

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 15-491

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

Transfer Question from Superior Court

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

PNE Energy Supply, LLC ("PNE"), and Resident Power Natural Gas & Electric Solutions, LLC ("Resident Power"), object to Public Service Company of New Hampshire, d/b/a Eversource Energy's ("PSNH") motion to compel the production of unredacted copies of certain documents PNE and Resident Power provided to the Commission in past dockets.

PSNH seeks the production of unredacted copies of four documents that concern two items of information: (1) an affidavit of PNE's president, Howard Plante (the subject of a Motion for Confidential Treatment), submitted in DE 13-049 (a docket in which PSNH was not a party) in support of a joint request for waiver; and (2) the contract between PNE and Resident Power and FairPoint for the sale of PNE's customer accounts (the subject of a Motion for Confidential Treatment that was granted in Order No. 25,479), submitted in DE 13-059 and 13-060, (dockets in which PSNH was not a party). PSNH is also asking for unredacted copies of Plaintiffs' Prehearing Memorandum submitted in Dockets DE 13-059 and DE 13-060 and of Staff's Recommendation for an Immediate Show Cause Hearing submitted in the same dockets. Motion to Compel at 2. The Commission, however, has *expressly prohibited "any discovery or other factual investigation"* in this docket in Order 25,881 because it concluded this case is in the procedural posture of a motion to dismiss, and the Superior Court's transfer order directed it to answer a "narrow question." PSNH's request directly contradicts and attempts to circumvent the

Commission's Order; it is in effect asking the Commission to reconsider the decision it made in Order 25,881. On this ground alone, the Commission should deny the Motion.

Even if the Commission considers PSNH's request, it should also deny the Motion. First, PSNH is estopped from requesting discovery. Its request contradicts its earlier position both in the Superior Court (when it moved for and obtained a stay of discovery pending the resolution of its motion to dismiss the Complaint) and at the April 5, 2016 pre-hearing conference (when it argued there should be no discovery). Granting PSNH's request would provide it with an unfair advantage and deprive PNE and Resident Power of a similar avenue for discovering information related to their claim and to which they are entitled. Second, PSNH has failed to demonstrate the information it seeks is relevant to this proceeding. It concedes it does not even know whether the information is material to the issues being briefed. PSNH's attempts to tie the information it *thinks* these documents contain to the issues in this proceeding fail because they are littered with speculative assertions regarding facts not raised in the Complaint and emphasize events that occurred *before* – and have no connection to – PSNH's improper conduct.

The Commission should deny PSNH's Motion.

A. The Commission's April 8, 2016 Order Expressly Prohibits Discovery.

1. In its recent Order, the Commission acknowledged it has “been asked to answer a narrow question.” Order 25,881 at 3. It observed this case is “in the *procedural posture of a motion to dismiss*.” *Id.* at 2 (emphasis added). Thus, “the ‘threshold inquiry involves testing the *facts alleged in the pleadings* against the applicable law.’” *Id.* at 2-3 (quoting Dismissal Order at 5) (emphasis added). In its inquiry, the Commission may also “consider ‘documents the authenticity of which are not disputed by the parties . . . official *public* records . . . or . . . documents sufficiently referred to in the complaint.’” *Id.* at 3 (quoting Dismissal Order at 5)

(emphasis added). It may go no further, however, than “the record as it currently exists in” the Superior Court. Order 25,881 at 3.

2. Accordingly, based on the posture of the case, the Commission concluded “*it is neither necessary nor permissible . . . to authorize any discovery or other factual investigation in this docket.*” Order 25,881 at 3 (emphasis added). Thus, the Commission has expressly prohibited any form of discovery pending the resolution of the issues presented in the briefs it ordered the parties to file. *See id.*

3. PSNH’s request and Motion to Compel attempt to circumvent this prohibition. Its pursuit of the confidential information constitutes a discovery request that, as the Commission acknowledged, is inappropriate at this stage of the proceeding. Its request and any disputes concerning it are normally reserved for the discovery phase of a case.

4. PSNH insists it “does not seek discovery.” Motion to Compel at 6. That is inaccurate. “Discovery” is “[t]he act or process of finding or learning something that was previously unknown” and “[c]ompulsory disclosure, at a party’s request, of information that relates to the litigation.” *State v. Schaefer*, 746 N.W.2d 457 (WI 2008) (quoting *Black’s Law Dictionary* 478 (7th ed. 1999)). It refers to “[t]he pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party’s preparation for trial.” *Id.* (quoting *Arnett v. Dal Cielo*, 923 P.2d 1, 10-11 (Cal. 1996)).

