

Issue



185 (287)

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

JULIAN M. CARROLL
GOVERNOR

REVIEW COMMISSION

H. L. STOWERS
CHAIRMAN

IRIS R. BARRETT
EXECUTIVE DIRECTOR

104 BRIDGE ST.

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FRANKFORT, KENTUCKY 40601

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CHARLES B. UPTON
MEMBER

June 7, 1976

KOSHRC # 185

*JOSARC
Decision
Index No. 287*

COMMISSIONER OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

CINCINNATI BELL, INC.

RESPONDENT

DECISION AND ORDER OF
REVIEW COMMISSION

Before STOWERS, Chairman; UPTON and STANTON, Commissioners.

PER CURIAM:

A Recommended Order of Hearing Officer John T. Fowler, Sr., issued under date of February 19, 1976, is presently before the Commission for review.

The facts of the citation under 1926.150(vi) are admitted by Respondent; at issue is only the application of that standard. Respondent alleges that its employees, who were splicing telephone cable to make connections for new service, were performing a telecommunications function only and not a construction activity, and that the cited standard was therefore inapplicable. Complainant, however, considered their work a construction activity and cited them under a construction standard.

As phrased by the Hearing Officer, the issue is two-fold:

- 1) Whether 1926.150(c)(vi) is the standard which Respondent was legally required to fulfill on July 25, 1975; and
- 2) Whether the act of splicing underground cable to extend telephone service to additional customers is properly considered "construction work."

The Hearing Officer concluded from the evidence that 1910.268, a Federal OSHA standard covering telecommunications activities, was both in effect and applicable on the date of inspection, thereby "pre-empting" a citation under 1926.150(vi) in this instance. He consequently vacated the latter citation as invalid. Mr. Fowler further indicated that while 1926.150 could have been applicable "where the telecommunications industry was in the process of installing their system in a construction project," he did not find that situation to exist in the instant case. Hearing Officer's Decision, p. 6.

After reviewing all briefs, pleadings and the complete transcript of evidence in the record, the Commission finds that it cannot agree with these conclusions.

We will first consider Issue No. 1 regarding the controlling standard on July 25, 1975. It is true that a Federal telecommunications standard, 1910.268, was in effect at the time of inspection, but it was to be enforced ONLY by Federal OSHA Compliance Officers until Kentucky adopted its own telecommunications standard. On July 25, 1975, Kentucky State Compliance Officers were not even permitted to cite under 1910.268. Given that fact, the question now becomes, "May Kentucky Compliance Officers continue to cite under State construction standards on telecommunications worksites, during the same time period that the Federal Officers are enforcing telecommunication standards in Kentucky?"

Obviously, though Federal enforcement of telecommunication standards was provided in Kentucky during that period, such Federal activity would have no effect upon a validly-issued citation under a Kentucky construction standard that was in effect simultaneously. By no directive was Kentucky OSHA instructed to stop citing under construction standards which happen to apply to telecommunication worksites. The failure of a Federal inspector to cite Respondent under the telecommunication standards did NOT preclude the Kentucky Public Service Commission from citing under a construction standard, if it was applicable to a construction activity on a telecommunications worksite.

We thus reach Issue No. 2 regarding the nature of the cited activity. The Hearing Officer in his Decision stated on Page 6 that construction work is defined by 1910.12(d) to mean:

...the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of the existing transmission and distribution lines and equipment.
(Emphasis added)

The Hearing Officer states further that he found as fact (Page 8, No. 2),

...the work being performed by the Respondent was the splicing of telephone cables to provide additional services to customers by addition and extension to existing cable. (Emphasis added)

It appears to this Commission that the Hearing Officer's Finding of Fact was almost identical to the OSHA definition of construction above, and yet the Hearing Officer held the splicing activity to be non-construction. Unfortunately, we do not have the benefit of an absolute definition that splicing is or is not "construction work." Instead, we must construe from the statute and the facts before us. As outlined above, it is our finding that the definition of construction provided in 1910.12(d) describes the splicing activity being performed on Bell's worksite on July 25, 1975.

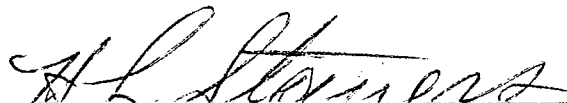
For its part, Respondent urges that the subject splicing was solely a telecommunications activity, controlled exclusively by 1910.268; in the absence of a citation under 1910.268, Respondent feels none other lies in this instance. But Respondent is likewise unable to provide an absolute definition of splicing specifically as a telecommunications activity; he relies upon the wording of 1910.268(a) to make that inference. Respondent feels it is "clear beyond argument" that the splicing in question is constituted by the "...installation...of conductors...underground on public... rights of way...", within the meaning of 1910.268(a)(1).

