

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 15-491

PNE ENERGY SUPPLY, LLC, et al.

v.

PSNH D/B/A EVERSOURCE ENERGY

**MOTION OF PSNH
TO COMPEL PRODUCTION OF
CONFIDENTIAL DOCUMENTS FILED WITH THE COMMISSION**

Public Service Company of New Hampshire, d/b/a Eversource Energy (“PSNH”), hereby requests that the Commission require PNE Energy Supply, LLC (“PNE”) and Resident Power Natural Gas & Electric Solutions, LLC (“Resident Power”) (collectively the “Plaintiffs”) to provide unredacted copies of certain documents that were provided to the Commission in several dockets related to the instant proceeding. Based on information disclosed to PSNH, information contained in some of those documents may be relevant to this proceeding. All the documents fall within the scope of “official records, and other documents the authenticity of which is not disputed by the parties” that the Commission has ruled it would consider in ruling on the issues in this Docket. Order No. 25,881 at 3.

As grounds for this Motion, PSNH states as follows:

1. As a result of the Superior Court Order dated November 25, 2015 transferring certain questions to this Commission, the Commission now has under consideration whether PSNH’s actions were “improper within the meaning of a tortious interference with contract claim,” when “[c]onsidering the tariff and regulatory provisions cited by plaintiffs and

defendants.” Order 25,881 at 2, citing the Court’s Transfer Order at 4. Specifically, the Commission was asked to determine whether the tariff, rules or regulations of the Commission were violated when PSNH: (1) refused to provide off-cycle meter readings for 8,000 customers; or (2) deleted electronic enrollments submitted by FairPoint in order to take PNE’s customers onto its default service. See Plaintiffs’ Complaint ¶¶ 137(a), (b) and (c).

2. In Order No. 25,881 at p. 3, the Commission ruled:

We have concluded it will be useful for the parties to file briefs stating their positions regarding the question transferred by the Court, with reference to the facts alleged in the complaint filed in the Court Case and, to the extent relevant to the question presented, to documents sufficiently referred to in the complaint, official records, and other documents the authenticity of which is not disputed by the parties.

3. The Plaintiffs have filed a number of documents with the Commission for which confidential treatment was granted. Those documents include:

- a. The Affidavit of PNE President Howard Plante submitted in Docket DE 13-049 in support of the Joint Request for Waiver;
- b. The contract between Plaintiffs and FairPoint dated February 6, 2013, for which Plaintiffs sought confidential treatment in their responses to the Commission’s Order of Notice in Docket Nos. 13-059 and 13-060; and
- c. Plaintiffs’ Prehearing Memorandum in Docket Nos. DE 13-059 and 13-060.

4. In addition, the Staff’s Recommendations for an Immediate Show Cause Hearing in Docket Nos. DE 13-059 and DE13-060 contain redacted information that, based on the context of the redacted information in the Recommendation, is likely relevant to this Docket because the redacted information appears to relate to PNE’s communications with Staff in the “days leading up to default,” and to a further affidavit submitted by PNE’s President concerning those events. See Staff Memo dated February 27, 2013 at 4.

5. PSNH was never provided with access to the confidential documents. Without such access, PSNH is unaware whether such official records of the Commission include information that is material and relevant to the legal briefs required by Order No. 25,881.

6. For example, PSNH has reasonable grounds to believe that the Plante Affidavit (item 3 a above) has information which is relevant to both issues transferred to the Commission by the Superior Court.

7. On February 7, 2013, Plaintiffs requested that the Commission grant them an expedited waiver from the requirement that they provide 14 days' notice to customers of the proposed transfer of PNE's customers to FairPoint so that they could begin the transfers immediately. See February 7, 2013 Joint Motion for Expedited Waiver in Docket No. DE 13-049 at ¶ 9 (the "Joint Motion"). The Joint Motion expressly represented that no "special off-cycle meter read" would be necessary and that customers "will transfer suppliers upon their next scheduled meter read date."

8. By secretarial letter dated February 8, 2013, the Commission conditionally approved the waiver of notice based upon that representation, and specifically noted the representation by PNE and FairPoint of their intent to "fulfill all other requirements of the rule," which, under Puc 2004.05 (1)(7), included a statement to customers of the time period (30 days) during which they could find an alternate provider. February 8, 2013 Secretarial Letter in Docket No. DE 13-049 at 1.

9. The Joint Motion was accompanied by the Plante Affidavit, which was signed under oath on February 7, 2013. It was also accompanied by a Motion for Confidential Treatment of all of the matters filed as exhibits (including the Plante Affidavit), allegedly because they included information concerning the "short-term strategy" of Plaintiffs, a

“description of PNE’s operations, and financial information related to those operations,” all of which was said to be “highly sensitive,” not public and not published elsewhere. The Commission granted Plaintiffs’ Motion for Confidentiality after determining that “the information sought is proprietary and confidential financial information and is exempt from public disclosure under RSA 91-A:5, IV.”

10. In discovery in the Superior Court, Plaintiffs subpoenaed documents from FairPoint and then produced those documents to PSNH. One of the documents produced was an unsigned draft of Mr. Plante’s affidavit in unredacted form. Thus, to the extent that it was necessary to protect the information described above by redacting it at the Commission, Plaintiffs have now disclosed that confidential information to PSNH, assuming that the version of the Affidavit filed with the Commission is the same, or similar to, that produced to PSNH.

