No. 87207

In the Supreme Court of Missouri

CITIES OF WELLSTON and WINCHESTER, MISSOURI, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

SBC COMMUNICATIONS, INC., *et al.*,

Defendants-Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
Cause No. 044-02645
The Honorable David L. Dowd, Judge Presiding

**BRIEF OF THE NATIONAL LEAGUE OF CITIES,
THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION,
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS,
AND CITIZENS FOR TAX JUSTICE
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici curiae* consist of organizations representing local government officials and taxpayers throughout the United States. The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 communities nationwide. The NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, to serve as a national resource for cities, and to advocate for the municipal governments NLC represents. On behalf of its membership NLC has argued as an *amicus curiae* in both state and federal courts against the preemption of local authority to collect revenues necessary to ensure adequate funding for the infrastructure and services demanded by citizens.

The International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada since 1935. IMLA has appeared as *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interests of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

Citizens for Tax Justice, founded in 1979 and based in Washington D.C., is a national public interest group that advocates for fair taxation at federal, state and local levels on behalf of middle- and low-income Americans. Working with a growing network of labor, community and church groups from every part of the country, CTJ's goal is to achieve tax fairness for middle- and low-income American families. CTJ's membership includes numerous Missouri taxpayers, individuals and organizations, who have an important interest in the outcome of this case.

ARGUMENT

This case presents an exceedingly important question regarding the General Assembly's power to repeal retroactively a local government's lawfully enacted taxes. At least two separate provisions of the Missouri Constitution operate independently to deny the General Assembly that power, and there are compelling policy reasons for courts to safeguard vigilantly the modest constitutional protections that state constitutions like Missouri's provide to local governments.

Although most states view cities as mere creations of the state which depend on the legislature for their very existence and for their continued existence, the reality is that cities have become critically important instruments of self-government for the states' citizenry. Cities in the United States deliver the most basic – and among the most important – services to the taxpaying public. They are the governments of first contact and last resort. Burdened by unfunded federal and state mandates, balanced budget requirements, personnel-heavy expenditure commitments, dependence on often unpredictable state aid, and revenue options lim-

ited by their respective states, city officials face the most difficult budgeting task of any level of government. They currently face unparalleled challenges in providing and funding the essential services which municipalities have historically delivered for the states' citizens: fire prevention, police protection, sanitation, public health, parks and recreation, education and now homeland security, to name only a few.

Thus, while it is true that legislatures hold broad power over cities, including the power to abolish them altogether, the truth is that state legislatures do not cavalierly or frequently abolish cities. So long as a state legislature permits a city to exist, courts ought to require the legislature to deal with its municipal creations by at least the few rules imposed by state constitutions. It is ironic that private corporations enjoy without question innumerable protections from state control, yet *municipal* corporations – which this Court has recognized as the people's instrumentalities of "indispensable" local self-government and "a chief factor in human progress" – are often regarded as mere instruments of the state and far too infrequently as one of the citizens' safeguards against a distant government.

Protection of the rights of the citizenry means, on occasion, protection of their organs of local self-government. In the present case, the General Assembly has encroached impermissibly on the rights of local governments by passing a law "retrospective in its operation" and which "extinguish[es] … without consideration, the indebtedness, liability or obligation of … [certain] corporation[s] … due … [certain] municipal corporation[s]." This Court should accordingly declare

H.B. 209 unconstitutional in violation of Article I, § 13 and Article III, § 39(5) of the Missouri Constitution.

I. THE AUTHORITY OF MUNICIPALITIES TO LEVY GROSS RECEIPTS TAXES ON THE PROVISION OF CELLULAR TELEPHONE SERVICE IS BEYOND LEGITIMATE QUESTION.

In the court below, the cell phone companies did not contest the authority of municipalities to levy gross receipt taxes in general – or on telephone companies providing telephone service in particular – nor could they have. Many local governments in Missouri and throughout the country have long imposed gross receipts taxes on public utilities, such as telecommunications, electric, gas and water companies. Such taxes are called by many names, including excise, franchise, privilege, occupational, and license taxes. Missouri law authorizes municipalities to levy such taxes. *See, e.g.*, RSMo § 94.270 (1994). The right of local authorities to do so has existed in one form or another for well over a century. *City of St. Charles v. St. Charles Gas Co.*, 353 Mo. 996, 1002, 185 S.W.2d 797, 798 (1945) ("Prior to 1889 there was no limitation, at least as to certain cities, on the occupations or pursuits, whether named or not, which the city might tax.").

