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February 10, 2006

VIA HAND DELIVERY

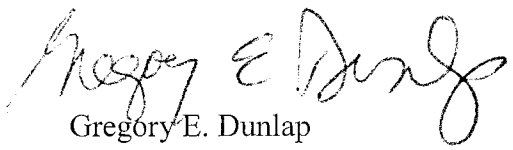
C.R. Hostutler
Deputy Prothonotary/Chief Clerk
COMMONWEALTH COURT OF PENNSYLVANIA
Irvis Office Building - Sixth Floor
Harrisburg, PA 17120-0001

Re: *Mary Beth Kuznik, et al. v. Westmoreland County Board of Commissioners, et al.*
No. 18 M.D. 2006

Dear Mr. Hostutler:

Enclosed for filing in the above-referenced matter is the Post-Hearing Brief of Respondent Pedro A. Cortés, Secretary of the Commonwealth.

Respectfully submitted,



Gregory E. Dunlap
Deputy General Counsel

GED:gkd
Enclosure
cc: Charles A. Pascal, Jr., Esquire (w/enc.)
Eugene A. Ferace, Deputy Solicitor, County of Westmoreland (w/enc.)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARY BETH KUZNIK, JIM FERLO, SALLIE W. BRADLEY, MERLE L. KUZNIK CLARE VAILL, TIMOTHY KRUPAR, WILLIAM P. KUZNIK, JEFFREY HAILS, JOHN W. HETLER, CHARLENE MAY HETLER, and MATTHEW HETLER, **Petitioners**	)	**No. 18 M.D. 2006**
v.	)	
WESTMORELAND COUNTY BOARD OF COMMISSIONERS; WESTMORELAND COUNTY BOARD OF ELECTIONS; and PEDRO A. CORTÉS, Secretary of the Commonwealth, **Respondents.**	)	

POST-HEARING BRIEF OF RESPONDENT PEDRO A. CORTÉS, SECRETARY OF THE COMMONWEALTH

As the Court indicated at the hearing on February 7, 2006, this case does not revolve around the lever voting machines that counties in Pennsylvania have used for decades; it concerns how the Commonwealth will bring its election system into the next generation of voting technology and administration. *See* February 7, 2006 Transcript of Proceedings Hearing ("Transcript") at 102. A cursory review of Petitioners' Post-Hearing Brief reveals that it is not clear exactly how Petitioners would have the Court usher the Secretary of the Commonwealth, Westmoreland County, and the voters of Pennsylvania into this new era. Apparently, Petitioners

urge the Court to require the Board of Elections of Westmoreland County (Board of Elections) either to return to the days of forlorn paper ballots, and/or to piece together (without the benefit of the Election Code for guidance) a hodgepodge system where elections for federal office are conducted on one system, and elections for state office on another. Not only are both of these scenarios unnecessary for the County of Westmoreland to comply with both federal and state law, their implementation would contradict the mandates and rationale of Pennsylvania law and the Help America Vote Act of 2002 (HAVA).

Petitioners have conceded that lever voting machines do not comply with the "manual audit capacity" requirement prescribed by section 301(a)(2) of HAVA, 42 U.S.C. § 15481(a)(2). *See* Transcript at 119; Petitioners' Post-Hearing Brief at 5. Since all voting systems used in federal elections after January 1, 2006 must meet this requirement, it is unmistakable that lever voting machines cannot be used in such elections. This leaves two questions for the Court to decide: (1) May the Board of Elections procure an electronic voting system in order to comply with HAVA for the next federal election; and (2) if it is permissible for the Board of Elections to select an electronic voting system for this purpose, absent a voter referendum, is the Board of Elections either obliged or permitted by Pennsylvania law to use a different system for elections for state and municipal offices, and would federal law in any event permit the Board of Elections to use a different system under the circumstances as presented in this case?

With regard to the first question, Petitioners concede that Westmoreland County may use electronic voting systems to meet their HAVA section 301(a)(3) requirements for voters with disabilities. Since any voting systems procured to comply with section 301(a)(3) must be made available for use by all individuals at each polling place, it stands that the Board of Elections may procure enough electronic voting systems for all of Westmoreland County to use in the May

16, 2006 General Primary. With respect to the second question, the rationale of HAVA, as well the Constitution of the Commonwealth of Pennsylvania and the Pennsylvania Election Code, require uniformity in the voting systems used for federal, state and municipal elections. Consequently, using different voting systems for federal and non-federal elections would not be permissible under either HAVA or Pennsylvania law, let alone required.

