Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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| *In the Matters of* | |
| OFFICE DES POSTES ET TELECOMMUNICATIONS DE POLYNESIE FRANÇAISE, | |
| Application for License to Land and Operate a Fiber-Optic Submarine Cable System between the United States and French Polynesia | File No. SCL-LIC-20081008-00017 |
| Application for Section 214 Authority to Construct and Operate a Fiber-Optic Submarine Cable System on a Common Carrier Basis Linking the United States and French Polynesia | File No. ITC-214-20081008-00453 |
| THE HONOTUA SYSTEM | |

**CONSOLIDATED AMENDMENTS TO APPLICATIONS FOR A CABLE LANDING LICENSE AND INTERNATIONAL SECTION 214 AUTHORITY**

Pursuant to the Cable Landing License Act, 47 U.S.C. §§ 34-39, Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and the Commission's implementing rules, 47 U.S.C. §§ 1.767, 63.12, and 63.18, Office des Postes et Télécommunications de Polynésie française ("OPT") (FRN 0015464282) has proposed to land, construct and operate the Honotua system, a fiber-optic submarine cable system between the United States and French Polynesia, on a common-carrier basis.[1] To address questions raised by

[1] *See* Application for a License to Land and Operate a Fiber Optic Submarine Cable System between the United States and French Polynesia, FCC File No. File No. SCL-LIC-20081008-00017 (filed Oct. 8, 2008) ("Honotua SCL Application"); Application for Section 214 Authority to Construct and Operate a Fiber-Optic Submarine Cable System on a Common Carrier Basis Linking the United States and French Polynesia, File No. ITC-214-20081008-00453 (filed Oct. 8, 2008) ("Honotua 214 Application").

Commission staff in connection with the Honotua SCL Application and the Honotua 214 Application, OPT undertakes the following actions:

(1) OPT requests a waiver of Section 63.10(c)(1) of the Commission's rules in order to exempt OPT from the Commission's separate-subsidiary requirement and in exchange for imposition of other competitive safeguards. At present, OPT cannot create a separate subsidiary to satisfy the requirements of Section 63.10(c)(1) without exposing itself to unacceptable legal and financial risk.

(2) OPT seeks a waiver of Section 1.767(h)(1) of the Commission's rules in order to exclude Pacific Lightnet, Inc. ("PLNI") – the owner of its proposed U.S. cable landing station – as a co-applicant for the cable landing license for the Honotua system and, by extension, a co-applicant for international Section 214 authority to operate the Honotua system on a common-carrier basis. OPT satisfies the well-established criteria for a waiver of Section 1.767(h)(1).

(3) OPT certifies that it is aware of and will comply with the requirements of the Coastal Zone Management Act ("CZMA").

## I. Request for Waiver of Section 63.10(c)(1) of the Commission's Rules

OPT requests a waiver of Section 63.10(c)(1), which otherwise requires "any carrier classified as dominant for the provision of particular services on particular routes" to provide service along such route "as an entity that is separate from its foreign carrier affiliate..."[2] As set forth below, imposition of this requirement on OPT would expose OPT to significant legal risk under French Polynesia law and could impose an extreme burden on OPT by jeopardizing financing for the Honotua project. At the same time, by requiring OPT to establish a separate

[2] 47 C.F.R. § 63.10(c)(1).

subsidiary, OPT believes that the Commission would achieve few, if any, public interest benefits, and would act inconsistently with the policies underlying Section 63.10(c)(1). For these reasons, and in consideration of additional competitive safeguards by which OPT volunteers to abide in order the address the policies underlying the rule section, OPT urges the Commission to grant a rule waiver.

### A. OPT cannot create a separate subsidiary without exposing itself to further legal risk under French Polynesia law

The Government of French Polynesia created OPT as an *établissement public* (in English, "public establishment") for the provision of telecommunications services in French Polynesia. As such, OPT is subject to regulation by the *Chambre territoriale des comptes de la Polynésie française* ("CTC") (in English, the Territorial Board of Auditors of French Polynesia). CTC regulates all public and semi-public entities, including OPT, established under French Polynesia law in order to ensure their performance of their chartered missions and their use of public funds for general public purposes, rather than private commercial ends. Unlike the federal government in the United States, with *établissements publics* the French Polynesia's Government plays a more direct role in ownership of commercial enterprises in French Polynesia. Nevertheless, these *établissements publics* are not one and the same as the French Polynesia Government. They operate autonomously, with separate leadership and institutions subject to CTC oversight and ultimate government control, via OPT's board.

