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March 10, 2009

VIA HAND DELIVERY

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: The Narragansett Electric Company d/b/a National Grid v. The City of Providence, et al
Docket No. 4028

Dear Luly:

I am enclosing an original and 10 copies of National Grid's Motion for Summary Judgment and Memorandum of Law in Support thereof in the above-reference matter.

Please file stamp the provided copy of this letter and Petition and return with our courier.

Thank you.

Sincerely,

Peter V. Lacouture

PVL/lgo
Enclosures

cc: Adrienne G. Southgate, Esq.
Patricia S. Lucarelli, Esq.
Cynthia Wilson-Frias, Esq.
John Spirito, Jr., Esq.
Leo J. Wold, Esq.
Michael R. McElroy, Esq.
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID, Plaintiff,	:	
v.	:	Docket No. 4028
THE CITY OF PROVIDENCE; and SETH YURDIN; CLIFF WOOD; KEVIN JACKSON; NICHOLAS J. NARDUCCI, JR.; MICHAEL A. SOLOMON; JOSEPH DELUCA; JOHN J. IGLIOZZI; LEON F. TEJADA; MIGUEL LUNA; LUIS A. APONTE; BALBINA A. YOUNG; TERRENCE HASSETT; JOHN J. LOMBARDI; PETER S. MANCINI; JOSEPHINE DIRUZZO, in their official capacities as members of the Providence City Council; Defendants.	:	

NARRAGANSETT ELECTRIC COMPANY d/b/a/ NATIONAL GRID
MOTION FOR SUMMARY JUDGMENT

The Narragansett Electric Company d/b/a National Grid ("National Grid") moves for summary judgment on its petition seeking nullification of an Ordinance passed by the City of Providence ("Providence" or "City") affecting the placing, erection, and maintenance of National Grid's underground and above-ground gas and electric lines and/or gas or electric metering equipment. National Grid relies upon the accompanying Memorandum of Law in support of its Motion.

Respectfully submitted,

THE NARRAGANSETT ELECTRIC CO.
d/b/a NATIONAL GRID

By its attorneys,

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Dated: March 10, 2009

Movant's Rule 1.15(b) Certification

Pursuant to Rule 1.15(b) of the PUC Rules of Practice and Procedure, the above-listed counsel certify that they conferred in good faith with opposing counsel and that the Motion for Summary judgment will be opposed.

CERTIFICATION

I hereby certify that a copy of this Motion for Summary Judgment has been sent via first class mail and by email on this 10th day of March, 2009, to the following counsel:

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

THE NARRAGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID, Plaintiff,	:	
v.	:	Docket No. 4028
THE CITY OF PROVIDENCE; and SETH YURDIN; CLIFF WOOD; KEVIN JACKSON; NICHOLAS J. NARDUCCI, JR.; MICHAEL A. SOLOMON; JOSEPH DELUCA; JOHN J. IGLIOZZI; LEON F. TEJADA; MIGUEL LUNA; LUIS A. APONTE; BALBINA A. YOUNG; TERRENCE HASSETT; JOHN J. LOMBARDI; PETER S. MANCINI; JOSEPHINE DIRUZZO, in their official capacities as members of the Providence City Council; Defendants.	:	

NARRAGANSETT ELECTRIC COMPANY d/b/a/ NATIONAL GRID
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Narragansett Electric Company d/b/a National Grid ("National Grid") moves for summary judgment on its petition seeking nullification of an Ordinance passed by the City of Providence ("Providence" or "City") affecting the placing, erection, and maintenance of National Grid's underground and above-ground gas and electric lines and/or gas or electric metering equipment.

The Public Utilities Commission (the "PUC") should nullify the Ordinance for three reasons. First, the City's attempt to regulate the location of gas meters, lines, and regulators is preempted by federal law because the City is not a state authority certified by the U.S. Department of Transportation. Second, the Ordinance is preempted by state law because the General Assembly intended the PUC to completely occupy the field with respect to the location

of electric meters. Third, as evidenced by a Settlement Agreement entered into by the City and National Grid, the Ordinance's permitting process for sidewalk and street excavation is against the public interest, and the City's Ordinance violates the Commission-approved Settlement Agreement as well as the rules of equity.