11. PSNH believes that the Plante Affidavit is relevant to this proceeding in several respects. First, in the draft, Plante represents, as did the Plaintiffs in the Joint Motion, that no off-cycle meter reading would be required. The draft affidavit contains a statement made under oath that if the requested waiver is granted, and “assuming that market rates do not rise to catastrophic levels, PNE will be able to meet its financial obligations to ISO New England and serve all of its customers until they are transferred to FairPoint Energy *in accordance with the process dictated by the customers’ meter reading dates.*” Draft Affidavit at ¶ 5 (emphasis added). At present, this statement is not available to PSNH as an “official record” for use in this proceeding. But if Mr. Plante made that representation under oath in the Affidavit, it demonstrates that by requesting an off-cycle meter reading of thousands of customers just five days after the Joint Motion and Affidavit were filed, Plaintiffs acted contrary to specific representations to the Commission, in this case under oath.

12. Second, on the issue of whether the deletion of EDIs by PSNH was improper and interfered with the FairPoint contract, the draft affidavit states: “It should be noted that FairPoint Energy has the right, but not the obligation, to assist PNE in meeting PNE’s ISO obligations until all customers have been transferred.” *Id.* If that language was included in the final version of the Plante Affidavit, PNE’s President represented to this Commission, under oath, that under the FairPoint contract, FairPoint could have stepped in to remedy the ISO-NE situation while the customers were being transferred. Thus, if FairPoint had chosen to step in and assist PNE, PNE and FairPoint could have avoided any default, the transfer of customers to PSNH’s default service would not have occurred, and the transfers to FairPoint would have gone forward in the normal course. In sum, the Plante Affidavit likely demonstrates that the failed contract between Plaintiffs and FairPoint was not the result of PSNH’s actions, but of the voluntary decision by PNE to default and not to cure, and FairPoint’s voluntary decision not to assist PNE in the ISO-NE marketplace.

13. The executed FairPoint contract (item 3 b above) is certainly relevant to the issues in this Docket. PSNH is alleged to have interfered with that contract, but it may be that Plaintiffs’ default was a breach of that agreement or that there are terms that permitted the FairPoint to back out of the Agreement for reasons unrelated to the meter reading or the deletion of the EDIs.

14. Deleted material in the Plaintiff’s Prehearing Memo in Dockets No. 13-059 and No. 13-060 is also relevant to this Docket.¹ The Memo deleted all information concerning the Plante Affidavit and the FairPoint contract.

¹ The portions of the Plaintiffs’ Memo that are not redacted demonstrate the extent to which the issues Plaintiffs on which the Plaintiffs brought suit in the Superior Court were also addressed in Docket Nos. 13-059 and 13-060.

15. Without access to the confidential documents, PSNH is unable to determine whether the Plante Affidavit, or any of the remaining confidential documents, include information material and relevant to this proceeding.

16. On April 22, 2016, the undersigned counsel for PSNH contacted counsel for Plaintiffs and requested that Plaintiffs agree that the confidential documents be disclosed. On April 25, 2016, Counsel for Plaintiffs refused on the grounds that production of the requested documents would constitute a discovery request and that the Commission had ordered that there be no discovery in this Docket. PSNH does not seek discovery. It seeks documents on file with the Commission that are “official records” “the authenticity of which is not disputed by the parties” that are readily available to both the Plaintiffs and the Commission – but not to PSNH.

17. Plaintiffs want to have it both ways, suing PSNH for its actions while preventing PSNH from having access to public records of this Commission that may undermine their position.² Fairness requires otherwise.

18. With respect to the Plante Affidavit, as a result of Plaintiffs’ disclosure of the unsigned draft of that document, any claim that the information in the affidavit was confidential has been waived. However, access to the actual affidavit that was signed and sworn to is necessary to ensure that PSNH accurately reflects what Plaintiffs represented to the Commission.

19. Finally, to the extent the Commission believes that the confidential information contains proprietary information, the Commission can order that that PSNH not disclose same except in connection with these proceedings, or may provide copies of the confidential

² Assuming that the final version of the Affidavit is similar to the draft, there is no confidential information in it other than a description of the business strategy of PNE. That strategy is now more than three years old and well known, given PNE’s default.

information with proprietary information redacted following an *in camera* review by the Commission.

20. In the event that the Commission rules that the confidential documents should be produced prior to the due date of PSNH's Reply memo, they will be addressed in that memo. In the event that the Commission rules on the issue at a later date, PSNH requests that it be permitted to file a supplemental memo to address only the information in those documents.

WHEREFORE, PSNH respectfully requests that the Commission enter an order:

- (A) Compelling the Plaintiffs' to supply PSNH with unredacted copies of the confidential information;
- (B) Allowing PSNH to supplement its Brief as necessary based upon the contents of the confidential information; and,
- (C) Granting such further relief as may be just, equitable and appropriate.

Respectfully submitted,

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

By its attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: April 29, 2016

By: Wilbur A. Glahn
Wilbur A. Glahn, III, Bar No. 937
900 Elm Street, P.O. Box 326
Manchester, NH 03105
(603) 625-6464
bill.glahn@mclane.com

Dated: April 29, 2016

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

By: Matthew J. Fossum by W.A. Glahn
Matthew J. Fossum, Bar No. 16444
Senior Counsel
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-2961
matthew.fossum@psnh.com

Certificate of Service

I certify that I have served the foregoing Motion to Compel by sending copies thereof by electronic mail to all counsel of record.

Wilbur A. Glahn
Wilbur A. Glahn, III