UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 265
Charged Party

Case No. 09-CD-116000

and

HENKELS & MCCOY, INC.
Charging Party

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18
Party-In-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S MOTIONS FOR RECONSIDERATION AND TO REOPEN THE RECORD

Pursuant to Sec. 102.65(e)(1) of the Board's Rules and Regulations, now comes the International Union of Operating Engineers, Local 18 ("Local 18" or "Union"), by and through counsel, and for the reasons which follow, respectfully Moves for Reconsideration of the Board's Decision and Determination and a Reopening of the Record in the instant matter.

Respectfully Submitted,

/s/ *Timothy R. Fadel*
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BRIEF IN SUPPORT

I. Introduction

On December 19, 2013, Local 18 was a party to a Sec. 10(k) hearing regarding the above-captioned matter. On May 5, 2014, the Board rendered its Decision and Determination of Dispute. *Laborers' Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB No. 102 (2014). The Board rejected Local 18's contention that the present matter is a work preservation dispute outside the scope of Sec. 10(k), and ultimately found that there was reasonable cause to believe that Sec. 8(b)(4)(D) of the Act was violated. Accordingly, the Board rendered a decision on the merits, and awarded the work to the Laborers.

On February 27, 2014, prior to the Board rendering its decision in this matter, Local 18 filed a Petition for Certification of Representative for all individuals employed as operating engineers by Henkels & McCoy, Inc. ("Henkels & McCoy" or "Employer") qualified to operate, *inter alia*, skid steers and mini-excavators. (Exh. A.) On May 5, 2014, after a stipulated election was held, the Board issued a Certification of Representative ("Local 18 Board Certification"), declaring that Local 18 was the exclusive collective bargaining representative for all Henkels & McCoy individuals employed as operating engineers qualified to perform the work in dispute for the present matter. (Exh. B.) The Board has repeatedly held that a certification such as the Local 18 Board Certification is a controlling factor in determining a jurisdictional dispute on its merits. As such, Local 18's Motion to Reopen the Record is well-taken because, to the prejudice of Local 18, without the opportunity to consider the import of the Local 18 Board Certification, the Board was unable to properly make a Decision and Determination of Dispute.

Moreover, there are two material errors rendered in the Board's Decision and Determination of Dispute concerning the validity of Local 18's work preservation argument.

First, the Board misapplied contractual principles in finding that Local 18 was not prejudiced by the Hearing Officer's prohibition of Local 18's questioning of Susan Gannon, the Employer's Labor Contracts Coordinator, concerning the existence of a binding 2013-2017 collective bargaining agreement between Local 18 and the Employer. Second, the Board misapplied the critical justification underlying Board decisions that look to the "real nature and origin of the dispute" in determining that the present dispute was jurisdictional in nature. A reevaluation both of the Hearing Officer's conduct regarding the relevancy of Ms. Gannon's testimony and the criteria for determining whether a dispute is jurisdictional in the context of applicable labor law demonstrate that the instant Decision and Determination of Dispute has departed from the mainline of compelling Board precedent. Accordingly, Local 18's Motion for Reconsideration is well-taken.

II. Law & Analysis

Section 102.90 of the Board's Rules and Regulations states that Secs. 102.64 to 102.68 shall govern the proceedings in Sec. 10(k) matters, insofar as applicable. Under Sec. 102.65(e)(1), any party may request reconsideration of a decision which contains a material error to the detriment of the moving party. Any party may also request a reopening of the record where the evidence sought to be introduced was not available at the time of the hearing and would support a different result by the Board. In the context of Sec. 10(k) proceedings, the Board has permitted parties to file both motions for reconsideration, *see, e.g., Machinists Lodge 160 (SSA Marine)*, 360 NLRB No. 64, *6 (2014), and motions to reopen the record, *see, e.g., Longshoremen Local 8 (Waterway Terminals Co.)*, 193 NLRB 477, 479 (1971), after it has rendered its decision and determination of dispute.

