

**STATE OF NEW HAMPSHIRE**  
**before the**  
**PUBLIC UTILITIES COMMISSION**

Docket No. DE 11-250

**Public Service Company of New Hampshire**

**Investigation of Merrimack Station Scrubber Project and Cost Recovery**

**MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**  
**TO RESCIND TRANSCANADA’S INTERVENOR STATUS OR ALTERNATIVELY**  
**TO STRIKE TRANSCANADA’S OBJECTIONS TO PSNH’S DATA REQUESTS**  
**AND COMPEL ANSWERS TO THOSE REQUESTS**

Pursuant to RSA 541-A:32 and Rules Puc 203.07 and 203.09(i), Public Service Company of New Hampshire (“PSNH) hereby moves the Commission to rescind the intervenor status of TransCanada, or, in the alternative to strike its February 7, 2014 objections to PSNH’s data requests and issue an order compelling adequate answers from TransCanada. In support of this Motion, PSNH states:

**Introduction**

This not the typical discovery dispute in which the parties are unable to resolve differences over a few responses. Rather, this is the extreme case in which a party simply refuses to answer discovery, hiding behind a series of “general objections” while pretending to make them “specific” by simply repeating them over and over for each question. Courts have defined this practice as the “paradigm of discovery abuse.” *Pegoraro v. Marrero*, 281 F.R.D. 122, 128 (S.D.N.Y. 2012) (quoting *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y.2009).

TransCanada’s discovery tactics violate a direct edict of the Commission, and are patently deficient under the Commission’s rules, the Commission’s precedent, and well-settled

case law. TransCanada's objections could not possibly have been made in good faith because there is no logical connection between the TransCanada "rubber stamp" objections and the question asked, and in most cases, one must wonder whether TransCanada bothered to read the question. Likewise, because of the manner in which the objections are made (often 40 or more objections to each question), it is impossible for PSNH or the Commission to determine which of the objections might apply to the question (if any) or which of the numerous objections might have merit (if any). Thus, any effort to reach agreement on this discovery as required by Rule Puc 203.09(i)(4) has been (and would be) futile,<sup>1</sup> and responding to the thousands of spurious objections put forward by TransCanada would be unreasonable and burdensome.

TransCanada has been warned about this abusive discovery tactic. The Commission *sua sponte* rejected the attempt of TransCanada and other parties to disrupt the discovery process with general objections and complaints. Rejecting TransCanada's motion to limit the number of questions PSNH could ask and its response in the form of "general objections," the Commission found "a lack of specificity" and "direct[ed] the parties to file objections to specific data requests" "in compliance with Puc 203.09(g)(2)." Secretarial Letter of January 31, 2014 (the "1/31 Letter"). But instead of complying with the Commission's 1/31 directive, TransCanada simply restated its earlier general objections and then repackaged them as "specific" objections by repeating them over and over again.

When it intervened in this proceeding, TransCanada claimed to have knowledge of the scrubber project (the "Scrubber") and asserted that this knowledge, as well as its status as a competitor,<sup>2</sup> would "be of value to the parties and the Commission" and "would not impair the

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<sup>1</sup> PSNH made a good-faith effort to resolve the dispute informally as required by Rule Puc 203.09(i)(4).

<sup>2</sup> TransCanada's Petition to Intervene at ¶ 4 references "TransCanada's competitive position relative to PSNH" as support for its intervention request, yet it now takes the position in responding to discovery that "I do not regard PSNH as a competitor." Response of Michael Hachey, TransCanada, to PSNH Question 105. *See also* Amicus

orderly and prompt conduct of the proceeding.” TransCanada Motion to Intervene, December 7, 2011 at 3.<sup>3</sup> It also alleged that the “rights, duties, privileges or substantial interests of TransCanada and its affiliates, may be affected by the proceeding... .” *Id.* at 2. Yet now, as evidenced by its thousands of objections, it claims that PSNH is not entitled to inquire about the knowledge of TransCanada or its affiliates, that questions may *only* be directed to its witness, Mr. Hachey (who denies knowledge of virtually anything), and offers thousands of objections that serve only to cause delay.

It is difficult to imagine a clearer example of a party interfering with the orderly and prompt conduct of the proceedings. TransCanada’s repetitive and inadequate objections have caused substantial and unnecessary work by the parties, administrative burdens to the Commission, and harm to PSNH and its retail customers as the under-recovery of mandated project costs continues to grow. Under RSA 541-A:32, II, this Commission need not, and should not, countenance such behavior from a party intervenor that has not demonstrated affected rights, duties, or privileges that mandate its intervention. *See* Secretarial Letter dated December 23, 2011; Order No. 25,346 dated April 10, 2012, at 2-3.

As illustrated below, the deficiencies in TransCanada’s discovery objections inescapably warrant this harsh assessment. Going forward, the remedy is not for the Commission to waste time and resources trying to mediate this dispute between the parties. Such involvement is appropriate only when the objecting party has met its most basic obligations to respond and

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Brief of TransCanada to the N. H. Supreme Court in *Appeal of Stonyfield Farm* 159 N.H. 227 (2009) at p. 5 (“TransCanada is a competitor of Public Service Company of New Hampshire.”)

<sup>3</sup> It based this representation, in part, on its statement that, “TransCanada and its affiliates are involved in the transportation of natural gas and the power generation business in North America. TransCanada and its affiliates collectively own approximately 567 MW of hydroelectric generation capacity on the Connecticut and Deerfield rivers, with the bulk of it being in New Hampshire.” *Id.*

object in a meaningful manner.<sup>4</sup> TransCanada's responses are nowhere near that point, nor do they even remotely satisfy the specificity required by the Commission's rules, the Commission's express 1/31 directive, or Commission precedent.

Consequently, at this point in the procedural schedule, the Commission is faced with two choices: the Commission can rescind TransCanada's party status and exclude it from these proceedings pursuant to RSA 541-A:32; or it can reject TransCanada's objections as it did just days ago in its 1/31 Letter, apply its Rule Puc 203.09(h) ("Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object") and compel full and complete responses to all of PSNH's data requests. PSNH certainly believes the point has come where the first path is the necessary and proper course, as the latter is just a recipe for more disagreements and delays. But if TransCanada is permitted to remain in this docket, it should be compelled to comply with the discovery process and to promptly provide proper responses to all of PSNH's questions.

**A. Motion to Rescind Intervenor Status**

Following the submission of pre-filed testimony by TransCanada and others on December 23, 2013, PSNH propounded data requests on TransCanada and other intervenors on January 16, 2014 (five days in advance of the deadline set in the December 30, 2014 Secretarial Letter). PSNH's data requests are attached hereto as Attachment A.

On January 24, 2014, TransCanada filed an Objection to PSNH's requests and a motion to require PSNH to reduce the number of questions it had submitted, complaining that there were

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<sup>4</sup> See e.g., *Re New England Telephone and Telegraph Company, Inc.*, 74 NH PUC 317, 320 (1989) ("NET has filed at least seventeen general objections to only five sets of staff data requests. It was administratively burdensome for the commission to review and compare all of these objections, most of which were simply copies of all the other objections.")

just too many questions to answer.<sup>5</sup> In addition to adopting a similar objection filed by the Office of Consumer Advocate (“OCA”), TransCanada contended that this Commission should look to the New Hampshire Superior Court rules concerning discovery. In particular, TransCanada cited to Superior Court Rule 23, which creates a presumptive limit of 25 interrogatories<sup>6</sup> and requested that the Commission waive Rule 203.09(d), which requires an individual objection to each individual data request. TransCanada also asserted a number of alleged “general” objections. January 24<sup>th</sup> Objection at 4-6.

On January 31, 2014, by Secretarial Letter, the Commission rejected the requests of TransCanada, OCA and CLF, specifically referencing the “lack of specificity” in the motions, and ordered TransCanada and the others “to file objections to specific data requests in accordance with the discovery rules” by February 7<sup>th</sup>. In response to the Commission’s directive, the OCA provided substantive answers to the majority of PSNH’s data requests on February 7<sup>th</sup>. Thus, within a week, OCA was able to assemble meaningful answers, notwithstanding its remaining objections.

By contrast, TransCanada’s response to the 1/31 Letter was to defy it.<sup>7</sup> On February 7<sup>th</sup>, instead of providing specific, meaningful objections, TransCanada *increased* the number of general objections set out in its rejected January 24<sup>th</sup> Objection and simply repeated some (and in

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<sup>5</sup> The Conservation Law Foundation and the Office of Consumer Advocate filed similar objections. CLF, like TransCanada, has persisted in a strategy of refusing to answer questions. The consistency in the positions taken by these discretionary intervenors, each of which has no direct interest in this proceeding, seems far from coincidental.

