

November 30, 2011

John H. Zawadsky, Esq.  
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DELIVERED BY FEDEX

Executive Secretary  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570-0001

Dear Executive Secretary:

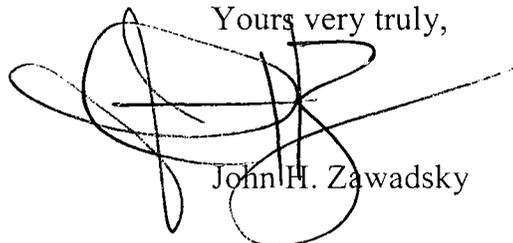
Re: Request for Review  
*NextEra Energy Operating Services  
LLC and International Union of  
Operating Engineers Local 150,*  
Case No. 33-UC-000181

Please find enclosed the original and eight copies of the Employer/Petitioner's Request for Review of the Regional Director's November 18, 2011 Decision and Order Dismissing Petition in the above-referenced matter.

Also enclosed is a Certificate of Service of the Request for Review on the Regional Director and on counsel for the Union.

Thank you for your time and attention in this regard.

Yours very truly,



John H. Zawadsky

REINHART\8063431JHZ:LT

Encs.

cc Claude T. Harrell, Jr., Regional Director (w/enc. by FedEx)  
Elizabeth A. LaRose, Esq. (w/enc. by FedEx)

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HLRB  
ORDER SECTION

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
SUBREGION THIRTY-THREE

NEXTERA ENERGY OPERATING  
SERVICES LLC,

Employer/Petitioner,

Case No. 33-UC-000181

and

INTERNATIONAL UNION OF  
OPERATING ENGINEERS LOCAL 150,

Union.

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**CERTIFICATE OF SERVICE**

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I, Laura I. Taggart, hereby certify that a copy of Employer/Petitioner's Request for Review of the Regional Director's November 18, 2011 Decision and Order Dismissing Petition in the above-referenced matter was served by Federal Express on Mr. Claude T. Harrell, Jr., Regional Director, National Labor Relations Board Region 14, 1222 Spruce Street, Room 8302, St. Louis, MO 63103-3818, and by Federal Express on counsel for International Union of Operating Engineers Local 150, Elizabeth A. LaRose, Esq., 6140 Joliet Road Countryside, IL 60525.

Dated this 30th day of November, 2011.

Reinhart Boerner Van Deuren s.c.  
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REINHART\8064190

A handwritten signature in black ink, reading "Laura I. Taggart", written over a horizontal line.

Laura I. Taggart  
Secretary to John H. Zawadsky  
WI State Bar ID No. 1008654

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NLRB  
ORDER SECTION

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION THIRTY-THREE**

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NEXTERA ENERGY OPERATING  
SERVICES LLC,

Employer/Petitioner,

Case No. 33-UC-000181

and

INTERNATIONAL UNION OF  
OPERATING ENGINEERS LOCAL 150,

Union.

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**REQUEST FOR REVIEW**

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The Employer-Petitioner, NextEra Energy Operating Services, LLC, hereby requests review pursuant to Section 102.67 of the Board's Rules and Regulations of the Regional Director's Decision and Order Dismissing Petition dated November 18, 2011 (attached hereto and incorporated herein), in the above-referenced matter on the following grounds:

1. The Regional Director's decision that the parties' Stipulation is clear and unambiguous raises a substantial question of law or policy because said decision is a departure from officially reported Board precedent.

The Stipulation in the instant case defines the bargaining unit as:

All full-time and regular part-time site technicians, central maintenance technicians, **business service technicians** and high voltage technicians employed by the Employer at its Shabonna, Illinois facility,

excluding all other employees, managers, **office clerical employees**, professional employees, guards and supervisors as defined in the Act.

The Regional Director found that because the Employer stipulated that the business service technician was in the bargaining unit, the Employer was precluded from seeking to exclude the business technician's status. Such a position is nonsensical.

First, the Stipulation is patently ambiguous. It is internally contradictory as to employees who are both business service technicians and "office clerical" employees. There was never a Stipulation that the business service technician was not an office clerical employee. That issue was simply not resolved by the Stipulation, therefore, the appropriate and only available forum in which to seek resolution of the business technician's status is via a unit clarification petition.

