

THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 15-491

PNE ENERGY SUPPLY, LLC, et al.

v.

PSNH D/B/A EVERSOURCE ENERGY

**BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY**

Public Service Company of New Hampshire, d/b/a Eversource Energy (“PSNH”), submits this Memorandum of Law relating to questions transferred to the Commission by the Superior Court and in accordance with the Commission’s Order No. 25,881.<sup>1</sup>

**I. Introduction**

As the Commission knows, prior to transfer of this matter by the Superior Court, PNE Energy Supply, LLC (“PNE”) and Resident Power Natural Gas & Electric Solutions, LLC (“Resident Power”) (collectively the “Plaintiffs”) sued PSNH in the Superior Court relating to events in early 2013. Those events include PNE’s attempt to stem financial difficulties by selling its entire retail customer base to FairPoint Energy, LLC (“FairPoint”) and PNE’s voluntary default on – and voluntary failure to cure – its financial security requirements under the ISO-NE Tariff (the “FERC Tariff”).

PNE’s default resulted in ISO-NE ordering PSNH to assume responsibility for PNE’s load asset in the wholesale marketplace under that same ISO-NE Tariff. To effectuate that federal tariff requirement, as of the date set by ISO-NE all PNE customers that had not yet been

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<sup>1</sup> At the time the events relevant to this matter took place, PSNH had not adopted the tradename Eversource. Accordingly, for ease of reference, and because the Superior Court Complaint and the relevant documents refer to PSNH, this brief will refer to PSNH.

transferred to FairPoint were switched to PSNH's default service. The Commission then directed that before any transfer of PNE's former customers from PSNH's default service to FairPoint could occur, customers would have to be given notice that the transfer would not occur unless or until they affirmatively agreed to such a transfer, in effect, to "opt-in" to having FairPoint as their supplier.

More than two years after these events, and after several proceedings before this Commission addressing Plaintiffs' actions, Plaintiffs filed a 159-paragraph complaint against PSNH alleging five causes of action (including interference with contract, a violation of the New Hampshire Consumer Protection Act, RSA Ch. 358-A, and negligence).<sup>2</sup> The Superior Court dismissed four of the five counts, leaving only the claim described in its transfer order that PSNH allegedly interfered with the contract between the Plaintiffs and FairPoint in two alleged respects. First, Plaintiffs alleged that before PNE's default, PSNH refused to perform a "one-time, off-cycle transfer of PNE's customer accounts to FairPoint." Comp. ¶ 137(a). Plaintiffs assert that the request for this off-cycle transfer of approximately 8,000 customers was made "in order to avoid an ISO-NE default and a scenario in which its customers would be placed on PSNH's default service." *Id.* ¶ 65. Put differently, the request was made to avoid the consequences of PNE's planned default.

Second, Plaintiffs alleged that upon PNE's default, PSNH disrupted (or prevented) the planned transfer to FairPoint by deleting pending electronic enrollments ("EDIs") from FairPoint (issued before the PNE default) and "upon information and belief, replac[ed] those 7,300 Enrollments with Electronic Enrollments for transfer of PNE's customer accounts to PSNH's

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<sup>2</sup> The various actions before this Commission that related to the factual allegations in Plaintiffs' Complaint were referenced in Appendix A to PSNH's Memorandum In Support of its Motion to Dismiss in the Superior Court. For ease of reference, that Appendix is attached to this Memorandum and is designated Exhibit A.

Default Service.” *Id.* ¶¶ 79, 137 (b) and (c). This action supposedly prevented the consummation of the FairPoint contract because “the only way for FairPoint to serve the customer accounts it had acquired from PNE....was to resubmit the [EDIs] PSNH had deleted.” *Id.* ¶ 81.

In the Superior Court, PSNH argued that the question of whether either of these claims stated a cause of action for interference with contract was dependent on an interpretation of tariffs and regulations within this Commission’s expertise. On November 25, 2015, the Superior Court issued an order asking this Commission to determine whether PSNH’s failure to perform approximately eight thousand off-cycle meter readings under the circumstances alleged in Plaintiffs’ Complaint, and PSNH’s deletion of EDIs submitted by FairPoint following PNE’s default, were “improper within the meaning of a tortious interference with contract claim,” when “[c]onsidering the tariff and regulatory provisions cited by plaintiffs and defendants.” Order 25,881 at 2, citing the Court’s Transfer Order at 4. Thus, the question now before the Commission is whether either of PSNH’s actions were consistent with applicable tariffs, regulations or orders and thus “protected by law.”

The Commission’s analysis of that question need proceed no further than the Commission’s first involvement in Plaintiffs’ application to transfer customers to FairPoint. On February 7, 2013, Plaintiffs requested that the Commission grant them an expedited waiver from the requirement that they provide 14 days’ notice to customers of the proposed transfers so that they could begin the transfers immediately. Plaintiffs expressly represented, however, that no “special off-cycle meter read” would be necessary and that customers “will transfer suppliers upon their next scheduled meter read date.” See February 7, 2013 Joint Motion for Expedited Waiver in Docket No. DE 13-049 at ¶ 9 (the “Joint Motion”).

By secretarial letter dated February 8, 2013, the Commission conditionally approved the waiver of notice based upon that representation, and specifically noted the representation by PNE and FairPoint of their intent to “fulfill all other requirements of the rule,” *i.e.*, Puc 2004(1)(5). February 8, 2013 Secretarial Letter in Docket No. DE 13-049 at 1. The Commission also included an express condition on the grant of the waiver:

As an additional condition to the waiver, the Commission requires FairPoint Energy to make a filing within 10 business days of this letter demonstrating that the surety provided under Puc 2003.03 is adequate given the additional customer base assumed in the PSA.

*Id.* at 2. FairPoint never made that filing. Based on FairPoint’s failure to make the filing required by the Commission when it granted the waiver request, the waiver never became effective and FairPoint had no right to become the supplier for any PNE customer.<sup>3</sup>

Now, in this matter, PSNH acted improperly by failing to perform thousands of off-cycle meter readings that Plaintiffs represented to the Commission they did not need and would not seek. PSNH had no duty under the applicable tariff and regulations to provide such off-cycle readings and had no obligation to undertake an act that Plaintiffs had no right to request. Likewise, PSNH was entitled to replace FairPoint’s EDIs to effectuate the placing of PNE’s customers onto default service. Under the FERC Tariff, PSNH was required to take load-responsibility for PNE’s customers. At that point, PSNH became the mandated supplier for these customers as a matter of law. Hence, under PSNH’s retail tariff, FairPoint’s EDIs were no longer valid. And most important, just a day after PNE was prohibited from holding load in the wholesale marketplace, this Commission specifically prevented the transfer of customers from PNE to FairPoint unless notice was given to those customers and they affirmatively “opted-in” to

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<sup>3</sup> Nevertheless, approximately 1200 customers were transferred to FairPoint prior to PNE’s decision to default at ISO-NE. Comp. ¶ 77.

the proposed transfer. Plaintiffs concede that it was the opposition of Commission Staff that caused FairPoint to “back out of the deal.” Comp. ¶ 112. Consequently, PSNH’s deletion of FairPoint’s EDIs had no impact whatsoever on the proposed transfer.

## II. Facts Relevant to The Commission’s Determination

As Order 25,881 points out, the Commission will evaluate the transferred questions on the record in the Superior Court, public records, and documents fairly referenced in the Complaint, or available to the Commission. Order at 3. The Commission has PSNH’s Motion to Dismiss and the documents referenced therein, which include a number of documents filed with this Commission in other dockets. PSNH notes that some of the documents in a variety of the related Commission dockets were, and remain to this day, redacted to varying degrees. Some, such as the affidavit of PNE’s President, Howard Plante, that accompanied the Joint Motion are almost entirely redacted.<sup>4</sup>

The events relevant to this proceeding occurred between February 6, 2013, when the Plaintiffs allegedly entered into the FairPoint contract, and February 21, 2013. On that date, the Commission posted a notice on its website that informed PNE customers: that their accounts would not automatically be transferred to FairPoint; that there would be no further transfers under the FairPoint agreement; and that customers on default service “will only be changed if they affirmatively choose FairPoint or any other competitive supplier.” *Id.* ¶¶ 50; 96-97. The Plaintiffs admit that this notice “succeeded in blocking PNE’s and FairPoint’s efforts to consummate the sale of PNE’s customers to FairPoint.” *Id.* See also ¶ 112.

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<sup>4</sup> PSNH has previously requested that confidential material in dockets relating to PNE’s default be disclosed. See July 8, 2013 Response of PSNH in Docket No. IR 13-233 at 4, fn. 1. In preparation for this brief, PSNH requested that PNE provide unredacted copies of various documents for which they requested and received confidential treatment. PNE refused that request. As a result, PSNH has filed a Motion to Compel the disclosure of certain confidential documents with the Commission. PSNH requests that the Commission allow it to file a brief supplement to this Brief in the event that it finds that the Affidavit should be disclosed to PSNH.

Rather than repeating the factual allegations in the Complaint – many of which are now irrelevant given the Superior Court’s dismissal of nearly all of that Complaint – PSNH has attached a chronology of relevant facts to the Memorandum as Exhibit B.<sup>5</sup> The relevant facts were set out by Commission Staff in its February 27, 2013 Recommendation for an Immediate Show Cause Hearing in Dockets DE 13-059 and 13-060 (attached as Exhibit C). Additionally, PSNH set out the relevant facts in its Memorandum in Support of its Motion to Dismiss in the Superior Court at pages 10-15. For the convenience of the Commission, those pages are attached hereto as Exhibit D. For purposes of this Brief, PSNH supplements those facts as follows.

**A. Plaintiffs’ Request for Off-Cycle Meter Readings for Thousands of Customers**

In early 2013, PNE was having trouble meeting its financial security requirements with ISO-NE due to the volatility of pricing in the energy markets. Comp. ¶¶ 52-53. As a result, Plaintiffs sought permission to transfer PNE’s customers to FairPoint on an expedited basis. They did so by that Joint Motion seeking a waiver of the Commission rule (Puc 2004.05(k)) which required them to give 14 days’ notice of their intent to sell the right to serve their customer accounts. *Id.* ¶ 54.

The Joint Motion is highly relevant to the issues before the Commission in this proceeding. There, Plaintiffs requested a waiver of the 14-day notice requirement and represented as follows:

- “Every customer will be extended all, or more of the rights due them under Puc 2004.05(1).” Joint Motion at ¶ 7.<sup>6</sup>

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<sup>5</sup> The chronology contains citations to the Complaint or to other documents either referenced in the Complaint or filed with the Commission and that are relevant to the narrow issues now before the Commission.

<sup>6</sup> That Rule requires that a notice be sent to any customer whose service would be changed set out specific terms, including specification of the time period within which a customer had the right to select an alternate CEP (*i.e.*, in this case an entity other than FairPoint). Puc 2004.05 (1)(7). The notice required the customer to authorize the

- The time period during which customers could decide whether to transfer to FairPoint or to choose another CEPS was open for 30 days, after notice. *Id.*
- **“No special off-cycle meter read dates will be necessary as a result of this transfer. Customers will transfer suppliers upon their next scheduled meter read date.”** *Id.* ¶ 8 (Emphasis added.)
- “There will be no risk or detriment to PSNH as a result of this transfer or requested waiver.” *Id.* ¶ 11.
- “[T]here will be no detriment to the transferred customers. Every customer will be extended all, or more, of the rights contained in Rule 2004.05(l).” *Id.*

The Commission conditionally approved the requested waiver on February 8<sup>th</sup>, specifically noting that “PNE and FairPoint ... intend to fulfill all other requirements of the rule,” including a requirement that they provide notice to customers. February 8, 2013 Secretarial Letter in Docket No. DE 13-049 at 1. The Commission further stated that it approved the waiver request as being “in the public interest inasmuch as the waiver does not disrupt the orderly and efficient resolution of matters before the Commission,” and that the “proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.” The Commission also expressly conditioned its approval by requiring that FairPoint “make a filing within 10 business days of this letter demonstrating that the surety provided under Puc 2003.03 is adequate given the additional customer base.” Finally, the Commission directed Staff to “commence an investigation into PNE’s CEPS authorization and the circumstances that necessitated the requested waiver.”

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transfer. Puc 2004.05(a)(1). This was, in effect, a right of the customer to “opt-out” of the transfer within that period.

PNE sent notice to its customers on February 11, 2013. The Notice (a draft of which was filed with the Joint Motion) advised customers that the “transfer to FairPoint is expected to occur at the beginning of the next billing cycle, but may take two billing cycles to occur.”

