

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Confederated Salish and Kootenai Tribes</b>	)	
<b>Energy Keepers, Inc.</b>	)	<b>Project No. 5-098</b>
	)	

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**ANSWER OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF  
THE FLATHEAD RESERVATION AND ENERGY KEEPERS, INC. TO  
MOTIONS TO INTERVENE AND COMMENT**

Pursuant to Rules 101(e) and 212 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.101(e), 385.212 (2014), the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT”), current co-licensee of the Kerr Hydroelectric Project, Project No. 5 (“Kerr Project” or “Project”), and Energy Keepers, Inc. (“EKI”), a federally-chartered corporation that is wholly-owned by CSKT, respectfully provides the following Answer to the Motions to Intervene and Protest filed by State Senator Bob Keenan and Montana Conservation District Supervisor Verdell Jackson (“Keenan/Jackson Motion”), the Montana Land and Water Alliance Motion (“MLWA Motion”) dated May 26, 2015, the Notice of Intervention and Comments filed by the Montana Public Service Commission (“MPSC”) (“MPSC Motion”), and the Motion to Intervene, Comment and Request a Hearing filed by the Flathead, Mission, and Jocko Valley Irrigation Districts (the “Districts”) and the Districts’ Flathead Joint Board of Control (“FJBC”) (“Flathead Motion”) dated May 28, 2015, in the above-captioned proceeding.

## I. SUMMARY OF ANSWERS TO MOTIONS TO INTERVENE

Under the terms of the License,<sup>1</sup> CSKT has the option, unilaterally and exclusively, upon NorthWestern Energy Corporation's ("NorthWestern") receipt of payment of the Estimated Conveyance Price from CSKT, to have NorthWestern convey the Kerr Project to CSKT. Under the terms of the License, upon NorthWestern's receipt of the Estimated Conveyance Price on the Conveyance Date, all of NorthWestern's interests in the Kerr Project shall without any further action on the part of NorthWestern, the Commission, or any other entity, vest in CSKT (the "Conveyance"). This Conveyance is scheduled to occur on September 5, 2015 (the "Conveyance Date").

In this proceeding, for legitimate commercial and business reasons, CSKT and EKI (with NorthWestern specially joining) filed an application ("Application") requesting that the Commission simply add EKI to the Kerr Project License effective on the Conveyance Date. This effective date is after the Conveyance of the Project. This Application has no bearing on whether the Kerr Project will be conveyed to CSKT.

In response to the Application, the Intervenor Motions raise issues unrelated to the underlying issue of whether it is appropriate to add EKI as a co-licensee after the Kerr Project is conveyed to CSKT.

Specifically, the Keenan/Jackson, MLWA, and MPSC Motions each argue that additional administrative process is needed to determine whether the Kerr Project should be conveyed to CSKT. **However, this proceeding is not about whether CSKT should**

**become the licensee or whether the Project should be conveyed on the Conveyance Date.**

**That proceeding took place in 1985 and those issues are resolved.** Similarly, **this**

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<sup>1</sup> *Mont. Power Co.*, 32 FERC ¶ 61,070 (1985) [hereinafter "License"].

proceeding is not about amending or revising the operational terms of the current License. No changes are contemplated to the operation of the Project or the terms of the License. Accordingly, the issues raised in the Keenan/Jackson, MLWA, and MPSC Motions should each be dismissed by the Commission.

Likewise, the Districts seek to expand the scope of this proceeding to include a proceeding contemplated by License Article 40(c) to determine whether CSKT should continue to provide low-cost power from the Kerr Project to the United States. That issue is unrelated to whether EKI should be added as a co-licensee. Nothing in this Application proceeding precludes, prejudices, or affects the District's ability to initiate a separate proceeding addressing whether CSKT and EKI (as co-licensees) should be required to provide a low-cost block of power.<sup>2</sup> Accordingly, the District's request to expand this proceeding to include an Article 40(c) proceeding should be dismissed by the Commission.

