

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of Moore Bend )  
Water Company, Inc. and Moore Bend Water Utility, ) **File No. WM-2012-0335**  
LLC for Authority of Moore Bend Water Company )  
Inc. to Sell Certain Assets to Moore Bend Water )  
Utility, LLC. )

**STAFF'S RESPONSE AND  
OBJECTION TO PUBLIC COUNSEL'S PROPOSED CONTINGENCIES**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff), by and through its attorney, and submits this *Staff Response and Objection to Proposed Contingency* to the Missouri Public Service Commission (Commission) and supports it as follows:

**OVERVIEW**

Staff objects to the additional conditions contained in Public Counsel's August 2<sup>nd</sup> Filing,<sup>1</sup> which go against what Staff understood to be an agreement between Staff and Public Counsel as to how to address this matter, for the reasons set out below. First, the Commission does not have jurisdiction to approve the conditions Public Counsel seeks in that Filing. Second, Public Counsel's conditions would not alleviate the concerns it raises. Further, the proposed conditions fail to provide a clear direction as to what may happen in this case, and in the future, thus they would leave all of the interested parties subject to impractical outcomes which is not in the public interest.

The problem Public Counsel seeks to prevent from occurring with these proposed conditions may not be resolved if their conditions are granted. If the

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<sup>1</sup> On August 2, 2012, Public Counsel filed with the Commission *The Office of the Public Counsel's Response to Staff's Motion to Amend Recommendation*, referred to as the August 2<sup>nd</sup> Filing.

purchasing utility fails to purchase the real estate or obtain easements where the wells are located timely and at a reasonable price, the conditions would be exercised and the transfer of assets will be void. That would mean that the current owner, who does not own the real estate in question, does not possess any written legal easements to access the wells, and does not want to continue to own and operate the utility, would again become the owner. If Public Counsel's conditions are not met, the system ends up in the same situation it exists in today; the very situation that Public Counsel concerned about.

While Staff supports the concept that the utility could obtain a written legal easement, or purchase the area surrounding the wells and avoid the concerns in the future, Staff disagrees that any such sale should be part of this case. The utility's management should be allowed to determine the price it is willing to pay for such a transaction and seek to have it placed into rate base in its next rate case. Public Counsel, Staff and any intervening party will have an opportunity to contest the reasonableness of any price paid in another proceeding. The Commission should, in the context of the next proceeding, make an independent determination as to the reasonableness of the sale, and only allow the utility to place the full purchase price in rate base if it is determined to be reasonable. Until an amount deemed reasonable by the Commission is placed in rate base, the utility will neither earn a return on its investment nor recover any portion of that investment from its customers.

The Commission has statutory authority<sup>2</sup> to approve conditions and to investigate utilities that are violating laws, orders or regulations, but that statutory authority does not provide the Commission with the power to make its own order void if a condition is not

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<sup>2</sup> See Section 393.160.3

met. The Commission should not approve a condition that may make approval of the transfer void in the future, as such a condition is not reasonable or necessary to provide safe and adequate service.

Staff asserts that approving this transfer, as stated in Staff's amended recommendation, will provide the Commission with appropriate jurisdiction. If the Commission approves Staff's proposal, should such a sale occur, the utility would have determined the price it is willing to pay for the land and assets, but the Commission will have the opportunity to review the price of the transaction in the context of a rate case that may result in disallowances, if appropriate.

What is important in this case is that this system needs to have an owner interested in the provision of utility service, and it needs to continue to be regulated by the Commission to ensure the citizens of Missouri have safe and adequate drinking water. Making the approval void as a result of the failure to meet a condition, as proposed by Public Counsel, is unnecessary, overly burdensome and causes more problems. If any utility under the Commission's regulation fails to comply with a condition included in a Commission order, then there are lawful consequences established, including seeking permission to seek penalties. Staff or Public Counsel may file a complaint against the utility. Additionally, Staff or Public Counsel may review the utility's performance in the context of a rate case resulting in disallowances or additional requirements that may not have been implemented had the utility not violated the Commission's order.