A. Motion to Reopen the Record

The additional evidence Local 18 wishes to be adduced and credited is a May 5, 2014 Board certification of Local 18 as exclusive collective bargaining representative for all Henkels & McCoy individuals employed as operating engineers qualified to perform the work in dispute. (Exh. B.) The error alleged is that without consideration of the Local 18 Board Certification, the Board was not properly able to render a decision on the merits because it did not have all of the pertinent factors before it. Because the Board did not have all of the pertinent factors before it when rendering a determination of dispute and award on the merits, Local 18 was unfairly denied the opportunity to fully develop and present the Board certification, which would have been dispositive in rendering an award on the merits in favor of Local 18. The Local 18 Board Certification was not submitted previously because Local 18 filed its Petition for Certification of Representative on February 27, 2014. (Exh. A.) The hearing was held on December 19, 2013.

If the Local 18 Board Certification was adduced and credited, it would clearly demonstrate that Local 18 is the proper union to whom the work should be awarded. As early as *Machinists Lodge No. 1743 (J.A. Jones)*, the Board suggested that Board certification, if applicable, could be "controlling as to the operation" of the work in dispute. 135 NLRB 1402, 1407 (1962). *Accord Longshoremen's Union Local 10 (Matson Navigation Co.)*, 140 NLRB 449, 453 (1963); *Seafarers' Union (Albin Stevedore Co.)*, 182 NLRB 633, 636 (1970); *Teamsters Local 85 (Pacific Maritime Assn.)*, 208 NLRB 1011, 1014 (1974).

Subsequent to *J.A. Jones*, the Board has squarely held that "Section 8(b)(4)(D) requires that controlling weight be given to a certification of the Board determining the bargaining representative for employees performing the disputed work." *Iron Workers Local 474 (Structural Concrete Corp.)*, 146 NLRB 1435, 1438-1439 (1964). *Accord Steelworkers Union (Anaconda*

Co.), 158 NLRB 135, 142 (1966). *Iron Workers Local 474* and its progeny demonstrate that Board certification is a dispositive factor, if properly established and credited, in determining the merits of a jurisdictional dispute. That is, the Board would be statutorily required to give controlling weight to the Board certification of Local 18 as exclusive collective bargaining representative for all operating engineers employed by Henkels & McCoy qualified to perform the work in dispute. As such, the Board would properly make a determination and decision of award in favor of Local 18 as the union entitled to the work in dispute.

B. Motion for Reconsideration

i. *The Board misapplied contractual principles in finding that Local 18 was not prejudiced by the Hearing Officer's prohibition of Local 18's questioning of Susan Gannon, Henkels & McCoy's Labor Contracts Coordinator.*

In determining the binding nature of a collective bargaining agreement ("CBA"), the Board will find relevant the "evidence of the parties' attitudes towards their bargaining relationship." *See Van Eerden Co.*, 154 NLRB 496, 501 (1965). This, in conjunction with a party's "adoption-by-conduct" of a CBA, can indicate a party's "belief that it was bound" to a contract. *See Asbestos Workers Local No. 84 (DST Insulation, Inc.)*, 315 NLRB 19, 22 (2007). *See also Miner v. Local #373, Internatl. Bhd. of Teamsters*, 513 F.3d 854, 860 (2007) (the critical inquiry in determining the validity of a CBA is examining the conduct of the parties).

Whether Ms. Gannon's belief that Henkels & McCoy was bound to the 2013-2017 Distribution Agreement (L18 Exh. 18) was relevant should not have been considered in isolation from other evidence of whether Henkels & McCoy was bound to the new contract, but should have been considered in conjunction with other established conduct by Henkels & McCoy, such as its voluntary decision to pay wage rates and benefits pursuant to the terms of the 2013-2017 Distribution Agreement. (TR 257-258.) Ms. Gannon's opinion as to the contractual status of the

Employer regarding the 2013-2017 contract was no less relevant than the testimony by Stephen Freind, the Employer's Head of Labor Relations (TR 170), concerning his opinion as to the contractual status of Henkels & McCoy regarding the 2010-2013 Distribution Agreement. (L18 Exh. 4; TR 187.) By not being able to further develop this line of evidence, Local 18 was prejudicially foreclosed from determining whether Henkels & McCoy was bound to the 2013-2017 Distribution Agreement via the "adoption-by conduct" principle. *See Asbestos Workers Local No. 84 (DST Insulation, Inc.)*, 315 NLRB at 22. Accordingly, attempts by Local 18 to elicit evidence in order to support this conclusion are very relevant, and should not have been prohibited by the Board. *See Laborers' Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB at *2, fn. 3.

ii. *The Board misapplied the critical justification underlying Board decisions that look to the "real nature and origin of the dispute" in determining whether a dispute is jurisdictional*.

