DE 15-491

THE STATE OF NEW HAMPSHIRE

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September 13, 2016

W. Michael Scanlon
Clerk of Court
Hillsborough Superior Court
300 Chestnut Street
Manchester, NH 03101

Re: PNE Energy Supply, LLC, et al v Public Service Company of New Hampshire d/b/a Eversource Energy

Case Number: 216-2015-CV-00265

Mr. Scanlon:

Please find attached Public Utilities Commission Order No. 25,942 (09/12/16) Addressing Question Transferred from Superior Court.

Sincerely,

Debra A. Howland
Executive Director

Encl.

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 15-491

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

Order Addressing Question Transferred from Superior Court

O R D E R N O. 25,942

September 12, 2016

In this Order, we answer the question transferred to us by the Superior Court, finding that PSNH did not violate any rule of the Commission, or any tariff filed with and accepted by the Commission, in connection with: (a) its refusal to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint Energy, (b) its deletion of 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint Energy, and (c) its replacement of those enrollments with electronic enrollments for the transfer of PNE customers to PSNH default service.

I. BACKGROUND

This proceeding was commenced to consider a question transferred to the Commission by the Hillsborough North Superior Court (Court), with respect to its Case No. 216-2015-CV-00265, *PNE Energy Supply, LLC and Resident Power Natural Gas and Electric Solutions, LLC v. Public Service Company of New Hampshire d/b/a Eversource Energy* (Court Case). The Court Case involves the claim by plaintiffs PNE Energy Supply, LLC (PNE), and Resident Power Natural Gas and Electric Solutions, LLC (Resident Power), against defendant Public Service Company of New Hampshire, d/b/a Eversource Energy (PSNH),[1] for tortious interference with contractual relations.

[1] Because PSNH had not adopted the trade name "Eversource Energy" at the time the events relevant to this matter occurred, and because the Court Complaint and relevant documents, including the briefs filed by the parties in this proceeding, all refer to "PSNH," we also will refer to "PSNH" in this Order.

The context in which PSNH's conduct occurred is well known to the Commission, having been the subject of several dockets opened during or following that timeframe. *See* Docket DE 13-049 (joint request for expedited rule waiver filed by PNE and FairPoint); Docket DE 13-059 (Resident Power show cause and settlement); Docket DE 13-060 (PNE show cause and settlement); Docket IR 13-233 (investigation into dispute between PNE and PSNH); Docket DE 14-066 (PNE petition for declaratory ruling on off-cycle meter reads); and Docket IR 14-132 (joint complaint against PSNH filed by PNE and Halifax American Energy Supply, LLC).

The proposed transfer of customer accounts from PNE to FairPoint was first brought to the attention of the Commission through their joint motion for an expedited waiver of the 14-day customer notice requirement under Puc Rule 2004.05(k) filed on February 7, 2013. In the joint motion, PNE and FairPoint represented that "[n]o special off-cycle meter read dates will be necessary as a result of this transfer" and that "[c]ustomers will transfer suppliers upon their next scheduled meter read date." PNE's proposed notice to customers regarding the transfer to FairPoint stated that the "transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur." The Commission granted the requested rule waiver by secretarial letter dated February 8, 2013, having found that "the purpose of the rule is satisfied by the alternative method proposed."

The transfer of PNE customer accounts to FairPoint, however, did not occur as planned. Instead, a quite different series of events took place:

> On February 12, 2013, PNE verbally inquired of PSNH as to whether it would be possible for PSNH to transfer on the same date all of the 8,500 PNE customer accounts sold to FairPoint, rather than to wait to transfer each account on the customer's next scheduled meter read date. On February 13, 2013, PNE informed PSNH that PNE was ready and willing to pay PSNH's estimated costs to execute a one-day transfer. On February 14, 2013, PNE sent PSNH a written Request for Special Off-Cycle Meter Reads. Also on February 14, 2013, PSNH informed PNE that PSNH "did

> not have the personnel resources necessary to manually transfer 8,500 customers to a new competitive supplier on the same, near-term date."

Stipulation of Facts filed by PNE, Resident Power, and Staff on March 27, 2013, in Docket DE 13-059 and DE 13-060 at 6. A short time later, still 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.

Joint Statement of Agreed Facts filed by PNE and PSNH on February 14, 2014, in Docket IR 13-233 at 3. PSNH subsequently transferred all of PNE's remaining customers to default service and deleted the pending electronic enrollment transactions involving FairPoint. Complaint at 20, ¶79.

In its Transfer Order dated November 25, 2015 (Transfer Order), the Court asked the Commission to answer the following question raised in the context of PSNH's motion to dismiss filed in the Court Case:

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

In Order No. 25,881 (April 8, 2016) (Initial Order), we addressed the scope of this proceeding and certain procedural issues. We found in the Initial Order that, in view of the procedural posture of the matter in the context of a motion to dismiss filed with the Court, it is "neither necessary nor permissible for us to authorize any discovery or other factual investigation in this docket." Initial Order at 3. Instead, we clarified that the transferred question would be determined based on facts alleged by PNE and Resident Power in their complaint, while also

considering "documents the authenticity of which are not disputed by the parties … official public records … or … documents sufficiently referred to in the complaint." *Id.; see also Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010).

In Order No. 25,903 (May 20, 2016), we denied PSNH's Motion to Compel Production of Confidential Documents, which sought production by PNE and Resident Power of documents subject to confidential treatment granted in related dockets opened by the Commission in 2013, because we had previously determined that no discovery is necessary or permissible in this proceeding.

