

STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

Public Service Company of New Hampshire
Investigation of Merrimack Station Scrubber Project and Cost Recovery

MOTION TO COMPEL
TRANSCANADA TO RESPOND TO DATA REQUESTS

Pursuant to Rule Puc 203.09 (i) and Commission Order No. 25,646 of April 8, 2014, Public Service Company of New Hampshire (“PSNH”), hereby moves the Commission to compel TransCanada to fully respond to seven data requests submitted to it by PSNH.

PSNH has a substantial need for the specific information requested in the questions identified herein, which information is relevant and necessary to this docket and not otherwise available from any source other than through discovery from TransCanada. In a nutshell, PSNH seeks information in the possession of TransCanada affiliated companies directly relating to the testimony of Mr. Hachey, TransCanada’s witness, and directly relating to the scope of this proceeding as set forth by the Commission. PSNH sets forth the reasons why the information is both relevant and necessary, and the legal bases why such information is properly discoverable.

In support of this Motion, PSNH states:

1. On December 7, 2011, a “Petition to Intervene on Behalf of TransCanada” was filed in this proceeding, whereby “TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (collectively ‘TransCanada’)” requested intervenor status. TransCanada Petition to Intervene at 1. In that petition, TransCanada set forth as a basis for intervention, “*TransCanada and its affiliates* are involved in the transportation of natural gas and the power

generation business in North America.” *Id.* at 2 (emphasis added). TransCanada also alleged that, “TransCanada’s rights, duties, privileges or substantial interests as a competitive supplier of electricity in New Hampshire and as a producer of electricity that is sold into the New England ISO market, as well as other rights, duties, privileges or substantial interests *of TransCanada and its affiliates*, may be affected by the proceeding given the scope of the issues identified in the Order of Notice.” *Id.* (emphasis added).

2. By Secretarial Letter dated December 23, 2011, the Commission granted TransCanada’s petition to intervene, stating, “The Commission has determined that although NEPGA, TransCanada, Sierra Club and CLF have not demonstrated affected rights, duties, or privileges that mandate their intervention, given the particular circumstances of this docket their intervention requests will be granted pursuant to RSA 541:32, II.”

3. As an intervenor in this proceeding, TransCanada vigorously participated in the opportunity to seek discovery from PSNH. TransCanada propounded 112 discovery questions on PSNH (not including subquestions) and it filed three separate motions to compel regarding its discovery inquiries. In addition, TransCanada requested, and was granted, the ability to depose PSNH’s former President, Gary A. Long, during which TransCanada asked Mr. Long nearly 400 additional questions.

4. On December 23, 2013, TransCanada submitted the prefiled testimony of Michael E. Hachey.¹ Mr. Hachey testifies that TransCanada Corporation is “a leader in the responsible development and reliable operation of North American energy infrastructure, with a network of more than 36,500 miles of pipeline facilities and approximately 400 billion cubic feet of gas

¹ Upon information and belief, Mr. Hachey is an officer and/or director of many TransCanada companies, including, *inter alia*, TransCanada Power Marketing Ltd.; TransCanada USA Services Inc.; TCPL Power Ltd.; OSP Finance Co.; TransCanada Hydro Northeast, Inc.; TransCanada Pipeline USA Ltd.; TC Ocean State Corporation; TC Power Operations Ltd.; TCPL Ocean State Ltd.; TCPL OSP Ltd.; TCPL Power Ltd.; and perhaps others.

storage capacity. As a growing independent power producer, TransCanada owns, controls or is developing approximately 10,900 megawatts of power generation in Canada and the United States.” Hachey Testimony at 2.² Mr. Hachey testifies that, “The purpose of my testimony is to address the question of whether or not Public Service Company of New Hampshire's (‘PSNH’) investment in and actions with regard to the scrubber project at Merrimack Station were prudent.” *Id.* He further testifies that in determining whether PSNH was prudent, the Commission “will evaluate what a reasonable person of requisite skill and experience, a "highly trained specialist", would have done under the circumstances. The Commission's analysis should be based on what is known or could reasonably have been known at the time of the conduct (Order No. 25,565, p. 20);” *Id.*, internal footnotes omitted. Mr. Hachey testifies that in his testimony:

I address the following issues:

- Scrubber law and project estimates
- PSNH' s knowledge regarding cost increases
- The importance of the relationship between projected natural gas and coal prices
- PSNH' s fuel forecasts and assumptions
- Cost to go analysis
- Factors PSNH should have taken into account
- Options open to PSNH

Id. at 3.

