STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 15-491

PNE ENERGY SUPPLY, LLC, ET AL. v. PSNH D/B/A EVERSOURCE ENERGY

Transfer Question from Superior Court

PNE ENERGY SUPPLY, LLC AND RESIDENT POWER NATURAL GAS & ELECTRIC SOLUTIONS, LLC's SUR-REPLY

PNE Energy Supply, LLC, ("PNE") and Resident Power Natural Gas & Electric Solutions, LLC, ("Resident Power") submit the following brief Sur-reply to respond to Public Service Company of New Hampshire, d/b/a Eversource Energy's ("PSNH") Reply Brief.

1. The Milan Lumber Transfer Shows PSNH Treated the PNE-to-FairPoint Enrollments Differently

PSNH *concedes* that (a) TransCanada (another CEPS) submitted a valid electronic enrollment for Milan Lumber (a large former PNE commercial customer) *before* PNE's default and suspension; and (b) following PNE's suspension, PSNH honored that enrollment and transferred Milan Lumber to TransCanada *despite* transferring it to default service for a short period of time. *See* PSNH's Reply at 9. This concession contradicts PSNH's treatment of the FairPoint enrollments: despite FairPoint's valid submission of those enrollments before PNE's default and suspension, PSNH did not honor them and, instead, deleted them. *See id.*

PSNH cites several reasons in an attempt to explain this glaring inconsistency. None of them have merit. First, it alleges for the first time that, unlike Milan Lumber, the 8,500 customers PNE and Resident Power sold to FairPoint did not request to be transferred to FairPoint. *See id.* at 2, 9. The Complaint contradicts this assertion. As demonstrated below, under their aggregation agreements with Resident Power, these customers chose to switch their service to FairPoint when PNE sold those accounts to FairPoint. *See infra* pp. 4-5.

Second, PSNH introduces factual allegations – that are not in the Complaint – concerning a different billing system it uses for large commercial/industrial customers. *See* Reply at 9-10. The Commission should disregard these allegations. *Jenks v. Menard*, 145 N.H. 236, 239 (2000). Regardless, PSNH's use of a different billing system for Milan Lumber and its manual transfer of that account to default service do not explain why it did not delete TransCanada's enrollment as it did the FairPoint enrollments, and why it ultimately allowed Milan Lumber to be transferred to TransCanada after its brief stay on default service. *See* Reply at 9-10.

Third, PSNH disputes the argument that it could have left the FairPoint enrollments alone because the notice posted on the Commission's website *one day after it deleted those enrollments* supposedly absolved PSNH of any improper conduct. *See id.* at 10. Like its prior assertions regarding this notice, this one, too, begs logic. The notice was not a Commission *order* or posted pursuant to one; rather, it was posted by *Commission Staff* at PSNH's urging and amidst threats, also by Staff, of "slamming" violations against Resident Power and FairPoint. Complaint ("Compl.") ¶¶ 88, 92-93, 96-98. Further, the notice did not exist the day before, February 20, when PSNH deleted the FairPoint enrollments but chose to leave TransCanada's enrollment for Milan Lumber alone.

Fourth, PSNH relies on a self-fulfilling prophecy to further explain why it could not leave the FairPoint enrollments alone: until February 20, it "transferred customers to FairPoint if there was a pending enrollment transaction in the EDI system," but it could not transfer the remaining 7,300 former PNE customers to FairPoint *after* PNE's suspension because, as of February 20, *there were no pending enrollments for those customers*. *See id.* at 10-11. In other words, PSNH *voluntarily* eliminated the very circumstance (the existence of pending enrollments) that would have required it to transfer the 7,300 remaining customer accounts to FairPoint. *See id.* This

feeble attempt at circular reasoning lacks merit. In addition, it does not clarify why, on February 20, it treated the FairPoint enrollments differently, or why its lengthy recitation of the "protocols" expressed by the Commission or either Tariff did not *also* "mandate" that PSNH delete TransCanada's enrollment for Milan Lumber. *See id.*

2. PNE Had a Right to Request an Off-Cycle Meter Reading Under Puc 2004.07(b)

PSNH's argument that Puc 2004.07(b) does not apply and did not grant PNE a right to request an off-cycle meter reading is premised on its belief that the rule is ambiguous. *See* Reply at 6-7. This is incorrect.

