

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

June 9, 2016 - 2:10 p.m.
Concord, New Hampshire

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

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

Sandy Deno, Clerk

APPEARANCES: Reptg. PNE Energy Supply, LLC, and
(As noted) Resident Power Natural Gas &
Electric Solutions, LLC:
Douglas L. Patch, Esq. (Orr & Reno)
Robert M. Fojo, Esq. (Fojo Law)

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Hampshire d/b/a Eversource Energy:
Wilbur A. Glahn, III, Esq. (McLane..)
Robert A. Bersak, Esq. (Eversource)
Matthew J. Fossum, Esq. (Eversource)

Reptg. PUC Staff:
David K. Wiesner, Esq., Esq.
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Court Reporter: Steven E. Patnaude, LCR No. 52

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P R O C E E D I N G

CHAIRMAN HONIGBERG: All right.

We're here in Docket 15-491, to consider what we have referred to as a "Motion to Dismiss", which has been filed by PSNH doing business as Eversource Energy, in the matter that was transferred to us by the Superior Court.

I believe all we're going to be doing is hearing from Mr. Glahn, or one of the other gentlemen at that table, and Mr. Patch over here, or maybe perhaps someone else from that table. I don't know if Staff is going to have anything to offer.

Am I correct that that's the order of events, Mr. Wiesner?

MR. WIESNER: I mean, my concept of this hearing is it's more or less oral argument on the briefs that have been filed on the Motion to Dismiss, as you mentioned, and the issues that were transferred by the Superior Court. And I do expect the Parties to have the most to say.

CHAIRMAN HONIGBERG: Any other procedural things before we get started?

1 MR. WIESNER: Not that I'm aware of,
2 Mr. Chairman.

3 CHAIRMAN HONIGBERG: All right.
4 Mr. Glahn, you may proceed.

5 MR. GLAHN: Thank you. And, if I
6 may, I recognize that the last thing the
7 Commission or anybody else wants in this case
8 is more paper. But I'm going to be referring
9 to some things, and I just thought, for the
10 convenience of the Commission today, that I
11 would give you the documents so that you have
12 them separately. They're all things that are
13 in the public record. Just a copy of a
14 regulation, copy of the notice that was sent,
15 an order of this Commission, and the Joint
16 Statement of Facts in another docket.

17 CHAIRMAN HONIGBERG: Okay. I'm sure,
18 if Mr. Patch has a problem with any of that,
19 he'll let us know.

20 *[Atty. Glahn distributing*
21 *documents.]*

22 CHAIRMAN HONIGBERG: Mr. Glahn, are
23 you suggesting that these be marked in any way
24 or are these just --

1 MR. GLAHN: No. They're --

2 CHAIRMAN HONIGBERG: -- chawks for
3 demonstration purposes?

4 MR. GLAHN: They're more in the
5 nature of chawks, Your Honor. They're all
6 things that you have available to you, but I
7 just thought, for ease of your reference, that
8 I'd provide an extra copy of them.

9 CHAIRMAN HONIGBERG: All right.

10 MR. GLAHN: So, there is a lot of
11 paper in this case already. And, as the
12 Commission is aware, there are really three
13 matters that PNE is complaining about at this
14 point. And, just for a start, I'd like to
15 point out that they are one -- there's one
16 count of this Complaint that was left,
17 Paragraph 137 of the Complaint. And it alleges
18 three wrongful acts or unlawful acts on the
19 part of Public Service Company. Those were the
20 failure to provide an off-cycle meter read,
21 and, really, in reverse order of the way they
22 describe them in the Complaint, the setting up
23 of new EDIs to place the PNE customers onto
24 PSNH's default service, and then the deletion

1 of FairPoint EDIs, which were already in the
2 system.

3 The law of this case is that, from
4 the Superior Court order, is that, if PSNH did
5 not act unlawfully, it is protected by law.

6 So, I want to change the focus a
7 little bit this morning to say, or this
8 afternoon, to say that the -- this case can be
9 resolved without getting to the merits of
10 whether an off-cycle meter read was required or
11 whether the deletion of those EDIs was
12 improper, the deletion or replacement of EDIs
13 was improper, because this entire transaction
14 started with a request for a waiver. And that
15 request for a waiver was based upon
16 representations and the imposition of a
17 condition.

18 So, the Commission without that
19 waiver, PNE would have been required to give 14
20 days advance notice to every customer. And,
21 when the conditions of that waiver were not
22 satisfied, the Staff of this Commission stepped
23 in and said "No more transfers to FairPoint,
24 unless the FairPoint customers opt into the

1 transaction." So, the Commission acted on the
2 request and on the representation. And, on the
3 specific finding that PNE and FairPoint intend
4 to comply with all conditions of the
5 Commission's rules, and specifically cited the
6 fact that the purpose of the rule was satisfied
7 by the alternative method that PNE had put
8 forward, and that PNE's transfer process
9 complies with the purpose of the rule.

10 Now, that transfer process, as
11 described in the waiver, was that there would
12 be no off-cycle meter reads and that customers
13 would be transferred upon their next normal
14 meter read.

15 So, PNE and FairPoint, there was one
16 other condition. The condition was that
17 FairPoint would make a filing with this
18 Commission demonstrating that it had the
19 financial wherewithal to take these customers
20 onto its service. PNE did exactly the opposite
21 of what they had represented. They, within
22 days of the waiver being approved, asked PNE
23 for an off-cycle meter read. Minutes, 35
24 minutes after they asked for that, they were

1 suspended by ISO. They had an option. They
2 could have cured that default; they did not.
3 At that point, they were out of business. And,
4 as the Commission's own Staff said in Docket
5 13-059, "given the suspension of PNE's status
6 as a market participant by ISO, much of what
7 PNE conveyed to its customers is no longer
8 accurate." In other words, the representations
9 in the notice were no longer accurate. And,
10 despite efforts to get them to do so, PNE has
11 not yet provided a supplemental notice to its
12 customers. What the Staff of the Commission
13 did was then step in and require that no
14 further transfers occur.

15 So, unless -- and one more thing.
16 PNE and Resident Power could have solved this
17 whole problem. All that needed to be done at
18 that point was for FairPoint to get the
19 permission of their customers to make the
20 transfer. Had they done that, there would have
21 been no problem whatsoever; but they chose not
22 to do that.

23 So, my point is this. Without
24 addressing the merits, which I'll get to in a

1 minute, of either whether it was unlawful to
2 perform the off-cycle meter read or not to
3 perform it or to replace those EDIs, the
4 Commission should consider whether PSNH's
5 actions were protected by the waiver that was
6 granted by this Commission's order, and the
7 failure of PNE and FairPoint -- or, PNE and
8 Resident Power to comply with the terms of that
9 waiver.

10 Simply put, PSNH cannot be deemed to
11 have acted unlawfully by refusing to provide a
12 meter read that the Commission's waiver order
13 did not allow, by failing to make a transfer
14 that the Commission Staff had restricted or in
15 a circumstance where FairPoint had no right to
16 receive the customers at all, because it did
17 not make the requisite filing.

18 It is worth talking at the outset
19 very briefly about the fact that there are
20 certain issues in this matter, there's a lot of
21 issues that are in dispute, but there are
22 certain matters that are not in dispute. That
23 the waiver request was requested on February
24 7th. That there was a specific representation

1 in that waiver request that no off-cycle meter
2 reads would be required or requested. That
3 notice would be given to all of the customers
4 that the transfer would occur on their next
5 normal meter read date. That, on February
6 12th, an oral request was made, this is
7 Paragraph 66 of the Complaint, an oral request
8 was made to do an off-cycle meter read
9 immediately. That, on February 14th, when
10 Public Service Company said it didn't have the
11 manpower to do an off-cycle meter read for
12 7,300 customers, Mr. Plante, the President of
13 PNE, made the first written request for an
14 off-cycle meter read, and didn't specify a time
15 when that meter read should be done.

16 Effectively, they were asking that it be done
17 immediately. And the reason they asked it to
18 be done immediately was that that -- and I
19 don't have -- I lost my note on this, I'm sorry
20 to say, but that request is in the record in
21 our -- attached to our reply. Thirty-five
22 minutes later, after that request was made, PNE
23 was suspended, and 83 minutes after it was
24 made, Public Service Company was informed of

1 the suspension.

2 On February 21st, the -- I'm sorry,
3 on February 20th -- let me back up one step.
4 On the 145h, which was a Thursday, Public
5 Service Company received a notice from ISO-New
6 England that they were required to take all of
7 PNE's customers onto their default service on
8 February 20th, at one minute after midnight,
9 because of their suspension. And there is no
10 dispute in this case that that suspension was
11 voluntary, and that their -- that they failed
12 to cure. They were out of business on the
13 14th.

