

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 OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
FOR
RECONSIDERATION OF ORDER NO. 25,687
STRIKING CERTAIN PORTIONS OF THE TESTIMONY OF MICHAEL HACHEY,
WITNESS FOR TRANSCANADA POWER MARKETING LTD.
AND TRANSCANADA HYDRO NORTHEAST INC

Pursuant to RSA 541:3 and Rule Puc 203.07(a), Public Service Company of New Hampshire (“PSNH”), hereby moves for Reconsideration of the Commission Order No. 25,687 dated July 2, 2014 striking portions of the testimony of Michael Hachey (“Hachey”), the witness for TransCanada Power Marketing, Ltd. and TransCanada Hydro Northeast, Inc. (“TransCanada”).

At the outset, PSNH points out that the Commission’s Order was in response to PSNH’s request that the Commission rescind the status of TransCanada as a discretionary intervenor due to TransCanada’s failure-and extraordinary refusal- to comply with the Commission’s two Orders requiring TransCanada to produce relevant information in its possession. As a result, although this is a Motion for Reconsideration, PSNH has not previously had an opportunity to address the Commission’s decision to strike portions of Hachey’s testimony or the Commission’s decision to apply an adverse inference at the hearing, rather than now.

PSNH respectfully submits that the Commission erred by allowing TransCanada to remain in this proceeding as an intervenor, by failing to strike all of Hachey’s testimony given

TransCanada's refusal to comply with the Commission's Orders or by failing to strike additional portions of that testimony relating to information that TransCanada refused to produce.

I. Background to this Motion

1. On May 8, 2014, following several motions to compel answers to discovery from TransCanada by PSNH, the Commission ordered (Order No. 25,663) TransCanada to answer four data requests asked by PSNH and to provide answers consistent with Standard 2 set out in Order No. 25,646 of April 8, 2014. That standard provided that regardless of whether the information was in the possession of the two TransCanada entities that intervened in this Docket or "TransCanada Corporation and all subsidiary and affiliated entities," the information was to be produced. Specifically, the Commission compelled answers to the following data requests:

No. 34a: Please produce all fuel price forecasts relating to the price of coal, oil and natural gas produced by or available to TransCanada from 2005 through 2012."

The Commission limited this request to "fuel price forecasts for natural gas and coal (not oil), that were in the produced by or were in the possession of TransCanada affiliates during the period January 1, 2005, through December 31, 2008 and that were long term forecasts that included prices for 2012 and beyond." Order No. 25,663 at 7.

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 2008-2011 timeframe.

The Commission granted this request and also directed TransCanada "in its response to Request 34a...to identify those documents that are also responsive to Request 52.

No. 74b: Please provide any studies or statements made by TransCanada in the 2008/2009 timeframe on the effects of horizontal drilling or hydraulic fracturing on future gas supply and prices.

No. 75c: When did TransCanada first acknowledge the impact of Marcellus gas on gas prices? Please provide all documents evidencing that acknowledgement.

The Commission granted requests 74b and 75c as written, stating that the “information is necessary because it may shed light on how [the] industry thought the new drilling technologies would impact prices and on whether PSNH’s interpretation was reasonable.” *Id.* at 8.

2. As is evident from the data requests, PSNH sought to obtain TransCanada’s knowledge of gas price forecasts since, as the Commission found, “Mr. Hachey’s testimony discussed gas price forecasts at length.” *Id.* at 6 (citing to Hachey’s testimony at 14-22). In fact, gas price forecasts are central to Hachey’s testimony, to TransCanada’s participation in this Docket, and as the Commission noted are “necessary to resolve issues” before the Commission. In granting PSNH’s Motion to Compel answers to these requests, the Commission specifically found that PSNH had satisfied the requirement in Order No. 25,646 (April 8, 2014) that PSNH make a “‘particularized showing’ of a ‘substantial need’ for the information and...that the information is ‘not otherwise available’.” *Id.* at 6-7. Even more telling, the Commission stated that “*natural gas price forecasts during critical periods may be necessary to resolve issues in this docket.*” *Id.* at 7 (emphasis added).

3. In a Motion for Reconsideration filed on May 20, 2014, TransCanada advised the Commission that if the Commission did not reconsider its May 8 Order compelling TransCanada to provide the “voluminous” information in its possession responsive to the four data requests listed above, TransCanada would simply refuse to comply. Then, following the Commission’s denial of TransCanada’s Motion for Reconsideration in Order No. 25,671, TransCanada did exactly what it had threatened: in an act of contempt, it simply refused to comply with the Commission’s Order to Compel, stating that it “will not produce” the information ordered to be produced. Now, despite what the Commission recognizes as

TransCanada's intentional refusal to comply with its Order, TransCanada has been allowed continued participation in this proceeding. In addition, because the Commission struck only limited portions of his testimony, Hachey is apparently allowed to draw conclusions regarding this "necessary issue."¹

