

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

**Motion to Compel Public Service Company of New Hampshire
to Respond to Data Requests Regarding Rebuttal Testimony**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, “TransCanada”), an intervenor in this docket, and moves this Honorable Commission, pursuant to Admin. Rule Puc 203.09(i), to compel Public Service Company of New Hampshire (“PSNH”) to respond to certain data requests TransCanada made of PSNH, the objections to which were provided on August 4, 2014, as described in more detail below. In support of this Motion TransCanada states as follows:

INTRODUCTION & PROCEDURAL HISTORY

1. Through this proceeding PSNH seeks to recover, and receive a return on investment for its \$422 million expenditure on a more than forty year old coal plant. *Prepared Testimony of William H. Smagula* at 16 (June 15, 2012) [hereinafter “Smagula Direct Testimony”]. While it filed limited direct testimony for only two witnesses, on July 11, 2014, PSNH filed six sets of rebuttal testimony for eight witnesses, only two of

whom provided direct testimony in the above-referenced docket.¹ The rebuttal testimony and attachments were over 700 pages long.

2. TransCanada, along with other parties to this docket, propounded data requests on PSNH's rebuttal testimony on July 25, 2014. PSNH provided its objections to the requests on August 4, 2014, and its responses were provided on August 8, 2014. By secretarial letter dated August 12, 2014, the Commission appointed its General Counsel to conduct a technical session and preside over an informal discussion of discovery disputes. On August 15, 2014, to facilitate the best use of this technical session, TransCanada provided a letter to PSNH narrowing the number of requests it sought to discuss at the August 18, 2014 technical session, which limited the number of questions at issue to less than forty. While PSNH objected to nearly half of TransCanada's requests, here TransCanada asks the Commission to compel twenty-eight requests, most of which concern the same issue – market information and the economics which applied to the scrubber during the relevant time period. During the course of the technical session the data requests were further limited.² By secretarial letter dated August 19, 2014 the Commission approved a schedule that required motions to compel to be filed by August 25, 2014 and prehearing motions by September 10, 2014.

3. At its most basic, this motion to compel addresses PSNH's claim, through its objections, that it can avoid producing documentation that this Commission has already found to be relevant and discoverable.

¹ Eric Chung provided rebuttal testimony indicating that he was adopting the testimony of Mr. Baumann, who provided direct testimony. *Chung Rebuttal Testimony* at 2.

² Via electronic mail on August 22, 2014, PSNH indicated to TransCanada that it would be providing additional responses to TC 6-37, -62, -93, -94, -134, -137, -149, -152, -157, -158, -174, and 195. Once TransCanada receives and has the opportunity to review these additional responses, it may withdraw some portions of the below motion to compel.

4. The question in this case is whether PSNH's actions were prudent. "[Prudence] is the degree of care required by the circumstances under which the action or conduct is to be exercised and *judged by what is known, or could have reasonably been known, at the time of the conduct.*" *Order Denying Third Motion for Rehearing*, Order No. 25,565 at 20 (Aug. 27, 2013) [hereinafter August 2013 Order] (quoting *Duke Energy Indiana, Inc.*, Cause No. 43114 IGCC 4S1, PUR slip copy at 108, 2012 WL 6759528 at *108 (IURC December 27, 2012)) (emphasis added).

5. With respect to the scope of this docket relating to PSNH's options, the Commission has stated that:

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. If the processes and decisions of complying with the Scrubber Law were prudently managed, then the resulting costs would be included in rates. Conversely, the evidence may demonstrate that market and regulatory circumstances at the time decisions were being made did not justify continued operation of the plant with the Scrubber installed, and thus did not justify the expenses of the Scrubber. In such a case, the costs of complying with the Scrubber Law would not be allowed into rates, even if prudently managed.

Order Denying Second Motion for Rehearing and Clarifying Scope, Order No. 25,546 at 10 (July 15, 2013) [hereinafter "July 2013 Order"]. The questions at issue in this motion concern what PSNH knew or should have known at the time it was making management decisions relating to this docket, and whether the market and regulatory circumstances demonstrate that PSNH should have exercised an option other than proceeding with the scrubber installation.

6. As demonstrated further below, the responses sought by TransCanada are "admissible or reasonably calculated to lead to the discovery of admissible evidence."

Order on Motions to Compel and Motions to Rescind Intervenor Status, Order No. 25,646 at 3 (April 8, 2014) [hereinafter “April 2014 Order”]. PSNH should be required to respond to TransCanada’s requests; if it fails to produce the required information it must be subject to the Commission’s consequences for failure to comply with discovery orders.

I. MARKET INFORMATION

7. PSNH refuses to produce information sought that is clearly relevant to this docket, for which it has no legal objection, and which is related to its rebuttal witnesses. Further, it refuses to produce information from its parent and affiliates that would aid this Commission in its decision making and which meets the “particularized showing” standard set forth in Order No. 25,663. *Order on PSNH Motion to Compel*, Order No. 25,663 (May 8, 2014) [hereinafter “May 2014 Order”]. This motion first addresses the general arguments to be applied to the data requests in this section, and then addresses individual witnesses and specific questions below.

A. Relevance to this Docket

8. On rebuttal, several PSNH witnesses testify regarding the economics of Merrimack Station and provide opinions regarding other PSNH’s witnesses’ testimony, PSNH’s actions, and other witnesses’ conclusions in this case. TransCanada has asked these witnesses (detailed specifically below) data requests probing the conclusions they have drawn or impliedly relied on regarding markets during the time frame in question. TransCanada has a substantial need for the specific information requested; this information is relevant and necessary to this docket and is not otherwise available from any other source other than through discovery from PSNH and its expert witnesses. In a

nutshell, TransCanada seeks information that is directly related to the scope of this proceeding, is in the possession of PSNH, its experts, and affiliated companies, and is directly related to the testimonies of Mr. Smagula, Mr. Reed, Mr. Harrison and Mr. Kaufman, and Mr. Large and Mr. Vancho.

