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11 South Main Street, Suite 500 | Concord, NH 03301  
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Email: barry.needleman@mclane.com  
Licensed in NH

July 23, 2009

Arthur B. Cunningham, Esquire  
79 Checkerberry Lane  
Hopkinton, NH 03229

Re: July 10, 2009 New Hampshire Sierra Club Letter

Dear Mr. Cunningham:

On behalf of my client, Public Service Company of New Hampshire (PSNH), I am responding to your letter of July 10, forwarded to me by Attorney Elise Zoli of Goodwin Procter, LLP. Your letter deals primarily with the New Hampshire Sierra Club's (NHSC) Second Request for Information in the context of a pending appeal NHSC filed against Public Service Company of New Hampshire (PSNH) before the New Hampshire Air Resources Council (the Council). The appeal objects to the issuance by the New Hampshire Department of Environmental Services (NHDES) of the Temporary Permit for the legislatively-mandated construction of a wet flue gas desulphurization system ("Scrubber Project") at Merrimack Station. Because I am counsel for PSNH in that appeal, I am responding to your letter.

NHSC's information request is improper for three reasons.<sup>1</sup> First, it violates a procedure the Council established, and to which NHSC agreed, on June 26, 2009. Second, it ignores the fact that the New Hampshire Site Evaluation Committee (SEC) just conducted an evidentiary hearing on the precise issue NHSC continues to press in the Council appeal: the alleged linkage between the Scrubber Project and the 2008 turbine replacement project. The SEC unanimously (9-0) rejected the position NHSC is advancing in this appeal when it concluded that the two projects are separate.<sup>2</sup> The SEC determination is particularly noteworthy since the SEC is

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<sup>1</sup> As you know, we filed our formal objection to this Second Information Request on July 16, 2009. That objection elaborates on all of the arguments contained in this letter.

<sup>2</sup> SEC members who voted on in PSNH's favor on that issue were Thomas S. Burack, Commissioner of the Department of Environmental Services; Thomas Getz, Chairman of the New Hampshire Public Utilities Commission; Robert Scott, Director of the New Hampshire Air Resources Division; Harry Stewart, Director of the New Hampshire Water Division; Clifton Below, Commissioner of the Public Utilities Commission; George Campbell, Commissioner of the New Hampshire Department of Transportation; Glenn Normandeau, Director of the New Hampshire Fish & Game Department; Brooke Dupee, Designee

comprised of the many of the critical decision makers in the State - such as the commissioners and directors of key state agencies – individuals, in brief, who have the health and well-being of the citizens of this State as their top priority. Third, this Second Information Request seeks material that is in no way relevant to the Scrubber Permit proceeding (e.g. extensive start-up data from the 1960s pertaining to Merrimack Station).

Regarding the first point, NHSC's Second Information Request is improperly filed at this time because it is in direct contravention of the procedure established in the prehearing conference with the Council's Presiding Officer on June 22, 2009. At that time, it was agreed by all parties, *including NHSC*, that resolution of NHSC's First Request for Information would be delayed until after the Council received briefs on July 22, 2009 from the parties (NHSC, Conservation Law Foundation (CLF), the Attorney General's Office (representing NHDES), and PSNH) pertaining to the proper scope of the proceeding and made its formal determination on that issue. If the Council determines that the scope of the appeal is limited to issues related to the NHDES's decision to issue the permit (i.e., issues related to the Scrubber Project), then NHSC's previous information request would be denied. The same would certainly be true for the Second Request for Information as well. Therefore, until the Council defines the proper scope of the proceeding, this Second Request is inappropriate and untimely.

Second, a number of the issues raised in your letter have already been addressed in an extensive, public manner in the Legislature, in regulatory proceedings, and in adjudicated proceedings. Moreover, these issues have been resolved repeatedly in favor of PSNH. Specifically, on June 26, 2009 the SEC held a full-day evidentiary hearing in response to a motion for Declaratory Judgment filed by various parties, including CLF (one of the other parties in the Council appeal). The primary purpose of that hearing was to receive evidence as to whether the Scrubber Project was a "sizeable addition" under RSA 162-H. One of the central issues in that proceeding was whether the Scrubber Project and 2008 turbine replacement project should be linked. As you know, NHSC and CLF have been trying to advance that same issue before the Council. In fact, that issue is the centerpiece of the NHSC and CLF challenges at the Council.

During that evidentiary hearing Mr. William Smagula, Director of Generation for PSNH, testified extensively about many of the topics addressed in your July 10, 2009 letter. Mr. Smagula was then cross-examined at length, both by the moving parties (including CLF) and by members of the SEC. Mr. Smagula's testimony furnished a great deal of information pertaining to the exact issues you raise in your letter. Moreover, prior to this evidentiary hearing the parties filed a joint Stipulation of Facts that contained a substantial amount of additional information. That document is publicly available.