4. With respect, the Commission's decision to strike very limited portions of Hachey's testimony (testimony which the Commission itself has noted is based on gas price forecasts) is an insufficient sanction for TransCanada's extraordinary decision to disobey Commission orders. Dr. David Harrison and Dr. Noah Kaufman, PSNH's expert witnesses on rebuttal from NERA, note that, "[t]he testimony of Mr. Hachey is based fundamentally on his opinions that the gas price forecasts used by PSNH were imprudent and did not properly take into account the impact of gas fracking on the marketplace." Harrison/Kaufman Rebuttal Testimony at 8. Drs. Harrison and Kaufman were asked "Q. DID YOU HAVE THE INFORMATION NECESSARY TO FULLY EVALUATE MR. HACHEY'S TESTIMONY?" *Id.* at 9. Their answer was:

A. No, we did not. We asked PSNH to obtain information in the possession of TransCanada regarding forecasts of fuel prices and the impact of gas fracking on the marketplace during the mid-2008 to early-2009 time period, a period of market turmoil and uncertainty on the future implications of natural gas fracking. TransCanada has not provided the requested information, which would have been significant in evaluating Mr. Hachey's testimony.

Similarly, Mr. John Reed, an additional PSNH expert rebuttal witness, testifies,

"[u]nfortunately, Mr. Hachey did not provide much of the relevant information regarding the

¹ In its letter of June 6, 2014 informing the Commission that it would not comply with its Order, TransCanada essentially challenged the Commission. It stated: "The Commission now has to decide how it wants to proceed with this case." As shown in this Memorandum, TransCanada's continued involvement in this Docket when it refuses to comply with Commission orders creates problems that cannot be resolved simply by tinkering with Hachey's testimony. All of those problems are of TransCanada's own making.

price forecasts he references; therefore, it is impossible to fully evaluate or reply to Mr. Hachey's contentions." Reed Rebuttal Testimony at 15.

5. Absent rescission of TransCanada's discretionary intervention, its outright refusal to abide by the rules requires more than a limited excision of certain testimony. As pointed out below, anything less than striking all, or significantly more of Hachey's testimony, will create significant procedural and practical problems in this docket.²

II. The Commission Should Rescind the Intervenor Status of TransCanada

5. PSNH will not repeat the arguments contained in its June 13, 2014, Motion to Rescind the Intervenor Status of TransCanada. Suffice it to say that TransCanada's contempt of the Commission's orders has created significant due process issues. As this Commission has previously noted, "due process . . . required providing the parties with an opportunity to conduct discovery and to cross-examine..." *Re PSNH*, 81 NH PUC 766, 772 (1996). TransCanada was first ordered to provide information regarding gas price forecasts and gas fracking on May 8th in Order 25,663. Now, more than two months later, TransCanada's contemptuous actions continue to "impair the orderly and prompt conduct of the proceedings." RSA 541-A:32, II. If outright disobedience to two Commission Orders and a delay of measured in months is not the "unusual situation" which warrants "[r]evocation of intervenor status based on discovery misconduct" (Order No. 25,646 at 3), it is hard to imagine what would be.

III. The Commission Should Strike all of Hachey's Testimony

² The Commission is reminded that by Order No. 25,640, March 26, 2014, other portions of Mr. Hachey's testimony related to the legislative process has already been stricken, and further portions of his testimony related to the variance provision of the statute are subject to a further Motion to Strike.

6. The Commission has already determined that the information TransCanada refused to produce in direct violation of the Commission's Orders is directly relevant to this Docket, that PSNH has shown a "substantial need" for that information and that it is not otherwise available. It has also determined that TransCanada has "intentionally withheld the information," and "acted intentionally in blocking the production of the evidence, even after the Commission orders to produce." Order No. 25,687 at 8. Under each of the cases cited by the Commission in its Order, such conduct would be sufficient to permit an adverse inference instruction to a jury that the information TransCanada refuses to produce would be harmful to TransCanada's case, and more particularly in this case, to Hachey's testimony claiming that PSNH acted imprudently by failing to consider the future of gas prices and impact of gas fracking.

7. The Commission's reservation of the adverse inference for the hearing is unnecessary and impractical. The Commission already has all of the information necessary to conclude that TransCanada's obstruction of this Docket results from the fact that voluminous information in its possession would undermine Hachey's testimony and the position TransCanada tries to advance here. After all, the fundamental premise of Hachey's testimony is that PSNH was imprudent because it relied on certain projections of future gas prices while ignoring other forecasts that were allegedly available to it. As noted earlier, Drs. Harrison and Kaufman, PSNH's expert witnesses from NERA, agree that, "[t]he testimony of Mr. Hachey is based fundamentally on his opinions that the gas price forecasts used by PSNH were imprudent... ." TransCanada is one of the largest energy companies in North America. *See* Order No. 25,687 at 9, fn.2. TransCanada surely was projecting the future price of gas during the relevant 2008-2009 period as to which it contends that PSNH failed to make reasonable projections of those

prices. TransCanada has admitted that it possesses relevant responses: “the information which the Commission is now directing non-party affiliates to produce is not only voluminous but is highly sensitive, commercial and proprietary information about competitive markets.”

TransCanada Motion for Reconsideration and/or Clarification of Order No. 25,663, May 19, 2014, at ¶6. Therefore, in light of TransCanada’s intentional conduct (and the Commission has already determined that the conduct was intentional) the adverse inference can—and should—be drawn now.