The imposition of gross receipts taxes on telephone companies in particular is also nothing new. *See, e.g., City of California v. Bunceton Tel. Co.*, 112 Mo.App. 722, 87 S.W. 604 (1905) (sustaining city's gross receipts tax on telephone company); *City of Plattsburg v. The People's Tel. Co.*, 88 Mo.App. 306,

1901 WL 527 at *3 (1901) (sustaining municipal tax based on telephone company's gross receipts). The only thing "new" this case presents is the *means* by which companies like the defendants provide that telephone service. There can be no serious question that municipalities have retained their authority to tax telephone service even though the means of providing that service has in recent years changed from the use of copper wires to fiber optics. As federal District Judge Laughrey recently noted:

> The rotary dialing system has given way to tone dialing. Satellite technology enables customers to place calls to other continents, while cordless technology enables them to do so from their backyards. And twisted copper telephone wires are being replaced with fiber optics. Each of these new technologies could be described in technical terms that may sound quite unlike our current understanding of telephone services. But that does not change the fact that these technologies, just like "Commercial Mobile Radio Services," are created by "telephone" companies to provide what we all think of as "telephone services."

City of Jefferson v. Cingular Wireless, LLC, 2005 WL 1384062 at *4 (W.D. Mo. June 9, 2005). The court thus logically concluded that the cities' gross receipt taxes on the cellular phone companies in that case were enforceable. *Id*. at *1.

Judge Laughrey's common sense conclusion is consistent with the holdings of other courts to have addressed the issue. *See, e.g., Airtouch Comm., Inc. v.*

Dep't of Revenue, 76 P.3d 342, 349-51 (Wyo. 2003); *Southwestern Bell Mobile Sys., Inc. v. Arkansas Pub. Serv. Comm.*, 40 S.W.3d 838, 843 (Ark. Ct. App. 2001); *City of Lebanon Junction v. Cellco Partnership*, 80 S.W.3d 761 (Ky. Ct. App. 2001) ("provider of cellular telephone services" was "telephone company" for purposes of statute requiring "[e]very … telephone company … [to] pay a tax on its operating property to the state"); *Campanelli v. AT&T Wireless Serv., Inc.*, 706 N.E.2d 1267 (Ohio 1999) (holding that cellular companies were "public utilities"); *Central Ky. Cellular Tel. Co. v. Commonwealth*, 897 S.W.2d 601, 603 (Ky. Ct. App. 1995). There is no reason to believe Missouri state courts would not have arrived at the same conclusion but for the General Assembly's enactment of H.B. 209.

II. THE GENERAL RULE AGAINST LAWS WHICH ARE RETROSPECTIVE IN THEIR OPERATION IS "SACRED," "TIMELESS AND UNIVERSAL," AND ART. I, § 13 OF THE CONSTITUTION WHICH EMBODIES THAT ANCIENT RULE REQUIRES THE INVALIDATION OF H.B. 209.

As the U.S. Supreme Court long ago noted, generally construing statutes to operate retrospectively "would cause in a high degree the evil and injustice of retroactive legislation." *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 202 (1913). The presumption that laws do not operate retrospectively "has timeless and universal human appeal," and its ancient history is a testament to "enduring notions of what is fair …." *Kaiser Aluminum & Chemical Corp. v. Bon-*

jorno, 494 U.S. 827, 855, 856 (1990) (Scalia, J., concurring). "It was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law." *Id*. at 855 (citations omitted). Because of that extraordinary history, "the principle we are considering is now to be regarded as sacred." *Dash v. Van Kleeck*, 7 Johns 477 (N.Y. 1811) (Kent, J.).

Affording even greater protection than the federal constitution, Missouri's "constitution forbids the enactment of retrospective laws by the general assembly, and in such disfavor are such laws held and so generally are they condemned, that the intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction." *State ex rel. Haeussler v. Greer*, 78 Mo. 188, 1883 WL 9427 at *2 (1883). *See also* Marshall J. Tinkle, *Forward into the Past: State Constitutions and Retroactive Laws*, 65 TEMP. L. REV. 1253 (1992) (discussing how state constitutions afford greater protection than the federal constitution does against retrospective legislation). The Missouri constitution provides "[t]hat no … law … retrospective in its operation … can be enacted." MO. CONST. Art. I, § 13. H.B. 209 clearly does express its intent to operate retrospectively, and it is therefore unconstitutional.