9. The Commission has concluded that, for example, “[n]atural gas price forecasts during critical times may be necessary to resolve issues in this docket” *May 2014 Order* at 7. As a result, intervenors have been compelled to provide market and economic information, even if that information was not directly related to a particular witness’s testimony. *See, e.g., April 2014 Order* at 14-15 (regarding forward market information for natural gas delivered to New England and bus bar costs of power for a new coal or natural gas plan). For example, while the Commission concluded that market- and economics-based data requests were not related to the Sierra Club expert’s testimony, it found that those requests “nonetheless seek relevant information because the parties argue that PSNH should have been aware of the New England forward market price for natural gas.” *Id.* at 15 (compelling Sierra Club’s production); *cf id.* at 19-20, 28-29 (compelling CLF’s production).³

10. PSNH, the company which seeks a \$422 million recovery, now refuses to provide the information that it sought of intervenors. Inexplicably, given the Commission’s orders in this docket, PSNH objected to data requests directly linked to

³ In Docket DE 08-103, the Commission previewed the analysis it would undertake in this case, indicating that the Scrubber Law “does, however, provide a basis for the Commission to consider, in the context of a later prudence review, arguments as to whether PSNH had been prudent in proceeding with installation of scrubber technology in light of increased cost estimates and additional costs from other reasonably foreseeable regulatory requirements” *Order Denying Motions for Rehearing*, Order No. 24,914 at 13-14 (Nov. 12, 2008). Further, in 2009, the PUC indicated that the scope of this proceeding would include consideration of “the prudence of PSNH’s actions during the construction of the scrubber, including whether it avails itself of the variance procedure under RSA 125-0: 17 in the event of escalating costs.” *Order Defining Scope of Proceeding*, Order No. 24,979 at 19 (June 19, 2009).

what it knew or should have known when it was deciding to invest hundreds of millions of dollars in an aging coal plant.

11. PSNH objected to several requests because it claims that they are unrelated to that witness's testimony. *See, e.g.*, Exhibit A, TC 6-38, -39, -40, -96, -137, -152, -174, -136, -252. PSNH cites, as support for its conclusion, the Commission's statement that "PSNH also directed questions at parties that are unrelated to the testimony sponsored by those parties. We will generally not compel answers to those requests because they do not seek evidence relevant to that party's witness and they could not provide impeachment evidence." *April 2014 Order* at 5. However, *all* of the rebuttal witnesses are PSNH's own witnesses, so any analogy to the Commission's findings in its April 8 Order must fail (those orders concerned questions regarding other parties' witnesses). PSNH sought and obtained the testimony of all eight rebuttal witnesses, and those rebuttal witnesses' testimony fits together like a puzzle – PSNH cannot avoid responding to data requests by segregating its witnesses' testimony into separate silos, in effect pointing fingers between witnesses to avoid answering requests.

12. The appropriate analysis is whether the request is either relevant to a witness's testimony or could be used to provide impeachment evidence. *April 2014 Order* at 5. As PSNH stated in one of its discovery motions (with the parties changed): "[PSNH] cannot limit [TransCanada's] inquiry into [a witness's] opinions only to the precise issues he raises in his testimony. Isn't that what discovery is for? Suppose there were issues outside [the witness's] testimony that he failed to consider but that undercut his testimony? Would they be appropriate for follow-up?". *Motion of Public Service Company of New Hampshire to Rescind TransCanada's Intervenor Status or*

Alternatively to Strike TransCanada's Objections to PSNH's Data Requests and Compel Answers to those Requests at 31 (Feb. 21, 2014) [hereinafter "PSNH Motion to Compel"].

13. Furthermore, with respect to PSNH's employees, as PSNH has argued in this docket, because data requests can be served on any party, PSNH "cannot avoid answering requests on the basis that they may only be directed at [a witness], or that any information not in the possession of that [witness] is off-limits." *PSNH Motion to Compel* at 14. The same is true here; with respect to PSNH (and NU) employees, witnesses cannot hide behind the cloak of their individual lack of knowledge.

B. PSNH's Objection Cannot Be Based on What TransCanada has or Has Not Produced in this Docket.

14. PSNH purportedly refuses to respond to TransCanada's requests because TransCanada did not provide affiliate and parent information in response to some of its data requests. PSNH states, as a discovery objection to several of TransCanada's data requests that "In an act of contempt, TransCanada has refused to obey Commission Orders to provide information in its possession regarding price forecasts; hence, as a matter of fairness, equity, and due process TransCanada is not entitled to this information from PSNH." *See, e.g.*, Exhibit A, questions 6-38, 6-39, 6-40, 6-125, 6-149, 6-153, 6-157, 6-158, 6-160, 6-171, 6-172, 6-183, 6-208, 6-209, 6-210. This reasoning for failing to respond to discovery requests must fail.

15. The "objection" itself is baffling. As the Commission is aware, TransCanada produced the data and discovery responses that were in the possession of the TransCanada entities that are parties to this docket, and produced all information that Mr. Hachey relied upon in developing his testimony. TransCanada's April 25, 2014

Objection to Public Service Company of New Hampshire's Motion to Compel

TransCanada to Respond to Data Requests at 4-5. *May 2014 Order* at 3 (“TransCanada responded to these requests on behalf of the two TransCanada entities that are parties to this docket, but did not respond as to its affiliates.”). In addition to the documents produced by TransCanada, the Commission also found that though it was a “close call,” PSNH had met a “particularized need” standard and that TransCanada should produce information held by non-party affiliates. *May 2014 Order* at 7. When TransCanada did not produce that information, the Commission penalized TransCanada, finding that in the circumstances the proper penalty was redacting parts of Mr. Hachey’s testimony and concluding that it “may draw adverse inferences regarding information TransCanada did not produce.” *Order Denying PSNH's Motion to Reconsider Order No. 25,687*, *Order No. 25,697* at 1 (July 28, 2014) [hereinafter “July 2014 Order”]. Likewise, the Commission declined PSNH’s request to rescind TransCanada’s intervenor status. *Id.* at 3. PSNH now refuses to provide *any* market data, whether it is sought from PSNH, its witnesses, or its parent/affiliates (some of which are represented through witnesses in this docket who are employees of such affiliates, see below).

16. TransCanada has been penalized for its failure to respond to the data requests at issue in the Commission’s earlier orders. While PSNH may seek to appeal the Commission’s decisions on the penalty imposed on TransCanada at the conclusion of this proceeding, this may not be used as the basis for an objection to providing necessary information. This issue is further addressed below, in the witness-by-witness analysis of particular objections.

