

ORIGINAL

IN THE SUPREME COURT OF OHIO

Rumpke Sanitary Landfill, Inc., et al.

Appellees,

v.

Colerain Township, Ohio, et al.

Appellants.

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: Supreme Court Case No. 11-0181
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: On Appeal from the
: Hamilton County Court of Appeals
: First Appellate District
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: Court of Appeals
: Case No. C090223
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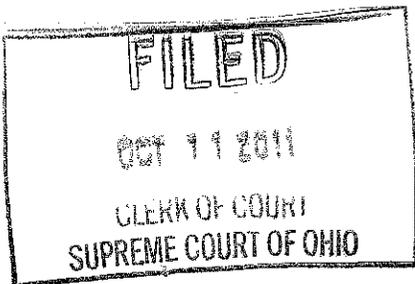
**BRIEF OF AMICI CURIAE OHIO TOWNSHIP ASSOCIATION AND
COALITION OF LARGE OHIO URBAN TOWNSHIPS IN SUPPORT OF
APPELLANTS COLERAIN TOWNSHIP, OHIO, COLERAIN TOWNSHIP BOARD
OF TRUSTEES, BERNARD A. FIEDELDEY, TRUSTEE, KEITH N. CORMAN,
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I. STATEMENT OF AMICI CURIAE INTEREST

Amici curiae, the Ohio Township Association (“OTA”) and the Coalition of Large Ohio Townships (“CLOUT”), respectfully request that this Court reverse the decision of the First District Court of Appeals. OTA is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties. OTA has over 5,200 active members and is comprised of elected township trustees and township fiscal officers from Ohio’s 1,308 townships. OTA has an additional 4,000 associate members who are dedicated to supporting causes of OTA.

CLOUT is a group of large, urban townships in Ohio that has formed a committee for the purpose of providing its members with a forum for the exchange of ideas and solutions for problems and issues related specifically to the governance of large, urban townships. CLOUT works jointly with OTA. Membership in CLOUT is limited to those townships having either a population of 15,000 or more residents in the unincorporated area, or a budget of over \$3,000,000.¹

As the form of government closest to the citizens of Ohio, townships play a critical role in promoting the health, safety and general welfare of their residents. The ability of townships to

¹ CLOUT members include: in Butler County: Fairfield Twp., Liberty Twp., West Chester Twp.; in Clermont County: Miami Twp., Pierce Twp., Union Twp.; in Delaware County: Genoa Twp., Liberty Twp., Orange Twp.; Perkins Twp./Erie Co.; Violet Twp./Fairfield Co.; in Franklin County: Jefferson Twp., Madison Twp., Norwich Twp., Prairie Twp., Washington Twp.; Russell Twp./Geauga Co.; Sugarcreek Twp./Greene Co.; in Hamilton County: Anderson Twp., Colerain Twp., Columbia Twp., Delhi Twp., Green Twp., Miami Twp., Springfield Twp., Sycamore Twp., Symmes Twp.; in Lake County: Concord Twp., Madison Twp., Perry Twp.; in Lucas County: Springfield Twp., Sylvania Twp.; in Mahoning County: Austintown Twp., Boardman Twp.; Bethel Twp./Miami Co.; in Montgomery County: Butler Twp., Harrison Twp., Miami Twp., Washington Twp.; in Stark County: Jackson Twp., Lake Twp., Perry Twp., Plain Twp.; in Summit County: Bath Twp., Copley Twp., Springfield Twp.; in Trumbull County: Howland Twp., Liberty Twp., Weathersfield Twp.; in Warren County: Clearcreek Twp., Deerfield Twp., Hamilton Twp.; Perrysburg Twp./Wood Co.

regulate land use, through the adoption and enforcement of zoning resolutions pursuant to Chapter 519 of the Ohio Revised Code, is central to this role. The decision of the First District Court of Appeals in this case threatens the ability of townships to promote the health, safety and general welfare of their residents by unduly relaxing the requirements for the “public utility” exception to township zoning under R.C. 519.211.

