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BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 04-12

JOINT REPLY TO PETITIONS FOR RECONSIDERATION OF THE
INTERNATIONAL SHIPPERS' ASSOCIATION AND THE
AMERICAN INSTITUTE OF SHIPPER ASSOCIATIONS, INC.

submitted by

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TRANSPORTATION LEAGUE
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BAX GLOBAL INC.
FEDEX TRADE NETWORKS TRANSPORT
& BROKERAGE, INC.**

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Dated: January 24, 2005

**JOINT REPLY TO PETITIONS FOR RECONSIDERATION OF THE
INTERNATIONAL SHIPPERS' ASSOCIATION AND THE
AMERICAN INSTITUTE OF SHIPPER ASSOCIATIONS, INC.**

The foregoing non-vessel operating common carriers ("NVOCCs") and national trade associations representing intermediaries and their shipper customers (collectively, the "Joint Commenters") hereby submit this Reply to the Petition for Reconsideration submitted by the International Shippers' Association ("ISA") filed on January 7, 2005 ("ISA Petition") and to the Petition for Reconsideration submitted by the American Institute for Shippers' Associations, Inc. ("AISA") filed on January 11, 2005 ("AISA Petition") (together, the "Petitions").

The Petitions seek various revisions to Section 531.3(o) of the Federal Maritime Commission's ("Commission's") Final Rule on Non-Vessel Operating Common Carrier Service Arrangements ("NSAs") adopted in Docket No. 04-12 ("Final Rule"). The Joint Commenters will show that the Petitions do not support reconsideration of the Final Rule in any respect. The Petitioners erroneously argue that the Final Rule is legally flawed; incorrectly assert that the agency has misconstrued the statute; and wrongly contend that the agency has failed to follow applicable precedent.¹

I. The Commission's Action Was Fully Within Its Statutory Authority

Petitioners argue that the Commission exceeded its congressionally mandated authority by promulgating the Final Rule since Congress ultimately decided to limit service contract authority to vessel-operating common carriers ("VOCCs"). Although the Shipping

¹ Both Petitions asked the Commission both to reconsider and to stay its decision. On January 19, 2005, these Joint Commenters filed a Joint Reply to the Request for Stay filed as part of both Petitions, which Joint Reply was directed solely to the request for stay and certain procedural infirmities in both Petitions. This pleading is filed as a single reply to both the ISA Petition for Reconsideration and the AISA Petition for Reconsideration, since the two Petitions make many of the same arguments. This Joint Reply is a directed solely to the substantive arguments set forth in both Petitions.

Act's legislative history is noteworthy, it does not restrict the FMC's authority to examine matters that clearly fall within the confines of Section 16.² As described below, the Commission properly exercised its expanded authority under Section 16 (a result of the OSRA amendments to the Shipping Act); adopted a rule that will not "result in substantial reduction in competition or be detrimental to commerce"³; and, most importantly, tailored the Final Rule to reflect the congressional mandate to place a greater emphasis on marketplace developments. The Final Rule is also consistent with other Commission Section 16 exemptions—each responding to Congress' desire that the agency enjoy expanded exemption authority to meet unforeseen developments in the marketplace that may not be consistent with legislative history.⁴

The statutory language of the Shipping Act authorizes the Commission to grant exemptions for "any specified activity of those persons from any requirement of this Act if it

² See 46 U.S.C. App. § 1715.