In a recent audit report covering OPT's activities over the previous decade, CTC addressed, *inter alia*, OPT's legal authority to create subsidiaries. The French law serving as French Polynesia's constitution empowers the French Polynesia Government to engage in certain

commercial enterprises for reasons of general interest.[3] The CTC concluded that the creation of new subsidiaries by OPT was unlawful under Article 30 of *la loi organique* .[4]

OPT does not agree with the CTC's conclusion and would like to overturn it – a prospect that could take years of litigation at best. Nevertheless, the CTC's legal interpretation remains definitive and effectively prohibits OPT from complying with the Commission's separate-subsidiary requirement absent a change in *la loi organique* or a legal challenge to the CTC. Neither of these options is feasible in the near-term.

Against this background, OPT respectfully requests that the Commission apply the doctrine of international comity to grant a waiver of Section 63.10(c)(1) of the Commission's rules. International comity reflects the broad concept of respect among nations, and one nation

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[3] *La loi organique portant statut d'autonomie de la Polynésie française*, No. 2004-192, art. 30 (Feb. 27, 2004) ("*la loi organique*"), *available at* http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000435515 (stating that "*[l]a Polynésie française peut participer au capital des sociétés privées gérant un service public ou d'intérêt général ; elle peut aussi, pour des motifs d'intérêt général, participer au capital de sociétés commerciales. Ces participations feront l'objet d'un rapport annuel annexé au compte administratif de la Polynésie française examiné annuellement.*" (in English, "French Polynesia may participate in the capital of private companies managing a public service or general interest but can also, for reasons of general interest, participate in the capital of commercial companies. These investments will be an annual report annexed to the Administrative Account of French Polynesia reviewed annually.").

[4] *See* Chambres territoriale des comptes de la Polynésie française, *Rapport d'observations definitives, Offices des postes and télécommunications, exercices 1996 à 2007*, § 3.1.2.1.2 (Sept. 2008) (stating that "*La création des filiales est irrégulière*," in English, "the creation of subsidiaries is illegal"). The French Polynesia Government—but not OPT itself—may establish an OPT subsidiary that is a *société d'économie mixte* (in English, a public-private joint venture company). This explains why OPT has subsidiaries such as Tahiti Nui Telecom (established as a joint venture with France Télécom) and Tikiphone (established as a joint venture with Alcatel-Lucent). Nevertheless, the use of a *société d'économie mixte* presumes that there is a private-sector entity entering into a joint venture with the French Polynesia Government. This is not the case with the Honotua system, which is entirely government-owned.

recognizing within its territory the laws of a foreign state.[5] Although the Commission has applied this doctrine sparingly, it has stated that it may honor a foreign law or regulation where warranted by exceptional circumstances. *See VIA USA, Ltd., Telegroup, Inc., Discount Call Int'l Co., Order on Reconsideration*, 10 FCC Rcd. 9540, 9555-56 ¶ 47 (1995) ("*Call Back Reconsideration Order*").

OPT respectfully submits that such exceptional circumstances of this case warrant application of the doctrine of international comity. *First*, OPT asks that the Commission recognize the legitimacy of French Polynesia's broad and long-standing regulation of public and semi-public institutions. French Polynesia's prohibition against the creation of new subsidiaries – as reflected in Article 30 of *la loi organique* (French Polynesia's constitution), as interpreted and enforced by the CTC – applies not only to OPT but to all public and semi-public entities in French Polynesia. The prohibition exists first and foremost to ensure that public and semi-public entities operate, and expend funds, to serve their public missions, rather than other private ends. OPT recognizes that (notwithstanding responses to the current economic crisis) the United States generally lacks similarly-constituted public or semi-public entities, restrictions on the corporate and commercial activities of such entities, and public auditors to oversee and enforce restrictions on such entities. Nevertheless, OPT asks that the Commission respect these differences between French Polynesia and the United States as they pertain to governmental activities and regulation.