The Commission should approve this transfer as Staff has proposed in its Recommendation as amended on July 27<sup>th</sup>. Public Counsel's August 2<sup>nd</sup> Filing presents

a major roadblock for this system to be transferred so that an interested owner can begin operating the system and continue to provide safe and adequate service. Public Counsel's proposal should be denied because it proposes an unlawful condition that is not reasonable or necessary, nor is that proposal in the public interest.

### **PROCEDURAL BACKGROUND**

1. On April 11, 2012, Moore Bend Water Company, Inc. (Moore Bend) and Moore Bend Water Utility, LLC (MBU) filed a joint application with the Commission.

2. On July 9, 2012, Staff filed *Staff's Recommendation (Recommendation)* recommending that the Commission approve the joint application with conditions as expressed in Staff's Memorandum, attached to the *Recommendation*.

3. On July 19, 2012, Public Counsel filed its *Response* making several general assertions about this matter and citing several objections to the *Recommendation*. Specifically, Public Counsel objected on the grounds that there was not legal access to the well site.

4. Staff then approached Public Counsel and proposed an agreement to address Public Counsel's concern about the property where the wells are located. As a result of an email exchange on the topic, Staff understood there was an agreement on the language resolving Public Counsel's concerns and included that language in its *Staff's Response to the Office of the Public Counsel's Response and Motion to Amend Staff's Recommendation* that was filed on July 27, 2012 (hereafter referred to as the "*July 27<sup>th</sup> Response*").

5. Staff understood the agreed upon language to be as follows and so stated that to the Commission:

7. As a result of those conclusions and Public Counsel's noted objections, Staff requests adding the following two recommendations to the eight recommendations previously filed, thereby amending Staff's *Recommendation* as follows:

The Commission issue an order that includes the following:

a. Requires MBU to obtain a legal written easement or purchase the property the wells are located on within six (6) months of obtaining the certificate of convenience and necessity for the utility and to file notice of such document with the Commission, Public Counsel and Staff within five (5) days of such a transaction under this case number; and

b. Requires MBU to file a rate case no later than three (3) years from the effective date of any order entered in this matter, wherein any such transaction described above is reviewed for prudence by Staff and Public Counsel.

8. Staff presented this offer to Public Counsel and does not anticipate an objection to this proposal for the purposes of compromise and resolution, though Public Counsel plans to file a separate response to Staff's proposal.

6. Staff was surprised by Public Counsel's filing on August 2, 2012, because Staff understood that Public Counsel would not oppose Staff's Amended Recommendations set out above. Instead, Public Counsel now seeks to add conditions that were never presented, proposed or discussed with Staff prior to being filed. Regardless, Public Counsel's August 2<sup>nd</sup> filing makes Staff's understanding of the agreement moot, since the August 2<sup>nd</sup> filing does not reflect what Staff understood to be an agreement and is unacceptable to Staff.

7. Public Counsel's position stated in its August 2<sup>nd</sup> filing is as follows:

**Public Counsel is willing to accept all of Staff's recommendations; however Public Counsel believes that the Commission should approve the Joint Application contingent on MBU obtaining a legal written easement or purchasing the property where the wells are located on at a reasonable price**

within six (6) months of obtaining the Certificate of Convenience and Necessity. **If MBU fails to meet this requirement, the Commission's Approval of the Joint Application and the Certificate of Convenience and Necessity for MBU would be void. Without this contingency, Public Counsel opposes Staff's motion to amend and renews its original objection.**

In an effort to make it easier for the differences to be identified, Staff put the language Public Counsel seeks to add in bold type.

8. Public Counsel's statement that it "is willing to accept all of Staff's recommendations"<sup>3</sup> is inaccurate, as its acceptance is conditioned upon Public Counsel's proposed language being added, and "without this contingency, Public Counsel opposes Staff's motion to amend and will renew its original objection."<sup>4</sup>

9. Staff opposes Public Counsel's proposal<sup>5</sup>, as stated above, because it is unlawful, beyond the Commission's jurisdiction and potentially creates impractical results that are not in the public interest.

