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December 3, 2008

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886 McKinley Ave.
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Re: Main St. Bridge Project 264 (06)
Kokosing Construction Company's (KCC) Transportation Delay Claim

Gentlemen:

Per Proposal Note 108, I enclose for each of you an original of the Dispute Review Board's Findings and Recommendation on KCC's "Transportation Delay Claim." Please note that within 21 calendar days of receipt, KCC and ODOT should indicate their respective intentions in regards to the DRB's recommendations.

The DRB acknowledges the efforts and professionalism of the parties in connection with this claim. If you have any questions, please contact me.

Sincerely,

Kurt L. Dettman
Chairperson

Cc: Dan Meyer, DRB Member
Scott McNary, DRB Member

MAIN STREET BRIDGE PROJECT **TRANSPORTATION DELAY CLAIM**

DRB FINDINGS AND RECOMMENDATIONS

I. BACKGROUND AND SUMMARY LEVEL DESCRIPTION OF CLAIM

A. Project Description

The Project Work includes the replacement of the existing Main Street Bridge over the Scioto River in Columbus, Ohio. The New Main Street Bridge will be a single arch cable stayed bridge (the Project). The Ohio Department of Transportation (ODOT or Department), in conjunction with the City of Columbus (Columbus), is the awarding authority. Kokosing Construction Company, Inc. (KCC) is the general contractor.

The Project is a steel bridge that requires, among other elements, box girders that form the structure under the vehicular bridge deck. KCC selected PDM Bridge LLC (PDM) in Eau Claire, Wisconsin to fabricate the girders. In order to deliver the box girders to the Project site, KCC had to arrange delivery of the girders from the PDM plant in Wisconsin to the Project site. Due to the size of the girders, the selected hauler, Perkins Motor Transport, Inc. (Perkins), had to use special trailers for overweight and oversized loads, which required special hauling permits from each of the states through which the shipments passed. KCC worked with PDM and Perkins to establish the route to ship Box Girders 1 through 9. The route they selected traversed Wisconsin, Illinois, Indiana and Ohio. For a variety of reasons, the shipments were delayed in transit. KCC asserted that its costs for delivery and erection of the girders were increased due to a claimed delay of 33 Calendar Days to that activity in the schedule.

B. Transportation Delay Claim History

Through a series of letters and emails KCC notified ODOT that it experienced delivery delays on Box Girders 1 through 9 between September 27, 2007 and January 8, 2008. This culminated in a January 22, 2008 letter in which KCC sought \$25,017.60 for three weeks of idle equipment operators and oilers due to the delays.¹

¹ At the DRB hearing KCC clarified that this letter did not include all of its costs associated with the delay in delivery and erection of the box girders.

On February 6, 2008, the parties held a Step 1 meeting. On February 8, 2008 ODOT issued a Step 1 decision denying the claim. On February 14, 2008, KCC requested a Step 2 meeting, which was held April 30, 2008. On May 28, 2008 ODOT issued its Step 2 decision, again denying the claim. By letter dated June 10, 2008, KCC requested a Step 3 hearing by the DRB. By letter dated July 13, 2008, the DRB confirmed the parties' agreement that the DRB would address entitlement only and, if entitlement was found, issue recommended guidelines on time and monetary compensation. On November 3, 2008, after the parties exchanged Position Papers and Power Point presentations, the DRB held a hearing on the claim.

During the Step 1 and 2 dispute resolution process, KCC offered to split the claim 50/50 (which ODOT rejected). The DRB finds that these actions met the partnering requirement under Proposal Note 108.

II. SUMMARY OF THE PARTIES' POSITIONS

It is not the intent of the DRB to recount in detail each and every argument advanced by the parties. The DRB summarizes below the parties' positions as the DRB deems them material to resolution of KCC's claim.

