ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company

Docket No.: 050958-EI
Filed: June 25, 2007

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MOTION FOR RECONSIDERATION OF ORDER NO. PSC-07-0499-FOF-EI

The Citizens of the State of Florida (Citizens), by and through undersigned counsel, hereby files this request that their Motion for Reconsideration of Order No. PSC-07-0499-FOF-EI, issued June 11, 2007, (Order) be granted, and as grounds for the motion states that the Commission made mistakes of fact and law and overlooked facts in rendering its Order.

I. BACKGROUND

TECO filed its Petition for ECRC recovery of its "Big Bend Flue Gas Desulphurization Program" that it had claimed are designed to improved the reliability of the flue gas desulphurization systems (scrubbers) on its Big Bend Units 1, 2, and 3. TECO based its request for ECRC recovery on its assertion that the Big Bend Reliability Program was designed to meet the requirements of the Consent Decree (CD) it entered into with the United States Environmental Protection Agency (EPA) in 2000.

At issue are this case is four of the Big Bend Reliability projects - electric isolation, split inlet and outlet ducts, and gypsum fines filter - which TECO has claimed were necessary to comply with Paragraph 40 of the Consent Decree (CD). Paragraph 40 of the CD provides that the Big Bend Units 1- 3 may not by-pass the FGD equipment during outages except for those permitted circumstances allowed under the Clean Air Act's New Source Performance Standards (NSPS) after January 1, 2010, (for Unit 3) and

January 13, 2013, (Units 1 and 2).[1] (TR 124) The CD was a settlement of litigation between the EPA and TECO due to allegations that TECO had made major modifications to the Big Bend Units 1-3 subjecting the units to the same requirements as new units and requiring retrofitting of additional environmental equipment. (TR 124) Pursuant to the CD, TECO has submitted Quarterly Reports to the EPA regarding the status of its compliance with the settlement.

Section 366.8255, Florida Statutes, provides that electric utilities may petition the Commission for all of their prudently incurred costs that are necessary and required for complying with environmental laws or regulations for recovery through the ECRC. All other costs are to be recovered through base rates. As a matter of policy, the Commission should strictly apply Section 366.8255, Florida Statutes, to only those costs necessary to comply with actual environmental laws or regulations.

Four of the projects TECO proposed fail to meet this standard because they are not being done to comply with an actual environmental law or requirement imposed by an agency with the authority to impose such requirements.[2] Since these projects fail to meet the statutory standard, the Order should not have allowed recovery through the ECRC, even if these projects might be recoverable through base rates. Misapplication of this standard in the Order has resulted in mistakes of law or fact and the overlooking of certain facts.

II. ARGUMENT

[1] Big Bend Unit 4 currently is required to operate scrubbed at all times.
[2] The parties stipulated to Issue 2 that the remaining eight projects appeared to be eligible for recovery through the ECRC. One project's proposed recovery is through base rates.

The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). As discussed below, this motion identifies several mistakes of law and fact and facts that were overlooked in the Order issued in the above docket.

While motions for reconsideration are not appropriate for reargument of matters that have already been considered, there ". . . will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court." Sherwood v. State, 111 So 2d 96 (Fla 3rd DCA 1959) citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Thus, arguments regarding mistakes of law and fact which require discussion of the same facts and issues that were addressed in post hearing briefs and recommendations are not merely rearguing matters that had already considered. This motion for reconsideration addresses the facts and issues as they relate to the mistakes of law and fact and those facts which were overlooked in the Order.

A. The Order Creates an Environmental Requirement Where None Exist

The essential mistake of law is that the Order creates an "improved scrubber reliability" requirement from the actual requirement of Paragraph 40 of the Consent Decree that the Big Bend Units must run with the scrubbers while in operation after certain dates. Paragraph 40 is silent as to reliability of the scrubbers. There is no direct

nexus between the actual requirement of running scrubbed - which requires that the company does nothing further - and this invented requirement of "improved scrubber reliability." The only paragraph of the CD which speaks to reliability is Paragraph 31 which required TECO to identify those programs it would undertake to improve the availability of its operation and maintenance in its written plans submitted to the EPA.

