BEFORE THE PUBLIC UTILITY COMMISSION

OF THE STATE OF OREGON

UM 1087

CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, Complainant, v. VERIZON NORTHWEST, INC., Defendant.	**CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT'S RESPONSIVE BRIEF**

I. Introduction.

Complainant Central Lincoln People's Utility District (CLPUD) submits the following Responsive Brief to respond to the arguments of Defendant Verizon Northwest, Inc. (Verizon) and intervenors Oregon Cable Telecommunications Association (OCTA) and OPUC Staff.

II. CLPUD Properly Terminated The Joint Use Agreement With Verizon No Later Than July 2, 2002.

A. The Joint Use Agreement Between CLPUD and Verizon Provided For Termination Upon Mailing of Notice, Regardless of When the Notice Was Received.

Verizon has argued that the two notices CLPUD sent to Verizon terminating the contract either were not received by Verizon at all, were not received by the right department, or were not

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received in a timely manner. *See* Verizon Brief at 9. However, all of these arguments are immaterial because the contract between CLPUD and Verizon provided for termination upon mailing of notice, regardless of when the notice was received.

The black letter law on effectiveness of a notice upon mailing is as follows:

> Generally, service is accomplished by depositing the notice in the mail properly addressed and stamped where it is statutorily provided that the written notice must be given by mail, *or where it is so provided by contract, and the failure of the addressee to receive the notice is immaterial.*

58 Am.Jur.2d, Notice, § 34 (emphasis added); *accord* 66 C.J.S. Notice § 18, p. 664; *see also Johnson Service Co. v. Climate Control Contractors, Inc.*, 478 S.W.2d 643 (Tex.Civ.App. 1972) (notice mailed on 89th day of 90-day period was effective, although not received till 91st day).

Article XVIII of the Agreement provides that the Agreement may be terminated "by either party upon six (6) months' notice in writing to the other." CLPUD Ex. 3, p. 12. This provision does not require any particular manner of giving notice, or any particular form of the notice, other than that it be in writing. Article XVI of the Agreement provides that notice pursuant to the Agreement "shall be in writing and delivered personally *or mailed*…to such other address as either party may from time to time designate in writing." (emphasis added). There are no further requirements or conditions precedent before a notice may be effective. The most logical reading of this provision is that notice is effective when it is "mailed", not when it is received. The contract does not even refer to *receipt* of notice, nor does it require that notice be received; it merely requires that "whenever notice is to be *given*…such notice shall be…*mailed*." (emphases added). Where a notice provision provides that notice be given by mail, but does not require actual notice, notice is effective upon mailing, even if the notice is never received. *Hurley v. Olcott,* 91 N.E. 270, 198 N.Y. 132 (1910).

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B. Verizon Failed to Rebut the Presumption That A Letter Duly Directed and Mailed Was Received in the Regular Course of Mail.

Moreover, even if the Agreement did require that notice be received, Verizon failed to meet its burden of proof that it did not receive the termination notice.

The normal rule is that, if one party proves that a letter was duly directed and mailed, the other party has the burden to prove that it is more probable than not that the notice was not received. OEC 311(1)(q); *State v. Liefke*, 101 Or.App. 208, 211, 789 P.2d 700 (1990); *Van Dyke v. Varsity Club, Inc.*, 103 Or.App. 99, 101, 796 P.2d 382, *rev. denied*, 310 Or. 476 (1990). CLPUD has presented uncontradicted testimony that it mailed the notice to Verizon's Beaverton, Oregon address on December 26, 2001, and to Verizon's Everett, Washington office on January 2, 2002. CLPUD Ex. 1, p. 4, lines 4-15, CLPUD Ex. 5. Verizon admits that it received the December 26, 2002 notice, but claims it was sent to the wrong department.[1] Verizon argues that it is "black-letter law" that "a termination that does not comply with the termination provisions of a contract is ineffective." Verizon Brief at 9. However, it is also the law that, where notice to terminate a contract is actually received by the other party, it is immaterial that the terminating party did not mail the notice to the exact address specified by the contract. *U.S. Broadcasting Co. v. National Broadcasting Co.*, 439 F.Supp. 8 (D.C.Mass. 1977). Verizon cites no authority to the contrary.