The cell phone companies contended below that section 13 does not prohibit the state from waiving its own rights and, hence, those of a municipal corporation as a political subdivision of the state. This Court, however, has specifically ***sustained*** a city's challenge to a state law on the grounds that it retrospectively,

and thus unconstitutionally, interfered with the city's property rights. In *Planned Indus. Expansion Auth. v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772, 776 (Mo. 1981) (hereinafter "*PIE*"), this Court unanimously held that the city could challenge a statute which purported "to convert a 'permissive use' of a public street easement into a 'real property public easement.'" *Id*. at 775. The Court specifically held that the city had standing to challenge the statute as unconstitutionally retrospective and further found the statute to be unconstitutional because it was "a law retrospective in its operation." *Id*. at 776 (citation omitted).

In the proceedings below, the cell phone companies relied upon the decision in *Savannah R-III School Dist. v. Public School Ret. Sys.*, 950 S.W.2d 854, 858 (Mo. 1997), where the Court held that "the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition." The Court reached that conclusion reasoning that "[b]ecause the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state," including the rights of school districts because they are "instrumentalities of the state." *Id*. While that admittedly broad rationale could also be applied to municipalities, this Court has never done so. Indeed, in *PIE* the Court reached precisely the opposite result.

Nowhere in *Savannah* did the Court discuss or even cite *PIE*. The Court also did not intimate in any way that its holding might also apply to municipal corporations. Compelling policy reasons counsel strongly against accepting such

an interpretation of section 13. First, "the complex realities of municipal government" and municipalities' "important and indispensable duty … to serve the welfare of the public" are indisputably strong reasons for permitting municipalities to challenge legislation as unconstitutionally retrospective, as this Court expressly recognized in *PIE*. 612 S.W.2d at 776. In the very concrete terms of the present case, if the General Assembly is permitted to repeal retroactively a municipality's gross receipt taxes, then in order to make up the shortfall, the municipalities will necessarily be forced either to curtail the services they provide to their citizens or to raise other taxes or fees on their citizens. In either case, the retrospective operation of H.B. 209 ultimately harms the very citizenry which *Savannah* recognizes section 13 is intended to protect.

Second, and in the same vein, school districts and municipalities are very different kinds of entities. "It has been said a school district is in no sense a municipal corporation with diversified powers, but is a quasi public corporation, 'the arm and instrumentality of the state for one single and noble purpose, *viz*., to educate the children of the district.'" *Kansas City v. School Dist. of Kansas City*, 356 Mo. 364, 369, 201 S.W.2d 930, 933 (1947). A municipality, by contrast, "'[w]ithin its authorized sphere of action … has been termed 'a miniature state.'" *Id.* (quoting *State ex rel. Audrain County v. City of Mexico*, 355 Mo. 612, 615, 197 S.W.2d 301, 303 (1946)). *Accord Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962) (upholding city ordinance designed to prevent racial discrimination in restaurants).

> Municipal corporations are the result of a voluntary association of the inhabitants sanctioned by the State primarily for the purpose of local self-government subordinate to the State and at the same time constituting, although secondary, an effective instrumentality for the administration of governmental affairs. A charter, defining their powers and duties, is essential to their creation and existence, which is effected upon 'incorporation.' Cities have been a chief factor in human progress. They exercise policy making authority and have legislative powers for their local government. … The indispensability of local self-government arises from problems implicit in the safety, order, health, morals, prosperity, and general welfare of thickly populated areas.

State ex rel. Audrain County, 355 Mo. at 615, 197 S.W.2d at 303.

Furthermore, it is well established that the law already recognizes important exceptions to the power of legislatures over municipalities. For instance, the power of a legislature to abolish entities created under state law ***or their taxation authority*** cannot be exercised in such a way that impairs the obligation of a pre-existing contract. *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909). "A number of decisions in this court have settled the law to be that, where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation of the con-

tract [for the state legislature] to destroy or lessen the means by which it can be enforced." *Id*. at 175-176.

In addition, "the United States Supreme Court has held that Congress may grant to a city the power to condemn and take land from the state against the wishes of that state." 1 MCQUILLIN MUN. CORP. § 1.58 (3rd ed.) (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)). *See also City of Davenport v. Three-fifths of an Acre of Land in Moline, Ill.*, 252 F.2d 354 (7th Cir. 1958) (holding that a city may, pursuant to a grant of eminent domain by Congress, condemn and take land including public streets owned by a city in another state). As discussed more fully in the next section, another provision of the Missouri Constitution limits the power of the General Assembly to extinguish "in whole or in part" the obligations owed to municipal corporations. MO. CONST. Art. III, § 39(5). These authorities demonstrate that the authority of the legislature over municipal corporations, although broad, is not absolute.