C. Application of the Above-Referenced Arguments to PSNH's Rebuttal Witnesses

17. The following sections of this motion apply the general principles set forth above to specific witnesses and testimony.

i. William Smagula, Mr. Large and Mr. Vancho

18. Mr. Smagula, Mr. Large and Mr. Vancho provided rebuttal testimony (Mr. Large and Mr. Vancho filed joint testimony) regarding scrubber economics and benefits, but they refused to produce data which is *directly related* to what information was "*known, or could have reasonably been known, at the time of the conduct*" at issue in this case. *August 2013 Order* at 20 (emphasis added). The information Mr. Smagula, Mr. Large and Mr. Vancho refuse to produce is nearly identical to the information that PSNH sought, and the Commission compelled, from TransCanada's non-party affiliates. *See May 2014 Order* at 7-8.

19. PSNH's witnesses now refuse to respond to the following requests:

Q-TC-06-038 (to Mr. Smagula)⁴

Reference your testimony concerning conclusions drawn by Legislators and the Public Utilities Commission regarding going forward with the Scrubber in spite of "higher costs" as well as your testimony on page 23 regarding fuel diversity. Please provide copies of any and all price forecasts for natural gas, electric and coal produced by or available to PSNH, its affiliates, or parent company from 2005 through ~~2014~~2011.

Q-TC-06-208 (to Mr. Large and Mr. Vancho)

Reference pages 4-5 of your testimony regarding economic analyses undertaken by PSNH and page 6 of your testimony regarding Mr. Hachey's testimony. Please provide copies of any and all fuel price forecasts of natural gas and coal, and electricity price forecasts produced by or available to PSNH, its affiliates or parent company from 2005 through ~~2014~~2011.

Q-TC-06-039: (to Mr. Smagula)

⁴ At the technical session on August 18, 2014, TransCanada agreed to limit some of its data requests. Any changes to the original data request included in this filing are shown by striking through the eliminated text and underlining new text.

Reference your testimony concerning conclusions drawn by Legislators and the Public Utilities Commission regarding going forward with the Scrubber in spite of “higher costs” as well as your testimony on page 23 regarding fuel diversity. Please provide copies of any and all documentation in PSNH’s possession, or in the possession of PSNH’s affiliates or parent company regarding the forward market for natural gas delivered to New England from 2008 through 2011.

Q-TC-06-209: (to Mr. Large and Mr. Vancho)

Reference pages 4-5 of your testimony regarding economic analyses undertaken by PSNH and page 6 of your testimony regarding Mr. Hachey’s testimony. Please provide copies of any and all documentation in PSNH’s possession, or in the possession of PSNH’s affiliates or parent company regarding the forward market for natural gas delivered to New England in the 2008-~~2014~~2011 timeframe.

Q-TC-06-040: (to Mr. Smagula)

Reference your testimony concerning conclusions drawn by Legislators and the Public Utilities Commission regarding going forward with the Scrubber in spite of “higher costs”, as well as your testimony on page 23 regarding fuel diversity. Please provide copies of any and all studies regarding the economic viability of coal plants in the ISO-NE region produced by or obtained by PSNH, its affiliates, or parent companies from 2005 through ~~2012~~2011.

Q-TC-06-210: (to Mr. Large and Mr. Vancho)

Reference pages 4-5 of your testimony regarding economic analyses undertaken by PSNH and page 6 of your testimony in response to Mr. Hachey’s testimony. Please provide copies of any and all studies regarding the economic viability of coal plants in the ISO-NE region produced by or obtained by PSNH, its affiliates, or parent companies from 2005 through ~~2014~~2011.

20. PSNH objected to these requests on four bases: relevance, TransCanada’s actions (see Part I(B), above), limitation of the time period requested, and refusal to produce information from its affiliates and parent company.⁵ See Exhibit A.

21. As indicated generally above, these requests are relevant to this proceeding, related to the testimony at issue, and PSNH’s objections are insufficient to demonstrate that it should not be compelled to produce the requested information.

22. More specifically, Mr. Smagula is PSNH’s Vice President of Generation and is “responsible for the safe, reliable and economic operation and maintenance of

⁵ PSNH did not enunciate what time period would be appropriate, though TransCanada agreed, in the August 18, 2014 technical session to limit the dates as set forth above.

PSNH's generating stations." *Smagula Rebuttal Testimony* at 1:9-10. Mr. Smagula discusses the economic analyses PSNH performed regarding the scrubber, asserting that the analyses "indicated that there were positive benefits that would accrue as a result of proceeding with the scrubber project." *Id.* at 13:13-14. Mr. Smagula also provides testimony regarding why PSNH continued with the Scrubber project after the cost increases were understood, and what information PSNH provided to the Legislature regarding the same. *Id.* at 18-20. Mr. Smagula relies on the expert economic and prudence testimony of Mr. Reed, Mr. Harrison, and Mr. Kaufman to support his conclusions. *See, e.g., id.* at 18 (regarding Mr. Reed's testimony). Finally, Mr. Smagula provides extensive testimony about economic outcomes associated with running Merrimack Station in recent years. *See id.* at 22-25.

23. Mr. Large is the Director – Generation Engineering and Technical Support for PSNH, while Mr. Vancho is the Manager – Financial Analysis for Northeast Utilities Service Company. They testify extensively about the analyses PSNH performed regarding the scrubber expenditure and their conclusion that "complying with the mandate to proceed with the scrubber project represented a reasonable economic alternative for PSNH's customers." *Large & Vancho Rebuttal Testimony* at 4-5. They further testify that "gas prices utilized" in their analyses were reasonable. *Id.* at 6:1-4.

24. PSNH seeks recovery for a \$422 million investment but refuses to provide the parties with evidence that is intrinsic to whether it met this Commission's prudent utility standard. PSNH has, to date, refused to provide *any* response to these questions, whether from it or its affiliates, even though it sought similar information from the

TransCanada parties to this docket and it obtained an order to compel TransCanada's affiliates to respond to the following questions:

- “all fuel price forecasts relating to the price of coal, oil and natural gas produced by or available to TransCanada from 2005 through 2012”;⁶
- “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”;
- “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”; and
- “When did TransCanada first acknowledge the impact of Marcellus gas on gas prices? Please provide all documents evidencing that acknowledgment”.