The Regional Director's decision is at substantial variance from Board precedent. *Kirkhill Rubber Co.*, 306 NLRB 559 (1992). In *Kirkhill*, the Board recognized that "it is not unusual for the Board to leave unresolved the status of employees who had voted under challenge during the election, but whose status was not determinative of the election results." *Id.* In such circumstances, following the election and certification, "the Board will process a unit clarification petition to determine the placement or status of the contested individuals." *Id.*

Indeed, in a very similar circumstance, the Board recognized the necessity of determining whether the employee in issue was in an excluded

category. *Business Records Corp.*, 300 NLRB 708 (1990). In that case, the stipulated unit included "inspectors" and excluded "electronic shop" employees. After first determining that the employee in issue was an inspector, the Board then held: "the sole determination to be made, regarding the challenge to Sutton's ballot, is **the factual question whether Sutton is an employee of the electronics shop and hence a member of an excluded category of employees.**" *Id.* (emphasis supplied).

2. The Regional Director's decision that the parties' Stipulation is clear and unambiguous raises a substantial question of law or policy because said decision would undermine the parties' confidence in relying upon representations made by Board personnel engaged in the Board's processing of election petitions.

In the instant case, evidence was presented at hearing that the petitioner "entered into the Agreement with the understanding that it could subsequently challenge Mr. Hoffman if it needed to after the election was held." Regional Director's decision at p. 2. The Regional Director upheld the Hearing Officer's ruling that such testimony "had no value towards the interpretation of the Agreement." *Id.*, n.1 at p. 2.

Such a ruling has the effect of stating that the clear directives and representations of Board agents have no value. The practical effect of such a ruling is that the parties should not enter into election agreements. Instead the parties should insist that unit issues be litigated regardless of the directives and

representations made by Board agents. Such precedent undermines the Board's policy favoring election agreements and the promotion of expeditious elections.

3. The Regional Director's decision that the parties' Stipulation is clear and unambiguous fails to acknowledge substantial record evidence; is clearly erroneous on the record; and such error prejudicially affects the rights of the Petitioner.

At hearing, there was also evidence introduced that the Union challenged a voter working in a position that is included in the unit description – the high voltage technician. (Transcript at 83-84). The Union's challenge of this voter prior to the election is at total variance with its post-election position that the Stipulation is clear and unambiguous. The Regional Director's failure to even acknowledge this evidence is manifestly prejudicial to the Petitioner and demonstrates that the parties did not view the Stipulation as precluding further litigation over the status of either business service or high voltage technicians.

4. The Regional Director's decision upholding the Hearing Examiner's finding that testimony regarding the employer's discussion with the Board agent regarding the terms of the Stipulation was irrelevant raises a substantial question of law or policy because said decision is a departure from officially reported Board precedent. The Board has long held that a party to a representation proceeding is entitled to rely upon the representations of a Board agent. *Navtar Corp.*, 109 NLRB 1278 (1954). NextEra entered into the stipulated unit "only because of the representation of a Board agent...it would be unfair to penalize

(NextEra) for acting on this advice." *Navtar Corp.*, 109 NLRB at 1279-1280. *See also, Carolina Power & Light Co.*, 119 NLRB No. 177 (1958). Given the inherent ambiguity in the Stipulation, "the Board must seek to determine the parties' intent through normal methods of contract interpretation, **including the examination of extrinsic evidence.**" *Caesar's Tahoe*, 337 NLRB No. 170, 170 LRRM 1344, 1346.

5. The Regional Director's decision finding that the business service technician (Mr. Hoffman) was a plant clerical employee fails to acknowledge substantial record evidence; is clearly erroneous on the record, and such error prejudicially affects the rights of the petitioner. The Regional Director does not acknowledge, let alone discuss, the overwhelming record evidence supporting a finding that the business service technician is an office clerical employee.

Undisputed record evidence the Regional Director ignored includes the following:

(a) The job description for the Business Service Technician which sets forth the job responsibilities as including: maintenance of records, data retrieval/compilation, financial reporting and month end close. (Transcript at 130).

(b) The Business Service Technician is in a separate corporate division from the Wind Technicians. (Transcript at 137).

(c) The Business Service Technician performs over 90% of his job duties in NextEra's office on a laptop computer to which no one else has access. (Transcript at 24; 26).

(d) The only training provided to the Business Service Technician involves business processes and procedures. (Transcript at 36).

(e) The Business Service Technician is supervised by different management personnel than the Wind Technicians. (Transcript at 26; 116-117).