5. Following the submission of Mr. Hachey’s pre-filed testimony by TransCanada, PSNH propounded data requests on TransCanada and other intervenors on January 16, 2013 (five days in advance of the deadline set in the December 30, 2014 Secretarial Letter). TransCanada provided its initial objections and responses to PSNH’s questions per the January 31, 2014 procedural schedule.

² Also upon information and belief, neither TransCanada Power Marketing Ltd. nor TransCanada Hydro Northeast Inc. own the 36,500 miles of pipeline facilities, the approximately 400 billion cubic feet of gas storage capacity, nor the 10,900 megawatts of power generation Mr. Hachey refers to in order to bolster the credibility of his testimony.

6. By Order No. 25,646 (the “April 8th Order”), the Commission ordered that counsel for PSNH and TransCanada were to reconsider their respective positions in light of the order, and meet face-to-face to review the outstanding data requests and if necessary. The Commission stated that PSNH was permitted to re-file a motion to compel by April 18, 2014, if necessary.

7. Following the Commission’s April 8th Order, PSNH reviewed its outstanding data requests in light of that Order and significantly reduced the number of questions for which it sought answers from TransCanada. More specifically, PSNH requested that TransCanada answer 34 outstanding questions to which they had previously objected; 8 of which the Commission had already ruled in Order No. 25,646 must be answered. *See* letter from attorney Barry Needleman to attorney Douglas Patch dated April 10, 2014, attached hereto as Attachment A.

8. By letter dated April 12, 2014, Mr. Patch responded that TransCanada had agreed to provide answers to 16 of the requests identified by PSNH. Letter attached as Attachment B.

9. Counsel for PSNH and TransCanada arranged to meet to discuss the outstanding requests on April 14, 2014. During that meeting, PSNH further limited, or waived, certain of the outstanding requests and on that same date, counsel for TransCanada agreed to answer the remainder of the 34 revised requests as revised by PSNH. However, counsel for TransCanada indicated that he would likely limit all answers solely to information from TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc., and that TransCanada was unwilling to provide information in the possession of any other affiliated company.

10. TransCanada agreed to provide answers expeditiously and sent its supplemental responses to PSNH the afternoon of April 16. In those responses, TransCanada indeed declined to provide any responsive information possessed by affiliated companies.

11. Despite what PSNH believes to be a good faith effort to narrow the areas of disagreement by both PSNH and TransCanada, one significant issue remains in dispute.

12. PSNH renews its request that the Commission order the production of relevant information in the possession of TransCanada or any of TransCanada's subsidiary or affiliated companies. This request is made only as seven of the 34 requests PSNH has sought answers to from TransCanada. In particular, this Motion to Compel is limited solely to information in the possession of TransCanada or any of TransCanada's subsidiary or affiliated companies concerning costs and price forecasts during the time frame in which the Scrubber was being planned and constructed.

13. More specifically, PSNH seeks information from TransCanada for the following seven requests:

Request No. 23: Please provide copies of any and all documents relating to cost estimates for the installation and operation of scrubber technology for all coal-fired generating plants in which TransCanada has a direct or indirect interest.

Request No. 34: Page 13, Line 18 – You testify about assumptions regarding the forecast price of natural gas.

a. Please provide all fuel price forecasts relating to the price of coal, oil and natural gas produced by or available to TransCanada from 2005 through 2012..

Request No. 52: Please provide copies of any and all documentation in TransCanada's possession regarding the forward market for natural gas delivered to New England in the 2008 through 2011 time frame.

Request No. 74b: Page 21 - You provide a quote from a Wall Street Journal article from November 2009 stating that the potential of unconventional gas supply "became clear around 2007."

b. Please provide any studies or statements made by TransCanada in the 2008/2009 timeframe on the effects of horizontal drilling and hydraulic fracturing on future gas supply and prices.

