

BEFORE THE NORTH CAROLINA OCCUPATIONAL  
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2011-5131  
OSHA INSPECTION NO. 314380353  
CSHO ID: G6735

DOCKET NO. OSHANC-2011-5127  
OSHA INSPECTION NO. 314380361  
CSHO ID: G6735

vs.

INFRASTRUCTURE TECHNOLOGY  
SERVICES, INC.  
*and its successors*

ORDER

and

PSNC ENERGY  
*and its successors*

Respondents.

**APPEARANCES:**

**Complainant:**

**Daniel Addison, Special Deputy Attorney General,  
North Carolina Department of Justice**

**Respondents:**

**Thomas A. Farr, Ogletree Deakins, Nash, Smoak &  
Stewart, P.C., Counsel for Respondent, PSNC Energy  
Edward B. Keever, pro se, CEO, Infrastructure  
Technology Services, Inc.**

**BEFORE:**

**Hearing Examiner: Monique M. Peebles**

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on October 6, 2011, and October 24, 2011, at the North Carolina Medical Society Auditorium, 222 North Person Street in Raleigh, North Carolina. Post-trial briefs were submitted by Complainant, Respondent PSNC Energy, and Respondent Infrastructure Technology Services on March 29, 2012.

As a preliminary matter, the parties consented to have the two cases consolidated pursuant to Rule 42 of the North Carolina Rules of Civil Procedure. In the case for PSNC Energy (“PSNC”), Complainant dismissed Citation 2, Item 1, and for Infrastructure Technology Services (“ITS”), Complainant dismissed Citation 3, Item 1. The Court allowed Respondent ITS’s motion to amend the Statement of Position to deny Citation 1, Item 1, based on a clerical mistake.

After reviewing the record file and the evidence presented at the hearing, with due consideration of the post-hearing briefs of all parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

**FINDINGS OF FACT**

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the “Act”).

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about February 7, 2011, contesting a citation issued on December 20, 2010, to both Respondents.
3. Respondent PSNC, is a corporation which provides natural fuel gas to commercial and residential customers and gas line maintenance in the State of North Carolina and is subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 863 workers overall; and 1 person was employed at the worksite at the time of the accident.
4. Respondent ITS, is a corporation which specializes in the distribution of fuel gas piping in the State of North Carolina and is subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 66 workers overall, and 3 people were employed at the worksite at the time of the accident.
5. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
6. On November 23, 2010, Safety Compliance Officer, Brian Burger ("SCO Burger") along with two other officers-in-training, Don Johnson and Mike Conner, saw an open excavation from the public way near the corner of Reedy Creek Road and Blue Ridge Road in Raleigh, North Carolina ("site"). Respondent PSNC hired ITS to dig a trench and lay in new pipes.
7. The project called for a new pipe line to be attached to an existing line located approximately three feet beneath the surface of the work site. (T p 411)
8. SCO Burger conducted an inspection of Respondent's worksite on the basis of OSH Division's national emphasis

program for trenching and excavation on November 23, 2010.

9. SCO Burger conducted an opening conference with Mr. Bobbie Freed, supervisor at PSNC, and Mr. James Shawver, project manager for Respondent ITS (“Mr. Shawver”); and he was given permission to do the inspection.
10. SCO Burger took photographs, interviewed several witnesses from both PSNC and ITS, took notes, and created diagrams.
11. SCO Burger conducted a closing conference with Mr. Freed and Mr. Shawver on the same day as the inspection; and as a result of the inspection, he recommended that citations be issued.
12. As a result of the recommendations of the compliance officer, Nicole Brown issued two citations on December 20, 2010. The first citation was the same violation for both Respondents--a serious violation for PSNC and a repeat serious violation for ITS as follows:

29 CFR 1926.652(a)(1): “Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Paragraph (b) or (c) of this section except when:

(a)(1)(i) Excavations are made entirely in stable rock  
or

(a)(1)(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The proposed penalty for this violation was \$6300.00.