With respect to the January 2, 2002 notice, Verizon has failed to meet its burden of proof to show that it did not receive the notice. Verizon points to the absence of evidence in the record

[1]Verizon states that the December 26, 2002 notice was received by its Coos Bay Engineering Office, *see* Verizon Ex. 103, an office which Verizon claims has nothing to do with joint use or pole attachments. Since it is clear that there is enough communication between Verizon's various offices that a notice delivered to one office may be provided to other offices, one wonders why the Verizon employees who received the notice would have sent it to an office which had nothing to do with joint use and therefore was unable to respond to the notice.

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that it received the notice; however, because Verizon has the burden of proof on this issue, it may not rely on the absence of evidence, but must come forward with affirmative evidence showing that it did not receive the notice. This is logical, given that such evidence is wholly within the possession and control of Verizon. Because Verizon has failed to come forward with any evidence showing that it did not receive the January 2, 2002 notice, the Commission should find that Verizon received the January 2, 2002 notice and that the notice terminated the Agreement between CLPUD and Verizon.

Verizon cites *Hubert v. Luden's, Inc.*, 88 S.E.2d 481 (Ga.App. 1955) for the proposition that "As a general matter of contract law, notice of termination with a period shorter than that required by the contract is ineffective, if the effect is to impose a forfeiture of already existing rights under the agreement." Verizon Brief at 11. However, *Hubert* actually states the opposite proposition:

> [T]he weight of authority in this country is to the effect that, where a contract of employment requires written notice of intention to terminate a stated period in advance of actual termination, and where such notice is given, a discharge without notice is effective after the lapse of the agreed time. *Oldfield v. Chevrolet Motor Co.*, 198 Iowa 20, 199 N.W. 161, 35 A.L.R. 893; *Seaboard Mutual Casualty Co. v. Profit*, 4th Cir., 108 F.2d 597, 126 A.L.R. 1110; Williston, Contracts (Rev. ed.), Vol. IV, p. 2846 and citations. Thus, as in *Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 109 P. 205, where an employer terminates a contract without giving a required 60-day notice, the employee is entitled to wages for the 60-day period during which he should properly have been allowed to continue his employment.

88 S.E.2d at 484-85. Moreover, as Verizon recognizes, the Court in *Hubert* merely acted to avoid a forfeiture by holding that a salesman would not forfeit his commissions where the employer terminated the contract without any prior notice as required by the contract. Here, Verizon is not claiming that CLPUD's termination of the contract caused it to forfeit rights which accrued between June 30, 2002 (CLPUD's stated termination date) and July 2, 2002 (six months after the

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second termination notice was sent). Verizon's alleged "forfeiture" is that its attachments are subject to sanctions under the Commission's pole attachment rules. The sanctions to which Verizon has subjected itself were in no way caused by CLPUD's termination of the contract with less than 6 months' notice. As Verizon acknowledges, it made no attempt whatsoever to negotiate a new contract in the six months after CLPUD sent its termination notice, and to this day Verizon has not signed a contract with CLPUD. Verizon Brief at 10. Verizon's alleged "forfeiture" was not caused by CLPUD's termination of the contract; it was caused by Verizon's complete failure to make any effort to comply with the Commission's rules by negotiating a new contract with CLPUD governing Verizon's attachments on CLPUD's poles.

Verizon also argues that the second, January 2, 2002 notice was also insufficient since it was sent to a different zip code than that specified by Verizon. However, the zip code that CLPUD used was the zip code listed on the letterhead of Verizon's letter to CLPUD designating the address for joint use notifications, and was also the zip code provided by Verizon as its "Primary Joint Pole Use Contact" on March 4, 2003. CLPUD Ex. 4, p. 1; CLPUD Ex. 9.