On February 12<sup>th</sup>, just one day after the notice was issued, and just five days after the Plaintiffs represented to the Commission that no off-cycle meter readings would be required for the transfer, PNE’s counsel called PSNH and requested the immediate, off-cycle, transfer of all of PNE’s approximately 8,000 customers. Comp. ¶ 66. On February 14<sup>th</sup> PSNH informed PNE that PSNH did not have the personnel to perform the immediate transfers (*id.* ¶ 68). Immediately thereafter, PNE’s President Howard Plante sent a letter formally requesting off-cycle meter readings so that customers could be “immediately enrolled with FairPoint,” and alleging that it had the authority to make that request under Puc 2007.04(b).<sup>7</sup> Thus, PNE requested the very off-cycle meter readings it represented to the Commission would not be required and would not occur.<sup>8</sup>

PNE’s email requesting the off-cycle meter readings was sent at 3:11 pm on February 14<sup>th</sup>. Plaintiffs concede that they were defaulted by ISO-NE as of 3:45 pm on February 14<sup>th</sup>, or just 34 minutes after their request for the off-cycle meter readings. Comp. ¶ 71. Within the hour, PSNH was also advised by ISO-NE that PNE had been “suspended immediately” from participating in the wholesale marketplace, and had “waived possibility to cure.” *Id.* ¶¶ 61-62.

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<sup>7</sup> The letter is attached hereto as Exhibit E. The citation in the letter is mistaken. PNE intended to refer to Puc 2004.07 for its contention that PSNH had some obligation to perform the off-cycle meter reading. As explained below, that Rule does not support Plaintiffs’ argument.

<sup>8</sup> Upon information and belief, as set out in PSNH’s Motion to require disclosure of the Plante Affidavit, PNE President Plante may have provided the Commission with sworn testimony regarding this subject in his Affidavit filed in support of the Joint Waiver Request in Docket No. DE 13-049. PSNH requests the right to supplement this brief as deemed necessary should the Commission grant PSNH’s request that PNE be compelled to provide that and other confidential filings made at the Commission.

The ISO-NE notice is attached as Exhibit F. The ISO-NE notice required PSNH to take PNE's customers onto its default service as of February 20<sup>th</sup>.

**B. The Deletion of FairPoint's EDIs**

After Plaintiffs had obtained permission to proceed with the FairPoint transaction under the conditional waiver of the 14-day notice of the Commission's rules on February 8, FairPoint began submitting EDIs to PSNH "on or about February 9<sup>th</sup>." Comp. ¶ 56.<sup>9</sup> Until it was required to take all customers onto its default service on February 20<sup>th</sup>, PSNH transferred to FairPoint any PNE customers who had a regularly scheduled meter read and who otherwise met the requirements for being transferred pursuant to PSNH's tariff. *Id.* ¶ 60 and see Public Service Company of New Hampshire, Electricity Delivery Service Tariff – NHPUC No. 8 (the "PUC Tariff"), page 36, Section 3 of the Terms and Conditions for Suppliers.

Plaintiffs' complaint about the process by which PSNH transferred PNE's customers to the PSNH default service is that notwithstanding PNE's default, PSNH could have continued the transfer to FairPoint because there were allegedly valid EDIs from FairPoint. Yet Plaintiffs also concede that throughout the period in which decisions were being made regarding the treatment of customers, Plaintiffs and PSNH were in constant communication with the Commission on what should be done in this first-ever instance of a default – and voluntary failure to cure – by a CEPS in the midst of an attempted bulk transfer of customers to a third-party supplier. They allege that PSNH or the Plaintiffs spoke or communicated in writing with representatives of the Commission on the following issues:

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<sup>9</sup> Plaintiffs allege this fact "upon information and belief." In its Comments filed in Docket Nos. DE 13-059 and 060, PSNH stated that the EDI submissions occurred over the period of February 8 through February 16. PSNH Comments at 3.

- PSNH’s refusal to perform the thousands of off-cycle meter readings, *id.* ¶ 70;
- The transfer of customer accounts to FairPoint and how PSNH addressed the issue of multiple enrollments (i.e. the FairPoint EDIs and the transfer to default service) and how those enrollments would be handled, *id.* ¶¶ 82,87;
- The notices that Plaintiffs were to be required to send to their customers, *id.* ¶ 86;
- “[C]larification on the processing of [Electronic Enrollments],” *id.* ¶ 87;
- The process for re-submitting EDIs where the PUC Rules restricted PSNH from accepting “more than one Supplier for a Customer during any particular billing cycle,” *id.* ¶¶ 89-91; and
- Whether Resident Power’s attempt to transfer customer accounts from default service without customer authorization would constitute “slamming,” ¶ 93.

Thus, with respect to what the Plaintiffs refer to as the “illegal deletion of 7,300 pending Electronic Enrollments” and the replacement of those enrollments with “new Electronic Enrollments for the transfer of PNE’s customer accounts to PSNH’s Default Service,” Plaintiffs concede that the Commission was consulted or informed of those issues throughout the seven days following PNE’s default on February 14<sup>th</sup>, and PSNH’s deletion of the EDIs in order to take the customers onto default service on February 20<sup>th</sup>.

Plaintiffs also concede a point that completely undermines any claim that PSNH’s deletion of the FairPoint EDIs interfered with the transfer to FairPoint. Plaintiffs admit that on February 21<sup>st</sup>, one day after PSNH was required by ISO-NE to assume responsibility for PNE’s load, the Commission Staff, following “negotiations with PNE [and] Resident Power,” required Plaintiffs to provide notice to all their retail customers. The required notice stated that “there would be no further transfers to FairPoint” pursuant to the contract between Plaintiffs and FairPoint and that the customers would be required to contact FairPoint if they wished to select it as a supplier. *Id.* ¶¶ 96-97. The Commission also posted this notice on its website (copy attached as Exhibit G). Plaintiffs contend that this notice, mandated by the Commission,

“succeeded in blocking PNE’s and FairPoint’s efforts to consummate the sale of PNE’s customer accounts.” *Id.* ¶ 98.

In the Superior Court, Plaintiffs blamed PSNH for all of the actions and directives taken by the Commission and its Staff, essentially contending that the Commission Staff was under the control of PSNH,<sup>10</sup> and that PSNH’s actions in deleting the FairPoint EDIs was part of a scheme by PSNH to take over PNE’s customer base. Comp. at ¶¶ 64, 70-90.<sup>11</sup> But the Complaint concedes *that it was the Commission Staff* that required the notice that resulted in “blocking” the FairPoint deal, that *it was also the Staff*, as part of negotiations with the Plaintiffs, that raised the issue of potential “slamming,” and that it was *the actions of the Staff* that “left Resident Power with no alternatives” but to give notice to customers that they would have to “opt-in” to the FairPoint deal. *Id.* ¶¶ 96-98. They also admit that *it was the Staff*, allegedly based on “persuasion” by PSNH, that “oppose[d] both FairPoint’s attempts to re-enroll PNE’s former customers with FairPoint and Resident Power’s later efforts to move these customer accounts from PSNH’s Default Service.” *Id.* at ¶ 112. Lastly, Plaintiffs concede that *it was the Staff’s requirements* that caused FairPoint to “ultimately back out of the deal.” *Id.*

The Superior Court dismissed all of the Plaintiffs’ claims that PSNH’s discussions with the Commission Staff violated the law, finding that even if PSNH sought to “persuade” the Staff with respect these matters, nothing in those efforts was unlawful. Order on Motion to Dismiss at

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<sup>10</sup> Plaintiffs alleged that PSNH: “engaged in an aggressive campaign to persuade PUC Staff to block the PNE/FairPoint transaction: ... persuaded PUC Staff to frustrate any attempt by Resident Power or FairPoint to re-submit the Electronic Enrollments; convinced PUC Staff to oppose Resident Power’s efforts to transfer former PNE customer accounts from PSNH’s Default Service to another CEPS; and prompted PUC Staff to initiate a “show cause” proceeding against PNE and Resident Power for alleged, unfounded regulatory violations.” Comp. ¶ 64. The Superior Court dismissed Plaintiffs’ causes of action based on these claims.

<sup>11</sup> Plaintiffs do not explain why PSNH would have been so anxious to acquire those customers at a time when PNE found it uneconomic to serve them due to “unusually high rates” in the wholesale marketplace (Comp. ¶¶ 52-53), or why PSNH would have been anxious to be forced to take them by ISO-NE with very short notice, and thus to serve them at PSNH’s fixed default energy service rate below the prevailing cost of energy.

8-10 (dismissing any claim that PSNH acted improperly in “persuading” the Staff to act.) As a result of the Court’s dismissal, this Commission should ignore the allegations that its Staff simply acted as a proxy for PSNH when Staff required the notice that Plaintiffs allege caused FairPoint to terminate the deal.

The Commission is aware that PNE’s default presented a unique circumstance involving thousands of retail customers never before dealt with by PSNH, the Staff, or the Commission. The record is replete with references to discussions and negotiations between the Staff, the Plaintiffs, the OCA, FairPoint, and PSNH on how to resolve the issues arising out of PNE’s *voluntary decision* to default on its obligations under the FERC Tariff. The Commission recognized the unique nature of this matter and the consequences of PNE’s default in Order No. 25,660, where it stated:

The PSNH Tariff does not contemplate the circumstances of this case where the customers of a suspended supplier were switched through a process involving ISO-NE. The ISO-NE Tariff, however, does address such circumstances: “Any load asset registered to a suspended Market Participant [PNE] shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned” to another entity such as the distribution utility. Ex. 2 at 143. ***When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension.*** Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE’s load similar to an agency relationship in the very limited sense discussed here.

Order No. 25,660 at 7 (emphasis added). If the FairPoint deal did not go through, it was the result of PNE’s own actions, PNE’s voluntary decision to default on its obligations at ISO-NE, and the failure of the Plaintiffs to fulfill the conditions placed on the waiver by the Commission.

**III. PSNH's Actions Did Not Violate Provisions of Tariffs or Commission Rules and Plaintiffs' Complaint is Barred by Their Own Violations of the Terms of the Commission's Waiver and of PSNH's PUC-approved Tariff**

The FairPoint transaction was dependent on Plaintiffs and FairPoint following the terms of the Commission's conditional waiver of notice and PSNH's Tariff. Because Plaintiffs and FairPoint failed to satisfy the terms of the waiver – terms that they specifically represented they would follow – the transaction was not permitted without advance notice, as later required by the Commission. Moreover, PNE violated the terms of PSNH's Tariff by failing to “be either a member of NEPOOL or have an agreement in place with a NEPOOL member whereby the NEPOOL member agrees to take responsibility for all the NEPOOL load obligations ... associated with supplying energy and capacity to the Customer's delivery point.” PUC Tariff. Original Page 31 at ¶ 1.b.

**A. PSNH Had No Duty to Perform Thousands of Off-Cycle Meter Readings and Plaintiffs Had No Right to Ask for Such Readings**

Plaintiffs' Complaint does not allege that PSNH had a duty to perform off-cycle meter readings at all, let alone a duty to do so for approximately 8,000 customers *immediately* in order to save PNE from its own voluntary decision to default.<sup>12</sup> Instead it alleges only that PSNH had the “authority” to do so, without identifying that authority. The reason for that failure is simple: there is no such obligation. Later, in pleadings before the Superior Court, and in the written request by PNE's President to PSNH, PNE claimed that Puc 2004.07 required PSNH to either

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<sup>12</sup> As noted above, the first inquiry as to whether PSNH would undertake the off-cycle readings occurred in a phone call on February 12<sup>th</sup> and the formal request was made on February 14<sup>th</sup>, the same day PNE defaulted. Thus, even crediting the oral notice on the 12<sup>th</sup>, to save PNE from default by allowing the customers to be transferred to FairPoint before the customers' next normal meter read date, PSNH would have had to undertake to read 8,000 meters scattered throughout the State within 48 hours. Even if Plaintiffs contend that the FairPoint deal could have been saved by such meter reads in advance of the date on which the customers were required to be transferred to default service (February 20<sup>th</sup>), that still would have given PSNH only two business days to do so. (February 14, 2013 was a Thursday. Monday February 18<sup>th</sup> was President's Day.)

conduct the off-cycle meter readings or to negotiate a time to do so. But that regulation is not applicable.

