IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
and	)	
OFFICE OF FEDERAL HOUSING, ENTERPRISE OVERSIGHT,	)	
Petitioners,	)	Misc. No. 03-MC-57
v.	)	
LELAND BRENDSEL	)	
Respondent.	)	

REPLY IN SUPPORT OF PETITION FOR SUMMARY ENFORCEMENT OF ADMINISTRATIVE SUBPOENA DUCES TECUM

INTRODUCTION

Petitioners explained in the opening memorandum that the administrative subpoena to Respondent Leland Brendsel should be enforced by this Court because: 1) the subpoena was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the agency has satisfied statutory requirements of due process; (3) the documents and testimony requested are relevant to that purpose; and (4) the subpoena demand is reasonable and not unduly burdensome. Respondent offers three arguments in response: the subpoena was issued for an improper purpose; the subpoena is not relevant to any proper agency examination; and the Office of Federal Housing Enterprise Oversight (OFHEO) failed to follow its internal procedures. Each of these arguments is unavailing.

The subpoena was issued for the purpose of obtaining testimony directly relevant to issues raised in the special examination. This is a wholly proper purpose. That Respondent has also been the subject of a Notice of Charges does not change that fact.

Respondent contends that the special examination is over because the special examiners issued a report (known as the Report of the Special Examination of Freddie Mac ("Report")), but he is incorrect in that assessment. The issuance of the Report does not end the examination. The Report provides information about the conclusions and recommendations to date, but the special examiners are continuing to move forward by interviewing individuals and reviewing documents pertinent to the delay and restatement of earnings by the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "the enterprise"). Respondent also suggests that the special examination is not a safety and soundness examination, but that argument relies on a tortured definition of "safety and soundness." The special examination is an inquiry into policies and practices that may seriously harm the long-term viability of Freddie Mac and damage investor confidence in the enterprise. As such, it is a safety and soundness examination.

OFHEO followed all appropriate procedures relevant to the subpoena. Respondent asserts that his request to have the subpoena revoked was not responded to; OFHEO employed a private law firm in conducting the examination; and confidentiality provisions were not followed. Respondent received notice and an explanation that the Director did not grant his request to revoke the subpoena when the Petition in the instant case was filed. OFHEO is empowered by statute to hire such entities as private law firms to assist in their examinations. Finally, none of the confidentiality provisions cited by Respondent are relevant to the release of testimony obtained in the course of an examination.

ARGUMENT

I. THE SUBPOENA WAS ISSUED FOR A PROPER PURPOSE.

As discussed in the opening memorandum, the subpoena was issued pursuant to OFHEO's special examination of Freddie Mac, a safety and soundness inquiry which came on the heels of the announcement that Freddie Mac's earnings would need to be delayed and/or restated for fiscal years 2000, 2001, and 2002. Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Administrative Subpoena Duces Tecum at 5-7 (hereinafter "Pet.'s Memo"); Declaration of David W. Roderer ¶¶ 2-5 (hereinafter Roderer Decl.).[1] Respondent does not deny, nor can he, that OFHEO has the authority to issue administrative subpoenas pursuant to safety and soundness examinations. See 12 U.S.C. §§ 4517(f) and 4641(a).[2]

Respondent contends that the subpoena was issued improperly because OFHEO filed a

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[1] This citation refers to the first declaration of David W. Roderer, attached to the opening memorandum. There is also a declaration by Mr. Roderer attached to this reply brief, which will be referred to as the Second Roderer Declaration (2d Roderer Decl.). Contrary to Respondent's suggestions, Mr. Roderer is the appropriate declarant on these issues because, as counsel to the special examination, he has first-hand knowledge of the facts surrounding the special examination and the circumstances of these subpoenas. See Roderer Decl. ¶ 6.