Verizon cites errors in the notice in the numbers of the articles of the Agreement and the date of the Agreement. However, Verizon has never contended, and does not now contend, that it was somehow misled by the termination notice, or that it thought the notice somehow referred to some contract other than the only contract between CLPUD and Verizon regarding pole attachments. *See* CLPUD Ex. 1, p. 3, lines 6-8. The only object or purpose of a contract termination notice is to apprise the party to whom notice is given that the other party intends to terminate the contract. *Lyon v. Pollard,* 87 U.S. 403 (1874). Any notice which accomplishes this purpose is sufficient, even if it does not strictly comply with the terms of the contract. *Barbier v. Barry,* 345 S.W.2d 557, 562 (Tex.Civ.App. 1961) (notice which substantially complies with

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contract termination provision is sufficient); *Utilities Engineering Institute v. Bendall*, 84 A.2d 423, 423-24 (D.C.App. 1951) (same).

Verizon argues that it responded the very next day to CLPUD's letter of June 27, 2002 indicating that the contract would terminate shortly and providing CLPUD's Pole Occupancy License Agreement's for Verizon's signature. *See* CLPUD Ex. 13. However, the most telling thing about Verizon's response to this letter is what it did not say.

The first sentence of CLPUD's June 27, 2002 letter states: "As indicated in previous correspondence sent to your company on December 26, 2001, the District will terminate the existing General Agreement for Joint Use of Poles on June 30, 2002." If, as Verizon contends, it did not receive either the December 26, 2001 notice or the January 2, 2002 notice, one would expect Verizon to show some degree of surprise or confusion at this statement. Instead, Verizon representative Mark Simonson responded to the letter with an e-mail to CLPUD Chief Engineer Mike Wilson which provided in full:

> We are in receipt of the proposed agreement. Please note, due to the number of contacts you have on our poles, you may want to begin revising the agreement, to reflect a bilateral joint use agreement instead of a unilateral license agreement.

CLPUD Ex. 14. If Verizon had a genuine disagreement with CLPUD's statement that "the District will terminate the existing General Agreement for Joint Use of Poles on June 30, 2002" (that is, a disagreement based on a genuine misunderstanding regarding the terms of the termination notice, rather than one manufactured after the fact by Verizon's attorneys once it realized it was subject to sanctions), it would be reasonable to expect that Verizon would assert that disagreement immediately, and in any event at some time prior to this litigation.

This case is almost exactly analogous to *Macke Laundry Service Ltd. Partnership v. Mission Associates, Ltd.*, 19 Kan.App.2d 553, 873 P.2d 219 (Kan.App. 1994). In *Macke*, the

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contract provided for a minimum term of 5 years and automatic annual renewal thereafter without notice. The contract also provided that either party could terminate the agreement:

> "…at the end of any subsequent twelve-month period, by giving written notice thereof by mail to the other party…at least 60 days prior to the end of said subsequent twelve-month period."

19 Kan.App.2d at 554, 873 P.2d at 221. The defendant sent written notice of termination to the plaintiff exactly 60 days prior to the end of the 12-month period, but the notice was not received until 59 days prior to the end of the 12-month period. 19 Kan.App.2d at 554-55. The court concluded:

> We believe the better rule regarding the mailing of a notice is best summarized as follows:
> "Where a statute or rule merely states that written notice shall be given, ordinarily mailing a notice is not alone sufficient; the notice must be received. (Citation omitted.) When, however, a statute or rule does not merely state that written notice shall be given but also states that it may be given by mail, service is ordinarily accomplished by depositing the notice in the mail properly addressed and stamped." *Liberty Mut. Ins. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 857 (Iowa 1984).
> *See Mund v. Rambough*, 432 N.W.2d 50, 53 (N.D. 1988); *Johnson Service Co. v. Climate Control Contractor, Inc.*, 478 S.W.2d 643 (Tex.Civ.App. 1972).
> We conclude that written notice of termination shall be effective upon mailing when the contract expressly requires the notice to be given by mail and when the notice provision is silent as to receipt. Furthermore, to be effective, the notice must be correctly addressed, stamped, and mailed within the specified period of time required by the contract for giving timely notice, and the addressee or the addressee's employee or agent must receive that notice within a reasonable time after its mailing.
> Additionally, if the notice of termination is not received within a reasonable time after its mailing, the notification shall be ineffective. Nevertheless, a presumption will occur that notice was received by the party to whom it was addressed if that notice is correctly addressed, stamped, and mailed. This presumption, however, is rebuttable and may be overcome by evidence that notice was never received. (Citation omitted).

