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

PNE ENERGY SUPPLY, LLC AND RESIDENT POWER NATURAL GAS & ELECTRIC SOLUTIONS, LLC'S MOTION FOR REHEARING OF ORDER NO. 25,942

PNE Energy Supply, LLC, ("PNE") and Resident Power Natural Gas & Electric Solutions, LLC, ("Resident Power"), pursuant to RSA 541:3 and Puc 203.33, respectfully move for rehearing of the Commission's Order No. 25,942, issued on September 12, 2016, and which concerned a question transferred to the Commission by the Superior Court in a lawsuit involving PNE, Resident Power, and Public Service Company of New Hampshire, d/b/a Eversource Energy's ("PSNH").

INTRODUCTION

The Commission admits it was tasked with assuming the role of a trial court and ruling on PSNH's motion to dismiss PNE and Resident Power's claim for tortious interference with contract. However, despite a clear directive from the Superior Court, the Commission's acknowledgement of its limited standard of review, and a clear set of applicable legal standards, the Commission remained comfortably numb in its evaluation of the Complaint against these requirements. Several conclusions in Order No. 25,942 are incorrect, unlawful, or unreasonable, as demonstrated in further detail below:

First, the Commission's limited review of the Superior Court's transfer question was unlawful and contradicts the broad directive in the Court's Transfer Order. The Court's Transfer Order requested that the Commission determine "did [PSNH] act 'improperly,' within the

meaning of a tortious interference with contract claim." The Commission, however, answered a much narrower question and concluded that "PSNH did not violate any rule adopted nor any tariff accepted or approved by the Commission."

Second, the Commission did not adhere to the appropriate standard of review on a motion to dismiss. That standard required that the Commission take the facts in the complaint as true; draw reasonable inferences in the plaintiff's favor; and not consider facts outside the complaint or that cannot easily be verified by judicial notice. The Commission overlooked or misapprehended this standard and, instead, (a) accepted PSNH's factual allegations explaining its disparate treatment of the Milan Lumber transfer, and (b) erroneously concluded PSNH had to delete the FairPoint enrollments in order to satisfy ISO-NE's directive to assume PNE's remaining load asset.

Third, the Commission's conclusion that PSNH's deletion of the FairPoint enrollments did not violate the PSNH Tariff is incorrect and unlawful. The PSNH Tariff expressly requires that a utility process a valid enrollment within two business days of receiving it. PSNH failed to do that here with the remaining 7,300 FairPoint enrollments that it deleted.

Fourth, the Commission's conclusion that PSNH did not violate Puc 2004.07(b) is unlawful and unreasonable for several reasons: (a) it misinterprets the rule, which unambiguously permitted PNE to request, and required PSNH accommodate, off-cycle meter readings; (b) misapprehended PNE and Resident Power's arguments concerning that requirement; and (c) overlooked facts in the Complaint and presented at the June 9, 2016 hearing.

Fifth, the Commission should not have resolved the question of whether PSNH's interference with the FairPoint Contract was improper on a motion to dismiss and overlooked

well-established law regarding this restriction. It is improper for a court to dismiss a tortious interference claim because the claim involves a factually-intensive inquiry that cannot be resolved during the limited review of legal issues on a motion to dismiss.

Accordingly, PNE and Resident Power respectfully request that the Commission reconsider its Order, as further demonstrated below.

ARGUMENT

A. Standard of Review

Under RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Tele. Co.*, Order No. 25,291 (Nov. 21, 2011) at 9. "The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision." *Dumais v. State Personnel Comm'n*, 118 N.H. 309, 311 (1978). A motion for rehearing must "set forth fully *every* ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4 (emphasis added).

As demonstrated below, PNE and Resident Power respectfully submit that several conclusions in Order No. 25,942 are incorrect, unlawful, or unreasonable.

B. The Commission's Limited Review of the Superior Court's Transfer Question was Unlawful and Contradicts the Court's Broad Directive in the Transfer Order

The Superior Court's Transfer Order requested that the Commission determine the following question: "Considering the tariff and regulatory provisions cited by plaintiffs and defendant, did [PSNH] act 'improperly,' within the meaning of a tortious interference with contract claim" by undertaking three acts: "(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?" Order No. 25,942 at 3 (quoting Transfer Order at 4). The Superior Court's Order on PSNH's Motion Dismiss ("Dismissal Order") further stated it referred Count I of the Complaint to the Commission "to determine if [PSNH] acted improperly" based on the conduct above. Order No. 25,881 at 2 (quoting Dismissal Order at 14) (emphasis added).

The Commission did not answer this question. Instead, it answered the question *PSNH* wanted it to answer, and concluded that "PSNH did not violate any rule adopted nor any tariff accepted or approved by the Commission" by undertaking the three acts identified above. Order No. 25,942 at 26.[1]

While the Transfer Order was clear, the two sides in this case set forth different interpretations of the transfer question. PSNH believed the transfer question required the Commission to determine whether PSNH acted improperly ***only in connection with a determination of whether PSNH violated applicable tariffs and regulations***. *See supra* n.1. PNE and Resident Power, on the other hand, argued the transfer question required the Commission to determine ***overall*** whether PSNH acted improperly. Period. The latter interpretation is the correct one, and Order No. 25,942 interpreted the transfer question incorrectly.

The transfer question is divided into two parts: (1) its prefatory clause ("Considering the tariff and regulatory provisions cited by plaintiffs and defendant") and (2) its operative clause ("did [PSNH] act 'improperly,' within the meaning of a tortious interference with contract claim"). "[A] prefatory clause does not limit or expand the scope of the operative clause."

[1] PSNH insisted in its Brief filed in this docket dated April 29, 2016 ("PSNH Brief") and its Reply Brief filed in this docket dated May 20, 2016 ("PSNH Reply") that the question before the Commission was much narrower: to determine whether PSNH's conduct was "improper," the Commission had to decide *only* whether PSNH violated the PSNH and ISO-NE Tariff provisions and PUC rules. *See* PSNH Brief at 3; PSNH Reply at 13-14.

