

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
RANGE TELEPHONE COOP., INC.)
FROM A DECISION BY THE) Docket No. 2014-14
DEPARTMENT OF REVENUE)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Tim P. Green, Chief Technology Officer for Range Family of Companies, appeared on behalf of Range Telephone Cooperative, Inc. (Range or Petitioner).

Cathleen D. Parker, Senior Assistant Attorney General, appeared on behalf of the Wyoming Department of Revenue (Department or Respondent).

STATEMENT OF THE CASE

Range is a multiple state telephone service cooperative headquartered in Sheridan, Wyoming. Range entered into a contract with Cyan, Inc. (Cyan), a telecommunication equipment manufacturer, which required Cyan to deliver and install an Ethernet network throughout the Range system. The project included installation sites located throughout Wyoming and Montana. Cyan shipped the equipment for the entire project, including all the installation sites, to Range in Sheridan, Wyoming. Range personnel divided the shipments by destination and delivered the equipment to the installation sites. Cyan invoiced Range for the project and included taxes on all of the equipment installed at both the Wyoming and the Montana sites. The Department reviewed the assessment at Range's request, and affirmed the assessment of the sales tax for the Wyoming equipment and the use tax for the equipment delivered to Montana.

Range appealed the Department's decision to the State Board of Equalization (Board) asserting that it did not owe the \$5,826.68 use tax assessed on the equipment installed at the two Montana sites. The Board held a hearing on the matter on May 29, 2014.

The Board, consisting of Chairman E. Jayne Mockler, Vice Chairman Martin L. Hardsocg and Board Member Robin Sessions Cooley, considered the matter.¹

The Board finds that the Department incorrectly determined that Range was liable for the use tax on the equipment installed at the two Montana sites, and reverses the Department's decision.

ISSUE

Range presented one issue on appeal: Whether "the broadband equipment shipped to Sheridan, Wyoming for sorting and delivery to the Forsyth, Montana and Broadhus, Montana locations for installation can be considered as a 'continuous shipping stream' as referenced by the Department of Revenue." (Pet'r's Notice of Appeal 1).

The Department identified two mixed issues of fact and law on appeal, which the Board restates as follows:

1. Whether Petitioner's actions constitute temporary storage in Wyoming to avoid Wyoming sales/use tax?
2. Whether Petitioner took possession of the property in Sheridan, Wyoming?

(Dep't's Issues of Fact and Law and Exhibit Index 1).

The Board restates the issue as follows: Is Range liable for use tax when, pursuant to the parties' contract terms, it temporarily stored and sorted equipment in Wyoming, and thereafter transported the equipment to Montana for installation by the equipment's vendor?

¹ Paul Thomas Glause and Steven D. Olmstead were members of the Board at the time of the hearing. Mr. Glause resigned from the Board, effective January 2, 2015. Mr. Olmstead's term expired March 1, 2015. Governor Matthew H. Mead appointed Martin L. Hardsocg and Robin Sessions Cooley to the Board effective March 16, 2015. Ms. Cooley and Mr. Hardsocg reviewed the transcript, exhibits, record and briefing and participated in the decision in this matter.

JURISDICTION

The Board shall review final decisions of the Department on application of any interested person adversely affected. Wyo. Stat. Ann. § 39-11-102.1(c) (2013). Taxpayer's appeal must be filed with the Board within thirty days of the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(a) (2006). Petitioner timely appealed the Department's final decision of February 11, 2014, by filing a "Notice of Appeal" with the State Board on February 17, 2014. The Board has jurisdiction to decide this matter.