[2] Respondent makes a point of noting that his leadership of Freddie Mac was consistently praised and that the transactions currently under examination were appropriate. Memorandum of Leland Brendsel in Opposition to OFHEO's Petition for Summary Enforcement of Administrative Subpoena at 3-4 (hereinafter "Resp.'s Memo"). None of this is relevant to the question of whether OFHEO can subpoena Respondent to examine him about the transactions in question. Respondent was given the opportunity to present his version of events, but he elected to ignore the subpoenas. The question now is whether he should have obeyed the subpoena, not whether he did a good job of running Freddie Mac. That latter question will be determined in due course.

Notice of Charges against him on December 17, 2003.[3] Resp.'s Memo at 8-9. Respondent fails to acknowledge, however, that the subpoena at issue was originally issued on October 10, 2003, well before the Notice of Charges issued. Roderer Decl. ¶ 25. Furthermore, OFHEO first indicated its intent to depose Respondent on July 18, 2003, very early on in the special examination process. Roderer Decl. ¶ 10. It is Respondent's delaying tactics and failure to appear for a properly-subpoenaed examination that have created the timing problem about which Respondent complains in his brief.[4] 2d Roderer Decl. ¶ 7.

While it is true that oral discovery is not permitted as part of the enforcement proceeding that is now pending against Respondent, the fact of a pending enforcement proceeding does not strip OFHEO of its ability to issue subpoenas pursuant to its separate special examination authority. See 2d Roderer Decl. ¶ 6. The information that Respondent has been withholding from OFHEO all this time remains as relevant to the special examination now as it was in July. Id. at ¶¶ 4, 8. OFHEO is entitled to proceed simultaneously with its special examination and with enforcement actions against those people or entities that appear to have engaged in wrongdoing based upon evidence already gathered. Id. at ¶¶ 4, 9. See In re Stanley Plating Co.,

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[3] Petitioners take issue with Respondent's suggestion that Petitioners have deliberately withheld relevant information from this Court. See Resp.'s Memo at 8, 9. Prior to the filing of this Petition, there was no Notice of Charges issued against Respondent, and there was no Report of the Special Examination of Freddie Mac. Petitioners did not inform the Court of either event because neither event had yet occurred.

[4] Respondent also complains that he was not given access to documents to use in preparation for the deposition. Resp.'s Memo at 6-7. OFHEO is under no obligation to provide documents to Respondent prior to the examination. OFHEO is interested in obtaining those documents that Respondent currently possesses and in exploring Respondent's knowledge of and best recollection regarding policies and events leading to the restatement and delay of earnings. There is no rule or regulation requiring that such documents be given to the witness in advance.

637 F. Supp. 71, 72-73 (D. Conn. 1986) (administrative agency allowed to proceed with subpoena pursuant to its enforcement procedures while civil action is pending). If Respondent's contention that administrative subpoenas cannot be enforced against those who are also subject to Notices of Charges were accepted, it would lead to the absurd situation that OFHEO would be unable to engage in any further examination of Freddie Mac because it has recently issued a Notice of Charges against Freddie Mac. The only alternative would be for OFHEO to delay indefinitely the issuance of Notices of Charges against people or entities that possess information critical to safety and soundness examinations. However, those who possess the information are most likely to be the ones against whom Notices of Charges would be appropriate. The broader role of OFHEO to ensure the safe and sound operation of the enterprises must not be constrained by the narrow prosecution of misconduct by Freddie Mac or related persons. See Sutro Bros. & Co. v. SEC, 199 F. Supp. 438, 439 (S.D.N.Y. 1961) (no limit on investigative power from institution of adjudicative hearing; such limit would frustrate purpose of investigative authority). It is untenable to contend that by filing an enforcement action against a party, OFHEO is thereby constrained from obtaining information from that party in its examination activities. See United States v. Merit Petroleum, Inc., 731 F.2d 901, 905 (Temp. Emer. Ct. App. 1984) (despite filing of Notice of Probable Violation, agency maintains interest in obtaining all records pertinent to investigation). The D.C. Circuit has spoken to the issue of enforcing an administrative subpoena after a civil complaint has been filed.[5] See Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1518 (D.C. Cir. 1993). In Linde, the Resolution Trust Corporation ("RTC") issued an administrative subpoena against law firm Linde Thomson. Id. at

[5] The Fourth Circuit does not appear to have been squarely faced with this issue.