8. The proper remedy for TransCanada’s conduct and for that adverse inference is the exclusion of *all* of Hachey’s testimony. TransCanada cannot have it both ways, asserting on the one hand that it “has gained knowledge of this Project and PSNH that could be of value to the parties and to the Commission in this proceeding” (TransCanada Motion to Intervene, at ¶5), while also refusing to produce that same information where it would undermine its witness or the positions it vigorously asserts in this matter.

9. The adverse inference cases cited by the Commission each leave the imposition of the inference for proof at trial. Yet those cases are distinguishable because each involved the need to establish the circumstances concerning the destruction of evidence—and the adverse inference resulting therefrom—in the context of an instruction to a jury. By contrast, here, the Commission is the finder of fact, and the testimony in question has been pre-filed. Having determined that TransCanada’s refusal to produce gas forecast and fracking information in its possession (and that might undercut Hachey’s testimony or confirm the reasonableness of PSNH’s forecasts) was intentional, no more information is needed to determine that an adverse inference may be drawn. It defies reason to believe that if TransCanada had projected gas prices that *supported* Hachey’s testimony, it would not have produced that information.

10. Moreover, extrinsic evidence demonstrates that during the most relevant time period for the Scrubber Project, TransCanada considered the price of gas to be uncertain and in flux at the very time that Hachey claims PSNH should have known that the price would continue to decline:

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. And you could see over that period, gas prices going well above 10 and you can see them going down into the 3 or 4 range, as we're seeing right now.

Mr. Hal Kvisle, President and Chief Executive Officer of TransCanada, Q1 2009 TransCanada Corporation Earnings Conference Call, May 1, 2009.³ Mr. Hachey – a TransCanada Vice President- disagrees with Mr. Kvisle's statement that "you could see over that period, gas prices going well above 10." What information in TransCanada's possession forms the basis for Mr. Kvisle's statements regarding these gas prices? TransCanada refuses to say.

11. Similarly, during that same May, 2009, conference call, Mr. Kvisle stated that the impact of gas fracking on the marketplace remained uncertain. When asked about the effect of "the shale plays, and things like the Marcellus and the Utica that are close to essentially big demand centers" on TransCanada's pipeline business, Mr. Kvisle answered:

I would say, we don't know, at this point, how aggressively people will develop the Marcellus, 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.

Apparently, when he made this statement to the financial community in 2009, Mr. Kvisle and TransCanada were unaware that "[c]lear documentation existed as early as 2006 indicating that production of unconventional natural gas was exceeding production from conventional natural

³ <http://seekingalpha.com/article/202126-transcanada-corporation-q1-2010-earnings-call-transcript>

gas sources,” as testified to by Mr. Hachey. Hachey Testimony at 21. What information in TransCanada’s possession forms the basis for Mr. Kvisle’s statements regarding the impact of development of shale gas? TransCanada refuses to say.

12. As the finder of fact, the Commission needs no additional information to conclude that Hachey and TransCanada have information contrary to his conclusions and failed to produce it because it would undermine that testimony. TransCanada’s intentional refusal to comply with Commission orders supplies all the information that is needed. As a result, it is not enough to pick around the edges of Hachey’s testimony; the entire testimony is affected by TransCanada’s non-compliance and should be stricken. Since Hachey’s entire testimony relates to gas forecasts, every question to Hachey on cross-examination will implicate the adverse inference. It is thus completely impractical to apply that inference question-by-question or to wait until the hearing to do so. And the credibility of Hachey and TransCanada on this issue has been completely undermined by their contempt of the Commission’s orders.⁴

13. The Commission itself said in Order No. 25,663, “Mr. Hachey’s testimony discussed gas price forecasts at length. Hachey Testimony at 14-22.” Order at 6. Indeed, pages 14-22, which the Commission referenced, are the heart of Hachey’s testimony. The core of that testimony is this: PSNH was imprudent because it failed to consider forecasts and information that would have demonstrated that the price of natural gas had peaked in 2007 and information (including forecasts Hachey does mention) was available in the marketplace to demonstrate that

⁴ Although the Rule does not apply in this proceeding, the Commission could look to Rule 37(b) of the Federal Rules of Civil Procedure for guidance on the appropriate remedy where a party refuses to comply with an order. Under Rule 37(b)(2)(A), where a discovery order is disobeyed, the court may “direct that the matters embraced in the order or other designated facts be taken as established; “prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;” strike pleadings; dismiss the action in whole or in part; or “render a default judgment against the disobedient party.”

fact.⁵ Hachey opines that “the price of natural gas” was “the underpinning of PSNH’s analysis regarding economics of the coal scrubber” (testimony at 14, line 18), that PSNH erred by using NYMEX futures contracts, and there were valid alternative forecasts that PSNH could have used. Testimony at 15-16. As Hachey puts it: “[r]ather than rely upon gas forecasts, PSNH relied on an inappropriate methodology for projecting gas prices out nearly 20 years to justify and presumably recover, its expenditure” and “chose to ignore substantial information that was available.” *Id.* at 16-17.

