

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-491

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

Transfer Question from Superior Court

Initial Procedural Order

ORDER NO. 25,881

April 8, 2016

In this Order, we address procedural issues raised during the prehearing conference held in this proceeding on April 5, 2016, including the scope of the proceeding before the Commission, the filing of briefs addressing the question to be resolved by the Commission, the disposition of two petitions to intervene, and the procedural schedule for the docket.

I. SCOPE OF PROCEEDING

On November 25, 2015, the Hillsborough North Superior Court (Court) issued an order (Transfer Order), transferring to the Commission the Court's Case No. 216-2015-CV-00265, *PNE Energy Supply, LLC and Resident Power Natural Gas and Electric Solutions, LLC v. Public Service Company of New Hampshire d/b/a Eversource Energy* (Court Case). The Court Case involves the claim by plaintiffs PNE Energy Supply, LLC (PNE) and Resident Power Natural Gas and Electric Solutions, LLC (Resident Power), against defendant Public Service Company of New Hampshire, d/b/a Eversource Energy (Eversource), for tortious interference with contractual relations. This claim is based primarily on Eversource's assignment of customer accounts serviced by PNE as a registered competitive electric power supplier (CEPS) to Eversource's default service. The assignment occurred coincident with PNE's suspension from the regional wholesale power markets administered by ISO New England, Inc. (ISO-NE) in

February 2013 and at a time when PNE was seeking to sell its customer accounts to FairPoint Energy, LLC (FairPoint).

In the Transfer Order, the Court referenced the complexity of the tariffs and regulations cited by the parties, and “the fact that interpretation of these tariffs and regulations is integral to the determination of whether defendant’s conduct was improper,” as the bases for transferring the Court Case to the Commission. Transfer Order at 4. The Court transferred the Court Case for determination of the following question:

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

Id. The Transfer Order further states that the transfer to the Commission is being made “[f]or reasons more fully explained in the Court’s concurrently issued order on defendant’s motion to dismiss.” Transfer Order at 1. The Court’s Order on Defendant’s Motion to Dismiss (Dismissal Order) states that the Court has referred Count I of the plaintiffs’ complaint to the Commission,

to determine if defendant acted improperly based on the conduct alleged in paragraphs 137(a) through (c) [of the complaint]. Should the [Commission] find defendant acted improperly, this Court will decide the remainder of this claim.

Dismissal Order at 14. The Court also explained that, if Eversource’s conduct was “protected by law,” then it would not be considered “improper” within the meaning of a tortious interference with contract claim, citing *Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 540 (1994). Transfer Order at 2; Dismissal Order at 10.

The Court Case comes to us at an early stage, in the procedural posture of a motion to dismiss filed by Eversource and objected to by PNE and Resident Power. As explained by the Court, in the context of a motion to dismiss, the “threshold inquiry involves testing the facts

alleged in the pleadings against the applicable law.” Dismissal Order at 5 (citing *Williams v. O’Brien*, 140 N.H. 595, 597-598 (1995)). In considering a motion to dismiss, it is necessary to assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff. *Id.* (citing *Bohan v. Ritzo*, 141 N.H. 210, 213 (1996)). The Court will also consider “documents the authenticity of which are not disputed by the parties ... official public records ... or ... documents sufficiently referred to in the complaint.” *Id.* (citing *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010)).

In view of the procedural posture of this matter as it comes before us, and the guidance provided in the Court’s orders with respect to the applicable legal standard of review, we find that it is neither necessary nor permissible for us to authorize any discovery or other factual investigation in this docket. We have been asked to answer a narrow question, involving legal interpretations of administrative rules and tariffs within our specialized expertise, based on the record as it currently exists in the Court Case. This is the task we must perform, and we will undertake it without the need for any factual discovery or an evidentiary hearing.

II. FILING OF BRIEFS

We have concluded it will be useful for the parties to file briefs stating their positions regarding the question transferred by the Court, with reference to the facts alleged in the complaint filed in the Court Case and, to the extent relevant to the question presented, to documents sufficiently referred to in the complaint, official records, and other documents the authenticity of which is not disputed by the parties. We expect that the brief filed by Eversource will resemble a legal memorandum filed in support of a motion to dismiss, and that the brief filed by PNE and Resident Power will resemble a legal memorandum filed in support of an objection to such a motion to dismiss. We will not impose a specific page limit on the briefs to be filed in

this proceeding, although we encourage the parties to strive for brevity and concision in their briefs.

III. PETITIONS TO INTERVENE

We question whether it is necessary or appropriate for Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities (Liberty) and Unitil Energy Systems, Inc. (Unitil) to intervene as parties in this proceeding. Based on their petitions and the statements of their respective counsel during the prehearing conference, neither Liberty nor Unitil has intervened or otherwise participated in the Court Case. Both Liberty and Unitil have described their interests in this proceeding as general and not specific, citing the potential effects a Commission order may have on their transactions and other interactions with CEPS. For example, Unitil stated in its petition that it would be directly affected by the outcome of this proceeding,

if any of the Commission's determinations are inconsistent with Unitil's Tariff and/or currently effective supplier agreements. Furthermore, Unitil may be subject to increased administrative burdens relative to customer billing if the Commission determines that an electric utility has an obligation to perform a mass "off-cycle" transfer in the event of a supplier's default with [ISO-NE]. Therefore, any action the Commission may take in this Docket may impact the rights, duties and interests of Unitil and/or its customers.

We are not convinced that these generalized concerns and generic interests warrant granting the petitions to intervene of Liberty and Unitil under RSA 541-A:32 and N.H. Code Admin. Rules Puc 203.17. We therefore deny their petitions to intervene. In view of the non-evidentiary nature of this proceeding, however, we see no harm in their participation in the docket and will permit them to file memoranda or other comments addressing their general concerns regarding interpretation of the rules and tariff provisions implicated by the transferred question.

IV. PROCEDURAL SCHEDULE

We adopt the following procedural schedule for this proceeding:

Eversource Brief Due April 29, 2016

PNE and Resident Power Brief Due May 13, 2016

Eversource Reply Brief, Liberty,
Unitil, and OCA Filings Due May 20, 2016

Hearing on Merits June 9, 2016 at 2:00 p.m.

Liberty, Unitil, and the OCA may file memoranda or comments regarding any relevant issue, on or before May 20, 2016. The hearing on the merits will be in the nature of oral argument on the parties' briefs and the relevant record, and will not be an evidentiary hearing, consistent with our decision above regarding the scope of this proceeding.

Based upon the foregoing, it is hereby


ORDERED, that the parties shall file briefs as and when described in the body of this Order; and it is

FURTHER ORDERED, that a hearing on the merits shall be held before the Commission located at 21 South Fruit Street, Suite 10, Concord, New Hampshire, on June 9, 2016 at 2:00 p.m.

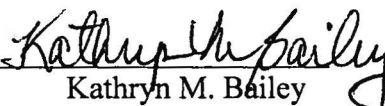
By order of the Public Utilities Commission of New Hampshire this eighth day of April, 2016.



Martin P. Honigberg
Chairman

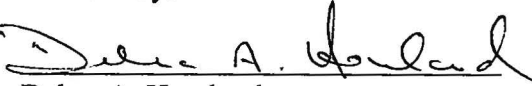


Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director