District of Columbia v. Heller, 554 U.S. 570, 578 (2008). Rather, it "announces a purpose." *Id.* at 577. Indeed, the transfer question could be rephrased, "Because of the tariff and regulatory provisions cited by plaintiffs and defendant, did [PSNH] act 'improperly,' within the meaning of a tortious interference with contract claim?"

Here, the operative clause of the transfer question sets forth a simple, clear question: "[D]id [PSNH] act 'improperly,' within the meaning of a tortious interference with contract claim" by undertaking three specific acts of conduct? *See* Order No. 25,942 at 3 (quoting Transfer Order at 4). This question does not limit the inquiry to whether PSNH violated any PSNH or ISO-NE Tariff provisions or PUC regulations, nor does it refer to any of these authorities. Rather, the phrase "within the meaning of a tortious interference with contract claim" sets forth the scope of the inquiry: the Commission must evaluate the *element* of improper conduct that is necessary for proving a claim for tortious interference with contract. Reading the transfer question as requiring a determination *only* of whether PSNH violated tariff provisions or PUC regulations would fit poorly with the operative clause's more general question of whether PSNH acted improperly within the meaning of a tortious interference with contract claim.

As demonstrated in PNE and Resident Power's Brief, the standard for determining whether interference with a contract is "improper" – which is the question posed in the operative clause of the Court's transfer question – is broad. *See* PNE/Resident Power Brief at 9-13. The very authority PSNH relied on in its Reply – *Roberts v. General Motors Corp.*, 138 N.H. 532 (1994) (*see* PSNH Reply at 14, 16) – held that New Hampshire courts rely on numerous factors to determine if such conduct is improper, including, but not limited to, the nature of the actor's conduct, the actor's motive, the interests sought to be advanced by the actor, and the interests of, and relations between, both parties. *See* PNE/Resident Power Brief at 9-10; PNE/Resident

Power Sur-reply at 9. Examples of improper conduct include not only a violation of a statute, but the abuse of a fiduciary relationship, misrepresentations, violation of business ethics or customs, and conduct that violates public policy. PNE/Resident Power Brief at 10.[2] These principles are best demonstrated in *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 B.R. 184 (Bkrtcy. S.D.N.Y. 1996), which PSNH failed to distinguish and which the Commission dismissed, without comment, on pages 19-20 of Order No. 25,942. *Balaber* is dispositive here. There, the court held a utility tortiously interfered with a merger between a pay telephone company and a third party, based on the utility's violation of a tariff ***and*** misrepresentations and threats it made to, and economic pressure it exerted on, the company. *Id.* at 208-09, 210-11.

Thus, based on the operative clause of the Court's transfer question, an interpretation of that question should start with a presumption that it required the Commission to determine ***overall*** whether PSNH acted improperly within the meaning of a tortious interference with contract claim.

The *prefatory* clause of the transfer question reads, "Considering the tariff and regulatory provisions cited by plaintiffs and defendant . . . ." The word "consider" is defined as follows: "1: to think about carefully: as a: to think of especially with regard to taking some action . . . b: to take into account," and "2: to regard or treat in an attentive or kindly way." See *See Merriam-Webster's Learner's Dictionary*. Black's Law Dictionary defines it as "to think about, or to ponder or study and to examine carefully." *See Black's Law Dictionary*, 2d ed. The clause then references what must be "considered": the PSNH and ISO-NE Tariff provisions and PUC

[2] Given the difficulty of addressing these many factors on a motion to dismiss, this is precisely why the question of whether interference with a contract is "improper" is not appropriate for resolution on a motion to dismiss. *See* PNE/Resident Power's Brief at 25-29.

regulations that the parties cited in briefs they filed in the Superior Court in connection with PSNH's motion to dismiss. The Superior Court included this reference because it recognized the Commission's expertise with respect to these tariff provisions and regulations was required to resolve Count I of the Complaint: the Court stated "[t]he resolution of whether the conduct in Count I . . . was improper requires interpretation not just of statutes, but of tariffs and regulations within the scope of the PUC's expertise." Dismissal Order at 13; *see also* Transfer Order at 4. The Court noted that "[c]omplex matters of tariff and regulatory interpretation are *integral*" – not dispositive – "to this claim." Dismissal Order at 13.[3] Accordingly, the clause, in its entirety, states that the Commission must *think about*, *take into account*, and *examine* the tariff provisions and PUC regulations that apply to PSNH's conduct.

This prefatory clause fits with the operative clause's question requiring the Commission to determine whether PSNH acted improperly. It fits once a reader understands the history of this case: as noted above, the Superior Court transferred this question to the Commission because a determination of whether PSNH acted improperly within the meaning of a tortious interference claim involved, in part, an analysis of specific tariff provisions and PUC regulations, and such an analysis required the Commission's expertise. The prefatory clause, therefore, announces *the purpose* for which the question was transferred: to rely on the Commission's expertise to interpret tariff provisions and PUC regulations, and then to answer a broader question (Did PSNH act improperly?) that, in part, required that interpretation. Indeed, the Court concluded "the PUC is best equipped to fairly decide whether [PSNH]'s conduct was improper." *Id.* at 13. The prefatory clause does not suggest that the question of whether PSNH violated any tariff

[3] PSNH argued its denial of PNE's request for an off-cycle meter reading and deletion of the FairPoint enrollments were protected by the PSNH and ISO-NE Tariff provisions and PUC rules. *See* Dismissal Order at 10.

provisions or regulations was the *only* issue the Court transferred to the Commission. Indeed, if it did so, the operative clause of the question would be meaningless.

