

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
East Ohio Gas Company d/b/a Dominion) Case No. 07-829-GA-AIR
East Ohio for Authority to Increase Rates)
for its Gas Distribution Service.)

In the Matter of the Application of the)
East Ohio Gas Company d/b/a Dominion) Case No. 07-830-GA-ALT
East Ohio for Approval of an Alternative)
Rate Plan for its Gas Distribution Service.)

In the Matter of the Application of the)
East Ohio Gas Company d/b/a Dominion) Case No. 07-831-GA-AAM
East Ohio for Approval to Change)
Accounting Methods.)

In the Matter of the Application of the)
East Ohio Gas Company d/b/a Dominion)
East Ohio for Approval of Tariffs to) Case No. 08-169-GA-ALT
Recover Certain Costs Associated with a)
Pipeline Infrastructure Replacement)
Program Through an Automatic)
Adjustment Clause, And for Certain)
Accounting Treatment.)

In the Matter of the Application of the)
East Ohio Gas Company d/b/a Dominion)
East Ohio for Approval of Tariffs to) Case No. 06-1453-UNC
Recover Certain Costs Associated with a)
Automated Meter Reading Deployment)
through an Automatic Adjustment Clause,)
And for Certain Accounting Treatment.)

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**MEMORANDUM CONTRA DOMINION EAST OHIO
MOTION FOR APPROVAL OF LEGAL NOTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**MEMORANDUM CONTRA DEO'S MOTION FOR APPROVAL OF LEGAL
NOTICE**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of approximately 1.1 million residential utility consumers of the East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "the Company") hereby files this Memorandum Contra DEO's Motion for Approval of Legal Notice. On May 30, 2008, DEO submitted a proposed legal notice that purports to describe DEO's Pipeline Infrastructure Replacement Application ("DEO PIR Application"). DEO's Motion should be denied because the Public Utilities Commission of Ohio ("PUCO" or "Commission") lacks jurisdiction to consider the proposed public notice based on the Company's failure to follow the fundamental statutory requirements of R.C. 4909.18, and R.C. 4929.05. The proposed public notice is not timely and violates Ohio's notice statutes in a case where DEO is seeking to collect \$2.5 billion from northern Ohio customers.

In addition, DEO's proposed public notice fails to adequately inform its customers about the proposed rates that affect them. For example, DEO's proposed notice fails to mention the \$2.5 billion (in 2007 dollars) that DEO is ultimately asking to recover from customers.

The reasons for denying DEO's Motion for Approval are further set forth in the attached Memorandum in Support.

I. INTRODUCTION

On August 30, 2007, DEO filed an Application for an increase in rates ("Rate Case Application") for all of its customers, including approximately 1.1 million residential customers in Ohio.¹ Within a month of its Rate Case Application, on

¹ *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, ("DEO Rate Case").

September 20, 2007, DEO moved to consolidate it with a previously existing, nine-month-old application to recover the costs associated with DEO's deployment of automated meter reading ("AMR") devices² ("AMR Application"). An AMR device is a meter that allows for remote reading by radio signal. The AMR Application was originally filed in December 2006, purportedly under R.C. 4929.11, and was docketed as Case No. 06-1452-GA-UNC. Both the Rate Case Application and the AMR Application were incorporated into the public notice approved by the Commission.³

Six months into the rate case review process, on February 22, 2008, DEO filed a second motion to consolidate.⁴ This time the motion to consolidate sought to add yet another revenue requirement to the Rate Case Application -- a \$2.5 billion (in 2007 dollars) PIR Application.⁵ The plan was designated as a "UNC" filing which in the PUCO's parlance is an unclassified filing, and assigned Case No. 08-169-GA-UNC.

The PIR Application included a proposal to replace the service lines directly associated with the bare-steel and cast- and wrought-iron pipeline infrastructure.⁶ The PIR Application also includes a proposal to replace main-to-curb connections and for the Company to take over ownership of the curb-to-meter service lines.⁷ The main-to-curb

² *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Waivers of Certain Provisions Contained in Chapter 4901:1-13, Ohio Administrative Code*, Case No. 06-1452-GA-UNC, ("DEO Waiver Request"), Application, (December 13, 2006).

³ DEO Rate Case, Application at Volume 1, Part 2 of 2, S-3, page 120-122. See also DEO Rate Case, Entry at page 3. (October 24, 2007). (The Commission approved the public notice with a slight modification that is irrelevant to this discussion.)

⁴ *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with A Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment*, Case No. 08-169-GA-UNC, Motion to Consolidate, (February 22, 2008). ("DEO Pipeline Replacement Case").

⁵ DEO Pipeline Replacement Case.

