THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 15-491

PNE ENERGY SUPPLY, LLC, et al.
v.
PSNH D/B/A EVERSOURCE ENERGY

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

PSNH submits this Reply Brief to the Opposition of Plaintiffs PNE and Resident Power dated May 13, 2016 (the "Opp.").

Plaintiffs spend the majority of their Opposition detailing the allegedly improper motives of PSNH, an argument that is wholly irrelevant as a matter of law if PSNH did not act unlawfully. The Superior Court has ruled that if PSNH did not violate the law, its conduct would not be "improper" for purposes of an interference with contract claim.[1] But in considering Plaintiffs' arguments relating to PSNH's alleged "improper" conduct it is worth remembering what claims are at the heart of their Complaint.

First, with respect to the off-cycle meter read issue, Plaintiffs complain that PSNH "initiated a series of events calculated to preserve its monopoly and injure [Plaintiffs]" including "delaying the transfer of PNE's customers to FairPoint" by refusing to perform thousands of off-cycle readings and with the intent that "upon PSNH's assumption of PNE's load asset" it would keep those customers for itself. Opp. at 17. PSNH had no obligation to perform these off-cycle readings. Moreover, this argument fails because it assumes that PSNH knew that PNE had not hedged its exposure in the wholesale marketplace, knew PNE would default on its financial

[1] Superior Court's Order on PSNH's Motion to Dismiss at 10. ("If defendant's conduct was protected by law, it was not 'improper.'")

obligations to ISO-NE, knew that PNE would waive its ISO-NE Tariff right to cure, knew FairPoint would not step in and assume PNE's load asset in the wholesale market, and that therefore PSNH would have the "opportunity" to serve those customers upon that default.[2] But Plaintiffs make no such allegations in their prolix Complaint and indeed, allege only that PSNH had communications with the Commission Staff about PNE's default on the same day that it occurred. Comp. at ¶ 70.[3]

Second, Plaintiffs assert that PSNH's deletion of FairPoint's EDIs "prevented customer choices from being consummated" and that PSNH "not only thwarted the eventual transfer to FairPoint, but engineered an implicit invitation for those customers to *choose another CEPS.*" Opp. at 22-23 (emphasis in original). The problem with this argument is that *none* of the thousands of customers had "*chosen*" to be served by FairPoint. Instead, those customers had an *explicit* option to choose another CEPS within 30 days of receiving PNE's Notice of discontinuation of service, and by public notice posted on the Commission's website one day after PNE's ISO-NE load asset had been eliminated, they were informed that no further transfers to FairPoint would occur unless they affirmatively chose FairPoint as their CEPS. Thus, PSNH

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[2] Throughout their Opposition, Plaintiffs complain that PSNH is attempting to dispute allegations that are not included in the Complaint. *See e.g.*, Opp. at 3, fn. 2 and at 23, fn.13. Opp. at 3 and 23. Plaintiffs ignore this Commission's decision in Procedural Order 25,881 (at 3), that it will consider "facts alleged in the complaint filed in the Court Case and, to the extent relevant to the question presented, … documents sufficiently referred to in the complaint, official records, and other documents the authenticity of which is not disputed by the parties." For example, Plaintiffs contend that the fact that their suspension was a "voluntary" business decision is a fact that cannot be considered. While that issue is not directly relevant to the two issues at hand for the Commission, it demonstrates that there would have been no opportunity for alleged interference if PNE had not chosen to default. There is no dispute about the voluntary nature of the default. *See* Order No. 25,660 and Resident Power notice to customers attached to the Staff Memo in Docket DE 13-059: "Your former supplier, PNE Energy Supply, suffered from cash flow issues stemming from record marketing 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." (Emphasis added).

