

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the matter of  
Pacific Gas and Electric Company  
Diablo Canyon Nuclear Power Plant  
Units 1 and 2

Docket Nos. 50-275-LR  
50-323-LR

**SAN LUIS OBISPO MOTHERS FOR PEACE'S  
PETITION FOR REVIEW OF LBP-15-29**

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November 16, 2015

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**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.341, San Luis Obispo Mothers for Peace (“SLOMFP”) hereby petitions the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for review of LBP-15-29, the Atomic Safety and Licensing Board’s (“ASLB’s”) Memorandum and Order (Denying Motion to File Amended Contention, Granting Summary Disposition, and Terminating Proceeding) (Oct. 21, 2015) (“LBP-15-29”). This petition seeks review of two rulings by the ASLB in LBP-15-29: the dismissal of SLOMFP’s Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation)<sup>1</sup>; and the granting of PG&E’s motion for summary disposition of SLOMFP’s Contention EC-1 (Failure of SAMA Analysis to Include complete Information About Potential Environmental Impacts of Earthquakes and Related SAMAS) (admitted in *Pacific Gas and Electric Co. Diablo Canyon Nuclear Power Plant, Units 1 and 2*, LBP-10-15, 72 NRC 257, 292 (2010) (affirmed in relevant part in CLI-11-11, 74 NRC 427, 444 (2011))).

In addition, this Petition renews and incorporates by reference SLOMFP’s Petition for Review of Memorandum and Order (Denying Motions to File New Contentions) (Sept. 14,

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<sup>1</sup> Amended Contention C was submitted in Mothers for Peace’s Motion to File Amended Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation (July 31, 2015) (“SLOMFP Motion to File Amended Contention C”).

2015) (“SLOMFP 9/14/15 Petition for Review”). SLOMFP’s 9/14/15 Petition for Review seeks Commission review of the ASLB’s August 6, 2015, Memorandum and Order (Denying Admission of Contentions) (“8/6/15 Memorandum and Order), which denied admission of SLOMFP’s Contention B (Failure to Conduct Cost-Benefit Analysis of Energy Alternatives) and SLOMFP’s original Contention C (Inadequate Consideration of Seismic Risk in SAMA Analysis).<sup>2</sup>

The Commission should take review of LBP-15-29 and the ASLB’s 8/6/15 Memorandum and Order because they are inconsistent with and contrary to established law and raise important questions of law and policy. *See* 10 C.F.R. §§ 2.341(b)(4)(ii) and 2.341(b)(4)(iii).

**II. RENEWAL OF SLOMFP’S PETITION FOR REVIEW OF THE ASLB’S 8/6/15 MEMORANDUM AND ORDER**

SLOMFP hereby renews and incorporates by reference its 9/14/15 Petition for Review. If combined, the briefs would meet the page limit in 10 C.F.R. § 2.341(c)(2).

**III. THE COMMISSION SHOULD TAKE REVIEW OF LBP-15-29’S DENIAL OF ADMISSION OF AMENDED CONTENTION C**

**A. Factual and Procedural Background**

In its original Contention C, SLOMFP asserted that Pacific Gas & Electric Company’s (“PG&Es”) Amended Severe Accident Mitigation Alternatives (“SAMA”) Analysis for the proposed renewal of the Diablo Canyon operating license, submitted to NRC in February 2015, is inadequate to satisfy the National Environmental Policy Act (“NEPA”) because it proposed to rely on the “results” of PG&E’s recently-submitted and seriously deficient post-Fukushima

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<sup>2</sup> Both PG&E and the Staff had opposed SLOMFP’s 9/14/15 Petition for Review on the ground that it was premature. *See* Applicant’s Response to Petition for Review (Oct. 9, 2015); NRC Staff’s Answer Opposing Commission Review of Atomic Safety and Licensing Board Memorandum and Order Denying Motion to File New Contentions A and C (Oct. 9, 2015). With the issuance of LBP-15-29, the ASLB has mooted the question of whether SLOMFP’s 9/14/15 Petition for Review is ripe or premature. The issues are now ripe for review.

seismic risk analysis for its evaluation of the cost-effectiveness of measures to mitigate earthquake impacts. SLOMFP's Contention C challenged the adequacy of the analysis underlying those "results" to support the SAMA Analysis.

On July 1, 2015, PG&E submitted an "Evaluation of the March 2010 Seismic Hazard Update on the February 2015 Severe Accident Mitigation Alternatives Analysis" (SHU-SAMA Evaluation"). The SHU-SAMA Evaluation concluded that "while the use of the updated seismic hazards probabilistic risk assessment model does have a small impact on the maximum averted cost-risk and the averted cost-risk results, it does not change the conclusions of the SAMA analysis." *Id.*, cover letter at 2.