A. Westmoreland County May Use Electronic Voting Systems for Its Elections for Federal Office.

1. Section 301(a)(3) of HAVA Requires That Voting Systems Made Available Pursuant to This Section Be Accessible By All Voters.

As Petitioners concede in the Stipulations, section 301(a)(3) of HAVA "**requires** the Board of Elections to provide **at least** one voting machine or device in each polling place that is available for use by electors with disabilities." Stipulations ¶ 24 (emphasis added); *see* 42 U.S.C. § 15481(a)(3). Petitioners also concede that the Board of Elections may at any time purchase electronic voting systems to fulfill this requirement. *Id.* ¶ 25; Petitioners' Post-Hearing Brief at 2-3. Implicit in these concessions is that HAVA preempts the referendum provisions of the Pennsylvania Constitution and sections 1102-A—1104-A of the Election Code (25 P.S. §§ 3031.2—3031.4), insofar as they would preclude the Board of Elections from purchasing electronic voting systems to comply with section 301(a)(3) of HAVA.[1] These concessions are

[1] In their brief, Petitioners cite section 304 of HAVA for the proposition that "Congress did not intend to preempt all state laws related to election administration." Petitioners' Post-Hearing Brief at 9-10. This is true as far as it goes, insofar as section 304 specifically provides that any "State requirements" cannot be "inconsistent with" the requirements of section 301. 42 U.S.C. § 15484. Petitioners also cite to section 305 of HAVA, which provides: "The specific choices on the methods of complying with the requirements of [Title III] shall be left to the discretion of the State." 42 U.S.C. § 15485. *See* Petitioners' Post-Hearing Brief at 10. However, as the legislative history makes clear, the "State" in this context refers to "State and local election officials." 148 Cong. Rec. S10488-02, S10506 (2002) (statement of Sen. Dodd) ("The original House and Senate bills addressed the problems that came to light in the November 2000 presidential election in similar ways. While the Senate bill set out minimum requirements of the States to meet over the next four years, and funded those requirements at 100 percent of costs, the House bill used Federal funds as an incentive to encourage States to take preferred action, either by following Federal standards or by adopting standards of their own. Both bills, however, **preserved the traditional authority of State and local election officials to determine the specific means of meeting those requirements or standards**.") (emphasis added).

significant, as HAVA requires that any system used to comply with section 301(a)(3) must be accessible to all voters – including voters who are not disabled.

As articulated by Christopher J. Dodd, United States Senator from Connecticut – the architect of HAVA and its primary sponsor in the Senate – Section 301(a)(3) was designed to offer individuals with disabilities the "same opportunity for access and participation (including privacy and independence)" that other voters share. *See* 148 Cong. Rec. S10488-02, S10507 (2002) (statement of Sen. Dodd). As such, in order to impart such individuals with the same opportunities as other voters to participate in the election process, Congress intended that the voting systems provided under section 301(a)(3) be accessible to **all** voters:

> A DRE used to meet the accessibility standard under this requirement **is not intended to be used solely by individuals with disabilities**. Obviously, any eligible voter should have access to such a machine, and in fact, may find voting on such a system to be preferable to other systems used in that polling place. **Nothing in this conference report is intended to suggest that because each polling place must have an accessible machine, that machine is for the exclusive use of individuals with disabilities, nor that such machine, or individuals who use such system, should be separated from other voters. Such treatment would be contrary to the requirement in section 301(a)(3)(A) that such individuals be given the same opportunity for access and participation (including privacy and independence)**.

See Id. (emphasis added). The rationale for this requirement is not only to ensure that disabled voters are treated equally, but also that their privacy is protected: "It is equally unacceptable to suggest that individuals with disabilities must come forward and declare their disability in order to participate in democracy through the polling place." *Id.*

As can be seen from the above, the text and legislative history of section 301(a)(3) make clear that the voting systems purchased under its mandate are not to be limited to use by voters with disabilities. Rather, such systems may – indeed, they **must** – be available for use by **all** voters. Accordingly, it is plain that in the process of procuring electronic voting systems to

accommodate voters with disabilities, the Board of Elections may consider that all voters will be able to use such systems.