A. KCC Arguments

KCC contended that the box girder delivery delays it experienced were both excusable and compensable. KCC relied exclusively on two "precedents" (KCC's term) which it contended established that ODOT interpreted the ODOT Construction and Material Specifications (CMS) to permit recovery of the type of additional costs that KCC claimed here. KCC did not contend that the overall Project Completion Date was impacted by the tub girder delivery delays, nor did it cite to any provision of the Project Contract in support of its claim.²

Turning to the "precedents" upon which KCC relied, the first was a claim and negotiated settlement on ODOT Project 509(03) in District 8. The District 8 claim involved a delay to the shipment of oversized beams in Ohio when the Ohio State Patrol failed to show up for escort duties. The contractor (KCC) requested compensation for the costs its subcontractor and supplier incurred due to the delay in delivery of the beams. In that case, ODOT agreed to settle the claim by paying a portion of the costs incurred. KCC pointed out that although the resolution occurred between Step 2 and 3 of the ODOT Dispute Resolution and Administrative Claim Process (PN 109), it occurred only after two ODOT Deputy Directors opined that "both parties bear some responsibility" and recommended that the issue be "returned to [the parties] to negotiate an equitable adjustment."

² In its Position Paper and at the hearing KCC did address the CMS provisions that ODOT cited, but at the hearing clarified that it was addressing the CMS provisions only because ODOT had raised them, not because KCC was relying on them.

KCC also relied upon a second claim and settlement on ODOT Project 101(03) in District 4. In the District 4 claim, ODOT agreed to pay additional costs associated with delay to the delivery of precast beams from Dacatur, Indiana to the project site in Ohio due to what the contractor claimed were unreasonable speed restrictions imposed by the Ohio State Patrol. KCC relied on the pertinent Change Order Report indicating that ODOT cited to the District 8 project as being a “similar case involving the OSP....” KCC also pointed out that in the District 4 settlement (February 2007) ODOT paid all of the costs associated with the delivery and erection delays.

KCC in its Position Paper and at the hearing disputed ODOT's reliance on CMS Specification Section 105.13 (Haul Roads). KCC contended that Section 105.13 applied only to local haul roads between state routes and the Project site, not to State-controlled roads or roads outside state borders. KCC also contended that ODOT's citation to Section 107.02 (Permits) was not determinative because all that section required was for KCC to obtain permits, which it did. Finally, KCC asserted that ODOT's reliance on Sections 108.06.A and .B (Time Extensions for Excusable Delays) was misplaced because overall project delay was not a part of its claim.

Although the DRB proceeding was limited to entitlement and time/cost guidelines, KCC submitted a schedule analysis showing 33 Calendar Days of delay to the schedule activity classified as “deliver and erect box girders”. It also submitted documentation in support of additional costs in the amount of \$259,808.92, which it proposed to split 50/50 with ODOT, for a total claim of \$129,904.46.

B. ODOT's Arguments³

ODOT argued that the transportation delays were non-excusable and non-compensable. As a factual matter, ODOT contended that KCC either did not obtain permits in a timely manner or state highway patrols failed to show up for permit-required escort duties. ODOT then cited to the following contract provisions in support of its denial of KCC's claim.

First, ODOT contended that Section 105.13 (Haul Roads) governed the outcome of KCC's claim. ODOT asserted that the section as a whole applied to the hauling of the box girders, but ODOT primarily relied on the sentence in Section 105.13 that provided:

³ ODOT in its position paper asserted a “state is the state” argument based on the defense of a claim against the Ohio Turnpike Commission. At the hearing ODOT agreed, without waiving its overall position, that it would not assert that argument as a basis for the DRB's findings and recommendations in this particular claim. Therefore, the DRB does not address that argument.

“The Contractor shall save the State harmless for any closures or hauling restrictions outside the Project limits beyond the control of the Department.”

ODOT also cited to the ODOT Operational Guide for Vehicles Operating with a Special Hauling Permit.⁴ ODOT relied on Section XII, page 1 the Operational Guide that provided:

“Acceptance of a permit by the permittee is prima facie evidence of an unequivocal allegation by the permittee that he:

.....

3) Agrees to hold harmless the State of Ohio from all suits, claims, damages, or proceedings of any kind and to indemnify the State of Ohio for any claim it may be required to pay arising from the movement.

Undertaking the movement is prima facie evidence of acceptance of the permit.”

ODOT argued that the “save harmless” and “hold harmless” language in Section 105.13 and in the Permit Guidelines, respectively, insulated it from KCC’s claim.