19 Kan.App.2d at 560, 873 P.2d at 224-25.

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III. CLPUD Is Entitled To Removal Of Verizon's Attachments And Sanctions Under OAR 860-028-0130 and 860-028-0180 for Verizon's Violation of OAR 860-028-0120 and ORS 757.271(1).

A. Even if the 144 Attachments in CLPUD Exhibit 6 were Established Before the Contract Terminated, Verizon is Subject to Sanctions Based on these Attachments Because Verizon Never Requested Authorization for the Atttachments and the Attachments Were Therefore Not Within the Scope of the Agreement.

Verizon argues that the Commission should infer that the 144 attachments identified in CLPUD Exhibit 6 were established before the Agreement between CLPUD and Verizon was terminated. Verizon Brief at 12-13. However, even if the attachments were physically connected to the poles prior to termination of the Agreement, the attachments were not within the scope of the Agreement because Verizon never made written application for the attachments prior to CLPUD's termination of the contract. Therefore, the attachments were not subject to any written agreement with CLPUD, and are accordingly subject to removal and sanctions under the Commission's rules.

Article XVIII of the Agreement between CLPUD and Verizon provides in part:

> …Upon any termination or such expiration, each party shall remove all of its existing attachments on poles of the other party in an orderly manner and within the period of five (5) years thereafter unless a longer period of time is agreed to in writing. All of the applicable provisions of this Agreement shall remain in full force and effect with respect to any and all attachments of either party remaining upon poles of the other party, until such time as all of such attachments have been removed.

CLPUD Ex. 3, p. 12.

Proper interpretation of this contractual provision is a question of law. *Yogman v. Parrott,* 325 Or. 358, 361 (1997). The first step in interpreting a contractual provision is to examine the text of the provision in the context of the document as a whole. *Id.* The Court must look at the four corners of the contract and consider the contract as a whole with emphasis on the provision in question. *Id.* If the meaning of the provision in context is clear, the analysis ends. *Id.*; *see also*

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ORS 42.230 ("…where there are several provisions or particulars, such constructions is, if possible, to be adopted as will give effect to all."). Read in the context of the Agreement as a whole, it is clear that the provision of Article XVIII allowing attachments to remain for 5 years after termination applies only to attachments on jointly used poles as authorized by the Agreement.

The provisions of the Agreement do not apply to all poles owned by either party; rather the Agreement's terms apply only to those poles for which joint use is established as provided in the Agreement. The opening recitals of the Agreement provide in part:

> WHEREAS, both parties desire to cooperate in establishing joint use of their respective poles when and where joint use shall be of mutual advantage; and
>
> WHEREAS, the conditions which have determined or will determine the necessity or desirability of joint use are dependent upon the service requirements of each party, including considerations of safety and economy, and *each party should, in its sole judgment,* determine the characteristics *and determine whether or not such service requirements can properly be met by joint use of poles;*

CLPUD Ex. 3, p. 1 (emphases added). Article I of the Agreement provides in full:

> ARTICLE I
> SCOPE OF AGREEMENT
>
> 1. This Agreement shall be in effect within all portions of the State of Oregon where the parties hereto jointly use poles and shall cover all poles of each of the parties within said portions of the State *which are presently jointly used, as well as poles which are now existing or which shall hereafter be erected when such poles are included within the scope of this Agreement in accordance with the procedures hereinafter set forth.*
>
> 2. Each party reserves the right to exclude from joint use:
>
> (a) Poles which, in the judgment of the owner thereof, are necessary for the owner's sole use; and
>
> (b) Poles which carry, or are intended to carry, circuits of such character that, in the judgment of the owner thereof, the proper rendering of the owner's service now or in the future makes joint use of such poles undesirable.