1510. The district court ordered that the subpoena be enforced, and Linde Thomson appealed. Id. While the case was on appeal, RTC filed a civil suit against Linde Thomson. Id. The D.C. Circuit held that the intervening civil suit did not terminate RTC's investigation or moot the subpoena enforcement. Id. at 1517-18. The court noted that the RTC statute did not "contemplate the termination of investigative authority upon the commencement of civil proceedings." Id. at 1518. The same is true of OFHEO's statute. As in Linde, the administrative enforcement action does not derail the investigation, and the subpoena should still be enforced. Other jurisdictions have taken the same approach as the D.C. Circuit to the issue of enforcing administrative subpoenas after the commencement of other proceedings. Id. (listing cases).

An almost identical factual situation to Linde is seen in RTC v. Walde, 18 F.3d 943 (D.C. Cir. 1994). There, too, the D.C. Circuit held that an intervening civil suit did not prevent the enforcement of an administrative subpoena. Id. at 949-50. In Walde, the court noted that if the individual subject to the subpoena had concerns about how that testimony would subsequently be used, those issues were properly raised in the context of the proceeding in which the testimony was presented, not in the context of the subpoena enforcement. Id. at 950. See also Office of Thrift Supervision, Dep't of Treasury v. Dobbs, 931 F.2d 956, 958 (D.C. Cir. 1991). Similarly, any concerns that Respondent might have that testimony that he gives pursuant to the instant subpoena could be used in the hearing that results from the Notice of Charges can be raised in that hearing, if OFHEO offers any such testimony.

The cases cited by Respondent are inapposite. See Resp.'s Memo at 8-9. They deal with agencies that are governed by statutory structures much different from that of OFHEO. The cases primarily show only that an agency cannot issue subpoenas on a purely pretextual basis, but

that they may issue subpoenas where the resulting testimony may serve more than one purpose. If anything, such a conclusion supports Petitioners' position more than it does that of Respondent.

In United States v. Gertner, 65 F.3d 963 (1st Cir. 1995), the Internal Revenue Service (IRS) subpoenaed a law firm's records under the pretext that the taxpayer-law firm was under investigation when, in fact, the IRS was only seeking evidence of criminal activity on the part of the law firm's unnamed clients. Id. at 965-66. Because the court concluded that the IRS was solely interested in the anonymous clients and not interested in investigating the law firm, it concluded that the subpoena should not be enforced because the IRS had failed to comply with the "John Doe" provisions at 26 U.S.C. § 7609(f).[6] Id. at 970-71. By contrast, in Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985), the Court held that where the IRS had an interest in investigating both the taxpayer being subpoenaed and unnamed parties about whom the taxpayer would be providing evidence, the subpoena should be enforced, and the John Doe provisions did not need to be followed. Id. at 320-22. Therefore, as long as at least one purpose of OFHEO's subpoena of Respondent is the investigation of matters related to the special examination, the subpoena should be enforced, without regard to possible secondary effects or motives. Respondent cannot credibly deny that information that he possesses is directly relevant to the safety and soundness examination being performed by OFHEO. See Roderer Decl. ¶¶ 28-30; 2d Roderer Decl. ¶¶ 4, 7.

Respondent also relies on EEOC v. Federal Home Loan Mortgage Corp., 37 F. Supp. 2d

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[6] John Doe provisions set out certain requirements the IRS must follow when seeking to issue summonses seeking information about unnamed third parties. See 26 U.S.C. § 7609(f).

