra Eramet Marietta, Inc.'s ("Eramet") and AEP Ohio's Motions for Protective Order in order to assist the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its duty to comply with Ohio law.

In its Motion for Protection, AEP Ohio maintains that the "Companies take no position as whether the Eramet load data is confidential and proprietary under Ohio law, but wanted to ensure that Eramet had a timely opportunity to seek protection."<sup>1</sup> AEP Ohio also notes that the same type of load information relating to Ormet Primary Aluminum Corporation (Ormet) was included in the public version of AEP Ohio's Economic Development Rider update filing. This public filing of the Ormet information

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<sup>1</sup> AEP Ohio's Motion for Protective Order at p. 1.

was made after Ormet indicated that there was no need to redact the information or seek a protective order.<sup>2</sup> In addition, AEP Ohio, in the belief that this type of information is public, made a public filing that included this type of Eramet information.

Yet Eramet asks the PUCO to block the release of its “actual usage and price information.”<sup>3</sup> This information--that is now in the possession of the PUCO--constitutes a public record under Ohio law. And under Ohio law there is no exception that would allow the PUCO to withhold disclosure, since state or federal law does not prohibit disclosure because the information is not a trade secret under R.C. 1333.61(D) as alleged by Eramet. And if the Commission were to protect such information, then every industrial customer’s electric bill will qualify as trade secret information—which is contrary to Ohio law. Accordingly, Eramet’s Motion should be denied and the PUCO should release the information to the public.

## **II. STANDARD OF REVIEW AND BURDEN OF PROOF**

### **A. PUCO’s Standard of Review**

Whether a document is a trade secret is a factual determination.<sup>4</sup> This Commission’s approach to resolving motions for protective orders recognizes that there is a “strong presumption in favor of disclosure”<sup>5</sup> created by the public record statutes applicable to the Commission<sup>6</sup> and that confidential treatment should only be given in

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<sup>2</sup> See *id.* at 1-2.

<sup>3</sup> Eramet’s Motion at p. 5.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Entry at 5-6 (October 18, 1990).

<sup>6</sup> Ohio Revised Code Sec. 4901.12 and 4905.07.

“extraordinary circumstances.”<sup>7</sup> An Attorney Examiner Entry<sup>8</sup> defines this approach as a three-part test: “(1) Are the materials prohibited from being released by state or federal law under R.C. 149.43(A)(1)(v) i.e. a trade secret under R.C. 133.61(D)? (2) Are the materials maintained as confidential? and, (3) Will non-disclosure be inconsistent with the purposes of Title 49?” Under this approach, if the first criterion is answered negatively, the Commission need not consider the remaining standards as the claim for protection must fail.<sup>9</sup>

## **B. Burden of Proof**

The Commission has made it clear that a movant who seeks to protect information from the public must raise “specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies’ competitors to use the information to their advantage.”<sup>10</sup> This is consistent with Ohio Adm. Code 4901-1-24(D)(3) that requires movants for confidentiality to file a pleading “setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure \*\*\*.”<sup>11</sup> Ohio Adm. Code 4901-1-27(B)(7)(e)

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<sup>7</sup>*In the Matter of the Application of the Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with American Steel Wire Corporation*, Case No. 95-77-EL-AEC, Entry at 2-3 (September 6, 1995).

<sup>8</sup> *See In the Matter of the Applications of: Vectren Retail, LLC, for Certification as Retail Natural Gas Suppliers in the State of Ohio*, Case No. 02-1668-GA-CRS, Entry at 3-4 (August 11, 2004).

<sup>9</sup> *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to the Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry at 7-8 (December 17, 2003).

<sup>10</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5-6 (October 18, 1990).

<sup>11</sup> The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy. *See In the Matter of the Amendment of Chapters 4901-1 et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry at 11 (March 21, 1998).

requires that “[t]he party requesting such protection shall have the burden of establishing that such protection is required.”

### **III. THE APPLICABLE LAWS**

#### **A. The Public Records Laws in Ohio: R.C. 149.43, R.C. 4901.12, and R.C. 4905.07**

Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. R.C. 4905.07 states: “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.” Accordingly, “[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (R.C. 149.43) and as consistent with the purposes of Title 49 of the Revised Code.”<sup>12</sup> The Commission has also noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”<sup>13</sup> These statutes<sup>14</sup> recognize that there are exceptions to the Commission’s open records policy that are established under another section of the Revised Code, R.C. 149.43.