### **Depth of the Trench**

13. Respondent's competent person on the site was ITS employee, Cirillo Cano ("Cano"), with 20 years of experience digging trenches.
14. Cano dug a "T" shape trench at the site with vertical walls and a bench. (Exhibit C1)
15. The longer new plastic pipe ran in a north/south direction, and the existing pipe ran in an east/west direction. (T p 35 & Exhibit C1)
16. Cano testified that he measured the trench in 3 locations near the existing pipe with a tape measure against the vertical wall. (See red marks on Exhibit C1)
17. Cano testified that all 3 measurements were 4'10". (T p 466)
18. Cano dug the bench so that dirt did not fall down into the hole "just to be on the safe." (T pp 463 & 469)
19. SCO Burger measured the "T" shaped trench in several locations by placing a grade rod across the excavation to simulate the position of existing grade before the excavation was cut, and then a tape measure was used to go to the bottom of the trench to its intersection with the grade rod. (Tp 63) When he measured the depth of the south wall, he extended his arm out, and the tape measure was not flush against the vertical wall. (T pp 140 & 230)
20. SCO Burgers measurements: the deepest part of the trench near the existing pipe on the south wall measured 66" or 5'6" (vertical wall 47" + top bench depth 19"=66"). The width was 4 feet. (T pp 39-40)
21. Respondent ITS project superintendent Shawver measured the vertical wall with a tape measure flush against the vertical wall. (T p 284 & Exhibits R16-21)

22. Respondent ITS project superintendent Shawver's measurements: (in the same area as SCO Burger) the deepest part of the trench measured 61" -62" or 5'1"-5'2"(vertical wall 43"-44" + top bench depth 18"= 61"-62")
23. The trench was dug in previously disturbed Type B soil. (T pp 57, 58, 456)
24. Pursuant to 29 CFR §1926.652(a)(1); 652(b) and Subpart P, Appendix B, Table B-1, Cano, foreman for Respondent ITS, should have sloped the sides of the trench 1-foot horizontal to every foot vertical (1:1 or 45 degrees) in the base of the "T" or benched the excavation 1:1. (T pp 61 & 68)
25. In class B soil, with a trench depth of at least 5'1" in the base of the "T" where both Respondents had employees working in the trench, the slope was significantly more than 45 degrees, and bench was less than 1:1.
26. The failure of Respondent to adequately slope and properly bench the side walls of the excavation created the possibility of an accident, to wit, a cave-in. (T pp 69-71)
27. The substantial, probable result of a cave-in would be broken bones, bruising, or muscle strain from an employee being pushed from falling dirt and pinned between existing pipe and earth behind them in the trench. (T p 72)
28. Respondent ITS had 3 employees and Respondent PSNC had 1 employee exposed to the hazard of a cave-in while either installing the gas flow isolation valve, making the connection, making the weld, and doing other tasks to connect the plastic pipe to the metal pipe (T p 73).
29. Respondent ITS knew or should have known that the trench was more than 5 feet deep and 1:1 ratio or 45 degree angle was the proper angle because the person they designated as the competent person dug the trench, and Respondent is in the business of excavating and has a duty to know the standards applicable to benching and sloping.



30. Respondent PSNC knew, or should have known, that the trench was more than 5 feet deep and 1:1 ratio or 45 degree angle was the proper angle, because Respondent's crew leader Dallin worked for PSNC 21 years, first as a pipe layer, has worked in thousands of trenches, and has had training on how to safely prepare trenches and has a duty to know the standards applicable to benching and sloping. (T pp 344-346)
31. The amount of the gravity based penalty was \$3,000.00 for Respondent PSNC, and credits were made according to the Operations Manual as follows:
  - a. The severity of the violation was medium due to the fact that only one of the two sides violated the standard, partial benching in place and death by cave-in was unlikely due to the width of the overall working space in the trench (T p 81);
  - b. The probability factor was lesser because only one employee was exposed to the hazard for a limited amount of time;
  - c. No credit was given for Respondent's size because they exceeded 251 employees;
  - d. A credit of 35% reduction was applied for Respondent's good faith; and
  - e. A maximum 10% reduction was applied for Respondent's history.
32. SCO Burger properly calculated the amount of the proposed adjustment penalty as \$1,650.
33. Respondent ITS had a previous Citation for this same standard in OSH Inspection Number 311941975 in which they were cited for not using a protection system in a 6' deep trench. This citation involved an excavation for a gas line installation adjacent to a road with a single bench on one side and no bench on the other side. The inspection was conducted on June 23, 2008, and closed on September 11,

2008, within three years of this inspection. (See Exhibit C7 & T pp 75-78)

34. The amount of the gravity based penalty was \$5,000.00 for ITS and \$10,000.00 after applying the repeat factor.
35. Credits were made according to the Operations Manual as follows:
  - a. The severity of the violation was medium due to the fact that only one of the two sides violated the standard, partial benching in place and death by cave-in was unlikely due to the width of the overall working space in the trench. (T p 81)
  - b. The probability factor was greater because there were 3 employees in the trench for approximately two and half hours.
  - c. A 40% credit was given for Respondent's size because the overall size was 66 employees; and
  - d. A maximum 10% reduction was applied for Respondent's history.
36. SCO Burger properly calculated the amount of the proposed adjustment penalty as \$5,000.00.
37. The second citation was issued to Respondent ITS under 29 CFR §1926.651 (k)(1). The standard requires:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspection shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.



