

RAS E-148

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
ENTERGY NUCLEAR OPERATIONS, INC. )  
 )  
(Indian Point Nuclear Generating Units 2 and 3) )  
 )

Docket Nos. 50-247-LR and  
50-286-LR

August 21, 2008

APPLICANT'S ANSWER TO RIVERKEEPER, INC.'S MOTION FOR CLARIFICATION  
AND RECONSIDERATION OF LBP-08-13 (REGARDING SAMA CONTENTION EC-2)

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") hereby files this Answer to "Riverkeeper, Inc.'s Motion for Clarification and Reconsideration of LBP-08-13," dated August 11, 2008 ("Motion"). Riverkeeper has asked the Atomic Safety and Licensing Board ("Board") to clarify and reconsider its ruling on Riverkeeper Contention EC-2 ("EC-2"), as set forth in the Board's Memorandum and Order (LBP-08-13) dated July 31, 2008.<sup>1</sup> Contention EC-2 challenged the adequacy of Entergy's severe accident mitigation alternative ("SAMA") analysis presented in its license renewal application ("LRA") for Indian Point Energy Center ("IPEC") Units 2 and 3.<sup>2</sup> The Board rejected EC-2, in its entirety, as inadmissible.

In its Motion, Riverkeeper asserts that "the Board's analysis and ruling on this contention confuses the contention's two main issues to a degree that makes it impossible for Riverkeeper to understand the Board's reasoning or basis for rejecting [Subparts] 1(a) and 2(a), (b) and (c) of the contention."<sup>3</sup> Riverkeeper further claims that "[t]he decision is also at odds with the record, which

<sup>1</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC \_\_ (slip op. July 31, 2008) ("LBP-08-13" or "July 31 Order").

<sup>2</sup> Entergy's SAMA analyses for IP2 and IP3 are contained in the IPEC Environmental Report ("ER"). See LRA, Appendix E, "Environmental Report," Section 4.21, "Severe Accident Mitigation Alternatives" and Attachment E, "Severe Accident Mitigation Alternatives (SAMA) Analysis."

<sup>3</sup> Motion at 1.

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shows that the contention establishes the existence of a genuine and material dispute between Riverkeeper and Entergy regarding the adequacy of the SAMA analysis provided in Entergy's [ER]."<sup>4</sup> For those reasons, Riverkeeper requests that the Board both clarify and reconsider its decision to reject the above-referenced sections of EC-2.<sup>5</sup>

Entergy opposes Riverkeeper's Motion insofar as it asks the Board to reconsider its ruling on EC-2 and to admit any portion of that contention. Contrary to Riverkeeper's suggestion, the basis for the Board's ruling is sufficiently clear, and the ruling is consistent with the voluminous record supporting the Board's decision. Reconsideration is not necessary to avoid manifest injustice. There are no compelling circumstances—no clear and material error, no decisive new information, or no fundamental misunderstanding—that warrant reconsideration of the Board's ruling on EC-2.

## II. BACKGROUND

### A. Relevant Procedural History

Riverkeeper submitted EC-2 as part of its November 30, 2007, Request for Hearing and Petition to Intervene in this proceeding.<sup>6</sup> EC-2 asserted that Entergy's SAMA analyses for IP2 and IP3 are "incomplete, inaccurate, nonconservative, and lacking in the scientific rigor required by NEPA."<sup>7</sup> Entergy and the NRC Staff filed their respective answers to Riverkeeper's Petition on January 22, 2008.<sup>8</sup> Riverkeeper filed a reply to the Entergy and Staff answers on February 15, 2008.<sup>9</sup>

During oral argument on March 12, 2008, the Board posed various questions to counsel for

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<sup>4</sup> *Id.*

<sup>5</sup> In this regard, Riverkeeper does not seek clarification and/or reconsideration of the Board's ruling with respect to Subparts 1(b) and 1(c) of EC-2 concerning spent fuel pool fires and intentional attacks on the IPEC facility.

<sup>6</sup> See "Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant" (Nov. 30, 2007) ("Riverkeeper Petition").

<sup>7</sup> Riverkeeper Petition at 54.

<sup>8</sup> See "Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene" (Jan. 22, 2008) ("Entergy Answer"); "NRC Staff's Response to Petition[] for Leave to Intervene Filed By [Riverkeeper, Inc.]" (Jan. 22, 2008) ("NRC Staff Answer").