769 (E.D. Va. 1999). Resp.'s Memo at 9. However, there are substantial differences between EEOC investigations and the special examination at issue here. In cases involving investigations of financial institutions, "the initiation of civil proceedings will not moot an administrative subpoena." Walde, 18 F.3d at 950 (citing Linde, 5 F.3d at 1518). OFHEO has an ongoing interest in the safety and soundness of Freddie Mac and its current and recent managers. Therefore, OFHEO's examination authority does not cease when it issues a Notice of Charges. Regardless of whether OFHEO has concluded that it has sufficient evidence to take action against Respondent (or Freddie Mac, for that matter), OFHEO retains the authority to investigate matters related to the safety and soundness of Freddie Mac, because that is OFHEO's role as regulator. OFHEO has a duty as the safety and soundness regulator to bring enforcement actions once it has found sufficient cause to do so. The agency cannot be required to wait until all the facts and potential actions relating to the institution are fully investigated before bringing individual cases. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980) (en banc). Such delay would allow problems to fester and create even greater risks to the institution. An EEOC investigation, by contrast, has a clear ending; once private litigation has commenced, the EEOC's role as investigator and mediator ceases. EEOC at 773. Thus, the EEOC provides an inapt analogy.

Finally, Respondent cites to United States v. LaSalle National Bank, 437 U.S. 298 (1978), superseded by statute 26 U.S.C. § 7602(d). Resp.'s Memo at 9. In LaSalle the Court discussed the statutory scheme of the IRS, noting the interrelationship between criminal and civil liability and investigations pertaining thereto. Id. at 312-14. Because of that interrelationship, Congress had created a prophylactic measure preventing a civil summons from issuing once an

investigation had been referred to the Department of Justice for criminal prosecution. Id. at 312-13 (citing 26 U.S.C. § 7602). The Court noted that, while the IRS is required to issue summonses prior to such referral in good faith, it would be extremely rare to find bad faith in light of the fact that the IRS would generally have coterminous interests in civil and criminal enforcement. Id. at 316-17. The Court ultimately concluded that the summons was validly issued. Id. at 318-19.

It is hard to see how LaSalle helps Respondent. For one thing, LaSalle is about civil and criminal enforcement. There has been no criminal enforcement action taken against Respondent. All that exists at this point is an examination into the safety and soundness of Freddie Mac and a civil administrative proceeding against Respondent. Additionally, the statutory structure discussed in LaSalle demonstrates that Congress is capable of demarcating the authority of an agency where appropriate. Congress decided to end the IRS's ability to issue civil summonses once a criminal investigation had begun. Congress did not, however, see fit to limit OFHEO's examination authority once a Notice of Charges has been filed. See Dresser Indus., 628 F.2d at 1378-81 (distinguishing LaSalle because of distinctions between IRS statute and SEC statute); see also United States v. Frowein, 727 F.2d 227, 231-32 (2d Cir. 1984) (distinguishing LaSalle because criminal proceedings have different policy interests than civil proceedings). There is no reason for this Court to impose such a limitation on OFHEO's examination ability when Congress has elected not to do so. Finally, LaSalle shows that it is appropriate to enforce summonses (or subpoenas) unless there is evidence of bad faith. As noted above, there can be no doubt that OFHEO's many attempts to subpoena Respondent are directly related to the safety and soundness examination and that Respondent possesses information relevant to that examination.

The fact that during the period Respondent delayed his testimony OFHEO obtained sufficient evidence to bring charges against him, does not change the fact that OFHEO sought the testimony initially in order to further the special examination, and that OFHEO continues to seek Respondent's testimony for the purpose of learning more about the events leading to the restatement and delay of earnings in order to ensure the future safety and soundness of Freddie Mac. 2d Roderer Decl. ¶¶ 4, 7. Indeed, it is only because of Respondent's delay in testifying that the Notice of Charges and the Report will have preceded his testimony.

In sum, the subpoena was issued for a proper purpose: OFHEO's special examination of Freddie Mac. The Director has the authority to issue such a subpoena, and Respondent ought to have obeyed it.