⁶ *Id.* at 6.

⁷ DEO Pipeline Replacement Case, Application at 5.

replacement cost is estimated to add approximately \$500 million (in 2007 dollars) to the cost.⁸ Finally, the PIR Application proposes to recover the revenue requirement associated with infrastructure expenditures “for other transmission and distribution pipeline replacements and relocations, (and) system improvements.

On March 14, 2008, OCC filed a Motion to Dismiss DEO’s Pipeline Replacement Plan Application and a Memorandum Contra DEO’s Motion to Consolidate the Pipeline Replacement Plan Application with the Rate Case. Also on March 14, 2008, Ohio Partners for Affordable Energy (“OPAE”) filed a Memorandum Contra DEO’s Motion and Application, presenting arguments that were similar to those made in OCC’s Memorandum Contra.

OCC’s Motion to Dismiss argued that the PIR Application failed to meet the statutory requirements associated with an application for an increase in rates and could not be accepted by the Commission.⁹ Additionally, as a R.C. Chapter 4929 filing, OCC argued that the Company failed to demonstrate how the PIR Application qualifies as an alternative rate plan and failed to show how the filing meets the requirements of R.C. 4929.05.¹⁰ Finally, OCC pointed out that allowing DEO to amend the Rate Case

⁸ Id.

⁹ *In the Matter of the Application of The East Ohio Gas company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause and for Certain Accounting Treatment*, Case No. 08-169-GA-UNC, Motion to Dismiss Dominion East Ohio’s Pipeline Infrastructure Replacement Application and Memorandum Contra Dominion East Ohio’s Motion to Consolidate the Application for an Automatic Adjustment Clause to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program By the Office of the Ohio’s Consumers’ Counsel at 6-10 (March 14, 2008) (“OCC Motion to Dismiss”).

¹⁰ OCC Motion to Dismiss at 10-15.

Application at this late date would deny the public the timely statutory notice required when seeking an increase in rates.¹¹

In its April 9 Entry the Commission denied OCC's Motion to Dismiss and accepted DEO's PIR as an automatic adjustment mechanism under R.C. 4929.11.¹² In addition, the Commission determined that DEO's PIR Application did not need to be filed as part of a rate case proceeding or as an alternative regulation plan because the proposal only requested approval of the proposed methodology to recover costs of the PIR program.¹³

The April 9 Entry also granted DEO's Motion to Consolidate the PIR Application with the ongoing Rate Case Application.¹⁴ The Commission again asserted that DEO's PIR is not a request to increase rates but rather only a request for the Commission to consider the methodology proposed for the Application.¹⁵

On April 18, 2008, OCC filed an Application for Rehearing of the Commission's April 9, 2008 Entry.¹⁶ OCC argued that the Commission should dismiss DEO's PIR Application because DEO did not follow the statutory requirements of R.C. 4909.18 and R.C. 4909.19 for an application for an increase in rates. OCC also argued allowing DEO to supplement its Rate Case Application six months late, severely limited the ability of interested stakeholders to get notice and adequately review DEO's \$2.5 billion proposal.

¹¹ Id.

¹² April 9 Entry at 5.

¹³ April 9 Entry at 5-6.

¹⁴ April 9 Entry at 8

¹⁵ Id.

¹⁶ Rate Case, Application for Rehearing by the Ohio Consumers' Counsel (April 18, 2008).

In addition, OCC argued that DEO's PIR Application failed to meet the statutory requirements of Chapter 4929 because, as filed, it failed to qualify as an alternative rate plan under both 4929.01(A) and as an automatic rate adjustment under R.C. 4929.11. Finally, OCC argued the Company failed to file the "alternative rate plan" as part of its R.C. 4909.18 application or properly notice the PIR Application as required by R.C. 4929.05.

On May 9, OPAE filed an Application for Rehearing with comparable arguments to OCC's arguments.

On May 28, 2008, the Commission granted OCC and OPAE's motions for rehearing in part and denied them in part. The Commission's ruling denied OCC and OPAE's positions that the April 9 Entry was in error by finding that DEO's PIR Application constituted an automatic adjustment mechanism under R.C. 4929.11.¹⁷ The Commission stated that a determination that DEO's PIR Application constituted an automatic adjustment mechanism has not been made and would be addressed at a hearing on the matter.¹⁸ The Commission noted that a ruling on the whether DEO's PIR Application constitutes an automatic adjustment mechanism did not prevent DEO from going forward with its application in the case.¹⁹

The Commission's Entry on Rehearing acknowledged that DEO's PIR Application is a request by DEO to increase rates and must be treated as an alternative rate plan in accordance with R.C. 4929.05, "Upon review of DEO's application in the [Pipeline Replacement Plan Application] case, we find that the company does propose an

¹⁷ DEO Rate Case, Entry on Rehearing at 6 (May 30, 2008).