38. A “competent person” is defined as one “who is capable of identifying existing and predictable hazards” and who has the authority to eliminate them. § 1926.650(b).
39. Cano, Respondent’s foreman, was designated as the competent person at the site by Respondent ITS.
40. Cano testified that he determined that soil in the trench was Type B soil by vision. He did not perform a manual test. (T pp 456 & 464)
41. Cano had a general idea of how to classify soils, but no specific knowledge.
42. He didn’t have the knowledge of understanding of how to apply the standard and requirements of benching.
43. There was a possibility of an accident, wall collapse, as a result of the trench not being inspected by a competent person, the substantial probable result being broken bones or bruising.
44. Three of Respondent ITS employees were exposed to the hazard.
45. Respondent ITS knew or should have known of the hazardous condition as Cano, the foreman and competent person, created the hazardous condition in digging the excavation and creating the bench, knowledge which is imputed to Respondent ITS. Further, Cano’s conduct was within his delegated authority.
46. CSO Burger found the severity to be medium, the probability greater, and assessed a Gravity based penalty of \$5,000. He applied a 40% credit for size, and 35% for good faith, no credit for history, and proposed an adjusted penalty in the amount of \$1250.00. The proposed

penalties were computed in accordance with the provisions of the Field Operations Manual.

### **Discussion: Trenching Violation**

To sustain a serious violation, the Commissioner must show: (1) the violative condition created the possibility of an accident, (2) a substantial probability that death or serious physical harm could result if an accident did occur as a consequence of the violation and (3) that either the employer knew or a reasonably prudent employer would have known that the violation existed. Brooks, Comm'r of Labor v. Grading Co., 303 N.C. 573, 584-586, 281 S.E.2d 24, 31-32 (1981)

#### ***The Violative Condition: Trench Depth***

The first issue presented in this case is whether the Complainant satisfied its burden of proving that Respondents ITS and PSNC violated the trenching standard under 29 CFR§1926.652. In accordance with 29 CFR§1926.652, a protective system must be used in the excavation of any trench with a depth of five feet or more, unless it is excavated in stable rock. There is no argument that the excavation was made in stable rock. Only the depth of the trench is at issue. The Complainant and Respondent ITS both took measurements of the trench and disagree on the actual measurement of the depth of the trench. The Complainant contends SCO Burger properly measured the depth of the trench wall at the deepest parts to be 5'5" and 5'6". Although Respondents dispute the Complainant's measurement and claim the original excavation was less than 5 feet, Respondent's own project manager, Shawver measured the depth in the southern part of the excavation to be 5'1" or 5'2". The slight variances in the measurements by the parties are significant when mere inches can ultimately determine whether there has been a trenching violation. The end result in this case however, is not altered by those variances. The regulations plainly required

excavations 5 feet or more to have adequate protection systems.<sup>1</sup> Even in the light most favorable to the Respondents, the 5'1" depth as measured here, without adequate protection, would be in violation of the trenching standard.<sup>2</sup> The undersigned carefully weighed the relevant testimony and the exhibits entered into evidence. SCO Burger's testimony was particularly reviewed and the undersigned considered and compared the way in which the trench was measured by both parties.<sup>3</sup> The excavation was shown to be at minimum, 5'1", and cave-in protection was required.<sup>4</sup>

Respondent bears the burden of proving the excavation was less than 5 feet in depth and that its inspection did not indicate the potential for cave-ins. *A.E.Y. Enterps.*, 21 BNA OSHC 1658, 1659 (No. 06-0224, 2006). Cano testified that when he dug the trench he measured the trench at a depth of 4'10". Cano also testified that he measured it in 3 different locations along or near the southern wall, and they were all 4'10". Even SCO Burger and Shawver had slightly

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<sup>1</sup> While the court agrees that a case can be made concerning the ambiguity in 1926 §652(a) surrounding the "less than 5 feet" language, see our Review Commission's language in *Hendrix Barnhill* ("1926 §652 requires that employees shall be protected in excavations by an adequate protection system except when: (1) excavations are made entirely in solid rock or are less than 5 feet in depth; AND examination by a competent person provides no indication of a cave-in. Hearing examiner Peebles did not find that the trench was 5 feet or more, and there was no suggestion made by any party that the excavation was made of stable rock...")