In almost all cases where the Board looks to the "real nature and origin of the dispute" in Sec. 10(k) proceedings, it enunciates such an inquiry because "Section 8(b)(4)(D) was not designed to authorize the Board to arbitrate disputes between an employer and a union, particularly with regard to the union's 'attempt to retrieve the jobs' of employees the employer chose to supplant by reallocating their work to others." *Teamsters Local 578 (USCP-Wesco, Inc.)*, 280 NLRB 818, 820-821 (1986). *Accord Seafarers (Recon Refractory & Constr. Inc.)*, 339 NLRB 825, 827-828 (2003) (even if dispute may "literally fall within Sections 8(b)(4)(D) and 10(k) of the Act" where the employer has for the first time, unilaterally reassigned work away from the union asserting work preservation, such a dispute is contractual, and not jurisdictional, in nature).

In the present case, the Board has decided the "real nature and origin of the dispute" was jurisdictional because even though Henkels & McCoy unilaterally reassigned work away which Local 18 members had traditionally performed, it found evidence that Local 18 had "claimed all of the disputed work" prior to the Employer's reassignment of the work. *See Laborers' Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB at *5. However, such evidence was complete hearsay, as it consisted solely of testimony paraphrasing statements given by others not at the hearing, and offered for the truth of the matter asserted. (TR 246, 337-344.) To the extent the testimony can be credited, it was admitted that such "harassment" amounted to alleged claims for work constituting grievances filed by Local 18. (Id.) The Board has expressly recognized that hearsay findings are *insufficient* for satisfying the "reasonable cause" standard. *Electrical Workers Local 103 (Comm-Tract Corp.)*, 289 NLRB 281, 282 (1988), fn. 3. *Accord Electrical Workers Local 3 (Mike G. Elec. Corp.)*, 279 NLRB 521, 521 (1986). *See also Operating Engineers Local 4 (Henly-Lundgren Co.)*, 268 NLRB 1227, 1228 (1984) (the Board will quash notice of hearing in Sec. 10(k) proceedings where there is only double hearsay evidence alleging violation of Sec. 8(b)(4)(D)). Moreover, Mr. Freind provided uncontested testimony that any alleged claims to the disputed work by Local 18 occurred *after* Henkels & McCoy reassigned the work to non-operating engineers. (TR 177.)

Under these circumstances, any conclusion that Local 18 was attempting to claim *all* of the work is highly specious. An equally valid factual finding of the record would be that Local 18's work preservation grievances filed prior to Henkels & McCoy's unilateral reassignment of the work were simply claims to protect its existing unit work if the Employer was unlawfully assigning it to a non-Local 18 member. Indeed, "a dispute does not lose its character as a work

preservation dispute simply because more than one union may have a . . . claim to the same work." *Machinists District Lodge 190 (SSA Terminal LLC)*, 344 NLRB 1018, 1020 (2005).

Moreover, where the union asserting work preservation has "historically performed . . . the same type of work in dispute," the employer has "essentially recognized the legitimacy" of that union's contractual claim, and that union has "essentially sought work for the unit it represent[s]" at the employer's jobsites, even if "the facts . . . literally fall within the terms of Sections 8(b)(4)(D) and 10(k)," the Board will conclude that "the real nature of this dispute is to retrieve jobs . . . not to acquire new work." *Electrical Workers Local 103 (Buffalo Elec. Constr.)*, 298 NLRB 937, 939-940 (1990). The same three circumstances are present in the instant case: 1) the Board acknowledged in its decision that Local 18 has historically performed the work in dispute, *See Laborers' Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB at *5; 2) it is unchallenged that the Employer acknowledged Local 18's contractual legitimacy to the work (TR 24); and 3) Local 18 has done nothing more than attempt to preserve work through its work preservation grievances. Thus, even if the present matter appears to "literally fall within the terms of Sections 8(b)(4)(D) and 10(k)," it is simply not a jurisdictional dispute. Application of the established facts to relevant legal precedent cannot mandate any other conclusion if the Board is to properly look into the real nature of the current dispute.

