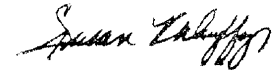


THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

JUN 30 2006

 Docket Room

In the Matter of Sage Telecom, Inc. Filing)
Tariff Revisions Adding a Public Switched) Docket No. 06-SAGT-1031-TAR
Network Recovery Charge, Adding More)
Plan Minutes to Specified Plans, and)
Making Rate Changes.)

PETITION FOR RECONSIDERATION OF JUNE 15, 2006 ORDER

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB"), pursuant to K.S.A. 77-529(a), K.S.A. 66-118b, and K.A.R. 82-1-235, and respectfully petitions for reconsideration of the Commission's June 15, 2006, Order Denying Petition for Reconsideration. In support of its Petition, CURB states and alleges as follows:

I. BACKGROUND

1. On June 15, 2006, the Commission issued its Order Denying Petition for Reconsideration (June 15th Order).
2. In the Commission's June 15th Order:
 - The Commission cited extensively and relied upon new evidence contained in Sage's June 9, 2006 Reply to Staff Response to Petition for Reconsideration (Reply to Staff Response). Sage's Reply to Staff Response was (1) filed with the Commission on June 9, 2006 (Day 25 after the filing of CURB's Petition for Reconsideration (PFR) and 4 business days prior to the issuance of the Commission's June 15th Order), (2) served by mail upon CURB on June 9, 2006, and (3) actually received by CURB on

June 12, 2006 (Day 27 after the filing of CURB's PFR and 3 days prior to the issuance of the Commission's June 15th Order). [June 15th Order, ¶¶ 10, 11, 12, 15, 16]

- The Commission made the following specific findings based on this new evidence:
 - Information in Sage's customer "Welcome Package" (Sage Exhibits A and B) informs customers that the access recovery charge "is not a tax or fee imposed by a governmental entity." [June 15th Order, ¶ 12]
 - Sage's new surcharge is not a disguised rate increase because Sage has demonstrated that new Sage customers receive information about this surcharge through the "Welcome Package." [June 15th Order, ¶¶ 12, 16]
 - Sage's new surcharge recovers an increase in the cost of an access line in its agreement with AT&T and also costs for increased employee benefits. [June 15th Order, ¶ 15]
 - "[I]t appears that [Sage's new surcharge] does not duplicate recovery of costs and there is a basis for the charge. It appears it is not unlike the SLC charge in the 016 docket, which CURB disagreed with, but did not appeal." [June 15th Order, ¶ 15 (emphasis added)]
 - Price deregulated companies are not limited to charging a rate that only recovers their costs and that the check on their pricing is the market. [June 15th Order, ¶15]
- The Commission concluded, without any reference to the record, that "the Commission is aware that many price deregulated companies have filed tariffs with similar discrete charges, thus the comparison may be meaningful since many

companies have a similar structure of charges. The fact that many companies rely on discrete charges, such as this one, to recover cost convinces the Commission that it is appropriate to address this issue in the generic docket, so that any decision on the issue will apply to all companies. The Commission finds it is not appropriate to single Sage out for separate treatment in this docket.” [June 15th Order, ¶ 16 (emphasis added)]

3. CURB respectfully requests that the Commission reconsider the above referenced rulings on the grounds they are erroneous, not based on substantial competent evidence, and/or unreasonably vague.¹

II. THE COMMISSION’S JUNE 15TH ORDER ERRONEOUSLY RELIED UPON SAGE’S UNTIMELY SUBMITTED NEW EVIDENCE.

4. The Commission’s June 15th Order erroneously relied upon untimely submitted new evidence from Sage just 3-4 business days prior to the issuance of the Commission’s June 15th Order, effectively depriving CURB of any reasonable opportunity to present analysis or argument to the Commission or conduct any discovery of such evidence. Some of the evidence was merely statements of counsel for Sage in Sage’s Reply to Staff Response and not supported by any company personnel affidavit or verification.²

