ADMINISTRATIVE PROCEEDING
FILE NO. 3-4330

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

PROJECT SECURITIES & CO., INC.

(8-15682)
WILLIAM C. MILLER

INITIAL DECISION

Washington, D.C.
March 6, 1975

Edward B. Wagner
Administrative Law Judge

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APPEARANCES: Franklin D. Ormsten, John J. O'Connor and Steven V. Shore of the New York Regional Office for the Division of Enforcement

Fellner & Rovins by Wynne B. Stern, Jr. for respondent William C. Miller

BEFORE: Edward B. Wagner, Administrative Law Judge

THE PROCEEDING

This public proceeding was instituted by an order of the Commission dated May 9, 1973 pursuant to Sections15(b) and 15A of the Securities Exchange Act of 1934 (Exchange Act) and Section 10(b) of the Securities Investor Protection Act of 1970 (SIPA).

The respondents named were Project Securities & Co., Inc. (Project) and William C. Miller. Project failed to file an answer and a default was taken.[1/] Miller both filed an answer and appeared at the hearing through counsel.

The Order recited that the Commission files reflected Miller as President, Treasurer and a Director of Project and named Miller as having wilfully aided and abetted wilful violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder (the Net Capital Rule)[2/] and as having wilfully aided and abetted wilful violations of Section 17(a) of that Act and Rule 17a-11 thereunder (the Early Warning Rule).[3/] The violations were alleged to have taken place from on about November 17, 1972 to December 13, 1972.

1/ As a result of the default the Commission issued an order revoking the broker-dealer registration of Project and finding, among other things, that Project had from about November 20, 1972 to May 9, 1973 wilfully violated Section 15(b) of the Exchange Act and Rule 15b3-1 thereunder in that it failed promptly to amend its application for broker-dealer registration to reflect the fact that Miller had ceased to be its president. SEA Rel. No. 10438 (October 16, 1973).

2/ 17 CFR 240. 15c3-1.

3/ 17 CFR 240. 17a-11.

The Order also alleged that a Trustee had been appointed for Project pursuant to Section 5(b)(3) of SIPA and that the Trustee had been required to make unreimbursed charges against the Securities Investor Protection Corporation (SIPC) fund in order to satisfy the administration expense of Project's liquidation. The only reference to SIPA thereafter is in Section III of the Order posing the question for determination at the hearing. This reference is as follows:

> "B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act, and Section 10(b) of the Securities Investor Protection Act of 1970." 4/

The Division more definitely stated its charge under SIPA on the record at the hearing. The gist of the Division's statement was that Miller had aided and abetted Project's net capital violation, that this violation formed the basis for the SIPC Trusteeship in which unreimbursed charges against the SIPC Fund were required, and that, accordingly, Miller was subject to a sanction pursuant to Section 10(b) (Tr. 76-81).

4/ Section 10 (b) of SIPA provides:

> " ENGAGING IN BUSINESS AFTER APPOINTMENT OF TRUSTEE. - It shall be unlawful for any broker or dealer for whom a trustee has been appointed pursuant to this Act to engage thereafter in business as a broker or dealer, unless the Commission otherwise determines in the public interest. The Commission may by order bar or suspend for any period, any officer, director, general partner, owner of 10 per centum or more of the voting securities, or controlling person of any broker or dealer for whom a trustee has been appointed pursuant to this Act from being or becoming associated with a broker or dealer, if after appropriate notice and opportunity for hearing, the Commission shall determine such bar or suspension to be in the public interest."

Miller's answer denied that the violations charged had taken place and asserted as a defense that he was not associated with Project at the time of the alleged violations.

An evidentiary hearing was held in New York City. Thereafter, both the Division and Miller filed Proposed Findings of Fact, Conclusions of Law and Briefs. The Division filed a reply.

The findings and conclusions herein are based upon the evidence as determined from the record and upon observation of the witnesses. Preponderance of the evidence is the standard of proof applied.

