

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PENNSYLVANIA AMERICAN WATER CO.

Employer

And

**UTILITY WORKERS UNITED ASSOCIATION,
LOCAL 537**

CASE NO. 06-RC-218209

Petitioner

And

**UTILITY WORKERS UNION OF AMERICA,
AFL-CIO, CLC, AND ITS LOCAL 537,**

Intervenor

**PETITIONER'S STATEMENT IN
OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW**

AND NOW, come the Petitioners, Douglas Opalko, and the Utility Workers United Association, Local 537 (hereinafter "the Association"), and submit this Response to Employer's Request for Review.

STATEMENT OF FACTS

Pennsylvania American Water Company ("PAWC" or the "Employer") is a public utility which provides water service to its industrial, commercial, and residential customers in Western Pennsylvania. Various of its employees are represented for collective bargaining purposes by Utility Workers Union of America, AFL-CIO, System Local 537 ("Local 537" or the "Intervenor"). The unit that is the subject of this litigation constitutes the permanent and temporary production, maintenance, and clerical employees at PAWC's operations in the Western Pennsylvania areas outside of Pittsburgh, the areas being the Butler, Clarion,

Uniontown, Indiana, Kane, Kittanning, New Castle, Punxsutawney, Warren, McMurray and Valley, Pennsylvania locations, called the Outside Districts by the parties.

In early 2018, a separate labor organization known as the Utility Workers United Association, Local 537 (hereinafter called “the Association” or the “Petitioner”) was formed. It was formed by members of Intervenor Local 537 because many of the members of Intervenor Local 537 were clamoring to disaffiliate from Intervenor Local 537’s national body, the Utility Workers Union of America, AFL-CIO (hereinafter sometimes referred to as the “National Union”). While the formation of the Petitioner occurred as part of a process to disaffiliate from the Intervenor’s national body, as is relevant to these proceedings, the question here is whether a Decertification Petition that was filed by one of the Outside District employees and joined in by the Petitioner after its formation is barred by the collective bargaining agreement allegedly in force in the Outside Districts.

As will be discussed hereinafter, the Intervenor’s national body imposed a trusteeship on the Intervenor, and the National Union commenced litigation in the United States District Court for the Western District of Pennsylvania (“the Federal Court litigation”) to validate the trusteeship. That litigation is still pending and while the Employer does not raise any objection to the decision of the Regional Director that the Federal Court litigation does not bar the representation petition under discussion here, the Federal Court litigation will be touched upon to a certain extent in this response.

On April 10, 2018, a Petition for Representation was filed with the National Labor Relations Board relative to the Outside Districts unit at No. 06-RC-218209 by Douglas Opalko, an employee of PAWC covered by its Outside Districts contract. Mr. Opalko sought an election among the Outside District employees to determine whether they should be represented for

collective bargaining purposes by the Association or by Local 537. The labor agreement between PAWC and Local 537 covering the Outside Districts employees had expired on November 17, 2017 and although a meeting had been held on March 17, 2018 at which a vote to ratify the results of negotiation for a successor contract was held, and at which the employees voted to approve the proposals that were explained at that meeting, the written collective bargaining agreement that succeeded the agreement that expired on November 17, 2017 was not signed until April 16, 2018, six days after the filing of the Petition for Representation.

The negotiations for a collective bargaining agreement to replace the one that was due to expire on November 17, 2017 began sometime in October of 2017. The parties were not able to negotiate a successor contract before November 17, 2017, and they continued their negotiations thereafter. By early March of 2018, the negotiations had gotten to the point where Local 537 was willing to put before the union membership the question of approving a new set of conditions of employment. PAWC and Local 537, during their negotiations, would revise their preceding contract (which ran from Dec. 8, 2012 to Nov. 17, 2017) electronically by having mutual access to a computer program called Sharepoint, and they would pass those revisions back and forth via e-mail. This was done so that the parties would have a working draft document that dealt with the negotiations as they proceeded. In some cases, they would refer to their revisions as a "tentative agreement", to which the other party would respond as "agreed" or "ok" and in other cases, their various positions would be passed back and forth, but neither party would mark the revision as "agreed" or "ok". By March 3, 2018, the parties had finished this electronic "back and forth" and their last electronic version of the old agreement contained some revisions marked "agreed", some marked "ok" and some, including the wages, not marked in any way.