The starting point to examine this issue is the applicable PUC Tariff. The Tariff provides that any change in supplier service “shall commence upon the next meter reading date for the Customer,” provided that the enrollment notice of EDI is received at least two business days before the next scheduled meter read. Tariff at 11; Comp. ¶ 31. Likewise, the Consensus EDI Plan approved by the Commission in Order No. 22,919 (May 4, 1998) provides that “the initial Competitive Supplier selection and subsequent supplier changes shall become effective at the beginning of the Customer’s next meter read date.” Consensus Plan at 10 and at 12, 14, 16 and 18. Paragraph II (6) of Order No. 22,919 provides as follows: “The Commission agrees with the EDI Working Group that competitive suppliers must provide a minimum of two-days’ notice to distribution companies for the termination of service *to become effective on the customer’s next meter read date.*” (Emphasis added.) In sum, PSNH’s obligation was to transfer service on each customer’s next meter read date and it had no duty to perform thousands of off-cycle readings.

This Commission’s regulations did not require PSNH to depart from the Tariff or the EDI rules. In the Superior Court, Plaintiffs claimed that Puc 2004.07 (b) and (c) required PSNH to “negotiate a reasonable extension of time for the completion” of the request.<sup>13</sup> But that Rule applies only “[w]hen a residential or small commercial electric customer has failed to meet any of the terms of its agreement for service” with a CEPS, the CEPS seeks to terminate the service off-cycle due to such failure, and then seeks an off-cycle meter read for that purpose. Puc

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<sup>13</sup> The claim that PSNH should have negotiated with PNE over the off-cycle readings ignores the timing discussed in footnote 12 above. At best, any negotiations would have to have been completed in less than 48 hours, or in the 34-minute window between PNE’s contact to PSNH and its default at ISO-NE. And once PNE defaulted, it was prohibited from engaging in any action and thus negotiations would have come to a halt.

2004.07 (a).<sup>14</sup> Requiring negotiation for a special off-cycle meter reading where the CEPS terminates an individual customer due to the customer's breach is very different from a request to provide off-cycle meter reads for thousands of customers – none of which is being terminated for failure to meet PNE's terms of service.<sup>15</sup>

In response, Plaintiffs could only argue that notwithstanding the title of section 2004.07 “Notice of Termination of Service” and the fact that subsections (a), (c), (d), (e), (f) and (g) all relate to termination of service by a CEPS to a specific customer or a class of customers, subsection (b) somehow creates a general obligation on the part of utilities to provide off-cycle meter reads. A reasonable, common-sense reading of the Rule indicates otherwise, particularly in light of the Tariff.<sup>16</sup> Accordingly, there was no obligation to complete the off-cycle meter readings, and PSNH was permitted to deny the request.

More important, in this particular case, irrespective of the requirements of the rule, PSNH had no obligation to conduct thousands of off-cycle readings because Plaintiffs had no right to ask for them. The conditional waiver granted on February 8 was premised upon the representation that no off-cycle meter readings would occur. If Plaintiffs were going to act contrary to the representations made to the Commission, they either had an obligation to inform the Commission and seek a different waiver, or to abandon the waiver and provide the 14-day

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<sup>14</sup> Plaintiffs argued that the obligation to negotiate arose when their counsel made an oral request on February 12, 2013 and asserted that this is a question of fact that must be construed in their favor. Even if the Rule applied, it requires “written notice” given five “business days” in advance in order to trigger the requirement to negotiate. Plaintiffs do not allege – nor could they – that written notice was given before February 14, 2013. But even if notice had been given in writing on February 12<sup>th</sup>, by February 14<sup>th</sup> – two business days later – PNE had been suspended and had no ability to do business at all. *Id.*

<sup>15</sup> Plaintiffs themselves have questioned the applicability of Puc 2004.07. In March 2014, PNE filed a declaratory judgment proceeding in the PUC asking the PUC to decide that Rule 2004.07 (b) required PSNH to have a provision governing off-cycle meter reads in its Tariff. See PNE Petition in Docket No. DE 14-066. If the Rule itself provided such a duty, there would have been no need to file the Petition.

<sup>16</sup> As noted in PSNH's Comments filed in Docket Nos. DE 13-059 and 13-060, Commission Staff was aware of PNE's assertion regarding the applicability of Puc 2004.07 and the matter was discussed with Staff prior to PSNH responding to PNE's demand. Comments at 4 and 5.

notice required by Puc 2004.05(1). PSNH cannot be held to account for the Plaintiffs' misrepresentations.

Furthermore, prior to seeking the off-cycle readings from PSNH, Plaintiffs had informed PNE's customers that their service would not necessarily be transferred to FairPoint "at the beginning of your next billing cycle, but may take two billing cycles to occur." Notice attached to Joint Motion in Docket No. DE 13-049. The notice also told the customers that they could select another provider within 30 days. If the off-cycle meter readings had gone forward, those representations to customers would have been false.

**B. PSNH's Deletion of the FairPoint EDIs Was Consistent with the Applicable Tariff and Rules and FairPoint Was Not Entitled to the Transfer of PNE's Customers Because It Did Not Comply With the Terms of the Waiver.**

Per its FERC-approved tariff, ISO-NE required PSNH to take load responsibility for all of PNE's customers as of 12:01 am on February 20, 2013, and PNE has stipulated to that fact. See February 14, 2014 Joint Statement of Agreed Facts in Docket No. IR 13-233 at ¶ 19. When that happened, PSNH was presented with a situation that had never previously occurred: what to do about pending EDIs for an involuntary transfer of customers via a bulk sale of customers, where the selling CEP voluntarily defaulted at ISO-NE forfeiting its authority to serve those customers until such customers' next cycle meter read date.

As the ISO-NE Tariff makes clear, once a CEPS is suspended it "shall have no ability so long as it is suspended (i) to be reflected in the ISO's settlement system, including any bilateral transactions, as either a purchaser or a seller of any products or services." ISO-NE Tariff at 140. Thus, once PNE defaulted, it had no legal right or ability to participate in any wholesale electricity market transactions under the ISO Tariff, and no legal right or ability to participate in any retail electricity markets per both Puc 2003.01(d)(2) and (i) and the PUC Tariff at page 31, ¶ 1, "Terms and Conditions for Energy Service Providers."

Faced with PNE's voluntary default, and the requirement that it take responsibility for all of PNE's customers, PSNH was faced with another dilemma. The Consensus EDI Plan approved by the Commission in Order 22,919 provides as follows: "The Distribution Company shall process the first valid enrollment transaction received during the enrollment period. Once received, any other enrollment transaction submitted for the same Customer during the enrollment period will be rejected." EDI Plan at 15. Plaintiffs concede that the PUC Tariff also restricted PSNH from accepting more than one supplier for a customer during any 30-Day period. Comp. ¶¶ 91, 98. But Plaintiffs contend that since FairPoint's EDIs were submitted first, PSNH was required to honor them. By contrast, since PNE had dropped its customers by operation of law ("PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension," Order No. 25,660 set out above, and also as a result of the ISO-NE tariff requirement for PSNH to take load responsibility of all of PNE's customers, the first valid enrollment transaction was the transfer of those customers to default service. That transaction occurred first in time in order to comply with the ISO-NE Tariff directive that resulted directly from "PNE[s]...drop of its own customers." Thus, the "other enrollment transaction" – the PNE to FairPoint transaction – was no longer valid under the EDI Plan and the Tariff.

PSNH did not proceed on its own in making this determination. As the Complaint points out, both PSNH and the Plaintiffs discussed this matter at length with the Commission. *Id.* ¶¶ 86-93. Indeed, the Complaint alleges that PSNH had "repeated exchanges" with Commission Staff on how to deal with the transfer to default service. *Id.* ¶ 91.

But in the end, the question of whether PSNH was correct in deleting the EDIs is irrelevant for two reasons. First, as Plaintiffs concede, as of February 21<sup>st</sup>, one day after their default, the FairPoint EDIs were no longer valid because of actions taken by the Commission,

not PSNH. As of that date, Plaintiffs were precluded from transferring any customers to FairPoint, and FairPoint was precluded from accepting any PNE customers, not by PSNH's deletion of the EDIs, but by the instruction from the Commission Staff that no further transfers could occur without notice to the customers. *Id.* ¶¶ 96-98. The Commission had clear authority to require additional notice under Puc 2004.05(r), which provides that where a determination is made that a CEPS has not complied with provisions for a "successor provider, then, in addition to any action the commission may take pursuant to Puc 2005, the commission *shall* order notice to affected customers clarifying the customers' rights and obligations." (Emphasis added.) In this case, given PNE's default and the confusion caused by notices sent by Plaintiffs, not to mention Plaintiffs' misrepresentation to the Commission concerning no need for off-cycle meter readings, the Commission's decision to issue the notice halting the transfers to FairPoint was proper.

Second, even if PSNH had not deleted the FairPoint EDIs, FairPoint had no right to receive *any* customer from PNE. The Joint Motion for waiver was granted on the condition that FairPoint make a filing with the Commission "within 10 business days of this letter demonstrating that the surety provided under Puc 2003.03 is adequate given the additional customer base assumed" in the purchase and sale agreement. Since no such filing was made, the waiver was not valid and FairPoint was not entitled to accept customers without providing adequate notice of the transfer consistent with the Commission's rules. Thus, nothing PSNH did caused interference with the FairPoint transfer.

Finally, although PSNH does not know why FairPoint "backed out of the deal" (Comp. ¶ 112), and no facts on that issue were presented to the Superior Court other than the allegation that PSNH's actions caused that result, one thing is clear. If FairPoint had wanted to

consummate the deal notwithstanding PNE's default and notwithstanding the situation in the energy market described in the Complaint, there were two ways that could easily have been accomplished. First, all it had to do was give the notice that the Commission directed. At that point, if PNE's customers had wanted to be served by FairPoint and had elected that option, neither Plaintiffs nor FairPoint would have suffered any harm. Second, FairPoint could have agreed to assume load responsibility for PNE's customers at ISO-NE, thereby preventing PNE's default and the chain of events that default caused.

#### **IV. Conclusion**

In the end, neither PSNH nor the Commission need to speculate on why FairPoint did not go through with the deal. This Commission can – and should – conclude that PSNH did not violate any provisions of law (statutes, tariffs, regulations) within the Commission's jurisdiction by failing to make approximately 8,000 off-cycle meter readings across the entirety of the State that Plaintiffs were not entitled to request and that PSNH had no obligation to perform. Likewise, the Commission should find that PSNH did not violate any such authority by deleting pending EDIs in order to allow it to transfer PNE's customers onto its default service to effectuate the ISO-NE Tariff requirement that PSNH assume load responsibility for all of those customers. It was Plaintiffs' voluntary decision to default on its obligations under the ISO-NE Tariff and to not comply with the conditions of this Commission's waiver.

Under the unique circumstances of this case where the Commission, not PSNH, halted the transfer of customers to FairPoint, and where FairPoint had no right to receive the Customers by virtue of its failure to comply with the requirements of the Commission's conditional waiver, PSNH did not act "improperly" regarding the matters transferred by the Court.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,  
d/b/a EVERSOURCE ENERGY

By its attorneys,

McLANE MIDDLETON, PROFESSIONAL  
ASSOCIATION

Dated: April 29, 2016

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**Certificate of Service**

I certify that I have served the foregoing Memorandum by sending copies thereof by email to all counsel of record.

Wilbur A. Glahn  
Wilbur A. Glahn, III

# Exhibit A

**APPENDIX A<sup>1</sup>**

**PUC Dockets Addressing Issues Related to Plaintiffs' Complaint**

<b>Docket No. and Name</b>	<b>Date and Party Initiating</b>	<b>Subject of Docket</b>	<b>Resolution</b>
<p><b>DM 11-075</b></p> <p>PNE Energy Supply, LLC Registration as a Competitive Electric Supplier</p>	<p>(As applicable to the instant complaint) February 19, 2013, filed by PNE.</p>	<p>This filing was made on a confidential basis by PNE and its contents are not publically available, but per PUC Order No. 25,512, the filing pertains to “the short-term competitive strategy and operations of PNE” – a matter directly related to the Complaint.</p>	<p>On May 3, 2013, the PUC approved PNE’s application to modify its registration statement subject to the establishment of an escrow created as part of the settlement in Docket DE 13-060 to provide as follows: “Escrow Agent shall pay the funds from the Escrow Account to the NHPUC if the NHPUC notifies Escrow Agent that PNE has not faithfully performed all duties and has not protected the NHPUC and PNE’s customers from any damage caused by PNE’s non-compliance with or breach of any laws or statutes, or rules or regulations pertaining to the CPES license or permit issued by the NH-PUC.”</p> <p>The PUC also “authorized PNE, as of the date of this letter, to resume its business outreach efforts to all classes of customers in New Hampshire, and ruled that the suspension of New Hampshire utilities’ obligation to accept</p>

<sup>1</sup> All pleadings and orders may be found on the PUC website [www.puc.state.nh.us](http://www.puc.state.nh.us) under the “Virtual File Room,” followed by “Docketbook” section of the site..

