FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2009-410
	:	LAKE 2009-412
v.	:	LAKE 2009-413
	:	LAKE 2009-414
BLACK BEAUTY COAL COMPANY	:	LAKE 2009-415

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). They involve three citations and two orders which were issued to Black Beauty Coal Company ("Black Beauty") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 8414923, in relevant part, alleges a violation of a safeguard notice and its subsequent modification. Citation No. 8414910 alleges a "significant and substantial" ("S&S")[1] violation of the safety standard in 30 C.F.R. § 75.370(a)(1), which concerns ventilation in mines. Citation No. 6680994 and Order Nos. 8414938 and 8414939 allege three S&S violations of the safety standard in 30 C.F.R. § 75.400, which concerns accumulations of combustible materials in mines. The two orders also alleged that the violations were a result of the operator's unwarrantable failure to comply.[2]

The Administrative Law Judge affirmed the citation issued for a violation of the safeguard notice. The Judge also affirmed the violations alleged in the other two citations and the two orders. However, he did not find the other citations or either order to be S&S and did not

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

find that the orders constituted unwarrantable failures to comply. 36 FMSHRC 1821-59 (Mar. 2014) (ALJ).[3]

The parties filed cross petitions for discretionary review, which we granted.

For the reasons that follow, we affirm the Judge's decision that Black Beauty violated the safeguard notice. However, we vacate and remand the Judge's decision that the ventilation and accumulations violations were not S&S. We also remand the Judge's decision that the violations subject to the two orders were not the result of the operator's unwarrantable failure to comply with a mandatory safety standard.

I.

Factual and Procedural Background

A. Citation No. 8414923 - Violation of a Safeguard Notice

In May 2003, an MSHA inspector issued Black Beauty a notice to provide safeguard at its Air Quality No. 1 Mine which stated, in relevant part:

> This is a Notice to Provide Safeguard(s) requiring a clear travelway at least 24 inches wide [to] be provided on both sides of all belt conveyors. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway of at least 24 inches is required on the side of such support farthest from the conveyor. [4]

Safeguard No. 7591942; Ex. G-87.

In August 2007, an MSHA inspector issued the following modification: "[t]his is to modify the safeguard requiring a clear travel way of at least 24 inches along both side[s] of all conveyor belts. The above referenced safeguard is hereby modified to require [ ] that the 24 inch travel way shall be clear of mud and water." Ex. G-87 at 3.

In January 2009, MSHA Inspector Franklin issued Citation No. 8414923 at the Air Quality #1 Mine for an alleged violation of 30 C.F.R. § 75.1403-5(g). Ex. G-86. The citation alleged that a clear 24-inch walkway was not provided on either side of the 2-B belt line at crosscut numbers 22 to 23 as water accumulated to a depth of 2 to 14 inches in the entry for a distance of 55 feet. The citation was based on Safeguard No. 7591942, as modified in 2007. Ex. G-87.

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[3] The Judge's decision was issued in March 2014, but is set forth in the Commission Bluebook for July 2014.

[4] Section 314(b) of the Act states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

The Judge found that Safeguard No. 7591942 as modified by No. 7591942-03 was valid on its face and that the Secretary had established a violation of this safeguard notice. 36 FMSHRC at 1842-44.

B. Citation No. 8414910 - Ventilation Violation

In January 2009, Inspector Franklin issued Citation No. 8414910 to Black Beauty for an alleged violation of 30 C.F.R. § 75.370(a)(1).[5] The citation alleged that the operator was not complying with the approved ventilation plan in the number 1 active section. Specifically, the citation claims that a continuous miner being operated in the number 7 entry did not have adequate ventilation to dilute, render harmless and carry away flammable explosive gasses, dust, and fumes while mining. In this regard, the inspector noted that the air velocity at the inby end of the wing curtain was approximately 4,982 cubic feet per minute ("CFM") and that the plan requires a minimum of 7,000 CFM.[6] The inspector determined that the violation was S&S. Ex. G-59. Equipment on the section included a number of safety features intended to minimize the hazards from dust and explosive gasses, including a methane monitor on the continuous miner (which was set at 2%), a scrubber on the continuous miner (which included water sprays to keep the dust down), and a fan that would pull air across the duct work, faces and the miner itself. Tr. III 8; 36 FMSHRC at 1851.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge based his non-S&S finding partly on the presence of a safety measure, the methane monitor on the continuous miner, which would "have shut the operation down if methane reached 2%." 36 FMSHRC at 1851.