In this case, the First District Court of Appeals misinterpreted and misapplied *A & B Refuse Disposers, Inc. v. Board of Ravenna Township Trustees* (1992), 64 Ohio St.3d 385 and its progeny, which set out the attributes courts are to look for to determine whether an entity qualifies as a “public utility” under R.C. 519.211. The First District erred in focusing on only one aspect of the *A & B Refuse* decision—whether a business claiming public utility status has a large or exclusive presence in the local market for an important or essential service. The First District ignored all of the other factors from *A & B Refuse*, which go to whether the business actually acts like a public utility in its operations. By elevating only one portion of the public utility analysis, the First District established a dangerous precedent that will undermine the zoning authority of townships by making it far easier for waste disposal facilities and other similar industries to exempt themselves from township zoning and control. If the First District’s decision is left undisturbed, there will be both short and long term consequences to Ohio townships. Limitations to township zoning authority should be strictly construed.

One of the most important purposes of township zoning is to provide townships with some ability to regulate the impacts on the community by intense land uses, like landfills, separating them from less intense uses and putting conditions on their operation. Often, these types of uses have the greatest potential to have negative impacts on neighboring property owners in the township. Ironically, the decision of the First District in this case, which ignores

many of the basic attributes that make a business a “public utility,” will invite those same industries to seek a wholesale exemption from zoning control. In the short term, the First District’s decision will create an expanded pool of candidates to seek “public utility” status whose only qualification for that status is a large share in the market of an important service. If that is the only meaningful attribute that a business must show to become a public utility, township zoning with respect to heavy industrial users—and landfills in particular—will indeed be greatly diminished.

In the long term, the First District’s decision will have a negative impact on the ability of townships to plan for future land use, and that, in turn, will cause legitimate commercial and residential developers from investing in property the neighboring use of which could be a landfill. Obviously, without control over a major industrial use like a landfill, a township cannot engage in any meaningful land use planning anywhere near the use or assure orderly placed growth. No area is safe because township zoning does not apply. With cases like this one telling townships that it will now be easier for landfills and other hard land uses to eventually put themselves beyond the zoning authority to townships under the guise of a “public utility.” “Monopolies” as claimed by Rumpke have never been found in the law and are relatively agreed to when governmental regulatory bodies such as PUCO oversee them. Here, there is no governmental oversight of Rumpke’s business activities.

It is not the position of OTA or CLOUT that no entity could ever qualify as a public utility under R.C. 519.211. However, the First District did not follow this Court’s path laid out in *A & B Refuse* and later cases, and with this decision, it now threatens to move the interpretation of R.C. 519.211 to a place that was neither anticipated by the General Assembly when it carved out a exception to township zoning nor by this Court in its interpretation of that

provision. R.C. 519.211 balances between the ability of Ohio townships to protect the health and safety of their residents through the reasonable exercise of zoning control on one hand and allowance for the unencumbered operation of true, necessary public utilities, on the other. The First District's decision has upset this balance by changing the basic criteria to be a public utility by focusing singularly on the whether the purported public utility has a large share of the market for a particular service. Even factually, the First District was wrong. The "public utility" status is claimed only for the landfill – a hole in the ground. It is not claimed for the collection company that picks up trash. There is no shortage of places to take the garbage as shown by the Hamilton County Solid Waste Authority. Under the First District's new formulation, entities that do not operate openly, indiscriminately and primarily for the benefit of the public—like Rumpke² in this case—can still be public utilities. This Court should reverse the erroneous decision of the First District Court of Appeals to confirm that only those entities that are truly acting as public utilities *in all aspects of their operations* meet the criteria of an exemption from township zoning under R.C. 519.211.

II. STATEMENT OF THE CASE AND FACTS

OTA and CLOUT adopt, in their entirety, and incorporate by reference, the statement of the case and facts contained within the Merit Brief of Appellants.

III. ARGUMENT

Proposition of Law No. I: A privately owned sanitary landfill cannot be a common law public utility exempt from township zoning where there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

² Rumpke is privately held and has no reporting requirements to any agency regarding their business. Rumpke pays no utility tax and is not subject to rate control.

In its past decisions setting up the factors for when an entity qualifies as a “public utility” under R.C. 519.211, this Court has recognized that there are two sides to being a “public utility: 1) an essential service that is indiscriminately provided as to access and rates; and 2) there is governmental oversight to ensure the company’s business practices protect the public and ensures the company continues to uphold its status.

