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September 9, 2005

Luly Massaro
Clerk
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Pawtucket Water Supply Board – Docket No. 3674

Dear Luly:

As you know, this office represents the Town of Cumberland.

Enclosed for filing in this matter are an original and nine copies of The Town of Cumberland's Objection to Pawtucket Water Supply Board's Motion to Strike Testimony and Request for Miscellaneous Relief. Copies have been sent to the service list.

If you have any questions, please feel free to call.

Very truly yours,

Michael R. McElroy

MRMc:ecm
Cumberland:Massaro11
cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: PAWTUCKET WATER SUPPLY BOARD : DOCKET No. 3674
GENERAL RATE FILING :

THE TOWN OF CUMBERLAND'S OBJECTION TO PAWTUCKET WATER SUPPLY BOARD'S MOTION TO STRIKE TESTIMONY AND REQUEST FOR MISCELLANEOUS RELIEF

The Pawtucket Water Supply Board (PWSB) has asked the Commission to strike the testimony of Thomas Bruce, the Finance Director of the Town of Cumberland, and to terminate the party status of Cumberland as an intervenor in this docket. Cumberland objects to this motion.

ARGUMENT

I. STANDARD OF REVIEW

The Commission is, of course, obligated under RIGL § 39-1-1(c) to "provid[e] full, fair, and adequate administrative procedures and remedies." With regard to the admissibility of the testimony of Mr. Bruce, PWSB claims that Mr. Bruce is unqualified to testify as an expert witness. In order for the Commission to properly determine this matter, the guiding principles for the admission of evidence before the Commission must be examined. The most important provision governing the admission of evidence is RIGL § 39-1-11 entitled "Proceedings before commission", which provides in pertinent part that "the commission shall not be bound by technical rules of evidence."

The Rhode Island Supreme Court has reinforced the directive of this statute and has held in the case of Valley Gas Co. v. Burke, 446 A.2d 1024 (R.I. 1982), that:

> "Initially, we observe that the Public Utilities Commission is not bound by technical rules of evidence. Providence Gas Co. v. Berman, 119 R.I. 78, 105, 376 A.2d 687, 701 (1977); G.L.1956 (1977 Reenactment) § 39-1-1, as amended by P.L. 1979, ch. 95, § 2; accord, New England Telephone & Telegraph Co. v. State, 113 N.H. 92, 101—02, 302 A.2d 814, 821 (1973)."

Next, this statutory directive is reinforced and explained by Commission Rule 1.22(a) dealing with "Rules of Evidence". This Rule states in pertinent part that:

> "While the rules of evidence as applied in civil cases in the Superior Courts of this state shall be followed to the extent practicable, the Commission shall not be bound by technical evidentiary rules, and, when necessary to ascertain facts not reasonably susceptible of proof under the rules, evidence not otherwise admissible may be submitted, unless precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." (Emphasis added)

In addition, Rule 1.20(d) provides in part that "parties shall have the rights to present evidence", and Rule 1.5(e) provides:

> "All pleadings shall be liberally construed and errors or defects therein which do not mislead or affect the substantial rights of the parties involves shall be disregarded."

Even though the Rhode Island Rules of Evidence do not need to be strictly applied, they have some bearing on this issue. For example, Rule 401 provides:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Moreover, the Advisory Committee's Note to Rule 401 provides that "to be admissible, evidence need pass only a low threshold of relevancy."

Rule 402 provides:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the constitution of Rhode Island, by act of congress, by the general laws of Rhode Island, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible."

Rule 601 provides:

> "Every person is competent to be a witness except as otherwise provided in these rules or by statute."

Rule 602 provides:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself or herself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witness."

With regard to opinions and expert testimony, limited opinions can be given by lay witnesses, and more expansive opinions can be given by expert witnesses. With regard to opinions given by lay witnesses, Rule 701 provides:

> "Opinion testimony by lay witnesses. – If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or determination of a fact in issue."

With regard to experts, Rule 702 provides:

> "Testimony of experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion."