<sup>9</sup> "Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene" (Feb. 15, 2008).

the parties concerning EC-2.<sup>10</sup> The resulting dialogue precipitated a Board request for “brief clarification” from Riverkeeper regarding its argument that Entergy has not used an appropriate source term in its SAMA analyses.<sup>11</sup> Riverkeeper submitted its written response to the Board’s questions on April 7, 2008,<sup>12</sup> to which the NRC staff replied on April 21, 2008.<sup>13</sup> Entergy chose not to submit a reply in view of the detailed and comprehensive arguments previously presented in its January 22 Answer. On July 31, 2008, the Board admitted Riverkeeper as party to this proceeding but rejected two of Riverkeeper’s proffered contentions, including EC-2.<sup>14</sup> Riverkeeper filed the instant Motion on August 11, 2008, in response to the Board’s ruling.

B. Overview of Contention EC-2

In challenging Entergy’s SAMA analyses, EC-2 raised multiple, discrete issues within the framework of a single contention. Riverkeeper argued that Entergy has not adequately analyzed the probability and scope of severe accidents, or their likely consequences, and that Entergy accordingly should be required to reperform its SAMA analysis. In particular, Riverkeeper alleges that Entergy has: (1) failed to consider the contribution to severe accident costs resulting from reactor containment bypass via induced failure of steam generator tubes; (2) underestimated population doses from severe accidents, in part because Entergy used an improper source term; (3) failed to address uncertainties due to meteorological variations; and (4) inappropriately used a \$2,000 per person-rem dose conversion factor.<sup>15</sup> These four arguments—the focus of Riverkeeper’s Motion—are contained in Subparts 1(a), 2(a), 2(b) and 2(c), respectively, of Contention EC-2.

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<sup>10</sup> Tr. at 610-38.

<sup>11</sup> Tr. at 629-38; *see also* LBP-08-13, slip op. at 180.

<sup>12</sup> *See* “Riverkeeper, Inc.’s Response to Atomic Safety and Licensing Board Questions Regarding Contention EC-2” (Apr. 7, 2008).

<sup>13</sup> *See* “NRC Staff’s Reply to Riverkeeper, Inc.’s Response to the Licensing Board’s Questions Regarding Contention EC-2 (SAMAs)” (Apr. 21, 2008) (“NRC Staff April 21 Reply”).

<sup>14</sup> *See* LBP-08-13, slip op. at 184-92.

<sup>15</sup> *See* Riverkeeper Petition at 54-55, 60-61, 68-74.

### III. APPLICABLE LEGAL STANDARDS

Consistent with 10 C.F.R. § 2.323(e), to avoid manifest injustice, motions for reconsideration may be filed upon leave of the presiding officer “upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”<sup>16</sup> While the standard is a high one, reconsideration is appropriate where a party “brings decisive new information” to the attention of the decisionmaker or “demonstrates a fundamental [] misunderstanding of a key point.”<sup>17</sup> As demonstrated below, such circumstances are not present here.

### IV. ARGUMENT

#### A. The Scope of the Board’s Ruling is Clear and Plainly Encompasses All of the Bases Proffered by Riverkeeper in Support of EC-2

A threshold question raised by Riverkeeper’s Motion is whether the Board ruled on all aspects of EC-2. Contrary to Riverkeeper’s suggestion, the Board’s July 31 Order clearly indicates that the Board understood—and squarely rejected—all bases associated with EC-2, including Subparts 1(a), 2(a), 2(b), and 2(c). This fact is manifest in the Board’s particularized references to each of the issues raised in those individual subparts of the contention.<sup>18</sup>

First, in describing EC-2 and its supporting bases, the Board carefully delineated the specific issues raised by Riverkeeper, making explicit reference to Riverkeeper’s allegations regarding containment bypass via induced failure of steam generator tubes, the appropriateness of Entergy’s source term, meteorological variations, and the use of a \$2,000 per person-rem dose conversion factor.<sup>19</sup> Neither Riverkeeper nor the Board’s July 31 Order provides any reason to believe that the Board ignored or overlooked any of these issues in ruling on EC-2.

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<sup>16</sup> See 10 C.F.R. § 2.323(e); Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

<sup>17</sup> *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

<sup>18</sup> See LBP-08-13, slip op. at 176 (describing the specific issues raised in each of the six subparts of EC-2).