FINDINGS OF FACT

1. Range is a telephone cooperative located in Sheridan, Wyoming. The cooperative includes Range, RT, and Dubois Telephone Exchange and Advanced Communications Tech, who share space at 60 West Seymour Street, Sheridan, Wyoming. The cooperative also includes various other independent phone companies throughout Wyoming and Montana. (Hr'g Recording).
2. In August 2013, Range began a project to upgrade twelve telephone network sites within its system. Range entered into a contract with Cyan, a manufacturer of telecommunication equipment, to deliver and install the telecommunications equipment required for the upgrade. (Ex. 300 at 1). The two Montana sites, in Forsyth and Broadhus, were equipment sites only; no personnel worked at these sites and they were largely unmanned the majority of the time. (Hr'g Recording; Exs. 301 at 12, 303 at 18-19; Ex. 500).
3. Pursuant to the parties' contract, Cyan shipped the entire inventory of equipment for the project, by common carrier, to Range's headquarters in Sheridan, Wyoming. Following Cyan's instructions, Range personnel inventoried the shipments and divided the shipments for specific site deliveries. (Stipulated Facts ¶ 5; Hr'g Recording; Ex. 301 at 12-13).
4. Range stored the Cyan equipment at co-op member Advanced Communications Technology's facilities in Sheridan, Wyoming, for three days before it transported the equipment to the Montana sites. (Stipulated Facts ¶ 6; Hr'g Recording). Range employees and representatives transported the equipment to Montana. (Stipulated Facts ¶ 7; Hr'g Recording).
5. Range stated, and the parties' contract confirmed, that it took delivery of the equipment for the entire project at the Sheridan location, but Cyan retained ownership of

the equipment until it installed and connected the equipment at each site, including the Montana sites. (Hr'g Recording; Ex. 500 at 7, 9-10).

6. During the hearing, and in Exhibits 300 and 301, Range referenced the project contract between Range and Cyan. The contract outlined each party's responsibilities, including the point at which transfer of ownership of the equipment passed from Cyan to Range, and Range's payment responsibilities. (Ex. 300, 301 at 10-12). The contract was not provided by Range to the Department prior to the State Board hearing or offered at the hearing. After the hearing, on June 4, 2014, and over the Department's objection, the Board admitted the contract, Exhibit 500, into evidence. (Ex. 500; Dep't of Revenue's Objection to Admission of Documents Provided After Hearing; Bd. of Equalization Order Admitting Evidence).

7. The contract stated that Cyan would "engineer, furnish, deliver, install, align and test the equipment, materials and software" if the proposal was accepted. (Ex. 500 at 3).

8. Article II, Section 4 of the contract stated: "The Bidder [Cyan] shall deliver to the Owner [Range], and the Owner shall accept, full possession and control of each Project on the date of Completion of the Project or on an earlier date if agreed under Article IV, Section 2." (Ex. 500 at 7).

9. Article III, Section 1 of the contract outlined payment terms to Cyan. Relevant sections include:

(a) The Owner shall pay the Bidder upon the basis of written estimates of the Equipment delivered at the site of the Project, presented by the Bidder, and approved by the Owner, the following percentages of the price of the materials, equipment and software for each Project set forth under Column 3, "Cost", in Article 1, section 1, as and if revised:

(i) Forty-five percent when 50% of the materials, equipment and software for each Project has been delivered at the site of the Project(s), and

(ii) Ninety percent when all of the materials, equipment and software required to place each Project into operation has been delivered at the site of the Project(s).

(b) Upon the Completion of the Project, but prior to the payment to the Bidder of any amount in excess of 90 percent of the Total Contract

Price, the Owner shall inspect the work performed thereunder and if the work shall be found to be in accordance with the Specifications and all provisions thereunder, the Owner shall certify as to that fact and as to the amount of the balance found to be due to the Bidder. No later than 30 days after Completion of Contract, as defined in Article VII, section 1, "Definitions" the Owner shall submit such final certificate to the Administrator for approval and when such approval has been given, the Owner shall pay to the Bidder all unpaid amounts to which the Bidder shall be entitled thereunder; provided, however, such final payments shall be made not later than 60 days after Completion of the Contract unless approval by the Administrator² shall be withheld or delayed due to Bidder's actions or failure to act.

(Ex. 500 at 8).