<sup>6</sup> TransCanada ignored the remainder of the Superior Court’s discovery rules which provide for unlimited requests for production of documents, unlimited requests for admissions, and liberal use of depositions.

<sup>7</sup> CLF has also persisted in standing by a series of general objections despite the 1/31 Letter. PSNH is filing a separate pleading concerning CLF.

most cases nearly all) of its “general objections” as objections to each question<sup>8</sup> as if repetition and additional lines of narrative could satisfy the Commission’s requirement for specificity.<sup>9</sup>

Ironically, TransCanada’s first “general objection” claims that it continues to object pursuant to Rule Puc 203.09(g), a rule the Commission expressly stated in its 1/31 Letter that TransCanada and the other Parties must comply with and which requires that “Objections to data requests shall: (2) Clearly state the grounds on which they are based.” TransCanada’s objections repeatedly violate the Commission’s express 1/31 directive and its procedural rule. TransCanada asks this Commission to assume that every data request merits the same objection, since it has made no effort to tailor any objection to the question asked. Can it really be the case that virtually every question asked by PSNH is objectionable for precisely the same reasons?<sup>10</sup>

Apart from violating the 1/31 Letter directive and Rule 203.09 (in addition to suffering from a lack of creativity), TransCanada’s objections suffer from one simple defect: not once, in its thousands of objections does TransCanada explain *why* a particular question justifies any one of the many objections TransCanada raises. For example:

- **Why** is the question burdensome?<sup>11</sup>
- **Why** does the question seek information that is not relevant?

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<sup>8</sup> The Commission should note the similarity to the General Objections raised by TransCanada in Attachment B and the identical objections set forth in TransCanada’s January 24, 2014 Objection/Motion at pp. 4-6 – objections which this Commission has already rejected as insufficient in its 1/31 Letter.

<sup>9</sup> For example, in its General and Specific objections, it repeats the statement that “Mr. Hachey has no knowledge of the information being requested” 263 times.

<sup>10</sup> *Cf. Re: New England Telephone and Telegraph Co., Inc.*, 74 NH PUC 317, 319 (1989) (“We have reviewed the questions in the case and have discovered that the general objections could not apply to every data response in the case. For example, in NET’s recent responses filed, August 18, 1989, ... none of these requests on their face request information which is protected by the attorney-client privilege, or the attorney work product privilege, or which calls for legal conclusions, attempts to require NET to function as counsel for staff, or involves legal analysis.”)

<sup>11</sup> By its 1/31 letter, the Commission rejected similar blanket objections of CLF which read “Objection: CLF objects to the extent that this request is overbroad, unduly burdensome and not reasonably calculated to lead to admissible evidence, is not responsive to the pre-filed testimony but is asserted merely to harass and burden CLF.” TransCanada cannot now rely upon objections that the Commission just found insufficient.

- **Why** does the question seek privileged information and **what** is the type of information (placed on a privilege log) that is privileged?<sup>12</sup>
- **Why** is discovery against TransCanada (as opposed to only discovery from its witness Mr. Hachey) prohibited, particularly when the very rule that TransCanada relies on, Rule Puc 203.09, provides that “any person covered by this rule *shall have the right* to serve upon *any party*, data requests, which may consist of a written interrogatory or request for production of documents?” Rule Puc 203.09 (b) (emphasis added).
- **Why** does TransCanada have no knowledge of the information sought when in its Petition to Intervene in this proceeding it stated that it should be granted intervenor status because it had “knowledge of this Project and PSNH that could be of value to the parties and to the Commission in this proceeding” and that “TransCanada and its affiliates are involved in the transportation of natural gas and the power generation business in North America”? TransCanada Petition to Intervene at 3.
- **Why** when TransCanada has put forward a witness who opines on the meaning of RSA 125-O:11-18, is PSNH barred from asking for information about Mr. Hachey’s view of that law?
- And **why** when TransCanada expressly contends that PSNH should be denied \$422 million for the reason that it did not accurately or reasonably predict future gas prices is it “beyond the scope of this proceeding” and “overly broad, unduly burdensome and . . . not reasonably calculated to lead to the discovery of information that is relevant and admissible in this proceeding” to ask TransCanada – self-admittedly one of the largest natural gas transmission and storage companies in North America<sup>13</sup> – for its estimates of future gas prices? Especially when the TransCanada witness who pre-filed direct testimony states that PSNH’s gas price forecasts were unreasonable now “has no knowledge of the information being requested”?<sup>14</sup>

Not once does TransCanada offer a single explanation of the reasons for its objections.

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<sup>12</sup> By its 1/31 Letter, the Commission rejected similar blanket objections of CLF which read, “CLF also objects to the extent that this request seeks discovery of privileged work product.” TransCanada cannot now rely upon objections that the Commission just found insufficient.

<sup>13</sup> [http://www.transcanada.com/investor/annual\\_reports/2011/mda/overview/](http://www.transcanada.com/investor/annual_reports/2011/mda/overview/)

<sup>14</sup> TransCanada General Objection 6; “Specific” objections to questions 34a, 34b, 34c, 34d, 34e, 34f, 36, 37a, 37b, 37c, 37d, 37e, 37f, 37g, 37h, 38a, 38b, 38c, 38d, 38e, 38f, 39a, 39b, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 57d, 62, 64a, 64c, 64e, 64f, 64g, 64h, 64i, 66, 67, 68, 70b, 70c, 70d, 70e, 71a, 71b, 71c, 71d, 71e, 72a, 74b, 75a, 75c, 75d, 75e, 76b, 76c, 85, 85a, 85b, 85c, 85d, 85e, 92, 94b, 94c, 94d, 95g, 96c, 97, 97a, 97b, 97c, 97d, 97e, 97f, 100a, 100b, 100c, 100d, 103a, 103b, 107, 129c, and 133, all of which request information in the possession of TransCanada concerning gas prices. In order to ensure that there is no doubt whatsoever that Hachey “has no knowledge” of the subject matter, not only are the General Objections incorporated into each of the objections to questions seeking gas price information, but each of the so-called “specific” objections states both that “Mr. Hachey has no knowledge of the information being requested” and “The Companies’ witness, Mr. Hachey, has no knowledge of the information being requested,” for a triple-layer of redundant objections indicating that TransCanada’s witness knows nothing about gas prices. Thus, when it suits TransCanada’s purpose, Hachey adopts the “Sergeant Schultz defense: *‘I know nothing.’*”

TransCanada makes so many objections that resolving them is virtually impossible. In its January 24<sup>th</sup> Objection, TransCanada argued that the Commission should appoint its General Counsel and spend its money and resources to work out the objections because TransCanada was too big a company and answering the questions would impose a burden on it.<sup>15</sup> Now, it seeks to shift the burden to PSNH and the Commission by requiring PSNH to justify, in the face of thousands of objections, why each question is relevant, not burdensome, etc., and deeming it proper to have the Commission sort it all out. This not only stands the Commission's rule on its head, but it is contrary to this Commission's precedent and the standards applied in New Hampshire courts (state and federal). Moreover, it is fundamentally unfair and, if not specifically designed to impair the orderly conduct of this proceeding, surely has that effect.

TransCanada wants unfettered discovery from its admitted competitor PSNH, including discovery of confidential information, while simultaneously claiming that it is immune from such discovery. Its intervention in this matter was solely as a competitor of PSNH in an effort to deny a competitor recovery of substantial costs and thus gain a competitive advantage.

TransCanada asked 112 data requests of PSNH (not including subparts) which PSNH answered. TransCanada then requested (and obtained) a deposition of PSNH's President/COO during which it asked 382 more questions. But when questions are asked of TransCanada, it hides behind the twofold contention that *it*, as opposed to its witness, may not be asked any questions, and that no information may be obtained that might be in the possession of any other TransCanada entity, despite the fact that TransCanada has ready access to the information and

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<sup>15</sup> "Given the scope of TransCanada's parent and affiliates' North American operations the information would be unduly burdensome to produce." TransCanada Objection/Motion of January 24, 2014 at 4-5. TransCanada has now argued both sides of this argument, too, taking the position in its objections that neither TransCanada's parent nor its affiliates are subject to the very discovery that it claimed they were subject to and "would be unduly burdensome to produce."

that TransCanada expressly included repeated references to its affiliates as support for its Petition to Intervene.<sup>16</sup>

TransCanada's tactics should cause the Commission to ask: what value does TransCanada have in this proceeding? The answer is none. Is its continued participation "in the interests of justice"? RSA 541-A:32,II. The answer is no. Is TransCanada "impair[ing] the orderly and prompt conduct of the proceedings"? *Id.* The answer is yes. TransCanada wants it both ways: on the one hand, it claims to have information that is useful to the Commission justifying its grant of discretionary intervention, while on the other, it claims that it is shielded from producing any such information.

