COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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March 22, 2010

Secretary James J. McNulty
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program

Docket No. P-2009-2143607

Dear Secretary McNulty:

Enclosed please find an original and nine (9) copies of the Office of Trial Staff's (OTS) **Main Brief** in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Richard A. Kanaskie
Senior Prosecutor
Office of Trial Staff
PA Attorney I.D. No. 80409

RAK/nhd
cc: Parties of Record

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company	:	
For Approval of its Revised	:	**Docket No. P-2009-2143607**
Electric Purchase of Receivables	:	
Program	:	

MAIN BRIEF
OF THE
OFFICE OF TRIAL STAFF

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I. BACKGROUND

On November 20, 2009 PECO Energy Company ("PECO" or "Company") filed its *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program* ("Petition") with the Pennsylvania Public Utility Commission ("Commission"). In this Petition PECO seeks approval to revise its current Purchase of Receivables ("POR") program. In addition, the Petition contains tariff supplements related to PECO's current Electric Generation Supplier Coordination Tariff and the Electric Tariff which was previously approved by the Commission.

The filing was assigned to the Office of Administrative Law Judge ("OALJ") for the development of a record and issuance of an Initial Decision. The Administrative Law Judge ("ALJ") assigned to this proceeding is Cynthia Williams Fordham. OTS filed an Answer to the Petition on December 10, 2009 recommending that the Petition be denied and the proceeding assigned to the OALJ. The Office of Small Business Advocate ("OSBA") and the Office of Consumer Advocate ("OCA") filed Notices of Intervention, Public Statements and Answers to the Petition on December 4, 2009. In addition, a Petition to Intervene was received from the Philadelphia Area Industrial Energy Users Group ("PAIEUG") on December 11, 2009. The Retail Energy Supply Association ("RESA") and Direct Energy Services, LLC ("Direct Energy") filed Petitions to Intervene on December 14, 2009. In addition, Constellation New Energy, Inc. and Constellation Energy Commodities Group, Inc. (collectively "Constellation")

filed Petitions to Intervene on December 16, 2009. In addition to the previously submitted Answer, OTS filed its Notice of Appearance on January 4, 2010. Also, on January 4, 2010, Dominion Retail ("Dominion") requested that its Petition to Intervene dated December 3, 2009 be assigned to the present Docket Number.[1]

A Prehearing Conference was held on January 5, 2010 at 10:00 a.m. before ALJ Fordham at which time a procedural schedule was developed. Among other procedural dates, the schedule established that Evidentiary Hearings would be held in Philadelphia on March 4 and 5, 2010. Harrisburg parties participated in the Prehearing Conference from Hearing Room 3 of the Commonwealth Keystone Building in Harrisburg, while, ALJ Fordham conducted the Prehearing Conference from a 4th Floor Hearing Room in the Philadelphia Public Utility Commission Office Building. On January 22, 2010, ALJ Fordham issued Prehearing Order # 2 memorializing all determinations, including the procedural schedule presented at the Prehearing Conference.

In accordance with the schedule, OTS submitted its Direct Testimony on February 2, 2010. On the same date, testimony was submitted by OCA, OSBA, RESA and Dominion. On February 5, 2010, OTS submitted Supplemental Direct Testimony and a Supplemental Exhibit.

Rebuttal Testimony was submitted by OTS, PECO, RESA, OCA and Dominion on February 22, 2010. This submission was followed by the service of

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[1] Dominion Retail's initial Petition to Intervene listed an incorrect docket number. Dominion subsequently requested the Petition be included in this proceeding.

Surrebuttal Testimony and the accompanying Exhibit of OTS on March 1, 2010. Dominion also submitted Surrebuttal Testimony on the same day. On March 3, 2010, PECO, OCA and OSBA submitted Surrebuttal Testimony. By request of the parties, the Evidentiary Hearings scheduled for March 4 and 5, 2010 were cancelled by ALJ Fordham. The cancellation of the Evidentiary Hearings was based, on part, to the stipulation of a significant number of issues by the signatory parties. Issues that were unable to be resolved were reserved for argument in Main and Reply Briefs. Included in the issues reserved for Briefing by the parties is the applicable discount rate to be applied to the POR. In addition, the need to unbundle non-jurisdictional generation related expenses from distribution rates requires resolution. The parties agreed to the entry of evidence by stipulation and waived cross-examination of all witnesses. Settlement discussions continued resulting in the subsequent request to extend the due date for Main Briefs in order to allow for the development of an agreement between the signatories. OTS did not oppose the further delay in the proceedings to allow the signatories to develop a consensus document alleviating further litigation. However, OTS does not support the Joint Petition for Partial Settlement and opines that approval in its present form is not in the public interest.