14 So, we come to the 20th, PSNH takes
15 all of the customers onto its default service.
16 And the very next day this Commission halts,
17 Commission Staff requires the posting of a
18 notice and post the notice preventing any
19 further transfers to FairPoint, unless the
20 customers opt in. And no effort was ever made
21 to have those customers opt into the
22 transaction. One day later, the time period
23 for FairPoint to comply with a condition about
24 financial security expired, without FairPoint

1 filing anything. That timing is probably clear
2 to you from the papers, but the point of the
3 timing is important. Because anything that
4 happened respecting the EDIs could only have
5 caused a problem for PNE and FairPoint or for
6 PSNH in a 24-hour period. Because, no matter
7 whether the EDIs were deleted or not, no
8 further transfers could occur as of the 21st.

9 Now, PNE says "Well, that's just a
10 notice posted by Commission Staff." Well, that
11 may be true, but PSNH was not free to ignore
12 that. PSNH was not free to say "well, that's
13 just the Commission Staff, and we're not going
14 transfer" -- "we're going to go ahead and
15 transfer the customers anyway."

16 Nor was PNE, and PNE made a big to-do
17 about that, that they didn't believe that
18 notice should have been posted. But the
19 reality of it is that they could have fixed it,
20 if they wanted to. And I don't think they were
21 in a position to say "well, it's just the
22 Staff."

23 So, now, let me talk about the
24 merits --

1 CHAIRMAN HONIGBERG: Well, before you
2 get there, Mr. Glahn, regarding that specific
3 incident, was PSNH in a position to call up
4 Staff and say "Wait. We need this from the
5 Commission" or "We need this in a secretarial
6 letter"?

7 MR. GLAHN: I don't know the answer
8 to that. I assume, sure, I assume they could
9 have done that. But that wasn't PSNH's point.
10 PSNH wasn't trying to prevent this transfer
11 from occurring. PSNH, as the Complaint makes
12 clear, had numerous conversations with the
13 Commission Staff while this transaction --
14 while this problem was occurring. Because
15 this, as this Commission noted in 25,660, Order
16 25,660, this was a one-off situation. It
17 hadn't happened before.

18 CHAIRMAN HONIGBERG: Well, there are
19 allegations that PSNH wanted all this massive
20 customer base on default service to help cover
21 other costs that only default service customers
22 pay. So, there is an allegation anyway of that
23 motive being there.

24 MR. GLAHN: Sure. And, if the

1 Commission wants to say -- I suppose the answer
2 is, if the Commission says "well,
3 notwithstanding what the Staff did, PSNH should
4 have stepped in to try to allow the transfer to
5 occur", notwithstanding that PNE and Resident
6 Power, Resident Power, actually, never made any
7 effort to go to its customers or have FairPoint
8 go to the customers and say "We want you to opt
9 into this transaction. And, if you do so,
10 we'll put the EDIs back in." And, had they
11 done that, PSNH would have been obligated to
12 honor those EDIs.

13 So, let's talk about the off-cycle
14 meter read for a moment. The Plaintiffs have
15 to win on this argument. And the reason they
16 have to win is because, if they don't, their
17 entire transaction with respect -- their entire
18 argument with respect to the EDIs doesn't hold
19 up. And the reason it doesn't hold up is
20 because the Staff's notice sits between what --
21 at that point all the customers were entitled
22 to transfer upon their normal meter read date
23 pursuant to the waiver. So, because the
24 Commission's Staff's notice sits in the middle

1 of that, they're stuck, because the off-cycle
2 meter reads were not permitted. So, let's talk
3 about why they're not permitted.

4 It has been our position that the
5 regulation that PNE and Resident Power cite as
6 allowing them to request and receive an
7 off-cycle meter read has nothing to do with the
8 situation in this case. Their argument is,
9 "We've got a regulation." That regulation, and
10 it's the -- it's Tab 2 in the documents that
11 I've given you. If you turn to Page -- what
12 I've done in this is just give you Part 2004.
13 And, if you turn to Page 14 of that part, we're
14 talking about 2004.07(b).

15 Now, what that says is, literally,
16 and you can read it, that "nothing prevents a
17 CEPS from requesting an off-cycle meter read."
18 The question is, does that apply in a situation
19 in which a CEPS requests a meter read for all
20 of its customers, which is what happened here,
21 an off-cycle meter read for all of its
22 customers.

23 There is a specific provision of this
24 rule that undercuts that entire argument, and

1 that provision is 2004.07(f). Which says that,
2 if a CEPS wants to cease selling electricity in
3 this state, which is what happened here, it has
4 to give 30 days notice to the utility. Now, if
5 you have to give 30 days notice to the utility
6 in that situation, then how could you also be
7 requesting an off-cycle meter read within five
8 days?

9 But there's another and more
10 compelling argument, I think, although that
11 last one is fairly direct, as to why this rule
12 doesn't apply. What PNE is arguing for here is
13 this. They're arguing that this rule, Part
14 2004, and specifically this particular rule, is
15 designed to establish and deal with the
16 relationship between a CEPS and a utility.

17 Well, when you start with this
18 proposition, the tariff and the EDI protocols
19 of the Commission specifically provide that
20 customers will be transferred on their next
21 normal meter read date. So, if, in fact, the
22 Commission wanted to set up a rule that created
23 an exception to that general rule of when
24 customers would be transferred, surely they

1 wouldn't have put it in a subpart of the rule
2 that deals with the relation -- that is a
3 consumer protection provision dealing with the
4 relationship between CEPS and their customers.
5 And, if you go back and look at the heading of
6 this subpart, this subpart is called "Consumer
7 Protection Requirements". As we pointed out in
8 a footnote to our reply memo, every section of
9 this part deals with the relationship between
10 consumers and CEPS, not CEPS and utilities.

11 If you read the regulation as a whole
12 and read it relative to its part, this section,
13 called "Termination of Service", and subpart
14 (b), has to be read in connection with subpart
15 (a). And subpart (a) deals with the situation
16 in which a CEP wants to terminate a customer,
17 because the customer has not complied with the
18 terms of service. And it says in that section
19 that that transfer will occur at the next
20 normal meter read date, in subpart (a).

21 Subpart (b) then says what happens if the CEP
22 in that situation, notwithstanding -- I agree,
23 the language in that situation dealing with
24 subpart (a) is not in subpart (b), but it makes

1 sense to read it that way. And one of the
2 reasons it makes sense to read it that way is
3 because, if you think about it, maybe it isn't
4 improper to give five business days notice when
5 what you want to do is transfer one customer
6 off-cycle, and the CEP would want it done
7 quickly, because the customer is not complying
8 with the terms of service. So, that would make
9 sense. But it doesn't make sense to apply that
10 to 7,000 customers in five business days or
11 with five business days advance notice.

12 CHAIRMAN HONIGBERG: Mr. Glahn, I get
13 the contextual arguments you've made and the
14 nature of (a)'s relationship to (b), and the
15 significance of (f) within 2004.07. You would
16 agree, though, that the titles of the overall
17 section, the 2400 chapter, and the specific
18 section are, I think by law, not relevant.
19 Isn't that right?

20 MR. GLAHN: I don't think they're --
21 I don't think, Your Honor, that, by law, they
22 are not relevant. They are relevant for
23 purposes of interpreting sections when there is
24 ambiguity or the statutory construction

1 argument as you read the statute as a whole.

2 CHAIRMAN HONIGBERG: You're not
3 arguing, really, that these sections are
4 ambiguous, are you? Aren't you really arguing
5 that they only have one possible meaning, and
6 that meaning is this, from the context and the
7 structure of the rule?

8 MR. GLAHN: I can argue both sides of
9 it, Your Honor. I think that --

10 CHAIRMAN HONIGBERG: I figured you
11 could.

12 MR. GLAHN: I think it is clear.
13 Well, let me be frank, okay, because I was
14 sitting here looking at this rule last night
15 and trying to make sense out of subpart (a) and
16 subpart (c), okay? And the reason it's hard to
17 do that is this. Subpart (a) says "Shall give
18 at least five business days notice". Subpart
19 (c) says "To the extent a utility cannot
20 accommodate a request for off-cycle meter reads
21 within five business days" then certain things
22 occur. So, how do you read those two things
23 together, if you have to give "five business
24 days advance notice"? Well, one way to read

1 them, and this is where the ambiguity comes in,
2 Mr. Chairman, is there are two ways to read it.
3 One is, you have to give five business days
4 notice. In other words, you say "starting five
5 days from now, I want you to do an off-cycle
6 meter read."