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
			or process new customer enrollments from PNE is now void, and no longer in effect.”
<p><b>DE 12-295</b></p> <p>PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND</p> <p>Petition for Review of Public Service Company of New Hampshire's Services and Charges to Competitive Electric Suppliers</p>	<p>October 1, 2012 Petition filed by PNE</p>	<p>PNE’s Petition was entitled “Petition for Review of the Reasonableness and Appropriateness of PSNH’s Approved Charges for Selection, Billing and Payment and Collection Service to Competitive Electricity Suppliers.”</p> <p>On February 19, 2013, PSNH moved to dismiss the petition asserting that PNE’s default deprived it of standing to raise its claims before the PUC.</p>	<p>Order No. 25,699 July 31, 2014 approved a settlement agreement relating to rates.</p> <p>The order did not consider the reasonableness of PSNH’s charge for transferring customers upon a supplier default (approved in Docket IR 13-233-Order No. 25,660) but agreed with PUC Staff that “PSNH or any other electric distribution utility may incur costs if a competitive supplier in the relevant service territory defaults at ISO-NE.”</p> <p>The order further states:          “We also direct PSNH to consider whether it would be advisable to institute a tariff or tariffs for some of the activities that are mandated by a competitive supplier default at ISO-NE and that have a uniform cost, e.g., off-cycle meter reads. Finally, with respect to the pending rulemaking for the readoption and amendment of Puc 2000 rules for competitive suppliers (DRM 13-151), we direct Staff to include language in the draft rules stating clearly that competitive electric suppliers shall pay all incremental costs associated with a default at ISO-NE.”</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p><b>DE 13-049</b></p> <p>PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND AND FAIRPOINT ENERGY, LLC</p> <p>Joint Petition for Expedited Waiver of Puc 2004.05(k)</p>	<p>February 7, 2013</p> <p>Joint Filing by Resident Power and PNE</p>	<p>Resident Power ,PNE, and FairPoint Energy requested a waiver of the PUC rules requiring 14 day notice to customers prior to the effective date of any change in customer service.</p> <p>Among other things, in their Petition Plaintiffs represented that:</p> <p>“In particular, every customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served, rather than the 14 period required by the rules.”</p> <p>“No special off-cycle meter read dates will be necessary as a result of this transfer. Customers will transfer suppliers upon their next scheduled meter read date.”</p> <p>“There will be no risk or detriment to PSNH as a result of this transfer or requested waiver. Furthermore, there will be no risk or detriment to</p>	<p>By Commission Letter dated February 8, 2013 the PUC approved the request for waiver of the rule stating:</p> <p>“PNE and FairPoint Energy’s proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.”</p> <p>The Commission Letter also “directed Staff to commence an investigation into PNE’s CEPS authorization and the circumstances that necessitated the requested waiver.”</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p><b>DE 13-057</b></p> <p>RESIDENT POWER, LLC      Emergency Petition for Declaratory Judgment</p>	<p>February 22, 2013. Resident Power</p>	<p>the transferred customers.”</p> <p>Petition For Declaratory Judgment by Resident Power requesting a ruling that Resident Power remained an aggregator in good standing under PUC rules and confirmation of its ability to serve “certain former PNE electrical power supply customers who as of February 20, 2013..... were transferred to default service with ...PSNH.”</p> <p>The Petition also requested, on behalf of Resident Power and PNE that transfer of customer accounts to under circumstances described in the Petition would not constitute “slamming” “under applicable state law and PUC rules.”</p> <p>The Petition recounts many of the facts that serve as the basis for the Plaintiffs’ Complaint, particularly as they relate to notice given to</p>	<p>Order No. 25,467 February 28, 2013.</p> <p>The PUC Order affirmed that Resident Power was a duly registered electric power aggregator but refused to provide a ruling on whether it remained an aggregator for specific former PNE customers or whether the transfer of those customers from default service under certain circumstances would constitute slamming.</p> <p>“For its remaining three requests for declaratory ruling, Resident Power seeks confirmation that it may continue to represent the former PNE customers and that certain courses of business action contemplated by Resident Power for its aggregation customers, in relation to the recent suspension of PNE by ISO-New England and the reversion of a number of customers of PNE to PSNH default service, would not constitute “slamming” under RSA 374:28-a and Puc 2004.10(b). In light of the show-cause Order of Notice issued today regarding the recent business activities of Resident Power and PNE2, and the factual uncertainties surrounding recent events involving Resident Power and PNE, as independently noticed by the Commission and pointed out by the OCA, we are not convinced that the factual background is sufficiently</p>

<b>Docket No. and Name</b>	<b>Date and Party Initiating</b>	<b>Subject of Docket</b>	<b>Resolution</b>
		PNE's and Resident Power's customers and alleged confusion resulting from those notices.	"definite and concrete" for the granting of the declaratory ruling sought by Resident Power for items 2 through 4, above."

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p><b>DE 13-059</b> <b>DE 13-060</b></p> <p>Resident Power, LLC Show Cause as to Whether the Company should be Subject to Penalties, or Registration Suspension or Revocation</p> <p>PNE Energy Supply, LLC Show Cause as to Whether the Company should be Subject to Penalties, or Registration Suspension or Revocation</p>	<p>February 27, 2013 PUC Staff</p>	<p>PUC Staff requested that the PUC open show cause hearings concerning whether PNE and Resident Power should be subject to Penalties or their Registrations Suspended or Revoked</p> <p>Issues in the Docket included the default by PNE, the waiver request by PNE and Resident Power and the event following PNE's default and suspension as well as the confusion created by notices to customers.</p> <p>In this docket, PNE sought to have the PUC issue subpoenas to PSNH witnesses on the following matters: "information related to the PSNH's role and responsibilities in porting (or not porting) PNE customers to Fairport Energy in February 2013" and "information relative to PSNH's interactions with the</p>	<p>The docket involved substantial discovery and hearing before the PUC.</p> <p>Order No. 25,492 dated April 15, 2013 approved a settlement agreement between the Resident Power, PNE and the PUC.</p> <p>Under the settlement PNE agreed to make payment to all former PNE customers placed on PSNH's default service on February 20, 2013 provided that each customer "waiv[ed] any claims against PNE relating to the customer's placement on default service." In addition, PNE was to provide an additional \$200,000 for financial security under PUC regulations.</p>

<b>Docket No. and Name</b>	<b>Date and Party Initiating</b>	<b>Subject of Docket</b>	<b>Resolution</b>
		<p>PUC Staff during the relevant time frame relative to PNE and Resident Power.”</p> <p>PNE also sought to have a subpoena issued to FairPoint Energy.</p>	

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p><b>IR 13-233</b></p> <p>PNE Energy Supply, LLC Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into Dispute Between PNE Energy Supply, LLC and Public Service Company of New Hampshire</p>	<p>June 21, 2013</p> <p>PNE by Petition pursuant to RSA 365:1</p>	<p>PNE filed a complaint against PSNH related to charges assessed it by PSNH for “drop transactions” when PNE’s former customers were placed on PSNH’s default service as a result of PNE’s default with ISO-NE. PNE alleged that PSNH withheld payments in order to “exacerbate pressure on its competitor PNE.”</p> <p>PNE sought its attorneys’ fees and costs.</p> <p>PNE seeks those same charges, fees and costs in its Complaint.</p> <p>In alleging jurisdiction under RSA 365:1 PNE stated:</p> <p>“PSNH’s business relationship with PNE (and, importantly, other suppliers) is controlled by the PSNH Electricity Delivery Service Tariff— NHPUC No. 8 (the “Tariff”), authorized by the</p>	<p>Order No. 25,660 issued May 1, 2014.</p> <p>Following a voluntary repayment of certain of the amounts withheld by PSNH, the PUC ruled that PSNH did not act improperly in assessing a \$5 per customer “drop charge” for when PNE defaulted and its former customers were placed on PSNH’s default service.</p> <p>“When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE’s load similar to an agency relationship in the very limited sense discussed here. The first issue we framed for this docket was whether PSNH improperly withheld PNE’s customer payments beginning the week after PNE’s suspension from ISO-NE, and if so, what is the appropriate remedy. Because we have determined that PSNH is entitled to the amount of money that it ultimately withheld, and because PNE sought no remedy for PSNH’s temporary withholding of the other money that was earlier in dispute, 2/8/14 Tr. at 11, the first issue is moot.”</p>

<b>Docket No. and Name</b>	<b>Date and Party Initiating</b>	<b>Subject of Docket</b>	<b>Resolution</b>
		Commission on June 28, 2010.”	PNE’s Motion for Rehearing was denied by Order No. 25,673 issued June 2, 2014.  No appeal was filed.
<b>DE 14-066</b>  PNE Energy Supply, LLC      Petition for Declaratory Ruling regarding Rule Puc 2004.07(b)(1)b.	March 6, 2014 PNE	PNE sought a declaratory ruling on the proper interpretation of Rule Puc 2004.07 with respect to the “availability of off-cycle meter reads” and whether PSNH is “required by [the Rule] to have a provision in its tariff for ‘an off –cycle meter reading.’”	PNE withdrew its Petition without prejudice pending the outcome rulemaking in another docket.
<b>IR 14-132</b>  PNE Energy Supply, LLC and Halifax American Energy Supply, LLC      Joint Complaint Against Public Service of New Hampshire	April 10, 2014 PNE and Halifax American Energy Supply, LLC	PNE and Halifax filed a complaint against PSNH pursuant to RSA 365:1 relating to the circumstances under which PSNH could “drop” customers from a CEP and place the customer on default service. The Complaint requests “reparation,” apparently for any customers PSNH took into its default service when	The PUC denied the complaint, finding that the specific instance complained of was resolved by PUC rules and denied PNE’s complaint concerning past and future practices stating: “PNE did not claim it was harmed by PSNH’s alleged violation of the tariff, did not describe how it could have been harmed, and did not itemize any damages. Therefore, the Complaint fails to meet the threshold for further Commission action.”

<b>Docket No. and Name</b>	<b>Date and Party Initiating</b>	<b>Subject of Docket</b>	<b>Resolution</b>
		directly requested by the customer.	

# Exhibit B

**Chronology of Events in PNE/RP Dispute with PSNH**

<b>Date</b>	<b>Event</b>	<b>Reference</b>
2/6/13	PNE/RP sign contract for transfer of customers with FairPoint approximately 8,000 customers to transfer	Complaint Paragraph 51 (Cited as "C-51")
2/7/13	PNE Files Docket DE 13-049 with the NHPUC requesting a waiver of the 14-day notice to customers concerning change in suppliers <ul style="list-style-type: none"> <li>• "No special off-cycle meter read dates will be necessary"</li> <li>• "There will be no risk or detriment to PSNH as a result of this transfer."</li> </ul>	Docket 13-049
2/8/13	PUC conditionally grants the request specifically noting that "PNE and FairPoint...intend to fulfill all requirements of ...[Puc 2004.05], and because the "waiver does not disrupt the orderly and efficient resolution of matters before the Commission." The letter also requires, "as an additional condition to the waiver" that FairPoint "make a filing within 10 business days of this letter demonstrating that the surety provided under Puc 2003.03 is adequate given the additional customer base assumed in the purchase and sale agreement. The Commission also directs PUC Staff to "commence an investigation into PNE's CEPs authorization and the circumstances that necessitated the requested waiver." Results in "show cause proceeding," PUC Docket DE 13-059	Letter from Deborah Howland to Harry Malone, Esq. dated February 8, 2013, in DE 13-049.
2/9/13	FairPoint submits first EDIs for transfer to FairPoint upon next meter read date <ul style="list-style-type: none"> <li>• PSNH Records show 913 EDIs submitted</li> <li>• "<i>On information and belief</i>, FairPoint submitted Electronic Enrollments for the transfer of the approximately 8,500 customer accounts acquired from PNE."</li> </ul>	C-56
2/11/13	PNE sends notice to its customers announcing an agreement with FairPoint and advising that "[t]his transfer is expected to occur at the	See Staff Memo dated February 27, 2013 in Dockets DE 13-059 and 060.