[3] In footnote 13 of their Opposition, Plaintiffs take PSNH to task for referencing the fact that it discussed matters with the Commission. But the citation to PSNH's Brief demonstrates that PSNH cited to the Complaint for this proposition, and the Superior Court held that PSNH had a legal right to conduct discussions with Commission Staff. PSNH Brief at 17, citing Comp. ¶¶ 86-93; Order on Motion to Dismiss at 8-10.

neither "prevented customer choices from being consummated" nor "thwarted" any such choices. If FairPoint had wanted to receive the PNE customers, all it had to do was either obtain the consent of the Plaintiffs' customers and resubmit the EDIs, or assume PNE's load asset obligations in the wholesale marketplace prior to its transfer to PSNH.

I. The Off-Cycle Meter Read Issue

Plaintiffs' response to PSNH's argument that plaintiffs had no obligation to perform off-cycle meter readings for 8,000 customers in order to save PNE from its own financial mismanagement consists of an effort to avoid their own representations to the Commission and a reading of the Commission regulations that supposedly construes one subsection by its plain meaning, while ignoring the plain words of the regulation as a whole.

Plaintiffs' Representations:

Plaintiffs describe PSNH's argument (PSNH Brief at 13-16) that plaintiffs had no right to ask for an off-cycle meter readings because they had specifically represented to the Commission that no such readings would occur as a "leap of logic" without support. Opp. at 15-16. In response, they claim that the Commission's ruling on their waiver request "was not conditioned on PNE agreeing *not* to request an off-cycle meter reading." *Id.* (Emphasis in original.) No "leap" or "logic" is required when common sense, legal precedent, and the pleadings on this issue dictate otherwise.

As a starting point, if Plaintiffs' representation that they would not require off-cycle meter readings was not a condition of their waiver request, then why was it mentioned at all in their Joint Motion? It takes no "leap of logic" to conclude that when a party makes a specific representation in a pleading requesting relief from an otherwise operative legal obligation, the Commission would take that representation into account in the relief granted. Plaintiffs

apparently assert that their representations in their Joint Motion were meaningless, including another representation that "every customer will be extended all, or more of the rights due them under Puc 2004.05." Waiver Motion at ¶ 11. But PSNH need not rely solely on common sense alone. Plaintiffs' argument that their representations are irrelevant to the scope of the Commission's conditional waiver ignores the language of the Joint Waiver request, the Secretarial Letter of February 8th, and legal precedent.

The Commission's legal authority to entertain the waiver request under its rules is based upon RSA 541-A:22, IV, "No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure." The conditional waiver granted by the Commission allowed PNE to vary from the normal notice provision required under Commission's Puc 2004 rules. In New Hampshire, the Supreme Court has clearly held that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued." *N. Country Envtl. Servs. v. Town of Bethlehem*, 146 N.H. 348, 353 (2001) (citing *Dahar v. Dept. of Buildings*, 116 N.H. 122, 123 (1976)); *1808 Corp. v. Town of New Ipswich*, 161 N.H. 772, 775 (2011). Here, the representations of the applicants were abundantly clear: "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." Waiver Motion at ¶ 9.

The February 8th Secretarial Letter conditionally granting the waiver states that "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." The "transfer process" set forth by the Joint Petitioners included the representation set out in the paragraph above. Accordingly, the "transfer process" referenced in

the Commission's conditional approval included both the representation that an off-cycle meter reading would not be necessary *and* that the transfer would occur on the next *scheduled* meter read date" and a mid-cycle transfer deviated from the terms of that approval.

The Commission's conditional approval of the waiver of the 14-day advance notice requirement also stated that the Joint Request "complies with the purpose of the rule." But in the Joint Request (at ¶ 11) Plaintiffs also represented that "every customer will be extended *all, or more* of the rights due them under Puc 2004.05(l)." (Emphasis added). One of those Consumer Protection rights set forth in Puc 2004.05(l)(3) requires that a CEPS must provide "*notice of the date* that the CEPS will discontinue service." (Emphasis added). PNE's actual notice to customers provided that the transfer to FairPoint would occur at the beginning of the customer's next billing cycle.[4] It is plain that an off-cycle reading would not be consistent with Puc 2004.05 (k) and (l) or with PNE's notice because the transfer would occur on an undetermined random date other than that provided in the notice; *i.e., before* the next scheduled meter read date.[5] In sum, PNE's representation was that it would comply with the Rule and would provide customers "with all or more" of the rights set forth in Puc 2004.05(l), and the Commission granted the waiver on that basis. The representation that no off-cycle meter readings would be necessary, combined with the notice to customers, was fully consistent with the rule because it provided

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[4] The draft notice accompanying the Joint Motion for Waiver expressly stated, "This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur" and "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."