2. Westmoreland County Is Not Required to Use Paper Ballots in Lieu of an Electronic Voting System for Federal Elections.

Petitioners are quick to characterize the referendum provision set forth in sections 1102-A—1104-A of the Election Code, 25 P.S. §§ 3031.2—3031.4, as "noble," since they assert it provides voters in Pennsylvania with the right to "ultimately speak on which system they will vote on in the future." *See generally* Petitioners' Post-Hearing Brief at 13-15 and 19-20. Paradoxically, Petitioners argue that since Westmoreland County's lever voting machines must be replaced, the Election Code requires that its voters must return to using pure, hand-cast, hand-counted paper ballots – a voting system that these voters have not chosen, and in fact, long ago explicitly rejected in deciding to use lever voting machines. This argument is not only ironic, but off the mark. While the section of the Election Code upon which Petitioners rely gives the Board of Elections the **option** to use paper ballots, it does not require their use.

Generally speaking, once a county or municipality has chosen to use voting machines, its election officials may not simply return to the use of paper ballots. Rather, the Election Code provides for a referendum prerequisite similar to the one that Petitioners extol in the present case. Specifically, section 1104(g) of the Election Code provides:

> Any county, city, borough or township may, by a majority vote of its qualified electors cast at any general election held not earlier than one hundred and three weeks after they have voted to adopt such machines, direct the discontinuance of the use of voting machines at elections held in such county, city, borough or township. The question for the discontinuance of the use of such voting machines shall be submitted to the voters, subject to the same requirements as to resolution or petition and signatures thereon, as is required for the submission of the question on the authorization of the use of such voting machines. . . .

25 P.S. § 3004(g). The particular question to be placed on the ballot is likewise similar to that provided for in section 1103-A(a) of the Election Code, 25 P.S. § 3031.3(a),[2] namely, "Shall the use of voting machines be continued in the (city, borough or township), of .....?" 25 P.S. § 3004(g).

Section 1116 of the Election Code provides an exception to this rule. In a county or municipality that has chosen to use voting machines, when the use of such machines is "not possible or practicable," the Election Code provides:

> the county election board **may** arrange to have the voting for such or all offices conducted by paper ballots. In such cases, ballots shall be printed for such or all offices, and the election conducted by the election officers herein provided for, and the ballots counted and return thereof made in the manner required by law for such offices, in so far as paper ballots are used.

25 P.S. § 3016 (emphasis added).

Petitioners argue that section 1116 is a "statutory edict," mandating that when "voting machines cannot be used, and electronic voting is not authorized by referendum," paper ballots **must** be used. Petitioners' Post-Trial Brief at 15. There are two problems with this contention. First, as is evident from the plain language of the statute itself, section 1116 is **permissive**: "If . . . at any election the use of voting machines is not possible or practicable, the county election board **may** arrange to have the voting for such or all offices conducted by paper ballots." 25 P.S. § 3016 (emphasis added). Accordingly, this section cannot be read to **require** the Board of Elections to return to a paper ballot. Second, as discussed *supra*, the Board of Elections, in its compliance with section 301(a)(3) of HAVA, may provide electronic voting systems in such a

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[2] Petitioners also go to great pains to assert that this provision requires that the electors of each county approve a particular type of electronic voting system. Petitioners' Post-Hearing Brief at 11-13. Without belaboring this point, Petitioners' proposed reading contradicts the plain language of the statute. 25 P.S. § 3031.3(a) (requiring the question to be put to the voters as "shall **an** electronic voting system be used at polling places in the (county or municipality) of . . . . . ?") (emphasis added).

quantity that all individuals participating in an election for federal office will be able to use them. As such, though a return to paper ballots *might* be an option[3] for the Board of Elections under section 1116 of the Election Code, there would be no emergent necessity to do so.

B. Westmoreland County Must Use the Same Election System in Elections for State and Municipal Office That It Does for Federal Office.