Date	Event	Reference
	beginning of your next billing cycle, but may take two billing cycles to occur. “ The notice also states that customers may select a different supplier or return to PSNH within 30 days of the notice.	
2/12/13 (Monday)	PNE’s counsel (Bob Cheney of Sheehan, Phinney) calls PSNH counsel (Bob Bersak) and asks whether PSNH could vary from the PUC Tariff and transfer customers immediately – requires off-cycle meter readings for 8,000 customers.	C-66
2/14/13 (Wednesday)	Bersak informs Cheney that PSNH could not make the immediate transfer because it did not have sufficient staff to read 8,000 meters over the upcoming holiday weekend (Presidents’ Day)	C-66
2/14/13 3:11 PM	By email and letter to Bersak, PNE’s President Howard Plante requests a bulk transfer and an “off-cycle meter read” “in accordance with PUC Rule 2007.04 (b)”	
2/14/13 3:45 PM	ISO-NE places PNE in default	C-71
2/14/13 4:38 PM	ISO-NE informs PSNH that PNE “has been suspended effectively immediately” and “has waived their responsibility to cure.” Per FERC jurisdictional tariff, PSNH instructed to take load responsibility for all PNE customers [ISO-NE will sign necessary forms for PNE] “prior to Wednesday February 20 <sup>th</sup> .”	See Exhibit F to PSNH Brief
2/20/13 (Wednesday)	As of 12:01 a.m. PSNH responsible to supply PNE’s former customers per FERC Jurisdictional Tariff	
2/20/13	PSNH deletes remaining EDI’s for transfer to FairPoint and transfers customers to PSNH default service to effectuate requirement of the FERC Jurisdictional Tariff	C-79
2/21/13	Commission requires PNE to inform customers	C-96-98

<b>Date</b>	<b>Event</b>	<b>Reference</b>
	that “there will be no further transfers to FairPoint Energy pursuant to the Agreement between PNE Energy Supply and FairPoint Energy. Customers who are now on default service will only be changed if the affirmatively choose FairPoint or any other competitive supplier.”	
2/27/13	PUC Staff requests that the PUC open show cause hearings as to PNE and Resident Power including the circumstances surrounding PNE’s notice waiver request of 2/12/13 and confusion created by notices from PNE and Resident Power to customers	Dockets DE-13-059 and 13-060

# Exhibit C

## STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: February 27, 2013  
AT (OFFICE): NHPUC

FROM: <sup>SEM</sup> Steven E. Mullen, Assistant Director – Electric Division  
<sup>AON</sup> Amanda O. Noonan, Director – Consumer Affairs Division

SUBJECT: Resident Power, LLC (Aggregator)  
PNE Energy Supply, LLC (Competitive Electric Power Supplier)

**Staff's Recommendation for an Immediate Show Cause Hearing  
as to Whether Resident Power, LLC and/or PNE Energy Supply,  
LLC Should be Subject to Penalties or their Registrations  
Suspended or Revoked Pursuant to Puc 2005**

TO: Chairman Amy Ignatius  
Commissioner Robert Scott  
Executive Director Debra Howland



Staff hereby requests that the Commission immediately schedule a hearing at which Resident Power, LLC (Resident Power) and PNE Energy Supply, LLC (PNE) both appear to show cause as to why they should not be subject to penalties or their registrations to operate as an aggregator and a competitive electric power supplier (CEPS), respectively, should not be revoked or suspended in accordance with N.H. Code Admin. Rules Puc 2005. In support of this request, Staff has identified the following rules which it believes may have been violated by PNE and/or by Resident Power:

- 2003.01(d)(2) Evidence that the CEPS is able to obtain supply in the New England energy market. Such evidence may include, but is not limited to, proof of membership in the New England Power Pool (NEPOOL) or any successor organization, or documentation of a contractual relationship with a NEPOOL member.
- 2003.01(i) Following registration, a CEPS shall continue to maintain compliance with the requirements of Puc 2000.
- 2004.05 (m) The CEPS shall provide a copy of the notice described in (l) above to the commission at the same time notice is sent to affected customers.
- 2004.07 (f) Any CEPS that ceases to sell electricity within the state shall, prior to discontinuing such service: (1) Provide at least 30 days written notice to any affected utility and to the commission; and (2) Provide each

- customer written notice of its intent to cease operations at least 30 days prior to the start date of the customer's next billing cycle.
- 2004.08 (a) (2) Provide notice to customers of the nature of any business relationships or affiliations with any CEPS or utility.

In addition to the rules listed above, Staff also notes that, in accordance with 2006.01(a)(11), PNE's application stated it intended to serve only residential customers. Reports filed in accordance with Puc 2003.03 (b) indicate that PNE has been serving non-residential customers since the fourth quarter of 2011, the first quarter following approval of PNE's registration as a competitive electric power supplier by the Commission.<sup>1</sup>

Staff requests this joint hearing partly due to recent events that have occurred, and that continue to develop, that involve business and ownership relationships between the two entities that are so intertwined that attempting to investigate the companies separately would result in an unnecessarily complicated process. Due to the overlapping facts and circumstances that have resulted in this recommendation, Staff believes that having a combined hearing would be the most efficient and expeditious process.

### ***Background***

Resident Power is a registered aggregator authorized to operate in New Hampshire pursuant to Puc 2003 (see Docket No. DM 11-081). PNE is a registered CEPS authorized to operate in New Hampshire pursuant to Puc 2003 (see Docket No. DM 11-075). On February 7, 2013, PNE and FairPoint Energy, LLC (FairPoint Energy)<sup>2</sup> filed a Joint Petition for Expedited Waiver of Puc Rule 2004.05(k) with respect to providing a required 14 day advance notice of PNE's intent to sell its right to serve its customer accounts. That filing was assigned Docket No. DE 13-049. The waiver request was related to a Purchase and Sale Agreement entered into by PNE and FairPoint Energy on February 6, 2013 pursuant to which PNE would transfer approximately 8,500 residential and very small commercial accounts to FairPoint Energy. In addition, PNE would assign all of its right, title and interest in certain customer contacts to FairPoint Energy and FairPoint Energy would assume all of PNE's responsibilities and obligations under the contracts. Included with that filing was the notice that would be provided to customers, a copy of which is attached to this recommendation as Exhibit 1. The waiver request was granted by the Commission on February 8, 2013, and in its letter of approval, the Commission stated the following:

**PNE and FairPoint Energy's proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.**

<sup>1</sup> A secretarial letter approving PNE's registration as a CEPS was issued on September 22, 2011.

<sup>2</sup> Staff notes that by its recommendation, it is not suggesting that FairPoint Energy be investigated for its involvement in the unfolding circumstances.

The notice of the transfer was sent to the affected customers of PNE in a letter dated February 11, 2013, with the letters actually mailed out on the dates of February 13 and 14, 2013. While the Commission was not provided with the notice at the same time it was sent to customers as is required in Puc 2004.05 (m), a copy of the notice was posted on the PNE website. The notice provided to customers included the following representations:<sup>3</sup>

- PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.
- This transfer between suppliers will occur at NO COST to you.
- Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.
- Under the FairPoint Energy terms and conditions you will have no termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.
- All billing and payment will continue to be done through PSNH.
- Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.
- Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.
- Please note that the current PSNH default service rate is \$0.0954 per kWh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.

Significant events occurred subsequent to the Commission's approval of the waiver request in DE 13-049 resulting in the planned transfer of customers from PNE to FairPoint Energy being interrupted and not fully completed. Specifically, on February 14, 2013, PNE's status as a market participant was suspended BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL<sup>4</sup> by ISO New England (ISO-NE). As a result, and pursuant to ISO-NE's rules, PNE's remaining load asset as of 12:01am, Wednesday, February 20, 2013 was transferred to Public Service

<sup>3</sup> The notice on the website, while substantially the same as that provided in the waiver request in DE 13-049, has some minor differences. See Exhibit 2.

<sup>4</sup> As reported in a New Hampshire Business Review article dated February 20, 2013, "'It was a financially related suspension,' said August 'Gus' Fromuth, managing director of Resident Power and PNE, related companies that are both based in Manchester."

Company of New Hampshire (PSNH) as PSNH is the "host utility" and default service provider for the affected customers. As of that time and date, approximately 1,200 former PNE customers had been transferred to FairPoint Energy on their scheduled meter read dates, with the remaining approximately 7,300 becoming default customers of PSNH. In the days leading up to PNE's suspension by ISO-NE, PNE communicated to Staff **BEGIN CONFIDENTIAL** |

[REDACTED]

**END CONFIDENTIAL**

Related to those events, pursuant to a filing dated February 15, 2013 that was officially received by the Commission on February 19, 2013 and filed in Docket No. DM 11-075, PNE submitted the sworn affidavit of the President of PNE in which PNE a) advised the Commission that it would be voluntarily ceasing operations as a CEPS for the period<sup>6</sup> **BEGIN CONFIDENTIAL** |

[REDACTED]

**END CONFIDENTIAL**

As noted above, among the representations made to customers of PNE was that "Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers." That sentence, which apparently was made on behalf of Resident Power, was the only mention of Resident Power in the notice provided to customers. It is important to note, however, that most, if not all, of the 8,500 customers of PNE became customers of PNE through Resident Power's role as an aggregator of customer accounts. In its role as an aggregator, Resident Power, in its Terms and Conditions provided to customers (attached as Exhibit 3), states:

You hereby appoint Resident Power as your exclusive agent, for a period of 12 months from the date of enrollment, to act in your name, place and stead in any way which it could act with respect to researching, negotiating, executing, terminating, assigning, rescinding and delivering,

<sup>5</sup> The information redacted in this section related to telephone conversations held with PNE regarding certain financial and business information. Although there has been no formal request by PNE to have the information treated confidentially, Staff is erring on the side of caution and has redacted the information subject to a later ruling by the Commission.

<sup>6</sup> The information regarding PNE's voluntary cessation of operations as a CEPS was filed pursuant to a Motion for Confidential Treatment in that February 15, 2013 submittal, but it was disclosed in a notice issued by Resident Power to certain customers shortly before midnight on February 21, 2013 (see Exhibit 4).

electricity supply and service agreements with competitive energy suppliers, sellers or service providers.

Resident Power and PNE are affiliates with common ownership. As events unfolded over the past two weeks, Bart Fromuth, a representative of both Resident Power and PNE, engaged in several discussions with Staff on behalf of PNE and Resident Power. To the best of Staff's knowledge, Resident Power failed to disclose this affiliation to its customers as is required in Puc 2004.08 (a)(2).

On February 21, 2013, it was brought to Staff's attention that PNE was in the process of enrolling a large commercial and industrial customer, despite a) PNE having previously been suspended as a market participant by ISO-NE, b) having informed the Commission that it would be voluntarily ceasing operations beginning **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL**, and d) PNE's CEPS registration indicating that it only intended to serve residential customers.

Shortly before midnight on February 21, 2013, Resident Power sent a notice (attached as Exhibit 4) to those of its customers for which the "transfer of your account from PNE Energy Supply to FairPoint Energy has regrettably not gone through as expected." In that notice, those customers were informed that their account was now being served by PSNH. In addition, Resident Power instructed customers how they could "renew" their accounts with Resident Power if they wished to remain customers of Resident Power. Further, if customers "renew" with Resident Power, Resident Power "...will get to work, right away, to find you an alternative to PSNH default service..." Renewal, in and of itself, seems to suggest that some sort of termination of an existing relationship is at hand. Resident Power's notice also contained information describing circumstances by which customers became default service customers of PSNH, an account which differs from the information contained in the filing described immediately below. In that same notice, Resident Power stated that "PNE temporarily and voluntarily suspended their own service of the New Hampshire market, *and was not forcibly suspended or removed from the market as others have suggested...*" (emphasis added), a statement at odds with the formal suspension action taken by ISO-NE.

On February 22, 2013, Resident Power filed a Verified Emergency Petition for Declaratory Judgment<sup>7</sup> in which, among other things, it made certain representations regarding discussion with PUC Staff counsel regarding the subject of "slamming," a subject described in Puc 2004.10(b) as "...initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization" and in RSA 374:28-a as any practice that changes a consumer's telecommunications or energy-related service carrier or provider without the customer's knowledge or consent. For purposes of RSA 374:28-a, a "customer" shall mean the person to whom the telecommunications or energy-related services are billed, or that person's designee. In its petition, Resident Power seeks various forms of relief including an order from the Commission finding that:

<sup>7</sup> That filing was assigned Docket No. DE 13-057.

- Resident Power's registration as an aggregator has not been revoked, suspended or withdrawn;
- No provision of the Commission's rules prevents or prohibits Resident Power from continuing to represent its customers, including those that were formerly customers of PNE;
- For those Resident Power customers with whom an aggregation agreement exists, who were transferred to PSNH's default service, enrollment by Resident Power of any of those customers to FairPoint Energy or any other CEPS shall not constitute slamming; and
- For those Resident Power customers with whom Resident Power has reconfirmed a prior aggregation agreement and were transferred to PSNH's default energy service, enrollment by Resident Power of any of those customers to FairPoint Energy or any other CEPS shall not constitute slamming.