10. An addendum to the contract, the "Range Carrier Ethernet Network Plans and Specifications Explanatory Notes," specifically addressed the transportation and storage responsibilities of the parties, confirming that Cyan was responsible for shipping, transporting, installing and provisioning the equipment, and that Range would not take final possession until all equipment was installed and functional. (Ex. 500 Explanatory Notes at 13, 17).

11. Cyan billed Range for the installed equipment through two invoices sent to Range's Forsyth and Broadhus post office addresses. (Stipulated Facts ¶ 4; Ex. 300 at 6-9).

12. Cyan included Wyoming tax in the amount of \$5,826.68 for the equipment it installed in Montana. (Stipulated Facts ¶ 1; Ex. 300 at 7, 9).

13. Range requested the Department advise whether the equipment installed in Montana was subject to Wyoming tax. Range asserted that, in accordance with the contract, it did not take possession of the equipment until Cyan connected and activated the equipment in Montana, and, therefore, it did not owe tax on the equipment installed in Montana. (Stipulated Facts ¶ 3; Ex. 300 at 1; Hr'g Recording).

14. In its final decision letter issued on February, 11, 2014, the Department determined the equipment installed in Montana was subject to use tax, finding that Range took possession, control and temporarily stored the equipment in Wyoming. The Department

² The project is financed through a loan to Range guaranteed by the United States of America, acting through the Administrator of the Rural Utilities Service (RUS), referenced throughout the contract as the "Administrator," or by loans to Range by the United States of America and by the Rural Telephone Bank. (Ex. 500 at 3).

concluded that although Range later transported the equipment to its Montana locations, its possession in Wyoming interrupted the “continuous shipping stream” of the equipment, which triggered the use tax. (Stipulated Facts ¶¶ 5-9; Hr’g Recording; Ex. 304 at 23).

15. After it issued a final decision letter, which concluded that Range owed Wyoming use tax, the Department investigated further and subsequently issued Cyan a sales tax license. At the hearing the Department stated that because Cyan later registered as a vendor in the State of Wyoming, the Department considered the matter a sales tax matter, as opposed to a use tax matter. (Hr’g Recording).

16. Ms. Kim Lovett, Administrator for the Excise Tax Division of the Department, testified on behalf of the Department. (Hr’g Recording).

17. During the hearing Ms. Lovett testified that if the contract between Range and Cyan revealed the property was installed by Cyan in Montana, and further that Range did not take possession in Wyoming, the Department would likely have ruled that no use tax was due. In its closing, the Department also recognized that the contract terms were important in this determination, and had Range provided the Department with a copy of the contract, it could have significantly impacted its decision in this matter. (Hr’g Recording).

18. Petitioner timely filed this appeal on February 17, 2014. (Notice of Appeal 1; Stipulated Facts ¶ 10).

CONCLUSIONS OF LAW: PRINCIPLES OF LAW

19. Upon application of any person adversely affected, the Board must review final Department actions concerning state excise taxes and “[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act and its own rules and regulations of practice and procedure.” Wyo. Stat. Ann. § 39-11-102.1(c) (2013). The Board must “[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department.” Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2013).

20. The Board's Rules provide:

Except as specifically provided by law or in this section, the Petitioner shall have the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action. For all cases involving a claim for exemption, the Petitioner shall clearly establish the facts supporting an exemption. In proceedings involving the question of whether or not there is a taxable event under Wyoming law, the Petitioner shall have the burden of going forward and the Department shall have the ultimate burden of persuasion.

Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006).

21. “A preponderance of the evidence is ‘proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.’ ” *Mitcheson v. State, ex rel., Wyo. Workers’ Safety & Comp. Div.*, 2012 WY 74, ¶ 11, 277 P.3d 725, 730 (Wyo. 2012) (quoting *Kenyon v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo. 2011)).

22. The role of this Board is strictly adjudicatory:

It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.