May 2014 Order at 7-8. If a non-party affiliate is required to produce this information even though it is not seeking recovery for a regulated investment, it surely is obligatory for a regulated utility seeking recovery – PSNH itself – to produce this information.

25. Furthermore, with respect to parents and affiliates, the Commission has indicated that if a party can make a “particularized showing that it has a substantial need for specific information from a non-party . . . affiliate, which information is necessary to this docket and not otherwise available,” it will consider such a request. *April 2014 Order* at 35-36. The circumstances here meet that standard.

26. First, in its *May 2014 Order*, the Commission concluded that the information requested from the TransCanada non-party affiliates “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.” *Id.* at 8. If this is the case, then

⁶ The Commission, in its order to compel TransCanada to obtain information from its non-party affiliates, limited this question to the following: “TransCanada must produce fuel price forecasts for natural gas and coal (not oil), that were 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 or beyond.” *May 2014 Order* at 7. However, this was a limitation that applied only to non-party affiliates, not to the TransCanada parties, that had already produced the requested information. Further, the request was not made of the company bearing the burden of demonstrating its prudence.

similar requests of PSNH and its affiliates are even more relevant to determine what PSNH knew or should have known when it was conducting its own analyses (which are highlighted in Mr. Large and Mr. Vancho's testimony).

27. The *Verizon* case, which has been extensively briefed in this docket, applied to data requests from the Office of Consumer Advocate to a regulated utility and sought relevant information from that utility's parent or affiliate. *Re Verizon New England Inc.*, 92 NHPUC 234 (2007). The Commission stated, "[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.*" *Id.* at 237 (emphasis added).

28. PSNH and its affiliates are the *only companies* which can provide the information which was located in-house and which PSNH reasonably could have or should have relied upon in accordance with the Commission's prudence standard. *August 2013 Order* at 20. Presumably PSNH and its affiliates have engaged in a number of capital investment projects during the time period at issue, both in gas and electric markets. In fact, in its objection to data request TC 06-192, PSNH indicates that from 2006-2010, PSNH itself undertook over 1000 capital projects relating to fossil generating plants alone. *See Exhibit A, Objection to TC 06-192.* PSNH and its affiliates likely considered available forecasts of energy prices for the purposes of determining economics of capital projects, a common practice in the industry. *See Capital Project Approval Policy and Procedures* at 5, 12, Attachment to Data Request TC 6-218,

attached hereto as Exhibit B (indicating that generation projects may be brought back to NU's Risk and Capital Committee for additional review and recommendation if there are "[s]ignificant increases in key inputs (e.g., commodity prices)", that generation projects may be required to provide information associated with "Incremental Busbar Costs/Megawatt Hour," and that such projects may be subject to a sensitivity analysis concerning financial assumptions). The simple question here is significantly more compelling than the question applied to TransCanada – what information did PSNH have at its fingertips, and what studies did it conduct with respect to these other projects, and what information did similarly-situated utilities hold that could have – or should have – informed PSNH's actions.

29. Further, PSNH has relied in its testimony on the knowledgebase that its parent brings to this action. PSNH is a subsidiary of Northeast Utilities ("NU"). *Smagula Direct Testimony* at 3:4-5. Throughout filings regarding the scrubber and Merrimack Station, PSNH referred to itself as "NU/PSNH" *See, e.g., id.* at 16. PSNH was careful to enunciate the benefits of its relationship with NU in the development and management of the Scrubber project. *Id.* at 15 ("The permanent FGD substation and the 115kV hi-yard expansion were also directly managed by NU/PSNH because PSNH and NU Transmission had expertise with site electrical transmission and distribution systems."); *id.* at 17 ("Another key NU/PSNH strategy to manage cost was to reduce cost uncertainty by locking in fixed price contacts[sic] for key, large contracts."); *id.* at 18; ("PSNH conducted periodic assessments and other reviews of the CAP, as well as the Power Advocate cost review, R.W. Beck oversight, and an independent external review by NU's Internal Audit Department.").

30. As PSNH indicates in its testimony, PSNH's parent and affiliates hold unique status not only because of their relationship to PSNH, but also as a result of their knowledge and experience. Northeast Utilities "operates New England's largest energy delivery system." *Northeast Utilities 2013 Annual Report* at 1, available at http://www.nu.com/investors/reports/2013_NU_Annual_Report.pdf (last visited August 21, 2014). The company includes several regulated electric utilities, as well as NSTAR Gas and Yankee Gas Service Company, regulated natural gas utilities, which presumably have substantial expertise regarding gas markets. *Id.* at 2.

31. PSNH needed approval from the NU Committee and Board of Trustees for the Scrubber Project to proceed; as a result, information held by NU or PSNH affiliates is clearly discoverable in this case. *See Capital Project Approval Policy and Procedures* at 2, Attachment to Data Request TC 6-218 and associated Data Request, attached hereto as Exhibit B ("In the 2008 timeframe, large projects such as the Scrubber project were governed by the NU Capital Project Approval Policy and Procedures (CaPP)."). The CaPP process applied to all of PSNH's affiliates. *Id.* As PSNH was considering the economics of the Scrubber, its parent and affiliates were apparently conducting analyses which reasonably could help determine what a reasonable utility should have done in PSNH's position.

32. PSNH further opened the door to questions of its affiliates by including, as witnesses, employees of NU who work with PSNH's affiliates and who have expertise in issues vital to this case. Mr. Baumann, who provided direct testimony for PSNH, was an employee of Northeast Utilities Service Company ("NUSCO") which "provides centralized services to the Northeast Utilities (NU) operating subsidiaries, including

Public Service Company of New Hampshire (PSNH), The Connecticut Light and Power Company, Yankee Gas Services Company and Western Massachusetts Electric Company.” *Baumann Direct Testimony* at 1 (June 15, 2013). Mr. Vancho is an employee of NU as its “Manager-Financial Analysis.” *Large & Vancho Rebuttal Testimony* at 2 (July 11, 2014). Mr. Chung is an employee of NU as “Director of Revenue Requirements for Massachusetts and New Hampshire”. *Chung Rebuttal Testimony* at 1 (July 11, 2014). These gentlemen work for the companies that are being asked to produce relevant information, making PSNH’s failure to respond to the relevant data requests truly concerning.