II. THE INFORMATION SOUGHT IS RELEVANT TO A PROPER AGENCY EXAMINATION.

Respondent advances two arguments that the subpoena is not relevant to a proper agency examination. He contends that the special examination is over and that the examination at issue is not a safety and soundness examination. Resp.'s Memo at 9-10. Both of these contentions are erroneous.[7]

The special examination is not over. It is an ongoing process. 2d Roderer Decl. ¶ 4. OFHEO continues to question current and former employees, examine documents, and otherwise investigate the policies and practices that led to the restatement and delay of the 2000, 2001, and 2002 earnings. Id. at ¶¶ 4-5. While the special examiners have issued a report on their conclusions and recommendations to date, that Report does not mark the end of the examination.

[7] Neither of these arguments is a denial that the information sought is, in fact, relevant to the examination.

Id. at ¶¶ 3-4. Rather, it reflects OFHEO's desire to keep Congress and the public informed of its progress while the examination continues. Id. at ¶ 3. It is not for Respondent to decide when the special examination has concluded. That is for OFHEO and the special examiners to decide. Thus, subpoenas issued pursuant to that examination remain valid.

Based upon an assortment of public statements in which OFHEO indicated that Freddie Mac was "safe and sound," Respondent contends that this could not be a safety and soundness examination. See Resp.'s Memo at 4-5. Unfortunately, this argument rests on a hopelessly narrow perception of what constitutes a safety and soundness examination. See Resp.'s Memo at 9-10. Respondent seems to believe that as long as Freddie Mac is presently "safe and sound," OFHEO is precluded from undertaking a safety and soundness examination. Based on this reading of the phrase, OFHEO cannot do a safety and soundness examination unless one of the enterprises is on the brink of bankruptcy. The more reasonable interpretation, as presented in the opening brief, is that safety and soundness examinations deal with business practices that may affect the safety and soundness of the enterprise. Pet.'s Memo at 6.

A banking practice is unsafe and unsound when it is "deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder." Greene County Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996); In re First Nat'l Bank of Eden, S.D. v. Dep't of Treasury, 568 F.2d 610, 611 n.2 (8th Cir. 1978); see also Landry v. FDIC, 204 F.3d 1125, 1138 (D.C. Cir. 2000) (noting that an unsafe or unsound practice is one that poses a reasonably foreseeable undue risk to the institution). Courts have found unsafe and unsound banking practices in situations where the institution in question was not itself about to be declared unsafe and unsound. See, e.g., Lindquist & Vennum v. FDIC, 103

F.3d 1409, 1417 (8th Cir. 1997) (finding certain employment agreements and bonuses to be unsafe and unsound banking practices).

It is clear, not only from the Roderer declarations, but also from the Report that the examination at issue is a safety and soundness examination. Roderer Decl. ¶¶ 3-5; 2d Roderer Decl. ¶ 4; Report at 2, 18, 60, 122, 124, 163, 165-66 (attached as Exh. A to 2d Roderer Decl.).[8] The focus of the examination is on issues that may pose a serious threat to the future safety and soundness of Freddie Mac: the determination of weaknesses in accounting practices, controls, and corporate governance. 2d Roderer Decl. ¶ 4; Report at 2 ("The Director instructed the special examination to make recommendations to him as to additional steps that needed to be taken to help ensure the continuing safe and sound operations of the Enterprise."). The special examiners are looking into why earnings reports were inaccurate, an issue critical to investor confidence, which is, in turn, critical to a safe and sound enterprise. Roderer Decl. ¶ 4.

The special examination is an ongoing process, and it is an examination into the safety and soundness of the business practices at Freddie Mac. OFHEO seeks testimony from Respondent regarding those business practices. Thus, the subpoena is appropriate and should be enforced.

III. OFHEO FOLLOWED ITS INTERNAL PROCEDURES.

Respondent argues that OFHEO failed to follow its own procedures in three ways: failing to adjudicate Respondent's request to revoke the subpoena, retaining a private firm to assist with the special examination, and failing to ensure confidentiality. Resp.'s Memo at 10-12. Each of

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[8] The entire report is available at http://www.ofheo.gov/media/pdf/specialreport122003.pdf.

these arguments fails.