This proceeding is solely about whether, for legitimate business reasons, it is appropriate to add EKI as a co-licensee effective on the Conveyance Date. No party opposes that result and all the issues raised by the Intervenors are outside the narrow scope of this License transfer request and therefore are not relevant. Thus, because EKI clearly qualifies to be a co-licensee, CSKT and EKI respectfully request that the

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<sup>2</sup> Furthermore, as explained below, CSKT and EKI have no immediate plans to change the terms of the delivery of low-cost power to the irrigators. Indeed, under the terms of a recently negotiated water compact, the irrigators will continue to receive the low-cost block of power described in Article 40(a)(ii) from CSKT in the same manner that NorthWestern is currently providing to them. *See Proposed Water Rights Compact Entered Into by Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America*, Art. IV, H.1 (Jan. 2015). Assuming that the Compact is approved by the United States and CSKT, it will create certain contractual obligations with respect to the delivery to the irrigators of the low-cost block of power, consistent with what is described in Article 40(a)(ii).

arguments raised in the Intervenor's Motions be dismissed and the Application be approved expeditiously.

## II. ANSWER TO THE KEENAN/JACKSON AND MLWA MOTIONS

The Kennan/Jackson Motion argues that the Commission needs to “verify”: 1) CSKT’s compliance with the License’s conditions, 2) transparency regarding CSKT and EKI’s project operations, 3) resolution of the so-called CSKT “liability issues,” and 4) the Commission’s, the U.S. Department of the Interior’s (“Interior”), and MPSC’s (allegedly) necessary oversight.<sup>3</sup> The MLWA Motion appears to merely repeat the Kennan/Jackson Motion’s first and second arguments.<sup>4</sup> The Kennan/Jackson and MLWA Motions raise issues that have nothing to do with the addition of EKI to the Kerr Project License. All four of the Kennan/Jackson Motion’s arguments pertain to CSKT’s

fitness as a licensee of the Kerr Project due to CSKT’s status as a federally-recognized Indian Tribe.

These arguments are very similar to the untimely and meritless arguments that Mr. Jackson (who joined Sen. Kennan in the Kennan/Jackson Motion) raised in his August 22, 2014 rehearing request (“Rehearing Request”) and other filings<sup>5</sup> made before

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<sup>3</sup> Additionally, the Kennan/Jackson Motion, in part, makes other tangential demands including that the Commission provide the protestors with information on how the Commission treats the governmental status of EKI and CSKT and with information related to homeland security issues. Kennan/Jackson Motion at 4. Similarly, the MLWA Motion asks the Commission for a field hearing to discuss, among other things, the “applicant’s inability to meet the previous license conditions . . .” MLWA Motion at 5. Additionally, both motions make arguments concerning payment in lieu of taxes. As explained *infra* note 18, this issue is beyond the scope of this proceeding.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> Motion to Intervene of Senator Verdell Jackson, Project No. 5-094 (filed June 2, 2014); Intervener Senator Verdell Jackson’s Comments on the transfer of the Kerr Project FERC License to Northwestern Corporation, Project No. 5-094 (filed Aug. 6, 2014); Request for Rehearing of FERC Order Transferring License by Senator Verdell Jackson,

the Commission concerning the Conveyance of the Kerr Project to CSKT. The Commission determined these same issues then raised in the Rehearing Request were not relevant, and/or were untimely.<sup>6</sup> Specifically, the Commission dismissed Mr. Jackson's Rehearing Request, which challenged the Commission's order approving the transfer of the License from PPL Montana, LLC ("PPL Montana") to NorthWestern ("July 24 order"), because the Commission found Mr. Jackson raised "issues germane to the final 1985 license order, rather than to [the] July 24 order," and therefore Mr. Jackson did not, and could not, establish a concrete injury arising from the July 24 order. Similar to the issues raised in the Rehearing Request, the Kennan/Jackson and MLWA Motions ask the Commission to address issues that are not germane to the Application proceeding, and therefore, the arguments raised in the Intervenor Motions are completely beyond the scope of the Application proceeding and should be dismissed.