Respondent Miller

Project Securities & Co., Inc. was a corporation organized under the laws of the State of New Jersey. Its principal place of business was located at 2401 Morris Avenue, Union, New Jersey and another main office was located at One Howe Avenue, Passaic, New Jersey. It had been registered with the Commission as a broker-dealer in securities since June 1969 and was a member of the National Association of Securities Dealers, Inc. (NASD).

Miller, the only contesting respondent in the proceeding, was Project's sole Director, President, Treasurer and largest single stockholder. He owned and continues to own over 4,000 of the 11,000 common shares outstanding.

Miller has been employed in the securities business since September 1968. He currently is a vice-president and registered principal of Investors Associates, Inc., a New Jersey brokerage firm.

Miller became associated with Project's predecessor corporation, Kern Investment Co., in September 1971 at which time he was employed as a registered representative. On January 1, 1972 he acquired a controlling interest in the firm, and the firm's name was changed to Project Securities & Co., Inc.

There is no question that prior to November 20, 1972 Miller, as sole Director, President and Treasurer of Project had overall responsibility for its operations and financial condition.

Net Capital Violation and Violation of the Early Warning Requirement

The record is clear, and Miller does not argue to the contrary, that on November 30, 1972 Project required additional capital in excess of $1,284.11 in order to achieve compliance with the Net Capital Rule.[5/]

The record is also clear that Project conducted a securities business on that date and thereafter. Respondent argues that, nevertheless, no violation of Section 15(c)(3) has been established since there is no evidence that the mails or the means or

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5/ On or about the same date the NASD found a net capital deficiency of $38,000. The differing figures are accounted for by the fact that the NASD employs a different method of valuation for securities. Division personnel were unable to prepare a capital computation for dates subsequent to November 30, 1972, because adequate records were not maintained after that date.

instrumentalities of interstate commerce were employed. There is no need, however, to make such a showing. While the order does recite that such means were used, the 1964 Securities Act Amendments in Section 15(b)(4) of the Exchange Act dispensed with the use of such means as a necessary element in the violation charged.

Accordingly, it is concluded that Project wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 (the Net Capital Rule) on November 30, 1972.

No telegraphic notice or other report of Project's net capital deficiency was ever sent to the Commission.

Accordingly, on November 30, 1972 and thereafter it is concluded that Project wilfully violated Section 17(a) of the Exchange Act and Rule 17a-11 thereunder (the Early Warning Rule) in failing to give telegraphic notice and file required reports at a time when it was out of compliance.

Responsibility of Miller for the Alleged Violations

The only real question involved in the proceeding is whether Miller had sufficient involvement in, knowledge of and responsibility for the violations occurring on November 30, 1972 and thereafter to be held to be a wilfull aider and abetter thereof.

On this score, Miller argues (1) that he effectively resigned as President of Project, on November 20, 1972, (2) that this action carried with it a resignation from his other positions as sole Director and Treasurer, (3) that he thereafter did not participate in any way in the management of the firm and therefore is in no way responsible for the above violations.

The Division, however, contends (1) that Miller's resignation was not effective and that he was Project's President at the time of the above violations, and (2) that in the event the resignation as President was effective, Miller continued as Project's sole Director, Treasurer and major stockholder and aided and abetted on this basis. The Division also contends (3) that if Miller's resignation is treated as completely divorcing him from the firm, he cannot thus be permitted to escape his legal obligations, and further that he still would be liable as an aider and abetter by virtue of the commission of acts prior to November 20, 1972 which directly resulted in the violations. The Division also contends (4) that even if Miller resigned from all of his positions with Project, he would still be subject to a sanction under Section 10(b) of SIPA by virtue of his uncontested status as a stockholder owning in excess of 10% of the voting securities of the firm (See Division Reply Brief, p. 12).

Findings relating to the above contentions are set forth below.

The NASD in early September 1972 when reviewing Project's August Form 12-2, a monthly statistical report which is routinely submitted, became concerned about Project's financial condition. Among the causes for the NASD concern were a decline in the firm's net capital from $26,141.34 to $19,952.28 during August 1972; a $25,000 realized loss for the month; and certain inconsistencies in information reflected on the form.