PSNH filed a brief and a reply, PNE and Resident Power filed a brief and a sur-reply. Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities and Unitil Energy Systems, Inc., each filed comments. The Commission heard oral arguments from the parties on June 9, 2016.

II. POSITIONS OF THE PARTIES

A. PSNH

PSNH asserts that the events addressed in the Court Case occurred in the context of: (1) PNE's attempt to stem financial difficulties in February 2013 by selling its entire retail customer base to FairPoint Energy, LLC (FairPoint), (2) PNE's voluntary default on and failure to cure its financial security requirements under the ISO New England (ISO-NE) Transmission, Markets, and Services Tariff (ISO-NE Tariff), (3) ISO-NE's requirement that PSNH assume PNE's load asset following the suspension of PNE as a wholesale market participant, and (4) the Commission's public notice that former PNE customers must first affirmatively agree to the transfer to FairPoint of their electric supply service. Brief of PSNH (4/29/16) (PSNH Brief) at 1-2.

PSNH argues that the focus of the Commission's inquiry should be on PSNH's compliance with the relevant legal and regulatory requirements established in the Commission's

rules applicable to competitive electric power suppliers (CEPS), PSNH's Tariff NHPUC No. 9 for Electric Delivery Service (PSNH Tariff), and the ISO-NE Tariff. Based on those legal requirements, according to PSNH, the Commission should consider whether PSNH's conduct affecting the transfer of customer accounts from PNE to FairPoint was "protected by law" within the context of an intentional interference action as interpreted in the Court's orders. *Id.* at 3; Reply Brief of PSNH (5/20/16) (PSNH Reply Brief) at 14. PSNH disputes the argument advanced by PNE and Resident Power that the Commission's review should include PSNH's motives and intentions, as those are irrelevant if PSNH did not act unlawfully. *Id.* at 13-14.

PSNH maintains that its actions were protected by law, because it had no duty or obligation to provide thousands of off-cycle meter readings that PNE had no right to request, and it was entitled to delete and replace FairPoint's electronic enrollments and place PNE's customers on PSNH default service when it was required by ISO-NE to assume PNE's load asset following PNE's suspension from wholesale market participation. PSNH Brief at 4. PSNH further notes that, one day following PNE's prohibition from holding load in the wholesale market system, the Commission expressly prevented the transfer of customers from PNE to FairPoint unless notice was given to those customers and they affirmatively consented to the transfer to FairPoint. *Id.* at 4-5.

PSNH also emphasizes that the Commission had approved a joint request by PNE and FairPoint to waive the requirement to give customers 14 days prior notice of a proposed transfer in order to complete an immediate transfer of PNE customers effective on their next meter reading date. *Id.* at 3-4. PSNH noted that this waiver was granted subject to the condition that PNE fulfill all other applicable requirements of the Commission's CEPS rules, and the condition that FairPoint make a filing within ten business days demonstrating that its financial security provided under Puc 2003.03 would be adequate. *Id.* According to PSNH, because FairPoint

never made the required filing on financial security, the waiver never became effective and FairPoint had no right to become the supplier for any PNE customers. *Id.*

With respect to the alleged obligation to perform off-cycle meter readings for thousands of PNE customers as requested by PNE, PSNH asserts it had no obligation to do so under Puc 2004.07 or any other provision of law or the PSNH Tariff. *Id.* at 13-16; PSNH Reply Brief at 3-8. PSNH argues that rule provision applies only when a "residential or small commercial electric customer has failed to meet any of the terms of its agreement for service" with a CEPS, the CEPS seeks to terminate the service off-cycle due to such failure, and the CEPS seeks an off-cycle meter read for that limited purpose. PSNH Brief at 14. According to PSNH, requiring an individual meter reading due to a customer's breach is very different from requesting off-cycle meter reads for thousands of customers, none of which is being terminated for failure to meet the CEPS's terms of service. *Id.* at 15. PSNH maintains that, read as a whole, the rule does not require that off-cycle meter readings be performed in non-default situations or for thousands of customers. PSNH claims that all of the subsections of the rule "relate only to the termination of service by a CEPS of a specific customer or a class of customers." PSNH Reply Brief at 6-8. PSNH disputes PNE's position that Puc 2004.07(b) should be read as a standalone provision requiring utility off-cycle meter readings upon request. *Id.*

PSNH interprets subsection (b)(2) to permit a utility to deny any request for an off-cycle meter reading if timely notice is not given, without requiring negotiation of a different time for the requested meter reading. PSNH Reply Brief at 8. According to PSNH, the correct reading of subsection (b)(3) is that an extension of time must be negotiated only if a utility cannot accommodate a request for an off-cycle meter reading despite having received proper notice from the requestor. *Id.* PSNH asserts that Puc 2004.07 did not require it to perform a general off-cycle meter reading for thousands of customer accounts, but, even if it had, under the circumstances where proper notice was not given, PSNH had the legal right to deny any such

request. *Id.* PSNH asserts that PNE's argument improperly conflates subsections 2004.07(b)(2) and (3) when it interprets them to mean that "if a utility denies a request that lacks proper notice," then, as provided in 2004.07(b)(3), "the utility and CEPS shall negotiate a reasonable extension of time." *Id.* PSNH observes that the language within the first set of quotation marks above does not appear anywhere in the rule and is inconsistent with the best reading of the rule as a whole. *Id.*