10. Public Counsel does not provide any new justification or reasoning for these additional contingencies.

11. As a result, Staff will begin with its interpretation of Public Counsel's proposal: if attainment of a written easement or the purchase of the land where the wells are located does not occur at a reasonable price within six months of the effective date of the Commission's approval of the transfer of assets and the transfer of the CCN from Moore Bend to MBU, then the approval of the transfer is void. Thus, the CCN would revert back to Moore Bend. With that understanding, Staff now provides support for its opposition and response to Public Counsel's proposal below:

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<sup>3</sup> See Paragraph 9 of Public Counsels' August 2<sup>nd</sup> filing.

<sup>4</sup> Public Counsel's objections have not been revoked or withdrawn so they still stand as filed on July 29, 2012.

<sup>5</sup> Under 4 CSR 240-2.080 (13), parties have ten days to respond, which would be August 12, 2012, however, since that date was a Sunday, Staff is timely filing this Response, pursuant to 4 CSR 240.050 (1).

## Legal Objections

Public Counsel makes the following proposal: *“If MBU fails to meet this requirement [written easement or sale at a reasonable price within six months], **the Commission’s Approval of the Joint Application and the Certificate of Convenience and Necessity for MBU would be void**”* (Emphasis added.) Staff argues that this condition is unlawful because of the following reasons: 1.) the Commission does not have jurisdiction to authorize such conditions because it is not reasonable and necessary to providing safe and adequate service, 2) it is not in the public interest; and 3.) the proposed condition is impractical. Such a condition also is not in the public interest because it puts the responsibility of providing safe and adequate service to the customers at risk in the future.

No utility is lawful “without first having obtained the permission and approval of the [C]ommission.” Section 393.160.1, RSMo<sup>6</sup>. Pursuant to Section 393.160.3, the Commission “may by order impose such condition or conditions as it may deem reasonable and necessary” when approving a CCN. The Commission has jurisdiction and its supervision extends “to all water corporations, and to the land, property, dams, water supplies or power stations thereof and the operation of same within this state,” with some exceptions. Section 386.250 (3). The Commission also has the statutory power to investigate utilities under Section 386.330.

In order to be lawful, MBU must obtain a Certificate of Convenience and Necessity (CCN), which it is attempting to do in this Application. The law provides that the Commission may condition certificates when they are reasonable and necessary. The statute does not state that such conditions can result in the Commission’s approval

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<sup>6</sup> Unless otherwise note, all references are to the RSMo as currently supplemented.

being void should the condition not be met. The review and oversight of whether the utility abides by the Commission's order already exists and is found in statutes. Should a utility fail to meet a condition ordered by the Commission, the Commission has the power to investigate utilities and seek penalties for violation of a Commission order. Staff and Public Counsel also have the authority to file complaints before the Commission. Public Counsel's proposed condition is unnecessary, unreasonable and overly burdensome to all of the involved parties. The Commission's approval of this Application should not be made void as a result of an entity failing to meet a condition ordered by the Commission because other remedies exist to address that possibility.

Even if it is within the Commission's power to make a certificate void, conditioning this transfer of assets as Public Counsel proposes is overly burdensome and potentially harmful to the system and its customers, and it does not alleviate the current problem. Additionally, the condition is not in the public interest.

Under Public Counsel's new proposal, if a legal written easement or purchase of the property is not completed within six months, the Commission's approval of this transfer becomes void and the CCN reverts back to Moore Bend. The Commission should not and cannot make its own decision void if a contingency is not met, especially when that contingency involves a third party that the Commission has no jurisdiction over. In this case, the sale would be between the owner of the land and the potential owner of MBU (a not yet regulated entity). Such a contingency does not solve the current problem; that Moore Bend does not have a legal easement nor does it own the land in question, which initially raised Public Counsel's concerns in this matter.



Additionally, Staff objects because the proposed condition requires the Commission's determination on the price of a utility's land purchase, rather than allowing the Commission to consider disallowing the purchase price that the utility was willing to pay in the context of a rate case. The Commission cannot independently determine the reasonableness of a sale that is ultimately the utility's decision, which is what is contemplated by Public Counsel's proposal. However, the Commission has jurisdiction to disallow recovery in rates if the purchase price is determined to be unreasonable. The Commission should not void the transfer of the assets and CCN based on the price of the land purchase by the utility. Staff asserts the Commission's ability to review any land purchase for prudence in the utility's next rate case is a better solution than requiring the purchase price be "at a reasonable price", particularly when the "reasonableness" could be an issue to void the sale as proposed by Public Counsel.

