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

Joint Objection to Public Service Company of New Hampshire's Motion for Rehearing of Order No. 25,546

NOW COMES the Office of the Consumer Advocate ("OCA"), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada"), the Conservation Law Foundation ("CLF") and the Sierra Club ("SC") (collectively, the "Moving Parties"), and objects to Motion of Public Service Company of New Hampshire for Rehearing of Order No. 25,546 dated August 9, 2013 ("Motion") pursuant to Admin. Rule Puc 203.07(f). In support of this Objection the Moving Parties state as follows:

1. On July 15, 2013 the Commission issued Order No. 25,546, an order responding to the Joint Motion for Rehearing, Clarification and/or Reconsideration of Order No. 25,506 submitted by the Moving Parties. On August 9, 2013 Public Service Company of New Hampshire ("PSNH") submitted the Motion to which the Moving Parties are now objecting. In the Motion PSNH argues that "[t]he July 15 Order conflicts with prior orders, is internally inconsistent, ignores the plain language of the statute and construes the statute in a way that renders it unconstitutional." Motion at 1.

2. The Commission may grant rehearing when a motion states "good reason for the rehearing." RSA 541:3. Such a showing may be made "by new evidence that was

unavailable at the original hearing, or by identifying specific matters that were either 'overlooked or mistakenly conceived.'" *Verizon New Hampshire Wire Center Investigation*, 91 NH PUC 248, 252 (2006), quoting *Dumais v. State*, 118 N.H. 309 (1978). See also *Lambert Const. Co., Inc. v. State*, 115 N.H. 516, 519 (1975). "A successful motion does not merely reassert prior arguments and request a different outcome. See *Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (2003)." 91 NH PUC at 252. RSA 541:4 requires that a rehearing motion "set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

3. In the Motion PSNH falls back on the same arguments that it has made in prior pleadings in this docket. PSNH argues once again that the scrubber law, RSA 125-O:11-18 "mandated" them to build the scrubber and that PSNH "had no discretion whether to do so" (Motion at 1) and falls back on the nonsensical argument that this Commission has previously rejected, that the law required PSNH to build the scrubber at any cost[1] including an unconstrained entitlement to recover its uncapped costs in rates, with its self serving insistence that all legal and constitutional tenets of the Commission's rate making obligations and duties have been annulled. (Motion at 5).[2] PSNH's arguments also once again ask the Commission to ignore its significant involvement in

[1] See Order No. 25,445 (December 24, 2103), pages 25-26: "PSNH's interpretation that the law required installation of the Scrubber irrespective of cost would have allowed PSNH, or another utility owner, to install scrubber technology costing many billions, a decision which flies in the face of common sense and would violate the principle of statutory interpretation that one avoid an illogical or absurd result when construing legislative language. *In re Johnson*, 161 N.H. 419, 423 (2011) *citing Weare Land Use Assoc. v. Town of Weare*, 153 N.H. 510, 511-12 (2006); and *In re Alex C.*, 161, N.H. 231, 235 (2010) *citing State v. Gubitosi*, 157 N.H. 720, 723-24 (2008). It would not comport with the statute's express understanding that the mercury reduction requirement was part of a balanced approach that could be accomplished at a reasonable cost to consumers." See RSA 125-0:11, VIII.

[2] See Motion at 5 (In the Commission's review of PSNH's actions and expenditures, there is "no cap on costs or rates" and the Commission lacks "any alternative review mechanism.")

getting the law drafted and passed in 2006[3] and its active opposition in 2008 and 2009 to any and all efforts to study whether the project should proceed. PSNH undertook these efforts despite what amounted to almost a doubling of the projected cost to complete, significant changes in the demand for electricity as a consequence of a serious economic recession, declines in the price of natural gas, increases in customer migration and the prospect of significant other capital investments to address environmental regulations.[4] PSNH's arguments also ignore not only the plain language of RSA 125-O:18 giving the Commission the authority and responsibility to conduct a prudence review, but also the Commission's underlying long-standing responsibility and authority to conduct such a review.[5] Adopting PSNH's argument on this point would require that the Commission abdicate its constitutionally-derived mandate to balance investor and consumer interests in fixing just and reasonable rates. It would also require that the Commission disregard the variance and prudence review sections of the law, contrary to one of the fundamental statutory construction principles, i.e. that statutes must be read as a whole, giving meaning to all of the provisions in the law. *Appeal of Public Serv. Co. of N.H.*, 141 NH 13, 17 (1996).

