

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

April 5, 2016 - 2:06 p.m.  
Concord, New Hampshire

NHPUC APR25'16 PM 4:01

RE: DE 15-491  
PNE ENERGY SUPPLY, LLC, ET AL VERSUS  
PSNH d/b/a EVERSOURCE ENERGY:  
Transfer Question from Superior Court.  
(Prehearing conference)

PRESENT: Chairman Martin P. Honigberg, Presiding  
Commissioner Robert R. Scott  
Commissioner Kathryn M. Bailey

Sandy Deno, Clerk

APPEARANCES: Reptg. PNE Energy Supply, LLC, and  
Resident Power Natural Gas & Electric  
Solutions, LLC:

Douglas L. Patch, Esq. (Orr & Reno)  
Robert M. Fojo, Esq. (Fojo Law)

Reptg. Public Service Co. of New Hampshire  
d/b/a Eversource Energy:

Wilbur A. Glahn, III, Esq. (McLane Middleton)  
Matthew J. Fossum, Esq. (Eversource Energy)

Reptg. Unitil Energy Systems, Inc.:

Patrick H. Taylor, Esq.

Reptg. Liberty Utilities (Granite State  
Electric) Corp.:

Sarah B. Knowlton, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

 ORIGINAL

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**APPEARANCES: (c o n t i n u e d)**

**Reptg. Residential Ratepayers:**

Donald M. Kreis, Esq., Consumer Advocate  
Office of Consumer Advocate

**Reptg. PUC Staff:**

David K. Wiesner, Esq., Esq.  
Thomas C. Frantz, Director/Electric Division

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**I N D E X**

**PAGE NO.**

**STATEMENTS/RESPONSES TO QUESTIONS BY:**

Mr. Patch		5, 36
Mr. Glahn	5, 8, 24, 27, 29, 37,	40
Mr. Fojo	9, 22, 27, 29,	43
Mr. Kreis		11, 33, 41
Mr. Taylor		11
Ms. Knowlton		15
Mr. Wiesner		18, 38, 39

\* \* \*

**QUESTIONS BY:**

Chrmn. Honigberg	7, 10, 11, 12, 20, 26, 28, 32, 39,	43
Commissioner Bailey		14, 30, 31

**P R O C E E D I N G**

1  
2 CHAIRMAN HONIGBERG: We're here this  
3 afternoon in Docket DE 15-491, which has been sent over  
4 to us -- or, a matter has been sent over to us from the  
5 Superior Court, which is a piece of litigation between  
6 PNE Energy Supply, and others, against PSNH doing  
7 business as Eversource Energy.

8 We've issued an Order of Notice in this.  
9 I know it took us a little longer than I think we would  
10 have liked to get you all in here. But it's out there.  
11 We've got a couple of people who want to intervene,  
12 which we'll discuss, and we'll discuss how we're going  
13 to process this docket.

14 Before we do anything else, let's take  
15 appearances.

16 MR. PATCH: Good afternoon, Mr. Chairman  
17 and members of the Commission. Doug Patch, from Orr &  
18 Reno, on behalf of PNE Energy Supply, LLC, and Resident  
19 Power Natural Gas & Electric Solutions, LLC. And, with  
20 me here at the table are Robert Fojo, from the Fojo Law  
21 Office, in Manchester also representing the same two  
22 entities, and then also Gus Fromuth.

23 MR. GLAHN: Wilbur Glahn, for PSNH, and  
24 with me is Matthew Fossum from PSNH. I'm with the

1 McLane Middleton Law Firm.

2 MR. TAYLOR: Patrick Taylor, Senior  
3 Counsel for Unitil Energy Systems, Incorporated.

4 MS. KNOWLTON: Good afternoon,  
5 Commissioners. Sarah Knowlton. I'm here on behalf of  
6 Liberty Utilities (Granite State Electric) Corp. And,  
7 with me from the Company are Steve Mullen and Steve  
8 Hall.

9 MR. KREIS: Good afternoon, Mr.  
10 Chairman. I'm Consumer Advocate Donald Kreis, here on  
11 behalf of the state's residential utility customers.

12 MR. WIESNER: Mr. Chairman,  
13 Commissioners, Dave Wiesner, representing Commission  
14 Staff. And, with me today is Tom Frantz, Electric  
15 Division Director.

16 CHAIRMAN HONIGBERG: All right. I think  
17 people probably have different views about what needs  
18 to be done here for this docket to be dealt with.

19 Let's start first with the intervenors.  
20 The mandatory parties to this are the litigants, PNE  
21 and PSNH. Does either of you have a position on the  
22 Petitions to Intervene by Liberty and Unitil?

23 MR. PATCH: No position.

24 MR. GLAHN: We have none, Your Honor. I

1 mean, we're happy to have the intervenors intervene. I  
2 think, as we'll explain, we think that this matter can  
3 be decided on the papers before a decision needs to be  
4 made as to whether these parties are permitted to  
5 intervene.

6 CHAIRMAN HONIGBERG: Okay. Why don't  
7 you explain that.

8 MR. GLAHN: So, our position on this is  
9 this is a very far referral. In simple English, what  
10 the Court, I think, asked the Commission to do is to  
11 say -- the Court said "I have to make a decision as to  
12 whether a tort has been committed here." Part of the  
13 allegations are on whether PSNH's actions were improper  
14 or whether PSNH violated rules, regulations or tariffs,  
15 either of this body or of ISO-New England.

16 We believe that this entire matter is  
17 controlled by a prior docket of this Commission, or  
18 other dockets that followed that, when PNE and Resident  
19 Power requested a waiver of certain requirements to  
20 give notice to their customers for this transfer. This  
21 Commission allowed the waiver of that notice subject to  
22 two conditions. Number one, that there would not have  
23 to be and would not be an off-cycle meter read. And,  
24 secondly, that FairPoint would make a filing with the

1 PUC before the customers were transferred or during  
2 customer transfer, that's indicated that FairPoint has  
3 sufficient security to take these customers.