By failing to take into account the standard for determining whether interference with the contract was "improper", the Commission also failed to address a critical public policy issue that PNE raised in its Brief, i.e. whether PSNH's conduct violated the public policy principles articulated in the electric utility restructuring law, RSA 374-F, and the N.H. Constitution, Part II, Art. 83. *See* PNE Brief at 1-2 and 9-17. *See generally,* Order No. 25,950, DE 16-241 (October 6, 2016) at 6-10 (one of the primary purposes of the restructuring statute is to enable "customers to pay market prices and avoid long-term over market costs").

Thus, in answering the transfer question, the Commission should have evaluated PSNH's conduct, and whether PNE and Resident Power stated a valid claim for relief, not just on whether PSNH's conduct was permissible under the applicable PSNH and ISO-NE Tariffs and PUC regulations, but also under the common law standards set forth in *Balaber* and other authorities.

C. The Commission's Consideration and Acceptance of PSNH's Factual Explanations Concerning Allegations in the Complaint and Facts in Public Records Were Incorrect and Contradict its Permissible Standard of Review on a Motion to Dismiss

The Commission acknowledged this case is in "the procedural posture" "of a motion to dismiss." *See* Order No. 25,881 at 2; Order No. 25,942 at 3. The Commission further acknowledged that "the 'threshold inquiry involves testing the *facts alleged in the pleadings* against the applicable law.'" Order No. 25,881 at 2-3 (quoting Dismissal Order at 5) (emphasis added). Accordingly, it stated it would answer the transfer question "based on facts alleged by PNE and Resident Power *in their complaint*" and facts contained in *only* three other sources: "documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint." Order No. 25,942 at 3-4 (emphases added). When reviewing the facts alleged in the Complaint, the Commission stated that, "[i]n

considering a motion to dismiss, it is necessary to assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff." Order 25,881 at 3 (quoting Dismissal Order at 5). In other words, 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). It must also "not . . . *assay the weight of the evidence* which might be offered." *Ramos v. Wright*, No. 9:09-CV-1046 (GLS/RFT), 2011 U.S. Dist. LEXIS 64485, *8 (N.D.N.Y. Jan. 3, 2011) (emphasis added). The inquiry "is limited to the facts in the complaint." *Kessenich v. Raynor*, No. CV 99-1253, 2000 U.S. Dist. LEXIS 20735, at *28 (E.D.N.Y. Jul. 20, 2000).

These restrictions – (1) taking the facts in the complaint as true, (2) drawing reasonable inferences in the plaintiff's favor; and (3) *not* considering facts outside a complaint or that cannot easily be verified by judicial notice – exist because a motion to dismiss addresses *only* procedural or substantive defects in a complaint. The motion is not a substitute for the trial of genuine factual issues. The parties must be able to engage in discovery and assess facts concerning the plaintiff's claims *before* proceeding to a trial.

The Commission's Order, in two instances, did not follow these standards and exceeded the scope of its permissible review:

1. Milan Lumber Transfer

The Commission accepted PSNH's unsupported, factual allegation concerning the Milan Lumber transfer. *See* Order No. 25,942 at 25-26. PSNH's allegation was not in the Complaint, and the Commission weighed that explanation against the information in the record, cited by PNE and Resident Power, and then relied on PSNH's unsupported, factual allegation to conclude PSNH's replacement of the FairPoint enrollments (after deleting them) with new enrollments for transfer to Default Service did not violate any tariff provision or PUC regulation. *See id.*

In brief: PNE and Resident Power alleged, and PSNH *conceded*, that (a) TransCanada (another CEPS) submitted a valid electronic enrollment for Milan Lumber *before* PNE's default and suspension; and (b) following PNE's suspension, PSNH honored that enrollment and transferred Milan Lumber to TransCanada *despite* transferring it to Default Service (from PNE) for a short period of time. *See* PNE/Resident Power Brief at 19 & Exhibit A;[4] PSNH's Reply at 9; PNE/Resident Power Sur-reply at 1-2. This conduct contradicts PSNH's treatment of the FairPoint enrollments: despite FairPoint's valid submission of the enrollments before PNE's default and suspension, PSNH did not honor them after PNE's suspension and, instead, deleted them. *See id.*

PSNH attempted to explain this disparity: it claimed it uses a "manual billing process for its 'Large Power Billing (LPB) system' customers and [an] automated billing process under its 'normal C2 billing system' used for other customers." Order No. 25,942 at 25 (citing PSNH Reply at 9-10). It alleged "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.* It concluded the manual process for handling Milan Lumber "has no bearing on how the remaining approximately 7,300 customers had to be handled." *Id.* at 25-26 (quoting PSNH Reply at 10). The Commission concluded "PSNH has provided a sufficient explanation for the differing treatment of Milan Lumber." *Id.* at 26.

The Commission's consideration and acceptance of PSNH's allegations were unlawful. First, PSNH's allegations were not included in the Complaint, and PSNH cited no undisputed document, official public record, or other document referenced in the Complaint that supported them. PSNH cited the Direct Testimony of Stephen R. Hall, Michael B. Coit, and Daniel S.

[4] The facts concerning the Milan Lumber transfer were included in an official public record and, thus, may be considered by the Commission on a motion to dismiss. *See* Order No. 95,942 at 3-4.

Comer, dated September 17, 2007, from Docket No. DE 06-061, only for the general proposition that PSNH serviced its larger customers using its LPB system. *See* PSNH Reply at 9 & n.11. That testimony, however, does not support, or even mention, the allegations that Milan Lumber was serviced under that system; a *transfer* of Milan Lumber to a CEPS, or any other larger customer, had to be handled manually; and transfers of the remaining 7,300 PNE customers were, in contrast, handled in an automated fashion. *See id.* at 9-10. PSNH's assertions, therefore, are unsupported allegations that the Commission should not have considered. Rather, the Commission was required to consider *only* the disparity PNE and Resident Power identified between PSNH's treatment of PNE's former customers, on the one hand, and Milan Lumber, on the other, and it should have disregarded PSNH's explanation for why that disparity occurred.