The Advisory Committee's Note to Rule 702 provides in part that:

> "Qualifying expert witnesses is a matter addressed to the discretion of the trial court and absent a showing of abuse, the Supreme Court will not disturb the exercise of that discretion. Leahey v. State, 121 R.I. 200, 397 A.2d 509 (1979); Anderson v. Friendship Body & Radiator Works, Inc., 112 R.I. 445, 311 A.2d 288 (1974); Schenck v. Roger Williams Hosp., 119 R.I. 510, 382 A.2d 514 (1977); Atlantic Ref. Co. v. Director of Pub. Works, 102 R.I. 696, 233 A.2d 423 (1967).; Redding v. Picard Motor Sales, Inc., 102 R.I. 239; 229 A.2d 762 (1967). 'Prime considerations in determining whether a witness is qualified includes evidence of the witness's education, training, employment, or prior experience.' State v. Villani, 491 A.2d 976 (R.I. 1985) See also State v. Ashness, 461 A.2d 659 (R.I. 1983)."

Rule 702 has been interpreted by the Supreme Court many times. For example, in Beaton v. Malouin, 845 A.2d 298 (R.I. 2004), an expert witness's testimony was limited by the trial court. However, the Supreme Court reversed the decision of the trial judge and ruled that:

> "A witness qualifies as an expert as long as his or her 'knowledge, skill, experience, training, or education' [can] deliver a helpful opinion..."
>
> * * *
>
> We deem the exclusion of this testimony to be error. The fact that the witness's opinion was based on various assumptions is a factor that goes to the weight of the witness's testimony and not its admissibility."(Emphasis added)

In the recent case of State v. D'Alessio, 848 A.2d 1118 (R.I. 2004), it was argued that the Rhode Island medical examiner was unqualified to offer her expert opinion that the cause of a baby's death was shaken-baby syndrome. It was argued that the medical examiner was not a qualified expert because she was admittedly not a specialist in the field of neuropathology, and she "had limited experience with shaken-baby syndrome." The Supreme Court affirmed the trial court's rejection of the motion to disqualify her expert opinion, and in doing so ruled as follows:

> "In determining whether a witness is qualified to testify as an expert, "[p]rime considerations ***include evidence of the witness's education, training, employment, or prior experiences." State v. Villani, 491 A.2d 976 (R.I. 1985). Rule 702 does not require that a proffered expert have a formal certification or specialization in a particular field...As we explained, "[t]he fact that [the surgeon] is not a specialist in the orthopedic field might bear upon the weight given to his testimony, but does not affect the admissibility of his testimony." Id.
>
> * * *
>
> [T]his Court has held that Dr. Laposata...despite the fact that she was not an expert in ballistics, was qualified to offer her opinion about how a bullet that was lodged in a victim's leg became deformed. State v. Rieger, 763 A.2d 997, 1004-05 (R.I. 2001).
>
> * * *
>
> Clearly, Dr. Laposata had sufficient 'education, training, employment, or prior experiences' to offer her opinion that Gianna died of shaken baby syndrome. Villani, 491 A.2d at 979.
>
> The fact that Dr. Laposata was not a certified expert in neuropathology did not render her unqualified to offer her expert opinion in this case...[A]s we concluded in Leahey, the fact that Dr. Laposata was not a specialist in neuropathology might bear on the weight of her testimony, but not its admissibility." (emphasis added)

In a PUC case which presented an issue similar to that presented here, Providence Gas Co. v. Burman, 376 A.2d 687, 119 RI. 78 (R.I. 1977), Providence Gas introduced the testimony of Herbert Steere, its Assistant Treasurer, who presented exhibits to the Commission concerning financial adjustments resulting from the use of various ratemaking principles. During the course of his testimony it was discovered "that Steere was almost totally unfamiliar with the various principles to which he applied his figures." Later in the hearings, a rate analyst for Providence Gas supported certain adjustments to the test year results included in Mr. Steere's exhibits. Then "the company produced an expert in ratemaking principles, who 'concurred' in what the exhibits proported to represent and supported the utilization of the ratemaking principles upon which Steere's figures were based." (at 103)