4 CHAIRMAN HONIGBERG: Mr. Glahn, before  
5 you go any further, you're arguing a lot of your  
6 argument about why this case should be resolved a  
7 particular way. I want to step -- I want to take one  
8 step back from that, and say what is it exactly the  
9 Court has asked us to do, based on what? And, having  
10 taken a look at the Order and the -- that transferred  
11 over here, and the order on the Motion to Dismiss was  
12 issued at the same time, it seems to me what the Court  
13 has said is "I've got a Motion to Dismiss here. And I  
14 can rule on a lot of it, because I'm going to get a set  
15 of facts from the parties that was based on the writ  
16 and some documents that were submitted by the parties  
17 in connection with that Motion to Dismiss, I can rule  
18 on most of these issues. But I can't rule on this one  
19 issue, because I'm not the expert in this body of law.  
20 I want you, PUC, to take a look at these facts that I  
21 would look at in ruling on the Motion to Dismiss, and  
22 say if -- using the motion to dismiss standard, is  
23 there a claim here for a violation of the rules, the  
24 ISO tariff, or anything else?"

1                   And, maybe I'm agreeing with you at some  
2                   level, Mr. Glahn, that this is very narrow, because  
3                   we've got a set of facts and it's already been briefed.  
4                   Why can't we just pick up what the Court had in front  
5                   of it and issue a ruling on the one claim that the  
6                   Court couldn't rule on?

7                   MR. GLAHN: Well, I think we're very  
8                   close to being in agreement, Commissioner Honigberg,  
9                   with a couple, maybe, of exceptions. I do think it  
10                  would be helpful for this body to have some further  
11                  briefing, no matter how brief that briefing may be.  
12                  Because now, to a certain degree, this would focus on  
13                  some different proceedings by virtue of what Judge  
14                  Brown did, because he dismissed -- he dismissed certain  
15                  allegations that would otherwise have required factual  
16                  findings there.

17                  The other area where I might disagree  
18                  with you slightly is, if the Commission were to decide,  
19                  in the first instance, based on the papers, that there  
20                  might possibly be a violation, then I think there are  
21                  some facts that would need to be found by this  
22                  Commission, because you'd still be addressing the  
23                  question of whether those facts lead to a violation of  
24                  tariffs, rules or recommendations. I don't think you



1 need to do that in the first instance. I think, in the  
2 first instance, there are no new facts that need to be  
3 found in order to address this case. And, I'm  
4 suggesting only that there be a filing with the  
5 Commission here on that issue.

6 CHAIRMAN HONIGBERG: Let's put aside  
7 what happens if we were to find that there might be a  
8 violation, because I might disagree with you about  
9 that.

10 Mr. Patch, do you have a view about how  
11 this should go?

12 MR. PATCH: I think Mr. Fojo is going to  
13 address that.

14 MR. FOJO: Yes, sir.

15 CHAIRMAN HONIGBERG: Mr. Fojo.

16 MR. FOJO: Thank you. Thank you, Mr.  
17 Chairman.

18 We believe that the Court's Transfer  
19 Order was very clear in stating that the Commission has  
20 to actually decide if PSNH acted improperly for  
21 purposes of the tortious interference claim. If the  
22 Court wanted the Commission to decide PSNH's Motion to  
23 Dismiss on that issue, it would have said so; it did  
24 not. It stated very clearly that the Commission has to

1 actually decide if PSNH acted improperly. That's a  
2 factual finding, that has to be based on the submission  
3 of evidence, and for which discovery is required, so  
4 the parties can engage in the fact-finding necessary to  
5 adjudicate that claim.

6 CHAIRMAN HONIGBERG: Was this -- did you  
7 request a jury trial in Superior Court?

8 MR. FOJO: Yes, Mr. Chairman.

9 CHAIRMAN HONIGBERG: And, so, you'd be  
10 asking us, instead of having the jury find your facts,  
11 you'd be asking the Commission to find your facts on  
12 that?

13 MR. FOJO: Mr. Chairman, that's not the  
14 position we had in Superior Court. We're living with  
15 the Court's Order on this issue. Based on that Order,  
16 the Order states that "the Commission must decide that  
17 issue and thus engage in an adjudicative proceeding to  
18 address the question of whether or not PSNH acted  
19 improperly". And the standard for finding whether  
20 interference in such a claim is improper is a very  
21 broad standard. It isn't just based on whether or not  
22 a tariff was violated or whether or not a statute was  
23 violated. There are common law standards of conduct  
24 that must be used to address the conduct of the party

1 that has been accused of engaging in the wrongful act.

2 CHAIRMAN HONIGBERG: Mr. Kreis, got any  
3 thoughts on this?

4 MR. KREIS: I do, Mr. Chairman. Thank  
5 you for inviting them.

6 I'm inclined to agree with you, that  
7 this case essentially comes to us in the posture of a  
8 pending Motion to Dismiss. And I think there's a lot  
9 of appeal in having the Commission simply accept the  
10 allegations in the complaint as true, and then ruling  
11 on whether there is some way of applying applicable  
12 tariffs and rules to the facts alleged in the Superior  
13 Court complaint that either demonstrate that, as a  
14 matter of law, PSNH acted improperly or, as a matter of  
15 law, acted properly.

16 That, I think, would keep faith with the  
17 fact that we're dealing here inherently with a tort  
18 claim, and not a garden variety administrative  
19 proceeding of the sort we're used to seeing here.

20 CHAIRMAN HONIGBERG: Mr. Taylor, I've  
21 read your Motion to Intervene. Ms. Knowlton, you're  
22 going to get the same question. Why are you here?

23 MR. TAYLOR: Well, I attempted to lay it  
24 out in my brief, Petition to Intervene. But the way

1 that I read the question, as it's been teed up for the  
2 Commission, the Commission could answer those questions  
3 in a way that, even though they may be specific to --  
4 even though the answer may be specific to the  
5 circumstances between PNE and PSNH, they could have  
6 precedential effects and have an effect upon the way  
7 that Unutil, and really any electric utility operating  
8 in the state, the way that they do business with  
9 competitive suppliers. The Commission potentially  
10 could reach a decision that is not consistent with our  
11 tariff, with existing competitive supplier agreements.  
12 It could create a circumstance where there are  
13 significant administrative burdens relative to billing,  
14 if it were to be a circumstance where a utility really  
15 does have to do some sort of one-time mass off-cycle  
16 meter read.