5. That is precisely what PSNH seeks here. It is requesting information (the confidential portions of four filed documents, documents which are thus not “public records”) that was previously unknown to it, and it now seeks the compulsory disclosure of that information (through its Motion to Compel, a traditional method of compelling discovery) because, it contends, it relates to this proceeding. Whether PSNH labels this effort “discovery”

or something else, it directly contradicts the Commission's Order. Based on the express prohibition in that Order, the Commission should deny PSNH's Motion.

B. Even if the Commission Considers the Motion, PSNH is Judicially Estopped from Requesting Discovery Pending Resolution of the Parties' Briefs

6. PSNH agreed with the Commission's position on discovery both in the Superior Court and in this proceeding. In Superior Court, upon receiving a set of interrogatories and requests for production from PNE and Resident Power, PSNH filed a motion to stay discovery pending resolution of its motion to dismiss the Complaint. *See* PSNH's 7/2/2015 Motion to Stay Discovery. The Superior Court granted that motion. *See* 7/8/2015 Order. Further, at the April 5, 2016 pre-hearing conference, PSNH agreed that the Commission's inquiry here is based on the posture of a motion to dismiss, and it opposed PNE and Resident Power's request that the Commission, instead, allow discovery. *See* 4/5/2016 Transcript at 8-9, 25-26. PSNH stated, "in the first instance, there are no new facts that need to be found in order to address this case." *Id.* at 9. It argued that, following the Commission's resolution of the question presented in the parties current briefing, "*then* the Commission could address the question of whether, in fact, any additional facts need to [be] found or not." *Id.* at 26.

7. The doctrine of judicial estoppel precludes PSNH from adopting and pursuing the opposite position here. That doctrine states, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [it] may not thereafter, simply because [its] interests have changed, assume a contrary position" *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). "The purpose of this [68] doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Id.* (quoting *New Hampshire*, 532 U.S. at 749-50). It "prevents a party from

prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Cohoon v. IDM Software, Inc.*, 153 N.H. 1, 4-5 (2005) (quoting *In re Pack Monadnock*, 147 N.H. 419, 425-26 (2002)). A court considers the following three factors in determining whether the doctrine applies: “(1) whether the party’s later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party’s earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Kelleher*, 152 N.H. at 848 (quoting *New Hampshire*, 532 U.S. at 750-51).

8. The doctrine applies here, and PSNH should be estopped from arguing it is entitled to discover the confidential information identified in its Motion.

1. PSNH’s position is “clearly inconsistent” with its earlier position.

9. First, PSNH’s current position is “clearly inconsistent” with the position it adopted in the Superior Court and at the April 5 pre-hearing conference. In its Motion to Stay Discovery, referenced above, PSNH asserted it “intends shortly to move this court to dismiss the Plaintiffs’ Complaint for failure to state a claim for which relief may be granted.” PSNH’s Motion to Stay Discovery at 1. It did so on July 31, 2015. *See generally* PSNH’s Motion to Dismiss. PSNH requested that the Court “stay discovery pending resolution of PSNH’s forthcoming Motion to Dismiss.” PSNH’s Motion to Stay Discovery at 1. As also noted above, PSNH adopted the same reasoning at the April 5 pre-hearing conference. *See* 4/5/2016 Transcript at 8-9, 23-26.

10. The position PSNH now takes in its Motion to Compel is inconsistent with its earlier position. The Commission noted this case remains “in the procedural posture of a motion to dismiss.” Order 25,881 at 2. Despite that posture, PSNH is now requesting to conduct limited

discovery of portions of documents that remain confidential. *See* PSNH's Motion to Compel at

1. This request directly contradicts its earlier position, when it argued *all* discovery should be deferred pending resolution of its motion to dismiss (in Superior Court) or the parties' briefs (in this proceeding).

2. PSNH succeeded in persuading the Superior Court and the Commission to accept its earlier position.

11. PSNH succeeded in persuading the Superior Court and the Commission that discovery should not be allowed at this juncture. Six days after PSNH filed its Motion to Stay, the Superior Court agreed with PSNH's position and granted the Motion. *See* 7/8/2015 Order. Then, it persuaded the Commission that discovery is unnecessary and should not be allowed while the case is in the posture of a motion to dismiss. *See* Order 25,881 at 3.

3. Granting PSNH's request would provide it with an unfair advantage and would impose an unfair detriment on PNE and Resident Power.

12. Allowing PSNH to conduct the limited discovery it seeks would provide it with an unfair advantage because it, *alone*, would be permitted to investigate facts it believes are relevant to PNE and Resident Power's tortious interference with contract claim and then use that information to support its brief. PSNH cites no authority for being afforded this unilateral privilege.