7 Another possible reading is, "you
8 have to give notice that you want the off-cycle
9 meter read done within five business days."
10 And, if you read it that way, then subpart (c)
11 is somewhat -- is somewhat consistent with
12 that.

13 I would say to you, however, that
14 none of that matters. And, so, if you take the
15 first literal meaning, then subpart (b)(c)
16 destroys their argument. Because what subpart
17 (b)(2) says is, "if you don't give the right
18 notice, you're done."

19 And, what happened in this case was
20 the following: They gave written notice, not
21 of five days, but written notice that was given
22 35 minutes before they defaulted. So, on
23 either reading it doesn't matter, they didn't
24 satisfy the rule.

1 But I wanted to be fair in saying "I
2 think it can be read both ways." But the other
3 thing is, when you read it the alternative way,
4 I think it's clear. That the rule was never
5 intended to apply to this situation. The
6 reason for that would be, it would be
7 preposterous to say that a utility could
8 come -- that a CEP could come to a utility and
9 say "Do a meter read for all of our customers
10 within five business days." That's simply
11 another indication that this rule was designed
12 to be the situation in which the five days
13 applies to the one customer that you're
14 terminating because they haven't complied with
15 your rules. And, in addition to that, I think
16 subpart (f) supports such proposition.

17 So, to go back to the second reason
18 why the off-cycle meter read doesn't apply is
19 that -- is the representation that was made
20 here. Now, I don't think I need to get into
21 that in great detail, except to say that, when
22 the Commission said, in its waiver request,
23 that they would comply with all other
24 provisions of the rule, the rule requires

1 specific notice, Rule 2004.05, requires
2 specific notice as to when the transfers will
3 occur. And what the customers were told in the
4 notice is "it will occur on your next normal
5 meter read date". Then, PNE comes to PSNH and
6 says "We don't want you to do it on the next
7 normal meter read date, we want you to do it
8 right away." That means that the customers
9 would not have known when that transfer was
10 going to occur. And I submit to you that
11 that's why the Staff stepped in on the 20th and
12 said "We've got a significant problem here.
13 Our problem is, customers don't know what's
14 happening. They got a notice that said
15 'Resident Power is no longer your aggregator.'
16 They're being told that they were" -- "they
17 were told that the transfer would occur on
18 their next off-cycle meter read date, that's
19 what the notice said, and now PNE has defaulted
20 and they're aware of that."

21 So, if you look at it, and I put the
22 notice in the package, if you look at the
23 notice, very clear that -- I'd say one other
24 thing. In Dockets 13-059 and 060, when the

1 Staff brought those dockets for a show cause
2 order, one of the things that was pointed out
3 is that this notice was not provided to the
4 Commission when the request for the waiver was
5 made. But, in fact, the notice that is the
6 notice that would have been provided
7 specifically talks, in the first paragraph,
8 "This transfer is expected to occur at the
9 beginning of your next billing cycle, but may
10 take two cycles to occur." In the first bullet
11 point, "PNE Energy Supply will be transferring
12 your electricity supply account to FairPoint at
13 the end of your current monthly billing."
14 "Resident", about the second to the last, next
15 to the last bullet point, "Resident Power will
16 no longer be your aggregator". And, on the
17 next page, in the paragraph that carries over,
18 "If you select another supplier or return to
19 PSNH within 30 days from the receipt of this
20 notice", well, by changing the -- by requesting
21 the change in the meter read date, they were
22 requesting something different from that.

23 My point is simply, PSNH -- put aside
24 the question of whether the regulation applies,

1 PSNH cannot have acted unlawfully by failing to
2 do something that PNE had no right to request
3 under the waiver that was granted.

4 So, let's talk about the EDIs for a
5 moment, because that's the second piece of
6 this. So, keep in mind the timing here. On
7 the 20th, PSNH acquires these customers as a
8 matter of law. On the 21st, the Commission
9 Staff requires a notice which would halt the
10 transaction. So, again, the Plaintiffs does --
11 now another argument that the Plaintiffs have
12 to win, and can't.

13 The Superior Court order on this
14 pointed out, at Page 12, that the Plaintiffs in
15 the Superior Court were relying on a provision
16 of the ISO-New England tariff dealing with host
17 market participants and the impact of a
18 suspension of a CEP. That tariff provision is
19 set out in Order 25,660, which the Commission
20 issued in another docket. But the specific
21 language is this: "Any load asset registered
22 with a suspended market participant shall be
23 terminated and the obligation to serve the load
24 associated with such asset shall be assigned to

1 the relevant unmetered load asset, or assets,
2 unless or until the host market participant for
3 such load assigns the obligation to serve such
4 load to another asset."

5 So, what the Plaintiffs said in the
6 Superior Court, and what they are saying to you
7 in this docket, is they are the host market
8 participant, and they had assigned all of these
9 customers to FairPoint before the default
10 occurred. Therefore, PSNH was obligated to
11 honor that assignment and transfer those
12 customers to FairPoint.

13 That is, how can I say this, these
14 Plaintiffs have taken a directly contrary
15 position before this Commission on a number of
16 occasions. And they have taken directly
17 contrary positions on that point in their
18 pleadings that you have before you. So, let me
19 explain that.

20 What Plaintiffs now say is, they
21 assigned these customers, and they've made two
22 opposing arguments. One is, they assigned the
23 customers and, therefore, PSNH could not have
24 taken any steps to change that. And the second

1 argument is, PSNH had these customers and could
2 have assigned them to FairPoint.

3 I suppose the latter of those things
4 might be true, if the Staff's notice hadn't
5 occurred, or, if, in fact, since the customers
6 had not been given notice.

7 And I would say, if I could go back
8 for one second, Mr. Honigberg, on the question
9 you asked me about, "could PSNH have asked the
10 Staff to change their position?" I don't think
11 so, because the waiver wasn't valid anymore,
12 and the customers did need to receive notice
13 and did need to give their permission to this
14 transfer.

15 So, let me describe their
16 inconsistent positions. First of all, their
17 argument that they "assigned these customers to
18 FairPoint" is belied and completely
19 contradicted by Order 25,660. So, if you take
20 a look at your order, on Page 7, which is in
21 Tab 3, the tariff provision is quoted in part.
22 And what this Commission ordered is the
23 following: When PNE agreed to the ISO-New
24 England tariff as a condition of becoming a

1 supplier, PNE knew that its suspension would
2 result in the automatic assignment of its
3 customers. In that sense, PNE initiated the
4 drop of its own customers when it engaged in
5 conduct that caused the suspension.

6 This Commission could not have issued
7 that order if these customers had already been
8 assigned to FairPoint. Say that again. This
9 order is fundamentally inconsistent with the
10 position that they are now taking in this
11 docket.

12 But there is another reason why the
13 position they're taking today is fundamentally
14 inconsistent with positions they have taken
15 before. And that's because, in another docket,
16 relating to the relationship between PSNH and
17 PNE, and this goes to the -- this is pointed
18 out in the Joint Statement of Facts that I've
19 attached as Exhibit 4, Paragraph 16. This is
20 an agreed Statement of Facts by PNE in another
21 docket. In which they say "PSNH was the host
22 market participant pursuant to the ISO-New
23 England tariff." So, for them to now come in
24 and say "we are the host market participant and

1 we had the ability to assign those customers",
2 is completely inconsistent with the
3 representation they made previously.

4 But they don't stop there. There are
5 three other places in which they have made
6 inconsistent statements. The first is in their
7 opposition in this case. On Page 20, in
8 Footnote 10, what they said is "We are the host
9 market participant. We have the right to
10 assign these customers." That's directly
11 contradicted by the representations by the
12 order and the representation they made earlier.

13 But, then, incredibly, in their
14 Motion for Leave to File a Sur-Reply in this
15 case, what they said is "PSNH misunderstands
16 our argument. They have mischaracterized it.
17 We didn't say "we were the host market
18 participant", we said "PSNH is the host market
19 participant", and we want to file a sur-reply
20 so that we can address that issue."

21 And one might have expected that,
22 since they took that position, that's what they
23 would have done in their sur-reply. Instead,
24 they did exactly the opposite. In their

1 sur-reply, the heading is "PNE was the host
2 market participant." They can't get their
3 story straight. And the reason they can't get
4 their story straight is they know that they got
5 a big problem. If they didn't have the right
6 to assign those customers, those customers, as
7 a matter of law, ended up in PSNH's system, and
8 they ended up in PSNH's system in a particular
9 way.