17 CHAIRMAN HONIGBERG: Did you tell the  
18 Superior Court all this, because the Superior Court got  
19 presented with the same -- the same allegations? We  
20 don't have any new allegations here. We have a case  
21 that was filed in Superior Court. Did you go to  
22 Superior Court and say "we want to participate in your  
23 Superior Court case"?

24 MR. TAYLOR: This is something that came

1 to, when this got transferred to -- so, I guess the  
2 answer to your question is --

3 CHAIRMAN HONIGBERG: The answer is "no",  
4 right?

5 MR. TAYLOR: -- Unitil did not appear in  
6 Superior Court. But this is something that, in  
7 Superior Court, this is a dispute between PNE and PSNH.  
8 There was no reason for Unitil, and I'll confess that I  
9 was not actually at Unitil when that dispute initiated,  
10 but there was no reason for Unitil or Liberty, or  
11 anybody but PSNH or PNE, to think that that is a case  
12 that would stay in the Superior Court without any sort  
13 of administrative ramifications, any sort of regulatory  
14 ramifications for utilities doing business in this  
15 state.

16 And, so, utilities and competitive  
17 suppliers, they're -- as is acknowledged in the  
18 Transfer Order and in the Court's Order, those are  
19 relationships that are governed by rules, by tariffs,  
20 both with the utilities and with ISO-NE. And those are  
21 things that the Superior Court has given over to this  
22 Commission for interpretation. And the Commission's  
23 interpretation of those tariffs and rules, which are  
24 typically dealt with here in this Commission, could

1 have an effect on any electric utility doing business  
2 in this state. There is a significant number of our  
3 customers and our load that is connected with  
4 competitive suppliers. And we're very concerned that  
5 this is a docket that, the way that these questions are  
6 posed, they could result in answers that will  
7 significantly affect the way we do business.

8 And, so, that's why we're here. And,  
9 I'll leave it to Attorney Knowlton to explain why  
10 Liberty is here. But I think that there are very  
11 compelling reasons to have us in this docket.

12 If we were to be -- if there was some  
13 sort of assurance, I suppose, and I don't know that you  
14 can provide -- that the Commission can provide this,  
15 that this would result in an order that would bind only  
16 PSNH or would apply solely to PSNH and not the other  
17 utilities, that would be a different story. But I  
18 don't know that that's -- the question is framed that  
19 way.

20 CHAIRMAN HONIGBERG: Ms. Knowlton. I'm  
21 sorry, Commissioner Bailey, you have a question for  
22 Attorney Taylor?

23 COMMISSIONER BAILEY: I do. And this is  
24 probably because I'm not a lawyer. But, if the Court

1 had decided this, and not asked us to do anything,  
2 would a precedent have been established that would  
3 apply to you?

4 MR. TAYLOR: If the Court had decided  
5 this, I guess this particular question, in interpreting  
6 the tariffs and the rules? You know, it's difficult  
7 for me to give you -- I haven't looked at the question  
8 from that perspective. I would certainly be very  
9 concerned about the legal ramifications, a decision  
10 like that.

11 It's a hypothetical, and it's difficult  
12 for me to answer definitively. But I think that a  
13 result like that would be a concern to me, yes.

14 CHAIRMAN HONIGBERG: Ms. Knowlton, why  
15 don't you give it a crack.

16 MS. KNOWLTON: I can start with  
17 answering that question, or answer a couple of those  
18 questions together. Which is, you know, why -- you  
19 know, did you go to Superior Court? Obviously, no.  
20 And, if not, why not?

21 For Liberty, we're here because, when we  
22 read the Order of Notice, to us, the way it was framed,  
23 the questions were stated more broadly than they are in  
24 the transfer of the questions from the Superior Court.

1 So, that's why we're here, and we didn't go to Superior  
2 Court.

3 If the questions were framed as narrowly  
4 as they were in what was transferred from the Court, I  
5 don't think we would be here.

6 I would take the position that a  
7 Superior Court order in the PNE-PSNH/Eversource docket,  
8 the Superior Court would not be binding precedent on  
9 Liberty Utilities. If it was an order of the New  
10 Hampshire Supreme Court, I would definitely have a  
11 different view of that. But I would not say that a  
12 Superior Court order is going to be a binding precedent  
13 on us.

14 Our concerns are very much similar to  
15 Unitil's. I can state it, I think, in a nutshell.  
16 Which is that, if this case between PNE and PSNH is  
17 going to become the playbook for what a regulated  
18 electric utility must do in -- faced with the  
19 circumstance of a supplier default, then Liberty would  
20 like to be part of the case, so that our voice can be  
21 heard about how we think those scenarios should be  
22 handled.

23 If it truly is going to be a ruling that  
24 just applies to that one utility and that one factual



1           circumstance, and the rest of us are not going to be  
2           held to conduct our business consistent with that  
3           ruling in the future, then we don't need to be here.

4                         CHAIRMAN HONIGBERG: I was great until  
5           the last thing you said. Because, if we interpret the  
6           rules or the tariff in a particular way, and say that  
7           this particular conduct we believe violates a tariff or  
8           violates the rules, that is going to be precedent, that  
9           you'd have to deal with in a claim that you had done --  
10          that Liberty or Unitil had done the same thing.

11                        Is it binding? No, because, unless you  
12          make yourselves party to this and litigate it, there's  
13          no collateral estoppel or *res judicata* effect on you.  
14          If you choose to come here and litigate it and lose,  
15          then it is binding on you. It's just persuasive until  
16          then.

17                        Although, you're right. If it goes up  
18          to the Supreme Court, that may be a more powerful  
19          precedent that you'd have to deal with.

20                        But I'm a little confused about your  
21          desire to be a party to what looks an awful lot like a  
22          legal dispute.

23                        I'll grant you that the Order of Notice  
24          may be broader or be worded in a way that's broader

1 than the transferred questions. I don't think that was  
2 their intent. I think it was -- maybe I should let  
3 Mr. Wiesner have a crack at speaking for Staff on how  
4 he thinks this should go.