The Commission previously found that CSKT was fit to become the Kerr Project licensee and that making CSKT a licensee was in the public interest, when the Commission approved the settlement agreement reached between CSKT and the Montana Power Company ("MPC"),<sup>7</sup> and issued the current 50-year License. During the re-

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Project No. 5-094 (filed Aug. 22, 2014) [hereinafter "Rehearing Request"]; Letter from Sen. Verdell Jackson, Montana State Senate, to Kimberly Bose, FERC at 2, Project No. 5-094 (filed Nov. 5, 2014) (suggesting that the Commission staff's failure to address Mr. Jackson's concerns to his satisfaction translates to the Commission staff's "incompetence or a deliberate attempt to avoid addressing them").

<sup>6</sup> See Rehearing Request. CSKT incorporates by reference the arguments it made in the Answer of the Confederated Salish and Kootenai Tribes of the Flathead Reservation to the Rehearing Request, Project No. 5-098 (filed Sept. 12, 2014). Because the Commission found the arguments were not relevant and/or were untimely, the Rehearing Request was dismissed because no concrete injury was involved.

<sup>7</sup> Joint Offer of Settlement, Docket Nos. EL84-12-000 *et al.* (filed Mar. 29, 1985); see also *Mont. Power Co.*, 31 FERC ¶ 63,015 (1985).

licensing proceeding that took place in the 1980s, the Commission made extensive factual and evidentiary findings regarding the Tribes' fitness to operate the Kerr Project and determined that awarding CSKT co-licensee status of the Kerr Project was in the public interest.<sup>8</sup> There is no basis for challenging the Commission's decision then or now. Under the License's terms, it will become the owner and operator of the Kerr Project upon payment of the Conveyance Price upon a date certain.<sup>9</sup> There is no other action, undertaken by either the Commission or any other party, necessary to perfect this right.

Likewise, as a wholly owned subsidiary to CSKT, EKI is clearly fit to become a Kerr Project co-licensee.<sup>10</sup> The addition of EKI as a co-licensee will have no material impact on the issues raised in the Kennan/Jackson and MLWA Motions. The addition of EKI as a co-licensee will have no effect on legal standing, license conditions, license

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<sup>8</sup> *Id.* at p. 61,175 (“For the reasons set forth in this order, the settlement appears fair and reasonable and in the public interest, and is therefore approved.”). *See also Mont. Power Co.*, 31 FERC ¶ 63,015 at p. 65,065 (“[t]he settlement creates a substantial future role for tribal ownership and operation of an important hydroelectric resource, the training and employment of tribal members in the operation of a vital resource, and the furtherance of tribal independence. It assures needed, adequate, reliable, and low-cost electric service to the citizens of Montana.”). Additionally, the Commission's finding should equally apply to Energy Keepers, Incorporated, which is a wholly-owned subsidiary of the Tribes and whose sole shareholder is CSKT.

<sup>9</sup> License at pp. 61,181-82.

<sup>10</sup> As described in the Application, EKI is a corporation, wholly-owned by CSKT with one share of common stock that cannot be encumbered or otherwise disposed of by CSKT. EKI was chartered by Interior pursuant to section 17 of the Indian Reorganization Act. CSKT's Tribal Council functions collectively as the Shareholder's Representative for all purposes regarding EKI. EKI's business affairs are managed under the direction of a Board of Directors, consisting of Directors appointed by the Shareholder's Representative, in the manner provided in and subject to, the provisions of EKI's corporate bylaws. EKI's purpose, *inter alia*, is to construct, manage, operate, and maintain the Kerr Project consistent with the terms of the License. EKI has established a corporate office in Polson, Montana and a corporate website at [www.energykeepersinc.com](http://www.energykeepersinc.com).

compliance obligations, or the application of any other state and federal requirement or regulation. Like CSKT, EKI will be subject to the Commission's same regulatory authority and oversight, as authorized by the Federal Power Act ("FPA")<sup>11</sup> and the Commission's Rules and Regulations,<sup>12</sup> as any other hydroelectric power facility owner and operator. There is simply no merit to arguments that CSKT or EKI will "escape" the Commission's scrutiny with respect to its license compliance obligations. The fact that EKI is a Tribal corporation has no bearing on EKI's fitness as a co-licensee. As co-licensees, CSKT and EKI intend to fully comply with the License obligations that pertain to the ownership and operation of the Kerr Project.