10 So, let me explain that again, or
11 explain it the first time, I suppose. Order
12 25,660 -- well, let me -- Order 25,660 says
13 that by -- bear with me for one minute, I'm
14 looking for the --

15 Sorry about that. I apologize. So,
16 25,660 says "this was a drop". The Commission
17 found it was a drop. A "drop", by definition,
18 means a "drop within the EDI system". Meaning
19 that, as soon as that drop occurred, these
20 customers, an EDI had to be put in to put these
21 customers on PSNH's default service. That
22 takes care of Paragraph 137(c) of their
23 Complaint, because their Complaint is "PSNH
24 didn't have to enter this EDI to put the

1 customers into its default service." In fact,
2 a drop required that to be done as a matter of
3 law. It's not a factual question, it's a legal
4 question.

5 Any doubt about that is resolved by a
6 statement that PNE made in another docket, in
7 Docket 13-233, which is the same one in which
8 25,660 was entered. PNE filed a memo
9 concerning the alleged agency relationship. It
10 was filed on February 18th, 2014. Here's what
11 they said: "Any customer" -- I'll read the
12 whole sentence. "PNE contends that PSNH
13 improperly assessed selection charges under
14 Section 2(a) of the PSNH tariff, in particular,
15 any customer drop transactions under the
16 electronic data interchange protocol for these
17 customers."

18 So, PNE has admitted, as a matter of
19 law, that, when a change occurs by operation of
20 law, it occurs through the EDI protocol. That
21 solves that section of their Complaint as an
22 operation of -- by operation of law.

23 So, here is the only question that
24 remains is, was -- did PSNH act unlawfully by

1 deleting the FairPoint EDIs? It doesn't
2 matter. First of all, PSNH had the right to do
3 that, because you can only have one EDI on the
4 system at a time. Put aside the question of
5 whether, as a definitional matter, PSNH is a
6 supplier or not. If there are two suppliers,
7 the second EDI, only two EDIs in 30-day period.
8 Because the FairPoint EDI was in the system,
9 and PSNH, and there was a drop, and there had
10 to be another EDI transaction, that's the first
11 lawful transaction by operation of law. The
12 second one has to be deleted.

13 But let's just play this out for a
14 minute and ask "what happens" -- "what would
15 have happened if PSNH hadn't deleted the EDIs?"
16 Well, then, the -- then, they're now on the
17 PSNH system, and they would be transferred,
18 assuming there was a valid EDI from FairPoint,
19 on the next customer meter read date. However,
20 less than 24 hours later they couldn't be
21 transferred, based on the notice that was
22 posted, without consent of the customer.

23 PNE and Resident Power filed a
24 declaratory judgment action, because there was

1 an issue of whether doing it without the
2 customer permission would be slamming; the
3 Commission said it wouldn't rule on that. All
4 they had to do was go get the consent; it was
5 never obtained. So, the transaction would have
6 been halted in any event within 24 hours.

7 Now, let's assume, for the sake of
8 argument, that the -- that the minute -- and,
9 by the way, to make that argument, they say
10 "these could have just stayed on the system for
11 a brief time and then have been transferred to
12 FairPoint. Not when that notice was posted
13 they couldn't. Or, they couldn't be
14 transferred the next day, because FairPoint
15 didn't satisfy the terms of the waiver request.

16 But one more point, and then I'll
17 stop. Assume for the moment that PSNH deleted
18 the FairPoint transactions, then put them back
19 into the system immediately, which is another
20 argument they have made. The problem with that
21 is that EDI only becomes valid two business
22 days after it's put back in, under the EDI
23 protocol. By that two-day period, FairPoint
24 hadn't posted the requisite financial security

1 and the notice had been posted. So, the
2 transaction wasn't going to go through anyway.

3 For all those reasons, going back to
4 the waiver, and the conditions in the waiver,
5 what -- the fact that the regulation doesn't
6 apply, but, if it applies literally, they're
7 out of luck, because they didn't give the
8 proper notice, and, because PSNH had no choice
9 under the ISO directive but to take these
10 customers onto its service, PSNH did not act
11 unlawfully. And, under the Superior Court
12 order, which is the law of this case, if PSNH
13 did not violate a regulation, a rule, a tariff
14 or an order of this Commission, it did not act
15 unlawfully.

16 Thank you.

17 CHAIRMAN HONIGBERG: I have two
18 questions, Mr. Glahn, before I let you finish.
19 The first is, can you talk a little bit about
20 the significance or, in your view, lack thereof
21 of Milan Lumber?

22 MR. GLAHN: Yes. First of all, we've
23 been accused of adding facts to the record
24 about Milan Lumber. And I would fully concede

1 that some of the issues, some of the facts that
2 we've put forward in our reply memorandum are
3 not part of the Complaint. But, equally so,
4 Milan Lumber is not a part of the Complaint.
5 Nowhere in this Complaint can you find a single
6 reference to it.

7 The difference with Milan Lumber is
8 the difference that could have resulted from
9 the fact of what PNE could have done in this
10 case with FairPoint. In the Milan Lumber case,
11 there was a specific -- first of all, the Milan
12 Lumber case occurred after this transaction had
13 been terminated for a number of reasons, but it
14 was after the 22nd. Milan Lumber is not a
15 residential customer, and the customer had
16 specifically authorized the transfer to
17 TransCanada, unlike the situation here that was
18 subject to the waiver, where the customers had
19 not specifically authorized that transaction.

20 Now, they argue "well, the customers
21 did give their approval, because Resident Power
22 was their aggregator." The problem with that
23 is, Resident Power sent a notice to the
24 customer saying "we're no longer your

1 aggregator." So, they didn't have, arguably,
2 the ability, they were still an aggregator, but
3 they told these customers "they were not their
4 aggregator." That was one of the reasons I
5 think Staff stepped in and said "Well, wait a
6 minute here. You don't have specific approval.
7 You would have required it absent the waiver."

8 So, Milan Lumber is a different
9 situation. And, to say that, factually, you
10 can draw a conclusion from one customer in a
11 different class I think is going a bridge too
12 far.

13 CHAIRMAN HONIGBERG: My second
14 question is about the elements of the tort that
15 is in Superior Court. There's a lot of
16 allegations regarding motive and evil intent on
17 PSNH's behalf. Under the law, if the
18 Defendant -- if the Defendant's conduct isn't
19 unlawful, does any of that motive matter?

20 MR. GLAHN: No. No. Not in this
21 state. And the reason for that is that, if you
22 look at what -- what the Plaintiff does is to
23 cite to the *Roberts* case and cites to the
24 elements of the tort set out in the

1 restatement.

2 I guess I'd first say, Chairman
3 Honigberg, it's irrelevant here, because your
4 task is the task that sits within your
5 jurisdiction. You don't sit to decide tort
6 law. You sit to decide whether -- you have no
7 specific jurisdiction, nor, in my view, could
8 the Superior Court transfer a tort case to you.

9 So, the question is, do -- is there a
10 violation of your tariff rules and regulations?
11 PSNH -- what they don't cite out of the *Roberts*
12 case is the privilege rule. Which is, if you
13 have a privilege to take an action, whether
14 it's in your self-interest or not, then it's
15 not a breach of -- it doesn't fall within the
16 elements of an interference with contract
17 claim.

18 So, I guess another way to say it is
19 this. Assume that PSNH acted with the -- with
20 complete evil motives, intentionally. They
21 wanted to screw up this transaction. But they
22 didn't violate any tariff, rule or regulation
23 of this Commission. That's not a tort claim
24 and it's not improper.

1 CHAIRMAN HONIGBERG: All right.

2 Thank you, Mr. Glahn.

3 Mr. Patch. Oh, Mr. Fojo?

4 MR. PATCH: Mr. Fojo.

5 MR. FOJO: Thank you, Mr. Chairman.

6 I just want to simplify this a little bit. The
7 question that the Court transferred to the
8 Commission is "did PSNH act improperly?" And
9 we believe that the Commission should answer
10 that question in the affirmative. Under the
11 standards of conduct articulated in the
12 authority that we cited in our brief, in
13 particular, the *Balaber* case, which has a very
14 parallel set of circumstances to those that
15 occurred here, PSNH acted improperly, for
16 purposes of our claim for tortious interference
17 with contract.

18 Its decision to delete the FairPoint
19 enrollments and its decision to refuse to
20 accommodate my clients' request for an
21 off-cycle meter read were not protected by
22 either the ISO tariff, PSNH tariff or any PUC
23 rules. Rather, those decisions violated
24 provisions of those requirements.

1 Let me address first the deletion of
2 the FairPoint enrollments. This issue has been
3 briefed extensively, and everyone knows what
4 the facts are. But there's one question that
5 PSNH has failed to answer for three years,
6 since these events occurred. And I would ask
7 the Commission, ask the simple question to
8 PSNH, and that question is "what specific
9 provision or language of the ISO tariff, the
10 PSNH tariff or any PUC rule required PSNH to
11 delete 7,300 FairPoint enrollments?" It's a
12 very simple question. Because it's not secret
13 that these enrollments were treated
14 differently, as PSNH just conceded, it allowed
15 an enrollment for Milan Lumber to be processed
16 and for Milan Lumber to be transferred to
17 TransCanada under the exact same circumstances
18 that the remaining 7,300 FairPoint enrollments
19 were deleted. PSNH has not answered that
20 question in three years, nor in any of the
21 briefs that it has filed, either here or in
22 Superior Court.