III. Conclusion

Based on all the foregoing, Local 18 respectfully requests that the Board grant its Motions for Reconsideration and to Reopen the Record.

Respectfully Submitted,

/s/ *Timothy R. Fadel*
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Counsel for the International Union of Operating Engineers, Local 18

CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically with National Labor Relations Board and served *via* email to the following on this 16th day of May, 2014:

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/s/ *Timothy R. Fadel*
TIMOTHY R. FADEL, ESQ. (0077531)

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

FORM EXEMPT UNDER 44 U.S.C

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
08-RC-123276	2/27/14

INSTRUCTIONS. Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1 PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [✓] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No _____
- [ ] **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
HENKELS & McCOY, INC.	DAVID COX	215-283-7861

3 Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*: 985 JOLLY RD. BLUE BELL, PENNSYLVANIA 19422 — Fax No.

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
GAS LINE DISTRIBUTION AND MAINTENANCE	GAS LINE CONSTRUCTION	e-Mail

5. Unit Involved *(In UC petition, describe present bargaining unit and attach description of proposed clarification.)*

Included: SEE ATTACHED

Excluded: SEE ATTACHED

8a Number of Employees in Unit: Present: APPROX. 10; Proposed *(By UC/AC)*:

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

6b. Is this petition supported by 30% or more of the employees in the unit?* [✓] Yes [ ] No *Not applicable in RM, UC, and AC

7a [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state)

7b [✓] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)*	Affiliation
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18	INTERNATIONAL UN. OF OPER. ENGINEERS

Address	Tel. No.	Date of Recognition or Certification	
3515 PROSPECT AVE. CLEVELAND, OHIO 44115	216-432-3138	Fax No.	e-Mail
	Cell No.	216-432-0370	

9. Expiration Date of Current Contract. If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day and Year)*
MAY 31, 2017	

11a Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [✓]

11b. If so, approximately how many employees are participating?

11c The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

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12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel No	Fax No.
NONE		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number): INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18

14a. Address *(street and number, city, state, and ZIP code)*	14b. Tel. No. EXT	14c. Fax No.
3515 PROSPECT AVE. CLEVELAND, OHIO 44115	216-432-3138	216-432-0370
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(to be filled in when petition is filed by a labor organization)*: INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title *(If any)*
CHRIS CAMINO		ORGANIZER

Address *(street and number, city, state, and ZIP code)*	Tel No	Fax No.
3515 PROSPECT AVE., CLEVELAND, OHIO 44115	216-432-3138	
	Cell No. 216-318-0289	e-Mail ccamino@iuoelocal18.org

Exh. A

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Included: Operating Engineer employees operating backhoes/excavators (all sizes), cranes (all types), dozers, graders, loaders and backfillers (all sizes), sidebooms, trenchers, all mechanics, welders, directional boring machines, bending machines, cradle type boring machines (all types), all types boring machines over 16" tall, truck type hydro-excavator/vac-all, power winch, boring machine (cross-type), all walking equipment, loaders (less than one yard), material handler/forklift sideboom (small hyd.) Trenchers (less than Cleve 92), mechanics helper, skid steer loader (all types with or without attachments), registered apprentices, apprentice and apprentice/helper (on 1 ¼ yard hoe or over) large capacity "Badger," and truck type hydro-excavator and all trailer type vac-alls employed in all counties in the state of Ohio except Columbiana, Mahoning, and Trumbull counties, but including Boone, Campbell, Kenton and Pendleton counties in Kentucky, performing gasline distribution and maintenance construction.

Excluded: All other employees, including Laborers, office clericals, professional employees, guards, and supervisors as defined in the Act.

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REGION 8

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

HENKELS & MCCOY, INC.

Employer

and

Case 08-RC-123276

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18

Petitioner

RECEIVED
MAY - 6 2014
BY:

TYPE OF ELECTION: STIPULATED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

Unit: All full time operating engineers working for Henkels and McCoy, Inc. in Ohio and Kentucky under the terms of the Distribution and Maintenance Agreement which expired May 13, 2013, but excluding all other employees, managers, office clerical employees, guards, and supervisors as defined in the Act.

May 5, 2014

/s/ Allen Binstock

ALLEN BINSTOCK
Regional Director, Region 8
National Labor Relations Board

Exh. B

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,[1] an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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1 Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.