While we find Respondent's to be a logical and rational construction of 1910.268(a), we cannot consider this interpretation as "clear beyond argument," and so compelling as to displace an equally reasonable reading by the Public Service Commission of its construction standard as applied to splicing herein.

At this point we must go beyond mere statute interpretation, and consider all elements of the situation of July 25, 1975. Respondent has emphasized that 1910.268 specifically excludes construction work as defined by 1910.12. This is certainly true. Complainant believed that splicing was a type of construction defined by 1910.12 and therefore excludable under the Federal telecommunication standard 1910.268 and we have found that position to be correct. Logically, then, Complainant assumed the burden of citing those excluded activities which it believed the Federal standard did not cover, since the Federal OSHA Officers lacked subject matter jurisdiction and were totally UNABLE to cite Respondent for that hazard. This was, in fact, Complainant's responsibility under the law; the existence of a new Federal standard enforced in Kentucky only by Federal CSHO's was not to interfere with the State's enforcement of its own validly existing standards.

Further, this Commission rejects the Hearing Officer's conclusion that Keibler Industries, Inc., CCH OSHD 1689, is the controlling case under the instant facts. Keibler was concerned with the actual repair of non-integral manufacturing equipment held not to be within the scope of 29 CFR 1926. Certainly that issue is not related to the subject splicing operation, nor could the instant cited standard, 1926.150(vi), be considered a "broad, introductory standard that should not be used as the basis of a charge of violation that involves a specific hazard." Keibler, supra. We hold the cited standard to be both specific and applicable to these facts.

Thus, in spite of the excellence and thoroughness of Respondent's briefs, and the ably presented arguments contained therein, the Review Commission finds that the cited standard, 1926.150(vi), was applicable to the conditions on Respondent's worksite on July 25, 1975, and was correctly applied by the Kentucky Public Service Commission in its initial citation. It is ordered, therefore, that the Hearing Officer's Recommended Order of February 19, 1976 be and it hereby is REVERSED and that the subject citation be REINSTATED and AFFIRMED. All other findings of the Hearing Officer not inconsistent with this decision are hereby affirmed.



H. L. Stowers, Chairman

/s/ Charles B. Upton

Charles B. Upton, Commissioner

/s/ Merle H. Stanton

Merle H. Stanton, Commissioner

DATED: June 7, 1976
Frankfort, Kentucky

DECISION NO. 287

KOSHRC # 185
(Decision and Order of Review Commission)

This is to certify that a copy of this Decision and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: Richard D. Heman, Jr., Secretary

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: A. F. Humphries
Director of Engineering

The Honorable Morris E. Burton (First Class Mail)
Attorney at Law
326 West Main Street
Frankfort, Kentucky 40601

The Honorable Daniel P. Dooley (Certified Mail #976044)
Frost & Jacobs
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Cincinnati Bell, Inc. (Certified Mail #976045)
225 East 4th Street
Room 303
Cincinnati, Ohio 45202

This 7th day of June, 1976.


Iris R. Barrett
Executive Director



FV

JULIAN M. CARROLL

GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 Bridge Street
FRANKFORT, KENTUCKY 40601
PHONE (502) 564-6892

February 19, 1976

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 185

PUBLIC SERVICE COMMISSION OF
KENTUCKY (For and on behalf of
DEPARTMENT OF LABOR)

COMPLAINANT

VS.

CINCINNATI BELL, INC.

RESPONDENT

NOTICE OF RECEIPT OF
RECOMMENDED ORDER, AND
ORDER OF THIS COMMISSION

All parties to the above-styled action before this Review Commission will take notice that pursuant to our Rules of Procedure a Decision, Findings of Fact, Conclusions of Law, and Recommended Order is attached hereto as a part of this Notice and Order of this Commission.

You will further take notice that pursuant to Section 48 of our Rules of Procedure, any party aggrieved by this decision may within 25 days from date of this Notice submit a petition for discretionary review by this Commission. Statements in opposition to petition for discretionary review may be filed during review period, but must be received by the Commission on or before the 35th day from date of issuance of the recommended order.

Pursuant to Section 47 of our Rules of Procedure, jurisdiction in this matter now rests solely in this Commission and it is hereby ordered that unless this Decision, Findings of Fact, Conclusions of Law, and Recommended Order is called for review and further consideration by a member of this Commission within 40 days of the date of this order, on its own order, or the granting of a petition for discretionary review, it is adopted and affirmed as the Decision, Findings of Fact, Conclusions of Law and Final Order of this Commission in the above-styled matter.