³ *Id.*

⁴ The standard of review for an agency's interpretation of its authority is supplied by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The FMC's interpretations of the 1984 Shipping Act are entitled to Chevron deference. Chemical Manufacturers Ass'n v. FMC, 900 F.2d 311, 314 (D.C.Cir.1990). Under the well-known Chevron doctrine, a court reviewing an agency's interpretation of a statute it administers must first determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the review ends there: the court must give effect to the unambiguously expressed intent of Congress. However, if a court determines that Congress has not directly addressed the precise issue, it then determines whether the agency's interpretation is based on a permissible construction of the statute. In this second step, the court must accord considerable weight to the agency's construction of the statute and it may not substitute its own construction of the statute for the agency's reasonable interpretation. If an agency's decision regarding a final agency rule is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, a court will not disturb an agency's decision. See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. EPA, 768 F.2d 385, 389 (D.C.Cir.1985); see also American Petroleum Inst. v. EPA, 52 F.3d 1113, 1117-18 (D.C.Cir.1995). Under the Chevron doctrine, courts have held that significant discretion is granted to agencies to determine how much deregulation is appropriate under certain statutes or rules it administers or promulgates. See, e.g., Association of American Railroads v. Surface Transp. Bd., 161 F.3d 58, 63-64 (D.C. Cir. 1998). After a Chevron analysis, the Court of Appeals found that the FMC reasonably interpreted the 1984 Act when the FMC determined that valid Maritime Administration orders could authoritatively exempt certain carriers from Section 10(c)(6) prohibitions; the court determined that such exemption authority was a policy question, one requiring a balancing of the pro-competitive interests behind Section 10(c)(6) and the rival demands of other policies, such as the promotion of the American merchant marine, entrusted to the agency. See Sea-Land Serv., Inc. v. Dep't of Transp., 137 F.3d 640, 644-45 (D.C.Cir.1998).

finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce The Commission may attach conditions to any exemption and may, by order, revoke any exemption.”⁵ It has been well-documented throughout this proceeding that there must *only* be a finding that an exemption request “will not result in substantial reduction in competition or be detrimental to commerce.”⁶ The Final Rule is based on the FMC’s determination that the Section 16 standards had been satisfied and that “the carriage of cargo by NVOCCs under individualized arrangements concerns ‘specified activity’ [u]sed in Section 16 and that the tariff-publication requirement . . . [i]s a ‘requirement’ of the Shipping Act”⁷ Additionally, the Final Rule responds to marketplace changes that have occurred since 1998 and provides shippers and NVOCCs with an expanded range of commercial options. Thus, the Final Rule keeps with congressional intent⁸ that the FMC should exercise its exemption authority to further the deregulatory effects of the OSRA, and is consistent with OSRA’s overall objective of further deregulating the ocean shipping industry.

The unambiguous nature of the Section 16 statutory language refutes the Petitioners’ claims that the OSRA legislative history somehow prohibits promulgation of the Final Rule. The FMC’s exemption authority clearly applies to (1) “any specified activity;” (2) “persons” (*i.e.*, regulated entities); and (3) from “any requirement of [the Act].”⁹ As noted above, each

⁵ *Id.*

⁶ *Id.*

⁷ *See* 69 FED. REG. at 63,985 (Nov. 3, 2004).

⁸ We note that FMC Chairman Steven R. Blust remarked after the NSA vote that “. . . [t]he [NSA] Rulemaking will provide shippers with a broader range of service options, and greater opportunities for integrated supply chain solutions. I am confident that, as the use of NSAs develops over time, they will ultimately lead to greater competition and a more efficient shipping industry.” *See* FMC Press Release (Dec. 15, 2004) at www.fmc.gov/Pressreleases/NR%2004-17%20Final%20Rule%20Docket%20No%2004-12.htm.

⁹ 46 U.S.C. App. § 1715.

of these points applies to the Final Rule and the FMC has demonstrated that utilizing its Section 16 authority is proper in the context of a *voluntary* tariff publication exemption coupled with authority for NVOCCs to offer individualized service arrangement for the carriage of goods by water in U.S. foreign commerce.

It is well-established that when a statute's text is unambiguous, no examination of legislative history is necessary.¹⁰ Moreover, it is worth noting that the legislative history pertaining to the so-called Gorton Amendment reflects a very different international ocean shipping industry than exists today.¹¹ Finally, OSRA was a product of compromise among various segments of the ocean shipping industry and public. It took over six years and two congresses to enact the OSRA amendments to the Shipping Act. Since the bill that eventually became OSRA was born out of compromise, the legislative history should be applied cautiously. Thus, despite the Petitioners' claims that the OSRA legislative history bars implementation of the Final Rule, it would be improper to rely on the same history given the differences between final enactment of the bill and the numerous and sometimes contradictory congressional deliberations.¹²

Importantly, although Congress ultimately decided to limit service contracting authority to VOCCs, it also refined and expanded the FMC's Section 16 exemption authority to deal timely and effectively with unforeseen and changing aspects of the international

¹⁰ See footnote 4 *supra*.