First, the Director engaged in all of the adjudication of Respondent's request to revoke the subpoena that is required by law. The statute authorizing the Director to quash subpoenas, 12 U.S.C. § 4641(a)(4), contains no provision for individuals to request that a subpoena be revoked. It sets up no procedure for such revocation, so there is no procedure pursuant to that statute that the Director could have failed to follow. Respondent also relies on the Administrative Procedure Act (APA) at 5 U.S.C. § 555(b)[9] & (e).[10] Resp.'s Memo at 11. To the extent that § 555(b) applies it all, it requires only that a matter be concluded within a reasonable time. Section 555(e) requires that notice of the denial of an application be given. Neither section sets out a specific time frame or procedure, nor does either prevent the notice of denial from taking the form of a petition filed in federal district court. Respondent has received notice that the subpoena is not

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[9] 5 U.S.C. § 555(b) provides as follows:
(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

[10] 5 U.S.C. § 555(e) provides as follows:
(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

being revoked, and he has received an explanation of the grounds for denial of his request. Petitioners filed with this Court, inter alia, a petition to enforce the subpoena, a supporting memorandum, and a declaration by David W. Roderer of OFHEO. Each of these documents explains why the subpoena was not revoked–because the subpoena was validly issued. Neither 12 U.S.C. § 4641 nor 5 U.S.C. § 555 entitles Respondent to any further notice than that which has been provided in the course of this litigation.

Second, OFHEO is empowered to hire a private law firm to assist with the examination. Respondent is correct that 12 U.S.C. § 4517(c) authorizes the Director to contract with an assortment of federal agencies to conduct examinations. Resp.'s Memo at 11-12. Where Respondent's analysis goes astray is in concluding that this is meant to limit, rather than expand, the Director's ability to procure assistance with examinations. Section 4517(c) provides that the "Director shall appoint examiners to conduct examinations under this section. The Director may contract with the Comptroller of the Currency. . . ." (emphasis added). The ability to contract with federal agencies is permissive, whereas the appointment of examiners is mandatory. See S. Rep. No. 102-282 *14-15 (May 15, 1992) (noting that the Director is authorized to contract for any service but that federal banking agencies are highlighted). The Director is thus allowed to use those listed federal agencies as examiners, but it is not limited to that option. Pursuant to § 4517(e), the Director is authorized to obtain the services of any technical experts the Director deems appropriate to assist with examinations. In addition, § 4515(e) authorizes the Director to appoint and compensate such outside experts and consultants as he deems necessary. Each of these provisions provides ample support for the Director's authority to hire Crowell and Moring to assist in the special examination.

Third, none of the three provisions on confidentiality referred to by Respondent have anything to do with the release of sworn testimony taken pursuant to an examination. See Resp.'s Memo at 12. The first, 12 C.F.R. § 1703.6, prevents employees from divulging confidential or otherwise nonpublic information except where authorized in other sections of § 1703 or as otherwise necessary in performing official duties. The second, § 1703.8, deals with situations in which reports of examinations may be disclosed. The third, § 1703.11(b)(11) does not exist at all. In general, however, § 1703.11, is about release of documents in response to document requests under the Freedom of Information Act and appropriate exemptions. None of these provisions prevents the release of testimony taken pursuant to an examination.

CONCLUSION

The subpoena seeking testimony and documents from Respondent was issued for a lawful purpose within the statutory authority of OFHEO. The information sought is directly relevant to the examination of the Freddie Mac earnings restatements. Respondent's protestations to the contrary are unavailing. Petitioners respectfully request that this Court enforce the administrative subpoena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2004, a copy of Petitioners' Reply In Support of Petition for Summary Enforcement of Administrative Subpoena Duces Tecum, was sent by first class mail, postage prepaid, to:

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