STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
UNIVISA, INC.	:	DECISION DTA NO. 820289
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Periods Ended December 31, 1996 and May 16, 1997.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 3, 2006 with respect to the petition of Univisa, Inc., c/o PricewaterhouseCoopers LLP, 1441 Brickell Avenue, Suite 1100, Miami, Florida 33131. Petitioner appeared by Kramer Levin Naftalis & Frankel LLP (Maria T. Jones, Esq., and Pamela M. Capps, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Nicholas A. Behuniak, Esq., of counsel).

The Division filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument at the Division of Taxation's request was heard on March 21, 2007 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether in calculating its separate New York State entire net income for the taxable years ended December 31, 1996 and May 16, 1997 petitioner is entitled to a deduction for net operating losses reattributed to it from a subsidiary in 1991 pursuant to the Federal consolidated return regulations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. During the years ended December 31, 1996 and May 16, 1997 (the "audit period") petitioner did business in New York State and filed timely New York State general business corporation franchise tax returns (Form CT-3) pursuant to Article 9-A of the Tax Law.

2. Following a field audit, the Division of Taxation ("Division") issued to petitioner a Notice of Deficiency, dated April 18, 2003, which set forth the following amounts of additional corporation franchise tax, penalty and interest due:

Period Ended	Tax	Interest	Penalty
12/31/1996	$243,705.00	$148,396.92	$15,434.00
12/31/1996	40,420.00	24,612.68	2,560.00
5/16/1997	647,829.00	304,778.43	43,647.00
5/16/1997	107,445.00	50,548.90	7,239.00
	$1,039,300.00	$528,336.93	$68,880.00

The total tax, penalty and interest was $1,636,615.93.

3. Following a conciliation conference in the Bureau of Conciliation and Mediation Services, an order was issued, dated September 10, 2004, which affirmed the Division's adjustments as reflected in the Notice of Deficiency.

4. Petitioner was incorporated in the State of Delaware on November 2, 1987 and was headquartered in Miami, Florida during the audit period. At that time, petitioner was owned indirectly by Grupo Televisa, S.A. de C.V. ("Televisa"), a Mexican corporation.

5. Petitioner filed consolidated U.S. corporation income tax returns (Form 1120) with its affiliated entities beginning with the year ended December 31, 1989, and including the audit period.

6. Petitioner began business in New York State on July 3, 1989 and began filing separate New York State general business corporation franchise tax returns beginning with the year ended December 31, 1989, and for each year of the audit period.

7. Petitioner reported net operating loss deductions on its Forms CT-3 in the amounts of $42,903,847.00 and $68,900,330.00 for the years ended December 31, 1996 and May 16, 1997, respectively.

8. Since January 1, 1989, Univisa Sports Holding Inc. ("USHI") was a wholly owned subsidiary of petitioner.

9. USHI filed as part of the federal consolidated group with petitioner for the years ended December 31, 1989, 1990 and 1991, and reported the following federal net operating losses ("NOLs") on a separate company basis per the federal consolidated return:

Year	Amount of Net Operating Loss
1989	$2,401,789
1990	62,198,836
1991	3,505,410
Total	$68,106,035

10. During the years ended December 31, 1989, 1990 and 1991, USHI's only business activity was its investment in a New York State partnership, The National American Sports Communication L.P. ("NASC"), which published a newspaper, The National Sports Daily, or "The National." USHI held a 50% interest in NASC.

11. USHI filed New York State general business corporation franchise tax returns beginning with the year ended December 31, 1989, and for each year of the audit period. For the years ended December 31, 1989, 1990 and 1991, USHI reported the following net operating losses to New York State:

Year	Amount of Net Operating Loss
1989	$2,401,789
1990	62,198,836
1991	3,505,410
Total	$68,106,035

12. Petitioner properly filed an election with its 1991 U.S. Corporation Income Tax Return to reattribute all of the losses sustained by USHI, as described above, to itself pursuant to Treasury Regulation § 1.1502-20(g)(1).