Parties will not receive further communication from the Review Commission unless a Direction for Review has been directed by one or more Review Commission members.

Copy of this Notice and Order has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
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The Honorable Morris E. Burton (First Class Mail)
Attorney at Law
326 West Main Street
Frankfort, Kentucky 40601

The Honorable Daniel P. Dooley (Certified Mail #456120)
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2900 DuBois Tower
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Cincinnati, Ohio 45202

Cincinnati Bell, Inc. (Certified Mail #456121)
225 East 4th Street
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Cincinnati, Ohio 45202

This 19th day of February, 1976.



Iris R. Barrett
Executive Director

COMMONWEALTH OF KENTUCKY
KENTUCKY OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC Docket No. 185

PUBLIC SERVICE COMMISSION OF
KENTUCKY (For and on behalf of
DEPARTMENT OF LABOR)
COMMONWEALTH OF KENTUCKY

Complainant

VS.

DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER

CINCINNATI BELL, INC.

Respondent

* * * * *

Hon. Robert T. Harrod, Attorney Public Service Commission, Capitol Plaza Tower, Frankfort, Kentucky 40601, Attorney for Complainant.

Hon. Daniel P. Dooley, Frost & Jacobs, Attorneys, 2900 DuBois Tower, 511 Walnut Street, Cincinnati, Ohio 45202, Attorney for Respondent.

Hon. Diane Schneider, Kentucky Occupational Safety and Health Review Commission, 104 Bridge Street, Frankfort, Kentucky 40601, Attorney for the Commission.

FOWLER - Hearing Officer

* * * * *

On July 25, 1975, an inspection was made by the Compliance Division of the Public Service Commission for and on behalf of the Department of Labor, Commonwealth of Kentucky at a location at Sixth and Scott Streets in Covington, Kentucky, a place of employment at which employees of the Respondent company were working.

As a result of that inspection a citation was issued July 29, 1975, alleging three violations of KRS 338, one of said violations having been contested in the subject matter of this recommended Order and Decision.

The item contested is listed as Item No. 3 on the citation and is as follows:

OSH-12, 29CFR 1926.150 (c)(vi)

"Failed to assure that fire extinguisher, rated not less than 10-B shall be provided within 50 feet of wherever more than five (5) pounds of flammable gas are being used on the jobsite exposing employees to the hazard of fire in that a fire extinguisher was not provided at cable splicing operation in a manhole at the intersection of Sixth and Scott Streets where a forty (40) pound cylinder of LP gas was in use."

The abatement date set for said alleged violation was August 6, 1975, and no penalty was proposed.

The aforesaid hearing was held under the provisions of KRS 338.071(4), one of the provisions dealing with the safety and health of employees which authorizes the Review Commission to hear and rule on appeals from Citations, Notifications and variances issued under the provisions of this Chapter, and to adopt and promulgate rules and regulations with respect to procedural aspects of the hearings. Under the provisions of KRS 338.081, hearing was authorized by provisions of said Chapter and such may be conducted by a Hearing Officer appointed by the Review Commission to serve in its place. After hearing and appeal, the Review Commission may sustain, modify or dismiss a Citation or penalty. The pertinent procedural dates and informations are as follows:

1. Inspection July 25, 1975, of working area of the Respondent employees at Sixth and Scott Streets in Covington, Kentucky.
2. Citation issued July 29, 1975, listing three violations, one of which is in contest.
3. Notice of contest received August 4, 1975, contesting Item No. 3 both as to a penalty and abatement.
4. Notice of contest with copy of citations and proposed penalty transmitted to the Review Commission August 5, 1975.
5. Notice of Receipt of Contest and Certification of Employer Form received August 11, 1975.
6. Complaint received August 14, 1975, and answer filed August 30, 1975.
7. Case assigned to Hearing Officer August 19, 1975.
8. Hearing scheduled and heard September 30, 1975, at 10 a.m. E.D.T. at District #6, Bureau of Highways in Covington, Kentucky.
9. Notice of Receipt of Transcript and Testimony mailed January 14, 1976.

At the conclusion of the testimony Parties were asked to file briefs and the Hearing Officer permitted each party to have 15 days from the date of the receipt of the Transcript of the testimony. Respondent's brief was filed and received approximately January 27, 1976, and Complainant has filed no brief.

DISCUSSION OF THE CASE

The evidence revealed that the Respondent's employees were performing work in a manhole in a paved street at the above-referenced location in Covington, Kentucky. There was a gas cylinder alongside the manhole, which was protected by guardrails, providing fuel for a generator to furnish fresh air to the employee in the manhole.