As stated above, the Order creates a reliability requirement in Paragraph 40 where none exists. The Order states that "[a]fter the bypass allowance is eliminated, any generating units served by the scrubber must be shut down when that scrubber goes down." Order at p. 8. This is a correct statement of the import of Paragraph 40. However, the conclusion that "[t]herefore, to maintain the same unit availability, scrubber reliability must be improved after the bypass allowance is eliminated," is unsupported by the plain meaning of the Paragraph 40 of the Consent Decree. Order at p. 8. Paragraph 40 of the CD reads:

> 40. Further SO2 Reduction Requirements if Big Bend Units 1, 2, or 3 Remains Coal-fired. If Tampa Electric elects under Paragraph 36 to continue combusting coal at Units 1, 2, and/or 3, Tampa Electric shall meet the following requirements.
> A. Removal Efficiency or Emission Rate. Commencing on dates set forth in Subparagraph C and continuing thereafter, Tampa Electric shall operate coal-fired Units and the scrubbers that serve those Units so that emissions from the Units shall meet at least one of the following limits:
> (1) the scrubber shall remove at least 95% of the SO2 in the flue gas that entered the scrubber; or
> (2) the Emission Rate for SO2 from each Unit does not exceed 0.25 lb/mmBTU.
> B. Availability Criteria. Commencing on the deadlines set in this Paragraph and continuing thereafter, Tampa Electric shall not allow emissions of SO2 from Big Bend Units 1, 2, or 3 without scrubbing the flue gas from those Units and using other equipment designed to control SO2 emissions. Notwithstanding the preceding sentence, to the extent that the Clean Air Act New Source Performance Standards identify circumstances during which Bend Unit 4 may operate without its scrubber, this Consent Decree shall allow Big Bend Units1, 2, and/or 3 to operate

> when those same circumstances are present at Big Bend Units 1, 2, and/or 3.
> C. Deadlines. Big Bend Unit 3 and the scrubber(s) serving it shall be subject to the requirements of this Paragraph beginning January 1, 2010 and continuing thereafter. Until January 1, 2010, Tampa Electric shall control S02 emissions from Unit 3 as required by Paragraphs 30 and 31. Big Bend Units 1 and 2 and the scrubber(s) serving them shall be subject to the requirements of this Paragraph beginning January 1, 2013 and continuing thereafter. Until January 1, 2013, Tampa Electric shall control S02 emissions from Units 1 and 2 as required by Paragraphs 29 and 31.
> D. Nothing in this Consent Decree shall alter requirements of NSPS, 40 C.F.R. Part 60 Subpart Da, that apply to operation of Unit 4 and the scrubber serving it.

Nowhere in the language of Paragraph 40 does it require "improved scrubber reliability" after the elimination of the allowance except for a specific reference to Paragraph 31. The Order creates out of whole cloth this legal requirement for "improved scrubber reliability" that does not exist implicitly or explicitly in Paragraph 40 of the Consent Decree. While Section 366.8255, Florida Statutes, grants the Commission the authority to approve costs or expenses prudently incurred by an electric utility in complying with environmental laws or regulations, it does not allow the Commission to create such a legal requirement. While improved reliability of plant is laudable and a proper goal, it is not required by the CD. Therefore any reliability project is a base rate item.

Paragraph 31, as referenced in Paragraph 40, is the paragraph in the Consent Decree that addresses scrubber availability. But TECO did not rely on Paragraph 31 as its justification for ECRC recovery. This is because TECO did not include any of the four contested programs in its Paragraph 31 Optimization Plans nor report them to the EPA as required by the Consent Decree. In fact, the Order states that TECO took great pains to ". . . differentiate the activities it has undertaken to implement the two programs" - the Big Bend Reliability Program and "[t]he existing scrubber optimization plans near-

term operation and maintenance activities required by Paragraph 31 of the Consent Decree." Order at p. 8. However, this analysis is another mistake of law. Paragraph 31 states:

> Optimizing Availability of Scrubbers Serving Big Bend Units 1, 2, and 3. Tampa Electric shall maximize the availability of the scrubbers to treat the emissions of Big Bend Units 1, 2, and 3, as follows:
> A. As soon as possible after entry of this Consent Decree, Tampa Electric shall submit to EPA for review and approval a plan addressing all operation and maintenance changes to be made that would maximize the availability of the existing scrubbers treating emissions of SO2 from Big Bend Units 1 and 2, and from Unit 3. In order to improve operations and maintenance practices as soon as possible, Tampa Electric may submit the plan in two phases.
> (1) Each phase of the plan proposed by Tampa Electric shall include a schedule pursuant to which Tampa Electric will implement measures relating to operation and maintenance of the scrubbers called for by that phase of the plan, within sixty days of its approval by EPA. Tampa Electric shall implement each phase of the plan as approved by EPA. **Such plan may be modified from time to time with prior written approval of EPA.**
> (2) The proposed plan shall include operation and maintenance activities that will minimize instances during which SO2 emissions are not scrubbed, including but not limited to improvements in the flexibility of scheduling maintenance on the scrubbers, increases in the stock of spare parts kept on hand to repair the scrubbers, a commitment to use of overtime labor to perform work necessary to minimize periods when the scrubbers are not functioning, and use of all existing capacity at Big Bend and Gannon Units that are served by available, operational pollution control equipment to minimize pollutant emissions while meeting power needs.
> (3) If Tampa Electric elects to submit the plan to EPA in two phases, the first phase to be submitted shall address, at a minimum, use of overtime hours to accomplish repairs and maintenance of the scrubber and increasing the stock of scrubber spare parts that Tampa Electric shall keep at Big Bend to speed future maintenance and repairs. If Tampa Electric elects to submit the plan in two phases, EPA shall complete review of the first phase within fifteen business days of receipt. For the second phase of the plan or submission of the plan in its entirety, EPA shall complete review of such plan or phase thereof within 60 days of receipt. Within sixty days after EPA's approval of the plan or any phase of the plan, Tampa Electric shall complete implementation of that plan or phase and continue operation under it subject only to the terms of this Consent Decree.

(emphasis added). Paragraph 31 of the Consent Decree is not limited to only near-term operation and maintenance activities. This is borne out by the ability to the Company to amend its Optimization Plans at any time during the term of the Consent Decree. The creation of the distinction between near-term and long-term was created out of thin air to explain away the fact that TECO did not include any of the four contest reliability programs in the Optimization Plans. Moreover, the only requirement related to availability of the scrubbers has to do with operation and maintenance activities, not the capital projects proposed by TECO in its reliability program. So not only is Paragraph 40 silent as to an "improved scrubber reliability" requirement, Paragraph 31 only applies to operation and maintenance activities.

Further, the Order acknowledges that "Paragraph 40 does not include **explicit language requiring** the 13 reliability projects TECO proposed or any other specific engineering project to comply with the requirement that the Big Bend Units not operate unscrubbed after 2010 and 2013." Order at p. 9. There is no additional requirement because the scrubbers are already in place. This fact means that there is no need to do anything else to comply with operating scrubbed after 2010 and 2013 – as stated in the Order. This should have end the inquiry into ECRC recovery. Only costs necessary to comply with environmental laws or regulations – new or old – are recoverable through the ECRC. This is not a discretionary standard to be broadly interpreted or changed, it is mandated by the statute.

Further, the Order misapplied Order No. PSC-02-1421-PAA-EI, issued October 17, 2002, in Docket No. 020648-EI (Turtle Order). The Turtle Order recognized that some leeway was appropriate in allowing costs for implementing an environmental

requirement – a turtle net - when the environmental requirement was silent as to how the requirement was to be met and the company wanted to include activities related to implementing the requirement – such as canal dredging at the net site and a pumping system to maintain dredging. Turtle Order at p. 5. However, in this case the Turtle Order has been fundamentally misapplied because there is no environmental requirement being implemented. As stated earlier, the Order acknowledges that there is no requirement to do any of the 13 projects, nor does the Consent Decree require "improved scrubber reliability." The Turtle Order does not allow bootstrapping activities for inclusion in the ECRC when no there is no legal requirement to anything.