4. Taking PSNH's argument regarding what it says is the "mandatory cost recovery provision of RSA 125-O:18" (see p. 2 of the Motion) to its logical conclusion would render the statute meaningless, contrary to principles of statutory construction, and

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[3] See Gary Long's September 2, 2008 letter to the Commission in DE 08-103, page 2, where he says that PSNH "spearheaded" the collaborative effort that resulted in the law and where he took credit for "crafting" of the law.

[4] See Docket No. 08-103 and the legislative history of SB 152 from the 2009 legislative session.

[5] "Independent of RSA 369-B:3-a, the Commission has authority to require PSNH to evaluate the economics of its generation units and to take appropriate action...in any relevant proceeding and at any time, if we determine that it is imprudent for PSNH under the circumstances to continue operation of any of its generation units, we can deny recovery of the associated costs through rates pursuant to RSA 369-B:3, IV(b)(1)(A)." Order No. 25,256 (July 26, 2011), DE 10-160, 96 NH PUC 407, 428.

make a mockery of the prudence review requirement in RSA 125-O:18 and the Commission's underlying authority to ensure that a utility's assets continue to be "used and useful". *See* RSA 378:28. PSNH goes even further when it says that the Commission erred "because it fails to accept that the decision whether it was prudent to build the Scrubber was made by the Legislature in 2006." (Motion at 4.) Again, PSNH is blatantly and irresponsibly asking the Commission to ignore the statutory requirement of a prudence review contained in RSA 125-O:18 and longstanding precedent of this Commission. PSNH's argument, when taken to its logical conclusion, is patently absurd and contrary to principles underlying the necessity of public utility regulation to protect ratepayers from the abuse of a monopoly. Nowhere in the law does it grant PSNH such unlimited discretion in spending on the scrubber project, nor does the scrubber law restrict the Commission's traditional and fundamental authority to act as the arbiter between the interests of the customer and the interests of the regulated utility and to insure that rates are just and reasonable. RSA 363:17-a; RSA 374:2. In fact quite the contrary, a section of the scrubber law, RSA 125-O:18, explicitly requires that the Commission conduct a prudence review. The Commission recognized this language in its order in DE 08-103, *Re Investigation of PSNH's Installation of Scrubber Technology at Merrimack Station*, 93 NH PUC 564, 572 (2008), as did the New Hampshire Supreme Court, in dismissing an appeal of the Commission's order in the 2008 docket for lack of standing, where it specifically said that "any potential injury the petitioners may suffer would arise only in a subsequent rate setting proceeding." The Court there cited to the language of RSA 125-O:18: PSNH "shall be allowed to recover all prudent costs…in a manner approved by the [Commission]." *Appeal of Stonyfield Farm*, 159 N.H. 227, 231

(2009). As the Commission has noted, this docket is the prudence review and proceeding anticipated by the Commission and the Supreme Court in these orders and PSNH's attempts to try to limit the Commission's ability to conduct a full and fair review should be rebuffed.

5. It is telling and ironic that in many forums and on many occasions PSNH has fallen back on the Commission's authority to review expenditures related to the scrubber project as justification for proceeding with the Scrubber project in the face of huge cost increases and market changes that would have led a prudent utility exercising "good utility practice" to take a second look at whether to continue with such a project.[6] Yet it now argues for unprecedented and unconstitutional limits on that authority not supported by the language in the statute.