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<sup>12</sup> *In the Matter of the Application of the Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003)(citations omitted).

<sup>13</sup> *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990).

<sup>14</sup> See also Ohio Adm. Code Sec. 4901-1-24(D) and 4901-1-27-(B)(7)(e).

R.C. 149.43 is Ohio's Public Records Law.<sup>15</sup> It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law."<sup>16</sup> Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of "trade secrets,"<sup>17</sup> the PUCO and other public agencies are prohibited from releasing public documents that qualify as a trade secret, per R.C. 149.43.

This Commission has emphasized the importance of the public records laws and has noted that "Ohio public records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public\*\*\*subject to only a very few limited exceptions.'"<sup>18</sup> Furthermore, this Commission has established a policy that confidential treatment is to be given only under extraordinary circumstances.<sup>19</sup>

Eramet has identified only one potential law that applies here: R.C. 1333.61(D), Ohio's trade secret law.<sup>20</sup> Thus, the issue that Eramet has placed before the Commission is whether the release of the information is prohibited under R.C. 1333.61(D).

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<sup>15</sup> For purposes of this Memorandum, R.C. 149.43 is referenced as Ohio's Public Records Law and R.C. 149.43, 4901.12 and 4905.07 are collectively referenced as Ohio's public records statutes.

<sup>16</sup> R.C. 149.43(A)(1)(v).

<sup>17</sup> R.C. 1331.61(D) defines trade secrets.

<sup>18</sup> See, e.g., *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Attorney Examiner Entry at 3, citing *In the Matter of the Application of IB The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry (November 23, 2003)(relying on *State ex rel Williams v. Cleveland*, 64 Ohio St. 3d 544 (1992)).

<sup>19</sup> See *In the Matter of the Application of The Cleveland Electric Illumination Company for Approval of an Electric Service Agreement With American Steel & Wire Corp.*, Case No. 95-77-EL-AEC, Supplemental Entry on Rehearing at 3 (September 6, 1995).

<sup>20</sup> Because Ohio has adopted the Uniform Trade Secrets Act, and has codified the definition of "trade secrets," the PUCO and other public agencies are prohibited from releasing public documents that qualify as a trade secret, per R.C. 149.43.

**B. The Trade Secret Exemption from Ohio's Public Records Statutes**

R.C. 1331.61(D) defines a trade secret as:

information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- 1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Under R.C. 1331.61(D) a trade secret must qualify under Section (D) as one of the forms of information listed and must then satisfy both criterion one and two: the information must have "independent economic value" and must have been kept under circumstances that maintain its secrecy.

This Commission and the Supreme Court of Ohio have on several occasions addressed what constitutes a "trade secret." The Supreme Court of Ohio has adopted, and this Commission has recognized,<sup>21</sup> the following factors in analyzing a trade secret claim:

- (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.<sup>22</sup>

<sup>21</sup> See *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 8-9 (November 25, 2003)(citations omitted).

<sup>22</sup> See *Plain Dealer v. Department of Insurance*, 80 Ohio St. 3d 513, 524-524 (1998)(citations omitted).



Furthermore, the details of business arrangements between utilities and third parties have been determined by the Commission to not qualify for protection from disclosure. Specifically, contracts between a utility and its customers have been found not to meet the definition of trade secrets.<sup>23</sup> The Commission has also held that interconnection agreements containing the rates, terms, and conditions of interconnection between a local exchange company and a competitive local service provider do not amount to a trade secret.<sup>24</sup>

Additionally, the Commission has held that information freely disclosed can not be considered a "trade secret".<sup>25</sup> In the *CG&E Pipeline Case*, the Commission addressed a motion for a protective order filed by CG&E to prohibit disclosure of the complete and final report authored by a retained outside expert, Battelle. The report contained the results of research conducted by Battelle relating to riser leaks on CG&E's distribution system.<sup>26</sup> Battelle was retained by CG&E to determine the cause of the riser failures and to assist CG&E in developing a comprehensive remedial plan.<sup>27</sup> At the same time CG&E filed its Motion for protective order, it filed the direct expert testimony of Mr. Pimputkar,

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<sup>23</sup> *In the Matter of Several Applications of Cincinnati Bell Telephone Company for Approval of a Contract or Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, Entry at 4-7 (February 12, 1998).