ODOT also cited to Section 107.02 (Permits, Licenses, and Taxes), which required KCC to “[p]rocur[e] all permits....and provide all notices necessary and incidental to the due and lawful prosecution of the Work.” ODOT argued that this section placed all permit related responsibility and liability on KCC. Finally, ODOT asserted that KCC’s claim did not fall within the definition of either excusable, non-compensable delays under Section 108.06.B, or excusable, compensable delays under Section 108.06.D. The DRB notes in regard to ODOT’s Section 108.06.B and .D arguments that at the hearing KCC essentially agreed with ODOT’s position because it stated that it was not seeking time or money due to a critical path delay to the Project Completion Date. Therefore, the DRB does not address that issue further in these Findings and Recommendations.

ODOT next turned to KCC’s “precedent” argument. ODOT contended that the District 8 settlement was not similar and did not set precedent binding on District

⁴ KCC at the hearing contended that it did not receive the Operational Manual when it applied for the Main Street Bridge Project permits. The DRB notes that the Operational Manual is posted on the ODOT web site, which for other reasons KCC said it consulted regularly to determine ODOT policies and positions. Also, by way of example, in Ohio Permit OH07021027 REV 1 issued for the Segment 3 North and Center box girders (see Exhibit 6 to ODOT’s Position Paper) at the bottom of page 3 of 4, the permittee (here, KCC’s hauler, Perkins Motor Transport, Inc.) was referred “[f]or reference or detailed information” to the Special Hauling Permits Operational Guide.

6. ODOT went through a series of factual issues that it contended made the District 8 claim different from the instant claim. Among other things, ODOT contended that, unlike in the District 8 situation, here there was no evidence presented that KCC gave reasonable advance notice to the state highway patrols that did not show up. ODOT also noted that in the District 8 settlement the ODOT Deputy Directors did not make an "official" decision on compensability; rather, they told the parties that they should negotiate an equitable adjustment, which is what they did. ODOT argued that this sort of negotiated settlement does not establish precedent as to how ODOT as an organization interprets and applies the CMS.

ODOT argued in a similar vein as to the District 4 claim and settlement. ODOT contended that there were factual dissimilarities between the instant claim and the District 4 claim, including that the District 4 situation involved an Ohio State Patrol delay due to speed restrictions that were permitted by the terms of the Ohio permit as issued. ODOT also pointed out that the District 4 project negotiated settlement did not establish any sort of precedent that is binding on District 6, let alone ODOT as a whole.

ODOT's final argument was that delays like the ones that KCC experienced are not unusual and should be anticipated in the general contractor's and supplier's bids. If there were delays that cost additional money, KCC should seek recovery from the other state authorities, not ODOT that had no control over the Ohio State Patrol or any other state's agents.

ODOT also raised various arguments about the reliability of the KCC's delay analysis and cost submissions.

C. KCC Rebuttal

KCC's elected not to file a rebuttal Position Paper.

D. Parties' Positions At The Hearing

At the hearing, the DRB asked the parties to address the "precedent" issue. KCC contended that ODOT by putting change order information on its web site provided information upon which contractors relied in bidding ODOT projects. KCC noted that, for example, the District 8 and District 4 change orders KCC cited as precedents were posted on the ODOT web site. KCC asserted that a reasonable contractor reading the change order reports would conclude that transportation delays like the instant one were compensable.

ODOT countered that there was a myriad of information posted on the ODOT web site and that merely posting it did not create a database of "official" ODOT positions. Here, in particular, the negotiated District 8 and 4 change orders, although posted on the web site, were not intended to determine how the instant

contract should be interpreted and applied. The District 6 District Construction Engineer stated that it was up to each District to decide how it interpreted and applied the applicable ODOT contract. Sometimes what other Districts had done under similar circumstances could inform the decision of another District—but only where there was a Step 3 decision based on the Director’s Claims Board or a Dispute Review Board would the District consider the outcome to have ODOT-wide applicability. Here, District 6 did not agree with what Districts 8 and 4 had done and instead viewed the DRB as the appropriate entity per PN 108 to determine the outcome of KCC’s claim on this Project.

KCC countered this argument by citing to the fact that the District 8 claim had in effect gone to the Step 3 level even if it did not result in a formal Step 3 decision, and that ODOT had had ample time since 2006 to change its specification if it felt that those outcomes lead to an erroneous result.

III. ANALYSIS, FINDINGS AND CONCLUSIONS

A. Introduction

The DRB has carefully considered the position papers and all of the documents submitted by the parties, as well as the arguments, rebuttals, and testimony at the hearing. Based on all of the materials, information and testimony submitted, the DRB makes the following analysis, findings and conclusions regarding entitlement only on KCC’s claim.