*Second*, OPT asks the Commission to recognize the legal risk to OPT in the event the Commission required it to comply with the separate-subsidiary requirement of Section

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[5] *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (noting that international comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"); Restatement (Third) of the Foreign Relations Law of the United States § 101, comment e (1986) (citing *Hilton v. Guyot*).

63.10(c)(1) as a condition precedent for licensing for Honotua on the U.S. end. As discussed further in part I.D below, OPT believes that the Commission has other remedies that would address the Commission's concerns about protecting competition on the U.S.-French Polynesia route – and without requiring OPT to expose itself to enforcement action in French Polynesia.

### B. Requiring OPT to establish a separate subsidiary would burden OPT

In adopting Rule Section 63.10(c)(1), the Commission assumed that the structural separation requirement "will not pose a significant burden on such carriers because most foreign-affiliated carriers operating in the United States do so in a manner that is consistent with the requirements we adopt here." *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities* ("*Foreign Participation Order*"), 23 FCC Rcd. 23,891, 24,005-06 ¶ 257 (1997). In the instant case, however, this assumption is unfounded. Nowhere in the *Foreign Participation Order*, however, did the Commission contemplate that a country might restrict for reasons of public administration the creation of separate subsidiaries by any government-owned or -controlled carrier, much less a situation with which compliance with the Commission's separate-subsidiary rule could expose the carrier to enforcement action in its home country.

Neither did the Commission contemplate in the *Foreign Participation Order* that compliance with the separate-subsidiary requirement could expose an applicant such as OPT to severe financial risks. To finance the Honotua project, OPT has relied on four sources of funding: (1) a grant from the Government of French Polynesia; (2) a commercial loan from Banque Socredo; (3) funding through a French tax-incentive program known as *défiscalisation*; and (4) funds allocated by OPT in its operating budget. In the case of the three outside sources of funds, the parties have executed the governing documents in the name of OPT, as the sole

recipient of funding, based on the explicit assumption that OPT will control and operate Honotua in its entirety. Moreover, OPT has already drawn funds from the government grant and the commercial loan. Consequently, the transfer of ownership and operation of the U.S.-territory portion of Honotua to a separate subsidiary would require renegotiation of these outside sources of financing. Any renegotiation would be time-consuming, could result in less-advantageous financial terms (given the deterioration in credit markets since the initial arrangements were agreed), or could result in a withdrawal of funding altogether. Moreover, the explicit opinion of the CTC could complicate any lending to a separate subsidiary created to own and operate the U.S.-territory portion of Honotua.

### C. Requiring OPT to establish a separate subsidiary is inconsistent with the policies underlying Rule Section 63.10(c)(1) and would achieve few public interest benefits

OPT continues to believe that application of the separate-subsidiary requirement in Section 63.10(c)(1) in licensing the Honotua system would be inconsistent with the Commission's stated basis for adopting that requirement. In its *Foreign Participation Order*, the Commission held that the principal rationale for its separate-subsidiary requirement was its "concern[] that a foreign carrier that possesses market power in a relevant market on the foreign end of an international route could leverage its market power into the downstream U.S. international market." *Foreign Participation Order*, 23 FCC Rcd. at 23,004 ¶ 254. Nowhere in its discussion of this requirement, however, did the Commission address the applicability of the requirement to submarine cables or submarine cable operators. Both Sections 63.10(c)(1) and 1.767 of the Commission's rules are silent on this point. In light of this omission, OPT respectfully submits that a strict application of the provisions of Section 63.10(c)(1) to cable operators may not be appropriate.

OPT further submits that requiring OPT to establish a separate subsidiary for the ownership and operation of the U.S.-territorial portion of the Honotua network is not likely to achieve the public interest benefits Rule Section 63.10(c)(1) was designed to protect. As noted above, the principal goal of the separate subsidiary rule was to prevent anti-competitive behavior by dominant foreign carrier affiliates. The U.S.-French Polynesia route of the proposed Honotua cable, however, is a classic "thin route" with little traffic volume, which will be used principally to provide broadband Internet connectivity on the French Polynesia end, not traditional Title II services. Indeed, OPT does not plan to offer service in the United States at all. Thus, the theoretical benefits of establishing a separate subsidiary in this case would be negligible at best.