On July 31, 2015, SLOMFP submitted Amended Contention C. Like the original Contention C, Amended Contention C asserted that PG&E's SAMA analysis is inadequate to satisfy NEPA or NRC implementing regulations because PG&E proposed to rely on the results of PG&E's recently-submitted and seriously deficient post-Fukushima seismic risk analysis for its evaluation of the cost-effectiveness of measures to mitigate earthquake impacts.<sup>3</sup> Amended Contention C was supported by the attached Declaration of Dr. David D. Jackson, Professor of Geophysics Emeritus at the University of California at Los Angeles.

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<sup>3</sup> PG&E's 2015 seismic hazards analysis consists of two documents: Pacific Gas and Electric Co., Seismic Hazard and Screening Report, Diablo Canyon Power Plant Units 1 and 2 ("SHS Report"), submitted by letter from Barry S. Allen, PG&E to NRC, re: Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding the Seismic Aspects of Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident: Seismic Hazard and Screening Report (Mar. 11, 2015) ("SHS Report"); and PG&E's Seismic Source Characterization for the Diablo Canyon Power Plant, San Luis Obispo County, California; report on the results of a SSHAC level 3 study (Rev. A, March 2015) ("SSC Report").

**B. The Commission Should Take Review of LBP-15-29 and Reverse the ASLB's Decision to Deny Admission of Contention C.**

In dismissing Contention C, the ASLB committed clear factual and legal errors by ignoring and mischaracterizing the claims of the contention, and by applying erroneous legal standards by which it impermissibly judged the merits of the contention and shifted the burden of proof from PG&E to SLOMFP. Therefore the decision warrants Commission review. 10 C.F.R. § 2.341(b)(4)(i), (ii).

To the extent that LBP-15-29 addresses the same issues in Amended Contention C that previously were raised in SLOMFP's original Contention C, SLOMFP relies on its Petition for Review of 8/6/15 Memorandum and Order. This Petition for Review addresses the ASLB's ruling on SLOMFP's additional assertion, in the basis statement for Amended Contention C, that PG&E "unreasonably restricted its analysis to considering the effects of spectral acceleration." LBP-15-29, slip op. at 7. SLOMFP contends that PG&E must consider other measures of ground motion "that could cause reasonably foreseeable and significant adverse environmental impacts on Diablo Canyon that are more extreme than or different from the impacts of spectral acceleration," including "surface fault rupture, ground displacement, ground velocity, and duration of shaking." SLOMFP Motion to File Amended Contention C at 13.

First, the ASLB erred by holding that SLOMFP must show that "considering ground displacement, ground velocity or shaking duration would materially change any conclusions regarding the cost-effectiveness of particular SAMAs," and that SLOMFP has failed to show how consideration of surface fault rupture "would make a material difference in any SAMA analysis conclusions." LBP-15-29, slip op. at 8. As the Commission has held, criticisms of the details of a SAMA analysis are not required where a contention asserts that significant information or inputs have been omitted from the analysis as a whole. *Pacific Gas and Electric*

Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 442-43 (2011); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 9-10 (2002). *See also* Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393, 407 (2012). SLOMFP met this burden by explaining the effects of these phenomena on buildings and engineered structures. SLOMFP Motion to File Amended Contention C at 14-17. In addition, SLOMFP asserted that “Given the proximity of the Diablo Canyon facility to the general location of the Shoreline Fault and other faults, an objective quantitative estimate of the environmental cost and probability of surface rupture should be included in the SAMA analysis for Diablo Canyon.” *Id.* SLOMFP is not required, at the admissibility stage, to prove its contention; to require such a showing would shift the burden of proof from PG&E and the NRC Staff to SLOMFP.

Second, the ASLB erroneously faulted SLOMFP for failing to address PG&E studies “that considered the potential for surface fault rupture and determined that ‘the ground at and near the [Diablo Canyon] site has not been displaced by faulting for at least 80,000 to 120,000 years.’” LBP-15-29, slip op. at 8. In fact, SLOMFP did assert that because PG&E has not collected adequate data to locate the Shoreline Fault, it does not have an adequate basis for confidence that surface fault ruptures will not occur under or close to the Diablo Canyon reactor.

As discussed in SLOMFP’s Reply:

SLOMFP contends that PG&E has failed to collect data west of the Shoreline Fault that are needed in order to reasonably locate the fault, or to address the uncertainty created by the lack of adequate data. This lack of adequate data or uncertainty analysis affects the reliability of PG&E’s risk estimates in two important ways: first, it may result in the underestimate of the frequency of seismic events of various peak ground motion acceleration rates; and second, if the Shoreline Fault or another fault is located directly beneath the Diablo Canyon plant, an earthquake could cause surface fault rupture, large ground velocity, and large ground displacement as well as strong acceleration. SLOMFP Motion at 8-9.

