

**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

**Objection to Public Service Company of New Hampshire's
Motions to Strike Testimony**

NOW COMES TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, "TransCanada") and objects to the Motions of Public Service Company of New Hampshire to Strike Testimony dated December 31, 2013 ("Motions") pursuant to Admin. Rule Puc 203.07(e). In support of this Objection TransCanada states as follows:

1. On December 31, 2013 PSNH filed four different Motions to Strike Testimony, one related to "PSNH's ability to retire Merrimack Station", one related to "the 'used and useful' ratemaking concept", one related to "PSNH's alleged duty to seek a variance", and one related to "efforts to support or block legislation relating to the scrubber". The Commission should withhold judgment on the Motions to Strike until all commissioners who will sit on this case have the opportunity to review the Motions and Objections.¹ PSNH has not even propounded data requests on this testimony or filed rebuttal testimony, which it is entitled to do under the procedural schedule approved by the Commission. The Commission should deny all four motions as premature and allow

¹ This assumes that the Commission were to grant the Joint Motion for Full Commission and Appointment of a Special Commissioner filed with the Commission on January 8, 2014.

this case to proceed to hearings so that it can give all the testimony presented the weight that it deems appropriate.

2. As a preliminary matter, all of PSNH's motions are procedurally defective because Mr. Hachey's testimony has not been adopted under oath and is not yet part of the evidentiary record in this proceeding. *See* Puc 203.23(b); *see also* *Re City of Nashua*, 91 NH PUC 384, 386 (2006) citing this same rule: "Strictly speaking, there is nothing to strike at this juncture because prefiled testimony does not become part of the evidentiary record until it is adopted under oath by a live witness at hearing. *See* Puc 203.23(b)." In that Order the Commission went on to say:

Indeed, it is the Commission's longstanding practice to allow parties to offer exhibits, including prefiled testimony, over the course of a hearing, marking such exhibits for identification purposes but ruling on their admissibility only at the conclusion of the hearing, thus giving parties as full an opportunity as possible to consider bases for objecting to such evidence.

91 NH PUC 384, 386-387. *See also* Secretarial Letter from the Commission in docket DE 10-261 dated February 3, 2012 denying motions to strike.

3. PSNH's various motions to strike portions of the testimony should be denied by the Commission because all four motions involve issues in this docket that are relevant to whether PSNH "has exhibited inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest". *Re Public Service Company of New Hampshire*, 81 NH PUC 531, 541 (1996) (citing *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708 (1985)); *see also Appeal of Easton*, 125 N.H. 205, 215 (1984); *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). It is "the Commission's responsibility and obligation under the law ...to determine whether PSNH conducted itself with the level of care expected of *highly trained specialists*..."

Public Service Company of New Hampshire, 87 NH PUC 876, 886 (2002) (Emphasis added). The four areas of testimony challenged relate to whether PSNH obtained the information necessary to exercise the proper level of care and whether it then prudently and in the spirit of candor to the tribunal, provided information to the decision-makers in a transparent and clear manner. The Commission needs to consider the full range of options that were available to PSNH as well as how it came to various conclusions at different points in its decision-making process and how information was shared in order to get to the bottom of whether such actions on PSNH's 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). As discussed further below, the four motions to strike should be denied.

PSNH's Ability to Retire Merrimack Station

4. PSNH's motion to strike related to the retirement of Merrimack Station amounts to an attempt to change the Commission's ruling that it can and should evaluate whether PSNH should have considered retirement of Merrimack Station as an option.² PSNH already asked the Commission to change that ruling on rehearing and appealed to the NH Supreme Court and asked it to step in to tell the Commission to change that ruling. The rehearing request and appeal were denied.³ PSNH is raising the issue again, in effect trying to get a third bite of the apple. This request should be denied as being untimely and as already having been addressed.

