THE 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 IN LIMINE OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE FOR LIMITATION OF THE PARTICIPATION OF THE SIERRA CLUB AND THE CONSERVATION LAW FOUNDATION IN THIS PROCEEDING DUE TO THE ISSUE PRECLUSION DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA

Pursuant to Rule Puc 203.07, Public Service Company of New Hampshire ("PSNH" or the "Company") respectfully moves the New Hampshire Public Utilities Commission ("Commission") to enforce the findings of the New Hampshire Air Resources Council in its decision and order issued in Docket Nos. 09-10 ARC and 09-11 ARC regarding the Scrubber Law by prohibiting the Sierra Club ("SC") and the Conservation Law Foundation ("CLF") from challenging the existence of a legal mandate on PSNH to install scrubber technology at Merrimack Station. Both CLF and SC are bound by a prior adjudication and decision regarding the meaning of the Scrubber Law, RSA 125-O:11, *et seq.*, by the Air Resources Council in that agency's Docket Nos. 09-10 ARC and 09-11 ARC, and they are barred under the issue preclusion principles of *res judicata* and collateral estoppel from relitigating that agency's findings before this body.

In support of this Motion, PSNH states as follows:

I. Background Facts

1. On June 8, 2006, the "Scrubber Law" took effect. *See* 2006 N.H. Laws, 105:4. RSA 125-O:13, I, enacted as part of the Scrubber Law, required in relevant part that, "The owner shall make appropriate initial filings with the department [DES] ...within one year of the effective date of this section... ." Pursuant to this statutory requirement, PSNH filed an application to construct the Scrubber with the New Hampshire Department of Environmental Services ("DES") on June 6, 2007.

2. On March 9, 2009, DES issued Temporary Permit TP-0008 (the "Scrubber Permit") to PSNH approving PSNH's application. The Scrubber Permit is available from the DES on-line at http://www2.des.state.nh.us/OneStopPub/Air/330130002611-0078TypePermit.pdf; the accompanying "Findings of Fact and Director's Decision," issued by Mr. Robert R. Scott (then-Director, Air Resources Division of DES), are attached to the rebuttal testimony of Mr. William H. Smagula as Attachment WHS-R-16.[1] The Scrubber Law is part of the state's Multi-Pollutant Reduction Program contained in RSA Chapter 125-O. The Attorney General of New Hampshire has noted that, "By law, DES is the agency charged with implementing the regulatory aspects of the multi-pollutant program." Brief for the State of New Hampshire to the Supreme Court, *In re Stonyfield Farm, Inc.*, 159 N.H. 227 (2009) (No. 2008-0897) at 11 (*See* Attachment WHS-R-02 to Mr. Smagula's rebuttal testimony, at page 15 of 28). Hence, the views of that agency regarding the Scrubber Law are entitled to deference.[2]

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[1] In the "Findings of Fact and Director's Decision, NHDES stated, "New Hampshire state law (RSA-125:O) [sic] requires PSNH to undertake this project and to file an application for a Temporary Permit with DES no later than June 8, 2007" (at 2) and "RSA 125-O:13 requires PSNH to install a FGD system to control mercury emissions from Merrimack Station Units MK1 and MK2 no later than July 1, 2013" (at 3).

[2] *See Re PSNH*, 76 NH PUC 332, 333 (1991) (citing *New Hampshire Retirement System v. Sununu* 126 N.H. 104 (stating "construction of a statute by those charged with its administration is entitled to substantial deference")).

3. On March 18, 2009, and March 19, 2009, the Sierra Club and the Conservation Law Foundation, respectively, each filed a Notice of Appeal with the Air Resources Council ("ARC") in an attempt to reverse the issuance of the Scrubber Permit. Those appeals were docketed by the Air Resources Council as Docket Nos. 09-10 ARC (*Appeal of Sierra Club*) and 09-11 ARC (*Appeal of Conservation Law Foundation*).[3] The ARC consolidated the appeals of CLF (Docket No. 09-11 ARC) and SC (Docket No. 09-10 ARC).