STATEMENT OF UNDISPUTED FACTS

On or about December 12, 2008, Providence, acting through its City Council, enacted an Ordinance Amending chapter 23 of the Providence Code of Ordinances (the "Ordinance"). Providence, R.I. Ordinance ch. 2008-48 (Dec. 12, 2008). The Ordinance prohibits utilities from installing exterior meters, metering equipment or regulators on any residential structure without the written consent of the property owner; and it authorizes the Providence Housing Court to impose fines for violations. Id. §§ 23-33, 23-34. The Ordinance also requires utilities to engage in a lengthy sixty-day municipal permitting process when seeking to "alter, install, or upgrade equipment located upon or under any public street or sidewalk, or upon or under any private property." Id. § 23-35. Under the terms of the permitting process, before a utility can engage in any work, it must submit a project plan to the City's Department of Planning and Development, which has thirty days to make recommendations to the City Council, after which the City Council has another thirty days to determine whether it will approve the plan. Id.

STANDARD OF REVIEW

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, no material questions of fact exist and the moving party is entitled to a judgment as a matter of law. Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1117 (R.I. 2004). A party opposing a motion for summary judgment has an affirmative duty to set forth specific facts to show that there is a genuine issue of material fact to be resolved and "cannot rest on

allegations or denials in the pleadings or the conclusions or on legal opinions." Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999). If the opposing party cannot establish the existence of a genuine issue of material fact, summary judgment must be granted. Grande v. Almac's Inc., 623 A.2d 971, 972 (R.I. 1993).

ARGUMENT

I. THE ORDINANCE IS PREEMPTED BY FEDERAL LAW BECAUSE THE CITY DOES NOT HAVE AUTHORIZATION FROM THE U.S. DEPARTMENT OF TRANSPORTATION TO REGULATE GAS METERS AND REGULATORS

To the extent the Ordinance seeks to regulate the placement of gas meters, lines, and regulators, it is expressly preempted by federal law. Preemption refers to the displacement of state or local law by federal law on the same subject. Algonquin LNG v. Loqa, 79 F. Supp. 2d 49, 50 (D.R.I. 2000). Express federal preemption occurs when Congress expressly manifests an intent to preempt state or local law. Id. The Natural Gas Pipeline Safety Act, 49 U.S.C. § 60104(c) (the "NGPSA"), contains an express federal preemption provision that preempts all state regulation in the area of intrastate pipeline safety, except where a "state authority" has submitted a current certification and only if the state authority's standards are compatible with minimum federal standards.[1] Southern Union Co. v. Lynch, 321 F. Supp. 2d 328, 338-39 (D.R.I. 2004) ("Southern Union I").

Installation of a customer's gas meter, and the process of reconnecting or reactivating gas at a customer's home, both fall within the scope of the NGPSA as intrastate pipeline facilities.

[1] 49 U.S.C. § 60104(c) reads in pertinent part: "Preemption.—A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter."

Southern Union I, 321 F. Supp. 2d at 340, 341.[2] It is undisputed that the Division of Public Utilities and Carriers (the "DPUC") is the only entity in Rhode Island that can submit proposed intrastate pipeline regulations to the U.S. Department of Transportation. Southern Union Co. v. R.I. Pub. Util. Comm'n, 2006 U.S Dist. LEXIS 7726, at *10 (D.R.I. 2006) ("Southern Union II"). The City, therefore, is not a "state authority" certified by the U.S. Department of Transportation with the power to regulate gas meters and regulators.

Attempts to regulate matters controlled by the NGPSA, including gas meters and regulators, "without concomitantly submitting the necessary certification statements to the Secretary of Transportation renders the [new regulations] invalid and federally preempted." Southern Union I, 321 F. Supp. 2d at 342. Because the City is not certified, the City Ordinance is expressly preempted by the NGPSA, and National Grid's motion for summary judgment should be granted.