Request No. 75c: Page 21, Line 20 – You testify that "the potential of the unconventional gas supply 'became clear around 2007'".

c. When did TransCanada first acknowledge the impact of Marcellus gas on gas prices? Please provide all documents evidencing that acknowledgment.

Request No. 159: Please provide copies of any and all documentation that TransCanada has regarding estimates of newly proposed coal and natural gas combined cycle generating stations in the 2008-2009 time frame.

Request No. 161: Please provide any and all documentation in TransCanada's possession related to the bus bar costs of power for a new coal or natural gas combined cycle plant in New England during the 2008 to 2012 time period.

14. Each of these questions relates to the issues contained in Mr. Hachey's prefiled testimony. Despite the good faith efforts of the parties, TransCanada provided no substantive information in response to these questions, repeatedly stating "the Companies" – i.e., TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. - "have no responsive documents" TransCanada's April 16 supplemental responses to these seven questions are attached hereto as Attachment C.

15. Not only are the seven questions directly related to Mr. Hachey's testimony, but there can be no contest that the information sought by PSNH in these seven questions is highly relevant to the issues in this proceeding. The Commission in ruling on PSNH Question 69 to CLF requesting "all fuel price forecasts relating to the price of coal, oil and natural gas available to CLF from 2005 through 2012" has already held that "This information is relevant to the fuel forecasts that PSNH used in developing its economic analysis of the Scrubber." Order No. 25,646 at 29. The Commission has held on innumerable occasions, including in this proceeding, that New Hampshire law favors liberal discovery, and that, "In addressing a motion to compel discovery responses, we consider whether the information being sought is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *See, Investigation into Whether Certain Calls are Local*, Order 23,658 (2001) at 5." Order No. 25,398 at 2.

16. In the April 8th Order, the Commission further discussed its discovery standard:

To prevail on its motions to compel, PSNH must demonstrate that its data requests sought facts that are admissible or are reasonably calculated to lead to discovery of admissible evidence. *Public Service Co. of N.H.*, Order No. 25,334 at 9 (Mar. 12, 2012); *see City of Nashua*, Order 24,485 at 4 (July 8, 2005) (“Discovery is not the time to argue policy or advocate for the final result but merely to seek and respond to factual matters that may lead to admissible evidence”). Data requests are a “vehicle for developing factual information.” *Freedom Ring Communications, LLC d/b/a Bay Ring Communications*, Order No. 24,760 at 2 (June 7, 2007).

Order No. 25,646 at 3-4.

17. The seven questions that are the subject of this Motion to Compel seek facts that the Commission has already deemed to be relevant to this proceeding. The information requested is admissible in this proceeding and is reasonably calculated to lead to the discovery of further admissible evidence.

18. Upon information and belief, TransCanada or TransCanada’s subsidiaries or affiliated companies possess this highly relevant information. Media reports indicate that “tough prices and U.S. competition has forced TransCanada Corp. to admit its earlier forecasts were too optimistic” and “TransCanada didn’t have much choice in changing its figures. The company’s forecast for 2012 was already wildly off.” *The Globe and Mail*, “TransCanada to revise ‘optimistic’ natural gas outlook,” June 6, 2012.³ TransCanada’s CEO has stated that, “Gas prices are obviously volatile and we look at them today and we would say that our gas price outlook for the longer term is somewhere in the 6 to 10 range;” “Looking broadly across North America, there's clearly some shale plays that are going to generate very impressive volumes. But I would argue that they are just the latest place that industry looks to replace declining production;” and “I would say, we don't know, at this point, How aggressively people will develop the Marcellus,

³ See PSNH Questions TC-38, 39, and 40 and Exhibit I included in PSNH’s Motion to Rescind TransCanada’s Intervenor Status or Alternatively to Strike TransCanada’s Objections to PSNH’S Data Requests and Compel Answers to Those Requests” dated February 21, 2014.

how sustainable the production is, what kind of decline rates will occur? Emphatically, we don't know what kind of local opposition people are going to run into as they try to get drilling locations. I'm not trying to be pessimistic on it but these are some of the things that we have to see unfold over time.” Q1 2009 TransCanada Corporation Earnings Conference Call, May 1, 2009.⁴ PSNH has a reasonable belief that TransCanada has information that refutes, rebuts, and impeaches the testimony of Mr. Hachey. Under Commission rules and precedent, PSNH is entitled to an order compelling production of this information.