4. RSA Chapter 21-O, "Department of Environmental Services," establishes the Air Resources Council. Per RSA 21-O:11, IV, "The air resources council shall hear all administrative appeals from department [DES] decisions relative to the functions and responsibilities of the division of air resources and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14." RSA 21-O:14, "Administrative Appeals," provides the procedure for appealing a DES action.[4] Importantly for purposes of this Motion, RSA 21-O:14, II and III provide:

> II. Appeal hearings before any council established by this chapter shall be conducted in accordance with the provisions of RSA 541-A governing adjudicative proceedings by an administrative hearing officer assigned by the department of justice, under RSA 21-M:3, VIII. All issues shall be determined as specified in RSA 21-M:3, IX.
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> III. Persons aggrieved by the disposition of administrative appeals before any council established by this chapter may appeal such results in accordance with RSA 541.

5. On September 20, 2010, the Air Resources Council denied both SC's and CLF's appeals. *See Appeal of Sierra Club et al., and Conservation Law Foundation, Decision & Order On Appeals*, Docket Nos. 09-10 ARC and 09-11 ARC (Sept. 20, 2010) (the "ARC Order"). In that

[3] A third companion appeal was also lodged by Freedom Logistics, LLC and Halifax-American Energy Company, LLC. That appeal, Docket No. 09-12 ARC, was subsequently dismissed by the ARC due to lack of standing.

[4] ARC proceedings are also governed by a detailed set of regulations contained in N.H. Code of Admin. Rules, Chapter Env-AC 200.

Decision & Order, pursuant to RSA 541-A:38, VIII and NH Code Admin. Rules Env-AC 205.09, the Air Resources Council made a number of findings of fact and conclusions of law.

6. In its decision in the ARC Order, consistent with the Temporary Permit issued by DES and the accompanying "Findings of Fact and Director's Decision," the Air Resources Council specifically made, *inter alia*, the following "Findings of Fact":

> 2. "Scrubber Project" means the wet flue gas desulphurization system ("FGD System") ***mandated by the New Hampshire Legislature to be installed by PSNH*** and operational at Merrimack Station Units 1 and 2 no later than July 1, 2013, under RSA 125-O:11 through RSA 125-O:18, inclusive.
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> 6. ***"Parties" means, collectively, Conservation Law Foundation ("CLF"), New Hampshire Sierra Club ("NHSC"), NHDES, and Public Service Company of New Hampshire ("PSNH").***
>
> ***7. "Appellants" means, collectively, CLF and NHSC.***

Decision & Order On Appeals at 7; *see Public Service of New Hampshire Requests for Findings of Fact and Conclusions of Law*, ARC Docket Nos. 09-10 and 09-11, No. 107 (July 2, 2010) (Attachment WHS-R-18 to the rebuttal testimony of Mr. Smagula, page 5) (emphases added).

7. In the ARC Order, the Air Resources Council also made the following "Conclusion of Law":

> 107. ***As a matter of law, PSNH is required to install and operate the Scrubber system***. RSA 125-O:11-18."

Id. (emphasis added).[5]

8. As noted above, RSA 21-O:11, III, provides for an appeal to the New Hampshire Supreme Court under RSA Chapter 541 by persons aggrieved by a decision of the Air Resources

[5] Similarly, in its March 19, 2009, "Notice of Appeal" at paragraph IV, A, CLF alleged to the ARC, "PSNH is required under New Hampshire law to install by 2013 wet flu [sic] gas desulpherization scrubbers that will reduce mercury emissions from the plant by eighty percent ('Scrubber Project'). *See* RSA 125-O:11, *et seq.* ('Scrubber Law')."

Council. Neither SC nor CLF filed such an appeal of the ARC Order resolving Docket Nos. 09-10 ARC or 09-11 ARC.

II. Underlying Law

9. The ARC is a quasi-judicial body that provided both CLF and SC with an adjudicative proceeding. The ARC Order precludes re-litigation of matters decided therein (or that could have been decided therein), in accordance with the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) per myriad New Hampshire Supreme Court decisions because: (a) the Decision was rendered by the ARC acting in a judicial capacity; (b) the issues decided were properly before the ARC; and (c) SC and CLF were both party-appellants that had extensive opportunity to fully litigate the matter.

a. Res Judicata & Collateral Estoppel in New Hampshire Courts

10. The doctrine of *res judicata* forbids a party to relitigate in a second action matters actually litigated, as well as matters that could have been litigated, in an earlier action between the same parties for the same cause of action. *Appeal of White Mountains Educ. Ass'n.*, 125 N.H. 771, 775 (1984). In *Scheele v. Village District*, 122 N.H. 1015 (1982), the New Hampshire Supreme Court held:

> The doctrine of res judicata prevents the parties from relitigating matters actually litigated and matters that could have been litigated in the first action. *Town of Durham v. Cutter*, 121 N.H. 243, 246, 428 A.2d 904, 906 (1981). "The heart of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in subsequent litigation involving the same cause of action." *Concrete Constructors, Inc. v. The Manchester Bank*, 117 N.H. 670, 672, 377 A.2d 612, 614 (1977). Modern usage of the term res judicata is broad, covering all the various ways in which a judgment in one action will have binding effect in another. *Bricker v. Crane*, 118 N.H. 249, 252, 387 A.2d 321, 323 (1978).
>
> Collateral estoppel, although not applicable to this case, is an extension of res judicata which prevents the same parties, or their privies, from contesting in a subsequent proceeding on a different cause of action any question or fact actually

> litigated in a prior suit. *Id.* at 253, 387 A.2d at 323; *cf. Cutter v. Town of Durham,* 120 N.H. 110, 111, 411 A.2d 1120, 1121 (1980) (mutuality of parties not always required under the doctrine of collateral estoppel). Considerations of judicial economy and a policy of finality in our legal system have resulted in the development of the doctrines of res judicata and collateral estoppel to avoid repetitive litigation. *Id.* at 252, 387 A.2d at 323. "The decisions in this state, in the final analysis, have always turned on whether there had been a full and fair opportunity to the party estopped to litigate the issue barring him ...." *Sanderson v. Balfour,* 109 N.H. 213, 216, 247 A.2d 185, 187 (1968).

See also State v. Pugliese, 122 N.H. 1141, 1144 (1982) (Collateral estoppel is an extension of the doctrine of *res judicata*, which "bars relitigation of factual issues which have already been determined"); ("Like the doctrine of *res judicata*, it [collateral estoppel] has the dual purpose of protecting litigants from the burden of relitigating identical issues"). (internal quotation marks omitted).

11. Similarly, in *Appeal of Hooker*, 142 N.H. 40, 43 (1997), the Supreme Court held:

> In its broadest sense, the term res judicata "cover[s] all the various ways in which a judgment in one action will have a binding effect in another." *Morin v. J.H. Valliere Co.*, 113 N.H. 431, 433, 309 A.2d 153, 155 (1973). Although the claimant has couched his arguments in res judicata terms, we note that more precisely he is seeking to apply collateral estoppel, a doctrine we have described as "an extension of res judicata which prevents the same parties, or their privies, from contesting in a subsequent proceeding on a different cause of action any question or fact actually litigated in a prior suit." *Scheele v. Village District*, 122 N.H. 1015, 1019, 453 A.2d 1281, 1284 (1982).

In *In re Alfred P.,* 126 N.H. 628, 629 (1985) the Court noted:

> The doctrine of res judicata precludes the litigation in a later case of matters actually litigated, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. *Scheele v. Village District,* 122 N.H. 1015, 1019, 453 A.2d 1281, 1283 (1982); *see MBC, Inc. v. Engel*, 119 N.H. 8, 11, 397 A.2d 636, 638 (1979) (cause of action is the underlying right). Collateral estoppel precludes the relitigation by a party in a later action of any matter actually litigated in a prior action in which he or someone in privity with him was a party. *Caouette v. New Ipswich*, 125 N.H. 547, 554-55, 484 A.2d 1106, 1111-12 (1984).

And, in *Pugliese*, 122 N.H. at 1144, the Court held:

> "Collateral estoppel, which is an extension of the doctrine of res judicata, bars relitigation of factual issues which have already been determined ...." *State v. Proulx*, 110 N.H. 187, 189, 263 A.2d 673, 675 (1970*); see State v. Hastings*, 121 N.H. 465, 467, 430 A.2d 1131, 1132 (1981*); see also Scheele v. Village District of Eidelweiss,* 122 N.H. 1015, 1019, 453 A.2d 1281, 1284 (1982). Like the doctrine of res judicata, it "has the dual purpose of protecting litigants from the burden of relitigating an identical issue ... and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979*); see In re Robert C.*, 120 N.H. 221, 224, 412 A.2d 1037, 1039 (1980).