5 But it seems to me that, for both Unitil  
6 and Liberty, you can do whatever it is you feel you  
7 need to do in this case as a friend of the Commission,  
8 to use the Latin phrase, *amicus*, offering your views on  
9 how this should go. And, if we screw it up, and you  
10 are aggrieved by the result, the administrative law  
11 provisions and the appeal rights, you may actually have  
12 appeal rights if we screw it up badly enough, even if  
13 you're not parties. And, either way, if one or the  
14 other -- one or the other of the parties brings it up  
15 to the Supreme Court, you can participate there as well  
16 in the same way. That's what I'm thinking. But we're  
17 not done with this yet.

18 So, Mr. Wiesner, why don't you have a  
19 go.

20 MR. WIESNER: One thing I would like to  
21 do is just clarify that, in the Order of Notice, the  
22 questions transferred from the Superior Court verbatim  
23 are reproduced, and those are the questions which the  
24 Commission has been asked to address. There is, as we

1 typically include in all orders of notice, another  
2 section which summarizes, in greater generality and  
3 greater breadth, issues that may be raised by the  
4 docket. And, those do appear to be more generic, in  
5 the sense that they refer to interpretation of the  
6 Commission's 2000 rules and statutory provisions,  
7 PSNH's tariff and the ISO-New England tariff.

8 The intent there was not to broaden the  
9 scope of the inquiry that the Commission is directed to  
10 make pursuant to the Superior Court Transfer Order, but  
11 merely to raise generally issues that may be relevant  
12 to its determination in this case.

13 And, moving on from that, I would say, I  
14 think we share a concern that this may not be an  
15 appropriate docket for other parties, other utilities  
16 to participate. This really is a dispute between two  
17 parties, transferred here from the Superior Court, for,  
18 you know, what we believe as well is a limited finding  
19 by the Commission with respect to how those rules  
20 provisions and tariff provisions should be interpreted  
21 in this particular dispute.

22 There may very well be precedential  
23 value, precedential effect for other parties, including  
24 other utilities. But that's often the case in many of

1 the dockets that come here. And I think I would be  
2 concerned, if every time a case came here that may have  
3 precedential effect for other utilities, that they  
4 would seek to intervene in what essentially is not  
5 their case.

6 CHAIRMAN HONIGBERG: What do you think  
7 about Mr. Fojo's view of what needs to be done in terms  
8 of factual development? How far beyond the Motion to  
9 Dismiss question are we required to go or is the Court  
10 expecting us to go?

11 MR. WIESNER: Well, the Transfer Order,  
12 which is the four-page Order which presents the  
13 questions for determination by the Commission, makes it  
14 clear that it is being issued in conjunction with the  
15 Order on the Motion to Dismiss, which dismissed four of  
16 the five counts that were brought by PNE and Resident  
17 Power against PSNH, and preserves only Count 1, which  
18 is the "intentional interference with contractual  
19 relations" count.

20 And, if you'll permit me to do so, I  
21 will read an excerpt from that Order. And this is at  
22 the end of the section where the Court is declining to  
23 dismiss Count 1, even though it is dismissing all of  
24 the other counts.

1 CHAIRMAN HONIGBERG: And, just to be  
2 clear, you're reading from Judge Brown's order --

3 MR. WIESNER: Yes. This is Judge  
4 Brown's order of November 25th, 2015, and it is  
5 referenced in the Transfer Order. This appears on Page  
6 14. "Therefore, the Court declines to dismiss Count 1,  
7 and instead refers Count 1 to the PUC, to determine if  
8 Defendant acted improperly based on the conduct alleged  
9 in Paragraphs 137(a) through (c). Should the PUC find  
10 Defendant acted improperly, this Court will decide the  
11 remainder of this Claim."

12 I take that, and the reference to  
13 "137(a) through (c)", that is essentially the factual  
14 allegations that are made in Count 1, which is the  
15 intentional interference with contractual relations.  
16 And it basically forms the foundation for the questions  
17 as they appear in the Transfer Order. Essentially,  
18 those are the alleged facts derived from the complaint.

19 So, I take that to mean that the Court  
20 expected that the Commission would decide these issues  
21 based on the record as developed through the Motion to  
22 Dismiss, without further factual investigation,  
23 essentially deciding whether or not PSNH's conduct as  
24 alleged was improper, in the sense that it was not

1 protected by law. And perhaps one way to interpret  
2 that would be to say "it would be protected by law, if  
3 it were in compliance with the applicable rules and  
4 tariffs."

5 And, then, once that determination is  
6 made by the Commission, the case would be transferred  
7 back to the Superior Court for further proceedings,  
8 which might involve complete dismissal of the case or  
9 further adjudication.

10 CHAIRMAN HONIGBERG: Mr. Fojo.

11 MR. FOJO: Thank you, Mr. Chairman. If  
12 the Court wanted the Commission to decide PSNH's Motion  
13 to Dismiss this particular portion of the tortious  
14 interference claim, the question -- I believe the  
15 question would have been "did PNE and Resident Power  
16 state a claim that PSNH acted improperly upon which  
17 relief can be granted?" The Order does not say that.  
18 The Order says "did PSNH act" -- rather, "did Defendant  
19 act improperly?" And the phrase that Attorney Wiesner  
20 just read, at the end of -- on Page 14 of the Order on  
21 Motion to Dismiss, "should the PUC find Defendant acted  
22 improperly, the Court will decide the remainder of this  
23 Claim." Meaning there's no other Claim -- portion of  
24 the Claim that is still open on PSNH's Motion to

1 Dismiss in Superior Court. What PSNH challenged has  
2 been ruled on. The only remaining piece of it is this.  
3 And the Court has elected to allow the Commission to  
4 decide that aspect of the claim, because it feels that  
5 the Commission has the expertise that the Court  
6 believed it did not have. And, then, the Court has  
7 elected to decide "the rest of the Claim". There are  
8 other elements that must be proven, we acknowledge  
9 that. But those elements will be subject to a  
10 traditional civil proceeding that includes discovery  
11 and so on and so forth.