¹ The Commission’s June 15th Order does not constitute final agency action subject to judicial review under K.S.A. 66-118b or K.S.A. 66-118c. On page 7, the Order states: “The parties have fifteen days, plus three days if service of this order is by mail, from the date this order was mailed in which to petition the Commission for reconsideration of any issue or issues decided herein. K.S.A. 66-118; K.S.A. 2005 Supp. 77-529(a)(1).” and “The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.” When the Commission enters a final order, it states so explicitly, as it did in January 2006 when it denied the petition for reconsideration filed by Atmos Energy and Aquila, Inc. in Docket No. 04-GIMX-651-GIV: “This Order constitutes final agency action that is subject to review. K.S.A. 77-607(b)(1). The agency officer designated to receive service of any petition for judicial review is Susan K. Duffy, Executive Director. K.S.A. 77-529(c).” *Order Denying Petition for Reconsideration*, p. 13. *See also*, Docket 01-WPEE-489-CON, *Order Denying Reconsideration*, Sept. 30, 2001, p. 3.

² New evidence regarding the increase in the wholesale rate and the “other cost increases” was provided by Sage Counsel, unsupported by company affidavit or verification. *See*, Sage Reply to Staff Response, ¶2.

5. The Sage Reply to Staff Response containing new evidence was (1) filed with the Commission on June 9, 2006 (the 25th day after the filing of CURB's Petition for Reconsideration (Day 25)), (2) served on CURB by mail, and (3) received by CURB on June 12, 2006 (Day 27 - only three days prior to the issuance of the Commission's June 15th Order). As a result, CURB's response to the new evidence and issues raised in the Sage Reply to Staff Response was due by Commission Rules on June 22, 2006,³ seven days after the Commission decision was issued.

6. Nonetheless, just three days after receipt, CURB filed its Response to New Evidence and Issues Raised in Sage's Reply to Staff Response to Petition for Reconsideration (Response to New Evidence and Issues) on June 15, 2006, noting that the new evidence produced by Sage on Day 27 was not timely included in the Response to Petition for Reconsideration filed by Sage on May 25, 2006.⁴

7. CURB's Response to New Evidence and Issues further demonstrated that Sage's untimely submitted new evidence supported CURB's Petition for Reconsideration, contrary to assertions by Sage.⁵

8. The Commission filed its June 15th Order prior to receiving CURB's Response to New Evidence and Issues, effectively denying CURB its due process right to respond, present analysis or argument, or conduct any discovery with regard to the untimely submitted new evidence and information contained in the Sage Reply to Staff Response.⁶

9. Under K.A.R. 82-1-220(c), "A formal complaint shall, as soon as practicable be examined by the commission to ascertain whether or not the allegations, if true, would establish a

³ Under K.A.R. 82-1-217(c) three days are added to the 10 day response time applicable to responsive pleadings under K.A.R. 82-1-218(d).

⁴ CURB Response to New Evidence and Issues, ¶¶ 1, 4-5.

⁵ *Id.*, ¶¶ 2-20.

⁶ Staff has actually filed a Motion to Strike CURB's Response to New Evidence and Issues, without any acknowledgement of the untimely submission of new evidence by Sage.

prima facie case for action by the commission and whether or not the formal complaint confirms to these regulations. In this case, the Commission failed to make this examination of CURB's Complaint, and further failed to require Sage to file an answer to the Complaint. Instead, the Commission accepted as true Sage's interpretation of its untimely submitted new evidence, rather than accept the allegations of CURB's complaint and ascertain whether, if true, the complaint would establish a prima facie case as required by K.A.R. 82-1-220(c).

III. THE COMMISSION'S INTERPRETATION OF SAGE'S UNTIMELY SUBMITTED NEW EVIDENCE IN THE JUNE 15TH ORDER IS ERRONEOUS, NOT BASED ON SUBSTANTIAL COMPETENT EVIDENCE, AND/OR UNREASONABLY VAGUE.

10. The Commission's June 15th Order not only erroneously accepted the untimely submitted new evidence from Sage, but also erroneously accepted Sage's interpretation of that new evidence. CURB will demonstrate below that the untimely submitted new evidence produced by Sage just prior to the Commission's June 15th Order supports CURB's Petition for Reconsideration.

A. The Commission's Conclusion That Information In Sage's "Welcome Package" Informs Customers That The Access Recovery Charge "Is Not A Tax Or Fee Imposed By A Governmental Entity" Is Erroneous And Not Based On Substantial Competent Evidence.