The Commission should deny Public Counsel's request, overrule Public Counsel's objections and grant the transfer in this case as recommended by Staff, with amendments. The Commission will have the opportunity to review any purchase of the property for prudence in a later proceeding, and conditioning its approval of this transfer as proposed by Public Counsel is unlawful because the conditions are unreasonable and unnecessary for the continued provision of safe and adequate service.

### **Impracticalities of Approving the Proposed Conditions**

In this case, Moore Bend is interested in selling the system because the owner has a desire to leave the utility business. MBU is interested in purchasing the system and continuing to operate it as a lawful utility, and MBU's owner is currently involved in

the regulated utility business in Missouri<sup>7</sup>. In order to achieve these goals and to remain a lawful utility subject to the Commission's jurisdiction, these parties filed the Application at issue in this case.

Moore Bend does not own the land on which the wells are located. The current owner of the land and former owner of the utility, Mr. Mickey Plummer, created the utility corporation in the late 1990s, but owned and still owns the land personally. Mr. Plummer sold Moore Bend in the early 2000s, but did not sell the land where the wells are located. For approximately 10 years, Moore Bend has been providing safe and adequate service to its customers without owning the land or having a written easement that provides access to the wells. Mr. Plummer has provided the utility necessary access during this time period. Public Counsel's proposed conditions do not change this fact or remedy the situation; it simply makes it more difficult to achieve the desired result of the utility owning the land.

In this situation, Public Counsel has gone to great lengths to express its opinion that "it is crucial that the owner of the utility have legal access to the well sites. The lack of legal access to the wells would greatly affect the utility's ability to provide safe and adequate service."<sup>8</sup> Staff acknowledges that it may benefit the utility to obtain a written legal easement, or to purchase the land surrounding the wells. Staff simply disagrees with Public Counsel's approach to solve the problem. Public Counsel's argument and proposed resolution are flawed because there are no allegations of failure to provide

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<sup>7</sup> The owner of MBU also owns Riverfork Water Company, Midland Water Company, Inc., Taney County Water, LLC, Valley Woods Utility, LLC *see Staff's Recommendation and supporting Memorandum pg 2.*

<sup>8</sup> Emphasis Added. *See the August 2<sup>nd</sup> filing, pg 3, paragraph 5, and Public Counsel's July 19<sup>th</sup> Response to Staff's Recommendation, pg 2, paragraph 5.*

safe and adequate service, even though the situation that Public Counsel opposes currently exists.

Public Counsel indicates that “it is not in the public interest to approve a sale of the utility property until the utility can prove it has legal access to the wells.”<sup>9</sup> However, Public Counsel does not require Moore Bend, the currently regulated utility, to do so. Public Counsel’s proposal seeks to have MBU purchase the land or acquire appropriate legal easements from a third party, Mr. Plummer, and then hope that the Commission approves both the transfer of assets to MBU and the agreed upon purchase price. In its most recent filing, Public Counsel advocates that the land sale could include a clause in the sales contract that makes the purchase of the property subject to the Commission’s approval of this application, yet Public Counsel still argues that approval could be void in six months. Therefore, including such language in the contract is not helpful to the situation. It is unduly burdensome to have Mr. Plummer and MBU (a not yet regulated entity) to be in limbo for six months and to be subject to Commission approval of reasonableness of the transaction. This is particularly true when both those entities are attempting to improve the situation and resolve the concerns that have been raised in this case.