¹⁸ Id.

¹⁹ Id.

alternative method to establishing rates for a distribution service that is alternate to the method found in Section 4909.15, Revised Code.”²⁰ In addition, the Commission stated that alternative rate plan applications are governed by R.C. 4909.18.²¹ As pointed out above, DEO’s PIR Application was filed six months after DEO’s Rate Case Application was filed.

Pursuant to the Commission’s May 28, 2008 Entry on Rehearing DEO filed a proposed legal notice and “the prefiled Supplemental Testimony of Jeffrey A. Murphy and Direct Testimony of Tim C. McNutt in support of the PIR Application in Case No. 08-169-GA-ALT.”²² DEO’s proposed legal notice is only a page and a half long, and includes: (1) a list of the cases that have been consolidated; (2) a list of the counties where customers will be affected by the PIR Recovery Charge; (3) a drawn out list of the rate schedules affected by the Application -- including a cap on the Daily Transportation Service Pipeline Replacement Plan Cost Recovery Charge; (4) a one paragraph summary of the proposal, information about the process DEO will complete to “update” the Pipeline Replacement Plan Recovery Charge every year; and (5) finally, information for the public about intervening in the case and getting detailed information about the case.²³

II. SUMMARY OF ARGUMENTS

On May 28, 2008, the Commission ruled that DEO’s February 22, 2008 PIR Application was an application for an increase in rates.²⁴ However, DEO has not

²⁰Id., at 9 (May 30, 2008).

²¹Id. at 8.

²²DEO Rate Case, Motion for Approval of Legal Notice (May 30, 2008).

²³Id.

²⁴DEO Pipeline Replacement Case, Application. at 1.

followed the statutory requirements of R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43 that set forth detailed notice requirements that must be followed when applying for an increase in rates.²⁵

The Commission should not allow the Company to sidestep these statutory requirements because the PIR Application is being consolidated with the current Rate Case Application, filed six months earlier. DEO specifically chose not to include the costs associated with its PIR Application as part of its Rate Case Application. DEO failed to place the PIR costs at issue in the rate case, and its failure to do so precludes the Commission from amending the Rate Case Application at this late date, to include such issues.

The PIR Application has not met the statutory requirements of an alternative rate regulation filing under Chapter 4929. Because DEO has not complied with the mandatory requirements under Chapter 4929, the Commission lacks the jurisdictional authority to accept DEO's proposed public notice and the PIR Application as an alternative rate regulation plan.

In addition, DEO's proposed notice for the PIR Application does not include the required detail to provide adequate and timely notice to the public. Providing information in customer notices that is both sufficient and understandable is a critical component to allowing public participation in the administrative process. Some of the core concepts that must be included in the notice are the \$2.5 billion (in 2007 dollars) cost of the plan and the transition of ownership for the curb-to-meters service lines from the customer to the Company.

²⁵ The Indus. Energy Users-Ohio v. Pub. Util. Comm., Slip Opinion No. 2008-Ohio-990.

III. ARGUMENT IN SUPPORT

A. As An Alt. Reg. Filing, DEO's PIR Application Fails to Comply With The Statutory Mandates Of Chapter 4929.

The Commission has ruled that DEO's February 22, 2008 PIR Application is an application for an alternative rate plan.²⁶ R. C. Chapter 4929 permits natural gas companies to have alternate rate plans, however, all alternative rate plans must comply with the seminal provision of chapter 4929.05. DEO's Motion for approval of legal notice fails in several respects to comply with the terms and conditions of R.C. 4929.05.

Revised Code 4929.05 states, in pertinent part:

(A) as part of an application filed pursuant to section 4909.18 of the Revised Code, a natural gas company may request approval of an alternative rate plan. After notice, investigation, and hearing, and after determining just and reasonable rates and charges for the natural gas company pursuant to section 4909.15 of the Revised Code, the public utilities commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that both of the following conditions are met....²⁷

Accordingly, to comply with R.C. 4929.05, DEO was required to file its PIR alternative rate plan "as a part of an application filed pursuant to section 4909.18 of the Revised Code." In addition, DEO's proposed \$2.5 billion (in 2007 dollars) program had to comply with the notice requirements of R.C. 4929.05. It does not.

"When the language [of a statute] *** clearly expresses the legislative intent, the court need look no further[.]" because "at that point the interpretative effort is at an end, and the statute must be applied accordingly."²⁸ Under R.C. 4929.05, the Commission is

²⁶ DEO Rate Case, Entry on Rehearing at 9 (May 28, 2008).