II. THE ORDINANCE IS PREEMPTED BY STATE LAW BECAUSE THE GENERAL ASSEMBLY INTENDED THE PUBLIC UTILITIES COMMISSION TO HAVE EXCLUSIVE AUTHORITY TO REGULATE ELECTRIC METERS

The PUC has exclusive authority to regulate the placement of electric meters on residential property under the doctrine of implied state preemption of local law. In Rhode Island, it is a fundamental principle that municipal ordinances are inferior to state laws, and ordinances inconsistent with state law of a general character and statewide application are invalid. Town of East Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992). State preemption of municipal law "works as a limitation on the exercise of inherent police powers by a governmental body when the purported regulation relates to subject matter on which superior government authority

[2] Natural gas pipes, meters, and installation at a customer's home are within the ambit of intrastate pipeline safety. See Southern Union I, 321 F. Supp. 2d at 338-41 (discussing the NGPSA and its accompanying federal regulations).

exists." Id. "[A] municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject." Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (R.I. 1999).

The doctrine of implied state preemption does not require a clear statement by the Legislature of its intention to preempt local legislation. O'Neil, 617 A.2d at 109. "[S]tate laws of statewide application pre-empt municipal ordinances on the same subject if the Legislature intended that they thoroughly occupy the field." Id. Where such is the case, an ordinance will be declared invalid even if it does not disrupt the state's overall scheme of regulation on public-utility issues. Id.

In O'Neil, the Rhode Island Supreme Court reviewed the propriety of a municipal ordinance that created a three-year moratorium on the construction of electric transmission lines. 617 A.2d at 106. The Court found that R.I. Gen. Laws § 39-1-1 et seq., (the "Public Utilities Act"), preempted the municipal ordinance by implication because the Legislature intended the PUC to completely occupy the field of electricity regulation. O'Neil, 617 A.2d at 110. The Court reasoned that the Public Utilities Act gives the PUC "the exclusive power and authority to supervise, regulate and make orders governing the conduct of public utilities." Id. The Public Utilities Act is "replete with examples of the broad reach of the [PUC's] authority," which demonstrate that the Legislature "has imparted vitality to the PUC by giving it power and the jurisdiction to enforce its regulations." Id. O'Neil also noted that a recent legislative enactment specifically related to electric transmission lines further confirmed preemption. Id. Since the statutory framework of the Public Utilities Act brings a comprehensive approach to resolving collective problems concerning utilities, the Court concluded that the Legislature intended the

PUC to address "the myriad of complex problems associated with regulatory proceedings, and render intelligent decisions." Id.

As in O'Neil, the Legislature intended the PUC to have exclusive power and authority to supervise, regulate, and make orders governing the placement of electric meters at residences. The Public Utilities Act dictates that "[s]upervision and reasonable regulation by the state of the manner in which [utilities] conduct their systems and carry on their operations within the state are necessary to protect" the people of the state. R.I. Gen. Laws § 39-1-1(a)(2) (emphasis added). The Act also vests the PUC and the DPUC with "the exclusive power and authority to supervise regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . for the purpose of increasing and maintaining efficiency of the companies, according desirable safeguards and convenience to their employees and the public." Id. § 39-1-1(c).