Public Counsel’s additional conditions, if fully approved and enforced, unfortunately would only make the situation worse because more unknown factors come into play. First, Public Counsel is essentially asking MBU to run a utility for six months. This means that MBU would be responsible for the provision of safe and adequate service during that time; it would be MBU’s responsibility to incur costs for billing, maintenance, repair, meeting DNR regulations, etc. However, after six months,

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<sup>9</sup> August 2<sup>nd</sup> Filing, pg 3, paragraph 6

it might lose those responsibilities and assets. The potential to lose the system may take away any incentive MBU has to make repairs, improvements or investments in the system within that six month period. Under Public Counsel's new proposal, after six months, the utility assets could revert back to an owner that may or may not be interested in being in the utility business. This could be confusing to the system's customers. This is not in the public interest.

Second, even if MBU completes a land purchase within six months, then under Public Counsel's new proposal if MBU fails to acquire the property at a "reasonable price", MBU faces the real possibility of losing its assets. If Commission approval is granted (a condition of the sale), a sale takes place, MBU obtains the easement or real estate in question, and the reasonableness of the price is challenged by Public Counsel, no one can predict what might occur. There is no guidance on how to review the sale or to address how a party would determine if the price is "reasonable." Without proper guidance, more questions surface about the process and timeline related to determining the reasonableness of the purchase. The overwhelming question that the uncertainty highlights is which entity will be responsible for ensuring safe and adequate service while that determination of reasonableness is being made.

The proposed conditions also raise questions for those involved in the transaction, MBU, Mr. Plummer and Moore Bend – one of whom is not a party to this Application. Should the land sale be made a condition in the Commission's order, MBU may have a parcel of land, but if the price was not "reasonable," MBU may not have a utility to operate, MBU may face legal action if MBU attempts to back out of the purchase of the land, MBU will own land that it has no interest in owning because the

land should be used for utility services, and MBU may not recover the money that went toward the purchase of the utility's assets or the land that holds those assets. Likewise, Mr. Plummer has sold his land to someone to allow the utility legal access, but can no longer use it for such access.

Public Counsel's proposal, if approved, would create confusion for the current owner of Moore Bend as well. Moore Bend's owner might *think* he successfully left the regulated utility business and would be out of the business for at least six months. If such sale was not realized at all, or not reasonably realized, then the current owner would be the owner of the very system he sought to sell in this Application. Still, the fact would remain that this current owner will not have a legal written easement to access the wells and he would not have taken steps to purchase the property, especially since he believed the proposed purchaser in this case and the landowner were embarking on a transaction together, and there was no need for him to be involved in that transaction. He may deem the price reasonable when Public Counsel disagrees and still be left with the system he does not want to own or operate. Such a result is preposterous and not in the public interest.

Finally, Staff has agreed to include a six month time period for MBU to either obtain easements or purchase the property. There are many situations where six months is sufficient for a land sale to occur, but there are also many situations where such a short time is insufficient for such a sale to occur. Simply making it a condition of approval, as Staff proposes, requires MBU to achieve this goal in six months, but it allows for the unforeseen circumstances that often arise in getting purchase agreements to close timely to occur without significant penalty. The resulting penalty

under Staff's proposal is a complaint may be filed seeking penalties. Public Counsel's proposal would make it void exactly at the six month time limit.

Staff's amended recommendation allows for the purchase price of the land to be reviewed in a rate case that must be filed three years after approval. If it is determined that the purchase price of the land was unreasonable, a prudence disallowance of the excess price can be made. Thus, the utility customers are protected under Staff's proposal. Under Public Counsel's proposal, the customers are part of the waiting game that could ultimately result in losing safe and adequate service.

In this case, the potential acquirer of the assets, MBU, has indicated that it is willing to purchase the land on which the wells sit. In fact, Public Counsel and Staff received a letter dated August 6, 2012, from MBU's attorney asserting that MBU is negotiating the purchase of the well property, and the Commission's approval of the transfer is a condition precedent to MBU's obligation to close the purchase transaction. A copy of the letter is attached and incorporated by reference herein as **Appendix A**. The purchase described in the letter will alleviate all of the concerns Public Counsel cites regarding the land where the wells are located. It is illogical to require MBU to purchase land prior to Commission approval of this transfer.