A motion was made to strike Mr. Steere's expert testimony "on the grounds that he did not possess the requisite expertise, and accordingly his exhibits were meaningless." (at 104) It was argued to the Commission that this testimony "cannot be retroactively validated by the experts who subsequently testified." (at 104) It was also argued that the exhibits were filed in violation of RIGL § 39-1-12 because they had not been prefiled. The Commission allowed the testimony to remain part of the record, and on appeal to the Supreme Court, the Court affirmed the Commission's decision admitting the testimony. In doing so, the Supreme Court reaffirmed that the Commission "shall not be bound by technical rules of evidence", holding as follows:

> "The basic problem here is that the foundation for Steere's testimony was laid after his exhibits were received. However, § 39-1-11 provides that at a hearing 'the commission shall not be bound by technical rules of evidence.' The testimony offered by the other experts provided a sufficient basis for the commission to 'analyze the data' and adjustment figures proposed by Steere.

> Moreover, we do not find that the commission abused its discretion by allowing the late-filed testimony to lend support for Steere's testimony. Lastly, the commission found, as a matter of fact, that there was sufficient evidence before it to determine the justifiability of Steere's recitation. We see no reason to disturb the findings." (at 105, emphasis added)

II. MR. BRUCE'S TESTIMONY SUPPORTS ADMISSION

We have established that an expert need not "have a formal certification or specialization in a particular field." Guided by the overriding statutory principle in RIGL 39-1-1 that "the commission shall not be bound by technical rules of evidence", and also guided by Commission Rule 1.22, which provides that evidence is admissible "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs", an examination of the substance of Mr. Bruce's testimony will demonstrate that it is admissible. Any questions regarding the extent of Mr. Bruce's expertise can be explored on cross-examination and can be considered by the Commission in evaluating the weight of Mr. Bruce's testimony.

Pages 1-2 of Mr. Bruce's testimony summarizes his duties and responsibilities in his current position as Cumberland Finance Director, including his responsibilities as they relate to water bills. It also summarizes his professional experience as a Finance Director in a number of other municipalities, as a Fiscal Officer for the City of Providence, and as the owner of a software firm devoted to utility firms serving clients in 27 states and Canada. In addition, his educational background is shown, and this includes a Bachelor's Degree in Management with a concentration in Accounting, as well as graduate courses in Accounting and Finance. Clearly, all of this testimony is admissible and goes directly to an

assessment of Mr. Bruce's "knowledge, skill, experience, training, or education" as provided in Rule 702.

On page 2, Mr. Bruce apologizes to the Commission for Cumberland's disregard of the Commission's discovery Rules in the last PWSB docket. Also on page 2, Mr. Bruce states that he personally believes that the proposed Cumberland surcharge would unfairly discriminate against Cumberland ratepayers. That is an expression of personal opinion of the Finance Director of Cumberland which is unquestionably admissible, whether as an expert opinion under Rule 702 or an opinion by a lay witness under Rule 701.

On the bottom of page 2, Mr. Bruce testifies regarding the facts of the ongoing Superior Court appeal by PWSB of its tangible tax. This is a recitation of facts, not opinion, and is clearly admissible.

On page 3, Mr. Bruce testifies that as Finance Director he has set up a reserve in the Town's fund balance to take care of the possibility of any refund to PWSB in case of an unfavorable court ruling or settlement in the pending tangible tax litigation. This is all clearly within Mr. Bruce's personal knowledge and area of responsibility.

On pages 3-4, Mr. Bruce summarizes the valuations imposed on PWSB's tangible property from 1997 through 2005, together with the associated taxes. All of this is factual information. It is based on Mr. Bruce's personal knowledge as Finance Director from the files and business records of Cumberland.

At the bottom of page 4, Mr. Bruce calculates what he believes will be PWSB's tangible property tax bill for 2006 (i.e. the rate year), which is within his duties and responsibilities as Finance Director.