Although the "Emergency Petition" was filed and signed on behalf of only Resident Power, the second paragraph of the "Introduction" includes a statement that "*PNE and R[esident] P[ower]* are requesting the Commission to rule that, under the circumstances described below, transfer of these customer accounts to a competitive energy supplier does not constitute "slamming" under applicable state law and PUC rules, is otherwise permissible under applicable New Hampshire law and PUC Rules, and is in the best interests of the customers involved." (emphasis added). In paragraph 3 of the "Emergency Petition," the Purchase and Sale Agreement that was the subject of DE 13-049 is described as being entered into by PNE, FairPoint Energy and Resident Power.<sup>8</sup> As mentioned above, the filing in DE 13-049 only described the Purchase and Sale Agreement as being agreed to between PNE and FairPoint Energy.

Beginning February 20, 2013, the Consumer Affairs Division began to receive calls from former PNE customers. In the three day period ending February 22, 2013, 83 calls were received by the Consumer Affairs Division from former PNE customers. Customers were responding either to the notice from PNE dated February 11, 2013, recent news articles or the February 21, 2013 e-mail from Resident Power. There is considerable confusion about the information provided in the two notices, some of which is contradictory, as well as confusion about what options are available to them as customers. Given the suspension of PNE's status as a market participant by ISO-NE on Thursday, February 14, 2013, much of what PNE conveyed to customers is no longer accurate. Despite efforts to get them to do so, PNE has yet to provide a supplemental notice to customers. The notice provided by Resident Power has served only to create further customer confusion.

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<sup>8</sup> Given the knowledge that both PNE and Resident Power are parties to the Purchase and Sale Agreement, Staff recommends that the Commission order PNE and Resident Power to produce the Purchase and Sale Agreement and all other relevant information. Such information is vital to understanding issues such as to what extent the statement in the notice to customers from PNE regarding Resident Power no longer being their aggregator was valid and whether that statement was made with the knowledge and consent of Resident Power.

The PNE notice dated February 11, 2013 stated that Resident Power would no longer be an aggregator for those customers, except to cooperate with FairPoint to assist in the transition between electricity suppliers. The Resident Power notice to customers recognizes this and asks the customer to affirmatively renew his or her account with Resident Power, indicating that if the customer does not renew with Resident Power, he or she will remain on PSNH's default service rate until another supplier is chosen. The Verified Emergency Petition For Declaratory Judgment filed by Resident Power on February 22, 2013 asks the Commission to make a ruling as to whether the Resident Power agreements with former PNE customers are valid and, therefore, any action by Resident Power to change the supplier of former PNE customers would not constitute slamming, something which seems contradictory to the notice provided by Resident Power the previous evening.

***Recommendation***

To date, documents have been issued by PNE or Resident Power indicating, among other things, that Resident Power is either no longer the aggregator for the former PNE customers, still their aggregator, or that those customers can "renew" their aggregation relationship with Resident Power. Representatives of PNE and Resident Power alternately seem to speak for one entity, the other or both, but at other times appear to fall back to relying on the companies' statuses as separate legal entities to disclaim knowledge of each other's actions. Customers, Staff and the general public are getting confusing and conflicting information, which continues to change over time.

The ongoing situation is very fluid with new information being received each day by Staff, customers and the general public. This recommendation is not meant to encompass all facts and circumstances involving PNE and Resident Power, but given the confusing and at times contradictory information being provided by the two companies, Staff recommends that the Commission have PNE and Resident Power appear before it to answer the numerous questions generated by their recent actions. Toward that end, Staff recommends that the Commission schedule a show cause hearing as soon as practicable. At the hearing, PNE and Resident Power should be required to produce the following information:

1. An organizational chart that details the corporate structure of PNE, Resident Power and all other companies affiliated by cross-ownership, key employee, officer, director or member in a detailed manner that breaks ownership down to individuals;
2. Records of the companies demonstrating ownership of PNE and Resident Power;
3. Financial records showing the financial position of PNE for each day of February 2013;
4. Any type of financial projections prepared by or on behalf of PNE covering time periods in calendar year 2013;

**REDACTED**

5. Any written projections of what PNE's ISO-NE financial obligations would be for the months of February, March and April 2013;
6. Written projections of PNE's ability to meet those ISO-NE financial obligations;
7. Copies of all communications from ISO-NE with respect to PNE's financial obligations;
8. A list of all commercial and industrial customers of PNE including an indication of which customers were aggregated by Resident Power;
9. A copy of all notices provided to customers of Resident Power pursuant to Puc 2004.08(a)(2) disclosing the nature of any business relationships or affiliations with any CEPS;
10. The date each customer of Resident Power entered into an aggregation agreement and the date each notice referred to in item #9 above was sent to the customer; and
11. A copy of the February 6, 2013 Purchase and Sale agreement entered into by PNE, Resident Power and FairPoint Energy and all other information related to that transaction that is relevant to this recommendation.

In addition, considering PNE's current lack of status as a market participant with ISO-NE and its voluntary suspension of operations in New Hampshire, Staff recommends that the Commission order that PNE cease enrolling new customers, to the extent it has not already done so, and that the New Hampshire electric utilities not be required to accept any customer enrollments from PNE, to the extent they receive any.

Please let us know if you have any questions regarding this recommendation.

cc: David Shulock, Director – Legal Division

## CUSTOMER NOTICE OF SERVICE PROVIDER CHANGE

[DATE]

Dear Customer,

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, [www.fairpointenergy.com](http://www.fairpointenergy.com). A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

Specifically, please note the following:

- PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.
- This transfer between suppliers will occur at NO COST to you.
- Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.
- Under the FairPoint Energy terms and conditions you will no longer have any termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.
- All billing and payment will continue to be done through PSNH.
- Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.
- Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless

you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

- Please note that the current PSNH default service rate is \$0.0954 per kwh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.
- The contact information for FairPoint Energy is:

FairPoint Energy, LLC  
1055 Washington Blvd.  
Stamford, CT 06901  
Phone: 866-842-1084  
Email: [support@fairpointenergy.com](mailto:support@fairpointenergy.com)  
[www.fairpointenergy.com](http://www.fairpointenergy.com)

Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England  
816 Elm Street Suite 364  
Manchester, NH 03101  
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England



PNE Energy Supply, LLC  
1000 North Main Street, Suite 200  
Manchester, NH 03102  
Phone: 603-271-1234  
Fax: 603-271-1235  
www.pneenergy.com

February 11, 2013

Dear Customer,

RE Account Number: 1234567890

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, [www.fairpointenergy.com](http://www.fairpointenergy.com). A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

**Specifically, please note the following:**

PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.

This transfer between suppliers will occur at NO COST to you.

Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.

Under the FairPoint Energy terms and conditions you will have no termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.

All billing and payment will continue to be done through PSNH.

Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.

Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

Please note that the current PSNH default service rate is \$0.0954 per kWh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.



PNE Energy Supply, 1000 Elm Street, Suite 364  
Manchester, NH 03101

**The contact information for FairPoint Energy is:**

## FairPoint

FairPoint Energy uses its name under a license agreement with Fairpoint Communications Inc.

FairPoint Energy, LLC  
1055 Washington Boulevard,  
7th floor  
Stamford, CT 06901  
Phone: 866-842-1084  
Email: [support@fairpointenergy.com](mailto:support@fairpointenergy.com)  
[www.fairpointenergy.com](http://www.fairpointenergy.com)

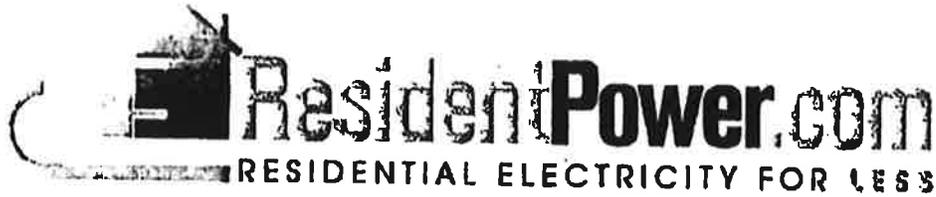
Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England  
816 Elm Street Suite 364  
Manchester, NH 03101  
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England



**Terms and Conditions**

Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power") operates as a registered aggregator of electricity in New Hampshire and Maine. "We", "us" and "our" refers to Resident Power. "You" or "your" refers to you the Customer. Resident Power will maintain your information with the strictest confidentiality and will utilize it only in the course of providing the services contemplated under these terms and conditions. Please read the terms and conditions below carefully as offers and opportunities may vary depending on utility, state and region of service.

- 1. Appointment of Agent:** You hereby appoint Resident Power as your exclusive agent, for a period of 12 months from the date of enrollment to act in your name, place and stead in any way which it could act with respect to researching, negotiating, procuring, contracting, signing, resending and delivering electricity supply and service agreements with competitive energy suppliers, sellers or service providers.
- 2. Authority to Sign/Enroll:** By accepting the terms and conditions and completing the online or hard copy enrollment form you are representing that you have the authority to sign on behalf of the electricity accounts listed and that you are either the account owner or the meters duly authorized representative. **NOTICE:** Anyone enrolling customers without their express permission shall be liable for any and all suits, complaints, damages, fines or charges resulting therefrom. Resident Power does not condone or tolerate customer "stealing" and will turn in any person or persons discovered to be engaged in any such activity to the proper authorities. If you feel that you have been a victim of improper or unauthorized enrollment please contact Resident Power at [info@residentpower.com](mailto:info@residentpower.com) and include INVAID ENROLLMENT in the subject line. If you are already with another supplier or aggregator [other than the utility] and you enroll with Resident Power it is your responsibility to inform Resident Power in writing as to when your current supply/aggregation contract expires. Resident Power is not responsible for any early termination penalties that may be charged to you by other suppliers or aggregators as a result of your enrollment with Resident Power.
- 3. Price Guarantee:** Resident Power guarantees that your new electricity rate will be lower than the 12 month average residential rate offered by your local utility company at the time of enrollment with your new competitive electricity provider ("CEP"). **Note:** The 10% Savings Guarantee applies to PSNH customers only and reflects Resident Power's commitment to price you, the Customer, 10% or more below the average residential rate listed by PSNH over the prior 12 months. All other utility customers are guaranteed a savings against the posted residential rate offer by their utility; however it may be a savings of less than the PSNH savings percentage referenced above. If Resident Power is unable to secure a rate that is lower than the previous 12 month average residential rate offered by your local utility company Resident Power will not enroll you with a new CEP and you will remain with the utility company at no additional charge, until such time as a new rate is found or you terminate your membership in the Resident Power program.  
  
Please note that Resident Power cannot and will not cover any increase in your transmission and distribution charges as those charges are the domain of your utility company and will remain as such even after we find you a new electricity supplier/CEP. Therefore, our guarantee of a lower price relates ONLY to the per kWh electricity charge for electricity supply and does not extend to, describe or pertain to any other service, utility, product, or charge levied by your local utility company.  
  