Local 537 held a contract ratification meeting with its members on March 17, 2018 and the terms that were presented to the membership by the union officials on that day were approved by the membership. The then president of Local 537, Kevin Booth, notified PAWC's chief negotiator, Robert Burton, that the membership ratified the presentation that was made to it. However, no wage increases were implemented or paid until April 27, 2018. (Employer Ex. 16), nor were any other terms or conditions of employment.

On March 19, 2018, the members of Local 537 voted to disaffiliate from the National Union and to become members of the Association. On that same day, the National Union imposed its trusteeship on Local 537. From and after March 19, 2018, all the officers of Local 537 were removed from office by the National Union. On April 10, 2018, the instant RC petition was filed by Douglas Opalko, a PAWC employee in the Outside Districts bargaining unit. On April 16, 2018, the trustee for Local 537 and a PAWC representative signed a formal collective bargaining agreement to replace the one that had expired on November 17, 2017. However, other than some job bid postings for jobs that were not expected to be filled for some weeks (Employer Ex. 14), none of the terms of the signed agreement had been put in place by the time that the RC petition was filed and the job posting itself was only meant to deal with jobs that would not be in effect for some time after the filing of the Petition for Representation. The wage increases mentioned in the agreement were not put in place until April 27, 2018, which was after the signing of the document by the trustee and the Employer. (Employer Ex. 16). After the date that the representation petition was filed, the trustee and the Employer were still working out the language for various matters that had been the subject of the negotiations. Testimony also reveals that historically, a ratified contract was not considered to be in force until the formal contract document was executed.

Not long after the Representation Petition was filed, the Employer and the Intervenor filed a Motion to Stay Deadlines, contending that the National Labor Relations Board should await the outcome of the pending federal court proceedings before deciding what to do with the Representation Petition. Both the Employer and the Intervenor also argued that there was a contract bar in the Outside Districts case. The Region required the parties to respond to an Order to Show Cause why the Region should not dismiss the representation petition, either because it was barred by the Federal Court litigation or because there was a contract bar. All parties did so, and the Region determined that a hearing should be held to develop evidence on the contract bar issue relative to the Outside Districts contract, but that the parties' responses provided enough information for the Region to decide all the other issues. A hearing was held on October 16, 2018 for the parties to present their evidence on the contract bar issue in this case. Following the conclusion of the hearing and the receipt of briefs from all parties, the Region decided in the instant case that the Federal Court litigation did not bar the representation petition and that the recently ratified contract proceedings did not result in a bar to an election. The Employer then filed its Petition for Review, stating that there was a contract bar in this matter and stating further that the failure of Kevin Booth, the president of the Intervenor during the Outside Districts contract negotiations, to testify should result in an inference that his testimony would be adverse to the Petitioner's case.

QUESTIONS PRESENTED

Does The Pending Federal Court Litigation Preclude A Decision On A Question Of Representation?

Is There A Contract Bar To The Outside Districts Petition?

Should Kevin Booth's Failure To Testify Result In An Inference That His Testimony Would Be Adverse To The Petitioner's Case?

Is The Employer Entitled To Extraordinary Relief?

ARGUMENT

Does The Pending Federal Court Litigation Preclude A Decision On A Question Of Representation?

Since the Employer does not appear to raise a question relative to the Regional Director's determination that Federal Court litigation does not bar the representation petition under review, that issue will not be addressed in this Statement in Opposition. However, it is submitted that this very issue has already been dealt with by the Board in West Virginia American Water Co., 09-RC-219179 (2018), unreported, where the exact same Federal Court litigation was held not to prevent the processing of a representation petition filed there.

Is There A Contract Bar To The Outside Districts Petition?

An analysis of the Employer's Request for Review must start with the reasons that the National Labor Relations Board will consider in ruling on that request. As are germane to this case, those reasons, which are found in the Board's Rules and Regulations at 102.67(d), are the following:

- “(1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
-
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.”

As the Region correctly pointed out, not only does the Employer bear the heavy burden of proving the existence of a contract bar, Roosevelt Memorial Park, 187 NLRB 517 (1970), for a contract to act as a bar, the fact that it is a bar must appear within the document itself, without reference to extrinsic evidence. See, e.g., Waste Management of Maryland, 338 NLRB 1002

(2003); United Health Care Services, 326 NLRB 1379 (1998); Jet-Pak Corp., 231 NLRB 552 (1977); Union Fish Co., 156 NLRB 187 (1965).

