

**THE 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

Order Denying Motion for Rehearing

ORDER NO. 25,963

November 9, 2016

In this Order, we deny the motion for rehearing of Order No. 25,942 (September 12, 2016) that was filed by PNE Energy Supply, LLC, and Resident Power Natural Gas and Electric Solutions, LLC.

I. PROCEDURAL BACKGROUND

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

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

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

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

In Order No. 25,881 (April 8, 2016) (Initial Order), we addressed the scope of this proceeding and certain procedural issues. We found in the Initial Order that, in view of the procedural posture of the matter in the context of a motion to dismiss filed with the Court, it is “neither necessary nor permissible for us to authorize any discovery or other factual investigation in this docket.” Initial Order at 3. Instead, we clarified that the transferred question would be determined based on facts alleged by PNE and Resident Power in their complaint, while also considering “documents the authenticity of which are not disputed by the parties ... official public records ... or ... documents sufficiently referred to in the complaint.” *Id.*; *see also Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010).

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

In Order No. 25,942 (September 12, 2016) (Merits Order), we provided an answer to the question transferred by the Court. We found that PSNH did not violate any rule of the Commission, or any tariff accepted or approved by the Commission, in connection with: (a) its refusal to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint, (b) its deletion of 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint,

and (c) its replacement of those enrollments with electronic enrollments for the transfer of PNE customers to PSNH default service. Merits Order at 26.

PNE and Resident Power filed a Motion for Rehearing of the Merits Order on October 12, 2016 (Motion), and PSNH filed an Objection to the Motion on October 18, 2016 (Objection).

II. POSITIONS OF THE PARTIES

A. PNE's and Resident Power's Motion

In their Motion, PNE and Resident Power argue that, despite a clear directive from the Court, the Commission's admittedly "limited standard of review," and a clear set of applicable legal standards, the Commission's conclusions in the Merits Order were "incorrect, unlawful, or unreasonable." Motion at 1-3.

PNE and Resident Power asserted that the Commission erred because it:

- (1) unlawfully narrowed the Court's transfer question from a focus on the alleged improper conduct of PSNH by concluding that PSNH "did not violate any rule adopted nor any tariff accepted or approved" by the Commission;
- (2) misapprehended the standard of review required for a motion to dismiss by accepting PSNH's allegations as factual instead of accepting the facts in the complaint as true and by considering facts outside the complaint that could not easily be verified by judicial notice instead of drawing reasonable inferences in favor of PNE and Resident Power;
- (3) incorrectly and unlawfully concluded that the deletion of FairPoint's electronic enrollments did not violate the PSNH Tariff² when Petitioners allege that in fact it did;
- (4) unlawfully and unreasonably concluded that PSNH did not violate Puc 2004.07(b) based on a misinterpretation of a rule that clearly permitted PNE to request and required PSNH to accommodate off-cycle meter readings, and based on a misapprehension of the arguments made by PNE and Resident Power and overlooking of facts in the complaint and as presented at hearing; and

² PSNH's Tariff NHPUC No. 9 for Electric Delivery Service (PSNH Tariff). *See* Merits Order at 5.

- (5) overlooked well-established law restricting the Commission from resolving the question whether PSNH's interference with the PNE transfer agreement with FairPoint was improper on a motion to dismiss, since 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."

Id.

PNE and Resident Power argued that the Commission failed to answer the question transferred from the Court, but rather "answered the question PSNH wanted it to answer" by concluding that PSNH did not violate any rule or tariff by its actions. *Id.* at 4. They asserted that the correct question for the Commission to determine was *overall* whether PSNH acted improperly, and the Commission was not entitled to reinterpret that question as narrowly as it did. *Id.* PNE and Resident Power examined sources for the correct grammatical uses of "prefatory" and "operative" clauses, and referenced dictionaries for the definition of "consider," in support of their argument that the Commission did not carefully "consider" the actual question transferred from the Court, and thereby relied on an incorrect standard for determining whether PSNH's alleged interference with the FairPoint contract was improper. *Id.* at 4-8. According to PNE and Resident Power, by failing to take into account the correct standard for determining whether interference with that contract was improper, the Commission "failed to address the critical public policy issue" raised in their brief. *Id.* at 8.