Additionally, the Kennan/Jackson Motion impliedly seeks to amend<sup>13</sup> the License that the MPC and CSKT bargained for and agreed to during the 1985 re-licensing proceeding,<sup>14</sup> which was adopted in its entirety by the Commission.<sup>15</sup> The FPA generally prohibits alterations of a license without the mutual assent of the licensee and the Commission.<sup>16</sup> Furthermore, transfer proceedings before the Commission are not the proper venue to address amendments to a Commission-issued license.<sup>17</sup> Once a license

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<sup>11</sup> 16 U.S.C. §§ 791a-825r (2012).

<sup>12</sup> 18 C.F.R. Parts 1-399. However, only certain Parts are applicable to hydroelectric power licensees.

<sup>13</sup> Keenan/Jackson Motion at 4. ("[T]he intervention is designed to help secure the best possible license conditions that satisfy the public within the framework of state and federal law.")

<sup>14</sup> See Joint Offer of Settlement; see also *Mont. Power Co.*, 31 FERC ¶ 63,015.

<sup>15</sup> See License.

<sup>16</sup> FPA section 6, 16 U.S.C. § 799, provides that a license "may be altered . . . only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

<sup>17</sup> See *Eagle Creek Hydro Power, LLC*, 139 FERC ¶ 62,132 at P 22 (2012) (rejecting intervenors' comments in license transfer proceeding requesting the Commission to

has been issued, it can only be amended through the mutual consent of the licensee and the Commission.

Because the issues raised by the Kennan/Jackson and MLWA Motions are beyond the scope of the Application proceeding, and reflect a complete lack of understanding of the relationship between federal, state, and tribal laws and regulations, CSKT respectfully requests that the Commission dismiss the arguments raised in the Kennan/Jackson and MLWA Motions and expeditiously grant the Application.

### **III. ANSWER TO THE MPSC MOTION**

The MPSC Motion does not raise nor identify any issue of material fact germane to the Application proceeding. The MPSC Motion is largely a request for the Commission to hold a public hearing in Montana to examine whether the transfer of the Kerr Project to CSKT is in the public interest.<sup>18</sup> As explained above, the Kerr Project will transfer to CSKT on the Conveyance Date by operation of law and issues pertaining to the upcoming Conveyance are completely outside of the scope of the Application

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establish reasonable guidelines for maintaining adequate water levels for recreational use as a condition to transfer the license to a new licensee, finding it outside the scope of a transfer proceeding. “As the Commission has explained before, the mere transfer of a license changes only the identity of the licensee; it does not alter the environmental impact of the project or any operational requirements. Transfer proceedings, therefore, focus on the qualifications of the transferee to become the licensee, not on project impacts or whether additional mitigation measures should be included in the license.”).

<sup>18</sup> MPSC specifically states that whether EKI “voluntarily subjects itself to a payment in lieu of taxes, is likely a central question of whether the transfer is in the public interest.” MPSC Motion at 5. However, as the Commission has repeatedly held, the tax impacts of a hydroelectric project, are not within its jurisdiction and that precedent is well-founded and applicable here. *See e.g., City of Tacoma*, 84 FERC ¶ 61,037 at p. 61,142, *reh’g denied*, 85 FERC ¶ 61,020 (1998) (declining to require licensee to compensate county for lost tax revenues); *see also, N.Y. Power Auth.*, 118 FERC ¶ 61,206 at PP 86-87 (2007), *petition for review denied, E. Niagara Pub. Power Alliance & Pub. Power Coal. v. FERC*, 558 F.3d 564 (D.C. Cir. 2009) (“[T]he tax impacts of a hydroelectric project are a matter of state law, and are not within our jurisdiction.”).



proceeding.<sup>19</sup> As such, this request for a public hearing should be disregarded as unnecessary.