The Employer argues that since there was a ratification vote following the conclusion of the Outside Districts negotiations, which vote occurred before the filing of the representation petition in that case, a valid contract was entered into which bars these representation proceedings. While the Employer concedes that there was no formal agreement signed until after the representation petition was filed (N.T. p. 41, 58), the Employer insists that the ratification proceedings and the e-mail communications between the Employer and Local 537 both before and after the ratification meeting satisfy the requirements of Appalachian Shale Products Co., 121 NLRB 1160 (1958), which case requires a contract to be signed before the filing of a representation petition for the contract to serve as a bar to a representation election. While there are Board cases that do indicate that an exchange of tentative agreements which evidences a complete collective bargaining agreement may satisfy the written contract requirement, those cases require that the exchanged documents must all be signed.

There is no set of “signed” tentative agreements here. All that exists is a “red-line” document with some sections marked as “agreed” or “ok” and others not marked with any indication of agreement. See Employer Ex. 1. While there are text messages that refer to the ratification of the proposals brought back to the union membership to vote upon, there is no evidence that the ratification alone was sufficient to constitute a written, signed agreement that would constitute a contract bar. The requirement for a “signed” agreement as set forth in Appalachian Shale Products Co. supra, means exactly that—there must be actual, written signatures on a document or series of documents. An exchange of unsigned letters or documents, which clearly can include e-mails, does not satisfy the requirements of Appalachian

Shale Products Co., supra. In its determination that an exchange of tentative agreements, letters or other communications can form a written agreement that can constitute a bar, the Board in Appalachian Shale Products Co., supra, stated that—

“The Board recognizes that on occasion contracts are not embodied in formal documents and that the parties, for reasons best known to them, execute and sign an informal document which nonetheless contains substantial terms and conditions of employment. Sometimes the agreement is arrived at by an exchange of a written proposal and a written acceptance, both signed. The rule stated above in no way diminishes the effectiveness of such contracts as a bar; it simply makes clear the necessity for signing the contracts or documents constituting the agreement of the parties.” Emphasis added.
121 NLRB, at p. 1162.

The requirement that there be documents showing mutual agreement on all points, even if all they consist of are letters back and forth between the parties, still requires that these documents must be signed. In Valley Doctors Hospital, Inc., a/k/a Riverside Hospital, 222 NLRB 907 (1976) a letter signed by the employer transmitting a proposed contract, which contract was ratified by the union membership and then signed by the union officers and returned to the employer, was held to be a contract that barred a representation petition filed the day after the union officers signed the contract. The Board in Valley Doctors Hospital, Inc. a/k/a Riverside Hospital, relied specifically on Appalachian Shale Products Co., supra, and again reinforced the necessity for signed documents. The reason for such logic is very clear—a manual signature is something that is difficult, if not impossible, to controvert, whereas oral statements, text messages and e-mail messages are not nearly as secure. In any event, the Petitioner suggests that there are no cases that establish that the kind of unsigned back and forth as existed in this case has been approved by the Board or held to be the equivalent of the signature requirement of Appalachian Shale Products Co., supra. The position of the Employer that the texts and e-mails that it relies upon constitute a contract that can bar a representation election simply does not

satisfy the requirements of Appalachian Shale Products Co., supra, which holds that there is a “. . . necessity for signing the contracts or documents constituting the agreement of the parties.” 121 NLRB, at p. 1162, emphasis added. Merely passing unsigned letters or communications back and forth does not satisfy the signing requirement set forth in Appalachian Shale Products Co., supra. While one may argue that Appalachian Shale Products Co., supra, and Valley Doctors Hospital, Inc., a/k/a Riverside Hospital, supra, were decided before the internet/e-mail age, the Regional Director correctly cited Seton Medical Center, 317 NLRB 87 (1995) to show that even after the internet/e-mail age, the complete signing requirement was still in effect. While Seton Medical Center, supra, did not deal with electronic signatures, that case makes it abundantly clear that a total signed agreement consisting either of one unitary agreement containing all elements agreed upon and signed by both parties, or several tentative agreements containing all elements agreed upon and all signed by all parties is necessary.