Please note that many utility companies increase their prices every 1, 3 or 6 months. It is for this reason that Resident Power uses a utility's previous 12 month average as the price to compare.
- 4. Term:** Your enrollment in our energy program starts on the day of sign up and submission and lasts for a period of 12 months from that date. If you wish to be removed from the Resident Power program you must inform us in writing 30 days prior to the expiration of your 12 month term, or you will be automatically renewed for another 12 months. This term listed under this Appointment of Agent does not relate to any Agreement entered into on your behalf with a CEP while acting under the authority provided herein. When a new electricity rate and CEP have been secured on your behalf, you will be notified of your new terms and conditions at that time, by the CEP or their agent.
- 5. Cancellation:** Under this Agreement you are enrolled with Resident Power for a period of 12 months from the date of sign up. At the expiration of the 12 month period, either party may cancel this Appointment of Agent 30 days prior to its expiration. However, you will have been enrolled to a new rate for another 12 months of trial. You will continue to auto renew for 12 month intervals until such time as either party cancels. In order to voluntarily cancel, the canceling party must submit a written notice of cancellation at least 30 days prior to the next enrollment date. In the event that you have already been enrolled with a CEP, cancellation of your Agreement with Resident Power will have no impact on the terms and conditions entered into between you and the CEP. **NOTICE:** If you have multiple utility accounts, please notify us of your new account number(s) within 30 days of re-enrollment and your early termination fee will be waived.
- 6. Right of Rescission:** By law the residential consumer has the right to rescind when Resident Power has found you a new rate and new CEP. You will remain a Resident Power customer, however, when we have found you a new rate with a CEP you will be notified by the CEP of your new rate terms and conditions. At which point you will have the following right of rescission depending on the form of the communication:  
 a. For residential customers and email communication terms shall be 3 business days from the date of payment or electronic delivery of a written terms or service statement required by (a) above to rescind notification and

[www.ResidentPower.com](http://www.ResidentPower.com)  
EMAIL: [info@residentpower.com](mailto:info@residentpower.com)  
603 232 9293 (Phone)  
603 625 8448 (Fax)  
116 Elm Street, Suite 364, Manchester, NH 03104

- b. Residential customers and small commercial customers receiving the terms of service statement required by (a) above via the United States postal service shall have 5 business days from the postmarked date to rescind authorization.
7. **Early Termination:** In order to provide our price guarantee, you may not sign with another electric broker or supplier while under contract with Resident Power. You have authorized Resident Power as your exclusive procurement agent for electricity; therefore if you leave prior to proper cancellation, Resident Power reserves the right to charge a \$100 early termination fee. See Section 4 Cancellation for more details.
8. **Information Release Authorization:** Through your enrollment via web, mail, telephone or other method you agree with the terms and conditions contained within this document and authorize Resident Power to act on your behalf, with your local utility company (i.e. PSNH, Unitil, NGRID, NH CO-OP, etc.) to release or allow access to us any pertinent account information including, but not limited to account number, usage information, payment history etc.
9. **Dispute Resolution:** In the event of a billing dispute or a disagreement involving any essential element of this Agreement, the parties will use their best efforts to resolve the dispute. If you have any concerns about your bill, you may call our Customer Service department (M-F 9AM-5PM EST) at 603 232 9293 or send a letter to Resident Power, 816 Elm Street, Suite 364, Manchester, NH 03101, or send an e-mail to [info@residentpower.com](mailto:info@residentpower.com)
10. **Low Income Eligibility:** A discount electric rate is available to qualifying residential customers by your utility company. If you are currently on such a rate with the utility company, we suggest that you do not enroll in our program as we cannot guarantee a lower electricity rate against non-published, specialized enrollment rates, such as those for low income eligibility.
11. **Governing Law and Regulations:** This Agreement shall be governed by, construed, enforced and performed in accordance with the laws of the State of New Hampshire, if action is taken by federal or state governmental authorities which might significantly change the way Resident Power does business with you. Resident Power may terminate this Agreement, after which you can enroll for service from another aggregator or supplier.
12. **Emergency Service:** In the event of an electric emergency or service interruption, you should immediately call your local utility company immediately.
13. **Assignment:** Resident Power may assign or transfer your accounts to another entity at any time under the same or substantially similar terms and conditions, unless otherwise agreed between Resident Power and the other entity. In such cases, Resident Power will use best efforts to provide you with 30 days notice via electronic mail, if you have not provided an electronic mailing address to Resident Power. Resident Power reserves the right to inform you by publishing such notice on their website at [www.ResidentPower.com](http://www.ResidentPower.com).
14. **Supplier Notice to Customers:** Resident Power will notice you when a new supplier rate is secured for your home or small business as noted above. Customers do have the ability to opt out of any rate offered for the time periods outlined in Section 8. Resident Power will utilize the mailing or email address provided by customer and is not liable for any undelivered supplier notices resulting from incorrect electronic or physical mailing addresses. Customers are encouraged to double check their enrollment forms to ensure that all information is input completely and accurately.

Thank you for your enrollment and we appreciate your support. Don't forget to Like Us on Facebook at <http://www.facebook.com/ResidentPower>

Like Resident Power on Facebook

Email Users: Don't forget to allow email from ResidentPower.com, as some mail servers may direct our letters and notices into your SPAM filter

Online Sign - Resident Power GREEN

10/10/10 06:28:01 2/4



[www.ResidentPower.com](http://www.ResidentPower.com)  
EMAIL: [info@residentpower.com](mailto:info@residentpower.com)  
603 232 9293 (Phone)  
603 625 8448 (Fax)  
816 Elm Street, Suite 364, Manchester, NH 03104



**Dear Resident Power Customer:**

**IMPORTANT UPDATE – REPLY REQUESTED**

If you are receiving this message the transfer of your account from PNE Energy Supply to Fairpoint Energy has regrettably not gone through as expected. Your account had been enrolled for transfer to Fairpoint Energy at the same low rates, terms and conditions that you enjoyed with PNE Energy. However, the transfer of your account has been halted, and your account is now back with Public Service of New Hampshire (PSNH), whose rates are considerably higher than those you enjoyed with PNE Energy and would have enjoyed with Fairpoint Energy.

If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH rates, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

If you renew with us, we will get to work, right away, to find you an alternative to PSNH default service at rates that continue to be well below PSNH. If you do not renew with us, please be advised that you will remain on PSNH's high default service rate of \$.0954 per kwh, until you choose another supplier on your own, or you re-sign with Resident Power.

While we are writing you, we would like to clear up some inaccuracies in the media the last few days.

1. Despite what was reported by the Nashua Telegraph and other news outlets this morning, Resident Power has not been suspended by the ISO or the New Hampshire PUC. The Telegraph and others have since changed their online versions to reflect the truth. We remain in good standing and continue to serve you (should you renew with us) and all of our 14,000 NH customers with superior rates and service.
  
2. Your account has gone back to PSNH as of Wednesday, February 20, 2013. A request was made to PSNH to transfer your account to Fairpoint Energy automatically and protect your rates, however PSNH declined to make the switch. PSNH stated that although they had the ability to do the automatic transfer, they lacked the "resources" to effect the transfer in the time provided.
  
3. Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (Fairpoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire's only locally owned and operated electricity supplier in the next few weeks.

When we started Resident Power, almost two years ago now, all we wanted to do was provide EVERY New Hampshire rate payer with a competitive choice, not just the large businesses. In the early days, the only supplier that would work with us, and be the first to offer service to residential and small commercial customers, was PNE Energy. As their partner these last two years, we salute them for being bold enough to do to what no competitive supplier had done before. Today, almost 50,000 New Hampshire customers have chosen an alternative supplier to help save them money on their electricity bills, and PNE Energy Supply is a major reason for that.

In closing, we hope that you decide to remain with Resident Power. It has been our pleasure to serve you and we hope you give us the chance to continue that relationship.

Please remember, that if you wish to stay with Resident Power, please REPLY to this

email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at [603 232 9293](tel:6032329293), and speak with one of our associates, between 9 am and 5 pm, M-F.

Sincerely,

Your Resident Power Enrollment Team



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Enrollment from Website [www.residentpower.com](http://www.residentpower.com)

Our mailing address is:

Resident Power

816 Elm St

Suite 304

Manchester, NH 03104

[Add us to your address book](#)

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# Exhibit D

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT  
Case No. 216-2015-CV-265

PNE Energy Supply, LLC  
Resident Power Natural Gas & Electric Solutions, LLC

v.

Public Service Company of New Hampshire  
d/b/a Eversource Energy

**MEMORANDUM IN SUPPORT OF PSNH'S  
MOTION TO DISMISS THE COMPLAINT OR  
ALTERNATIVELY FOR REFERRAL TO THE  
PRIMARY JURISDICTION OF THE PUBLIC UTILITIES COMMISSION**

PUBLIC SERVICE COMPANY  
OF NEW HAMPSHIRE  
d/b/a EVERSOURCE ENERGY

By its attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: July 31, 2015

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36; Comp. ¶ 32. Finally, in the event that a customer is not receiving service from a CEP for any reason, the PUC Tariff requires that PSNH “arrange default service.” Comp. ¶ 36.

**B. The PNE/Resident Power-FairPoint Transaction**

The Complaint arises out of Plaintiffs’ confidential FairPoint Contract, which was not publically disclosed to PSNH (in any form), until after the events underlying the Complaint.<sup>13</sup> According to the Plaintiffs, they began discussions in late 2012 about selling all of PNE’s customers to FairPoint and executed the FairPoint Contract on February 6, 2013. Comp. ¶ 51. The Complaint alleges that Resident Power’s aggregation agreements would terminate when the customers were transferred. *Id.* ¶ 51.

Plaintiffs concede that because of volatility in the energy markets in late 2012 and early 2013, PNE was having difficulty meeting its financial security requirements with ISO-NE. *Id.* ¶ 53.<sup>14</sup> PUC regulations require that before any non-customer initiated transfer of customers is made, the current supplier must provide notice of the proposed change 14 days prior to the effective date of the change so that the customer has the option of selecting a different supplier within a 30 day period. Puc 2004.05 (k); Comp. ¶ 54. In order to speed up the process (and apparently alleviate PNE’s financial security issues), PNE and FairPoint filed a Joint Motion for Expedited Waiver of the 14-day requirement with the PUC. Comp. ¶ 54.

That Motion was filed on February 7, 2013 (one day after the Closing Date of the FairPoint Contract) and resulted in the opening of a new Docket No. DE 13-049 with the PUC.

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<sup>13</sup> Plaintiffs filed a completely redacted copy of the FairPoint Contract with the PUC in Docket Nos. DE 13-059 and 13-060 on March 12, 2013. Plaintiffs subsequently filed another version of that contract with only the financial terms redacted on April 9, 2013 – long after the events complained of allegedly occurred.

<sup>14</sup> Although the Complaint does not explicitly so state, a fair inference is that in order to avoid continuing obligations to purchase power at a high (or volatile price) PNE sought to divest itself of its customers as soon as possible. *Id.* ¶¶ 53-54. PNE has conceded elsewhere at the PUC that the default with ISO was a “financially related suspension.” See Staff Memo in PUC Dockets DE 13-059 at 13-060 at 3, footnote 4. The Memo is referenced below and attached hereto as Exhibit 4.

In the Joint Motion, Plaintiffs stated that if the waiver was granted by the PUC “every customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served,” that “[n]o special off-cycle meter read dates will be necessary as a result of this transfer,” and that “[t]here will be no risk or detriment to PSNH as a result of this transfer or requested waiver.” *See* Joint Petition in Docket DE 13-049 attached hereto as Exhibit 5.

One day later, on February 8, 2013, the PUC granted the request. *See* PUC letter to Harry Malone, Esq. of Devine, Millimet & Branch dated February 8, 2013 in Docket No. DE 13-049 attached as Exhibit 6. Although the PUC granted the proposed waiver, it also informed PNE and FairPoint that “the Commission directed Staff to commence an investigation into PNE’s CEPs authorization and the circumstances that necessitated the requested waiver.” *Id.* at 2.

Subsequently, FairPoint submitted EDI enrollments to effect the transfer of approximately 8,000 PNE customers to it from PNE. *Comp.* ¶¶ 56-57. Then, on February 12, 2013, four days after the PUC had granted the notice waiver, PNE’s counsel called PSNH’s Associate General Counsel to ask if PSNH could vary from the ordinary course of business as set out in the PUC Tariff and transfer all of the accounts to FairPoint immediately, without waiting for a meter reading. *Id.* ¶ 66. PNE concedes that this request was made “in order to avoid an ISO-NE default and a scenario where its customers would be placed on PSNH’s Default Service.” *Id.* ¶ 55.<sup>15</sup> PNE alleges that PSNH had the “authority to perform these transfers,” which required manually entering detailed information for approximately 8,000 customers. *Id.* ¶ 68.

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<sup>15</sup> PNE alleges that it requested PSNH to make this immediate transfer in order to avoid defaulting in its security requirements with ISO-NE. *See Comp.* ¶ 65. Later, it contends that PSNH “was communicating with” PUC Staff regarding PNE’s “impending ISO-NE default,” but the discussion cited says nothing about an “impending ISO-NE default.” *Id.* ¶ 70.

On February 14<sup>th</sup> PSNH informed PNE that it did not have the personnel to perform the immediate transfer. *Id.* Later that same day, PNE (citing to a PUC rule that the PUC staff opined was inapplicable to this situation) formally requested PSNH to perform off-cycle meter readings of its approximate 8,000 customers. That request was overtaken by events, as PNE chose to default on its financial security obligations under the ISO Tariff that same day – within minutes of making that request.