Around the time he received the report James Richter, Assistant Director of the NASD's New York District Office, telephoned Miller to discuss Project's financial condition and to request Miller to appear at the offices of the NASD for further discussions. A meeting was scheduled for September 28, 1972.

On September 28, 1972 Miller met with Richter and John Shahinian, an NASD Examiner, at the offices of the NASD to discuss Project's continuing losses and to determine what remedial measures should be taken. At that meeting Richter and Miller discussed Project's Form 12-2 item by item, and Richter asked Miller for an explanation of Project's substantial losses. Among the matters discussed were the following:

(a) The 60% drop in tickets Project had been writing on a monthly basis.

(b) a drop in the firm's net capital since earlier in the year from $30,000 down to $19,000.

(c) the inadequate amount of cash on hand to cover customer credit balances, resulting in part from a substantial increase in the firm's trading position.

(d) the $25,000 loss incurred during August 1972; and

(e) the firm's computation on its Form 12-2 to the effect that net capital had increased from $39,000 in May to $43,000 in August which was inconsistent with the $25,000 realized loss incurred in August and the net cumulative loss of $10,000 between May and August also reflected on the Form 12-2.

At the meeting Miller offered a number of explanations. He stated that the August drop in order tickets was caused by the distribution of a new issue in July and August and that with a resumption of trading activity in September the number of order tickets should increase.[6/] Miller also said that Project's reduced cash position was accounted for by the fact that the firm trader had exceeded his $10,000 limit and that apparent inconsistencies with respect to net capital had been caused by an error in preparing the form and a failure to indicate that $70,000 of new funds had been subordinated to cover losses. Miller explained that the firm's overhead of approximately $18,000 per month was attributable to expenses incurred in maintaining two main offices, high telephone bills and a high average cost to process order tickets.[7/]

6/ Later Richter learned that no increase had occurred in September, but rather that the number of order tickets was down again.

7/ Project's fixed expenses were well above the average for a firm of its size.

As a result of the meeting between Richter and Miller the following suggestions were made to help Project overcome its problems:

(a) That a $10,000 maximum trading limit should be enforced;

(b) That one of the main offices be closed in order to reduce overhead;

(c) That in order to cut the firm's extraordinary overhead and costly processing of each ticket a thorough accounting by all firm employees of their expenses and any losses incurred in trading should be prepared on a weekly basis and submitted to the NASD; and

(d) That the total amount of customer free-credit balances should be limited to no more than 15% of the firm's cash position.

Subsequent to the meeting Richter sent a letter, dated October 5, 1972 to Miller which summarized the meeting and set forth in specific terms the firm's problems, Miller's explanations and certain suggested solutions. The letter stated that a "reply . . . outlining what steps you are taking to solve the aforementioned problems will be helpful to both you and the Association in its endeavors and responsibilities as a regulatory agent to assist as well as to regulate." (Div. Ex. 15, p. 3).

Miller did not, as requested, write to Richter in reply to the October 5, 1972 letter. On at least one occasion in October Richter telephoned Project to speak with Miller about his failure to acknowledge

the letter. Richter was told that Miller was out, and the call was not returned. Richter dispatched Shahinian to Project to review its books and records and to prepare net capital computations. According to the NASD computations made at the time, Project did not meet the requirements of the SEC's Net Capital Rule on October 31, 1972 and for every week in November.[8/] The standard NASD procedure -- in the event of such net capital deficiencies -- was for the person who made the computations immediately to apprise the principals of the firm of the deficiencies.

Although Miller did discontinue the firm's data processing service and asserts that he generally attempted to reduce spending by the firm and to reduce firm inventory, he took none of the important steps suggested by the NASD and no other substantial corrective action.

Miller continued as President in charge of the day-to-day operations of the firm until November 20, 1972.[9/]

Pursuant to a telephone call the day before, on November 20, 1972 in the afternoon Miller met with James Leonard, Project Vice-President and Secretary at a New Jersey restaurant, the Red Wood Inn.

8/ NASD net capital computations do not, of course, evidence that Project failed to meet SEC net capital requirements since, as previous noted, the NASD employs a different system for valuing O-T-C securities in its computations.

