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BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of:	*	
PWCA,	*	
and	*	
NAPWC,	*	
Petitioners	*	
v.	*	
SECRETARY OF LABOR,	*	ARB CASE Nos. 16-019 16-021
Respondent	*	
INDIANA-ILLINOIS-IOWA FOUNDATION FOR FAIR CONTRACTING,	*	
Intervenor	*	
Re: Annualization of Supplemental Unemployment Benefits Plans	*	
	*	

* *

REPLY BRIEF OF PETITIONER PWCA IN SUPPORT OF ITS PETITION FOR REVIEW

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I. SUMMARY OF ARGUMENT

As explained in PWCA's opening brief, the Department has previously applied annualization only to DBA contributions made for benefits that the employer has guaranteed to provide to participants at a certain level of payment for a certain period of time, *i.e.*, when the employer has an annual cost or funding requirement for the benefit. In contrast, the Administrator's brief has taken the position that one must look at whether any part of the plan benefit is paid out during the time that the participant is performing private work and, if so, then the contributions for the benefit must be annualized. This new position of the Administrator, in determining whether a benefit is "continuous in nature", incorrectly shifts the focus of annualization from looking at the employer's annual contribution requirement for the benefit, or lack thereof, to looking at the participant's work status at the time that plan benefits are paid out.

The result of the Administrator's new position only serves to disadvantage plan participants by limiting when plan benefits may be made available to them. The D.C. Circuit's *Mistick* decision specifically rejected the limitation of plan benefits to just periods when participants are working on DBA work because of this very disadvantage to plan participants. *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900, 905 (D.C. Cir. 1995). The Administrator's brief is both factually inaccurate in its description of the PWCA SUB Plan and legally wrong in its application of the annualization doctrine in this case. Absent reversal, the Administrator's position will deprive employee participants of access to a fringe benefit plan that is beneficial to them, in a manner that is arbitrary and capricious and contrary to the DBA.

II. ARGUMENT

A. Contrary To The Opposing Briefs, The Principle of Annualization Has No Application To PWCA's Irrevocably Funded And Immediately Vested SUB Plan.

As explained in PWCA's opening brief, the PWCA SUB Plan at issue here does not provide for a guaranteed benefit at a certain level of payment for a certain period of time and meets all of the previously recognized criteria for allowing employers to receive full credit for their contributions to a funded fringe benefit plan. (PWCA Br. at 10). Specifically, the PWCA SUB Plan provides for the deposit of contributions into fully vested individual employee accounts and benefits paid out are limited to the amount held in such individual accounts. The employer has no annual contribution or funding requirement under the PWCA SUB Plan.

Contrary to the briefs of the Administrator and the other opposing parties, annualization should not apply to the PWCA SUB Plan because there is no requirement that employer contributions for the benefit be made in a certain amount throughout the year. In addition, the Plan provides for immediate participation, and employer contributions to the Plan are made irrevocably and vest immediately to each employee working on DBA-covered work. Employees are entitled to access their fund benefits only when they become involuntarily unable to work due to cyclical, seasonal or similar conditions. The amounts of the benefits are dollar for dollar the same as the amount of each employer's contributions. Finally, the PWCA SUB Plan is never used to underwrite fringe benefits used by an employee during a period of private work – indeed, employee access to their SUB Plan benefits is contingent on their *not working at all*, *i.e.*, they must be missing hours of work under involuntary circumstances in order to qualify for the benefits.

In response to these undeniable facts, the briefs of the Administrator and the other opposing parties mischaracterize the nature and purpose of the annualization rule and further

misstate the nature of the PWCA SUB Plan benefit itself. Thus, the Administrator's brief incorrectly asserts that "PWCA makes the SUBs they provide available to participants without penalty on an uninterrupted basis throughout the year whenever a participant experiences involuntary unemployment." (Adm. Br. at 14). To the contrary, the SUB Plan provides the benefits of immediately vested money in employee accounts only during periods of DBA-covered work. What the Administrator refers to as the benefits of employee access to the money in their accounts is not the actual (or not the only) benefit offered by the Plan, since the payment of money into the employee accounts is itself a benefit to the employees. But even if only the employee access to their accounts is considered to be the only benefit at issue here, that benefit is NOT offered on an "uninterrupted basis." Instead the payout of funds is available only when an employee is involuntarily unable to work.[1]