12. Significantly, the New Hampshire Supreme Court has held that the doctrines of *res judicata* and collateral estoppel both apply to administrative proceedings, such as the instant proceeding. *White Mountains*, 125 N.H. at 775 (finding that *res judicata* is a limitation not only in the courts: "[a]n administrative proceeding affecting private rights is subject to this same limitation."); *see also Cook v. Sullivan*, 149 N.H. 774, 777-78 (2003) ("In order for *res judicata* to apply to an administrative decision...[the agency] must have been acting in a judicial capacity."). In *Morin v. J. H. Valliere Co.*, 113 N.H. 431, 433-34 (1973), the Supreme Court held:

> Res judicata has been applied to a decision of an administrative agency ... which is rendered in a judicial capacity and resolves disputed issues properly before it which the parties have had an adequate opportunity to litigate. *LaBonte v. National Gypsum Co.*, 110 N.H. 314, 316, 269 A.2d 634, 636 (1970); Davis, Administrative Law Text s 18.02 (1972); 3 Larson, Workmen's Compensation Law s 79.71, at 222 (1971). Contrary to plaintiff's contention, such a decision in the absence of an appeal which is pursued would meet the requirements of finality needed for res judicata to apply. RSA 281:37 (Supp. 1972); Restatement (Second) of Judgments s 41 (Tent. Draft No. 1, 1973).

b. Res Judicata as applied by the Commission

13. The Commission, consistent with the New Hampshire Supreme Court, has also declared that *res judicata* applies to its own proceedings:

> "[T]he essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." *Osman v. Gagnon*, 152 N.H. 359, 362 (2005) (citation omitted). "Res judicata attempts to avoid repetitive litigation in order to promote judicial economy and a policy of certainty and finality in our legal system." *Id.* (citation omitted).

Re Alden T. Greenwood dba Alden Engineering Company, 91 NHPUC 170, 172 (2006), *affm'd* 91 NHPUC 83 (2006). The Commission continued in *Greenwood* by holding that the *res judicata* doctrine applies to any agency decision that passes a three-pronged test: "Res judicata is applicable in connection with a decision of an administrative agency which was rendered in a judicial capacity, resolves disputed issues properly before it and which the parties had an opportunity to litigate." *Id.*

14. The Commission has also held that the doctrines of issue preclusion and claim preclusion lead to the same estoppel result:

> [w]ith regard to both issue preclusion and claim preclusion, such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.

Connecticut Valley Electric Company, 87 NHPUC 150, 169 (2002) (internal quotation marks omitted). Similarly, the Commission has held that the preclusion doctrines of *res judicata* and collateral estoppel operate where matters were actually litigated to final judgment in a forum of competent jurisdiction, citing to *Scheele v. Village District. Re New Hampshire Electric Cooperative, Inc.*, 76 NHPUC 373, 374 (1991). The Commission has also looked favorably on the doctrine of *res judicata* to limit controversies: "We trust that the parties will use the tools available, including requests for administrative notice and arguments of *res judicata*, to apply the findings and rulings from this proceeding to any future request by Merrimack for alternative regulation under RSA 374:3-b." *Re Kearsarge Telephone Co.*, 95 NHPUC 402, 404 (2010).

III. The ARC Order meets the requirements for Res Judicata

15. While the Supreme Court and the Commission have separate *iterations* of the test for determining whether the doctrines of *res judicata* and collateral estoppel apply, the requirements therein are nevertheless identical. Notably, the Commission sets forth a three-pronged test (*see Greenwood*), while the Supreme Court condenses prongs (1) and (3) into a single requirement (the "essential elements of adjudication"). Namely, under the Supreme Court iteration, for an agency to have been acting in a judicial capacity (Commission prong 1), all parties must have had an opportunity to litigate (Commission prong 3). This Motion will briefly discuss *both* iterations, first through a discussion of the elements of adjudication, then through a more specific examination of the Commission's third prong.[6]

a. The ARC Order was made in a judicial capacity

16. To act in a judicial capacity, an administrative tribunal must include the "essential elements of adjudication" during the proceeding. *Cook v. Sullivan*, 149 N.H. 774, 778 (2003) (citing the Second Restatement of Judgments § 83 as a reference for the "essential elements of adjudication."). These elements are: adequate notice, the right of all parties to present evidence and legal argument, fair opportunity to rebut opposing parties, a specific formulation of laws and facts as they apply to a specific "transaction, situation or status," and a ruling that involves a final decision on the merits. *See* Restatement (Second) of Judgments § 83 (1982). *See also Gould v. Director, DMV,* 138 N.H. 343, 348 (1994):