13. USHI did not conduct any business activities after 1991. For the taxable years ended December 31, 1992 and 1993, USHI filed New York State Forms CT-245 disclaiming tax liability and paying only a maintenance fee. Following the 1993 tax year, USHI no longer filed

in New York State and was listed as inactive on Schedule 851 of the consolidated federal returns of Univisa, Inc. and subsidiaries through the taxable year ended May 16, 1997.

14. Petitioner's federal income tax returns for the years ended December 31, 1995 and 1996 and May 16, 1997 were audited, and subsequently, petitioner was permitted to use USHI's reattributed losses in the years which were audited.

15. Petitioner utilized the net operation losses reattributed from USHI to offset the income it reported on its New York State Corporation Franchise Tax Return for each of the years ended December 31, 1996 and May 16, 1997. The basis of the Notice of Deficiency issued to petitioner, more fully described in Finding of Fact "2", was the Division's disallowance of petitioner's use of USHI's net operating losses for these years.

16. The losses at issue were sustained during the years when petitioner and USHI were subject to tax under Article 9-A of the Tax Law.

17. The Division and petitioner resolved all issues in this matter with the sole exception of whether the net operating losses of USHI may be reattributed to petitioner for New York purposes. The parties also agreed that if petitioner prevails on this issue the tax portion of the assessment will be reduced to zero, and no additional penalty or interest will be due. If the issue with respect to USHI's net operating loss is decided in the Division's favor, the tax portion of the assessment will be $768,761.00 plus interest, but no penalty or penalty interest will be due and owing from petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that since petitioner acquired the net operating losses of USHI "as the common parent and as a separate entity, not as part of the consolidated group," those reattributed losses must be the starting point for the calculation of the New York net operating loss. The determination draws support from a statement in the Treasury regulations that the common parent succeeds to the reattributed losses as if the losses were succeeded to in a transaction described in section 381(a) of the Internal Revenue Code. Since the reattribution of the Federal net operating losses does not depend on the continued filing of consolidated returns for the year to which the losses are carried, they should be regarded as the common parent's losses on a separate company basis.

The Administrative Law Judge also notes that a purpose of 20 NYCRR § 3-8.1 is to provide "parity" between taxpayers that file separate New York returns regardless of whether they join in Federal consolidated returns. If the losses were left with the subsidiary, USHI, in his view they could never be used because the subsidiary would have transferred its Federal net operating loss to petitioner and the New York deduction is limited to the amount of the allowable Federal net operating loss deduction. As a result, parity would be lost.

Finally, the Division's position was found to be an attempt to vary the meaning of the statutory phrase "entire net income" which is beyond its authority as interpreted by the Court of Appeals in ***Matter of Dreyfus Special Income Fund v. New York State Tax Commn.***, 72 NY2d 874, 532 NYS2d 356.

ARGUMENTS ON EXCEPTION

The Division argues in support of its exception that under the regulations (***see,*** 20 NYCRR § 3-8.1) corporations filing separate New York returns must compute their net operating loss deductions as if they had filed their Federal returns on a separate basis. Accordingly, in order to place petitioner in the same position as if it did not file consolidated Federal income tax returns, its use of the net operating losses of USHI should be denied (***see,*** Division's brief in support, p.

4). Instead, the net operating losses should stay with USHI as they would have if USHI had filed separate Federal income tax returns (***see,*** Division's brief in support, p. 7).

The Division also rejects the argument accepted by the Administrative Law Judge that the net operating losses that remained with USHI would be disallowed because there would be no Federal net operating loss, stating, "USHI may not produce any income in subsequent years which might be offset by the subject NOL's, but that does not mean that the Division disallowed such NOL's; it just means they may go unused . . ." (Division's brief in support, p. 7, n.10; Oral Argument Tr., p. 23).

In opposition to the Division's exception, petitioner argues that the outcome of the case is controlled by the decision of the Court of Appeals in ***Matter of Dreyfus Special Income Fund v. New York State Tax Commn. (supra)*** which concluded that the definition of "entire net income" in the Tax Law as "presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department" was not intended to afford the Division "the freedom to vary the meaning of 'entire net income'. " Accordingly, in petitioner's view the calculation of its net operating loss must begin with the deduction allowed for Federal purposes, including the reallocated loss of USHI (***see,*** Petitioner's brief in opposition, pp. 3-5).