TransCanada is in this proceeding by choice, and only per the discretion of the Commission. RSA 541-A:32,II. This Commission has ruled that TransCanada has no legal standing and no direct interest that is affected by these proceedings. Accordingly, under the statutory requirement of RSA 541-A:32,II that conditions discretionary party intervenor status on "not impair[ing] the orderly and prompt conduct of the proceedings," the Commission should rescind TransCanada's intervenor status.<sup>17</sup> And every delay caused by parties with no rights,

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<sup>16</sup> TransCanada's attempt to masquerade as a different, more limited entity continues in its data request responses. After more than five years as a participant in scrubber proceedings before this Commission, the NHSEC, and the Supreme Court where it identified itself as "TransCanada," in its responses to PSNH's data requests TransCanada now refers to itself as the "Companies," seeking to erase any references to its TransCanada roots and its reliance on "TransCanada and its affiliates" interests as a basis for its Petition to Intervene.

<sup>17</sup> Indeed, if there ultimately is an appeal in this matter, TransCanada will not have standing since, as the Commission has already concluded, none of its interests are impacted in this proceeding and it has thus suffered no injury in fact. TransCanada has one interest in this proceeding. It seeks to harm its competitor PSNH by denying it the recovery of the cost of constructing the scrubber. Mr. Hachey contends that PSNH should only recover \$10 million of the \$422 million spent to comply with the legislative mandate. Whatever competitive advantage TransCanada can obtain by seeking to cause a competitor to suffer more than \$400 million in damages, it does not establish that TransCanada has suffered the requisite "injury in fact" to establish standing. Indeed, TransCanada appeared as an *amicus* in *Appeal of Stonyfield Farm*, 159 N.H. 227 (2009), in which the Supreme Court rejected an appeal by other companies seeking to block construction of the scrubber because they lacked standing. TransCanada also sought to block construction of the scrubber in the SEC, and the Supreme Court determined that it had no standing (albeit under the specific provisions of a statute). *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245 (2011). This Commission should not countenance TransCanada's continued attempts to use-or misuse-this proceeding to gain competitive advantage.

duties or privileges at stake creates harm to others that do have standing in this proceeding – namely retail customers who are ultimately responsible for a cost that is ever-growing, and PSNH which invested its capital and has now waited two and a half years without a final decision on cost recovery. Alternatively, as discussed below, the Commission should strike all of TransCanada’s non-compliant objections, deem TransCanada to have waived its right to object pursuant to Rule Puc 203.09(h), and require TransCanada to provide full and complete responses to PSNH’s data requests.

**B. Motion to Strike Objections**

This Commission’s 1/31 Letter directed TransCanada to file objections that complied with Rule Puc 203.09(g), and thus to provide specific objections clearly stating the grounds on which they are based. Both under its own Rules and if, as TransCanada suggested in its January 24<sup>th</sup> Objection, the Commission applies court rules by way of supplementing its own rules, TransCanada’s objections in this docket are facially inadequate.

The Commission has explicitly rejected the use of “general objections” and mandated that parties provide specific objections together with a “reason the information qualifies for th[e] objection.” *Re: New England Telephone and Telegraph Company, Inc.*, 74 NH PUC 317, 320 (1989). There, the Commission rejected general objections similar to, but even less expansive than those asserted here. As the Commission stated: “Compliance with discovery in legal proceedings involves full disclosure of all requested information which the party has at the time of the discovery request.” *Id.* at 319, citing *Kearsarge Computer v. Acme Staple*, 116 N.H. 705, 707 (1976). The Commission found that: (1) such compliance includes searching a party’s records for information in the possession of its employees; (2) an objection that a relevant request is “unduly burdensome” will “seldom be sustained where the information sought lies

wholly within the knowledge of the interrogated party and will not be revealed at all unless the party that bears the burden discloses it; (3) generalized objections that fail to state the specific objection that applies to a specific request are inadequate; (4) objections based on privilege, work product or alleged legal conclusions must “provide the reasons motivating the protection;” and (5) “it is not sufficient for [a party] to simply list all the possible objections which it could apply to any data request” but rather, the party ***must state the specific objection and the reason*** the information qualifies for this objection” as well as “all legal precedent supporting the application of the objection to the information.” *Id.* at 320 (emphasis added).

TransCanada’s objections and responses do not come remotely close to meeting this standard. As in the *NET* case, the Commission should strike TransCanada’s general objections whether stated that way, or masquerading as a “specific” objection. It is patently clear from the *NET* order that merely listing a series of objections under a data request does not constitute a “specific” objection.

TransCanada’s suggestion that the Commission look to court rules fares no better. Rule 23 of the Superior Court Rules provides that “[i]f a party, upon whom interrogatories are served, objects to any questions propounded therein, he or she may answer the question *by objecting and stating the grounds.*” Rule 23 (k)(1) (emphasis added.) The New Hampshire Supreme Court in *Kearsarge Computer, Inc. v. Acme Staple, Co., Inc.*, 116 N.H. 705, 707 (1976) held that failure to properly object or answer an interrogatory serves as a basis to exclude evidence at trial and that the specificity required for objections requires an explanation of *why* the question is objectionable.

Similarly, Rule 33(b)(4) of the Federal Rules of Civil Procedure requires that: “[T]he grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated

in a timely objection is waived.” Rule 34(b)(2)(C), governing requests for production, provides that “[a]n objection to part of a request must specify the part and permit inspection of the rest.”

And unlike TransCanada’s attempt to impose the burden on PSNH, the Federal Rules impose the burden on the objecting party to justify the objection. *Vazquez-Fernandez v. Cambridge College, Inc.*, 269 F.R.D. 150 (D.P.R.2010) (party objecting to interrogatories has the burden of establishing lack of relevance or undue burden, mere statements that questions are overly broad, burdensome or oppressive not enough, party must specify how each interrogatory is overly broad, burdensome or oppressive); *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617 (N.D.W. Va. 2006) (objections to interrogatories must be stated with specificity and “mere recitation of the familiar litany that interrogatory is overly broad, unduly burdensome and irrelevant does not suffice.”) Consistent with the Commission’s *NET* decision, boilerplate objections claiming burden, lack of relevance, privilege and the like are considered inadequate. “[G]eneral and conclusory objections as to relevance, over breadth, or burden are insufficient to exclude discovery of requested information.” *Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 09 CIV. 3701 JPO JCF, 2013 WL 6628963, 1 (S.D.N.Y. Dec. 16, 2013) (quoting *Melendez v. Greiner*, No. 01 Civ. 7888, 2003 WL 22434101, at 1 (S.D.N.Y. Oct. 23, 2003)). Such “[b]oilerplate objections that include unsubstantiated claims of undue burden, over breadth and lack of relevancy,” while producing “no documents and answer[ing] no interrogatories ... **are a paradigm of discovery abuse.**” *Pegoraro v. Marrero*, 281 F.R.D. 122, 128 (S.D.N.Y. 2012) (quoting *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y.2009) (emphasis added). The basis for any objection must show “specifically how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.” *Vazquez-Fernandez v. Cambridge Coll., Inc.*, 269 F.R.D. 150, 155-56 (D.P.R. 2010).

TransCanada’s recitation and repetition of this “familiar litany” of objections *for virtually every single request* made by PSNH fits this “paradigm of discovery abuse.” While the state and federal rules do not apply in this Commission, PSNH submits that common sense does. A party opposing discovery should not be permitted to say in effect “I don’t want to answer.” Common sense as well as this Commission’s rules and orders require that if the party claims that the request is irrelevant it must, in order to frame the issue for resolution, explain why. If it contends the question would place a burden on it, it should explain what that burden is. If it claims information is confidential, it should explain what it is about the requested information that makes it confidential.

Thus, should the Commission not rescind TransCanada’s intervenor status pursuant to the requirements of RSA 541-A:32,II, PSNH respectfully requests that the Commission strike all of TransCanada’s inadequate objections and require TransCanada to respond completely and fully to all of PSNH’s questions in a full, comprehensive, and timely manner.