<sup>24</sup> *In the Matter of Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 2-3 (July 10, 1996).

<sup>25</sup> *In the Matter of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and related Matters*, Case No. 00-681-GA-GPS, Entry (March 3, 2005), Rehearing Den., Entry (March 23, 2005) ("CG&E Pipeline Case").

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*

Vice President of Technology Development for Battelle. Part of the purpose of his testimony was to discuss the Battelle research.<sup>28</sup>

The Commission concluded that the contents of the Battelle Report were not trade secrets because CG&E had made the preliminary report public, and had disclosed some of the results through filed testimony in the proceeding.<sup>29</sup> As discussed below, Eramet did not specifically release its actual usage and pricing information in PUCO Case No. 10-154-EL-RDR. Further, Eramet failed to later request that the information be removed from the Commission's public docket, and therefore did not act to maintain its secrecy.

#### **IV. ERAMET HAS FAILED TO MEET ITS BURDEN TO PROVE THAT THE INFORMATION SHOULD BE EXEMPTED FROM DISCLOSURE.**

##### **A. Eramet Failed to Meet the First Part of the PUCO's Three-Part Test.**

As stated above, the primary issue before this Commission is whether Eramet has met the burden of proof necessary to establish an exception to Ohio's public records law.<sup>30</sup> Eramet's claimed exception relates to the trade secret provisions of R.C. 1333.61, which this Commission has held is a very limited and narrow exception.<sup>31</sup> But Eramet's information does not qualify for this exception, as Eramet did not meet its burden of

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to the Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry at 7-8 (December 17, 2003).

<sup>31</sup> *See In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry at 7 (November 25, 2003)(citations omitted).

proof to establish that its actual usage and price information derives independent economic value and is the subject of reasonable efforts to maintain its secrecy.<sup>32</sup>

Eramet fails to produce anything but conclusory statements to address the “independent economic value” issue.<sup>33</sup> In order for the Commission to issue a protective order, “reasonable grounds” must be shown and the movant must “explain why the information that it seeks to keep confidential is entitled to protection as a trade secret.”<sup>34</sup> Eramet argues that the actual usage and price information that it seeks to protect “derives independent economic value from not being generally known and not being readily ascertainable by proper means by Eramet’s competitors.”<sup>35</sup> Conclusory statements alone do not meet the burden of proof necessary to show that information is protected as trade secret.<sup>36</sup> Eramet has not provided any factual information that shows how or in what way independent economic value is derived from the actual usage and price information.

As referenced above, AEP Ohio already has noted in this case that the same type of load information, relating to Ormet Primary Aluminum Corporation (Ormet), was included in the public version of AEP Ohio’s Economic Development Rider update filing. AEP Ohio informed that the public filing of the Ormet information was made after Ormet indicated that there was no need to redact the information or seek a protective

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<sup>32</sup> R.C. 1333.61(D) requires that the movant satisfy both conditions that the trade secret (1) derives independent economic value and (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

<sup>33</sup> The public records statutes in Ohio require more than a desire to keep the information confidential. See *In the Matter of the Application of Ameritech Ohio for Approval of the Interconnection Agreement Between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Attorney Examiner Entry at 3 (July 10, 1996).

<sup>34</sup> *In the Matter of the Commission’s Investigation into Continuation of Ohio’s Telecommunications Relay Service*, Case No. 01-2945-TP-COI, *Finding and Order* at 12-13 (April 27, 2005).

<sup>35</sup> Eramet Motion at 5.

<sup>36</sup> *Mondell v. Ohio Bell Telephone Co.*, Case No. 89-221-TP-PEX, *Entry* at 4 (May 16, 1999).

order.<sup>37</sup> And AEP Ohio already publicly filed this type of information from Eramet, in the belief that the Eramet information is not confidential.<sup>38</sup>

**B. Eramet Failed to Meet the Second Part of the PUCO's Three-Part Test.**

The second part of the PUCO's three-part test, as stated above, is whether the movant has maintained the materials as confidential. Eramet has failed to show that it has taken any active steps to ensure the secrecy of its actual usage and price information.<sup>39</sup> But, Eramet acknowledged that actual Eramet-specific information was released into the public domain by CSP's EDR filing on February 10, 2010.<sup>40</sup> Eramet's failure to take active steps, outside of this proceeding, to protect its information from being disclosed demonstrates that the actual usage and pricing information has not been the subject of reasonable efforts to maintain its secrecy. And Eramet does not allege any harm resulted from the February 2010 public disclosure of the information.