[5] Such a transfer of thousands of customers at a time other than the customers' scheduled meter read date is also inconsistent with PSNH's approved delivery Tariff, the Commission's EDI standards and the Commission's decision in Order No. 22,919 adopting those EDI standards. "(7) We disagree with the EDI Working Group on the issue of notice to distribution companies and customers when a competitive supplier decides to terminate business in New Hampshire. The notice required will be the later of thirty days or the start of the next billing cycle." *See* PSNH Brief at 14.

customers with a date for the transfer. But an off-cycle reading did not comply with the rule and thus was inconsistent with the condition on which the waiver was granted.

Put simply, law, the Secretarial Letter, and common sense all dictate that the scope of the conditional waiver was dependent upon the representations contained in their Joint Petition.

Does Puc 2004.07 (b) Require a Utility to Provide Off-Cycle Meter Readings In All Circumstances?

Plaintiffs ask this Commission to find that Puc 2004.07 (b) grants a very broad right to a CEPS to require a utility to perform near-term off-cycle meter readings in any circumstance. The Rule provides no such right.[6]

While the Rule is not a model of clarity, a starting point for its interpretation is the title of Part 2004, namely, "Consumer Protection Requirements." While the title of a statute or rule is "not conclusive of its interpretation," it is "significant when considered in connection with the legislative history" and "the ambiguities inherent in its language." *Bourne v. Sullivan*, 104 N.H. 348, 352-53 (1962); *New Hampshire Attorney Gen. v. Bass Victory Comm.*, 166 N.H. 796, 806 (2014); 1A Sutherland Statutory Construction § 18:7 (7th ed.). In addition, Part 2004 and each Section and Subsection of it should be read as a whole, *Zorn v. Demetri*, 158 N.H. 437, 438 (2009) and in the context of the overall scheme, *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 340 (1996). Here, it is plain that the various sections in the Part each relate to the relationship between, and the protections provided to, customers of CEPS and aggregators.[7] Yet despite this clear focus, Plaintiffs choose to read one subsection in Part 2004 as creating a broad right for

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[6] PSNH addressed this issue in its Brief at 13-16.

[7] 2004.02-information that must be provided to consumers concerning terms of service; 2004.03-restrictions on telephone solicitations by CEPS; 2004.04-requirements for in-person solicitation of customers by CEPS; 2004.05-protections where a CEPS wishes to transfer a customer; 2004.06-bill disclosure requirements; 2004.07-protections for the customer on termination of service; 2004.08-protections for customers relative to aggregators; 2004.09-release of customer information by CEPS or aggregators; 2004.10-"other consumer protections" including protection against "slamming."

CEPS in relation not to their customers, but to utilities with which they do business. When read in context, nothing in Subsection 2004.07 (b) suggests that it was intended to create such a right.[8]

By contrast, it is far more logical to read 2004.07 (b) in conjunction with 2004.07 (a). That Subsection describes the limited circumstances under which a CEPS seeks to terminate a customer for failure to meet the terms of service and specifically references the fact that the termination of service will occur on the next meter read date. 2004.07 (b) then provides that "nothing shall prevent a CEPS from requesting **an** off-cycle meter reading," strongly suggesting that the reference is to **"a"** reading in the specific circumstances set out in 2004.07 (a). Indeed, the remaining subparts of the Subsection each refer to "an" off-cycle reading, again suggesting that the Subsection is designed to refer to a specific reading for a specific customer and for a specific purpose.[9]

