

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY  
*Northern District*

SUPERIOR COURT

Docket No. \_\_\_\_\_

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

*Plaintiffs*

v.

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

*Defendant*

**COMPLAINT**

Plaintiffs PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas & Electric Solutions, LLC ("Resident Power") [collectively, "Plaintiffs"] bring this Complaint for damages against Defendant Public Service Company of New Hampshire, d/b/a "Eversource Energy" ("PSNH").

**INTRODUCTION**

The restructuring of New Hampshire's electric industry almost 20 years ago provided customers within PSNH's service territory with the freedom to purchase their electricity from a supplier other than PSNH, such as PNE. Although a customer may now choose to purchase electricity from any authorized supplier, PSNH, as the host utility, has the ability to influence these relationships because it owns the distribution system through which electricity is delivered. When customers elect to move from default service with PSNH and purchase electricity from a competitive electric power supplier ("CEPS"), PSNH manages the process of transferring customer accounts to the CEPS. PSNH is barred from impeding the transfer of customer

accounts from PSNH to CEPSs<sup>1</sup> or between CEPSs. Plaintiffs' claims arise from PSNH's anti-competitive conduct in interfering with the transfer of customers who elected to receive electricity from PNE. PSNH then sought to exploit the disruption it caused by attempting to expose Plaintiffs to regulatory sanctions for the interruption of the customer account transfers.

PSNH's Electricity Delivery Service Tariff – NHPUC No. 8 ("Tariff"), which contains the terms and conditions regarding PSNH's delivery service and its interaction with CEPSs, imposes three significant obligations on PSNH in order to mitigate PSNH's influence and ensure system reliability. First, it mandates that all customer account transfers from one CEPS to another be coordinated through PSNH. Second, it mandates that, when requested, all customer account transfers from *PSNH* to a CEPS also be coordinated through PSNH. Third, it states that, if a customer cannot receive service from another CEPS "for any reason," PSNH must "arrange Default Service," under which the customer is returned to service with PSNH. This latter obligation ensures that, in instances of uncertainty or disruption in service from CEPSs, customers are protected from experiencing extended periods of financial injury, and no confusion infiltrates the marketplace.

In February 2013, however, PSNH disregarded its role as impartial gatekeeper; breached these Tariff obligations and other provisions in its agreements with CEPSs; deceived and attempted to eliminate a CEPS, PNE; and attempted to persuade New Hampshire's regulatory entity, the Public Utilities Commission ("PUC"), to challenge and interfere with the operations of PNE and its aggregator, Resident Power.

On February 20, 2013, PSNH unilaterally – and without any legal authority – thwarted the transfer of approximately 7,300 of PNE's customer accounts to FairPoint (which FairPoint had purchased), by deleting pending enrollment requests from FairPoint that FairPoint submitted

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<sup>1</sup> The term "CEPSs" is the plural of "CEPS."

in PSNH's electronic system, in an opportunistic effort to retain those customer accounts following PNE's financial default with Independent System Operator - New England ("ISO-NE"), (a not-for-profit, private corporation that manages the New England region's electric bulk power generation and transmission systems), and PNE's temporary suspension from the New Hampshire marketplace.

In addition to its illegal interference with the PNE/FairPoint transaction, PSNH attempted to persuade the PUC staff to intervene in these events: PSNH engaged in an aggressive campaign to convince the PUC staff to interfere with the PNE/FairPoint transaction; PSNH persuaded the PUC staff to frustrate any attempt by Resident Power or FairPoint to re-submit the enrollments following their deletion – by implying that any such attempt should be considered “slamming” under PUC rules; PSNH convinced the PUC staff to oppose Resident Power's efforts to transfer the 7,300 former PNE customers from PSNH's default service to another CEPS; and PSNH prompted the PUC staff to initiate a “show cause” proceeding concerning alleged regulatory violations against PNE and Resident Power.

PSNH's illegal conduct harmed PNE and Resident Power (as well as New Hampshire consumers), jeopardized system reliability, undermined the principal purpose of the deregulation of New Hampshire's electric market, and set a dangerous precedent for the future. Plaintiffs seek recovery for the harm PSNH's conduct caused their business, together with attorney's fees and costs.

### **PARTIES**

1. Plaintiff PNE Energy Supply, LLC is a New Hampshire limited liability company at 5 Dartmouth Dr., Suite 301, with a principal place of business in Auburn, New Hampshire, 03032.

2. Plaintiff Resident Power Natural Gas & Electric Solutions, LLC is a New Hampshire limited liability company with a principal place of business <sup>at 5 Dartmouth Dr., Suite 301,</sup> in Auburn, New Hampshire, 03032.

3. Defendant Public Service Company of New Hampshire, d/b/a “Eversource Energy,” is a New Hampshire corporation with a principal place of business <sup>at 780 N. Commercial St.</sup> in Manchester, New Hampshire, 03101.

### JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this Complaint pursuant to RSA 491:7.

5. The Court has personal jurisdiction over PSNH, which is located and conducts business in New Hampshire.

6. Venue is appropriate in Hillsborough County pursuant to RSA 507:9 because PSNH is located and conducts business in this county.

### FACTUAL ALLEGATIONS

#### **A. The Deregulation of New Hampshire’s Electric Market**

7. The electric power industry in New England and, specifically, in New Hampshire has changed dramatically over the past few decades. Before the 1970s, the companies in the industry that provided electricity to customers handled every aspect of that service: generation of the electricity, transmission of the electricity, and distribution to residential and commercial customers. These companies operated as regulated local monopolies and independently of one another.

8. In 1965, a widespread blackout in the northeast shut down power for 30 million customers. In the aftermath of that event, energy companies in the northeast formed three

electric “power pools” to ensure a dependable supply of electricity was available. One of these “power pools,” the New England Power Pool (“NEPOOL”), was formed in 1971 by the region’s private and municipal electricity companies in order to foster cooperation and coordination among these companies in the New England region, including New Hampshire. NEPOOL is governed by an operating agreement (the Restated NEPOOL Agreement). Its member entities, which voluntarily and collectively participate in NEPOOL as “Participants,” include investor-owned utility systems, municipal and consumer-owned systems, joint-marketing agencies, power marketers, load aggregators, generation owners, and end users.

9. Over the next three decades, NEPOOL created a power grid in New England that includes more than 300 separate generating plants and an 8,500-mile, high-voltage transmission system. This grid, which is intended to avoid another region-wide power failure, connects electric utilities, publicly-owned electric companies, power generators, suppliers, alternative resources, and end users in a six-state wholesale electricity marketplace.

10. With a population of 1.3 million residents, New Hampshire represents approximately 9% of the total electricity consumption in this marketplace.

11. Four electric distribution companies – known legally as “public utilities” – currently operate in New Hampshire. Under New Hampshire law, a public utility is defined as a “company . . . owning, operating or managing any plant or equipment or any part of the same . . . for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public.” RSA 362:2.

12. Each of the four electric utilities in New Hampshire serves a mutually exclusive service territory. The four utilities are:

- PSNH (a subsidiary of Eversource Energy, which was formerly Northeast Utilities);

- Liberty Utilities (formerly National Grid and Granite State Electric Company);
- Unitil Energy Systems, Inc. (formerly Concord Electric Company and Exeter and Hampton Electric Company); and
- The New Hampshire Electric Cooperative, Inc.

13. PSNH is New Hampshire's largest electric utility. It serves several diverse areas, ranging from urban, southern areas to rural, northern areas of the state. It presently provides retail electricity services to over 500,000 customers in New Hampshire, which comprise 70% of New Hampshire's retail customers.

14. Until the mid-1990s, in New Hampshire and like other states in New England, PSNH and the other electric utilities *both* (a) owned the poles, wires, and conduit used to deliver electricity to their customers, *and* (b) generated or purchased the electricity they delivered.

15. While these regulated monopolies may have worked well for generations, the lack of competition provided little reason to improve service, minimize prices, or invest in new facilities and technologies. In New England in general, electricity rates were among the nation's highest, and the region had an antiquated electric power infrastructure.

16. In the early 1990s, Congress and the Federal Energy Regulatory Commission ("FERC"), which oversees the electricity industry nationally, began enabling the restructuring of wholesale electricity. They believed competition would improve the market.

17. To accomplish this goal, FERC began by issuing an order in 1996 that deregulated portions of the electricity market. FERC then created Independent System Operators ("ISO") to oversee the restructuring of the New England market on a regional basis.

18. In 1997, FERC created one of these ISOs – ISO-NE – as a replacement for NEPOOL. ISO-NE manages the New England region's electric bulk power generation and transmission systems, and it was approved as a regional transmission organization ("RTO") and

began operations in that role in 2004 and 2005, respectively. ISO-NE worked with NEPOOL – which then became a group of generators, utilities, marketers, and public power companies – and implemented wholesale markets in 1999, which now account for approximately \$10 billion in electricity transactions annually. ISO-NE further enhanced these markets in 2003 with a set of uniform standards for price efficiency and accuracy.

19. Individual states in New England began implementing similar reforms. In 1996, the New Hampshire legislature revised the legal framework governing electric power distributors and generators in the state. It enacted RSA 374-F, a statute that directed the PUC to develop a statewide restructuring plan to implement electric retail choice for all customers by January 1, 1998. This plan was intended to deregulate the market and encourage competition whereby a variety of CEPSs would compete for customers' business.

20. Pursuant to RSA 374-F, the PUC issued a restructuring plan in February 1997. In August 1998, Granite State Electric Company, now Liberty Utilities, was the first electric utility to restructure and introduce retail choice. PSNH and Unitil restructured in May 2001 and May 2003, respectively.

21. This restructuring allowed CEPSs, like PNE, to supply power at generally reduced rates to customers in the utilities' service territories.

22. The market in PSNH's service territory, however, did not adjust for several years because PSNH owned a price advantage in the production of electricity.

23. This changed in 2009, when the price of natural gas decreased. This price reduction made it cheaper for CEPSs to provide electricity to customers.

## **B. PSNH's Role in New Hampshire's Electric Market**

24. Although CEPSs now provide service to customers in utilities' service territories, PSNH remains the only electric utility in New Hampshire (and in all of New England) that owns *both* facilities that generate electricity *and* the infrastructure for delivering that electricity. Stated another way, PSNH both *generates* or *procures* the electricity it delivers (known as "Default Service") from a fleet of coal, oil-fired, natural gas, and hydroelectric power plants, and *delivers* electricity supplied by *competing* energy suppliers.

25. This reality creates a unique, and potentially troubling, situation: PSNH owns and controls the distribution system through which electricity supplied by its *competitors* is delivered to customers. In contrast, CEPSs, like PNE, are merely "market participants": they have contracts with customers and provide electricity to those customers, but they do not own or control the networks over which that electricity is delivered and distributed. PSNH – as the "host utility" for its service territory – owns and controls the distribution network.

26. PSNH's Tariff is intended to ensure, however, that, despite these apparent conflicts of interest, PSNH does not interfere with customer choice or the transfer of customer accounts to or between CEPSs. The Tariff mandates that PSNH, when requested, transfer customer accounts from PSNH to CEPSs and enable transfers of customer accounts from one CEPS to another. The Tariff also requires PSNH to arrange Default Service if a customer cannot receive service from a CEPS "for any reason."

### **1. PSNH Must Process Transfers of Customer Accounts From One CEPS to Another**

27. Since deregulation now allows customers in New Hampshire to choose their supplier, the transfer of a customer account from one CEPS to another has become commonplace. These transfers are accomplished as follows: PSNH communicates with suppliers

through a Value Added Network (“VAN”), which is a private network that allows two businesses to communicate for purposes of sharing data. The new CEPS for a customer issues an “Electronic Enrollment” directive to PSNH for the initiation of electricity service for that customer.

28. The Electronic Enrollment process was established in 1998, when an EDI (Electronic Data Interchange) Working Group for the PUC issued a Consensus Plan for the Transmission of Electronic Data in New Hampshire’s Retail Electric Market (“PUC EDI Plan”).

29. When PSNH receives an Electronic Enrollment, it must then perform two actions. First, it must send “a Successful Enrollment” transmission to the new CEPS. Second, it must send a “Customer Drops Supplier” transmission to the old CEPS.

30. Following these transmissions, the Tariff requires PSNH to process the change of supplier service “within two business days of receiving a valid Electronic Enrollment from a Supplier.” The PUC EDI Plan further requires PSNH to process enrollment requests “in the order in which they are received at its VAN.”

31. Following the Electronic Enrollment, the actual transfer of the customer account (from the old CEPS to the new CEPS) then occurs on the date of the customer’s next monthly meter reading. Once an Electronic Enrollment is properly entered, it is effective on the customer’s next meter reading date, provided PSNH receives the Enrollment at least two business days before that date.

32. The Tariff provides that no more than one “Supplier” – defined to include CEPSs like PNE, but not PSNH – can serve a customer during a single month.

33. If an Electronic Enrollment is invalid, PSNH is required, within one business day of receiving the Electronic Enrollment, to notify the CEPS requesting service of the reasons for

such failure. Further, PSNH must send an “Error” transmission to *both* the new CEPS *and* the existing CEPS.

**2. When Requested, PSNH Must Process Transfers of Customer Accounts From PSNH to a CEPS**

34. The transfer of a customer account from *PSNH* to a CEPS has also become routine. Because of its dual role as both a *generator* of electricity and *deliverer* of electricity by its competitors, *PSNH* must process these transfers.

35. The transfer of a customer account from PSNH to a CEPS is accomplished in the same manner as transfers from CEPS to CEPS: A new CEPS for a customer submits an Electronic Enrollment to PSNH for the initiation of electricity service for that customer. PSNH must then process the change of service within two business days. The actual transfer of the customer (from PSNH to the new CEPS) then occurs on the customer’s next monthly meter reading date, provided PSNH receives the Enrollment at least two business days before that date.

**3. PSNH Must Arrange Default Service for Customers Who Cannot Receive Service From Another CEPS**

36. The Tariff also requires PSNH to “arrange default service” for any customer that “is not receiving Supplier Service from a Supplier for any reason.”

37. This obligation fulfills the goal of maintaining system reliability. It ensures that, in instances of uncertainty or disruption in service, customers are protected from experiencing extended periods of financial injury, and no confusion infiltrates the marketplace.

38. These three Tariff requirements make certain that, despite the control PSNH can exert over its distribution system, PSNH must operate as a neutral gatekeeper between customers and their CEPSs, facilitate customers’ choices with respect to their CEPS, and intervene immediately should any service disruption occur.

**C. PNE's and Resident Power's Entry into the Competitive Electric Market**

39. The deregulation of the electric industry in New Hampshire spawned two types of companies that now compete with host utilities: aggregators and suppliers (or CEPSs).

Aggregators are similar to mortgage or insurance brokers. They gather customers and deliver them individually or in bundles to a CEPS; they do not buy or sell electricity. In contrast, suppliers or CEPSs buy electricity and then provide it to customers (through a host utility's distribution network).

40. Resident Power is an aggregator, and PNE is a CEPS. On June 28, 2011, the PUC approved Resident Power's application to provide electric aggregation services in New Hampshire, and on September 22, 2011, the PUC approved PNE's application to be registered as a CEPS in PSNH's service territory.

41. PNE was the first entity since the deregulation of the New Hampshire electric marketplace to apply for registration as a CEPS to serve residential customers.

**D. Thousands of Customers Leave PSNH and Begin Choosing CEPSs**

42. PNE and Resident Power succeeded in orchestrating significant change in the market. During the first two years of their existence – as of February 2013, before the events described below – almost 50,000 New Hampshire customers switched from their host utility, chose a CEPS, and, as a result, saved money on their electricity bills. In PSNH's service territory, approximately 80% of commercial and industrial customers, 21% of small commercial customers, and 7% of residential customers elected to transfer from PSNH to PNE or another CEPS.

43. PSNH was losing thousands of customers and was struggling to find a way to halt this exodus.

44. At the same time it was losing customers at a rapid rate, PSNH, in 2011, was required to spend approximately \$422 million to equip one of its power plants, the Merrimack Station in Bow, New Hampshire, with a modern pollution control system (referred to as a “scrubber”).

45. As customers switched from PSNH to CEPSs, this cost and other costs of operating PSNH’s power plants would be spread across fewer and fewer customers. This, in turn, would likely increase PSNH’s rates.

#### **E. ISO-NE’s Financial Security Requirements**

46. As noted above, PNE does not generate the electricity it sells; rather, it acquires it from the market. PNE and other CEPSs use a variety of methods to accomplish this: they might lock in future supply their customers will likely demand by contracting with one or more generators to provide the electricity at a defined price for a defined period; they might use various financial instruments to hedge their risk; they also could speculate by waiting and purchasing the electricity they are under contract to supply to customers at market rates close in time to when that electricity must be supplied.

47. ISO-NE regulates the wholesale markets where electricity is purchased and sold. It is an independent, non-profit RTO that coordinates and directs the flow of electricity throughout the New England market. It has the authority to provide tariffs for the prices, terms, and conditions of the supply of energy in New England, and it can set and enforce the rules for the competitive electric markets. It helps protect the health of New England’s economy and the well-being of its people by ensuring the constant availability of electricity.

48. ISO-NE requires market participants, including CEPSs like PNE, to maintain a minimum level of financial security to meet their customers’ needs. CEPSs meet the ISO-NE financial security requirements by maintaining funds in a “BlackRock” account established at

ISO-NE to pay for energy purchases. If a CEPS cannot meet the financial security requirements, it is subject to suspension from participation in NEPOOL.

49. PSNH's Tariff provides that, in circumstances where a CEPS is suspended from NEPOOL or otherwise cannot meet its obligations to its customers, the CEPS must arrange for another NEPOOL member to accept load responsibility for all of its customers.

**F. Purchase and Sale Agreement with FairPoint and Notice to Customers**

50. In November 2012, PNE began entertaining the idea of selling a portion of its portfolio of customer accounts. On January 30, 2013, PNE entered into negotiations with FairPoint. Then, on February 6, 2013, PNE and Resident Power entered into an Account Purchase and Sales Agreement ("P&S Agreement") with FairPoint. Under this Agreement, PNE agreed to transfer approximately 8,500 residential and small commercial accounts in the PSNH service territory to FairPoint. The estimated value of these transfers was \$750,000.

51. All of the 8,500 accounts sold to FairPoint involved customers who had executed aggregation agreements with Resident Power. Under these agreements, 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 the posted utility rate (here, PSNH's Default Service rate). The P&S Agreement between PNE and FairPoint provided that Resident Power's aggregation agreements would be terminated *as of the transfer of each such customer account*.

52. During the weeks before PNE began its negotiations with FairPoint, the energy markets became highly volatile, and the price of electricity fluctuated and ultimately exceeded what many market participants, like PNE, had anticipated. Electricity rates available to NEPOOL members through ISO-NE had been far above the historical January/February average

rate of approximately \$ 0.0635/kWh from 2004 - 2012. During the period of January 22 – February 8, 2013, these rates generally fluctuated from over \$0.06/ kWh to approximately \$0.30/kWh and beyond, with several exceptions.

53. These unusually high rates resulted in a corresponding increase in financial security required in PNE's BlackRock account with ISO-NE. By the time PNE's negotiations with FairPoint began on January 30, however, rates had dropped to approximately \$0.0326/kWh (one of the exceptions noted above).

54. On February 7, 2013, PNE and FairPoint filed a Joint Petition for Expedited Waiver of Puc Rule 2004.05(k), which required 14 days' advance notice of PNE's intent to sell its right to serve its customer accounts. On February 8, 2013, the PUC granted the waiver.

55. Several days later, on or about February 13 and 14, 2013, PNE and Resident Power sent notices to affected customers informing them of their impending transfer to FairPoint. These notices stated, "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.*" (Emphasis added.) The notice did not specify a date when the aggregation agreements would terminate.

#### **G. Electronic Enrollment of Customers for Transfer to FairPoint**

56. Upon information and belief, beginning on or about February 9, 2013, FairPoint submitted Electronic Enrollments for the transfer of the approximately 8,500 customer accounts FairPoint acquired from PNE.

57. Upon information and belief, PSNH accepted FairPoint's Enrollments and sent "Successful Enrollment" transmissions to FairPoint.

58. PSNH never notified PNE that FairPoint's Electronic Enrollments were not properly submitted or otherwise invalid, and never sent any "Error" transmissions concerning the FairPoint Enrollments to PNE. In addition, upon information and belief, PSNH never notified FairPoint that FairPoint's Electronic Enrollments were not properly submitted or otherwise invalid, and never sent any "Error" transmissions concerning the FairPoint Enrollments to FairPoint.

#### **H. Winter Storm "Nemo" and Corresponding Rate Increases**

59. On February 8 and 9, 2013, a severe winter storm named "Nemo" struck New England. The storm, among other damage, disrupted power transmission lines and caused the shutdown of the Pilgrim nuclear power plant (in Plymouth, Massachusetts) and other electricity generators. This damage caused sudden, unanticipated increases in electricity rates. During the week of February 11, 2013, rates increased over 500%, from \$0.0326/kWh on January 30 to approximately \$0.1999/kWh, \$0.2016/kWh, and \$0.1545/kWh on February 10, 11, and 12, respectively.

#### **I. PSNH's Initial Transfer of PNE Customer Accounts to FairPoint**

60. On February 12, 2013, PSNH began transferring PNE customer accounts to FairPoint. PSNH alleged it transferred customer accounts at a rate of 300 – 400 accounts per business day. However, although PSNH had initially stated that it transferred 392, 297, and 314 customer accounts to FairPoint on February 12, 13, and 15, respectively, it transferred only 15 customer accounts on February 14, and only three customer accounts on February 19. By the end of the day on February 19, PSNH had transferred approximately 1,200 PNE customer accounts to FairPoint. PSNH sent "Customer Drops Supplier" transmissions to PNE for these accounts.

**J. PNE's ISO-NE Default and Suspension**

61. As a result of the record market volatility and resulting rate increases the week of February 11, 2013, PNE could not continue to meet its financial security obligations with ISO-NE. On February 14, 2013, PNE financially defaulted with ISO-NE, and ISO-NE suspended PNE's participation in the New England electricity market, and scheduled PNE's load asset account to be terminated at 12:01 a.m. on Wednesday, February 20, 2013.

62. At that time, ISO-NE directed PSNH to assume PNE's "load asset." As of February 19, PNE's load asset consisted of all of its residential and small commercial customer accounts that had not already been transferred to FairPoint. These accounts totaled approximately 7,300 customers.

63. In addition to ISO-NE's directive, PNE had already undertaken the appropriate steps to protect its customers. Consistent with its obligation under the Tariff, PNE arranged for another NEPOOL member, FairPoint, to accept the load responsibility of PNE's customers – through the sale of the 8,500 PNE customer accounts to FairPoint.

**K. PSNH's Interference with the Transfer of PNE's Customer Accounts to FairPoint**

64. PSNH seized upon PNE's suspension as an opportunity to increase its revenue and customer base and bring PNE (a competitor) to its knees. PSNH engaged in an aggressive campaign to persuade PUC Staff to block the PNE/FairPoint transaction; thwarted the transfer of PNE's customer accounts to FairPoint and engineered their transfer to PSNH's Default Service; launched a public relations campaign to disparage and tarnish PNE's reputation; 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.

**1. PSNH Denies PNE’s Request for a One-Time, Off-Cycle Transfer**

65. In order to avoid an ISO-NE default and a scenario where its customers would be placed on PSNH’s Default Service, PNE initially requested that PSNH immediately transfer PNE’s customer accounts to FairPoint.

66. On February 12, 2013, PNE’s counsel, Robert Cheney, contacted Robert Bersak, PSNH’s Assistant Secretary and Associate General Counsel, to discuss the feasibility of transferring all of PNE’s customer accounts to FairPoint immediately, rather than wait for each customer’s scheduled monthly meter reading. PNE agreed to pay PSNH \$65,000 for its costs to facilitate this one-time transfer.

67. This one-time transfer would have had *no impact* on customers or their bills. Rather, customers would have been transferred from PNE to FairPoint and enjoyed the same low electricity rates (lower than PSNH) they were enjoying with PNE. This transfer could have occurred *before* PNE’s suspension.

68. Despite PSNH’s authority to perform these transfers, it refused to accommodate PNE’s request. Attorney Bersak informed Attorney Cheney of PSNH’s decision the morning of February 14. PSNH claimed it “did not have the personnel resources necessary to manually transfer 8,500 customers” to FairPoint “on the same, near-term date.” This claim, however, is belied by the fact that, just days later (as demonstrated below), PSNH would have to undertake a similar process to transfer these customer accounts to its Default Service. PSNH alleged the “system” was “not designed” to effectuate a bulk transfer, and that it could accommodate such a transfer *only to PSNH’s Default Service*. (The eventual transfer of PNE’s customer accounts to

PSNH's Default Service cost PSNH just \$38,000 – almost *half* what PNE offered to pay (\$65,000) several days earlier for a bulk transfer to FairPoint.)

69. PSNH also claimed that, once PNE's customer accounts were transferred to PSNH's Default Service, they would become PSNH's property. PSNH, therefore, declared it would *not* transfer these customer accounts *from* Default Service to another CEPS. This assertion ignored the facts that PNE and FairPoint had a valid agreement for the transfer of these customer accounts, and FairPoint had submitted valid Electronic Enrollments for their transfer, which PSNH had accepted and which remained pending. Instead, PSNH claimed, inaccurately, that it was “up to the competitive market to solicit” them.

70. Meanwhile, unbeknownst to PNE, PSNH was communicating with the Staff at the PUC regarding PNE's impending ISO-NE default and attempted to persuade PUC Staff to support PSNH's refusal to perform a bulk transfer. Around the same time of Attorney Bersak's communications with Attorney Cheney on February 14, Attorney Bersak participated in a conference call with Steve Mullen from PUC Staff and Stephen Hall of PSNH. This call had apparently been scheduled earlier that morning. According to PUC Staff notes, the parties discussed, among other items, PNE's offer to pay for PSNH's costs to effectuate the transfer and PSNH's claim that it lacked the “bodies” to perform a manual transfer. Attorney Bersak ultimately informed PNE that PUC Staff agreed with PSNH's refusal to perform the bulk transfer.

## **2. PSNH Thwarts the Transfer of PNE's Customer Accounts to FairPoint**

71. On the afternoon of February 14, ISO-NE emailed PSNH and stated PNE had defaulted with ISO-NE, and, as of 3:45 p.m., PNE was suspended from market participation and had waived its right to cure the default. This information was confidential.

72. ISO-NE initially requested that PSNH assume responsibility for PNE's load asset as soon as possible. Indeed, given PSNH's refusal to perform an off-cycle transfer of PNE customer accounts to FairPoint, the Tariff now obligated PSNH to intervene and prevent these customers from suffering harm. PSNH's immediate assumption of PNE's load asset would have relieved PNE of its continuing obligation to replenish its BlackRock account with ISO-NE, and avoided any possibility of those funds being depleted.

73. PSNH ignored this obligation – to immediately assume the remnants of PNE's load asset. First, PSNH failed to inform PNE, as early as February 12 when PNE initially requested a one-time off-cycle transfer, that it could have quickly transferred approximately 90% of PNE's customer accounts to Default Service. These customer accounts – known as “non-exception” customers – could have been transferred to Default Service on an automated basis because they did not receive service under any special circumstances. (In contrast, the remaining 10% of PNE's customer accounts are referred to as “exception” customers, and would have required that PSNH use a manual process for transferring them because PSNH allegedly incurs additional costs with such accounts: they either are net-metered or receive service under budget billing.)

74. Second, PSNH *negotiated a later date* with ISO-NE – until February 20 – by which it would assume PNE's load asset. Accordingly, in its February 14 email, ISO-NE informed PSNH that, as a result of PNE's suspension, PSNH was required to assume responsibility for PNE's load asset by 12:01 a.m. on Wednesday, February 20, 2013.

75. These delays caused PNE to incur several hundreds of thousands of dollars in increased financial security obligations with ISO-NE.

76. On the afternoon of February 14 and the following morning, February 15, PSNH revealed its intent to harm PNE and neglect PNE's customers. During a 10:30 a.m. call on February 15 with PUC Staff, PSNH acknowledged it was "[e]asier" for PNE customer accounts "to go to [PSNH Default Service] rather than supplier service," and it was a "[l]ess daunting process to switch everyone to Default Service." During these communications, PUC Staff and PSNH also "discussed an informational letter that the [PUC] intended to send to affected customers."

77. As of February 19, PSNH had transferred approximately 1,200 PNE customer accounts to FairPoint, and those customers had begun receiving electricity from FairPoint. Following PNE's suspension, however, PSNH alleged it had no obligation to transfer any more PNE customer accounts to FairPoint, despite the facts that (a) FairPoint had acquired those customer accounts under the P&S Agreement; (b) FairPoint had submitted Electronic Enrollments for those customer accounts for transfer to FairPoint; and (c) upon information and belief, PSNH had accepted those Enrollments.

78. PSNH even went so far as to represent to PNE and Resident Power that PNE's suspension from ISO-NE automatically *invalidated* the Electronic Enrollments. This was false.

79. On February 20, PSNH intentionally and unilaterally deleted the Electronic Enrollments for the remaining 7,300 PNE customer accounts that had not been transferred to FairPoint, and it informed PUC Staff and PNE that these customer accounts now belonged to PSNH. According to PSNH, "an automated program was run to delete all remaining [Electronic Enrollments] which would switch customers from PNE to [FairPoint]." Upon information and belief, PSNH replaced these deleted Enrollments with new Electronic Enrollments for the transfer of PNE's remaining customer accounts to Default Service. In addition, although PSNH

was required to send “Customer Drops Supplier” transmissions to PNE for these customer accounts, upon information and belief, it elected not to do so. PSNH’s actions prevented the transfer of these customer accounts from PNE to FairPoint at their existing electricity rates and, instead, resulted in their being transferred to PSNH Default Service, and remaining there, at a higher rate.

80. PSNH did not and could not cite any legal authority or valid explanation for its decision to delete FairPoint’s Electronic Enrollments. Rather, it has provided a series of inconsistent and meritless explanations for its illegal actions.

81. Following PSNH’s actions, the only way for FairPoint to serve the customer accounts it had acquired from PNE under the P&S Agreement was for FairPoint to re-submit the Electronic Enrollments PSNH had deleted. As demonstrated below, however, PSNH worked aggressively to frustrate FairPoint’s attempts to accomplish this goal.

82. During this timeframe, three other sequences of events occurred simultaneously: First, PSNH launched an aggressive public relations campaign that highlighted PNE’s suspension and disparaged and tarnished PNE’s reputation. Second, PUC Staff had been participating in email communications and telephone conferences with PNE, Resident Power, and their attorneys regarding the transfer of PNE’s customer accounts to FairPoint and the proposed notices PNE and Resident Power intended to send to their customers concerning their outstanding transfers to FairPoint. Third, PUC Staff and PSNH were involved in parallel communications concerning the PNE/FairPoint deal, how PSNH addressed multiple Electronic Enrollments, and PSNH’s efforts to frustrate FairPoint’s attempts to re-submit the Electronic Enrollments.

83. On February 19, at 10 a.m., ISO-NE emailed a confidential notice to utilities (including PSNH), CEPSs, and regulators notifying them of CEPSs that had defaulted on their financial assurance obligations. ISO-NE was under a requirement contained in a NEPOOL agreement and in the Tariff to periodically transmit these notices. The February 19 notice identified that PNE had defaulted. Like ISO-NE's February 14 email to PSNH (informing PSNH about PNE's default and suspension), its February 19 notice was also confidential: It contained, at the top of the page, the word "CONFIDENTIAL" in bold, red letters.

84. PSNH disregarded the confidentiality of this information and immediately forwarded it to news and media outlets. Fewer than three hours later, PSNH's Manager of Media Relations, Martin Murray, sent an email to a reporter at the New Hampshire Union Leader with the subject line, "PSNH msg, fyi... Energy Supplier suspended." In his email, Mr. Murray explained that, on that day, PSNH filed a Supplemental Motion in support of its pending motion to dismiss an October 1, 2012 petition filed by PNE in the PUC for review of certain charges PSNH sought to impose on CEPSs. (The docket number and title for this pending PUC proceeding were DE 12-295, "Petition for Review of PSNH Service and Charges to CEPS" (hereinafter, the "DE 12-295 Proceeding").) In the Supplemental Motion, PSNH argued PNE "lacked standing" to contest PSNH's charges as a result of PNE's suspension from ISO-NE. Mr. Murray communicated this information to the reporter: "Our basis for seeking dismissal is a story that will likely garner keen interest, here in NH and in national trade journals: PNE Energy was suspended as a market participant last week by ISO New England (and, therefore, we argue has no standing for the petition)."

85. Mr. Murray communicated the same information to WMUR. The next day, February 20, WMUR published an article on its website<sup>2</sup> that contained the following quote from Mr. Murray: “It might have been a seamless transition from PNE to FairPoint, except for the suspension by the energy supplier [PNE] that may have thrown a monkey wrench into this whole thing.” Mr. Murray then opined further: “So, at the moment, most of those customers are now PSNH customers, and the uncertainty and the question that has to be answered is, where do they transition to now?”

86. While PSNH was disparaging PNE in the media, PNE’s and Resident Power’s attorneys were attempting to collaborate with the PUC on proposed notices to their customers concerning their outstanding transfers to FairPoint. Earlier in the morning on February 20, at 8:16 a.m., PNE’s counsel, Attorney Cheney, emailed PUC Staff PNE’s proposed notice to its customers. (Resident Power’s proposed notice was still being prepared.)

87. Half an hour after receiving this draft notice – again, unbeknownst to PNE or Resident Power – Amanda Noonan from PUC Staff telephoned Attorney Bersak, Mr. Hall, and Paul Ramsey at PSNH “for clarification on the processing of [Electronic Enrollments]” and “wanted to know how multiple enrollment requests would be handled.” PUC Staff notes indicate “PSNH advised Staff that the first [Electronic Enrollment] would block any subsequent request.”

88. Over an hour later, at 10:11 a.m., Attorney Bersak emailed Ms. Noonan and other members of PUC Staff (David Shulock, Alexander Speidel, and Steve Mullen) to complain that PSNH customer service representatives were receiving calls from customers regarding the “PNE/FairPoint situation,” where apparently some customers were asking for more information about the transfer while others expressed a desire not to be transferred to FairPoint. Attorney Bersak stated, “We need direction from the Commission.” He also inquired about the status of

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<sup>2</sup> <http://www.wmur.com/money/Customers-confused-after-plug-pulled-on-power-supplier/19007738>

the “informational letter” the PUC intended to send to PNE customers, and he explained, “We are going to be out in front of that letter, as we field calls from customers, without any idea what the [PUC’s] views are.”

89. Attorney Bersak then urged PUC Staff to block Resident Power and FairPoint from re-submitting Electronic Enrollments for PNE’s customer accounts for their transfer to FairPoint. He wrote: “When a CEPS proposes to transfer or sell the right to serve any customer of the CEPS, the Commission Rules provide customers with the right to select an alternate CEPS or return to default service. (Rule 2004.05(k) et seq.) However, ***if FairPoint is allowed to submit EDI transactions to acquire all of PNE’s customers, that EDI submission will block any such choice for at least a month. Unless we act expeditiously, customer confusion will grow; customer choice will be limited; and those that caused this mess will still benefit.***”

(Emphasis added.)

90. Half an hour later, Ms. Noonan telephoned Mr. Hall of PSNH and “requested further clarification of the queuing process for [Electronic Enrollments].” Mr. Hall “advised [again] that if there are multiple [Electronic Enrollments], the first one takes preference. Once the meter is read and the customer is transferred, any other pending [Electronic Enrollments] are dropped.”

91. Mr. Hall’s explanation, and Attorney Bersak’s earlier comments, regarding the “queuing process” for Electronic Enrollments were consistent with the Tariff, which restricted PSNH from accepting “more than one Supplier for a Customer during any particular monthly billing cycle.” This information and PUC Staff’s repeated exchanges with PSNH on this topic are significant because the Electronic Enrollments FairPoint submitted for the transfer of PNE customer accounts to FairPoint trumped any subsequent enrollment transmissions or actions by

PSNH or any other CEPS. For any enrollment transmission by PSNH or any other CEPS to be valid – and lead to a transfer to PSNH or another CEPS, respectively – FairPoint’s Electronic Enrollments would have had to be deleted. This is precisely what PSNH did. Not only did it thwart the eventual transfer of PNE’s remaining customer accounts to FairPoint, it manufactured an implicit invitation for PNE’s customers to choose another CEPS, and it obstructed PNE and FairPoint from recouping those lost customer accounts.

92. At this time, PNE and Resident Power and their attorneys resumed their communications with PUC Staff concerning proposed notices PNE and Resident Power intended to send to their customers.

93. During these communications, PUC Staff alleged for the first time that PNE’s and Resident Power’s attempts to transfer customer accounts from PSNH’s Default Service would constitute “slamming,” which refers to the transfer of a customer account from one supplier to another without the customer’s authorization.

94. The following morning, February 21, PUC Staff held another telephone conference with PSNH regarding the approximate 1,200 customer accounts PSNH had transferred to FairPoint before 12:01 a.m. on February 20. During this call, PSNH initiated a separate discussion with PUC Staff concerning its billing arrangement with PNE. PSNH provided “consolidated” billing services to PNE. Under this arrangement, *PSNH* billed PNE’s customers for both PNE’s costs in purchasing electricity and PSNH’s costs for distributing electricity.<sup>3</sup> PSNH then collects a single payment for these amounts from PNE’s customers. A separate agreement between PSNH and PNE requires PSNH to forward PNE the portion of the

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<sup>3</sup> Alternatively, CEPSs can handle billing customers themselves, instead of using PSNH’s consolidated billing service.

payment that pertains to PNE's costs.<sup>4</sup> That agreement permits PSNH to invoice PNE for any other costs incurred. It provides no authority for PSNH to withhold payments that are due PNE to offset such costs. During the February 21 call with PUC Staff, PSNH alleged it had incurred "significant costs" in connection with PNE's attempts to transfer its customer accounts to FairPoint. (These "significant costs," again, were almost *half* what PNE offered to pay PSNH for a bulk transfer to FairPoint. See *supra* ¶¶ 66, 68.) PSNH further advised it had ceased forwarding PNE its payments as of February 15, and it alleged it was working to determine how much PNE "owed" PSNH. As of February 28, these outstanding payments totaled nearly \$250,000. For the next three months, PSNH also refused to provide PNE with an accounting or breakdown of PSNH's alleged costs. PSNH released approximately \$148,000 on March 1, 2013. In June 2013, PNE filed a complaint at the PUC seeking the return of the remaining funds. PSNH released approximately \$38,000 on December 16, 2013. By this time, however, PNE had incurred over \$97,000 in legal costs to pursue these outstanding payments.

95. PSNH's withholding of PNE's payments and delay in releasing these funds further illustrate PSNH's intent to harm PNE and its disregard for its role as an agnostic gatekeeper between CEPSs and their customers. PSNH was aware that, if it withheld these funds from PNE, PNE would be unable to pay its electric suppliers and risk damaging those relationships.

96. Later that day, February 21, PNE, Resident Power, and PUC Staff again resumed their negotiations concerning the customer notices. At 3:11 p.m., PNE emailed a revised notice to PUC Staff. A representative of FairPoint, Barbara Clay, was copied on this email chain. The revised notice contained the following language insisted on by PUC Staff: "*If you have not been*

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<sup>4</sup> During this time, nearly all of the revenue PNE would collect from these payments was being applied to its costs, leaving PNE with a slim, if any, profit margin.

*transferred as contemplated by our earlier notice and instead have been returned to PSNH default service, you must contact FairPoint Energy if you wish to select it as your competitive electric energy supplier.”* Because PSNH had deleted all remaining Electronic Enrollments the previous day, PNE was also compelled to include the following language: ***“Please be advised that there will be no further transfers to FairPoint Energy pursuant to the Agreement between PNE Energy Supply and FairPoint Energy.”***

97. Later that afternoon, Ms. Noonan emailed Attorney Bersak and Mr. Hall with an “update,” she attached a notice to her email that was “going up on the [PUC’s] website” that evening “regarding PNE” and that re-purposed the bolded language above from PNE’s revised notice, and she explained: “As you will see from the notice, ***PNE has agreed that there will be no further transfers to FairPoint Energy pursuant to the agreement between FPE and PNE. Customers who are now on default service will only be changed if they affirmatively choose FairPoint or any other competitive supplier.***” Contrary to Ms. Noonan’s comments, PNE had not agreed to this language.

98. PSNH had succeeded in blocking PNE’s and FairPoint’s efforts to consummate the sale of PNE’s customer accounts to FairPoint, salvage the more affordable electricity rates those customers were enjoying with PNE, and yield the compensation PNE had contracted to receive under the P&S Agreement. PSNH used its influence to require that a customer leaving PNE could do so only *if* that customer chose to be transferred to a CEPS other than FairPoint or return to PSNH’s Default Service. Indeed, due to the Tariff’s restriction against accepting “more than one Supplier for a Customer” during any 30-day period, PSNH’s deletion of FairPoint’s Electronic Enrollments – combined with its later efforts (further summarized below) to prevent

Resident Power or FairPoint from transferring these customer accounts from Default Service – permitted these customers to choose a supplier *other than FairPoint*.

99. Further, PSNH's deletion of the Electronic Enrollments and interference with the transfer of PNE's customer accounts to FairPoint resulted in higher rates for these customers due to their placement on PSNH's Default Service. This result, in turn, helped PSNH increase its revenue and customer base at PNE's and these customers' expense. Given PSNH's lack of authority for these actions and its incessant prodding of PUC Staff, there is no question PSNH intended to use PNE's financial distress to increase its market share, obstruct a valid transaction between two CEPSs, and attempt to crush an effective CEPS (PNE) into submission.

### **3. PSNH Opposes Efforts by Resident Power to Transfer Customer Accounts from PSNH's Default Service**

100. As noted above, Resident Power had aggregation agreements with all the customer accounts PNE had agreed to sell to FairPoint, including the remaining 7,300 customer accounts whose Electronic Enrollments PSNH had deleted. Under these agreements, these customers appointed Resident Power as their exclusive agent to find low electricity supply rates, execute electricity supply agreements with CEPSs whose electricity rates were lower than PSNH's Default Service rate, monitor those agreements for important details and dates, and provide helpful information and timely customer service. Further, these agreements permitted Resident Power or any customer to cancel the agreements.

101. Despite the fact these customers were now on PSNH's Default Service, the aggregation agreements remained valid and enforceable. Resident Power did not intend to cancel its aggregation agreements, and, as of February 20, Resident Power had received only five notices of cancellation from its customers. Accordingly, Resident Power intended to fulfill its obligations to its remaining customers under the agreements: it planned to work on their behalf

and transfer their accounts from PSNH's Default Service to a CEPS (whether FairPoint or another CEPS) with a rate plan lower than PSNH's default rate.

102. PSNH blocked this effort: It opposed Resident Power's attempt to transfer customer accounts from PSNH's Default Service and raised the threat of "slamming" to the PUC.

103. PSNH first challenged Resident Power's authority in the DE 12-295 Proceeding. In addition to its argument that PNE "lacked standing" in its February 19 Supplemental Motion in support of its pending Motion to Dismiss PNE's Petition, PSNH mischaracterized PNE's own notice to its customers and alleged, in footnote 4, that Resident Power (which was not a party to the DE 12-295 Proceeding) "would no longer be an aggregator on [PNE's] customer accounts."

104. Notwithstanding this filing, PUC Staff initially advised that it agreed with *Resident Power's* position that Resident Power's aggregation agreements with customers who had not been transferred to FairPoint remained valid. After February 19, however, PUC Staff adopted PSNH's position.

105. During PUC Staff's negotiations with PNE and Resident Power on February 21 concerning the notices PNE and Resident Power intended to send to their customers, a PUC Staff member, Mr. Shulock, in a 4:30 p.m. email to Plaintiffs, sent PUC Staff's "final comments" on PNE's notice. In addition to the forced language above, see supra ¶ 96, this version of the notice contained another insertion by PUC Staff stating, "Also please be advised that, consistent with our prior notice to you, *Resident Power is no longer your aggregator . . .*" FairPoint's representative, Ms. Clay, was, again, copied on this email chain.

106. PNE responded an hour later and stated it would not agree with this proposed language. Nevertheless, PUC Staff reportedly informed FairPoint that, if Resident Power

undertook steps to transfer customer accounts from PSNH's Default Service to FairPoint, FairPoint could be exposed to slamming charges that would generate enough fines and penalties to "close the state's budget deficit."

107. PUC Staff's position and PSNH's challenges to Resident Power's aggregation authority left Resident Power with no alternatives and pressured it to take immediate action to inform and protect its customers. First, Resident Power sent another notice to its customers on the evening of February 21. That notice explained the circumstances regarding the interruption of their transfers to FairPoint and clarified inaccuracies reported in the media about PNE and Resident Power. Second, the following morning, February 22, Resident Power filed an emergency petition for declaratory judgment with the PUC. The petition sought a declaration that Resident Power could continue operating as a registered aggregator in New Hampshire despite PNE's suspension. It also sought a declaration that the transfer of PNE's customer accounts to FairPoint did not constitute "slamming" under the applicable PUC rules.

108. Indeed, the transfer of PNE's customer accounts to FairPoint could not constitute "slamming." PUC 2004.10(b) defines "slamming" as "initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization." But for five exceptions, Resident Power's customers had not cancelled their aggregation agreements or otherwise withdrawn their authorization to be transferred to FairPoint. Rather, under the agreements, these customers expressly authorized Resident Power to transfer their accounts from PSNH's Default Service to a CEPS with a rate plan lower than PSNH's default rate. Accordingly, Resident Power's authorization to transfer these customer accounts remained in place. Its conduct in fulfilling its contractual obligations did not constitute "slamming."

109. Although PSNH was not a party to the February 22 proceeding initiated by Resident Power, PSNH challenged the emergency petition in private email communications with PUC Staff. When Steve Mullen (a member of PUC Staff) received the petition by email, he forwarded it to PSNH and remarked, “FYI – I’m sure you’d want to see this.” (Minutes later, Mr. Mullen also forwarded to Attorney Bersak the notice Resident Power sent to its customers the night before.)

110. Attorney Bersak responded to Mr. Mullen later that morning and provided extensive comments on Resident Power’s petition. First, he challenged it on procedural grounds. Second, he implied erroneously that PNE and Resident Power were abusing corporate formalities, arguing: “Resident Power seems to want it both ways - - 1. that PNE is a separate entity from RP with no authority to impact the relationship between RP and its retail customers; 2. But, it wants the deal with FairPoint to go through so that it gets its \$\$ from the sale of its customers. If there are damages suffered by RP, it is PNE that caused them. Let them sue each other.” Third, he attacked the PUC’s decision, several weeks earlier, to grant PNE and FairPoint’s Joint Petition for Expedited Waiver of Puc Rule 2004.05(k) (14 days’ notice of intent to sell customer accounts), stating: “The resolution of this issue will impact the entire competitive marketplace. ***It should not – indeed cannot – be dealt with in an overnight decision akin to the rules waiver that PNE got that kicked off this entire mess.***” (That matter was yet another proceeding in which PSNH was not a party or implicated in any way, yet on which Attorney Bersak believed it was appropriate to volunteer his unique perspective.)

111. Several days later, on February 28, Attorney Bersak again emailed a member of the PUC Staff (this time, Mr. Shulock), and disparaged PNE’s counsel, Attorney Cheney, for a

minor typographical error in the February 22 petition regarding the correct entity name for Resident Power.

112. PSNH's efforts in persuading PUC Staff to oppose both FairPoint's attempts to re-enroll PNE's former customer accounts with FairPoint and Resident Power's later efforts to move these customer accounts from PSNH's Default Service succeeded in disrupting the entire PNE/FairPoint transaction. FairPoint ultimately backed out of the deal. FairPoint's decision nullified Resident Power's desire to transfer customer accounts from PSNH's Default Service to FairPoint.

113. PNE and Resident Power attempted to salvage the FairPoint deal, and incurred over \$48,000 in attorney's fees and costs in doing so. They were ultimately unsuccessful.

**L. PNE Reimburses its Former Customers for their Placement on PSNH's Default Service**

114. Notwithstanding its temporary financial distress and its suspension from the market, PNE compensated the 7,300 former customers for the damages (higher electricity rates) they incurred as a result of PSNH's refusal to transfer the customer accounts from Default Service. PNE paid each customer an amount equal to the difference between PNE's lower rate and PSNH's higher default rate. These payments totaled approximately \$53,000. In addition, PNE incurred approximately \$12,000 in labor and other costs for this effort and to administer these payments.

**M. "Show Cause" Proceeding Before the PUC**

115. PSNH's interference with the PNE/FairPoint transaction and its attempts to persuade PUC Staff to intervene and frustrate the transfer of PNE customer accounts to FairPoint created substantial confusion among PNE's former customers. Despite PSNH's pivotal role in

these events, PUC Staff began to direct its attention towards PNE and Resident Power and ultimately cast blame on them for this market confusion.

116. PSNH, however, did not stop there; it continued to exert pressure on PNE. PSNH led PUC Staff to believe that, following PNE's suspension from the New Hampshire marketplace, PNE attempted to continue selling electricity by trying to enroll a commercial customer.

117. On February 21, 2013, PNE emailed PSNH a request for interval data for Granite Ridge Energy, (which was then a PSNH customer). "Interval data" is data collected by a meter that shows how much energy a particular customer used during a specific period of time. PNE submitted this request solely to acquire data it needed for billing purposes. It was not attempting to enroll a customer. Further, PSNH was aware that a request for interval data does not constitute enrolling a customer.

118. Within an hour of receiving this request from PNE, Attorney Bersak forwarded it by email to Mr. Shulock at the PUC and asked, "Is PNE still entitled to participate in the New Hampshire retail energy market?"

119. Attorney Bersak's question implied that (a) PNE – by merely requesting this data – was undertaking steps to illegally "participate" in the market by attempting to enroll a customer, and, thus, violate the PUC Rules, which forbid a suspended CEPS from serving customers; and (b) PNE should have been permanently excluded from *any* engagement in or contact with the market. Mr. Shulock replied several minutes later: "We will look into this immediately." PSNH did not clarify or disavow its insinuation that PNE was attempting to enroll a customer and violating the PUC Rules.

120. To avoid any misunderstanding and re-assert this accusation of illegal conduct by PNE, PSNH clarified its message several days later. On February 26, PNE filed a response to PSNH's Supplemental Motion in the DE 12-295 Proceeding. As noted above, PSNH had argued in that Supplemental Motion that PNE "lacked standing" to contest PSNH's charges as a result of PNE's suspension from ISO-NE. PNE emailed its response to the Supplemental Motion to PUC Staff and PSNH the following morning, February 27, at 9:34 a.m. Attorney Bersak forwarded this message to Mr. Shulock, Mr. Mullen, and Ms. Noonan and stated, "FYI: Not sure who received the attached 'filing' from PNE, as there is no certificate of service; no indication who was cc'd; it fails to comply with the Commission's rules for pleadings; etc. ***Clearly indicates PNE is still engaged in the marketplace.***" (Emphasis added.)

121. The confusion PSNH caused in the market and its suggestion that PNE was attempting to illegally serve customers prompted PUC Staff to initiate a "show cause" proceeding in which PUC Staff (which had been subject to PSNH's undue influence) alleged that PNE and Resident Power "may" have violated various provisions of the PUC 2000 rules relating to CEPSs and aggregators.

122. On February 27, 2013, PUC Staff filed a Recommendation Memorandum that contained unfounded allegations (prompted by PSNH) 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. PUC Staff alleged that the two customer notices PNE and Resident Power sent on February 13-14 and February 21 confused customers by "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." PUC Staff also claimed, that "[o]n February 21, 2013, it was

brought to Staff's attention" – by Attorney Bersak – "that PNE was in the process of enrolling a large commercial and industrial customer, despite . . . PNE having previously been suspended as a market participant by ISO-NE." Finally, PUC Staff parroted the allegations in the February 22 email from PSNH's in-house counsel: "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."

123. The following day, February 28, the PUC issued an order of notice, finding that a proceeding was warranted for Resident Power and PNE to show cause why they should not be subject to sanctions.

124. The allegations in PUC Staff's Memorandum were inaccurate, and the "show cause" proceeding ultimately vindicated Plaintiffs' position that *PSNH* (not Plaintiffs) was responsible for any customer harm or confusion that permeated the marketplace through its conduct in thwarting the transfer of PNE's customer accounts to FairPoint: first, by refusing to perform an off-cycle transfer; second, by illegally deleting 7,300 pending Electronic Enrollments for the transfer of these customer accounts to FairPoint; and, third, by persuading PUC Staff to oppose FairPoint's attempts to re-enroll these customer accounts with FairPoint and Resident Power's lawful efforts to transfer these customer accounts from PSNH's Default Service.

125. Further, as noted above, PNE did not "enroll" a customer. PUC Staff would retract this accusation one month later in a discovery response during the "show cause" proceeding, admitting: "Staff acknowledges that a request for interval data is not technically an enrollment."

126. PNE and Resident Power ultimately reached a settlement with PUC Staff in March 2013: The parties agreed on the establishment of an escrow fund, payments to former

PNE customers, and the preparation of a joint notice to those customers. In addition, PUC Staff *released* PNE and Resident Power “of all issues and allegations raised in the February 27, 2013 Staff recommendation, and the February 28, 2013 order of notice.” On April 15, 2013, the PUC approved this settlement.

127. If PSNH had acted pursuant to its obligations, the transfer of PNE’s remaining customer accounts from Default Service – where they would have remained for just a short period of time – to FairPoint would have occurred unimpeded, the market confusion it produced would never have occurred, and PUC Staff would not have intervened or initiated a “show cause” proceeding.

128. PNE and Resident Power incurred over \$190,000 in attorney’s fees and costs in defending PUC’s Staff’s allegations and litigating the “show cause” proceeding.

#### **N. PNE’s and Resident Power’s Damages**

129. PSNH’s interference with the PNE/FairPoint P&S Agreement, including its thwarting of approximately 7,300 transfers of PNE’s customer accounts to FairPoint; its attempt to crush PNE and retain PNE’s customer accounts; and its attempts to persuade PUC Staff to intervene in the PNE/FairPoint transaction caused PNE and Resident Power to incur significant losses and damages, totaling over \$2 million. These damages include, but are not limited to:

- \$750,000 for the sale of PNE’s customer accounts to FairPoint;
- \$53,000 for payments made by PNE to former customers that PSNH placed on its Default Service, to compensate those customers for the difference between PSNH’s default rate and PNE’s lower rate;
- \$12,000 for the labor and expense PNE incurred to contact its former customers and administer the payments identified above;
- \$190,000 for PNE’s and Resident Power’s attorney’s fees and costs they incurred to litigate the March 2013 “show cause” proceeding;

- \$97,000 for PNE's attorney's fees and costs it incurred to initiate and litigate a separate proceeding to recover the outstanding receivables PSNH refused to pay; and
- \$48,000 for PNE's and Resident Power's efforts to salvage the FairPoint deal.

130. In addition, PSNH's actions caused PNE to suffer additional and extensive reputational damage. Media outlets and newspapers reported inaccurately that PNE had gone out of business:



## PSNH competitor goes dark, for now

By ANNMARIE TIMMINS

Monitor staff

Wednesday, February 20, 2013

(Published online Wednesday, February 20, 2013)

One of the first companies to offer homeowners a cheaper alternative to Public Service of New Hampshire is out of the energy business and 8,500 of its customers are headed back to PSNH, at least temporarily.

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**The Telegraph**  
It's Your Community.

Wednesday February 20, 2013

### Alternative electricity supplier may be barred from power grid; fate is unclear

By DAVID BROOKS

Staff Writer

The new, fast-growing industry of deregulated electricity in New Hampshire may have hit a bump: One of the first companies to offer lower rates in New Hampshire, Resident Power, has seen a major provider suspended by New England's power grid. ... [Subscribe or log in to read more](#) →

# NEW HAMPSHIRE UNION LEADER

## Energy

February 20, 2013 10:34PM



## Manchester-based power supplier unplugged

By DAVE SOLOMON

New Hampshire Union Leader

Low natural gas prices gave rise to a competitive consumer market for electricity in New Hampshire, but increasing prices have claimed one of those competitors.

131. The February 20, 2013 *New Hampshire Union Leader* article by Mr. Solomon also stated inaccurately: “To further complicate matters, PNE was sold to FairPoint Energy in a transaction announced just two days before the ISO action.”<sup>5</sup> As demonstrated above, PNE had sold its *customer book*, not itself, to FairPoint.

132. In addition, newspapers reported the alleged violations and penalties PNE was forced to defend in the PUC’s “show cause” proceeding:

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<sup>5</sup> <http://www.unionleader.com/article/20130221/NEWS05/130229889>

NEW HAMPSHIRE  
**UNION LEADER**

**Business**

February 28, 2013 9:09PM



## **Utilities commission sets date for power penalty hearings**

By **TIM BUCKLAND**

**New Hampshire Union Leader**

CONCORD - The state Public Utilities Commission on Thursday set hearings for March 20 and 22 to determine whether to assess penalties on or revoke the registrations of Power New England and its broker, Resident Power.