Petitioner also argues that the reattribution of the USHI net operating loss should not be eliminated in arriving at petitioner's Federal "as if" separate-return net operating loss, but instead should be treated as if acquired in a "deemed merger" of USHI into petitioner because the Treasury regulations make reference to section 381(a) of the Internal Revenue Code (Petitioner's brief in opposition, pp. 6-7, 9-10).

Finally, petitioner states, "Under regulation 3-8.2(d), a taxpayer cannot claim a New York NOL unless it has an equivalent federal NOL for that year. The result of the position asserted by the Division here is that the Reattributed NOLs, which were generated in New York, could never be used" (Petitioner's brief in opposition, p. 8).

OPINION

The calculation of the New York corporation franchise tax, to the extent it is based on income, begins with Federal taxable income as defined in the Internal Revenue Code (***see,*** Tax Law § 208.9). The Tax Law then applies various adjustments and exclusions to arrive at "entire net income base" to which the prescribed rate of the franchise tax is applied (Tax Law § 210). In the case of a corporation that files separate Federal income tax returns, rather than as a member of an affiliated group filing consolidated returns, this process begins simply by carrying dollar amounts from lines on the taxpayer's Federal return on IRS Form 1120 to corresponding lines on its New York return on Form CT-3.

Under the Internal Revenue Code, once an affiliated group of corporations elects to file a consolidated return, the group must generally continue to file such returns and any domestic corporation that is affiliated with the group through 80% stock ownership must be included in the consolidated returns (***see,*** Treas. Reg. § 1.1502-75). By contrast, in order to file a combined report of New York corporation franchise tax, a group of corporations must meet tests relating to their businesses and activities, in addition to affiliation through stock ownership (***see,*** 20 NYCRR §§ 6-2.1 *et seq.*). As a result, corporate groups frequently file consolidated Federal income tax returns but separate New York corporation franchise tax reports. In these cases, the items of income and deduction attributable to each corporation that is subject to New York tax must somehow be disaggregated from the consolidated Federal return in order to determine that corporation's Federal taxable income on a stand-alone basis as the beginning point for the calculation of New York entire net income.

The Division's regulations state in this connection as follows:

> (a) *Entire net income* means total net income from all sources. It is presumed to be the same as the taxable income . . . which the taxpayer is required to report to the United States Treasury Department . . . . Federal taxable income is subject to the adjustments, deductions and modifications provided in this Subpart [3-2]. However, the income actually reported or the income actually determined for Federal income tax purposes is not necessarily the same as the taxable income which was required to be reported for Federal income tax purposes under the provisions of the Internal Revenue Code.
>
> *   *   *
>
> (c) Each corporation included in a Federal consolidated group must compute its Federal taxable income for purposes of article 9-A of the Tax Law as if such corporation had computed its Federal taxable income on a separate basis for Federal income tax purposes . . . (20 NYCRR § 3-2.2).

The mechanism for making this "separate basis" computation is a pro forma separate-company Federal return prepared as if that corporation did not join in the filing of a Federal consolidated return. Thus, the instructions to Form CT-3 (1996) include the following:

> Enter your federal taxable income (before net operating loss and special deductions) as required to be reported to the U.S. Treasury Department. . . . If you are a member of a federal affiliated group which files a consolidated return, complete a pro-forma 1120 reporting the federal taxable income you would have been required to report on a separate federal tax return and attach a copy of the federal consolidating workpaper indicating your separate taxable income before any elimination of intercorporate transactions included in the federal consolidated return (Instructions for Forms CT-3 and CT-3-ATT [1996], p. 5).

The creation of this pro forma separate return is apparently in every case the first arithmetic operation that is applied to the data appearing on the consolidated Federal return. No exceptions appear in any of the authorities cited by the parties to this case and we have found none.