"[T]he complex realities of municipal government" and the peculiar status of municipal corporations as "miniature states" charged with the general welfare of their citizens and which "exist as much to insulate citizens from distant government as to carry out the state's duties," *Savannah*, 950 S.W.2d at 861 (Robertson, C.J., dissenting), provide compelling policy reasons why the Court should continue to recognize the standing of municipalities to challenge legislation which is retrospective in its operation. The Court should accordingly declare H.B. 209 "retrospective in its operation" in violation of § 13 of the Missouri Constitution.

III. H.B. 209 IMPERMISSIBLY EXTINGUISHES THE DEFENDANTS' TAX LIABILITY WITHOUT PROVIDING THE MUNICIPALITIES THE CONSIDERATION REQUIRED BY ART. III, § 39(5).

The Missouri Constitution explicitly limits the authority of the General Assembly to interfere with obligations due a municipal corporation: "[t]he general assembly shall not have power: ...[t]o release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due … any … municipal corporation …." MO. CONST. Art. III, § 39(5). H.B. 209, which retroactively repeals municipal taxes on the telephone services provided by cellular telephone companies, is a classic (and, fortunately, extraordinarily rare) example of the kind of legislation section 39(5) prohibits.

A. H.B. 209 extinguishes the cell phone companies' municipal tax liability.

There can be no serious doubt that H.B. 209 "extinguishes" the cell phone companies' tax "liability." The most persuasive evidence that the General Assembly believed it was extinguishing the cell phone companies' tax liability within the meaning of section 39(5) is that the General Assembly expressly justified H.B. 209 on the grounds that it had provided the municipalities with "full and adequate consideration … as the term 'consideration' is used in Article III, Section 39(5) of the Missouri Constitution, for the immunity and dismissal of lawsuits …."

H.B. 209 § 92.089(1). If the defendants' tax liabilities were not an "indebtedness, liability or obligation" within the meaning of section 39(5), then there would have been no need for the General Assembly to provide the municipalities with "full and adequate consideration" when it enacted H.B. 209. The cell phone companies' arguments to the contrary are thus without merit and fly in the face of the plain language of H.B. 209.

B. The cell phone companies' municipal tax liabilities are "fixed sums certain."

The defendants argued below that their tax liabilities were not an "indebtedness, liability or obligation" within the meaning of section 39(5) because that liability was not "fixed as a sum certain." That argument is without merit. According to the cell phone companies, by ***disputing*** their liability for and the amount of their tax liabilities, those liabilities are not "fixed as a sum certain" and were therefore subject to "legislative compromise." That argument is reminiscent of the argument Missouri courts long ago rejected when litigants opposed awards of prejudgment interest simply because they had disputed either their liability for or the amount of damages in litigation.

It is axiomatic that "[a]n amount is sufficiently liquidated for the purpose of allowing prejudgment interest thereon if the amount is readily ascertainable by computation or by determination according to a recognized standard"; "the interposition of a counterclaim, set-off, or defense does not convert the liquidated demand into an unliquidated one or preclude recovery for prejudgment interest even

though the counterclaim, setoff or defense places the amount payable in doubt." *Ehrle v. Bank Bldg. & Equip. Corp. of Am.*, 530 S.W.2d 482, 496-97 (Mo. Ct. App. 1975); *Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc.*, 171 S.W. 81, 90 (Mo. Ct. App. 2005). That same unassailable logic should control here.

If the Court were to accept the cell phone companies' interpretation of section 39(5), it would open a significant loophole in section 39(5) that its drafters surely never intended. For instance, in this litigation the cell phone companies themselves have controlled when their tax liability will be calculated through their refusal to report the amount of their gross receipts. That, however, does not mean that the amounts are not now ascertainable. The actual amount of the cell phone companies' gross receipts is a matter of historical fact, even though the companies have kept that information secret. Thus, the precise amount of the tax liability of each defendant ***is*** "fixed as a sum certain"; it should not matter that the defendants themselves are the only ones who presently know what those amounts are.

Even if not all services the cell phone companies provide are taxable telephone services, that does not mean the cellular telephone services the defendants indisputably ***do*** provide are not taxable services. To whatever extent the cell phone companies are liable with respect to any of the services they render, the precise amount of those liabilities are "readily ascertainable" for purposes of prejudgment interest law and should accordingly be deemed "fixed as a sum certain" for purposes of section 39(5).