9/ Miller's testimony shows that pink sheet prices on November 20, 1972 on securities held in the firm's trading account on November 30, 1972 were almost uniformly higher, but since no evidence was offered as to what comprised the firm's inventory on the earlier date, no conclusion can be reached (as proposed by Miller) concerning Project's status under the Net Capital Rule on the day of his resignation.

He there tendered to Leonard a written resignation as President of Project, dated November 20, 1972, which stated that it was effective immediately. The resignation was addressed to the Board of Directors of Project. Miller sent a carbon copy of the resignation to Reisdorf & Jaffe, the firm's attorneys.

Thereafter, Leonard informed Miss Michele Sierchio, Miller's secretary, that Miller was no longer with the firm. She was instructed by Leonard to tell persons who called asking for Miller that he was not in and that she would take the message. She relayed such messages to Leonard. Leonard assumed the title of President and signed agreements in that capacity, and Miller completely absented himself from the premises of Project. Except for assistance rendered to a subordinated lender, Miller thereafter divorced himself from Project's activities.

The Division points to a number of factors which they assert negate the resignation. Thus, no amendment to the firm's B-D filing reflecting Miller's resignation was ever filed with the Commission. Harold Cohen, counsel for Project's SIPC Trustee, testified that in the course of conducting the firm's liquidation Leonard, Reisdorf & Jaffe, and five firm employees all independently told him that Miller was the firm's President as of December 13, 1973. Cohen also stated that Leonard had testified in the Federal District Court that Miller was President of Project.

I conclude, however, that Miller effectively resigned as President on November 20, 1972. A fact is a fact whether it is formally reported to the Commission or not.[10] As I indicated on the record (Tr. 102-03), Leonard should have been called by the Division as a witness, which he was not, if his statements regarding Miller's status were to be relied upon. Such hearsay evidence cannot override the direct testimony of Miller and Miss Sierchio. Leonard was not subject to cross-examination. For all that anyone knows, his statement that Miller remained the President may have been based upon a conclusion that Miller's resignation was ineffective, flowed from self-interest or reflected a belief that, since Miller was responsible for the firm's plight, he should answer therefor. The other testimony of Cohen, noted above, is also subject to the hearsay objection.

A further question remains as to the effect of the resignation upon Miller's offices as sole Director and Treasurer of Project. Miller testified concerning his resignation that "I believe I worded it as president, under the assumption it would take in all my other activities, would completely divorce me from the other operations of the firm" (Tr. 248) and that his "intent" was "to be divorced from the operation of the firm" (Tr. 248). There is, however, no evidence in the record that he communicated his "assumption" or "intent" to anyone else.

10/ There was no charge that Miller wilfully aided and abetted the firm's wilful failure to file an amendment reflecting his resignation, and no conclusion is reached on this score. On this point see Alfred Miller, 43 S.E.C. 233, 239 (1966), cited by the Division.

When questioned as to what efforts he had made to dispose of his large stock interest, for which he had paid from $15,000 to $20,000, Miller at first testified that he had made no effort. When the inconsistency of retaining his large stock interest in the firm and divorcing himself from all control of the firm's activities was pointed up to him, he testified that he "didn't expect that to materialize." (Tr. 309)[11].

Miller's testimony that he intended his resignation as President to cover his other offices is not credited, particularly in view of his above admission on the record that he did not expect a complete divorce to materialize and the inconsistency with a complete divorce evidenced by his failure to make any real effort to sell his stock interest.