19. The Commission’s discovery decision in *Re Verizon New England Inc.*, 92 NHPUC 234 (2007), is particularly relevant:

[T]he standard we apply in discovery matters is that parties are entitled to obtain information in discovery if the information is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.
Information meeting this standard is discoverable regardless of whether it was prepared by and/or relates to an affiliate or affiliates of the recipient of the request, and regardless of whether any such affiliate falls within the Commission’s regulatory jurisdiction.

92 NHPUC at 237 (emphasis added). (The Commission also held, “OCA is entitled to all Verizon documents responsive to OCA 1-15, ***regardless of whether such documents are in the possession of Verizon New Hampshire or an affiliate.***”) *Id.* (emphasis added).

20. Similarly, in *Electric Utility Customers*, Order No. 25,439 (December 7, 2012), the Retail Energy Supply Association (RESA) objected to certain discovery questions “on the basis that the information requested was not in the possession of RESA but its individual members... .” (*Slip op.* at 3). Finding that the information sought was relevant to the proceeding, that it may lead to the discovery of admissible evidence, and that it related to RESA’s testimony, and based upon RESA’s motion to intervene wherein RESA alleged the experience of its

⁴ See PSNH Questions TC-64, 71, and 75 included in PSNH’s Motion to Rescind TransCanada’s Intervenor Status or Alternatively to Strike TransCanada’s Objections to PSNH’S Data Requests and Compel Answers to Those Requests” dated February 21, 2014.

members and that its intervention would not impair the orderly conduct of the proceeding, the Commission compelled RESA to respond to data requests with information in the possession of its members.

21. As Mr. Hachey stated at the outset of his testimony TransCanada is a major player in the energy and natural gas industries (see ¶4, above). With NEPGA's withdrawal from this docket, TransCanada has unique information held by no other party in this proceeding regarding the knowledge of, and forecasts of, energy prices or the use of those prices in undertaking capital projects. That information is highly relevant to this proceeding and is unavailable from other sources.

22. There is little doubt that TransCanada has information that is highly relevant to this docket. Like PSNH (although likely on a much larger scale) TransCanada was in the business of developing capital projects during the relevant time period for this docket (2005-2010).⁵ In developing those projects, per Mr. Hachey's testimony, TransCanada would likely have made, or considered available forecasts of energy prices-most specifically natural gas-for the purpose of determining the economics of its capital projects. This type of analysis is central to Hachey's testimony.⁶

⁵ For example, TransCanada's 2013 Annual Report states: "North America's demand for natural gas is expected to grow by 15 Bcf/d by 2020, presenting opportunities for growth along with challenges related to low prices and changing flow patterns on some existing pipeline systems. We have \$13 billion in projects under development to connect new supplies with domestic and overseas markets and expect EBITDA from natural gas pipeline assets to represent approximately 45 per cent of our EBITDA by 2020. Most notably, the Coastal GasLink and Prince Rupert Gas Transmission pipeline projects represent \$9 billion of infrastructure investment in support of British Columbia's emerging liquefied natural gas (LNG) export opportunity and are supported by long-term contracts with major international energy companies. Route selection, public engagement and environmental assessments are well underway for both of these high-profile projects, with final investment decisions from the project backers expected in late-2014 and 2015." at 9.

⁶ TransCanada's 2013 Annual Report: "U.S. Pipeline earnings are affected by the level of contracted capacity and the rates charged to customers. Our ability to recontract or sell capacity at favourable rates is influenced by prevailing market conditions and competitive factors, including alternatives available to end use customers in the form of competing natural gas pipelines and supply sources, in addition to broader macroeconomic conditions that might impact demand from certain customers or market segments. Earnings are also affected by the level of OM&A and other costs, which includes the impact of safety, environmental and other regulator's decisions." at 26. "Demand for pipeline capacity is ultimately the key driver that enables pipeline transportation services to be sold. Demand for pipeline capacity is created by supply and market competition, variations in economic activity, weather variability, natural gas pipeline and storage competition and pricing of alternative fuels. Renewal of