<sup>2</sup> Respondent argues that even though Shawver's measurement slightly exceeds five feet, the Court should consider SCO Burger's testimony concerning the estimated grade of the original excavation before Cano created a bench. Burger estimated that the grade of the original excavation was three inches lower than the natural grade of the southern wall; and, therefore, Shawver's depth measurement of 5'1" should really be 4'10", which is less than 5' and not in violation of the standard. The Court finds it interesting that the Respondent suggested that the Court should "completely discredit and reject all of Burger's testimony" (Respondent PSNC's brief pg. 15) and then suggest that the Court however consider this part, which Respondent finds helpful to their argument. The Court is not inclined to do so.

<sup>3</sup> Measuring flush against the vertical wall may still be skewed by curve in the dirt on the bottom of the trench against the wall and measuring with your arm extended dropping a tape measure in the trench may be skewed slightly by the angle. Photographs of the measurement of the trench taken while the measuring tape is a few inches from the wall of the trench and dropped to the bottom of the trench with an intersecting perpendicular rod clearly showing the depth of the trench would be more precise in cases where inches are critical.

<sup>4</sup> Respondent ITS was also cited for a repeat violation. A repeated violation exists where there is a "subsequent violation by the same employer substantially similar to a prior violation or violations" when the employer knew or "should have known of the standard by virtue of the prior citation or citations." *Brooks, Comm'r of Labor v. Grading Co.*, 303 N.C. 573, 590, 281 S.E.2d at 34 (1981).

different measurements at different areas in the southern part of the trench. The Court is not persuaded by Cano's testimony. Nor is the Court persuaded by the testimony of Dallin who testified that the trench "didn't look over 5 feet to me," but did not personally take any measurements. (T p 349) In the final analysis, the record does not provide sufficient evidence, minus the speculation about why Shawver's measurement wasn't accurate, to establish that the trench was less than 5 feet. The excavation at issue was not adequately protected from a possible cave-in.

### ***The Violative Condition: Sloping and Benching***

The cave-in hazard continued to exist even with Cano's bench he created. Soils are classified as Type A (generally the most stable types of clay), Type B (angular gravel, silt, silt or sandy or clay loam, some previously disturbed or fissured soils, or those subject to vibrations), or Type C (the least stable gravel, sand, loamy sand, water soaked soils, or some previously disturbed soils) (Subpart P, App. A). Since the excavation at issue was in Class B soil and in excess of 5 feet in depth, Respondents were required to provide cave-in protection to employees. The Complainant bears the burden of proof that the excavation walls were not sloped or benched in accordance with Type B soil.<sup>5</sup>

The evidence plainly establishes that the trench was not sloped, benched, or otherwise protected in accordance with OSHA regulations. It is undisputed that a trench dug in Type B soil must be sloped at a 45 degree angle (meaning it is sloped back one foot for each foot rise). Although there was an attempt to bench the trench, the evidence establishes that the degree of benching was wholly inadequate. That is not surprising, wherein it's clear that at the time the bench was made, Cano did not intend to make it compliant with the standards. He testified he was just making it safe (T p 463) so dirt doesn't fall off on the heads of employees.

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<sup>5</sup> In as much as the Respondent argues that the excavation should be classified as type A soil where in the previously disturbed soil was all dug out, the Court is not persuaded.

Although mistaken and inaccurate, his testimony demonstrated that he honestly thought the trench was less than five feet and did not require a bench under the trenching standards.

### ***Possibility of an Accident***

The Act only requires the Complainant prove the ***possibility*** of an accident. Respondent argues that no one who observed the excavation in question truly believed that there was a possibility of an accident. Dallin testified that he looked at the walls to see if there were any cracks and a potential for cave-in, and the walls looked solid. (T pp 349-350) Cano only performed a visual inspection as well. It's important to note that both Dallin and Cano thought the trench was less than 5 feet in depth which would not require any protection from a cave-in. However, the standard also requires the competent person to perform an inspection and determine there is no potential for a cave-in. An important part of this inspection process includes determining the soil classification. Neither Respondent performed a manual inspection of the soil as required by the standard. SCO Burger, on the other hand, discovered through actual and reliable measurements that the trench was over 5 feet in depth and performed a visual and manual inspection of the trench. He testified at length why he believed there was a possibility of an accident as a result of the conditions observed with this trench. (T pp 69-72) He concluded, and the Court is persuaded, that a struck by accident from falling wall of earth is possible with the collapse of the unsupported vertical wall of this trench. While Respondent ITS had partial benching in place, this was properly considered when reducing the severity of the violation to medium.