The work being performed was undisputed and it consisted of splicing cable and using a propane fuel blower generator to ventilate and light the manhole chamber in which the employee was working. The employee was splicing together the open ends of a telecommunication conductor in a telephone cable. The purpose of the splicing was to extend service to additional customers by splicing the line into an already existing cable for the purpose of using some cables which apparently had theretofore been unused.

The question raised by the Respondent is that the standard which it is alleged to have violated, is not the standard which it was legally responsible to adhere to. The standards cited is a construction standard and it is the position of Respondent that construction standards do not apply to the telecommunications industry.

A brief history of the standards is necessary to bring the matter into proper context. The Federal Telecommunications Regulations, being 29CFR 1910.268 and other applicable 1910. standards were effective April 30, 1975. Kentucky adopted the telecommunication

standards about September 10, 1975. Between April 30, 1975, and September 10, 1975, the United States standard applied in the absence of Kentucky standards equally as regulatory.

On April 14, 1975, the Federal Occupational Safety and Health Administration issued a field information memo 75-28, directing that Federal enforcement would be provided in states with approved 18(b) plans prior to the effective date of the adoption of telecommunication standards by such states. Kentucky was and is a state with an approved 18(b) plan. It being understood of course that Kentucky did on or about September 10, 1975, adopt the same standards that have been applied to the Federal program in the interim.

The question thus becomes, simply stated, whether the construction standards apply or whether the telecommunications standards apply in the given instance.

It was the contention of the Respondent that the worker was conducting a splicing operation and the method of splicing and the materials used were demonstrated at length to the Hearing Officer and that such work was and is not a construction project. The Complainant takes the position that to alter or extend the line to other customers or new customers is then a construction project or that by doing this the respondent is engaged in construction and thus the construction standards apply.

In support of its position Respondent files as a part of its testimony a Transcript of the Record of the Kentucky

Occupational Safety and Health Standards Board held June 12, 1975, where at Page 28 Mr. A. F. Humphries requested that adequate fire protection be included in adopting 1910 regulations, which as above stated are the telecommunication standards and indicated that the standards were parallel or vertical standards and apparently recognized that these standards apply to the telecommunications industry.

An examination of the telecommunication regulations 29CFR 1910 et seq. indicates they do not apply to construction but it is noted that they could apply where the telecommunications industry was in the process of installing their system in a construction project. That is to say that it is, in some factual situations, possible for the construction standards to apply where the telecommunications system involved is in the process of installing new equipment in a construction project. That fact doesn't seem to be present in the instant case.

The facts justify the conclusion that the work being performed was not construction work nor was it done at a construction site within the meaning of the act both 29CFR 1926 and 29CFR 1910, 101, indeed at 29CFR 1910.12(a) §(b). Provision is made that in construction work, "includes the erection of new electrical transmission industries lines and equipment in the alteration conversion or improvement of existing transmission lines."

The standards commission, as evidence by Respondent's Exhibit, had asked that the fire protection provisions applicable

to the construction standard be applied to the telecommunications industry but that they were not so included by reason of the action of the Kentucky Board.

The case of K. Keibler Industries, Inc., at Paragraph 16,234 OSHD (cch), is determinative of the question of application of the construction as opposed to the telecommunication standards.

The operations engaged in by the Respondent employee could, in some circumstances be at a construction site, but only with work being done in connection with new construction or in remodeling or repair. The facts of this case indicate otherwise.

There are regulations which apply to telecommunications industry and the facts in this case seem to indicate that they are the regulations applicable and those to which the Respondent must adhere. The applicable standard appears to be 29CFR 1910.268 which sets forth operations which involve this type of work as related to telecommunications industry.

The evidence, together with Exhibits and testimony of the parties and the brief filed herein support the following Findings of Fact:

1. Employee of the Respondent was working in a manhole in a paved street and supplied air and light by a generator fueled with propane gas at Sixth and Scott Streets in Covington, Kentucky on the day cited.

2. That the work being performed by the Respondent was the splicing of telephone cables to provide additional services to customers by addition and extension to existing cable.

3. That when the cable is installed it contains lines which are not then used, but afterwards, as need arises, splices are made, providing service to additional areas or customers.

4. That telecommunications standard and regulations were adopted by the Federal OSHA on April 30, 1975.

5. That Kentucky adopted the Federal standards in regard to the telecommunications industry approximately September 10, 1975.