On July 7, the SEC deliberated publicly and ruled in PSNH's favor on every issue.<sup>3</sup> Most notably, with respect to the question of whether the Scrubber Project and the 2008 turbine replacement project should be linked, the Committee unanimously ruled that the projects were unrelated. The information provided to the SEC, coupled with its subsequent ruling, completely undercut the NHSC's misplaced assertions that PSNH has not been forthcoming about these matters.

Third, NHSC's Second Request seeks information which is not even remotely related to the Temporary Permit that is the subject of the Council proceeding. For example, there is simply no basis for asserting that 40 year old information about Merrimack Station has any bearing on the issuance of the Temporary Permit for the Scrubber Project.<sup>4</sup> The Request appears to derive from some standardized set of questions used in proceedings in other states that have barely been tailored to focus on Merrimack Station in general, and have in no way been designed to elicit information about the only relevant topic in the Council proceeding: the issuance of the Temporary Permit authorizing the construction of the Scrubber Project.

In sum, NHSC's claims that PSNH has not been forthcoming with information are baseless. PSNH has provided responsive and extensive information to regulators, legislators, and other interested parties, in numerous meetings, updates, information sessions, and permitting processes, as well as in response to legal challenges, including at the Department of Environmental Services, the Public Utilities Commission, the Site Evaluation Committee, and the New Hampshire Supreme Court. Even a casual review of the SEC proceeding, as just one example, will show that PSNH has produced an enormous amount of information about the Scrubber Project. As for NHSC's continued claims of linkage between the Scrubber permit process and the 2008 turbine replacement, that issue has now been fully litigated.<sup>5</sup> NHSC's position was flatly rejected in that forum after an extensive evidentiary proceeding.

Finally, your July 10, 2009 letter is highly inaccurate. PSNH has devoted tremendous time and resources to the legislatively-mandated Scrubber Project and it is energetically striving to complete the Scrubber Project in advance of the deadline (as NHSC itself urged in 2006 legislative hearings). As you know, the Legislature's determination that the Scrubber Project is in the public interest was driven by concerns for the public health and welfare of the citizens of

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<sup>3</sup> The transcripts of both the June 26, 2009 evidentiary hearing and the July 7, 2009 SEC deliberations are publicly available. Copies of both are attached to PSNH's July 22, 2009 Memorandum of Law Regarding the Appropriate Scope of Issues for the September 14, 2009 Hearing.

<sup>4</sup> NHSC seeks information about the "original" operational parameters of the boiler and "[d]ocuments discussing or presenting the results of the tests that were done at the time of the initial startup." See NHSC Second Request for Information (Question 2).

<sup>5</sup> Based on the collateral estoppel doctrine, the SEC decision, as a matter of law, bars both NHSC and CLF from continuing to pursue this issue in the Council appeal. See Public Service Company of New Hampshire's Memorandum of Law Regarding the Appropriate Scope of Issues for the September 14, 2009 Hearing at 9-12 (July 22, 2009).

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this State and, as the law states, represents “a careful, thoughtful balancing of cost, benefits, and technological feasibility.” RSA 125-O: 11(VIII). The Scrubber Project will reduce SO<sub>2</sub> emissions by no less than 90 percent and mercury emissions by no less than 80 percent. Thus, the statement in your letter that PSNH has “ignore[d] the public health concerns” is simply wrong—as PSNH’s efforts to proceed with the Scrubber Project demonstrate.

Very truly yours,



Barry Needleman

cc: Lisa Jackson, Administrator, U.S. Environmental Protection Agency  
Ira W. Leighton, Acting Regional Administrator, U.S. Environmental Protection Agency  
– Region 1  
Mark Stein, Esq., U.S. Environmental Protection Agency, Region 1  
Honorable John Lynch, Governor of the State of New Hampshire  
Thomas Burack, Commissioner, New Hampshire Department of Environmental Services  
Robert Scott, Director, Air Resources Division, New Hampshire Department of  
Environmental Services  
Allen Brooks, Esq., Environmental Protection Bureau, Office of the New Hampshire  
Attorney General  
John MacDonald, Vice President Generation-Public Service Company of New  
Hampshire  
William Smagula, P.E., Director-Generation, Public Service Company of New  
Hampshire  
Elise Zoli, Esq., Goodwin Procter, LLP  
Linda T. Landis, Senior Counsel, Public Service Company of New Hampshire