While the Employer cites St. Mary’s Hospital and Medical Center, 317 NLRB 89 (1995) for the proposition that an exchange of multiple tentative agreements can constitute a contract which can serve as a bar, in that case, the tentative agreements “. . . were signed and dated by both parties . . .” (p. 90 of 317 NLRB, emphasis added) and “Prior to the filing of the petition, the terms of the parties’ agreement were implemented in substantial part.” (p. 90 of 317 NLRB, emphasis added). The Board, in Seton Medical Center, supra, specifically referred to St. Mary’s Hospital and Medical Center, supra, in its decision and pointed out that in St. Mary’s Hospital and Medical Center, supra, every document was signed, whereas that was not the case in Seton Medical Center, supra, nor is it the case here. The Employer has not cited any case where unsigned documents were accepted as contracts that would bar a representation petition. Clearly, the Regional Director has followed exactly all the Board’s precedents in deciding this issue.

An examination of the evidence clearly reveals that the Employer came nowhere near sustaining its burden of proof. Instead, the Employer proved that the parties did condition the finality of the agreement upon its formal signing. The Employer proffered a “red-line” version of the 2012-2016 Outside Districts agreement in an attempt to establish the existence of a document constituting a contract that would bar an election. (Employer Ex. 1). That document consisted of an electronic copy of the 2012-2016 agreement upon which the parties would make notations about the changes that they were discussing. In some cases, the Employer representative who was making entries on this document would denominate some of the entries as a “Tentative Agreement”, and in some cases, the Union representative would respond that he “agreed” (see, e.g., Employer Ex. 1, page 30), in other cases he would respond with “okay” (see, e.g., Employer Ex. 1, page 32) and in other cases, he would not respond at all (see, e.g., Employer Ex. 1, page 27). The lack of his response is especially apparent in the wage tables (see, e.g., Employer Ex. 1, pages 52, 55, 56). Furthermore, the Employer’s evidence indicated that at least two different Employer representatives had access to the Sharepoint program and could make entries in it. (N.T., pp. 51, 52). While the Petitioner is not alleging that the Employer made any clandestine alterations to the document, it is not the Petitioner’s burden to prove that the document was flawed—it is the Employer’s initial burden to prove that the document is genuine, followed by its burden to prove that it was “signed” relative to each and every alleged tentative agreement. All that the Employer established is that a union representative and two Employer representatives had access to the Sharepoint program. Most importantly, to date, the Employer has offered no authority that what transpired in this case, where it admitted that no one signed any documents (N.T. 41, 58) before the Representation Petition was filed, satisfies the “signed document” requirement of the above-cited cases.

Other evidence proffered by the Employer also establishes that a signed document was contemplated by the parties as a pre-condition to a contract that would serve as a bar. The following exhibits clearly point to that conclusion, as follows---

1. Employer Exhibit 3 is an exchange of text messages between the Union and Employer chief negotiators. The Union negotiator suggested telling employees that “We have reached a tentative agreement and details will follow pending a joint review of the documents for accuracy”. The Employer negotiator replied that this “Sounds good to me”. The Union negotiator replied that “We actually will be reviewing the red line document.” The Employer negotiator replied “Agree”. These exchanges occurred after the last February 23, 2018 face to face meeting. (Emphasis added).
2. Per the same exhibit, as of March 6, 2018, the parties still “. . . [needed] to discuss a couple of things.”
3. Employer Exhibit 5 is an e-mail transcript from the Employer chief negotiator to other management individuals stating that “. . . there are a lot of changes that we made . . . that now have to be implemented. . . . [We need] to be sure we are hitting the ground running with the right procedures and practices.” This document was produced on March 19, 2018.
4. Employer Exhibit 8 is a text message exchange between the Union chief negotiator and Ms. Jamie Devine, the Employer representative who was making most of the Employer entries to Employer Exhibit 1. She sent the February 23, 2018 version of Employer Exhibit 1 to the Union negotiator and the text message exchanges between that date and March 14, 2018 show that changes to Employer

Exhibit 1 were still being made. However, a review of Employer Exhibit 1 reveals that other than a punctuation change on March 19, 2018, and a minor wage chart adjustment made on March 3, 2018, there is not one substantive change to Employer Exhibit 1 made after February 23, 2018, even though Employer Exhibit 8 shows that there were at least three areas where inquiries were still being made.