12 If I may raise two more points on this  
13 issue?

14 CHAIRMAN HONIGBERG: Uh-huh.

15 MR. FOJO: This hearing was called under  
16 the PUC 203 rules, which concern an adjudicative  
17 proceeding. And an adjudicative proceeding requires  
18 discovery under the rules. And that's our view  
19 concerning that. And the very question of whether PSNH  
20 acted improperly is a very fact-intensive inquiry. We  
21 cited cases in our -- that we would be happy to cite in  
22 briefing on this issue, if we were permitted to do so.  
23 But the case law is very clear that it's a very  
24 fact-intensive inquiry, that depend on the motives of

1 the party who has been alleged -- who has been alleged  
2 to have engaged in the conduct. That question can only  
3 be answered through discovery and through the  
4 development of facts that have not been developed yet.

5 CHAIRMAN HONIGBERG: Mr. Glahn.

6 MR. GLAHN: We disagree, and disagree  
7 for -- start with this proposition. The question of  
8 whether PSNH acted improperly, ultimately, is a  
9 decision for the Superior Court. That is, should this  
10 Commission decide that PSNH did not violate the rules  
11 and regulations of the PUC, I think this case will be  
12 over at the Superior Court. Should this Commission  
13 decide that PSNH, in fact, violated the rules and  
14 regulations, then it is up to the Superior Court to  
15 determine the element of tort law that would establish  
16 whether ultimately the question -- the action was  
17 improper, which would include intent and whether there  
18 were privileges, *etcetera*.

19 What the Court was asking, at our  
20 request, was that the determination whether PSNH had an  
21 obligation to do certain things, under the tariff or  
22 rules and regulations of the Commission, is a matter  
23 the Commission should decide in the first instance.  
24 Because, otherwise, the Court is getting involved in



1 interpreting things that are within the primary  
2 jurisdiction of this Commission.

3 So, whether, in fact, and I'll just make  
4 one observation, the transferred question begs a  
5 question, because it says "if you were to take all the  
6 facts as true, the complaint is that we acted illegally  
7 when we deleted certain EDIs?" So, if you start simply  
8 there and say "well, it was illegal", then I don't know  
9 where the Commission goes with that.

10 What I'm suggesting is that, and I think  
11 you and I are in very close agreement, Commissioner  
12 Honigberg, which is, there are -- whether you ever have  
13 to go beyond the facts in this case, the facts as pled  
14 and as in the record, because the -- as you know, the  
15 complaint in this case referenced a whole series of  
16 dockets, *etcetera*, which we then were entitled to put  
17 in, is I think a question that need not to be decided  
18 now. Because, if we were to entitled to submit another  
19 pleading, say less than ten -- ten pages or less, that  
20 lay out why we believe that, on the facts alleged in  
21 the complaint and in PUC dockets, that PSNH's conduct  
22 in this case was consistent with the PUC tariff, rules  
23 and regulations, I think that the Commission could  
24 decide that without ever getting into the question of

1 whether additional facts need to be found. And, of  
2 course, PNE can take the opposite position and could  
3 argue that there are facts that need to be found.

4 But, I think, like a proceeding in  
5 court, this is something that could proceed in two  
6 steps. And, if the Commission found against us on  
7 those papers, then the Commission could address the  
8 question of whether, in fact, any additional facts need  
9 to found or not.

10 CHAIRMAN HONIGBERG: Mr. Fojo, I think I  
11 see where Mr. Glahn went with this. He is suggesting  
12 that what he would like to do is essentially move to  
13 dismiss, based on the allegations that were made and  
14 the documents that are in the record here. And, if the  
15 Commission were to agree that the facts, as pled and as  
16 in the record, do not support a claim, regardless of  
17 what we would do in the circumstance where they would,  
18 we would say "it doesn't look like a stated claim, we  
19 will send it back."

20 If we were to disagree with him, and  
21 agree with you that a claim has been stated, then we  
22 could decide what further proceedings are appropriate  
23 here.

24 I think that's what Mr. Glahn is

1 suggesting. Do you agree with that?

2 MR. FOJO: Mr. Chairman, I don't -- I do  
3 not agree with that, because my concern is that the  
4 Court's Transfer Order did not pose that question to  
5 the Commission. And, let's assume, for instance, just  
6 indulge this, let's take this to its logical end, if  
7 the Commission were to decide or to answer the question  
8 from the Court as "no", and the Court had a different  
9 view concerning what question it posed to the  
10 Commission, the Court's -- let's assume the Court's  
11 view was "I want the Commission to decide, to make a  
12 factual finding about whether or not PSNH acted  
13 properly", then my clients will be -- their rights will  
14 be prejudiced in that instance, because they never had  
15 the ability to develop a factual record concerning that  
16 finding.

17 MR. GLAHN: May I comment, Mr. Chairman?

18 CHAIRMAN HONIGBERG: Sure.

19 MR. GLAHN: Well, it wouldn't be  
20 deprived that opportunity, because they would have an  
21 opportunity to address the pleadings, which, of course,  
22 would then decide whether they were entitled to develop  
23 any additional facts or not.

24 But I think what Mr. Fojo is overlooking

1 is that this Commission doesn't have jurisdiction to  
2 decide the ultimate question of "whether a tort claim  
3 has been stated?"

4 What the Court asked the Commission to  
5 do, in our view, is to decide whether rules and  
6 regulations of this Commission had been violated. And,  
7 if that was the case, then the Court has to decide  
8 whether that states a cause of action as a matter of  
9 tort law. But the Commission's jurisdiction is to rule  
10 on its -- on what it controls, which is all of the  
11 tariffs and rules and regulations that we argued in the  
12 Superior Court this Commission should decide in the  
13 first instance.

14 So, it's our view that -- I'm not going  
15 to repeat what I said earlier. I think you know where  
16 I'm going with that.

17 CHAIRMAN HONIGBERG: Mr. Fojo, I'm not  
18 going to ask you to address that again, unless you want  
19 to. I know one of the things you talked about was the  
20 other elements of this tort. And, I am sure at one  
21 time, even not very long ago, I remembered all of the  
22 elements of tortious interference, but I don't as I sit  
23 here. So, if you could go through those elements and  
24 tell me which ones you think it is we're supposed to

1 resolve and answer for the Court, and what it is that  
2 the Court will be left to do, maybe that will help  
3 crystalize my thinking and the thinking of some others.

