

**STATE OF NEW HAMPSHIRE**  
**BEFORE THE**  
**NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**  
**Docket No. DE 10-160**  
**Public Service Company of New Hampshire**  
**Investigation into Customer Migration and Power Procurement**

**TRANSCANADA'S POST HEARING BRIEF**

**BACKGROUND**

The Commission opened this docket on June 28, 2010 in response to a May 2010 filing by Public Service Company of New Hampshire (“PSNH”) that recommended that a portion of the PSNH energy service (“ES”) or default service costs that were being assessed to a shrinking number of ES customers should be removed from ES rates and recovered through a non-bypassable rate charged to all PSNH customers. Similar issues had been raised by PSNH in DE 09-180. The number of PSNH ES customers has been steadily declining as customers have migrated from PSNH’s ES rate to the competitive market to take advantage of lower prices. The Order of Notice said that PSNH’s filing raised a number of issues including whether the non-bypassable charge was permitted, what other methods exist to address the cost impacts of customer migration, the interplay of PSNH’s power purchase practices with migration, and whether alternative procurement strategies should be implemented.

In response to the Order of Notice a number of parties, including TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (“TransCanada”), Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (“Constellation”), the Retail Energy Supply Association (“RESA”), Conservation Law Foundation (“CLF”), the New England Power Generators Association (“NEPGA”), Freedom Logistics, LLC and Halifax-American Energy Company, LLC were granted intervention status, participated in discovery, submitted prefiled testimony and participated in the hearings that were held on November 30 and December 1, 2010. At

the close of the hearing and by letter dated January 21, 2011 the Commission identified a number of issues for the parties to address in a post-hearing brief.

### **NON-BYPASSABLE CHARGE**

TransCanada believes that it would be contrary to New Hampshire law and misguided public policy for PSNH to be allowed to charge a portion of the fixed costs of its generating units to all customers, including those customers who obtain their power from competitive suppliers. The underlying premise of PSNH's argument in support of a non-bypassable charge is that there is a benefit to all of PSNH's customers, ES and non-ES customers, for it to own generation that is used to provide service to the customers who do not or, in the case of smaller customers, effectively can not at this time shop for an alternative power provider. PSNH often refers to this benefit, which in its opinion is associated with providing more than just power, but also power from generating sources that it owns, as "backup supply" or "backup service". See for example, Transcript Day I ("TS I"), p. 15, 17, 19, 109, 156, 179. TransCanada submits that the facts presented in this docket do not support this claim by PSNH, that they support a very different conclusion, and that it is no longer in the economic interests of PSNH ratepayers for the company to own generation. Allowing PSNH to institute a non-bypassable charge to cover some of the fixed costs of owning and operating its generating units ("the most easily calculated and readily defineable fixed costs" as PSNH's witness Mr. Baumann put it (TS I, p. 94)), would run afoul of New Hampshire law and would constitute a significant public policy mistake that is contrary to the fundamental state goals of allowing customers to choose among electricity suppliers and encouraging the development of a fully competitive market. RSA 374-F:3, II and VII; RSA 374-F:4.

The prevailing view is that energy prices will remain flat for some time (TS II, p. 104), that there has been a fundamental shift in the region (TS I, p. 203), that "the world is changing, in terms of energy and fuel sources", and "this kind of problem will persist" (TS II, p. 27). As Michael Hachey testified on behalf of TransCanada, there have been fundamental changes in the natural gas market that drives current electricity prices in New England as well as credible forecasts of future prices. TS II, p. 56. The expectation is that the ES rate will stay above market. TS II, p. 149. Moreover, as the spread

between PSNH's fixed costs and the market price increases, migration, which is already well over 30% of PSNH's total load, is likely to increase. TS I, p. 115. In addition, as Exhibit 10 shows, the percentage of migration of the load supplied to Large C & I customers for PSNH as of September 30, 2010 was 92.01% and the percentage of Large C & I customers who had migrated was 77.78%.