1. Conducting Elections on Two Different Election Systems in the Same County for Federal and State Elections Would Frustrate the Purpose of HAVA.

Petitioners assert that even if principles of conflict preemption prevent the referendum requirement of sections 1102-A—1104-A of the Election Code (25 P.S. §§ 3031.2—3031.4) from standing as an obstacle to using electronic voting systems in elections for federal office, those principles cannot extend to forbid its application to elections for state and municipal offices. Accordingly, Petitioners contend, absent a referendum, lever voting machines or paper ballots must be used in elections for non-federal offices. This argument is predicated on the idea that HAVA "only applies to elections for Federal office," and as such, should have no effect on elections for non-federal offices. Petitioners' Post-Hearing Brief at 17. Petitioners' contention, however, overlooks the fact that this type of dual election system – regardless of its effect on

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[3] While it would be permissible under the Election Code for Westmoreland County to use paper ballots in the present circumstance, making the switch from lever voting machines to paper ballots in the short time period between the present and the May 16, 2006 General Primary would certainly frustrate the underlying purpose of HAVA with regard to improving the administration of federal elections, as described generally in section B.1 *infra*. Specifically, under HAVA, substantial voter education is required for any county that wishes to use paper ballots in a federal election. *See* HAVA § 301(a)(1)(B), 42 U.S.C. § 15481(a)(1)(B) (requiring for any paper ballot system used that the jurisdiction establish "a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office" and "providing the voter with instructions on how to correct the ballot before it is cast and counted"). This requirement is particularly germane, since the statutory rules governing paper ballots are very specific in many respects and can easily lead unwary voters to spoil their ballots or individual votes. *See, e.g.*, 25 P.S. §§ 3055-56 & 3063 (providing, *inter alia*, rules for determining when ballots are marked defectively, such as ballots containing any erasure).

Additionally, changing to a paper ballot system would involve a significant commitment of administrative time and poll worker education, for which many counties would be unprepared. Transcript at 94-97 (describing how Allegheny County would be unprepared for such a switch). In particular, poll workers would for the first time need to become intimately familiar with the very specific rules that govern paper ballots prescribed by the Election Code. *See, e.g.*, 25 P.S. §§ 3055-66.

state elections – would create voter confusion and irregularities vis-à-vis federal elections. As such, in light of the congressional goals in enacting HAVA to improve the administration of federal elections, such a dual election system would act as an obstacle to HAVA's purpose, mandating that the referendum requirement must yield.

The purpose of HAVA is "very simply . . . to improve our country's election system. The circumstances surrounding the election that took place in November 2000 brought an increased focus on the process of election administration, and highlighted the need for improvements." H.R. Rep. No. 107-329(I) at *31 (2001). HAVA is designed to "implement" those "needed improvements." *Id.*; *see also Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1076-77 (N.D. Fla. 2004) ("Congress enacted HAVA at least partly in response to perceived voting irregularities in the State of Florida during the November 2000 presidential election").

In his Pre-Hearing Brief, the Secretary detailed how irregularities and voter confusion in elections for federal office would certainly be exacerbated by the type of dual system Petitioners envision, thereby frustrating the purpose of HAVA (notwithstanding the likewise detrimental effect on elections for state and municipal office). Pre-Hearing Memorandum at 17-22. Further, at the February 7, 2006 hearing, all three witnesses who testified – William P. Boehm,[4] Mark Wolosik,[5] and Paula Pedicone[6] – explained in detail how using separate election systems for federal elections and non-federal elections would wreak havoc on the election administration and confuse voters. *See generally* Transcript at 30-31, 65 (testimony of Mr. Boehm describing how

[4] Director of the Office of Policy in the Department of State. *See* Transcript at 5.

[5] Allegheny County Elections Divisions Manager. *See* Transcript at 72.