33. Finally, PSNH’s parent and affiliates ought to be required to produce the requisite discovery in this matter, as they stand to benefit significantly from a Commission determination that the company was prudent. Recovery on \$422 million will result in a substantial authorized return that will be a benefit to NU’s shareholders.

ii. Mr. Reed

34. PSNH engaged Mr. Reed to testify on its behalf to “respond to the testimony of other parties to this proceeding relating to the prudence of PSNH regarding its Merrimack Station Scrubber Project . . . as well as to testimony suggesting that PSNH had viable alternatives to pursuing the project.” *Reed Rebuttal Testimony* at 2:14-17. Mr. Reed is “Chairman and Chief Executive Officer of Concentric Energy Advisors, Inc. and CE Capital Advisors, Inc. (together ‘Concentric’).” *Id.* at 1:6-7. Mr. Reed testifies that he has broad experience and has provided testimony “on a wide variety of economic and financial issues related to the energy and utility industry.” *Id.* at 2:7-9. According to his website biography, Mr. Reed “has provided advisory services in the areas of mergers

and acquisitions, asset divestitures and purchases, strategic planning, project finance, corporate valuation, energy market analysis, rate and regulatory matters and energy contract negotiations to clients across North and Central America.” *Reed Biography*, available at <http://www.ceadvisors.com/professional/johnreed.html> (last visited August 20, 2014).

35. Mr. Reed concludes that PSNH acted prudently, and summarizes the conclusions PSNH drew regarding the economics of its expenditure. *Reed Rebuttal Testimony* at 21:13-22:2. Citing PSNH’s filings with the PUC in 2008, Mr. Reed states that “PSNH concluded that the pursuit of the scrubber installation would allow Merrimack Station to continue to be a cost-effective base-load resource with the added benefit of being among the cleanest coal-burning plants in the nation.” *Id.* at 21:23-22:2. In responding to Mr. Hachey’s direct testimony, Mr. Reed states that “A differing view on the future of gas prices, or sources of forecasts, does not constitute imprudent behavior. The fact that PSNH relied on particular sources of data, or an alternative view of the future of gas prices in New England, does not render its actions unreasonable or not in the interest of ratepayers. PSNH performed its analysis in the summer of 2008 based on assumptions known and knowable at the time.” *Id.* at 22:15-20. In concluding that PSNH acted prudently, he cites that fact that “Mssrs. Large and Vancho present testimony demonstrating that PSNH performed real-time analyses that supported the Scrubber Project,” while failing to use his extensive background to question whether those analyses were appropriate. *Id.* at 41:17-19. Mr. Reed further relies on the new analysis that Dr. Harrison and Dr. Kaufman produced post-hoc to shore up his conclusions. *See, e.g., id.* at 37:7-17; 41:19-21 (“The expert testimony submitted by Drs.

Harrison and Kaufman, which I have also reviewed, demonstrates that based upon economic analyses alone, PSNH's pursuit of the Scrubber Project was well within a range of reasonableness.").

36. Notwithstanding his reliance on PSNH's "reasonable" studies, Mr. Reed refuses to respond to questions probing his opinion on PSNH's analysis. In questions TC 6-93 and 6-94, Mr. Reed was asked whether PSNH's reliance on NYMEX data was reasonable given his experience and his opinion that PSNH's analysis was reasonable.⁷ PSNH's sole objection to these questions is that "[t]he reasonableness of fuel price forecasts are addressed by the testimony of Drs. Kaufman and Harrison, not Mr. Reed." *Exhibit A*. However, Mr. Reed testifies that PSNH's analyses were within the range of reasonable, and he adopts Drs. Kaufman and Harrison's analyses in concluding that PSNH acted rationally. PSNH should not be permitted to silo its expert witnesses into discrete categories to avoid questions probing into whether its actions were prudent.

37. In question 6-96, Mr. Reed was asked to provide a study that Concentric did regarding another community which was considering investment in coal plant in Ohio.⁸ In February 2008, the Oberlin, Ohio city council acted based upon a study by Concentric. *See* Alice Ollstein, "Final Power Plant Decision: Council Votes down Coal, *The Oberlin Review* (Feb. 22, 2008), attached hereto as Exhibit C ("Before the meeting

⁷ TC 6-93 states:

Reference page 22 of your testimony. Do you believe that it was reasonable for PSNH to rely on NYMEX futures to analyze the economics for the Scrubber Project for 2012 through 2027?

TC 6-94 states:

Reference page 22 of your testimony. Have you ever relied on NYMEX or similar futures to determine future commodity prices to be estimated out for ten years or more? If yes, please list the circumstances that you have relied on NYMEX or similar futures and provide any written documentation regarding said reliance.

⁸ TC 6-96 states:

Reference pages 18 through 22 of your testimony. Provide the study and any presentation materials associated with CEA's assessment of various energy options for the Oberlin City Council in connection with the decision whether to participate in a pulverized coal plant in Ohio in 2008.

officially began, the consulting firm, Concentric Energy Advisors, presented the findings from their assessment of various energy options to the city council. The council had ordered this study in October This presentation . . . [was] instrumental in the council's final decision.”). PSNH objected to this request on relevance ground, and claimed that the study was unrelated to Mr. Reed's conclusions regarding the reasonableness of PSNH's studies and actions.

38. PSNH's objection must fail, as the Ohio study can help determine what industry information was available in 2008, as well as whether the analyses PSNH undertook were reasonable, given the circumstances. *See May 2014 Order* at 8. Further, the report will indicate whether Mr. Reed's testimony here is consistent with the advice his company provided in 2008.