The Tax Law provides for a New York net operating loss deduction from entire net income which is generally similar to the Federal deduction. The statute states as follows:

> A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code . . . except that in every instance where such deduction is allowed under this article:
>
> (1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by paragraphs (a), (b) and (g) [of section 208.9 of the Tax Law],
>
> (2) such deduction shall not include any net operating loss sustained during any taxable year beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article,
>
> * * *
>
> (3) such deduction shall not exceed the deduction for the taxable year allowed under section one hundred seventy-two of the internal revenue code . . . (Tax Law § 208.9[f]).

The Division's regulations also provide for a separate-company computation of the New York net operating loss of a corporation joining in Federal consolidated returns but filing separately in New York. The provision reads as follows:

> A taxpayer is allowed a deduction similar to that allowed under section 172 of the Internal Revenue Code . . . in computing entire net income for the purposes of article 9-A. A corporation which reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A computes its net operating loss and its net operating loss deduction as if it were filing on a separate basis for Federal income tax purposes (20 NYCRR § 3-8.1[a]).

Thus, corporations filing consolidated Federal returns and separate New York returns are subject to a general requirement to recompute their Federal taxable income on a separate-return basis and a specific independent requirement to compute their net operating loss deductions on a separate-return basis.

In the Treasury regulations governing consolidated Federal income tax returns applicable to the years at issue there was a provision disallowing losses on the sale of stock of subsidiary corporations, at least in circumstances in which the same economic loss might be taken for tax purposes more than once (***see,*** Treas. Reg. § 1.1502-20). An exception providing some limited relief from this general rule provided in part as follows:

> If a member disposes of stock of a subsidiary and the member's loss would be disallowed under paragraph (a)(1) of this section, the common parent may make an irrevocable election to reattribute to itself any portion of the net operating loss carryovers . . . attributable to the subsidiary (and any lower tier subsidiary) without regard to the order in which they were incurred. The amount reattributed may not exceed the amount of loss that would be disallowed if no election is made under this paragraph (g). . . . The amount of loss that would be disallowed and the losses that may be reattributed are determined immediately after the disposition, but the reattribution is deemed to be made immediately before the disposition. The common parent succeeds to the reattributed losses as if the losses were succeeded to in a transaction described in section 381(a). . . . (Treas. Reg. § 1.1502-20[g][1]).

Under this exception, an election was made on petitioner's 1991 consolidated Federal income tax return to transfer an amount of the Federal net operating loss of USHI from USHI to petitioner, its parent corporation. If pro forma separate-company Federal returns were prepared for petitioner and USHI for 1991, it appears that no such transfer of the net operating loss would occur since the Federal consolidated return regulations would not apply. On those returns USHI would instead continue to have its Federal net operating loss carry-over and petitioner would not.

The amount of the disallowed loss on the disposition of a subsidiary's stock is a limitation on the amount of the subsidiary's net operating loss that may be reattributed to the parent company under the Treasury regulation quoted above (***see,*** Treas. Reg. § 1.1502-20[g][1] and -20[g][4], *Example 1)*. Since the election was filed as part of the consolidated Federal income tax return for 1991 and the regulations require the filing "with the group's income tax return for the tax year of the disposition" (Treas. Reg. § 1.1502-20[g][4]), we must assume that some event constituting a disposition of USHI stock occurred in that year although the USHI stock continued to be held by petitioner until 1997. The parties have agreed that the Federal treatment was correct and it is accordingly not our place to question that premise. It is important for our purposes, however, to understand that the effect of the Federal election is to convert the parent company's loss on the stock of the subsidiary into a net operating loss of the parent.

Where as here corporations file separate rather than combined reports of corporation franchise tax under Article 9-A, two noteworthy rules apply. First, gains and losses attributable to subsidiary capital, such as a loss on the disposition of the stock of a subsidiary, are eliminated in computing the entire net income of the parent corporation. Second, the operating losses of a corporation do not offset the income of an affiliated corporation. The position of petitioner in this case is at odds with both of these principles. While this does not necessarily mean that the position is wrong, it does suggest that special scrutiny of the result is appropriate.