23. TransCanada itself opened the door to the relevance and admissibility of information from affiliated companies. As noted earlier, in its Petition to Intervene it relied upon the businesses of “*TransCanada and its affiliates*” and asserted “other rights, duties, privileges or substantial interests *of TransCanada and its affiliates*” as bases for its intervention. In his testimony, Mr. Hachey again asserts the “leadership” of “TransCanada Corporation . . . in the responsible development and reliable operation of North American energy infrastructure” citing to a network of more than 36,500 miles of pipeline facilities, approximately 400 billion cubic feet of gas storage capacity, and 10,900 MW of U.S. and Canadian generation resources. And, in his testimony, Mr. Hachey references an affiliate of PSNH to add support to his views. His testimony relies upon various forecasts including that of the Brattle Group. On page 20 of that testimony, Mr. Hachey testifies, “The Brattle Group's forecast was published on January 1, 2008 for the Integrated Resource Plan for Connecticut, ***and was sponsored by Connecticut Light and Power (a PSNH affiliate)***, and the United Illuminating Company.” (Emphasis added.) Mr. Hachey’s reference to the sponsorship of the Brattle Group report by The Connecticut Light and Power Company, and his identification of The Connecticut Light and Power Company as an ***affiliate*** of PSNH, was clearly intended to bolster the stature of that report, and hence, his own testimony which relies on that report, as well as to impeach the analyses performed by PSNH. TransCanada cannot have it both ways - - it cannot in its own pleadings and testimony include references to both its and PSNH’s affiliated companies to bolster its own testimony and impeach PSNH’s evidence, while at the same time claim that relevant evidence in the possession of its own affiliated companies is “off-limits” to the discovery process of this proceeding, thereby restricting access to information being sought which is relevant to the proceeding or reasonably

expiring contracts, and the opportunity to charge and collect a toll the market requires depends on the overall demand for transportation service. A change in the level of demand for our pipeline transportation services could impact revenues.” at 33.

calculated to lead to the discovery of admissible evidence and shielding its own testimony from the possibility of impeachment.

24. TransCanada made a decision to intervene in this proceeding – there was no mandate. In doing so, it justified intervention on the grounds that it “had knowledge of the scrubber project” and that this knowledge as well as its status as a competitor would “be of value to the parties and to the Commission.” *Petition to Intervene*, December 7, 2011 at 3. TransCanada also alleged that the “rights, duties, privileges or substantial interests of TransCanada *and its affiliates*, may be affected by the proceeding... .” *Id.* at 2. While TransCanada did not describe the reason that its “competitive status” would be of value to the Commission, it would seem obvious that it would be its knowledge of the energy market and future energy prices, which of course, is exactly what Mr. Hachey claims expertise in. In this proceeding, it is hard to imagine more relevant information than information in the possession of TransCanada, which is said to be a major player in the North American natural gas market, concerning projected gas and energy prices.

25. As framed by the Commission, the issue in this docket includes the reasonableness of PSNH’s conduct in proceeding with, or continuing, the construction of the Scrubber-*i.e.* PSNH’s prudence in doing so as measured by the conduct of a reasonable utility. The central focus of Mr. Hachey’s testimony is that PSNH acted unreasonably by failing to consider available information about energy prices, that its underlying assumptions were faulty, and that it relied on inappropriate methodologies. As Mr. Hachey states: “[t]he spread between natural gas and coal prices is vital to the scrubber economics analysis [and] PSNH’s underlying assumptions about prices were faulty and relied on an inappropriate methodology.” *Hachey Testimony* at 14. Indeed, Mr. Hachey’s opinion is all about the projection of future natural gas

prices, the particular projections that he claims PSNH should have used and why (according to Mr. Hachey) the use of those forecasts demonstrates that PSNH acted unreasonably. Put simply, Mr. Hachey contends that had PSNH used correct forecasts, it would have known that the Scrubber was so uneconomic that it should not be built.⁷