The second argument for rehearing in the Motion was that, since the Commission "acknowledged" that this case is framed as a motion to dismiss, its standard of review, as actually applied, was incorrect. *Id.* at 8. According to PNE and Resident Power, the Commission's consideration and acceptance of PSNH's factual explanations regarding allegations in the complaint and facts in public records were incorrect and contradicted permissible standards of review on a motion to dismiss. *Id.* at 8-9. PNE and Resident Power maintained that a "trial court" is not obligated to consider factual allegations not raised in the

“plaintiffs’ writ,” and “must also not assay the weight of the evidence which might be offered.” *Id.* at 9 (internal citations and quotations omitted). They argued that the Commission must assume that the facts alleged in their complaint are true, draw inferences in their favor, and consider no facts, other than those alleged in the complaint, that cannot be easily verified by judicial notice. *Id.*

PNE and Resident Power claimed that the Commission exceeded its authority, and the scope of its permissible review, in at least two instances: (1) the transfer of PNE customer Milan Lumber Company (Milan Lumber) to another competitive electric power supplier (CEPS) following PNE’s default and suspension; and (2) the transfer of former PNE customers to PSNH default service, rather than to FairPoint, as PNE intended, following its suspension by ISO New England Inc. (ISO-NE). *Id.* at 9-12.

According to PNE and Resident Power, the Commission accepted PSNH’s allegedly unsupported factual allegation, which was not in the complaint, regarding the Milan Lumber account transfer, weighing the explanation against information contained in the record. *Id.* at 9. In support of this argument, they reiterated their prior arguments regarding this issue. *Id.* at 10; *see also* Sur-Reply Brief dated 6/1/16 at 1-3 and Transcript of Hearing dated 6/9/16 at 38-39. They claimed that the Commission’s consideration of PSNH’s explanation regarding differences in its automatic and manual billing systems was unlawful, as the Commission was permitted only to consider their allegations regarding Milan Lumber and not to weigh PSNH’s allegations as evidence. Motion at 10-12. According to PNE and Resident Power, under the standards set forth in the Motion, the Commission cannot engage in such an analysis on a motion to dismiss and cannot weigh evidence or evaluate the credibility of either party’s factual explanation. *Id.*

PNE and Resident Power also claimed the Commission’s determination that PSNH effectively had no option but to delete the FairPoint electronic enrollments, and that PSNH did

not violate any provision of the PSNH Tariff or PUC rules in doing so, was incorrect because it was not in their complaint or in any judicially-noticed document. *Id.* at 12. In support of this claim, PNE and Resident Power reiterated allegations and arguments they had previously made. *Id.* (citing PNE and Resident Power Brief at 19 and Exhibit A).

According to PNE and Resident Power, the Commission failed even to mention the PSNH Tariff in its analysis of PSNH's deletion of the FairPoint electronic enrollments. *Id.* at 12-16. In their view, the Merits Order neither addressed nor attempted to reconcile the discrepancy among the arguments that ISO-NE required PSNH to delete the enrollments in order to assume the PNE load asset, that PSNH as a "Supplier" under the PSNH Tariff was required to delete the enrollments, and that the Commission had issued a directive ordering PSNH to delete the enrollments with Commission staff posting a notice on the Commission website stating that there would be no further transfers of PNE customers to FairPoint without the express consent of the customer. *Id.*

PNE and Resident Power claimed that the Commission misinterpreted the provisions of its own rule, Puc 2004.07(b), that required PSNH to comply with PNE's request for off-cycle meter readings, by misapprehending their arguments and overlooking facts presented in their complaint and during the hearing. *Id.* at 17-24. They maintained that the Commission based its allegedly erroneous conclusions in the Merits Order on four points: (1) that PNE requested over 7,300 off-cycle meter readings within five business days, when instead PNE asked that, if PSNH could not accommodate that request, it negotiate an extension of time in which the request could be completed consistent with the Commission rule; (2) that Puc 2004.07(b) contemplates only a single off-cycle meter reading rather than multiple meter readings that a utility is not obligated to perform, which would be an "absurd and unreasonable" conclusion; (3) that Puc 2004.07(b) applies only when a CEPS seeks to terminate service for a customer, which was not the case with

PNE; and (4) that Puc 2004.07(b)(2) and (3) did not require PSNH to negotiate an extension of time to accommodate PNE's request for multiple off-cycle meter readings. *Id.* PNE and Resident Power further implied that PNE's off-cycle meter reading request was timely made under the rule because it was provided five days prior to PNE's default and suspension by ISO-NE. *Id.* at 22-24.