11. The Commission's conclusion that Sage's "Welcome Package" informs customers that the public switched network access recovery charge is not a tax or fee imposed by a governmental entity is contrary to the evidence submitted by Sage just prior to the Commission's June 15th Order.

12. First, it should be noted that the Commission correctly determined that based on statements of counsel, only new customers are provided the welcome package.⁷ As a result, based on the limited, untimely submitted evidence in the record, existing customers who are being charged

⁷ June 15th Order, ¶ 16; Sage Reply to Staff Response, ¶ 5.

this new surcharge were given no information by Sage. These existing customers, based on the record in this docket, have been given no information regarding this new surcharge, contrary to the Commission’s findings in the June 15th Order, ¶ 12.

13. Further, Sage’s untimely submitted “Welcome Package” (Sage Exhibits A and B), produced in the Sage Reply to Staff Response, demonstrates that Sage does not inform customers that the new surcharge is not a tax or fee imposed by a governmental entity, but instead deceptively conceals and misrepresents the surcharge.

14. Contrary to the Commission’s finding that information in Sage’s customer “Welcome Package” informs customers that the access recovery charge “is not a tax or fee imposed by a governmental entity,” Sage’s current Welcome Package contains the following:

**STATE,
LOCAL AND
FEDERAL
REGULATIONS**

• • •

Public Switched Network Recovery Charge	This charge is used to offset increased costs incurred in gaining access to incumbent telephone company networks.*
--	---

* This charge is not a tax or fee imposed by a government entity.⁸

Placing information regarding its public switched network recovery charge under the heading, “State, Local, and Federal Regulations” in extremely large print misrepresents that the charge is a tax or fee imposed by State, local, or federal law. Providing a footnoted disclaimer in extremely small print does not cure this misrepresentation.

⁸ Sage Reply to Staff Response, Exhibit B, p. 1 (emphasis added).

15. Sage's original Welcome Package also contained the following Q & A:

Q. Why am I charged taxes and service fees?

A. Every telephone company **has to collect** some taxes and fees, **as required by law**. However, we DON'T charge for certain fees that other phone companies do. For an explanation of taxes, fees, and other charges, please see the back of this brochure.⁹

This clearly conveys to ratepayers that Sage "has to collect" these taxes and fees "as required by law," contrary to the finding made by the June 15th Order that Sage informs customers that the access recovery charge "is not a tax or fee imposed by a governmental entity."

16. Sage's original Welcome Package also contained the following:

The following taxes and fees are collected pursuant to state and local regulations:

...

Public Switched Network Recovery Charge	This charge is used to offset increased costs incurred in gaining access to incumbent telephone company networks.*
--	--

* This charge is not a tax or fee imposed by a government entity.¹⁰

The statement, "The following taxes and fees are collected pursuant to state and local regulations" again conveys (misrepresents) to ratepayers that the public switched network recovery charge is a tax or fee collected pursuant to state and local regulations. The footnoted disclaimer in extremely small print does not effectively eliminate the initial primary misrepresentation in larger print. This is likewise contrary to the Commission's finding that information in Sage's customer "Welcome Package" informs customers that the access recovery charge "is not a tax or fee imposed by a governmental entity."

17. Sage's original Welcome Package also contained the following misrepresentation:

The lowdown on taxes, fees and other charges.

Taxes for this. Fees for that. It can all be very confusing. That's why we wanted to provide you with this information so you can better understand **the taxes and fees we have to collect**. And the ones we don't.¹¹

⁹ Sage Reply to Staff Response, Exhibit A, p. 2 (emphasis added).

¹⁰ Sage Reply to Staff Response, Exhibit A, p. 1 (emphasis added).

¹¹ *Id.* (emphasis added).

The statement, “the taxes and fees we have to collect” again conveys to ratepayers that Sage’s public switched network recovery charge is a required tax or fee, not a disguised rate increase, which Sage has admitted.¹²

B. The Commission’s Conclusion That Sage’s New Surcharge Is Not A Disguised Rate Increase Because New Sage Customers Receive Information About This Surcharge Through The “Welcome Package” Is Erroneous And Not Based On Substantial Competent Evidence Because Sage Misrepresents And Conceals Information About This Surcharge Through Its “Welcome Package.”