The PUC alleges that PNE failed to follow several rules as Manchester-based PNE hit a money crunch and attempted to sell its customers to another company.

133. These news stories infiltrated the market and caught the attention of many customers. They harmed PNE's reputation and caused PNE to suffer a significant loss in revenue from 2013 – 2014. Many commercial and residential customers terminated service with PNE. Others either refused to enroll or re-enroll with PNE. Those that did enroll requested special accommodations, such as fixed pricing, which decreased PNE's profitability.

### **CLAIMS**

#### **COUNT I**

#### ***(Tortious Interference with Contractual Relations)***

134. PNE and Resident Power repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

135. PNE and Resident Power had a valid P&S Agreement with FairPoint for the sale of PNE customer accounts to FairPoint.

136. PSNH was aware of the P&S Agreement.

137. PSNH intentionally interfered with that Agreement by: (a) refusing to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint; (b) illegally deleting 7,300 pending Electronic Enrollments for the transfer of PNE's customer accounts to FairPoint, which FairPoint had properly submitted and PSNH had accepted; (c) upon information and belief, replacing those 7,300 Enrollments with new Electronic Enrollments for the transfer of PNE's customer accounts to PSNH's Default Service; and (d) persuading PUC Staff to oppose, and threaten prosecution of, FairPoint's attempts to re-submit the Electronic Enrollments that PSNH had deleted and Resident Power's lawful efforts to transfer PNE's former customer accounts from PSNH's Default Service.

138. As a result of PSNH's actions, PNE and Resident Power have suffered damages.

**COUNT II**  
***(Tortious Interference with Contractual Relations)***

139. Resident Power repeats and incorporates by reference the allegations of the paragraphs above as if fully stated herein.

140. After the placement of former PNE customer accounts on Default Service, Resident Power continued to have valid aggregation agreements with PNE's former customers to act as their exclusive agent for the purposes of researching, negotiating, and executing electricity supply agreements on their behalf.

141. PSNH was aware of those aggregation agreements.

142. PSNH intentionally interfered with those aggregation agreements by actively influencing and eventually persuading PUC Staff to declare to Resident Power's customers that

it was no longer their aggregator, and to raise the threat of “slamming” to Resident Power and FairPoint, all to thwart Resident Power’s fulfillment of its contractual obligations by attempting to transfer its customer accounts from PSNH’s Default Service.

143. As a result of PSNH’s actions, Resident Power has suffered damages.

**COUNT III**  
***(Violation of RSA 358-A)***

144. PNE and Resident Power repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

145. PSNH is a “person” under RSA 358-A:1, I.

146. PSNH engaged in unfair methods of competition and deceptive acts or practices by: (a) refusing to perform a one-time, off-cycle transfer of PNE’s customer accounts to FairPoint; (b) failing to inform PNE and Resident Power that it could have transferred approximately 90% of their customer accounts on an automated basis; (c) negotiating a later date with ISO-NE by which PSNH would be required to assume PNE’s remaining load asset; (d) illegally deleting 7,300 pending Electronic Enrollments for the transfer of PNE’s customer accounts to FairPoint, which FairPoint had properly submitted and PSNH had accepted; (e) upon information and belief, replacing those 7,300 Enrollments with new Electronic Enrollments for the transfer of PNE’s customer accounts to PSNH’s Default Service; (f) pursuing an aggressive media campaign that disparaged and tarnished PNE’s reputation; (g) withholding customer payments that were due to PNE; (h) persuading PUC Staff to oppose, and threaten prosecution of, FairPoint’s attempts to re-submit the Electronic Enrollments that PSNH had deleted and Resident Power’s lawful efforts to transfer PNE’s former customer accounts from PSNH’s Default Service; and (i) prompting PUC Staff to initiate a “show cause” proceeding against PNE and Resident Power.

147. PSNH's actions occurred in trade or commerce.

148. PSNH's actions rose to "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." ACAS Acquisitions v. Hobert, 155 N.H. 381, 402 (2007).

149. As a result of PSNH's actions, PNE and Resident Power have suffered damages.

150. In addition, under RSA 358-A:10, I, PNE and Resident Power are entitled to as much as three times the amount of damages they have suffered because PSNH's actions were "willful or knowing."

#### **COUNT IV** ***(Negligence)***

151. PNE and Resident Power repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

152. PSNH had a duty towards PNE and Resident Power to act as a neutral, agnostic gatekeeper between PNE and Resident Power and their customers, and to facilitate the transfer of PNE's and Resident Power's customer accounts to FairPoint.

153. PSNH breached this duty by: (a) illegally deleting 7,300 pending Electronic Enrollments for the transfer of PNE's customer accounts to FairPoint, which FairPoint had properly submitted and PSNH had accepted; (b) upon information and belief, replacing those 7,300 Enrollments with new Electronic Enrollments for the transfer of PNE's customer accounts to PSNH's Default Service; and (c) persuading PUC Staff to oppose, and threaten prosecution of, FairPoint's attempts to re-submit the Electronic Enrollments that PSNH had deleted.

154. But for PSNH's actions, PNE's customer accounts would have been transferred to FairPoint on each customer's next meter reading date by operation of FairPoint's previously-submitted, and accepted, Electronic Enrollments.

155. As a result of PSNH's actions, PNE and Resident Power have suffered damages.

**COUNT V**  
***(Negligence)***

156. PNE and Resident Power repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

157. PSNH had a duty towards PNE and Resident Power to act as a neutral, agnostic gatekeeper between PNE and Resident Power and their customers, facilitate the transfer of PNE's and Resident Power's customer accounts to FairPoint, and immediately intervene and provide Default Service for those customer accounts should any service disruption occur.

158. PSNH breached this duty by: (a) refusing to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint; (b) failing to inform PNE and Resident Power that it could have transferred approximately 90% of their customer accounts on an automated basis; and (c) negotiating with ISO-NE to assume PNE's remaining load asset on February 20, 2013, rather than on an earlier date, as originally required by ISO-NE.

159. As a result of PSNH's actions, PNE and Resident Power have suffered damages.

**REQUEST FOR RELIEF**

WHEREFORE, PNE and Resident Power respectfully request that the Court:

- A. Enter judgment in favor of PNE and Resident Power on all counts;
- B. Award PNE and Resident Power their damages, totaling **\$2 million**;
- C. Award PNE and Resident Power as much as three times their total damages;
- D. Award PNE and Resident Power their attorney's fees and costs, see RSA 358-A:10, I;
- E. Award such other relief as is just and equitable.

**REQUEST FOR JURY TRIAL**

PNE and Resident Power request a trial by jury on all claims so triable.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

and

RESIDENT POWER NATURAL GAS  
AND ELECTRIC SOLUTIONS, LLC

By Their Attorneys,

FOJO DELL'ORFANO, P.L.L.C.

Dated: May 8, 2015



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**SUMMONS IN A CIVIL ACTION**

Case Name: **PNE Energy Supply, LLC, et al v Public Service Company of New Hampshire  
d/b/a Eversource Energy**  
Case Number: **216-2015-CV-00265**

Date Complaint Filed: May 08, 2015

A Complaint has been filed against Public Service Company of New Hampshire in this Court. A copy of the Complaint is attached.

**The Court ORDERS that ON OR BEFORE:**

June 25, 2015 PNE Energy Supply, LLC; Resident Power Natural Gas & Electric Solutions, LLC shall have this Summons and the attached Complaint served upon Public Service Company of New Hampshire by in hand or by leaving a copy at his/her abode, or by such other service as is allowed by law.

July 16, 2015 PNE Energy Supply, LLC; Resident Power Natural Gas & Electric Solutions, LLC shall file the return(s) of service with this Court. Failure to do so may result in this action being dismissed without further notice.

30 days after Defendant is served Public Service Company of New Hampshire must file an Appearance and Answer or other responsive pleading form with this Court. A copy of the Appearance and Answer or other responsive pleading must be sent to the party listed below and any other party who has filed an Appearance in this matter.

**Notice to Public Service Company of New Hampshire:** If you do not comply with these requirements you will be considered in default and the Court may issue orders that affect you without your input.

Send copies to:  
Robert M. Fojo, ESQ

Fojo DellOrfano  
889 Elm Street Fifth Floor  
PO Box 531  
Manchester NH 03105-0531

BY ORDER OF THE COURT

May 11, 2015

W. Michael Scanlon  
Clerk of Court