In conclusion, PNE and Resident Power requested that the Commission reconsider the Merits Order, deny PSNH's motion to dismiss, and issue an order stating that they have a valid claim for relief that PSNH acted improperly regarding the claim for tortious interference with contract by (1) refusing to accommodate PNE's request for a one-time off-cycle meter reading, and (2) deleting FairPoint's electronic enrollments and replacing them with new enrollments for transfer of PNE customers to PSNH default service. *Id.* at 27.

B. PSNH's Objection

PSNH objected on the grounds that there is nothing new in the Motion and it provides no basis for reconsidering the Merits Order, nor does it demonstrate that the Commission overlooked any matter or mistakenly conceived of any of the arguments advanced by PNE and Resident Power in the more than "[one] hundred pages of pleadings and ... oral arguments [before the Court] and this Commission addressing the matters set forth in the [Motion]." Objection at 1-2.

According to PSNH, PNE and Resident Power continue to seek an expansion of the Commission's scope of inquiry beyond what is permissible under the Transfer Order and relevant New Hampshire case law regarding tortious interference with contract, because they argue the Commission failed to consider whether PSNH acted improperly even if its alleged actions did not violate any tariff or regulatory provision. *Id.* at 2. PSNH asserted that the Court "made quite clear what it sought in the Transfer Order, what it expected the Commission to

consider and what New Hampshire law required,” and the efforts of PNE and Resident Power to “explain what the [Court] meant are contrary to what that Court explicitly said.” *Id.* at 3.

According to PSNH, PNE and Resident Power failed to avail themselves of remedies available to resolve any perceived lack of clarity regarding the scope of the inquiry to be undertaken by the Commission as directed by the Court, because they neither moved for reconsideration or clarification of the Court's orders nor sought timely reconsideration of the Initial Order before the briefing directed by the Commission. *Id.* at 3-4. PSNH maintained that the Commission therefore correctly concluded that “its task was to look only to the authorities referenced by the [Court], i.e., the tariffs and regulatory provisions.” *Id.* at 3.

With respect to PSNH’s deletion of the pending electronic enrollments for transfer of PNE customers to FairPoint, PSNH maintained there was ample support for the Commission’s conclusion that this “represented a reasonable and appropriate action consistent with the respective obligations of PSNH and PNE under the ISO-NE Tariff.” *Id.* at 4 (quoting Merits Order at 23). PSNH noted that the Commission relied on Order No. 25,660 and the ISO-NE Tariff³ as the basis for its finding, and PSNH suggested that PNE and Resident Power “simply disagree with the Commission's conclusion in Order No. 25,660 and the [Merits Order] that once PNE defaulted, the ISO-NE Tariff required PSNH to assume PNE's load and that PSNH thus had no alternative but to transfer those customers to its default service.” *Id.* at 5 (citing Merits Order at 22). According to PSNH, the Motion simply repeats the prior argument of PNE and Resident Power that, because the PSNH Tariff required processing of a change in supplier service within two business days of receipt of an electronic enrollment from FairPoint, all of PNE's customers should have been transferred immediately. *Id.* PSNH asserted that this is an incorrect reading of the relevant tariff provision, and therefore the Commission was justified in finding that PSNH

³ ISO New England Inc. Transmission, Markets, and Services Tariff (ISO-NE Tariff). *See* Merits Order at 4.

did not violate any rule or tariff by deleting the pending FairPoint electronic enrollments once PSNH was required to assume PNE's load asset following its default and suspension by ISO-NE. *Id.* at 5-6. PSNH emphasized the "unique and extraordinary circumstances" cited by the Commission as the context in which it found that PSNH's actions did not violate relevant provisions of the Commission's rules, the PSNH Tariff, or the ISO-NE Tariff. *Id.* at 6.

PSNH also addressed the claim by PNE and Resident Power that PSNH's differential treatment of Milan Lumber demonstrated that an electronic enrollment with another CEPS could be completed, notwithstanding PNE's default and suspension by ISO-NE and PSNH's assumption of the PNE load asset. *Id.* at 4. PSNH maintained that, when considering this issue, the Commission was "fully entitled to consider differences between customers on PSNH's manual and automated billing processes as those matters are on file with the Commission." *Id.* (citing Merits Order at 25). PSNH further stated that the Commission was entitled to conclude that PSNH "had to delete the FairPoint enrollments" in connection with the Commission's interpretation of the PSNH Tariff and Commission rules "as applied to the circumstances facing PSNH after PNE's default." *Id.* (citing Merits Order at 23-26).