C. Citation No. 6680994 - Accumulations Violation

In February 2009, MSHA issued Citation No. 6680994 at Black Beauty's Riola Mine Complex for an alleged violation of 30 C.F.R. § 75.400.[7] The citation alleged that oil, oil-saturated coal fines, and brake fluid were present on a mantrip located in Unit #1. Specifically, the accumulations were in the transmission, brake caliper and muffler compartments, and ranged from a film of oil to a quarter of an inch in depth. The inspector determined that the violation was S&S. Ex. G-9. The mantrip was equipped with safety measures, including a heat-activated

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[5] 30 C.F.R. § 75.370(a)(1) states that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

[6] The approved ventilation plan, in a supplement filed June 17, 2008, provides that the mine "will maintain 7000 cfm of air at the end of the line curtain without the scrubber running." Ex. G-63.

[7] 30 C.F.R. § 75.400 requires, in part, that "[c]oal . . . and other combustible materials [] shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

fire suppression system and a "murphy switch" that automatically shuts down the mantrip if engine temperatures exceed 230 degrees. Tr. I 129-31.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge based his non-S&S finding partly on the presence of a safety measure, the fire suppression system, which he believed reduced the likelihood of a fire. 36 FMSHRC at 1827-28.

D. Order No. 8414938 – Accumulations Violation

In February 2009, Inspector Franklin issued Order No. 8414938 at the Air Quality #1 Mine for an alleged violation of 30 C.F.R. § 75.400. The order stated that there was float coal dust deposited on rock dusted surfaces from the belt tail going outby for three crosscuts. The inspector alleged that the violation was S&S and a result of the operator's unwarrantable failure to comply with the standard. Ex. G-24. The inspector testified that a "traveling roller was rubbing very hard against the frame, causing an ignition source." Tr. I 207. Witnesses testified about safety measures present in the area, including fire suppression devices and carbon monoxide ("CO") monitors, which would notify the firefighting brigades of the presence of a fire. Tr. I 208-09, 221. Each member of the firefighting brigades at the mine was equipped with a breathing device, foam generator and a foam cannon. Tr. I 221, 256-57.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge examined whether a confluence of factors existed to create the likelihood of a fire, citing in part *Texasgulf, Inc.*, 10 FMSHRC 498, 500-03 (Apr. 1988). During his S&S analysis, the Judge considered the presence of safety measures such as water sprays, CO monitors, fire suppression devices, a fire brigade, breathing devices and turnout gear for firefighters. The Judge stated that "while [he] considered the presence of water sprays, CO monitors and other protections, [his] non-S&S holding [was] not based solely on these protections. The risk of fire was quite low taking into consideration continued mining operations, including the operator's practice of frequent examinations and cleaning." 36 FMSHRC at 1834-35.

The Judge also ruled that the violation was not a result of the operator's unwarrantable failure to comply with the standard. While the Judge found that the violation was obvious and the operator had been put on notice that greater efforts were necessary for compliance, he found that the violation did not exist over several shifts, was not extensive, did not present a high degree of danger and that the operator did not have knowledge of the existence of the violation. *Id.* at 1835.

E. Order No. 8414939 – Accumulations Violation

In February 2009, MSHA issued Order No. 8414939 charging a violation of 30 C.F.R. § 75.400. The order alleged that a thin coating of float coal dust on rock dusted surfaces, was allowed to accumulate upon the energized main south belt from head to tail. Float coal dust and fine coal had also been allowed to accumulate in crosscuts 8 and 9. The inspector determined that the violation was S&S because there were many rollers in the area and testified that "[a]ll it

takes is one of the rollers malfunctioning, going out, dropping down in this material, and the hot bearings igniting the fuel source." Tr. I 212. The inspector also alleged that the violation was a result of the operator's unwarrantable failure to comply with the standard. Ex. G-25.

The Judge found that the Secretary had established a violation but that the violation was not S&S. The Judge did not explicitly base his non-S&S finding on the presence of safety measures, but did conclude that, "as stated above with respect to [Order No. 8414938] an injury would be unlikely if fire would start." 36 FMSHRC at 1837-38. Given the Judge's discussion of safety measures during his S&S analysis for Order No. 8414938, it is unclear as to whether the Judge implicitly considered safety measures during his S&S analysis for Order No. 8414939.

The Judge also found that the violation was not a result of the operator's unwarrantable failure to comply with the standard. The Judge found that the violation was extensive and obvious and that greater efforts were necessary for compliance. However, he also held that the violation did not present a high degree of danger, that there was no evidence that the violative condition had existed for a long period of time, and that the operator had no knowledge of the existence of the violation. 36 FMSHRC at 1837-38.