Further, even if his testimony were credited, the legal effect of his action was merely to resign him from his office as President. As previously stated, the record does not indicate that he communicated his "assumption" or "intent" to anyone either in writing or orally. As a matter of law, he retained his other positions and could have asserted his authority thereunder at any time. See New Jersey Statutes Annotated 14A: 6-3, 6-16; Dillon v. Berg, 326 F. Supp. 1214, 1224 (1971), aff'd. 453 F. 2d 877 (3rd Cir. 1971) (interpreting the Delaware Corporation

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11/ When the subject of the sale of his stock interest was pursued, Miller testified that he did talk to Leonard about it "briefly" at or about the time of the meeting at the Red Wood Inn but nothing further eventuated and that he had not thereafter spoken to Leonard or anyone else about it (Tr. 310).

law which is similar to the New Jersey law in respect to resignations and stating that a resignation must be "unequivocal" and that the necessity for written notice "clearly indicates an intent to outlaw secret, covert resignations in order to enable the other directors to know at all times the status of their fellow directors"); and Nichols - Morris Corporation v. Morris, 174 F. Supp 691, 698 (S.D.N.Y. 1959) (". . . it must appear unequivocally that a complete withdrawal has been effected").

It is concluded that Miller did not resign from his positions as sole Director and Treasurer.

Based upon his awareness of, as established above, of Project's serious financial plight and his retention of the above positions, through which he was obligated to and could have taken action[12/] to prevent the firm from engaging in violative activity, it is concluded that Miller wilfully aided and abetted Project's wilful violations of the Net Capital and Early Warning provisions. See Whitman & Sterling Co., 43 S.E.C. 181, 183-4 (1966); Aldrich Scott & Co., Inc. 40 S.E.C. 775, 778-779 (1961); and The Whitehall Corporation, 38 S.E.C. 259, 274 (1958).

In view of these findings and conclusions it is unnecessary to deal with Division contentions (3) and (4).[13/]

12/ His large stock interest which fortified his status should also be borne in mind here.

13/ See p. 6 of this Initial Decision.

Section 10(b) of SIPA

It was argued on behalf of Miller at the hearing that the second and final sentence of Section 10(b) of SIPA stating that a sanction may be imposed upon designated persons in the event a SIPC Trustee is appointed merely relates back to the first sentence which makes it unlawful for a broker or dealer for whom a SIPC Trustee has been appointed to engage in business thereafter (Tr. 80-83).[14/] Under this interpretation the second sentence would merely authorize the Commission to proceed against officers, directors, and other designated persons if the firm had transacted business unlawfully after the appointment of the SIPC Trustee. Assumedly, the purpose of the second sentence thus would be to reach those responsible for the illegal transaction of business in contravention of the first sentence. The interpretation appears to stem from a restrictive reading of the caption in the context of the first sentence of the provision. Thus, if the caption is read "Engaging in Business [by a Broker or Dealer] after Appointment of Trustee" (bracketed material added), the interpretation argued for becomes more plausible.

However, as the Division points out in its Brief at pp. 24-25, the caption as it appears, "Engaging in Business After Appointment of Trustee," clearly relates to and encompasses both sentences of

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14/ See fn. 4 , p. 2 of this Initial Decision for the full text of Section 10(b) of SIPA.

the provision -- the first sentence relating to engaging in business by the broker or dealer after appointment of the trustee and the second sentence relating to engaging in business by the principals of the firm after appointment of the trustee. Further, the legislative history cited by the Division indicates that the restrictive interpretation is erroneous.15/

The interpretation contended for on behalf of Miller is rejected.

Miller also contends in his Proposed Findings of Fact and Conclusions of Law (p. 15) that "There has been no demonstrable causal connection between Miller's acts (or omissions to act) and the Registrant's failure, if any, on November 30, 1972 to comply with the Commission's net capital rule, and therefore, it cannot be determined that the appointment of a SIPC trustee some months after Miller's departure was necessitated in any way by Mr. Miller's acts (or omissions to act)." It has, however, been found that Miller wilfully aided and abetted Project's wilful violations of the Net Capital and Early Warning provisions.

15/ In describing an identical provision the Senate Committee on Banking and Currency stated:

> "Section 35(n) bars from the business of broker-dealer any person for whom a trustee has been appointed under this Act unless the Commission otherwise determines in the public interest. In addition, the Commission may, by order, bar or suspend any officer, directors, general partners, owners of more than 10 percent of the voting stock or controlling persons of such debtor." S. Rep. No. 91-1218, Sen. Committee on Banking and Currency, Securities Investor Protection Corporation, 91st Cong., 2d Sess. p. 14 (1970).