The starting point for interpreting a statute or rule is the provision "***as written***." *Evans v. J Four Realty*, 164 N.H. 570, 571 (2013) (emphasis added). A court will look beyond the plain language ***only if it is ambiguous***. *Doggett v. Town of N. Hampton Zoning Bd. Of Adjustment*, 138 N.H. 744, 745 (1994).[1] A court will not "add words that [the legislature] did not see fit to include." *Forster v. Town of Henniker*, 167 N.H. 745, 749-50 (2015). PSNH agrees: it argues other sources of intent (the title of a statute) are "not conclusive of its interpretation" but are "significant" only when considered with "ambiguities" in the statute's language. *See* Reply at 6. That step, however, is not necessary here.

Puc 2004.07(b) states clearly: "*Nothing* shall prevent a CEPS from requesting an off-cycle meter reading." (Emphasis added.) That language is not ambiguous: it authorizes a CEPS to request an off-cycle meter reading. *See id.* The rule places a single condition on that right: a CEPS "[s]hall give at least 5 business days' written notice to the utility." Puc 2004.07(b)(1)(a). Indeed, Puc 2004.07(b)(2) states "[t]he utility may deny any request for an off-cycle meter reading if *proper notice as described in (1)a. above is not provided.*" (Emphasis added.) The

[1] For a statute or rule to be ambiguous, it must be susceptible to "more than one reasonable interpretation." *Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 677 (2011).

next subsection provides, however, that "[t]o the extent a utility can not accommodate a request for an off-cycle meter reading within 5 business days, the utility and CEPS *shall negotiate a reasonable extension of time for the completion of the off-cycle meter reading request.*" Puc 2004.07(c) (emphasis added). These provisions clearly articulate the process for requests for off-cycle meter readings. A CEPS may request one, but it has to provide five business days' written notice; if a utility cannot accommodate it (e.g., a request for *many* off-cycle meter readings, such as here), it must negotiate an extension of time to complete it. *See supra* pp. 3-4.

PSNH reverses the analysis above: it alleges the "starting point" for the interpretation of the rule should be "the title of Part 2004," Part 2004 as a whole, "each Section and Subsection of it," – *anything other than the actual language of Puc 2004.07(b).* Reply at 6-7. The "starting point," however, is the *rule*, Puc 2004.07(b): it states CEPSs may request an off-cycle meter reading. *See id.* PSNH violated the rule because PNE made a request, and PSNH refused to accommodate it or negotiate an extension of time to complete the request.

3. PNE and Resident Power's Customers Chose to be Transferred to FairPoint

As noted above, PSNH alleges for the first time that the 8,500 customers PNE and Resident Power sold to FairPoint did not request to be transferred to FairPoint. Reply at 2, 9. The Complaint contradicts this assertion, and it should be rejected. *See Jenks*, 145 N.H. at 239. Under their aggregation agreements with Resident Power, these customers "appointed Resident Power as their exclusive agent for the purpose of researching, negotiating, and executing electricity supply agreements with CEPSs whose competitive electricity rate would be lower than . . . PSNH's Default Service rate." Compl. ¶¶ 51, 100. These customers appointed Resident Power as their agent, and delegated their authority to it, for choosing an electric supplier. *See id.* Under that authority, when PNE and Resident Power sold 8,500 customer accounts to FairPoint, these customers *chose* to switch their service to FairPoint. The relationship between these

customers and Resident Power – and Resident Power's role as their agent – was incorporated into the P&S Agreement: Resident Power's aggregation authority continued until the customers were to be transferred to FairPoint. *Id.* ¶ 51.

PSNH's contention that these customers did not choose to be transferred to FairPoint because either PNE's notice of discontinuation of service or Commission Staff's February 21 website notice stated otherwise lacks merit. *See* Reply at 1-2. PNE's former customers *always* had the *option* of choosing to be transferred to another CEPS (a fact of which they were reminded time and again by both Commission Staff and PSNH): their aggregation agreements with Resident Power allowed them to terminate the agreement. *See* Compl. ¶ 100. That mere *possibility*, however, does not affect the fact that, on February 6, 2013, when PNE and Resident Power closed the sale of 8,500 customer accounts to FairPoint, those customers – through their aggregation agreements with Resident Power – *chose* to be transferred to FairPoint. They *could* have changed their minds after that fact: indeed, five customers *did* cancel their aggregation agreements. *See* Compl. ¶ 101. But the remaining customers adhered to their aggregation agreements and their choice (through Resident Power) to be transferred to FairPoint.

4. PNE was a "Host Market Participant" under the ISO-NE Tariff

PSNH claims it (not PNE) was the "host Market Participant" in an ISO-NE Tariff provision that states "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." Reply at 12. This is incorrect and contradicts PSNH's earlier position in this proceeding and in the Superior Court.