II.

Disposition

Black Beauty contends that the Judge erred in affirming a violation of the modified safeguard. In particular, the operator argues that the modified safeguard is invalid because it fails to identify a hazard with specificity. Black Beauty recognizes, however, that the validity of the safeguard and the modification at issue here were the subject of another docket pending on appeal before the Commission when the petitions for review were filed in the instant case.

In his petition, the Secretary maintains that the Judge erred by considering the presence of safety measures when ruling that the ventilation and accumulations violations were not S&S. The Secretary also argues that the Judge's unwarrantable failure rulings related to the two orders may have been affected by his erroneous S&S analyses. The Secretary requests that the Commission remand the S&S and unwarrantable failure issues to the Judge.

A. Validity of Safeguard No. 7591942, as Modified

On January 28, 2016, after the parties had filed their petitions, we issued a decision affirming modified Safeguard No. 7591942. *Black Beauty Coal Co.*, 38 FMSHRC 1 (Jan. 2016). Our decision in that case specifically addressed the same issue before us in this case , *i.e.* whether the safeguard, as subsequently modified, identified a hazard with specificity. We rejected the operator's challenge and affirmed the safeguard:

> Because the validity of . . . safeguard notice and modification is a purely legal issue, we review the judge's decision *de novo* . . . We conclude that when the original issuance and its modification are read in conjunction, the modified safeguard notice identifies a

> hazardous condition and modified remedy with sufficient specificity to provide the operator with notice as to the conduct that is prohibited or required. Accordingly, we find that the original safeguard notice and its modification are valid.

Id. at 4.

The operator did not seek judicial review of that decision. Therefore, the validity of the modified safeguard has been established as a matter of law by Commission precedent.[8]

B. S&S Issues

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. We have held that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec. of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission evaluates the reasonable likelihood of injury assuming that normal mining operations will continue. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). When examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. *Texasgulf*, 10 FMSHRC at 501; *see Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (Feb. 1991). Some of the factors to be considered include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *See Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 501-03.

It is well settled that safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res., LP*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox*

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[8] Commissioners Althen and Young dissented from the Commission's decision in the *Black Beauty* case referenced above. They recognize the decision in that case represents the law of the case here and governs the finding on the same safeguard in this case but continue to believe the safeguard should be found invalid for the reasons set forth in their earlier dissent.

Creek Coal Corp., 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek*, 52 F.3d at 135; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

In *Cumberland*, the D.C. Circuit confirmed that safety measures are irrelevant to the S&S analysis. 717 F.3d at 1028-29. The operator argued that the Commission erred in finding that certain violations were S&S by failing to consider evidence of preventative measures that would have rendered both the occurrence of an emergency and the resulting injuries less likely. The D.C. Circuit concluded that consideration of redundant safety measures is inconsistent with the language of section 104(d)(1) of the Mine Act and broadly held that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Id.* at 1029. By using the phrase "significant and substantial inquiry" rather than referring to a specific step in the S&S analysis, the court made clear that safety measures are irrelevant to all elements of the S&S analysis.

The Court also indicated that all types of safety measures are "irrelevant to the significant and substantial inquiry" because the focus of the significant and substantial inquiry is the nature of the violation. "By focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards." *Id.* at 1029, *citing Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997).

Similarly, the Fourth Circuit recently held in *Knox Creek* that safety measures, at least those that are required by mandatory standards, are irrelevant to the S&S analysis. 811 F.3d at 162. '"If mine operators could avoid S&S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply.' Such a policy would make such standards 'mandatory' in name only." *Id.* The Fourth Circuit also approvingly cited the D.C. Circuit ruling in *Cumberland* that safety measures, without any qualification, are irrelevant to the S&S analysis.

In *Brody Mining*, we held that "[w]hen deciding whether a violation is S&S, courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation." 37 FMSHRC at 1691 (citing *Cumberland*, 33 FMSHRC at 2369). Therefore, in *Brody* we interpreted the decision of the D.C. Circuit in *Cumberland* as applying to all safety measures without qualification or exception.

Black Beauty nevertheless argues that safety measures must be considered as part of the S&S analysis. The operator claims that two court of appeals decisions stating that safety measures are irrelevant to the S&S analysis are very limited in scope and thus not applicable to this case.

First, Black Beauty contends that the D.C. Circuit's decision in *Cumberland*, holding that safety measures are irrelevant to the S&S analysis, was limited to the specific facts at issue in that case, *i.e.*, violations involving emergency safety standards. However, nothing in the D.C.