<sup>19</sup> See *id.*

Second, Riverkeeper furnishes no compelling reason to believe that the Board's ruling on EC-2 fails to address each basis of the contention. In ruling on the admissibility of EC-2, the Board evidently consolidated its discussion of the containment bypass issue raised in Subpart 1(a) with its discussion of the other issues raised in Subparts 2(a), 2(b), and 2(c) of EC-2. Indeed, the Board indicated at the outset of its admissibility ruling that it intended to "address the contention in three parts: spent fuel pool fires, terrorist attacks, and issues related to containment bypass accidents."<sup>20</sup> Moreover, upon "turn[ing] to the question of accidents involving containment bypass via induced failure of steam generator tubes," the Board reiterated that its analysis encompassed the source term, meteorologic variation, and dose conversion factor issues raised by Riverkeeper in EC-2.<sup>21</sup>

The particular analytical or organizational framework used by the Board to evaluate the admissibility of EC-2 is plainly within the Board's discretion. The Board's decision to consolidate its treatment of certain issues in no way invalidates its decision. As demonstrated below, the Board considered and rejected each basis of EC-2. There simply is no merit to Riverkeeper's claim that "[t]he Board's rationale in dismissing the contention is based on a description of the content of the contention that is at odds with the actual contention."<sup>22</sup> Nor is there any indication that the Board misunderstood the contention, particularly to a degree that would result in clear and material error and given the voluminous existing record on this issue.<sup>23</sup>

B. The Basis for the Board's Rejection of EC-2 is Adequately Supported by the Record and Consistent with Established Legal Principles and Precedent

Contrary to Riverkeeper's claim, the Board stated the basis for its ruling in reasonably clear terms, and that ruling rests soundly on the adjudicatory record and established legal principles.

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<sup>20</sup> *Id.* at 180.

<sup>21</sup> *Id.* at 182.

<sup>22</sup> Motion at 7.

<sup>23</sup> The Board specifically noted that the parties' written submittals on issues related to EC-2 were "quite extensive." Tr. at 638; *see also* Tr. at 614.

1. *The Board Provided a Sufficiently Clear Statement of the Legal Basis for Its Ruling*

In rejecting Subparts 1(a) and 2(a) of EC-2, the Board stated unequivocally that Riverkeeper had “fail[ed] to demonstrate a genuine dispute with the applicant on a material issue of law or fact.”<sup>24</sup> The Board articulated the rationale underlying this determination, stating that “Riverkeeper has failed to make the minimal demonstration, as required by [NRC] contention admissibility rules, that Entergy’s [SAMA] analysis fails to meet a statutory or regulatory requirement.”<sup>25</sup> The Board further explained that “[p]resentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements.”<sup>26</sup> In rejecting Subparts 2(b) and 2(c) of EC-2, the Board similarly left no room for doubt as to the basis for its ruling, stating that “[t]he same argument applies to Riverkeeper’s arguments related to meteorologic variation and the dose conversion factor.”<sup>27</sup>

Thus, contrary to Riverkeeper’s claim, the Board adequately explained the basis for its decision to reject EC-2, as supported by Subparts 1(a), 2(a), 2(b), and 2(c), as inadmissible. Riverkeeper’s desire for further clarification or amplification of the basis for the Board’s ruling does not alter the fact that the basis for the Board’s decision is readily discernible. Absent a compelling indication that the Board clearly and materially erred in reaching its determination—and no such indication is present here—reconsideration of the Board’s ruling is not warranted.

2. *The Board’s Rejection of EC-2 Has Adequate Support in the Record*

As noted above, the Board rejected EC-2 because it concluded that Riverkeeper provided an “alternative analysis”—one deploying *Riverkeeper’s* preferred assumptions—without making a

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<sup>24</sup> LBP-08-13, slip op. at 183. In this regard, Entergy is not confused by the Board’s reference to “this aspect of Riverkeeper EC-2,” reasonably construing “this aspect” to refer to Subparts 1(a) and 2(a) of EC-2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 183-84.

“minimal demonstration” that *Entergy’s* SAMA analyses do not comply with applicable legal requirements. In so doing, the Board found persuasive, and directly relied upon, arguments advanced by the Staff and Entergy. As such, the Board’s decision is well-founded in the record.