B. Findings and Conclusions

By way of background, the DRB finds the following predicate facts: KCC controlled as its means and methods the procurement, manufacturing, delivery, and erection of the box girders. KCC selected its steel supplier, PDM, which happened to be located in Eau Claire, Wisconsin. As a consequence of this choice, KCC had to determine a route to ship the box girders from Eau Claire to the Project site in Columbus, Ohio. KCC also had to obtain special hauling permits to transport the box girders because of their large dimensions and weight.

KCC cited to a number of reasons for the delays in the box girder shipments. These included:

- Delays in issuing permits (Wisconsin and Illinois)
- Routing into a restricted area by accident (Illinois)
- Road construction closed a previously approved route (Wisconsin)
- State police escorts were unavailable to escort the box girders for a variety of reasons (Illinois and Ohio)

KCC, PDM and Perkins, as an experienced general contractor, supplier and hauler, respectively, knew or should have known that there was a reasonable chance, notwithstanding properly issued permits, that there would be delays in shipping along a multi-state route where a myriad of circumstances--weather, construction, or the unavailability of police escorts--could delay shipments. KCC testified at the hearing that representatives of PDM and Perkins worked diligently with KCC to try as best they could to keep the box girders moving despite the obstacles. The question here is whether the risk of delay and additional costs lay with KCC, or with ODOT.

In support of its claim, KCC relied not on the terms of the Project Contract, but rather on what KCC claimed were "precedents" on other ODOT projects that KCC contended ODOT was bound to follow on the Main St. Bridge Project. The DRB concludes, however, that the correct threshold question is whether the Project Contract addressed the claim before the DRB. If the Contract was silent on the issue, or if there was ambiguity in the Contract, the DRB could turn to the parties' course of dealings to determine if that provided any guidance as to how the DRB should interpret or apply the Contract. But in the absence of these circumstances, turning to the parties' prior course of dealings is not a reasonable and proper approach for interpretation of the Main Street Bridge Contract.

The DRB therefore reviewed the Main Street Bridge Contract to determine whether its provisions addressed the basis of KCC's claim. The DRB found three sections of the Contract that were pertinent here:

Section 105.13 (Haul Roads) required that KCC submit to the Engineer written notification of "the specific roads or streets on the haul route" for "hauling ...materials". The section further provided that if the haul route included roads that were not under the jurisdiction or control of the State, KCC could use local roads or streets that were not restricted by local authorities. However, the Engineer could require KCC to revise its haul route if there were State-controlled roads that were available and practical for the haul route. Section 105.13 further provided that if the haul route were properly used and damage to the road occurred, the Engineer could direct KCC to repair the damage at ODOT's expense. Finally, Section 105.13 in its last sentence included the following:

"The Contractor shall save harmless the State for any closures or hauling restrictions outside the Project limits beyond the control of the Department."

Section 107.01 (Laws to be Observed) provided, in pertinent part, that the Contractor shall:

"[s]tay fully informed of all ... State laws, all local laws, ordinances, and regulations, and all orders, decrees of authorities having any jurisdiction or authority that affect those engaged or employed on

the Work, or that affect the conduct of the Work. Observe and comply with all such laws, ordinances, regulations, orders, and decrees. The Contractor shall protect and indemnify the State...against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order, or decree, whether by the Contractor or the Contractor's employees, subcontractors, or agents."

In this regard, the DRB notes Ohio Revised Code Title 45, Section 4513.34 (Written Permits for Oversized Vehicles) that gave the ODOT Director the power to issue special permits for travel over State roads of oversized vehicles that would otherwise be prohibited by ORC Sections 5577.01 to 5577.09 or 4513.01 to 4513.37. In addition, the Ohio Administrative Code Chapter 5501: 2-1 (Movement of Overweight and Overdimension Vehicles) specified the process for and terms of issuing special permits authorized by the Ohio Revised Code. Under Section 107.01 of the Contract, these were laws that KCC was bound to follow both as a matter of law and of contract. Although the parties did not present information about the other haul route state's laws and regulations, the DRB presumes that there were similar legal regimes in Wisconsin, Illinois and Indiana—in any event, KCC did not dispute that it needed to obtain special hauling permits from each of those states.