23 The correct answer, and you don't
24 need a law degree to answer that question, Mr.

1 Chairman, the correct answer is that there is
2 no authority for what PSNH did. There is
3 nothing in the ISO tariff, the PSNH tariff or
4 in any PUC rule that required PSNH to delete
5 those enrollments. Instead, Section 6 of the
6 PSNH tariff requires that PSNH process a change
7 in supplier service within two business days of
8 receiving a valid electronic enrollment. And
9 the Commission's own EDI standards require that
10 PSNH process enrollments in the order in which
11 they are received.

12 Here, there's no dispute that
13 FairPoint properly submitted approximately
14 8,500 enrollments. PSNH accepted those
15 enrollments and began transferring customer
16 accounts, to the tune of 1,200 by the time all
17 was said and done, at the time of PNE's
18 suspension. PSNH violated these provisions,
19 because it not only failed to complete those
20 transfers, but then it took the active step of
21 deleting the remaining 7,300 enrollments.

22 Now, the answer to the question that
23 I just posed, that you'll get from PSNH, as
24 evidenced by the length of time that it took

1 Attorney Glahn to explain PSNH's position on
2 this issue, is a series of inconsistent and
3 contradictory explanations. They have alleged
4 that we can't get our story straight, well,
5 they can't get theirs straight either, and they
6 haven't been able to for three years. They
7 have either taken inconsistent positions, there
8 are instances in which they take a position on
9 one issue, and reverse themselves later when
10 that position is no longer convenient. And,
11 then, they also offer arguments that frankly
12 make no sense.

13 For instance, PSNH, through its
14 attorney, Matthew Fossum, stated in a hearing
15 right here, almost a little over two years ago,
16 and that's May 22nd, 2014, in Docket 12-295, he
17 stated that the Commission had issued a
18 directive that PSNH delete the FairPoint
19 enrollments. I'm going to quote directly from
20 that transcript, so that there's no confusion
21 about what was said.

22 At that hearing, Mr. Chairman, you
23 asked Mr. Fossum a very, very probative and
24 very good question, and that was "What happens

1 to an enrollment for a customer from a new
2 supplier when an existing supplier for that
3 customer is suspended?" Mr. Fossum responded
4 as follows, and this is on Page 129 of that
5 transcript, and it begins at the end of the
6 third line of his response: "In the PNE
7 default last year, there was a series of
8 enrollments that customers were to move to
9 FairPoint Energy as part of that transaction.
10 Pursuant to a directive of the Commission, all
11 of those pending enrollments were canceled."
12 He goes onto say, and I quote again, "That had
13 nothing to do with PSNH's decisions, protocols,
14 IT, any of it. We were ordered to end those
15 transactions and not allow those enrollments to
16 go forward." And he doubles down on his answer
17 later on a few lines down. "To the extent that
18 any occurred who were scheduled to occur", he's
19 referring to the enrollments and the transfers,
20 "after the date of default by Commission
21 order", again, "those did not occur." It's no
22 secret that there was no Commission order or
23 directive that directed PSNH to delete the
24 enrollments. And PSNH has cited nothing to

1 that extent either.

2 In another instance, PSNH, and it's
3 arguing here today, that the PSNH tariff now
4 required it delete the enrollments, because it
5 was "a supplier" under the tariff, and at
6 Section 6 of the tariff prohibits two suppliers
7 from serving a customer within a 30-day period.

8 And we explain on Pages 20 and 21 of
9 our brief that, when you read the tariff, PSNH
10 cannot be considered a "supplier" under the
11 tariff, the way it's defined and the way PSNH
12 is referred to in that same document. In fact,
13 it would render certain provisions of the
14 tariff nonsensical, if you were to read it the
15 way PSNH is asking that we view it.

16 In another instance, or PSNH has
17 offered contradictory explanations and
18 arguments for why it deleted the enrollments.
19 It is alleged on Pages 10 and 11 of its reply
20 brief that it couldn't transfer PNE's former
21 customers from default service to FairPoint,
22 because, normally, it would have "transferred
23 customers to FairPoint if there was a pending
24 enrollment transaction in the EDI system. But

1 it couldn't do so here, because, as of February
2 20th, there were no pending enrollments for
3 those customers any longer." Well, of course,
4 there weren't any pending enrollments, PSNH had
5 deleted them. I wouldn't make that argument to
6 anyone with a straight face. It's like saying,
7 "I only do my homework when it's in my book bag
8 at home, but, today, I couldn't do my homework
9 because it's not in my book bag, but that's
10 because I voluntarily left the homework at
11 school." It doesn't make sense and it doesn't
12 hold water.

13 Once you parse through all of this
14 obfuscation, you're left with one simple and
15 non-debatable point: There was no authority
16 for PSNH's decision to delete the enrollments.
17 There isn't any. In the ISO tariff, in the
18 PSNH tariff or in any PUC rule, there is no
19 language that required PSNH to delete those
20 enrollments, simply because the supplier for
21 those customer accounts were suspended.

22 CHAIRMAN HONIGBERG: Before you
23 leave -- before you leave that topic, --

24 MR. FOJO: Sure.

1 CHAIRMAN HONIGBERG: -- talk about
2 Mr. Glahn's waiver argument. That the entire
3 transaction was premised on a waiver. And,
4 once the terms of the waiver were not honored
5 by the person who requested the waiver,
6 everything else that happened after that is
7 essentially a nullity.

8 MR. FOJO: Well, first, Attorney
9 Glahn cites no authority for that proposition.
10 Second, the waiver was not premised on the
11 specific representation that -- well, there's
12 two -- it's two issues. Attorney Glahn is
13 arguing -- PSNH is arguing that the waiver was
14 premised on two -- two issues. One, that PNE
15 would not request an off-cycle meter read for
16 any of the customer accounts that it was
17 selling to FairPoint. And, two, that FairPoint
18 would make a certain filing within ten business
19 days of the waiver being granted.

20 The waiver, if you read the
21 secretarial letter that granted the waiver, it
22 was not premised, in that letter, it was not
23 premised on PNE not making any off-cycle meter
24 reading requests. The waiver is not premised

1 expressly on that representation or on that
2 obligation by PNE.

3 Second, the FairPoint filing, ten
4 business days from the date of the grant of the
5 waiver would have been February 22nd, which is
6 two days after PSNH had deleted the enrollments
7 already. So, PSNH is essentially arguing that
8 FairPoint's alleged failure not to make that
9 filing somehow retroactively absolved it of its
10 decision to delete the enrollments. Again,
11 that just doesn't make any logical sense, once
12 you -- once you consider it seriously.

13 If the Commission reaches the same
14 answer that we've reached, and that is that
15 there's no authority for what PSNH did, with
16 respect to the deletion of the enrollments,
17 then we ask that the Commission must find that
18 PSNH acted improperly, because its decision was
19 not protected by any one of those authorities,
20 and it resulted in two egregious results. One,
21 as, Mr. Chairman, as you pointed out, PSNH
22 added 7,300 new accounts to its ratepayer base,
23 which benefited it, because it improved its
24 ability to pay back the cost of the Scrubber.

1 And, two, it harmed two competitors, PNE, a
2 supplier, and Resident Power, an aggregator.
3 And this conduct should not take place in a
4 competitive marketplace.

5 Given PSNH's dual role, as both a
6 generator of electricity and a distributor,
7 again, it must administer transfers of customer
8 accounts from one supplier to another, and
9 these suppliers happen to be its competitors.
10 That dual role is inherently ripe for the
11 potential for abuse. And, so, it begs the
12 utility, such as PSNH, to act in the most
13 agnostic and restrained way possible. If it
14 had followed that approach here, it would have
15 left the FairPoint enrollments alone. And PSNH
16 has conceded that it could have left them
17 alone. It could have assumed PNE's remaining
18 load asset, and fulfilled its obligations to
19 the ISO directive to do that, without deleting
20 the enrollments.

21 So, there was no legal requirement,
22 PSNH has failed to cite any for deleting the
23 enrollments. There is no factual requirement.
24 There is nothing in PSNH's system, its internal

1 protocols, its internal policies, that require
2 it to delete the enrollments.

3 So, its conduct is not only not
4 protected by law, but PSNH went further and
5 acted in an unethical manner, in a situation in
6 which it should have acted in a much more
7 restrained and should have taken a much more
8 restrained approach.