6. In making its argument for rehearing PSNH also ignores various statements in prior Commission orders in this docket and elsewhere about its authority to review for prudence that are consistent with what the Commission is saying in its most recent order. *See* e.g., Order No. 25,445, page 26 ("Finally, to read the variance provision as PSNH urges would lessen from PSNH, or any other utility owner, the

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[6] *See* for example a bullet from a power point accompanying Gary Long's presentation to the legislature in 2009: "When the project is complete, the NH Public Utilities Commission will scrutinize every dollar spent on the project before any money can be recovered from customers through PSNH's rates." Attachment A. See also the transcript from the hearing on SB 152 where Gary Long says: "the Public Utilities Commission can and will see all of this stuff. They look at all these project things and they do prudence review and they do a very thorough job...they will do a very thorough job reviewing what we did...That's done in the normal course of business. That's already provided for under current law." (p. 31 of AM transcript of hearing on SB 152). Also: "I mean the PUC has access to this data without any law changed, and they certainly will look at it before, as Senator Gatsas says, anything goes in rate. I mean you really should take comfort in that. If they think we did anything wrong, or didn't do anything well, they will certainly let us know, and we will be hearing that one out too." (page 32) "But if people think that we're out of line, they have recourse through prudency review..." (p. 33) "It is the normal standard for the Public Utilities Commission to review our actions and our decisions, and it's done in hindsight. So it certainly presents business risk, as you might have a difference of opinion." (p. 39) "But financially we have to be very, very conservative and we have to be very sure of what we're doing, because if we're reckless or if we're making bad decisions, it'll hurt, it'll come back on us." (p. 40) Attachment B.

obligation to engage at all times in good utility management") (citing *Public Service Company of New Hampshire*, Order No. 20,794, 78 NH PUC 149, 160 (1993) and *West Swanzey Water Company, Inc.*, Order No. 25,203 (March 25, 2011) at 7). *See also* Order No. 25,506 (May 9, 2013), pages 17-18 ("PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times") (citing*Public Service Company of New Hampshire*, Order No. 20,794, 78 NH PUC 149, 160 (1993) and *West Swanzey Water Company, Inc.*, Order No. 25,203 (March 15, 2011) at 7); RSA 378:28 ("The commission shall not include in permanent rates any return on any plant, equipment, or capital improvement which has not first been found by the commission to be prudent, used, and useful....')." *See also* Order No. 24,979, Order Defining Scope of Proceeding, DE 09-033 (June 19, 2009), page 18 ("In describing the scope of our review in this case as not encompassing matters related to the propriety of the scrubber installation, we note that we have an open docket, DE 08-103, in which we are monitoring PSNH's costs of construction of the scrubber technology at Merrimack Station. In that docket we will consider 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."). Finally, PSNH's Motion ignores the important language in the Order Denying Motions on Rehearing in Docket No. DE 08-103 where the Commission said: "RSA 125-O:17 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...." [Emphasis added.] 93 NH PUC 564, 572 (2008). The

Commission's statements in Order No. 25,546 (page 8) that "the Scrubber Law does not allow PSNH to act irrationally with ratepayer funds" and that "we have never construed RSA 125-O to mandate that PSNH continue with the Scrubber's installation if continuing would require PSNH to engage in poor or imprudent management of its generation fleet" are thus entirely and necessarily consistent with what it has been saying all along in this and other dockets; by contrast, the interpretation that PSNH proffers is directly at odds with the Commission's prior orders.