26. PSNH has attached hereto as Attachment D a copy of Mr. Hachey's testimony on which PSNH has highlighted in yellow those portions of Mr. Hachey's testimony that deal with the projections of energy prices. It is readily apparent from Attachment D how central this issue is to his testimony. Indeed, Mr. Hachey admits that "the prime variable at issue with PSNH's analyses is the price of natural gas." *Id.* at 13, footnote 5. Mr. Hachey's main points may be summarized as follows:

a. Natural gas/coal price spreads are an essential element of this case, PSNH failed to properly assess these spreads, or to accurately present this information to the Commission.

b. PSNH's natural gas price assumptions as of 2008 were not reasonable; PSNH relied on NYMEX future prices, which Mr. Hachey claims are appropriate only for the short term; more reliable forecasts exist; PSNH ignored substantial information available including that gas futures had declined; other forecasts would have been more reliable (EVA, Synapse, EIA and Brattle); and that history showed that the 2008 summer peak was an unreliable starting point for PSNH's analysis.

c. PSNH ignored supply-side analyses including advances in horizontal drilling and fracking and that documentation available in 2006 demonstrated this trend.

d. Mr. Hachey's analysis, using three of the four methodologies he claims should have been used, shows that PSNH's projections and economic analyses were imprudent.

27. Given this testimony, PSNH submits that the relevancy of gas/coal spread projections or forecasts of future energy prices by - or relied on by - one of North America's largest natural gas companies cannot be seriously argued. If Mr. Hachey offered his testimony without any exploration or knowledge of whether his parent or affiliate companies relied on the

⁷ The Commission is well aware that PSNH has consistently asserted that it was mandated to construct the Scrubber. PSNH will not revisit that point here.

projections he claims should have been used, or whether TransCanada made similar projections and assumptions to those made by PSNH, this would substantially undermine his credibility and is highly relevant to cross-examination. Moreover, what anecdotal information PSNH has been able to obtain about TransCanada's projections from the public arena suggests that TransCanada's assumptions about future gas prices was inconsistent with Mr. Hachey's testimony. In short, information in the possession of TransCanada is directly relevant to PSNH's ability to test Mr. Hachey's testimony. PSNH has a substantial need for the specific information requested in the seven questions, which information is necessary to this docket and not otherwise available from any source other than via discovery from TransCanada.

28. This is not the situation in which PSNH seeks information that is tangentially relevant to this proceeding. The fundamental premise of TransCanada as an intervenor and of Mr. Hachey as a witness is that PSNH failed to accurately project or consider future gas prices. Assume for the moment that TransCanada's assumptions concerning energy prices were far closer to PSNH's than Mr. Hachey's view. Would that not be information that would be of import to the Commission in making its decision in this docket? Would it not be valuable to PSNH in defending against the claims of TransCanada? Would Mr. Hachey deem his own company to be "imprudent" for relying upon that information?

29. The Commission has ruled on the scope of this proceeding: "At hearing the evidence may demonstrate that market and regulatory circumstances in place at times of critical decision-making justified continued operation of Merrimack Station, under the standards of RSA 369-B:3-a and justified the installation of the Scrubber technology. . . . In any event, all the relevant facts and circumstances still need to be presented and reviewed at hearing." Order No. 25,546 at 10. By this Motion, PSNH is seeking responses to seven questions eliciting relevant

facts solely in the possession of TransCanada in order to demonstrate that the market circumstances in place at times of critical decision-making justified continued operation of Merrimack Station, under the standards of RSA 369-B:3-a and justified the installation of the Scrubber technology.


30. The Commission stated in Order No. 25,646 that “if PSNH can make a particularized showing that it has a substantial need for specific information from a non-party TransCanada affiliate, which information is necessary to this docket and not otherwise available, we will consider such a request.” *Id.* at 36. PSNH provides such a showing of need in this pleading. Consistent with *Re Verizon New England* and general rules of discovery, the Commission should grant PSNH’s request.

WHEREFORE, PSNH respectfully requests that the Commission order TransCanada to provide the information sought by the seven questions identified herein.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: April 18, 2014

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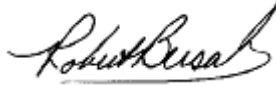
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Certificate of Service

I hereby certify that a copy of this Motion has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 18th day of April, 2014.

A handwritten signature in black ink, appearing to read "Robert A. Bersak", written in a cursive style.

Robert A. Bersak