9 Its decision to delete the
10 enrollments, and its conduct with respect to
11 Commission Staff, it was -- it attempted to
12 convince Commission Staff to adopt its position
13 regarding the enrollments. We contend that
14 that conduct, in totality, was improper for
15 purposes of a tortious interference claim.

16 CHAIRMAN HONIGBERG: Uh-huh. Go for
17 it.

18 CMSR. BAILEY: Before you move off of
19 that, --

20 MR. FOJO: Yes.

21 CMSR. BAILEY: -- could I ask you a
22 question?

23 MR. FOJO: Of course.

24 CMSR. BAILEY: I think your argument

1 is that "they didn't have any authority to
2 delete the enrollments." Can you cite a law or
3 a rule or a tariff that they violated when they
4 did delete them?

5 MR. FOJO: Section 6 of the PSNH
6 tariff requires that changes in supplier
7 service be processed within two business days
8 of receiving a valid electronic enrollment.
9 They clearly did not do that here, with
10 respect --

11 CMSR. BAILEY: Did they have a valid
12 electronic enrollment?

13 MR. FOJO: Yes. FairPoint submitted
14 valid enrollments. PSNH accepted them. The
15 Complaint alleges that FairPoint -- again, we
16 are testing the allegations in the Complaint
17 for legal sufficiency. The Complaint alleges
18 that FairPoint submitted approximately 8,500
19 enrollments, and PSNH has conceded that. And
20 PSNH accepted those enrollments and began
21 transferring them to the tune of three to four
22 hundred (400) accounts per day, until they were
23 halted on February 19th.

24 CMSR. BAILEY: Thank you.

1 MR. FOJO: I just want to address a
2 few points that Attorney Glahn raised regarding
3 this issue, before I move on to the off-cycle
4 meter reading issue.

5 Attorney Glahn argued that FairPoint
6 never had permission to take these customers;
7 that's inaccurate. These customers chose to be
8 transferred to FairPoint, through their
9 aggregation agreements with Resident Power.
10 That -- Resident Power's authority existed
11 throughout this process. The language that
12 Attorney Glahn quoted from the customer notice
13 specifically is that, in advising these
14 customers of the sale to FairPoint, the
15 statement was that "Resident Power will no
16 longer be your aggregator." That's future
17 tense. And that meant that, upon the transfer
18 of those customer accounts to FairPoint, of
19 course, Resident Power would no longer be their
20 aggregator.

21 The Purchase and Sale Agreement, and
22 this is also in the Complaint, contains a
23 provision stating that "Resident Power's
24 aggregation agreements with these customers

1 would be terminated as of the transfer of those
2 accounts to FairPoint." So, Resident Power's
3 authority remained throughout this process.

4 Going back to FairPoint, and whether
5 or not it had permission to take these
6 customers, again, the Complaint alleges that
7 FairPoint was threatened with slamming charges
8 here. So, FairPoint never acted, after the
9 enrollments were deleted, FairPoint did not act
10 any further because of these allegations. That
11 is what the Complaint alleges, and it must be
12 taken as true for purposes of this proceeding.

13 Attorney Glahn also argued that
14 "Resident Power made no effort to try to move
15 these customers from default service." Well,
16 again, the Complaint alleges that Resident
17 Power, along with FairPoint, was threatened
18 with slamming charges, and that that is a
19 reason for why Resident Power did not act any
20 further, because, in the face of such charges,
21 for 7,300 accounts, it wasn't going to risk
22 being hit with further sanctions by the
23 Commission.

24 As far as the Staff notice, that was

1 posted on February 21st. Again, that notice
2 was posted one day after PSNH had already
3 deleted the enrollments. And, so, again,
4 that's another instance in which PSNH is
5 alleging that an act by the Commission or the
6 Commission Staff retroactively absolved its
7 decision to delete the enrollments. And the
8 Complaint alleges, with respect to that notice,
9 that it was posted, it was prepared and posted
10 at PSNH's insistence. PSNH had communications
11 with Staff throughout this process. And the
12 Complaint alleges that PSNH was convinced --
13 was attempting to convince Commission Staff to
14 halt this transaction and prevent these
15 transfers from occurring.

16 If you look at the notice, the
17 language in the notice, and much of the
18 language in these e-mail communications between
19 PSNH and Commission Staff, which are quoted in
20 the Complaint, they mirror each other. We
21 allege in the Complaint that that notice was
22 posted at PSNH's insistence, to -- and, as
23 Attorney Glahn has argued, it retroactively --
24 he argued that it retroactively absolves PSNH's

1 decision to delete the enrollments. In other
2 words, to tie a nice, neat little bow around
3 what had already happened.

4 With respect to the off-cycle meter
5 reading, --

6 CHAIRMAN HONIGBERG: Well, hang on
7 just a second.

8 MR. FOJO: Sure.

9 CHAIRMAN HONIGBERG: Is there --
10 assuming bad motives, but a successful argument
11 to Staff, doesn't the posting of that memo wipe
12 away whatever lobbying, for lack of a better
13 word, PSNH may have done? It persuaded Staff.
14 And there was nothing inherently unlawful about
15 Staff's decision, was there?

16 MR. FOJO: We would disagree with
17 that, but I think that's a question for another
18 day.

19 Again, the Staff memo or the Staff
20 notice was not a Commission order or directive.
21 It was a notice from Staff, it was a position
22 taken by Staff, regarding these -- regarding
23 the FairPoint enrollments. And the Complaint
24 alleges that FairPoint -- that PSNH had

1 attempted to persuade Staff to halt this
2 transaction. That is not legal conduct.
3 Communications between Staff and -- between
4 PSNH and Staff are certainly appropriate. What
5 we allege is that PSNH abused that process.

6 CHAIRMAN HONIGBERG: Okay.

7 MR. FOJO: With respect to the
8 off-cycle meter readings, again, this issue is
9 simple. Mr. Chairman, again, you asked
10 Attorney Glahn whether or not he believes the
11 rule is ambiguous, and he essentially is
12 arguing that it's ambiguous, because it's the
13 only way he can get to the result he wants with
14 respect to this issue. Because the plain
15 language of 2004.07(b) is clear. There's
16 nothing ambiguous about those words. "Nothing
17 shall prevent a CEPS from requesting an
18 off-cycle meter reading". There's a single
19 condition placed upon that right, and that is
20 the "five business day notice" provision. The
21 whole purpose of a notice provision is to give
22 the utility, such as PSNH here, time to act
23 with respect to the off-cycle meter readings.

24 But, in an instance where a large

1 number of accounts is involved, such as here,
2 the rule contemplates that situation by
3 obligating the utility to negotiate a
4 reasonable time frame for completing those
5 meter reads. Attorney Glahn used the word
6 "preposterous" to describe whether or not PSNH
7 could have accomplished that feat here. It's
8 not preposterous. And, in filings with the
9 Commission and in news reports, as of 2015,
10 PSNH had 50 meter readers out in the field, and
11 possibly more in 2013, because, as I'm sure
12 everyone in this room is aware, there's been a
13 transition from traditional meters to automated
14 meter reading.

15 Some of these meter readers, in
16 densely populated areas can conduct up to 1,600
17 meter reads in a single day. So, assuming that
18 you had 50 meter readers out there, which is a
19 low number for 2013, conducting 1,000 meter
20 reads, that's a significant number of off-cycle
21 meter reads that could be accomplished in a
22 very short period of time. So, it's not
23 preposterous that this could have been done.
24 And I don't think that the rule, as applied

1 here, would be absurd.

2 CHAIRMAN HONIGBERG: I have a couple
3 of questions about that.

4 MR. FOJO: Sure.

5 CHAIRMAN HONIGBERG: About the rule
6 and its relevance to this.

7 One of the things Mr. Glahn said was
8 that "if you don't prevail in your argument
9 regarding the off-cycle meter reads, you lose."
10 Assume with me for a moment a hypothetical
11 situation in which we disagree with you about
12 this interpretation of the rule. Can your
13 claim survive?

14 MR. FOJO: So, the question, if I
15 understand it, is, "if we do not prevail in the
16 off-cycle meter reading argument, we can't
17 prevail at all?" I disagree with that.

18 CHAIRMAN HONIGBERG: Okay. Tell me
19 why not? I mean, is it the argument -- is that
20 actually your first argument? Because I think
21 you said that, if we agree with you that the
22 deletions of the enrollments were improper,
23 then we should find that they acted improperly.
24 Is that a sufficient answer to the question?