For the same reasons, the Administrator's Brief errs in contending that the SUB benefit is "continuous in nature." (*Id.* at 15). To the contrary, the benefit is paid dollar for dollar into trust accounts of each employee only on DBA-covered work; and the benefit payout is not continuous at all but is instead interrupted by periods of time worked by each covered employee. Again, the PWCA SUB plan must be deemed exempt from annualization for the same reason that Defined Contribution Pension Plans (DCPPs) have long been deemed to be exempt, because both the SUB plan and DCPPs require employers to contribute funds that are irrevocably and immediately vested in employee accounts, giving employees dollar for dollar

[1] The Administrator's new comparison of the SUB Plan to a paid sick leave benefit (Adm. Br. at 13), highlights the distinction. In the case of paid sick leave, funds are not paid into employee accounts on a fully vested and irrevocable basis during periods of DBA-covered work. Only the PWCA SUB Plan contains this feature, making it indistinguishable from the *Mistick* fringe benefit plan which was found to be exempt from annualization. Further, paid sick leave benefits are generally employer contributions guaranteed to be provided in a certain amount and for a certain period of time, unlike the employer contributions to the PWCA SUB Plan, which are not guaranteed or required.

benefits that they can access when proper criteria are met, just as former Administrator McCutchen properly held.[2]

The opposing briefs are all inconsistent with the WHD's historical treatment of DCPPs and the DC Circuit's treatment of the *Mistick* fringe benefit plan. *See* Field Operations Handbook 15d11; WHD Prevailing Wage Resource Book, Compliance Principles, at p. 22. *See also Tom Mistick & Sons, Inc. v. Reich,* 54 F.3d 900.[3] In addition, the plain language of the DBA requires the Department to credit fully the "rate of contribution irrevocably made" to a funded fringe benefit plan such as the PWCA SUB Plan. 40 U.S.C. 3141(2)(B).

The Administrator claims in its brief that PWCA "misunderstands" what it means for a benefit to be "continuous in nature." (Adm. Br. at 21). It is significant that the Administrator's brief does not cite any authority for the assertion that "the continuous nature of a fringe benefit refers to its availability to the participant" and that it is "immaterial" whether a contractor makes contributions into a participant's account when the participant is not working. (*Id.* at 23). There is no such authority; but in any event it is the Administrator who misunderstands the non-continuous nature of the PWCA SUB Plan.

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[2] The NABTU Amicus brief would have this Board depart entirely from decades of settled law by doing away with the annualization exemption even for defined contribution pension plans. (NABTU Br. at 20-21). In as much as this was not the basis for the Administrator's holding, the novel position argued by the NABTU brief should not be considered by the Board and should certainly not be adopted.

[3] Contrary to the opposing briefs, the history of the annualization principle indicates that the Department's purpose in adopting it was to guard against abuse of a type that is not present here, i.e., to prevent an employer from paying for extra months of health insurance premiums out of a limited time period of DBA-covered work. *See generally* 29 CFR §5.26 ("in no event will the contractor or subcontractor be able to recapture any of contributions paid in or any way direct the funds to his own use of benefit...") *See* 40 U.S.C. 3141(2)(B); 29 CFR § 5.20 et seq.; United States Department of Labor Prevailing Wage Resource Book (May 2015) at 21-23.

Thus, the Administrator states (without supporting authority) that "a benefit is continuous in nature when it is available to a participant without penalty throughout the year." (*Id.*).[4] The PWCA SUB Plan actually complies with that definition because Plan benefits are certainly NOT available to a participant throughout the year, but only during periods of lost work hours. Just as the DCPP benefit does not pay out cash until the condition precedent of retirement or other distribution criteria are met, the PWCA SUB Plan does not allow access to vested employee accounts until the condition precedent of lost work hours is met.