39. Similarly, PSNH must respond to request TC 6-125.⁹ PSNH's sole objection to this request is that TransCanada failed to provide certain information from non-party affiliates. TransCanada did provide a response to a similar question about fracking, PSNH Request No. 74. Here, PSNH's expert witness concluded that PSNH's contemporaneous studies were reasonable, and that post-hoc studies also support this conclusion. Mr. Reed also indicated that “[b]y 2010 it became clear that technology advances in gas fracking were fundamentally affecting the supply of gas” *Reed Rebuttal Testimony* at 28:9-10. The information sought from Mr. Reed must be produced “because it may shed light on how industry thought the new drilling technologies would impact prices and on whether PSNH's interpretation was reasonable.” *May 2014 Order*

⁹ TC 6-125 states:

Reference page 28 of your testimony. What did you know about fracking in 2008-2009? During 2008 through 2010, did you or any other employee of Concentric Energy Advisors, Inc. refer to the impact of fracking on gas prices in any testimony, report, or study? Please list all such testimony, report, and/or studies and provide copies of the same.

at 8. It also will permit the parties to probe Mr. Reed's conclusions regarding PSNH's actions and may be relevant for impeachment purposes as well.

iii. Drs. Harrison and Kaufman

40. Drs. Harrison and Kaufman work for NERA Economic Consulting, "an international firm of economists specializing in microeconomics." *Harrison and Kaufman Rebuttal Testimony* at 1:16-17. According to NERA's website, it "pioneered in developing approaches for introducing competition in segments such as power generation and gas supply where competition is workable and for improving the regulation of sectors where it is not." *Practice Areas: Energy*, available at http://www.nera.com/59_811.htm (last visited August 20, 2014). NERA states that its reach and knowledge is broad: "Our economists help clients to decide which lines of business to pursue; to divest assets no longer consistent with their strategy; to identify and evaluate opportunities for mergers, acquisitions, and investment; and to develop bidding, trading, contracting, and marketing organizations and strategies." *Id.*

41. In response to several of the data requests highlighted below, PSNH asserts that Drs. Harrison and Kaufman did not testify regarding the prudence of PSNH's actions. However, they conclude in their testimony that PSNH's actions were "reasonable," and that Mr. Hachey and Dr. Stanton's testimony was "unreasonable." *See, e.g., Harrison and Kaufman Rebuttal Testimony* at 7:4-6, 7:26-8:1, 12:9-13, 36:4-11. They conclude if PSNH had cancelled the project it would have been required to pay "prudently incurred" costs (and they rely on a "sunk cost" analysis performed by PSNH which assumes that those costs were prudently incurred). *Id.* at 14:17, 32:18-19. They further assert that Mr. Reed relies on their analysis in drawing his prudence opinion. *Id.*

at 25-7-10. Their testimony regarding the reasonableness of various analyses is, in effect, testimony regarding prudence. As this Commission recently stated regarding the prudence standard,

“In other words, whether an action will be considered prudent depends on whether the action would be considered reasonable by a person with similar skills and knowledge under similar circumstances. *It is a term often used interchangeably with what is considered “reasonable” under the circumstances.* The Commission must determine whether decisions were made in a reasonable manner in light of the conditions or circumstances that were known or reasonably should have been known when the decision was made.

August 2013 Order at 20 (emphasis added).

42. With respect to questions 6-149¹⁰, 6-153¹¹, 6-160¹², 6-171¹³, 6-172¹⁴, and 6-183¹⁵, PSNH’s sole objections were (a) its statement regarding TransCanada’s production of documents; and (for some of the questions) (b) confidentiality. Both of these objections must fail for the reasons set forth above in sections I(A) and (B), above. Confidentiality cannot be a reason for PSNH’s refusal to produce this documentation.

¹⁰ TC 06-149 states:

Reference page 10 of your testimony. Please provide copies of any and all fuel price forecasts or forecasts of electricity prices produced by or available to NERA, its affiliates or parent companies in 2008 and 2009.

¹¹ TC 06-153 states:

Reference page 11, lines 6-8 of your testimony. You cite “supply effects of expanded use of advanced technologies to drill for shale gas (notably horizontal drilling and hydraulic fracturing typically referred to as “fracking”)”. Please provide all sources of information available in 2008-2009 that informed your statements regarding this statement.

¹² TC 6-160 states:

Reference your testimony on page 11. How much was known about the shale gas revolution in 2008 and 2009? Please provide all documents you reviewed to draw your conclusion.

¹³ TC 6-171 states:

Provide all information available to you or NERA relative to the topics of shale gas, fracking, and unconventional gas between 2006 and 2010.

¹⁴ TC 6-172 states:

Did any NERA consultant advise a client that U.S. natural gas reserves had increased significantly due to development of shale gas between 2006 and 2010? If so, provide all supporting documents.

¹⁵ TC 6-183 states:

Reference page 37 of your testimony. Are you aware of any studies regarding natural gas prices that would have been available in mid-2008 that were not listed by Mr. Hachey? Please list all such studies and provide copies of them.

See *May 2014 Order* at 5 (concerning affiliate information and indicating that “TransCanada has the option to provide confidential responses under the normal discovery practices”); *July 2014 Order* at 10 (“[T]he Commission routinely handles sensitive financial information and has the tools available to limit its dissemination”). PSNH reserved no objection related to the relevance or any other consideration associated with these questions and therefore cannot make such a claim at this juncture. That said, the Commission’s prior orders in this matter indicate that all of the information requested in these requests is acutely relevant to the Commission decision in this matter.

43. With respect to questions 6-137¹⁶, 6-152¹⁷, and 6-174¹⁸, PSNH objected solely on the basis that the information sought was “unrelated to the testimony of the witnesses.” See Exhibit A. All three questions directly concern Drs. Harrison and Kaufman’s statements regarding Mr. Hachey and Dr. Stanton’s testimony and conclusions. PSNH appears to believe that because its witnesses did not testify directly about the actions it took¹⁹, but instead criticized the testimony of other witnesses, it could avoid consideration of its own actions. Drs. Harrison and Kaufman testify that the

¹⁶ TC 06-137 states:

Reference pages 5-6 and page 8 of your testimony, was it reasonable and prudent for PSNH to rely on actual natural gas prices from the first four months of 2008, instead of any natural gas price forecast, as an assumption of what the price of natural gas would be on going forward basis for 15 years beginning in 2012, escalated at 2.5% per year?