18. The Commission’s conclusion that Sage’s new surcharge is not a disguised rate increase because new Sage customers receive information about the surcharge through the “Welcome Package” is contrary to the evidence submitted by Sage just prior to the Commission’s June 15th Order.

19. Contrary to the Commission’s June 15th Order, new Sage customers are not provided accurate information about the new surcharge through Sage’s “Welcome Package,” but instead Sage misrepresents and conceals information about the new surcharge.

20. The provisions in Sage’s Welcome Packages described and discussed in Argument III.A. above demonstrate that Sage misrepresents and conceals information about whether the new surcharge is a tax or fee imposed by a governmental entity.

21. Furthermore, neither of Sage’s “Welcome Packages” (Sage Exhibit A and B) disclose the amount of the public switched access recovery charge. To be fully disclosed, the \$1.33 amount should be specified in some material provided to all Sage customers at the time a new surcharge was implemented.

¹² Sage Reply to Staff Response, ¶ 2 (“Sage intended to absorb the increased cost, but it soon became evident that ... a rate increase was necessary.”).

22. Sage's failure to disclose the amount of this surcharge in its "Welcome Package" or other materials is contrary to the Commission's finding that Sage informs its customers about this surcharge. Instead, it supports CURB's allegation that the amount is concealed from ratepayers who are therefore unable to make a meaningful comparison of rates both before and after they become customers of Sage.

23. In addition, Sage Exhibits A and B both specifically state that the surcharge "is used to offset increased costs incurred in gaining access to incumbent telephone company networks," but conceal that the \$1.33 surcharge also includes "other cost increases (such as higher costs for employee benefits)."¹³ Higher costs for employee benefits relate to the general cost of doing business or providing service, not the specific cost of gaining access to incumbent telephone company networks. In addition, the "other increased costs" not related to higher costs for employee benefits have not even been identified by Sage, but are presumably also not related to the specific cost of gaining access to incumbent telephone company networks, as represented to customers in the Welcome Package. This representation is therefore clearly deceptive and, contrary to the Commission's finding in the June 15th Order, does not accurately inform customers of the new surcharge.

24. Sage also conceals from ratepayers that the new surcharge is really a disguised rate increase.¹⁴ After disclosing the amount of the wholesale rate increase and alleging the new surcharge includes "other increased costs" (the "other" increased costs were unidentified by Sage to the extent they include costs beyond increased employee benefits) in Sage's Reply to Staff's Response, Sage

¹³ Sage Reply to Staff Response, ¶ 2.

¹⁴ Sage Reply to Staff Response, ¶ 2 ("Sage intended to absorb the increased cost, but it soon became evident that ... a rate increase was necessary.").

attempts to argue that its decision to implement the public switched network recovery charge was not an attempt to disguise a rate increase:

With respect to the first issue, **the access recovery charge was necessitated by an increase in Sage’s underlying costs.** In specific, AT&T raised the wholesale rate for access lines charged to Sage by \$1.00 on January 1, 2006. **Sage intended to absorb the increased cost, but it soon became evident that its margins were so tightly squeezed by that increase and other cost increases (such as higher costs for employee benefits) that a rate increase was necessary.** However, by that time Sage’s principal competitors in Kansas had received Commission approval of tariffs which incorporated discrete charges for access cost increases (e.g., Xpedius’ tariff docket cited in footnote 4 of Sage’s Reply to CURB), so **it was competitively impossible for Sage to initiate a general rate increase. For that reason – and not to pass on any government-mandated charge or to disguise a rate increase – Sage filed its proposed tariff.**¹⁵

25. It is difficult to follow Sage’s logic. First, Sage states that because of cost increases, a “rate increase was necessary.” Next, Sage alleges because other competitors had disguised their rate increases in surcharges, it was “competitively impossible for Sage to initiate a general rate increase.” Finally, because of this alleged impossibility to raise its rates, Sage “filed its proposed tariff” for the public switched access recovery charge, but somehow this was “not to ... disguise a rate increase.” Sage admits a rate increase was necessary, but it didn’t believe it could implement a general rate increase competitively, so it implemented the surcharge to disguise the required rate increase.