PSNH argues that the correct starting point to examine the issue is the PSNH Tariff, which provides that any change in supplier service "shall commence upon the next meter reading date for the Customer," provided that the electronic data interchange (EDI) enrollment notice is received at least two business days before the next scheduled meter read. PSNH Brief at 14. PSNH also cites the "Consensus EDI Plan" approved by the Commission in Order No. 22,919 (May 4, 1998), which provides that "the initial Competitive Supplier selection and subsequent supplier changes shall become effective at the beginning of the Customer's next meter read date." *Id.* PSNH specifically references the mandate in that order that "competitive suppliers must provide a minimum of two-days' notice to distribution companies for the termination of service to become effective on the customer's next meter read date." *Id.* PSNH maintains that its obligation under those requirements was merely to transfer service on each customer's next meter read date, and not to immediately perform thousands of off-cycle meter readings. *Id.*

PSNH further claims that it had no obligation to conduct PNE's requested off-cycle meter readings because PNE had no right to ask for them. *Id.* at 15. PSNH maintains that the rules waiver granted to PNE by the Commission was conditioned on the PNE representation that no off-cycle meter readings would be requested. *Id.* PSNH charges that, if PNE intended to act contrary to the waiver the Commission had granted, it had an obligation to either inform the Commission and seek an alternative waiver, or abandon the waiver and provide the requisite

14-day customer notice. *Id.* at 15-16. According to PSNH, it takes no "leap of logic" to conclude that, when a party makes a specific representation when requesting a rule waiver, the Commission will take that representation into account when granting the relief requested. PSNH Reply Brief at 3-4. PSNH further notes that PNE had informed its customers that their services might not necessarily be transferred to FairPoint at the beginning of the next billing cycle, but might take two billing cycles to occur. PSNH Brief at 16. PSNH observes that the notice also informed customers that they could select another provider within 30 days. *Id.* According to PSNH, had the off-cycle meter readings gone forward as PNE wanted, the representations PNE made to customers would have been false. *Id.*

With respect to its deletion of the FairPoint electronic enrollments and their replacement with electronic enrollments for default service, PSNH claims that ISO-NE's requirement that PSNH assume load responsibility for all of PNE's customers as a result of PNE's market suspension, resulting in the "forfeiture of [PNE's] authority to serve those customers," was a situation that had never before occurred in New Hampshire and had not been dealt with by the Commission, Staff, or PSNH. *Id.* at 12, 16; PSNH Reply Brief at 11. PSNH maintains that the ISO-NE Tariff makes clear that, once a CEPS or other market participant is suspended, it has "no ability so long as it is suspended (i) to be reflected in [ISO-NE's] settlement system, including any bilateral transactions, as either a purchaser or a seller of any products or services." PSNH Brief at 16. According to PSNH, once PNE had defaulted and been suspended, it had no legal right or ability to participate in any wholesale electricity market transactions under the ISO-NE Tariff, and no legal right or ability to participate in any retail electricity markets pursuant to the Commission's rules and the PSNH Tariff. *Id.* (citing Puc 2003.01(d)(2) and (i) and PSNH Tariff at page 31, ¶1, "Terms and Conditions for Energy Service Providers").

PSNH claims it was faced with a dilemma due to PNE's voluntary default and suspension and the requirement that PSNH take responsibility for all of PNE's customers. Pursuant to the

Consensus EDI Plan approved by the Commission in Order No. 22,919, PSNH asserts it was required to "process the first valid enrollment transaction received during the enrollment period," and "[o]nce received, any other enrollment transaction submitted for the same Customer during the enrollment period [must] be rejected." *Id.* at 17; PSNH Reply Brief at 11. According to PSNH, PNE has conceded that the PSNH Tariff restricted PSNH from accepting more than one supplier for a customer during any 30-day period, but nonetheless argues that, since FairPoint's electronic enrollments were submitted first, PSNH was required to honor those electronic enrollments. PSNH Brief at 17. PSNH counters that, because PNE effectively dropped its customers by operation of law "when it engaged in the conduct that caused its suspension," and in view of the ISO-NE Tariff requirement that PSNH take load responsibility for all of PNE's customers, the first valid enrollment transaction was the transfer of those customers to PSNH's default service. *Id.* PSNH claims that, in order to comply with the ISO-NE Tariff mandate that was a direct result of PNE dropping its own customers, the default service transaction occurred first in time and therefore the PNE to FairPoint transaction was not valid under the PSNH Tariff. *Id.* PSNH emphasizes that it did not proceed on its own in taking such actions, noting that both it and PNE had lengthy discussions with Commission Staff regarding the situation. *Id.*

PSNH challenges the reliance of PNE and Resident Power on the ISO-NE Tariff provision that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset." PSNH Reply Brief at 11-12. PSNH maintains that this provision of the ISO-NE Tariff is not applicable to PNE, because PNE was not the host market participant as implied in its argument. *Id.* at 12. PSNH instead asserts that PSNH was the host market participant and host utility pursuant to the ISO-NE Tariff, and that PNE has previously stipulated to this fact. *Id.* PSNH argues that, because PNE was not the host

market participant, PNE's interpretation of the ISO-NE Tariff is incorrect and its alleged assignment of customers to FairPoint had no force or effect within the ISO-NE market system. *Id.* PSNH suggests that, if PNE had transferred its load asset responsibility to FairPoint in the ISO-NE wholesale marketplace before its default and suspension, PNE and FairPoint could have avoided the entire adverse situation. *Id.*

PSNH explains its processing to completion of an electronic enrollment for transfer of a single large commercial customer of PNE, Milan Lumber Company (Milan Lumber), to another CEPS, TransCanada Power Marketing Ltd. (TransCanada), by emphasizing the difference between the manual billing process for its "Large Power Billing (LPB) system" customers and the automated billing process under its "normal C2 billing system" used for other customers. *Id.* at 9-10. Milan Lumber was billed through the manual LPB system, while the 7,300 other remaining PNE customers subject to the FairPoint electronic enrollments were billed through the automated C2 billing system. *Id.*