5. Employer Exhibit 10 reveals that after the March 17 ratification meeting, Employer representatives received an e-mail from an Employer negotiator stating that now that there was a ratification, “We will work now to finalize the fully executed and signed contract.” This e-mail was sent on March 17, at least two days before Employer Exhibit 1 was produced, so the quoted language had to mean that the parties were now proceeding to prepare a final document for review and signature. If a document had to be “finalized” and reviewed, at that point, the parties did not have an agreement that both considered as binding.
6. Employer Exhibit 11 was an e-mail exchange between an Employer negotiator and the Employer payroll department on March 19, 2018. The wage tables being sent at that time were evidently in need of updating and possible modification. Again, this was after the ratification meeting of March 17 and the Employer offered absolutely no proof that the wage table modifications referred to in Employer Exhibit 11 were the same wages that the parties agreed upon and which were ratified on March 17.
7. Employer Exhibit 12 shows that as of April 2, 2018, the Employer had still not verified the accuracy of the wages in the wage table and would need at least three more weeks to do so. Clearly, if “internal processes” were needed to establish

“accuracy in our payroll department”, the parties did not yet have a document that they both accepted as their agreement.

8. Employer Exhibit 13 is an e-mail exchange that reveals that what the Employer saw as the parties’ agreement on a new pipeline inspector classification was not what the Union presented to the membership for ratification, and the parties then discussed the impact of that issue.
9. Employer Exhibit 16 reveals that it was not until April 27, 2018 that the agreed-upon wage rates were paid to the employees.
10. Petitioner Exhibit 1 reveals that on March 20, 2018, which was three days after the ratification meeting of March 17, 2018, and almost a month after the parties’ last face to face negotiation meeting, the Union negotiator contacted Ms. Devine on behalf of the Employer to find out when they could “. . . go over the red line version of the contract.” (Emphasis added). There would be no reason for this inquiry unless finalizing the red line version was necessary to verify that the parties had in fact reached a meeting of the minds. Ms. Devine never replied to that inquiry since the trusteeship had been declared the previous day, but curiously, she never reached out to the trustee to tell him that a review of the red line document needed to occur. (N.T., p. 73). Instead, the Employer and the Trustee evidently just signed a document on April 16, 2018.

While Employer witnesses Burton and Devine testified that they considered the agreement to be “in effect” upon ratification (N.T., pp. 35-36, 62-63), neither of them, both of whom professed to have direct experience in prior negotiations, could testify that the newly ratified benefits in those prior contracts were ever put in place, substantially or otherwise, before a signed agreement was

in existence.(N.T., pp. 37-38; 69) The upshot of all of this is that since the Employer has the burden of proof, this evidence and these exhibits have to be viewed in detail to see if the Employer presented a preponderance of evidence to establish that Employer Exhibit 1 represents what the parties supposedly agreed to, before even considering the “signed document” requirement of Appalachian Shale Products, Inc., supra. Clearly, without even considering the “signing issue”, the most substantial part of the alleged agreement, the wage increase, was not implemented until after the formal signing. Even after the ratification meeting, the Employer and Local 537 were not in agreement on certain of the terms of what they supposedly negotiated, and the Employer’s payroll department had questions about the wage table and needed time to verify it. Thus, it appears that the Employer could not prove by a preponderance of the evidence that Employer Exhibit 1 embodied all the parties’ agreements, and it could not prove at all there were any signed documents evidencing whatever agreements were supposedly reached.

The Employer argues that Kevin Booth’s email to the Employer stating that “You are both being persnickety. . . we will simply accept all changes and print some documents” evidently is the equivalent of a signature to an agreement, and the Employer alleges that the Regional Director erred in ignoring this evidence. Weighing and construing evidence is the function of the Regional Director as the trier of fact, and the quoted statement can easily be held to be no more than a statement dealing with how the parties will craft the written document which they would then review for signature purposes. This is apparent by the Employer’s evidence which included an e-mail from Mr. Booth asking when he and an Employer representative could “. . . go over the red line version of the contract.” There would be no reason for him to ask that question unless the parties intended that their agreement was not final until

the formal document was signed. In any event, the Regional Director's conclusion on this matter is amply supported by the evidence.