14. Despite the Commission’s attempt to parse out some of Hachey’s statements and to strike them as a sanction, the testimony cannot be dissected in this manner. The entirety of Hachey’s testimony at pages 14-22 (as well as elsewhere) addresses gas price forecasts. This may be seen simply by looking at some of the questions posed on these pages: “Why was the price of natural gas the underpinning of PSNH’s analysis?” (*id.* at 14, line 18); “Did PSNH develop a fuel forecast that would produce the coal-gas price spread that it needed to economically justify the scrubber?” (*id.* at 15, line 8); “Is there alternative data that PSNH could have relied upon?” (*id.* at 16, line 12); “Was PSNH imprudent to rely on NYMEX futures....?” (*id.* at 16, line 17); “Did natural gas futures pricing support PSNH’s view that the scrubber would provide net customer benefits?” (*id.* at 17, line 22); “Why didn’t the June and July prices validate PSNH’s decision to construct the scrubber?” (*id.* at 18, line 13); “After reviewing these materials [the forecasts PSNH relied on and other information] what conclusion do you reach about the PSNH analysis?” (*id.* at 19, line 8); “Did PSNH have actual forecasts available to it that contradicted the NYMEX-based analysis...?” (*id.* at 20, line 3);

⁵ As PSNH’s witness John Reed points out : “Mr. Hachey’s position is essentially that PSNH’s gas price forecasts were outside of any range of reasonable expectations, that reliance on these forecasts was unreasonable, that this reliance led to the decision to continue with the Projects, and that ‘but for’ these unreasonable actions, the costs to ratepayers would only have been \$10 million, not the \$422 million that PSNH is seeking.” Rebuttal Testimony of John Reed at 17-18.

and “In addition to PSNH’s failure to rely on appropriate data in drawing its conclusions, are there other issues it appears to have ignored?” (*id.* at 21, line 7). These questions alone reveal the extent to which Hachey’s entire testimony are based on gas price forecasts and PSNH’s alleged failure to look at other forecasts and to make reasonable predictions about the future price of gas. Indeed, in the conclusion to his testimony, the penultimate sentence of Hachey’s response to the question, “Do you think it was prudent for PSNH to proceed with the scrubber project?” (testimony at 29) is:

Based on all of the information made available in this docket it appears that PSNH did not review and consider appropriate forecasts and did not update information about natural gas and coal prices during a critical time in the development of the project.

Without the information held by TransCanada, PSNH’s ability to rebut the fundamental bases of Hachey’s testimony has been materially and adversely impacted.

15. Since TransCanada’s intentional refusal to produce information would merit an adverse inference to the finder of fact, the Commission could—and should—consider these facts:

Suppose that TransCanada itself relied on NYMEX futures pricing? Suppose that TransCanada had forecasted that gas prices would increase in the future (as it likely did given the major infrastructure projects it was attempting to justify to regulators such as the Canadian National Energy Board)? Suppose that TransCanada was predicting that the price of gas was speculative in 2008-2009 and had not bottomed out in 2007? Suppose that TransCanada was not predicting the impact of fracking and Marcellus shale finds in 2007, 2008, or 2009? And suppose that TransCanada had studies and forecasts that contradicted the studies used by Hachey? Each of these suppositions is a valid inference given the statements of TransCanada’s own CEO and TransCanada’s intentional refusal to produce information. Moreover, given that refusal,

TransCanada cannot rebut any of these suppositions at the hearing and the Commission will therefore not learn any additional information from TransCanada on these issues.

16. The Commission has stated that “allowing an adverse inference arising from th[e] missing information” may be granted “where appropriate.” Order No. 25,687 at 10. That inference is appropriate now, since the entirety of Hachey’s testimony is addressed to the issue of gas pricing and his credibility on any other issue is undermined by TransCanada’s “intentional blocking of the evidence.” Accordingly, all of Hachey’s testimony should be stricken. At the very least, pages 14-22 and all other testimony concerning gas forecasts cannot stand. The deliberate and intentional refusal to produce information for which a “substantial need” has been proven merits such a result.

17. The practical effect of trying to dissect Hachey’s testimony may be seen by a few examples of what might happen at the hearing in this docket. Hachey has offered testimony that PSNH was imprudent in failing to make, or consider, gas pricing forecasts that were inconsistent with other forecasts (either specifically or generally). A logical question on cross-examination would be: “Did TransCanada make any forecasts during the applicable period that supported [or as a separate question, contradicted] PSNH’s forecasts?” Hachey has no basis to answer “no”, because he either did not look for the information or he knows it exists but refuses to say what it would show. Yet he also cannot answer the question “yes,” because TransCanada refused to produce the information. If Hachey offers testimony on PSNH’s failure to recognize the impact of fracking during specific periods PSNH is entitled to ask: “When did TransCanada recognize that impact? How did that impact affect TransCanada’s gas price forecasts?” Again, Hachey should not be permitted to answer either question given the intentional refusal to provide the information requested in Requests 74b and 75c above. These

examples demonstrate both the difficulties in allowing Hachey to testify at all, and why striking only portions of testimony does not adequately address TransCanada's contempt of the Commission's Order. They also demonstrate why an adverse inference should be drawn in response to virtually every question about TransCanada's knowledge of gas forecasts. Without the ability to testify on these issues, substantially every one of Hachey's opinions disappears.⁶

18. The continued involvement of Hachey and TransCanada in this proceeding presents a further problem. Suppose TransCanada's counsel wishes to cross-examine PSNH's witnesses- or any other witness-on the reasonableness of gas price forecasts. Why should TransCanada be permitted to do so when it has refused to provide information that would undermine key premises of the cross-examination? Should TransCanada's counsel be permitted to establish a fact knowing (or at least refusing to even inquire whether) that his or her own client has information directly contrary to the facts or premises he or she is trying to advance through cross-examination? While the Commission has attempted to balance PSNH's interests in limiting testimony with the alleged benefit of having TransCanada participate, that balance cannot reasonably be achieved given the significance of the information involved and TransCanada's intentional actions. Accordingly, as the concurring opinion in Order No. 25,687 states, the only practical sanction for TransCanada's abuse of the discovery process and contempt of the Commission's orders other than to rescind its intervenor status, is to strike the testimony in its entirety.