(f) The Business Service Technician performs the same business service technician duties at the company's wind farm in Horse Hollow, Texas as he does for the facility located in Shabonna, Illinois. (Transcript at 18; 130).

(g) The Business Service Technician performs computer-based forecasting duties (Transcript at 23; 96; 112-113); purchasing of supplies (Transcript at 35; 105-108); preparing and revising budgets (Transcript at 112); vendor maintenance (Transcript at 102-103); composition of monthly accruals (Transcript at 111); drafting monthly and weekly reports (Transcript at 112); preparation of daily production and output reports (Transcript at 100-101); maintenance of all required records for Sarbanes-Oxley compliance (Transcript at 132); and preparation of inventory relief logs (Transcript at 34; 102; 108).

All of the foregoing duties have been consistently recognized as the responsibilities of an office clerical. The Regional Director's failure to acknowledge the overwhelming record evidence of the business service technician's performance of such duties is in error.

6. The Regional Director's decision finding that the business service technician was a plant clerical employee raised a substantial question of law or policy because of the departure from officially reported Board precedent.

Overwhelming Board precedent dictates that: "Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals..." *Mitchellace, Inc.*, 314 NLRB No. 95, 146 LRRM 1305, 1307 (1994). Numerous Board cases support this proposition. *Genesis Health Ventures*, 326 NLRB No. 116 (1998); *Peco Energy Co.*, 322 NLRB No. 197 (1997); *Cook Composites and Polymer Co.*, 313 NLRB No. 189 (1994).

For the foregoing reasons, NextEra Energy Operating Services respectfully requests that its Request for Review be granted.

Dated this 30th day of November, 2011.

Respectfully submitted,

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Attorney for NextEra Energy  
Operating Services LLC

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 33

NOV 22 2011

NEXTERA ENERGY OPERATING SERVICES,  
LLC

Employer-Petitioner

and

Case 33-UC-000181

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 150, AFL-CIO

Union

DECISION AND ORDER DISMISSING PETITION

The Employer-Petitioner, NextEra Energy Operating Services, LLC, here called the Employer, operates a wind farm in Shabbona, Illinois. On June 24, 2011, in Case 33-RC-5185, the International Union of Operating Engineers Local 150, AFL-CIO, here called the Union, was certified as the exclusive collective-bargaining representative for all site technicians, central maintenance technicians, business services technicians, and high voltage technicians employed by the Employer at its Shabbona wind farm, excluding all other employees, managers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On July 5, 2011, the Employer filed this petition under Section 9(b) of the National Labor Relations Act seeking to clarify the unit to exclude the business services technician position from the bargaining unit. A hearing officer of the Board held a hearing, and the Employer and the Union filed briefs with me, which I have carefully considered.

At the hearing, counsel for the Employer stated the issue to be determined is whether an office clerical employee, Matt Hoffman, should be excluded from the unit.

Contrary to the Employer, the Union contends that Hoffman is a business services technician, a classification specifically agreed as being part of the unit in the Stipulated Election Agreement, here called the Agreement, approved on May 25, 2011. Because the unit description is clear, the Union argues that clarification is not appropriate.

While admitting that Hoffman is classified as a business services technician, the Employer argues the unit description in the Agreement is ambiguous because Hoffman is an office clerical employee, a position excluded from the unit. Counsel for the Employer testified that in the course of discussions with the Board agent regarding the Agreement in Case 33-RC-5185, the Union sought to exclude the high voltage technician from the unit while the Employer sought to exclude Mr. Hoffman. He added that in the course of those discussions, the Employer entered into the Agreement with the understanding that it could subsequently challenge Mr. Hoffman if it needed to after the election was held.<sup>1</sup> At the election, the Employer challenged Hoffman's ballot. However, because the number of challenged ballots was insufficient to affect the results of the election, the issue was not resolved in Case 33-RC-5185. In light of the above, the Employer argues it has properly preserved its position to raise the issue of Hoffman's status in this proceeding.

After careful consideration of the evidence and arguments presented by the parties, I find that the Agreement is clear and unambiguous, and specifically includes Hoffman's position as business services technician as part of the bargaining unit. Moreover, I find that the Employer

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<sup>1</sup> Shortly following this testimony, the Union objected to the relevancy of testimony concerning the Board agent's alleged advising to the attorney that the Union was proposing a Norris-Thermador list. The objection was on the ground that such testimony had no value towards the interpretation of the Agreement. It appears that the hearing officer sustained some or all of the objection. However, it is not clear if the ruling applied only to the Norris-Thermador testimony or also to the testimony concerning the Board agent's alleged assertions that the Employer could challenge Hoffman's ballot after the election. Regardless, in light of my determination, the hearing officer's ruling was not prejudicial.

has failed to establish that Hoffman is an office clerical employee. Accordingly, unit clarification is not warranted and I shall dismiss the petition.