According to PSNH, the question whether it was correct in deleting the FairPoint electronic enrollments is not even relevant because (1) the actions taken by the Commission the day after PSNH's assumption of the PNE load asset to preclude any further transfers of former PNE customers to FairPoint without their express consent rendered invalid the FairPoint EDIs, and (2) FairPoint had no right to receive customers from PNE because FairPoint had not complied with the conditions of the Commission's rule waiver by filing within 10 days a letter demonstrating it had adequate security given the additional customer base it would be acquiring. PSNH Brief at 17-18. PSNH claims it therefore did not cause interference with the FairPoint customer account acquisition transaction. *Id.* at 18.

PSNH disputes the argument of PNE and Resident Power that PSNH sought to retroactively justify its decision to delete the FairPoint electronic enrollments, based on the customer notice posted by the Commission, and FairPoint's failure to satisfy the rule waiver

conditions. PSNH Reply Brief at 13. PSNH asserts instead that it cannot be found to have acted unlawfully by allegedly thwarting a transfer of customers that the Commission found could not occur without FairPoint obtaining the consent of those customers, which it never sought, or by satisfying a mandatory condition to proceeding with the transfer of customers, which it never did. *Id.*

PSNH further maintains that its actions did not prevent customer choice from being consummated, nor did it thwart the transfer of PNE customers to FairPoint by engineering an implicit invitation for the consumers to choose another CEPS, as claimed by PNE and Resident Power. PSNH Reply Brief at 2-3. PSNH asserts that their argument fails because none of the thousands of customers had chosen to be served by FairPoint, but instead had an explicit option to choose another CEPS within 30 days, and they were informed that no further transfers to FairPoint would occur unless they affirmatively chose FairPoint as their CEPS. *Id.*

PSNH concludes it violated no provision of applicable statutes, rules, or tariffs as a result of its actions affecting PNE and FairPoint in February 2013, under the unique circumstances of this case where the Commission, and not PSNH, halted the transfer of customers to FairPoint, and where FairPoint had no right to receive the customers by virtue of its failure to comply with the requirements of the Commission's conditional rule waiver. PSNH Brief at 19. According to PSNH, it therefore did not act "improperly" regarding the matters transferred by the Court for resolution by the Commission. *Id.*

B. PNE and Resident Power

PNE and Resident Power argue that PSNH's conduct with respect to PNE's attempted transfer of customers to FairPoint in February 2013 represented improper interference with a private business transaction between two competitive suppliers that violated the free market principles applicable under the electric restructuring law, other state statutes, Commission rules, and the New Hampshire Constitution. Brief of PNE and Resident Power (5/13/16) (PNE and

Resident Power Brief) at 1-4. They charge PSNH with breaching the trust and confidence of the public, robbing competitive suppliers of incentives to operate in the market, and contriving to preserve and perpetuate its monopoly. *Id.*

According to PNE and Resident Power, PSNH had a clear incentive and motivation to regain default service customers because it had incurred $422 million for the Merrimack Station pollution control scrubber, as well as costs related to its ownership and operation of other generation facilities, which it could only recover from its default service customers under New Hampshire law and Commission precedent. *Id.* at 7. They charge that PSNH therefore was looking for opportunities to increase the number of its default service customers from whom it could recover those uneconomic costs. *Id.*

PNE and Resident Power assert it is proper for the Commission to consider PSNH's incentives and intentions, challenging PSNH's position that the question before the Commission is whether its conduct was consistent with applicable tariffs, regulations, and orders, thus affording it protection under the law. *Id.* at 9. PNE and Resident Power assert that the law and standards by which contract interference should be determined are far broader, stating that to establish "improper" interference with a contract, a plaintiff may "show that the interference … was either desired by the [defendant] or known by him to be a substantially certain result of his conduct." *Id.* (citation omitted). According to PNE and Resident Power, a plaintiff need not plead that the defendant was solely or directly responsible for the failure of the contract, or that the defendant acted with the purpose to interfere with the plaintiff's contract. *Id.* Instead, they maintain, the claim may be pursued so long as "the interfered-with party remains an intended (or at least known) victim of the interfering party – albeit one that is indirect rather than direct." *Id.* (citation omitted).

PNE and Resident Power state that New Hampshire courts rely on factors listed in the *Restatement (Second) of Torts* to determine if intentional interference with a contract is improper:

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference, and
> (g) the relations between the parties.

Id. at 9-10 (citing *Roberts v. General Motors Corp.*, 138 N.H. 532, 540-41 (1994)). They assert there is no exhaustive list of conduct that is considered "improper" or "wrongful," but examples of wrongful conduct include abuse of a fiduciary relationship, misrepresentations, violation of business ethics or customs, and conduct that violates a statute or public policy. *Id.* at 10. These factors and examples generally relate to principles of "common morality." *Id.*; PNE and Resident Power Sur-Reply Brief at 9.