Second, as noted above, the Commission improperly *weighed* PSNH's allegations as evidence. *See* Order No. 25,942 at 26. The Commission went further and stated PSNH's explanation was "sufficient," and on that basis concluded PSNH did not violate any tariff provision or PUC regulation. *See id.* This statement demonstrates the Commission *weighed* that evidence against PNE and Resident Power's allegations. Under the standards above, the Commission cannot engage in such an analysis on a motion to dismiss and weigh evidence or evaluate the credibility of either party's explanation. *See supra* pp. 8-9. Rather, "[w]eighing the evidence is a proper function of the factfinder," i.e., a *jury*. *See State v. Exxon Mobil Corp.*, 168 N.H. 211, 235 (2015). "The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses." *Id.* Here, the Commission was not a factfinder, because it expressly acknowledged this case was in the posture of a motion to dismiss, and it would answer the transfer question only "based on facts alleged . . . in the[] complaint." Order

No. 25,942 at 3-4. Thus, the Commission should not have considered PSNH's allegations at all, and it certainly could not weigh them against other information before it.

2. Transfer of Former PNE Customers to Default Service

The Commission's finding that PSNH had to delete the FairPoint enrollments was incorrect. *See* Order No. 25,942 at 24. The Commission found that PSNH satisfied its obligation to transfer PNE customers to Default Service "by deleting the pending enrollments and replacing the deleted enrollments with enrollments for its default service," and also relied on this conclusion to find that PSNH's replacement of the FairPoint enrollments with new enrollments for transfer to Default Service did not violate any tariff provision or PUC regulation. *See id.* This finding – that PSNH *had* to delete the FairPoint enrollments and replace them with new enrollments – was incorrect. It was not in the Complaint nor in any judicially-noticed document. Rather, it contradicts reality: PSNH could have fulfilled ISO-NE's directive to assume PNE's remaining load asset *without* deleting the FairPoint enrollments: There was no impediment in PSNH's EDI system that required it to delete the enrollments. PNE/Resident Power Brief at 19 & Exhibit A. Thus, the Commission should not have reached this conclusion.

D. The Commission's Conclusion that PSNH's Deletion of the FairPoint Enrollments Did Not Violate the PSNH Tariff is Incorrect and Unlawful

The Commission concluded that "PSNH's deletion of the pending electronic enrollments for the transfer of PNE customers to FairPoint . . . represented a reasonable and appropriate action," was "consistent with . . . the ISO-NE Tariff," and "did not violate any rule . . . or tariff" because "PSNH was required by ISO-NE to provide default service to PNE's former customers at least until their next regular meter read dates" following PNE's suspension. Order No. 25,942 at 23. This conclusion contradicts the requirement in the PSNH Tariff.

PSNH's conduct clearly violated the PSNH Tariff. Section 6 of the PSNH Tariff requires that PSNH process a change of supplier service "within two business days of receiving a valid Electronic Enrollment from a Supplier." PNE/Resident Power Brief at 17-18. The Commission's 1998 Consensus Plan for the Transmission of Electronic Data in New Hampshire's Retail Electric Market ("Consensus EDI Plan") requires PSNH to process enrollments "in the order in which they are received." *Id.* at 18. If an enrollment is invalid, PSNH must, within one business day of receiving the enrollment, notify the CEPS requesting service of the reasons for such failure. *Id.* PSNH must also send an "Error" EDI transmission to the new CEPS and existing CEPS. *Id.*

The Complaint alleges – and the Commission must accept as true – the following facts:

- FairPoint submitted electronic enrollments for the transfer of approximately 8,500 customer from PNE. *Id.*
- PSNH accepted these enrollments, and it never notified FairPoint that any of them were invalid or sent "Error" transmissions to FairPoint or PNE. *Id.*
- PSNH began transferring PNE customer accounts to FairPoint at a rate of 300-400 per business day, totaling 1,200 accounts by February 19. *Id.*
- On February 20, however, PSNH ran an "automated program" to *delete* the remaining FairPoint enrollments and replaced them with new enrollments for the transfer of PNE's remaining accounts to PSNH's Default Service. *Id.* at 19.
- PSNH urged Commission Staff to support PSNH's decision and block the transfer of PNE customer accounts to FairPoint. *Id.* at 23.

In addition, PSNH's transfer of Milan Lumber demonstrates it could have assumed PNE's remaining load asset *without* deleting the FairPoint enrollments, because there was no impediment in PSNH's EDI system that required it to delete the enrollments. *Id.* at 19. Rather, following their transfer to, and a brief stay on, PSNH's Default Service, those customer accounts could have and should have been transferred to FairPoint on their next meter read date. *See id.*

This conduct violated the Tariff: PSNH failed to process a change of supplier service for the remaining 7,300 PNE accounts "within two business days" of receiving their enrollments from FairPoint. Instead, as noted above, it deleted those enrollments.

Order No. 25,942, however, appears to imply that *ISO-NE's directive* that PSNH assume PNE's remaining load asset following its suspension relieved PSNH of the requirements above. Order No. 25,942 at 23. This conclusion was unlawful. The Order cites no authority for its conclusion that PSNH's deletion of the enrollments was "reasonable and appropriate." *See id.* Rather, like PSNH, the Commission relies on Order No. 25,660 and the ISO-NE Tariff. *See id.* at 22-23. Those authorities, however, govern only the assignment of PNE's load asset to PSNH. They do not address the impact of such assignment on a valid transaction entered into between PNE and a third party (FairPoint) that pre-dated PNE's default and suspension, or on FairPoint's submission of enrollments for the remaining 7,300 accounts that were not transferred before PSNH's assumption of PNE's remaining load asset. Nothing in Order 25,660 or the ISO-NE Tariff precluded PSNH from leaving FairPoint's enrollments alone and, like Milan Lumber, transferring the remaining 7,300 accounts to FairPoint on their next meter read date.