San Luis Obispo Mothers for Peace's Reply to Oppositions to Motion to File Amended Contention C at 3-4 (Sept. 14, 2015). Thus, the fact that PG&E has not previously identified surface faulting is not dispositive. Again, by weighing SLOMFP's assertions against PG&E's assertions, the ASLB unlawfully reached the merits of the contention and shifted the burden of proof to SLOMFP.

Finally, in a footnote, the ASLB stated that it was not necessary to reach the issue of timeliness because the contention filed to meet the NRC's admissibility standards. Should the Commission reach the issue of timeliness, SLOMFP respectfully submits that the new information added by SLOMFP to the basis of the contention are timely under the Board's 8/6/15 Memorandum and Order. In that decision, the ASLB held that the original Contention C was premature, because:

[I]t alleged deficiencies in the 2015 seismic analysis that had not yet even been incorporated in PG&E's SAMA analysis. At that time, any complaints that SLOMFP might have had about a future, updated SAMA analysis were necessarily speculative.

*Id.*, slip op. at 17.n.75. Claims that are premature cannot be late at the same time. Under the terms of NRC admissibility regulations and the Memorandum and Order, all of Amended Contention C's assertions are timely because they were filed within 30 days of SLOMFP's receipt of the revised SAMA Analysis.<sup>4</sup>

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<sup>4</sup> SLOMFP also notes that while SLOMFP has provided additional explanation of the factual basis for Contention C in Amended Contention C, the statement of the contention itself has not changed since the filing of the original Contention C.

### **III. THE COMMISSION SHOULD TAKE REVIEW OF LBP-15-29'S DISMISSAL OF CONTENTION EC-1.**

#### **A. Factual and Procedural Background**

As admitted by the ASLB in LBP-10-15, Contention EC-1 asserts that:

PG&E's Severe Accident Mitigation Alternatives ("SAMA") analysis fails to satisfy 40 C.F.R. § 1502.22 because it fails to consider information regarding the Shoreline fault that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant. Further, that omission is not justified by PG&E because it has failed to demonstrate that the information is too costly to obtain. As a result of the foregoing failures, PG&E's SAMA analysis does not satisfy the requirements of the National Environmental Policy Act ("NEPA") for consideration of alternatives or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L).

72 NRC at 292, 360. In the basis statement of Contention EC-1, SLOMFP asserted that "information sufficient to conduct a probabilistic analysis of the risks posed by the Shoreline Fault is 'essential' to the SAMA, and must be included unless the cost is exorbitant." LBP-10-15, 72 NRC at 287. Given that PG&E was in the process of preparing the "Shoreline Fault Report" at the time of that decision, the ASLB refused to limit the scope of the contention to any particular information that must be submitted to satisfy Contention EC-1, ruling that such a limitation would come too close to a merits determination. *Id.* at 290. Instead, the ASLB held that the sufficiency of the SAMA Analysis would be addressed in the hearing on the merits. *Id.*

During the following four years, the ASLB issued two scheduling orders. The first Scheduling Order was issued on September 15, 2010, and was revised on November 19, 2012. On March 19, 2014, contemplating a new scheduling order, the ASLB held a pre-hearing conference "to try to manage this case as efficiently, and proactively, and fairly as we can." Transcript at 636 (Judge Karlin). Expressing concern that the ASLB's and parties' time and resources would be wasted by the filing of motions for summary disposition of Contention EC-1 that could be mooted or repeated after the Staff's issuance of the Draft Supplemental

Environmental Impact Statement (“DSEIS”), then-ASLB Chair Judge Karlin proposed to set “one deadline” for summary disposition motions: “30 days after the DEIS.” Tr. at 644. None of the parties objected to his proposal.

Consistent with Judge Karlin’s proposal, on March 26, 2014, the ASLB issued a Second Revised Scheduling Order stipulating that: “Dispositive motions, if any, with regard to Contention EC-1 shall be filed thirty (30) days after the date when NRC issues the DSEIS.” *Id.*, § II.I.5 (footnote omitted).<sup>5</sup> The Order also required that “dispositive motions based on Pacific Gas and Electric’s final seismic report [*i.e.*, the Shoreline Fault Report] should not be filed before, and shall be deemed timely if they are filed within, thirty (30) days after the date when NRC issues the DSEIS.” *Id.*, § II.I.2. In addition, the Order provided that any new or amended NEPA contentions based on the Shoreline Fault Report (*i.e.*, the “final seismic report”) should be submitted within 30 days after issuance of the DSEIS. *Id.*, § II.F.2.