II. SUMMARY OF ARGUMENT

PECO Energy Company has not satisfied its burden of proof with respect to its proposed revised Electric Purchase of Receivables Program. The record does not contain the type of substantial evidence needed to allow the presiding ALJ to

recommend and the Commission to subsequently approve the submitted plan. The concomitant Joint Petition for Partial Settlement does not cure the defects in the Evidentiary Record. The filed POR program, even with the compromises evident in the Joint Petition, still requires modification in order to satisfy the standards for approval of a settlement agreement. As presented, PECO's proposed POR is not in the public interest.

The Company and the signatories to the proposed Joint Petition for Partial Settlement have not presented substantial evidence to support the inclusion of non-jurisdictional generation rates in the charges to be borne by distribution customers. As presented by the Office of Trial Staff, a properly designed POR includes a Discount Rate that reflects the assignment of costs in an equitable manner. This will be accomplished by unbundling jurisdictional and non-jurisdictional charges and applying expenses in the appropriate manner. It is certainly understandable why the intervening Electric Generation Suppliers ("EGS") would support the Company's proposal. Without a properly determined discount rate, the EGS can avoid expenses and risks which will allow for a greater profit margin.

III. ARGUMENT

A. BURDEN OF PROOF

The Company has not borne its burden of proof with respect to supporting each, and every, element of its proposed revised Purchase of Receivables Program. Failing in this responsibility, the proposed program is not in the public interest and

must be rejected. The amendments to the program presented in the Joint Petition for Partial Settlement do not cure the evidentiary defects.

In the instant proceeding, it is incumbent upon the PECO to affirmatively prove the reasonableness of every element of its proposal. As defined in Section 332(a) of the Public Utility Code, "the proponent of a rule or order has the burden of proof."[2] A review of the record will demonstrate that in a number of instances identified herein the Company has failed to prove the reasonableness of its proposed POR program. As such, PECO's proposed program should be rejected based upon the Company's failure to sustain its burden of proof. Failing to satisfy this burden, the Company's proposed POR program will result in rates, rules and regulations that are not in the public interest as they will result in rates that are neither just, nor reasonable. The OTS proposals identified in this OTS Main Brief, and supported by the record, should be recommended by Administrative Law Judge Cynthia Williams Fordham and adopted by the Commission as they will allow for the proposed POR Program to satisfy the legal standard necessary for approval.

Submission of the proposed POR Program and supporting data may establish a prima facie case. However, averments and data composing a prima facie case do not meet the utility's burden of proving the elements of its proposed tariff with substantial evidence. As noted by the Supreme Court in *Burleson* "there is clear distinction between the weight of evidence required to support a

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[2] 66 Pa. C.S.A. §332(a).

prima facie case and the weight necessary to meet a complainant's burden of proof."[3] The court in *Burleson* further opined that:

> ...the elements of that cause of action are proven with substantial evidence that enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.[4]

Substantial evidence has been defined as " . . . that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion."[5] It has also been stated that the "burden of proof before administrative tribunals...is satisfied by establishing a preponderance of evidence which is substantial and legally credible."[6] Furthermore, the standard for a "preponderance of evidence" has been described as meaning "that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party."[7]

The Commission and the Courts have clearly held that the burden of proof does not shift to the party challenging a requested rate increase. While the burden of going forward may shift, the burden of finally and convincingly establishing the justness and reasonableness of every component of a requested rate increase remains on the utility. The opposing parties have no such burden. The

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3 *Burleson v. Pennsylvania Public Utility Commission*, 501 Pa. 433, 461 A.2d 1234 (1983).

4 Id. at 437.

5 *Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*, 19 Pa. Cmwlth. 1, 337 A.2d 922 (1975), as quoted in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission.*, 489 Pa. 109, 128 (1980).

6 *Samuel J. Lansberry v. Pa. PUC*, 578 A.2d 600, 602 (1990).