As Mr. Baumann testified on behalf of PSNH, what it is trying to do by proposing this non-bypassable charge is "to dollarize a benefit associated with that supply, that safety net". TS I, p. 180. The question the Commission needs to ask itself, however, is how PSNH's continued ownership of generation can be considered to be a benefit not only to PSNH's ES customers, but also, in order to justify the imposition of this proposed charge, to the customers in PSNH's service area who are not ES customers. As the Commission analyzes the "benefit" of having PSNH's generation as a "backup supply" it should also keep in mind that ES customers are paying a price that is, and has been for some time, above market, and that Unitil and National Grid default service customers in New Hampshire are paying less than PSNH ES customers. TS II, p. 21. Additionally, TransCanada submits that the Commission should ask whether the PSNH customers really care whether the power used to provide default service comes from a generating source that is owned by PSNH or from the market as long as they have such a service available and as long as the price stays affordable. The benefit of a "backup supply" for customers will be there through default service regardless of whether the power is supplied by PSNH's generation and supplemental power purchases or as the result of an RFP for the power.

PSNH argued throughout this proceeding that the ES rate represents a fairness issue, that it became, at some vaguely defined point in time (TS I, pp.55-56), "unfair" to ES customers, who are now mostly smaller customers, because they alone have to pay the costs associated with backup supply. During the course of the hearing, however, it became clear that the issue of fairness needs to be viewed from a number of different perspectives. For example, what about the issue of fairness to customers who have migrated and are paying for the fixed costs of the generation that is actually being used to supply them with power? TS I, p. 88-89. Should those customers have to pay twice for fixed costs of generation? What about fairness to PSNH ES customers vis-à-vis other

New Hampshire ratepayers taking default service from their distribution utilities? TS I p. 179; TS II, p. 101-102. PSNH's ES rates are higher than Unitil's or National Grid's (TS I, p. 129; TS I, p. 200; TS II, p. 33) even though all three have about the same level of migration (TS II, p. 34). And what about fairness to the PSNH ratepayers who have overpaid hundreds of millions of dollars for this alleged benefit and "service"?

TransCanada also submits that as the Commission evaluates the issues in this docket it must take into consideration the long term consequences of opening the door for PSNH to levy a non-bypassable charge on all customers. What PSNH is asking for at this point in time is for approval to assess a charge that would allow them to recover some of the fixed costs of their generation (approximately \$40 million). During the course of the proceeding, however, it became clear that if PSNH were allowed to levy this non-bypassable charge it is highly likely that the company will ask that other generation and supply costs be included in this charge, thus increasing the size and impact of the charge. If successful in this initial request PSNH will be back asking either the Commission or the Legislature for the recovery of power purchase expenses and then the costs of the upgrade at Merrimack Station through a charge on all customers (TS I, p. 111, 112; p. 127; p.149; p. 151). PSNH views this as a "small step" (TS I, p.151). As Mr. Baumann testified, "you'd have to be kind of flexible in the future as to what type of costs go into that non-bypassable rate." TS I, p. 152. What PSNH is really asking the Commission to do is to open the door to a non-bypassable charge that it will then ask to increase and expand in the future. Taking this step would set a dangerous precedent and further deepen the price gulf and exposure risk between PSNH customers and those of other New Hampshire distribution companies.

From a purely legal perspective TransCanada submits that it would be contrary to New Hampshire law to allow PSNH to collect this charge. RSA 374-F:3, V(c) provides: "The allocation of the costs of administering default service should be borne by the customers of default service in a manner approved by the commission." The language of this statute is very clear: the costs of the default service are to be borne by those customers, not the customers who obtain their service from another supplier. Further, RSA 374-F:3, V(e) provides that as competitive markets develop, the Commission may approve alternative means of providing this service, but such means must be "designed to

minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, if the commission deems such means to be in the public interest.” The establishment of a non-bypassable charge would in all likelihood harm the development of competitive markets by unfairly shifting responsibility for fixed costs and artificially reducing the margin between the ES rate and the market rate. To implement a non-bypassable charge when the market for competitive power is providing meaningful opportunities for large customers in New Hampshire would be contrary to New Hampshire law as well as a step backwards from a public policy perspective.