**C. Motion to Compel**

**1. TransCanada’s General Objections Are Inadequate and Constitute Discovery Abuse**

For the reasons set out above, PSNH could easily stand on the fact that the type of generalized, boilerplate objections made by TransCanada are facially inadequate and deemed to constitute discovery abuse; however, a further examination of TransCanada’s general objections is merited because TransCanada uses the same objections as purported “specific” objections. As a result, it is worth asking whether any of these general objections has merit, whether applied in this manner, or at all. While some of the objections might be valid if applied to a specific question and if an explanation was given as to why the objection meets the specific question, they are meaningless when applied in the manner employed by TransCanada in this docket. In

the discussion below, PSNH refers to the TransCanada's General Objections ("G.O.") by number.

**G.O. No. 2: Instructions Placing Greater Requirements Than PUC Rules.**

This objection begs the question: just what does this mean? In what respect does PSNH ask for information not "authorized by" the Commission's Rules? TransCanada does not say. And even if TransCanada purported to answer the request, neither PSNH nor the Commission would know if information was withheld based on the objection. This is precisely why specificity is required. Moreover, TransCanada has little basis for this objection: PSNH's instructions were based upon those used by TransCanada in its data requests.

**G.O. No. 3: Requests For Information "Unrelated to the Testimony of Mr. Hachey and From Entities Not Parties to this Docket."**

This objection ignores the fact that TransCanada intervened in this action and is the "Party" as defined by Rule Puc 102.10. Mr. Hachey is TransCanada's witness – he is *not* a party. By its own request, TransCanada is a party in this proceeding and pursuant to Rule Puc 203.09, PSNH is entitled to serve data requests "upon any party." Thus, TransCanada cannot avoid answering requests on the basis that they may only be directed at Hachey, or that any information not in the possession of Hachey is off-limits. Indeed, if Hachey were subject to a deposition, he would not be able to hide behind such a request and the limits of his knowledge could be explored directly. However, if a request asks for Hachey's personal knowledge on a matter and he does not have any, it is simple to answer "I don't know" rather than interposing a page of purported objections.

The objection is also an effort by TransCanada to evade any responsibility for its actions in this docket by claiming that PSNH may only ask for information in the possession of two specific TransCanada entities and no other TransCanada entity. In its intervention in this matter,

it justified its intervention by referring to “TransCanada *and its affiliates*” as “involved in the transportation of natural gas and power generation” and as “being affected by this proceeding.” Now, however, when information in the possession of these “affiliates” is sought, TransCanada refuses to produce it. A simple example demonstrates the unfairness and absurdity of this position.

TransCanada Power & Marketing, Ltd. is owned by TransCanada Corporation, Inc. [www.transcanada.com/power-marketing](http://www.transcanada.com/power-marketing). According to its website, TransCanada Power & Marketing, Ltd. “owns, controls or is developing approximately 10,800 megawatts of power generation”; “Operates 37,000 miles of pipeline — tapping into virtually all major gas supply basins in North America”; “Provides gas storage and related services with approximately 380 billion cubic feet of storage capacity — one of the continent’s largest providers”; and has “More than 60 years of experience in the energy industry.” *Id.* Hachey is an officer of this entity, which is clearly an affiliate of TransCanada Corporation.<sup>18</sup> In his pre-filed testimony, Hachey testifies that PSNH did not act prudently in predicting the future price of natural gas. Yet when PSNH asks questions about the natural gas market, TransCanada contends that Hachey has no knowledge,<sup>19</sup> that the information cannot be sought from any of TransCanada’s affiliates, and that predictions TransCanada or its affiliates may have made about gas prices are irrelevant. Apart from being absurd, this again begs the question: if TransCanada and its affiliates cannot be asked to provide such information, or do not have it, why is their intervention helpful to the Commission? Likewise, if Hachey has no knowledge or information about how TransCanada’s own companies projected gas prices, then why does he have any expertise to criticize PSNH?

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<sup>18</sup> See the partial organization chart submitted by TransCanada in response to PSNH Question 3, attached hereto at Attachment E, Bates page 401.

<sup>19</sup> See footnote 9, *supra*.

*See Re Public Service Co. of New Hampshire*, 69 NH PUC 649, 651 (1984). (“Information sought for the purpose of exploring the experience, expertise and credibility of a witness is relevant, and its withholding is subject to an order to compel production.”) This simply demonstrates how frivolous this general objection is.

This objection also contends that neither Hachey nor TransCanada “may even seek the answer” to every request (the “general” objections being incorporated into every “specific one”) “due to regulated codes of conduct that prevent any access to or knowledge of the information being requested.” This convenient excuse is yet another example of why TransCanada’s answers are inadequate. Although this claim is asserted for every question, surely not every question implicates the alleged regulatory codes. Furthermore, which “codes” is TransCanada referencing? Why do they prevent disclosure of the information in an adjudicative proceeding? And what information is subject to this objection? Without such specificity, the objection has no merit.

Finally, TransCanada once again applies an inconsistent standard when discovery is sought of it, as opposed to PSNH. When it sought to compel production from PSNH, TransCanada stated:

The standard for discovery in Commission proceedings is broad and extends to information that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 167, 168 (2001). The Commission will typically allow “wide-ranging discovery” and will deny discovery requests only when it “can perceive of no circumstance in which the requested data would be relevant.” *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). A party in a legal proceeding in New Hampshire is entitled to “be fully informed and have access to all evidence favorable to his side of the issue. *This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else.*” *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969).

TransCanada Motion to Compel dated July 16, 2012, at 3 (emphasis added). Moreover, when TransCanada first sought to avoid its discovery obligations in this proceeding, in its January 24, 2014 Objection/Motion, TransCanada alleged that “Given the scope of TransCanada’s parent and affiliates’ North American operations the information would be unduly burdensome to produce.” Because the Commission rejected that pleading, TransCanada now reverses course and claims that its parent and affiliates are not subject to this proceeding’s discovery process. Even if the information is in the possession of TransCanada’s affiliate TransCanada Corporation, TransCanada is required to produce it unless it can demonstrate why doing so would be burdensome. Alternatively, TransCanada and Hachey can explain why information about how TransCanada’s parent estimated, predicted or calculated gas prices is irrelevant when similar estimates, predictions and calculations form the basis of Hachey’s testimony. As the Commission has previously held in this proceeding:

In the context of civil litigation, New Hampshire law favors liberal discovery, *see, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979), and discovery is regarded as “an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.’” *Johnston v. Lynch*, 133 NH 79, 94 (1990) (citing *Hartford Accident & Co. v. Cutter*, 108 NH 112, 113 (1967)).

Order No. 25,398 at 2-3, quoting from *City of Nashua*, Order 24,681 (2006) at 2. TransCanada should be held to the same standard.

**G.O. No. 4: Privilege, Work Product, “Proprietary,” “Protected Under State or Federal Law.”**

As evidenced by the catch-all description, this objection offers no explanation of the basis on which TransCanada refuses to answer questions or is withholding documents. If the question legitimately calls for privileged information or work product, TransCanada should explain why, and for documents, provide a privilege log from which the basis for the assertion of privilege or

work product can be tested. *See NET, supra*, and Superior Court Rule-Civil 21(c) (requiring that any claim of privilege be supported by a privilege log and must describe the “contents or substance of the materials or information at issue ... with sufficient specificity as to enable the other parties to assess the applicability of the privilege claim”). PSNH is not required to simply take TransCanada’s word for the fact that a privilege exists. Moreover, based on the number of requests which ask for information relating to Hachey’s testimony, it is hard to imagine that any privilege or work product has been implicated. As for the objection that documents are “protected under state and federal law,” unless such documents are identified and some explanation is given of the laws referred to, the objection would provide TransCanada with carte blanche to refuse to answer questions or produce documents.<sup>20</sup>

**G.O. No. 5: Overbroad, Burdensome, etc.**

TransCanada’s general objection number five actually includes six separate objections, claiming that every request is “overbroad” (whatever that means) or “unduly burdensome” because every question satisfies at least one of the six objections. Of course, without further specificity, PSNH is left to guess at whether the request is “overbroad or burdensome” because, for example, it calls for “review, compilation and/or production of a voluminous number of documents” or because it calls for information that is “cumulative or duplicative.” Surely, such an objection cannot apply to the large number of requests that can be answered “yes” or “no,” (*e.g.*, 24 (b)-(k), 26, 27, 29, 31(a)) or that call for admissions (*e.g.*, 37(b)-(h), 42-50, 66-69, 78-83), yet the objection is asserted for every single request. If neither TransCanada nor Mr. Hachey have sufficient information to answer the request, they can so state. Moreover, as set

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<sup>20</sup> TransCanada also claims that under RSA 91-A:5, it cannot be required to disclose confidential information. This claim has no merit. Section 5 of the Right-to-Know law applies only to governmental bodies, and the Commission’s Chapter Puc 200 rules include specified means of protecting confidential materials.

forth above, it is not enough to claim a burden without explaining why the question is burdensome. TransCanada makes no attempt to do so.