With respect to Subpart 1(a) of EC-2, the Board’s ruling clearly was informed by arguments advanced by Entergy and the Staff. For example, in responding to EC-2, Entergy stated:

Petitioner claims that, *if Entergy were to adopt its assumptions*, then Entergy’s estimates of the conditional probabilities of atmospheric release categories (in the event of core damage) for IPEC Units 2 and 3 would increase significantly, as would the corresponding present values of cost risk associated with atmospheric releases.<sup>28</sup>

Entergy further stated that Riverkeeper “offer[ed] nothing adequate to support its extraordinary assertion that the SAMA analysis must assume that *any* High/Dry sequence would involve a bypass of containment and a substantial release of radioactive material to the atmosphere.”<sup>29</sup> Entergy further asserted that none of the arguments or information presented by Riverkeeper served to “speak to any specific deficiency in the IPEC SAMA analysis.”<sup>30</sup> The Board ultimately agreed. While the Board declined to opine on whether Riverkeeper’s unmitigated induced tube rupture scenario constituted a “worst-case” assumption (as asserted by Entergy), it nonetheless found that Riverkeeper had failed to identify any specific, material deficiency in Entergy’s SAMA analyses.<sup>31</sup>

The Board’s rejection of Subpart 2(a) similarly is supported by the record. Indeed, the Board expressly relied on representations made by the Staff concerning the intended applicability of NUREG-1465 and Riverkeeper’s misplaced reliance thereon:

According to the NRC Staff, NUREG-1465 addresses only releases into containment and assumes that containment remains intact but leaks. Therefore, its methodology does not apply in the scenario in which Riverkeeper would like to apply it, that of [a 100% prompt release resulting

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<sup>28</sup> Entergy Answer at 113 (additional emphasis added).

<sup>29</sup> *Id.* (emphasis in original).

<sup>30</sup> *Id.* at 114.

<sup>31</sup> LBP-08-13, slip op. at 183.

from an] early energetic containment breach.<sup>32</sup>

The Board's reliance on the Staff's explanatory statements is reasonable, given that NUREG-1465 is an NRC guidance document developed by the NRC Staff. The Board also found dispositive the Staff's explanation that early containment failure and containment by-pass are significantly different events that "naturally result in different source terms."<sup>33</sup> Not coincidentally, the Board's ruling parallels the Staff's observation that "the disparity between Entergy's MAAP-based probabilistic source term and the NUREG-1465 source terms fails to show any reason to believe that Entergy's source term is deficient, as required to support an admissible contention."<sup>34</sup>

Although the Board's July 31 Order does not cite Entergy's January 22 Answer, it warrants mention that Entergy proffered arguments similar to those of the Staff. For example, in response to Riverkeeper's objections to Entergy's use of the MAAP code, Entergy cited Riverkeeper's failure to supply "any basis for its assertion that Entergy should redo its entire SAMA analysis using source term values extracted from another source []." <sup>35</sup> Entergy further noted that "[t]here is no regulatory mandate that the source-term identification component of a SAMA analysis be conducted with any particular computer code."<sup>36</sup> Entergy accordingly asserted—and the Board ultimately agreed—that "[t]here is no genuine dispute with the Applicant on a material issue of law or fact."<sup>37</sup>

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<sup>32</sup> *Id.* (citing NRC Staff April 21 Reply at 1-2). Although the Board cited and relied upon the Staff's April 21 Reply, the Staff made a similar statement in its January 22 Answer. In response to Riverkeeper's assertion that Entergy should have used source terms from NUREG-1465, the Staff stated: "But the use of one code rather than another does not raise an admissible contention unless some showing has been made that the code which was used is defective or that it was used in an inappropriate manner. Riverkeeper makes no such showing." NRC Staff Answer at 111 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-03-17, 58 NRC 221, 240 (2003), *petition for review denied*, CLI-03-17, 58 NRC 419 (2003)).

<sup>33</sup> NRC Staff April 21 Reply at 2.

<sup>34</sup> *Id.* As the Board noted, the Staff further explained that "the MAAP code that Entergy employs does include the scenario raised by Riverkeeper, along with other accident scenarios all weighted in proportion to their probabilities of occurrence." LBP-08-13, slip op. at 183.

<sup>35</sup> Entergy Answer at 130.

<sup>36</sup> *Id.* at 132. Entergy, like the Staff, also noted that the MAAP code, irrespective of any formal review and approval by the NRC, has been widely used by the industry to generate plant-specific source terms for an array of regulatory applications, including applications that have required NRC approval. *Id.* at 130-32; NRC Staff Answer at 111 n.77.

<sup>37</sup> *Id.* at 132.



The Board relied on the same rationale in rejecting Riverkeeper's arguments in Subparts 2(b) and 2(c) of EC-2. Specifically, the Board concluded that Subparts 2(b) and 2(c) did not provide the required "minimal demonstration" that Entergy's SAMA analyses are materially deficient. Although the Board's ruling on these particular bases is not accompanied by further explication, that fact alone does not constitute clear and material error or manifest injustice, as the Board's decision again finds more than sufficient support in the record.