¹⁷ TC 06-152 states:

Reference your testimony on pages 10 to 11 regarding the economic realities of commodity prices in 2008 and 2009. Do you agree that PSNH concluded that an escalating differential of \$5.29/MMBtu was needed to economically justify scrubber construction? Do you agree with PSNH’s conclusion that the market would support that differential?

¹⁸ TC 06-174 states:

Reference page 19 of your testimony. Please explain whether a prudent utility would have undertaken the analysis that you have performed, and/or whether such a utility would have utilized an already-prepared commodity price projection (such as the EIA futures data).

¹⁹ Drs. Harrison and Kaufman do state “We understand that in mid-2008 PSNH conducted its own economic assessment of the scrubber project, after obtaining a substantially revised estimate of the cost of the Scrubber Project as a result of bids it had received from potential project contractors.” *Harrison and Kaufman Rebuttal Testimony* at 5:17-20.

information Mr. Hachey relied on “does not provide an appropriate basis for assessing the prudence of the Scrubber Project,” *id.* at 8:23-24, and then conclude that their analysis is more appropriate. *Id.* at 8-9. However, the issue in this case is whether PSNH’s actions were prudent, and PSNH should not be permitted to bypass consideration of its own actions by asking its witnesses to perform only a “post hoc” analysis.

44. With respect to questions TC 6-157²⁰ and 6-158²¹, Drs. Harrison and Kaufman fail to respond to the question asked. *See* Exhibit A. Both questions seek to probe what forecasts would have been available to PSNH at the time in question and why the witnesses created a new forecast rather than relying on what would have been available. The witnesses cite their own testimony, describing the steps that they took, failing to respond to the question asked. PSNH did not object to these requests. These questions may have been appropriate for discussion at a technical session with the witnesses, but in lieu of a tech session, TransCanada is forced to seek to compel further response from the witnesses.

45. In conclusion, the data requests that TransCanada seeks to compel fall well within this Commission’s previous orders on discovery in this docket, and the Commission should require PSNH to respond to TC 6-38, -39, -40, -93, -94, -96, -125, -137, -149, -152, -153, 157, -158, -160, -171, -172, -174, -183, -208, -209, and -210.

²⁰ TC 06-157 states:

Provide a list of natural gas price forecasts known to you (e.g., IHS Global Insight, EVA, Deloitte, Seer, Exxon-Mobil, Infonun, etc...). Which of these would have been available to PSNH between 2006 and 2009?

²¹ TC 6-158 states:

Please explain why you did not analyze the gas price forecasts referenced in question 157 to determine the economic impacts the scrubber to PSNH customers. Why did you create a new forecast rather than relying on a forecast that would have been available to PSNH?

II. PSNH MUST RESPOND TO NON-MARKET DATA REQUESTS WHICH ARE DIRECTLY RELATED TO THIS MATTER AND TO ITS REBUTTAL TESTIMONY.

46. In addition to the market-based data described above, PSNH also failed to respond to other data requests for which the parties are due responses under the law and the Commission's discovery practices. Each such data request is considered individually below:

47. First, Mr. Smagula testified (and the other witnesses relied on this testimony) regarding the "sunk costs" associated with the Scrubber investment. *See Smagula Rebuttal Testimony* at 21. TC 6-37²² seeks to probe Mr. Smagula's conclusions and understand how he reached the summarily drawn conclusion in his testimony. In response to TC 6-37, Mr. Smagula provided a report apparently developed for the purpose of his testimony, but the report fails to provide the underlying data, electronic documents, and work papers associated with Mr. Smagula's conclusions. Under the

²² TC 06-37 states:

Reference page 21 of your testimony. What is your understanding of termination provisions in the contracts that PSNH entered into? Is there a difference between the contractual value and the value that PSNH would have had to pay if it had terminated the contract early? Please explain, and provide values PSNH was obligated to pay in the following months and years:

June 2008
July 2008
August 2008
September 2008
October 2008
November 2008
December 2008
January 2009
February 2009
March 2009
April 2009
May 2009
June 2009
July 2009
August 2009
September 2009
October 2009
November 2009
December 2009

discovery standards enunciated by this Commission, Mr. Smagula must do more than merely produce his report in response to TC 6-37. *See Clean Air Project: Development of Costs associated with a CAP Cancellation Scenario*, Attached to TC 6-37 and attached hereto as Exhibit D.

48. Second, Mr. Smagula testified regarding the savings he claims PSNH customers received as a result of certain generation facilities operating during the winter of 2013-2014. *Smagula Rebuttal Testimony* at 22:3-11. Through TC 6-047 and 6-50, TransCanada seeks information from PSNH regarding how Mr. Smagula's reached his conclusion regarding the alleged savings.²³ Inexplicably, PSNH claims that the information sought by TransCanada is irrelevant, or, in the alternative, that TransCanada should search out the data that Mr. Smagula used and recreate his calculations. *See Exhibit A*. This is unreasonable – PSNH relies on Mr. Smagula's calculation of savings throughout its testimony, and should be required to provide the underlying evidence associated with its conclusion, and evidence which would permit probing his conclusion that “affected sources” “created over \$119 in savings to PSNH's customers compared to

²³ TC 06-47 states:

With regard to your testimony at page 22 and the savings to customers this past winter, please explain how such savings were calculated. In so doing, please enunciate all costs included in valuing the power produced by Merrimack Station (e.g., O&M costs, scrubber costs, commodity costs, rate of return, etc...). Please provide all costs on a monthly basis for each month since the scrubber began operating. Please also provide all data used to determine the ISO-NE “daily” price enunciated in Attachment WHS-R-03. Please provide all documentation, including relevant spreadsheets or other calculations you used to calculate the “savings” for ratepayers on a monthly basis for each month since the scrubber began operating.

TC 06-50 states:

Relative to your testimony on page 22, lines 3 – 6, provide a monthly tabulation for Merrimack Station from the date of scrubber operation through June, 2014 of:

- a. MWHs generated
- b. market revenues from all NEPOOL markets
- c. fuel costs billed to consumers
- d. all non-fuel costs billed to consumers
- e. costs incurred but not yet billed to consumers

purchasing an equivalent amount of energy at prevailing market prices.” *Smagula Rebuttal Testimony* at 22:3-6. Presuming that Mr. Smagula’s testimony regarding “savings and “savings” calculation are relevant to this docket (and noting that it is the subject of motions to strike filed by the Office of Consumer Advocate), PSNH should be required to respond to TC 6-47 and 6-50.