**G.O. No. 6: Beyond the Scope of Hachey’s Testimony or Information About Which Hachey Has No Knowledge.**

As described above (General Objection No. 3), TransCanada claims that PSNH’s data requests are limited solely to questions addressed to Hachey’s testimony and that no questions can be asked of TransCanada, the party intervenor in this matter. Apart from repeating that portion of its general objection No. 3 in G.O. No. 6, TransCanada contends that PSNH has asked Hachey for information about which he has no knowledge. If so, rather than interpose a lengthy objection, Hachey is entitled to provide a very simple answer: “I don’t know.” As for TransCanada, as a party to this docket, it is required to make a good faith effort to determine whether it has sufficient knowledge to answer the request even if that requires a company official other than Hachey to do so. *See NET, supra.* Having intervened, TransCanada cannot hide behind a claim that it is only required to provide information that its hand-picked witness knows.

**G.O. No. 7: “Overly Broad, Unduly Burdensome” “Not Reasonably Calculated to Lead to Information that is Relevant or Admissible.”**

Apparently TransCanada thought that just one general objection claiming PSNH’s requests imposed an undue burden or were “overly broad” was insufficient. As a result, it repeats that objection in more general form in general objection No. 7 and adds that objection to every single request, even if such requests are addressed to the specifics of Hachey’s testimony (*see, e.g.,* Nos. 9, 24, 26, 29, 33, 64, 66-71, 93, 104, 113 and 126). This is simply more boilerplate and is insufficient for the reasons set forth above.

**G.O. No. 8: “Confidential and Proprietary Information.”**

This objection is frivolous. TransCanada does not say what the confidential information is, or why it is confidential. For example, why do questions seeking TransCanada’s position on the Scrubber (*see, e.g.*, 117,119-121, 138-141, 143, 145-150) seek confidential information? Why is it that the very same questions TransCanada asked of PSNH seek confidential information when asked of TransCanada? (*See, e.g.*, 152-157, 162, 173, 175). Why do requested admissions concerning information that TransCanada has publicly disclosed seek confidential information? (*See, e.g.*, 40-50). Perhaps TransCanada’s point is that it may intervene in a matter in which it has no direct interest and obtain confidential information about its competitor, but it may hide behind a claim of confidentiality when that competitor seeks information from it.

**G.O. No. 10: Information Available From Public Sources.**

This objection might be acceptable for an individual question if it were true, if the information was identified and if the information was not readily available in a form that could be produced by TransCanada. The fact that TransCanada has asserted this objection for every single request demonstrates its inadequacy. As an example, surely information asking for clarification on Hachey’s testimony is not readily available from public sources.

**G.O. No. 11: Speculation About the Thought Processes of Others.**

Once again, TransCanada uses a sledge hammer when a scalpel is necessary. If a specific question requires TransCanada to speculate on the motives of others, it can say so. More to the point, TransCanada can answer the question by saying that it doesn’t know the answer or can say that while it doesn’t know what the motives of the alleged “other” is, it either agrees or disagrees. TransCanada’s witness Hachey was more than willing to speculate about PSNH’s

motives when asked in his pre-filed testimony (“PSNH developed an assumption about future gas prices for the sole purpose of economically justifying scrubber construction,” Hachey at 19), but refuses to respond to any such questions when asked by PSNH.

**G.O. No. 12: The Scope of This Docket is Limited to a “Specific Investment in a Specific Geographic Region and Market.”**

TransCanada makes this claim up out of thin air. The issue in this case is prudence. The other parties to this docket routinely question fuel price projections and national trends in environmental law as bases for their claims that PSNH was imprudent in how it conducted economic analyses of the scrubber project. PSNH, as well as all other generators using coal, oil or gas, purchases fuel from around the world, not just one “geographic region and market.” But when asked for information regarding fuel prices or economic analyses, TransCanada objects on the basis that questions are only relevant if limited in scope to “a specific geographic region and market.”

Can it seriously be argued that the reasonableness of PSNH’s actions in proceeding with Scrubber construction (an issue TransCanada sought to inject into this Docket) can only be measured in relation to this specific project and in one geographic region (which TransCanada does not identify)? TransCanada does not explain *why* that is the case or *why*, for example, TransCanada’s prediction of long-term gas prices in various markets is not relevant. Indeed, Hachey’s own testimony relies on studies and issues well beyond this specific project or one geographic area (Hachey at 20-22 among other things, criticizing PSNH for failing to consider “technological advancements in horizontal drilling and hydraulic fracturing”), In order to make this objection, TransCanada should be required to demonstrate why the only relevant information

for the Commission is information pertaining solely to this plant and solely to a particular geographic region. It has done no such thing.<sup>21</sup>

The geographic area that TransCanada deems relevant is indeed quite small. For example, in question 135, PSNH requested, “Please provide copies of all economic analyses performed by TransCanada relating to the relicensing of the Wilder, Bellows Falls, and Vernon Hydroelectric Projects on the Connecticut River.” TransCanada interposed all of its general objections to this question, including that it sought information not within the “specific geographic region and market” of the Scrubber. TransCanada then made its “specific” objection which included the complaint that the question “seeks information that is irrelevant to this proceeding – a proceeding to determine whether PSNH’s actions with regard to a specific investment in a scrubber project in a specific geographic region and market were prudent.”

Exactly what is the “specific geographic area and market” that TransCanada deems to be relevant? The Wilder, Bellows Falls, and Vernon Hydroelectric Projects are *all* located in New England; indeed they all are located *on the New Hampshire-Vermont border*.<sup>22</sup> In its Notice of Intent for the Bellows Falls Project, TransCanada states that the “Location of the Project” is within the states of “New Hampshire and Vermont;” that parts of that Project are in Sullivan and Cheshire Counties; and that the Project is located in the New Hampshire municipalities of

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<sup>21</sup> In point of fact, TransCanada has actually indicated that relevant data for the “specific geographic region and market” does not exist. In its response to Q PSNH-TC-69, “Is it your opinion that a cost of gas in New Hampshire of \$12/MMBtu in the Fall of 2008 was unreasonably high?” TransCanada could not answer, responding “the EIA data for the fall of 2008 in New Hampshire was limited to a small number of sources and was withheld by EIA due to confidentiality concerns.” See Attachment E at Bates page 401.

<sup>22</sup> TransCanada so admitted in its Petition to Intervene. See footnote 3, *supra*.

Cornish, Claremont, Charlestown, and Walpole, as well as four towns in Vermont.<sup>23, 24</sup>

Apparently, TransCanada's rubber-stamp objection regarding "geographic region and market" would require questions to be limited to Merrimack County, or perhaps just the Town of Bow.

**G.O. No. 13: Relevance.**

TransCanada makes yet another relevance objection (see also No. 7 and No. 12), citing to the decision of the Commission in *Re Investigation into Whether Certain Calls are Local*, 86 NH PUC 168-9 (2001) and then repeating this point over and over in its objections. The Commission's decision stands only for the unremarkable position that the Commission has the authority to determine what questions must be answered as relevant to the issues in the docket. The objection adds nothing and not once does TransCanada explain *why* the information sought is not relevant.

**G.O. No. 14: Seeking Admissions on Contested Issues.**

TransCanada objects to nearly every question asked on the basis that "they are seeking an admission on an issue that is contested in the docket." The whole point of the discovery process is to obtain information or concessions on issues that are in dispute for the purpose of limiting the dispute. One would hardly seek admissions on matters on which the parties agree. The objection is frivolous.

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<sup>23</sup> PSNH's service territory includes Cornish, Claremont, and Charlestown. Similarly, TransCanada's other Notices of Intent state that the Wilder Project is located in part in New Hampshire, in Grafton County, and the towns of Lebanon, Hanover, Lyme, Orford, Piermont, and North Haverhill; and the Vernon Project is located in part in New Hampshire, in Cheshire County, and the towns of Hinsdale, Chesterfield, Westmoreland, and Walpole. PSNH's service territory includes all or portions of Hanover, Lyme, Orford, Piermont, Haverhill, Hinsdale, Chesterfield, and Westmoreland.