4 MR. FOJO: Mr. Chairman, to answer your  
5 question, the only element that the Commission has been  
6 directed to answer --

7 *[Court reporter interruption.]*

8 MR. FOJO: Maybe I'm just not close  
9 enough to it. I apologize.

10 CHAIRMAN HONIGBERG: We have a saying  
11 around here that "if it's not uncomfortably close to  
12 your mouth, it's probably not close enough."

13 MR. FOJO: I won't address that comment.  
14 Mr. Chairman, to answer your question, the only element  
15 that the Commission has been directed to answer is  
16 whether -- is the improper interference. That consists  
17 of two elements, the tort -- that portion of the tort  
18 consists of two elements: Interference with a  
19 contract, but that also the interference must be  
20 improper. And, it's that "improper" piece of it that  
21 the Commission has been directed to answer. That's the  
22 only element that the Commission must answer here.

23 MR. GLAHN: Could I help a little on  
24 that? I don't have the Court's order in front of me,

1 but --

2 [Court reporter interruption.]

3 MR. GLAHN: But I think the elements are  
4 you have to know about the contract; the actions have  
5 to be intentional; it has to be improper in the sense  
6 that either that you've taken action for the purpose of  
7 breaching the contract or -- and/or -- and that you do  
8 not have a privilege to do so. And, then, that those  
9 actions caused the breach of the contract. So, you  
10 could have a situation where the contract -- where the  
11 action had been taken improperly under those standards,  
12 but there's no evidence that the party -- the  
13 contracting party breached the contract because of  
14 that. I think that's -- I don't have the Order in  
15 front of me, but that's my recollection.

16 CHAIRMAN HONIGBERG: Commissioner  
17 Bailey.

18 COMMISSIONER BAILEY: Is that what you  
19 want us to do?

20 MR. FOJO: Can you specify what --

21 COMMISSIONER BAILEY: What he just said.  
22 Figure out all those legal things that we don't  
23 normally do?

24 MR. FOJO: No. I think Attorney Glahn,

1 and he can correct me on this if I'm wrong, I think he  
2 was, just for the Commission's benefit, he was reciting  
3 the elements of a claim for tortious interference with  
4 a contract.

5 But the only element of the Claim that  
6 the Commission has been asked to answer is "whether or  
7 not PSNH acted improperly?" "Whether its interference  
8 with the FairPoint contract was improper?"

9 COMMISSIONER BAILEY: But there's a  
10 whole lot of legal standards about what "improper"  
11 means, which is what he just recited.

12 MR. FOJO: With all due respect, I  
13 believe Attorney Glahn just recited the elements, the  
14 intent, the knowledge of the contract, and so on and so  
15 forth. Those are other elements of the Claim that have  
16 to be resolved at the Superior Court. The only element  
17 that the Court has directed the Commission to answer is  
18 "whether or not PSNH's conduct was improper?"

19 COMMISSIONER BAILEY: And what will we  
20 look -- sorry.

21 CHAIRMAN HONIGBERG: Go ahead.

22 COMMISSIONER BAILEY: What will we look  
23 at to determine whether it was improper or not?

24 MR. FOJO: Well, first, there is a

1 standard laid out in applicable case law that lays out  
2 what kind of conduct is considered improper in these  
3 instances. And it could -- it includes not only  
4 violations of tariffs or statutes or public policy, it  
5 also includes unethical business customs,  
6 misrepresentations, intimidation, and so on and so  
7 forth.

8 We would be happy to brief this issue,  
9 if that would assist the Commission in understanding  
10 the question that's been posed.

11 CHAIRMAN HONIGBERG: So, we're to assume  
12 interference, and just decide whether the interference  
13 was wrongful?

14 MR. FOJO: Mr. Chairman, I agree that  
15 the Court is -- our view has always been that this  
16 issue -- this is a tort that should be decided in  
17 Superior Court. Attorney Glahn and PSNH argued the  
18 opposite, that that Claim should be decided here, which  
19 is -- which is a contradiction of what he just stated  
20 earlier.

21 But we agree that this poses a very  
22 unique proceeding for the Commission to address. Given  
23 the Court's Order, the only conclusion I can draw from  
24 it is that the Commission has to decide whether or not



1 PSNH's conduct was improper. To the extent it has to  
2 make certain assumptions that are not binding on the  
3 parties, we can address how to proceed with that. It  
4 is a unique concept. I will agree with you on that.

5 CHAIRMAN HONIGBERG: Mr. Kreis.

6 MR. KREIS: I've learned that I need to  
7 keep this thing very close to my mouth. I'm relying  
8 here on the Superior Court's Order for what I know  
9 about this tort. And what the Superior Court stressed  
10 in its Order, at Page 2, is that the word "improperly"  
11 is the key word that the Commission has to rule on.  
12 And the Court cites a case called "*Roberts versus*  
13 "*General Motors*", decided by the New Hampshire Supreme  
14 Court in 1994, to the effect that "if Defendant's  
15 conduct was protected by law, it was not improper."

16 So, I think that's the question that's  
17 pending here. Even if PSNH did something that none of  
18 us like, because it was mean, nasty, ugly, and awful,  
19 if it was protected by law, then there isn't a tort  
20 here. And, so, it's a legal question that the  
21 Commission fundamentally faces.

22 One reason to open up the universe of  
23 parties who might opine on that question is, frankly,  
24 because you're stuck with me by statute as a

1 representative of all of the residential utility  
2 customers in the state. And, so, if I get to be here,  
3 it's at least fundamentally fair that all of the other  
4 utilities get to be here.

5 CHAIRMAN HONIGBERG: And there's nothing  
6 preventing them from filing their comments and their  
7 wisdom with us. They just don't necessarily have the  
8 same statutory right that you do. And we're always  
9 happy to have you here, Mr. Kreis, because we never  
10 feel like we're stuck with you.