PNE and Resident Power argue that New Hampshire courts also may rely on cases from other jurisdictions to reach conclusions of first impression. PNE and Resident Power Sur-Reply Brief at 10. They cite a New York Bankruptcy Court case finding that, in addition to a monopoly utility having committed a tariff violation, its interference with a debtor's merger negotiations was improper because the means it used included "misrepresentations, threats, improper economic pressure, [and] restraint of trade." PNE and Resident Power Brief at 11-13 (citing *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 B.R. 184, 211 (Bkrtcy. S.D.N.Y. 1996)). According to PNE and Resident Power, in the *Balaber-Strauss* case, a monopoly public utility misrepresented the amount of debt owed to it by a competitor, thereby directly influencing the competitor's negotiations with a merger partner and

contributing to the partner pulling out of negotiations, which had the ultimate effect of eliminating a competitor to the utility. *Id.*

Based on their broader reading of the law regarding intentional interference, PNE and Resident Power assert they have stated a valid claim for relief that PSNH improperly interfered with PNE's contract with FairPoint by refusing to accommodate PNE's request for a one-time, off-cycle meter reading of its customer accounts, and by deleting FairPoint's electronic enrollments of PNE's customer accounts and replacing them with new enrollments for transfer to PSNH's default service. *Id.* at 13. They argue that, in any event, given the heavily factual nature of the relevant inquiry, the issues could not be determined at the procedural stage of a motion to dismiss the Complaint. *Id.* at 25-27.

PNE and Resident Power maintain that, under Puc 2004.07(b), an electric distribution utility such as PSNH must provide an off-cycle meter reading upon the timely request of a CEPS and, even if the utility denies a request due to lack of proper notice, the rule requires that "the utility and CEPS shall negotiate a reasonable extension of time for the completion of the … request." *Id.* at 13. According to PNE and Resident Power, this provision of the CEPS rules stands alone and must be read separately from the remainder of Puc 2004.07, and a clear reading of the unambiguous language of the subsection compels the conclusion that a utility must accommodate a CEPS's request for an off-cycle meter reading. *Id.* at 13. In support of that conclusion, they cite the long-held guidance of the New Hampshire Supreme Court that, when interpreting a statute or rule, a court ascribes to it the plain and ordinary meaning of its language as written and does not consider what the Legislature might have intended. *Id.* at 14; PNE and Resident Power Sur-Reply Brief at 3.

PNE and Resident Power dispute PSNH's claim that PNE's request to conduct thousands of off-cycle meter readings could be denied as inconsistent with the conditions of the rule waiver it had received from the Commission on February 8, 2013. PNE and Resident Power Brief

at 15-16. They claim that argument is an unwarranted "leap of logic," stating that (1) no authority has been cited for the conclusion, (2) nothing in Puc 2004.07 imposes such a restriction or condition on a CEPS's right to request an off-cycle meter reading, and (3) the waiver granted by the Commission was not conditioned on PNE agreeing that it would not request an off-cycle meter reading. *Id.*

PNE and Resident Power charge that PSNH's deletion of electronic enrollments for the transfer to FairPoint of PNE's customers, in connection with the transfer of those customers to default service, violated applicable law and was improper. *Id.* at 17-19. They assert that the proper procedure, according to Section 6 of the PSNH Tariff and Commission precedent, requires that PSNH process a change of supplier service within two business days of receiving a valid electronic enrollment from a supplier, that the enrollments must be processed in the order in which they are received, that, if an enrollment is invalid, PSNH must within one business day notify the CEPS of the reason for its rejection, and that PSNH must send an error EDI transmission to the new and the existing CEPS. *Id.* According to PNE and Resident Power, PSNH violated all of those requirements. *Id.*

PNE and Resident Power maintain that when FairPoint submitted electronic enrollments on February 9, 2013, for the transfer of approximately 8,500 PNE customers, PSNH did not notify FairPoint that any of the submissions were invalid. *Id.* at 18. Instead, PSNH began transferring the PNE customer accounts to FairPoint at a rate of 300-400 per day. *Id.* Following the suspension of PNE by ISO-NE, PSNH halted the transfer of the remaining 7,300 PNE customers to FairPoint, and redirected them to default service. *Id.* PSNH then ran an automated program to delete unexecuted Fairpoint transfer requests. *Id.* PNE and Resident Power allege that PSNH slowed the transfers significantly just prior to the date it was required to assume PNE's load asset in the ISO-NE market system, from a rate of 300-400 accounts per day to only fifteen accounts transferred on February 14 and only three accounts transferred on February 19.

Id. at 28. They suggest that the slowdown in transfer rate was intended to switch as many PNE customer accounts as possible to PSNH default service on February 20, 2013. *Id.*

PNE and Resident Power also assert that PSNH could have fulfilled ISO-NE's directive to assume PNE's remaining load asset responsibility without deleting the FairPoint electronic enrollments, as there was no "impediment" in PSNH's system that required it to delete the enrollments. *Id.* at 19. They dispute PSNH's argument that PNE's default and suspension represented a "drop" of its customer accounts to default service, based in part on the Commission's Order No. 25,660 (May 1, 2014). *Id.* at 19-20. According to PNE and Resident Power, Order No. 25,660 characterizes PNE's conveying of load asset responsibility to PSNH as an "assignment" and references the transfer as a "drop" solely to determine whether PSNH was entitled to impose a selection charge on PNE. *Id.* at 20. They therefore maintain that the relevant provisions of Order No. 25,660, the ISO-NE Tariff, and the PSNH Tariff address only the assignment of PNE's load asset to PSNH and do not address the impact of such an assignment on a valid customer account transfer transaction between PNE and a third party that pre-dated PNE's default and suspension. *Id.*

PNE and Resident Power maintain as well that, although PSNH had "targeted" the FairPoint electronic enrollments for deletion, it did not delete enrollments by other suppliers for PNE customer accounts submitted prior to PNE's default, citing as an example Milan Lumber, a PNE commercial customer that was transferred to TransCanada after a brief period on default service based on a previously-submitted electronic enrollment that was not deleted following PNE's market suspension. *Id.* at 19; PNE and Resident Power Sur-Reply Brief at 1-3. PNE and Resident Power dispute PSNH's rationale for such disparate treatment of PNE customers based on the type of billing system used to serve large commercial and industrial customers as opposed to residential and small commercial customers. PNE and Resident Power Sur-Reply Brief at 2.