<sup>24</sup> Copies of TransCanada's Notices of Intent filed with FERC are available on-line at: Bellows Falls <http://www.transcanada-relicensing.com/wp-content/uploads/PAD/Bellows%20Falls%20Project%20P-1855/10-31-12-Bellows-Falls-Project-Notice-of-Intent.pdf> ; Vernon <http://www.transcanada-relicensing.com/wp-content/uploads/PAD/Vernon%20Project%20P-1904/10-31-12-Vernon-Project-Notice-of-Intent.pdf> ; Wilder <http://www.transcanada-relicensing.com/wp-content/uploads/PAD/Wilder%20Project%20P-1892/10-31-12-Wilder-Project-Notice-of-Intent.pdf>

## **G.O. No. 15: Legal Conclusions**

See further discussion in PSNH's response to "specific" objections, below.

### **2. TransCanada's "Specific Objections" Are Anything But Specific and Constitute Discovery Abuse**

Instead of providing objections that bear some reasonable relation to each specific request, TransCanada apparently assumes that if it repeats enough of its general objections in response to each request, the Commission will conclude (without any additional information) that there must be some basis for the objection. Thus, TransCanada repeats the entirety of its general objections **211 times** (in addition to incorporating them by reference in the objection to *every question*).

Apart from this facial deficiency, a few examples of the objections interposed by TransCanada will demonstrate how inadequate and abusive the objections are:

#### **A Few Examples<sup>25</sup> of Frivolous Objections:**

- Request 23: The request asks for documents relating to cost estimates for the installation and operation of scrubbers at coal-fired generating plants in which TransCanada has a direct interest. TransCanada contends that what it spent to install scrubbers (assuming the answer is not that it has no interest in such plants) is irrelevant. Yet it can testify that similar cost estimates by PSNH are unreasonable and thus PSNH should be denied recovery of \$422 million.
- Request 30: Hachey testified concerning a study by PowerAdvocate. Hachey at 9. When asked about statements in that report as applied to TransCanada, TransCanada claims the information is irrelevant, that Hachey has no knowledge and that the information is protected by RSA 91-A:5.
- Requests 41-50: Each of these questions are in the nature of a request for admission about a single statement that can be answered "yes" or "no." TransCanada instead provides a full page of objections, including that Hachey has no knowledge, that the request is "overly broad, unduly burdensome" and irrelevant, cannot be answered because of codes of conduct and is protected by RSA 91-A:5. If TransCanada or Hachey don't know the answer, they could have said so.

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<sup>25</sup> Many more could be given.

- Request 66-68: The request asks questions regarding demands for natural gas and gas pricing that can be answered “yes” or “no.” After all, Hachey’s opinions concerning PSNH’s alleged lack of prudence is based on his contention that PSNH improperly predicted gas prices. Instead of answering, TransCanada repeats most of its general objections, including that the question is burdensome, irrelevant and that Hachey has no knowledge of the questions. If neither TransCanada nor Hachey have any knowledge, why not say so?
- Request 75: The request follows up on testimony from Hachey and asks about a statement made by the CEO of TransCanada to investors in May 2009 which appears to be inconsistent with that testimony. In response, TransCanada included its boilerplate general objections and an additional full page of “specific” objections including, *inter alia*, that the question is overly broad, burdensome, irrelevant, unrelated to Mr. Hachey’s testimony, beyond the scope of the proceeding, not reasonably calculated to lead to the discovery of information that is relevant and admissible in this proceeding, was not limited to a specific investment in a scrubber project in a specific geographic region and market, it is unnecessarily argumentative, and it is seeking an admission on an issue that is contested in the docket.
- Request 135: As discussed earlier, this question sought economic analyses performed in support of TransCanada’s ongoing relicensing efforts for its Vernon, Wilder, and Bellow Falls hydro generating projects located on the New Hampshire-Vermont border. Since Mr. Hachey testifies that PSNH’s economic analyses were inadequate, examples of such analyses performed by TransCanada itself would appear to be particularly relevant. TransCanada has already admitted to the relevance of such economic analyses – in its “Motion to Compel Public Service Company of New Hampshire to Respond to Data Requests” of July 16, 2012, TransCanada argued:

8. ... Similarly, PSNH did not answer questions about economic analyses and fuel price forecasts, instead arguing that the questions are based on a “faulty premise.” Because the Commission is tasked in this proceeding with evaluating the prudence of the Scrubber costs and PSNH’s decisions before and during the course of the Scrubber construction, responses to these questions are relevant to this evaluation or will lead to the discovery of admissible evidence. Therefore, the Commission should direct PSNH to respond to the questions.

Indeed, the Commission agreed with TransCanada, granted its motion to compel, and ordered PSNH to respond to all questions about economic analyses and fuel price forecasts. Order No. 25,445 at 26-27. It is disingenuous for TransCanada to now do an about-face and claim that such economic analyses and fuel price forecasts are NOT relevant to this proceeding, and will NOT lead to the discovery of admissible evidence.

And, if this alone is not evidence of the frivolous nature of these objections, TransCanada also objects to question 135 on the bases that, *inter alia*, “it would require the Companies to put forth another witness to respond”; “beyond the scope of this proceeding”; “it is overly broad, unduly burdensome and are not reasonably calculated to lead to the discovery of information that is relevant and admissible in this proceeding”; “the Companies object to the request on the basis that it seeks confidential and proprietary information from entities that are not a party to the docket”; “The Companies’ witness, Mr. Hachey, has no knowledge of the information being requested”;<sup>26</sup> “the Companies’ witness, Mr. Hachey, is asked questions he may not even seek the answer to due to regulated codes of conduct that prevent him from having any access to or knowledge of the information being requested”; “the Companies object to the request on the basis that it is to an entity that is not a party to the docket”;<sup>27</sup> “the Companies object to the request on the basis that it seeks information that is irrelevant to this proceeding – a proceeding to determine whether PSNH’s actions with regard to a specific investment in a scrubber project in a specific geographic region and market were prudent”; “the Companies object to the request on the basis that it is not relevant to the determination of the prudence of PSNH’s investment in the scrubber at Merrimack Station”; “it is necessarily argumentative”; “it is seeking an admission on an issue that is contested in the docket, which will be decided by the Commission.”

Each and every one of these objections is meritless on its face. As noted above, both TransCanada and this Commission have already agreed that economic analyses and fuel price forecasts are indeed proper topics for discovery questions and that such materials must be provided.

- Request 171: Jacobs Consultancy, Inc. was retained by the Commission to monitor and report on the Scrubber project to determine whether the costs were prudently managed in during construction. Jacobs issued such a report. This request asks whether TransCanada intends to challenge that report in any manner. Since the Jacobs report goes directly to the prudence of the costs incurred, whether parties intend to challenge that report is directly relevant. But TransCanada issues its full boilerplate objection, including that it seeks information protected by the Right-to-Know law, that the question is burdensome, overly broad, Hachey has no knowledge (*i.e.*, of a report that found the costs were prudently incurred), that the question asks for an opinion of law, and, remarkably, that the question “seeks information that is irrelevant to this proceeding – proceeding to determine whether PSNH’s actions with regard to a specific investment in a scrubber project in a specific geographic region and market were prudent.” These objections could not have been made in good faith.

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<sup>26</sup> In fact, Mr. Hachey has been designated by TransCanada to act as agent for TransCanada Hydro Northeast Inc. pursuant to 18 C.F.R. § 5.6(d)(2)(i) regarding these relicensing applications. See the Notices referenced in *fn. 24, supra*.

<sup>27</sup> The holder of the FERC licenses is TransCanada Hydro Northeast Inc., which is a party to this proceeding. See the FERC Notices referenced in *fn. 24, supra*.

- Request 174: The request asks whether TransCanada made a Right-to-Know law request to DES relating to Merrimack Station or the Scrubber from 2005 to the present and if so, to produce any documents obtained. If such documents were in TransCanada's possession, they would potentially serve as a basis for, or to contradict, its position in this docket. TransCanada objected, stating that the request is overly broad, burdensome, irrelevant, seeks information available from public sources and "is asking the Companies to find information and conduct research for it." Of course, if the answer is "no," none of these objections apply. If it is "yes," and the documents exist, the request is not burdensome and it is often the case that requests for production of documents ask the opposing party to find documents in their possession.