The Commission's reliance on Order 25,660 and the ISO-NE Tariff is further confusing for an additional reason: PSNH's argument for justifying its deletion of the enrollments *also* relied on the *PSNH Tariff's* restriction against PSNH accepting more than one "supplier" for a customer during any 30-day period *in conjunction* with Order 25,660 or the ISO-NE Tariff. *See* PSNH Brief at 17. As PSNH's argument goes – and relying on each of these authorities – PSNH claimed PNE's default constituted a "drop" of its customer accounts (according to Order 25,660), and then, because of the ISO-NE Tariff's requirement that PSNH assume PNE's remaining load asset, "the first valid enrollment transaction was the transfer of those customers

to default service" (because PSNH was allegedly a "supplier" under the PSNH Tariff, and there could not be more than one "supplier" in any 30-day period), and FairPoint's enrollments were, therefore, "no longer valid." *See* PNE/Resident Power Brief at 19-20.

The Commission makes no mention of the PSNH Tariff in its analysis of the deletion of the FairPoint enrollments. *See* Order No. 25,942 at 22-23. (Indeed, PSNH was not a "supplier" under the PSNH Tariff, and that provision of the Tariff did not apply. *See id.* at 21-22.) Accordingly, without reliance on that critical third prong of PSNH's argument (the PSNH Tariff), the reasoning for concluding PSNH's conduct was appropriate fails: the transfer of PNE's customer accounts to PSNH's default service was *not* "the first valid enrollment transaction" for each of those accounts' 30-day period. Instead, under the PSNH Tariff, the *first* valid enrollments were *FairPoint's* enrollments; those enrollments remained valid notwithstanding PNE's default and suspension; and they *trumped* any subsequent enrollments. Under the PSNH Tariff, PSNH was *required* to process those enrollments. It failed to do so.

The Commission also makes no mention of, or attempts to reconcile, the discrepancy between, on the one hand, the two arguments above – that the ISO-NE Tariff required PSNH to delete the enrollments merely because it was required to assume PNE's remaining load asset; and the PSNH Tariff required the deletion of the enrollments because PSNH was a "Supplier" – and, on the other hand, a PSNH attorney's assertion in 2014 on the record in DE 12-295 that the *Commission* issued a "directive" ordering PSNH to delete the enrollments. *See* PNE/Resident Power Brief at 24-25 & Exhibit B. This glaring inconsistency highlights the fact that PSNH had no valid justification for its deletion of the enrollments and demonstrates the improper motives underlying its conduct.

The Commission's only other cited authority or justification for PSNH's deletion of the enrollments is Commission *Staff's* February 21 2013, website notice "stating that there would be no further transfers to FairPoint without the express consent of the customers." *See* Order No. 25,942 at 26. The Commission labels this notice a "direction on behalf of the Commission" and concludes "it was reasonable and appropriate for PSNH to take no further action to facilitate the transfer of customers to FairPoint." *Id.* Its reliance on this notice, however, is misplaced for two reasons. This notice was published *the day after* PSNH deleted the enrollments. Thus, it could not have provided PSNH with any direction *at all*. Second, the Commission fails to explain how Staff's notice was the same as a directive or order from the Commission. The notice was not a Commission *order* or posted pursuant to one; rather, it was posted by *Commission Staff* at PSNH's urging and amidst threats, also by Staff, of "slamming" violations against Resident Power and FairPoint. *See* PNE/Resident Power Sur-reply at 2. (The Commission also fails to explain – if this notice was, indeed, a "direction on behalf of the Commission" – why PSNH did not obey it completely and delete TransCanada's pending enrollment for Milan Lumber as well.) This notice did not provide any authority for PSNH's deletion of the enrollments.

The Commission's Order does not cite any authority for absolving PSNH's violation of the PSNH Tariff, and its reliance on two of the three sources for PSNH's reasoning that its conduct was proper (Order 25,660 and the ISO-NE Tariff), to reach that same conclusion, was incomplete. Thus, the Commission's conclusion that PSNH's conduct was "reasonable and appropriate" and "did not violate" any rule or tariff is unlawful and contradicts the PSNH Tariff.

E. The Commission's Conclusion that PSNH did not Violate Puc 2004.07(b) is Unlawful and Unreasonable Because it Misinterprets the Requirement in the Rule that PSNH Accommodate PNE's Request for an Off-Cycle Meter Reading, it Misapprehends PNE and Resident Power's Own Arguments, and it Overlooks Facts in the Complaint and Presented at the June 9, 2016 Hearing

The Commission concluded that PSNH did not violate Puc 2004.07. *See* Order No. 25,942 at 20-22. It bases its conclusion, erroneously, on four points:

First, the Commission states it disagrees 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." *Id.* at 20-21. PNE and Resident Power did not make that argument. *See* PNE/Resident Power Brief at 13-14. Instead, they argued PSNH had an obligation to accommodate PNE's request, and if PSNH could not accommodate PNE's request *within five business days*, it was required to negotiate an extension of time to complete the request. *See id.*

Second, the Commission states Puc 2004.07(b) refers to "off-cycle meter reading" "in the singular and not in the plural" and provides "no indication that the obligation to perform an off-cycle meter reading extends to multiple requests, let alone thousands of such requests." Order No. 25,942 at 21. This statement echoes PSNH's argument that it "had no obligation to conduct thousands of off-cycle readings." PNE/Resident Power Brief at 15. This interpretation of the rule is incorrect.