There is also language in the restructuring law that says that exit fees are not a preferred recovery mechanism for stranded costs, RSA 374-F:3, XII (d), though the costs that PSNH is proposing to include in the non-bypassable charge would not qualify under the definition of stranded costs in RSA 374-F:2, IV. See Direct Testimony of Steven E. Mullen dated December 2, 2009 in docket DE 09-180, pages 5 and 6. The non-bypassable charge that PSNH is proposing is different than a stranded cost charge. TS II, p. 149. The only kind of non-bypassable charges contemplated by the law are the system benefits charge referenced in RSA 374-F:3, VI, the stranded cost charges referred to in RSA 374-F:4, V and defined in RSA 374-F:2, IV, and the distribution and transmission expenses charged to all customers. What PSNH is proposing fits into none of these categories and relates directly to energy supply, as distinct from delivery, issues.

PSNH has argued that it should be allowed to implement this non-bypassable charge because the current economic situation results in different classes of customers being treated differently and that this is contrary to RSA 374-F:3, VI (“Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted unfairly among customers.”) There is little doubt that the current economic situation has tended to benefit larger customers who are willing to participate in the competitive market more than smaller customers. Even when the price of default service was either closer to or less than market prices and migration levels were much lower, it was the larger customers who tended to take advantage of the market, not the smaller customers. The way to address this issue, however, is to find new

ways to encourage smaller customers to participate in the market, not to authorize unfair and arguably illegal cost shifting through the use of a non-bypassable charge that will have the effect of discouraging competition and further hobbling businesses and institutions facing a multitude of cost challenges in the current economy. While as noted above one of the goals of restructuring is to benefit all consumers equitably, as is the case with virtually all aspects of ratemaking such laudable goals can never be accomplished to perfection. Moreover, to the extent any inequity exists in the current situation it is more about the willingness and ability of a customer to participate in the market than it is about some structural defect in the implementation of restructuring, which RSA 374-F:3, VI (cited above) seems to be contemplating. Finally, as the legislative history of RSA 369-B:3-a shows, the Legislature and PSNH understood that PSNH's default service (provided primarily through its generation) was going to be used much more by residential and smaller customers. Appendix A, page 23 (using the consecutive numbering at the bottom of the pages) (Mr. Long: "I view that default service would continue to use our generation to provide default service, which will probably be for more of the customers, certainly I think, for most residential and small customers.")

As the language of RSA 369-B:3-a and the legislative history of this statute described in more detail in the Divestiture section below indicates, this statute created a mechanism to be used when it became uneconomic for PSNH to continue to own generation and use it to provide default service. PSNH clearly understood this in 2003, as the legislative history shows. Nonetheless, it is now trying to avoid divestiture, the statutory solution to PSNH's ownership of generation becoming uneconomic, the solution that it understood and supported in 2003. PSNH is now trying to avoid divestiture by coming up with a different approach, and denying the economic reality of its generation assets' eroded value by proposing a non-bypassable charge. This approach was never contemplated by the law and the Commission should not allow PSNH to impose such a charge on all customers. RSA 369-B:3-a does not say that if it becomes uneconomic to operate its generating plants PSNH can go to the Commission and seek to recover its fixed costs through a non-bypassable charge.

## **RFP FOR POWER**

PSNH should be required to obtain the power that it needs to serve default service customers through a transparent and competitive RFP process. While PSNH has consistently resisted attempts to require it to replace the sole-source managed portfolio approach with the competitive and transparent approach used by so many other distribution companies in New Hampshire and New England, PSNH's arguments against an RFP are not persuasive and the economic history of its efforts shows that it has not benefited ES ratepayers. It is a fundamental principle that an RFP process leads to lower prices. As Michael Hachey testified on behalf of TransCanada: "we're looking for ...an open and transparent RFP for the products needed to provide that supplemental power..." TS II, p. 75. Allowing PSNH to continue with the managed portfolio model that it currently uses will perpetuate a practice that has cost PSNH ratepayers hundreds of millions of dollars and put PSNH out of step with other load serving entities around New England. The Office of Consumer Advocate and other parties to this docket, other than PSNH, support the use of an RFP (TS II, p. 11). Under an RFP process the risk is on the supplier, not the ratepayer as it has been in recent years, much to the detriment of PSNH ratepayers. TS II, p. 29. One of the underlying principles of restructuring has always been to transfer the risks from ratepayers to participants in the market. What TransCanada and other parties to this docket are proposing is consistent with that fundamental principle and addresses the perverse incentive that the more the utility spends, the more it earns.