> Actions by administrative agencies are quasi-judicial if the adjudicatory process, provided by statute, requires notification of the parties involved, a hearing including receiving and considering evidence, and a decision based upon the

[6] In a broad sense, a decision made in a judicial capacity requires a final decision, on the merits, that affects a party's private rights. *See Morin*, 113 N.H. at 434; *see also Petition of Boston & Maine Corp.*, 109 N.H. 324, 336 (1969) ("If private rights are affected by the board's decision the decision is a judicial one"). And, when establishing the finality of an administrative decision, courts will look to whether the parties involved had "adequate opportunity to litigate." *Morin*, 113 N.H. at 434.

evidence presented. *See Winslow v. Holderness Planning Board*, 125 N.H. 262, 266-67, 480 A.2d 114, 116 (1984).

17. The ARC Order meets and otherwise exceeds all of the essential elements of adjudication in a judicial capacity. The ARC Order was sought in the context of an administrative appeal, to the statutorily delegated body charged (under RSA 21-O) with the judicial and adjudicative duties set forth by the New Hampshire Administrative Procedures Act ("NH APA"). *See* RSA 21-O:14, I-a, II, III, (stating that DES appeal hearings "shall be in accordance with the provisions of RSA 541-A" and "[p]ersons aggrieved by the disposition of administrative appeals before any council established by this chapter may appeal such results in accordance with RSA 541."). The NH APA requires that all agencies follow a minimum set of rules during *all* informal and formal adjudicative proceedings. These rules include the essential elements of adjudication. RSA §§ 541-A:30, 541-A:31, ("all parties shall be afforded an opportunity for an adjudicative proceeding after reasonable notice"; "opportunity shall be afforded all parties to respond and present evidence and argument on all issues"; "the record in a contested case shall include... any decision, opinion or report by the officer presiding.")

18. Since the ARC was bound by the NH APA during its adjudicative proceeding involving SC and CLF (as per its statutory obligations), the proceeding met all essential elements of adjudication. Therefore, the ARC Order was made in a judicial capacity.

b. The parties involved had full opportunity to litigate the ARC Order

19. Although this requirement has already been met (as one of the "essential elements of adjudication" listed above), one last fact is relevant to note: The parties not only had a *full* opportunity to litigate the ARC Order – SC and CLF had *extensive* opportunity to do so. The ARC order denying the SC's and CLF's appeals states that "[t]he procedural history of these appeals is lengthy and voluminous, including extensive motion practice by the parties, numerous

meetings of the Council, and pre-hearing conferences." Decision & Order On Appeals, Docket Nos. 09-10 and 09-11 ARC at 1 (Atch WHS-R-18, page 2). Indeed, as shown here and above, the parties enjoyed more than a full opportunity to debate the ARC Order.