1 MR. FOJO: Well, on that issue alone,
2 yes, could form the basis for a finding that
3 PSNH's conduct was improper. Let's assume that
4 the other request for an off-cycle meter
5 reading was never done, we can still prevail
6 based on the deletion of the enrollments. And
7 there's no -- there's no authority that
8 suggests otherwise, nor has PSNH cited any.

9 CHAIRMAN HONIGBERG: On the
10 interpretation of the rule, I do have to tell
11 you, I am skeptical of the relying on the plain
12 language of (b), without looking at anything
13 else in 2400 or even 24 -- I'm sorry, 2004 or
14 2004.07. Because, when you look at, when
15 you -- working from the small to the large, the
16 rest of 2004.07 is about different
17 circumstances in which different notices are
18 required, until you get to the very last
19 section, which says something else, but it's
20 pretty clear it follows from that.

21 And, when you look at all of 2004, I
22 think as Mr. Glahn pointed out, it's a consumer
23 protection provision. It really isn't, as a
24 whole, directed at the relationship between a

1 CEPS and a utility and a distribution company.

2 So, make me more comfortable with
3 your argument.

4 MR. FOJO: Well, one point on
5 Subsection (f), which Attorney Glahn argued
6 applies here, it does not apply here. PNE was
7 not ceasing to sell electricity, in fact, it
8 still was. That section does not apply.

9 With respect to your question, Mr.
10 Chairman, in this instance, by requesting an
11 off-cycle meter reading for its customer
12 accounts, PNE was acting to protect its
13 customers. There's -- simply because the
14 request was made to a utility, which is how it
15 normally would have been made in any other
16 situation, does not mean it's not -- it was not
17 an act for the purposes of protecting
18 customers.

19 So, I understand that it's a consumer
20 protection section of the rules. What I fail
21 to understand is how that notion indicates that
22 a supplier is not allowed to request off-cycle
23 meter readings for numerous accounts.

24 And, you know, it's not -- it's not

1 our job to be skeptical about whether or not a
2 certain statute or rule applies. We need to
3 rely on the plain language that's before us,
4 because that's the best expression of the -- in
5 an instance of a statute, of the Legislature's
6 intent, and, in this instance, of the
7 Commission's intent.

8 And that's what it says. I did not
9 write the rule. It says what it says.

10 CHAIRMAN HONIGBERG: No, we did, or
11 our predecessors.

12 MR. FOJO: But that's what the rule
13 says. And perhaps it can be amended at some
14 point in the future, to address specific
15 requirements, which is done in many instances.
16 But the rule does say "Nothing shall prevent a
17 CEPS from requesting an off-cycle meter
18 reading". The fact that other provisions of it
19 deal with different circumstances, again, does
20 not render that provision inapplicable.

21 And Attorney Glahn's reliance on
22 titles of different sections and parts, again,
23 but those -- the titles are irrelevant for
24 purposes of reading this, this rule.

1 CHAIRMAN HONIGBERG: Okay.

2 CMSR. SCOTT: Can you go back to --

3 MR. FOJO: Yes.

4 CMSR. SCOTT: You've made a statement
5 regarding the -- that "PNE indeed was still
6 selling electricity". Can you help me out with
7 that? The condition, as I remember it, was
8 there was a default at ISO-New England. Can
9 you clarify the statement for me?

10 MR. FOJO: Well, PNE's load asset was
11 not retired until February 20th. When this
12 request was made, it was made on February 12th,
13 before PNE defaulted.

14 CMSR. SCOTT: Okay.

15 MR. FOJO: And these customers were
16 still under PNE's umbrella, until they were --
17 they were assumed by PSNH, six days later,
18 after the ISO notice went out to PSNH. That's
19 what I meant by that.

20 CMSR. SCOTT: Thank you.

21 CHAIRMAN HONIGBERG: Isn't another
22 way to look at (f), though, is not so much
23 specifically applying to this situation, but
24 the way it is phrased differently from (a),

1 (b), (c) and (d) and (e), that it is about the
2 mass notice situation? It's about what happens
3 when a big event takes place. And the
4 brilliant drafters of this rule did that
5 intentionally. I'm being somewhat facetious in
6 the last part of that, obviously.

7 But, I mean, isn't that part of what
8 Mr. Glahn is arguing, separate and apart from
9 "this specifically applies", it's a different
10 formulation of the notice rule for the large
11 scale notice, is it not?

12 MR. FOJO: No, Mr. Chairman. Again,
13 that's not what (f) says. (f) addresses the
14 specific instance in which a supplier intends
15 to "cease operations". And our clients had not
16 intended to cease operations here. They
17 were -- they defaulted and they suspended, and
18 it was temporary.

19 If we're going to rely on titles of
20 these different sections to try to interpret
21 this rule, I mean, chapter PUC -- the title of
22 chapter Puc 2000 is "Competitive Electric Power
23 Supplier and Aggregator Rules". And Puc
24 2001.02 states that those rules apply to

1 suppliers and aggregators. So, it's not just
2 about consumer protection. These are rules
3 that govern the conduct of CEPSs and
4 aggregators.

5 Give me one second, Mr. Chair.

6 (Atty. Fojo conferring with Mr.
7 Fromuth.)

8 MR. FOJO: Commissioner Bailey, I
9 just wanted to go back to the question that you
10 asked. You asked me, "is there a specific
11 provision that PSNH violated?" In addition to
12 the one I addressed, the Statute -- Revised
13 Statute 374.1 sets forth the doctrine --
14 language that requires that public utilities
15 render "just and reasonable service in all
16 respects". We believe that that broadly and
17 generally applies here. Because, if PSNH had
18 adopted the approach that I articulated
19 earlier, a more restrained, a more agnostic
20 approach, these customers would not have been
21 treated as they were.

22 CMSR. BAILEY: So, that statute says
23 that utilities have to "ensure just and
24 reasonable service".

1 MR. FOJO: That's correct.

2 CMSR. BAILEY: Were they then in any
3 way obligated to make sure that these customers
4 continued to have electricity and weren't
5 somehow left to fall through the cracks?

6 MR. FOJO: Well, that would have
7 never happened, based on the system and the way
8 it's designed. What we're saying is that these
9 customers chose to be transferred to FairPoint.
10 They had delegated their authority to choose
11 their supplier to Resident Power, and, through
12 those aggregation agreements, had asked
13 Resident Power to find the best rate with the
14 best supplier that they could. Through that
15 arrangement, they had chosen to be transferred
16 to FairPoint. PSNH violated that choice.
17 Violated those customers' choices, by deleting
18 the enrollments and taking those customers for
19 itself on its default service, with no
20 intention of ever honoring those enrollments
21 and transferring them to FairPoint.

22 With respect to the off-cycle meter
23 readings, again, we contend that it's a simple
24 issue. PNE had a right to request an off-cycle

1 meter reading, which could have been performed
2 here. And PSNH failed to honor it and failed
3 to negotiate a reasonable extension of time to
4 complete those requests.

5 So, with respect to that refusal,
6 and, again, its conduct in communicating with
7 Commission Staff, to try to get Commission
8 Staff to adopt PSNH's position with respect to
9 that issue, and there were communications
10 regarding that that are referenced in the
11 Complaint, we believe PSNH's conduct was
12 improper, based on the standards that have been
13 articulated and the authority that we cite in
14 our brief, in particular, the *Balaber* case,
15 which is very similar to what occurred here.

16 That's all I have, unless the
17 Commission has any further questions.

18 CHAIRMAN HONIGBERG: I am 100 percent
19 certain that Mr. Glahn wants to respond.

20 MR. GLAHN: Only if you will allow me
21 to.

22 CHAIRMAN HONIGBERG: I will allow you
23 to. We're not, happily, under a time crunch
24 this afternoon. But, I mean, you've each gone

1 for a decent amount of time in making your
2 arguments. I imagine that you've said
3 98 percent of what you could ever imagine
4 having said today.

5 So, Mr. Glahn, if you want to briefly
6 respond. And, then, Mr. Fojo, I may end up
7 giving you the last word, although,
8 technically, he's the moving party and he
9 should, I'm going to give you a chance to
10 respond, if he says something new.

11 MR. FOJO: Thank you.

12 CHAIRMAN HONIGBERG: Go ahead, Mr.
13 Glahn.

14 MR. GLAHN: I will only respond to
15 points that Mr. Fojo has made.

16 So, let me start at the end, at the
17 off-cycle meter read. It isn't our position
18 that the regulation is ambiguous.

19 *[Court reporter interruption.]*

20 MR. GLAHN: Our position is the
21 regulation doesn't apply at all. But, if it
22 applies, and if you read it literally the way
23 they want to read it, they're cooked, for two
24 reasons. One is, the termination of service

1 point that Chairman Honigberg raised. What is
2 it, if you're giving up all your customers and
3 you're doing it voluntarily, other than a
4 termination of your service? They say it was
5 temporary. How do those customers know that?