There is a question of how extensive the RFP process should be, i.e. should it be for the amount of power that PSNH needs beyond what is provided through its generating assets, at least until divestiture. Should PSNH be required to sell the power that it generates and then issue an RFP for all of the power it needs to provide default service? Should the RFP be an all requirements bid, or instead should it be for blocks of power on an as needed basis, should PSNH put out a bid for a strip of power that it needs at any particular point in time? The Commission has also asked the specific question of whether it would be legal to require PSNH to sell the power it generates into the market and then to issue an all requirements RFP.

RSA 369-B:3, IV(b)(1)(A) says that “PSNH shall supply all...default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission.” PSNH has argued that this language means that it must use the power that it generates for default service. Mr. Allegretti on behalf of Constellation suggested that the Commission might take an approach that is similar to one that has been used by National Grid in Massachusetts whereby Grid actually delivers output that it has purchased to the ES suppliers, who then pay Grid the hourly spot market price for the power. TS II, p. 151-153; Exhibit 16, p. 20. TransCanada believes that it makes sense for PSNH to obtain as much of the power as possible that it needs to provide power for default service through a competitive RFP process and believes that ultimately the competitive market and the customers who remain on the ES rate will benefit from such an approach. We therefore encourage the Commission to take a definitive step in the direction of competitively procured power through a transparent process, a process that this Commission is intimately familiar and presumably comfortable with in light of the processes used by other New Hampshire utilities and approved by this Commission. To require PSNH to do this would also be in step with what its affiliates are required to do in both Connecticut and Massachusetts. TS I, p. 88-89.

As became clear during the course of the proceeding, one other reason to implement an RFP process is to eliminate the need for a prudence review of PSNH’s purchases of power to supplement what it obtains from generation. TS II, pp. 123-124. This could save the Commission and the company a significant amount of time and resources. The current situation puts the Commission in the uncomfortable position of having to Monday-morning quarterback decisions that are made, a process that is time consuming and difficult at best with limited results to benefit customers at risk from poor purchasing decisions. TS II, p. 59-60.

From a purely legal perspective TransCanada believes that at a minimum the power needed to serve default service customers beyond what is provided by the generating assets owned by PSNH should be obtained through a competitive bid process. RSA 374-F:3, V(c) provides: “Default service should be procured through the competitive market and may be administered by independent third parties.” This

language indicates a clear preference for obtaining power to serve default service customers through a competitive process, not the singular and narrow managed portfolio method through which PSNH currently obtains such power. Similarly, RSA 374-F:3, XIV says: “New Hampshire should move deliberately to replace traditional planning mechanisms with market driven choice as the means of supplying resource needs.”

There are thus two reasons, one economic and one legal, for making this change. As the evidence in this docket shows, PSNH’s ratepayers have significantly overpaid for the power needed to provide default service, so the current methodology is not working. Secondly, under the provisions of law cited above it is clear that default service should be procured through the competitive market. While the law allows the Commission to establish default service that is “appropriate to the particular circumstances of each jurisdictional utility”, RSA 374-F:3, V(d), TransCanada submits that this should not be interpreted to perpetuate a mechanism that does not work to the benefit of PSNH ratepayers and is not consistent with the principles and specific provisions in the restructuring law. Both Unitil and National Grid use a mechanism that works efficiently and keeps default service rates down for customers, so there is no reason to allow PSNH to continue to utilize a mechanism that has not worked well for ratepayers and further claim it as an alleged “benefit”. That does not comport with the direction the Legislature has provided for obtaining such power. In addition the Legislature has directed that as competitive markets develop the means of providing default service should be “designed to minimize customer risk”. RSA 374-F:3, V(e). The evidence in this docket shows that the prices default service customers have had to pay have been increased by virtue of the methodology that PSNH has used. The methodology should be changed to an RFP process so that the risks to default service customers can be minimized by placing them instead on the suppliers. The evidence in this docket clearly shows that the power needed to serve ES customers could be provided more economically through an RFP process.