Furthermore, Eramet's argument that the disclosure of pricing information would jeopardize Eramet's business position and its ability to compete is severely undercut by the fact that load information relating to Ormet was publicly disclosed.<sup>41</sup> Ormet's position demonstrates that there is no legitimate risk to Eramet by the disclosure of its

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<sup>37</sup> See *id.* at 1-2.

<sup>38</sup> Again, under the PUCO's three pronged approach, if the first criterion is answered negatively, the Commission need not consider the remaining standards as the claim for protection must fail; see *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to the Compliance With the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GAS-GPS, Entry at 7-8 (December 17, 2003).

<sup>39</sup> The Supreme Court of Ohio has stated, "An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy." *State ex rel. Perrea v. Cincinnati Pub. Sch.* (2009), 123 Ohio St.3d 410 at ¶25 (citing *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St.3d 396, 400).

<sup>40</sup> Eramet Motion at 3.

<sup>41</sup> See Eramet Motion for Protective Order.

actual usage and pricing information because the information is not trade secret information under Ohio law.

Although Eramet emphasizes that the Commission has already determined that the information should receive protected status,<sup>42</sup> Eramet's arguments in this regard should be rejected. When Eramet's motion for protection was granted, it was granted without opposition from any party, including OCC. OCC did not oppose Eramet's motion for protection of portions of its pre-filed testimony (allegedly containing similar information) because OCC was, under the terms of a protective agreement, given access to the information and, under the terms of the protective agreement, OCC could require Eramet to prove that the information is truly confidential. Furthermore, OCC was able to cross-examine Eramet's witnesses on the substance of the protected testimony. Based on Eramet's failure to offer any evidence that its actual electric usage and price information is a trade secret, this Commission should deny Eramet's request for a protective order.<sup>43</sup>

**C. Eramet Failed to Meet the Third Part of the PUCO's Three-Part Test.**

Finally, Eramet failed to meet the third part of the PUCO's three-part test, which is to determine whether the non-disclosure is inconsistent with the purposes of Title 49. Under R.C. 4901.12, all proceedings of the public utilities commission and all documents and records in its possession are public records. R.C. 4905.07 states: "all facts and

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<sup>42</sup> Eramet Motion at 11.

<sup>43</sup> See e.g., *In the Matter of the Petition of Alvahn L. Mondell et al v. The Ohio Bell Telephone Company, Relative to A Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry at 4 (May 16, 1989) (finding that "due to the lack of detail offered" in the motion for protective order, "the Commission can not find the information should be afforded protected status."); see also *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 6-7 (finding that joint applicants had failed "by not raising specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage.").

information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.”

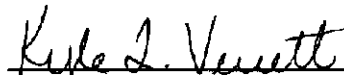
Accordingly, “[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio’s public records law (R.C. 149.43) and as consistent with the purposes of Title 49 of the Revised Code.” The Commission has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.” Accordingly, the failure to disclose Eramet’s pricing information would be inconsistent with Title 49 because this information--that is now in the possession of the PUCO--constitutes a public record under Ohio law.

## **V. CONCLUSION**

For the reasons stated herein, the Commission should deny Eramet’s Motion for Protection, which means that the information needed to determine if Eramet is meeting its commitment to invest its Marietta facilities (one quid-pro-quo for its discounted electric bill) would be publicly available. Accordingly, Eramet’s usage is needed to assess the impact of the approved reasonable arrangement on AEP’s customers. The Commission also should deny AEP Ohio’s motion for protection, which AEP Ohio filed not in its own right but merely to preserve an opportunity for Eramet to seek protection if Eramet were so inclined.

Respectfully submitted,

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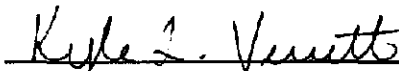
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Memorandum Contra was served by regular U.S. Mail Service, postage prepaid, to the following parties, this 23rd day of August, 2010.



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