Nothing in Puc 2004.07 imposes such a condition or restriction on a CEPS's right to request an off-cycle meter reading. The Commission notes that statutes should "not be read in isolation but in the context of the[ir] overall purpose and effect." Order No. 25,942 at 20-21. This principle, however, does not undermine the starting point for any interpretation of a statute or rule: the starting point for interpretation is the provision "***as written***." PNE/Resident Power Sur-reply at 3. The cases cited in the Commission's Order support this point. *See Appeal of N. New England Tel. Operations, LLC*, 165 N.H. 267, 271 (2013) ("Our analysis must start with

consideration of the plain meaning of the relevant statutes."); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010) (same); *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22 (2007) ("When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used. . . . We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."). A court will look beyond the plain language ***only if it is ambiguous***. PNE/Resident Power Sur-reply at 3.

Here, the rule plainly states "*[n]othing* shall prevent a CEPS from requesting an off-cycle meter reading." Puc 2004.07(b) (emphasis added). Nothing in the rule restricts a CEPS from requesting more than one off-cycle meter reading. For it to do so, the Commission would have included the word "one" in place of "an," or included other language stating that a CEPS could not invoke this rule more than once. It did neither. As written, it reasonably permits a CEPS to invoke the rule to request an off-cycle meter reading for a customer, and to invoke it again for another customer if necessary.

Even if the rule were read to limit off-cycle meter reading requests to a *single* request, the Commission's own standard of interpretation – that statutes should "not be read in isolation but in the context of the overall purpose and effect of Puc 2004.07," *see* Order No. 25,942 at 20-21 – undermines that conclusion. Other sections of Puc 2004.07 refer to "*customers*" in the plural. For example, Puc 2004.07(c) states "[a] CEPS shall provide not less than 5 business days' written notice to ***customers*** . . . prior to terminating electric service." (Emphasis added.) Also, Puc 2004.07(g) states "[a]ny CEPS that ceases to sell electricity to a class of ***customers*** within the state shall refund to customers any outstanding deposits or prepayments within 30 days of final billing." (Emphasis added.) If other sections of Puc 2004.07 contemplate action by a

CEPS with respect to a group of customers, it is reasonable for a CEPS to interpret Puc 2004.07(b) to mean it can request an off-cycle meter reading for each of those customers. Indeed, limiting a CEPS to just a *single* off-cycle meter reading for a *single* customer, in a situation when it terminates service for a group of customers, would be absurd and unreasonable.

The Commission's conclusion that PSNH could not have performed "thousands of off-cycle meter readings" is incorrect and overlooks facts in the Complaint and presented at the June 9, 2016 hearing. *See* Order No. 25,942 at 21-22. First, PSNH could have transferred approximately 90% of PNE's customer accounts – known as "non-exception" customers – to Default Service on an automated basis, (but it failed to inform PNE and Resident Power of that fact). *See* Complaint ¶ 73. Second, at the June 9, 2016 hearing, undersigned counsel explained how PSNH could have easily performed thousands of meter readings in a single day: PUC filings and news reports[5] showed that PSNH had approximately 50 meter readers in the field (and possibly more in 2013, when PNE made the request for an off-cycle meter reading). *See* 6/9/2016 Transcript at 54. Some of those meter readers could, in densely-populated areas (like Derry, NH, for instance), conduct up to 1,600 meters reads in a single day, and over 200 meter reads in more rural towns (like Chester, NH) in a day. *See supra* n.5. If just 10 of those meter readers conducted 1,000 meter reads each in a single day (a low estimate based on the above information), they could conduct a total of 10,000 meter readings. *See id.* Here, PNE requested 8,500 off-cycle meter readings. It is reasonable – and far from absurd – to conclude PSNH could have accommodated PNE's request in a short period of time.

Third, the Commission relies on the title of Puc 2004.07, "Notice of Termination of Service," and states Puc 2004.07 applies only when a CEPS seeks to terminate service for a

[5] http://www.unionleader.com/article/20150517/NEWS05/150519274/1028/NEWS05&template=mobileart

customer, and that circumstance was not present here. *See* Order No. 25,942 at 20-21. That is inaccurate. PNE and Resident Power *were terminating* service to their 8,500 customer accounts that were sold to FairPoint. Thus, the rule applies here.

Even if they were not, "[t]he title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous [a] court will not consider the title in determining the meaning of the statute." *In re Estate of McCarty*, 166 N.H. 548, 552 (2014).

McCarty is instructive here. In that case, the New Hampshire Supreme Court held that the plain language of RSA 167:16, III applied to all claims for recovery of medical assistance, including claims not secured by a lien by the New Hampshire Department of Health and Human Services ("DHHS"). *Id.* at 551. The statute in question read as follows: "Notwithstanding RSA 556:5 [which provides a one-year limitations period] and any other provision of law to the contrary, the administrator of a recipient's estate shall be conclusively presumed to have accepted a *claim* for recovery of assistance which is subject to the jurisdiction of the [circuit court — probate division] unless, within 12 months from the initial grant of administration, the administrator commences an equitable action in the superior court challenging the validity or amount of the commissioner's *claim and lien*." *Id.* at 550 (quoting RSA 167:16, III) (emphases in original). DHHS had filed a claim for recovery of medical assistance, but it was not secured by a lien against the decedent's property. *Id.* at 449. The appellant, the executrix of an estate, did not pay the claim, and she asked the circuit court to dismiss it, arguing it was barred by the one-year limitations period in RSA 556:5 because DHHS failed to file suit within one year. *Id.* DHHS objected, stating its claim was exempted from RSA 556:5 because it was a claim for recovery of medical assistance under RSA 167:16, III, and the estate had not challenged the claim's validity or amount within one year, as required. *Id.* The circuit court denied the estate's

motion to dismiss and held RSA 167:16, III applied and exempted DHHS from being required to file suit within the one-year limitations period in RSA 556:5.