² PSNH's motion is also overbroad with respect to Mr. Hachey's testimony. Even if the Commission were to rule in PSNH's favor, only those phrases directly related to retirement should be stricken. PSNH's overbroad description of Mr. Hachey's testimony, including his testimony regarding the economic environment and PSNH's claims that the law is a "mandate" are irrelevant to PSNH's motion to strike which concerns only retirement of Merrimack Station.

³ Commission Order No. 25,565; NH Supreme Court Case No. 2013-0624, *Appeal of Public Service Company of New Hampshire*, Order Declining Appeal and Denying Petition, November 6, 2013,

5. PSNH's Motion related to retirement should be denied for the same substantive reasons this Commission gave after considering and rejecting PSNH's arguments in orders associated with prior proceedings. There is nothing explicit in the scrubber law that changed any of the authority granted to the Commission elsewhere in the law and in Commission precedent that authorizes review and approval of the retirement of Merrimack Station. If the Legislature meant to require that the scrubber be installed regardless of cost and that PSNH and the Commission be precluded from seeking and approving a retirement or mothballing of the facility, the Legislature could have said that. There are no legislative findings and there is no language in the statute that says that an investment in the scrubber should have been made regardless of cost, nor are there any legislative findings or statutory provisions that say that all options available to the owner of the facility other than proceeding with the scrubber installation were precluded. In fact, to the contrary, the legislation actually contains important provisions like the "variance" statute, a provision concerning which PSNH seems to be in denial, but which on its face created an opportunity for other options. PSNH is asking the Commission to construe the law in an absurd way that is not supported by any explicit language in the statute and that is inconsistent with precedent and principles of statutory construction. If the Legislature intended that PSNH install the scrubber regardless of whether the investment was the prudent thing to do and to eliminate other options available to PSNH it would not have included a prudence review provision in the law (RSA 125- O:18), it would not have included a variance provision in the law (RSA 125- O:17), and it would not have included a provision that said PSNH still had to get all necessary permits and approvals before proceeding (RSA 125- O:13,I).⁴ The

⁴ The law, which the legislative history shows was based on the "not-to-exceed" cost estimate of \$250

Commission has already rejected these arguments from PSNH for good reason and should stand by its decision.⁵

6. As early as the letter opening DE 08-103 in August of 2008 the Commission recognized the possibility of a retirement or sale of Merrimack Station when it directed PSNH to file “an analysis of the effect on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated by PSNH.” August 22, 2008 letter in DE 08-103. In Order No. 25,445 in this docket, at 25, the Commission recognized that PSNH’s argument that it was required to build the scrubber regardless of cost “flies in the face of common sense” and that retirement “would effectively eliminate all emissions from the station.” 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: (a) limit the discretion to retire or sell this asset, (b) limit consideration of the financial impact on its customers, or (c) limit reconsideration of continuing the project under changed circumstances. For these reasons the Commission should deny the motion to strike testimony related to “PSNH’s ability to retire Merrimack Station”

million for the scrubber project, refers to the emissions reductions being obtained “with reasonable cost to consumers” and as incorporating “a careful, thoughtful balancing of costs, benefits, and technological feasibility”. RSA 125-O:11,V and VIII. The Commission referred to this in Order No. 25,445 as “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.” Order at 26.

⁵ Order No. 25,546 and Order No. 25,565.

The 'Used and Useful' Ratemaking Concept

7. The Commission should deny PSNH's Motion to strike testimony related to the "used and useful" ratemaking concept for a number of reasons. In the testimony that PSNH witnesses filed in DE 11-215 asking for recovery of the scrubber costs, testimony which was then transferred to this docket when it was opened and which became the basis for the temporary rates approved by the Commission, PSNH's own witnesses raised the used and useful concept. In response to a question about the purpose of their joint testimony, Mr. Baumann and Mr. Smagula said that as of September of 2011 the scrubber project "became used and useful in the provision of service to customers as it began providing significant reductions to the emissions at Merrimack Station." Joint Testimony dated October 14, 2011 at pp. 1-2. They referred to this again on page 5 of the testimony. In his subsequent testimony filed on June 15, 2012 Mr. Smagula also referred to the last portion of the project being declared used and useful on page 24 of that testimony. Therefore, PSNH itself raised this issue in this docket and can not now claim it is irrelevant and outside the scope of this proceeding.