Section 107.02 (Permits, Licenses, and Taxes) provided that KCC was required to "[p]rocur[e] all permits and licenses....and provide all notices necessary and incidental to the due and lawful prosecution of the Work." As to this claim, KCC contended, and ODOT did not dispute, that KCC did obtain all the state permits that it needed to haul the box girders.

Turning first to the application of Section 105.13 to the claim, the DRB agrees with KCC's general argument that the first part Section 105.13 deals primarily with the use of local roads for hauling equipment and materials to the Project site. The Section was replete with references to local roads and streets, and it differentiated between local roads/streets and State-controlled roads, with the right reserved to ODOT to require the contractor's use of State-controlled roads if available. The intent appeared to be to protect local roads and streets from damage for which the State would have to take responsibility. This intent was confirmed by the statements of ODOT personnel at the DRB hearing. The DRB also notes that the first part of this Section did not appear to address the use of roads outside the borders of Ohio as its focus was on the ability of ODOT to require the use of State (of Ohio) controlled roads in order to limit damage to "local" Ohio roads and streets.

Consistent with this interpretation of Section 105.13, KCC submitted a letter dated July 31, 2006 (Letter No. 14212-002) with KCC's proposed haul roads for the Main St. Bridge Project. This letter detailed the use of local roads between various material suppliers and the Project site. It did not address the hauling of

the box girders, did not address the use of State of Ohio-controlled roads, and did not address the use of roads outside of Ohio. The DRB understands that ODOT accepted the haul routes as KCC proposed. KCC did not make any further submittals on the issue of haul routes, nor did ODOT request any further submittals.

If Section 105.13 ended after the first two paragraphs, the DRB would tend to agree with KCC's argument as to the limited applicability of the Section to KCC's claim, as evidenced by KCC's submission of the haul route letter and ODOT's apparent acceptance of it. But, as noted above, the last sentence of Section 105.13 provided:

"The Contractor shall save harmless the State for any closures or hauling restrictions outside the Project limits beyond the control of the Department."

This sentence, given its plain meaning and broad reach as drafted, applied not just to local roads, but more generally to "closures or hauling restrictions outside the Project limits beyond the control of the Department." The DRB notes that although the final sentence of Section 105.13 appeared in the context of the "Haul Roads" section of the specifications, it did not, as drafted, limit itself to local roads or streets. It could have been drafted to so provide if indeed that was ODOT's intent, but to interpret it that way would require the DRB in effect to re-write the Contract, which it does not have the authority to do. Rather, the DRB is bound to apply the Contract consistent with its plain meaning as bid by ODOT and as accepted by KCC when it agreed to the Contract.

A reasonable interpretation of this "save harmless" language in Section 105.13 would encompass Wisconsin, Illinois, Indiana and even most of Ohio since they were "outside the Project limits". "Closures" would cover the instances where the route changed due to construction and the Perkins trucks were routed into the wrong area. "Hauling restrictions" would cover the requirement of police escorts, where KCC became subject to the vagaries of the lack of police escorts due the intervention of funerals, holidays or unavailability for other reasons.

The DRB next turns to the application of Sections 107.01 and 107.02. Clearly under both of these provisions KCC was obligated to follow applicable law. The applicable law, at least in Ohio and presumably in the other states, did not permit transporting the box girders without obtaining special hauling permits. Among the delays KCC cited were delays in the issuance of some permits (Wisconsin and Illinois). Because under Sections 107.01 and 107.02 KCC had to follow the law and "[p]rocure all permits...", any delay in procuring the hauling permits in Wisconsin and Illinois would be KCC's responsibility.

As noted above, KCC also cited to instances where routes turned out to be bad or troopers were unavailable for escort duties for a variety of reasons. As an

initial matter, KCC presented no evidence to the DRB that it properly “provided all notices” to the appropriate authorities as it was required to do under Section 107.02. However, even assuming that it did provide proper notices, the DRB concludes that ultimately KCC had responsibility for the permit conditions (i.e., the requirement for the use of particular haul routes or the use of police escorts) and permit execution in accordance with those conditions (i.e., complying with permit conditions, such as staying on permitted routes even if, as in one instance KCC cited, it lead to being directed to the wrong route, or in other instances that KCC cited of being delayed because required police escorts did not show up).