First, a public utility must provide an essential service to a large portion of the public. Because of the importance of the service provided, in terms of amount of the public, the nature of the type of service and how it must be provided, the entity is fundamentally different in kind from businesses that sell other types of products and services. Moreover, in many cases, the nature of the service provided—electricity, water, sewer, gas—are different because the provision of those services is not suited to having multiple providers with extensive competing infrastructure necessary to connect the provider with the consumer.³

The other side of being a public utility is that because the service provided is so important and because the service is provided to a large portion of the public, the entity providing the service is subject to certain limitations in how it operates that other business are not subject to, such as rate regulation, requirements about transparency in operations, and other regulations of the relationship between the provider and their customers. Courts, starting with this one, have required that a purported public utility show that: (1) its customers have a legally enforceable right to demand its services; (2) it provides its service to the public reasonably and indiscriminately, either as to user or prices charged; (3) it provide services that cannot be arbitrarily withdrawn; and (4) it is heavily regulated in its relationship with its customers to

³ Landfills are unlike traditional public utilities in this respect, as waste can be hauled to any number of landfills and there is no reason waste must be disposed of in any one location.

protect the public from the potential for abuse because of the public utilities' favorable position in the market. Taken together, these criteria establish a requirement that the entity claiming public utility status show that it is especially accountable in its relationship with its customers in a way that other businesses are not. Part of the price for obtaining this protected status is paying "utility taxes." Rumpke pays none.

Any entity that is deserving to be exempt from township zoning under R.C. 519.211 must show that it has both sides—that it provides an essential service and that it is especially accountable to the public.

In this case, the lower courts erred by focusing exclusively on whether Rumpke established the first side—whether it provided an essential service to a large portion of the public—and entirely neglected the fact that Rumpke does not operate in any way, shape or form like a traditional public utility, and cannot meet *any* of the factors relating to public accountability. The lower courts ended their analysis when they found that Rumpke provides an essential service to a large portion of customers in the Cincinnati area,⁴ failing to consider the criteria relating to whether the Rumpke landfill actually operates like a public utility. Had they done so, it would have been apparent that Rumpke does not and can not carry the burden of showing any of these "public accountability" criteria. As set forth below, the overwhelming evidence in this case shows that Rumpke, while certainly a large player in the solid waste disposal industry in southwest Ohio, does not operate and is not regulated in any way like a public utility.

⁴ Rumpke has essentially "bootstrapped" its argument. By having a monopoly on trash and running others out of the business, its landfill has been one of the favored locations for depositing trash.

A. The First District Erred In Finding That Rumpke Was a Public Utility Where There Was No Evidence That Rumpke Indiscriminately and Reasonably Provided A Service That The Public Had An Enforceable Legal Right to Demand, or That Rumpke's Relationship With Its Customer Is Regulated.

In *A & B Refuse*, this Court was clear that it is not sufficient for a purported public utility to show simply that it provides an essential service; it must also show that the service is a service the general public has a legal right to demand. *A & B Refuse, supra*. "Legal right to demand," if it is to have any meaning at all, must mean that the general public has a legally enforceable right to compel the entity to provide that service. That is, the service must be one that the public enjoys as of right, not simply by permission of the entity providing the service. *Freight, Inc. v. Bd. of Trustees of Northfield Center Township* (1958), 107 Ohio App. 288, 292. Another characteristic of a public utility is that the entity in question must not be capable of arbitrarily withdrawing the services that it provides. *A & B Refuse, supra*. Taken together, these factors require that the purported public utility show it can be compelled to provide its service to the public under claim of right, and that once those services are being provided, the public utility could not make the unilateral decision to cease providing those services.