¹¹ There is no need to recount how the international liner shipping environment has changed since 1998; the record in the NSA rulemaking (and in each of the related petitions filed in 2003 and 2004) more than adequately illustrates these developments. The mere presence of companies like UPS, BAX Global, DHL-Danzas, FedEx Trade Networks, and the united participation of key trade associations (*i.e.*, NIT League and TIA) in this proceeding demonstrate the dynamic evolution of the industry over the past six years and the importance of the Final Rule to the industry and public.

¹² Given the range of reasons for rejecting a proposed amendment, consideration of its rejection should be exercised cautiously when interpreting a statute. See Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L.Rev. 1125, 1133 (1983).

ocean shipping environment.¹³ It has been noted that when facts and circumstances change dramatically (such as those that have affected the regulated entities before the Commission here), congressional deliberations surrounding a piece of legislative action become even less relevant. Moreover, the U.S. Supreme Court has upheld regulatory rulemakings that arguably appear counter to legislative history when such history only reflected a regulated industry's state at the time the law was enacted.¹⁴

Lastly, the Final Rule is consistent with a series of recent decisions by the FMC pursuant to its Section 16 authority. Each of the prior decisions responded to changes in the marketplace that were not present when Congress passed specific provisions in the Shipping Act. In April and September 2004, the FMC granted requests from four controlled carriers for Section 16 exemptions from certain tariff publication and adherence requirements of the Shipping Act.¹⁵ Each of the controlled carriers argued that granting their exemption request would advance competition and commerce by increasing ocean transportation options for shippers.¹⁶ The so-called "controlled carrier provisions" of the Shipping Act reflect

¹³ See S. Rep. No. 105-61 at 30.

¹⁴ See generally Pattern Makers League of North America, AFL-CIO v. National Labor Relations Board, 473 U.S. 95 (1985). In this case, the Supreme Court upheld action by the NLRB, notwithstanding the regulatory decision appeared to be contrary to legislative history. The Court explained that the legislative history had no application since it was based on circumstances that existed in labor relations when the statute was enacted—but had changed dramatically prior to the agency's action. See *id.* at 110. Also, in Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission, 650 F.2d 1235 (D.C. Cir. 1980), the court held that the FMC had rulemaking authority that arguably was inconsistent with the Shipping Act's legislative history (*i.e.*, Shipping Act, 1916) and amendments due to changed circumstances in the shipping industry necessitating an increased role of the FMC. The court found that the FMC had authority to address—through a rulemaking—the self-policing practices of steamship conferences, rather than on an *ad hoc* basis, as envisioned by the Shipping Act's legislative history. See *id.* at 1245-47.

¹⁵ See Dkt. No. P3-99, Petition of China Ocean Shipping (Group) Company, 30 SRR 187 (F.M.C., Apr. 1, 2004); Dkt. No. P4-03, Petition of China Shipping Container Lines, Ltd., 30 SRR 193 (F.M.C., Apr. 1, 2004); Dkt. No. P6-03, Petition of Sinotrans Container Lines Co., Ltd., 30 SRR 197 (F.M.C., Apr. 1, 2004); and Dkt. No. P5-04, Petition of American President Lines, Ltd. and APO Co. Pte. Ltd., SRR _____ (F.M.C. Oct. 27, 2004). Each of the petitioners requested a full exemption from the first sentence of Section 9(c) of the Shipping Act.

¹⁶ See Dkt. No. P5-04, Petition of American President Lines, Ltd. and APO Co. Pte. Ltd., Dkt. No. P5-04, at 3 and 4.

congressional concern (dating to the late 1970s) with anti-competitive commercial activities typically associated with stated-owned and-controlled VOCCs.¹⁷ As is the case with the NVOCC industry, the controlled carrier landscape has indeed changed since Congress passed the original Controlled Carrier Act. Additionally, the FMC has the authority to exempt controlled carriers from Section 9(c) of the Shipping Act, despite the fact that regulation of controlled carriers was considered by Congress during consideration of OSRA.¹⁸ Thus, despite both the specific congressional intent of the controlled carrier provisions and the OSRA legislative history, ultimately the Commission agreed that each request satisfied the Section 16 exemption criteria and authorized the controlled carriers to reduce tariff rates immediately. This same analysis applies to the NSA Final Rule.