Next, Mr. Bruce explains that Cumberland's previous tax assessor surveyed 38 of the municipalities in the State of Rhode Island and determined that all of them taxed gas pipelines at the tangible tax rate, and that 9 of them also taxed water pipes at the tangible tax rate. This is information obtained from the business records of Cumberland by its Finance Director and is factual information, not opinion.

At the bottom of page 5, and going over to page 6, Mr. Bruce conveys to the Commission the information he received from the attorney representing Cumberland about the pending tax litigation. Again, this is factual information.

On pages 6-7, Mr. Bruce summarizes the information set forth in the valuation analysis prepared by Cumberland's Tax Assessor, which he attached as Exhibit 1 to his testimony. Once again, he is testifying as the Finance Director of the Town to factual information in Cumberland's files and business records.

On page 7, Mr. Bruce is testifying that he believes that the tangible items taxed benefit the entire PWSB system. As the Finance Director of the Town, as a former Finance Director of other cities and towns, as a former Fiscal Officer for the City of Providence, and as a person educated and trained in Accounting and Finance, Mr. Bruce is qualified to render this opinion.

On page 8, Mr. Bruce expresses his understanding that the usual ratemaking rule for the collection of taxes is to spread the cost across the entire utility system. However, he freely admits that his knowledge about this is limited to information he obtained from his participation in the last PWSB full rate filing and the testimony presented by Mr. Woodcock and Mr. Catlin in that filing, which is all a matter of public record.

On page 8, Mr. Bruce states that he feels that the proposed surcharge would be discriminatory. Moreover, he states that if such a surcharge were implemented, in order to be consistent, there would have to be surcharges in the case of any other "special benefit" items in a utility system. He gives as an example the $9.4 million estimated costs in this docket to replace 11 miles of the Central Falls distribution pipes, to clean an additional 2 miles of that pipe, and to replace valves and hydrants in Central Falls, none of which benefits Cumberland. However, Cumberland is being asked to pay its fair share without a Central Falls surcharge. Page 9 provides a second similar example, again using information from this filing regarding the relining of Pawtucket's distribution pipes. All of this factual information is all drawn directly from the rate filing put together by PWSB, and Mr. Bruce is entitled as a financial and accounting expert to analyze this information.

At the top of page 10, Mr. Bruce refers to data responses received in the last PWSB rate case, which are a matter of public record and on file with the Commission, and are clearly admissible. He also refers to PWSB's attempt to obtain a statutory exemption for its pipes from taxation, which again is a matter of public record.

The top of page 11 summarizes the findings of the Commission's data responses in the last rate case, which are a matter of public record. The rest of page 11 discusses the over $500,000 requested by PWSB for the tax surcharge in this case, and compares this amount to the amount requested by PWSB as a surcharge in the last rate case, all of which is a matter of public record in the case and is fact, not opinion testimony.

On page 12, Mr. Bruce explains that in his capacity as Finance Director, he has been informed that the PWSB Superior Court appeal regarding taxation is the exclusive

remedy available to PWSB to challenge the tangible taxation, and PWSB should not be asking this Commission to impose a surcharge regarding those taxes.

On the bottom of page 12 and the top of page 13, Mr. Bruce agrees with testimony presented by Mr. Catlin in the last PWSB full rate case regarding the general rule for collecting taxes and the previous rejection of a surcharge for "special benefit" pump stations by this Commission, all of which was testified to by Mr. Catlin. Mr. Bruce is simply agreeing with Mr. Catlin's observations.

On the bottom of page 13 and the top of page 14, Mr. Bruce is testifying to potential problems that he sees as an experienced Finance Director which could arise from the proposed surcharge. He discusses the potential for tax rates changing, valuations changing, and other matters that are all within the scope of his duties and responsibilities as Finance Director.

On pages 14-15, Mr. Bruce, as a long time Finance Director of a number of municipalities, explains why he believes that Pawtucket and Central Falls have not taxed the water pipes in their jurisdiction. (This is because Pawtucket and Central Falls own their respective pipes and would not normally tax themselves.)