8. In the Order of Notice in this docket the Commission cited the temporary rate statute, RSA 378:27 (which specifically refers to temporary rates being "sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service") and also said the docket raises issues about "whether the resulting rates are just and reasonable pursuant to RSA 378:5 and 8." The concept of justness and reasonableness of rates has for many years incorporated the concept of the rates being tied to prudent investments in property that is used and useful. RSA 378:28 contains this specific prohibition: "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.” The Commission quoted this sentence in Order No. 25,506 in this docket, pp. 17-18, as a follow up to noting that: “PSNH, like any other utility owner, maintained the obligation to engage in good utility management at all times.” RSA 378:29 also requires that temporary rates, the review of which is generally regarded as being less stringent than for permanent rates,⁶ be reconciled to permanent rates once the prudence analysis is completed. It would be absurd to suggest that a used and usefulness review should be assumed as part of the temporary rate consideration, and then not be subject to challenge as part of the permanent rate consideration. Moreover, there is nothing in RSA 125-O that contradicts the Commission considering “used and useful” as required in these separate statutory requirements and in long standing precedent of the Commission; nowhere in the scrubber law did the Legislature say that the Commission is precluded from exercising other powers available to it when determining recovery of scrubber costs from ratepayers.

PSNH’s Duty to Seek a Variance

9. PSNH’s Motion to Strike related to the variance provision in the scrubber law in effect asks the Commission to ignore this particular provision in the law.⁷ As the Commission noted in Order No. 25,445 “to read the variance provision as PSNH urges would lessen from PSNH, or any other utility owner, the obligation to engage *at all times* in good utility management.” Order at 26 (emphasis added). It would also be contrary to principles of statutory construction to just ignore the variance provision. The parties should be allowed to offer testimony and make arguments about the variance provision

⁶ See Order No. 25,346 in this docket, page 20.

⁷ As the Commission noted in Order No. 25,445, p. 23, in this docket: “There is no dispute that RSA 125-O:17 is part of the overall statutory scheme...”

and what steps PSNH should have taken in light of the language in the law and the facts and circumstances that evolved prior to continued investment in capital for the scrubber.

10. As the Commission noted in Order No. 25,546, at 9: “PSNH’s prudent costs of complying with RSA 125-O must be judged in accordance with the management options available to it at the times it made its decisions to proceed with and to continue installation.” To preclude consideration of whether PSNH should have taken steps to seek a variance is to unnecessarily and inappropriately limit the consideration of options that were available to PSNH at various times. To preclude the parties from even offering this testimony and making these arguments is contrary to a prudence review, which specifically seeks to determine whether the utility made a prudent choice between various options. Specifically, as the Commission noted in Order No. 24,914 in DE 08-103, at 13: “RSA 125-O:17, however, is pertinent to prudence” and the variance provision “provide[s] 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...” PSNH will have a full and fair opportunity to provide rebuttal testimony, to cross examine the witnesses, and to provide legal arguments to support its position that alternatives were not available and that the scrubber investment was a mandate from the legislature regardless of cost.

Efforts to Support or Block Legislation Relating to the Scrubber

11. In so far as PSNH’s Motion to Strike portions of the testimony related to “efforts to support or block legislation relating to the scrubber” is concerned the Commission should deny this motion as well. As noted above, the issue in this docket is

the broad prudence issue, i.e. whether PSNH “has exhibited inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest”. *Re Public Service Company of New Hampshire*, 81 NH PUC 531, 541 (1996) (citing Appeal of Seacoast Anti-Pollution League, 125 N.H. 708 (1985)); *see also Appeal of Easton*, 125 N.H. 205, 215 (1984); *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). Whether PSNH obtained the information necessary to exercise the proper level of care and whether it then prudently and in the spirit of candor to the tribunal, provided that information to the decision-makers is at issue before the Commission. The Commission needs to consider the full range of options that were available to PSNH in order to get to the bottom of whether such actions on PSNH’s 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).