Furthermore, from a jurisdictional perspective, the MPSC has no interests in the Application proceeding.<sup>20</sup> CSKT and EKI intend to do business in the wholesale market, which is solely jurisdictional to the Commission. As such, despite MPSC's statements to the contrary, after the Kerr Project is conveyed to CSKT, the MPSC will have no regulatory role with respect to overseeing the Kerr Project operations or the sale of power from the Project.

Finally, representatives of EKI met with representatives from MPSC to advise them of issues related to transfer of the Kerr Project on several occasions.<sup>21</sup> During these meetings, CSKT and EKI advised MPSC regarding the plan to submit a request to the Commission to add EKI as a co-licensee, as well as, the rationale for such a request. At no time, has MPSC expressed concern or objection to CSKT or EKI about this plan.

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<sup>19</sup> MPSC Motion at 3.

<sup>20</sup> Contrary to MPSC arguments (*id.* at 6), MPSC is not an "interested State Commission" under 18 C.F.R. section 9.2 because, after the Conveyance, the MPSC will have no jurisdiction over CSKT or EKI, or the sale of power from the Kerr Project.

<sup>21</sup> EKI's Chief Executive Officer ("CEO") and General Counsel met with the full MPSC on January 14, 2015 and EKI's General Counsel met with several MPSC Commissioners on May 26, 2015 at the MPSC Office in Helena, Montana. Furthermore, EKI distributed print handouts with FAQs and other narrative explanations regarding CSKT's and EKI's intentions for acquisition and subsequent operations of the Kerr Project to Montana State legislators and executives and during the biennial 2015 legislature EKI's CEO met directly with eight Montana legislators whose legislative districts are included in the same river basin as the Kerr Project. Sen. Keenan was offered this briefing but was unable to accommodate it. Similarly, Mr. Jackson was also offered a briefing, and initially scheduled one in his hometown of Kalispell, Montana, only to later cancel it and not respond to offers to reschedule it. Finally, EKI's CEO has also met with local community organizations to inform them of CSKT's and EKI's intentions, including: Lake County Pachyderm Club, Polson Rotary Club (three times), and Ronan Chamber of Commerce.

#### IV. ANSWER TO THE FLATHEAD MOTION

The Flathead Motion does not raise any issues germane to the Application proceeding. Instead, the Flathead Motion requests a “mandatory evidentiary hearing” pursuant to Article 40(c) of the License to address whether CSKT and EKI are obligated to provide the output from the Kerr Project, described Article 40(a), to the United States, for and on behalf of Flathead Irrigation Project (“FIP”) or the Districts, after the Conveyance.<sup>22</sup> The Application proceeding is not the appropriate forum to request an Article 40(c) hearing. The Districts and the FJBC cannot change the nature of the Application proceeding, they must take the proceeding as they find it, which involves the simple issue of whether EKI can be added as a co-licensee, nothing more.<sup>23</sup> The Application proceeding is completely unrelated to the Article 40(c) option to request a hearing before the Commission to determine the low-cost block of power issue.

By way of background, the License obligates of the Project licensee to provide, to the United States, Project output, for and on behalf of the FIP, or the Districts from the Effective Date of the License to the Conveyance Date.<sup>24</sup> The License does not establish

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<sup>22</sup> Flathead Motion at 6.

<sup>23</sup> *See, e.g., City of New Martinsville*, 126 FERC ¶ 62,122 at P 10 (2009) (rejecting intervenor’s comments in license transfer proceeding that transfer would violate state law and have adverse property tax implications, finding that such issues are beyond the scope of a license transfer proceeding).