On page 15, Mr. Bruce discusses the recent trend of wholesale purchases by the Cumberland Water Department and illustrates how Mr. Woodcock's wholesale estimate for the 2006 rate year appears to be too low based on Cumberland's usage for the last three years. These are facts from Cumberland's business records and are not opinions.

On pages 15-16, Mr. Bruce asks the Commission to consider the sheer size of the proposed surcharge in determining whether or not to implement it, and emphasizes that, if

implemented, there would be a 37.3% increase in water rates to Cumberland ratepayers, but only a 16.7% increase in rates to all other PWSB ratepayers.

As can be seen from a review of Mr. Bruce's direct testimony, there is, in fact, very little testimony in which he expresses expert opinion. Almost all of his testimony is based on facts, personal knowledge, and/or information obtained from public records, such as previous PUC dockets and/or public business records in Cumberland. In the very limited areas in which Mr. Bruce has expressed an expert opinion, Cumberland submits that Mr. Bruce is qualified to express those opinions based on his "knowledge, skill, experience, training, or education" as set forth in Rule 702. Mr. Bruce, with (1) his education in the areas of finance and accounting, (2) his training, employment, and prior experiences as a Finance Director of various municipalities, and as a Fiscal Officer of the City of Providence, and (3) his experience as the owner of a software firm servicing public utilities, is an expert witness.

PWSB argues that Mr. Bruce cannot testify because he has not been demonstrated to be an expert PUC regulatory ratemaking witness. Mr. Bruce has not held himself out as a PUC regulatory expert. He has, however, held himself out as an expert in finance and accounting. This Commission accepts evidence from persons trained and skilled in the areas of finance and accounting on a regular basis. Moreover, the Supreme Court has specifically ruled that an expert need not be a specialist in the particular field under discussion in order for the expert's testimony to be admissible. The issue of specialization goes to the weight of the testimony, not its admissibility.

Remember that in the D'Alessio case, a medical examiner, who was not a specialist in neuropathology and had limited experience with shaken-baby syndrome, was allowed to

testify regarding whether shaken-baby syndrome was the cause of a baby's death. The Supreme Court concluded that the medical examiner was properly allowed to testify. She did not need to be a specialist in neuropathology or to have specific experience with shaken-baby syndrome, but her lack of training in neuropathology and her lack of experience with shaken-baby syndrome would go to "the weight of her testimony, but not its admissibility." The same is true here.

Clearly, Mr. Bruce is an expert. His admitted lack of specialized PUC regulatory experience is something that can be explored on cross-examination and can be considered by this Commission in evaluating the weight of Mr. Bruce's testimony, but it is not something that should call for this Commission to strike the testimony of Mr. Bruce, especially in light of the fact that, by statute, this Commission is "not bound by technical rules of evidence." (RIGL § 39-1-11)

III. CUMBERLAND'S INTERVENOR PARTY STATUS SHOULD NOT BE TERMINATED

PWSB has also asked the Commission to terminate the intervenor party status of Cumberland under Rule 1.13(e). However, this request is not properly before the Commission. PWSB simply does not have the authority to move to terminate the party status of an intervenor. Such a motion can only be made by the Commission itself "on its own motion after notice and hearing" as specifically provided for in Rule 1.13(e). Therefore, this request should be summarily rejected because it is not properly before the Commission.

Even if the request were properly before the Commission, however, the request should be denied. Cumberland and its water users are major customers of PWSB. There are a number of retail customers of PWSB in the Valley Falls area of Cumberland who would be substantially and significantly impacted by the proposed surcharge. Moreover, the Cumberland Water Department, which is currently the only wholesale purchaser of water from PWSB, and its ratepayers, would also be substantially and significantly impacted by the proposed surcharge, which PWSB proposes to assess against both the Cumberland retail and the Cumberland wholesale water purchasers (even though the distribution pipes serve only the Cumberland retail customers). It is routine for wholesalers to participate as intervenors in water rate dockets. As only one example, the Kent County Water Authority routinely participates in water rate dockets of the Providence Water Supply Board. Cumberland therefore has an important interest in this matter and is entitled to be heard.