Apart from this problem, Plaintiffs ask that the Commission "ascribe the plain and ordinary meaning" to the language of the introductory clause of 2004.07 (b) ("Nothing shall prevent a CEPS from requesting an off-cycle meter reading") but then ignore the plain meaning of 2004.07 (b)(2). Assuming, for argument's sake, that the Subsection applies to a general request for off-cycle reads, that Subsection also provides that "[t]he utility may deny any request

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[8] Plaintiffs focus on the title of the Subsection 2004.07 itself, without considering the title of the Part in which it appears, and without reading it in a manner that is consistent with the other subsections in Part 2004. Opp. at 13.

[9] Plaintiffs' reading would also be inconsistent with tariffs on file with the Commission. The tariffs of both Unitil Energy Systems Inc. (Tariff No. 3-Electricity) and Liberty Utilities (Tariff No. 19-Electricity) contain provisions regarding off-cycle meter readings. Commission-approved tariffs have the force and effect of law and therefore must be considered in the proper interpretation of Puc 2004.07. *Appeal of Pennichuck Water Works,* 120 N.H. 562, 566 (1980). The Unitil tariff (original Page 73) provides that off-cycle meter readings are only conducted at the sole discretion of the company, while the Liberty Utilities tariff (original Page 74) limits off-cycle meter readings to large time-of-use customers when the company has the ability to do so. Interpreting Puc 2004.07(b) to place no restrictions on when, how, why, or the quantity of requested off-cycle meter readings would place the regulation in conflict with the two tariffs. "We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. *Soraghan v. Mt. Cranmore Ski Resort*, 152 N.H. 399, 405, 881 A.2d 693 (2005). When interpreting two or more statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Id.*" *In re Aldrich*, 156 N.H. 33, 35 (2007).

for an off-cycle meter reading if proper notice as described in (1) a above [*i.e.*, 5 business days' written notice] is not provided." Plaintiffs did not give written notice 5 business days before their default and have never argued to the contrary. *See* PSNH Brief at 13, fn. 12 and 15, fn.14.[10] The Subsection is plain: a utility may deny *any* request for an off-cycle read where 5 business days' notice is not given.

In an effort to avoid this problem, Plaintiffs attempt to combine Subsections 2004.07 (b)(2) and (3) to mean "*that if a utility denies a request that lacks proper notice*" then, as provided in 2004.07 (b)(3), the "the utility and CEPS shall negotiate a reasonable extension of time." Opp. at 13. But the italicized language appears nowhere in the Rule. Instead, Subsection (b)(2) allows a utility to deny any request if proper notice isn't given – with no condition as to a negotiated time for the reading. In contrast, a plain reading of Subsection (b)(3) is that if a utility cannot accommodate a request *despite* the proper notice, *then* an extension shall be negotiated. In sum, Puc 2004.07 did not require PSNH to perform a general off-cycle meter reading for thousands of customer accounts; but even if it did, under the circumstances of this case, where proper notice was not given, PSNH had the legal right to deny such a request.

II. PSNH's Default Service and Deletion of the FairPoint EDIs

Apart from challenging PSNH's argument that in this highly unusual situation involving the default of a CEPS, PSNH was *required* to take PNE's customers onto its default service and effectively became a "Supplier" within the meaning of the Tariff, Plaintiffs' Opposition is

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[10] Plaintiffs now appear to claim that the notice given on February 12th, two days before their default, may have been written notice. They contend (once more) that PSNH's claim that the February 12th notice was in a phone call cannot be considered because it "disputes allegations in the Complaint." Opp. at 14, fn. 7. But the Complaint (¶ 66) states only that counsel for PNE "contacted" PSNH on the 12th, and PNE has indeed stipulated in an "official record" that the February 12 contact was verbal. ¶ 26, Stipulation of Facts attached to the Settlement Agreement in Docket Nos. DE 13-059 and 13-060. The record – undisputed by Plaintiffs in the Superior Court – demonstrates that written notice from PNE occurred on February 14th, within minutes of PNE's default in the ISO-NE marketplace. See email from Howard Plante, President of PNE, with attached letter, attached hereto as Exhibit 1.