Petitioner's position rests on the premise that the computation of its Federal net operating loss, as the beginning point for determining its New York net operating loss, occurs after the reattribution of the net operating loss of USHI to petitioner. A major obstacle to this outcome is the fact that such reattribution is entirely dependent on the filing of consolidated Federal returns. Petitioner grasped this nettle in its reply brief before the Administrative Law Judge, addressing the Division's argument "that if Univisa had always filed on a separate company basis, it would not have been permitted to make a reattribution election and, therefore, the election actually made by Univisa should simply be ignored" (Petitioner's reply brief below, p. 5). Petitioner's principal response is that since the Federal net operating loss deductions do not depend on the filing of a consolidated return for the years to which the losses are carried, the losses are properly treated as separate-company items and, therefore, need not be eliminated in calculating the New York "as if separate" deduction. While it is conceivable that this is correct, nothing cited by petitioner directly supports the argument.

It seems questionable to treat items that depend on the consolidated return regulations for their existence, and therefore would be eliminated consolidated items if we were applying the "as if separate" principle to the year in which they arise, as somehow ripening into cognizable separate-company items if we are applying the principle to a later year to which those items are carried. Petitioner is in effect reading regulations section 3-8.1(a) as requiring a corporation filing consolidated Federal returns and separate New York returns to compute its net operating loss on the basis of a consolidated Federal return for the year in which the loss arose, or was reattributed, and a separate pro forma Federal return for the year to which the loss is carried. A more natural reading of regulations section 3-8.1(a) would apply the "as if separate" principle to both the origin and destination years. If we were to accept the idea that some consequences of consolidated filing are eliminated from these pro forma calculations and some are not, we would need to adopt a standard for making that distinction. No such standard, or rationale from which it could be drawn, has been suggested by petitioner.

Petitioner also argues that Treas. Reg. § 1.1502-20(g)(1) should be read to treat an election under that provision as a "deemed merger" of the loss subsidiary into the parent corporation which should thereafter be viewed as if an actual merger had taken place for purposes of preparing the parent's pro forma separate-company return. The concept of "deemed merger" appears to be entirely of petitioner's invention and there is no reason to think that under the Federal regulations the subsidiary corporation is deemed to disappear or to transfer to the parent corporation any tax attributes other than the portion of its net operating losses that are transferred pursuant to the election. Any portion of the net operating loss not so transferred remains with the subsidiary (***see***, Treas. Reg. § 1.1502-20[g][3], *Example 1*). A better reading of the reference to section 381(a) of the Internal Revenue Code is that it is merely intended to incorporate the various ordering rules and limitations that apply in such transactions as distinguished from the expansive interpretation of "deemed merger." Even if there were a "deemed merger," the question remains, as in the case of petitioner's first argument, whether such treatment should be undone along with other consequences of consolidated filing.

As noted above, petitioner also asserts, and the Administrative Law Judge held, that the outcome of the present case is governed by the decision of the Court of Appeals in ***Matter of Dreyfus Special Income Fund v. New York State Tax Commn., supra*** (Petitioner's brief in opposition, pp. 4-5). In that case the court held that the statutory definition of entire net income as "presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department" prevented the Division from adjusting the Federal taxable income of a regulated investment company by disallowing the dividends paid deduction. The Division's regulation so providing was held invalid. Unlike that case there is no dispute here about the items of income and deduction entering into the determination of taxable income. The issue here is not the calculation of net operating losses but rather the identity of the corporation to which those losses should be allocated in disaggregating items of income and deduction from the Federal consolidated return. An allocation of deductions will inevitably affect the taxable income of the corporations involved since the corporation to which a deduction is assigned will have a taxable income lower than would be the case in the absence of such assignment and the corporation to which the deduction is not assigned will have a higher taxable income. If this process of disaggregation were viewed as prohibited by the decision of the Court of Appeals in ***Dreyfus***, it is hard to imagine how entire net income could be computed in the case of corporations filing consolidated Federal returns but separate New York returns. Accordingly, we conclude that this case is not governed by ***Dreyfus***.