On appeal, the estate argued RSA 167:16, III applied only to claims secured by a lien, and DHHS's claim was not secured by a lien. *See id.* at 549-50. Specifically, the estate made the same arguments PSNH makes here, and which the Commission adopted in Order No. 25,942: first, that language elsewhere in the statute (the words "claim and lien" at the end) modified the statute's general reference to "claim" at the beginning, such that "claim" had to mean "claim secured by a lien"; second, that because other paragraphs in RSA 167:16 applied only when DHHS had both a claim *and* lien, paragraph III should be interpreted to be limited to those circumstances as well; and, third, that the statute applied only to claims secured by liens because the *title* of RSA 167:16 was "Enforcement of Assistance Liens." The Supreme Court rejected all three arguments. *See id.* at 550-52. It held, instead, that the language in RSA 167:16, III was clear and unambiguous: the first clause referred only to a "claim," not a claim with a lien or a claim secured by a lien, and the second clause's reference to "claim and lien" meant only that an estate must challenge both a claim *and lien*, *if* a lien secures the claim. *Id.* at 551. The latter clause did not, however, limit application of RSA 167:16, III to claims secured by liens. *Id.* The Court concluded the statute applies to *all* claims for recovery of assistance, and it would "not add language that the legislature did not see fit to include." *Id.*

Here, as noted above, the rule is clear and unambiguous: PNE had a right to request these off-cycle meter readings. *See supra* pp. 18-19. The fact that other sections of Puc 2004.07 refer to other circumstances, or the possibility that the title of Puc 2004.07 may refer to something different, do not affect or undermine the plain meaning of Puc 2004.07(b). *See McCarty*, *supra*.

Fourth, the Commission erroneously concluded Puc 2004.07(b)(2) and (3) did not obligate PSNH to negotiate with PNE an extension of time to accommodate PNE's request. *See* Order No. 25,942 at 21. The Commission based its conclusion on two points: first, that, under Puc 2004.07(b)(2), a "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;" and, second, Puc 2004.07(b)(3) requires a utility "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." *See id.*

Although the Commission is correct that Puc 2004.07(b)(2) permits a utility to deny a request if five business days' written notice is not provided, that did not occur here. PSNH never claimed in 2013 that PNE did not provide the required notice. Rather, it *conceded* PNE provided written notice on February 14, 2013. *See* PSNH Brief at 8, 14-15 & Exhibit E. Further, PSNH spent two days (after PNE's counsel's initial request on February 12) considering how to accommodate PNE's request. *See* Complaint ¶¶ 66-68. Although PNE defaulted on the afternoon of February 14, PNE's load asset was not required to be retired – and PSNH did not assume it – until *six days later*, February 20, 2013. Thus, PNE was still conducting business until February 20,[6] and PSNH would have had six days (eight, if one begins counting from February 12, when PNE and PSNH first discussed this issue) to effectuate the off-cycle meter readings. Moreover, PSNH's stated reason for its denial of PNE's request was that it "did not have the personnel resources necessary" to accommodate it within a few days, *not* that PNE did not provide it with proper notice. *See* Complaint ¶ 68. Accordingly, given that reason, PSNH

[6] PSNH's assertion in its Brief that, as of February 14, PNE "had no ability to do business at all" is, therefore, inaccurate. *See* PSNH Brief at 15 n.14.

was obligated, under Puc 2004.07(b)(3), to negotiate with PNE an extension of time to complete the request. It failed to do that and, thus, violated Puc 2004.07.

Even if PSNH had, under Puc 2004.07(b)(2), denied PNE's request because it did not provide the required five days' written notice, the plain language of Puc 2004.07(b)(3) would have still obligated PSNH to negotiate an extension of time to complete it. The Commission's interpretation of that section is incorrect. That section provides guidance on what occurs if a utility denies a request that lacks proper notice. It begins with the phrase, "[t]o the extent a utility can not accommodate a request for an off-cycle meter reading within 5 business days . . . ." *See id.* It uses the same phrase – "five business days" – used in subsections (1)(a) and (2). This language contemplates a utility's inability to complete a request for an off-cycle meter reading in fewer than five business days, which *includes* a scenario when it does not receive proper notice. The purpose of providing notice with a request – e.g., to terminate a contract, effectuate a change order in a construction project – is to allow the recipient of the notice sufficient time to examine the request, potentially accommodate it, and plan for its consequences. *See*, *e.g.*, *Stonebrae, L.P. v. Toll Bros., Inc.*, No. C-08-0221 EMC, 2009 U.S. Dist. LEXIS 33641, at *14 (N.D. Cal. Apr. 22, 2009) (purpose of a default notice provision in a purchase agreement was to give the plaintiff an opportunity to cure any asserted default within a given time period); *Blankenship Constr. Co. v. N.C. State Highway Com.*, 222 S.E.2d 452 (N.C. App. 1976) (purpose of a notice requirement in a construction contract for requesting additional compensation concerning unexpected conditions arising during the project was to apprise the defendant of those conditions); *Whittle v. General Mills, Inc.*, 252 S.W.2d 55, 56-57 (Ky. Ct. App. 1952) (purpose of notice requirement in workers compensation statute requiring notice of injury at the earliest practicable time was to give the employer an early opportunity to examine the nature and extent of the claimed injury and determine

whether the injury arose from an accident suffered in the course of employment). The presence of a notice requirement presumes that, if proper notice is not given, the party entitled to the notice cannot accommodate the request. *See id.* Accordingly, Puc 2004.07(b)(3) contemplates a situation in which a utility is faced with a request for an off-cycle meter reading that was not provided with five days' written notice, and that it, presumably, cannot therefore complete in fewer than five business days. Puc 2004.07(b)(2) protects the utility by permitting it to deny the request to perform it in fewer than five business days. But subsection (b)(3) obligates the utility to negotiate a timeframe – beyond five business days – to accommodate and complete the request. If it were interpreted differently, the preface to that requirement ("[t]o the extent a utility can not accommodate a request for an off-cycle meter reading within 5 business days . . . .") would be meaningless. PSNH failed to do that here and, thus, violated Puc 2004.07.