#### I. OVERVIEW OF OPERATIONS

The Employer is engaged in the generation of energy and operates wind farms in several states. The Employer's wind farm in Shabbona, Illinois is the only facility at issue in these proceedings. The Shabbona wind farm occupies an area of approximately ten by ten miles and consists of 145 turbine towers that use the wind to generate energy. The energy generated is converted into electricity and stored/distributed at a substation on the farm. The wind farm employees work out of an office building located near the substation. The office building contains three offices, a conference room, a communications room, a tool room and shop containing a locked inventory storage area.

As of May 2011, 13 employees and a site lead worked at the wind farm. The site lead supervises the farm and performs managerial functions. Eleven of the 13 employees were classified as either site technician or central maintenance technician. As of the date of hearing, these two classifications had been reduced to 6 site technicians and 2 central maintenance technicians. At all times, the only other employees on the site have been one high voltage technician and the business services technician Hoffman.<sup>2</sup>

All of the employees at the facility work in jeans and steel-toed boots. The site technicians work in pairs and are mainly responsible for troubleshooting the turbines. They spend 90% of their time working outside on turbines when the weather permits. The central maintenance technicians also work in pairs. They perform preventative maintenance on the

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<sup>2</sup> The record reflects that the business services technician classification was previously known as plant technical and notwithstanding the name change, the duties and responsibilities of the position have not changed.

turbines and spend a significant amount of time outdoors. The high voltage technician is responsible for operating the electricity substation.

Business services technician Hoffman spends 90% of his time in the office building. However, he does go outside to deliver parts or tools to the site and central maintenance technicians. He is responsible for preparing monthly reports establishing the facility's productivity and power output. The reports indicate the amount of time the wind farm is shut down due to low electricity prices. Hoffman also does daily budget forecasting. Hoffman also orders and receives parts and supplies, communicates with vendors, and logs parts that have been issued. He does not perform receptionist duties such as answering telephones and he does not routinely prepare correspondence. Most of his work is performed on a computer. Unlike the other employees at the facility, Hoffman's supervisors are located in Iowa and Texas. Additionally, Hoffman serves as the business services technician for a smaller wind farm in Texas. When Hoffman takes time off, his responsibilities are performed by a business services technician located at a different Illinois facility.

The employees generally work from 7 a.m. until 3:30 p.m., excluding overtime work.<sup>3</sup> The workday begins with a meeting for all employees in the office building. During this 15 to 30-minute meeting, employees discuss operational issues, including possible inventory concerns raised by Hoffman. The meeting ends with everyone except the site lead and high voltage technician performing stretching exercises.

After the morning meeting, Hoffman generally goes into the office to work on the computer while the site and central maintenance technicians work outside on the turbines. Hoffman generally eats lunch in the office with the site and central maintenance technicians.

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<sup>3</sup> Hoffman rarely works overtime. It is not clear how much overtime is performed by the other employees.

Through the day, he interacts with the other employees on regular occasions when they come to the building.

Each week, Hoffman and the other employees perform safety observations of each other and enter the results into a computer. Hoffman has also worked on quality improvement stories with the other technicians. These are narratives describing a problem and proposing a solution.

Like the site and central maintenance technicians, Hoffman has been authorized to climb turbines and has been trained to perform CPR. He also participates in a company-wide online learning system.

Hoffman is able to perform certain site and central maintenance technician functions such as resetting the turbines by computer and performing the Employer's version of a lockout tagout procedure. Further, in order for site and central maintenance technicians to be promoted, they must be familiar with completing the business services technician's reports.

Hoffman is paid hourly, as are the other unit employees. All employees enter their hours into a computer system. The employees may all contribute to a 401(k) plan.

## II. ANALYSIS

In resolving eligibility issues in stipulated unit cases, the Board has adopted a three-part analysis. First, the Board must determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community of interest test. *Desert Palace, Inc. d/b/a Caesars Tahoe*, 337 NLRB 1096 (2002).