C. H.B. 209 does not provide "consideration" within the meaning of Art. III, § 39(5) in return for the municipal tax liabilities which it extinguishes.

The "consideration" which the General Assembly purported to provide the municipalities is not "full," is not "adequate" and is not constitutional, the legislature's "findings" to the contrary in H.B. 209 notwithstanding. As an initial matter, there can be no doubt that while the General Assembly should satisfy itself that any legislation it passes is constitutional, it nevertheless remains "'emphatically the province and duty of the judicial department to say what the law is.'" *Poertner v. Hess*, 646 S.W.2d 753, 755-56 (Mo. 1983) (quoting *Marbury v. Madison,* 5 U.S. 137, 177 (1803)). "Constitutional interpretation is a function of the judicial, and not the legislative, branch." *Id*. at 756. Thus, it is for this Court to decide whether the "consideration" the General Assembly has provided municipalities satisfies section 39(5)'s requirement of "consideration." It does not.

H.B. 209 takes from municipalities tax revenues for ***prior*** tax years and proffers as "consideration" tax revenues for ***future*** tax years – taxes which the municipalities would have collected without the passage of H.B. 209. H.B. 209 also caps those revenues, so in at least some instances, it actually proffers as "consideration" future tax revenues in an amount ***less than*** some municipalities would have collected in the absence of H.B. 209.

As additional justification for H.B. 209, the General Assembly "granted" the cities the authority to tax cell phone service as "consideration" for any past tax

revenues they lose as the result of H.B. 209 – as if the cities did not already have that authority. As previously noted, cell phone companies have repeatedly attempted to escape liability for tax liability on the kinds of arguments they have made in the present litigation and those arguments have been repeatedly rejected by numerous courts around the country. The issue, however, is a simple one. As Judge Laughrey succinctly stated:

> Despite the voluminous briefing in this case, the primary issue to be resolved is relatively simple. Are the Defendants in the business of providing telephone services in the two Cities? If they are, then the Cities' ordinances require them to pay a gross receipts tax.

City of Jefferson v. Cingular Wireless, LLC, 2005 WL 1384062 at *2 (W.D. Mo. June 9, 2005). It is thus little wonder that Judge Laughrey concluded that the cell phone companies *are* liable for municipal gross receipts taxes. *Id*. at *4.

Some future case may require this Court to determine what deference, if any, should be accorded to a legislative determination that the General Assembly has provided adequate consideration to a municipality under section 39(5). This case, however, does not. H.B. 209 would extinguish the defendants' liability for gross receipt taxes and offer as "consideration" something the municipalities already had: the right to levy gross receipt taxes on the defendants in the future. That is not the "consideration" contemplated by section 39(5); it is an unconstitutional boondoggle and fleecing of Missouri municipalities. The difference between the tax liabilities the General Assembly extinguished and the "consideration" it has

tendered to the municipalities is staggering. If the Court were to declare it constitutionally sufficient, it would render section 39(5) a dead letter.

CONCLUSION

No one disputes that the state has full authority to specify the kinds of taxes its political subdivisions can impose. For example, the state could choose to ban all local real property taxes in the future, though the negative political repercussions would likely be high. A ***retroactive*** tax repeal is a much different story. Obviously the state could not pass a law requiring municipalities to refund real property taxes collected 10, 20 or 50 years ago. This case is not meaningfully different.

Municipalities provide vitally important services to their citizens, and today they face an array of obstacles in carrying out that responsibility. To say that municipalities are creatures of the legislature does not, or at least ***should*** not, dispose of the question whether the legislature should be permitted to enact laws to the detriment of municipalities which are retrospective in their operation. The universally recognized "evil and injustice" of such legislation is not cleansed of its unjust nature simply because it is applied to a city. Such laws impose very real hardships upon a city's inhabitants. The inherent unfairness of such legislation, even when it is enacted with respect to a municipality, is made unquestionably apparent by H.B. 209.

"The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform,

transferred to the hands of privileged corporations." *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. 420, 548 (1837). This Court should not indulge such "implications and presumptions" in this (or any) case. Two provisions of the Missouri Constitution by their plain, clear language require the invalidation of H.B. 209 which impermissibly repeals the cities' gross receipt taxes retroactively. It is "emphatically the province and duty" of this Court to say so.

Respectfully submitted,

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RULE 84.06 (c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 4,943 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

_____

Robert L. King

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 26th day of January, 2006, addressed to the following:

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