## **DIVESTITURE**

RSA 369-B:3-a put a hold on the divestiture of PSNH’s generating assets that was required under restructuring. Passed in 2003, this statute prohibited the sale of PSNH fossil and hydro generating assets (after its share in the Seabrook nuclear generating

facility had been sold) until April 30, 2006. After that date “PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so” and they provide for “the cost recovery of such divestiture”. With consideration of all the facts in this docket, it appears that it is now clearly in the economic interest of PSNH’s retail customers for PSNH to divest. The situation that has led PSNH to propose a non-bypassable charge is proof that it is no longer in the interests of its ratepayers for PSNH to continue to own generation and the situation is not likely to get better. In fact, it is likely to get much worse. Merrimack Station scrubber costs are looming on the horizon as are other purchase power agreement costs that will drive default service rates up further. TS I, pp. 206-207 (the impact of the Merrimack Station scrubber will increase expected ES rates by 1.1 cents kWh for the first 12 months). The economics of PSNH owning generation and using the expensive power from that generation to provide power to ES customers are no longer favorable.

It is instructive to look at the legislative history of SB 170 (which was enacted as Chapter 21 of the Laws of 2003 and which created RSA 369-B:3-a) from the 2003 legislative session. In a statement to the Senate Committee on Energy and Economic Development found on page 6 of Appendix A to this brief Senator Robert Clegg (one of the sponsors of SB 170) made it clear that the intent of the bill was that “if we find that it’s not in the consumer’s best interest to maintain power plants, that we have PSNH divest them.” Later during that hearing (page 21 of Appendix A) there was an exchange between Senator Ted Gatsas and Gary Long on behalf of PSNH in which Mr. Long says:

If the prices go down to three cents, this bill says, *if it becomes economic, then we go to the PUC and say it is time to do something, time to close the plants down, it’s time to sell them.* So, this bill already answers that question. If the market changes, I think the Public Utilities Commission is quite capable of presenting information to them and saying, ‘Okay, divest if you think there is a market’ or ‘They are old plants, shut them down’. You don’t need to look at it every two years because *this sets the standard of economics for customers and I think it is a good standard.*” [Emphasis added.]

Similarly on page 19:

“[O]nce we get past this kind of moratorium that we can’t divest, then as we go out in time, and we have to do what Senator Gatsas implied, which is, *as circumstances change, we may have to go back to the Commission and say circumstances changed.* But, if it continues to be that this is highly economic for

customers, then we continue to serve customers, from that generation, as long as it is running. [Emphasis added.]

This is exactly what most of the parties to this docket are now saying to the Commission, circumstances have changed, it is time to take action in the manner anticipated in the law and in the way that PSNH clearly understood the law would operate. Furthermore, this legislative history supports the argument that it is the Commission's decision, not PSNH's, on whether it is appropriate to divest and PSNH appeared to accept that.

TransCanada submits that RSA 369-B:3-a clearly contemplated the situation that now exists, i.e. that the retention of generating assets by PSNH is no longer in the economic interests of PSNH ratepayers, and given this state of affairs that appropriate steps consistent with RSA 369-B:3-a should be taken to address this. How long should the Commission wait before taking action or as Commission Below asked Mr. Traum: "When is it that we know that it's appropriate to pursue a remedy like divestiture? When is it that we know that this is something more than, you know, an intermittent symptom that we can deal with or it's something grave?" TS II, p. 44. TransCanada would argue that the situation has gone on for long enough and based on what is most likely to happen in the future it is not going to change, a position that Mr. Traum and the OCA agreed with. TS II, pp. 44-45.

While PSNH has argued that continued ownership of generation is a hedge for customers, the Commission must ask itself how worthwhile such a hedge really is given the overpayment by PSNH ratepayers of at least \$100-200 million. TS I, p. 202; TS II, p. 22. "PSNH's decision resulted in millions of dollars in excess of market – customers have to pay for." (TS II, p. 30-31). The reality is that PSNH customers would have been far better off had PSNH bought the supplemental power it needed to serve ES customers on the spot market. TS II, p. 46-47. PSNH's ownership of generation is a very expensive hedge product that is not working for the benefit of customers. TS I, pp. 194-185.