They assert that the billing system used is not a sufficient explanation of why other electronic enrollments were not deleted while FairPoint's enrollments were deleted. *Id.*

According to PNE and Resident Power, PSNH's deletion and replacement of the FairPoint enrollments is not excused by a provision of the PSNH Tariff that does not allow for more than one supplier for a customer during any 30-day period, as claimed by PSNH. *Id.* at 19-22. They assert that PSNH should not be considered a "supplier" under this provision, as the PSNH Tariff defines and refers to "suppliers" and PSNH separately and contains numerous examples of separate treatment of PSNH and suppliers such as PNE and FairPoint. *Id.* at 21-22. PNE and Resident Power maintain that PSNH has not identified any provision of the PSNH Tariff that "ignores or overrides" the separation between PSNH and a "supplier," and, in fact, any other interpretation of the term would be "illogical." *Id.* Because PSNH is not a "supplier," PNE and Resident Power assert that the restriction in PSNH's tariff precluding acceptance of more than one supplier in a 30-day period is moot, and the transfer of PNE's customer accounts to default service was not the first valid enrollment transaction for each of those accounts' 30-day period, but rather the first valid enrollments were those to FairPoint. *Id.* at 22.

PNE and Resident Power further imply that PNE retained the right to transfer its load asset in the ISO-NE market system after its suspension under the ISO-NE Tariff provision stating that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset." *Id.* at 20; PNE and Resident Power Sur-Reply Brief at 5-7. They maintain that PNE was in fact both the "Market Participant" and the "host Market Participant" under that ISO-NE Tariff provision, and that Order No. 25,660 had interpreted the ISO-NE Tariff to mean that PNE was the "Market Participant" and PSNH's

default service was the "unmetered load asset." PNE and Resident Power Sur-Reply Brief at 5-7.

PNE and Resident Power argue that PSNH's conduct, in addition to violating its tariff, also prevented customers from exercising the right to choose their electric service provider, under the authority they had delegated by contract to Resident Power. PNE and Resident Power Brief at 22. Those customers, by and through Resident Power, had chosen to switch service to FairPoint, and PSNH's actions had the effect of overriding their choices, according to PNE and Resident Power. *Id.* at 22-23; PNE and Resident Power Sur-Reply Brief at 4-5. They maintain that PSNH had accepted the electronic enrollments intended to effect those customer choices, and PSNH had no right to delete the enrollments and replace them with transfers to PSNH default service. *Id.* They claim that PSNH's conduct therefore was contrary to the electric restructuring principles favoring competition, as set forth in RSA 374-F:3, II. PNE and Resident Power Brief at 23.

PNE and Resident Power dispute PSNH's defense based on the February 21, 2013, notice posted on the Commission's public website stating that there would be no further transfers to FairPoint without the express consent of customers communicated directly to FairPoint. *Id.* They characterize this PSNH argument as an "illogical" attempt to "retroactively justif[y]" its actions, because the notice to customers did not exist and had not been provided to customers at the time PSNH deleted and replaced the FairPoint enrollments. *Id.* at 23-24. They note also that the posted notice was issued by Staff and had not been directed by the Commission. *Id.;* PNE and Resident Power Sur-Reply Brief at 2.

PNE and Resident Power likewise dismiss as meritless PSNH's claim that FairPoint had no right to receive PNE's customers because it had failed to meet a filing deadline under the Commission's rule waiver approval. PNE and Resident Power Brief at 24. They assert it would be "illogical" to conclude that, because FairPoint had failed to make a retroactive filing, the

enrollments should be invalidated and it was legitimate for PSNH to delete them. *Id.* They note that the ten-day filing deadline for FairPoint was several days after FairPoint had submitted the enrollments and two days after PSNH had assumed PNE's load asset and deleted the FairPoint enrollments. *Id.* According to PNE and Resident Power, the filing deadline failure used by PSNH as justification for deleting the FairPoint enrollments had not even occurred when it decided to delete and replace those enrollments. *Id.*

III. COMMISSION ANALYSIS

A. Scope of Review

The Court transferred this matter to the Commission so we could address a specific three-part question regarding certain conduct of PSNH related to and affecting PNE and Resident Power occurring in February 2013. Specifically, the Court wants to know if PSNH's actions violated any rule of the Commission or any tariff governing PSNH's conduct. PNE and Resident Power urge us to broaden the scope of our inquiry to include PSNH's motivations and intentions in taking those actions. PNE and Resident Power Brief at 9-13. In support of that request for a broader scope of inquiry, they assert that interference with a contract may be improper if a defendant's conduct includes, for example, abuse of a fiduciary relationship, misrepresentations, violation of business ethics or customs, and conduct that violates public policy, which are all "factors and examples relate[d] to principles of common morality." PNE and Resident Power Sur-Reply at 9. They argue that the determination of whether a party's conduct was "improper" can be based on many standards of conduct, not just those set forth in tariffs or administrative rules, relying heavily on *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 Bankr. 184 (Bkrtcy. S.D.N.Y. 1996). PNE and Resident Power Brief at 11-13; PNE and Resident Power Sur-Reply Brief at 9-10.

