

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

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

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

v.

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

**PSNH'S REPLY TO PLAINTIFFS' OBJECTION
TO ITS MOTION TO DISMISS**

Counts I and II Fail to State a Claim: PSNH contended that these Counts failed to allege causation or to establish any improper interference. On causation, Plaintiffs' Objection, like their Complaint, is notable for what it does not say. Despite an opportunity to cure their failure to allege that FairPoint "backed out of the deal" (Complaint ¶ 112) because of some action by PSNH, or that Resident Power lost a single customer, the Objection is silent on both points. The best Plaintiffs can say as to Count I (Interference with the FairPoint agreement) is to argue that Paragraphs 98 and 112 of the Complaint allege that PSNH's actions "succeeded in disrupting the entire PNE/FairPoint transaction," and "caused FairPoint not to perform its end of the bargain." Obj. at 13.¹

Plaintiffs point to no paragraph of the Complaint alleging that PSNH caused FairPoint not to perform (citing only to the Objection) and the act that supposedly caused the alleged interference is said to be "Plaintiffs' later attempts to transfer customers from Default Service," rather than some action by PSNH. *Id.* Paragraphs 98 and 112 allege only that PSNH's actions

¹ This Reply refers to PSNH's Memorandum in Support of its Motion to Dismiss as the "Memo." Plaintiffs' Objection is referred to as the "Obj." All references with paragraph markers (¶) are to the Complaint.

resulted in PNE's customers being able to "choose a supplier other than FairPoint." Yet the right to choose a new supplier was provided to those customers by regulation. Puc 2004.05(1)(2) (requiring notice to customers that they may select an alternate CEPS). And when PNE requested that the PUC waive the 14 day notice requirement in Puc 2004.05, it specifically acknowledged that "[e]very customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served." Memo Ex. 5 at ¶ 7. Thus, even if one were to accept the allegation that the PUC Staff acted at PSNH's behest, Plaintiffs allege only that the PUC Staff required what Plaintiffs conceded was required by law.²

As for causation claims by Resident Power (Count II), Plaintiffs claim that PSNH manipulated the PUC Staff to take actions that "caused Resident Power's aggregation agreements to terminate."³ Obj. at 14. Yet the Complaint does not allege that those agreements terminated. On the contrary, it expressly states that "Resident Power continued to have valid aggregation agreements with PNE's former customers." ¶ 140.⁴ Plaintiffs cannot have it both ways.

On the issue of whether Plaintiffs have *alleged* any improper interference, Plaintiffs contend that interference with the FairPoint contract or their aggregation agreements is a question of fact that cannot be resolved in a motion to dismiss. Only improper interference is

² The PUC Secretarial Letter granting the waiver stated: "PNE and FairPoint Energy's proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier." Memo Ex.6.

³ Count II is based entirely on the notion that PSNH controlled the actions of the PUC by "persuading the PUC Staff" to require Resident Power to tell its customers what it had already told them, and to "raise the threat of slamming." Complaint ¶ 142. Not only is this allegation absurd on its face, but as shown below at page 16, this claim fails because the alleged statement of PSNH's "position" taken in the PUC was accurate.

⁴ Plaintiffs state that page 13 of the Objection demonstrates that "PSNH's interference caused those agreements to terminate." Obj. at 14. But no such claim is made on page 13. And it is important to note that Resident Power had given its customers notice that it would no longer be an aggregator for their account before any action by PSNH. See Memo at 29.

deemed tortious in New Hampshire. *Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 539 (1994).

What Plaintiffs fail to recognize is that they must first allege that PSNH wrongfully induced FairPoint to breach the contract. *Id.* at 540. Counts I and II of the Complaint are devoid of any such claim.⁵ Moreover, where the alleged actions by PSNH arise from a tariff or regulation, it is a question of law whether the facts set out in the Complaint state a claim. A tariff has the same force and effect as a statute, *In Re Verizon New England, Inc.*, 158 N.H. 693 (2009), and PUC regulations have the force of law. RSA 541:22, II.

As for other allegations in Count I, Plaintiffs still fail to identify any duty that required PSNH to provide immediate off-cycle meter reads, or that prevented the deletion of pending electronic enrollments when PSNH was mandated under the ISO-NE Tariff to accept PNE's customers upon its suspension from the marketplace. See pages 10-12 below. And the claims in Counts I and II that PSNH somehow "persuaded PUC Staff" to oppose the transfer of customers to FairPoint are contrary to documents as to which this Court may take judicial notice. See pages 15-16 below.

Plaintiffs' Claims Are Exempt Under RSA 358-A:3, I: Plaintiffs contend that the conduct alleged in the Complaint is not covered by the statutory exemption in RSA 358-A:3, I because it does not relate to "trade or commerce" falling within the PUC's jurisdiction. Plaintiffs

⁵ In the cases cited in the Objection, unlike here, the party claiming tortious interference pled that the defendant engaged in an act that was wrongful apart from the interference itself. And in those cases, the alleged wrongful activity was some unlawful act, breach of recognized duty, or violation of a statute. See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003) (alleged improper acts were multiple violations of the Foreign Corrupt Practices Act); *Gold v. Los Angeles Democratic League*, 49 Cal. App.3d 365 (1975) (alleged improper acts violated election process); *Mobile Mech. Contractors Ass'n v. Carlough*, 456 F. Supp. 310 (S.D. Ala. 1978) (alleged improper acts were unlawful under union rules). Plaintiffs fail to allege that PSNH wrongfully induced FairPoint to breach the contract or committed some other wrongful interference. Instead, they rely on cases from outside of New Hampshire to claim that the determination of whether interference is improper is a factual question. These cases are inapposite. Plaintiffs in those cases, unlike here, had established that the defendants' interference was improper, and the factual question dealt with whether the defendants' improper actions were privileged or justified.

are wrong. The allegations in the Complaint are squarely within such trade or commerce.

Moreover, Plaintiffs apply the wrong standard in claiming that the exemption does not apply.

1. Plaintiffs' claims occurred in the conduct of "[t]rade or commerce" that is subject to the PUC's jurisdiction

All of the Plaintiffs' claims flow from three alleged acts of PSNH: (1) not agreeing to make off-cycle meter reads; (2) deleting electronic enrollments submitted by FairPoint; and (3) not taking PNE's customers into its default service prior to the date mandated by ISO-NE. The Complaint is replete with references to statutes, regulations and tariffs governing the relationship between PSNH and the Plaintiffs generally, and specifically as to PSNH's duties in these three areas. The Complaint alleges that the PUC Tariff "contains the terms and conditions regarding PSNH's delivery service and its interaction with CEPs," that the PUC Tariff imposes the obligations on PSNH in areas at the heart of this Complaint, and asserts that PSNH "breached these Tariff obligations." Complaint at page 2. It then goes on to allege that:

- RSA Ch. 374-F created New Hampshire's electric restructuring plan, thereby giving CEPs the authority to operate. ¶¶ 20-21.
- The PUC Tariff is "intended to insure...that...PSNH does not interfere with customer choice or the transfer of customer accounts to or between CEPs," and "mandates that PSNH, when requested, transfer customer accounts from PSNH to CEPs and enable transfers of customer accounts from one CEPs to another." ¶ 26. [This concerns the off-cycle meter read issue.]
- That the system by which customers are transferred between CEPs is governed by the Electronic Enrollment (Electronic Data Interchange) ("EDI") process established and governed by the PUC. ¶¶ 27-33. [This is the EDI deletion issue.]
- "The Tariff also requires PSNH to 'arrange default service' for any customer 'that is not receiving Supplier Service from a Supplier for any reason.'" ¶¶ 36-37. [The claim that PSNH had a duty to provide default service prior to the date ISO-NE ended Supplier Service from PNE.]
- "These three tariff obligations make certain that.....PSNH must operate as a neutral gatekeeper between customers and their CEPs [*i.e.*, meter read ¶¶ 65-70], facilitate

customer's choices with respect to their CEPs [*i.e.*, EDI deletion ¶¶ 79-80], and intervene immediately should any service disruption occur [*i.e.*, default service ¶¶ 71-75]. ¶ 38.

Plaintiffs' Objection also defines PSNH's alleged breach with reference to PUC Tariff and regulations.

- Deletion of FairPoint's Electronic Enrollments: "[T]he Tariff requires PSNH to honor customer choice." Obj. at 27.
- Refusal to Perform Off-Cycle Transfers: "PSNH had an obligation to accommodate PNE's request [under Puc 2004.07(b)]." Obj. at 29.
- Failure to inform PNE of the ability to transfer 90% of customers to default service: "PSNH owed Plaintiffs a duty 'to provide Default Service for [Plaintiffs'] customer accounts should any service disruption occur'because the Tariff 'requires PSNH to arrange default service'and ... this duty logically implies an obligation by PSNH to inform Plaintiffs of its ability to transfer customers." Obj. at 31.
- Withholding of Customer Payments: Plaintiffs concede that the conduct they complain of here was alleged as a violation of RSA 374:1 and a breach of the PUC Tariff before the PUC in Docket IR 13-233. Obj. at 32.

Plaintiffs' current claim that no statutes provide for PUC jurisdiction over their relationship with PSNH is meritless. First, RSA Ch. 374-F gives the PUC the authority to restructure the electric utility industry and requires all electric utilities and distribution companies (PSNH) to file tariffs "that provide open access for all competitors." RSA 374-F:3, IV and 374-F:4, III (Supp. 2014).⁶ RSA 374:4, VIII grants broad authority to the PUC to "take such other actions that are necessary to implement restructuring and that are substantially consistent with the principles established in this chapter." RSA 374-A:7 grants the PUC jurisdiction over CEPs and authorizes it to adopt rules to implement that jurisdiction. Consistent with that authority, the PUC adopted Puc Part 2000 (which Plaintiffs rely on for their claim concerning off-cycle meter reads). Those regulations govern the relationship between CEPs and

⁶ All references to RSA Ch. 374-F are to the 2014 Supplement.

aggregators with their customers, with utilities and with the Commission. In addition, the EDI process was established and is regulated by the PUC. *See* PUC Order No. 22,914, May 4, 1998, mandating “that each distribution company implement the report’s requirements.” The PUC Tariff adopted pursuant to RSA Ch. 374-F sets out specific requirements governing PSNH’s relationship with PNE and other CEPs, including requirements: that CEPs comply with the PUC’s EDI standards (see Memo, Ex. 1, page 31, Section 1.f); that CEPs enter into service agreements with PSNH (*id.* page 32, 1.g); for the initiation and termination of service (*id.* pp. 36-37); and for metering (PUC Tariff at page 38 Section 5).⁷ CEPs are required by Puc 2003.01 to use the EDI process. Memo at 6-10.⁸

Plaintiffs completely ignore the showing by PSNH that the trade or commerce alleged in the Complaint falls within the regulatory authority of the PUC and nearly all issues in the Complaint have been raised in the PUC, in many instances by Plaintiffs. *Id.* at 21-34 and Appendix A (listing the dockets in which the issues have been raised). They also ignore their own statements to the PUC that “Supplier-Utility Disputes” and issues of contract interpretation relating thereto “are matters not only within the Commission’s jurisdiction but matters warranting application of the Commission’s particular expertise.” *Id.* at 2-3.⁹ And they ignore

⁷ PSNH did not include pages 37 and 38 with Exhibit 1 to its Memo. They are attached hereto in Exhibit A.

⁸ Plaintiffs also ignore RSA 365:1, which allows them to bring any claim against PSNH in the PUC and which served as the basis for their claims in several of the dockets set out in PSNH’s Memo at Appendix A. See Complaint in Docket IR 13-233 and in IR 14-132 referenced in Appendix A.

⁹ Plaintiffs attempt to explain away this statement by arguing that it was taken “out-of-context,” and related only to the “business relationship” in Docket IR13-233. Obj. at 21, fn.10. The statement speaks for itself and contrary to Plaintiffs’ current interpretation, is amply supported by the statutes, tariffs and regulations cited herein and by the Plaintiffs in their Complaint. Indeed, at the end of the Plaintiffs’ statement, PNE added a footnote describing the force of its agreements with PSNH and stating “[t]he Agreements - and the manner in which they are construed, their relationship to the delivery of a competitive electrical power supply to New Hampshire consumers, and their overall place in the development of a competitive marketplace - cannot simply be unhinged from the PUC Tariff Terms and Conditions at issue in this matter.” PNE pleading of October 15, 2013 in IR 13-233, fn.3.

the Settlement Agreement entered into by Plaintiffs as part of PUC Dockets DE 13-059 and 13-060 wherein they did not challenge the PUC's authority to govern the competitive marketplace and agreed to sanctions imposed by the PUC to resolve issues arising from the very conduct that forms the basis of this Complaint.

2. Plaintiffs apply the wrong standard under RSA 358-A:3, I

Further, the standard for determining whether a complaint is exempt from RSA Ch. 358-A is not limited to whether the specific practices alleged are subject to PUC jurisdiction (although in this case Plaintiffs' central allegations are) or whether "every conceivable interaction between [Plaintiffs] and PSNH" is subject to that jurisdiction. Obj. at 21. The Supreme Court described the broad scope of the exemption in *Rainville*:

The plaintiffs also argue that the PUC's jurisdiction does not extend to deceptive practices related to water quality. This frames the issue incorrectly. The issue is not whether a party's *deceptive practice* is subject to the PUC's jurisdiction, but whether the practice occurred in the conduct of "[t]rade or commerce" that is subject to the PUC's jurisdiction. RSA 358-A:3, I (emphasis added)...[I]f a party engages in an unfair method of competition or unfair or deceptive practice in the conduct of "[t]rade or commerce" that is subject to the jurisdiction of one of these agencies or officers, the CPA does not apply.

Rainville v. Lakes Region Water Co., Inc., 163 N.H. 271, 276 (2012) (emphasis in original).

Thus, if the allegedly deceptive acts arise from the conduct of trade or commerce subject to PUC jurisdiction, the exemption applies. It is irrelevant whether the PUC has jurisdiction over every aspect of the dispute or over every allegedly deceptive practice.

Plaintiffs cite this test (Obj. at 20 fn.9), but contend that the PUC has jurisdiction only over the relationship between PSNH and its customers and not over disputes like this one. *Id.* at 19-20. In support, they cite many sections of RSA Ch. 374 (and a few of RSA Ch. 381 and 378), as if these were the only statutes delineating the PUC's jurisdiction. But they ignore RSA Ch. 374-F which, as shown above, provides the PUC with specific authority to regulate CEPs,

utilities, and the trade or commerce under which this dispute arose and on which Plaintiffs previously relied to assert PUC jurisdiction in multiple disputes with PSNH. Memo App. A.¹⁰ They apparently expect this Court to ignore both the allegations of their Complaint and their prior unequivocal admissions concerning PUC jurisdiction in this area.¹¹

Because the Plaintiffs allege that the PUC Tariff or regulations govern the duties PSNH allegedly violated and because the applicable statutes give the PUC jurisdiction over the relationship at the heart of this dispute, the practices described in the Complaint occurred in the conduct of “[t]rade or commerce” subject to the PUC’s jurisdiction, and Count III should be dismissed.

Counts IV and V Fail to State a Claim: PSNH moved to dismiss these Counts because Plaintiffs failed to identify any duty supporting a negligence claim and were actually raising claims under the PUC Tariff without alleging any violation of its provisions. Memo at 20.¹² In response, Plaintiffs claim that PSNH owed it a general duty to “act as a neutral, agnostic

¹⁰ Plaintiffs create a straw man by citing statements made by PSNH counsel to the effect that the PUC is an agency of limited jurisdiction with only those powers granted to it by the Legislature. Obj. at 17 and Exhibits B and C to the Objection. PSNH does not dispute this limitation. But here, the Legislature has granted the PUC broad and specific statutory authority regarding the matters asserted in the Complaint. *See e.g.* RSA 374-F:7, I (“Notwithstanding a competitive energy supplier’s non-utility status, the commission is authorized to establish requirements, excluding price regulation, for competitive electricity suppliers, including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements.”); RSA 374-F:7, III (“The commission is authorized to assess fines against, revoke the registration of, and prohibit from doing business in the state, any competitive electricity supplier which violates the requirements of this section or any other provision of this title applicable to competitive electricity suppliers.”); RSA 374-F:7, V (“The commission shall adopt rules, under RSA 541-A, to implement this section.”) The Plaintiffs ignore this statutory authority relating to the matters set forth in the Complaint.

¹¹ Plaintiffs argue that PSNH did not meet its burden on the exemption because it failed to identify the authority giving the PUC jurisdiction. Obj. at 21. Apart from the fact that the Plaintiffs identified that authority – as described herein – Plaintiffs ignore pages 6-10 of PSNH’s Memo, which spelled out the ways in which the PUC Tariffs and regulations apply to this dispute. As a result of Plaintiffs’ allegations and admissions, PSNH did not need to be expansive in contending that RSA 358-A:3, I exempted the acts alleged here.

¹² At page 25 of its Objection, Plaintiffs now identify specific provisions of the PUC Tariff that were allegedly violated. But contrary to their argument, none of the referenced paragraphs of the Complaint cited to the Tariff, nor did Counts IV and V of the Complaint.

gatekeeper,” unrelated to the PUC Tariff. Obj. at 24. Plaintiffs fail to cite to any common law, statutory, regulatory, or tariff provision creating this general duty. They also ignore the fact that their Complaint alleges that the source of every duty relating to the transfer of accounts and to default service is the PUC Tariff. Comp. at page 2 and Obj. at 24-25. Put simply, Plaintiffs now contend that a negligence claim may be asserted even if the duties set out in the PUC Tariff have not been violated. Yet they fail to cite any case law or duty requiring PSNH to provide services contrary to, or beyond, the relationships set out in that Tariff, particularly where their dealings with the utility are entirely governed by the Tariff. And as for the PUC Tariff provisions cited, none of those provisions gives rise to a cause of action. See discussion immediately below.¹³

Plaintiffs Have Failed to State A Claim As to Each of the Allegedly Wrongful Acts:

In Part V of the Objection, Plaintiffs assert that under standards applicable to motions to dismiss, each of the alleged substantive claims survive because the facts alleged in the Complaint must be taken as true. Obj. at 25. But allegations must do more than simply state “legal conclusions and amorphous accusatory statements.” *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 48 (1987). Here, Plaintiffs’ factual claims have been shown to be deficient as a matter of law based on PUC Tariff

¹³ Plaintiffs cite cases for the proposition that a violation of a tariff may give rise to a claim in negligence. Obj. at 22. But those cases involve claims by members of the public for personal injury (*State Farm v. PECO*) for failure to list individuals in phone directories (*Behrend v. Bell*, and *Consumers Guild v. Ill. Bell*) or for misrepresentation regarding or failure to provide service to members of the public (*Mobile v. Firstel* and *Olson v. Pac. Nw. Bell*.) None of those cases recognizes a negligence claim for alleged breach of a tariff in a situation like that at issue here, where the relationship between Plaintiffs and PSNH is explicitly governed by the PUC Tariff and where the alleged duty arises only under the PUC Tariff. Likewise, Plaintiffs’ attempt to create some general duty to protect against foreseeable risks finds no support in case law concerning the duty of a business to invitees provide a safe workplace (*Werst v. Wal-Mart*), to protect female students from physical harm by outsiders on a college campus (*Mullins v. Pine Manor*), or social invitees from personal injury from fireworks (*Luoni v. Berube*). Obj. at 23.

provisions, regulations, statutes, PUC Orders and referenced or publicly available documents.

Memo at 2.¹⁴

1. **Deletion of FairPoint's Electronic Enrollments (Comp. ¶¶ 77-79, 91; Memo at 26; Obj. at 26):** Plaintiffs contend that PNE's default with ISO-NE and the consequence of that default (the "drop" of its customers and their automatic assignment to PSNH's Default Service) did not impact PSNH's obligation to transfer PNE's customers to FairPoint without deleting FairPoint's EDIs. Plaintiffs point to PSNH's transfer of customers to FairPoint the day after PNE's default as proof of this claim. Obj. at 26-28. However, Plaintiffs ignore the fact that the desired transfer of customers to FairPoint was not immediate but per the PUC Tariff, was to occur only at the next meter reading cycle date for each customer, and that until that meter reading, PNE was obligated to provide service to those customers. PUC Tariff Section 6. See Memo, Ex. 1 at 11. Therefore, Plaintiffs' citation to the provisions of the PUC Tariff concerning notice to PNE and FairPoint of the validity of the EDIs is irrelevant. Obj. at 25.

Prior to PNE's default, PSNH processed the change in supplier and transferred PNE customers to FairPoint, as Plaintiffs concede. *Id.* at 28. But upon default and PNE's suspension from the wholesale marketplace, when the FERC-jurisdictional ISO-NE Tariff required PSNH to take responsibility for PNE's customers, the situation changed. At that point, whether PSNH had the specific status of a "Supplier" under the PUC Tariff, the PUC specifically found that PNE's customers had been assigned to PSNH and that PSNH was obligated to supply energy to them. Memo at 23. Since, as the PUC found, PNE's customers had been dropped by PNE's default,

¹⁴ PSNH addressed each of Plaintiffs' alleged violations of law in Section III.B of its Memo at 21-33. This Reply does not repeat its prior detailed response (*id.* 28-33) to Plaintiffs' arguments concerning the withholding of customer payments, that PSNH supposedly "prompted" the PUC Staff to initiate show cause proceedings, or that PSNH "pursued an aggressive media campaign" against them. These claims are alleged to support a violation of RSA Ch. 358-A only, and are thus barred for the reasons stated above.

PSNH became the de facto supplier under the ISO-NE Tariff. *Id.* Therefore, because the PUC Tariff provides that PSNH “shall accept no more than one Supplier per month,” PSNH was within its rights to delete the FairPoint enrollments, *i.e.*, to avoid the transfer to a second supplier in the same meter reading period. PUC Tariff Section 6, Memo Ex. 1 at 11. Plaintiffs contend that this result defeated customer choice. But as part of the proposed transfer to FairPoint, customers were *required to be given a choice to change suppliers* and Plaintiffs acknowledged to the PUC that they had that right. See page 2 above. If, subsequent to PNE’s default and suspension from business, Plaintiffs and FairPoint had wanted to effectuate the transfer of these customers, and if they had the legal authority to do so, they could have resubmitted the EDI enrollments following each customer’s meter reading date – but they never did.

Finally, Plaintiffs’ entire argument is based on its reading of the language in Section 6 of the PUC Tariff concerning the acceptance of more than one supplier in a month. Plaintiffs’ interpretation is foreclosed by Order No. 25,660 (Memo at 23) wherein the PUC decided that under the terms of the ISO-NE Tariff, PNE by its default and suspension “initiated the drop of its own customers” to PSNH’s default service. If PNE wanted to quarrel with that conclusion, it should have appealed the PUC Order to the Supreme Court. RSA 541:22. But if there is any lingering dispute over the meaning of the language in the Tariff, that dispute should be decided by the PUC.

2. Rejection of Request to Perform Off-Cycle Meter Readings and an Immediate Transfer of Customers (Comp.¶¶ 65-70; Memo at 21; Obj. at 28): PSNH showed that Plaintiffs failed to allege or identify *any* authority supporting their claim that PSNH was required to read nearly 8,000 customer meters scattered throughout New Hampshire over a holiday weekend in order to accommodate an immediate transfer of customers to FairPoint.

Moreover, Plaintiffs had expressly represented to the PUC that no such off-cycle meter reads would be necessary because customers would be transferred at the next meter cycle. Memo at 21, fn. 25. In response, Plaintiffs point to Puc Rule 2004.07 (b) and (c), which they now claim required PSNH to “negotiate a reasonable extension of time for the completion” of the request. Obj. 29.¹⁵ That Rule applies only “[w]hen a residential or small commercial electric customer has failed to meet any of the terms of its agreement for service” with a CEP, the CEP seeks to terminate the service, and then seeks an off-cycle meter read for that purpose. See Puc 2007.04 (a).¹⁶ Requiring negotiation for a special off-cycle meter reading where the CEP terminates an individual customer for breach is very different from a request to provide off-cycle meter reads for thousands of customers – none of which is being terminated for failure to meet PNE’s terms of service.¹⁷

Plaintiffs also quarrel with PSNH’s contention that once PNE defaulted, any request for immediate transfer (which was dependent on the off-cycle meter reading) was moot because PNE had no authority to operate. Obj. at 29. Plaintiffs interpret PUC Order 25,660 and the ISO-NE Tariff as allowing the continued assignment of their customers to FairPoint because they had supposedly assigned them before their default. *Id.* at 30. This argument is contrary to that Order, which clearly states that upon PNE’s default and suspension, its customers were

¹⁵A copy of the entirety of Rule 2004.07 is attached as Exhibit B for the Court’s convenience. Note that Section 2004.07 is entitled “Notice of Termination of Service.”

¹⁶ Plaintiffs posit that the obligation to negotiate arose when their counsel made an oral request on February 12, 2013 and assert that this is a question of fact that must be construed in their favor. Obj. at 29, and fn.16. Even if the Rule applied, it requires “written notice” given five “business days” in advance in order to trigger the requirement to negotiate. Plaintiffs do not allege-nor could they-that written notice was given before February 14, 2013. Memo at 22 and Exhibit 8 thereto. But even if notice had been given in writing on February 12th, by February 14th-two business days later-PNE had been suspended and had no ability to do business at all. *Id.*

¹⁷ Plaintiffs themselves have questioned the applicability of Puc 2004.07. In March 2014, PNE filed a declaratory judgment proceeding in the PUC asking the PUC to decide that Rule 2004.07 (b) required PSNH to have a provision governing off-cycle meter reads in its Tariff. See PNE Petition in Docket DE 14-066 attached hereto as Exhibit C. If the Rule itself provided such a duty, there would have been no need to file the Petition.

automatically assigned to PSNH. Memo at 23.¹⁸ As noted above, PNE did not appeal that Order.

3. Failure to Inform PNE of Possible Transfer to Default Service (Comp. ¶ 23; Memo at 24; Obj. at 31): Plaintiffs argue that it is “reasonable to infer” that the duty under the PUC Tariff to “arrange default service” required PSNH to inform PNE of its ability to transfer customers to default service on an automated basis. Obj. at 31. They claim that if PSNH had so advised them, they could have transferred customers prior to their default and stopped the “financial bleeding” that resulted from PNE’s *obligation* under the ISO-NE Tariff to replenish its security account with ISO-NE. But the PUC Tariff has no such requirement. To the contrary, the PUC Tariff states, “In the event that a Customer is not receiving...Supplier Service from a Supplier for any reason, the Company will arrange Default Service....” Tariff NHPUC No.8, Original Page 10 at para. 4 (attached hereto as part of Exhibit A). Per the direction of ISO-NE, customers continued to receive service from PNE until February 20, 2013. Only when those customers no longer were receiving their electricity from PNE did the PUC Tariff require PSNH to arrange the provision of default service.

No matter how much Plaintiffs try to spin what the PUC said about this issue, they cannot avoid the fact that Order No. 25,660 made a specific finding that “PNE knew that its suspension would result in the automatic assignment of its customers” to PSNH’s default service. Memo at 23. PSNH had no duty to tell PNE what PNE already knew. Moreover, PNE does not allege that it legally could have initiated an immediate and voluntary transfer of customers to PSNH’s default service prior to its default had it “known” of this alleged ability. With good reason: such

¹⁸ See also PUC Order No. 25,488, Docket No. DE 11-216, April 8, 2013 at 19. (“If competitive suppliers are unable to meet their obligations, customers are automatically switched to the default energy service rate of their distribution utility so that there is no break in their power supply.”) Plaintiff PNE was an intervenor in that proceeding.

a transfer would have been barred by the PUC's Rules, which require 14 days prior notice to and approval by each customer prior to such a transfer (see Puc 2004.05, the very rule that Plaintiffs asked the PUC to waive in Docket DE 13-049 in order to transfer customers to FairPoint), and the express terms of the PUC Tariff restrict customer transfers to the date of the next meter read. Memo Ex. 1 at page 11, para. 6.¹⁹

4. Negotiation of a Later Date to Assume PNE's Load With ISO-NE

(Comp.¶ 74; Memo at 25; Obj. at 32): Despite the terms of the ISO-NE notice requiring PSNH to assume PNE's load asset at 12:01 A.M. on February 20th, Plaintiffs say the establishment of this deadline (and thus whether PSNH negotiated a later date with ISO-NE) "amounts to nothing more than a factual dispute." Obj. at 25. The notice and Plaintiffs' prior admissions directly contradict this claim, which is simply a conclusion unsupported by *any* facts.

Plaintiffs do not dispute that they voluntarily defaulted on February 14th or that the ISO-NE notice of default was issued that day. Given the date of the default and the immediate notice by ISO-NE, Plaintiffs' allegations are not plausible. In fact, Plaintiffs have previously stipulated to the fact that the transfer of customers to PSNH's default service, and the timing of that transfer, was mandated by ISO-NE. In a Joint Statement of Facts filed with the PUC in Docket IR 13-233, Plaintiffs stipulated as follows:

17. On February 14, 2013, PNE was suspended by ISO-NE from participation in the New England wholesale electric market. *Further, on that same date, ISO-NE*

¹⁹ What Plaintiffs are actually complaining about is that PSNH somehow "*delayed* assuming PNE's load asset" and thus "allowed PNE's BlackRock account with ISO-NE to continue to be depleted." Obj. at 31 (emphasis in original). While it is unclear what the period of "delay" is alleged to be, Plaintiffs assert that when PSNH denied its request for immediate meter reads "the next best option for PNE to relieve its financial assurance obligations was for PSNH to immediately assume its remaining load asset." *Id.* fn. 20. But again, Plaintiffs do not allege that they ever asked PSNH to assume their load asset on its default service and by virtue of the ISO-NE notice to PSNH, the ISO-NE and PUC Tariffs imposed no obligation on PSNH to assume that load before February 20th. Memo at 25-26 and Exhibit 8. Plaintiffs simply contend that PSNH had a duty to alleviate the harm created by an *obligation* PNE voluntarily assumed when it chose to do business as a CEP and accepted the terms of the ISO-NE Tariff.

notified PSNH that pursuant to the ISO-NE Tariff, as the host utility PSNH must assume the load assets that had been held by PNE by 0001 hours on February 20, 2013....

...
19. On or after February 20, 2013, the remaining customer accounts in the suspended PNE load asset were moved by PSNH to PSNH Default Service *as required by ISO- NE.*

See Joint Statement of Agreed Facts, PUC Docket No. IR 13-233, February 14, 2014, at 3-4 (emphases added) (attached hereto as Exhibit D).

5. Efforts to Persuade PUC Staff to Oppose Resubmission of Electronic

Enrollments (Comp. ¶¶103- 107; Memo at 28-32; Obj. 33-36): Plaintiffs also contend that whether PSNH persuaded the PUC Staff to oppose attempts by Resident Power or FairPoint to re-submit EDIs by questioning Resident Power's status as an aggregator is a "factual dispute." Obj. at 34. This claim is based entirely on a pleading filed by PSNH in Docket DE 12-295. Memo at 29; Obj. at 34-35. Plaintiffs do not assert that the pleading was inaccurate, but only that it failed to include "qualifying language" in Resident Power's notice to customers, thereby causing the PUC Staff to "adopt PSNH's position." Obj. at 35. Only if one ignores the language of the pleading can this be said to be a factual dispute.

PSNH challenged PNE's standing to continue a complaint against it in Docket DE 12-295 due to PNE's suspension by ISO-NE. The pleading referenced and contained a link to the entirety of Resident Power's notice to its customers. *Id.* Memo at 29, fn.34. Moreover, PSNH's pleading was filed on February 27, 2013, the same day that PUC Staff filed its Memo in PUC Dockets DE 13-059 and 13-060 recommending that Plaintiffs show cause why they should not be subject to penalties related in part to their notice. Memo Ex. 4. The Staff Memo not only referenced the "qualifying language" PSNH is said to have excluded, but attached a copy of the

entire notice. *Id.* at 4 and Ex. 1 to the Staff Memo. Plaintiffs thus allege that the Staff was misled by the omission of language the Staff itself actually quoted to the PUC.²⁰

Plaintiffs' attempt to demonstrate that they have adequately alleged that PSNH caused Staff to raise the issue of "slamming" fares no better. Obj. at 36. The cited statement reflects PSNH's legal position on the PUC Tariff and on its face, has nothing to do with slamming. Obj. at 36.

Res Judicata Bars These Claims: Plaintiffs contend that because they did not assert these claims in PUC Docket IR 13-233, they are not barred here. But that is not the test. If Plaintiffs could have raised them there, they are barred. Memo at 34. Plaintiffs' cause of action in that Docket related entirely to the transactions that underlie its instant Complaint and the PUC Tariff provisions that regulate the parties' conduct. All three foundational issues to the instant matter [(1) off-cycle meter reads; (2) EDI enrollment issue; and (3) when default service begins] arise from the same PUC Tariff, the same regulations, and the same transaction, and could have – and should have – been raised before the PUC in that proceeding.

The Doctrine of Primary Jurisdiction Favors Referral to the PUC: Plaintiffs misconstrue the doctrine of primary jurisdiction, which provides that "a court will refrain from exercising its *concurrent* jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it." *N.H. Div. of Human Servs. v. Allard*, 138 N.H. 604, 607 (1994) (internal quotation and citations omitted) (emphasis added). The PUC need not have "exclusive jurisdiction" over an action for a court to abstain while it refers claims

²⁰ Plaintiffs point to alleged communications between PSNH's counsel and PUC Staff concerning Resident Power's petition for declaratory relief and note that PSNH does not address these in its memo. Obj. at 35. PSNH did not do so because the statements are irrelevant. Plaintiffs do not allege that PUC Staff relied on these statements to take any action against them.

to the agency in the first instance. Rather, as in this case, the Court should exercise its discretion to refer this matter to the PUC because that agency has jurisdiction to decide Plaintiffs' claims and those claims "contain some issue within the special competence of [the PUC]." *Frost v. Comm'r, New Hampshire Banking Dep't*, 163 N.H. 365, 371 (2012), quoting 2 Am.Jur.2d *Administrative Law* § 480, at 407 (2004).²¹

Here, as explained above, the PUC has jurisdiction over Plaintiffs' claims, all of those claims (including all of those identified at pages 48-49 of the Objection) arise out of PSNH's alleged breaches of the PUC Tariff and regulations, and Plaintiffs have conceded the PUC's expertise. See pp. 3-8 above. Interpreting the PUC Tariff and regulations and determining, based upon a review of the relevant facts, whether they were breached is best left to the specialized expertise of the PUC.²² Further, this action involves an issue of first impression—the interpretation of complex tariffs and regulations in the context of the default of a CEPS. See *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (applying primary jurisdiction doctrine to an issue of first impression and referring the matter to the Register of Copyrights); *Rovai v. Select Portfolio Servicing, Inc.*, No. 14-CV-1738-BAS WVG, 2015 WL 3613748, at *3 n.2 (S.D. Cal. May 11, 2015) (referring matter to the IRS under the

²¹ *Nelson v. Public Service Co.*, 119 N.H. 327 (1979) supports this proposition. In *Nelson*, the New Hampshire Supreme Court was tasked with deciding whether a district court's small claims jurisdiction extended to a ratepayer's action against a public utility to recover an alleged overcharge. *Id.* at 328. Noting that RSA 365:1 contained no reference to primary or exclusive jurisdiction, the Court found that the permissive jurisdiction granted to the PUC by that statute did not deprive the district courts of their jurisdiction. *Id.* at 330. Invoking the principles underlying the doctrine of primary jurisdiction, the Court held that "[t]he issue before us does not involve the type of rate case that is usually within the commission's sole expertise" and "does not involve the complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission." *Id.*

²² Plaintiffs' reliance on *Wisniewski* and *Frost* is misplaced. In *Wisniewski*, the Court determined that the doctrine of primary jurisdiction did not apply because the administrative agency at issue had no jurisdiction over the plaintiffs' claims. See *Wisniewski v. Gemmill*, 123 N.H. 701, 706 (1983). In *Frost*, the Court held that the trial court did not abuse its discretion in exercising its jurisdiction because the question was whether the Banking Department had any jurisdiction over the transactions at issue under the relevant statute. See *Frost v. Comm'r, New Hampshire Banking Dep't*, 163 N.H. 365, 372 (2012).

doctrine of primary jurisdiction where issue presented was a matter of first impression and required expertise and uniformity to properly administer). The issue here may be described as follows:

When PNE (a Market Participant as defined by applicable federal tariffs) defaulted under ISO-NE financial security requirements, and failed to cure that default after notice leading to its suspension, and PSNH (the Host Market Participant) was required to take responsibility for PNE's electrical load, what measures was PSNH allowed or required to take under New Hampshire statutes, regulations, PUC orders and the PUC Tariff to address the impact of that default? In particular, in that situation, was PSNH entitled to delete enrollments pending in the Electronic Data Interchange (a system under the jurisdiction of the PUC) as part of its obligation to comply with the ISO-NE Tariff to assume responsibility for serving the electricity needs of PNE's customers when, due to its default, PNE is not able to do so?

It is readily apparent that these issues are specialized matters for PUC consideration that will significantly impact the rules of the electricity marketplace for all utilities, CEPs, aggregators, and consumers. They should not be decided by a jury.

Nor does referral to the PUC foreclose Plaintiffs' ability to seek relief in this Court once the PUC has rendered a final decision. *See Bd. of Trustees of Univ. Sys. of N.H. v. Keene State Coll. Educ. Ass'n*, 126 N.H. 339, 342 (1985) ("Primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review."). If the PUC finds that PSNH violated its Tariff or regulations, Plaintiffs may then seek damages for any such violations in this Court.

Accordingly, the Court should dismiss the Complaint or stay it until the PUC has had the chance to address Plaintiffs' claims. Once the PUC renders a final decision, the Court can then determine whether or not Plaintiffs may move forward with their claims in this action.

Respectfully submitted,

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

By its attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

Date: September 21, 2015

By: Wilbur A.

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CERTIFICATE OF SERVICE

I, hereby certify that on this 21st day of September 2015, I served the foregoing Memorandum via electronic mail and first class mail to:

Robert M. Fojo, Esquire
Fojo Dell'Orfano, P.L.L.C.
889 Elm Street, 5th Fl.
Manchester, NH 03105
rfojo@FojoDell.com

Wilbur A. Glahn, III

A

The Company does not undertake to regulate the voltage or frequency of its service more closely than is standard commercial practice or required by the rules of the Commission. If the Customer requires regulation of voltage or frequency that is more refined, the Customer shall furnish, install, maintain and operate the necessary apparatus at the Customer's expense.

4. Availability

Delivery Service shall be available to a Customer who has made an Application and has satisfied all of the requirements of this Tariff. Delivery Service shall be available solely for the delivery of electricity from a Supplier to a Customer or for the delivery of Default Service or Self-Supply Service to a Customer.

In the event that a conflict arises between this Tariff and the Terms and Conditions specifically related to transmission service under NU System Companies Transmission Service Tariff No. 10, or successor thereto, then NU System Companies Transmission Service Tariff No. 10 will apply.

In the event a conflict arises between this Tariff and the Settlement Agreement, then the Settlement Agreement will take precedence over this Tariff.

In the event that a Customer is not receiving Self-Supply Service and is not receiving Supplier Service from a Supplier for any reason, the Company will arrange Default Service provided the Customer has satisfied all the requirements for service under this Tariff.

5. Application, Contract and Commencement of Service

Application by the Customer for Delivery Service may be made to the Company at any time. Whether or not an Application for service is made by the Customer and accepted by the Company, the rendering of the service by the Company and its use by the Customer shall be deemed a contract between the parties and subject to all provisions of the Tariff, as in effect from time to time, applicable to the service.

Except as otherwise specifically provided for under a rate, all rates are predicated on a period of service at one location of not less than twelve (12) consecutive months with monthly billing and monthly payment. The rendering of bills to Customers under this Tariff shall be performed exclusively by the Company.

Issued: July 2, 2010

Issued by: Gary A. Long

Effective: July 1, 2010

Title: President and Chief Operating Officer

If a Supplier's Electronic Enrollment fails to meet the requirements of this Tariff, the Company shall, within one business day of receipt of the Electronic Enrollment, notify the Supplier through an EDI Error notice.

(b) Termination

To terminate Supplier Service with a Customer, the Supplier of record shall submit electronically to the Company a valid "Supplier Drops Customer" transaction. Supplier Service shall terminate on the date of the Customer's next meter read date, provided that the "Supplier Drops Customer" transaction is submitted and successfully processed at least two business days prior to the Customer's scheduled meter read date. If the "Supplier Drops Customer" transaction is not received at least two business days prior to the scheduled meter read date, Supplier Service will terminate on the subsequent meter read date. The Company shall send a "Confirm Drop Date" transaction to the Supplier of record. The Supplier of record will be responsible for notifying the Customer of the termination date.

In cases where the Company uses estimated energy and demand values for billing purposes and the estimated bill coincides with the termination of Supplier Service, the Supplier shall agree to accept the estimated metering values as final values. The Company shall not be obligated to reconcile the estimated values after actual meter reading values are available.

(c) Customer Moves

If a Customer of record moves within the Company's Service Area and the Customer or designee notifies the Company prior to the initiation of Delivery Service at the new service location that he/she wishes to continue Supplier Service with the Supplier of record, the Company shall send a "Customer Move" notice to the Supplier and no Electronic Enrollment is necessary for the continuation of Supplier Service.

If a Customer of record initiates Delivery Service at a new service location, in addition to another established account within the Company's Service Area, the Customer shall be responsible for selecting a Supplier for the new service location. If an Electronic Enrollment is not received by the Company at least two business days before the initiation of Delivery Service, the Customer will be rendered energy and capacity under Default Service.

Unless the Company is notified otherwise by the Customer, the Company treats all applications for Delivery Service as a new Customer to the Service Area and the Customer will be rendered energy and capacity under Default Service at the new service location. In the event the Company is informed that the new application for Delivery Service is a Customer of record on or after the date Delivery Service is initiated, the Supplier will be notified either by the Customer Usage Information or the Customer Usage and Billing Information EDI transactions, if and when Delivery Service is terminated at the prior service location.

Issued: July 2, 2010

Issued by: Gary A. Long

Effective: July 1, 2010

Title: President and Chief Operating Officer

(d) Other

In the event a Delivery Service account is terminated by either the Customer or the Company, such termination will be shown on either the Customer Usage Information or the Customer Usage and Billing Information EDI transactions.

4. Interruption, Disconnection and Refusal of Delivery Service

Any interruption, disconnection and refusal of Delivery Service by the Company shall be in accordance with this Tariff and the rules of the Commission. The Company shall not be liable for any revenue losses to Suppliers as a result of an interruption or disconnection of Delivery Service to an existing Customer.

In the event the Company refuses to supply or expand Delivery Service for any reason, the Company shall not be responsible for any losses or damages (direct, indirect or consequential) to a Supplier resulting from the corresponding loss of compensation.

5. Metering

The Company shall meter each Customer in accordance with Tariff provisions. Each Customer shall be metered or its load estimated such that the loads can be reported to the ISO-NE for inclusion in the Supplier's, or applicable NEPOOL member's, load calculations.

In the event a Supplier utilizes the Company's meter readings for billing purposes, the Company shall not be responsible for any loss or damage to a Supplier resulting from a failure of the Company's metering equipment to partially or fully register the amount of electricity consumed by a Customer.

Should a Supplier install metering equipment or any other equipment on Customer-owned facilities which interferes with the operation of the Company's metering equipment or any other Company-owned equipment, the Supplier shall undertake best efforts to remedy the interference in a timely manner and shall compensate the Company for any damages resulting from the interference. Failure to remedy the interference may result in the termination of Delivery Service after 30 days' notice to the Supplier and Customer.

The Company is not obligated to use metering data registered by Supplier-owned metering equipment for the purpose of billing Delivery Service under this Tariff or for reporting load to ISO-NE.

Issued: July 2, 2010

Issued by: Gary A. Long

Effective: July 1, 2010

Title: President and Chief Operating Officer

B

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

(b) Upon request of a customer, the CEPS shall provide the customer with a clear and concise statement of the customer's actual consumption for each billing period during the prior year or the months in which the CEPS sold electricity to the customer.

Source. #7758, eff 9-4-02; ss by #9774-A, eff 8-26-10 (from Puc 2004.05)

Puc 2004.07 Notice of Termination of Service.

(a) When a residential or small commercial electric customer has failed to meet any of the terms of its agreement for service with its CEPS, the CEPS may terminate its agreement to sell electricity to the customer as follows:

(1) The CEPS shall provide written notice of the termination, stating the reason(s) for the termination, to the customer no less than 10 business days prior to the termination; and

(2) The actual date of termination of the agreement to sell electricity by that CEPS shall be upon the customer's next meter read date that falls not less than 10 business days after issuing notice to the customer, provided that notice to the utility provided for in (d) below is also met.

(b) Nothing shall prevent a CEPS from requesting an off-cycle meter reading, except that:

(1) In requesting an off-cycle meter reading, a CEPS:

a. Shall give at least 5 business days' written notice to the utility; and

b. May be subject to a reasonable charge from the utility for such reading not to exceed the charge for performing an off-cycle meter reading for the utility's customer as defined in the utility's tariff;

(2) The utility may deny any request for an off-cycle meter reading if proper notice as described in (1)a. above is not provided; and

(3) To 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.

(c) A CEPS shall provide not less than 5 business days' written notice to customers, other than residential or small commercial electric customers, prior to terminating electric service when the customer has failed to meet any of the terms of the agreement for service.

(d) A CEPS shall provide not less than 2 business days' electronic notice to the utility prior to terminating electric service to any customer who has failed to meet the terms of its agreement for service with the CEPS, unless the 2 day notice is waived by the utility.

(e) When a CEPS terminates service to a customer, it shall provide written notice to the customer that shall include a statement that termination of service will not result in disconnection from the electricity grid, and that the customer may obtain service from another CEPS or return to default service, subject to the provisions of the default service provider.

(f) Any CEPS that ceases to sell electricity within the state shall, prior to discontinuing such service:

(1) Provide at least 30 days written notice to any affected utility and to the commission; and

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

(2) Provide each customer written notice of its intent to cease operations at least 30 days prior to the start date of the customer's next billing cycle;

(g) Any CEPS that ceases to sell electricity to a class of customers within the state shall refund to customers any outstanding deposits or prepayments within 30 days of final billing.

Source. #7758, eff 9-4-02; ss by #9774-A, eff 8-26-10 (from Puc 2004.06)

Puc 2004.08 Customer Protections Required of Aggregators.

(a) An aggregator shall, within 5 days of entering into an agreement with a customer, provide each customer with a written statement disclosing the following information:

- (1) The name, business address, telephone number and e-mail address of the aggregator;
- (2) The nature of any business relationships or affiliations with any CEPS or utility;
- (3) The toll free telephone number of the commission's consumer affairs division and a statement that customers may contact the commission if they have any questions about their rights and responsibilities; and
- (4) A statement, not inconsistent with Puc 2004.09, of the customer information that will be accorded confidential treatment.

(b) The disclosure statement required by this section shall be written in plain language, and be legibly typed or printed in a font size no smaller than 12 point.

(c) An aggregator shall comply with the telemarketing and solicitation provisions of Puc 2004.03 and 2004.04 as stated above.

Source. #7758, eff 9-4-02; ss by #9774-A, eff 8-26-10 (from Puc 2004.07)

Puc 2004.09 Release of Confidential Customer Information.

(a) No CEPS or aggregator shall release confidential customer information without written authorization from the customer, unless otherwise required by law.

(b) Confidential customer information shall include, but not be limited to:

- (1) Customer name, address, e-mail address and telephone number; and
- (2) Individual customer payment information.

(c) A CEPS or aggregator shall be deemed authorized to obtain customer usage information when it has secured from the customer, in writing, the customer's name, account number(s), and the unique utility assigned authorization number(s).

(d) In the event of a dispute about the release of confidential information, including whether the information is or should be confidential, a CEPS, aggregator or customer may file a complaint with the commission for resolution.

Source. #7758, eff 9-4-02; ss by #9774-A, eff 8-26-10 (from Puc 2004.08)

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

PNE ENERGY SUPPLY LLC

PETITION FOR DECLARATORY RULING REGARDING RULE PUC 2004.07(b)(1)(b.)

Now Comes PNE Energy Supply, LLC (“PNE”) and, pursuant to Rule Puc 207.01, seeks a declaratory ruling regarding the proper interpretation of Rule Puc 2004.07(b)(1)b. with respect to the availability off-cycle meter reads, and in support hereof says as follows:

1. This Petition for Declaratory Ruling seeks a determination by the Commission as to whether Public Service of New Hampshire (“PSNH”) is required by Rule Puc 2004.07(b)(1)b. to have a provision in its tariff providing for “an off-cycle meter reading.”

2. On December 18, 2013, PNE sent a letter to PSNH explaining its position that, under Rule Puc 2004.07(b), “the availability of an off-cycle meter read is not constrained to circumstances where a customer has failed to meet any of the terms of its agreement with a CEPS.”

3. In its reply by letter dated December 23, 2013, PSNH stated that it “interprets the rule to make a customer’s breach of its agreement with a CEPS... to be a condition precedent to a valid request for a mid-cycle¹ meter read.”

4. Rule Puc 2004.07(b)(1)b. provides that in requesting an off-cycle meter reading, a CEPS “may be subject to a reasonable charge from the utility for such reading not to exceed the charge for performing an off-cycle meter reading for the utility’s customer as defined in the utility’s tariff [.]”

5. Accordingly, Rule Puc 2004.07(b)(1)b. is expressly premised and dependent upon the general requirement for utility to have a provision in its tariff providing for “an off-cycle meter reading.”

6. PSNH does not have a provision in its tariff providing for “an off-cycle meter reading.”

¹ Although Rule 2007.04(b) expressly and exclusively uses the term “off-cycle,” PSNH appears to prefer to use the term “mid-cycle.”

WHEREFORE, PNE Energy Supply LLC respectfully requests the Commission to issue a ruling declaring that PSNH is required to have a provision in its tariff providing for an off-cycle meter reading, and to grant such other and further relief as may be just and equitable.

RESPECTFULLY SUBMITTED,
PNE Energy Supply LLC
by its Attorney,

Dated: March 6, 2014

/s/ James T. Rodier
James T. Rodier, Esq.
1465 Woodbury Ave., No. 303
Portsmouth, NH 03801-5918
jrodier@mbtu-co2.com

AFFIRMATION

I hereby affirm that I have knowledge of the relevant facts stated in the foregoing Petition and that those facts are true and accurate to the best of my knowledge and belief.

