

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
Case No. 216-2015-CV-265

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

v.

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

PSNH'S MOTION TO DISMISS THE COMPLAINT
OR ALTERNATIVELY
FOR REFERRAL TO THE PRIMARY JURISDICTION
OF THE PUBLIC UTILITIES COMMISSION

Defendant Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") hereby moves to dismiss the above-captioned Complaint of PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power") (collectively the "Plaintiffs") for failure to state a claim on which relief may be granted, and as barred by *res judicata*. Alternatively, for any counts not so dismissed, PSNH requests that the Court defer to the primary jurisdiction of the Public Utilities Commission.

As grounds for this Motion, PSNH states as follows:

1. This dispute arises out of Plaintiffs' claims that PSNH first failed to facilitate, and then interfered with the transfer of PNE's retail electric supply customers to another supplier, FairPoint Energy. Every aspect of that transfer is controlled by Federal and State utility tariffs as well as regulations within the jurisdiction of the Public Utilities Commission. In fact, before seeking relief in this Court, the issues raised here have been the subject of at least nine different dockets at the PUC. See Appendix A to PSNH's Memorandum in Support of this Motion.

2. Plaintiffs' 43-page, 159-paragraph Complaint was seemingly designed to portray this dispute in a manner so complicated that it would survive early dismissal by this Court. Yet despite that attempt, the Complaint is facially deficient.

3. Plaintiffs assert five causes of action, two for interference with contract (Counts I and II), one for violation of the New Hampshire Consumer Protection Act, RSA Ch. 358-A (Count III), and two for "negligence" (Counts IV and V). Counts I and II fail because Plaintiffs have not alleged that any action by PSNH caused a breach of those contracts or caused them to fail, or even that there was a loss of any contracts in Count II. Count III fails because RSA 358-A:3, I exempts from that Act trade or commerce that is subject to the jurisdiction of the Public Utilities Commission. *Rainville v. Lakes Region Water Company, Inc.*, 163 N.H. 271 (2012). Plaintiffs have conceded that this case involves issues of tariffs and regulations squarely within the PUC's jurisdiction. Counts IV and V fail because the only "duty" PSNH owes to Plaintiffs is established by Federal and State tariffs and regulations, and Plaintiffs have failed to allege any violation of those tariffs or regulations. The Complaint may therefore be dismissed without any further analysis.

4. Further analysis demonstrates, however, that the acts about which Plaintiffs complain do not support a cause of action. Plaintiffs identify ten acts of alleged wrongdoing by PSNH. See Appendix B to PSNH's Memorandum. A review of prior PUC dockets (in which Plaintiffs raised many of the same issues) and of publicly available documents shows that none of these alleged acts violated tariffs or PUC regulations and that PSNH's actions were, in fact, consistent with those tariffs and regulations.

5. The Complaint should also be dismissed as barred by the doctrine of *res judicata*. Plaintiffs filed a complaint against PSNH in the PUC raising many of the same issues they

complain of here and the PUC issued both a final order (Order No. 25,660) and an order on rehearing (Order No. 25,673) denying the relief that PNE sought in that docket (IR 13-233). Plaintiffs did not appeal. The cause of action in that docket is the same as that raised here, namely, PSNH's alleged failures relating to PNE's desire to transfer customers to FairPoint. Because Plaintiffs raised – or could have raised – all of the issues raised here in the PUC, they are barred from asserting them here, and this Court has no jurisdiction to hear this dispute. RSA 365:21 and RSA 541:22.

6. In the event and to the extent that this Court does not dismiss Plaintiffs' Complaint, PSNH submits that it should refer the matter to the PUC pursuant to the doctrine of primary jurisdiction. *N.H. Div. of Human Services v. Allard*, 138 N.H. 604, 607 (1994). Because every aspect of this dispute implicates Federal and State utility tariffs, PUC regulations, and a nascent competitive electricity market overseen by the PUC, the factual and policy issues involved here should, to the extent they remain undecided, be resolved at the PUC, which has special expertise in these areas. Absent such a referral, this Court will be put in the position of interpreting tariffs and regulations involving a situation of first impression namely, the default of a competitive electric supplier and the fall-out from that default.

7. This case results from the voluntary decision by PNE to default on its obligations under a Federal utility tariff and its attempt to then blame PSNH for the problems created by that business decision. Having failed to obtain relief from the PUC, Plaintiffs now seek a "do-over" in this Court. This Court should not entertain such an action. Accordingly, for the reasons set forth above and discussed at length in the attached Memorandum, the Complaint should be dismissed.

8. PSNH is filing a Memorandum of Law in support of this Motion.

9. PSNH requests oral argument on this Motion.

WHEREFORE, PSNH respectfully requests that the Court enter an Order:

- (A) Dismissing Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief may be granted and/or dismissing the Complaint as barred by the doctrine of *res judicata*;
- (B) Alternatively, dismissing this action until the issues addressed in the Complaint have been decided by the Public Utilities Commission; and
- (C) Granting such further relief as may be just, equitable and appropriate.

Respectfully submitted,

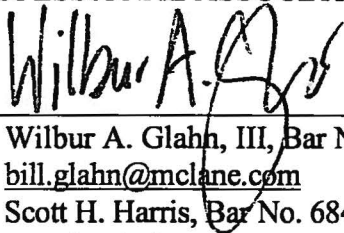
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d/b/a EVERSOURCE ENERGY

By its attorneys,

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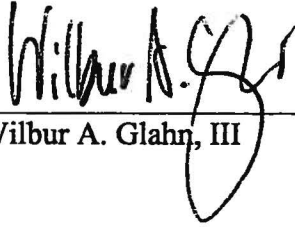
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CERTIFICATE OF SERVICE

I, hereby certify that on this 31st day of July, 2015, I served the foregoing Motion via electronic mail and first class mail to:

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PUBLIC SERVICE COMPANY
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This Memorandum supports the Motion of Defendant Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") to Dismiss the above-captioned Complaint of PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power") (collectively the "Plaintiffs") for failure to state a claim on which relief may be granted and as barred by *res judicata*. Alternatively, for any counts not so dismissed, PSNH requests that the Court defer to the primary jurisdiction of the Public Utilities Commission.

When all of the verbiage and histrionics in Plaintiffs' Complaint are sugared off, this case amounts to nothing more than an attempt to blame PSNH for the admittedly voluntary business decision by PNE to default on its obligations under a federal electric tariff governing its conduct in the regional electric marketplace and to further waive its right to cure that default. Based on the allegations of the Complaint alone, it is clear that if PNE had not made a business decision to

default on its obligations under the tariff, none of the subsequent acts about which Plaintiffs complain would have occurred.¹

I. Introduction

The matters set forth in the Complaint involve complex interactions in the nascent competitive electricity market encompassing multiple players governed by both federal and state tariffs, and pervasively regulated by the New Hampshire Public Utilities Commission (“PUC”) through duly implemented Rules (N.H. Admin Rules, Puc 2002)² and myriad administrative orders. The PUC has stated that the restructured competitive electricity market is composed of “a complex statutory scheme that has evolved significantly since the Legislature first undertook to restructure New Hampshire’s electric industry in 1996.” *In Re Pub. Serv. Co. of New Hampshire*, 88 N.H.P.U.C. 16 (Jan. 30, 2003). In regard to the very issues that form the basis for the Complaint, the Plaintiffs themselves have stated:

PNE emphatically opposes any transfer of this matter and these Supplier-Utility disputes, to the Superior Court. Certainly, the contractual issues – whether PSNH could withhold customers payments; whether PSNH “suspended” or “terminated” or, indeed, provided any appropriate notice of its actions, and the like - turn on the language of the Agreements and might, in some circumstances, be suitable to Superior Court review. But these “issues of contractual interpretation and common law” are central to the operating relationship between Competitive Electricity Suppliers, such as but not limited to PNE, and to carrying out the

¹ Throughout this memo, PSNH cites to documents on file with the PUC and to documents referenced by the Plaintiffs in their Complaint. This Court is entitled to take judicial notice of the decisions and dockets of administrative bodies and such notice has been allowed in a number of other cases. *See, e.g., New England Tel. & Tel. Co. v. State*, 95 N.H. 515, 517 (1949) (taking judicial notice of Public Service Commission’s report); *Lichoulas v. City of Lowell*, 555 F.3d 10, 13 (1st Cir. 2009) (upholding trial court’s decision to take judicial notice of FERC proceedings on a motion to dismiss). Moreover, where documents and actions are referenced in a complaint, use of those documents in a motion to dismiss does not convert the motion into a motion for summary judgment. *Gargano v. Liberty Intern. Underwriters, Inc.*, 572 F.3d 45, 47 n.1 (1st Cir. 2009) (“While we ordinarily do not consider materials that are outside the complaint when reviewing a motion to dismiss under Rule 12(b)(6), we make ‘narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.’” (quoting *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir.1993))).

² Cited throughout this memo as “Puc.”

mandate of RSA 374-F - matters not only with[in] the Commission's jurisdiction but matters warranting application of the Commission's particular expertise.³

Plaintiffs' Complaint involves matters that the PUC has adjudicated in numerous dockets, both on its own motion in exercise of its jurisdiction over the state's electricity market and in response to complaints and petitions filed by the Plaintiffs.⁴ Now, having failed to appeal, or to assert their claims here as part of their causes of action in the PUC, Plaintiffs seek to re-litigate these specialized issues concerning tariffs and PUC regulations in this Court.

The Complaint alleges that in early 2013, PNE, a "Competitive Energy Power Supplier" ("CEP"), registered with and regulated by the PUC operating in PSNH's franchised service territory, and Resident Power, an electric "aggregator" also registered with and regulated by the PUC, entered into a contract with FairPoint Energy, LLC ("FairPoint"), also a PUC-registered CEP, to sell substantially all retail electricity customers served by PNE to FairPoint (the "FairPoint Contract"). Comp. at ¶¶ 39 and 50. See also Puc 2002.02 and 2002.05. The focus of the Complaint is Plaintiffs' allegation that, contrary to the PUC's regulations and federal and state tariff requirements, PSNH first failed to facilitate, and then interfered with, the transfer of PNE's retail electric supply customers to FairPoint. Plaintiffs also contend that PSNH then prevented Resident Power from accomplishing that transfer after PNE defaulted and was barred from providing any services as a CEP under the federal and state regulatory schemes.⁵

³ PNE filing with the NHPUC dated October 15, 2013, in its complaint filed against PSNH, PUC Docket No. IR 13-233 at p.4 (Internal footnote omitted.) < <http://tinyurl.com/pm35uqz> >.

⁴ A list of these proceedings is attached hereto as "Appendix A."

⁵ Although PNE and Resident Power each sue PSNH, these are affiliated entities with identical ownership and addresses. August ("Gus") Fromuth owns (or owned at the time of the events in this Complaint) 99 percent of the membership interests in both LLCs, with the Deborah O. Fromuth Revocable Trust owning the remaining 1 percent. Thus, actions taken by either entity were under the *de facto* control of the other. While Plaintiffs conveniently omit these facts concerning ownership from the Complaint, there can be no dispute about this issue. Plaintiffs admitted this ownership in documents filed with the PUC in Dockets DE 13-059 and 13-060 at docket entries 39 and 38, respectively. See, e.g., <http://tinyurl.com/qcr9eqf>.

Plaintiffs concede that PSNH's role in this proposed transfer is entirely governed by applicable federal and State tariffs and assert five causes of action based on PSNH's alleged actions. These include: (1) tortious interference with the FairPoint Contract (Count I, ¶¶ 134-138); (2) tortious interference with the "aggregation" agreements between Resident Power and PNE's customers (Count II, ¶¶ 139-143); (3) violation of the New Hampshire Consumer Protection Act, RSA Ch. 358-A (Count III, ¶¶ 144-150); (4) negligent breach of a duty to Plaintiffs to act to facilitate the transfer (Count IV, ¶¶ 151-155); and (5) negligent breach of a duty to Plaintiffs to both facilitate the transfer and to expeditiously provide so-called "Default Service" by PSNH after PNE defaulted (Count V, ¶¶ 156-159).

Although Plaintiffs' 159-paragraph Complaint strives to complicate (and obfuscate) the facts surrounding this dispute, a review of Plaintiffs' causes of action demonstrates the failings of the Complaint, including the following:

- Plaintiffs allege interference with the FairPoint Contract (Count I) but nowhere does the Complaint allege that FairPoint failed to perform because of any action by PSNH. The best Plaintiffs can say is that "FairPoint ultimately backed out of the deal." *Id.* ¶ 112. But FairPoint may have "backed out" for any number of reasons, including Plaintiffs' own breach. Absent an allegation of causation there can be no claim for interference with contract.
- Plaintiffs' claimed interference with the FairPoint Contract (Count I) also fails because Plaintiffs studiously guarded the confidentiality of that agreement.⁶ Consequently, PSNH is alleged to have interfered with a contract it had never seen, and which Plaintiffs themselves expressly kept secret. Plaintiffs fail to identify some basic issues including, what terms were interfered with? The law requires more.
- Count II alleges interference by PSNH with principal-agent aggregation agreements between Resident Power and residential electricity customers. But Plaintiffs fail to allege that Resident Power lost a single aggregation customer or if it did, that the loss was caused by any wrongful action by PSNH. Moreover, they fail to identify any provision of the aggregation agreements that was interfered with by PSNH.

⁶ See "Motion for Confidential Treatment and Protective Order" filed by Plaintiffs with the NHPUC in Docket Nos. DE 13-059 and 13-060, dated March 12, 2013. < <http://tinyurl.com/q6bgvys> >.

- Likewise, Plaintiffs' claims are based on violation of an alleged duty to facilitate the transfer of customers from one CEPS to another, which Plaintiffs assert gives rise to a negligence claim (Counts IV and V). Plaintiffs concede that the relationship between PSNH and CEPs is comprehensively governed by tariffs, PUC regulations, and PUC orders (which would, therefore, be the source of any alleged duty). But Plaintiffs do not allege such a breach of any applicable tariff, regulation or order in any of the 159 paragraphs of the Complaint.⁷ Absent alleged violations of the governing tariff provisions or of PUC regulations, there is no duty and Counts IV and V fail.
- Plaintiffs allege a cause of action for breach of RSA Ch. 358-A (Count III). This claim fails because trade or commerce subject to the jurisdiction of the Public Utilities Commission (exclusive or discretionary) is expressly exempted from that Act. RSA 358-A:3, I. *Rainville v. Lakes Region Water Co., Inc.*, 163 N.H. 271, 275 (2012).

In support of these fatally defective claims, the Complaint asserts ten allegedly wrongful actions by PSNH. But these actions are either disposed of by publicly available documents or have already been litigated before and resolved by the PUC in a series of dockets, including at least two brought by the Plaintiffs. See Appendix A. Any remaining claims could have, and therefore must have, been asserted at the PUC. As a result, Plaintiffs' claims are barred by *res judicata*. Moreover, Plaintiffs' claims have no legal basis because they are contrary to the applicable tariffs, applicable PUC regulations, or because Plaintiffs have failed to allege any actionable conduct.

As explained in detail below, this Court should not entertain Plaintiffs' action. The Complaint fails to state a claim for which relief may be granted; alleges violations of statutes that do not apply; revisits legal and factual matters that were raised, or could have been raised, at the PUC, and seeks to have this Court address issues that involve complex, comprehensively regulated activities and policies within the jurisdiction of the PUC.

⁷ The introduction to the Complaint states that PSNH "breached these Tariff obligations and other provisions" but that is it. Comp. at 2. None of the 159 paragraphs refers to a specific breach, let alone identifying the provision of the Tariff that was breached.

II. Factual Background as Alleged in the Complaint

A. The Regulatory Framework Surrounding The Dispute

Plaintiffs allege that PSNH failed to act as an “impartial gatekeeper” in the transfer of PNE’s customers to FairPoint. Comp. Intro. at 2. The relationship between and conduct in the marketplace of CEPS, aggregators, and public utilities is governed by PUC regulations⁸ and PSNH’s Electric Delivery Service Tariff-NHPUC No. 8 (the “PUC Tariff”). (Excerpts from the PUC Tariff are attached as Exhibit 1.). As a result, it is necessary to understand the regulatory provisions applicable to that relationship and to PSNH’s duties, many of which are referenced in the Complaint.

As Plaintiffs point out, following deregulation of the electric utility industry in New Hampshire, entities like PNE were permitted to become “suppliers” of retail electric service. Comp. ¶¶ 11-17, 19-22. In this structure, CEPs such as PNE compete to provide retail electric service while the utilities continue to deliver that electricity. *Id.* ¶¶ 24-25. In addition, companies like Resident Power serve as “aggregators.” *Id.* ¶¶ 39-40. Aggregators act as agents for customers serviced by suppliers, gathering those customers under agreements akin to powers-of-attorney by which they have a fiduciary duty to place the customers with suppliers (CEPs) of the aggregator’s choice. *Id.*

The wholesale marketplace for electric generation and transmission in New England is administered by the Independent System Operator – New England or “ISO-NE.” ISO-NE is the New England Power Pool or “NEPOOL” operating center that “centrally dispatches the electric generating and transmission facilities owned or controlled by NEPOOL participants.” See PUC

⁸ The PUC has promulgated comprehensive regulations governing relationship between and conduct in the marketplace of CEPS, aggregators, and public utilities in Puc 2000, “Competitive Electric Power Supplier and Aggregator Rules.”

Tariff at 8 (defining ISO-NE and NEPOOL); Comp. ¶18. ISO-NE regulates entities within its jurisdiction (including any of the activities of CEPs in the wholesale electric markets) in accordance with the ISO-NE Tariff (the “ISO Tariff”) which is subject to review and approval by the Federal Energy Regulatory Commission pursuant to its authority under the Federal Power Act, as amended. *See* 16 USC §791a, *et seq.* *See* ISO Tariff at 20. (Excerpts from the ISO Tariff are attached as Exhibit 2.) The ISO Tariff sets out conditions for “market participants,” defined as those entities who execute a “Market Participant Service Agreement.” *Id.* at 58. PNE executed such an agreement.

Two provisions of the ISO Tariff are directly relevant to this Complaint. First, ISO-NE requires that all market participants, including CEPs, maintain minimum financial security requirements to ensure that they have sufficient funds to pay for electricity purchased from the wholesale marketplace for their customers. Comp. ¶ 48; Exhibit 2 at 135. This becomes important when a CEP like PNE enters into long term contracts with customers to sell power at a fixed price, but speculates on power purchases to meet that supply. Comp. ¶¶ 59-61. Second, the ISO Tariff provides that a market participant that fails to meet financial security requirements and thus “defaults” with ISO-NE will be “suspended from participation in NEPOOL” (Comp. ¶ 48) and “shall have no ability so long as it is suspended ... 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.” Exhibit 2 at 140. A default under the ISO-NE Tariff therefore puts a CEP out of the electric supply business.

At the state level, the PUC has jurisdiction over various activities of CEPs and aggregators in the retail marketplace. For a CEP to be able to operate in New Hampshire it must be approved by the PUC and be able to obtain electricity supply in the New England wholesale

energy market. Puc 2003.01(d)(2). The PUC Tariff provides obligations and duties for a CEP by setting forth “Terms and Conditions for Energy Service Providers.” PUC Tariff at 31. A CEP is required to be members of NEPOOL eligible to take responsibility for its customers’ electric load obligations and to meet all of the registration and licensing requirements imposed by the PUC. *Id.* Thus, just as a default under the ISO Tariff’s financial security requirements results in suspension from NEPOOL, it also prevents a CEP from supplying energy or engaging in any transactions governed by the PUC. In the event of a default in the wholesale marketplace, the PUC Tariff requires that the CEP promptly notify PSNH so that PSNH can take the CEP’s customer onto its “Default Service,” and requires a CEP to “undertake best efforts to recommit with its obligations under this Tariff and the Commission’s rules in a timely manner.”⁹ *Id.* at 32; Comp. ¶49.

PNE concedes that its business relationship with PSNH is governed by the terms of the PUC Tariff. Comp. Intro. at 2. In June 2013, PNE filed a complaint with the PUC under RSA 365:1¹⁰ and Puc Part 204¹¹ concerning charges levied by PSNH (a matter it complains of here). PNE’s PUC complaint, docketed by the PUC as IR 13-233, stated as follows:

4. PSNH’s business relationship with PNE (and, importantly, other suppliers) is controlled by the PSNH Electricity Delivery Service Tariff-NHPUC No. 8 . . . authorized by the Commission on June 28, 2010. The Tariff includes “Terms and Conditions for Energy Service Providers” . . . which govern the services PSNH provides to suppliers, the charges PSNH is permitted to assess PNE and other suppliers for those services, and the manner in which PSNH may assess suppliers for the services.

⁹ “Default service” is defined in RSA 374-F:2, I-a, and is a retail electric service regulated by the PUC.

¹⁰ RSA 365:1, Complaint Against Public Utilities. – Any person may make complaint to the commission by petition setting forth in writing any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission.

¹¹ Part Puc 204, “Complaints Against Public Utilities,” sets forth a comprehensive administrative procedure concerning complaints against entities over which the PUC has jurisdiction.

See PNE Complaint in Docket No. IR 13-233, attached hereto as Exhibit 3.

The Complaint in this case also concedes that *this dispute* is governed by the PUC Tariff. Comp. ¶¶ 26, 30-32, 35-38, 49, and 98. More specifically, Plaintiffs allege that when a CEP wishes to transfer responsibility for providing power to a customer to another supplier, it communicates with PSNH through a computer network called the Electronic Data Interchange or “EDI.”¹² Comp. ¶¶ 27-28. When PSNH receives a request from a prospective supplier in the EDI system, the EDI system sends notice of the successful enrollment to that supplier and notice to the old supplier that the customer has been dropped. *Id.* ¶ 29. Absent an extraordinary event, each of these events, the processing of the EDI, the notice to the new and old suppliers, and the change in the customer’s service, occur automatically and generally without any manual involvement other than the monthly reading of each affected customer’s electric meter.

The PUC Tariff provides that the actual change in service “shall commence upon the next meter reading date for the Customer” provided that the enrollment notice is received at least two days before the next scheduled meter read. PUC Tariff at 11, 36; Comp. ¶ 31. The reason for the transfer becoming effective only at the meter read date is to ensure accurate billing of retail charges to customers by each supplier and to apportion responsibility for obtaining the customer’s electricity from ISO-NE’s wholesale marketplace. Of import to this case, the PUC Tariff also provides that “[i]f the Company [PSNH] receives more than one Electronic Enrollment for the same Customer for the same enrollment period [i.e. each month due to billing], the first successfully processed Electronic Enrollment shall be accepted. All subsequent Electronic Enrollments received during that enrollment period shall be rejected.” PUC Tariff at

¹² The EDI was established and is regulated by the PUC. See PUC Order No. 22,919 at 83 NHPUC 277 (1998).

36; Comp. ¶ 32. Finally, in the event that a customer is not receiving service from a CEP for any reason, the PUC Tariff requires that PSNH “arrange default service.” Comp. ¶ 36.

B. The PNE/Resident Power-FairPoint Transaction

The Complaint arises out of Plaintiffs’ confidential FairPoint Contract, which was not publically disclosed to PSNH (in any form), until after the events underlying the Complaint.¹³ According to the Plaintiffs, they began discussions in late 2012 about selling all of PNE’s customers to FairPoint and executed the FairPoint Contract on February 6, 2013. Comp. ¶ 51. The Complaint alleges that Resident Power’s aggregation agreements would terminate when the customers were transferred. *Id.* ¶ 51.

Plaintiffs concede that because of volatility in the energy markets in late 2012 and early 2013, PNE was having difficulty meeting its financial security requirements with ISO-NE. *Id.* ¶ 53.¹⁴ PUC regulations require that before any non-customer initiated transfer of customers is made, the current supplier must provide notice of the proposed change 14 days prior to the effective date of the change so that the customer has the option of selecting a different supplier within a 30 day period. Puc 2004.05 (k); Comp. ¶ 54. In order to speed up the process (and apparently alleviate PNE’s financial security issues), PNE and FairPoint filed a Joint Motion for Expedited Waiver of the 14-day requirement with the PUC. Comp. ¶ 54.

That Motion was filed on February 7, 2013 (one day after the Closing Date of the FairPoint Contract) and resulted in the opening of a new Docket No. DE 13-049 with the PUC.

¹³ Plaintiffs filed a completely redacted copy of the FairPoint Contract with the PUC in Docket Nos. DE 13-059 and 13-060 on March 12, 2013. Plaintiffs subsequently filed another version of that contract with only the financial terms redacted on April 9, 2013 – long after the events complained of allegedly occurred.

¹⁴ Although the Complaint does not explicitly so state, a fair inference is that in order to avoid continuing obligations to purchase power at a high (or volatile price) PNE sought to divest itself of its customers as soon as possible. *Id.* ¶¶ 53-54. PNE has conceded elsewhere at the PUC that the default with ISO was a “financially related suspension.” See Staff Memo in PUC Dockets DE 13-059 at 13-060 at 3, footnote 4. The Memo is referenced below and attached hereto as Exhibit 4.

In the Joint Motion, Plaintiffs stated that if the waiver was granted by the PUC “every customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served,” that “[n]o special off-cycle meter read dates will be necessary as a result of this transfer,” and that “[t]here will be no risk or detriment to PSNH as a result of this transfer or requested waiver.” *See* Joint Petition in Docket DE 13-049 attached hereto as Exhibit 5.

One day later, on February 8, 2013, the PUC granted the request. *See* PUC letter to Harry Malone, Esq. of Devine, Millimet & Branch dated February 8, 2013 in Docket No. DE 13-049 attached as Exhibit 6. Although the PUC granted the proposed waiver, it also informed PNE and FairPoint that “the Commission directed Staff to commence an investigation into PNE’s CEPs authorization and the circumstances that necessitated the requested waiver.” *Id.* at 2.

Subsequently, FairPoint submitted EDI enrollments to effect the transfer of approximately 8,000 PNE customers to it from PNE. Comp. ¶¶ 56-57. Then, on February 12, 2013, four days after the PUC had granted the notice waiver, PNE’s counsel called PSNH’s Associate General Counsel to ask if PSNH could vary from the ordinary course of business as set out in the PUC Tariff and transfer all of the accounts to FairPoint immediately, without waiting for a meter reading. *Id.* ¶ 66. PNE concedes that this request was made “in order to avoid an ISO-NE default and a scenario where its customers would be placed on PSNH’s Default Service.” *Id.* ¶ 55.¹⁵ PNE alleges that PSNH had the “authority to perform these transfers,” which required manually entering detailed information for approximately 8,000 customers. *Id.* ¶ 68.

¹⁵ PNE alleges that it requested PSNH to make this immediate transfer in order to avoid defaulting in its security requirements with ISO-NE. *See* Comp. ¶ 65. Later, it contends that PSNH “was communicating with” PUC Staff regarding PNE’s “impending ISO-NE default,” but the discussion cited says nothing about an “impending ISO-NE default.” *Id.* ¶ 70.

On February 14th PSNH informed PNE that it did not have the personnel to perform the immediate transfer. *Id.* Later that same day, PNE (citing to a PUC rule that the PUC staff opined was inapplicable to this situation) formally requested PSNH to perform off-cycle meter readings of its approximate 8,000 customers. That request was overtaken by events, as PNE chose to default on its financial security obligations under the ISO Tariff that same day – within minutes of making that request.

Eighty-three minutes after PNE's written request, ISO-NE informed PSNH that PNE "was suspended from market participation and *had waived its right to cure the default.*" *Id.* ¶ 71 (emphasis added). PNE concedes that this default was a voluntary business decision. See Staff Memo in Dockets DE 13-059 and 13-060, Exhibit 4 at 4, 5, 8 and Exhibit 2. Plaintiffs assert that ISO-NE "originally requested that PSNH assume responsibility for PNE's load as soon as possible," and that had PSNH done so, they would have been relieved from "continuing to replenish" PNE's security account. They also allege that PSNH negotiated a later date with ISO-NE to harm them. *Id.* ¶¶ 72-73, 146(c), 158(c). In reality, the federal ISO-NE Tariff controls how quickly the host utility (in this case PSNH) must act to take on responsibility for a defaulting supplier's customers, and PSNH in fact complied with that ISO-NE Tariff, which required that PSNH act by 12:01 a.m. on February 20th.

On February 20, 2013, PSNH deleted the pending EDI enrollments submitted by FairPoint for the PNE customers in order to place the customers on PSNH's default service in compliance with the ISO-NE directive and the PUC Tariff.¹⁶ Comp. ¶ 79. At that point, in order to transfer the former PNE customers to FairPoint from PSNH's default service, FairPoint would have had to submit new electronic enrollment forms. *Id.* ¶ 81. However, due to the transfer to

¹⁶ "In the event the Supplier is unable or unwilling to re-satisfy its obligations, the Company may transfer the Suppliers' Customers to service under Default Service after notification to the Commission." PUC Tariff at ¶32.

its Default Service and the PUC Tariff's prohibition on more than one supplier in a month, PSNH concluded that any such submission by FairPoint could not be accepted until after each customer's next monthly meter read date. Comp. ¶ 89. The Plaintiffs concede that PSNH's interpretations were "consistent with the [PUC] Tariff, which restricted PSNH from accepting 'more than one Supplier for a Customer during any particular monthly billing cycle.'" *Id.* ¶ 91. But they nevertheless complain about PSNH's action, ignoring the preemptive effect of their own voluntary default in the wholesale marketplace, and that default's resulting requirement that PSNH take responsibility for PNE's customers per the ISO Tariff and place them onto PSNH's default energy service per the PUC Tariff. Plaintiffs instead contend that PSNH "thwarted the eventual transfer of PNE's remaining customers to FairPoint." *Id.* ¹⁷

Following PNE's default, Resident Power's attorneys communicated with the PUC Staff concerning notices PNE and Resident Power intended to send to "their customers" regarding the transfer. *Id.* ¶¶ 92-93. According to the Complaint, the PUC Staff contended that if Resident Power attempted to transfer the customers from PSNH's Default Service to FairPoint without the customer's express approval, this might constitute "slamming." *Id.* ¶¶ 93, 108.¹⁸ Resident Power also complains that PSNH caused the PUC to question whether it remained an aggregator for these customers after PNE's default. *Id.* ¶¶ 100-104. Although alleging that it "did not intend to cancel its aggregation agreements" (*id.* ¶ 101), Resident Power concedes that the FairPoint Contract provided that those agreements "would be terminated as of the transfer of each such

¹⁷ This ignores that fact that by operation of the ISO Tariff, once PNE defaulted it had no remaining customers to transfer and also the fact that the Complaint is completely devoid of any allegation that FairPoint ever asked PSNH to transfer customers to it at a date outside the monthly billing cycle. Plaintiffs apparently sat on any alleged right to transfer the customers in question and never in fact re-initiated those transfers for the billing period after PNE's voluntary default.

¹⁸ Puc 2004.10(b) defines "slamming" as "initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization." *See also* RSA 374:28-a.

customer account” (*id.* ¶ 51) and that the notice sent to PNE’s customers before PNE’s default stated that “Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition.” *Id.* ¶ 55.¹⁹

Allegedly because of the confusion over whether Resident Power remained the aggregator or whether a transfer without customer authorization would be slamming, Resident Power filed a Petition for Declaratory Judgment with the PUC addressing these issues. *Id.* ¶ 107. Plaintiffs concede that the PUC Staff “ultimately cast blame on them for this market confusion,” but still contend that PSNH was responsible for it, alleging that the confusion around FairPoint’s attempt to re-enroll PNE’s former customers “disrupted the entire PNE/FairPoint” transaction and that “FairPoint *ultimately* backed out of the deal.” *Id.* ¶¶ 112, 115.

Plaintiffs also assert that following PNE’s default, PSNH engaged in a campaign in the media and in the PUC to disparage and discredit them. *Id.* ¶¶ 83-89; 102-111; 115-126. Supposedly as a result of this campaign, the PUC opened “show cause” proceedings in which it asserted that “PNE and Resident Power acted recklessly and deceptively in connection with the transfer of PNE customer accounts to FairPoint and PNE’s financial default with ISO-NE.” *Id.* ¶ 122. The show-cause proceedings, initiated by the PUC on its own motion, became Docket Nos. DE 13-059 (Resident Power) and DE 13-060 (PNE).²⁰

Finally, the Plaintiffs complain that PSNH withheld monies due them during the period following PNE’s default. *Id.* ¶¶ 94-95.

¹⁹ In fact, the FairPoint Contract does not state what the Complaint alleges. The Contract reads, “All such Customer Aggregation Agreements shall be terminated *as of the Closing Date* for each such Customer,” with the Closing Date defined as February 6, 2013. *Supra*, pp. 10-11 (emphasis added).

²⁰ While Plaintiffs contend that the show cause Dockets “ultimately vindicated Plaintiffs’ position that PSNH (not Plaintiffs) was responsible for any harm or confusion that permeated the marketplace” on many of the same issues they now raise in the Complaint, this contention is contrary to the Commission’s decision in the show-cause dockets. *Id.* ¶ 124 (emphasis in original). As Plaintiffs concede, the Docket was settled between them and the PUC with an agreement on the establishment of an escrow fund and reparation payments to all former PNE customers. *Id.* ¶ 126.

Plaintiffs seek damages for PSNH's alleged actions, including: the entire amount of the FairPoint contract as well as for expenses (of an unknown kind) for their efforts to "salvage the FairPoint deal;" the payments it made to former customers under their settlement at the PUC to compensate them for the difference between the PNE rate and the Default Service Rate²¹ (as well as PNE's "labor and expense" to contact former customers in order to make those payments); and for attorneys' fees for the show cause proceeding initiated by the PUC and the action brought by PNE to recover withheld fees.

Despite the complexity of their Complaint, the alleged wrongful conduct said to give rise to the five causes of action asserted by Plaintiffs amounts to ten alleged wrongful acts on the part of PSNH. Comp. ¶¶ 137, 142, 146, 153 and 158. For ease of reference for the Court, these acts are described in Appendix B to this memo (with reference to the cause of action they are said to support) and are discussed in detail in Part III.B below. None of these allegedly wrongful acts states a legally cognizable claim.

III. Plaintiffs' Factual Allegations Fail to State a Claim Both on Their Face and When Considered Against Public Documents, PUC Proceedings and Documents Referenced in the Complaint

Preliminarily, it is useful to consider two points. First, based on the allegations in the Complaint, it is clear that if PNE had not voluntarily defaulted on its obligations to ISO-NE and further expressly waived its right to cure that default, the transfer of customers under the FairPoint Contract would have been completed as "routine." Comp. ¶ 34. Second, if Resident Power or FairPoint had authority post-default to transfer the customers, a resubmission of EDI

²¹ Notably, these payments were made pursuant to a settlement agreement negotiated between PNE and the PUC Staff and voluntarily entered into by PNE. That agreement was approved by the PUC in Docket No. DE 13-060, a docket where PSNH did not participate except to provide "public comment." Accordingly, PNE is asking that PSNH pay for expenses it negotiated and voluntarily incurred to resolve the PUC's "show-cause" proceedings by entering into a settlement.

enrollments at a time consistent with the PUC Tariff could have implemented the transfers notwithstanding PNE's voluntary default. The simple truth is this: PNE made a business decision not to take the market risk of continuing to supply its customers and instead knowingly off-loaded that risk to PSNH. Likewise, after the PUC decided not to grant Resident Power's request for clarification via a declaratory ruling petition, Resident Power decided not to take the risk of going forward by having the transfers of customers resubmitted into the EDI system. As a result, neither PNE nor Resident Power took any steps to mitigate their alleged damages caused by PNE's voluntary default.

PSNH recognizes that all plausible allegations pled in the Complaint must be taken as true for purposes of this Motion. *McNamara v. Hersh*, 157 N.H. 72,74 (2008); *K & B Rock Crushing v. Town of Auburn*, 153 N.H. 566, 568, (2006). Yet even under that standard the Complaint is defective. Plaintiffs have not pled sufficient facts to make out a claim. See Part III.A below. And even if Plaintiffs had met the facial pleading standard as to their causes of action, when matters of public record and documents fairly referenced in the Complaint are considered the Plaintiffs' factual allegations cannot be sustained as a matter of law. See Part III.B below.

A. Based on the Allegations in the Complaint, It is Facially Deficient. Each of Plaintiffs' Five Causes of Action Fails to State a Claim on Which Relief May Be Granted.

1. Plaintiffs Fail to State a Cause of Action for Tortious Interference with Contract.

Counts I and II of the Complaint purport to state claims for interference with the FairPoint Contract and Resident Power's aggregation agreements. Both counts omit an essential allegation, namely, that FairPoint (in the case of the FairPoint Contract), or Resident Power's

customers (in the case of the aggregation agreements) failed to perform or terminated the contracts because of any action by PSNH.

“To establish liability for intentional interference with contractual relations, a plaintiff must show: (1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference.” *Tessier v. Rockefeller*, 162 N.H. 324, 337 (2011) (internal quotations omitted). A plaintiff must therefore demonstrate that “the damages claimed were proximately caused by that interference.” *Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 539 (1994) (where party breaching the contract had a right to do so, plaintiff could not show interference). *See also White v. Ransmeier & Spellman*, 950 F. Supp. 39, 41 (D.N.H. 1996) (defendant’s counterclaim did not state a claim for interference with contractual relations where it “failed to allege any facts demonstrating that the plaintiff’s conduct caused [its] clients or employees not to perform their contractual obligations to [defendant], or that the plaintiff’s conduct caused [defendant] not to perform its contractual obligations to third parties.”)

Counts I and II fail in two respects. First, as shown below in Part III.B, Plaintiffs have alleged no “improper” interference in either count because they do not allege any duty on the part of PSNH to perform “off-cycle meter reads,” any duty to vary from the terms of the PUC Tariff, any violation of the applicable tariffs in deletion of the electronic enrollments, or that any statements made to the PUC were false. Second, and fatal to their claims, Plaintiffs fail to allege causation. They do not claim that FairPoint failed to perform because of something PSNH did. The most Plaintiffs can say is that “FairPoint ultimately backed out of the deal.” Comp. ¶ 112. But they do not allege why that happened, when it happened, or any connection between

FairPoint “backing out” and PSNH’s actions. Similarly, they fail to allege that any Resident Power customer withdrew from an aggregation agreement, let alone that it did so due to an action by PSNH.

Absent an allegation of why FairPoint “backed out,” there are any number of reasons it might have done so, all of which require speculation by PSNH and the Court.²² For example, FairPoint may have backed out because of PNE’s default with ISO-NE. In particular, Section 7(c) of the FairPoint Contract requires that PNE “will supply electricity” to each customer until FairPoint begins providing electricity to that customer. (The Contract is attached as Exhibit 7).²³ PNE’s ISO-NE default and suspension was thus a breach of the FairPoint Contract, as that default precluded PNE from supplying electricity to customers under both the ISO-NE Tariff, the PUC Tariff, and the PUC’s regulations. Moreover, pursuant to Section 8(a)(xi) of the Contract, PNE represented that it had complied, and until FairPoint began serving customers “will continue to comply, in all material respects with federal, state, and local laws, rules and regulations applicable to the Customer Accounts.” By its default, PNE was prohibited from servicing the customers at all.

Furthermore, the FairPoint Contract provides that all PNE aggregation agreements “shall be terminated as of the [February 6, 2013] Closing Date for each such Customer.” Exhibit 7, ¶ 2(b). Thus, the aggregation agreements PSNH supposedly interfered with *had already*

²² And, PSNH had no knowledge of what the relationship was between Plaintiffs and FairPoint. As noted earlier, Plaintiffs sought, and obtained, confidential treatment of that contract from the PUC. It was not until two months after the events in question that Plaintiffs released a partially redacted version of the Contract – too late to support a claim of liability for intentional interference therewith.

²³ Because the FairPoint Contract is referenced in the Complaint, the terms of that Contract may be cited without converting this motion to one for summary judgment. PSNH cites it here not to demonstrate why FairPoint “backed out,” since PSNH does not know why that occurred and Plaintiffs do not say. But the Contract demonstrates why an allegation of causation is required, particularly in this case.

terminated long before any knowledge of the FairPoint Contract by PSNH, and nearly a week before any contact by Plaintiffs to PSNH and any action by PSNH.

In sum, absent allegations of improper interference or of causation, Counts I and II should be dismissed in their entirety.

2. Plaintiffs Have No Claim Under RSA Chapter 358-A. The Act Specifically Exempts Trade or Commerce Subject to the Jurisdiction of the Public Utilities Commission.

Count III of the Complaint alleges a series of acts said to violate the Consumer Protection Act, RSA Ch. 358-A. These claims are specifically exempted from the Act pursuant to RSA 358-A:3, I, which exempts trade or commerce subject to the jurisdiction of the PUC.

In *Rainville v. Lakes Region Water Company, Inc.*, 163 N.H. 271 (2012), the Supreme Court considered the scope of the exemption in RSA 358-A:3, I as it applies to the jurisdiction of the PUC. The appellant contended that the Act exempted only those matters within the PUC's exclusive, as opposed to discretionary jurisdiction. The Court disagreed, finding that although not defined in the Act, the plain meaning of "jurisdiction" was "the legal power, right or authority to hear and determine a cause." *Id.* at 275. Noting that the PUC had authority to initiate dockets when it believed a utility had "declined or unreasonably failed to render service" and that individuals could file petitions under RSA 365:1 to challenge any action of a public utility (see footnote 10 above), the Court concluded that the Act broadly exempts claims falling within the general authority of the PUC (in *Rainville*, alleged misrepresentations concerning the safety of water).

By Plaintiffs' own admission, their claims in this case are similarly exempt. Plaintiffs concede that the relationship between them and PSNH is governed by tariff provisions and regulations adopted by the PUC and ISO-NE. Comp. Introduction at 1-2. See also, page 2

above. And as shown in Part III.B below, the claims raised here have in fact already been or could have been raised before the PUC. Count III therefore fails to state a claim and should be dismissed.

3. Plaintiffs' "Negligence" Claims Fail to State a Claim. Plaintiffs Complain About a Duty Governed by Applicable Tariffs But Fail to Allege a Violation of any Tariff Provisions.

Counts IV and V of the Complaint fail for reasons similar to Counts I and II. Although styling these Counts as negligence claims, the alleged duty identified in the Counts is one for PSNH to act as a "neutral, agnostic gatekeeper between PNE and Resident Power and their customers." Comp. ¶¶ 152 and 157. Plaintiffs concede that this duty derives entirely from the PUC Tariff. *Id.*, Introduction at 2. Plaintiffs' "negligence" claims are therefore nothing more than a claim that PSNH breached the Tariff, which is akin to a contract claim. *J Dunn and Sons, Inc. v. Paragon Homes of New England, Inc.*, 110 N.H. 215, 217 (1970) (court will look to the substance of an action when determining whether it is a tort or contract claim). By classifying their claims in "negligence," Plaintiffs invite the Court to apply standards that vary from those expressed in the applicable tariffs, both those approved under federal law and by the PUC.²⁴

Yet despite the fact that the alleged duty must be based on the PUC Tariff, the Complaint is facially defective because Plaintiffs have failed to allege that any PSNH's actions violated the Tariff. Absent such an allegation there is no duty, and no cause of action. Counts IV and V should therefore be dismissed.

²⁴ *Guglielmo v. WorldCom, Inc.*, 148 N.H. 309, 313 (2002) ("The filed tariff is 'the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff.' *AT&T v. Central Office Telephone*, 524 U.S. at 230, 118 S.Ct. 1956 (Rehnquist, C.J., concurring). 'The rights and liabilities as defined by the tariff cannot be varied or enlarged by either contract or tort of the common carrier.' *Id.* at 227, 118 S.Ct. 1956 (quotation omitted).")

B. None of the Wrongful Acts Set Out in Plaintiffs' Causes of Action Supports A Cognizable Claim.

Apart from the facial deficiencies of the Complaint, none of the specific acts alleged to support Plaintiffs causes of action (as identified in Appendix B) states a viable claim. These acts fail either because Plaintiffs do not even allege a duty under applicable Tariffs (or any other duty), because public documents or documents referenced in the Complaint prove that PSNH's actions were not wrongful, or because the issues have been raised and decided in the PUC or could have been raised there, and are thus barred.

1. Alleged Refusal to Perform a "One-time Off-Cycle Transfer" of PNE's Customer Accounts to FairPoint.

This claim can be dismissed on the face of the Complaint. Despite conceding that the relationship between PSNH and PNE is based on provisions of the PUC Tariff and PUC regulations, Plaintiffs fail to allege any such provision that required PSNH to accommodate this request by PNE. This is so for good reason; there are none. Like many other contentions in their Complaint, Plaintiffs tell half the story. They omit to point out that the one-time off-cycle transfer requested is contrary to the terms of the PUC Tariff. PSNH's duty was to comply with that tariff, not to vary therefrom.

Plaintiffs allege that on February 12, 2013, their counsel called PSNH counsel to "discuss the feasibility of transferring all of PNE's customer accounts to FairPoint immediately" and that two days later, PSNH declined to do so. ¶¶ 65-68.²⁵ The actual request to make a special "off-cycle meter read" of the approximate 8,000 customer meters was made by an email and letter to

²⁵ Plaintiffs neglect to point out that when they sought permission from the PUC to make the FairPoint transfer without 14-day notice to their customers, they did so on the express representation that "[n]o special off-cycle meter read dates will be necessary as a result of this transfer." See Joint Petition re Waiver, Exhibit 5 at 2, ¶ 9. PNE further informed the PUC that: "There will be no risk or detriment to PSNH as a result of this transfer or requested waiver." *Id.* at 2 ¶ 11. Thus, PNE asked PSNH to make assist in a transfer in direct contravention to representations they had made to the PUC, and upon which their waiver request was granted.

PSNH's counsel Robert Bersak at 3:11 p.m. on February 14, 2013. (The email and attached letter are attached hereto as Exhibit 8.) PNE relied on Puc 2004.07, which provides that a CEP 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 as described ... above is not given."²⁶ Thus, assuming the rule applied, and even if PNE had not defaulted, PSNH had no obligation to perform the off-cycle read and absolute discretion to refuse to do so without five days prior notice.

But at 4:38 p.m. (83 minutes after PNE had made the request for the 8,000 off-cycle meter readings), ISO-NE notified PSNH that PNE had defaulted and that PNE was no longer able to participate in the wholesale marketplace. The notice required PSNH to take responsibility for serving the electric load of PNE's customers. See ISO-NE email to PSNH's parent Northeast Utilities²⁷ attached at Exhibit 9. At that point, the request for 8,000 special meter readings in order to make a transfer of customers from PNE to FairPoint was moot and PNE, as a suspended supplier, had no rights whatsoever with respect to its former customers. See ISO-NE Tariff at 140. Clearly, a notice requesting PSNH to conduct nearly 8,000 manual, off-cycle meter reads given 83 minutes before PNE defaulted did not comply with PUC rules.

There can be no dispute about the impact of PNE's default; the matter has been conclusively resolved by PUC Order No. 25,660 dated May 1, 2014, issued in PUC Docket No. IR 13-233. That docket was initiated by PNE itself to challenge the fees imposed by PSNH and which are also, improperly, the subject of the Complaint. In that Order, the PUC stated as follows:

²⁶ In fact, the letter contains an erroneous reference to Puc 2007.04. No such regulation exists. The context makes clear that the intended reference was Puc 2004.07(b).

²⁷ Northeast Utilities is now Eversource Energy.

The PSNH Tariff does not contemplate the circumstances of this case where the customers of a suspended supplier were switched through a process involving ISO-NE. The ISO-NE Tariff, however, does address such circumstances: “Any load asset registered to a suspended Market Participant [PNE] shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned” to another entity such as the distribution utility. Ex. 2 at 143. When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE’s load similar to an agency relationship in the very limited sense discussed here.

Order No. 25,660 at 7. (The Order is attached as Exhibit 10). Although it was entitled to appeal this Order under RSA 365:21 and RSA Ch. 541, PNE failed to do so and is barred by *res judicata* and RSA 541:22 from challenging it in this Court.

The “conduct that caused [PNE’s] suspension” was also clear to the PUC when Order 25,660 was issued. In Docket Nos. DE 13-059 and DE 13-060 (the “show cause” dockets about which Plaintiffs complain in the Complaint), PUC Staff noted that on February 19, 2013, the President of PNE filed an affidavit with the PUC “advising the Commission that it would be voluntarily ceasing operations as a CEPS.” See Exhibit 4 at 3.²⁸ The ISO-NE notice of default also points out that PNE had been suspended immediately on February 14th and that PNE had “waived their possibility to cure.” *Id.*

²⁸ On February 24, 2013, Resident Power sent a notice to PNE’s former customers stating (among other things) that: “Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (FairPoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire’s only locally owned and operated electricity supplier in the next few weeks.” See Notice attached as Exhibit 11. Likewise, on February 21, 2013, PNE sent a notice to its customers stating: “You may have read or heard in the media that PNE [Power New England] has been ‘unplugged’ from the ISO-NE’s power grid. That is true, but it was voluntary and is only temporary. It suffered from cash flow issues, stemming from record market volatility. It found a buyer for its residential customer book but will remain a supplier to its commercial and industrial customers.” See Notice attached as Exhibit 12. Any doubt that PNE’s default was a business decision is belied by these Notices.

In sum, the PUC has already decided that upon PNE's default with ISO-NE, its customers were "automatically assigned" to PSNH and that PNE knew that the ISO-NE Tariff required that result. Even putting aside the fact that PNE does not – and cannot – argue that PSNH had any duty to make the off-cycle meter readings, any such readings were made irrelevant by PNE's own voluntary default with ISO-NE and its suspension as a CEP. Accordingly, this claim, as set out in Paragraphs 137(a), 146(a) and 158(a) of the Complaint, should be dismissed.

2. Alleged Failure to inform PNE and Resident Power that PSNH could have transferred 90% of their customer accounts on an automated basis.

This claim suffers from the same fatal defect as item 1 above namely, nowhere in the Complaint is there an allegation that PSNH had any duty to inform PNE that it could take its customers onto its default service immediately. Once again, there is good reason for this admission – there is no such duty.²⁹

Plaintiffs fail to identify any request made by them to transfer their customers (90% or otherwise) to PSNH's default service. The only allegation in the Complaint concerning this issue is that when PNE made the initial request to make the "off-cycle meter reading," PSNH "failed to inform PNE ... that it could have quickly transferred approximately 90% of PNE's customer accounts to Default Service." Comp. ¶ 73. This is a bizarre allegation and claim. The entire thrust of Plaintiffs' Complaint is that PSNH should have transferred the accounts to FairPoint, not to its Default Service. Plaintiffs' claim therefore amounts to an assertion that PSNH should have told Plaintiffs that it could make a transfer (to PSNH default service) that the Plaintiffs didn't want PSNH to make (they wanted customers transferred to FairPoint).

²⁹ Moreover, as PSNH informed the PUC in the show-cause proceedings, it had no such ability to immediately transfer the customers as alleged by Plaintiffs.

As pled, the claim suggests that PSNH should have taken affirmative steps to inform PNE that it could take PNE's customers onto its default service (even if it had no duty to do so) in order to alleviate PNE's financial situation. PNE therefore blames PSNH for its default. But as discussed in Part III.B.1, this contention was resolved by Order No. 25,660 where the PUC found that it was PNE's own conduct, not the conduct of PSNH, that resulted in the transfer of its customers to default service. That Order concluded that "PNE knew that its suspension would result in the automatic assignment of its customers." Exhibit 10 at 7. Moreover, PNE admitted this point in its pleadings in that Docket. There, PNE stated: "PNE knew that its suspension by ISO-NE would result in the lapse of its customers to PSNH default service." See Motion for Rehearing of Order No. 25,660 at 6 (attached as Exhibit 13). PNE's complaint is thus that PSNH failed to tell it what it already knew. This claim, as set out in Paragraphs 146(b) and 158(b) of the Complaint, should therefore be dismissed.

3. Alleged Negotiation of a later date with ISO-NE to assume PNE's remaining load asset on February 20, 2013 rather than on an earlier date as originally required by ISO-NE.

This claim suggests that PSNH knew that PNE was planning to default and that PSNH had discussions with ISO-NE (either before or after that default) about extending the date on which it was to take PNE's customers into its default service. Comp. ¶ 74.³⁰ The Notice itself, sent under the ISO Tariff (referenced therein as the RTO Tariff),³¹ proves otherwise:

Per the RTO Tariff, Section I, Exhibit 1D, "ISO New England Billing Policy," this load asset will need to be retired as soon as practicable, but no later than 00:01, Wednesday February 20, 2013 (3 business days following the date of the

³⁰ Apparently, PSNH is alleged to have known what PNE insisted be kept confidential. As shown in the Staff memo (Exhibit 4), when PNE informed the PUC of its voluntary cessation of operations in a submittal on February 15, 2013 (one day after the ISO-NE default) it did so pursuant to a "Motion for Confidential Treatment" of the affidavit admitting that it had voluntarily defaulted. Exhibit 4 at 4, footnote 6. It wasn't until February 21, 2013 that PNE even advised its customers of its default.

³¹ RTO is "regional transmission organization," which in New England is ISO-NE.

suspension) ... If the asset is not retired prior to Wednesday February 20, the ISO will take action to retire the asset effective on that date.

ISO-NE notice to PSNH, Exhibit 9. Thus, per the ISO's FERC-jurisdictional Tariff, PSNH's duty was to retire PNE's load as soon as practicable but no later than the date in the notice, which offered no room for negotiation.³² Plaintiffs' contention that PSNH somehow negotiated a later date to take PNE's customers into its default service is contrary to the federal Tariff and the notice thereunder. PSNH was, and is, required to follow the requirements of the ISO Tariff. This claim, as set forth in paragraphs 146(c) and 158(c) of the Complaint, should therefore be dismissed.

4. "Illegally" Deleting the 7,300 Pending Electronic Enrollments For Transfer of PNE's Accounts to FairPoint and Replacing Those Enrollments with New Enrollments for Transfer to PSNH's Default Service.

These claims are barred by Order No. 25,660 and by the ISO-NE and PUC Tariffs. Plaintiffs' contend that because electronic enrollments had been submitted to transfer its customers to FairPoint before PNE defaulted with ISO-NE, those requests "trumped" any subsequent requests, the customers belonged to FairPoint, and PSNH was not permitted to delete those enrollments and place the customers onto its default service. Comp. ¶¶ 77-79 and 91.

The first problem with this claim is that PSNH was *required* to take responsibility for the electric load of these customers by the terms of the ISO-NE Tariff that has federal preemptive effect under the Federal Power Act, as directed by the ISO-NE Notice (Exhibit 9). As Order No. 25,660 makes clear, once the PNE default and suspension occurred, PNE's customers were automatically assigned to PSNH and as the PUC found, "PNE initiated the drop of its own

³² February 14, 2013 was a Thursday before the three-day Presidents' Day holiday weekend. Thus, per the ISO Tariff requirements, PSNH had until 1 minute after midnight, on Wednesday, February 20, to retire PNE's load and for PSNH to become responsible for supplying electricity to PNE's former customers.

customers when it engaged in the conduct that caused its suspension.” Exhibit 10 at 7. Having failed to appeal that PUC Order, PNE is barred from re-litigating that issue here.

The second problem with the claim is that it assumes that customer accounts that had not yet been transferred to FairPoint remained with PNE or, put differently, that despite its default, PNE retained its customers. As the ISO-NE Tariff makes clear, once a CEP 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.” Exhibit 1 at 140. In short, once PNE defaulted, it had no legal right or ability to participate in any wholesale electricity market transactions under the ISO Tariff, and no legal right or ability to participate in any retail electricity markets per both Puc 2003.01(d)(2) and (i) and the PUC Tariff at ¶ 1, “Terms and Conditions for Energy Service Providers.” PNE thus cannot complain about the deletion of its EDIs.

Despite its current claims, PNE admitted that the transfer occurred by operation of law in filings before the PUC in Docket No. IR 13-233. There, in its Motion for Rehearing of Order No. 13-233, PNE disputed that it had caused the transfer to PSNH but nonetheless agreed that the transfer occurred by operation of law:

PNE did not “initiate” the disputed drop transactions simply by agreeing to the terms of the ISO-NE Tariff. To the contrary, *the drop transactions in this case occurred by operation of law under the terms of the ISO-NE Tariff*. In fact, no one initiated the drop transactions here. ISO-NE notified PSNH that it was required to accept PNE’s accounts into default service and PSNH moved the accounts into default service.