The Legislature's usage of "by the state" and "exclusive power and authority" in § 39-1-1 demonstrates that the PUC has exclusive authority to regulate electricity utilities. See Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006) ("The plain meaning of the statute is the best indication of the General Assembly's intent.") It is only in specific and limited circumstances that the General Assembly, by statute, has seen fit to grant municipalities regulatory power over activities that fall within the PUC's jurisdiction. See In re: Petition for Review Pursuant to 39-1-30 of Ordinance Adopted by Providence, 745 A.2d 769 (R.I. 2000) ("Petition for Review"). In Petition for Review, the Court found that the City had authority to regulate street excavations and reconstructions, even when the proposed regulations impacted public utilities. 745 A.2d at 775. Crucial to the Court's reasoning in Petition for Review was the finding that the General Assembly required municipalities to maintain roadways. Id. at 774; see also R.I. Gen. Laws. §

24-5-1 (requiring that roads "shall be kept in repair" at the "proper expense and charge of the town"). Equally crucial to the Court's decision was the General Assembly's imposition of liability on municipalities for failure to maintain roadways. Petition for Review, 745 A.2d at 774; R.I. Gen. Laws. § 45-15-18. The Court also noted that the state roadway statute requires utilities to restore roadways after excavation and that the statutory scheme provided that restoration after excavation in city streets would be subject to the oversight and control of the city. R.I. Gen. Laws. § 24-5-1.1. The Court concluded that "a municipality's regulating the excavation and refilling of roadways—for which activity towns have long been held responsible and liable in the event of damages—does not clearly invade a field that the state has intentionally occupied, to the exclusion of cities and towns." Petition for Review, 745 A.2d at 775-76. Even then, the Court held that the PUC had the authority to nullify the provisions of the ordinance to the extent that they unreasonably burdened the provision of utility service.

By contrast, in this case, the General Assembly does not require municipalities to maintain electric (or gas) meters. Nor has the General Assembly imposed liability on municipalities for improper installation of electric meters. See R.I. Gen. Laws §§ 39-2-7, 39-2-8 (imposing liability on public utilities). Instead, the statutory structure concerning electric meters demonstrates the PUC's exclusive regulatory authority. As an initial matter, the General Assembly requires that the PUC's regulatory powers "shall be interpreted and construed liberally." R.I. Gen. Laws § 39-1-38. The PUC "shall have, in addition to powers specified in this chapter, all additional, implied, and incidental power which may be proper or necessary." Id. This language makes clear that the PUC has broad regulatory power for subjects within its jurisdiction.

Further, the General Assembly's grant of authority to the PUC to regulate electric meters is a strong indicator of implied preemption. See O'Neil, 617 A.2d at 110 ("By bringing transmission lines within [state agency jurisdiction], the General Assembly has more directly pre-empted future municipal enactments in this area.") Several statutes directly address the PUC's power to regulate electric meters. For example, § 39-3-7 gives the PUC authority to determine the "character of each kind of product or service to be furnished or rendered by each public utility, and standard condition or standard conditions pertaining to furnishing or rendering the same." The DPUC is required to prescribe regulations for examining, testing, and measuring utility products and services, and it must "establish reasonable rules, regulations, specifications, and standards to secure accuracy of all meters and appliances for measurement." R.I. Gen. Laws § 39-3-8; see also § 39-3-9. The PUC can also promulgate standards for system reliability, including net-metering. Id. § 39-1-27.7(a)(1)(iv). The General Assembly also recently enacted renewable energy standards that affect the PUC's regulation of meters. See id. § 39-26-2 et seq.

These statutes, and others, demonstrate that the General Assembly intended the PUC to occupy the field with respect to electric meters. In the exercise of its legislatively delegated authority, the PUC has approved the terms and conditions of the Company's electric tariffs which provide that "[m]eters of either the indoor or outdoor type shall be installed by the Company at locations to be designated by the Company. The Company may at any time change any meter installed by it. The Company may also change the location of any meter or change from an indoor type to an outdoor type, provided that the cost of the change shall be borne by the Company . . . ." RIPUC No. 1197, section 10.

Any parallel authority delegated to the City must yield in the face of the General Assembly's intention to declare invalid any ordinance that disrupts the overall scheme of

regulation on public utility issues. See O'Neil, 617 A.2d at 109. The Rhode Island Supreme Court has ruled that even where state statutes permit municipalities to exercise authority over certain matters, those municipal ordinances would be stricken when they crossed into areas that were part of a broad statewide scheme. The Court struck down a municipal ordinance that purported to regulate high voltage electric power transmission lines, even though a state statue allows municipalities to enact ordinances, "not repugnant to law . . . to regulate the putting up and maintenance of telegraph and other wires and their appurtenances." R.I. Gen. Laws § 45-6-1(a). On its face then, § 45-6-1(a) provides municipalities with authority to regulate the placement of electric wires within its jurisdiction. Nevertheless, the O'Neil Court found that municipal regulation concerning power lines was preempted by state law. 617 A.2d at 110. The Court reached this result notwithstanding the town's power to enact ordinances concerning "wires and their appurtenances." The outcome should be the same here. The City's local zoning authority must yield to the PUC's statewide regulatory authority.[3]

In sum, "the PUC has the exclusive power and authority to supervise, regulate and make orders governing the conduct of public utilities." Town of East Greenwich v. Narragansett Elec. Co., 641 A.2d 725, (R.I. 1994) (negating a municipal comprehensive plan that impacted the location of transmission lines). "By granting this authority to the PUC, the General Assembly has expressed its intent to entirely preempt town and city regulatory activity in the field of public utilities regulation." Id. "This regulatory activity need not be disruptive or otherwise inconsistent with the state's regulatory scheme." Id. "[A]s long as a town or a city's enactment invades the expressly reserved field of public utilities regulation, the enactment is preempted." Id.

[3] See Munroe v. Town of East Greenwich, 733 A.2d 703, 710 (R.I. 1999) ("[z]oning, land development and subdivision regulations constitute a valid exercise of police power, and are matters of statewide concern," particularly where the General Assembly enacts state laws of statewide application.)

Accordingly, the City cannot regulate the placement of electric meters on residential property, and the Commission should grant the Company's motion for summary judgment and nullify the Providence Ordinance.

III. THE CITY IS ESTOPPED FROM ENFORCING STREET AND SIDEWALK EXCAVATION REQUIREMENTS THAT VIOLATE THE COMMISSION-APPROVED SETTLEMENT AGREEMENT BETWEEN IT AND NATIONAL GRID

National Grid is entitled to summary judgment because the PUC approved a Settlement Agreement concerning similar issues between the parties two months before the City enacted the Ordinance. In 2008, National Grid, the City, and other utilities entered into a Settlement Agreement that set standards for street and sidewalk excavations. In the Settlement Agreement, National Grid and the City agreed that the standards were "fair, reasonable, and in accordance with regulatory policy." (Settlement Stipulation and Consent Order at 4.) The explicit purpose of the Settlement Agreement was to balance the needs of the City against the needs of National Grid and other utilities. See Petition for Review, 745 A.2d at 776. As such, under R.I. Gen. Laws § 39-1-30 and equitable principles, the City cannot unilaterally promulgate an Ordinance that contains more onerous permitting requirements than those the City agreed to a mere two months earlier.

Following the Supreme Court's Petition for Review decision in 2000, the parties entered into mediation over proper standards for sidewalk and street excavation. After years of negotiation, mediation, and partial settlement, the parties concluded and the PUC approved the Settlement Agreement between the parties on October 6, 2008. (Petition for Review Pursuant to § 39-1-30 of Ordinances adopted by the City of Cranston and the City of Providence, Docket No. 2641, Order (Order No. 19465, Oct. 22, 2008)). In pertinent part, the parties agreed that the "issuance of a permit by a Municipality for Utility Installation, repair, maintenance or upgrade

work in any public way within the Municipality's jurisdiction shall be subject to the Standards" in the Settlement Agreement. (Standards To Be Employed By Public Utility Operations § 3.0.) Among other things, the Settlement Agreement required the City to "make its best efforts to issue a permit within seven days" after submission by National Grid or another utility. (Id. § 3.4.) This provision was entered into in recognition of the need utilities have to complete construction work in a timely manner, subject to the time constraints of the weather-dictated construction season and the needs of customers and developers to coordinate their obtaining utility service with arrangements with private electricians and plumbers. Moreover, the settlement's construction Standards are both specific and comprehensive. Those standards govern all areas of roadway excavation and re-surfacing, including compaction requirements and even permitting fees.