limited to two contentions. First, they contend that because PSNH transferred a single PNE customer (Milan Lumber) from default service to a different CEPS (TransCanada) after PNE defaulted, it could have transferred *all* of PNE's customers to FairPoint despite PNE's default. Opp. at 5, 19. Second, they assert (albeit in a footnote) that because PNE had entered into a contractual agreement to assign all of its customers to FairPoint before PNE defaulted, PNE's load would have been assigned to FairPoint in the ISO-NE marketplace if PSNH had not deleted the EDIs. *Id.* at 20, fn.10. Neither argument has merit.

Milan Lumber:

The transfer of Milan Lumber to TransCanada does not demonstrate that PSNH could have or should have transferred all of PNE's customers to FairPoint following the PNE default. Unlike pending transfers of thousands of PNE's customers to FairPoint, which involved a switch to a new supplier not requested by the customers and which (at least as of February 21, 2013) was halted by the Commission's notice that the customers could not be transferred without their consent, Milan Lumber had affirmatively accepted and requested the transfer of its account to TransCanada prior to PNE's default.

In addition, Milan Lumber was in PSNH's Large General Service Rate category (large commercial/industrial, Rate LG). As an LG customer, Milan Lumber's account was not serviced under PSNH's normal C2 billing system, but instead is billed using PSNH's Large Power Billing (LPB) system.[11] At the time of its default, PNE served approximately 30 large commercial or industrial customers billed using the LPB system.[12] To comply with the ISO-NE mandated move

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[11] *See* Direct Testimony of Hall, Coit, and Comer, Docket No. DE 06-061, September 17, 2007.

[12] PNE also served nearly 1,200 Rate G (commercial) customers billed in the C2 system. *See* Plaintiffs' confidential response to Order of Notice at Tab 8 in Docket Nos. DE 13-059 and 13-060. At the time of its default in February 2013, PNE was not authorized to serve customers in any rate category other than residential. *See* Docket No. DM 11-075, "PNE Energy Supply LLC Initial Registration to Become a Competitive Electric Power Supplier," April 9, 2011, at ¶ 11: "A description of the types of customers the applicant intends to serve, and the customer classes as

of PNE's customers to default service, the 30 customers billed in the LPB system were handled manually, as opposed to the remaining approximately 7,300 residential and small commercial customers billed via the C2 system. As a result, an example of how one large commercial and industrial customer that was being served without authorization by PNE at the time of its default was treated and where that customer affirmatively initiated the transfer to a new supplier, has no bearing on how the remaining approximately 7,300 customers had to be handled by PSNH in order to effectuate ISO-NE's mandate.

Plaintiffs also point to the Milan Lumber transfer to support their argument that PSNH could have transferred all of PNE's residential customers to FairPoint without deleting the FairPoint EDIs because "following a brief stay on PSNH's default service, those customer accounts could have been transferred to FairPoint *on their next meter read date.*" Opp. at 19 (emphasis added.) Apparently, this "brief stay" would have occurred between February 20th, when PSNH took PNE's customers onto its default service, and the next meter read date. There is a simple and significant problem with this argument, namely, on February 21st, the Commission posted its Notice that there would be no further transfers to FairPoint without the express consent of customers, necessitating the input of new EDIs by FairPoint.[13]

Plaintiffs' contention that PSNH could have taken PNE's customers onto its default service without deleting the FairPoint EDIs also fails for another reason. FairPoint's EDI enrollments were submitted to PSNH's EDI system during the period of February 8-16. *See* Comments of PSNH, Docket Nos. DE 13-059 and 13-060. Until the February 20, 2013 load assumption deadline established by ISO-NE, PSNH's system transferred customers to FairPoint

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identified in the applicable utility's tariff within which those customers are served; *Applicant intends to serve only residential customers.*" (Emphasis in original.)