7. In the Motion PSNH says that the Legislature found as a matter of law that the installation of the Scrubber would be achieved at a reasonable cost to consumers. Motion at 4. For other reasons in this docket PSNH has argued that there is no need and no authority for the Commission to review the issue of whether the Scrubber was too expensive because it exceeded some presumed price that appears nowhere in the law. PSNH Motion for Rehearing of Order No. 25,445 dated January 23, 2013 at 7. Yet they are now arguing that despite this lack of specificity on costs in the law the Commission should give recognition to the finding that it would be achieved at a reasonable cost to consumers. They are in effect asking the Commission to take the reference in the law about the installation being achieved at a reasonable cost to customers as a blank check, to mean that no matter what it cost to build the scrubber it would constitute a reasonable cost to customers. This argument defies logic and ignores the legislative history from 2006 which has been included in prior pleadings in this docket which clearly indicates that the Legislature was told, based on information provided by PSNH, that the cost of constructing the Scrubber was a "not-to exceed" number of $250 million in 2013 dollars. In making this argument PSNH once again ignores the statutory requirement to conduct a

prudence review noted above and ignores reference in the law to this being done "with reasonable costs to consumers", RSA 125-O:11,V, and the language of RSA 125-O:11,VIII: "The mercury reduction requirements set forth in this subdivision represent *a careful, thoughtful balancing of cost*, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of non-severable components." [Emphasis added.][7] The lack of "care" and "thought" to advance a strategy of "full speed ahead" advocated by PSNH to the New Hampshire Legislature in 2009 in the face of multiple factors of concern defies common sense.

8. The Commission's orders in this docket reinforce good public policy and protect ratepayers because they reinforce the obligation that regulated utilities have to act responsibly. The Commission's Order insures that utilities understand that they have an obligation, in fact a duty of care, to constantly engage in good utility management practices. *See Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). This is where PSNH's argument ultimately fails, because it does not recognize the scope and implications of a prudence review, which is what the Legislature clearly said it not only wanted, but expected. RSA 125-O:18.

9. PSNH argues that the Commission's order is unconstitutional because the Commission's reading of the statutes constitutes a taking. To justify this claim, PSNH referenced the common law definition of a vested right for purposes of a taking, stating in

[7] In his September 2, 2008 letter to the Commission in DE 08-103 cited above even Mr. Long noted, at p. 2, that the Legislature "performed a careful balancing of the costs and ensuing benefits" of the scrubber, though he failed to note that the costs that he referred to that the Legislature considered and that were referred to in the law were the $250 million figure provided to the Legislature in 2006, not the $457 million that the estimate had risen to in 2008. It is also quite ironic to review Mr. Long's continued references in this letter to the need to work on this project "on an accelerated basis" in order to "save money" and obtain "early compliance credits" given what has now turned into, on a temporary rate basis (which did not even give PSNH the full recovery of costs for this Project that they requested), an additional cent per kWh on ES customer rates. A recent response to a technical session discovery request now puts the total proposed ES Scrubber rate at 2.19 cents/kwh.

part that an owner acquires a vested right when "relying in good faith on the absence of any regulation which would prohibit his proposed project" and "...in spite of the subsequent adoption of an ordinance prohibiting the same." *Appeal of Public Service Company of New Hampshire*, 51 P.U.R. 4th 298, 1069 (1982) (Citing: *Henry and Murphy, Inc. v. Town of Allenstown*, 120 N.H. 910, 912 (1980)). In those two cases, the "subsequent adoption of an ordinance" was clearly post-facto. 120 N.H. at 911 and 51 P.U.R. at 1064. In this case however, there was no "absence of any regulation." To the contrary the Commission's reading of the statutes is consistent with long-standing principles of public utility regulation recognized by the Supreme Court. A franchise is a special privilege granted to a public utility. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, Docket Nos. 12-707-cv (L) 12-791-cv (XAP), Slip Copy, at 43 (2d Cir. Aug. 14, 2013) ("[T]he 'franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the state.'" (quoting *Frost v. Corp. Comm'n*, 278 U.S. 515, 534 (1929) (Brandeis, J., dissenting)). Public utilities do not have an unlimited right to recover all of their expenditures, regardless of whether those expenditures were prudent or whether an asset for which they are seeking recovery is used and useful. PSNH would have the Commission repudiate or ignore this long-standing authority, to the ultimate detriment of ratepayers.