IV. Application of the doctrines of Res Judicata and Collateral Estoppel to this Proceeding

20. As demonstrated above, per the precedent of the New Hampshire Supreme Court as well as that of this Commission, both CLF and SC are bound by the Air Resources Council decision and findings that the Scrubber Law mandated PSNH to install scrubber technology at Merrimack Station. The *res judicata* and collateral estoppel doctrines "***limit***" (*Daigle v. City of Portsmouth*, 129 N.H. 561, 574 (1987)), "***bind***" (*see Day v. New Hampshire Ret. Sys.*, 138 N.H. 120, 123 (1993)), "***conclude***" (*see ERG, Inc. v. Barnes*, 137 N.H. 186, 191 (1993)), "***extinguish***" (*Grossman v. Murray*, 141 N.H. 265, 269-70 (1996)), "***prohibit***" *(see Petition of Walker*, 138 N.H. 471, 475 (1994)), "***restrict***" *(Demetracopoulos v. Wilson*, 138 N.H. 371, 376 (1994)), "***thwart***" (*Hopps v. Utica Mut. Ins. Co.*, 127 N.H. 508, 511(1985)), "***end***" (*In re Zachary G.*, 159 N.H. 146, 151 (2009)), "***blockade***" (*In re Smith*, 189 B.R. 240, 243 (Bankr. D.N.H. 1995)), "***forestall***" *(U.S. v. Dray*, 901 F.2d 1132, 1136 (1st Cir. 1990)), "***avoid***" (*In re Appeal of Univ. Sys. of New Hampshire Bd. of Trustees,* 147 N.H. 626, 629 (2002)), "***inhibit***" (*Cohen v. Massachusetts Bay Transp. Auth.*, 647 F.2d 209, 212 n.4 (1st Cir. 1981)), "***obviate***" *(In re Strangie,* 192 F.3d 192, 195 (1st Cir. 1999)), "***remove***" (*Allen v. McCurry*, 449 U.S. 90, 93 (1980)), "***avert***" (*Reed v. Allen*, 286 U.S. 191, 201, (1932)), "forbid" (*White Mountain, supra*), "***prevent***" (*Town of Durham, supra*), "***preclude***" (*Alfred P., supra*), and "***bar***" (*Pugliese, supra*) such relitigation.

21. In light of the ARC's findings of fact and law regarding the nature and extent of the mandate placed on PSNH by the Scrubber Law, both SC and CLF may not relitigate that fact. For purposes of this instant docket, SC and CLF are limited to issues involving the prudence of PSNH's compliance with the Scrubber Law (i.e., the prudence of the engineering, design, procurement, installation, and commissioning of the Scrubber) and not whether PSNH should have installed the Scrubber at all.

22. As a result of the *res judicata*/collateral estoppel bar, the testimonies of both Dr. Elizabeth Stanton filed on behalf of CLF and Dr. Ranajit Sahu filed on behalf of SC should not be accepted into the record of this proceeding. The purpose of the testimony of both witnesses Stanton and Sahu is the same; that is to support the common positions of CLF and SC that PSNH was imprudent for "deciding" to pursue the Scrubber Project – positions which are contrary to and which collaterally attack the ARC Order. Neither of those witnesses provides any testimony on issues which SC and CLF are not barred from relitigating as a result of the decision and order they received in their appeals to the Air Resources Council.

V. Conclusion

23. Here, both the Sierra Club and the Conservation Law Foundation filed appeals with the New Hampshire Air Resources Counsel, a quasi-judicial adjudicative agency of this state. A full adjudicative proceeding was held before that agency. The ARC made findings of law and fact regarding the Scrubber Law. Those findings were decided under the circumstances necessary to invoke the preclusion doctrines of *res judicata* and/or collateral estoppel. Both the Sierra Club and the Conservation Law Foundation had the legal right to appeal the Air Resource Council's decision to the New Hampshire Supreme Court - - but they did not. The myriad precedents cited herein from both the New Hampshire Supreme Court and from this Commission preclude the

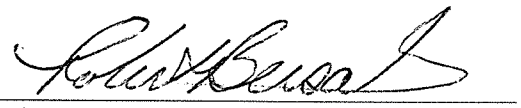
Sierra Club and the Conservation Law Foundation from attacking the final decision of the Air Resources Council before this Commission.

24. As a result, both the Sierra Club and Conservation Law Foundation are estopped from collaterally attacking the ARC Order, both through the testimony of witnesses Sahu or Stanton, as well as via the questioning of other witnesses during hearings in this proceeding.

WHEREFORE, PSNH respectfully moves the Commission to prevent the Sierra Club and Conservation Law Foundation from collaterally attacking the decision and order of the Air Resources Council issued in its Docket Nos. 09-10 ARC and 09-11 ARC by limiting the participation of both the Sierra Club and the Conservation Law Foundation only to issues involving the prudence of the engineering, design, procurement, installation, and commissioning of the Scrubber, and not whether PSNH should have installed the Scrubber at all; and, by excluding from entry into the record the testimonies of both Dr. Elizabeth Stanton filed on behalf of CLF and Dr. Ranajit Sahu filed on behalf of SC, both of whom testify only that PSNH improperly proceeded with installation of the scrubber.

Respectfully submitted this 21st day of August, 2014.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).

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