[6] Director of Elections for Westmoreland County. *See* Transcript at 106.

reverting between two voting systems would create voter confusion and increase the opportunity for error with polling workers); *id.* at 88-92, 97-98 (testimony of Mr. Wolosik describing administrative difficulties in fashioning a dual-election scenario, including problems with accommodating the number of machines, difficulty in controlling the flow of voters from machine to machine, errors in tabulation, as well as confusion among voters and polling workers); *id.* at 109-10 (testimony of Ms. Pedicone affirming that the same problems articulated by Mr. Wolosik would occur in Westmoreland County if a dual system were used).[7]

2. Conducting Elections on Two Different Election Systems in the Same County for Federal and Non-Federal Elections Would Violate the Election Code and the Pennsylvania Constitution.

As described in the Secretary's Pre-Hearing Memorandum, the Election Code does not contemplate or provide for a dual election system, with one voting system for federal offices, and another for non-federal offices. As such, this type of scenario would violate a number of the Code's provisions. *E.g.*, 25 P.S. § 3007(b) (requiring that a voting machine "shall permit each voter, at other than primary elections, to vote a straight political party ticket *in one operation*, and, in one operation, to vote for . . . *all* the candidates of one political party for every office to be voted for . . ."") (emphasis added); 25 P.S. § 3010(h) (requiring that "[t]he names of *all* candidates of a political party shall appear in the same row or column" at a voting machine so that an elector may "*in one operation*, vote for *all* the candidates of that political party for every office to be voted for") (emphasis added); 25 P.S. § 3010(j) (requiring for primary elections that

[7] Petitioners cite to *Oregon v. Mitchell*, 400 U.S. 112 (1970), for the proposition that, "[a]s a general rule, Congress can only dictate election rules for Federal Elections, and cannot dictate the way states conduct state elections." Petitioners' Post-Hearing Brief at 9. *Mitchell*, however, is inapposite to the present case. In *Mitchell*, the Supreme Court held that Congress, while having the authority to enfranchise 18-year olds for national elections, did not have the power to do so for state and local elections. *Mitchell*, 400 U.S. at 117-18. As such, *Mitchell* has no bearing on the doctrine of conflict preemption, since it does not concern whether a state law frustrates the purpose of a federal law, but rather, whether the federal law in question was properly enacted in the first place. *See also infra* note 8.

the "the names of *all* the candidates seeking nomination in any one political party shall appear on one machine") (emphasis added).

Additionally, the uniformity provisions contained in the Constitution of the Commonwealth of Pennsylvania would prohibit this type of dual voting system. Specifically, Article VII, Section 6 provides:

> All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only: Provided, That such laws be uniform for cities of the same class, and except further, that the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, **at all elections or primaries**, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe. . . .

Pa. Const. art. 7, § 6 (emphasis added). The plain language of this provision of the Pennsylvania Constitution requires not only that the laws regulating the holding of elections be "uniform throughout the State," but more specifically that when a particular method of voting is used (such as by voting machine), that it be done "at **all** elections or primaries." *Id.* (emphasis added). Accordingly, the scenario suggested by Petitioners is barred by the very provision upon which they predicate their claim.[8]

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[8] During closing arguments, the Court asked counsel for Secretary Cortés to explain why Respondents' contention about the commands of a unitary system for voting systems – *i.e.*, arguing that the system for voters casting votes for federal and state offices must be the same – would not also apply in the example from several decades ago when the Congress established the age for voting in elections to be 18 instead of 21, as many states (including Pennsylvania) then required. Transcript at 133-34, 156-57. As suggested by counsel, the federal age requirement imposed by Congress briefly in 1970 and around is fundamentally different and did not require Pennsylvania to conform its age requirement for state and local elections for several reasons.

First, Article VII, § 1 of the Constitution of Pennsylvania is very specific: "Every citizen 21 years of age, possessing [certain prescribed qualifications], shall be entitled to vote at all elections...." (That provision was overridden by the 26th Amendment to the U.S. Constitution adopted in July 1971, which lowered the voting age to 18 for *all* elections.) Though Congress might have reduced to 18 the age for voting in elections for Federal office, the Pennsylvania Constitution explicitly prescribed the age for voting as 21. Article VII, § 6 of the Pennsylvania

Constitution relating to voting systems, by contrast, provides the electors the option to choose their voting systems for *all* primaries and elections; and the Election Code provides a unitary procedure for voters to exercise those options. Neither the Pennsylvania Constitution nor the Election Code provides for voters to choose a separate voting system for state and local offices when federal law forecloses such options for elections for federal office.