Since the issuance of the Second Revised Scheduling Order, PG&E has revised its SAMA Analysis twice. On February 25, 2015, PG&E submitted an update to parts of its Environmental Report, including “an updated SAMA analysis based on PG&E’s 2014 Diablo Canyon PRA.” Pacific Gas and Electric Company’s Motion for Summary Disposition of Contention EC-1 at 3-4 (July 31, 2015) (footnote omitted). According to PG&E, the 2014 PRA model “incorporated probabilistic seismic hazard curves that included the Shoreline Fault, as well as updated hazard curves for other regional faults.” *Id.* at 4. The revised seismic hazard curves “were based on the most recent probabilistic hazard analyses available at the time –

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<sup>5</sup> In its latest schedule update, the Staff predicted that the DEIS will be issued in August 2016. Letter from Catherine E. Kanatas to ASLB (Aug. 20, 2015).

developed as part of PG&E's 2011 Shoreline Fault Report." *Id.* In July 2015, PG&E revised its SAMA Analysis again, to incorporate the results of its 2015 seismic hazards analysis.<sup>6</sup>

On July 31, 2015, PG&E filed a Motion for Summary Disposition of Contention EC-1. PG&E asserted that on July 1, 2015, it had "submitted an evaluation of the March 2015 Diablo Canyon seismic hazard update on the February 2015 SAMA Report," and that "information from the March 11, 2015 Seismic Hazard Report has been incorporated into the Diablo Canyon PRA model in order to evaluate the impact of the updated seismic hazard information on the Diablo Canyon SAMA analysis." PG&E Motion for Summary Disposition at 5.

On July 31, 2015, the same day PG&E filed its summary disposition motion, SLOMFP requested an extension of the filing date until September 14, 2015, stating that SLOMFP's counsel would be on a long-planned family vacation during much of the response period (August 7 through August 21), and that SLOMFP had no other counsel that can respond to the motion. No party opposed the motion, and it was granted on August 3, 2015.

On August 24, 2015, due to an unexpected and serious illness in undersigned counsel's immediate family, which required her full attention for an uncertain period, counsel for SLOMFP asked the ASLB and the NRC Commissioners to extend two other deadlines in the Diablo Canyon license renewal proceeding: a September 1 ASLB deadline for SLOMFP's reply to oppositions to Amended Contention C before the ASLB; and an August 31 Commission deadline for appealing the ASLB's 8/6/15 Memorandum and Order. SLOMFP asked that both

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<sup>6</sup> On April 15, 2015, SLOMFP filed Contention C, which challenged the adequacy of the 2015 seismic hazards analysis for purposes of consideration in the SAMA Analysis. Because Contention C was focused on the 2015 seismic hazards analysis and not the 2014 Shoreline Fault Report, Section II.F.2 of the Second Revised Scheduling Order regarding the post-DSEIS timing of contentions on the Shoreline Fault Report did not apply to Contention C.

deadlines be extended until September 14, 2015. Neither motion was opposed, and both motions were granted by orders dated August 25, 2015 (ASLB) and August 28, 2015 (Commission).

On September 14, 2015, SLOMFP responded to PG&E's Motion for Summary Disposition. San Luis Obispo Mothers for Peace's Response to Pacific Gas & Electric Company's Motion for Summary Disposition of Contention EC-1. SLOMFP argued that under the Second Revised Scheduling Order, PG&E's summary disposition motion was premature. SLOMFP pointed out that the Second Revised Scheduling Order had been agreed to by all the parties and was designed to protect the fairness of the proceeding. Further, SLOMFP asserted that, in allocating its limited resources, SLOMFP had relied on the terms of the Second Revised Scheduling Order and the ASLB's assurances regarding the purpose of the Order. Therefore, SLOMFP contended that ASLB should deny PG&E's Motion.<sup>7</sup>

In LBP-15-29, the ASLB granted PG&E's request for summary disposition of Contention EC-1, on the ground that PG&E has cured the omission complained of in Contention EC-1 and mooted the contention by updating its SAMA analysis in light of information about the Shoreline Fault. *Id.*, slip op. at 9. The ASLB disregarded the Second Revised Scheduling Order, on the ground that it was entitled to "modify or waive" the Order "as it deems appropriate in the interest of sound case management." *Id.* at 10 (citing *S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 1 and 2)*, ALAB-841, 24 NRC 986, 991 (1974)).