IV. If Allowed to Remain an Intervenor, The Commission Should Limit TransCanada's Participation in this Docket

⁶ This is shown in greater detail below in the review of specific testimony.

19. The Commission should also prevent TransCanada's counsel from inquiring in any way on the issue of gas price forecasting.⁷ (See Rule 37(b)(2)(A)(i) of the Federal Rules of Civil Procedure allowing a court to "prohibit the disobedient party from supporting or opposing designated claims.") TransCanada's contempt of the Commission's Orders raises a serious problem for the conduct of the hearing in this docket. Although it refuses to produce information that likely would support PSNH's position, TransCanada is apparently free, through counsel, to question witnesses about the reasonableness of their gas price projections. Once again, this allows TransCanada to participate in the hearing under a completely different set of rules from all other participants.

20. PSNH, and each of the intervenors, has been required to produce discovery, including discovery relating to forecasted gas prices. Thus, in response to examination and cross-examination each participant knows that its own documents may be used to challenge or confirm its position on PSNH's prudence with respect to its forecasts. But not so for TransCanada, which has the luxury of taking positions knowing that its position cannot be challenged effectively, or challenged at all. Once again, this advantage results from TransCanada's own misconduct.

21. The Commission apparently believes that TransCanada offers some value to this proceeding and that this value should be weighed against the harm flowing to PSNH from its failure to receive information for which it has established a "substantial need" and cannot obtain elsewhere. With respect, the balance struck by the Commission unduly favors the wrongdoer, TransCanada, over the remaining participants, each of which answered discovery

⁷ Indeed, it is hard to imagine what value TransCanada has in this Docket apart from the fact that as a major player in the gas industry, it has knowledge of gas prices-knowledge it refuses to share. But it is TransCanada, not PSNH or the Commission that made the choice to eliminate that value.

it might otherwise have wished not to produce. The resulting harm is not only to PSNH but to the process itself and to the Commission. Assume this example: TransCanada's counsel cross-examines PSNH witnesses (or supports by examination the testimony of witnesses for other intervenors) in an effort to show that PSNH's forecasts were wrong, all the while knowing (or perhaps ignoring) the fact that its own forecasts were similar. Not only does that not help the Commission, it willfully misleads it. TransCanada chose not to produce information that might be helpful to this Commission and was essential to PSNH's case. It should not now be permitted to play any role in developing information about, or cross-examining on the very topic it purposely hid from the Commission. Accordingly, in addition to striking Hachey's testimony, if TransCanada is allowed to remain in this Docket, PSNH requests that the Commission limit TransCanada's involvement to issues unrelated in any way whatsoever to energy prices and the impact of shale gas on the marketplace.

22. In sum, if Hachey is allowed to testify to the appropriateness of PSNH's gas forecasts or on the impact on the market of shale gas fracking, and if TransCanada is allowed to question witnesses on those issues, PSNH will be denied due process in this proceeding. *Re PSNH, supra*. The Commission has found that the information PSNH has been denied is material, relevant and *necessary* to a resolution of this proceeding. Yet PSNH is forced to go forward without that information. A denial of the opportunity to obtain relevant and necessary information because a party (in this case a discretionary intervenor) refuses to comply with Commission orders plainly taints the entire process.

V. Alternatively, the Commission's Determination of Testimony Relating to Gas Price Forecasts is Too Restricted. All of Hachey's Testimony on the Issue Should be Stricken

23. At a bare minimum, if not all of the testimony is excluded, all of it that relates in any way to the projection of energy prices or the impact of gas fracking should be. The Commission identified two principles used to determine what testimony should be stricken. Order No. 25,687 at 10. First, it asked whether Hachey's testimony was based on his personal knowledge and beyond what he read in PSNH's testimony. While the Commission does not identify why that fact is relevant, it is presumed that it is because Hachey did not need to rely on information in TransCanada's possession if he had personal knowledge of other information relevant to the Docket. However, it is also possible that Hachey testified from personal knowledge but did not identify-or was unaware of-information in the possession of TransCanada that directly contradicted that knowledge.⁸

24. Second, the Commission indicates that it struck language that "relates to Hachey's knowledge of forecasting" and to the timing of awareness of the impact of fracking on prices. But the questions the Commission ordered TransCanada to answer (see above) are broader than Hachey's knowledge. That was the whole point of asking the questions, which TransCanada attempted to limit to Hachey's knowledge. With respect, the Commission's principles miss the point: Hachey's entire testimony, whether or not based on personal knowledge, would be undermined if TransCanada has information or made projections that contradict his testimony. Again, that is why PSNH asked the questions, and presumably one of the reasons the Commission ordered them to be answered. Absent the information, the Commission would be required to make a decision on PSNH's prudence based on Hachey's alleged knowledge without testing whether that knowledge is accurate. PSNH would be asked to accept that testimony as true because, as the Commission found, the information requested (and that would

⁸ Given the statements from TransCanada's CEO cited above, this is not a hypothetical supposition

allow Hachey’s testimony to be tested) is “not otherwise available.” Order No. 25,663 at 7, citing Order No. 25,646 at 35-36. As a result, any testimony relating to gas prices, their projections, or the impact of shale gas-the very information the Commission ordered to be produced-should be excised.