Second, to properly assess whether a federal law effectively preempts state law in the area of elections, it is necessary to analyze the legal and practical harmony of maintaining state election rules and procedures that are different from the rules imposed by Congress for elections for federal office. In the case of voting systems, both Pennsylvania law and the practical realities attendant to a dual voting system make it effectively impossible to maintain two systems in a manner that is reasonably uniform and grounded in legal integrity. As the record demonstrates, voting systems are such a fundamental core foundation of an election system – in which the conduct of elections for federal and state office are so thoroughly integrated under Pennsylvania law and in Pennsylvania's experiences – that bifurcation of voting systems between the two offices would fundamentally undermine the foundation on which Pennsylvania elections are built. Under a bifurcated system, elections for both federal and state offices would be made more chaotic, rather than more fair, efficient, uniform and confident. Thus, a dual system would harm the integrity and public confidence in the election of *both* federal and state officials. Such a result would simultaneously undermine the goals that HAVA was designed to achieve and frustrate the general Pennsylvania constitutional command that elections be uniform.

By contrast, maintaining two minimum age requirements – one for federal offices and another for state and local offices – would be much more manageable. Administering a dual voting system based on age would not upend all of the assumptions of a unitary voting system. Rather, elections officials would much more likely be able to administer this dual system with only minor structural changes to elections procedure to accommodate the two sets of rules. For example, with adequate time for preparation and training, elections officials could develop and maintain a separate list of individuals eligible to vote only for federal office; and they might program a voting machine for use solely by underage voters to vote for federal offices (and no others), or provide some other voting device for such limited purpose. The rest of the election machinery would be able to operate in a unitary manner consistent with the requirements of the Election Code.

In fact, Pennsylvania's boards of elections already maintain a list of civilian "federal electors" who have the right under the Uniformed and Overseas Absentee Voters Act (UOCAVA), 42 U.S.C. §§ 1973ff—1973ff-6, to vote in Pennsylvania in elections for federal office, but who cannot be registered or vote in Pennsylvania in elections for non-federal office because they are not residents and citizens of the Commonwealth. Rather, these "federal electors" are U.S. citizens who reside permanently outside the United States whose last state of residence before permanently leaving the country were residents of the Commonwealth. Though Congress has determined that these citizens must be allowed to vote for federal office in their state of last residence because they are citizens of the United States, states that do not grant such former residents the continuing right to vote in state and local elections do not thereby undermine the goals and objectives of Congress in enacting UOCAVA. Similarly, Pennsylvania elections officials are able with minimal uniform procedures prescribed by the Secretary of the Commonwealth to accommodate these former Pennsylvania residents as federal absentee electors without undermining the uniformity requirement of Article VII, § 6 of the Constitution of Pennsylvania or the fundamental integrity of the Pennsylvania Election Code.

CONCLUSION

For all of these reasons, this Court should dismiss Petitioners' action for declaratory judgment and equity and enter judgment for Respondents.

Respectfully submitted,

BARBARA ADAMS
General Counsel

By: _____
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DATE: February 10, 2006

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARY BETH KUZNIK, *et al.*	)	No. 18 M.D. 2006
Petitioners	)	
	)	
v.	)	
	)	
WESTMORELAND COUNTY BOARD OF COMMISSIONERS, *et al.*,	)	
	)	
	)	
Respondents	)	

CERTIFICATE OF SERVICE

I, GREGORY E. DUNLAP, Deputy General Counsel, hereby certify that on this date I have caused to be served a copy of the foregoing Post-Hearing Brief of Respondent Pedro A. Cortés, Secretary of the Commonwealth, in the above-captioned action in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by Electronic Mail and First Class Mail

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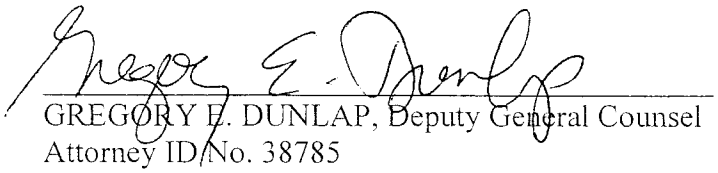

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DATE: February 10, 2006