Although it is not entirely clear from PWSB's motion what the exact grounds are in support of its request to terminate Cumberland's intervenor status, it appears that PWSB believes that "full participation at hearings should not be afforded to a party who has avoided full participation prior to the hearing by skirting the Commission's rules." (at 6) However, Cumberland has not skirted the Commission's Rules in this matter, and PWSB's claims to the contrary are not accurate.

PWSB's recitation of previous common dockets is irrelevant to this determination. Each docket stands on its own, and the Commission took the actions it felt were appropriate with regard to Cumberland in Dockets 3378 and Docket 3497. PWSB's attempts to subject Cumberland to "double jeopardy" by asking this Commission to

terminate Cumberland's intervenor status in this docket because of matters which occurred in two previous dockets is improper. Moreover, Mr. Bruce has apologized for Cumberland's admitted failure to comply with the Commission discovery Rules in Docket 3497, and Cumberland was sanctioned by the Commission in Docket 3497 by having its intervenor status limited. Those dockets are now closed.

It is true, however, that in Docket 3497 the Commission ruled that "in the future, full intervention will only be allowed to a movant if that movant makes an affirmative showing that it will be filing pre-filed testimony." Cumberland does not understand how PWSB could claim that Cumberland has, in any way, violated this directive in Docket 3497.[1] Cumberland made an affirmative showing in this docket that it would be filing pre-filed testimony. Consistent with this showing, Cumberland pre-filed on a timely basis the direct testimony of Mr. Bruce, which Cumberland now seeks to strike. This motion to strike was filed by PWSB about a month after Mr. Bruce's testimony was filed, and only about a week before the hearings are set to begin.

Cumberland has also recently pre-filed the surrebuttal testimony of Mr. Bruce, of David Russell, a regulatory ratemaking expert, and of Christopher Collins, Superintendent of the Cumberland Water Department. This testimony was all timely filed. Cumberland has accordingly not "disregarded the Commission's rules of practice and procedure" as PWSB has incorrectly alleged. (at 3)

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[1] It is also questionable whether the Commission can, in a ratemaking order, amend its rules and regulations regarding party intervention and establish a new "rule" that intervenors must pre-file testimony in order to be allowed intervention. Under the Administrative Procedures Act, such a modification to the Commission's Rules would require a rulemaking proceeding, and cannot be done in the form of an order in a particular docket for many reasons, not the least of which is the fact that only the parties to that case would be aware of the order.

PWSB's arguments regarding Cumberland's data responses (all of which were either timely filed or filed ahead of time) is similarly unavailing. PWSB incorrectly argues that "each of the answers is provided solely by Cumberland's attorney" (yet acknowledges that it is "customary for legal counsel to occasionally respond to data requests") (at 4). However, the data response attached to Cumberland's motion clearly shows that it was not solely Cumberland's attorney who provided the information for the data responses. The attached response to Division Request No. 3 was "Prepared by: Michael R. McElroy, attorney for the Town of Cumberland, with input from Thomas Bruce". (Emphasis added) Mr. Bruce is fully prepared to be cross-examined on the data responses that he participated in, as he has testified to in his surrebuttal testimony, and PWSB's argument that Cumberland's attorney "would have to be called as a witness to explore the information in the data responses" is simply not the case.

Finally, PWSB's claim that "Cumberland will once again be able to question witnesses and challenge witnesses without having to face any scrutiny of their position" (at 6) is not true. Cumberland has presented three witnesses who are prepared to undergo cross-examination and scrutiny of their position from all parties and the Commission. Cumberland has not in any way delayed these proceedings. If there is any delay, the fault lies with PWSB, who waited an entire month to file its motion to strike the testimony of Mr. Bruce, thereby pushing the briefing and oral argument on this motion directly into the scheduled evidentiary hearings.

IV. CONCLUSION

Cumberland respectfully submits that PWSB's motion to strike the testimony of Thomas Bruce and to terminate the intervenor party status of the Town of Cumberland should be denied.

Respectfully submitted,
Town of Cumberland
By its attorney

Date: September 9, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2005, I mailed a true copy of the foregoing by first class mail to the following:

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