[13] Plaintiffs' argument concedes, as it must, that the transfer could occur only on the next meter read date. It also ignores the differences between the two billing systems (LPB and C2) used by PSNH.

if there was a pending enrollment transaction in the EDI system and if that customer had a regularly scheduled cycle meter read. *Id.* As Plaintiffs concede, as of February 20th ISO-NE "directed PSNH to assume PNE's 'load asset.'" Comp. at ¶ 62. This Commission has determined that as a result of PNE's own decision to default, its customers were "dropped," assigned to PSNH, and that PSNH was mandated to take those customers onto its default service. *See* Order No. 25,660, cited in PSNH's Brief at 12. As Plaintiffs have conceded, ISO-NE mandated that PSNH drop PNE's customers to default service.[14] That transaction, the mandated gain of customers to default service, required replacing the outstanding EDI transfers to FairPoint with the mandated transfers to default service. But even if PSNH had effectuated this assumption of PNE's customers by immediately reinstating the FairPoint EDIs, the resultant problem for Plaintiffs created by the Commission's February 21st notice would not have been resolved.

Under both the Commission's EDI protocols and PSNH's Tariff, EDI enrollments are not effectuated for two business days. *See* Order No. 22,919 in Docket No. DR 96-150, May 4, 1998 (order adopting EDI Standards) cited in PSNH's Brief at 14. *See also* footnote 6 above. Thus, if PSNH had reentered the FairPoint EDIs in the early morning of February 20th, they would not have been effective until February 22nd. But the next day, February 21, the Commission's notice halted transfers to FairPoint.

Alleged Assignment of PNE's Load to FairPoint:

Plaintiffs contend that PSNH did not need to delete the FairPoint EDIs at all because under the ISO-NE tariff, PNE had already assigned its load to FairPoint. Opp. at 20, fn. 10. They argue that as a result, if the FairPoint EDIs had not been deleted, the transfer to FairPoint

[14] *See* Petition of Resident Power, LLC, Docket No. DE 13-057 ("at the time of the transfer to PSNH default service, as mandated by ISO-NE....") at 1; ("All of the former PNE customer accounts moved to PSNH default service by order of ISO-NE....") at 3.

would have gone forward as planned. Once again, Plaintiffs ignore the impact of the Commission's February 21st notice preventing further transfers to FairPoint until customers "opted-in" to that transaction. But even putting that problem aside, Plaintiffs are wrong.

PNE quotes from the ISO-NE Tariff provision stating that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) *unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset.*" *Id.* (Emphasis in original). This section of the Tariff does not apply to PNE because it was not the "host market participant," as their argument implies. Instead, "PSNH was the 'host market participant'/'host utility' pursuant to the ISO-NE Tariff." Joint Statement of Agreed Facts, Docket No. IR 13-233, February 14, 2014 at ¶ 16.[15] Since PNE was not the "host Market Participant," its interpretation of the ISO-NE Tariff is erroneous and its alleged "assignment" of customers to Fairpoint had no force or effect in the ISO-NE marketplace.[16] Of course, PNE and FairPoint could have avoided the entire situation resulting from PNE's default if PNE had actually transferred its load asset responsibility to Fairpoint in the wholesale marketplace of ISO-NE prior to the default, or during the period that PNE had to cure the default – a cure that PNE waived.

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[15] *See also* Statements of Attorney Robert Cheney on behalf of PNE, Transcript of February 18, 2014, Docket No. IR 13-233, discussing this ISO-NE Tariff provision regarding participant defaults: "This is the section that talks about what happens to a load asset registered to a suspended market participant, indicates that that load asset shall be terminated, *and the obligation to serve passes on to the host market participant.* Again, our point here is that what's happening is not something that's happening under the principles of 'agency', but it's happening by virtue of operation of law under this particular tariff." At 20 (emphasis added); "That load asset, by virtue and operation of the ISO tariff, *now moves to the host market utility, PSNH. PSNH gets the customers.*" *Id.* at 13 (emphasis added).