The Petitioner's position relative to the Outside Districts agreement is that the document signed by the trustee is not a bar to these proceedings because it was signed after the filing of the representation petition, and the messages that were e-mailed between the parties and the text messages relative to the ratification proceedings are likewise insufficient to constitute a contract which would bar these proceedings for several reasons, not only because they were not signed but also because they did not establish what the parties agreed to. Unlike the tentative agreements in St. Mary's Hospital and Medical Center, supra, which were all signed and dated by the parties, none of the documents relied upon by the Intervenor and the Employer in this case were signed by anyone (N.T., p. 41, 58), thus the Intervenor and Employer did not satisfy the requirements of Appalachian Shale Products Co., supra, where it was held that--

“ . . . the Board adopts the rule that a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.”
121 NLRB, at p. 1162, emphasis added.

The Region correctly decided that “. . . the parties' written document does not bar the election because it was not sufficiently complete and there is no signed document specifying the overall terms of the contract at the time that the petition was filed. (Amended Decision and Direction of Election, p. 6). The Region also correctly showed why each case cited by the Employer is inapposite to this issue.

Should Kevin Booth's Failure To Testify Result In An Inference That His Testimony Would Be Adverse To The Petitioner's Case?

The Employer states that neither Mr. Booth nor anyone else testified on behalf of the Association. This statement is untrue. Douglas Opalko testified on behalf of the Association.

Mr. Booth was subpoenaed by the Association to testify on its behalf, but the record reveals that due to a personal family emergency, he was unable to attend. His absence should not result in any adverse inference, since he was not an unknown, surprise witness, and the Employer could have subpoenaed him if it thought that his testimony was necessary. Of greatest import, however, is the fact that the drawing of an adverse inference due to the absence of a witness is within the sole purview of the Regional Director as the finder of fact, and the Regional Director's failure to make such an inference was totally within her discretion.

Is The Employer Entitled To Extraordinary Relief?

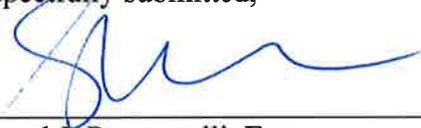
A party is entitled to extraordinary relief such as a stay only where the requesting party can provide a clear showing that relief is necessary under the particular circumstances of the case. Rule/Regulation 102.67(j)(2). The instant case is one that deals with the usual situation of a direction of election where a contract bar has been interposed by the Employer as a defense and rejected by the Regional Director. There is nothing unique about such a situation and it is probably one of the usual types of cases that may reach the Board by way of a Request for Review. In addition, the Region set forth all the germane and well settled precedents applicable in this matter and followed them. It is respectfully submitted that there has been no showing, much less a "clear" showing, that extraordinary relief is necessary in this matter.

CONCLUSION

In conclusion, as much as the Employer may argue that this is a situation that calls for reversal of the Regional Director's decision, the Regional Director's decision was fully in accordance with long-settled Board precedent and there are no facts that call for any deviation from those precedents. In fact, the Employer is asking the Board to do the very thing that the Board's long line of precedents counsel against, namely allowing extrinsic evidence to bear upon

the question of the signing of the contract alleged to be a bar to the representation proceedings. If the logic of the Employer were to be adopted, there would be no way to determine if a collective bargaining agreement is a bar since one could imagine the numerous reasons that parties could conjure to deviate from the clear requirement that to be a bar, a contract must be signed. The Board adopted the "signing" requirement to eliminate the very types of arguments that the Employer is making here. There was no departure from officially reported Board precedent by the Region in its decision in this case and there are no compelling reasons to reconsider the precedents that the Region relied upon. For all the reasons set forth herein, the Employer's Request for Review should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

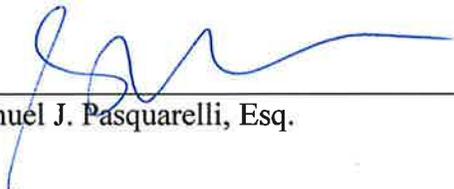
The undersigned hereby certifies that he did, on November 27, 2018, serve a true copy of the document to which this certificate is attached by e-mail, as follows:

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