STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

PNE Energy Supply, LLC &
Resident Power Natural Gas and Electric Solutions, LLC

v.

Public Service Company of New Hampshire
d/b/a Eversource Energy

Docket No. 216-2015-CV-265

TRANSFER ORDER

Plaintiffs, PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power"), brings a claim against defendant, Public Service Company of New Hampshire ("PSNH"), for tortious interference with contractual relations.[1] For reasons more fully explained in the Court's concurrently issued order on defendant's motion to dismiss, the Court orders that this case be transferred to the Public Utilities Commission, consistent with the following.

The following briefly summarizes the relevant facts alleged in plaintiffs' complaint. Defendant serves as the host utility for PNE, a Competitive Electric Power Supplier ("CEPS"). As such, defendant is tasked with delivering electricity supplied by PNE to PNE customers. On February 6, 2013, plaintiffs signed a purchased and sales agreement with FairPoint, another CEPS, in which PNE agreed to sell its 8,500 customer accounts to FairPoint. The customers in question all had aggregation agreements with Resident Power. On February 9, FairPoint submitted electronic

[1] All additional claims against defendant, as well as Paragraph 137(d) of plaintiffs' complaint, have been dismissed.

enrollments to defendant for the transfer of those accounts. Defendant began transferring the accounts on February 12. PNE contacted defendant on this day and requested that defendant transfer the accounts to FairPoint immediately rather than waiting for the customers' scheduled meter readings. Defendant refused to do so.

On February 14, PNE defaulted on its security obligations with ISO-NE and was suspended from the New England electricity market. Defendant and ISO-NE agreed that defendant would assume PNE's remaining load asset on February 20. By February 19, defendant had transferred 1,200 customer accounts from PNE to FairPoint. On February 20, it deleted the pending electronic enrollments for the transfer of the remaining 7,300 accounts to FairPoint and replaced them with electronic enrollments for the accounts' transfer to Default Service.

Plaintiff alleges defendant tortiously interfered with plaintiffs' purchase and sales agreement with FairPoint 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. A tortious interference with contract claim requires plaintiffs to prove, among other things, that defendant "*improperly*" interfered with plaintiffs' economic relationship with a third party. Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 40–41 (2005). If defendant's conduct was protected by law, it was not "improper." Id.; Roberts v. Gen. Motors Corp., 138 N.H. 532, 540 (1994).

Defendant argues refusing to perform a one-time, off-cycle transfer of PNE accounts to FairPoint was not improper because it was permissible under PUC tariffs and regulations. Defendant relies on Puc 2004.07(b), which provides a CEPS may request an off-cycle meter reading subject to "at least 5 business days' written notice to the utility" and that the utility "may deny any request for an off-cycle meter reading if proper notice . . . is not given." Thus, defendant argues it had an absolute right to refuse to make an off-cycle meter reading and off-cycle transfer because PNE did not provide proper notice. Plaintiffs respond that Puc 2004.07(b)(3) requires that, if a utility denies a request for an off-cycle reading based on lack of proper notice, then the utility must negotiate a reasonable extension of time for the completion of the off-cycle meter reading. Plaintiffs argue defendant did not do this, and so it did not comply with the applicable tariffs and regulations.

Defendant also argues tariffs and regulations required it to delete the electronic enrollments for the transfer of PNE accounts to FairPoint and replace them with enrollments for transfer to Default Service. Specifically, the ISO-NE Tariff required defendant to take responsibility for PNE's load asset after PNE defaulted. Further, the ISO-NE Tariff states that once a CEPS is suspended, it "shall have no ability so long as it is suspended (i) to be reflected in the ISO's settlement system, including any bilateral transactions, as either a purchaser or a seller of any products or services sold through the New England Markets." Likewise, Puc 2003.01(d) provides suspended CEPSs cannot participate in retail electricity markets. Therefore, once PNE defaulted, defendant argues, it lost any rights respecting its former customers and could not transfer its customers to FairPoint. Moreover, defendant contends it had to delete the pending enrollments for transfer to FairPoint to prevent customers from being assigned to multiple suppliers in a single billing period, which the PUC Tariff forbids.

Plaintiffs argue defendant remained obligated to transfer its customer accounts to FairPoint even after defendant assumed responsibility for PNE's load asset. They rely on the ISO-NE Tariff statement 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." Plaintiffs argue this means PNE could assign its load asset despite its default.

Given the complexity of the tariffs and regulations cited by both parties, and the fact that interpretation of these tariffs and regulations is integral to the determination of whether defendant's conduct was improper, the Court transfers this case to the PUC 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?

SO ORDERED.

11\25\15
Date

Kenneth C. Brown
Presiding Justice