### **3. Relevance (and other) Objections to Questions TransCanada asked of PSNH But Now Refuses to Answer**

In August 2012, TransCanada moved to compel answers to data requests seeking information about PSNH's economic and fuel forecasts relating to Merrimack Station and the Commission granted those requests. *See* Order 25,398 at 4-17. For each of the requests that TransCanada moved to compel, it argued that the information was highly relevant, stating "PSNH did not answer questions about economic analyses and fuel price forecasts.... Because the Commission is tasked in this proceeding with evaluating the prudence of the Scrubber costs and PSNH's decisions before and during the course of the Scrubber construction, responses to these questions are relevant to this evaluation or will lead to the discovery of admissible evidence." Motion to Compel Public Service Company of New Hampshire to Respond to Data Requests of July 16, 2012. In Order No. 25,445 at 26-27, the Commission considered questions posed to PSNH concerning fuel price forecasts and consistent with the standard of review in addressing motions to compel discovery responses, ordered PSNH to respond to all such questions. Similarly, PSNH was asked a series of questions by TransCanada earlier in this proceeding to which PSNH objected. Those questions, TC 1-6, 1-7, 1-9, 1-10, 2-2, and 2-3, were included in TransCanada's first Motion to Compel dated July 16, 2012, at pages 8-12. In Order

No. 25,398 at pages 11-18, the Commission discussed these questions and determined that responses from PSNH were required. PSNH questions 152 through 158 to TransCanada are substantially the same as questions TC 1-6, 1-7, 1-9, 1-10, 2-2, and 2-3.

Now, in yet another about-face, TransCanada objects to the relevance of these same questions and responds with its boilerplate objections, including that the requests are burdensome, irrelevant, beyond the scope, not calculated to lead to the discovery of admissible evidence, and on and on and on. Among the requests TransCanada made of PSNH but now refuses to answer are requests on the following topics:

- Economic and fuel forecasts. TransCanada Requests 1-2 to 1-4. PSNH requests 34, 36-52, 57, 62, 63, 64, 70, 71, 72, 77, 83, 84, 85, 89, 90, 100, 106, 114, 133, 134, 150, and 151.
- Whether PSNH considered seeking a variance under RSA 125-O:17. TransCanada 1-14. PSNH No. 150 (what analysis did TransCanada make of PSNH's ability to obtain a variance, *i.e.*, did TransCanada consider economic factors it argues PSNH should have considered?).
- Documents provided to government officials related to achieving approval for RSA 125-O:11-18. TransCanada 1-6. PSNH No. 152.
- Names of individuals employed or compensated to take positions on the passage of the act. TransCanada 1-7. PSNH No. 153,155 (whether TransCanada compensated individuals to support or oppose the legislation).
- Documents provided to elected or public officials related to opposition to efforts to oppose the 2009 legislation that would have capped the cost of the scrubber or provided jurisdiction to the PUC to consider the construction costs. TransCanada 1-9. PSNH No.154 (seeking information to determine whether TransCanada took a position on that legislation).
- Correspondence with DES on the scrubber. TransCanada 2-2 and 2-3. PSNH No. 157, 158.

TransCanada cannot have it both ways, contending *when it* seeks the information that it is highly relevant, and asserting that *when PSNH seeks the same information* it is not. PSNH is

entitled to determine whether TransCanada has taken positions that may be inconsistent with its position in this proceeding. *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969). *See also, Public Service Co. of New Hampshire*, Order No. 25,398 (August 7, 2012). Information sought for the purpose of exploring the experience, expertise and credibility of a witness is relevant, and its withholding is subject to an order to compel production. *Re Public Service Co. of New Hampshire*, 69 NH PUC 649, 651 (1984). The credibility of the testimony, and the experience and expertise of the witnesses, are issues in this docket that PSNH has a right to explore, and which will only be considered here, not on appeal.

#### **4. Objections Based on Alleged Requests for Legal Opinions Concerning the Scrubber**

Hachey's testimony is based in large part on his opinion that RSA 125-O:11-18 does not mandate construction of the Scrubber and that PSNH should have retired Merrimack Station as opposed to constructing the Scrubber. Hachey testifies that he is "familiar with the scrubber law" and points out various provisions of the law, which he interprets, including his interpretation of RSA 125-O:17 as allowing PSNH to seek a variance from the requirements of the law. Hachey's testimony at 3-5. Yet when TransCanada is asked questions about the statute, including questions about Hachey's understanding of RSA 125-O:17, of the issue of retirement (which is central to Hachey's testimony) and divestiture, or other provisions of the statute, TransCanada refuses to answer the questions, except when it suits its purpose to answer. *See Responses to Requests 11, 15, 16,18, 21e, 25, and 27.* The basis for the objection is that "PSNH is asking Mr. Hachey, who is not an attorney, to provide a legal conclusion," and that "while Mr. Hachey is able to read the law and to provide a lay person's understanding of what the law says, he is not qualified to provide a legal conclusion." *See, e.g., TransCanada Objection to No. 117a.* If that is so, Hachey is equally unqualified to provide any opinions concerning the meaning of

the statute (*e.g.*, his opinion about what the statute permitted PSNH to do, Hachey at 28), and all of his testimony concerning the meaning of the law and how PSNH should have complied with it should be stricken. Alternatively, TransCanada should answer the questions by providing Hachey's lay person's understanding of what the law means.

##### **5. Hachey's Lack of Knowledge**

Hachey opines at length on why PSNH was not required to construct the Scrubber, and devotes an entire portion of his testimony to "The Importance of the Relationship Between Projected Natural Gas and Coal Prices." Hachey's testimony at pages 10-22. Yet when asked about TransCanada's forecasts of prices or about the specifics of the Scrubber project, TransCanada asserts that "Mr. Hachey has no knowledge" of various matters 263 times. Hachey could have answered "I don't know," but that might have established what he actually didn't know. So instead, TransCanada includes this objection within its boilerplate objection so that no one knows whether this is actually the basis for the objection, and thus Hachey cannot be pinned down.

A number of PSNH's requests quote from Hachey's testimony and either ask for an explanation of that testimony or ask about statements of TransCanada that are inconsistent with the testimony, ask follow-up questions concerning the testimony or ask for his opinion on matters raised in the testimony. *See, e.g.*, Requests 9, 24, 26, 27, 29, 30-34, 57, 58, 61, 62, 64, 66-70, 71, 72, 74, 75, 76, 93, 94, 104, 113 and 126. TransCanada objects to all of these requests applying the boilerplate objections, claiming that Hachey has no knowledge (in many instances about topics he addressed in his own testimony), that the information sought is irrelevant (despite Hachey's testimony on it), asserting that it is "beyond the scope of and not related to the

testimony that Mr. Hachey filed in this docket” and would either require Hachey to do more research or cause TransCanada to proffer another witness. None of these objections has merit.

First, each of these questions would be entirely appropriate follow-up questions in a deposition. Second, Hachey cannot deny knowledge about issues raised in his testimony or that follow-up on that testimony. Third, TransCanada cannot limit PSNH’s inquiry into Hachey’s opinions only to the precise issues he raises in his testimony. Isn’t that what discovery is for? Suppose there were issues outside Hachey’s testimony that he had failed to consider but that undercut his testimony? Would they be inappropriate for follow-up? For example, TransCanada refuses to answer questions relating to statements made by TransCanada’s CEO on matters within the scope of what Hachey has testified to. *See, e.g.*, No 64e, asking Hachey whether he agrees with a statement made by Mr. Hal Kvisle, TransCanada’s CEO, that “gas prices are obviously volatile.”<sup>28</sup> Contrary to TransCanada’s claim that this request is burdensome, that Hachey has no knowledge of it, or that it would require Hachey to conduct research, the question can be answered by stating whether or not Hachey agrees – yes or no. It certainly would be a fair question on cross, and it is a fair attempt to limit Hachey’s opinions and to test his understanding of the movement of gas prices.

TransCanada’s objections are simply an effort to prevent any meaningful inquiry into the bases of Hachey’s testimony, whether he has any support for his position and whether his testimony is contrary to positions TransCanada has taken elsewhere. As TransCanada has stated in this docket:

Taking an unnecessarily restrictive or limited view of discovery on these requests in this docket will serve no purpose other than to protect PSNH from the level of scrutiny that it must accept in return for the benefits and protections it receives

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<sup>28</sup> TransCanada now responds by repeating the general objections but without answering the question; that is, by providing a general statement but without stating agreement or disagreement.

from rate of return regulation. PSNH cannot continue to have it both ways: risk free decisions and frequent withholding of information that can help to evaluate the merit of those decisions.