In this context, it is also worth noting that the proposed Honotua network is inherently pro-competitive and pro-consumer, as it seeks to replace existing satellite circuits that have extortionate per-circuit costs, offer inferior quality of service, and cannot provide true high-speed broadband in French Polynesia.

It is also clear that application of Rule Section 63.10(c)(1) would not prevent the "vertical effects" in the market for services on the U.S.-French Polynesia route which the separate subsidiary requirement is designed to address. As noted, OPT is a legal monopoly, and has no rivals in the market for international telecommunications services, in French Polynesia. OPT has, and will continue to have for the foreseeable future, a legal, regulated monopoly for the provision of such services.

Against this background, OPT respectfully submits that the creation of a separate subsidiary, while appropriate in the situations contemplated by the Commission when it adopted Rule Section 63.10(c)(1), would not have the beneficial effect for which the rule was designed, and would not, in and of itself, serve the public interest. OPT, however, is cognizant of the

potential anti-competitive concerns that its rule waiver request may raise, and commits itself to other, more targeted pro-competitive safeguards, as set forth below.

### D. Voluntary Competitive Safeguards

While OPT does not believe that imposition of the separate subsidiary requirement in this case is appropriate, it recognizes the extraordinary nature of the relief sought hereunder, which the Commission has not previously granted. OPT also recognizes that other existing rule requirements governing dominant carriers may not adequately address Commission concerns regarding the potential for anticompetitive conduct by OPT. OPT therefore voluntarily commits that it will comply with the following additional safeguards as a condition to the grant of its rule waiver request:

- Withdrawal of Section 214 Application. OPT will withdraw its Section 214 application for authority to provide global facilities-based and global resale international telecommunications services. By undertaking this commitment, OPT hereby certifies that its service to US customers will be limited to the provisioning of capacity on Honotua between the French Polynesia and U.S. landing stations, and that it will not offer or provide backhaul service to any U.S. point of presence.
- Creation of Separate Operating Division. OPT will establish a separate operating division with OPT with respect to the ownership and operation of the U.S.-territory portion of Honotua.
- Creation and Maintenance of Separate Books of Account. OPT will maintain separate books of account (*i.e.*, separate financial accounts to record assets, liabilities, equity, and revenues and expenses from operations) for this separate division and for the U.S.-

territory portion of Honotua. OPT will make such books available to the FCC upon request.

- Filing of Quarterly Maintenance Reports. OPT will file with the FCC quarterly reports summarizing the provision and maintenance of all basic network facilities procured from OPT's local exchange and other French Polynesia-domestic operations and operating divisions and affiliates.
- Provision to the FCC of French Polynesia Tariffs. OPT will provide to the FCC on a timely basis all new and revised *cahiers des charges* (tariff-like filings) filed publicly with the French Polynesia Ministry of Economy and Finance for telecommunications service between French Polynesia and the United States.

OPT will also be happy to discuss with the Commission other potential pro-competitive conditions, consistent with OPT's business plans and French Polynesia law.

Regardless, OPT will remain subject to other, existing regulatory requirements, including:

- Filing of quarterly traffic and revenue reports, as required by Sections 63.10(c)(2) and 43.61 of the FCC's rules.
- Filing of quarterly circuit-status reports, as required by Sections 63.10(c)(4) and 43.82 of the FCC's rules.
- Compliance with the applicable international settlement rate benchmark for French Polynesia, as required by Section 63.10(e) of the FCC's rules and established in IB Docket No. 96-261.
- Submission to the FCC, within 30 days of execution, of copies of all contracts affecting the provision of telecommunications on the U.S.-French Polynesia route (including, but

not limited to, interconnection agreements, collocation agreements, IRU agreements, capacity leases, settlement agreements, accounting agreements, and service agreements) to which it is a party, as required at least in part by Sections 43.51(a)(1) and (b)(2) of the FCC's rules.