7 *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge* at Docket No. P-2009-2129502 Order Adopted and Entered November 19, 2009, p. 7, citing *Se-Ling Hosiery v. Marguiles*, 364 Pa. 45, 70 A.2d 854 (1950).

Commission has stated that "[w]hile the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission."[8] In addition, the Commission has ruled as follows:

> [t]here is no presumption of reasonableness which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims. A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims.[9]

Clearly, the standard in this proceeding is that PECO has the burden of proving that its proposed revised POR program is reasonable and in the public interest. Furthermore, this proof must consist of substantial evidence. Furthermore, the OTS identification of elements of the proposal that are not on the public interest does not require that OTS prove the efficacy of its recommendation.

Clear guidance on the elements of a well designed Purchase of Receivables Program was provided by the Commission in its Order in the *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge.*[10] The fact that resolution of pertinent issues in the PPL proceeding was achieved through a settlement does not mitigate its applicability in this proceeding. Although the Commission's

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[8] Id. citing *Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217 (2001).

[9] *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, 57 Pa. PUC 423, 444 (fn. 37) (1983).

[10] Docket No. P-2009-2129502. Order Adopted and Entered November 19, 2009.

Regulations indicate it is its policy to promote settlements,[11] agreements are subject to Commission review and approval with the standard of review including an affirmative determination that the terms are in the public interest.[12]

There has not been a presentation of legally credible evidence to support a finding that the parameters of the POR program approved by the Commission in PPL's service territory are not applicable to PECO's service territory. Specifically, PECO's failure to include a reasonable discount rate in its POR program coupled with its refusal to unbundle its non-jurisdictional generation rates have not been distinguished from the established Commission ruling. Lacking substantive evidence explaining the absence of these parameters, the proposal must be modified.

B. DISCOUNT RATE TO INCLUDE UNCOLLECTIBLE ACCOUNTS EXPENSE

In the PPL proceeding the Commission noted that "[u]nder the POR Program, PPL will purchase EGS accounts receivables for residential shopping customers who take service…at a discount of 1.37%. This discount reflects an uncollectible accounts expense percentage factor of 1.32% and a POR administrative factor of .05%."[13] Furthermore, the Commission identified that "PPL will purchase EGS accounts receivables for small commercial and

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[11] 52 Pa. Code § 5.231(a).

[12] See, e.g. *Pennsylvania Public Utility Commission v. C S Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pennsylvania Public Utility Commission v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985).

[13] *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge* at Docket No. P-2009-2129502 Order Adopted and Entered November 19, 2009, p. 4.

industrial (C&I) shopping customers who take... service...at a discount of 0.17%. This discount reflects an uncollectible accounts expense percentage factor of 0.12% and a POR administrative factor of 0.05%.[14] In the instant proceeding, PECO's proposal understates the administrative factor and completely ignores the inclusion of an appropriate factor for uncollectible accounts. The Company has not presented substantial evidence, as defined by the Courts, in support of the omission of these key elements from its proposed POR program.

The appropriate discount rate to be applied to PECO's POR is 2.27% for residential customers and .34% for small commercial and industrial customers. For residential customers, the discount rate includes an allowance for uncollectible accounts of 2.07%. For small commercial and industrial customers the uncollectible accounts component is 0.14%.[15] Without the inclusion of an uncollectible accounts expense factor in the proposed discount there will be an improper shifting of non-jurisdictional generation expenses from the EGS to the jurisdictional distribution ratepayers.

The use of a discounted rate methodology is appropriate in this proceeding, as it was in the PPL proceeding, because it reflects the added risk of the uncollectible account expense associated with the Electric Generation Supplier's receivables being purchased.[16] A discount rate is simply an allowance, or

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14 Id., p. 5.

15 OTS Statement No. 1-S, pp. 2-3, OTS Exhibit No. 1-S, pp. 1-3.

16 OTS Statement No. 1, p. 9.

reduction, from the gross amount due.[17] In PECO's service territory, the record contains credible evidence demonstrating that the Company does not collect 100% of its billed revenue.[18] The relevancy of uncollectible accounts has been succinctly described by one of the intervening parties. RESA has stated that "[t]he risk of non-payment is a cost of doing business. Whether a company is selling electricity or widgets, there will always be instances where some customers do not pay for the products or services that they receive. Businesses account for this expense by factoring it into the prices that they charge."[19] While an intervening party representing Electric Generation Suppliers recognizes the impact of uncollectible accounts, PECO's proposal will insulate the non-jurisdictional entity while exposing the jurisdictional customers to the burden of subsidizing the program. Simply put, PECO proposes that distribution customers pay for the portion of the EGS generation related bills that are not collected. Clearly, this proposal is improper and must be rejected.