²⁷ R.C. 4929.05 (Emphasis added).

²⁸ *Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229, 237 citing *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101.

permitted to use alternative rate-making only as “part of an application filed pursuant to 4909.18***.” Any other interpretation defies the express language and clear intent of the General Assembly.

The notice requirements of R.C. 4929.05 are those that must be met with an application for an increase in rates under R.C. 4909.18. It is axiomatic that the “notice” required under R.C. 4929.05 is the same notice required when a utility applies for a rate increase under R.C. 4909.18. This is because R.C. 4929.05 is based upon a filing under R.C. 4909.18 -- “as part of an application filed pursuant to section 4909.18 of the Revised Code.”

B. DEO’s PIR Application Is An Application For an Increase in Rates And As Such Must Comply With The Applicable Statutory Notice Requirements Including R.C. 4909.18, 4909.19, And 4909.43.

DEO’s PIR Application was filed without regard to meeting any of the procedural notice requirements for an application filed under R.C. 4909.18. DEO cannot now go back and retroactively comply with the mandatory notice and informational requirements of R.C. 4909.18, 4909.19, and 4909.43.

The Commission’s Entry on Rehearing ruled that the PIR Application falls under R.C. 4909.18,²⁹ which states, in part:

Any public utility desiring to establish any rate, joint rate, toll, classification charge, or rental or to modify, amend charge, increase, or reduce any existing rate, joint rate, toll, classification, charge or rental, or any regulation or practice affecting the same, shall file a written application.

Under Ohio ratemaking law, DEO’s rates may only be increased: (1) after pre-

²⁹ DEO Rate Case, Entry on Rehearing at 8 (May 28, 2008).

filing notice in accordance with R.C. 4909.43; (2) upon written application and notice to the public under R.C. 4909.18; (3) after a hearing under R.C. 4909.19; and (4) upon an order of the Commission under R.C. 4909.18 and R.C. 4909.15(D) fixing and establishing the rates as just and reasonable rates (and after compliance with certain other statutes and rules). In this regard, DEO has failed to file an appropriate pre-filing notice, failed to file a timely application, and has failed to issue appropriate timely notices to the public, as required by the Revised Code.

In R.C. Chapter 4909 the General Assembly has established specific proceedings and processes for setting utility rates. Whenever a utility desires to increase its rates and collect more money from customers, it must comply with the procedures set forth in R.C. 4909.18 or R.C. 4929.05.

C. DEO's Attempt To Amend the Rate Case Application At This Late Date Means the Public Will Not Receive the Statutorily Required Timely Public Notice For this Rate Increase.

The notice requirements for an application for a traditional rate case (and an alternative rate case) can be found under R.C. 4909.18, 4909.19, and 4909.43. DEO has failed to meet any of these notice requirements.

DEO has failed to comply with the associated notice provisions of R.C. 4909.43(B) which states:

Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.³⁰

³⁰ Emphasis Added.

Because DEO has failed to submit the proper pre-filing notice thirty days before filing the PIR Application, DEO cannot meet the statutory requirements related to filing an application for a rate increase after the fact, and the Commission has no jurisdiction to accept DEO's filing.

In the alternative DEO's August 30, 2007 Rate Case Application did not include the PIR information and accordingly the PIR proposal does not meet the requirements of R.C. 4909.18(E) and 4909.19. Revised Code 4909.18(E) sets forth requirements relating to the substance of the application; R.C. 4909.19 establishes the method of publication. Under R.C. 4909.18(E),

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The **notice shall** further include the average percentage increase in rate that a representative industrial, commercial, and residential customer **will bear** should the increase be granted in full. (Emphasis added.)

R.C. 4909.19 requires that the "substance and prayer" of the application must be approved by the PUCO and published once a week for three consecutive weeks in "newspapers published and in general circulation throughout the territory in which such utility operates." DEO has not complied with, and more importantly cannot retroactively comply with these requirements at this late date. The Ohio Supreme Court has stated the purpose of R.C. 4909.18(E) is "to provide **any person**, firm, corporation, or association,

an opportunity to file an objection to the increase under R.C. 4909.19.”³¹

The Commission, as a “creature” of statute, may exercise only that jurisdiction conferred upon it by statute.³² The Commission’s jurisdiction is limited by the plain language contained within the confines of R.C. 4909.18. That language sets forth distinct mandatory requirements for an application for an increase in rates. These requirements were not met, and thus the Commission lacks the authority to accept the deficient notice filing.