Thus, the FMC's Section 16 authority is not restricted by the OSRA legislative history. The Final Rule is pro-competitive, narrowly tailored (*i.e.*, *voluntary* tariff exemption for NVOCCs), beneficial to all segments of the ocean shipping community, and consistent with other Section 16 exemptions that respond to the market-driven benefits brought about by OSRA.

II. The Petitioners' Contention That the Agency Must Find that the Limitations on the Parties Who May Participate in NSAs Will Not Result in a Substantial Reduction in Competition is Erroneous As a Matter of Law and Fact

ISA argues that the Commission is required to apply the Section 16 exemption test – that is, it must find that the exemption will not substantially reduce competition or be detrimental to commerce – to each individual aspect of the final rule, and has not done so.

¹⁷ The “controlled carrier provisions” of the Shipping Act were originally drafted by Congress in response to the predatory rate behavior of steamship lines owned by (or associated with) the former Soviet Union.

¹⁸ See Comments of the National Customs Brokers and Forwarders Association of America in FMC Dkt. No. P5-04 at 3.

ISA Petition, at 5-6. Put another way, because the exclusion barring shippers' associations with NVOCC members from participating in NSAs as shippers was not subject to an independent analysis and finding on the subject of substantially reducing competition, the entire rule must fall. AISA's argument is couched in slightly different terms: the Commission's decision "fails to consider or adopt a less restrictive solution to its perceived antitrust problem." AISA Petition, at 3.

The Petitions by ISA and AISA share two common characteristics in their assertions regarding the absence of an FMC competitive analysis relating to the exclusion of shippers' associations with NVOCC members from participation in NSAs as shippers. First, neither cites a single legal authority to support their assertion: not a Commission ruling, nor a judicial decision, not even a treatise or article. That is not surprising, because the proposition that every element of a rule must be separately and independently subjected to the Section 16 exemption test is supported by neither the statute, precedent, nor logic. The rule selected by the FMC may indeed not be the least restrictive solution; a blanket exemption for all NVOCCs from tariff filing requirements would clearly be less restrictive, as the Department of Justice repeatedly pointed out in its filings before the Commission. But there is nothing in the statute or precedent to require the agency to impose the least restrictive solution.

Second, neither Petitioner provides a single fact, by way of verified statement or reference to published information or other sources, to support its assertion that the exclusion will substantially reduce competition between smaller NVOCCs and larger ones. Repetition of the same argument over and over does not expand the evidentiary basis on which it is grounded – which is, at this point, zero. Section 16 does not turn on whether a rule may result in "some" reduction in competition; it requires a showing that the reduction will be

“substantial.” Petitioners have addressed this requirement only with rhetoric. Under the final rule, shippers' associations with NVOCC members will continue to be able to contract for ocean transportation services as before, under service contracts offered by vessel operators or under tariffs offered by other NVOCCs.

The plain meaning of the language of Section 16 is clear: the Commission must consider an exemption's cumulative effect on competition. The statute imposes no obligation on the agency beyond that assessment, and it surely does not require the Commission to examine separately the details comprising that cumulative effect. Nor does the statute require the FMC to determine that the rule will benefit all stakeholders equally. It is clear from the supplemental information published with the final rule that the FMC conducted the required “substantial reduction in competition” analysis of the rule as a whole, fully aware of the condition imposed. *See Non-Vessel-Operating Common Carrier Agreements*, 69 Fed. Reg. 75,850, 75,851 (Dec. 20, 2004). Therefore, the FMC fully met the statutory requirement; further analysis of the exclusion, separate and apart from the rule, need not be conducted.