Amoco Prod. Co. v. Wyo. State Bd. of Equalization, 12 P.3d 668, 674 (Wyo. 2000); quoted in *Amoco Prod. Co. v. Dep’t of Revenue*, 2004 WY 89, ¶ 22, 94 P.3d 430, 440 (Wyo. 2004).

23. Wyoming Statutes section 39-16-101(a)(ix) (2013) defines “use” as “the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract[.]”

24. Wyoming Statutes section 39-16-103(a)(i) (2013) imposes a use tax on persons “storing, using or consuming tangible personal property” in the state.

25. The Department bases the excise tax on the location where the purchaser receives or takes receipt of the property. Wyo. Stat. Ann. § 39-15-104(f)(i)(B) (2013).

26. The Department Rules further clarify the use tax as follows:

(i) Use Tax

(i) Transactions Subject to the Use Tax. The purchase or lease of all tangible personal property outside this state for use, storage, or consumption within this state shall be subject to the use tax, providing the same transaction would be subject to the sales tax if the transaction had occurred wholly within Wyoming.

(ii) The use tax shall be determined by when tangible personal property is first stored, or first used or first consumed in Wyoming.

...

(iv) Storage of Property. The use tax shall not apply to tangible personal property held or stored in this state by a licensed vendor as defined by W.S. 39-16-101(a)(x) as inventory for resale. The use tax will not apply to tangible personal property purchased outside Wyoming for use in other states, but shipped to and temporarily stored in Wyoming pending shipment to another state.

Rules, Wyo. Dep't. of Revenue, ch. 2 § 4 (2012).

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW

27. Range appealed the Department's determination that it owed \$5,826.68 in use tax. The question is whether Range was liable for use tax when it temporarily handled and stored equipment that Cyan would later install at Range's Montana sites. The Department determined that Range owed use tax because it received, briefly stored, and transported the equipment from Sheridan, Wyoming, to the eventual project locations in Montana. *Supra* ¶¶ 12-14.

28. During the hearing the Department clarified that once Cyan registered as a vendor with the Department, Range was subject to sales tax rather than use tax. Those events occurred after the Department issued the written determination disputed in this appeal. The record, however, contains no written departmental determination concerning Range's sales tax liability. Because Range had no sales tax determination from the Department, it did

not appeal a sales tax assessment or a departmental determination addressing sales tax; consequently, the Board will not address any sales tax implications. *Supra* ¶ 15.

29. It was evident at the hearing that the Department lacked critical information when it concluded that Range was liable for use tax stemming from its purchase, receipt, or storage of the equipment in Sheridan, Wyoming. The Department admittedly issued its ruling without fully understanding the project and contractual obligations entered between Range and Cyan, specifically the bid package and contract for the purchase, delivery, and installation of “optical transmission equipment.” (Hr’g Recording). Mr. Green informed the Board that he had a contract with Cyan which he could provide to the Board. (Hr’g Recording). The Board admitted the contract and the attachments to the contract, frequently discussed during the hearing, into evidence following the hearing. (Ex. 500); *Supra* ¶ 6.

30. The Department’s objection to admission of the contract, and its reliance on *Wyo. Dep’t of Revenue v. Qwest Corp.*, 2011 WY 146, 263 P.3d 622 (Wyo. 2011) in support of its objection, does not dissuade us from relying upon the contract to resolve this dispute.

31. *Qwest Corp.* concerned an auditee that repeatedly denied possession of information which the Department of Audit and Department of Revenue sought. *Id.*, ¶¶ 11, 27-28, 263 P.3d at 625-31. The auditee persisted in claiming that it did not possess the requested information during the hearing. *Id.* Instead, the requested information was submitted to the Board well after the hearing, and no opportunity was provided to the Department of Audit or Department of Revenue to respond to the documents. *Id.* ¶¶ 12, 27, 263 P.3d at 625, 630-31. The Wyoming Supreme Court held that under those circumstances, the State Board improperly relied upon evidence the auditee produced weeks after the hearing. *Id.*, ¶ 30, 263 P.3d at 631. In contrast, Range fully described the contract during the hearing but failed to offer it until prompted by the Board. (Hr’g Recording). *Supra* ¶ 6. The Department offered no evidence that Range intentionally withheld the contract documents or refused to make them available upon request. Indeed, the Department acknowledged that it was aware of the contract’s existence, but did not request the contract and believed it fully understood the facts through correspondence with Range’s representative, Mr. Tim Green. (Hr’g Recording).