TransCanada Motion to Compel July 16, 2012 at ¶ 18. Likewise, TransCanada cannot have it both ways – intervening in this docket with full rights of discovery claiming it has valuable knowledge, but limiting its own discovery responsibilities in an effort to avoid scrutiny it must accept as a party to this docket.

Among the topics TransCanada admits via its objections that Hachey has no knowledge of are the following:

- How TransCanada predicts whether or not costs in a competitive marketplace have or have not reached a peak
- TransCanada’s fuel price forecasts
- Economic analyses conducted by TransCanada
- TransCanada’s NYMEX gas price forecasts (forecasts which Hachey claims PSNH should not have used)
- TransCanada capital projects that relied in any way on the forecasts which turned out to be overly optimistic
- Documentation in TransCanada’s possession regarding the forward market for natural gas delivered to New England in the 2008 through 2011 time frame
- Whether the statement by TransCanada’s CEO that gas prices for the longer term could go “well above 10” ignored substantial information that was available at or about the time he made that statement
- Whether the CEO ignored substantial information available to him when he made the statement that “our gas price outlook for the longer term is somewhere in the 6 to 10 range”
- Whether in 2007, was it reasonable to expect gas production across North America to remain flat, demand for gas to grow, and therefore, for gas prices to rise
- Whether In February 2009, was it reasonable to assume that the natural gas supply bubble could last another 12 to 18 months and that prices would probably not drop much lower
- Whether the CEO’s statement to investors about Marcellus shale gas were “flawed or outdated”
- Whether the CEO “failed to disclose,” as he used those terms on Page 19, Line 6 of his testimony, information that was reasonably known to him at the time he made that statement

- Why the CEO told investors in May, 2009, that TransCanada did not know the impact of unconventional gas supplies
- When TransCanada first acknowledged the impact of Marcellus gas on gas prices
- Whether since 2006, TransCanada used gas price forecasts as an input into economic analyses for new facilities
- Regulatory filings made by TransCanada before the National Energy Board from 2006 through present regarding the “used-and-useful” standard in utility ratemaking [recall that his title is Vice President, Regulatory Affairs and Compliance]
- Whether the availability of Marcellus shale gas resulted in a significant drop in TransCanada’s Mainline Gas Shipments.
- Whether he characterizes having to recover set fixed costs over a dwindling base of customer to be a “death spiral”
- Whether he agrees that new supplies of shale gas in North America have caused Canadian gas prices to tumble, thus causing or helping to cause the pricing issues TransCanada has been experiencing with the Mainline
- How much gas-fired generating capacity TransCanada owns in New England
- Whether delays in the Keystone XL pipeline have increased the cost of that project
- Whether he can provide copies of economic analyses in the possession of TransCanada concerning the flue gas scrubber at Merrimack Station
- Whether he can provide copies of any and all documentation that TransCanada has regarding estimates of newly proposed coal and natural gas combined cycle generating stations in the 2008-2009 time frame
- Whether he can provide copies of any and all documentation in TransCanada’s possession regarding the forward market for natural gas delivered to New England in the 2008 through 2011 time frame
- Whether he can provide any and all documentation in TransCanada’s possession related to the bus bar costs of power for a new coal or natural gas combined cycle plant in New England during the 2008 to 2012 time period
- Whether TransCanada is intending to challenge in any manner the final reports produced by Jacobs Consultancy Inc. which was retained by the NHPUC to monitor and report on PSNH’s Clean Air Project at Merrimack Station

This docket is an adjudicative proceeding that is quasi-judicial in nature.<sup>29</sup> The integrity of this process is put into jeopardy when a party offers a witness, then repeatedly, in this case hundreds of times, takes the position that its witness has no knowledge of the subject matter he

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<sup>29</sup> See Order No. 25,342 issued in this proceeding on April 3, 2012. “In conducting adjudicative proceedings the Commission performs ‘important judicial duties,’ *Parker-Young Co. v. State*, 83 N.H. 551, 556 (1929), and is, therefore considered a quasi-judicial body. *Public Service Company of New Hampshire*, 122 N.H. 1062, 1074 (1982).”

testified to. TransCanada's objections claiming Mr. Hachey's lack of knowledge are so extensive that they raise the question of whether Mr. Hachey is competent to testify in this proceeding.<sup>30</sup>

#### **6. Inadequacy of TransCanada's February 14, 2014 "Responses" to PSNH's Questions**

On February 14, TransCanada provided "responses" to a fraction of PSNH's data requests. It provided no responses whatsoever for 87 of the 176 requests made by PSNH, as well as to portions of a dozen more, instead relying upon the objections discussed above. Of the questions responded to, PSNH reviewed TransCanada's responses and found the answers to approximately 54 (about 30 percent) were adequate enough to avoid the need to compel responses.

The questions for which TransCanada offered no response whatsoever are listed in Attachment C. A question-by-question recitation of those questions would not only be unduly burdensome, but given the inadequacy of TransCanada's objections thereto, would also be an exercise in futility. In light of TransCanada's failure to provide specific objections to the questions listed in Attachment C as required by the Commission's 1/31 Letter, the Commission's rules, and Commission precedent, PSNH requests that if TransCanada is allowed to continue as a party intervenor in this proceeding, it be compelled to respond fully and completely to these questions.

The questions for which PSNH deems TransCanada's responses to be inadequate are listed in Attachment D. TransCanada's full responses to those questions are included in Attachment E. Each of those questions references portions of the pre-filed testimony of

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<sup>30</sup> Of course, TransCanada has made so many objections that it will likely claim at the hearing that its form objection concerning Hachey's knowledge was not the actual basis for the objection and that Hachey should therefore be permitted to testify on topics as to which he denies knowledge. Given TransCanada's refusal to answer any questions concerning Hachey's knowledge, the Commission should consider striking the testimony altogether.

Mr. Hachey, relate to fuel price forecasts, or to other topics of relevance to this proceeding. As set forth in Attachment D, TransCanada's responses were incomplete or nonresponsive. If TransCanada is allowed to continue as a party intervenor in this proceeding, PSNH moves the Commission to compel full and complete responses to these questions.

**Conclusion**

TransCanada sought, and was granted, party intervenor status in this proceeding. It fully availed itself of the discovery process afforded parties. Now, as a party, it must comply with that same discovery process. If TransCanada wanted to be immune from discovery it should not have intervened in this docket in 2011, and it can choose to withdraw now. What it cannot do is have it both ways. By the express directive in the 1/31 Letter, the Commission's rules and prior decision, and the guidance provided by state and federal court rules and decisions, TransCanada's objections and responses are so defective as to constitute discovery abuse, warranting the relief requested herein.

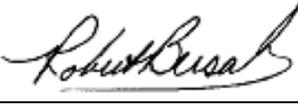
**WHEREFORE**, PSNH respectfully moves this Commission to:

- A. Rescind the intervenor status of TransCanada pursuant to RSA 541-A:32,II and V;
- B. In the alternative:
  - a. Strike the objections of TransCanada to PSNH's data requests;
  - b. Compel TransCanada to respond completely and fully to all of PSNH's questions set out on Attachments C and D in a full, comprehensive, and timely manner; and
- C. Grant such other relief as the Commission deems necessary and appropriate.

Respectfully submitted,

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

Dated: February 21, 2014

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

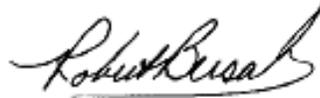
Robert A. Bersak, Bar No. 10480  
Assistant Secretary and Chief Regulatory Counsel  
Linda Landis, Bar No. 10557  
Senior Counsel  
Public Service Company of New Hampshire  
780 N. Commercial Street  
Post Office Box 330  
Manchester, New Hampshire 03105-0330  
[\(603\) 634-3355](tel:6036343355)  
[robert.Bersak@PSNH.com](mailto:robert.Bersak@PSNH.com)  
[linda.Landis@PSNH.com](mailto:linda.Landis@PSNH.com)

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Wilbur A. Glahn, III, Bar No. 937  
Barry Needleman, Bar No. 9446  
900 Elm Street, P.O. Box 326  
Manchester, NH 03105  
(603) 625-6464  
[bill.glahn@mclane.com](mailto:bill.glahn@mclane.com)  
[barry.needleman@mclane.com](mailto:barry.needleman@mclane.com)

**Certificate of Service**

I hereby certify that a copy of this Objection has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 21<sup>st</sup> day of February, 2014.



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Robert A. Bersak