12. Most of the testimony cited by PSNH at pages 2-3 of its motion concerns subject matter that the Commission already explicitly stated can be relevant and may be admissible. Many of the statements highlighted by PSNH concern what PSNH told Commission Staff and other important decision-makers during 2008 and 2009. Its statements to regulators, for example, stand in direct contrast with what PSNH actually knew at this time. What PSNH knew about the economics of the scrubber, and who it told (or did not tell) goes directly to its prudence. As the Commission has already recognized, “[w]e are cognizant, however, that information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue.” Order No. 25,592 at 4-5. PSNH’s motion to strike appears to be an attempt to exclude

testimony regarding what PSNH told their Board of Trustees in the summer of 2008, but apparently never told the Commission, the Staff, the OCA or the Legislature thereafter.

13. The following bullets, set forth by PSNH at pages 2-3 in its motion to strike Mr. Hachey's testimony, are directly relevant to what information PSNH did and did not present to the *Commission* (not to the Legislature) during 2008 related to Scrubber economics:

- PSNH "essentially withheld critical information about the commodity prices that would be required for the project to 'break even' and create customer benefits" from the Commission. 12/21-23.
- "PSNH appears to have withheld from Staff and the OCA critical information about the 15 year history of the price spread between gas and oil." 13/2-11.
- PSNH did not put certain information concerning the "price spread" in the filing it made with the PUC in September 2008. 13/12-15.
- "I saw no indication that PSNH ever told the NH PUC at this time [September 2008] or at any time subsequently that the basis for their economic analysis was flawed or outdated." 19/3-5.
- "PSNH failed to recognize and share with the Commission Staff, the OCA and the Commission, critical information about the economics of the scrubber project." 29/15-17.

Mr. Hachey's testimony concerns the veracity of PSNH's statements, its candor to regulators, and the scope of the economic analysis it performed. This testimony is fundamental to the argument about whether PSNH was prudent; what company officials knew and when they knew it and the omission of information from regulators is an important aspect of an analysis with respect to the prudence of their actions. These portions of Mr. Hachey's testimony also set forth the results of discovery explicitly allowed by the Commission in this docket. See Order No. 25,445 at 26 ("we will allow

discovery of PSNH's economic analyses of the Scrubber installation up to the point it was substantially complete in September 2011.”)

14. PSNH also contests testimony that is directly related to the economic analyses performed (or not performed) by PSNH during the relevant time periods:

- “In my view, the president and COO of PSNH fully understood the shortcomings of the analysis by his personnel, yet recommended proceeding with construction of the scrubber despite the high likelihood that it would not result in customer benefits.” 22/21-24.

Evidence of what Mr. Long did and did not know during the timeframes in question is directly related to whether PSNH's actions and investment were prudent. *See* Order No. 25,592 at 4-5; *Re Public Service Company of New Hampshire*, 87 NH PUC 876, 886 (2002). Similarly, evidence regarding what was known by the Company versus the evidence it provided to the Legislature is relevant to this docket. This evidence is important in determining whether PSNH acted prudently in providing correct and up-to-date information regarding the scrubber investment economics and alternatives while the Legislature was considering RSA Chapter 125-O. As noted above, the Commission already ruled that “information presented by PSNH and others before the legislature may be relevant to our determination of other facts in issue.” Order No. 25,592.