49. Third, Mr. Smagula highlights in his testimony issues of fuel diversity and attaches to his testimony a report from ISO-NE called the “2013 Regional Electricity Outlook.” *Smagula Rebuttal Testimony* at 23:12-14. Mr. Smagula quotes the ISO-NE regarding regional reliance on natural gas prices, inferring that Merrimack Station helps to maintain regional fuel diversity. TransCanada seeks a response to TC 6-62, regarding the relevance of ISO-NE’s report to Merrimack Station.²⁴ Attachment WHS-R-04 indicates that certain “at-risk” generation resources may close in coming years. Given PSNH’s reliance on the ISO-NE report regarding fuel diversity and coal plants in New England, it should respond to the question of whether Merrimack Station is included in the ISO’s analysis of facilities at risk to close. Presuming that Mr. Smagula’s testimony regarding ISO-NE is relevant to this docket (and noting that it is the subject of motions to strike filed by the Office of Consumer Advocate), PSNH should be required to respond to TC 6-62.

50. Fourth, TransCanada seeks PSNH’s communications with its experts from NERA.²⁵ PSNH objected to the request “to the extent it seeks materials that are not

²⁴ TC 06-062 states:

Reference your testimony at Attachment WHS-R-04. Is Merrimack Station an “at risk” facility as identified by ISO-NE?

²⁵ TC 06-134 states:

Please provide all communications between NERA Economic Consulting and any representative of Public Service Company of New Hampshire related to Docket 11-250 and/or Merrimack Station.

related to this docket,” but provided *no* materials in response to this question.

TransCanada seeks all communications with the NERA experts related to Merrimack Station and DE 11-250. To the extent that PSNH seeks to withhold any communications on a relevance basis, TransCanada asks that PSNH provide a log of all allegedly irrelevant materials. As such, TransCanada asks that this commission compel PSNH to respond to TC 6-134.

51. Fifth, Mr. Large and Mr. Vancho testify regarding Northeast Utilities’ oversight processes for large capital projects. *Large and Vancho Rebuttal Testimony* at 3-4. In fact, PSNH has produced the economic analysis prepared for the Northeast Utilities Risk and Capital Committee. *See id.* In order to understand how the assumptions PSNH applied in the economic analyses of the Scrubber project compare to the analyses prepared for other projects (e.g., what information would typically be used when a capital investment is being considered), TransCanada asked PSNH to provide information regarding capital projects during the relevant time period, including forecast assumptions for natural gas, electric, and coal plants via TC 6-192.²⁶ PSNH answered part (a) of TC 6-192 but objected to the other subsections, claiming that the documentation required was irrelevant and burdensome. At the technical session held on August 18, TransCanada offered to discuss with PSNH a means to narrow this data

²⁶ TC 6-192 states:

- Reference pages 1-2 of your testimony. With respect to non-Scrubber capital projects at PSNH:
- a. Please explain how economic assumptions are developed (i.e. fuel and energy forecasts and the frequency these assumptions are revised/updated for specific projects).
 - b. Please provide a list of capital projects developed during 2006-2010 and their respective capitalization periods.
 - c. Please provide all forecast assumptions for natural gas, electric and coal developed for the capital projects listed in subsection (b)
 - d. To the extent input assumptions set forth in part (c) are different from the assumptions associated with the Scrubber, please explain those differences.

request, but PSNH has not responded, despite two emails from TransCanada's counsel seeking an update on the status of the response.

52. Finally, in TC 6-195, PSNH asked Mr. Vancho and Mr. Large to provide a list of the analyses that they reference at page 3, lines 12 through 15 of their testimony.²⁷ Mr. Vancho and Mr. Large responded to that request, “[a]ll parties to these proceedings have received all data request responses from PSNH. TransCanada may review those responses and compile the list requested.” *See* Exhibit A. However, Mr. Large and Mr. Vancho’s testimony references “the indicative economic analyses *we* conducted regarding the scrubber project on behalf of PSNH” and goes on to indicate that “[t]hese analyses were previously provided to the parties to this proceeding in response to various data requests during the summer of 2012.” *Large and Vancho Rebuttal Testimony* at 3:12-15 (emphasis added). TransCanada merely seeks clarification about which analyses Mr. Large and Mr. Vancho are referencing in *their* testimony.

53. With respect to “other” responses, TransCanada respectfully asks this Commission to compel PSNH to respond to TC 6-37, -47, -50, -62, -134, -192, and -195.

CONCLUSION

54. In this latest round of discovery, PSNH has refused to respond to questions that are clearly relevant to this docket and has withheld relevant documents that are not protected by any privilege. PSNH is withholding large amounts of relevant materials, in an apparent attempt to either revisit the Commission’s decision regarding TransCanada’s discovery responses, or to “run down the clock” so that the parties have a

²⁷ TC 06-195 states:

Reference page 3, lines 12 through 15 of your testimony. Please identify each analysis that you refer to, and identify the specific data request or other means by which that analysis was provided to the parties.

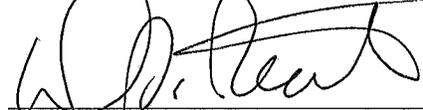
limited amount of time to review the relevant material. Either way, this Commission should apply the discovery orders it has issued in this case to require PSNH to respond to the limited number of requests that TransCanada brings forth in this motion.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Compel PSNH to respond to data requests TC 6-37, -38, -39, -40, -47, -50, -62, -93, -94, -96, -125, -134, -137, -149, -152, -153, 157, -158, -160, -171, -172, -174, -183, -192, -195, -208, -209, and -210; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

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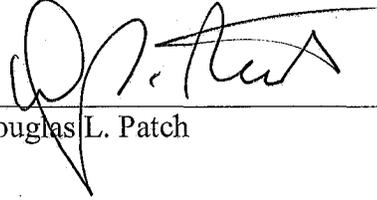


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August 25, 2014

Certificate of Service

I hereby certify that on this 25th day of August, 2014 a copy of the foregoing motion was sent by electronic mail to the Service List.



Douglas L. Patch

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