Under Section 105.13 (last sentence) KCC was obligated to “save the State harmless for any closures or hauling restrictions outside the Project limits beyond the control of the Department.” Under Section 107.01 (third sentence of first paragraph) KCC was obligated to “protect ... the State...against any claim or liability arising from or based on a violation of any such law...[or] regulation.....”. In addition, Section XII of the Special Hauling Permit Section Operational Guide (posted on the ODOT web site and referred to in the permits issued to Perkins) stated that an applicant by accepting the permit “[a]grees to hold harmless the State of Ohio from all suits, claims, damages, or proceedings of any kind and to indemnify the State of Ohio for any claim it may be required to pay arising from the movement.” All of these provisions evince a clear intent of ODOT to keep responsibility for obtaining permits and the consequences of hauling in accordance with those permits on contractors such as KCC and its hauler.

Moreover, KCC presented no evidence that any of the delay events were within the control of ODOT—to the contrary, the evidence points to KCC (or its agents) making or controlling all of the choices that lead to the need for the permits, the restrictions in the permits, and PDM/Perkins’ decisions as to the movement of individual loads. For example, KCC testified that it elected to truck the keystone arch segment via a different route through Wisconsin, use a barge to traverse Lake Michigan, and then truck the segment through Michigan and Ohio. KCC has stated that it did not experience any delay in this shipment and it is not making a claim thereon. Thus, in that instance, KCC means and methods choice was successful.

This raises the question as to whether the box girder delivery delays could have been avoided or mitigated by KCC through selection of alternate haul routes, especially after the first routes proved problematic. The above testimony, in effect, renders KCC’s claim as one emanating from a means and methods decision. Under the Contract, means and methods are KCC’s responsibility. See Generally Section 108.05 (Character of Workers, Methods and Equipment) which sets forth that KCC was to determine methods necessary to complete the Work in the absence of contract provisions directing the same, as is the case with haul routes. Under these circumstances, KCC must live with the choices it made—and the consequences of those choices—regarding the fabrication and delivery of the delayed box girders.

In summary, the DRB considers it noteworthy that KCC did not affirmatively cite to any part of the Contract to support its claim. Rather, it disclaimed the applicability of the Contract and chose instead to rely exclusively on "precedents". However, the DRB concludes that it need not delve into the issue of the "precedents" KCC cited because the Main St. Bridge Contract provisions governed the resolution of KCC's claim. Section 107.01 placed on KCC the responsibility to follow the applicable laws governing the movement of overweight and oversize vehicles. Section 107.02 placed on KCC the more specific responsibility to obtain permits and the concomitant risk of implementing the permit conditions imposed by the various authorities issuing the required permits. All of reasons that KCC cited for the box girder delays fell within the permit related risk imposed on KCC by Sections 107.01 and 107.02. Equally important, the Contract (Sections 107.01 and 105.13) and the permitting process authorized by the Ohio Revised Code were replete with references to the requirement that KCC insulate the State of Ohio from liability, which must include the type of claim that KCC is making here or the "save harmless" and the "hold harmless" language would be rendered meaningless. Finally, the genesis for the risk of delays to the box girder shipments resulted from KCC's means and methods decisions that were not caused by or under the control of ODOT.

III. RECOMMENDATION

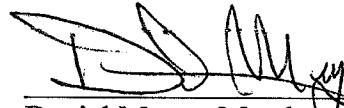
The parties are advised that the DRB in formulating these recommendations focused on the facts and circumstances of this Project only. Its reasoning and conclusions are not intended to support any party's position on or affect the outcome of other ODOT projects or other related disputes that KCC and ODOT may have.

The DRB recommends that ODOT deny KCC's claim as to entitlement and that KCC not pursue the claim further. Because the DRB recommends denial as to entitlement it does not address the issues of delay damages.

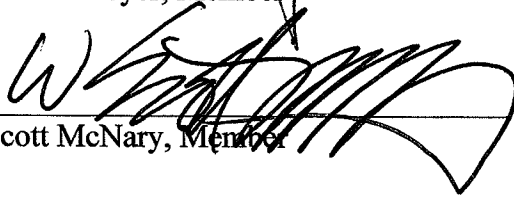
Dated: November 30 2008



Kurt L. Dettman, Chairperson



Daniel Meyer, Member



Scott McNary, Member