In *Daniel International Corp. v. Donovan*, the 10<sup>th</sup> Circuit Court of Appeals held that the Secretary need show only the existence of the hazardous condition and its accessibility to employees in order to satisfy the burden of proving

exposure. 705 F.2d 382 (10<sup>th</sup> Cir. 1983) quoting *Stahr and Gregory Roofing Co.*, 1979 CCH OSHD p 23,261 (No. 76-88-1079). The Second and Fifth Circuit have also reached a similar conclusion pertaining to the proof necessary to establish exposure. (See *Mineral Industries & Heavy Construction Group v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir.1981) and *Brennan v. Occupational Safety & Health Rev. Com'n.* (Underhill Construction Co.), 513 F.2d 1032, 1038 (2d Cir. 1975). See also, *Commissioner of Labor v. Weekley Homes*, 169 NC. App. 17, 25, 609 S.E.2d 407, 414 (2005) (N.C. Court of Appeals, quoting the 2<sup>nd</sup> Circuit Court's holding from *Brennan*). The evidence showed that 3 of Respondent's ITS employees were exposed to the violative condition, and 1 employee of Respondent PSNC was also exposed.

### ***Serious Injury & Knowledge***

SCO Burger testified that broken bones, bruising and muscle strain would be the substantial probable result from an accident if one occurred. The Court disagrees that this is implausible as Respondent argues. Did Respondent have actual or constructive knowledge? Respondent ITS had constructive knowledge imputed by Cano's knowledge of his own misconduct. In *W.G. Yates & Sons Inc. v. OSH Review Commission*, 459 F.3d 604,(5<sup>th</sup> Cir. 2006) the Court found that a supervisor's knowledge of his own malfeasance is imputable to the employer.

### ***Competent Person***

OSHA has included in Appendix A of its excavation standard methods to make it easier for a competent person to classify soils. (See Chapter 3 for details on soil classification.) The competent person determines what soil types are present by using both **manual** and **visual** methods. Complainant points out that Respondents considered Cano to be a "competent" person. The ability of the competent person to determine soil type correctly is critical, because soil type is



one of the determining factors in specifying protective systems. The soil was Type B, and a manual inspection and analysis of the soil would not have changed this fact; but it was still violation of standard for Cano to only perform a visual inspection. At the hearing he still could not articulate how to provide adequate protection to employees in an excavation. As demonstrated at the hearing, despite his years of experience and prior “competent person” training, Cano demonstrated confusion and lack of knowledge of the requirements for bringing an excavation into compliance with OSHA regulations.

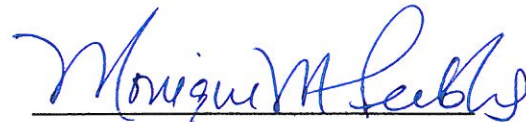
### **CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 1, Item 1, for Respondent PSNC was a serious violation of 29 CFR §1926 .652 (a)(1).
4. Complainant proved by a preponderance of the evidence and substantial evidence that the Citation 1, Item 1, for Respondent ITS was a serious violation of 29 CFR §1926 .652(a)(1).
5. Complainant proved by a preponderance of the evidence and substantial evidence that Respondent ITS’s violation of 29 CFR §1926.652(a)(1) was a repeat violation.
6. Complainant proved by a preponderance of the evidence and substantial evidence that Citation 2,

Item 1, for Respondent ITS was a serious violation of 29 CFR §1926.651(k)(1).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby affirmed; and Respondent shall pay the penalties as set forth in the Findings of Fact and Conclusions of Law above.

This the 29 day of November 2012.



MONIQUE M. PEEBLES  
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER, upon:

EDWARD B KEEVER  
INFRASTRUCTURE TECHNOLOGY SERVICES  
360 WOLFPACK LANE  
YOUNGSVILLE NC 27596

THOMAS A FARR  
OGLETREE DEAKINS  
4208 SIX FORKS ROAD  
SUITE 1100  
RALEIGH NC 27609

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

DANIEL ADDISON  
NC DEPARTMENT OF JUSTICE  
LABOR SECTION  
P O BOX 629  
RALEIGH NC 27602-0629

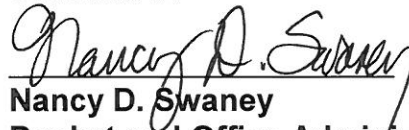
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 12<sup>th</sup> DAY OF December 2012.

OSCAR A. KELLER, JR.  
CHAIRMAN



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