It must again be reiterated that the types of benefits that the Department has previously determined to be "continuous in nature" are benefits for which annual employer contributions or funding is required and that are guaranteed to be provided to participants at a certain level of payment for a certain period of time. For example, health insurance benefits are guaranteed to be provided to participants at a certain level of coverage if monthly premiums are continuously paid. Similarly, unemployment insurance benefits are guaranteed to be provided to participants during the entire period of unemployment at a certain level of coverage if monthly premiums are paid. Likewise, defined benefit pension benefits are guaranteed to be provided to participants upon retirement at certain monthly annuity amounts and the employer has the obligation to

[4] The Administrator's new definition that "[a] benefit is continuous in nature when it is available to a participant without penalty throughout the year" (Adm. Br. At 21) is a definition that is based on an incorrect assumption. The Administrator seems to assume that, because certain tax penalties are imposed on DCPPs, participants can only receive benefit payments from DCPPs at retirement. To the contrary, DCPP participants can and do receive benefit payments from DCPPs under many circumstances while the participant is still employed, including when the participant is actually working on a private job (and not just involuntarily "laid off" from a private job). For example, participants frequently receive hardship withdrawals or in-service benefit payments from a DCPP while the participants are still employed, and tax penalties are imposed only if the participant is under age 59-1/2. If the imposition of a tax penalty to the benefit payment is a new criterion to the application of annualization, the absurd result would be that DCPP contributions for benefits paid before a participant attains age 59-1/2 would be annualized and DCPP contributions for benefits paid after a participant attains age 59-1/2 would not be annualized.

make plan contributions required to satisfy this guaranteed benefit obligation.[5] In contrast, like DCPPs which are not subject to annualization, the PWCA SUB Plan benefits are limited to the amount in the participant's Plan account and the SUB Plan does not require employer contributions guaranteed to provide a certain level of payment for a certain period of time. Notably, because PWCA SUB Plan benefits are limited to the balance in the participant's SUB Plan account, SUB Plan benefits are not available throughout the year and may not even be available when the participant is involuntarily unable to work if there are no funds available in the participant's SUB Plan account.

The Administrator's brief confirms the arbitrariness of the annualization principle as applied in the Administrator's ruling to a benefit that provides a dollar for dollar benefit to employees and that is not continuous in nature. Contrary to the opposing parties' briefs, the PWCA SUB Plan is fundamentally similar to the defined contribution pension plan structure, in as much as the benefits available to a participant under the PWCA SUB Plan are determined solely by the amount of contributions made on behalf of the participant to the Plan, NOT based

[5] As noted above, in apparent acknowledgement that the Administrator's previous analogy between SUB plans and health insurance does not withstand scrutiny, counsel for the Administrator attempts in his brief to shift the focus to a theoretical treatment of paid sick leave. (Adm. Br. at 13; see also Ill FFC Br. at 6). However, in this appellate proceeding, the Board is required to review the grounds upon which the Administrator relied in making the ruling under review, not the *post hoc* rationalizations of counsel. *See Bowen v. Georgetown University Hospital*, 484 U.S. 204 (1988) (declining to "give deference to agency counsel's interpretation...."); *see also A-Mac Sales And Builders Company, Inc.*, WAB No. 90-37, 1991 DOL Wage App. Bd. LEXIS 45, *2 (WAB 1991)(" The Board cannot give blind deference to a determination of the Administrator justified by a *post hoc* rationale."). The Administrator has not previously relied on any case or ruling involving annualization of paid sick leave benefits. Even if paid sick leave is used as the analogy, such benefits are different from the PWCA SUB Plan benefits, as paid sick leave benefits are generally employer contributions guaranteed to be provided in a certain amount and for a certain period of time and are not typically derived from employer contributions into irrevocable and fully vested employee accounts.

on when Plan benefits are paid and how "continuous" such payments are.[6] As noted above, in applying annualization, the focus has been on whether the employer has a required "annual cost" of contributing to the benefit plan in order to ensure that the employer is not offsetting its portion of the funding obligation for private work with DBA-contributions, and not on whether the Plan *benefit* is paid out during a time that the participant is working on a private job. WHD Davis-Bacon Resource Book (2010), DBA Compliance Principles at p.21.