32. *Qwest Corp.* is distinguishable and does not prevent the Board from considering the documents under the facts and circumstances of this case.

33. Without the benefit of reviewing the contracts, it appeared to the Department that Range completed the purchase of the equipment in Sheridan when it received, sorted, and then transported the equipment to its Montana locations. However, because the

Department bears the burden in this matter, it had the responsibility to establish the taxability of the equipment. At the hearing it offered no evidence to contradict Mr. Green's testimony that Range did not take possession or control of the equipment until it was "turned on" and fully integrated into the Range system. (Hr'g Recording). *Supra* ¶¶ 5-6, 20.

34. After reviewing and considering Mr. Green's testimony and the contract between Range and Cyan, the Board finds that the Department incorrectly concluded that Range received and took possession of the equipment or first stored the equipment in Sheridan, Wyoming. The contract supports Mr. Green's testimony and reveals that Cyan contracted to sell and deliver the optical transmission equipment to Range at multiple locations, including two Montana locations, and it agreed to install, warrant, and assume responsibility for the equipment and installation throughout completion of that portion of the project located in Montana. Range, in other words, did not merely purchase and receive equipment, rather, it purchased a turn-key project in which Cyan assumed full responsibility for all facets of the project, including movement of the equipment and installation work to be performed at numerous locations. *Supra* ¶¶ 6-10.

35. In particular, the contract at Article II, Section 4, *supra* ¶ 8, clearly established that Range purchased not only the equipment, but professional services necessary to transport, install, configure, and test the equipment in Montana, and that completion of the project would not occur until the equipment was turned on and Range accepted. (Hr'g Recording).

36. Wyoming Statutes section 39-16-101(a)(ix) (2013) defines "use" as "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract[.]" Per the contract between Cyan and Range, neither ownership of, nor responsibility for, the equipment passed to Range in Sheridan. *Supra*, ¶¶ 7-10. While Range temporarily stored and sorted the equipment before transporting it from Sheridan to Montana, the contract between the parties required that Cyan retain ownership and responsibility for the equipment through the installation and testing process in Montana. *Supra* ¶¶ 3-10. Range offered sufficient unrefuted evidence to demonstrate that it did not "use" the property in Wyoming in accordance with Wyoming's use tax statutes and regulations.

37. Further, Range's brief storage and sorting by location of the equipment in Sheridan for three days did not qualify as "storage" under Wyoming's use tax statutes. Wyoming Statutes section 39-16-101(a)(v) (2012) defines "storage" as the "keeping or retention in this state of tangible personal property purchased from a vendor for any purpose **except for sale in the course of business or subsequent use outside the state[.]**" (emphasis added). Range's brief storage of the equipment in Sheridan, before moving it to Montana

for installation by Cyan, was not “storage” in Wyoming because the parties intended that Cyan would install and use the equipment “outside the state” in Montana. Moreover, the Department’s rules confirm that storage of property does not occur if done so temporarily “pending shipment to another state.” Rules, Wyo. Dep’t of Revenue, ch. 2 § 4(i), (iv) (2012).

38. The Department counters that Range took possession of the equipment in Sheridan because Cyan did not transport the equipment to Montana via a “continuous shipping stream.” (Ex. 304 at 23). The Department’s final decision letter explained:

Our determination would differ if the vendor (Cyan Inc.) shipped the product directly to the Montana installation site (possession passes in Montana), or where the product was shipped as part of a continuous shipping stream where it was only temporarily held in Wyoming. For example, Cyan ships equipment with instructions to the carrier that Montana is the shipping destination, and the carrier temporarily stores the equipment in a train yard waiting on a train to complete the shipping arrangement[.]