6. That the facts in this case do not support the contention that the place of citation was a construction site.

CONCLUSIONS OF LAW

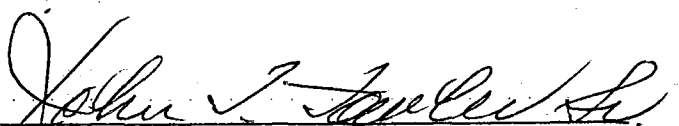
It is concluded as a matter of law that in the factual situation of this case it is found that the telecommunications and standards and regulations of 29CFR 1910.268 apply.

In the facts in this case it is found that the construction industry standards of 1926.150 do not apply and that the work in question was not construction work or work performed at a construction site.

RECOMMENDED ORDER

IT IS ORDERED AND ADJUDGED that the citation herein may be and the same is hereby vacated.

Dated: February 19, 1976
Frankfort, Kentucky


JOHN T. FOWLER, SR.
Hearing Officer

DECISION NO. 226

Done



KENTUCKY OCCUPATIONAL SAFETY AND HEALTH

REVIEW COMMISSION

104 BRIDGE ST.

FRANKFORT, KENTUCKY 40601

PHONE (502) 564-6892

June 23, 1976

JULIAN M. CARROLL
GOVERNOR

IRIS R. BARRETT
EXECUTIVE DIRECTOR

H. L. STOWERS
CHAIRMAN

MERLE H. STANTON
MEMBER

CHARLES B. UPTON
MEMBER

KOSHRC # 185

PUBLIC SERVICE COMMISSION
OF KENTUCKY (For and on Behalf
of DEPARTMENT OF LABOR)

COMPLAINANT

VS.

CINCINNATI BELL, INC.

RESPONDENT

ORDER GRANTING MOTION
FOR STAY OF ORDER
AND
NOTICE OF CORRECTION

Respondent herein has notified the Review Commission of its intent to appeal to the Franklin Circuit Court for review of the Order issued by the Review Commission June 7, 1976 in this action. The Respondent has further moved, pursuant to KRS 338.091, that this Commission stay such order pending disposition of Respondent's appeal.

The Rules of Procedure of this Commission, Section 49, provide:

(1) Any party aggrieved by a final order of the commission may, while the matter is within the jurisdiction of the commission, file a motion for a stay.

(2) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(3) The commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

The dispositive review order of this Commission becomes "final" thirty days after issuance being subject during this


thirty days to further review of such order by the courts of this Commonwealth. The Commission, however, upon application properly made, may issue a stay of the final order for purposes of tolling the abatement period of a citation pending such judicial review, where justice so requires. Citations issued under the Kentucky Occupational Safety and Health Act specify abatement dates which typically often are of short duration. Citations for nonabatement can carry sizeable penalty assessments (KRS 338.991), and the risk of accumulated nonabatement penalties would have a chilling effect on the right of judicial review.

Therefore, it is the Order of this Commission that justice requires that a stay in the effective date of its final order in this case be granted, motion having been made by the respondent for such stay under date of June 16, 1976.

This order of stay shall be effective until an appeal of this case is perfected to the Franklin Circuit Court, or until the time for such appeal shall have expired.

Notice is further given of an error occurring in the caption of June 7, 1976 DECISION AND ORDER OF REVIEW COMMISSION, and it is hereby stated that the proper name of Complainant in this action should read: "Public Service Commission of Kentucky (For and on behalf of the Department of Labor)."

KOSH REVIEW COMMISSION

By: 
Iris R. Barrett
Executive Director


Diane M. Schneider
Of Counsel

This is to certify that a copy of this Order Granting Motion For Stay Of Order And Notice Of Correction has been served by mailing or personal delivery on the following:

Commissioner of Labor (Messenger Service)
Commonwealth of Kentucky
Frankfort, Kentucky 40601
Attention: Honorable Michael D. Ragland
Executive Director for
Occupational Safety and Health

Public Service Commission of Kentucky (Messenger Service)
Capital Plaza Tower
Frankfort, Kentucky 40601
Attention: Richard D. Heman, Jr., Secretary


Public Service Commission of Kentucky (Messenger Service)
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Attention: A. F. Humphries
Director of Engineering

The Honorable Morris E. Burton (First Class Mail)
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326 West Main Street
Frankfort, Kentucky 40601

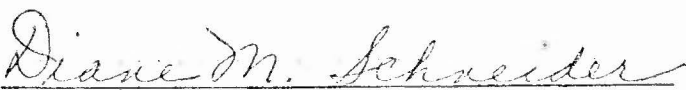
The Honorable Daniel P. Dooley (Certified Mail #976074)
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Cincinnati Bell, Inc. (Certified Mail #976075)
225 East 4th Street
Room 303
Cincinnati, Ohio 45202

This 23rd day of June, 1976.



Iris R. Barrett
Executive Director



Diane M. Schneider