6 Secondly, they have added words to
7 the regulation that don't exist. What they say
8 is "well, you come in, you give a five-day
9 notice, and you're suppose to negotiate." But
10 there's another specific provision of the rule
11 that they just ignore. And that provision is,
12 "The utility may deny any request for an
13 off-cycle meter reading if proper notice as
14 described in (1)a. is not provided". In other
15 words, if you don't give the five-day notice,
16 you don't put the key in the door the right
17 way, nothing happens. And there wasn't a
18 five-day -- at least five days notice here.
19 The only written notice was given on
20 February 14th. The Complaint does not allege
21 there was a written notice on February 12th.
22 Paragraph 66 of the Complaint alleges that
23 there was a "contact". Now, you can decide
24 whether that's plausible, in light of the only

1 written request. And, I think we can agree on
2 this: That, if there had been a written
3 request on the 12th, we would have seen it by
4 now.

5 So, that's all I have to say on the
6 meter read issue.

7 So, let's go to where Mr. Fojo
8 started. We, he says, "have never answered the
9 question about "what provision of law allowed
10 us to delete these EDIs?" It simply isn't
11 true. They just don't like the answer. We
12 alleged previously that Order 25,660 resolved
13 this issue, and we've made that point today.
14 Which is the same point that they conceded in
15 memoranda they filed before. Once we were
16 required to take these customers onto our
17 default service and there was a drop, it
18 automatically resulted in an EDI being put into
19 the system to put it on PSNH's default service.
20 We recognize that the definition of "supplier"
21 is not clear, but this was a unique and
22 different situation. Nobody had defaulted
23 before in this manner.

24 So, and by the way, -- I won't go

1 back. That's fine.

2 So, the answer is, there is an answer
3 to the question. It is, as a matter of law,
4 new EDIs had to be put in. At that point, the
5 old EDIs had to be deleted from the system.
6 And, as I've said before, you take the
7 hypotheticals after that, I disagree, of
8 course, that, if there was no off-cycle -- if
9 an off-cycle meter read was not permitted, then
10 the customer had to wait after those EDIs were
11 put in for the default service until the next
12 meter read date. So, even if the EDIs stayed
13 in, it wouldn't have helped them. And it
14 wouldn't have helped them as of the 22nd,
15 because they say that my position is that
16 "FairPoint didn't have the authority". I
17 didn't say that. What I said is that "on
18 February 22nd, FairPoint didn't have the
19 authority". Because, at that point, they
20 hadn't satisfied the conditions of the waiver.

21 And, to go back to your point,
22 Chairman Honigberg, I don't think you got an
23 answer to that question. I don't think you got
24 an answer to "why, in this particular instance,

1 this transaction was not governed by the waiver
2 request to begin with?" All they can say is
3 "well, there's no authority for that." I don't
4 need authority for that. The request was made
5 to start this transaction with that waiver, and
6 there were conditions placed on it. That's an
7 order of the Commission.

8 And I just want to respond to one
9 point about all of the talk that's been in this
10 case about how we acted improperly to deal with
11 the Commission Staff. It assumes the
12 following: That the Commission Staff is simply
13 a shill for PSNH. I think this Commission
14 knows otherwise.

15 And, as the Superior Court has
16 already found, as a matter of law, we had the
17 right to petition. Moreover, if you think
18 about it, the only thing that they can point to
19 that is arguably outside of the specific
20 Noerr-Pennington provision of the order, of the
21 Superior Court order, is a request that
22 Mr. Bersak made that PSNH needed guidance on
23 what to do in this one-off situation.

24 Oh, and I just want to come back, a

1 final point. This case that they keep citing
2 is a bankruptcy case. It's not an interference
3 with a contract case. It's an interference
4 with economic relations case. It's a case in
5 which the Court found that there was
6 extortionate conduct purposefully,
7 notwithstanding that the tariff had been --
8 that the Plaintiffs specifically set out to
9 violate the tariff, knowing the tariff's
10 provisions. It couldn't be more different from
11 the allegations in this case.

12 And, of course, it doesn't apply,
13 it's a New York bankruptcy case. And the law
14 in New York, with respect to privilege, is
15 different. Thank you.

16 CHAIRMAN HONIGBERG: Mr. Fojo. Very
17 briefly.

18 MR. FOJO: I'm sorry?

19 CHAIRMAN HONIGBERG: Very briefly.

20 MR. FOJO: Of course, very briefly.
21 Again, and I will only respond to the points
22 that Attorney Glahn just raised.

23 On whether or not PUC 2004.07
24 applied, Attorney Glahn explained that the

1 provision in the rule that states "the utility
2 may deny a request for an off-cycle meter
3 reading if proper notice is not given", PSNH --
4 that's not what happened here. There's no
5 allegation in the Complaint that PSNH denied
6 the request because proper notice was not
7 given. In fact, to the extent that PSNH's
8 communications with our clients on
9 February 14th could be construed as a denial,
10 that -- purportedly that was based on their
11 allegation that they lacked manpower to perform
12 these off-cycle meter readings, which we --
13 which we disagree with.

14 As to Order 25,660, Attorney Glahn
15 argued that that order resolves the issue
16 regarding the deletion of the enrollments.
17 And, again, his argument is that, once the
18 PNE's remaining load asset was assigned to
19 PSNH, when PNE was suspended, there were two
20 enrollments in the system, the drop to PSNH and
21 then the existing FairPoint enrollment. That
22 argument again is premised on the notion that
23 PSNH was a "supplier" under the PSNH tariff,
24 and that is simply not true. It cannot be a

1 supplier, based on the way that term is defined
2 in the tariff and the way references to PSNH
3 are made in conjunction with references to
4 suppliers in the tariff.

5 Excuse me.

6 (Atty. Fojo conferring with
7 Atty. Patch.)

8 MR. FOJO: And, with respect to that
9 order as well, that order addressed two very,
10 very nuanced and specific issues. And that was
11 whether or not PSNH had acted improperly when
12 it withheld payments to PNE back in
13 February 2013, and whether PSNH had improperly
14 calculated and assessed selection charges on
15 PNE.

16 Attorney Glahn continues to rely on
17 this waiver that was granted, but he still
18 fails to indicate how that waiver -- that the
19 granting of that waiver is connected to PSNH's
20 decision to delete the enrollments. And there
21 is no connection.

22 He also explained, with respect to
23 PSNH's communication with Commission Staff,
24 that Attorney Bersak had made a request for

1 guidance from Commission Staff. That entire
2 statement and e-mail is quoted in the
3 Complaint. That was not a polite request for
4 guidance. It was a directive from PSNH to
5 Commission Staff that this transaction be
6 thwarted in some way or another and that it had
7 to be.

8 On the *Balaber* case, the fact that it
9 dealt with a claim for tortious interference
10 with economic relations is a distinction
11 without a difference. The elements for that
12 claim and the elements for a claim for tortious
13 interference with a contract are the same. The
14 only difference being that the interference is
15 with a contract, versus interference with an
16 economic relationship between two parties. And
17 the fact that it's a bankruptcy case is also a
18 distinction without a difference. Bankruptcy
19 cases deal with adversary proceedings, which
20 are no different than litigation proceedings.

21 He also explains that the utility in
22 that case had "acted with intent to violate the
23 tariff, even though it knew what provisions of
24 the tariff applied." We allege here that PSNH

1 acted with an intent to thwart this transaction
2 for the reasons and the motives that we already
3 described. That's all I have. Thank you.

4 CHAIRMAN HONIGBERG: Mr. Wiesner, is
5 there anything you want to add before we go?

6 MR. WIESNER: I think I just wanted
7 to reiterate what I had said previously in this
8 proceeding, that we view these as a -- this is
9 a very narrow set of questions transferred by
10 the Superior Court. In order to complete, if
11 you will, our role in the Motion to Dismiss, it
12 is necessary for the Commission to address
13 those questions, and then the case will be
14 transferred back to the Superior Court, in my
15 view.

16 And this is not really the proper
17 forum to look deeply into parties' motives or
18 to explore principles of common morality. The
19 focus here, in our view, should be on the
20 applicable rules and tariff provisions and how
21 they should be interpreted by this Commission
22 in the exercise of its specialized expertise.

23 CHAIRMAN HONIGBERG: All right.
24 Well, I think we'll thank both sides for making

1 the arguments, the oral arguments today,
2 focused, I think as Mr. Wiesner indicated they
3 should be.

4 We will take this matter under
5 advisement and issue an order as quickly as we
6 can.

7 ***(Whereupon the hearing was***
8 ***adjourned at 3:35 p.m.)***

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