CLPUD Ex. 3, p. 1-2 (emphasis added). This provision makes clear that the Agreement only applies to poles which are "presently jointly used", or poles which are "included within the scope of this Agreement *in accordance with the procedures*" set forth therein. All other poles are not

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within the "Scope of [the] Agreement."

The "procedures…set forth" in the Agreement are quire simple: A party desiring to bring one or more of its attachments within the scope of the Agreement must make written application to the party owning the pole. Article III of the Agreement provides that, if a party desires a contact on newly installed pole facilities of the other party, "the contacting party *shall immediately make written application to the owner of the pole for contacting said pole*, and *upon approval of the application by the owner* and completion of the installation of the new pole, the new pole shall become, for the purposes of this Agreement, a jointly used pole." CLPUD Ex. 3, p. 3 (emphases added). Likewise, Article IV of the Agreement provides with respect to attachments on existing poles: "Whenever either party desires an allocation of space for its attachments on any existing pole owned by the other party, *it shall make written application therefor*." CLPUD Ex. 3, p. 4 (emphasis added).

Thus, viewed in the context of the Agreement as a whole, it is clear that Article XVIII of the Agreement only covers attachments that are within the scope of the Agreement, i.e., those attachments for which Verizon had already made written application. *See Hoffman Construction Co. of Alaska v. Fred S. James & Co. of Oregon,* 313 Or. 464 (1992) (while suggested interpretation was plausible in isolation, it was not reasonable either when scrutinized in context or in the light of the policy as a whole); *Groshong v. Mutual of Enumclaw Ins. Co.,* 329 Or. 303 (1999) (same); *cf. Black v. Arizala*, 182 Or.App. 16, 29-30 (2002) (contract's forum selection clause did not apply to dispute because dispute did not arise from the contract).

Verizon never "ma[d]e written application" for its unauthorized attachments until after its Agreement with CLPUD had been terminated. *See* Verizon Brief at 7, 13. Verizon argues that the attachments were on the poles as early as 2000-2001, yet it admits that it did not begin to seek permits for these attachments until September of 2002. Verizon argues that all of the attachments were permitted by November 25, 2002. Verizon Brief at 13. However, CLPUD witness Denise Estep testified to the contrary:

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> **22. What was CLPUD's response to these NJUNS permit applications [shown in CLPUD Exhibit 6]?**
> I received these applications and did not respond to them because Verizon did not have an agreement for these attachments, so I could not approve them. Because Verizon still has not signed a written agreement for these attachments, the applications currently continue to be in pending status on the NJUNS system.
> **23. Do the 144 Verizon attachments represented in Exhibit 6 still physically exist on CLPUD's poles?**
> Yes.
> **24. Has CLPUD sent a bill to Verizon for the attachments reference in Exhibit 6?**
> No.
> **25. Has CLPUD received any payments for the attachments referenced in Exhibit 6?**
> No.

CLPUD Ex. 1 (Affidavit of Denise Estep dated January 23, 2004), p. 6, lines 1-12. Thus, it is clear that Verizon maintained these attachments on CLPUD's poles without any permits or authorization.

Verizon's attachments are therefore in violation of ORS 757.271(1), which provides:

> **Authorization from pole owner required for attachment.** (1) Subject to applicable regulations of the Public Utility Commission, a person shall not establish an attachment to a pole or other facility of a…consumer-owned utility unless the person has executed a contract with and has authorization from the utility allowing the attachment.

Because Verizon had no contract with CLPUD which allowed the 144 attachments alleged in the Petition, Verizon's attachments are in violation of ORS 757.271. Likewise, OAR 860-028-0120 provides:

> (1) Except as provided in sections (2) and (3) of this rule, a pole occupant attaching to one or more poles of a pole owner shall:
> (a) Have a written contract with the pole owner *that specifies general conditions for attachments on the poles of the pole owner.*

OAR 860-028-0120(1)(a) (emphasis added). Because the Agreement between CLPUD and Verizon did not specify any conditions for attachments for which Verizon had not made written

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application, Verizon's unauthorized attachments are in violation of OAR 860-028-0120(1)(a). Therefore, the attachments are subject to removal by CLPUD, and Verizon is liable for sanctions under OAR 860-028-0130 and 860-028-0180.