III. The Petitioners Are Incorrect That the Agency Has Unlawfully Redefined the Term “Shipper” in the Final Rule

ISA and AISA attack the Commission's prohibition against NVOCCs and shippers' associations with NVOCC members being shipper parties to NSAs on the basis that the Shipping Act includes NVOCCs and shippers' associations within the definition of “shipper.” ISA Petition, at 8; AISA Petition, at 1-3. However, ISA and AISA misunderstand and mischaracterize the Commission's exclusion at Part 531.3(o) of the Rule. The Commission is not seeking to rewrite the definition of “shipper” under the Shipping Act. It has merely concluded that in the exercise of its exemption-granting authority under Section 16, for valid

policy reasons, it should not extend the conditional tariff publication exemption of the NSA Rule to some classes of potential NVOCC service arrangements because it cannot make the required Section 16 findings as to competitive impact and benefits to commerce in regard to such arrangements.

As noted above, a regulatory agency may exercise its authority, including its exemption authority, in a flexible manner within its sound discretion. The agency is not constrained to grant or withhold an exemption on an "all-or-nothing" basis. To the contrary, Congress, in granting exemption powers to a regulatory agency, expects that the agency will use its specialized expertise to craft the proper scope of deregulatory measures so as to best balance the competing concerns of industry and protection of the public interest which the regulatory program of the statute was originally designed to safeguard.¹⁹ Accordingly, an agency may fashion specialized exemptions which may permit certain persons to engage in activities without restriction, while others remain subject to varying degrees of restrictions or may not be permitted to participate in the exempted class of activities at all.²⁰

Section 16 of the Shipping Act specifically empowers the Commission to exempt "any class of agreements" or "any specified activity" from the requirements of the Shipping Act, provided it also finds such exemption will not result in substantial reduction of

¹⁹ The rationale for agency discretion is that administrative bodies possess experience and specialization that place them at an advantage in making decisions within an agency's area of expertise. 2. Am. Jur. Adminlaw 2d § 58 (2004). Agencies are permitted, consistent with the obligations of due process, to carry out their statutory duties and to adapt their rules and policies to the demands of changing circumstances. By virtue of its specialized knowledge and authority, a federal agency is empowered by Congress to develop a policy that is best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy effectively and economically. Moog Industries, Inc. v. F.T.C., 355 U.S. 411, 413 (1958).

²⁰ In a matter analogous to the instant case, the Interstate Commerce Commission exempted rail and truck service provided by rail carriers in connection with trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) service from ratemaking regulation under Title 49, Subchapter IV of the U.S. Code. The exemption was based on findings that regulation of these classes of traffic was not necessary to carry out the national transportation policy or to protect shippers from the abuse of market power by railroads. 364 I.C.C. 731 (1981).

competition or be detrimental to commerce. In accordance with the foregoing principles, the Commission clearly may utilize Section 16 to exempt certain classes of persons or traffic from specified requirements of the act without granting a *carte blanche* to all classes of persons or traffic.

In utilizing its authority under Section 16, the Commission has frequently granted exemptions which benefit only one class of shipper. For example, the Commission has invoked Section 16 to exempt from tariff publication requirements shipments of household goods, used (but not new) military household goods, Department of Defense cargo, and certain classes of traffic including controlled carriers, terminal barge operators in "Pacific Slope" states and movements of traffic in certain other geographic trades.²¹ Indeed, the Petitioners' concern over potential discrimination is particularly weak given the fact that, in the amendments to the Shipping Act made by OSRA, the Congress removed a requirement that the agency must make a finding that a proposed exemption would not be "unjustly discriminatory" in order to grant the requested exemption. See, 144 Cong. Rec. S3316 (April 21, 1998).

The restriction imposed by the Commission in Section 531.3(o) is no different than these historical examples of limited exemptions focused upon specific classes of traffic or persons, based on the Commission's exercise of its discretion, which was in turn founded upon its expertise and factual findings.

²¹ 46 C.F.R. §520.13(b) and (c).

IV. The Petitioners Erroneously Contend That the Agency's Decision Not to Extend the Exemption to Permit Shippers Associations to Enter into NSAs on Behalf of the NVOCC Members Is Inconsistent with Applicable Precedent

ISA argues that the Final Rule unlawfully discriminates against shippers' associations by barring such associations from entering into NSAs on behalf of their NVOCC members. ISA claims that this prohibition is allegedly contrary to the express purpose of Congress in authorizing shippers' associations to obtain volume rates and contracts on behalf of their members. ISA Petition, pp. 8-9. The AISA Petition makes a similar argument, and argues that the courts have struck down industry and agency rules that arbitrarily restrict shippers' associations membership and contract rights. AISA Petition, pp. 4-5.