PNE was both the "Market Participant" and "*host* Market Participant" referenced in this provision. The ISO-NE Tariff defines "Market Participant" as "a participant in the New England

Markets . . . that has executed a Market Participant Service Agreement." ISO-NE Tariff § I.2.2. Although the terms "host Market Participant" and "relevant unmetered load asset" are not separately defined, the Commission has interpreted the provision above to mean that PNE was a "Market Participant," and PSNH's default service was the "unmetered load asset." In Order No. 25,660, the Commission quoted the ISO-NE Tariff provision and held, "The ISO-NE Tariff . . . 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*." *Id.* at 7 (emphases added). The Commission's reference to PNE in brackets, above, demonstrates PNE was a "Market Participant" under the ISO-NE Tariff. *See id.* The Commission's insertion of the phrase "another entity such as the distribution utility" in the place of "relevant unmetered load asset" demonstrates the latter refers to PSNH's default service. *See id.* Indeed, PSNH has heavily relied on Order No. 25,660 to argue PNE's suspension constituted an "assignment" of its load asset to PSNH. *See* PSNH's Memorandum in support of Motion to Dismiss at 22-24 ("the PUC has already decided that upon PNE's default with ISO-NE, its customers were 'automatically assigned' to PSNH"); *see also* PSNH's Brief at 12.[2]

The reference to "host Market Participant" later in that sentence also refers to PNE, not PSNH. First, it includes the same defined term ("Market Participant") that applies to PNE. Second, the word "host" merely references the first mention of "Market Participant" earlier in that provision, i.e., the "suspended Market Participant" to which a load asset was "registered," to make clear the provision is addressing the same entity that was suspended. In order words, the

[2] As stated in PNE and Resident Power's Objection to PSNH's Motion to Compel, PSNH should be judicially estopped from adopting yet another position now that contradicts a position it took on the same issue in its prior briefs both in this proceeding and in the Superior Court. *See* 5/6/2016 Objection to Motion to Compel at 4-8.

term "host Market Participant" means the same "Market Participant" that was suspended, whose load was automatically assigned to the distribution utility, and that must assign its load to another asset (until which its load will remain with the distribution utility).

PNE did precisely what this ISO-NE Tariff provision states: it assigned the obligation to serve the loads of 8,500 residential customers to FairPoint – by entering into the P&S Agreement – *before* it defaulted. *See* 9/1/2015 Objection to Motion to Dismiss at 30. Following the automatic assignment of PNE's load asset to default service, PSNH should then have transferred the remaining 7,300 former PNE customer accounts to FairPoint – *if* it had not deleted the enrollments. *See id.* Its failure to do so was improper.

5. PSNH's Discussions with Commission Staff Showed Improper Conduct

PSNH does not (and *cannot*) dispute that it urged Commission Staff – in part, through Attorney Bersak's February 20 email – to support PSNH's decision to delete the FairPoint enrollments and block the transfer of PNE customer accounts to FairPoint. *See* PNE/Resident Power's Brief at 23 & n.13. Instead, PSNH claims the Superior Court held it had a "legal right" to communicate with the Commission. Reply at 2 n.3. The Court ruling it cites, however, applies to allegations concerning attempts by PSNH and Commission Staff, *after* PSNH's deletion of the enrollments, to block FairPoint's attempts to *re-submit* them and Resident Power's efforts to transfer customers from default service. Order on Motion to Dismiss at 8-10.

Even if the notion that PSNH had a "legal right" to communicate with Commission Staff applied here, it is immaterial. PNE and Resident Power do not dispute PSNH could communicate with whomever it wants, including Commission Staff. Their claim rests, instead, on PSNH's *abuse* of that right: PSNH – through Attorney Bersak's email – urged the Commission to block a valid private business transaction, disparaged two competing suppliers, and intentionally misread the PSNH Tariff to persuade the Commission that PNE's former

customers should be transferred either to another CEPS *or to its default service*. *See* Compl. ¶ 89. This conduct was "improper." *See* PNE/Resident Power's Brief at 22-23.

6. The Standard for Determining Whether Interference with a Contract is "Improper" is Broad

PSNH alleges the question before the Commission is narrow: to determine whether PSNH's conduct was "improper," the Commission must decide only whether PSNH violated the PSNH and ISO-NE Tariff provisions and PUC rules. Reply at 13-14. This is incorrect.[3]

The Order on PSNH's Motion to Dismiss states the Court "*refers Count I* to the PUC to determine if [PSNH] acted improperly." Order on Motion to Dismiss at 14 (emphasis added). The Court referred *that portion of Count I in its entirety*, not a piece of it. The phrase "[c]onsidering the tariff and regulatory provisions" in the Court's Transfer Order does not limit the scope of review. *See* Reply at 14. The Court recognized only that the Commission's expertise was required to resolve Count I: "The resolution of whether the conduct in Count I . . . was improper requires interpretation *not just of statutes*, but of tariffs and regulations *within the scope of the PUC's expertise*." Order on Motion to Dismiss at 13 (emphases added); *see also* Transfer Order at 4. The Court noted that "[c]omplex matters of tariff and regulatory interpretation are *integral*" – not dispositive – "to this claim." Order on Motion to Dismiss at 13.[4] Thus, the Court concluded "the PUC is best equipped to fairly decide whether [PSNH]'s conduct was improper." *Id.* at 13.