The First District found that Rumpke had a legal right to provide services because it "contracts" for waste disposal with the City of Cincinnati. Contractual obligations to provide services are not the same as a "legal right to demand." *Pittsburgh & Conneaut Dock Company v. Limbach* (1985), 18 Ohio St.3d 320, 323 (contractual obligations into which business has voluntarily entered do not create a "right to demand" services comparable to a utility); *Inland Refuse Transfer Company v. Limbach* (1990), 53 Ohio St.3d 10, 12 (waste hauling company that is only bound to haul waste by contract and is free to cease business without prior approval from a regulatory body is not a public utility). The fact that Rumpke voluntarily

entered into a contract to provide disposal service at a fixed rate to the City of Cincinnati does not translate into a right by the public to compel, if necessary, Rumpke to continue to accept waste, or to prevent Rumpke from ceasing to accept waste. At most, in the event Rumpke stopped accepting waste, the City of Cincinnati would have a breach of contract action for the price difference between disposal at the Rumpke landfill and disposal at some other facility. In addition, that contract was limited to four (4) years with no assurance it would continue. This is hardly the “legal right to demand” described previously by this Court in *A & B Refuse, supra*.

The First District also held that the public has a right to demand services because Rumpke “pledged” to provide disposal capacity to HCSWMD and OEPA in the future. There is, however, no mechanism for enforcing this “pledge” by the public, by HCSWMD, or by OEPA. There is no cause of action that could be brought by either the solid waste district or OEPA to force Rumpke to continue to operate, simply because Rumpke has obtained a permit to operate or has described to the solid waste district that it has a certain amount of capacity. The First District (without analysis) engaged in a stretch of the imagination to find a “legal right to demand” on this basis. The reality is that Rumpke provides its services to the public because it is very lucrative for Rumpke to do so, not because it is under any compulsion to do so by the government because of the nature of the service it provides. If providing waste disposal services was no longer profitable, Rumpke would not provide those services, and there is nothing that the government or the general public could do to stop it.

Closely associated with the notion that the public must be able to legally demand that a public utility provide its services is the concept that the public has a right to have the public utility provide those services “indiscriminately and reasonably.” The theory is that a public utility that is truly operating for the benefit of the public will charge a rate that is both uniform

and which is sufficiently reasonable that the public can afford it.⁵ There was substantial evidence in the record that Rumpke does not provide its services indiscriminately, and that, in fact, it charges the highest rate that it can charge from customer to customer. Rumpke uses its collective companies and landfill together to get contracts approved. The goal is to get it all. Additionally, the great disparity between the cost of actually providing the service and the fees charged by Rumpke, which is a matter of record, can fairly be considered unreasonable, at least in the context of an entity that should be operating for the benefit of the public, not for the maximization of profit.

The specific meaning of the term “indiscriminate” under *A & B Refuse* has not been widely discussed or interpreted. However, in the context of the public utility case, the notion of “indiscriminately” providing services must necessarily mean that the services in question are provided by the public utility without making distinction between customers. A public utility that is providing its services indiscriminately should be providing those services the same manner to similarly situated customers. However, the record in this case shows beyond any reasonable dispute that Rumpke treats its customers very differently. The rates charged by Rumpke for exactly the same service—disposal of solid waste at the landfill—differs dramatically depending solely on the identity. For its own hauling company (Rumpke of Ohio), Rumpke charges only a base disposal rate of approximately \$15 per ton of waste (which is essentially the cost it takes to dispose of the waste in the landfill). However, for other non-Rumpke affiliated haulers and municipalities that haul directly to the landfill, Rumpke charges disposal rates that are double and even triple the amount that it charges its own company. Even

⁵ True public utility landfills (those operated by governmental entities) operate uniformly as to rates, the public can demand the services, profit is limited and rates are established after public hearing.

as between non-Rumpke landfill customers, there is a wide variance in the disposal rates charged. There is, however, no difference in the cost to Rumpke to dispose of the solid waste from any of these sources. For Rumpke, the cost to dispose of the waste at the landfill is the same, regardless of the source, but it discriminates between customers all the same. This discrimination in pricing filters down to the public. Residents who live in municipalities that are charged higher disposal rates (or who use haulers that are charged higher disposal rates) will be charged more in fees for those services. It is difficult to see how the First District could have come to the conclusion Rumpke provides its services “indiscriminately” when Rumpke charges widely differing rates to different customers, and clearly favors its own affiliated company (simply another arm in a larger, overarching Rumpke corporation) in pricing in order to give itself a competitive advantage over all other players in the region.