10. As the New Hampshire Supreme Court has noted, citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591(1944) "the constitution requires only that the regulatory body engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable." 130 N.H. at 274. "The import of *Hope* is that the constitution is only concerned with the end result of a rate order; i.e. that

it be just and reasonable." 130 N.H. at 275. As the Supreme Court noted in the *Hope* case: "The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944). In another case the Supreme Court noted: "[R]egulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base..." *Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 590 (1942). The takings clause of the 5th Amendment to the U.S. Constitution has not been violated in this case. As The Supreme Court held in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), a case "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. Here, further hearings are scheduled for December 2013. No final decision has been reached. The claim is not ripe.

11. PSNH is now essentially claiming that the Scrubber Law is rigid and tied the hands of the Commission in setting rates – yet PSNH itself argued before the PUC, and eventually before the New Hampshire Supreme Court, that a law preventing it from recovering from ratepayers sunk costs of a nuclear plant was unconstitutional. The Court rejected PSNH's argument, explaining that the utility could not fairly shift risk back onto ratepayers for an unprofitable investment: "In cases where the balancing of consumer interests against the interests of investors causes rates ... which [are] insufficient to ensure

the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business enterprise, namely the risk of financial failure." *Petition of Pub. Serv. Co. of N.H.*, 130 N.H. 265, 277 (N.H. 1988) (quoting *Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n,* 502 A.2d 130, 134 (Penn. 1985)).

12. PSNH argues that the Commission has denied PSNH due process by its "repeated flip-flops in position and by its revisiting of issues without fair warning to PSNH of its obligations under law...." Motion at 29. PSNH has known what the law (which it took credit for crafting and spearheading) provides since 2006, long before the company incurred any costs related to the Scrubber and it certainly is aware of the Commission's plenary authority to review and oversee the activities of regulated utilities affecting rates. *See* RSA 378:7. The scrubber law contains no provision limiting this authority. It strains credibility to argue that PSNH did not have fair warning. What the Commission has done is to read the law logically and consistently. There is no "arbitrary decision-making" as PSNH argues. Motion at 31.

13. PSNH's myopic assertions regarding due process disregard the statutorily and constitutionally-mandated duty of the Commission to balance both PSNH's and consumers' interests in establishing just and reasonable rates. *Hope Natural Gas* at 603. The Commission's fundamental responsibility to act as the arbiter between the interests of the regulated utility and the interests of customers under RSA 363:17-a gives it authority to act within a zone of reasonableness. The "zone of reasonableness ... is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates." *Jersey Cent. Power & Light Co. v. F.E.R.C.*,

810 F.2d 1168, 1177 (D.C. Cir. 1987) (quoting *Wash. Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)). PSNH's unabashed assertion that there is "no cap on costs or rates" (Motion at 5) runs roughshod over consumer interests, and would be constitutionally infirm if accepted by the Commission.

14. Moreover, because the order on which PSNH is seeking rehearing is an order regarding discovery and because this docket still has many procedural steps to complete, no hearings have yet been held and no final determination from the Commission on prudence has been issued and will not be until after those hearings are completed, any arguments about violation of due process are premature and misplaced. PSNH's Motion is completely disconnected from the subject matter of the Commission's ruling in Order No. 25,546 (July 15, 2013) and its progeny which at their core, address discovery disputes.[8] There is no need or legal authority compelling the Commission to repeatedly respond to PSNH's attempts to narrow the scope of the Commission's review at this stage of the proceeding. The Commission is statutorily empowered with plenary authority to supervise and review the actions of regulated utilities under its jurisdiction. *See* RSA 374:3. In addition, New Hampshire law takes a liberal view on discovery and favors disclosure. *Yancey v. Yancey*, 119 N.H. 197, 198 (N.H. 1979). Continuously rehashing and arguing over the extent of the Commission's authority before discovery is complete and the evidence has been placed into record, is not a productive use of the Commission's resource and is delaying the Commission and the parties from proceeding to hearing in this docket. Finally, as the New Hampshire Supreme Court noted in *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1073, due process requires that the parties