25. PSNH submits that given the information that TransCanada intentionally withheld and the fact that Hachey’s testimony is all about gas price forecasting and the impact of gas fracking on the marketplace, that if the Commission does not reconsider its Order and strike Hachey’s testimony in its entirety, at the very least, the following testimony-in addition to that excised by the Commission-should be cut.⁹

Page and Line Numbers	Reason for Striking the Testimony
Page 3, lines 7-9 and 11	Hachey asserts the right to testify about the “relationship between projected natural gas prices and coal prices.” Yet TransCanada has refused to produce information in its possession on that very issue. Allowing this testimony would permit Hachey to opine on the subject but prevent effective cross-examination based on contrary information in TransCanada’s possession. Likewise, given the intentional refusal to produce fuel forecasts for the relevant period, Hachey-an officer of TransCanada- should not be permitted to offer any opinion on PSNH’s fuel forecasts or “factors” PSNH should have taken into account. Again, this would result in the Commission making a decision based on evidence that cannot be countered.
Page 7 lines 16-19	Hachey opines that PSNH had a responsibility to “monitor the relevant markets and raise concerns to the extent that the scrubber project did not make sense.” Yet TransCanada failed to produce information concerning its monitoring of those same markets. That

⁹ A copy of Hachey’s testimony is attached to this motion. The attached copy highlights in yellow the portions of the testimony that the Commission cut. The testimony that PSNH submits should be stricken is highlighted in green.

	information should be presumed to have established that PSNH's decision "made sense," if the adverse inference is to have any meaning. TransCanada should not be permitted to testify to this proposition without the right to cross-examine.
Page 10, lines 3-6	Hachey criticizes PSNH's PowerAdvocate report because it drew conclusions concerning capital construction costs "with no clear understanding of whether or not a peak had been reached due to recent volatility of costs associated with the supply market." Since TransCanada has refused to produce information relating to its own assessment of the supply market, <i>i.e.</i> gas prices, Hachey should not be permitted to testify on this issue.
Page 10, lines 11-16	Hachey opines that a prudent utility would not have begun construction of the scrubber "given other things going on in the market during the summer and early fall of 2008." To the extent those "other things" include forecasts of future gas prices or the impact of fracking, Hachey should not be permitted to testify to how a prudent utility would take them into account when it refuses to identify how (or whether) it did so.
Pages 11, lines 6-8 and page 11, line 12 to page 12, line 6	This portion of Hachey's testimony lays the groundwork for his contention that PSNH did not accurately consider the future spread between coal and gas prices. While the testimony itself offers no opinion on PSNH's statements, Hachey later opines that PSNH was imprudent for not considering other forecasts. Hachey should not be permitted to question or criticize PSNH's forecasts or conclusions given TransCanada's refusal to produce its own forecasts-which may support or affirm those of PSNH.
Page 12, lines 20 and 21 and pages 12, line 23 to page 13, line 11.	Ironically, Hachey criticizes PSNH for failing to provide information about the price spread between natural gas, oil and coal. This is the exact information TransCanada was ordered to produce and withheld. That information might well have confirmed PSNH's information (and should be deemed to have done so.
Pages 14 through 22	Per the Commission's prior finding in Order

	No. 25,663 at page 6, “Mr. Hachey’s testimony discussed gas price forecasts at length. Hachey Testimony at 14-22.” All of this testimony should be eliminated where TransCanada refuses to produce information sufficient to cross-examine this testimony.
Page 15, lines 30-7	Hachey criticizes PSNH’s calculation of a spread between gas and coal prices and the projection of that spread. Hachey should not be permitted to express any opinion on the reasonableness of that projection given TransCanada’s failure to produce its projections and as a result, should not be permitted to comment on it at all, since it is clear that he is opining that the spread in prices and the period of the spread was unreasonable.
Page 15, line 8 to page 16, line 11.	The Commission struck Hachey’s conclusion that PSNH’s reliance on the NYMEX prices was “plainly inappropriate.” (Page 16, lines 10-11.) But the testimony leading up to that conclusion and most particularly at page 16, lines 1-3 and lines 6-9 is an opinion that NYMEX prices are not “indicative of market prices in future years.” Yet TransCanada has refused to produce its own projections of those same prices, information that might have shown whether Hachey’s statement is true-and information specifically sought by PSNH and ordered to be produced by the Commission. Striking the conclusion while leaving all the predicate information, including Hachey’s attachments, is thus an inadequate sanction for TransCanada’s intentional failure to produce its own forecasts.
Page 16, line 17 to page 17, line 21	The Commission excised a portion of this testimony but allowed Hachey to provide his opinion about: “inappropriate methodologies” used by PSNH; PSNH allegedly “ignor[ing] substantial information that was available at or about the time of its September 2, 2008 filing with the Commission;” a conclusion that NYMEX futures had fallen “raising significant questions regarding the validity of [PSNH’s] futures analysis;” that PSNH was “in possession of several reputable forecasts” that