We also find support for this distinction in the decision in ***Matter of W. H. Morton v. New York State Tax Commn.***, 91 AD2d 1080, 458 NYS2d 91, ***affd*** 59 NY2d 690, 463 NYS2d 437, which was cited by the Appellate Division in ***Dreyfus***. There, a corporate subsidiary filing consolidated Federal income tax returns but separate New York returns paid compensation to officers which was not deducted on the Federal return because the payments were reimbursed by affiliated corporations. On the pro forma Federal separate-company return the payments were shown as deductions but then cancelled out by the reimbursement. The court, confirming the decision of the State Tax Commission, held that, notwithstanding the Federal treatment, the reimbursement should be treated as income to the subsidiary and the payments shown as deductions subject to the add-back for officer's salaries provided in Tax Law § 210(1)(a)(2). The Appellate Division stated in part as follows:

> Petitioner is correct in its contention that Federal law controls for the purpose of defining entire net income (Tax Law § 208, subd 9; *Matter of Petrie Stores Corp. v. Tully,* 80 AD2d 328). However, it is incorrect in assuming that since the salaries paid its officers were not taken as Federal deductions because [the subsidiary] was fully reimbursed by [its parent company], the payments to its officers are not "salaries and other compensation" within the meaning of the Federal and New York tax law and should not be added back for purposes of the "income-plus-compensation" calculation of the franchise tax liability (Tax Law § 210, subd 1, par [a], cl [3]) (***Matter of W.H. Morton v. New York State Tax Commn., supra*** at 1081).

Here, as in ***W.H. Morton***, the preparation of a pro forma Federal return before applying the New York Tax Law should not be viewed as an impermissible alteration of Federal taxable income.

Petitioner's final argument, which was adopted in the determination of the Administrative Law Judge, is that a purpose of section 3-8.1 of the regulations is to provide parity of treatment between taxpayers that file separate New York franchise tax reports regardless of whether they join in filing Federal consolidated returns. This purpose would be frustrated in petitioner's view if the Federal net operating loss were moved to the parent corporation and the New York net operating loss were left with the subsidiary because as a result of the application of section 208.9(f)(3) of the Tax Law, quoted above, the subsidiary would be forever prohibited from using the loss.

This argument begs the question whether the statutory requirement of a corresponding Federal loss should be tested by reference to the actual Federal income tax return of the subsidiary in some future year in which it has income that might be offset by the net operating loss or instead by reference to a pro forma Federal return that would be purged of the effects of its prior consolidated filings with the parent corporation, including the reattribution of the subsidiary's net operating losses. The latter approach, in which the Federal loss would be restored to the subsidiary on a pro forma basis, seems more consistent with the Division's view that the effects of consolidated filing must be eliminated regardless of the year in which they arose. That more sweeping view would consistently eliminate the effects of Federal consolidated filing from the pro forma "as if separate" calculations–including both (i) reattributing the net operating loss to the parent corporation in 1991 and (ii) testing whether the subsidiary has a Federal net operating loss in a future year in which it has net taxable income. It is petitioner's more limited application of this governing principle that creates the disparity of which it complains.

In any event, even if petitioner is correct that the losses were rendered unusable, that consequence should not weigh heavily in deciding the issue presented here. The Appellate Division has stated as much in an analogous setting in ***Matter of American Employers' Ins. Co. v. State Tax Commn.*** (114 AD2d 736, 738, 494 NYS2d 513):

Petitioner will never be able to claim the unused portion of the net operating loss deduction which appeared on its 1976 New York franchise tax return. This does not change the fact that respondent's determination was a proper interpretation of the statutory provision (*see, Matter of Sheils v. State Tax Commn., 52 N.Y.2d 954; Matter of Gurney v. Tully, 51 N.Y.2d 818).*

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Univisa, Inc. is denied; and

4. The Notice of Deficiency dated April 18, 2003 is modified as provided in finding of fact "17" and as so modified is sustained.

DATED: Troy, New York
September 20, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner