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

BRIEF OF PNE ENERGY SUPPLY, LLC AND RESIDENT POWER NATURAL GAS & ELECTRIC SOLUTIONS, LLC

PNE Energy Supply, LLC, ("PNE") and Resident Power Natural Gas & Electric Solutions, LLC, ("Resident Power") submit the following brief on questions transferred to the Commission by the Superior Court, in accordance with Order 25,881, and in response to the brief submitted by Public Service Company of New Hampshire, d/b/a Eversource Energy's ("PSNH").

INTRODUCTION

A key principle behind the restructuring of the New Hampshire electric industry was that "[f]ree and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." *Appeal of Public Serv. Co. of N.H.*, 141 N.H. 13, 18 (1996) (quoting N.H. Const., Part II, Art. 83); *see also* RSA 374-F:1, II (same): "Competitive markets should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry."

PSNH's improper interference with a private business transaction between two competitive suppliers (PNE and FairPoint) violated these free market principles; breached the public's trust and confidence in electric utilities; robbed competitive suppliers of incentives to operate in the market; and was designed to preserve and perpetuate its monopoly while

disguising its conduct as a legal response to marketplace turbulence whose outcome only PSNH could define. PSNH, as the host distribution utility, had the ability to influence and ultimately thwart the relationship between customers and their electricity suppliers, and to thwart customer choice, because it owned and operated the distribution system through which electricity was delivered and controlled the metering and billing systems. When customers chose to move from default service with PSNH and purchase electricity from a CEPS, or chose to move from one CEPS to another, PSNH managed the process of transferring these customer accounts to the CEPS. PSNH also owned electric generating facilities, the expenses of which it could recover only from default service customers, so it had an interest in seeing as many of its distribution customers as possible stay on or come back to default service.

In February 2013, PNE and Resident Power entered into a purchase and sale agreement to sell approximately 8,500 customer accounts to FairPoint. PNE and Resident Power, with the assistance of Commission Staff, ensured this transaction complied with applicable PUC rules and maintained current electricity rates (lower than PSNH)[1] for their customers: PNE and FairPoint filed a joint petition for waiver of Admin. Rule Puc 2004.05(k), which required 14 days' advance notice of PNE's intent to sell its right to serve its customer accounts (the Commission granted the waiver); PNE and Resident Power sent notices to affected customers informing them of their impending transfer to FairPoint; and the agreement with FairPoint required FairPoint to honor PNE's lower rates through the end of those customers' agreements with PNE, which the Commission verified *before* granting the requested waiver above. PNE's customers – through their aggregation agreements with Resident Power – *chose* to be transferred to FairPoint.

[1] PNE's rates were lower than PSNH's rates. This is why PNE's customers were buying electricity from PNE rather than PSNH.

Over the next several days, PSNH thwarted the transfer of approximately 7,300 of those accounts by, first, refusing PNE's request for an off-cycle meter reading and transfer of those accounts to FairPoint, and, second, deleting enrollment requests FairPoint submitted in PSNH's EDI system and replacing them with new enrollments for transfer to PSNH's default service.

These decisions were an opportunistic effort by PSNH to use PNE's default with ISO-NE and temporary suspension[2] from the New Hampshire marketplace to regain those customer accounts that left default service. PSNH could recoup the $422 million cost of the pollution control system it installed in its Merrimack Station power plant in Bow ("Scrubber") and the cost of owning and operating other generating facilities only from default service customers. Between January of 2012 and January of 2013, however, PSNH lost 31,000 residential default service customers. PSNH had a clear motive to do what it could to bring some of these customers back onto default service to prevent a death spiral from occurring. By thwarting customer choice and reassigning PNE's customers to its default service, PSNH gained much-needed revenue to help pay for the Scrubber and the continued ownership and operation of its generating fleet.

Last year, PNE and Resident Power filed a lawsuit in New Hampshire Superior Court against PSNH for its tortious interference with the FairPoint contract. The Superior Court transferred this case to the Commission and requested that the Commission determine the following question: Did PSNH act "improperly" within the meaning of a tortious interference

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[2] PSNH's repeated references to the "voluntary" nature of PNE's suspension are immaterial. PSNH fails to explain how a "voluntary" suspension (as opposed to an "involuntary" one, which PSNH does not define) relieved it of its obligations under applicable law. Further, it is introducing facts that, as demonstrated below, are not raised in the Complaint and should be disregarded. When considering a motion to dismiss, "it is necessary to assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff." Order 25,881 at 3 (quoting Dismissal Order at 5). In addition, a "trial court [is] not obligated to consider factual allegations not raised in the plaintiffs' writ." *Jenks v. Menard*, 145 N.H. 236, 239 (2000). Thus, the Commission should disregard PSNH's many references and insinuations concerning whether or not PNE's suspension was "voluntary."

claim. The Court requested that the Commission consider certain tariff and regulatory provisions in its determination and cited: (a) PSNH's refusal to perform a one-time, off-cycle transfer of PNE's former customer accounts to FairPoint; (b) PSNH's deletion of the 7,300 pending enrollments; and (c) PSNH's replacement of those enrollments with new enrollments for the transfer of those accounts to default service.

The Commission is deciding this question as a motion to dismiss. Accordingly, it should find that PNE and Resident Power have stated a valid claim for relief that PSNH acted "improperly." The standard for determining whether interference with a contract is "improper" is broad. A finding of improper interference may be based not just on a violation of a tariff or regulation, but a violation of a statute or public policy; violation of business ethics or customs; intimidation of a business and its customers; and misrepresentation. Whether or not conduct is improper is a factually-intensive question and requires an inquiry into the defendant's motives.

Here, PSNH acted improperly, as follows:

First, it refused to perform an off-cycle meter reading and transfer of PNE's former customer accounts to FairPoint. This refusal violated Puc 2004.07(b) and PSNH's Electricity Delivery Service Tariff – NHPUC No. 8 ("PSNH Tariff"), which is on file with the Commission. Puc 2004.07(b) requires a utility to accommodate such a request or negotiate an extension of time to complete it. PSNH's actions failed to satisfy this requirement.

Second, PSNH deleted 7,300 pending electronic enrollments that FairPoint submitted and PSNH accepted for the transfer of PNE's former customer accounts to FairPoint. PSNH then replaced those enrollments with new enrollments for the transfer of those accounts to PSNH's default service. PSNH's decision prevented the consummation of the FairPoint contract. Section 6 of the PSNH Tariff requires that it process a change in supplier service within two

business days of receiving a valid electronic enrollment. Its deletion of the enrollments demonstrates it failed to honor that obligation or customers' choices.