Here, the Agreement clearly and unambiguously includes the classification of business services technician in the unit. The Employer admits that Hoffman is classified as such and, in fact, admits that Hoffman is the only business service technician employed at the Shabbona wind farm. In light of the above, no other evidence need be examined. The Board has consistently found that a stipulated election agreement is a binding contract to which the parties will be held, and that the Board will not examine extrinsic evidence to determine the parties' intent regarding bargaining unit composition if the unit description of the agreement is expressed in clear and unambiguous terms, *South Coast Hospice, Inc.*, 333 NLRB 198 (2001); *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997). Moreover, the Employer does not assert that the position has undergone any changes since it stipulated to the inclusion of the business services technicians. The Employer also does not claim any new and previously undiscovered evidence impacts the unit placement of the business services technician. In these circumstances, the Employer is bound by its agreement and cannot challenge the unit placement of the business services technician following its voluntary stipulation to his inclusion in the unit. *Premier Living Center*, 331 NLRB 123 (2000); *South Coast Hospice, Inc.*, *supra*.

Assuming, for the sake of argument only, that the Agreement is ambiguous because it simultaneously includes business services technicians while excluding office clerical employees (establishing some kind of either/or choice for Hoffman's eligibility) I find upon examining the duties of the business services technician position, that the Employer has failed to establish that Hoffman is an office clerical employee. Concededly, Hoffman performs some clerical functions. However, the great bulk of his work is more closely allied to the daily operations of the facility than to general office operations. Thus, his duties more closely resemble those of a plant clerical employee rather than an office clerical employee. Indeed, the previous designation of the

business services technician position as a “plant technical” is indicative of his role. Historically, the Board has taken the position that plant clericals are normally included in production and maintenance units while office clerical employees are excluded. In light of the fact that the Employer has failed to establish that Hoffman’s duties are office clerical functions, I find that he does not fall within that unit exclusion. *Desert Palace, Inc. d/b/a Caesars Tahoe*, supra. Accordingly, in accordance with the parties’ Agreement, he is appropriately included within the unit as a business services technician.

### III. CONCLUSION AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer’s rulings made at hearing are free from prejudicial error and are hereby affirmed.<sup>4</sup>
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.
3. The Union is a labor organization within the meaning of the Act.
4. The bargaining unit currently represented by the Union shall not be clarified as requested by the Petitioner.

### IV. ORDER

IT IS HEREBY ORDERED that the petition is dismissed.

### V. RIGHT TO REQUEST REVIEW

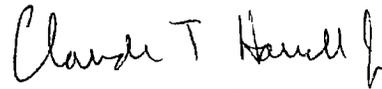
Under the provision of Section 102.67 of the Board’s Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

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<sup>4</sup> In light of the determination, the Union’s September 9 Motion to Quash Notice of Hearing and October 5 Motion to Reply or Strike are moot.

Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by December 2, 2011. The request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>5</sup> but may not be filed by facsimile.

Dated in St. Louis, Missouri, this 18th day of November 2011.



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Claude T. Harrell Jr., Regional Director  
National Labor Relations Board  
Region 14, Subregion 33  
1222 Spruce Street, Room 8.302  
St. Louis, Missouri 63103-2829

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<sup>5</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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NLRB  
ORDER SECTION

From: (608) 229-2200  
John Zawadsky  
Reinhart Boerner, Van Deuren s c  
22 East Mifflin Street, Suite 600

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**National Labor Relations Board**  
**1099 14th St NW**

**Washington, DC 20570**

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**THU - 01 DEC A1**  
**STANDARD OVERNIGHT**

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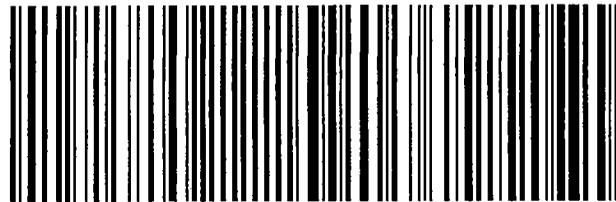
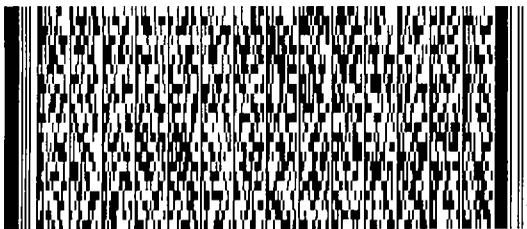
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