11 MR. KREIS: Understood.

12 CHAIRMAN HONIGBERG: Well, maybe "never"  
13 is a --

14 MR. KREIS: I'm still new, though. So,  
15 you have to reserve judgment, I understand.

16 COMMISSIONER BAILEY: We're still in the  
17 honeymoon period.

18 CHAIRMAN HONIGBERG: Commissioner Bailey  
19 reminds us we're still in the honeymoon phase with you.

20 I personally think, and I haven't  
21 discussed this with Commissioner Scott, Commissioner  
22 Bailey, is that we should have the parties, and anyone  
23 else who's interested in this, essentially brief this  
24 as a Motion to Dismiss, and take the record as it

1 was -- as it comes to us alleged by the Plaintiff in  
2 Superior Court, with the documents that were referenced  
3 by the parties as part of that motion, and go from  
4 there.

5 If we determine that the conduct was not  
6 wrongful or was privileged or protected by something,  
7 then we -- that's the conclusion we would reach, and we  
8 will let the Superior Court know that. If we conclude  
9 that it isn't, I think we'd have to come back and  
10 decide how to go from there.

11 I think, in the course of that briefing,  
12 Mr. Fojo, Mr. Patch, you could certainly identify the  
13 things that you feel would be essential to answering  
14 the question, if you feel that it's not already in the  
15 record. And, I'm not sure what you wouldn't have put  
16 in front of the Superior Court to help prove your case,  
17 but I expect you may have something to say on that, I  
18 just don't know. And the others who want to weigh in  
19 can certainly do that. I don't know, maybe we need to  
20 caucus, the Commissioners need to caucus and have a  
21 conversation, before I make Commissioner Scott and  
22 Commissioner Bailey weigh in without having thought  
23 about it, unless you're prepared to?

24 (Chairman and Commissioners conferring.)

1 CHAIRMAN HONIGBERG: I've got  
2 concurrence from the other two Commissioners, on at  
3 least on that position as to how to go forward.

4 Mr. Patch.

5 MR. PATCH: Mr. Chairman, if that's the  
6 way that you're going to go, I would strongly urge that  
7 you put something in writing, so that we all knew  
8 exactly sort of what the parameters were, what it was  
9 you're expecting from us. Because I'm just fearful we  
10 would have to go back to the transcript and try to  
11 interpret the words that you've used. And I just think  
12 it would be very important here to make it crystal  
13 clear exactly what it is you're expecting and what we  
14 should produce.

15 CHAIRMAN HONIGBERG: Anyone else want to  
16 comment on that suggestion or any other aspect of what  
17 we've talked about?

18 Yes, Mr. Patch. You have something  
19 else?

20 MR. PATCH: Well, --

21 CHAIRMAN HONIGBERG: And, while you're  
22 at it --

23 MR. PATCH: No. And, I think Mr. Fojo  
24 made this request, too. But it might not hurt to see

1 something in writing from the parties on this issue  
2 before you make a decision, because I think some of the  
3 case law that is important to this issue might be  
4 helpful to the Commission. And, so, if you gave us  
5 even a day or a couple of days to file something. You  
6 know, it's not critical that it be decided today, maybe  
7 you could decide early next week. But, if you gave us  
8 a chance to submit something in writing, I think that  
9 could be helpful to the Commission. It might help to  
10 crystalize then whatever you were to put in writing  
11 back to the parties about what you expected of us.

12 MR. GLAHN: If I may comment on that?

13 CHAIRMAN HONIGBERG: Mr. Glahn.

14 MR. GLAHN: I think that's unnecessary.  
15 I think the Commission has a good idea of where this  
16 should go. And I think it's -- I can tell you the  
17 question we will pose, which is "whether, based on the  
18 facts in the complaint and the record, which includes  
19 PUC dockets that this Commission can take notice of,  
20 PSNH has violated rules, regulations or tariffs?"

21 I don't want to repeat myself, but the  
22 Court can't refer to this -- can't refer a question to  
23 this body it has no authority to decide. I think all  
24 -- the only issue is, is that the case? "Were tariffs,

1 rules, and regulations violated?" If so, then it has  
2 one result at the PUC; if no, it has another -- I'm  
3 sorry, at the Superior Court; if no, it has another  
4 result at the Superior Court.

5 So, to me, that's the question. That  
6 is, "based on the record and on the complaint, were the  
7 tariffs, rules and regulations violated?" Conclusions  
8 can be drawn from that in the Superior Court as to  
9 whether a tort has occurred.

10 CHAIRMAN HONIGBERG: Mr. Taylor,  
11 Ms. Knowlton, Mr. Wiesner, do you have any thoughts on  
12 how we should proceed from here?

13 Ms. Knowlton?

14 MS. KNOWLTON: We don't have anything  
15 further to add.

16 CHAIRMAN HONIGBERG: Mr. Taylor?

17 MR. TAYLOR: I have nothing further to  
18 add either.

19 CHAIRMAN HONIGBERG: Mr. Wiesner?

20 MR. WIESNER: I think I'm inclined to  
21 agree with Attorney Glahn. That the scope is limited  
22 and the record is defined. And I might even suggest  
23 perhaps that the Commission could be seen as  
24 overstepping its bounds, if it were to engage in a more

1 extensive, intensive factual investigation than the  
2 Court would have had before us, if it had gone forward  
3 and decided this case itself, and decided the Motion to  
4 Dismiss Count 1 itself, rather than referring it to  
5 here, in an exercise of primary jurisdiction, because  
6 this Commission has primary jurisdiction, as the Court  
7 found, over its rules and tariffs filed by utilities  
8 here, and the ISO tariff at the wholesale regional  
9 level.

10 CHAIRMAN HONIGBERG: Do you think it  
11 would be wise for us to issue an order as a result of  
12 this prehearing conference that specifies what we would  
13 like the parties to do?

14 MR. WIESNER: If the next step would be  
15 some sort of a brief, and I understand that Attorney  
16 Patch is suggesting that that brief might go to the  
17 scope of the proceeding itself, and I believe that  
18 Attorney Glahn is suggesting that the brief would go to  
19 the merits of the case, then I would agree that it  
20 might be useful to have the Commission's expectation of  
21 what would be included in that brief, what will be  
22 addressed in that brief stated clearly.