PSNH has failed to cite any legal authority or justification for its decision to delete FairPoint's enrollments. Indeed, it did not delete enrollments submitted by *other suppliers* for former PNE customer accounts *before* PNE's default: PSNH transferred Milan Lumber (a former PNE account) to its default service on February 20, 2013 (following PNE's default and suspension), but then transferred that account to TransCanada on February 26 (Milan Lumber's next meter read date) pursuant to an enrollment TransCanada had submitted on February 8 (before PNE's default) and that – unlike the FairPoint enrollments – PSNH left untouched. PSNH has been deliberately ambiguous regarding the deletion of the enrollments over the last three years: it has offered a series of inconsistent explanations, including that the ISO-NE Tariff required it, the PSNH Tariff required it, and a PSNH attorney's assertion in 2014 on the record in DE 12-295 that the *Commission* directed PSNH to delete those enrollments. As demonstrated below, nothing it has cited authorized or justified its decision.

The Commission should find that PNE and Resident Power have stated a valid claim for relief that PSNH acted "improperly."

ARGUMENT

I. Standard of Review

The Commission acknowledged that, based on the Superior Court's transfer order, it has "been asked to answer a narrow question." Order 25,881 at 3. It observed this case is "in the *procedural posture of a motion to dismiss*." *Id.* at 2 (emphasis added). Thus, "the 'threshold inquiry involves testing the *facts alleged in the pleadings* against the applicable law.'" *Id.* at 2-3 (quoting Dismissal Order at 5) (emphasis added). "The standard of review in considering a

motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Gordonville Corp. N.V. v. LR1-A Ltd. P'ship*, 151 N.H. 371, 376-77 (2004).

The Commission further stated that, "[i]n considering a motion to dismiss, it is necessary to assume the truth of all well-pleaded facts alleged by the plaintiff and construe all inferences in the light most favorable to the plaintiff." Order 25,881 at 3 (quoting Dismissal Order at 5). Thus, a "trial court [is] not obligated to consider factual allegations not raised in the plaintiffs' writ." *Jenks v. Menard*, 145 N.H. 236, 239 (2000). The inquiry "at this stage is limited to the facts in the complaint." *Kessenich v. Raynor*, No. CV 99-1253, 2000 U.S. Dist. LEXIS 20735, at *28 (E.D.N.Y. Jul. 20, 2000). The Commission may "consider 'documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint.'" *Id.* at 3 (quoting Dismissal Order at 5).

PNE and Resident Power do not need to show they will prevail. "The function of a motion to dismiss . . . is to assess the legal sufficiency of the complaint." *Perkett v. Applied Printing Techs., L.P.*, No. 3:03CV1840 (GLG), 2004 U.S. Dist. LEXIS 2399, *1 (D. Conn. Feb. 17, 2004). A court is "not to assay the weight of the evidence which might be offered in support thereof." *Ramos v. Wright*, No. 9:09-CV-1046 (GLS/RFT), 2011 U.S. Dist. LEXIS 64485, *8 (N.D.N.Y. Jan. 3, 2011). If a plaintiff's allegations merely "constitute a basis for legal relief," the Court must deny a motion to dismiss. *Gordonville*, 151 N.H. at 377. "[T]he question is not whether plaintiff will prevail, but rather 'whether the claimant is entitled to offer evidence to support the claims.'" *Kessenich*, 2000 U.S. Dist. LEXIS at *28 (quoting *Az. Premium Fin., Inc. v. Bielli*, 77 F. Supp. 2d 341, 345 (E.D.N.Y. 1999)); *see also Ramos*, 2011 U.S. Dist. LEXIS at *8 (same); *Perkett*, 2004 U.S. Dist. LEXIS at *1 (same).

II. PSNH Had an Incentive to Use PNE's Default and Suspension as an Opportunity to Regain Default Service Customers

PSNH claims "Plaintiffs do not explain why PSNH would have been so anxious to acquire [PNE's] customers at a time when PNE found it uneconomic to serve them due to 'unusually high rates' in the wholesale marketplace . . . , or why PSNH would have been anxious to be forced to take them by ISO-NE . . . and thus to serve them at PSNH's fixed default energy service rate." PSNH Brief at 11 n.11. Perhaps ignorance is bliss, but it "lets [one] do a thing his cleverness forbids." John Steinbeck, *East of Eden* (4th ed. 2002). The Complaint specifically explains how and why PSNH had a clear incentive to regain default service customers.

PSNH incurred a $422 million price tag for the Scrubber at Merrimack Station, and it had other costs from owning and operating other generating facilities. Compl. ¶ 44. RSA 125-O:18 restricts PSNH from recovering the costs of the Scrubber from customers other than those on PSNH's default service. PSNH attempted, unsuccessfully in the past, to pass certain fixed costs of other generating facilities on to customers who chose to receive electricity from CEPSs. *See generally* DE 10-160, Order No. 25,256 (July 26, 2011). The Commission noted then: "The cure . . . is not to impose a non-bypassable charge on those customers who have migrated from PSNH's default ES supply to pay a portion of PSNH's fixed generation costs. Such a charge . . . *would* constitute unfair cost-shifting to customers that have taken advantage of competitive supply. Furthermore, imposition of such a . . . charge would only serve to treat a symptom of the transition to competitive markets and would be contrary to the purposes of RSA 374-F." Order No. 25,256 at 28.[3] Thus, the more customers PSNH could retain on default service, the larger pool of ratepayers it would have across which it could spread its fixed generation costs.

[3] The Commission also reasoned that "the creation of a non-bypassable charge for these purposes is contrary to principles of the restructuring statute, the most important of which is to reduce costs for all consumers of

Between January of 2012 and January of 2013, however, PSNH lost approximately 31,000 residential default service customers to the competitive market: the percentage of load that migrated during this period of time went from 34% to 42%. *See* DE 06-125 (PSNH's 2012-2013 Customer Migration Quarterly Reports); *see also* Compl. ¶¶ 42-44.

This continuous loss of customers forced PSNH to spread the costs of the Scrubber and other generation costs across fewer and fewer ratepayers. The Commission acknowledged such a concern four years ago in DE 12-292: "Staff noted that [PSNH's]'s proposed rate [default service rate] is over market which is of concern from a customer perspective and cautioned that the rate may cause more customer migration which would continue to push PSNH's rates higher going forward." Order 25,448 at 6. Indeed, just several days ago, PSNH filed a forecast with the Commission that estimates the utility will raise its rate by "one cent per kilowatt hour, from 9.99 cents to 10.94 cents."[4] This rate increase means PSNH's default service customers "will see their monthly electric bills increase by an average of $5.50 this summer." *See supra* n.4.

PSNH had a clear motive to do everything in its power to regain some of these customers and place them back onto default service. As demonstrated below, by thwarting customer choice and reassigning PNE's customers to its default service, PSNH gained much-needed revenue to help pay for the Scrubber and the continued ownership and operation of its generating fleet. Its actions also are consistent with an attempt to stem the tide of a death spiral, where the more the default service rate increased, the more customers would migrate from default service to the competitive market, in an ever-increasing spiral toward unjust and unreasonable rates.

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electricity by harnessing the power of competitive markets, RSA 374-F:1. In addition, imposition of such a charge is contrary to the principles of customer choice and minimization of customer confusion, RSA 374-F:3, II, and full and fair competition, RSA 374-F:3, VII." Order No. 25,256 at 29.

[4] *See* http://www.concordmonitor.com/Eversource-proposes-to-energy-service-rate-2028844.

III. PNE and Resident Power's Claim for Tortious Interference with Contract States a Valid Claim for Relief that PSNH Acted "Improperly."

PSNH argues PNE and Resident Power's claim for tortious interference with the FairPoint Contract does not state a claim for relief because, PSNH contends, the Complaint does not allege "improper" interference. *See* PSNH Brief at 13-19. This is inaccurate.

A. The standard for determining whether interference with a contract is "improper" is broad.

PSNH claims "the question now before the Commission is whether either of PSNH's actions were consistent with applicable tariffs, regulations or orders and thus 'protected by law.'" PSNH Brief at 3. This is not the correct standard against which the Commission must test the facts alleged in the Complaint, and the spectrum of laws cited by PSNH is too narrowly focused.

Instead, the body of applicable law and standards for determining whether interference with a contract is "improper" is much broader. To establish that interference with a contract was "improper," a plaintiff must "'show that the interference . . . was either desired by the [defendant] or known by him to be a substantially certain result of his conduct.'" *Laramie v. Cattell*, Nos. 06-C-224, 06-C-225, 2007 N.H. Super. LEXIS 6, at *15-*16 (N.H. Super. Aug. 27, 2007) (quoting *Demetracopoulos v. Wilson*, 138 N.H. 371, 373-74 (1994)). A plaintiff need not plead that the defendant was *solely* or *directly* responsible for the failure of the contract, or that the defendant acted with the purpose to interfere with the plaintiff's contract. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1162-63 (2003). The claim may be pursued so long as "the interfered-with party remains an intended (or at least known) victim of the interfering party—albeit one that is indirect rather than direct." *Id.* (citation omitted).

New Hampshire courts rely on the following list of factors in the *Restatement* to determine if intentional interference with a contract is improper:

(a) the nature of the actor's conduct,

(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference, and
(g) the relations between the parties.

Roberts v. General Motors Corp., 138 N.H. 532, 540-41 (1994).

There is not an exhaustive list of conduct that is considered "improper" or "wrongful." *See Restatement (Second) of Torts,* § 769, cmt. d, and § 767, cmt. c. Examples of wrongful conduct include abuse of a fiduciary relationship, misrepresentations, violation of business ethics or customs, and conduct that violates a statute or public policy. *Id.*

Courts in other states apply a similarly broad standard – developed, in part, from some or all of the factors above: "[T]he ultimate inquiry is whether the conduct was 'both injurious and transgressive of generally accepted standards of common morality or of law.'" *Sustick v. Slatina*, 48 N.J. Super. 134, 144 (App. Div. 1957) (citation omitted); *see also Harris v. Perl*, 41 N.J. 455, 461 (1964) ("sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated").[5] "In other words, was the interference by defendant 'sanctioned by the "rules of the game"'" and considered "right and just dealing." *Sustick*, 48 N.J. at 144 (citation omitted); *see also Ass'n Group Life Ins. v. Catholic War Veterans*, 120 N.J. Super. 85, 99 (App. Div. 1971) (whether the defendant's conduct was "consonant with good business morality"). "Not only must defendants' motive and purpose be proper but so also must be the means."

[5] "Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interests interfered with." *Scott v. McDonnell-Douglas Corp.*, 37 Cal. App. 3d 277, 292 (1974); *see also Freed v. Manchester Servs., Inc.*, 165 Cal. App. 2d 186, 190-91 (1958) ("whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasion"). As noted earlier, the interests PSNH interfered with, i.e. "free and fair competition in the trades and industries" (N.H. Const., Part II, Art. 83) are important interests protected in the New Hampshire Constitution and New Hampshire Law. RSA 374-F:1.

Sustick, 48 N.J. at 144. If there is no crystallized determination of whether interference is improper, the determination is usually left to a jury. *Ass'n Group Life*, 120 N.J. Super. at 99.

Here, PSNH concedes a violation of a tariff supports a claim for tortious interference with contract. In *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 B.R. 184 (Bkrtcy. S.D.N.Y. 1996), the court held a utility tortiously interfered with a merger between the debtor (a pay telephone company) and a third party. *Id.* at 208-09, 210-11. The debtor leased local lines from the utility, which – like PSNH – was a state-chartered and regulated monopoly and the debtor's largest competitor. *Id.* at 188-89. Like PNE and Resident Power, the debtor depended on the utility to provide local telephone service. *Id.* at 188. The utility, in turn, billed the debtor for certain local and long-distance charges. *Id.* at 189. Under the governing tariff, the utility had the right to collect overdue charges, but it could not terminate or interrupt service for non-payment of certain long-distance charges. *Id.* In its merger negotiations, the debtor represented it owed the utility approximately $600,000 in long-distance charges, for which the debtor's merger partner had agreed to provide funding. *Id.* at 190-91. The utility, however, claimed the debtor owed more – approximately $1 million – which the debtor disputed, and – in violation of the tariff – the utility threatened to cancel service if payment was not made. *Id.* at 191. As a result, the merger partner canceled the merger, and the debtor filed for bankruptcy. The court held that the utility's violation of the tariff, in part, supported a finding that its interference in the merger was improper. *Id.* at 208-09, 210-11.

A finding of "improper" interference, however, can be based on conduct *other than a violation of a tariff.* In *Balaber*, in addition to finding a tariff violation, the court also based its conclusion that the utility's interference was "improper" on a finding that the "means" it used included "misrepresentations, threats, improper economic pressure, [and] restraint of trade." *Id.*

at 211. Specifically, the court cited the utility's "material misrepresentations" and "trade libel" concerning the amount of the indebtedness at a meeting with the debtor's merger partner, and "near extortionate 'economic pressure' effecting a 'restraint of trade' in making excessive demands for payment backed by unlawful threats of interruption of service . . . with the foreseeable effect of eliminating a competitor." *Id.* at 208-09. The court rejected the utility's argument that it acted in good faith by insisting upon what it believed to be its legal rights because, in part, it engaged in "misrepresentations" and "unlawful threats." *Id.* at 209-10.

Like *Balaber*, courts have found various types of conduct to be "improper" interference:

- Intimidation of a business and its customers. *See, e.g., Evenson v. Spaulding*, 150 F. 517 (9th Cir. 1907) (affirming injunction against business association whose members followed and harassed plaintiff business's agents and made false representations about plaintiff's goods and services); *Gilly v. Hirsh*, 48 So. 422 (La. 1909) (affirming injunction against store owner from placing signs in his window that reflected negatively on neighboring auctioneer's business).

- Misrepresentation. *See, e.g., Jandro v. Foster*, 53 F. Supp. 2d 1088, 1099 (D. Colo. 1999) (denying motion to dismiss, where plaintiff alleged defendant terminated plaintiff's employment, thereby denying plaintiff employment benefits and advancement opportunities; [26] gave plaintiff an unsubstantiated negative performance review; and spread rumors about plaintiff's employment "deficiencies."); *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365 (1975) (reversing dismissal of plaintiff's claim for intentional interference with his opportunity to be elected to office, where plaintiff alleged that defendants mailed misleading voter guides that urged recipients to "Vote Democratic" but listed another person as the candidate for city controller).

- Threats of civil suits. *See, e.g., Maytag Co. v. Meadows Mf'g Co.*, 35 F.2d 403 (7th Cir. 1929) (affirming injunction against defendant – a "powerful corporation, with income of many millions of dollars per year" – from filing lawsuits against plaintiff, whose purpose and effect were to interfere with the sale of plaintiff's products and increase plaintiff's expenses so its business would be destroyed, and where suits were not necessary to protect defendant's interests).

- Unlawful conduct. *See, e.g., Mobile Mech. Contractors Ass'n v. Carlough*, 456 F. Supp. 310 (S.D. Ala. 1978) (finding defendants interfered with plaintiff business by causing demands and a strike, in violation of federal law, to force business to join a union), *reversed, in part, on other grounds, Mobile Mech. Contractors Ass'n v. Carlough*, 664 F.2d 481 (5th Cir. 1981).

- Economic pressure. *See, e.g., Jackson v. Travelers Ins. Co.*, 403 F. Supp. 986 (M.D. Tenn. 1975) (entering judgment against insurer that threatened to deny insured coverage if she retained an attorney to represent her in connection with injuries she sustained while riding motorcycle covered by insurer).

- Business ethics and customs. *See, e.g., Harris v. Perl*, 41 N.J. 455 (1964) (reversing order that reversed judgment against defendant purchasers of property for interference with prospective economic advantage, where defendants circumvented plaintiff real estate broker and purchased property directly from bank after discovering property was bank-owned).

B. PNE and Resident Power sufficiently allege that PSNH's interference was "improper."

Under the broad standards above, PNE and Resident Power have stated a valid claim for relief that PSNH *improperly* interfered with the FairPoint Contract by: (1) refusing to accommodate PNE's request for a one-time, off-cycle meter reading of its former customer accounts; and (2) deleting FairPoint's enrollments and replacing them with new enrollments for the transfer of PNE's former customer accounts to PSNH's default service.

1. PSNH's refusal to accommodate PNE's off-cycle meter reading was "improper."

PSNH alleges it had no duty to perform an off-cycle meter reading, and PNE and Resident Power had no right to ask for one. PSNH Brief at 13. This is inaccurate.

PSNH *had* an obligation to accommodate PNE's request. Puc 2004.07(b) authorizes a CEPS to request an off-cycle meter reading. It states, without restriction, "*[n]othing* shall prevent a CEPS from requesting an off-cycle meter reading." Puc 2004.07(b) (emphasis added). It provides only one condition upon which a utility may deny a request: "if [5 business days' written] notice . . . is not provided." *See* Puc 2004.07(b)(2). Puc 2004.07(c) states, however, that, if a utility denies a request that lacks proper notice, "the utility and CEPS *shall* negotiate a reasonable extension of time for the completion of the . . . request." (Emphasis added) Thus, this rule *requires* a utility to accommodate a request for an off-cycle meter reading.

The Complaint alleges PNE requested[6] an off-cycle meter reading on February 12, 2013 (and again on February 14).[7] Compl. ¶¶ 66-68. PSNH refused the request and failed to negotiate a reasonable extension of time to complete it. *Id.* ¶ 68. Its decision violated Puc 2004.07(b) and was, therefore, improper. *See Balaber*, *supra* pp. 11-12.

PSNH contends "there is no such obligation" to perform an off-cycle meter reading in Puc 2004.07(b) because the rule "applies only '[w]hen a residential or small commercial electric customer has failed to meet any of the terms of its agreement for service' with a CEPS, the CEPS seeks to terminate the service off-cycle due to such failure, and then seeks an off-cycle meter read for that purpose." PSNH Brief at 13-15. This interpretation of the rule is incorrect.

When interpreting a statute or rule, a court "ascribe[s] the plain and ordinary meaning to the words used." *Evans v. J Four Realty*, 164 N.H. 570, 571 (2013). It will "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* "If the language is plain and unambiguous," a court "'need not look beyond the statute for further indications of legislative intent.'" *Doggett v. Town of N. Hampton Zoning Bd. Of Adjustment*, 138 N.H. 744, 745 (1994) (quoting *Silva v. Botsch*, 120 N.H. 600, 601 (1980)). A court departs from this approach only if it "would lead to an absurd or unjust result." *Doggett*, 138 N.H. at 745.

The plain language of Puc 2004.07 demonstrates it is not limited to "when a residential or small commercial electric customer has failed to meet any of the terms of its agreement for

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[6] PSNH attempts to diminish the request made on February 12, alleging it "occurred in a phone call." PSNH Brief at 13 n.12. This is an attempt to dispute allegations in the Complaint that must be taken as true; the Commission should reject and not consider PSNH's assertion. *Gordonville*, 151 N.H. at 377.

[7] PSNH also claims PNE's request would have forced it "to undertake to read 8,000 meters scattered throughout the State within 48 hours." PSNH Brief at 13 n.12. This is inaccurate: PNE did not request PSNH to "read 8,000 customer meters scattered throughout the State within 48 hours." *See id.* Rather, as PSNH concedes, the request invoked Puc 2004.07(b), *see* PSNH Brief at 8 n.7 & Exhibit E, which requires the parties to negotiate an extension of the time necessary to complete the meter readings. Further, PSNH considered the request, and PNE offered to pay up to $65,000 for PSNH's costs in facilitating this one-time transfer. Compl. ¶ 66.

service." That phrase first appears in the *preceding* section (a) in Puc 2004.07, and in several other subsections. It does not, however, appear in or modify *section (b)*, which contains the requirement PNE invoked concerning requests for off-cycle meter readings. That section states clearly, "*[n]othing* shall prevent a CEPS from requesting an off-cycle meter reading." Puc 2004.07(b) (emphasis added). Nor does language concerning a customer's breach of an agreement for service appear in subsections (e), (f), or (g). Indeed, the title of Puc 2004.07 is "Notice of Termination of Service," *not* "Notice of Termination of Service *When a Customer Fails to Meet Any of the Terms of Its Agreement for Service.*" If the PUC saw it fit to include the condition that a customer has to have breached its agreement for service in order to trigger the right expressed in Puc 2004.07(b), it would have done so. It did not. Thus, under that section, only if a CEPS does not comply with the notice requirement may a utility deny an off-cycle meter reading; otherwise, it must comply with the request. When it denies a request for lack of notice, a utility must "negotiate" an extension of time to complete it.

The PSNH Tariff and Consensus EDI Plan do not affect this requirement. They apply to *on-cycle* changes in supplier service. In contrast, Puc 2004.07(b) refers and applies to "*off-cycle* meter reading[s]." (Emphasis added.) Thus, the language PSNH cites in the PSNH Tariff and Consensus EDI Plan do not apply when a supplier requests an "off-cycle meter reading."

PSNH's argument – notwithstanding the rule above – that it "had no obligation to conduct thousands of off-cycle readings because Plaintiffs had no right to ask for them" is meritless. PSNH claims the joint waiver PNE and FairPoint requested on February 7, 2013, and that the Commission granted the following day, "was *premised* upon the representation that no off-cycle meter readings would occur." PSNH Brief at 15. PSNH argues PNE's request several days later for an off-cycle meter reading invalidated the waiver the Commission granted and

PNE's right to request an off-cycle meter reading. *See id.* at 15-16. PSNH cites no authority for this leap of logic. First, nothing in Puc 2004.07 imposes such a condition or restriction on a CEPS's right to request an off-cycle meter reading. Second, the Commission's grant of the joint waiver was not conditioned on PNE agreeing *not* to request an off-cycle meter reading.[8]

In addition to its violation of Puc 2004.07(b), PSNH's other conduct in connection with refusing PNE's request was improper. The Complaint alleges PSNH used PNE's suspension as an opportunity to eliminate two competitors (PNE and Resident Power) and benefit from their absence. Compl. ¶ 64. Because of its position as the owner and operator of the distribution system through which electricity was delivered to customers and through which competitive suppliers had to operate to participate in the market, PSNH played the role of an agnostic gatekeeper in the marketplace for electricity. It could have exercised this role with fairness and evenhandedness, but it instead chose to exercise it in a manner that improperly and tortiously interfered with PNE and Resident Power's contractual rights. In doing so, PSNH also improperly interfered with the rights that customers and competitive suppliers – the people of this state – have to free and fair competition in this industry. PSNH had massive costs to repay associated with the Scrubber and its generating fleet; PSNH was experiencing a steady loss of thousands of customers since the deregulation of the electric industry; and PSNH somehow could accommodate large transfers of customer accounts from a CEPS *only to its default service*, and not to another CEPS. *See* Compl. ¶¶ 24-26, 42-44, 39-45, 68, 76, 99. A reasonable

[8] PSNH's other claim that PNE's "representations" in the customer notice regarding when customers would be transferred to FairPoint and their right to choose another supplier became "false" by virtue of its request for an off-cycle meter reading lack merit. *See* PSNH Brief at 16. The notice stated only that the "transfer *is expected* to occur at the beginning of your next billing cycle, but *may* take two billing cycles to occur," and it referenced each customer's right to select another supplier within 30 days. That language did not promise or create an obligation that PNE would wait at least one or two billing cycles to transfer its customer accounts; it merely managed those customers' expectations by cautioning them that such transfers could take that long, and it reminded customers they could choose a supplier other than FairPoint either within 30 days or afterward. PNE's request for an off-cycle meter reading was consistent with these statements in the notice.

inference to draw from these facts, as well as a plausible basis for relief, is that, faced with an increasing financial burden and the loss of customers to CEPSs offering electricity at rates 10% to 20% lower than default service, PSNH initiated a series of events calculated to preserve its monopoly and injure and destroy two competitors (PNE and Resident Power). This conduct included PSNH *delaying* the transfer of PNE's customer accounts to FairPoint – so that, upon PSNH's assumption of PNE's load asset, those accounts would, instead, be transferred to PSNH's default service – by refusing PNE's request for an off-cycle meter reading and neglecting to negotiate an extension of time to complete it. Compl. ¶¶ 68-69. The Complaint also alleges PSNH, through private emails and telephone conversations and unbeknownst to PNE and Resident Power, attempted to persuade Commission Staff to support its refusal to perform the off-cycle reading, and that, during this time, PSNH informed PNE and Resident Power that these accounts would become PSNH's property once they were transferred to default service, and it would be up to the market to solicit them. *Id.* ¶¶ 69-70.

Thus, the Complaint alleges PSNH acted "improperly" when it refused PNE's request for an off-cycle meter reading, which, in turn, interfered with the FairPoint Contract and FairPoint's and PNE's and Resident Power's efforts to transfer PNE's customer accounts to FairPoint.

2. PSNH's interference with the transfer of former PNE customer accounts to FairPoint – by deleting 7,300 pending electronic enrollments that FairPoint submitted and PSNH accepted, and then replacing them with new enrollments for transfer to PSNH's default service – was "improper."

PSNH alleges its deletion of the FairPoint enrollments was "consistent" with applicable tariff provisions and rules, and that FairPoint was, nevertheless, not "entitled" to the transfer of PNE's customer accounts. PSNH Brief at 16. This is inaccurate.

PSNH's deletion of the enrollments violated the law and was improper. Section 6 of the PSNH Tariff requires that PSNH process a change of supplier service "within two business days

of receiving a valid Electronic Enrollment from a Supplier." The Consensus EDI Plan further requires PSNH to process enrollments "in the order in which they are received." *See* Compl. ¶ 30. If an enrollment is invalid, PSNH must, within one business day of receiving the enrollment, notify the CEPS requesting service of the reasons for such failure. *Id.* ¶ 33. PSNH must also send an "Error" EDI transmission to the new CEPS and existing CEPS. *Id.*

PSNH violated these requirements. The Complaint alleges that, beginning on or about February 9, 2013, FairPoint submitted electronic enrollments for the transfer of the approximately 8,500 customer accounts it acquired from PNE. *Id.* ¶ 56. PSNH accepted these enrollments; it never notified FairPoint that any of them were invalid or sent "Error" transmissions to FairPoint or PNE. *Id.* ¶¶ 57-58. The Complaint also alleges that, on February 12, 2013, PSNH began transferring PNE customer accounts to FairPoint at a rate of 300-400 per business day. *Id.* ¶ 60. By February 19, PSNH had transferred approximately 1,200 PNE customer accounts to FairPoint. *Id.*

The Complaint then alleges that, following PNE's suspension and PSNH's assumption of PNE's remaining load asset, PSNH improperly thwarted the transfer of the remaining 7,300 customer accounts to FairPoint. *Id.* ¶¶ 77-81. As noted above, this decision was also motivated by PSNH's desire to use PNE's suspension as an opportunity to eliminate PNE and Resident Power from the market and benefit from their absence. *See supra* pp. 7-9, 16-17. The addition of 7,300 customer accounts to PSNH's default service – which PSNH admits was *easier to perform than a transfer to another CEPS, such as FairPoint* – would help stem the steady loss of customers PSNH had experienced in recent years and facilitate its ability to recoup its generating costs. *See* Compl. ¶¶ 24-26, 39-45, 68, 76, 99. The Complaint alleges that, following PNE's suspension, PSNH claimed it had no further obligation to transfer any more accounts to

FairPoint, despite the fact FairPoint had submitted enrollments for those accounts that PSNH had accepted. *Id.* ¶ 77. The Complaint further alleges that, on February 20, PSNH ran an "automated program" to *delete* the remaining FairPoint enrollments and replaced them with new enrollments for the transfer of PNE's remaining accounts to PSNH's default service. *Id.* ¶ 79.

PSNH could have fulfilled ISO-NE's directive to assume PNE's remaining load asset *without* deleting the FairPoint enrollments: There was no impediment in PSNH's EDI system that required it to delete the enrollments. *See* Exhibit A (PNE Reply to PSNH Response to Record Request – Exhibit No. 25, filed in DE 12-295) at 2.[9] Following a brief stay on PSNH's default service, those customer accounts could have been transferred to FairPoint on their next meter read date. Indeed, while PSNH targeted those enrollments for deletion, it did not delete enrollments submitted by *other suppliers* for former PNE customer accounts *before* PNE's default. For example, on February 8, 2013, TransCanada submitted an enrollment for Milan Lumber, a PNE customer. *Id.* Following PNE's default and suspension, PSNH transferred Milan Lumber to its default service on February 20. *Id.* However, on February 26 (Milan Lumber's meter read date), Milan Lumber was transferred to TransCanada pursuant to the enrollment submitted on February 8. *Id.*

Notwithstanding its disparate treatment of different enrollments for PNE's customer accounts, PSNH alleges it was permitted to delete the FairPoint enrollments because the PSNH Tariff restricts PSNH from accepting more than one "supplier" for a customer during any 30-day period. PSNH Brief at 17. It relies on Order 25,660 and the ISO-NE Tariff to argue PNE's default constituted a "drop" of its customer accounts, and, because of the ISO-NE Tariff's requirement that PSNH assume PNE's remaining load asset, "the first valid enrollment

[9] http://www.puc.state.nh.us/regulatory/Docketbk/2012/12-295/LETTERS-MEMOS-TARIFFS/12-295%202014-06-11%20PNE%20LTR%20REPLY%20TO%20PSNH%20RESPONSE%20TO%20RECORD%20REQUEST.PDF

transaction was the transfer of those customers to default service," and FairPoint's enrollments were "no longer valid." *Id.*

PSNH cites no authority for this proposition, and its reliance on Order No. 25,660 and the PSNH and ISO-NE Tariffs is unavailing. These authorities govern only the assignment of PNE's load asset to PSNH. They do not address (or preclude a claim concerning) the impact of such assignment on a valid transaction entered into between PNE and a third party (FairPoint) that pre-dated PNE's default and suspension. Nor did they preclude PSNH from leaving FairPoint's enrollments alone. Further, Order No. 25,660 characterizes the transfer of PNE's load asset to PSNH as an "assignment." It characterizes that transfer as a "drop" solely for purposes of determining whether PSNH was entitled to impose a selection charge on PNE.[10]

Even assuming PSNH could rely on any of the authorities above to justify its deletion of the enrollments, its argument is premised on an erroneous interpretation of the PSNH Tariff: that PSNH is a "Supplier." *See* PSNH Brief at 17. This is incorrect. The PSNH Tariff defines and refers to "Suppliers" and PSNH separately. A "Supplier" is defined as "[a]ny entity registered with the Commission and authorized by the Commission to supply electricity to retail users of electricity in the state of New Hampshire." PSNH Tariff, § 2. PNE and FairPoint qualify as "suppliers" under the PSNH Tariff: PNE registered, and was approved, as a supplier (or CEPS) on September 22, 2011, *see* Compl. ¶ 40, and FairPoint did so on January 31, 2012. *See* DE 11-

[10] It should be noted the ISO-NE Tariff provision on which PSNH relies – while unhelpful to PSNH – *does* contemplate and support the PNE/FairPoint transaction. It states that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) *unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset.*" PSNH Memo in support of Motion to Dismiss, Exhibit 2 (emphasis added). PNE did precisely what this language provides – it assigned the obligation to serve its load asset to FairPoint *before* it defaulted. Thus, under the language above, although PNE's load asset was assigned to PSNH upon its default, the obligation to serve that load asset would ultimately have been assigned to FairPoint *if* PSNH had not deleted the remaining 7,300 enrollments.

175.[11] Both companies were listed on the Commission's website as registered CEPSs. *See* http://www.puc.state.nh.us/Consumer/energysuppliers.htm. In contrast, PSNH was not registered with the Commission as a supplier. *See id.* Indeed, PSNH is defined as, and referred to elsewhere in the PSNH Tariff, as the "Company." *Id.* It provides "Default Energy Service," or "Default Service," which is defined as "[e]lectric energy and capacity supplied to a Customer by the Company." *Id.* The PSNH Tariff states "[Default] Service shall be supplied during periods in which a Customer is not receiving Self-Supply Service or *Supplier* Service. *Id.* (emphasis added) The PSNH Tariff contains many other examples of its separate treatment of PSNH, on the one hand, and "Suppliers" like PNE and FairPoint, on the other. For example:

- It defines an "Electronic Enrollment" as "[a] request submitted electronically to *the Company* by a *Supplier* for the initiation of *Supplier* Service to a Customer. *Id.* (emphasis added) This definition makes sense because PSNH controlled the distribution network for the delivery of electricity, and CEPSs would submit Electronic Enrollments to PSNH in order to initiate service for customers.

- It distinguishes between "Default Service," above, and "*Supplier*-Rendered Energy Service," or "*Supplier* Service," which it defines as "[t]he sale of energy and capacity including ancillary services to a Customer by a *Supplier*." *Id.*

- It identifies that "Delivery Service" – which is the "delivery of electric power [from whatever source, i.e., PSNH or a CEPS] by the Company to a Customer" – is available for the delivery of (1) "electricity from a *Supplier*," *OR* (2) "Default Service or Self-Supply Service." *Id.* §§ 2, 4 (emphasis added).

- It requires that, if "a Customer is not receiving Self-Supply Service and is not receiving *Supplier* Service from a *Supplier* for any reason, *the Company* will arrange Default Service." *Id.* § 4 (emphases added).

- As noted above, it requires *PSNH* to "process a change or initiation of *Supplier* Service . . . within two business days of receiving a valid Electronic Enrollment." *Id.* § 6 (emphasis added)

PSNH fails to identify any provision of the PSNH Tariff that ignores or overrides the language above and confers "Supplier" status on PSNH when PSNH must assume the responsibility of

[11] *See* https://www.puc.nh.gov/Regulatory/Docketbk/2011/11-175.html.

supplying electricity to customers of a defaulted CEPS. *See* PSNH Brief at 17. Indeed, based on the provisions above, applying the Tariff language as PSNH suggests would be illogical: it restricts *PSNH* from "accepting" more than one "Supplier" in any 30-day period; PSNH cannot *accept (or reject) itself* as a Supplier. Thus, PSNH is not a "Supplier" under the PSNH Tariff.

Because it is not a "Supplier," PSNH's argument evaporates: the restriction in the PSNH Tariff that PSNH cannot accept more than one "Supplier" in any 30-day period does not apply. Thus, the transfer of PNE's customer accounts to PSNH's default service was *not* "the first valid enrollment transaction" for each of those accounts' 30-day period. Instead, the *first* valid enrollments were *FairPoint's* enrollments; those enrollments remained valid notwithstanding PNE's default and suspension; and they *trumped* any subsequent enrollments. Under the PSNH Tariff, PSNH was *required* to process those enrollments. It failed to fulfill that obligation, and it violated the Tariff. This was "improper." *See Balaber, supra* pp. 11-12.[12]

In addition to its violation of the Tariff, PSNH's conduct was also "improper" because it prevented these customers' choices from being consummated and urged Commission Staff to support its decision. PNE's customers – by virtue of their aggregation agreements with Resident Power – *chose* to switch their service to FairPoint when PNE sold those accounts to FairPoint. The Complaint alleges that PSNH *accepted* FairPoint's enrollments for those accounts. Compl. ¶¶ 57-58. It further alleges that PSNH's deletion of these enrollments (and replacement with new enrollments for transfer to its default service) freed these customers to choose a CEPS other than FairPoint. *See id.* ¶ 98. Indeed, because FairPoint's enrollments trumped any subsequent

[12] PSNH's recent filing concerning its rate increase further demonstrates the significant impact its conduct had on PNE, and could have on other CEPSs. CEPSs like PNE and FairPoint are driven by the ebb and flow of the competitive marketplace. The slightest interference in that marketplace can generate a substantial impediment to the success of a CEPS. In contrast, the ease with which PSNH operates reveals it faces no such impediments: it can alleviate an unforeseen financial hardship simply by filing a need for recovery with the Commission and increasing its rates, and it can impact the activities of its competitors because it controls the distribution network and transfers of accounts between CEPSs.

enrollments, for any new enrollment – whether by PSNH or another CEPS – to be valid, and lead to a transfer to a CEPS other than FairPoint, FairPoint's enrollments would have had to be deleted. *Id.* ¶ 91. The Complaint alleges this is precisely what PSNH did: it not only thwarted the eventual transfer of PNE's remaining customer accounts to FairPoint, but it engineered an implicit invitation for those customers to *choose another CEPS. Id.* PSNH also urged Commission Staff to support PSNH's decision and block the transfer of PNE customer accounts to FairPoint. In an email to Staff on February 20, 2013, PSNH's general counsel, Robert Bersak, defying logic, emphasized that allowing the FairPoint transaction – which he termed a "mess" – to proceed and FairPoint's enrollments to remain valid would "block" customers' choices "for at least a month," and he cited the Commission Rules providing customers "with the right to select an alternate CEPS *or return to default service*." *Id.* ¶ 89.[13] Clearly, allowing FairPoint's enrollments to remain valid *would have allowed customer choice to proceed*, while deleting those enrollments, in fact, *thwarted customer choice*, contrary to RSA 374-F:3, II.

PSNH cites two events in an attempt to absolve its conduct. First, it alleges it was correct in deleting the FairPoint enrollments on *February 20* (and the enrollments "were no longer valid") because, one day later, on *February 21*, Commission Staff directed PNE and Resident Power to provide notice to their former customers stating there would be no further transfers to FairPoint, and the customers were required to contact FairPoint if they wanted to select FairPoint as a supplier. PSNH Brief at 10, 17-18. This assertion is illogical: PSNH claims an action taken by Commission Staff *one day after* it deleted the enrollments *retroactively justified* that decision.

[13] PSNH attempts to dispute the nature of these communications: it claims it "did not proceed on its own in making this determination," and that it "discussed this matter at length with the Commission." PSNH Brief at 17. This is another attempt to dispute allegations in the Complaint that must be taken as true; the Commission should reject and not consider PSNH's characterization of these communications. *Gordonville*, 151 N.H. at 377.

See id. The February 21 customer notice, however, *did not exist* and *had not been provided to customers* when PSNH decided to delete the enrollments.

Second, PSNH claims "FairPoint had no right to receive *any* customer from PNE" because a condition upon which the February 8 joint waiver was granted – that FairPoint make a certain filing with the Commission within 10 business days – was not satisfied, and, thus, "the waiver was not valid and FairPoint was not entitled to accept customers without providing adequate notice of the transfer." *Id.* at 4, 13, 18. This argument is also meritless. PSNH again attempts to introduce facts (whether or not FairPoint made this filing) that are not raised in the Complaint and should be rejected. *Gordonville*, 151 N.H. at 377. Even if this information could be considered, it is illogical: PSNH appears to argue that FairPoint's purported failure to make this filing *retroactively* invalidated the enrollments and legitimized PSNH's deletion of them. However, the 10-day business day period during which FairPoint needed to make this filing, would have expired on *February 22, two days after* PSNH assumed PNE's load asset and deleted the FairPoint enrollments, and *several days* after FairPoint submitted its enrollments. The alleged failure *had not occurred* when PSNH decided to delete the enrollments.[14]

PSNH has offered no other valid justification for its deletion of the enrollments or its overall conduct above. Rather, it has provided a series of inconsistent explanations for its decision. These include (1) the argument that the ISO-NE Tariff required PSNH to delete the enrollments merely because it was required to assume PNE's remaining load asset; (2) the argument that the PSNH Tariff required the deletion of the enrollments because PSNH was a

[14] PSNH also claims "FairPoint could have agreed to assume load responsibility for PNE's customers at ISO-NE, thereby preventing PNE's default and the chain of events that default caused." This speculative assertion disputes allegations in the Complaint that must be taken as true; the Commission should reject and not consider it. *Gordonville*, 151 N.H. at 377.

"Supplier"; and (3) a PSNH attorney's assertion in 2014 on the record in DE 12-295 that the *Commission* issued a "directive" ordering PSNH to delete the enrollments. *See* Exhibit B (Transcript of 5/22/14 Hearing in DE 12-295) at 129.[15] Nothing it has cited, however, authorized or justified its decision to delete the enrollments. Further, these inconsistent assertions also demonstrate the improper motives underlying PSNH's conduct.

Thus, the Complaint alleges that PSNH acted "improperly" when it deleted the FairPoint enrollments and replaced them with new enrollments for transfer to PSNH's default service, which, in turn, interfered with and thwarted the FairPoint Contract and FairPoint's and PNE's and Resident Power's efforts to transfer PNE's former customer accounts to FairPoint.

IV. The Question of Whether Interference with a Contract is "Improper" is Not Appropriate for Resolution on a Motion to Dismiss.

Although the Commission is proceeding with deciding the Superior Court's transfer question in the posture of a motion to dismiss, PNE and Resident Power respectfully submit that such a resolution is not appropriate. "The question of whether [a defendant's] conduct was merely competitive or improper is a factual question which cannot be decided on a motion to dismiss." *Gen. Beverage Sales Co.-Oshkosh v. East Side Winery*, 396 F. Supp. 590, 594 (E.D. Wis. 1975); *see also Grunstein v. Silva*, No. 3932-VCN, 2009 Del Ch. LEXIS 206, at *61 (Del. Ch. Dec. 8, 2009) (same). "[W]rongfulness of conduct is, by its nature, a *factually intensive* question." *Healthwerks, Inc. v. Spine*, No. 14-cv-93-pp, 2015 U.S. Dist. LEXIS 64216, at *37 (E.D. Wis. May 15, 2015) (emphasis added). This issue "requires an 'inquiry into the mental and moral character of the defendant's conduct.'" *City of Keene*, 2015 N.H. LEXIS at *12; *see also Jandro*, 53 F. Supp. 2d at 1099 ("Whether an actor's conduct is improper is a factual inquiry

[15] http://www.puc.state.nh.us/regulatory/Docketbk/2012/12-295/HEARING%20ROOM%20DOCUMENTS/12-295%202014-06-12%20TRANSCRIPT%20OF%20HEARING%20HELD%20ON%205-22-14.PDF

largely dependant upon the actor's motives."). Thus, "it would be improper for [a] court to dismiss [a] tortious interference claim." *Healthwerks*, 2015 U.S. Dist. LEXIS at *37.