It is not disputed that PECO experiences a level of uncollectible accounts. The recommended discount rate necessary to recognize uncollectible accounts expense supplied by OTS is based solely on the information provided by the Company in response to an Interrogatory.[20] What is disputed is who should be assigned responsibility for the accounts that are not being collected. OTS maintains that its recommendation to include a factor for uncollectible accounts

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17 Id. p. 3.
18 Id., p. 9, OTS Statement No. 1-S, OTS Exhibit No. 1-S.
19 RESA Statement No. 1-R, p. 6.
20 See, OTS Exhibit No. 1-S.

in the discount rate is appropriate as it properly assigns avoided costs and risks to the participating electric Generation Suppliers and PECO.

C. UNBUNDLE NON-JURISDICITONAL GENERATION CHARGES

A properly designed POR Program will accomplish the proper assignment of costs by unbundling its non-jurisdictional generation rates from the jurisdictional distribution charges. Unbundling generation related charges and collecting them from default service customers through a surcharge per kwh is appropriate because this practice will place all participants on a level playing field.[21] This is accomplished by assigning the costs of generation related uncollectible accounts in the price for generation provided by the EGS. As stated above by RESA's witness, the price of the product already accounts for risks, including uncollectible accounts. Furthermore, non-shopping customers pay for the appropriate levels of uncollectible accounts through the distribution charge as reflected in the price to compare. This practice avoids the "double recovery of uncollectible accounts from shopping customers, once in their generation rates, and again in their distribution rates."[22] Subsidies between shopping and non-shopping customers are eliminated by unbundling generation related expenses from distribution rates and properly assigning costs to each component of a customer's bill.[23] The viability and appropriate nature of unbundling costs is identified by RESA's witness wherein it is stated that "RESA continues to

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21 OTS Statement No. 1, p. 10.
22 OTS Statement No. 1-R, p. 4.
23 OTS Statement No. 1, p. 10.

support full unbundling of all generation-related costs...."[24] In addition, the Commission approved the PPL Program commenting that the Settlement provides that "PPL will be permitted to unbundle its generation related uncollectible accounts expense from distribution rates and collect it from default service customers though the MFC charges...."[25]

There is simply no evidentiary support to recommend different standards in two different service territories. Especially since the service territories of PPL and PECO include, potentially, some of the same Electric Generation Suppliers. Both RESA and Dominion Retail, Intervenors in this proceeding, are signatories to the settlement presented in the PPL proceeding. The illogical conclusion is that the same providers would be subject to different criteria based on the service territory where their receivables are purchased. Although the principle of unbundling generation related costs was deemed acceptable in PPL's POR program, it is now considered improper in PECO's proposal. This level of inconsistency cannot form the basis for a recommendation. Furthermore, RESA has actively participated in other jurisdictions wherein it has acknowledged the appropriate nature of the OTS recommendations. It is somewhat disingenuous to advocate one methodology in one jurisdiction and then offer inconsistent recommendations in another. As shown in OTS Exhibit No. 1-SR, information

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[24] RESA Statement No. 1, p. 13.

[25] *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge* at Docket No. P-2009-2129502 Order Adopted and Entered November 19, 2009, p. 6.

made available on the RESA website offers a candid explanation of its opinion on a properly designed Purchase of Receivables. In RESA's information provided in its website it offers the following description; "[a] Purchase of Receivables ("POR") program involves the utility purchasing the receivables of an ARES at a discount rate equal to the utility's actual uncollectible rate."[26] Furthermore, the proposed legislation made available on RESA's site includes the following language; "[r]eceivables for power and energy of alternative retail electric suppliers or electric utilities other than the electric utility in whose service area the retail customers are located shall be purchased by the electric utility at a just and reasonable discount rate to be reviewed and approved by the Commission after notice and hearing. The discount rate shall be based on the electric utility's historical bad debt and any administrative costs associated with the electric utility's purchase of receivables."[27] Clearly, this intervening party understands the appropriate nature of assigning costs in the proper manner. On the other hand, it is easy to understand why an EGS would want a little to no-discount POR. As an unregulated entity, the participating EGS would be able to avoid costs and shed risks while being afforded full reimbursement for its product. The intervening parties understand this as Dominion Retail identified an example of the costs that can be avoided in a POR program.[28] Avoided costs need to be reflected in the discount rate associated with a POR program. PECO, on the other

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26 OTS Exhibit No. 1-SR, p. 1.