D. DEO’s Proposed Legal Notice Does Not Comply with the Statutory Requirements and Fails to Provide DEO Customers the Opportunity to Exercise Their Right to Object to DEO’s Pipeline Replacement Plan Application.

R.C. 4909.18 provides that, unless otherwise ordered by the commission, the public utility must file, along with its application to the commission, “a proposed notice for newspaper publication fully disclosing the substance of the application.” As discussed below, DEO filed a proposed legal notice that fails to disclose the substance of the PIR Application within the notice.

For example, DEO’s proposed legal notice failed to disclose its estimates for the pipeline replacement portion of its plan or the associated main-to-curb replacement costs included in its Application.

DEO estimates that the pipeline replacement portion would cost approximately \$1,656,000,000, with the associated main-to-curb replacement expected to cost approximately \$490,000,000.³³

³¹ *Committee Against MRT et al. v. Public Util. Comm.* (1977), 52 Ohio St.2d 231, 234. (Emphasis added.)

³² *Columbus Southern Power Co. v. Public Utilities Comm.* (1993), 67 Ohio St.3d 535, 537.

³³ DEO Pipeline Replacement Case, Application at 5 (February 22, 2008).

In addition, DEO failed to disclose in its proposed legal notice its estimates for the replacement costs of service lines associated with the bare-steel and cast- and wrought-iron pipeline infrastructure portion of its Application.

DEO estimates that the replacement cost of service lines directly associated with the bare-steel and cast- and wrought-iron pipeline infrastructure will be \$516,000,000 in 2007 dollars.³⁴

Further, DEO failed to disclose in its proposed legal notice the magnitude of the Pipeline Replacement Plan proposal as contained in the Application.

The net mileage estimated for this portion of the PIR program is approximately 3,567 miles. The program will also entail replacement of approximately 515,000 main-to-curb connections to which curb-to-meter service lines are connected.³⁵

DEO also failed to disclose in its proposed legal notice its estimates of what its residential consumers could expect to pay in the event the Commission approved its Application.

DEO estimates that the program will result in an incremental cost per residential customer of \$1.12 per month for the first year of the PIR Cost Recovery Charge, with subsequent increases of less than \$0.90 per year in 2007 dollars.³⁶

Finally, DEO failed to disclose clearly within the proposed legal notice that its Application proposed a change to the ownership interest of curb-to-meter service lines from the customer to DEO.

In addition to the proposed pipeline infrastructure replacement program, DEO has also determined that it would be appropriate to assume responsibility and ownership of curb-to-meter service lines that the Company installs, replaces, ties in or repairs.³⁷

³⁴ Id. at 6.

³⁵ Id. at 5.

³⁶ Id. at 4.

³⁷ Id. at 3.

These omissions from the proposed notice are significant and result in DEO's failure to fully disclose the substance of the PIR Application. Without notice of the specific nature and dramatic increases to the monthly customer charges incorporated in DEO's PIR Application, the public does not have the statutory opportunity to participate in the proceedings.

V. CONCLUSION

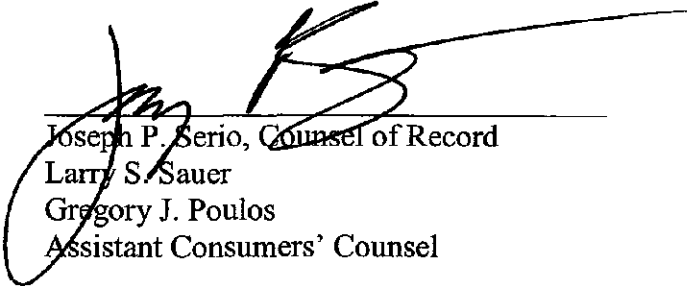
DEO's Motion for approval of legal notice should be denied because DEO's PIR Application does not and cannot comply with the statutory requirements of R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43. On May 28, 2008, the Commission ruled that DEO's PIR Application is a request for an increase in rates. R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43 set forth the notice requirements that must be followed when applying for an increase in rates.

DEO failed to submit the proper pre-filing notice thirty days before filing the PIR Application, in accordance with R.C. 4909.43. In addition, the Commission should not allow the Company to sidestep this statutory requirement or those of R.C. 4909.18 and R.C. 4909.19 because the PIR Application is being consolidated with the current Rate Case Application.

Finally, DEO's proposed legal notice for the PIR Application does not "fully disclose the substance of the application" to meet the requirements of R.C. 4909.18 and provide adequate notice to the public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's forgoing Memorandum Contra Dominion East Ohio's Motion for Approval of Legal Notice By the Office of the Ohio Consumers' Counsel was provided to the persons listed below via electronic mail this 6th day of June, 2008.



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