- Provision of service on the U.S.-French Polynesia route pursuant to a tariff filed with the Commission.
- Compliance with the Commission's no special concessions requirements.

## II. Request for Waiver of Rule Section 1.767(h)(1) of the Commission's Rules

OPT requests a waiver of Section 1.767(h)(1) of the Commission's rules to exclude PLNI—the owner of the Hawaii cable station—from the application as a co-applicant for the cable landing license for the Honotua system and, by extension, a co-applicant for Section 214 authority to operate the Honotua system on a common-carrier basis. The Commission should grant OPT's waiver request, as OPT will retain operational authority over Honotua facilities and provide direction to PLNI in all matters relating to the Honotua system.

On September 5, 2008, OPT and PLNI entered into a Landing Party Agreement ("LPA") pursuant to which OPT will retain operational authority over the Honotua facilities and provide direction to PLNI in all matters relating to the Honotua system. The LPA has an initial term of 15 years, and may be renewed solely at OPT's discretion for two additional five-year periods, for a total possible term of 25 years. OPT's cable landing license application for Honotua reflects this planned landing at PLNI's cable landing station at Kawaihae, Hawaii.[6] PLNI already holds

[6] Honotua SCL Application, Attachment 1, at 4.

a cable landing license for the cable station, as well as Section 214 international operating authority.[7]

Pursuant to the LPA, PLNI will provide certain limited services that would not provide it with any ability to affect significantly the operation of the Honotua System. OPT will have exclusive control over and access to OPT System terminal equipment, which it will collocate in the Kawaihae cable station building. Equipment for the Honotua system will be separately caged and controlled exclusively by OPT from its network operations center in French Polynesia. OPT will retain operational authority over Honotua system facilities and provide direction to PLNI in all matters relating to the Honotua system. Pursuant to the agreement between OPT and PLNI, PLNI will perform certain limited "remote hands" monitoring, testing, and maintenance services on OPT's equipment, which would be performed in accordance with OPT's directions.

Under existing Commission policies and precedents, OPT believes that its arrangements with PNLI would qualify for a waiver of Section 1.767(h)(1) of the Commission's rules. "The purpose of [Section 1.767(h)(1)] is to ensure that entities having a significant ability to affect the operation of the cable system become licensees so that they are subject to the conditions and responsibilities associated with the license."[8] As noted above, however, PLNI, will not have the ability to affect significantly the operation of the Honotua system. Moreover, the addition of PLNI as a joint applicant would not be necessary to ensure compliance by OPT with the Cable Landing License Act, the Commission's cable landing license rules, or the terms of any cable landing license.

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[7] FCC File Nos. SCL-T/C-20080219-0002, ITC-214-20010503-00269, and ITC-T/C-20080215-00062.

[8] See Actions Taken Under the Cable Landing License Act, Public Notice, FCC File SCL-LIC-20070222-00002, 23 FCC Rcd. 227, 229 (Int'l Bur. 2008) ("TPE Cable Landing License") (citing Review of Commission Consideration of Applications under the Cable Landing License Act, Report and Order, 16 FCC Rcd. 22,167, 22,194-95 ¶¶ 53-54 (2001)).

Since the adoption of Section 1.767(h)(1) in late-2001, the International Bureau has often declined to require owners of existing and separately-licensed cable stations to be joint applicants or licensees for new undersea cable systems that connect, or will connect, to those existing cable stations and has generally declined to require a waiver of Section 1.767(h)(1).[9] The Commission has also uniformly granted rule waiver requests where, as here, the owner of the cable landing station will have no ability to affect the operations of the proposed network. Most recently, for example, the International Bureau granted a waiver to the joint cable landing licensees for the American Samoa Hawaii Cable system, declining to require that AT&T – which owns an existing cable station in Keawaula, Hawaii – be a joint applicant or licensee for the American Samoa Hawaii Cable system, which will land at the Keawaula cable station.[10]