Circuit's decision limits the ruling to the circumstances of that case. Although the court recognized that emergency standards under the Mine Act are different from other Mine Act standards for purposes of S&S determinations, that part of the decision had nothing to do with whether safety measures must be considered in the S&S analysis.

The court later rejected, on two separate grounds, the operator's argument that safety measures must be considered. The court pointed out that for an emergency to occur, one must assume that all the redundant safety measures have failed. *Id.* at 1028-29. Importantly, the court also concluded that "consideration of redundant safety measures is inconsistent with the language of [section 104(d)(1)]." *Id. at* 1028-29. It explained that Congress intended that the focus of the S&S inquiry be "the nature of the violation," not the surrounding conditions. *Id.* at 1029. The D.C. Circuit also cited with approval the Seventh Circuit's decision in *Buck Creek,* 52 F.3d at 136, for the proposition that safety measures "are irrelevant to the significant and substantial inquiry." *Id.* Accordingly, we reject the operator's argument.

Second, Black Beauty argues that the Seventh Circuit's decision in *Buck Creek* – that the presence of safety measures "to deal with a fire does not mean that fires do not pose a serious safety risk to miners" – did not explicitly hold that safety measures are irrelevant to all elements of the S&S analysis. 52 F.3d at 136. We note that the Seventh Circuit's decision is consistent with our practice of finding that safety measures are irrelevant to all elements of the S&S analysis, including the likelihood that a fire would occur. For example, prior to *Buck Creek,* we had clarified that the exercise of caution by miners is irrelevant to the S&S analysis, including the portion of the S&S inquiry that seeks to determine the likelihood of injury from a hazard. *See Eagle Nest, Inc.,* 14 FMSHRC 1119, 1123 (July 1992). This principle applies equally to the relationship between safety measures and the S&S analysis.

Thus, the Judge erred in considering safety measures when determining that the ventilation and accumulation violations were not S&S. Specifically, the methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters are the sort of safety measures that we, and the appellate courts, have held to be irrelevant to the S&S analysis under the Act. We remand to the Judge to reconsider his S&S findings for these violations in light of our ruling in this decision.

C. Unwarrantable Failure Issues

The Judge held that the accumulations violations underlying the two orders before us were not a result of the operator's unwarrantable failure to comply with a standard, partly because the violations did not pose a high degree of danger.[9] 36 FMSHRC at 1835, 1838. The Secretary claims that the Judge's erroneous non-S&S findings for these orders led him to view

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[9] In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek,* 52 F.3d at 136 (approving Commission's unwarrantable failure test).

the available safety measures as a mitigating factor and influenced his findings as to the degree of danger, and consequently, his determinations as to unwarrantable failure.

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Brody Mining,* 37 FMSHRC at 1691; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1351-57 (Dec. 2009).[10]

In particular, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"). The Commission has specifically noted that the factor of dangerousness, by itself, may warrant a finding of unwarrantable failure, though the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan Mining,* 35 FMSHRC at 294.

As discussed above, the Judge's determinations that the violations in these orders were not S&S may have been flawed due to consideration of redundant safety measures. We further conclude that the Judge's non-S&S findings might have influenced his view of the degree of danger, and consequently his unwarrantable failure determinations for these orders. [11]

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[10] A judge may determine, in his or her discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *Brody Mining,* 37 FMSHRC at 1692.

[11] Of course, S&S violations are not synonymous with unwarrantable failures. An S&S inquiry centers on whether a "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). An unwarrantability determination, on the other hand, involves an analysis similar to gross negligence or reckless disregard. *Sec'y of Labor v. FMSHRC*, 111 F.3d at 919 ("the Secretary and the Commission interpret the words 'unwarrantable failure' to require a culpability determination similar to gross negligence or recklessness"). The Judge must analyze the relevant factors to determine whether the operator engaged in aggravated conduct constituting an unwarrantable failure. *Emery Mining,* 9 FMSHRC at 2001, 2003-04. On remand, therefore, the Judge's consideration of the S&S issue and unwarrantability issue will require separate analyses.

Accordingly, we remand this case to the Judge to reconsider his unwarrantable failure findings for these violations in light of our ruling in this matter.

III.

Conclusion

We affirm the Judge's determination that the modified safeguard is valid and that the operator failed to comply with it.

We remand the Judge's S&S and unwarrantable failure findings at issue for reconsideration in light of our decision.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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