The Commission asked the parties to address the question of whether the Commission has the authority to require PSNH to divest its assets. TransCanada submits that it does have the power to do so and the language and legislative history of RSA 369-B:3-a support this; the Commission clearly does have the power to order divestiture if it determines that the economics do not justify continued ownership. Even if the

Commission were to decide that it did not have the authority to order divestiture, it could find continued ownership of generating assets to be imprudent and not allow PSNH to recover the costs of owning and operating the generating assets going forward.

Most of the parties agreed that divestiture should be addressed in a separate proceeding. TransCanada agrees with that approach, though it believes that a separate proceeding ought to be opened and noticed and then merged with the PSNH IRP docket, DE 10-261, which is already opened and includes in its scope a review of the propriety of PSNH's continued ownership and operation of Newington Station. This would be the most administratively efficient way to do this.

### **STAY OUT PROVISIONS AND SEPARATE DEFAULT SERVICE FOR LARGER CUSTOMERS**

Mr. Hachey testified that a stay out provision is “a little on the crude side” and that it would be better to price the service for customers who want to come back to an ES rate. As he stated, once customers are gone generally they are gone, “customers aren't looking back anymore”. TS II, p. 87. This is supported by the experience with gas customers. TS II, p. 41. As Mr. Traum testified, a premium on those who have left and come back could be crafted so it wouldn't violate the exit and entry fee provision. TS II, p. 38-39. As Mr. Traum also said, the Commission should take care to make sure that it does this in a way that does not stifle competition. TS II, p. 42.

In lieu of a stay out provision Mr. Hachey advocated allocating costs differently to different classes of customers. TS II, p. 52-53. As he also testified, larger customers have a full variety of options in the marketplace, so there is no need to preserve the ES service for them: “PSNH has been trying to preserve a power supply for people that don't really need it.” TS II, p. 63. It is more important to get the pricing of the service right. TS II, p. 66. See also Mr. Hachey's prefiled testimony, Exhibit 14, page 10.

TransCanada submits that the Commission should require PSNH to establish a separate default service rate for customers who leave the default rate and want to preserve the option to come back. Taking these customers out of the mix will allow for better planning for the power needed to serve the smaller customers who, at least for the time being, are not likely to have the opportunity to shop for power.

## **POR PROGRAM**

To address the fairness issue and to assist in moving the remaining customers to a competitive market a POR program has been recommended by some parties. This program is already in place in Connecticut and soon to be in Massachusetts in the service areas of PSNH's affiliates. TS I, p. 98; TS I, p. 210. As Mr. Hachey and others suggested "the best party to mitigate risk is the utility - the party that can pull the meter". TS II, p. 87. A POR program is consistent with this principle. TransCanada believes that the Commission should also explore the other suggestions that Mr. Allegretti included in his prefiled testimony (POR program, customer referral program, electronic interfacing) to try to spur the development of the market for small customers in New Hampshire. Exhibit 16, pp. 23-25.

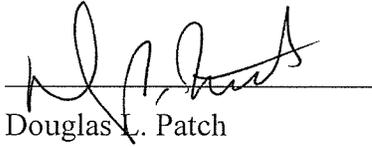
## **CONCLUSION**

The Commission should deny PSNH's request to implement a non-bypassable charge because it would be contrary to law to allow them to collect such a charge and it would be contrary to sound public policy principles. The Commission should at a minimum take the further step of requiring PSNH to do an RFP for any purchases of power that it needs to make to supplement the power provided by the generation that it currently owns as a means of ensuring that PSNH is obtaining the best price for customers and avoiding the sole-source decisions that have led to cost overruns in the purchase of power. The Commission should open a docket to address the issue of the divestiture of the generation that PSNH still owns and should merge that docket with the PSNH IRP docket. Finally, the Commission should consider and implement a number of options that will assist in developing the competitive market for smaller New Hampshire customers.

Respectfully submitted,

TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc.

By Their Attorneys



Douglas L. Patch

Orr & Reno, P.A.

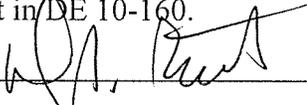
One Eagle Square  
Concord, N.H. 03302-3550  
(603) 223-9161

Dated: February 25, 2011

Certificate of Service

I hereby certify that a copy of the foregoing Petition has on this 25th day of February, 2011 been sent by email to the service list in DE 10-160.

By: \_\_\_\_\_



Douglas L. Patch

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