[8] Order No. 25,546 and Order No. 25,506 (May 9, 2013) resulted from Motions to Rehear the Commission's orders in response to Motions to Compel by TransCanada.

have an opportunity to have a hearing on the government's action. Hearings are scheduled for December; PSNH's opportunity to file rebuttal testimony is November 15, 2013. Thus, because PSNH will clearly have a full and fair opportunity to present its case to the Commission, there cannot be a due process violation at this (discovery) phase of the proceeding.

15. In terms of PSNH's argument that the Commission's order misinterprets the interaction between RSA 369-B:3-a and the scrubber law, they have it backwards. If the Legislature had intended to limit PSNH's or the Commission's authority to propose and approve the sale or retirement of Merrimack Station the Legislature could have done that. They did not. Instead, as the Commission correctly noted : "RSA 125-O:18 makes clear that PSNH retained the management discretion to divest itself of Merrimack Station, if appropriate. Likewise, under RSA 369-B:3-a, PSNH retained the management discretion to retire Merrimack Station in advance of divestiture." Order 25,546 at 8. Nowhere in the scrubber law, or elsewhere, did the Legislature limit the discretion to retire or sell this asset, let alone at least consider its customers and re-think the project under changed circumstances. There is no conflict between these two statutes. PSNH's argument that these two statutes are in conflict ignores one of the fundamental principles of statutory construction, that insofar as reasonably possible various statutes should be construed harmoniously. *Petition of Mooney*, 160 N.H. 607, 610 (2010). That is exactly what the Commission has done in its orders.

16. In the Motion, at page 11, PSNH notes that the Commission has recognized that the Legislature has retained oversight of the scrubber and reports to the Legislature on its costs. PSNH then goes on to say that it reported cost estimates to the

Legislature in June of 2009 and 2010. Motion at 35. What it fails to mention, however, and what the responses to data requests in this docket show, is that PSNH knew at least as early as May of 2008 that the project estimate had risen to $457 million, but it failed to report that increase in the cost estimate to the Legislative Oversight Committee when it made its annual presentation to the Committee on June 18, 2009. *See* Attachment C to this Objection. The Moving Parties are pointing this out now as a response to the PSNH assertions in its Motion that it reported increased costs to the Legislature and to ensure that the record is complete. This kind of evidence will be important to consider as part of the evaluation of whether PSNH behaved prudently, i.e. whether such actions on its part were "inimical to the public interest" and whether PSNH conducted itself "with the level of care expected of highly trained specialists...." *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002).

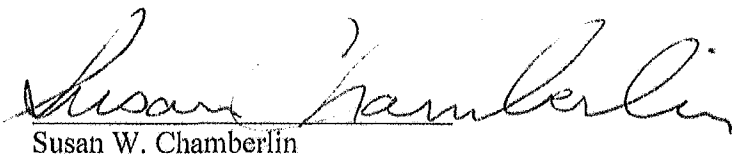
17. PSNH has thus failed to raise any new arguments or to point out anything that was overlooked or mistakenly conceived by the Commission that would justify reconsideration of Order No. 25,546. For the reasons noted above and included in the Moving Parties' prior pleadings in this docket, the Commission should deny PSNH's Motion for Rehearing.

WHEREFORE, the Moving Parties respectfully request that this honorable Commission:

A. Deny PSNH's Motion for Rehearing of Order No. 25,546; and

B. Grant such further relief as it deems appropriate.

Respectfully submitted,



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August 16, 2013

Certificate of Service

I hereby certify that on this 16th day of August, 2013 a copy of the foregoing motion was sent by electronic mail to the Service List.

Douglas L. Patch

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