With respect to the off-cycle meter reading provisions of Puc 2004.07, PSNH argued that the Commission's interpretation of this rule is "entitled to significant deference in that determination." *Id.* at 6 (citing *Vector Marketing v. Dept. of Rev. Adm'n.*, 156 N.H. 781 (2008)). According to PSNH, the Commission properly based that conclusion on its consideration of the overall context and specific language of the particular rules section. *Id.* at 7. PSNH further maintained that PNE and Resident Power claimed for the first time in the Motion that PNE's off-cycle metering reading request was timely made in accordance with Puc 2004.07, and PSNH refuted this claim because the rule requires that such a request be made *five business days* in

advance and PNE “concedes it was out of business” only *two business days* after it provided written notice to PSNH. *Id.* at 7-8.

Finally, PSNH asserted that the Motion asks the Commission to award relief it is not permitted to order, “namely, to deny PSNH’s Motion to Dismiss made at the [Court] and to enter an order finding that they have stated a valid claim for tortious interference with contract,” both of which actions are within the exclusive province of the Court. *Id.* at 8. According to PSNH, the Court asked the Commission only to address tariff and regulatory provisions within its particular expertise, having done so it is now “up to the [Court] to determine whether [PNE and Resident Power] have stated a claim and to rule on [PSNH’s] motion to dismiss.” *Id.*

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for “good reason” if the moving party shows that an order is unlawful or unreasonable. *See* RSA 541:3, RSA 541:4; *Rural Telephone Companies*, Order No. 25,291 (November 21, 2011). A successful motion must establish “good reason” by showing that there are matters the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118. N.H. 309, 311 (1978) (quotations and citations omitted), or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision,” *Hollis Telephone Inc.* Order No. 25,088 at 14 (April 2, 2010). A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 (September 8, 2015).

The Commission has found good reason for rehearing when rulings were made without sufficient opportunity for an affected party to comment. *Verizon New Hampshire Tariff Filing Introducing Charges for Busy Line Verification*, 86 NH PUC 266 (2001). Good reason is also shown when a party explains that new evidence exists that was unavailable at the original

hearing. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), cited in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23,976 (May 24, 2002).

On the other hand, the Commission has denied requests for rehearing where a petitioner failed to support its allegations with any factual assertions different than those raised at the original hearing. *LOV Water Company*, 85 NH PUC 523 (2000). The Commission also found insufficient reason to grant a rehearing in *Public Service Company of New Hampshire Petition of Wausau Papers*, Order No. 24,179 (May 29, 2003), in light of the opportunity for Wausau's concerns to be addressed in another docket. Rehearing was denied in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23, 976 (May 24, 2002), because the Commission's intent was made clear and the arguments raised on rehearing had been fully considered during the hearings.


Based on our review of the Merits Order, the Motion, and the Objection, we find that the Motion does not present any new information that would change our original decision on the scope of this proceeding or the answer we provided to the question transferred to us by the Court. Further, the Motion does not demonstrate that the Commission overlooked or mistakenly conceived of the meaning and interpretation of the relevant rule and tariff provisions addressed therein. In particular, we believe there was sufficient basis in the record reviewable on a motion to dismiss, including the differences in PSNH's automatic and manual billing systems, for us to determine that PSNH's deletion of electronic enrollments for the transfer of PNE customers to FairPoint was justified, notwithstanding PSNH's processing of the electronic enrollment for the transfer of the Milan Lumber account to another CEPS. Indeed, our decision regarding the propriety of PSNH's deletion of the pending electronic enrollments for customer transfers to FairPoint would not have been different even if we had been unaware of the Milan Lumber

transaction processing, as raised in PNE and Resident Power's Brief, or the applicable difference in billing systems, as described in PSNH's Reply Brief.

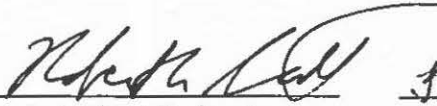
Based upon the foregoing, it is hereby

ORDERED, that the Motion for Rehearing filed by PNE Energy Supply, LLC, and Resident Power Natural Gas and Electric Solutions, LLC, is DENIED.

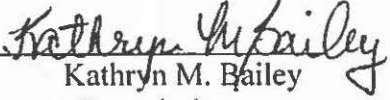
By order of the Public Utilities Commission of New Hampshire this ninth day of November, 2016.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

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