F. The Commission Should Not Have Resolved the Question of Whether PSNH's Interference with the FairPoint Contract was "Improper" on a Motion to Dismiss

Assuming the Commission's Order addressed some portion of the question of whether PSNH's conduct was "improper," it should never have resolved that issue on a motion to dismiss, and it overlooked well-established law regarding this restriction. "The question of whether [a defendant's] conduct was merely competitive or improper is a factual question which cannot be decided on a motion to dismiss." PNE/Resident Power Brief at 25. The alleged "wrongfulness" of PSNH's conduct "is, by its nature, a *factually intensive* question." *Id.* It "requires an 'inquiry into the mental and moral character of the defendant's conduct'" and largely depends on the defendant's "motives." *Id.* at 25-26. It is "improper for [a] court to dismiss [a] tortious interference claim." *Id.* at 26.

PNE and Resident Power cited several authorities in their Brief in which courts ***denied*** a defendant's motion to dismiss a tortious interference claim, and held the plaintiff had stated a

valid claim for relief, because the claim presented a factually-intensive question that could not be resolved at the pleading stage of a case without the benefit of the parties' conducting discovery. *See id.* at 26-27. PSNH failed to address these authorities in its Brief or its Reply.

As demonstrated above, a resolution of the Superior Court's transfer question ("did PSNH act improperly within the meaning of a tortious interference with contract claim?") requires application of a well-established, broad standard for determining whether conduct is "improper" that relies on various types of wrongful conduct for meeting its burden of proof. *See supra* pp. 5-6. Such a standard, therefore, requires *fact-specific* inquiries that are impossible to resolve at this juncture based solely on the allegations in the Complaint. For example, determining whether PSNH acted "improperly" in deleting the FairPoint enrollments requires examining: the motives of the individuals at PSNH who were involved in that decision; why that decision was made even though PSNH's own EDI system did not require the deletion of the enrollments; communications between PSNH and ISO-NE and/or Commission Staff concerning how and why PSNH would address the existing FairPoint enrollments in light of its obligation to assume PNE's load asset; the software used for processing EDI transactions in PSNH's EDI system and the management of that system; and the "automated program" PSNH used to delete the FairPoint enrollments. Even if PSNH did not violate any tariff provision or PUC regulation, the above inquiries need to be made to ascertain whether PSNH violated other common-law standards of conduct articulated in authorities cited above, including *Balaber*, such as whether it misrepresented any facts to PNE and Resident Power concerning its ability to accommodate PNE's off-cycle meter reading request; whether its denial of the off-cycle meter reading request was an attempt to delay the transfer of those customer accounts to FairPoint so they could, instead, be transferred to Default Service; and whether its deletion of the FairPoint enrollments

was motivated by a desire to add more customer accounts to its Default Service in an effort to continue to recoup its expenses for its electric generating facilities.

The Commission's consideration of PSNH's explanation for its preferential treatment of Milan Lumber, for example, demonstrates why the question of whether PSNH acted improperly cannot be resolved on a motion to dismiss. PNE and Resident Power allege that PSNH's disparate treatment of TransCanada's enrollment for Milan Lumber and the FairPoint enrollments show it acted improperly in deleting the FairPoint enrollments (because, like the TransCanada enrollment, it could have left the FairPoint enrollments alone and allowed those customer accounts to be transferred to FairPoint). PSNH's explanation for that disparate treatment involved complicated issues concerning its billing systems. That assertion – and whether it adequately explains the disparate treatment – requires an inquiry into, for instance, the details of those billing systems, why they are used for different customers, how/why one system requires a manual process for customer account transfers, and why a manual process requires PSNH to delete the FairPoint enrollments. This fact-finding can only be accomplished in discovery and could not be resolved by the Commission – as it did here – on a motion to dismiss.

Indeed, the Commission's narrow ruling, which focused solely on whether PSNH violated applicable tariff provisions and PUC regulations, and its reluctance to address factual inquiries related to PSNH's motives and intent, further demonstrate that resolving the question of whether PSNH acted improperly should not be resolved on a motion to dismiss. These factual questions present complicated issues that the parties must be allowed to vet during the discovery process. They cannot be addressed or resolved in a setting in which only legal issues are addressed, like the resolution of a motion to dismiss.

Even the question of whether PSNH violated applicable tariff provisions and PUC regulations requires delving into PSNH's motives and intent. For example, information concerning PSNH's EDI system is critical in determining whether PSNH violated the ISO-NE or PSNH Tariffs. An inquiry must be made to confirm that system contains no technical restriction for handling multiple enrollments and, if any such restriction exists, whether it was based on PSNH's interpretation of requirements imposed by either the ISO-NE Tariff or PSNH Tariff. The Commission did not permit the parties to conduct that inquiry here, and its reasoning in the Order did not benefit from such an inquiry.

Thus, the Commission should have denied PSNH's motion to dismiss and allowed the Superior Court (or the Commission itself) to address and decide the issue of whether PSNH acted improperly after the parties have had an opportunity to conduct discovery. *See* PNE/Resident Power Brief at 28-29.

CONCLUSION

For the foregoing reasons, PNE and Resident Power respectfully request that the Commission:

A. Reconsider Order No. 25,942;

B. Deny PSNH's motion to dismiss;

C. Issue an order stating that PNE and Resident Power have stated a valid claim for relief that PSNH acted "improperly" for purposes of their claim for tortious interference with contract (Count I of the Complaint) by (1) refusing to accommodate PNE's request for a one-time, off-cycle meter reading, and (2) deleting FairPoint's enrollments and replacing them with new enrollments for transfer to default service; and

D. Grant other relief that may be just and equitable.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

and

RESIDENT POWER NATURAL GAS
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By Their Attorneys,

Dated: October 12, 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: October 12, 2016

Robert M. Fojo