Disregarding this ruling, PSNH indicates that the following evidence should be stricken:

- Material that Mr. Hachey contends explains “what PSNH was telling officials about the legislation.” 4/20-22 and attachment 3.
- “PSNH understood and was well aware that the Legislature was relying on it to provide updated and accurate information.” 7/14-15.
- “Furthermore, the company fought strenuously against the SB 152 legislation that would have required a study of the economics of the project. Gary Long argued to the Legislature in March 2009 that a vote to study the project was a vote to kill the project, presumably because he realized that a study would show that the economics of the project put

default service customers at great risk and this would have led to the project being abandoned.” 28/23-29/5.⁸

PSNH’s motion disregards Mr. Long’s statement at deposition that the Company was “updating most everyone on the status of the project, the costs. And, you know, it’s up to the legislature to decide if they wanted to change course.” Long Deposition at 53:10-13. Implicit in this statement is that the Legislature was relying on the data provided by PSNH and that PSNH was telling them all that it knew. Mr. Hachey’s testimony provides evidence that contradicts this statement and argument. The third bullet above evidences what PSNH was providing the legislators during the duration of its investment in the scrubber. The contrast between the economic data that PSNH had and should have had, and the economic data PSNH provided to legislators is striking. A prudent utility provides frank updates to decision-makers that are comprehensive and consistent, not data which directly contradicts or omits what it has reported internally.

15. Finally, with respect to testimony directly regarding Legislative action, Mr. Hachey and TransCanada are not asking the Commission to ignore what the law says or the powers of the Legislature, nor are they trying to get “into the thought process of elected representatives.”⁹ TransCanada is putting forth information obtained during discovery that is directly relevant to prudence. TransCanada is asking the Commission to recognize the obligation PSNH had to provide complete and comprehensive information

⁸ Mr. Long’s statements to the Legislature in 2009 (cited by Mr. Hachey and contained in Attachment 24, p. 25 of 31 and Attachment 27 p. 34 to Mr. Hachey’s testimony) to the effect that passing SB 152, the bill that would have required a further study of installing the scrubber at Merrimack Station, would “derail the scrubber installation” and would “give you a platform to say shut the plant down” both seem to contradict PSNH’s argument that the law was somehow sacrosanct, that it was a “mandate” that could not be undone. PSNH’s argument in this docket seems to imply that the scrubber law somehow had an effect similar to that of a provision of the constitution, not a law that the Legislature had full authority to change. PSNH’s “mandate” argument also ignores the critical role that it played in the Legislature’s decision to pass the law in 2006 and not to change that law in 2009 and the importance of the information PSNH provided (and did not provide) to the Legislature when it was making those decisions.

⁹ See Order No. 25,445 at 29.

to the Legislature, in addition to the discretion PSNH had to request legislative changes or to support or oppose legislation. These obligations should be part of the consideration of whether or not PSNH's actions were prudent. The testimony at issue includes the following bullets from PSNH's motion:

- That former PSNH CEO Gary Long "took credit for 'spearheading' and 'crafting' the scrubber law, so clearly PSNH played a major role in drafting and then supporting the enactment of the law." 6/15-17.¹⁰
- "It is not as if PSNH had no role in the development and passage of the law, which its argument about the scrubber being a mandate suggests; in fact, PSNH by its own admission had a major role in the creation of its 'mandate.'" 6/17-20.3
- PSNH "could have agreed to study whether proceeding with the project still made sense (for example, this could have included supporting rather than actively opposing SB 152, the Janeway bill, in 2009, or it could have included taking a different approach in DE 08-103, such as suggesting a more in depth study of the economics)." 28/10-13.

The reality is that information provided to the Legislature and related positions that PSNH took on legislation were bound to have a significant impact on what the Legislature chose to do. The issue is not whether PSNH had the power to change history; this issue is instead whether PSNH acted prudently in its decision-making and dealings with the Legislature on the subject of scrubber economics. The Commission has allowed discovery in this docket related to documents that PSNH provided to elected or appointed officials finding that they could shed light on PSNH's position on the scrubber law and could produce information relevant to the prudence review. Order No. 25,398 at 14.