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[9] *See Actions Taken Under the Cable Landing License Act, Public Notice*, FCC File No. SCL-LIC-20060413-00004, 21 FCC Rcd. 6380 (Int'l Bur. 2006) (declining to require that AT&T, which owned an existing cable station at Seward, Alaska, be a joint applicant or licensee for the Kodiak-Kenai Cable System, which landed at the Seward cable station); *Actions Taken Under the Cable Landing License Act, Public Notice*, FCC File No. SCL-LIC-20050418-00010, 20 FCC Rcd.14,639 (Int'l Bur. 2005) (declining to require that AT&T and Global Crossing St. Croix, Inc. – which owned existing cable stations in Puerto Rico and St. Croix, respectively – be joint applicants or licensees for the Global Caribbean Network, which landed at the Puerto Rico and St. Croix cable stations); *Actions Taken Under the Cable Landing License Act, Public Notice*, FCC File No. SCL-LIC-20031125-00032, 19 FCC Rcd. 446 (Int'l Bur. 2004) (declining to require that Global Crossing St. Croix, Inc. – which owned the existing cable station in St. Croix, USVI – be a joint applicant or licensee for the Antilles Crossing system, which landed at the St. Croix cable station); *Actions Taken Under the Cable Landing License Act, Public Notice*, FCC File No. SCL-LIC-20031209-00033, 19 FCC Rcd. 8564 (Int'l Bur. 2003) (declining to require that Telecomunicaciones Ultramarinas de Puerto Rico, Inc., which owned an existing Puerto Rico cable station, be a joint applicant or licensee for the SMPR-1 system, which landed at the Puerto Rico cable station), *aff'd Order on Review*, 20 FCC Rcd. 18,732 (2005).

[10] Public Notice Report No. SCL-00080, DA No. 09-45, released January 16, 2009 ("although AT&T, Inc. owns the existing cable station..., it will not be able to affect significantly the operation of the ASHC System. The Applicant will retain operational authority over their ASHC System facilities and provide direction to AT&T in all matters relating to the ASHC System.") *See also TPE Cable Landing License*, 23 FCC Rcd. at 229 (finding that "WCIC

## III. CZMA Certification

By the signature below, OPT certifies that it is aware of and will comply with the requirements of the Coastal Zone Management Act of 1972, as amended ("CZMA"), and the National Oceanic and Atmospheric Administration's CZMA implementing rules, codified at 15 C.F.R. Part 930 Subpart D. In certifying its awareness of and compliance with the CZMA, OPT does not concede that the legality or policy appropriateness of the Commission's new CZMA rules, given the pending challenge by the North American Submarine Cable Association ("NASCA") to the Commission's CZMA-related findings, conclusions, and rules adopted in the Commission's Report and Order, FCC 07-118, in IB Docket No. 04-47 (released June 22, 2007). *See* NASCA Consolidated Petition for Reconsideration and Petition to Defer Effective Date, IB Docket No. 04-47 (filed Oct. 25, 2007).

## IV. Certification Regarding the Anti-Drug Abuse Act of 1988

As required by Sections 1.767(a)(8) and 63.18(o) of the Commission's rules, 47 C.F.R. §§ 1.767(a)(8), 63.18(o), OPT further certifies that no party to this application has been denied federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.

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will not have the ability to affect the operation of the TPE Network. Verizon will retain effective operational authority and provide direction to WCIC in all matters relating to the TPE Network").

## CONCLUSION

For the reasons set forth above and in the Honotua SCL Application and the Honotua 214 Application, OPT requests that the Commission expeditiously grant the amended cable landing license application and international Section 214 authorization for the Honotua system.

Respectfully submitted,

**OFFICE DES POSTES ET TELECOMMUNICATIONS DE POLYNESIE FRANÇAISE**

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May 12, 2009

Attachment

## CERTIFICATE OF SERVICE

I, Eric Fishman, hereby certify that consistent with Section 1.767(j) of the Commission's rules, 47 C.F.R. § 1.767(j), I have served copies of the foregoing Consolidated Amendment and Waiver Requests, by hand- or overnight delivery on this 18th day of May 2009, to the following:

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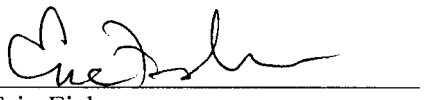

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