For both the DCPP and the PWCA SUB Plan, the employer does not have a required annual contribution obligation for the benefit and, for this reason, annualization should not apply to PWCA SUB Plan contributions, just as annualization does not apply to DCPP contributions. In contrast, if the Plan benefit analysis described by the Administrator is used, greater issues result for DCPPs when in-service benefits are paid out when a participant is working on a private job, as the contributions for such benefits must be annualized, contrary to the DCPP annualization exception. The PWCA SUB Plan does not have the same issue as DCPPs as the SUB Plan only pays out benefits when the participant is involuntarily not working on any job (i.e., not on either a private job or a DBA job). Therefore, the Administrator has erred in claiming that there is any material difference between defined contribution pension plans and the PWCA SUB Plan with regard to the reasons for annualization.[7]

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[6] The Administrator's Brief also errs in claiming that non-annualized DCPPs qualifying as profit sharing plans -- as nearly all now are – do not permit any distributions of funds until retirement. In reality, such plans do often permit in-service distributions and certain of these in-service distributions are subject to penalties. *See generally* 26 CFR 1.401-1(b)(1)(ii); IRS Publication 560.

[7] The Ill FFC's Brief, though not that of the Administrator, contends that annualization is not appropriate because of the possibility of forfeitures under the PWCA SUB Plan. (Ill FFC Br. at 12-14). But the record shows that there have been no forfeitures for at least six years, and it is undisputed that the amount of forfeitures is *de minimus* because of the Plan design and the cyclical unemployment of the employees for which the benefit is intended.

B. The Opposing Briefs Err In Claiming That The Administrator's Ruling Is In Any Way Consistent With The D.C. Circuit's Holding In *Mistick*.

As shown in PWCA's opening brief, in the *Mistick* case, 54 F.3d 900, the D.C. Circuit rejected the Administrator's attempt to impose the annualization requirement on a fringe benefit plan that, like the PWCA SUB Plan, created a trust into which the employer irrevocably contributed money for hours worked under the DBA, to be withdrawn by employees upon their termination of employment. 54 F.3d 900, 904. As the D.C. Circuit found, there was a "one-for-one ratio between employer contributions on behalf of an employee and value received," just as is the case under the PWCA SUB Plan. "Each employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with [Plan] funds or in cash at the end of his employment." *Id.*

In response, the Administrator's brief wrongly asserts that the D.C. Circuit "did not question the reasonableness of the Department's rationale for annualizing an employer's contributions." (Adm. Br. at 15, citing 54 F.3d at 905). To the contrary, the appeals court flatly rejected the Administrator's claim in *Mistick* that "because part of the employees' compensation for Davis-Bacon work paid for fringe benefits used by them during periods of private work, the Department concludes that they did not receive the prevailing wage for their Davis-Bacon work." Again, the Court "reject[ed] this argument." *Id.* The D.C. Circuit further held as follows:

> If we uphold the invalidation of a plan because employer contributions to it could finance fringe benefits used during private work, employers would then have to limit employees' use of their Davis-Bacon trust accounts to only those fringe benefits used during Davis-Bacon work. Such a result would disadvantage employees. We decline, therefore, to uphold the Department's denial of Davis-Bacon credit for Mistick's contributions to the [Plan] merely because they could underwrite fringe benefits used by an employee during private work periods.

The court went on to further reject the Administrator's claim that "annualization ensures that an employer does not receive Davis-Bacon credit for contributions made for

Davis-Bacon work but which pay for benefits used by an employee while performing private work." The court further held that the Administrator failed to show that Mistick's contributions "to its [plan] for Davis-Bacon work financed benefits which were used by employees during private work periods and which would have been funded by a separate fringe benefit plan for private work but for the [plan]."