27 Id., p. 3.

28 Dominion Retail Statement No. 1, p. 2, lines 7-8.

hand, is insulated from risk in either scenario. Under no proposal is PECO at risk for uncollectible accounts. The Company either assigns the risks properly by including a discount factor reflecting uncollectible accounts in its POR as recommended by OTS or PECO inappropriately recovers generation related expenses from its distribution customers allowing non-jurisdictional Electric Generation Suppliers to be insulated from the appropriate level of risk. Either way, PECO does not absorb any unwarranted costs.

Any concerns that an EGS may not offer service in a particular territory if they are required to absorb the appropriate generation related costs associated with a POR through a discounted rate are unsupported by credible record evidence. In RESA's Rebuttal testimony, its witness advances that very prospect.[29] As unregulated businesses, RESA's members are not required to serve any particular customer, nor are they required to sell their receivables. To threaten not to provide service if it cannot avoid costs without recourse is clearly inflammatory and suggests the level of desperation by this Intervenor. RESA is a supplier in PPL's service territory and a signatory to PPL's POR settlement. As a signatory to this agreement, RESA agreed to the same POR discount that is recommended by OTS in this proceeding. Furthermore, one need look no further than PPL's results to determine if a POR with properly apportioned costs in its discount rate has had a negative impact on customers shopping.

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[29] RESA Statement No. 1-R.

The proper review of the proposed POR program by PECO requires the proper separation of jurisdictional expenses and non-jurisdictional expenses. The recognition of an uncollectible expense but the failure to assign it in the proper manner violates this principle. Unfortunately, this is exactly what PECO's proposal does. With the support of intervening Electric Generation Suppliers, PECO is attempting to assign generation related expenses to distribution customers.

IV. CONCLUSION

The Purchase of Receivables Program proposed by PECO in this proceeding must be amended to include the proper factors in its discount rate. As identified throughout the OTS testimony and as defined in the Commission's Order in PPL's POR proceeding, a properly designed POR program includes a discount factor that recognizes administrative costs associated with the program as well as the Company's uncollectible accounts expenses. The record evidence shows that PECO's discount rate associated with its POR must be 2.27% for residential customers and 0.34% for small commercial and industrial customers.

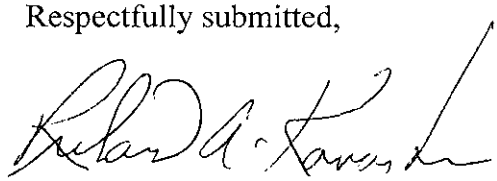
In addition, PECO should unbundle its generation related uncollectible account expenses from its distribution rates and collect it from default service customers through a surcharge per kwh. This recommendation will result in shopping customers paying for uncollectible accounts through the price for generation while non-shopping customers are responsible for the appropriate uncollectible accounts through their distribution rates as reflected in the price to compare.

As argued above, the settlement approved by the Commission in the PPL POR proceeding included unbundled rates and the inclusion of uncollectible accounts in the discount rate. As settlements approved by the Commission must be in the public

interest, it is inconceivable that a program that includes unbundling of rates and the inclusion of uncollectible accounts in the discount rate could be found to be in the public interest in one proceeding while the omission of the same elements in a similar proceeding could yield the same result.[30] Sound regulation requires the same treatment of these elements in order to protect ratepayers, jurisdictional utilities and Electric Generation Suppliers.

For the reasons set forth above and as supported by the testimony submitted in this proceeding, the Office of Trial Staff respectfully submits that PECO's proposed Purchase of Receivables Program must include unbundling of generation related costs from distribution rates as well as the inclusion of a factor to account for uncollectible accounts expense in its discount rate.

Respectfully submitted,



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Dated: March 22, 2010

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30 See, e.g. *Pa. PUC* v. *C S Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC* v. *Philadelphia Electric Co.*, 60 Pa. P.U.C. 1 (1985).

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Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program	: : :	Docket No. P-2009-2143607

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated March 22, 2010, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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