	<p>conflicted with NYMEX; and that “the history of the natural gas market had shown a number of short-lived price peaks with sharp drops following the peak.” Eliminating the conclusion of Hachey’s opinion still allows him to testify that PSNH ignored information, “cherry-picked information” and ignored a history of peaks and price drops. Effective cross-examination of Hachey requires that information in the possession of TransCanada- of which he is an officer-that might well have confirmed PSNH’s futures analysis be available. TransCanada’s intentional withholding of that information should bar Hachey from opining on what the market was likely to do or what PSNH should have considered, considered, or didn’t consider.</p>
Page 17, line 22 to page 18, line 12	<p>The question (“Did natural gas futures pricing support PSNH’s view that the scrubber would provide net customer benefits?”) demonstrates why this testimony should be stricken. Hachey testifies to the reasonableness of PSNH’s projections of future gas prices and that the gas price forecasts used lasted for only a few months. Thus, Hachey offers an opinion on the exact issue covered by the data requests and squarely within the principle that the Commission is striking any testimony related to Hachey’s knowledge of forecasting. Hachey should not be permitted to question PSNH’s forecasts-or provide “Monday morning quarterback” testimony when TransCanada has refused to provide its forecasts of similar pricing from the same time period. Otherwise, there is no real penalty for TransCanada’s intentional failure to obey Commission orders.</p>
Page 19, lines 1-5	<p>Although the Commission struck a portion of this answer, it left Hachey’s conclusion that “forward gas prices had already fallen below levels needed to justify the scrubber.” This presumes that one could predict that future gas prices would not rise. Without information about TransCanada’s own predictions of futures prices at that time, Hachey is permitted to draw the conclusion that “the basis for</p>

	[PSNH's] economic analysis was flawed or outdated," despite TransCanada's failure to produce information that might (and should be presumed to have confirmed) that PSNH's analysis was neither flawed nor outdated.
Page 19, lines 8-15	Despite stating that it would strike language relating to Hachey's knowledge of gas forecasting, the Commission allows Hachey to draw the conclusion that "PSNH developed an assumption about future gas prices for the sole purpose of economically justifying the scrubber," that this "forecast was at odds with contemporaneous forecasts available to PSNH" and that assumptions used by PSNH "did not realistically reflect actual pricing seen in the market." This is exactly what Hachey should not be permitted to say when TransCanada refuses to produce its own forecasts, particularly when TransCanada prevents PSNH and the Commission from knowing whether this conclusion is true, or whether TransCanada made similar forecasts.
Page 19, line 16 to page 20, line 2.	Hachey testifies that the price of natural gas actually delivered did not "validate" PSNH's "desired forecast." This testimony implies, once again, that PSNH intentionally created a false ("desired") forecast as evidenced by the fact that gas prices crashed in 2008. But PSNH has no way of showing whether TransCanada made exactly the same forecasts because TransCanada refuses to produce them.
Page 20, lines 3-22	Hachey has pointed to four forecasts that he claims contradicted PSNH's reliance on NYMEX forecasts. While standing alone, this testimony might be acceptable, in the context of a witnesses' blatant refusal to produce other forecasts readily available to him or his company, the witness should not be permitted to selectively choose forecasts while at the same time declining to disclose whether he (or his employer) has forecasts directly contradicting the four forecasts he selected.
Page 21, line 7 to page 22, line 2.	This testimony falls squarely within the second principle announced by the Commission namely, that it would strike all language relating to the timing of the

	<p>awareness of fracking on natural gas prices. While refusing to produce any forecasts or studies made by TransCanada on that issue (see Request 74b above) Hachey opines that PSNH ignored information available as early as 2006 about the impact of fracking on gas pricing and that “the potential of the unconventional gas supply became clear around 2007. In ordering the production of information in response to Request 74b, the Commission stated: “The requested information is necessary because it may shed light on how industry thought the new drilling technologies would impact prices and on whether PSNH’s interpretation was reasonable.” Order No. 25,663 at 8. Exactly. Hachey and TransCanada should not be permitted to say that a “prudent utility...should have exhaustively researched natural gas supply developments and been aware of this looming issue” when it refuses to say whether it conducted any such research or was aware of the issue before PSNH supposedly should have known of it.</p>
Page 22, lines 21-24	<p>TransCanada contends that PSNH’s President and COO “understood the shortcomings of the analysis by his personnel.” Since Hachey is unwilling to produce TransCanada’s analyses, he should not be permitted to opine on the alleged “shortcomings” of PSNH’s, let alone Mr. Long’s alleged “understanding.”</p>
Page 23, lines 16-23 to page 24, line 1.	<p>Once again, the Commission struck the a portion of this testimony but left nearly all of it intact. Disclaiming any “Monday morning quarterbacking,” Hachey claims that he can opine on information available to PSNH in 2008 and criticize PSNH for failing to consider “carefully assess” such information. Yet TransCanada at the same time refuses to produce what the Commission ordered namely, “fuel price forecasts for natural gas and coal (not oil), that were in the produced by or were in the possession of TransCanada affiliates during the period January 1, 2005, through December 31, 2008 and that were long term forecasts that included prices for</p>