We are not persuaded that the broader scope of inquiry advocated by PNE and Resident Power is necessary or even permitted in this proceeding. We continue to believe that the Court

has asked us to "answer a narrow question, involving legal interpretations of administrative rules and tariffs within our specialized expertise, based on the record as it currently exists in the Court Case." Initial Order at 3. We will provide our answer to the transferred question without delving into the motivations or intentions of PSNH or any other party, but by focusing on the specific relevant conduct of the parties in this matter. We now address the three separate components of the question presented to us by the Court.

B. Requirement to Perform Off-Cycle Meter Readings

PNE and Resident Power claim that PSNH acted improperly in failing to perform off-cycle meter readings to accommodate the transfer of thousands of PNE customer accounts to FairPoint. They cite Puc 2004.07(b) as the basis for PSNH's alleged obligation to complete such off-cycle meter readings. Puc 2004.07(b) provide as follows:

> (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 cannot 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.

Based on a review of the overall context and specific language of this rules provision, we disagree with PNE and Resident Power's interpretation that a utility is required to perform any number of off-cycle meter readings on less than five business days' prior notice. This specific rules provision should not be read in isolation but in the context of the overall purpose and effect

of Puc 2004.07 and the Puc 2000 rules in their entirety. *See Vivint Solar, Inc.*, Order No. 25,859 (January 15, 2016) at 20 (citing *Appeal of Northern New Eng. Tel. Operations, LLC*, 165 N.H. 267, 271 (2013) (legislative intent to be determined from words of the statute considered as a whole; statutes to be interpreted not in isolation but in the context of overall statutory scheme); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010) (various statutory provisions to be construed harmoniously insofar as reasonably possible); *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22 (2007) (statutes to be construed in harmony with the overall statutory scheme)).

We note that Puc 2004.07(b) appears in a section captioned "Notice of Termination of Service," in which every other subsection references a CEPS's termination of service to a customer or its cessation of service to all or a class of customers in the State. There is no indication that requests for off-cycle meter readings should be available under any other circumstances or in any other context. In addition, subsection (b) refers only to "an off-cycle meter reading" in the singular and not in the plural, with no indication that the obligation to perform an off-cycle meter reading extends to multiple requests, let alone thousands of such requests.

Moreover, Puc 2004.07(b)(2) provides that the "utility may deny any request for an off-cycle meter reading if proper notice" is not given at least five business days prior to the requested off-cycle meter read date, as required under subsection (b)(1)a of the rule. Under subsection (b)(3), the utility is required to "negotiate a reasonable extension of time for the completion of the off-cycle meter reading request" if *more* than five business days is required to accommodate the request, not *less* than five business days. The utility has an absolute right to deny an off-cycle meter reading request if it is not made at least five business days in advance under subsection (b)(2).

Based on the foregoing interpretation, we find that PSNH had no obligation under Puc 2004.07(b) to perform thousands of off-cycle meter readings on less than five business days'

prior notice, as requested by PNE, and PSNH therefore did not violate the Commission's rules in refusing to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint.

C. Deletion of Pending Electronic Enrollments for PNE Customer Transfers

The Court has asked us to determine the propriety of PSNH's action in "deleting 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint."[2] The Commission has previously considered the transfer of PNE's customers to PSNH default service as a result of ISO-NE's suspension of PNE from regional wholesale market participation:

> When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE's load similar to an agency relationship in the very limited sense discussed here.

Order No. 25,660 (May 1, 2014) at 7. In effect, PSNH was required to assume the PNE load asset (*i.e.*, PNE's customers' electric load requirements) as a result of PNE's suspension by ISO-NE, and PSNH had no alternative but to transfer those customers to default service, consistent with its obligations under the ISO-NE tariff and the direction it received from ISO-NE. *See* ISO-NE Tariff, Section l, Exhibit ID, *ISO New England Billing Policy*, and Exhibit IA, *ISO New England Financial Assurance Policy*; *see also* PSNH Brief, Exhibit F.

The ISO-NE Tariff provides, in relevant part, as follows:

> Any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset.

See ISO-NE Tariff, Section l, Exhibit IA, *ISO New England Financial Assurance Policy*, Section III.B.3.b. On February 14, 2013, ISO-NE sent an electronic mail message to

[2] The Court's transfer order refers to PSNH's having "illegally" deleted the pending electronic enrollments, as alleged by the Plaintiff. We assume the inclusion of the word "illegally," as initially used by the Plaintiff, was inadvertent, as the question otherwise would presume the answer to the question the Court has asked us to consider.

PSNH directing that the PNE "load asset [must] be retired as soon as practicable, but no later than 00:01, Wednesday February 20, 2013 (3 business days following the date of the suspension)," and indicating that if the PNE load asset "is not retired prior to Wednesday February 20, [ISO-NE] will take action to retire the asset effective on that date." *See* PSNH Brief, Exhibit F.

Under those circumstances, which resulted from PNE's wholesale market suspension and waiver of the possibility to cure, PSNH was required by ISO-NE to provide default service to PNE's former customers at least until their next regular meter read dates. PSNH's deletion of the pending electronic enrollments for the transfer of PNE customers to FairPoint therefore represented a reasonable and appropriate action, consistent with the respective obligations of PSNH and PNE under the ISO-NE Tariff, that did not violate any rule adopted or any tariff accepted or approved by the Commission.