B. The Commission Should Make a Finding As To Whether Verizon Had Permits for the 144 Attachments.

Verizon appears to admit that, for a substantial period of time, it had not requested any permits for the 144 attachments in CLPUD Exhibit 6. *See* Verizon Brief at 6-8, 12-13. Ironically, Verizon seeks to excuse its violation of the "no contract" provision of the Commission's rules (OAR 860-028-0120(1)(a)) by arguing that it in fact violated the "no permit" provision of the Commission's rules (OAR 860-028-0120(1)(b)). "No permit" attachments are still subject to sanctions and removal under the Commission's rules. *See* OAR 860-028-0140, 860-028-0180. It would be inequitable and would frustrate the purpose of the Commission's regulatory scheme to allow Verizon to avoid liability for its "no contract" violations by claiming that it violated another provision of the Commission's rules. Therefore, in the event the Commission finds that Verizon did have a contract with CLPUD covering the 144 attachments in CLPUD Exhibit 6, CLPUD respectfully requests that the Commission order that Verizon is subject to sanctions based on its admitted violation of the "no permit" provision, OAR 860-028-0120(1)(b).

Even if the Commission determines that this is not the proper proceeding to impose sanctions for the "no permit" violations, in order to avoid lengthy further proceedings and to minimize the additional burden and expense to the parties, CLPUD respectfully requests that the Commission make a ruling as to whether the 144 attachments in CLPUD Exhibit 6 had permits as required by OAR 860-028-0120(1)(b).

IV. CLPUD Continues in its Efforts to Adhere to All Safety Standards and to Identify and Correct Any Safety Problems Which May Arise, Despite Verizon's Refusal to Enter Into A Written Pole Attachment Agreement.

With respect to the Brief of OPUC Staff, CLPUD offers the following response: CLPUD continues to perform all maintenance and safety related tasks on all of its pole plant facilities

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regardless of the state of an agreement with any particular licensee. CLPUD continues to inspect and correct problems it finds on all of its facilities if they are located on a CLPUD-owned joint pole or a Verizon-owned joint pole. CLPUD has inspected over half of its facility point locations in the CLPUD/Verizon service area and expects to have 100% inspected by July 2005. CLPUD has begun corrective action on the reported problems from the inspection. It plans to have all of the corrective actions completed by July 2007 for the CLPUD/Verizon service area. Therefore, to the extent OPUC Staff suggests that CLPUD has ignored safety standards because Verizon has refused to enter into a contract with CLPUD, such concerns are unfounded. CLPUD's efforts to maintain a high standard of safety continue unabated despite Verizon's violation of the Commission's rules requiring a currently effective agreement.

V. The Commission Does Not Have Authority Under the Oregon Constitution to Regulate CLPUD's Pole Attachment Rental Rates.

Under the Oregon Constitution, the Commission does not have the authority to regulate the pole attachment rental rates adopted by a people's utility district, such as CLPUD. *See* Or. Const., Art. XI, § 12.

V. Conclusion.

For the foregoing reasons, CLPUD requests that the Commission grant CLPUD the relief sought in its Petition, namely, that it enter an Order requiring Verizon to pay sanctions in the amount of $1,248 per pole pursuant to OAR 860-028-0130(1)(b) and OAR 860-028-0180(2) and authorizing CLPUD to remove Verizon's unauthorized attachments.

Dated this ___ day of December, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I served a complete and true copy of the foregoing **RESPONSIVE BRIEF** on the following persons:

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by mailing a copy thereof contained in a sealed envelope, with postage paid, and deposited in the United States Post Office in Newport, Oregon on the date set forth below.

Dated this 3rd day of December, 2004.

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