13. This luxury would, in turn, impose an unfair detriment on PNE and Resident Power. At the April 5 pre-hearing conference, PNE and Resident Power asserted that the Superior Court's Orders required the Commission to *adjudicate* whether PSNH acted "improperly" for purposes of PNE and Resident Power's tortious interference claim, not just decide whether PNE and Resident Power have stated a claim upon which relief can be granted. *See* 4/5/2016 Transcript at 9-11. As PNE and Resident Power argued, a determination of whether PSNH acted "improperly" is a *fact-intensive* inquiry that is impossible to resolve

without discovery, based solely on the allegations in PNE and Resident Power's Complaint.

"The question of whether [a defendant's] conduct was . . . improper is a factual question." *Gen. Beverage Sales Co.-Oshkosh v. East Side Winery*, 396 F. Supp. 590, 594 (E.D. Wis. 1975); *see also Healthwerks, Inc. v. Spine*, No. 14-cv-93-pp, 2015 U.S. Dist. LEXIS 64216, at *37 (E.D. Wis. May 15, 2015) ("[W]rongfulness of conduct is, by its nature, a factually intensive question."). It "requires an 'inquiry into the mental and moral character of the defendant's conduct.'" *City of Keene v. Cleaveland*, No. 2013-885, 2015 N.H. LEXIS 53, at *12 (Jun. 9, 2015); *see also Jandro v. Foster*, 53 F. Supp. 2d 1088, 1099 (D. Colo. 1999) ("Whether an actor's conduct is improper is a factual inquiry largely depend[e]nt upon the actor's motives.").

14. Although the Commission has made its decision not to allow any further discovery, if the Commission were to grant PSNH's request, PNE and Resident Power would submit that it should consider, as a matter of fairness, whether to allow PNE and Resident Power discovery into PSNH's *motives* for its improper conduct. That discovery would pertain to (a) its decision to deny PNE's request for a one-time, off-cycle transfer of its customer accounts to FairPoint, and (b) its decision to delete the electronic enrollments FairPoint submitted for PNE's former customer accounts and replace them with new enrollments for transfer to PSNH's default service.¹ Given its earlier position, PSNH would likely oppose any effort by PNE or Resident Power to conduct discovery of this information.

¹ This inquiry requires, for example, testimony from individuals at PSNH who were involved in these decisions; internal documents and communications regarding those decisions; testimony from individuals involved in communications between PSNH and Commission Staff – since PSNH communicated with Staff regarding both decisions; testimony from individuals involved in communications between PSNH and ISO-NE concerning PNE's default and PSNH's assumption of PNE's load asset; information concerning the transfer of PNE's customer accounts to PSNH's default service; information concerning the software used for processing EDI transactions in PSNH's EDI system and the management of that system; and information concerning the "automated program" PSNH employed to delete FairPoint's electronic enrollments.

15. Meanwhile, granting *PSNH*'s request would permit PSNH, alone, to discover similar information it contends is critical to PNE and Resident Power's claim. PSNH would be allowed to discover information that allegedly pertains to PNE's representations to the Commission, FairPoint, and the FairPoint contract, and how that information relates to the factual allegations underlying PNE and Resident Power's claim. Such an unbalanced approach would provide PSNH with an unfair advantage and impose an unfair detriment on PNE and Resident Power.

16. The doctrine of judicial estoppel precludes PSNH from seeking discovery of this confidential information. *See Kelleher*, 152 N.H. at 848 (relying, in part, on judicial estoppel to affirm trial court's exclusion of evidence of an alleged one-year warranty, where defendant argued in earlier, related case that warranty longer than one year applied); *Cohoon*, 153 N.H. at 6-8 (affirming grant of summary judgment and holding defendant was judicially estopped from arguing plaintiff shareholders had rescission rights, where, in a prior action, defendant argued they did not have such rights).

C. PSNH Has Failed to Demonstrate the Information Requested is Relevant

17. Even assuming the Commission considers PSNH's request, it should deny it because PSNH has failed to demonstrate the information it seeks is relevant. A "party moving to compel discovery over an adversary's objection bears the burden of showing that the information is relevant." *Bourne v. Arruda*, No. 10-cv-393-LM, 2012 U.S. Dist. LEXIS 63233, at *5 (D.N.H. May 3, 2012).