B. The Order Misconstrues Representations Made by TECO to the EPA

In addition to the Optimization Plans, TECO was required to make on going reports to the EPA regarding its compliance with the actual requirements of the CD. In it's reporting to the EPA, TECO was required to report any project undertaken on Big Bend Units 1-4 above a certain amount, even if the project was not required by the CD. In those monthly reports to the EPA, TECO self-identified that the four contested projects were **not required** by any provision of the CD. The Order makes a fundamental error in the legal import of the Quarterly Reports to the EPA. (See example, HE 10, TECO Quarterly Report 3rd Quarter 2006 (Dated 10/27/06)) The Order essentially ignores the fact that TECO reported the four projects under the General Information Section, Number 7, of the Quarterly Reports in accordance with Paragraph 44(b) of the CD as not required by the CD and subsequently claimed in this docket that the Paragraph 40 of the CD requires these four projects. The Order states that ". . . the wording of the reports does not change the nature of the projects, which would not have been undertaken but for the

requirements of Paragraph 40." Order at p. 9. Not only does this conclusion mistake the importance of the "wording of the reports" (i.e. where these projects were reported in the Quarterly Reports), but it also contains an underlying mistaken statement of the law that the company's undertaking of an action, without a legal compulsion, is sufficient to justify recovery through the ECRC.

First, the "wording of the reports" is of essential legal importance because in the reports TECO states plainly under penalty of law that it did not believe that any of the four programs were required by the CD prior to filing this case. While the nature of the projects has not changed, TECO has greatly changed its characterization regarding the environmental requirement of the project depending on the agency.

If the programs were not required by the CD, as TECO acknowledged in its reporting to the EPA, there would be no factual or legal basis for finding that the CD through Paragraph 40 or any other paragraph, legally compelled TECO's Big Bend Reliability Project – i.e. no "but for" has been established. Paragraph 44 of the CD states that:

> 44. Resolution of Future Claims - Covenant not to Sue . The United States covenants not to sue Tampa Electric for civil claims arising from the Prevention of Significant Deterioration or Non-Attainment provisions of Parts C and D of the Clean Air Act, 42 U.S.C. § 7401 et seq., at Big Bend or Gannon Units and that are based on failure to obtain PSD or nonattainment New Source Review (NSR) permits for:
> A. work that this Consent Decree expressly directs Tampa Electric to undertake; or
> **B. physical changes or changes in the method of operation of Big Bend or Gannon Units not required by this Consent Decree, if and only if:**
> (1) such change is commenced after Tampa Electric is implementing the plan, or the first phase of the plan if applicable, approved by EPA under Paragraph 31 (Optimizing Availability of Scrubbers),
> (2) such change is commenced, within the meaning of 40 C.F.R. Section

> 52.21(b)(9), during the time this Consent Decree applies to the Unit at which this change has been made ;
> (3) Tampa Electric is otherwise in compliance with this Consent Decree;
> (4) hourly Emission Rates of NOX, SO2, or PM at the changed Unit(s) do not exceed their respective hourly Emission Rates prior to the change, as measured by 40 C.F.R. § 60.14(h); and
> (5) in any calendar year following the change, emissions of no pollutant within the scope of Total Baseline Emissions exceed the emissions of that pollutant in the Total Baseline Emissions.

(emphasis added). Allowing the Order to disregard TECO's own words and justify reporting these four contested programs under Paragraph 44(b) to the EPA as merely taking ". . . full advantage of the safe harbor provision of the Consent Decree to protect itself from further litigation with the EPA. . . ." misconstrues TECO's representation and statement to the EPA. The Commission should not find that these programs were required by Paragraph 40 of the CD now when the uncontested evidence in the record shows that TECO has previously reported to the enforcing federal agency (EPA) that these same programs were not required by the CD.