PSNH argues that "New Hampshire courts have never judged whether conduct is 'improper' . . . based on nebulous concepts of 'common morality.'" *See* Reply at 15 n.18. In an act of self-defeat, it boldly asserts that, "[i]f they did, no intentional interference claim could be

[3] PNE and Resident Power's argument concerning the standard for judging PSNH's conduct is not a late request for reconsideration; rather, it is based on a plain reading of the Court's Orders. *See* Reply at 13-16.
[4] PSNH argues its denial of PNE's request for an off-cycle meter reading and deletion of the FairPoint enrollments were protected by the PSNH and ISO-NE Tariff provisions and PUC rules. *See* Order on Motion to Dismiss at 10.

dismissed on a motion to dismiss." *Id.* No truer words were ever spoken: PNE and Resident Power demonstrated this fact in their Brief – that the question of whether interference with a contract is "improper" is *not appropriate for resolution on a motion to dismiss* – and cited supporting authority for it, including from New Hampshire. *See* PNE/Resident Power's Brief at 25-29. Aside from its concession, PSNH fails to address this point.

PSNH's argument is also incorrect. In *Roberts v. General Motors Corp.*, 138 N.H. 532 (1994),[5] the New Hampshire Supreme Court held that, to determine whether interference with a contract is "improper," a court must rely on a list of factors from the Restatement,[6] including "the actor's motive," "the social interests in protecting the freedom of action of the actor and the contractual interests of the other," and "the relations between the parties." *See* PNE/Resident Power Brief at 9-10.[7] The Restatement identifies several examples of improper conduct, including abuse of a fiduciary relationship, misrepresentations, violation of business ethics or customs, and conduct that violates public policy.[8] *See Restatement (Second) of Torts,* § 769, cmt. d, and § 767, cmt. c. These factors and examples relate to principles of common morality.

PSNH also cannot dispute any of the cases cited in PNE and Resident Power's Brief, which establish that a determination of whether a party's conduct was "improper" can be based on many standards of conduct, not just those set forth in tariffs or administrative rules. *See* Reply at 15. Those cases include *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 B.R. 184 (Bkrtcy. S.D.N.Y. 1996), which is dispositive here. In *Balaber*, the court held a utility tortiously interfered with a merger between a pay telephone

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[5] PSNH cites and relies on *Roberts* twice in its Reply. *See* Reply at 14, 16.
[6] The Restatement is an influential legal treatise that summarizes general principles of U.S. tort law.
[7] *See also Laramie v. Cattell*, Nos. 06-C-224, 06-C-225, 2007 N.H. Super. LEXIS 6, at *15-*16 (N.H. Super. Aug. 27, 2007) (also relying on the Restatement).
[8] PNE/Resident Power noted in their Brief (at pp. 1, 10) that PSNH's conduct violated the free market principles protected in the NH Constitution, Part II, Art. 83, and embodied in the electric restructuring law, RSA 374-F:1,II.

company and a third party, based on the utility's violation of a tariff *and* misrepresentations and threats it made to, and economic pressure it exerted on, the company. *Id.* at 208-09, 210-11.

PSNH's best challenge to these authorities is that they are "non-binding law from other jurisdictions." *See id.* Courts in New Hampshire, however, have relied on cases from other jurisdictions to reach conclusions on issues of first impression. *See, e.g., N.H. Bank Comm'r v. Sweeney*, 167 N.H. 27, 35-37 (2014) (relying on case law from Minnesota and New York concerning issue of personal jurisdiction over passive investors). PSNH concedes this case is "a situation that had never previously occurred" in New Hampshire. PSNH's Brief at 16. Indeed, it fails to cite a single case from New Hampshire or anywhere else that supports its narrow reading of the Court's Orders and the question to be decided here. *See id.* Thus, in determining whether PSNH's conduct was "improper," the Commission may rely on *Balaber*, and it should evaluate PSNH's conduct not just on whether it was permissible under the applicable PSNH and ISO-NE Tariffs and PUC rules, but also under the standards set forth in *Balaber* and other authorities.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the foregoing by email to the service list in DE 15-491.

Dated: June 1, 2016

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