	2012 and beyond.” Order No. 25,663 at 7. That information likely confirms PSNH’s assessment or TransCanada would have produced it. This is worse than Monday morning quarterbacking. It is akin to asking for bets when one side knows the outcome of the game.
Page 24, lines 3-17	Without disclosing TransCanada’s own forecasts, Hachey takes exception to PSNH’s failure to use forecasts that TransCanada selectively identifies, which it claims were available to PSNH (while also failing to identify whether TransCanada placed any weight on those forecasts.) At the risk of repetition, TransCanada’s own forecasts might well have been contrary to the forecasts it selected to criticize PSNH. Since the heart of the “results of [Hachey’s] analysis” are the gas forecasts, his entire conclusion is tainted by TransCanada’s refusal to produce the information the Commission compelled it to produce.
Page 24, lines 7-8	Hachey concludes that a “prudent utility should have considered....projections or forecasts for the price of natural gas as compared to coal.” This is his ultimate conclusion based on the forecasts he claims PSNH should have considered. Given that TransCanada hides what it considered, Hachey should not be permitted to give this opinion.
Page 24, lines 21-23	Hachey contends that if PSNH had performed “additional analyses” in the summer of 2008 it would have concluded that the scrubber presented risks to PSNH customers. Having refused to produce the “analyses” that TransCanada performed in the same time period, he should be barred from drawing this conclusion.
Page 27, lines 7 to page 28, line 2.	Hachey’s concludes that although PSNH “did look at some cost projections for natural gas...they did it in an inappropriate manner...by relying on short term gas price futures....and did not take seriously the longer term forecast information.” This goes to the heart of TransCanada’s intentional violation of the Commission’s orders. If TransCanada had

	<p>complied, PSNH (and the Commission) would know whether TransCanada's long term forecast information confirmed PSNH's view. Moreover, the ability of Hachey to provide conclusions on the effect of gas price forecasts shows why it is impossible to excise portions of his opinion on that issue from his testimony.</p>
<p>Page 29, lines 6-21</p>	<p>This conclusion is based entirely on the statement in lines 17-19 that "[b]ased on all of the information available in this docket it appears that PSNH did not review and consider appropriate forecasts and did not update information about natural gas and coal prices during a critical time in the development of the project." This is exactly the information PSNH sought, and the Commission ordered to be produced. Striking portions of the testimony but allowing Hachey to draw this ultimate conclusion when TransCanada's own projections may well have confirmed (indeed, by inference should be deemed to have confirmed) PSNH's forecasts results in no effective sanction for TransCanada's misconduct in this case.</p>

26. While PSNH has provided details on the portions of Hachey's testimony that should be stricken (if the entire testimony is not eliminated) the foregoing discussion amply demonstrates why piecemeal excision of portions of Hachey's testimony is a hollow remedy. TransCanada offers Hachey as a witness with knowledge about gas price forecasting and any reading of his testimony demonstrates that the testimony is all about such forecasting. Indeed, absent his alleged knowledge of gas price forecasts, it is hard to see what Hachey offers to this Docket or, for that matter, what TransCanada offers.

Conclusion

The Commission recognized the centrality of gas price forecasts and the impact of shale gas development to TransCanada's involvement in this Docket and to Hachey's opinion when it compelled the production of that information from TransCanada ("Mr. Hachey's testimony discussed gas price forecasts at length.") Order No. 25,663 at 6. Allowing Hachey to testify *at all* on such forecasts or the impacts of shale gas development makes a mockery of the discovery process and of this Commission's orders, and materially adversely impacts PSNH's due process rights. Likewise, allowing TransCanada to have any involvement on those issues when it stymied PSNH and the Commission from obtaining information on them is unfair and rewards misconduct.

The Commission has spent many hours ruling on the discovery battles in this docket. To say the least, TransCanada's intentional disregard of the Commission's orders is extraordinary (and likely unprecedented) and calls for an extraordinary sanction. If a party-particularly one in the docket at the Commission's discretion-can openly disobey Commission orders but be permitted to participate and cross-examine on the very issues as to which has failed to comply, it is hard to imagine how this Commission could ever enforce its orders in the future. While PSNH submits that the appropriate sanction for TransCanada's contempt of the Commission's order is rescission of its involvement in this docket, alternatively, the only appropriate sanction is to strike Hachey's entire testimony and to limit TransCanada's involvement in this docket.

WHEREFORE, PSNH respectfully moves the Commission to:

- A. Grant rehearing of Order No. 25,687 to reconsider the matters set forth herein;
- B. Pursuant to RSA 541-A:32, to rescind TransCanada's intervenor status in this proceeding;
- C. Alternatively,
 - a. to strike the pre-filed testimony of Mr. Michael E. Hachey submitted on behalf of TransCanada in its entirety;
 - b. to limit TransCanada's participation in this proceeding;
 - c. to strike additional portions of Mr. Hachey's testimony as identified herein.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Dated: July 16, 2014

By: 

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Certification

I hereby certify that a copy of this Objection has been served electronically on the persons on the Commission's service list in this Docket in accordance with Puc 203.11 this 16th day of July, 2014.

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

Robert A. Bersak