<sup>24</sup> Article 40(a) states as follows:

From the Effective Date **until** such time as MPC conveys the project to the Tribes, under this license or any amendment thereto, it will make available to the United States, for and on behalf of the FIP or the Districts comprising the same, capacity and energy at the Kerr Project 100 kV bus in the following amounts:

(i) During all months of the year, up to 7.466 megawatts of capacity at up to 100 percent load factor;

an obligation to provide Project output to the United States, for and on behalf of the FIP or the Districts, after the Conveyance Date.<sup>25</sup> Article 40(c) goes on to define the process that must be utilized, if the parties cannot agree, to determine whether CSKT has an obligation to make a portion of Project output available to United States after the Conveyance Date and if so, under what terms and conditions. With respect to the process, Article 40(c) states “[u]pon request of (i) the Tribes, the Secretary, or the Districts, made any time after the fifteenth anniversary of the Effective Date . . . the Commission shall set such matters for hearing within twelve months of the date of the request.”<sup>26</sup>

If the Districts or the FJBC would like to petition the Commission for an Article 40(c) hearing, they should do so in a separate proceeding, stating their arguments in a more clear and concise manner, so that CSKT, EKI, and the Commission may address their arguments.

Notwithstanding, at this time, the initiation of an Article 40(c) proceeding is likely unnecessary. CSKT and EKI have no immediate plans to unilaterally change the amount

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(ii) During the months of April through October, additional capacity of up to 3.734 megawatts at up to 100 percent load factor.

License at p. 61,184 (emphasis added).

<sup>25</sup> Article 40(c) states in relevant part as follows:

This joint license does not cover or resolve the questions of whether . . . (i) the Tribes must make any part of the output from the project available to the United States, for and on behalf of FIP or the Districts, or if so on what terms or conditions.

*Id.* at p. 61,185 (emphasis added).

<sup>26</sup> *Id.* Article 40(c) also establishes a process for the Secretary or the Districts to seek a portion of project output greater than that which is provided under Article 40(a) of the License. This process required that the Secretary or the Districts make such a request by July 17, 1995. Because such requests were not made, the Secretary and the Districts are now “forever barred” from making such requests.

or terms of the delivery of the low-cost block of power to the Districts after the Conveyance. Furthermore, under the terms of a recently negotiated water compact (“Water Compact”), if approved, the irrigators will continue to receive the irrigation portion of the low-cost block of power described in Article 40(a)(ii) from CSKT in the same manner that NorthWestern has been providing this power.<sup>27</sup> Assuming that the Water Compact is approved by the United States and CSKT, it will include certain obligations with respect to the delivery of the irrigation portion of the low-cost block of power that are consistent with what is described in Article 40(a)(ii).

Regardless, the Commission should disregard the Flathead Motion’s request to institute an Article 40(c) proceeding because an intervenor cannot unilaterally change the nature of an on-going proceeding through a Motion to Intervene.

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<sup>27</sup> See *Proposed Water Rights Compact Entered Into by Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America*, Art. IV, H.1 (Jan. 2015). The water compact has been ratified by the state of Montana. It is pending ratification by the federal government and CSKT. Until the United States and CSKT complete their respective reviews of the negotiated Water Compact there is uncertainty with respect to the CSKT obligations pertaining to the delivery of the low cost block of power. Refraining from initiating an Article 40(c) proceeding at this time will serve the interests of preserving the parties’ and the Commission’s resources, and also best serve judicial economy.

**V. CONCLUSION**

For all of the reasons stated above, CSKT and EKI respectfully requests that the Commission expeditiously deny the various Motions and approve the Application to add EKI to the Kerr Project License.

Respectfully submitted,



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***Counsel for the Confederated Salish and Kootenai Tribes of the Flathead Reservation***

Dated: June 9, 2015

**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 9th day of June, 2015.

Respectfully submitted,

/s/ Erin K. Bartlett  
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