Rumpke has long wrongly contended that if a company does not turn customers away and takes all customers, it is operating “indiscriminately.” Rumpke argues that the fact that it will accept any “qualifying solid waste” from any source means it provides its services “indiscriminately.” This position, however, ignores one of this Court’s first principles, which is that simply showing that you are “open to the public” is not enough to establish that you are providing your services indiscriminately. *A & B Refuse, supra* at 389. Unfortunately, the First District did not make this important distinction (and, in fact, made no mention of whether Rumpke provided its services indiscriminately or reasonably).

Moreover, Rumpke’s position defies common sense. Any company that intends to stay in business for any length of time will not turn away customers. The question is not whether a purported public utility serves some customers and turns others away. The question, rather, is whether the public utility discriminates in the manner in which those services are provided.

Clearly, Rumpke treats similarly situated customers very differently, and that disparity in treatment translates into real dollar and cents differences to haulers, municipalities, and the general public.

Rumpke has also argued that it provides its services “reasonably” because its rates are generally in line with rates charged in other regions. This is a false comparison. A rate that is reasonable for a private, for-profit corporation may not be the same as the rate for a business that intends to operate a legalized monopoly and wishes to be exempt from zoning regulation. It is undisputed that Rumpke could fulfill its function of safely disposing solid waste by charging a rate of \$15 per ton, but that Rumpke chooses to charge rates well in excess of that amount. There is, of course, nothing wrong with charging the highest price for your services that the market will bear-but not if you are a government sanctioned public utility. If Rumpke was truly operated as a public utility, its rates would have some reasonable relationship to the cost of providing the services. The purpose of a public utility is to provide an essential service to the public that it needs, not to sell an essential service at the highest price that the provider can get for it. If Rumpke truly operated as a public utility, the region that it provides services to would be paying much less for waste disposal services. If Rumpke is not willing to change the focus of its business to public service, Rumpke does not deserve to be treated like as a public utility.

As to Rumpke’s landfill, there is no governmental control or regulation of its relationship with its customer. This Court has held that one attribute of a public utility is whether “[s]tate regulation is provided to protect members of the public from disparate treatment in the acquisition of an essential good or service.” *Id.* at 389. While Rumpke may be subject to environmental and occupational regulations, it is not accountable in any way for the manner in which it provides waste disposal services to its customers. Its rates are not: 1) regulated, 2)

uniform, and 3) public. Rumpke operates secretly, meaning that it keeps its financial information, including rate information and cost of operation, closed from the public. Unlike a traditional public utility, there is no transparency in Rumpke's operations, at least as to its customers and its finances. In short, there is no state regulation that protects the public from disparate treatment in the provision of Rumpke's services (to the contrary, there is no dispute that Rumpke treats parts of the public disparately). The reality is that Rumpke cannot show that it is regulated like a public utility. Unfortunately, the lower courts did not require it to do so.

Amici have little doubt that in its brief, Colerain Township will more thoroughly establish how deficient the evidence is to establish Rumpke's claim that it is a public utility. However, what is troubling for *Amici*, who represent many townships (some of which are very similar to Colerain in terms of being near large urban centers) is that the First District appears to have redefined what a public utility is, and the new definition will serve to create a large new class of businesses that could qualify as exempt from zoning control, most notably landfills. That definition appears to be that if an entity provides an important (or even essential) service to a large amount of consumers in a region, the entity is a public utility, even if that entity operates in all respects like a traditional for-profit business with respect to the public. *Amici*, whose members' ability to reasonably manage land uses in their jurisdiction, is in the balance in this case, submit that this Court intended that an entity be required to show more than this before it be granted the extraordinary benefit of being exempted from zoning control. Accordingly, *Amici* urge this Court to reverse the decision of the First District to confirm that the only entities that deserve exemption as a public utility are those entities that are actually accountable to the public.

B. Easing the Requirements for Landfills to Become Public Utilities Will Have a Detrimental Effect on the Welfare of Townships.

As set forth above, privately owned Rumpke Sanitary Landfill, Inc. is not a public utility. However, in stretching logic to declare that it is the First District reinvented the public utility test in a way that, if applied across the state, will have several detrimental effects of Ohio townships. Also, given the First District's formulation of the public utility factors under *A & B Refuse*, there are unresolved questions about the applicability of these factors in the future.