[16] ISO-NE has a specified "Asset Registration Process" for assigning load within the wholesale marketplace. There is no allegation that PNE in fact "assigned" its load asset to FairPoint in the ISO-NE market. Opp. at 20, fn.10. Indeed, had such an assignment taken place, PNE would not have been holding load in ISO-NE, it would not have been defaulted and suspended from the marketplace, and this whole matter would never have arisen. The claim is thus belied by the factual allegations in the Complaint.

The Impact of the Commission's Notice and FairPoint's Failure to File:

Plaintiffs misconstrue PSNH's arguments concerning the impact of the Commission's notice on February 21st and of FairPoint's failure to satisfy the Commission's requirement that it make a filing demonstrating adequate surety. Opp. at 23-24; *See also* PSNH Brief at 17-18. They assert that PSNH seeks to "retroactively justif[y]" the decision to delete the FairPoint EDIs or to "retroactively invalidate those enrollments." PSNH made no such argument. Rather, PSNH's point is simple: it cannot be considered to have acted "unlawfully" under Commission rules by allegedly "thwarting" a transfer that the Commission itself found could not occur without FairPoint obtaining the consent of PNE's customers – a consent FairPoint never sought. Likewise, PSNH cannot be found to have acted unlawfully by somehow delaying or interfering with that transfer when FairPoint failed to satisfy a condition precedent to the receipt of the customers. Plaintiffs have no answer to either of these arguments.[17]

III. Plaintiffs' Arguments About the Scope of the Commission's Jurisdiction Amount to a Motion for Reconsideration of the Superior Court's Transfer Order

Plaintiffs' Opposition is based on the incorrect premise that the question for the PUC in this matter is whether "PSNH act[ed] 'improperly' within the meaning of a tortious interference claim." Opp. at 3-4. Relying on this premise, Plaintiffs argue that the Commission should apply a "much broader" standard for determining whether PSNH's alleged interference with a contract was improper, and devote half of their Opposition to speculating as to whether PSNH's "motives" violated unspecified concepts of business ethics, morality, or public policy. Opp. at 4, 9-10.

[17] Because they have no answer to FairPoint's failure to make the required filing, Plaintiffs try to sidestep the issue by arguing (yet again) that FairPoint's failure was not alleged in the Complaint and thus cannot be raised by PSNH. Opp. at 24. But the condition set forth in the Commission's waiver and FairPoint's failure to make the filing required to satisfy that condition are matters of public record and thus encompassed within this Commission's Procedural Order No. 25,881. Indeed, Plaintiffs do not dispute that FairPoint failed to make the filing.

Plaintiffs have it wrong. The question before the Commission is a narrow one, and PSNH's motives are irrelevant to that question. Specifically, the Superior Court has tasked the Commission with answering the following question:

> *Considering the tariff and regulatory provisions cited by plaintiffs and defendant*, did defendant act 'improperly,' within the meaning of a tortious interference with contract claim, by: (a) refusing to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint; (b) illegally deleting 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint; and (c) replacing those enrollments with electronic enrollments for the transfer of PNE customers to Default Service?

Transfer Order at 4 (emphasis added); *see also* Order on Motion to Dismiss, at 14 ("the Court… refers Count I to the PUC to determine if defendant acted improperly based on the conduct alleged in paragraphs 137(a) through (c)."). This Commission also recognized that this is a "narrow question, involving legal interpretations of administrative rules and tariffs," to be decided based on the Superior Court record, namely, the allegations in PNE's complaint, and *not* information gleaned through discovery. *See* Order 25,881 at 3 ("[W]e find that it is neither necessary nor permissible for us to authorize any discovery or other factual investigation in this docket.")