**B. The Commission Should Review and Reverse the Board's Order.**

The Commission should take review of the Board's dismissal of Contention EC-1 because it is inconsistent with the Commission's legal and policy precedents protecting the

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<sup>7</sup> Also on September 14, as provided by the ASLB's and Commission's extension orders of August 25 and 28, SLOMFP filed its Reply to Oppositions to Motion to File Amended Contention C (Inadequate Consideration Of Seismic Risk in SAMA Analysis as Supplemented by SHU-SAMA Evaluation)s and its Petition for Review of 8/6/15 Memorandum and Order.

fairness of NRC adjudications. As the Commission has recognized, “[c]ase management by the presiding officers and Licensing Boards is an essential element of a fair, efficient hearing process.” Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,183 (Jan. 14, 2004). To ensure procedural fairness, parties should be able to rely on the terms of standing case management orders unless they receive prior notice from the ASLB that the orders will be changed. Nothing in *San Onofre* (cited by the ASLB at page 10 n.39) suggests otherwise. To the contrary, in *San Onofre*, the Appeal Board held that the “considerable latitude” granted to licensing boards for the management of adjudications was circumscribed by “basic concepts of procedural due process,” which must be “scrupulously observed.” 24 AEC at 991. Thus, the Appeal Board reversed an ASLB order denying an extension request on the ground that it was procedurally unfair. 24 AEC at 994.

Here, the Second Revised Scheduling Order clearly provided that SLOMFP would not have to defend against dispositive motions on Contention EC-1 or file new contentions based on the Shoreline Fault Report until after the issuance of the Draft Supplemental Environmental Impact Statement. Under the basic principles of procedural fairness to which the NRC adheres, SLOMFP was entitled to rely on those provisions, or at the very least to receive notice of the ASLB’s intention to drop the provisions *before* the ASLB granted PG&E’s summary disposition and dismissed the contention on the merits.

The ASLB claims that it was permissible to “modify or waive” the Second Revised Scheduling Order to serve its case management objectives of expediting the disposition of the proceeding and discouraging wasteful activities. LBP-15-29, slip op. at 10 (citing Initial Scheduling Order at 1 (Sept. 15, 2010), 10 C.F.R. § 2.332(c)). As recognized in *San Onofre*, however, fairness may not be sacrificed to expediency. In any event, no such sacrifice was

necessary. It is incorrect, as suggested by the ASLB, that the only available case management options were either to grant PG&E's motion -- and thereby preserve the efficiency of the proceeding -- or to deny the motion and thereby "hold open this proceeding for nearly another year, at a minimum." LBP-15-29, slip op. at 9-10. As the Board itself acknowledged, it could have "issued an order to show cause why Contention EC-1 should not now be dismissed as moot." *Id.*, slip op. at 11. Such an order would have put SLOMFP on notice that the Board was contemplating the abandonment of a key procedural order on which SLOMFP had previously relied. SLOMFP could then have obtained expert help to evaluate the question of whether, in fact, the information submitted by PG&E satisfies NEPA's requirements for SAMA analyses. Instead, the ASLB waited until after SLOMFP had responded to PG&E's motion for summary disposition to announce, in a decision to grant PG&E's motion on the merits, that it had decided to drop the previous case management order. There was no need or justification for the ASLB's unfair and prejudicial actions.<sup>8</sup>

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<sup>8</sup> The ASLB contends that SLOMFP was "not prejudiced in any way" because it had "some 45 days in which to respond to PG&E's motion for summary disposition." LBP-15-19, slip op. at 11. Having granted SLOMFP two extensions in the proceeding during August, the ASLB was well aware that counsel for SLOMFP was either on vacation or caring for a seriously ill family member for more than half of the 45-day period allowed for responding to PG&E's motion. As a practical matter, SLOMFP's counsel had only two weeks to respond to PG&E's motion, during which time she was preparing two other major pleadings in this proceeding. SLOMFP reasonably relied on the Second Revised Scheduling Order in allocating most of its time and resources to those two other pleadings. Such circumstances were, indeed, prejudicial to SLOMFP.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should take review of LBP-15-29 and the ASLB's 8/6/15 Memorandum and Order and reverse them.

Respectfully submitted,

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November 16, 2015

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**SAN LUIS OBISPO MOTHERS FOR PEACE  
CERTIFICATE OF SERVICE**

I certify that on November 16, 2015, I posted on the NRC's Electronic Information Exchange SAN LUIS OBISPO MOTHERS FOR PEACE'S PETITION FOR REVIEW OF LBP-15-29. It is my understanding that as a result, the NRC Commissioners, Atomic Safety and Licensing Board, and parties to this proceeding were served.

Respectfully submitted,

*Electronically signed by*

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