Eighty-three minutes after PNE's written request, ISO-NE informed PSNH that PNE "was suspended from market participation and *had waived its right to cure the default.*" *Id.* ¶ 71 (emphasis added). PNE concedes that this default was a voluntary business decision. See Staff Memo in Dockets DE 13-059 and 13-060, Exhibit 4 at 4, 5, 8 and Exhibit 2. Plaintiffs assert that ISO-NE "originally requested that PSNH assume responsibility for PNE's load as soon as possible," and that had PSNH done so, they would have been relieved from "continuing to replenish" PNE's security account. They also allege that PSNH negotiated a later date with ISO-NE to harm them. *Id.* ¶¶ 72-73, 146(c), 158(c). In reality, the federal ISO-NE Tariff controls how quickly the host utility (in this case PSNH) must act to take on responsibility for a defaulting supplier's customers, and PSNH in fact complied with that ISO-NE Tariff, which required that PSNH act by 12:01 a.m. on February 20<sup>th</sup>.

On February 20, 2013, PSNH deleted the pending EDI enrollments submitted by FairPoint for the PNE customers in order to place the customers on PSNH's default service in compliance with the ISO-NE directive and the PUC Tariff.<sup>16</sup> Comp. ¶ 79. At that point, in order to transfer the former PNE customers to FairPoint from PSNH's default service, FairPoint would have had to submit new electronic enrollment forms. *Id.* ¶ 81. However, due to the transfer to

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<sup>16</sup> "In the event the Supplier is unable or unwilling to re-satisfy its obligations, the Company may transfer the Suppliers' Customers to service under Default Service after notification to the Commission." PUC Tariff at ¶32.

its Default Service and the PUC Tariff's prohibition on more than one supplier in a month, PSNH concluded that any such submission by FairPoint could not be accepted until after each customer's next monthly meter read date. Comp. ¶ 89. The Plaintiffs concede that PSNH's interpretations were "consistent with the [PUC] Tariff, which restricted PSNH from accepting 'more than one Supplier for a Customer during any particular monthly billing cycle.'" *Id.* ¶ 91. But they nevertheless complain about PSNH's action, ignoring the preemptive effect of their own voluntary default in the wholesale marketplace, and that default's resulting requirement that PSNH take responsibility for PNE's customers per the ISO Tariff and place them onto PSNH's default energy service per the PUC Tariff. Plaintiffs instead contend that PSNH "thwarted the eventual transfer of PNE's remaining customers to FairPoint." *Id.* <sup>17</sup>

Following PNE's default, Resident Power's attorneys communicated with the PUC Staff concerning notices PNE and Resident Power intended to send to "their customers" regarding the transfer. *Id.* ¶¶ 92-93. According to the Complaint, the PUC Staff contended that if Resident Power attempted to transfer the customers from PSNH's Default Service to FairPoint without the customer's express approval, this might constitute "slamming." *Id.* ¶¶ 93,108.<sup>18</sup> Resident Power also complains that PSNH caused the PUC to question whether it remained an aggregator for these customers after PNE's default. *Id.* ¶¶ 100-104. Although alleging that it "did not intend to cancel its aggregation agreements" (*id.* ¶ 101), Resident Power concedes that the FairPoint Contract provided that those agreements "would be terminated as of the transfer of each such

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<sup>17</sup> This ignores that fact that by operation of the ISO Tariff, once PNE defaulted it had no remaining customers to transfer and also the fact that the Complaint is completely devoid of any allegation that FairPoint ever asked PSNH to transfer customers to it at a date outside the monthly billing cycle. Plaintiffs apparently sat on any alleged right to transfer the customers in question and never in fact re-initiated those transfers for the billing period after PNE's voluntary default.

<sup>18</sup> Puc 2004.10(b) defines "slamming" as "initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization." *See also* RSA 374:28-a.

customer account” (*id.* ¶ 51) and that the notice sent to PNE’s customers before PNE’s default stated that “Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition.” *Id.* ¶ 55.<sup>19</sup>

Allegedly because of the confusion over whether Resident Power remained the aggregator or whether a transfer without customer authorization would be slamming, Resident Power filed a Petition for Declaratory Judgment with the PUC addressing these issues. *Id.* ¶ 107. Plaintiffs concede that the PUC Staff “ultimately cast blame on them for this market confusion,” but still contend that PSNH was responsible for it, alleging that the confusion around FairPoint’s attempt to re-enroll PNE’s former customers “disrupted the entire PNE/FairPoint” transaction and that “FairPoint *ultimately* backed out of the deal.” *Id.* ¶¶ 112, 115.

Plaintiffs also assert that following PNE’s default, PSNH engaged in a campaign in the media and in the PUC to disparage and discredit them. *Id.* ¶¶ 83-89; 102-111; 115-126. Supposedly as a result of this campaign, the PUC opened “show cause” proceedings in which it asserted that “PNE and Resident Power acted recklessly and deceptively in connection with the transfer of PNE customer accounts to FairPoint and PNE’s financial default with ISO-NE.” *Id.* ¶ 122. The show-cause proceedings, initiated by the PUC on its own motion, became Docket Nos. DE 13-059 (Resident Power) and DE 13-060 (PNE).<sup>20</sup>

Finally, the Plaintiffs complain that PSNH withheld monies due them during the period following PNE’s default. *Id.* ¶¶ 94-95.

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<sup>19</sup> In fact, the FairPoint Contract does not state what the Complaint alleges. The Contract reads, “All such Customer Aggregation Agreements shall be terminated *as of the Closing Date* for each such Customer,” with the Closing Date defined as February 6, 2013. *Supra*, pp. 10-11 (emphasis added).

<sup>20</sup> While Plaintiffs contend that the show cause Dockets “ultimately vindicated Plaintiffs’ position that PSNH (not Plaintiffs) was responsible for any harm or confusion that permeated the marketplace” on many of the same issues they now raise in the Complaint, this contention is contrary to the Commission’s decision in the show-cause dockets. *Id.* ¶ 124 (emphasis in original). As Plaintiffs concede, the Docket was settled between them and the PUC with an agreement on the establishment of an escrow fund and reparation payments to all former PNE customers. *Id.* ¶ 126.

Plaintiffs seek damages for PSNH's alleged actions, including: the entire amount of the FairPoint contract as well as for expenses (of an unknown kind) for their efforts to "salvage the FairPoint deal;" the payments it made to former customers under their settlement at the PUC to compensate them for the difference between the PNE rate and the Default Service Rate<sup>21</sup> (as well as PNE's "labor and expense" to contact former customers in order to make those payments); and for attorneys' fees for the show cause proceeding initiated by the PUC and the action brought by PNE to recover withheld fees.

Despite the complexity of their Complaint, the alleged wrongful conduct said to give rise to the five causes of action asserted by Plaintiffs amounts to ten alleged wrongful acts on the part of PSNH. Comp. ¶¶ 137, 142, 146, 153 and 158. For ease of reference for the Court, these acts are described in Appendix B to this memo (with reference to the cause of action they are said to support) and are discussed in detail in Part III.B below. None of these allegedly wrongful acts states a legally cognizable claim.

**III. Plaintiffs' Factual Allegations Fail to State a Claim Both on Their Face and When Considered Against Public Documents, PUC Proceedings and Documents Referenced in the Complaint**

Preliminarily, it is useful to consider two points. First, based on the allegations in the Complaint, it is clear that if PNE had not voluntarily defaulted on its obligations to ISO-NE and further expressly waived its right to cure that default, the transfer of customers under the FairPoint Contract would have been completed as "routine." Comp. ¶ 34. Second, if Resident Power or FairPoint had authority post-default to transfer the customers, a resubmission of EDI

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<sup>21</sup> Notably, these payments were made pursuant to a settlement agreement negotiated between PNE and the PUC Staff and voluntarily entered into by PNE. That agreement was approved by the PUC in Docket No. DE 13-060, a docket where PSNH did not participate except to provide "public comment." Accordingly, PNE is asking that PSNH pay for expenses it negotiated and voluntarily incurred to resolve the PUC's "show-cause" proceedings by entering into a settlement.

# Exhibit E

From: "Howard Plante" <[himplante@comcast.net](mailto:himplante@comcast.net)>  
To: Robert A. Bersak/NUS@NU,  
Cc: "Gus Fromuth" <[gusfromuth@efpower.com](mailto:gusfromuth@efpower.com)>  
Date: 02/14/2013 03:11 PM  
Subject: Off-Cycle Meter Read Request

Dear Attorney Bersak:

Please find attached a letter requesting off-cycle meter reads for the residential and small commercial accounts referenced in the letter.

Sincerely,

Howard M. Plante  
President  
PNE Energy Supply LLC  
497 Hooksett Road  
Suite 179  
Manchester, NH 03104  
P: 603-413-6602  
P: 888-669-1685  
[www.powernewengland.com](http://www.powernewengland.com)



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February 14, 2013

Mr. Robert A. Bersak  
Public Service Company of NH  
780 N. Commercial Street  
Manchester, NH 03101

Re: Request for Special Off-Cycle Meter Reads

Dear Attorney Bersak:

I am writing on behalf of PNE Energy Supply LLC (PNE). Extensive discussions have taken place this week between PSNH and PNE regarding PNE's request for an electronic bulk transfer of certain of PNE's residential and small commercial accounts from PNE's load asset to FairPoint Energy's load asset. This is pursuant to a Purchase & Sales Agreement the parties (PNE and FairPoint Energy) signed on February 6, 2013.

In accordance with NH PUC Rule 2007.04(b) PNE hereby requests an electronic off-cycle meter read for all of the afore-mentioned residential and small commercial customers presently enrolled with PNE. PNE will terminate service to these customers on the date of the meter read. These customers should then be immediately enrolled with FairPoint pursuant to FairPoint's existing EDI instructions.

Thank you for your assistance in this matter.

Sincerely,  
PNE Energy Supply LLC

Howard M. Plante  
President

---

PNE Energy Supply, LLC  
497 Hooksett Road – Suite 179  
Manchester, NH 03104

P: 603.413.6602  
F: 603.625.8448

# Exhibit F

----- Forwarded by Donald E. Bergeron/NUS on 02/14/2013 04:44 PM -----

From: "Nelson, Chad" <CNelson@iso-ne.com>  
To: Donald E. Bergeron/NUS@NU, Carmel M. Gondek/NUS@NU  
Cc: Aaron J. Downing/NUS@NU, Janet R. Kelliher/NUS@NU  
Date: 02/14/2013 04:38 PM  
Subject: Customer Suspension

**Company PNE Energy Supply LLC (51393) has been suspended effective immediately. The customer has waived their possibility to cure. PNE is the Lead Load Asset Owner and has 100% Ownership Share of load asset 39637, PNE\_PSNH\_LOAD in Metering Domain PSNH NODE (687). Per the RTO Tariff, Section I, Exhibit 1D, "ISO New England Billing Policy", this load asset will need to be retired as soon as practicable, but no later than 00:01, Wednesday February 20, 2013 (3 business days following the date of the suspension). We will be sending you a pre-populated Load Asset Registration Form reflecting the retirement. Please upload a signed version of the Asset Registration Form through Ask ISO with an effective date as soon as practicable. ISO-NE will sign on behalf of the suspended Market Participant. If the asset is not retired prior to Wednesday February 20, the ISO will take action to retire the asset effective on that date. Please let me know if you have any questions.**

**Chad Nelson  
Generation & Load Administration  
ISO New England  
(413) 540-4508  
Cell(860) 922-8380**

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# Exhibit G

### **Important Information for Customers of PNE Energy Supply and Resident Power**

If you are a customer of Resident Power and PNE Energy Supply, recently you received a notice from PNE stating it would be transferring your account to FairPoint Energy upon your next meter read date. PNE Energy Supply also advised you that you could choose a different competitive supplier or to return to your utility's default service, and there would be no cost to you to do so. Since the time of that notice, events have occurred which prevent PNE from continuing to provide electric energy supply to you during the transition to FairPoint Energy. As a result, your account may have been transferred to PSNH's default service. Default service is available in situations like this to act as a safety net to ensure customers' lights do not go out when their supplier, in this case PNE Energy Supply, is no longer apply to purchase electric energy for its customers.

What does this mean to you? For all but about 1200 of PNE Energy Supply's former customers, electric energy service is now being provided to you by PSNH. Your account will not be automatically transferred to FairPoint Energy. To change the provider of your electric energy supply, you must affirmatively select a new competitive electric energy supplier. Please be aware that the change to a new supplier may take up to two billing cycles to complete.

The Commission is investigating the circumstances of PNE Energy Supply's inability to continue to serve its customers.

A list of the competitive electric energy suppliers providing service to residential customers can be found below. Should you have any questions, you may contact the Commission's Consumer Affairs Division by e-mail at [puc@puc.nh.gov](mailto:puc@puc.nh.gov), through completing the consumer form found at <http://www.puc.nh.gov/ConsumerAffairsForms/complaintfrm.aspx>, or by telephone Monday through Friday from 8:00 am to 4:30 pm at 1-800-852-3793.