These contentions are without substance. First, it is important to be clear as to what the Commission did, and why. The agency did not affirmatively restrict the rights of shippers' associations, but simply refused to extend to shippers' associations with NVOCC members the exemption that the agency granted to others. The agency did this because it feared, from its examination of the law and several recent court decisions, that an extension of the exemption to shippers' associations with NVOCC members could result in a situation itself inconsistent with the statute and sound public policy, because the activities of the associations might be deemed to be immune from the antitrust laws under Section 7 of the Shipping Act and also not reachable under the agency's regulatory authority. Final Decision, pp. 2-3. In limiting the definition of NSA shipper to exclude shipper associations with NVOCC members, the agency attempted to avoid creating a situation that would permit anticompetitive conduct to occur in NSAs without oversight from a governmental authority.

The Petitioners in effect argue that the law requires that the agency must either deny the benefit of the exemption to anybody unless the agency extends the exemption to everybody; or must extend the benefit of the exemption to everybody regardless of possible

deleterious consequences. But such a Hobson's Choice is not required by the statute, which gives the Commission broad authority to craft exemptions and conditions. See Section 16 of the Shipping Act (The Commission may exempt "any class of agreements . . . or any specified activity . . . from any requirement of this Act . . . [and] may attach conditions to any exemption . . ."). The statute does not give shippers' associations an absolute right to an exemption granted to other parties, and does not restrict the Commission's ability to craft an exemption that may not permit some shippers' associations to qualify for it.

The cases cited in the AISA Petition are utterly inapposite. In Pacific Coal Wholesalers' Ass'n et al v. United States, 81 F. Supp. 991 (S.D. Cal. 1949), the court simply and narrowly determined whether "the facts found by the Commission show respondent Pacific Coast Wholesalers Association to be a 'freight forwarder' within the meaning of § 402 of the Interstate Commerce Act . . ." Id. at 995. The court established no broad rule that the agency could not differentiate between shippers' associations and other persons in crafting a rule to accommodate various requirements of the statute. Similarly, in the nearly one-hundred year old decision in Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad Company, 220 U.S. 235 (1911), the Supreme Court determined that a carrier may not distinguish between freight forwarders and beneficial owners for the purpose of charging carload versus less than carload rates. The decision says nothing about the power of the agency to craft exemptions (a power not even granted to the ICC in 1911) to address a concern of potential anticompetitive conduct.

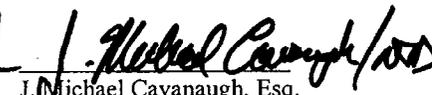
Finally, the Petitioners' claim that the rule discriminates against shippers' associations with NVOCC members is without merit. The limitations included in the rule in no way prohibit such associations from obtaining volume rates on contracts on behalf of their

members. The Petitioners can in fact continue to obtain these benefits for their members by dealing and contracting with vessel operators as they do today. Indeed, the Petitioners have failed to produce any evidence that an inability to negotiate contracts with NVOCCs will result in their members' having to pay higher shipping rates or in their suffering any other kind of harm. Without such evidence, their claims of discrimination are pure conjecture and must be rejected.

V. Conclusion

The Commission should deny the Petition for Reconsideration filed by the American Association of Shipper Associations and the Petition for Reconsideration filed by the International Shippers' Association.

Respectfully submitted,

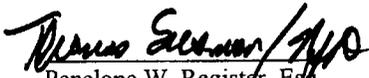
 

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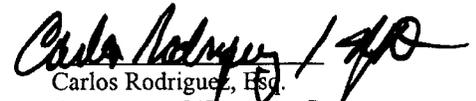
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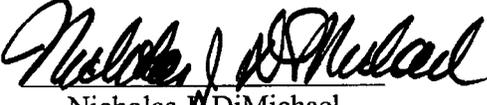
Dated: January 24, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of January, 2005, served a copy of the foregoing Reply via first-class mail, postage pre-paid on all parties of record, including:

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