18. PSNH fails to meet this burden here. As noted above, PSNH seeks unredacted copies of four documents that concern two items of information: (1) an affidavit of PNE's president, Howard Plante, submitted in DE 13-049 in support of a joint request for waiver; and

(2) the contract between PNE and Resident Power and FairPoint for the sale of PNE's customer accounts, submitted in DE 13-059 and 13-060.

19. As to *all* four documents, PSNH initially concedes it "is unaware whether" they "include information that is material and relevant to the legal briefs required by Order 25,881." Motion to Compel at 3; *see also id.* at 6 ("PSNH is unable to determine whether . . . [the] confidential documents . . . include information material and relevant to this proceeding."). On this admission alone, the Commission should deny PSNH's request.

20. PSNH's later attempts to connect the information above to the issues in the parties' briefs fail to meet its burden and lack merit.

1. The Plante Affidavit

21. PSNH claims it "has reasonable grounds to believe that the Plante Affidavit . . . has information which is relevant" to this proceeding. *Id.* at 3. It relies, however, on a *purported draft* of that Affidavit that PNE and Resident Power apparently provided to FairPoint during their *confidential* contractual negotiations. PSNH fails to demonstrate the draft is the same document as the Affidavit filed in DE 13-049. *See* Motion to Compel at 3-5.

22. Even if PSNH could demonstrate the documents are the same, its claim that the Affidavit is relevant is incorrect. First, PNE's representation to the Commission that no off-cycle meter reading would be necessary does not absolve PSNH's failure to accommodate PNE's later request, under Puc 2004.07(b), for an off-cycle meter reading. Whether PNE's representation was "contrary" to its later request has nothing to do with whether *PSNH* acted "improperly" in refusing PNE's request. Second, PNE's assertion that FairPoint could assist PNE in meeting its ISO obligations, and PSNH's suggestion that FairPoint failed to satisfy that obligation, also have no connection to *PSNH's* conduct and whether it acted "improperly" –

FairPoint's purported failure to assist PNE does not retroactively absolve PSNH of its conduct in refusing PNE's off-cycle meter read request and deleting the remaining FairPoint enrollments.²

23. Further, PSNH's assertions concerning FairPoint allege facts that are not included in the Complaint. When a case is "in the procedural posture of a motion to dismiss," "the 'threshold inquiry involves testing the *facts alleged in the pleadings* against the applicable law.'" Order 25,881 at 2-3 (quoting Dismissal Order at 5). PSNH conceded in the Superior Court that "all plausible allegations pled in the Complaint must be taken as true for purposes of [its] Motion." PSNH's Memo in support of Motion to Dismiss at 16. A "trial court [is] not obligated to consider factual allegations *not raised in the plaintiffs' writ*." *Jenks v. Menard*, 145 N.H. 236, 239 (2000) (emphasis added). Accordingly, the Commission should reject PSNH's interjection of facts and other speculation that are not raised in the Complaint.

24. PSNH's assertion that PNE and Resident Power "waived" the confidentiality of the Plante Affidavit because it received a copy of a *draft* of the Affidavit in FairPoint's production of documents in the Superior Court proceeding lacks merit. First, PSNH concedes the draft and the Affidavit that was filed with the Commission are likely not the same document. *See* Motion to Compel at 6 & n.2. Second, PNE and Resident Power did not waive the confidentiality of the Affidavit. They provided the draft and other documents FairPoint produced in the Superior Court proceeding to PSNH because they were *obligated* to provide PSNH with copies of the documents FairPoint produced in response to the subpoena served by PNE and Resident Power. If that case had proceeded to discovery, PNE and Resident Power

² PSNH also argues the assertion that FairPoint could have assisted PNE with its ISO obligations is relevant because it "demonstrates that the failed contract between Plaintiffs and FairPoint was not the result of PSNH's actions." Motion to Compel at 5. This is irrelevant. The question of whether PSNH's actions caused FairPoint to terminate the contract – and whether PNE and Resident's allegations on that issue can withstand a motion to dismiss – was already resolved by the Court and is not at issue here. *See* 11/25/15 Order on Motion to Dismiss at 8 ("[T]he complaint implies FairPoint broke the P&S, at least in part, because of [PSNH]'s wrongful conduct.").

likely would have filed a motion for protective order and designated that draft and other documents as confidential. It had not yet taken such action because discovery was stayed pending resolution of PSNH's motion to dismiss.

2. The FairPoint Contract

25. PSNH argues the *entire* FairPoint Contract is relevant because "it may be that Plaintiffs' default was a breach of that agreement or that there are terms that permitted FairPoint to back out of the Agreement for reasons unrelated to the meter reading or the deletion of the EDIs." Motion to Compel at 5. This is incorrect.