With respect to Subpart 2(b), the record supports the Board's conclusion that Riverkeeper failed to raise a genuine dispute on a material issue of law or fact. In Subpart 2(b), Riverkeeper asserted that Entergy "should" use the 95th percentile of the meteorological distribution in estimating the benefit of each SAMA in addition to using the 95th percentile of the core damage frequency ("CDF").<sup>38</sup> Entergy underscored Riverkeeper's failure to adequately explain how applying the alternative "uncertainty" analysis posited by its proffered expert would materially affect the outcome of Entergy's SAMA analyses, which Entergy performed consistent with NRC-endorsed guidance.<sup>39</sup>

Finally, in regard to Subpart 2(c), the Board found that Riverkeeper's arguments concerning the use of the \$2,000 person/rem factor dose conversion factor failed for the same reason—*i.e.*, they raised no material dispute. In the Staff's words, Subpart 2(c) simply "pits one set of calculations against another," and a "difference of opinion as to the calculation to be employed does not, by itself, generate an admissible contention absent a showing that the Applicant's calculation is flawed in some significant manner."<sup>40</sup> Again, the Board's finding that Subpart 2(c) did not support admission of Contention EC-2 has clear support in the adjudicatory record.

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<sup>38</sup> Riverkeeper Petition at 71.

<sup>39</sup> Entergy Answer at 133-36. In particular, Entergy explained that its benefit estimates included conservatisms in both the frequency and consequences terms to offset uncertainty and ensure that SAMA benefits were not underestimated. *Id.* at 135-36. Entergy further explained that it used the ratio of the 95th percentile to the mean of the CDF distribution as a multiplier on the estimated benefits for each SAMA to provide additional conservatism and to avoid underestimation of the benefit of each SAMA. *Id.* at 136. Having failed to controvert these facts, Riverkeeper failed to establish a genuine material dispute.

<sup>40</sup> NRC Staff Answer at 111-112 (citing *McGuire and Catawba*, 58 NRC at 240).

3. *The Board's Ruling is Consistent With Applicable Principles and Precedent*

Riverkeeper suggests that the Board's decision "does not show that it was applying the law to the facts of Sections 1(a), 2(a), 2(b), or 2(c)."<sup>41</sup> To the contrary, the Board correctly applied controlling legal principles to each of Riverkeeper's arguments. It is the petitioner's burden to come forward with contentions meeting the pleading rules.<sup>42</sup> The Board found that Riverkeeper did not meet that burden. Where, as here, a petitioner fails to "show[] how the specific actions of [the] Applicant fall short, . . . the contention fails to show any genuine dispute on a material issue of fact relating to the matters at issue."<sup>43</sup> Riverkeeper's Motion makes it clear that, to the extent there is any uncertainty regarding the scope or meaning of EC-2, it is due to Riverkeeper's own failure to articulate a clear and specific contention, despite its numerous opportunities to do so.

V. CONCLUSION

For the foregoing reasons, Riverkeeper's Motion should be denied. The Board's ruling is not clearly erroneous and certainly is "plausible in light of the record viewed in its entirety."<sup>44</sup>

Respectfully submitted,



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<sup>41</sup> Motion at 7.

<sup>42</sup> *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

<sup>43</sup> *Entergy Nuclear Gen. Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 322 (2006). See also *McGuire and Catawba*, 58 NRC at 240 ("The Intervenor merely point out that, by using their models in the manner they are recommending, a different result would be achieved. This is an insufficient basis for a contention.").

<sup>44</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005) (discussing the Commission's standard for "clear error").

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
Lawrence G. McDade, Chair  
Dr. Richard E. Wardwell  
Dr. Kaye D. Lathrop

\_\_\_\_\_  
In the Matter of ) Docket Nos. 50-247-LR and 50-286-LR  
)  
ENTERGY NUCLEAR OPERATIONS, INC. ) ASLBP No. 07-858-03-LR-BD01  
)  
(Indian Point Nuclear Generating Units 2 and 3) )  
\_\_\_\_\_) August 21, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Answer to Riverkeeper, Inc.'s Motion for Clarification and Reconsideration of LBP-08-13 (Regarding SAMA Contention EC-2)," dated August 21, 2008, were served this 21st day of August, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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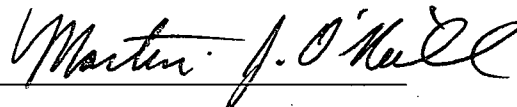
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