Moreover, the Quarterly Reports submitted to the EPA were certified under penalty of law that the information submitted was to the best of TECO's knowledge and belief, true, accurate, and complete understanding that " . . .there are significant penalties for making misrepresentations to or misleading the United States." TECO's explanation of just taking advantage of the safe harbor provision because there was no other place to list the programs on report, does not explain, excuse, or mitigate the fact it signed the EPA reports under penalty of law with full knowledge that it was to provide accurate, truthful and complete information. And the Commission should not allow a party to represent a fact one way in one forum – the projects are not legally required by the CD - and thereafter represent the fact is the opposite in a different forum – the projects are

legally required by the CD. TECO must be held to its representations made under penalty of law before the EPA, even if these representations have subsequently become inconvenient for recovery purposes.

C. The Order Misinterprets The Partial Stipulation

On page 8, the Order misinterprets the stipulation agreed to by OPC which resolved the recovery of nine of TECO's proposed reliability projects. The Order reads that "[i]nherent in that stipulation is the assumption that the Consent Decree is a new legal requirement." The Order uses this misstatement to support its conclusion that "OPC cannot logically argue that that requirement is not 'new' as to some of the reliability projects, but is 'new' for others." Order at p. 8. In addition, to misrepresenting the argument in OPC's brief that there is no requirement to do these projects, irrespective of whether they are old or "new," the stipulation says nothing that supports the Order's assumption. The only agreement that was made was the costs should be recovered through the ECRC clause allocated in the manner shown on the chart entitled "Big Bend Flue Gas Desulphurization System Reliability Program Recovery of Expenditures-Revised." Order at p. 12.

The Order takes the title of the program TECO made to identify certain projects - Big Bend FDG System Reliability (New) ECRC Program – and uses the word "new" out of context. A plain reading of the stipulation shows that the word "new" was employed as a means of referring to those projects that were to be included in the stipulation, and nothing more. If the Commission allows it's Orders to read into stipulations thing that are not there, this will have a chilling effect on parties entering into stipulations.

D. The Order Improperly Ignores the Function of The Electric Isolation Project

By ignoring the function served by the new transformer, the Order allows costs which are not ECRC eligible to be recovered through the ECRC. It is not contraverted that at least " . . . 3,750 KVA load, representing 18 percent of transformer 3B's total connected load, will not be dedicated to pollution control." Order at p. 11. A transformer, in and of itself, is not a piece of environmental equipment. So in order to justify recovery of any of the cost of this piece of non-environmental equipment through the ECRC, a functionality test was applied in the Order. While the Order recognized that 18 percent of transformer's load would not be used for pollution control equipment, it failed to disallow at least that portion of the cost associated with the transformer. The Order failed to consider the Commission independent obligation to set fair, just, and reasonable rates by allowing only environmental costs to be flowed through the ECRC when it stated that "[n]either TECO nor OPC has offered any suggestion or reasoning regarding partial removal of base rate items based on allocated base rate function." Order at p. 11. At a minimum, the Commission should have removed 18 percent of the cost associated with the new electric transformer.

As noted earlier, Paragraph 40 requires that the Big Bend Units may not run unscrubbed after certain dates. Scrubbing requires the installation of FGD equipment – scrubbers – which are already in place. Since TECO already has scrubbers in place to comply with this regulation, TECO has to do nothing else to comply with this requirement. For the reasons discussed in previous sections of the motion, there is no requirement to "improve scrubber reliability" by electrically isolating Unit 3 from Unit 4. The Order ignores the evidence that electrically isolating Unit 3 from Unit 4 would have

no appreciable effect on the reliability of the Units based on historical outage data. (TR 155)

However, the fundamental flaw in the Order's analysis of eligibility of cost recovery for the transformer through the ECRC is the Order's misconstruing the reason for the new transformer addition. Since the addition of the new transformer is not necessary to meet an environmental regulation or law, it is not be recoverable through the ECRC. The evidence shows that the addition of the new transformer has been driven by the addition of the two new ID fans (non-environmental equipment). When TECO refers to the additional load caused by "new SCR system," it is referring to the addition of the two new ID fans. Even though, the ID fans will be used to push air through both the boiler and SCR, TECO has relegated the total functionality of these fans to SCR as part of the "SCR system" rather than appropriately identifying the fans as separate pieces of non-environmental equipment. If the addition of the SCR equipment required the addition of a new transformer, it would have been included as part of the separate SCR program which was approved in 2005. Order at p. 11.