(Ex. 304 at 23).

39. While Range unquestionably assisted Cyan’s shipment of equipment to Range’s Montana locations, the State Board disagrees that Range’s actions amounted to receipt or control of the equipment in Wyoming for use tax purposes. Nor does the Department provide any support for its reliance on a “continuous shipping stream,” except in support of its interpretation for the “first used” or “first stored” metric. (Pet’r’s Notice of Appeal 1; Hr’g Recording; Exs. 301 at 13-14, 304 at 22-23). An uninterrupted continuous shipping stream, according to the Department, occurs only through transfer from one common carrier to another common carrier. (Hr’g Recording). The Department offered no authority for this proposition, however, in either statute or rule.

Under our statutory interpretation rules, this Court applies the plain meaning of the statute unless found to be ambiguous. *Adams v. State ex rel. Wyoming Workers' Safety and Comp. Div.*, 975 P.2d 17, 19 (Wyo. 1999). Clearly, the hearing examiner has applied the plain meaning of the statute and in doing so has compared two wage rates at the particular points of time specified in the statute, resulting in looking at Savicki's wage rate immediately upon his return to work. This interpretation is not error. **To uphold the Division's argument would require that we improperly add language to the statute, altering its plain meaning, and usurping the legislative function to amend the act.**

State, ex rel., Wyo. Worker's Safety and Comp. Div. v. Savicki, 2004 WY 71, ¶ 13, 92 P.3d 294, 296 (Wyo. 2004) (emphasis added).

40. Range's actions in staging and moving the equipment from Sheridan to Montana merely served a practical, project-related purpose. Range only sought to reduce delays and delivery issues that might arise from sending equipment to unmanned Montana sites. *Supra* ¶ 2.

41. Again, the Board's Rules require that "in proceedings involving the question of whether or not there is a taxable event under Wyoming law, the Petitioner shall have the burden of going forward and the Department shall have the ultimate burden of persuasion", *supra* ¶ 20. Range offered sufficient unrefuted evidence to demonstrate that it did not "use" the property in Wyoming in accordance with Wyoming's use tax statutes and regulations. Further, the Department failed to meet its burden to prove that Range's receipt and staging of the telecommunication equipment in Sheridan, Wyoming, was subject to Wyoming use tax. The Board finds Range's limited activities did not constitute use, storage or consumption of the equipment in Wyoming, and therefore the equipment is not subject to the Wyoming use tax.

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ORDER

THEREFORE, IT IS ORDERED the Wyoming Department of Revenue's final administrative decision affirming the assessment of sales tax for the equipment ultimately delivered to Montana for Range Telephone Coop., Inc. is **reversed**.

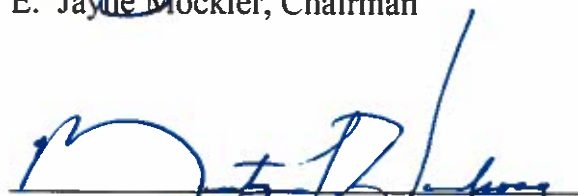
Pursuant to Wyo. Stat. Ann. § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 23rd day of September, 2015.

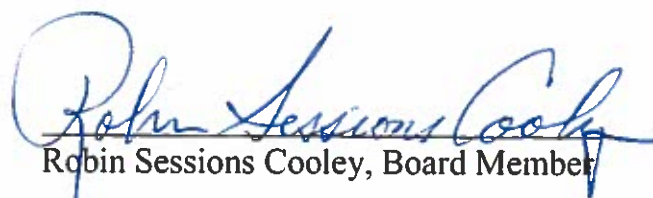
STATE BOARD OF EQUALIZATION



E. Jayne Mockler, Chairman




Martin L. Hardsøeg, Vice Chairman



Robin Sessions Cooley, Board Member

ATTEST:




Jessica M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2015, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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