Staff notes that as it was drafting this pleading, Staff received an email from Public Counsel indicating that this land transaction between MBU and the individual land owner may not occur. The undersigned counsel confirmed this information with MBU's attorney, but is unable to provide additional details to the Commission at this time. This confusion supports Staff's position that it is important to get this Application approved so it can assert its jurisdiction over MBU with necessary and reasonable

conditions. Concluding this transfer and making MBU the clear owner of the utility will allow it to negotiate as the clear owner and remove any cloud associated with who is bargaining on behalf of the utility. As it stands, the Commission cannot assert any jurisdiction or direction over the sale of the land because it is not utility-owned to date.

In contrast, Staff's amended recommendation solves the problem and is forward-looking. Staff's amended recommendation gives MBU six months to acquire ownership or written easement of the land after approval of the transfer. If within six months ownership is not obtained, Staff and/or Public Counsel may file a complaint against MBU and seek penalties. If the purchase of the land is completed, Staff and Public Counsel will have the opportunity to review the reasonableness and prudence of the transaction in the next rate case, which will occur within three years, as described in Staff's amended recommendation. Public Counsel's extra contingencies simply opens the door to more questions that leave all parties in a "wait and see" situation unnecessarily, and is not in the public interest. Staff's amended recommendation is a viable reasonable solution and in the public interest.

### **CONCLUSION**

In conclusion, Staff's amended *Recommendation* allows the Commission to:

- 1) approve the certificate;
- 2) include a condition that access to the well sites should take place within six months;
- 3) require the parties involved in obtaining such access to notify the Commission, Staff and Public Counsel when the access is granted by written easement or purchase agreement;
- 4) allow Staff and Public Counsel to review such legal documentation and access for prudence when the Company files its next rate

case; and 5) require any such rate case to be filed within three (3) years of the effective date of any Commission order approving this Application.

The language Public Counsel identifies in its August 2<sup>nd</sup> Response only guarantees that 1) access should be obtained within six months for a “reasonable price” and 2) if not, then the transfer is void<sup>10</sup>. No justification has been provided to support the proposal of this contingency, how it is in the public interest, or how it guarantees the continued provision of safe and adequate service. Additionally, as Staff has demonstrated above, it creates more questions and potential problems than providing a plausible resolution to the current situation.

Staff remains willing to amend its *Recommendation* as indicated in the *July 27<sup>th</sup> Response*, but objects to all of the additional language and contingencies included in Public Counsel’s August 2<sup>nd</sup> Filing.

**WHEREFORE**, Staff respectfully submits this *Staff Response and Objection to Public Counsel’s Proposed Contingencies* for the Commission’s information and consideration, and further requests that the Commission approve Staff’s Recommendation, as amended by its *July 27<sup>th</sup> Response*, along with any other relief the Commission deems appropriate.

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<sup>10</sup> If Public Counsel intended for other conditions to apply other than this six months or it would be void, that was not made clear in its most recent filing as Staff’s reading is that Public Counsel’s agreement lies solely with this condition being fulfilled.



Respectfully submitted,

**/s/ Rachel M. Lewis**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed, sent by facsimile or hand-delivered to all counsel of record this 13<sup>th</sup> day of August, 2012.

**/s/ Rachel M. Lewis**

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August 6, 2012

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Re: In the Matter of the Joint Application of Moore Bend Water Company, Inc. and  
Moore Bend Water Utility, LLC  
File No. WM-2012-0335

Dear Ms. Lewis and Ms. Baker:

I have received the recent filing regarding, at least at this time, my client Moore Bend Water Utility, LLC's ("MBU") lack of legal access to the well, which would be the source of water for my client.

The purpose of this correspondence is to advise you that at this time, MBU is attempting to negotiate the purchase of the well property with the owner. Needless to say, PSC approval of the transfer is condition precedent to my client's obligation to close the transaction, and unless we secure that approval, we will not be closing the transaction.

MBU would also like to have that purchase price of the well property be included in the rate-base valuation since it is an essential part of the overall water system. Once MBU negotiates a contract to acquire the well property, it will send the PSC all of the information regarding the same. The contract regarding the acquisition of the well property will be conditioned upon the PSC approval of the overall transaction.

Yours very truly,

David L. Wieland