While the additional fan capacity is needed due to the addition of the SCR, the Order ignores TECO's own study on the fan capacity options. A review of the facts in the Sargent and Lundy Study - which was attached to witness Smolenski's testimony as Exhibit JVS-2, Document No. 3 - shows that the ID fan were not the only option available to TECO for Unit 3, but rather was the most expensive. (EXH 5, Document 3 at p. 91) In fact, the Sargent and Lundy Study recommends that the best fan option to meet the SCR requirement are the forced draft (FD) fan alternatives. (EXH 5, Document 3 at p. 91) The Sargent and Lundy Study stated "Both of these FD fan alternatives were

clear winners over the other options by a large margin . . ." which included the ID fan option which TECO choose. Id. A review of Section 5.10 of the Sargent and Lundy Study showed that had TECO chosen the FD fan options for Unit 3, the overall maximum connected horsepower of the auxiliary system would have been reduced and the present motors could have retained. (HE 5, Document 3 at p. 76) The additional variable frequency drive systems (VFD) would have allowed TECO to keep the existing Unit 3 boiler FD fans. This would not have required the additional cost of a new transformer which is the majority of the $6.6 million cost. The Order chose to ignore the import of the facts in the Sargent and Lundy fan study on the need to install the electric transformer at all.

According to the Sargent and Lundy Study conducted on behalf of TECO, the addition of the ID fans requires 12,000 kVA. The study noted that the conversion of balanced draft operation (ID fans) will require the present 4160 V auxiliary system to accept an additional 3000 kVA. (EXH 5, Document 3 at p. 76) The result of TECO's choice to use the ID fans for its system is a new transformer. While the SCR additions may have resulted in the need to modify the existing FD fans, it is clear from the study TECO commissioned that either retrofitting the existing fans with a new rotating element ($423,000) or adding a VFD to the existing fans ($709,000) was all that was necessary to comply with addition fan need imposed by the addition of the SCR to Unit 3. In fact, these two options were also the most cost effective means of addressing the SCR issue. (EXH 5, Document 3 at p. 92)

Rather that conduct the necessary analysis of the facts, the Order states that review of the ID fans will be addressed in the 2007 hearing. Order at p. 11. While the

Order ignores the facts that demonstrate that the use of the ID fans drove the need for the transformer, the Order recognized that ". . . TECO should consider removing a portion of these [ID fans] costs from ECRC to reduce immediate ratepayer impact." The Order implies that ID fan option chosen by TECO was not the least cost option and that some of the cost should be removed by the Company, but fails to disallow the largest cost impact of the Company's failure to pick the least cost option – the transformer. Customers should not have to pay for a transformer which would not have been necessary to resolve TECO's fan issue "but for" TECO choosing to opted for the supped-up fans. This Order has placed the cart before the horse, because it is going to allow the cost of a transformer which is being added because of the additional load of the two ID fans, without determining whether those fans are appropriate. This is a fundamental error.

Based on TECO's own fan study, the most cost effective option to address the need for additional fan capacity would have cost $709,000 dollars, not the $6.6 million TECO has asked for in this case. Even if the Commission were to find that that additional fan capacity was necessary to operate the SCR, recovery of the cost to resolve the need for the additional fans should be limited to the least cost option. While companies are afforded some leeway in how they met environmental laws or regulations, they are constrained to choose the most cost effective method.

III. CONCLUSION

The essential mistakes of fact and law made in the Order which allow recovery of the four Big Bend Reliability Program projects through the ECRC will cause the customers to be subject to a back door rate increase. The Commission should not allow

TECO to pass through the ECRC $14,411,000 in costs associated with the four projects which are not necessary to comply with environmental laws or regulations.

The Commission should strictly apply the standard set forth in Section 366.8255, Florida Statute, and be vigilant in its scrutiny of any request for recovery through the ECRC. Due to the mistakes of fact and law described above, the Commission should grant reconsideration and disallow ECRC recovery of those costs which are not necessary to comply with an actual environmental law or regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Reconsideration has been furnished by electronic mail and U.S. Mail on this 25th day of June, 2007, to the following:

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