For example, in *Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC*, No. 07 Civ. 7998 (HB), 2008 U.S. Dist. LEXIS 28999 (S.D.N.Y. Apr. 10, 2008), the district court rejected the plaintiffs' argument that the defendant's counterclaim for tortious interference with contract failed to allege the plaintiffs' interference was improper. *Id.* at *9-*16. The counterclaim alleged only that the plaintiffs (licensors of a beer trademark) "intentionally, knowingly and by wrongful means interfered with defendant's contracts" "by . . . surreptitiously circulating communication addressed to third-party licensees of plaintiffs . . . and defendant's other accounts, which . . . falsely represented that defendant was in breach of its License Agreement" and "falsely implied that [the] License Agreement had been properly terminated." *Id.* at *12-*13. The court did not dismiss the defendant's counterclaim" because, "whether the actions of one party . . . were improper or justified ought not be decided at this juncture." *Id.* at *16.

Similarly, in *WaveDivision Holdings, LLC v. Highland Capital Management L.P.*, No. 08C-11-132-JOH, 2010 Del. Super. LEXIS 126 (Del. Super. Mar. 31, 2010), the court rejected an argument by the defendants (a series of investment funds, fund managers, and affiliated entities) that a claim by the plaintiffs (disappointed buyers of cable systems) for tortious interference with a contract to sell did not allege the defendants' interference was "improper" or lacked justification. *Id.* at *22-*23. The complaint alleged the defendants conspired to block the sale of certain cable systems to the plaintiffs, by offering the seller a more beneficial deal. *Id.* at *5. The defendants countered that their actions were an appropriate response to the plaintiffs' offer for purchase, and they were merely acting to further their legitimate economic interests. *Id.* at *8-*9. The court reasoned that "[a] motion to dismiss is not the appropriate avenue to

challenge this highly factual determination," and the "issue can be re-raised in a motion for summary judgment after discovery, if appropriate." *Id.* at *23-*24.[16] The court held the plaintiff's complaint stated a claim for tortious interference with contract. *Id.* at *22-*24.

PSNH's arguments challenging PNE and Resident Power's claim require *fact-specific* inquiries that are impossible to resolve at this juncture based solely on the allegations in the Complaint. As demonstrated above, determining whether PSNH acted "improperly" requires an inquiry into PSNH's motives with respect to (a) its decision to deny PNE's request for a one-time, off-cycle meter reading and transfer of its customer accounts to FairPoint, and (b) its decision to delete the electronic enrollments FairPoint submitted for PNE's former customer accounts and replace them with new enrollments for transfer to PSNH's default service. This inquiry requires, for example, testimony from individuals at PSNH who were involved in these decisions; internal documents and communications regarding those decisions; testimony from individuals involved in communications between PSNH and Commission Staff – since PSNH communicated with Staff regarding both decisions; testimony from individuals involved in communications between PSNH and ISO-NE concerning PNE's default and PSNH's assumption of PNE's load asset; information concerning the transfer of PNE's customer accounts to PSNH's default service; information concerning the software used for processing EDI transactions in PSNH's EDI system and the management of that system; and information concerning the "automated program" PSNH used to delete FairPoint's enrollments.

[16] *See also Long v. Valley Forge Military Acad. Found.*, No. 05-4454, 2008 U.S. Dist. LEXIS 99358, at *41 (E.D. Pa. 2008) (whether defendant's statements were justified "is a factual question that is more properly addressed at the close of discovery"); *Rosenfeld v. Cohen*, 146 Cal. App. 3d 200, 230 (1983) (determination of whether interference is improper "involves consideration of numerous factual matters" and "is peculiarly a question for determination by the trier of fact"), *reversed, in part, on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503 (Cal. 1994).

By way of further example, information concerning PSNH's EDI system is critical in determining whether PSNH acted "improperly" in deleting FairPoint's enrollments. An inquiry must be made to confirm that system contains no technical restriction for handling multiple enrollments and, if any such restriction exists, whether it was based on PSNH's interpretation of requirements imposed by either the ISO-NE Tariff or PSNH Tariff.

In addition, although PSNH transferred hundreds of PNE customer accounts to FairPoint before PNE was suspended, it slowed these transfers considerably as February 20, 2013 (the date PSNH assumed PNE's load asset) approached. The Complaint alleges that, before PNE was suspended, PSNH transferred customer accounts to FairPoint at a rate of 300 – 400 accounts per day. Compl. ¶ 60. PSNH transferred 392, 297, and 314 accounts on February 12, 13, and 15, respectively. *Id.* However, it transferred only 15 accounts on February 14 and just three accounts on February 19. *Id.* (February 16 and 17 fell on Saturday and Sunday, and February 18 was President's Day.) This significant lag in what was initially a much higher rate of account transfers suggests PSNH purposely delayed them in order to transfer as many accounts as possible to default service on February 20. Information concerning *why* the number of transfers was reduced would reveal PSNH's motives concerning the delay.

Further, PSNH's internal communications concerning its decision to delete FairPoint's enrollments would reveal its motivations for that decision. Indeed, deciding whether PSNH acted "improperly" requires determining which of PSNH's explanations for why it deleted the enrollments, *see supra* p. 25, is accurate (if any), and PSNH's motives for offering them.

Finally, the nature of PSNH's process for transferring PNE's former customer accounts to PSNH's default service on February 20, 2013, bears on PSNH's motives. Several days earlier, PSNH denied PNE's request for an off-cycle meter reading and transfer of PNE's customer

accounts to FairPoint and explained that it (PSNH) lacked the manpower to conduct the transfer because it was a manual, labor-intensive process. However, PSNH conceded that, just days later, on February 20, the transfer of a portion of PNE's customer accounts to PSNH's default service was *also* a manual, labor-intensive process. The nature of these processes, whether and to what extent they are similar, and, if so, PSNH's motives in refusing to accommodate PNE's request for an off-cycle reading are critical in assessing whether PSNH acted "improperly."

These issues should be addressed after the parties have had an opportunity to conduct discovery, not now. *See Gen. Beverage*, 396 F. Supp. at 596 (denying motion to dismiss counterclaim for tortious interference with business relationships because question of whether plaintiff's conduct was improper and could not be resolved on a motion to dismiss).

CONCLUSION

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

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

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

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

and

RESIDENT POWER NATURAL GAS
AND ELECTRIC SOLUTIONS, LLC

By Their Attorneys,

Dated: May 13, 2016

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CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the foregoing by email to the service list in DE 15-491.

Dated: May 13, 2016

Douglas L. Patch