¹⁰ Note that these statements quoted by Mr. Hachey were actually made by Gary Long to the Commission in a September 2, 2008 letter in Docket DE 08-103, a docket in which PSNH gave the Commission status reports regarding the scrubber. The Commission Staff indicated that closure of docket 08-103 was appropriate "as it is now duplicative of DE 11-250. All documents that would normally be filed in DE 08-103 have been, and will continue to be, filed in DE 11-250." Correspondence from Steven E. Mullen (Aug. 28, 2012) in Docket DE 08-103. Therefore, the statements quoted by Mr. Hachey are, effectively, admissions which PSNH itself has made in docket DE 11-250.

PSNH's singular and repeated reliance on the argument that the law is a mandate that prevented it from taking the steps that a prudent utility would have otherwise taken brings this issue to the forefront. The first and perhaps most important "step" for a prudent utility would have been to take the "second look" that circumstances at the time and the pending commitment of \$457 million dollars of ratepayer money deserved. Full examination of that "first step" and PSNH's seemingly unalterable decision to commit necessarily requires a response, data and full examination that includes references to legislation and what information PSNH presented and did not present to the Legislature. The other parties should not be precluded from offering testimony and arguments as to why the Commission should not accept this argument without considering the full scope of the purported "mandate" and PSNH's role in its creation and ultimate passage into law.

16. Finally, Staff witness Steve Mullen discusses legislative history and legislative action and inaction in his prefiled testimony, yet PSNH has not moved to strike any of that testimony which supports PSNH. *See, e.g.*, Mullen Testimony at 13:6-16. Mr. Mullen relies on the fact that the Legislature and the Commission retained oversight over the scrubber, but PSNH argues that the facts it presented to those entities are irrelevant. *Id.* at 18:23-19:18.¹¹ It would be unfair and unreasonable to strike Mr. Hachey's testimony while allowing other testimony on this specific issue to stand. Many of PSNH's actions or inactions cited in Mr. Hachey's testimony raise important

¹¹ Mr. Mullen's prefiled testimony supports PSNH's arguments about the meaning of the law and when it provides an overview of the legislation it refers to the scrubber law as being "unique" (Mullen testimony at 7) and refers to the fact that the law contains no cost estimates (at 13) (overlooking the careful and thoughtful balancing of costs and benefits language in the law referred to in Mr. Hachey's testimony) and refers to the fact that the \$250 million estimate was "preliminary and did not include things such as the cost of emissions removal guarantees, site-specific considerations or PSNH's internal costs" (at 11-12), ignoring the legislative history that shows that PSNH presented information that the estimate for the project was a "not-to-exceed" number of \$250 million.

evidentiary issues with respect to what was known and what should have been known as part of PSNH's decision-making process and what was disclosed, all of which need to be considered by the Commission when considering prudence in this docket.

17. This docket is about the duty of care that regulated utilities have to engage in good utility management practices at all stages of investment, including whether 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). PSNH's motions to strike seem to imply that the decision to proceed with building the scrubber, as distinct from the way it went about its construction, are not subject to a prudence review because the "mandate" foreclosed all options. This is simply not correct as is demonstrated by the law's specific provisions and language and Commission precedent with regard to prudence reviews. This is where the motions to strike should ultimately fail, because PSNH is asking the Commission to ignore the evidence presented as well as the full scope and implications of a thoughtful prudence review based on that evidence, a review specifically called for in the scrubber law. RSA 125-O:18.

WHEREFORE, TransCanada respectfully requests that this honorable Commission:

- A. Deny PSNH's Motions to Strike; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

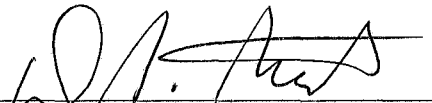
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Certificate of Service

I hereby certify that on this 10th day of January, 2014 a copy of the foregoing objection was sent by electronic mail to the Service List.



Douglas L. Patch

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