D. Replacement of Deleted Enrollments with Enrollments for Default Service

The Court has asked us also to determine the propriety of PSNH's replacement of the deleted electronic enrollments for transfer of PNE customers to FairPoint with electronic enrollments for the transfer of those customers to PSNH default service. As discussed in Section III.C of our analysis above, PSNH was justified in deleting the pending electronic enrollments in order to transfer the remaining PNE customers to default service as a result of ISO-NE's suspension of PNE from wholesale market participation. It follows from this conclusion that PSNH also was warranted in replacing those deleted enrollments with enrollments confirming the customer transfers to default service.

PNE and Resident Power observe that PSNH had accepted the electronic enrollments submitted to effectuate customer transfers to FairPoint and had begun processing those enrollments. PNE and Resident Power Brief at 17-18. They assert that PSNH was obligated to

process a change in CEPS for customers "within two business days of receiving a valid Electronic Enrollment from a [CEPS]." *Id.* (citing PSNH Tariff Section 6). Section 6 of the PSNH Tariff further provides that the date of change in a customer's CEPS

> shall commence upon the next meter reading date for the Customer provided [PSNH] receives and successfully processes the Electronic Enrollment from a Supplier … at least two business days prior to the regularly scheduled meter reading cycle date for the Customer.

Upon its receipt and acceptance of electronic enrollments for transfer of PNE customers to FairPoint, PSNH began the process of transferring those customers, but had not yet completed that process when PNE defaulted and was suspended by ISO-NE. As a result of PNE's default and suspension, PSNH was required to transfer the PNE customers to its default service, and PSNH did so by deleting the pending enrollments and replacing the deleted enrollments with enrollments for its default service. Under those unusual circumstances, we find that PSNH's actions did not violate the provisions of the PSNH Tariff.

PNE and Resident Power further challenge PSNH's deletion and replacement of the electronic enrollments on two additional grounds, neither of which has merit. First, they assert that it would have been possible for the customer load transfer to FairPoint to have been concluded through the ISO-NE process if the pending electronic enrollments had not been deleted and replaced by PSNH. In support of this position, they cite the language of the ISO-NE Financial Assurance Policy, as quoted in Section III.C above, which requires that the load asset of a suspended ISO-NE market participant "shall be assigned to the relevant unmetered load asset(s) *unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset*." *See* ISO-NE Tariff, Section l, Exhibit IA, *ISO New England Financial Assurance Policy*, Section III.B.3.b. (emphasis added).

PNE and Resident Power argue that the italicized language means that PNE had the right to assign the obligation to serve its load asset to FairPoint, and in fact had done so before it defaulted. PNE and Resident Power Brief at 20. They claim that the load asset assignment to FairPoint ultimately would have been completed, notwithstanding the assignment to PSNH following PNE's suspension, if PSNH had not deleted the remaining 7,300 electronic enrollments. *Id.* PNE and Resident Power misconstrue the language of the ISO-NE Tariff. The cited language does not apply to PNE because it was not the "host market participant," a fact it has previously conceded before this Commission, stating that "PSNH was the "host market participant"/"host utility" pursuant to the ISO-NE Tariff." *See* Joint Statement of Agreed Facts filed by PNE and PSNH on February 14, 2014, in Docket IR 13-233 at 3. PNE therefore lacked the authority under this provision of the ISO-NE Tariff to assign its load asset responsibility to FairPoint or to any other participant within the ISO-NE market system.

Second, PNE and Resident Power assert that PSNH applied disparate treatment in deleting electronic enrollments for the transfer of PNE customer accounts to FairPoint while processing to completion an electronic enrollment for transfer of another PNE customer, Milan Lumber, to another CEPS, TransCanada. PNE and Resident Power Brief at 19; PNE and Resident Power Sur-Reply Brief at 1-3. PSNH explains and distinguishes its completion of the Milan Lumber customer transfer to TransCanada by emphasizing the difference between the manual billing process for its "Large Power Billing (LPB) system" customers and the automated billing process under its "normal C2 billing system" used for other customers. PSNH Reply Brief at 9-10. Milan Lumber was billed through the manual LPB system, while the 7,300 other remaining PNE customers subject to the FairPoint electronic enrollments were billed through the automated C2 billing system. *Id.*

Based on that billing process distinction, PSNH maintains that the example of how a single large commercial and industrial customer was treated "has no bearing on how the

remaining approximately 7,300 customers had to be handled by PSNH in order to effectuate ISO-NE's mandate." PSNH Reply Brief at 10. We find that PSNH has provided a sufficient explanation for the differing treatment of Milan Lumber, whose affirmative request was processed using a manual billing system, and PNE's other customers processed using a different, automated, billing system, to support the conclusion that this treatment was not unduly discriminatory.

Finally, we take note of the February 21, 2013, posting on the Commission's public website of a notice stating that there would be no further transfers to FairPoint without the express consent of the customers. In view of that direction on behalf of the Commission, it was reasonable and appropriate for PSNH to take no further action to facilitate the transfer of customers to FairPoint after they had been moved to PSNH default service following PNE's default and suspension by ISO-NE.

IV. CONCLUSION

In summary, we find that, under the unique and extraordinary circumstances related to PNE's default and suspension by ISO-NE in February 2013, PSNH did not violate any rule adopted nor any tariff accepted or approved by the Commission in (a) refusing to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint, (b) deleting 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint, and (c) replacing those deleted enrollments with electronic enrollments for the transfer of PNE customers to PSNH default service.

Based upon the foregoing, it is hereby

ORDERED, that the Court Case be transferred back to the Superior Court for further proceedings.

By order of the Public Utilities Commission of New Hampshire this twelfth day of September, 2016.

Martin P. Honigberg	Robert R. Scott	Kathryn M. Bailey
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director