26. Sage’s admitted disguised rate increase implemented as a new surcharge is contrary to Sage’s claim that it “fully discloses the nature, purpose, and amount of the access recovery charge,”¹⁶ and contrary to the Commission’s findings that the new surcharge is not a disguised rate increase because new Sage customers receive information about this surcharge through the “Welcome Package.” Nothing in the “Welcome Package” explains that increased employee benefits are

¹⁵ Sage Reply to Staff Response, ¶2 (emphasis added).

¹⁶ Sage Reply to Staff Response, ¶ 5.

included in this new surcharge, nor is any explanation of the yet unidentified “other” increased costs disclosed to ratepayers (nor to the Commission or parties to this proceeding).

C. The Commission’s Conclusion That Sage’s New Surcharge Recovers An Increase In The Cost Of An Access Line In Its Agreement With AT&T And Also Costs For Increased Employee Benefits Is Erroneous And Not Based On Substantial Competent Evidence.

27. The Commission’s conclusion that Sage’s new surcharge recovers an increase in the cost of an access line in its agreement with AT&T and also costs for increased employee benefits is contrary to the untimely submitted new evidence produced by Sage, and even if partially correct, is still contrary to representations made to ratepayers in Sage’s Welcome Package.

28. Specifically, the information provided in argument only by counsel for Sage states:

With respect to the first issue, **the access recovery charge was necessitated by an increase in Sage’s underlying costs.** In specific, AT&T raised the wholesale rate for access lines charged to Sage by \$1.00 on January 1, 2006. **Sage intended to absorb the increased cost, but it soon became evident that** its margins were so tightly squeezed by that increase and other cost increases (such as higher costs for employee benefits) **that a rate increase was necessary.** However, by that time Sage’s principal competitors in Kansas had received Commission approval of tariffs which incorporated discrete charges for access cost increases (e.g., Xpedius’ tariff docket cited in footnote 4 of Sage’s Reply to CURB), so **it was competitively impossible for Sage to initiate a general rate increase. For that reason – and not to pass on any government-mandated charge or to disguise a rate increase – Sage filed its proposed tariff.**¹⁷

29. This information, to which CURB has been denied any ability to cross-examine or conduct discovery on, indicates that the new surcharge includes the \$1.00 increase in the wholesale rate paid to AT&T and “**other** cost increases (**such as** higher costs for employee benefits).” What these “other cost increases” consist of is still “anyone’s guess.”¹⁸ Sage has not chosen to identify the

¹⁷ Sage Reply to Staff Response, ¶2 (emphasis added).

¹⁸ CURB Petition for Reconsideration, filed June 2, 2006, ¶ 18; Staff’s Response to the Petition for Reconsideration, ¶¶ 6, 11.

mysterious “other cost increases,” Staff and the Commission have not identified them in approving the tariff, and CURB has been denied any opportunity to conduct discovery by the Commission’s denial of CURB’s Petition to Intervene.

30. More importantly, the “other cost increases”, including the portion identified as higher costs for employee benefits, are contrary to the representations made to ratepayers regarding the new surcharge. Sage Exhibits A and B both specifically state that the surcharge “is used to offset increased costs incurred in gaining access to incumbent telephone company networks.” As discussed in Argument III.B. above, this representation is simply not true: these unidentified “other cost increases,” including the higher costs for employee benefits, relate to the general cost of doing business or providing service, not the specific cost of gaining access to incumbent telephone company networks. This representation is therefore clearly deceptive, contrary to the Commission’s finding in the June 15th Order, and does not accurately inform customers of the new surcharge.

D. The Commission’s Conclusions That “It Appears” that Sage’s New Surcharge Does Not Duplicate Recovery Of Costs And There Is A Basis For The Charge, And “It Appears” It is Not Unlike The SLC Charge In The 016 Docket, Are Unreasonably Vague, Erroneous, And Not Based On Substantial Competent Evidence.