26. First, the Complaint recites the essential terms of the FairPoint Contract and sufficiently alleges the nature of the transaction to support PNE and Resident Power's claims. Complaint ¶¶ 50-51. The existence of the Contract is not at issue in this proceeding and was never at issue in Superior Court.

27. Second, PSNH's assertions concerning what the Contract may or may not have contained are not included in the Complaint and, at most, raise factual disputes that cannot be resolved on a motion to dismiss and, thus, at this juncture by the Commission. They must be disregarded, and the Commission must take as true the allegations in the Complaint concerning the FairPoint Contract. *Gordonville Corp. N.V. v. LRI-A Ltd. P'ship*, 151 N.H. 371, 377 (2004). Accordingly, PSNH's attempt to connect provisions it blindly speculates may be included in an unredacted copy of the FairPoint Contract to the issues before the Commission fails to demonstrate the relevance of the document and should be rejected.

D. PSNH Will Suffer No Harm if its Motion is Denied

28. PSNH claims its inability to obtain this confidential information means PNE and Resident Power get to "su[e] PSNH for its actions while preventing PSNH from having access to

public records of this Commission that may undermine their position. Fairness requires otherwise.” Motion to Compel at 6 (emphasis added). This is inaccurate, and hardly “unfair.” The records that PSNH is seeking are not “public records”; they are records that are confidential.

29. First, PSNH neglected to request this information in the Superior Court before it filed its motion to dismiss or within the three-month period during which that motion was pending, briefed, and heard. PSNH’s motion and supporting memorandum collectively totaled 46 pages; it attached two appendices and 20 exhibits totaling an additional 149 pages (including many “official records” it alleged may be judicially noticed); and its reply memorandum and accompanying exhibits totaled another 36 pages. Not once, in any of those filings, did PSNH request the release of the confidential information it seeks here or file a motion to compel. Nor, in the years since this information was made confidential, did PSNH file a motion with the Commission under Puc 203.08(k) requesting its release. Nothing has changed since the Superior Court proceeding last year – other than PSNH’s sudden, 11th-hour realization that it wants this information.

30. Second, the only “unfairness” PSNH claims is that it “was never provided with access to the confidential documents.” Motion to Compel at 2. Puc 203.08, however, provided PNE and Resident Power with the authority to move for and obtain protective orders providing for confidential treatment of information that deserved that protection. Nothing in that rule provides that, once a docket is closed, the confidential protection disappears; rather, Puc 203.08(h) states, *without limitation*, that the information “shall not be subject to public disclosure.” In short, PSNH is complaining about a valid process that may be invoked by parties before the Commission to protect confidential information. This is hardly “unfair.”

31. Third, the denial of PSNH's Motion to Compel would not hamstring it or place it at a disadvantage. Rather, the traditional process for addressing and resolving a motion to dismiss would be preserved. As noted above, in this procedural posture, "the 'threshold inquiry involves testing the *facts alleged in the pleadings* against the applicable law.'" Order 25,881 at 2-3 (quoting Dismissal Order at 5). PSNH cites no authority stating that this inquiry also involves testing facts speculated by one party or facts legally protected from disclosure, and, thus, requires the production of this information. If PSNH is denied the information it seeks, it will merely proceed under the same standard that applied in the Superior Court, and that the Commission has articulated here.

E. If Commission Grants PSNH's Request and Allows it to Supplement its Briefing, PNE and Resident Should Be Permitted to Conduct Discovery and Supplement Their Briefing

32. PSNH requests that, "[i]n the event that the Commission rules on [its Motion to Compel], at a later date, . . . it be permitted to file a supplemental memo to address only the information in those documents." Motion to Compel at 7. If PSNH's request is granted and it is permitted to obtain the discovery it seeks, and it is permitted to supplement its briefing, PNE and Resident Power respectfully request that they, too, be allowed to conduct discovery, to file a supplemental memo, and to respond to PSNH's supplemental briefing.

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

- A. Deny PSNH's Motion to Compel;
- B. In the alternative, if the Commission grants PSNH's Motion in any part and allows PSNH to supplement its briefing, allow PNE and Resident Power to conduct discovery, file a supplemental memo, and respond to PSNH's supplemental memo; and
- C. Grant other relief that may be just and equitable.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

and

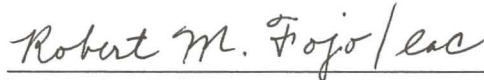
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By Their Attorneys,

Dated: May 6, 2016



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CERTIFICATE OF SERVICE

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

Dated: May 6, 2016



Douglas L. Patch

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