Only two months after the Commission's approval of the settlement agreement, the City promulgated the Ordinance on December 12, 2008. It purports to replace the seven-day permitting process in the Settlement Agreement with a lengthy sixty-day review conducted by the City Council and the City's Department of Planning and Development. See Providence, R.I. Ordinance ch. 2008-48 § 23-35 (Dec. 12, 2008).

When reviewing municipal ordinances concerning street and sidewalk excavations, the PUC decides the matter by "giving consideration to its effect upon the public health, welfare, comfort, and convenience." R.I. Gen. Laws § 39-1-30. "It is clear and unambiguous that the Legislature intended that the PUC use a 'public interest' standard." Petition for Review, 745 A.2d at 776. The PUC must "seek to harmonize the need of the municipality to maintain its highways with the need of the utility companies to provide services." Id. at 775. "The dual obligations must coexist and be accorded as effective a balance as is practicable in a given set of

circumstances." Id. The PUC is empowered to set aside municipal roadway ordinances that are "unduly or unreasonably burdensome or restrict the ability of the utilities to perform necessary tasks." Id. at 776.

Petition for Review made clear that the public interest standard in § 39-1-30 can be achieved by "compromise settlement" between the parties. 745 A.2d at 776 (describing the provisions of a Cranston settlement agreement approved by the PUC as "in the interest of the public"). The Settlement Agreement in this case states explicitly that the standards described therein are "fair, reasonable, and in accordance with regulatory policy." (Settlement Stipulation and Consent Order at 4.) It was the stated understanding of the settling parties that the seven-day permitting procedure in the Settlement Agreement is in the public interest and balances the needs of the City and the needs of National Grid. Nevertheless, just two months later and in flagrant violation of the Settlement Agreement, the City unilaterally enlarged the permitting review period by nearly ten-fold, to sixty days. As a matter of law, such an expansion is unreasonably burdensome to National Grid and against the public interest. Moreover, the new Ordinance violates the settlement terms, which were approved by this Commission.

Further, under equitable principles, the City is estopped from enforcing onerous permitting requirements that are incompatible with the Settlement Agreement. Equitable estoppel is available against municipalities when "representations were designed to induce plaintiff's reliance thereon; and that plaintiff actually and justifiably relied thereon to its detriment." El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1234 (R.I. 2000). National Grid and other utilities—including intervenors in the instant matter—agreed to the seven-day permitting review period after years of negotiation with the City. As late as October 2008, the City represented to National Grid that the standards in the Settlement Agreement were "fair,

reasonable, and in accordance with regulatory policy." (Settlement Stipulation and Consent Order at 4.) Just two months later, however, the City reversed course and changed the permitting review process to sixty days. Because National Grid actually and justifiably relied on the City's commitment to the seven-day permit when it signed the Settlement Agreement, the City is estopped from enforcement of the Ordinance.

Conclusion

The PUC should nullify the City Ordinance affecting the placing, erection, and maintenance of National Grid's underground and above-ground gas lines and/or gas or electric metering equipment. The City cannot regulate the location of gas meters, lines, and regulators because it is not a certified state authority and is preempted by federal law. The City cannot interfere with the location of electric meters because the General Assembly intended the PUC to completely occupy the field and the Ordinance is preempted by state law. Finally, as a matter of law, the Ordinance's permitting process for sidewalk and street excavation is against the public interest, and the City's attempt to change the terms of the Settlement Agreement violates the rules of equity.

Respectfully submitted,

THE NARRAGANSETT ELECTRIC CO.
d/b/a NATIONAL GRID

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Dated: March 10, 2009

CERTIFICATION

I hereby certify that a copy of this Memorandum of Law in Support of Motion for Summary Judgment has been sent via first class mail and by email on this 10th day of March, 2009, to the following counsel:

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