James T. Rodier
NH Bar #8583

D

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into
Dispute Between PNE Energy Supply, LLC and Public Service Company of New
Hampshire**

JOINT STATEMENT OF AGREED FACTS

NOW COMES the Petitioner PNE Energy Supply, LLC ("PNE") and the Respondent Public Service Company of New Hampshire ("PSNH") (collectively, the "Parties"), in response to the Secretarial Letter of the New Hampshire Public Utilities Commission ("Commission") dated February 3, 2014, requesting that the Parties submit no later than February 14, 2014, a joint statement of agreed facts for use by the Parties and the Commission at a hearing scheduled by the Commission in this matter for February 18, 2014. For their Joint Statement, the Parties state as follows:

1. PNE is a duly registered competitive electric power supplier ("CEPS") under Puc 2003.01.
2. PSNH is a New Hampshire electric utility subject to the jurisdiction of the Commission under RSA Chapters 362 and 365, and Chapter Puc 300.
3. The PSNH Electricity Delivery Service Tariff – NHPUC No. 8 (the "PSNH Tariff"), authorized by the Commission on June 28, 2010, is the applicable tariff that governs the relationship between PSNH and suppliers, including PNE.
4. The PSNH Tariff includes "Terms and Conditions for Energy Service Providers" (hereinafter "PSNH Tariff Terms and Conditions"), which govern the services PSNH provides to suppliers and the charges PSNH assesses to suppliers.

5. In addition to the PSNH Tariff Terms and Conditions, on January 16, 2013, PSNH and PNE entered into a standard form Electric Supplier Services Master Agreement (“ESSMA”) and a standard form Electric Supplier Trading Partner Agreement (“ESTPA”) [collectively “the Agreements”].
6. Upon execution of these Agreements and prior to February 20, 2013, PNE requested and PSNH provided services covered by these Agreements.
7. The Agreements require PSNH to provide services to CEPS in accordance with the PSNH Tariff Terms and Conditions.
8. The Agreements delineate the manner in which PSNH can charge and collect fees approved by the PSNH Tariff Terms and Conditions.
9. PSNH drafted the Agreements, and the language of the Agreements is not negotiable.
10. The Agreements require PSNH to invoice CEPS on a monthly basis for billing and payment services and other services. See Exhibit A (ESSMA, § IX); Exhibit B (ESTPA, § IX).
11. The Agreements require the Parties to remain in compliance with all applicable laws, tariffs, and NH PUC regulations. See Exhibit A (ESSMA, § V); Exhibit B (ESTPA, § V).
12. The ESTPA requires, “To the extent reasonably practicable, Supplier shall notify the Company no less than forty-eight (48) hours prior, to an event reasonably within Supplier’s knowledge, and of which Supplier has reason to believe the Company has no knowledge, and that will render Supplier or its agent unable to maintain Supplier’s status with NEPOOL required to serve load.” See Exhibit B (ESTPA, § VI).

13. The ESSMA also provides that, "Payments received shall be applied first to the Company's accounts receivable until the Company's accounts receivable are fully satisfied. Any remaining payment shall be applied to the Supplier accounts receivable until the Supplier accounts receivable are fully satisfied." See Exhibit A (ESSMA, § VII.A).
14. The Agreements contain identical provisions that provide as follows:
- The Company shall have the right to subtract fees that Supplier owes to the Company, and that are sixty (60) days or more past due, from amounts the Company collects on behalf of Supplier for reimbursement to Supplier, if applicable. Amounts subject to a good faith dispute will not be subject to deduction.
- See Exhibit A, § VIII (emphasis added); Exhibit B, § VIII.
15. PSNH has never provided PNE with written notice that either one of the Agreements was terminated or suspended.
16. In February 2013 both of the Parties were "market participants" pursuant to the ISO New England Inc. Transmission, Markets and Services Tariff ("ISO-NE Tariff"), and PSNH was a "host market participant"/ "host utility" pursuant to the ISO-NE Tariff. See Exhibit C (definitions from ISO-NE Tariff of "Market Participant" and "Host Participant or Host Utility"; the entire ISO-NE Tariff is available at <http://iso-ne.com/regulatory/tariff/index.html>).
17. On February 14, 2013, PNE was suspended by ISO-NE from participation in the New England wholesale electric market. Further, on that same date, ISO-NE notified PSNH that pursuant to the ISO-NE Tariff, as the host utility PSNH must assume the load assets that had been held by PNE by 0001 hours on February 20, 2013. Finally, ISO-NE stated that PNE had waived its right to cure.

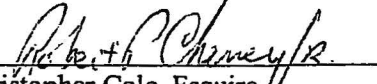
18. Prior to February 20, 2013, 1188 PNE customer accounts were transferred to FairPoint Energy, LLC ("FPE") consistent with EDI transactions submitted to PSNH by FPE.
19. On or after February 20, 2013, the remaining customer accounts in the suspended PNE load asset were moved by PSNH to PSNH Default Service as required by ISO-NE.
20. On February 28, 2013, the Commission convened two dockets – DE 13-059 and DE 13-060 – to investigate PNE's financial default and other matters concerning PNE and Resident Power Natural Gas & Electric Solutions, LLC ("Resident Power"). On March 27, 2013, the Commission Staff, PNE, and Resident Power entered into a Settlement Agreement in DE 13-059 and DE 13-060. The Commission issued an Order approving the Settlement on April 15, 2013.
21. Beginning on or about February 20, 2013, and prior to any invoice sent from PSNH to PNE, PSNH held and did not remit to PNE customer payments for electricity purchases prior to February 20, 2013, that by February 28, 2013, had accumulated to an amount in excess of \$250,000.
22. On February 28, 2014, PSNH remitted to PNE all but \$100,000 of the PNE customer payments held by PSNH.
23. By letters dated April 15 and April 30, 2013, PNE requested an invoice for the \$100,000 in PNE customer payments held by PSNH. See Exhibit D (letter from Robert P. Cheney, Esquire to Robert A. Bersak, Esquire, dated April 15, 2013); Exhibit E (letter from Robert P. Cheney, Esquire to Robert A. Bersak, Esquire, dated April 30, 2013).

24. On May 8, 2013, PSNH invoiced PNE the following amounts totaling \$92,961.39:
- (a) \$38,570 in PSNH internal costs associated with assuming PNE's load responsibility; (b) \$47,735 in Selection Charges relating to 9,547 electronic data interchange ("EDI") drop transactions recorded by PSNH ("invoiced drop transactions") prior to February 20, 2013; and (c) \$6,656.39 in other PSNH Tariff charges for various services provided in February and March 2013; and remitted to PNE \$7,038.61. See Exhibit F (letter from Robert A. Bersak, Esquire, to Robert P. Cheney, Esq., dated May 8, 2013).
25. On or about December 16, 2013, PSNH remitted to PNE the \$38,570 relating to PSNH's internal costs.
26. As of February 18, 2014, PSNH retains \$54,391.39.
27. In this proceeding, PNE has not challenged the PSNH invoice relative to \$6,656.39 in various supplier charges, which include the following: (a) Billing and Payment Service Charges - \$4,092.50; (b) Collection Services - \$1,963.89; and (c) Interval Data Subscription -- \$600. Subtracting these sums from the amount in ¶26 above yields a remainder of \$47,735.
28. In this proceeding, PNE has not challenged that PNE will pay PSNH \$3,450 in PSNH Tariff Selection Charges for 690 EDI drop transactions initiated by PNE of the 9,547 invoiced drop transactions recorded by PSNH.
29. Of the remaining 8,857 invoiced drop transactions, 1188 of these accounts were enrolled by and transferred to FPE, and FPE paid a \$5.00 Selection Charge for each of these accounts, totaling \$5,940. PNE has also been charged a \$5.00 Selection Charge for each of the 8,857 transactions.

Respectfully submitted,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**


Dated: February 14, 2014

By: 
Christopher Cole, Esquire
Robert P. Cheney, Jr., Esquire
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PUBLIC SERVICE COMPANY OF NH

Date: February 14, 2014

By its Attorneys,

By: 
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