Contrary to the assertion in the Administrator's brief, the possible existence of an additional fringe benefit plan did not determine the outcome in the *Mistick* case.[8] The Mistick court further distinguished the annualization of apprenticeship benefits in *Miree Construction Co. v. Dole*, 930 F.2d 1536 (11th Cir. 1991), as follows:

> The Department emphasized that annualization "prevents [an employer from] using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are in fact continuous in nature and compensation for all the employee's work, both Davis-Bacon and private." (citation omitted). It has not established, however, that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions. The rationale for annualizing an employer's contributions therefore does not apply.

In the present case, as noted above, Petitioner PWCA has already shown that the employer does not have an annual required contribution obligation under the SUB Plan and, thus, no DBA-contributions to the SUB Plan are financing any portion of contributions for benefits used during periods of private work. Further, Petitioner PWCA has shown that participating employees cannot receive any SUB benefits unless they are in fact involuntarily *unable to work* for qualifying reasons. For this reason, no benefits are paid from the PWCA SUB Plan for periods during which the participant is working a private job. As PWCA has previously argued, the Administrator's argument for

[8] The Administrator's brief also fails to recognize that the record in the present case is no different from Mistick's with regard to private fringe benefit plans available to contributing employers. There is no evidence refuting the existence of such plans.

annualizing PWCA's SUB Plan contributions is even weaker than it was in *Mistick*, and the holding of the D.C. Circuit compels the reversal of the Administrator's ruling.

C. The Opposing Briefs Fail To Justify Denying Employees Access To A Valuable Fringe Benefit, Contrary To The Intent Of Congress Under the DBA.

As explained in PWCA's opening brief, and confirmed by the amicus brief of the USW, the ability of employees to access SUB Plan funds in addition to or instead of funds that are vested in a DCPP is highly beneficial to the employees, because it allows them to avoid withdrawal penalties and taxes that are imposed on early withdrawals from DCPPs. The practical effect of the Administrator's ruling imposing annualization on PWCA's SUB Plan is to deprive employees of access to this or any similar plan due to the uncertainties and risk created by the annualization process.

Further, if SUB Plan benefits are limited in some way to be paid out only when the participant experiences an involuntary loss of employment on a DBA-covered project, as suggested by the Administrator (Adm. Br. at 28), the resulting impact would be a significant disadvantage to employees who would be restricted as to when SUB Plan benefits would be available to them in times of need. This limitation would not change the amount of employer contributions to the Plan, but would limit when employees could receive benefits from the Plan.

In response, the Administrator's brief acknowledges and "appreciates" that USW members "may prefer SUBs," but the Administrator is nevertheless unyielding in denying employees their preferred fringe benefit. (Adm. Br. at 20). The Administrator's position is directly contrary to the intent of Congress in allowing contractors to receive credit for

payments to fringe benefit programs for the benefit of employees, just as occurred in *Mistick*.

As PWCA's opening brief explained, and the opponents have failed to refute, the concept of annualization assumes that there is an "annual cost" of the particular benefit at issue. That is not the case with employer contributions to the PWCA SUB Plan. There are no set premiums or guaranteed employer funding obligation, and there is no ability to predict how much money any employer will contribute to any employee's account. As a result, the unwarranted imposition of annualization on employer contributions to the PWCA SUB Plan will result (and already has resulted) in significant loss to employees, including those represented by the USW. Employers contributing to the Plan will be unable to determine their costs of performing work on Davis-Bacon projects until after the project has been completed. Alternatively, employers who make such contributions for employees on public projects will have no way of knowing how much time such employees will spend working on private projects and therefore what portion of employer contributions will receive reduced (annualized) credits.[9]

The opposing briefs fail to justify depriving employees one of the fringe benefits expressly authorized by the DBA, and it is undisputed that without employer contributions the PWCA SUB Plan cannot continue to function.[10] As further noted in PWCA's opening brief, the PWCA SUB Plan offers a benefit that is more advantageous

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[9] The fact that the Administrator cannot provide a method to use for annualization of contributions to the PWCA SUB Plan is evidence that annualization of the SUB Plan is not warranted or correct. If the SUB Plan is truly continuous in nature, like all other types of plans that are annualized, then the method of annualizing contributions should be easy to ascertain.