31. The Commission’s conclusions that “it appears” that Sage’s new surcharge does not duplicate recovery of costs and there is a basis for the charge, and that “it appears” it is not unlike the SLC charge in the 016 docket, are unreasonably vague, erroneous, and not based on substantial competent evidence. The use of the words “it appears” in both of these conclusions demonstrates this point, even ignoring the untimely submission of the new evidence resulting in denying CURB any opportunity to respond to this new evidence. Most of the “evidence” supporting the Commission’s conclusion that “it appears” there is no duplication and a basis for the charge, and that “it appears” it is not unlike the SLC charge, was contained in statements of counsel - unsupported by

company personnel testimony or affidavit. As a result, this evidence was so insubstantial that the Commission could not conclusively determine these issues, but instead concluded that “it appeared” these findings were correct. This demonstrates that the Commission’s findings were erroneous and not supported by substantial competent evidence.

E. The Commission’s Conclusion That Because Price Deregulated Companies Are Not Limited To Charging A Rate That Only Recovers Their Costs, The Only Check On Their Pricing Is The Market, Is Erroneous.

32. The Commission’s June 15th Order concluded that price deregulated companies are not limited to charging a rate that only recovers their costs and that the check on their pricing is the market. [June 15th Order, ¶15]. As applied to the tariff filed by Sage, and the untimely submitted evidence of Sage’s marketing practices produced by Sage (Welcome Package), this conclusion is erroneous.

33. As correctly noted by the Commission at ¶15 of the June 15th Order, the Commission has jurisdiction under K.S.A. 66-1,188, K.S.A. 66-1,189, and K.S.A. 66,192. These statutes authorize the Commission to regulate even price deregulated companies with regard to deceptive practices that would result in unreasonable, unfair, unjust, unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential practices or rates. As a result, the only check on the tariff and marketing practices of price deregulated companies is not the market; the Commission is statutorily authorized and mandated to regulate the practices of these companies.

34. As a result, the Commission’s conclusion that the only check on the pricing [tariff and marketing practices] of price deregulated companies is the market, is erroneous as a matter of law.

35. Furthermore, CURB is not seeking to regulate the amount of Sage’s rates, only to eliminate the deceptive nature of Sage’s new surcharge tariff and marketing materials (or lack of materials) available or provided to ratepayers.

IV. THE COMMISSION'S CONCLUSION THAT PRIOR COMMISSION APPROVAL OF OTHER SURCHARGES IS RELEVANT TO WHETHER IT SHOULD HAVE APPROVED SAGE'S DECEPTIVE SURCHARGE IS ERRONEOUS.

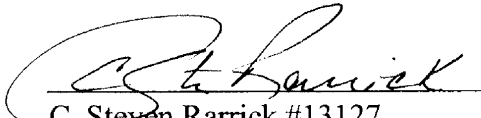
36. The Commission discusses, without any citation to record evidence, that “many price deregulated companies have filed tariffs with similar discrete charges” in support of its decision not to “single out Sage for separate treatment in this docket.”¹⁹

37. CURB submits it is irrelevant and erroneous for the Commission to base its decision on what may or may not have occurred in prior tariff filings. If those prior tariff filings were deceptive, as CURB has demonstrated with respect to Sage's new surcharge, the approval of those surcharges by the Commission does not make Sage's new surcharge any less deceptive.

V. CONCLUSION

38. WHEREFORE, CURB respectfully requests that the Commission reconsider its June 15th Order, reopen the docket, approve CURB's request to intervene, approve CURB's motion to defer the effective date of Sage's proposed public switched network recovery charge and suspend the tariff proceeding, and consider the complaint filed by CURB.

Respectfully submitted,


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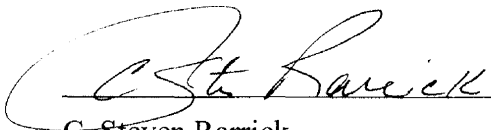
¹⁹ June 15th Order, ¶ 16.

VERIFICATION

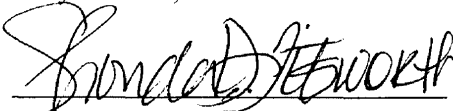
STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

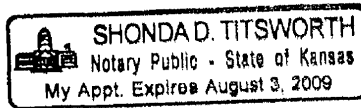
That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.


C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 30th day of June, 2006.


Notary Public

My Commission expires:



CERTIFICATE OF SERVICE

06-SAGT-1031-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 30th day of June, 2006, to the following:

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