23 CHAIRMAN HONIGBERG: So, you're just  
24 referring to the last suggestion Attorney Patch made

1 with respect to sort of a pre-filing or a pre-order  
2 filing from the parties about scope? I'm not thrilled  
3 about that idea. I'm more interested in the notion  
4 about whether we should issue an order saying "here's  
5 what you should do." Or, are we sufficiently clear  
6 about what the parties need to do, and essentially  
7 briefing a Motion to Dismiss? Maybe we should issue an  
8 order. I see enough concern out there. That we will  
9 issue an order soon, as quickly as we can, I think,  
10 spelling out the expectations and the deadlines for  
11 filing.

12 I'm thinking that you're not going to  
13 need a tremendous amount of time, because you've all  
14 written this one up once for Judge Brown. You know, a  
15 few weeks for Eversource, and then two, three weeks to  
16 respond. Is that going to make sense?

17 MR. FOJO: That's fine with us.

18 CHAIRMAN HONIGBERG: All right. Mr.  
19 Glahn.

20 MR. GLAHN: Could I just add one other  
21 thing. It's a minor point, but it's not an unimportant  
22 point. We've been referring to "Count 1". One portion  
23 of Count 1 was dismissed. It's subpart (d) of that  
24 count, which deals with the question of whether PSNH



1           somehow persuaded the PUC Staff to take action. That  
2           can be significant where that case is now. So, it's  
3           only -- it's only to be very precise, Paragraphs  
4           137(a), (b), and (c) of this complaint that is left.

5                       CHAIRMAN HONIGBERG: Yes. I think  
6           that's right. I think, from the Order from Judge  
7           Brown, I think it's pretty clear what is still alive in  
8           his view and what was sent over here.

9                       Everyone agrees with that?

10                      *[No verbal response]*

11                      CHAIRMAN HONIGBERG: Okay. So, we'll  
12           get an order -- yes, Mr. Kreis?

13                      MR. KREIS: Mr. Chairman, I just wanted  
14           to make the point that, if the posture is basically one  
15           of Motion to Dismiss, then I think it would be useful  
16           if one of the two major parties actually filed a copy  
17           of the civil complaint that was filed in the Superior  
18           Court. I've had a chance to read that. There are  
19           quite a few factual allegations in that complaint.  
20           And, if that's what we're working off here with regard  
21           to what the facts might be, then I think it would be  
22           helpful if you had an opportunity to review them as you  
23           make your ultimate ruling.

24                      CHAIRMAN HONIGBERG: Mr. Wiesner, we

1 have that. We have the record from the Superior Court,  
2 do we not?

3 MR. WIESNER: I have it. It has not  
4 been filed in the docket yet. But we can do that.

5 CHAIRMAN HONIGBERG: So, is that --

6 MR. GLAHN: We're happy to provide it,  
7 if they don't have it. But, on the other hand, if you  
8 go up into the docket, that's probably the easiest way  
9 for people to get it.

10 CHAIRMAN HONIGBERG: I don't -- I'm  
11 indifferent. I represent to you all that we have a  
12 copy of the complaint. We will make it a part of the  
13 record.

14 Mr. Patch, I don't think it's going to  
15 be necessary for you or the parties to file anything  
16 regarding a scope. We'll issue an order regarding what  
17 we think the parties should be doing, sometime in the  
18 next few days, and that will contain deadlines a few  
19 weeks out and a few weeks after that.

20 Is there anything else we need to deal  
21 with?

22 MR. WIESNER: Mr. Chairman, would that  
23 order also address the intervention requests?

24 CHAIRMAN HONIGBERG: Yes. We'll deal

1 with the intervention requests. It may be that we  
2 defer ruling on them at this time. And the parties --  
3 the prospective intervenors are going to be free to  
4 file papers with respect to the issues that are before  
5 us.

6 Mr. Fojo.

7 MR. FOJO: Thank you, Mr. Chairman. We  
8 think that, in the order that's forthcoming, the order  
9 should clearly state what exactly the parties are going  
10 to rely on with respect to this, this decision, if this  
11 is the way this is going to go.

12 The complaint contains a lot of  
13 information. And, assuming that that will be filed in  
14 the docket and relied upon, there are, in addition to  
15 Paragraph 137(a), (b), and (c), there are many  
16 allegations in the complaint that pertain to those  
17 three subsections of that paragraph, and there are some  
18 that I can say do not. We would need some kind of  
19 clarity on which facts in the complaint and the  
20 allegations leading up to the actual Count 1 section we  
21 will rely on.

22 CHAIRMAN HONIGBERG: I assume this is --  
23 I actually have read this complaint, but it's been a  
24 while since I did. Isn't this complaint like virtually

1 like every other complaint, that has a bunch of factual  
2 allegations, and then the counts that incorporate those  
3 factual allegations, and then some which go to Count 2  
4 and incorporate everything before that, and then Count  
5 3 incorporates everything before that, so that all  
6 those facts are out there and in the record?

7 MR. FOJO: That's correct. And I guess  
8 I'm foreseeing a possibility of disagreement on whether  
9 Paragraph 37 is relevant to the arguments that are  
10 being posed to the Commission, or Paragraph 46, and so  
11 on and so forth.

12 CHAIRMAN HONIGBERG: If it's in the  
13 complaint and it was incorporated into that count, it's  
14 fair game.

15 MR. FOJO: I have no qualms with that.  
16 Thank you.

17 CHAIRMAN HONIGBERG: I think the issue  
18 is going to be the documents that were brought in  
19 outside of that. But I gather, from what Mr. Glahn has  
20 said, and, in fact, I think we can see that from the  
21 record in the Superior Court, that both parties  
22 referred to documents that were outside of the  
23 complaint, some of which were referred to, but you both  
24 brought in a lot of other information for Judge Brown

1 to consider when he was ruling initially on this, isn't  
2 that right?

3 MR. FOJO: That's right. There were  
4 other -- documents in other dockets that the Court and,  
5 obviously, the Commission could take judicial notice  
6 of. We don't have a disagreement with that.

7 CHAIRMAN HONIGBERG: All right. If  
8 there's nothing else for us to do, we'll adjourn, and  
9 we'll issue an order as quickly as we can. Thank you  
10 all.

11 ***[Whereupon the prehearing conference was***  
12 ***adjourned at 2:56 p.m.]***