To answer this question, the Commission need look no further than the New Hampshire case law cited in the Superior Court's orders. As recognized by the Superior Court, "if [PSNH's] conduct was protected by law, it was not 'improper.'" Order on Motion to Dismiss at 10; Transfer Order at 2 (citing *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 41 (2005)); *see also Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 540 (1994) (lawful exercise of contractual right not improper); *Montrone v. Maxfield*, 122 N.H. 724, 727 (1982) ("While the actions of the defendants may not have been commendable, the defendants were acting within the law by communicating an offer to [the third party]," and for that reason, the defendants' actions were

not improper). Accordingly, if PSNH's actions did not violate the relevant tariffs or rules, its conduct was protected by law and not "improper" within the meaning of a tortious interference with contract claim. The only question for the Commission is therefore whether PSNH's actions were permissible under Commission tariffs or regulations.

Plaintiffs attempt to obfuscate this straightforward and narrow question by citing to non-binding law from other jurisdictions,[18] and arguing, contrary to well-established principles of New Hampshire law, that a "finding of 'improper' interference . . . can be based on conduct *other than a violation of a tariff.*" Opp. at 11 (emphasis in original). Their main support for this incorrect argument is a decision from the Federal Bankruptcy Court in New York, which is binding on neither New Hampshire Courts nor the Commission, and factually distinguishable from this case. *See* Opp. at 11 (citing *Balaber-Strauss v. N.Y. Telephone & Am. Telephone & Telegraph Co.*, 203 B.R. 184 (Bankr. S.D.N.Y. 1996) (finding defendant's conduct improper in part because it knew what the tariff required, and ignored these requirements). There is no allegation here that PSNH knowingly violated a PUC tariff.[19]

But this is not the law in New Hampshire and, more importantly, not the question the Commission is answering in this proceeding. The non-New Hampshire cases cited by Plaintiffs and supposedly giving examples of types of conduct found to be "improper" are therefore irrelevant. As noted above, the Superior Court made it clear that "if [PSNH's] conduct was protected by law, it was not 'improper.'" Order on Motion to Dismiss at 10. This is the law of

[18] Recognizing that New Hampshire law is well-settled and not in their favor, Plaintiffs rest their hopes on the law of New Jersey to argue that the "ultimate inquiry" is whether the defendant's conduct was "transgressive of generally accepted standards of common morality or of law." Opp. at 10. New Hampshire courts have never judged whether conduct is "improper" for purposes of an intentional interference with contract claim based on nebulous concepts of "common morality." If they did, no intentional interference claim could be dismissed on a motion to dismiss. Plaintiffs' argument amounts to an effort to overturn the Superior Court's dismissal of their Consumer Protection claims under RSA Ch. 358-A.

[19] PNE made these nearly-identical arguments, and cited the same cases, in support of a broader standard of judging whether conduct was improper before the Superior Court. The court swiftly rejected them, applied New Hampshire law, and directed the narrow question for the PUC to answer here. Order on Motion to Dismiss at 10, 14.

the case, and is consistent with other binding cases from New Hampshire, and the Restatement (Second) of Torts. *See Hughes*, 152 N.H. at 41; *Roberts*, 138 N.H. at 540; *Montrone*, 122 N.H. at 727; Restatement (Second) of Torts, § 773 ("One who, by asserting in good faith a legally protected interest of his own . . . intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.").

Plaintiffs' request to apply a "much broader" standard is thus a veiled attempt to seek reconsideration of the Superior Court's order transferring the question at issue and the Commission's procedural order restating that narrow question. The time for reconsidering the transfer order is over. Resolution of the narrow question before the Commission is a straightforward task: take the allegations in PNE's complaint (together with documents not in dispute, in the public record, or fairly referenced in the Complaint) and determine whether, on that basis PSNH violated Commission tariffs, rules, or regulations. If it did not, the conduct is not improper as a matter of law and the Superior Court will dismiss PNE's lone remaining claim. As PSNH's Brief and this Reply demonstrate, PSNH's conduct was clearly permissible under these tariffs and regulations and therefore not improper for purposes of an intentional interference with contract claim.

Respectfully submitted,

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