It is further found that these violations formed a basis for the appointment on December 13, 1972 of a SIPC Trustee for Project. During the SIPC liquidation of Project it was ascertained that the firm was short many customer securities. As a result of these shortages and other unsatisfied customer obligations the SIPC fund has been required to expend $46,000.

Accusations of Improper Conduct on the Part of the Division

Miller asserts that the Order for Proceedings was "the result of personal pique on the part of persons at the Division of Enforcement" because he participated in the Division's initial inquiry only upon the issuance of a subpoena. (Miller Proposed Findings of Fact and Conclusions of Law, pp. 1-2) The allegation is unsupported and irrelevant.

Miller further complains of "The unabashed use, at the hearings, and reliance in its findings of fact, conclusions of law and brief, by the Division of doctored and perjured testimony" (Id. p. 3, underlining in original).

The "perjured" testimony which is cited is that of Leonard before the Federal District Court to which witness Cohen referred (Tr. 102). Leonard was said to have testified at that hearing that Miller was the President, Treasurer and primary officer responsible for running Project. However, since it does not appear from the record as of what date Leonard was speaking, it cannot be even concluded that Leonard's testimony was inconsistent with other evidence, much less "perjured." In any event, as indicated above, no credence was given to such statements of Leonard.

The "doctored" testimony is a subordination agreement signed by Miller as President and dated November 27, 1972 -- a week after his resignation from that office. The document indicates that the original date, which is indecipherable, was changed to November 27, 1972. A possible explanation could be that the document was signed on an earlier date, then revised and the date changed after the revisions had been made. However, this is pure speculation.

It is impossible to conclude from the document itself that the date was altered either before or after it was signed by Miller, or to determine the identity of the person or persons who changed the date. There is, however, nothing in the record to suggest that the Division changed the date. In any event, although the Division offered the document and it was received in evidence (Tr. 26-8), the Division did not rely upon it to establish its case, and I have not relied upon it in any way. There is no basis to conclude that the Division "doctored" the document, and it is irrelevant to this initial decision.

Miller also charges that the Division used "hearsay statements by phantom witnesses" (Miller Proposed Findings, etc., p. 2) in attempting to establish that Miller continued in office as President of Project. The Division states that its decision not to call witnesses

is "one of total discretion on the part of the staff" and "should be unassailable by the Respondent unless it resulted in a failure to prove the allegations in the Order for Proceedings." (Division Reply Brief, pp. 5-6). I agree that this was a discretionary matter.

Other accusations made by Miller against the Division are also unsupported and irrelevant to this Initial Decision.

Public Interest

Miller's violations are of important provisions of the Federal Securities Laws relating to the financial stability and solvency of broker-dealers. See Blaise D'Antoni Associates v. SEC, 289 F. 2d 276, 277 (5th Cir. 1961); Lockhurst & Company, Inc., 40 S.E.C. 539, 541 (1961).

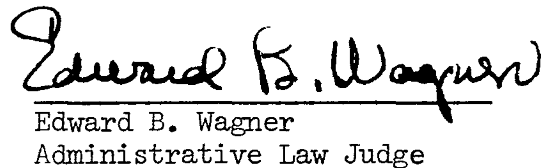
Miller failed to heed the warnings given him by the NASD and treated its recommendations in cavalier fashion. As a result of its financial deficiencies Project is now in liquidation,and SIPC funds have been expended in satisfying obligations of the firm.

It is clear that a substantial sanction is warranted pursuant to both Section 15(b)(7) of the Exchange Act and Section 10(b) of SIPA. It is determined, under all the circumstances, that an eighteen-month bar from the securities business with an opportunity thereafter to apply to the Commission for reinstatement in a supervised capacity will best serve the public interest.

Accordingly, IT IS ORDERED that William C. Miller is barred from association with any broker or dealer, except that after eighteen months from the effective date of this order he may apply to the Commission for permission to become associated with a broker-dealer in a nonproprietary and nonsupervisory position in which his activities would receive adequate supervision.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.[16/]



Edward B. Wagner
Administrative Law Judge

Washington, D.C.
March 6, 1975

16/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.