[10] As previously noted in the briefs of PWCA and the USW, approximately 660 members of the USW currently participate in the Plan and rely on the Plan to provide them with income during the portion of the year when weather makes their work difficult and often impossible, resulting in significant periods of missed hours of work.

to employees than a DCPP, while otherwise sharing the identical features of irrevocable contributions and immediate, 100% vesting.[11] The D.C. Circuit has held that it is unreasonable to interpret the fringe benefit provisions of the DBA in such a way as to "disadvantage employees." *Mistick*, 54 F.3d at 905. For the same reason, the Administrator's new ruling should be found to be contrary to legislative intent, and should be overturned for the benefit of employees who will otherwise be unable to receive this important benefit during times of need.

D. Contrary To The Opposing Briefs, The Administrator's Decision To Overrule The WHD's Previous Ruling Violates The Administrative Procedure Act.

As discussed in PWCA's opening brief, the Administrator's ruling in this case overturned a longstanding declaration of WHD policy *not* to require annualization of employer contributions to SUB Plans in general, and PWCA's SUB Plan in particular. In such circumstances the Supreme Court has held that the agency bears the burden to explain and justify its reversal of policy. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199

[11] The Ill FFC brief, at 17, wrongly asserts that the PWCA SUB Plan charges excessive fees compared to some DCPPs. The Ill FFC is mistaken because it fails to note that PWCA's 5-7% fee is a one time charge, whereas DCPP fees are typically 1% *per year*, resulting in total fees that significantly exceed those charged by the PWCA SUB Plan. Again, the level of fees did not enter into the Administrator's ruling on annualization, and this would be an impermissible (and incorrect) basis on which to rule in this Petition for Review.

(2015) (reaffirming this holding). PWCA showed that a number of the *State Farm* factors were violated in the Administrator's erroneous ruling. (PWCA Br. at 19).[12]

The Administrator's claim that the change without notice to the Prevailing Wage Resource Book in May 2015 was unrelated to the ruling in this case rings hollow. There is no other explanation for the Administrator's unjustified reversal of course. Finally, the alternative SUB Plan structures proposed as alternatives in the Administrator's brief are unworkable and of little use to either employers or employees.[13] The Administrator suggested in its brief that it would be easier for the PWCA SUB Plan to determine how to annualize contributions if the SUB Plan adopted a funding requirement for employer contributions. To argue that the SUB Plan should adopt an obligated cost (i.e., employer funding requirement or annual premium) is to fundamentally change the design of the SUB Plan. If the SUB Plan had an annual employer contribution or funding requirement, then annualization would apply to the Plan. It is the very fact that there is no funding requirement that exempts the SUB Plan from annualization.

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[12] These included the plain language and legislative history of the fringe benefits section of the DBA showing that Congress intended to allow employers to take full credit for irrevocable contributions to funded fringe benefit plans like the PWCA SUB Plan; the failure by the Administrator to consider how employees would be disadvantaged by reversing course and requiring annualization of Plan contributions; the Administrator's explanations for the decision that run counter to the undisputed evidence, including the fact that the benefit does not fund private work by employees because they cannot access it unless they are involuntarily *unable* to work, as well as the claim that the Plan is more like insurance than it is like a DCPP, and the failure to adhere to the plain holding of the *Mistick* case.

[13] For example, the Administrator proposed that annualization would not be required if the PWCA plan only allowed employees to obtain access to their accounts when they become unemployed while performing DBA-covered work. This would be of little benefit to employees who are assigned to work on both private and public projects, often in close proximity to each other. As noted previously, such a program would be singularly disadvantageous to the employees, as noted by the D.C. Circuit in *Mistick* with respect to a similar argument by the Administrator. It must be observed also that annualization of DCPPs does not depend on whether the employee is working on a DBA-covered project when he or she elects to receive a distribution upon retirement, in-service withdrawal or other permitted circumstances.

CONCLUSION

For the reasons set forth above and in PWCA's previous filings, the October 22, 2015 ruling of the Administrator should be vacated and the Board should hold that annualization does not apply to employer contributions to PWCA's SUB Plan.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2016, I caused a copy of the foregoing Brief in Support of Petition for Review to be served by electronic mail, on the following:

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