Foremost, there can be little question that if left to stand, this decision will make Ohio townships, particularly those near large urban centers that contain many potential waste streams, very inviting locations for landfills, if only for the potential that the landfill would be or could be exempt from zoning. The only clear qualification that the First District's decision sets down for a landfill to become a public utility is the amount of the public that it serves. If that decision is ratified by this Court, there may already be other facilities that will claim the same exemption as Rumpke. The result will be a dawn of unregulated public utility landfills over which there is no zoning control, regulated only by basic environmental regulations and the pressure of the free market. To *Amici*, this is a particularly troubling image, considering that there is no flow control of waste, meaning that a zoning exempt public utility landfill could grow exponentially to serve the solid waste disposal needs of regions far away from the township where the landfill is located, with no control on the operation or growth of the landfill by that township. Imagine, for instance, a landfill that secures waste streams from New York or New Jersey and then buys up vast quantities of land (regardless of zoning) into which it would dispose of that waste. That is a very real possibility under the First District's decision.

Also troubling is the fact that the presence of an unregulated public utility would undermine the ability of the township to engage in land use planning for the future. There is a preference for land use planning by local governments, both to avoid inconsistent and arbitrary zoning and to provide land owners with some amount of certainty about the development patterns in the jurisdiction in the future. Obviously, if a large land use exists within the township that is not subject to zoning, the township cannot engage in any land use planning anywhere near that use. In the case of Rumpke, the landfill has grown for 56 years from a farm to one of the largest landfills in the county. Rumpke continues to buy adjacent properties. How can Colerain Township, or any other township that finds itself home to a public utility landfill, engage in future land use planning if it has no control over the use of land that is within the reach of the landfill?

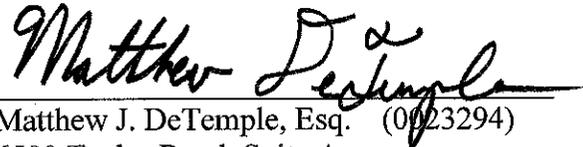
Finally, the First District's decision poses a particular problem for township and courts in its application. In this case, Rumpke's claim is based mostly on the fact that it is the primary provider of solid waste services in Hamilton County, where the landfill is located. What if, however, Rumpke was the exclusive provider of waste disposal for Cuyahoga County, or Ashtabula County, or Montgomery County, or some other county, municipality, or even state, far away from the landfill itself? Under the First District's decision, if a landfill could establish that it provided landfill services relied upon by a large amount of the public, that landfill could be exempt from zoning, regardless of how remote that "public" being served by the landfill was. Again, given that there is no control or limitation on interstate flow of waste, this is a chilling prospect. For townships dealing with entities claiming public utility status in the future and courts reviewing those claims, these unresolved questions arise primarily from the First District's

misinterpretation of the public utility analysis, a misinterpretation that should be rectified by this Court.

IV. CONCLUSION

The lower courts in this case have an understandable concern for the viability of a business that, presently, provides an important service to many residents of Hamilton County. However, declaring that a landfill is no longer bound by the zoning authority of the township in which it is located is a drastic step. It is drastic for the township, because that township has lost a basic tool for managing its affairs and protecting its citizens from the inevitable negative effects on the public that accompany landfill as a land use. Uncertainty “kills” development. The decision will cost Colerain Township and townships throughout Ohio millions of dollars in development opportunities. Perhaps more important, however, is that it is a drastic step for every other township in Ohio. There can be no question that there are other landfills, and even other non-landfill industrial land users, who are only awaiting this Court to affirm that Rumpke is a landfill before they make their claim to public utility status as well. *Amici* submit that the basic zoning authority of the townships of Ohio (and the prior precedent of this Court) should not be weakened based on the solid waste needs of Hamilton County, needs that will not even become pressing for more than a decade. According, *Amici curiae*, the Ohio Township Association and the Coalition of Large Ohio Townships respectfully request that this Court reverse the decision of the First District Court of Appeals in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following parties via regular U. S. mail, postage pre-paid, on this 11th of October, 2011:

Joseph L. Trauth, Jr., Esq.
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