Exhibit 13 (emphasis added). The claims set out in Paragraphs 137(b), 137(c), 146(d), 146(e), 152(a) and 152(b) of the Complaint should therefore be dismissed.

5. Allegedly Improper Withholding of Customer Payments Due to PNE

This claim is frivolous.³³ Plaintiffs contend that PSNH improperly withheld funds due PNE. However, they admit that PNE previously filed a complaint with the PUC seeking the return of these same funds. Comp. ¶¶ 94-95. All of these claims were heard by the PUC in Docket No. IR 13-233. See Order No. 25,660 (Exhibit 10) (detailing all of PNE's claims for return of these funds). Plaintiffs fail to inform this Court that the PUC rejected the very claims it now asks the Court to address. *Id.*

PNE is not deterred. Despite its failure to appeal Order No. 25,660 to the Supreme Court it now seeks attorneys' fees for pursuing a complaint on which it was unsuccessful while also contending that PSNH's withholding of fees "illustrates PSNH's intent to harm PNE." Comp. ¶¶ 94-95. Because the claim (as set out in Paragraph 146 (g) of the Complaint) was resolved by Order 25,660, it is barred by RSA 541 and *res judicata*. See Part IV below.

6. Persuading the PUC Staff to Oppose Resident Power's Attempts to Resubmit Enrollments and FairPoint's Attempt to Resubmit Electronic Enrollments.

Plaintiffs' claims focus on two allegedly improper actions by PSNH. First, they contend that in a pleading filed with the PUC, PSNH questioned Resident Power's continued status as an aggregator, thereby causing the PUC to adopt that same claim and compelling Resident Power to seek a declaratory judgment on that issue. Comp. ¶¶ 103-107. Second, Plaintiffs aver that PSNH somehow caused the PUC to contend that a transfer of customers from PSNH's default service to FairPoint would constitute "slamming" (transfer of a customer from one supplier to another without customer authorization). *Id.* ¶ 93. This is a problem of Plaintiffs' own making,

³³ This claim is alleged only to constitute a violation of RSA Ch. 358-A and thus does not state a claim in any event.

and once again, the Complaint ignores PUC proceedings that addressed – and resolved – these issues.

Plaintiffs' specific allegation is that a filing by PSNH challenging PNE's continued standing in PUC Docket No. DE 12-295 after its default "mischaracterized" a notice PNE sent to its customers by stating that Resident Power "would no longer be an aggregator on [PNE's] customer accounts. *Id.* ¶ 103. In fact, PSNH's pleading made specific reference to the actual notice sent by Resident Power, quoted that notice and provided a link to it. Contrary to Plaintiffs' allegations, PSNH did *not* say that Resident Power was no longer an aggregator for all purposes.³⁴

If there was confusion over Resident Power's continued status as an aggregator (whether generally or for former customers of PNE), it was Resident Power that initiated that confusion. On February 7, 2013, before PNE made any request to PSNH to transfer customers to FairPoint immediately (and before any other involvement of PSNH in this matter), PNE filed its "Customer Notice" with the PUC. The notice described the transfer to FairPoint and stated: "Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers." See Customer Notice attached as Exhibit 14. In its Petition for Declaratory Judgment in PUC Docket No. DE 13-057, Resident Power claimed that while PNE's Customer Notice stated that it would no longer be an aggregator "for your account," its aggregation agreements with former PNE customers

³⁴ The actual statement made by PSNH in its pleading was as follows: "PNE'S suspension by ISO-NE came in the midst of a transaction whereby PNE had agreed to assign all of its right, title and interest in certain customer contracts to FairPoint Energy, LLC. See Docket No. DE 13-049, PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND AND FAIRPOINT ENERGY, LLC, "Joint Petition for Expedited Waiver of Puc 2004.05(k)."

Concurrently, PNE announced to its customers that Resident Power, an affiliate of PNE that was granted status as an "aggregator" by the Commission in Docket No. DM 11-081, would no longer be an aggregator *on these customer accounts*. See PNE's "Customer Notice of Supplier Change," available on-line at <http://www.powernewengland.com/serviceproviderchange.pdf>.

transferred to PSNH's default service remained in effect. See Petition in Docket No. DE 13-057 attached as Exhibit 15 at ¶¶ 6 and 13.

The Office of Consumer Advocate ("OCA") objected to Resident Power's Petition. See OCA Objection in Docket DE 13-057, attached as Exhibit 16. The OCA contended that confusion had been created by PNE's Customer Notice, together with a later Notice from Resident Power stating: "If you would like to still be a customer of Resident Power and authorize us to place you with an electricity supplier other than PSNH ... please reply to this email any type 'RENEW MY ACCOUNT.'" *Id.* ¶ 4. While Plaintiffs place the blame on PSNH for the PUC's requirement that Resident Power provide notice to its customers, OCA's Objection states:

For RP to now argue that its aggregator status remains unchanged is inconsistent with previous notices to customers, whether from RP or PNE. Customers should not now be given another piece of confusing information. To do so undermines the integrity of the competitive market place. At a minimum, a public hearing must be held to explain to customers what has taken place.

Id. ¶ 5. Moreover, in Docket No. DE 13-059, the "show cause" proceeding relating to Resident Power that the PUC had opened, the PUC Staff recited the history of notices concerning Resident Power's status and stated as follows:

To date, documents have been issued by PNE or Resident Power indicating, among other things, that Resident Power is either no longer the aggregator for the former PNE customers, still their aggregator, or that those customers can "renew" their aggregation relationship with Resident Power. Representatives of PNE and Resident Power alternately seem to speak for one entity, the other or both, but at other times appear to fall back to relying on the companies' statuses as separate legal entities to disclaim knowledge of each other's actions. Customers, Staff and the general public are getting confusing and conflicting information, which continues to change over time.

Exhibit 4 at 7. In short, it was not PSNH that caused confusion over Resident Power's status.

But whatever the source of the confusion, Resident Power made its own decision to file the Petition for Declaratory Judgment, not just to determine whether it was still an aggregator but rather, to ask the PUC to determine whether it was still an aggregator for the customer accounts of former PNE customer transferred to PSNH's default service. See PUC Order No. 25,467 (February 28, 2013), attached as Exhibit 17. In that Order, the PUC recognized that there remained uncertainty about Resident Power's ability to represent PNE's former customers and left that decision to the show cause dockets, Docket Nos. DE 13-059 and DE 13-060. Those dockets were settled and in the Order approving the settlement, the PUC stated that "Resident Power submitted a request to renew its status as an electric power aggregator." Order No. 25,492 (attached as Exhibit 18) at 3.³⁵

Plaintiffs' claim that PSNH somehow also "persuaded" the PUC to challenge FairPoint's attempt to resubmit electronic enrollments by raising a claim of "slamming" is equally meritless. The Complaint does not even allege that PSNH raised that issue with the PUC. Instead, it, states that in conversations between the Plaintiffs and the PUC Staff over the confusing notices," PUC Staff alleged for the first time that PNE's and Resident Power's attempts to transfer customer accounts from PSNH's Default Service would constitute 'slamming.'" Comp. ¶ 93. Likewise, in its Declaratory Judgment Petition in Docket No. DE 13-057, Resident Power stated:

Based upon communications with PUC counsel, Petitioner understands that based on the statement in the PNE notice set forth at Paragraph 6 [i.e., PNE's Customer Notice] above, any attempt by Petitioner to place one of its aggregation customers now on PSNH default service as a result of the ISO-NE mandate described in Paragraph 11 [the ISO-NE notice transferring PNE's load to PSNH] above with a CEPS may constitute "slamming" under the Commission's rules.

³⁵ That request was ultimately granted in Docket No. DM 13-089, where Resident Power complied with the PUC's requirement in Puc 2006.02, apparently for the first time, to disclose to its principals/customers its common ownership with PNE.

Exhibit 15 at ¶ 17 (emphasis added). In short, Plaintiffs have conceded that it was the PUC staff that raised the issue and have failed to identify any statement made by PSNH to cause Staff to take that position.³⁶

Accordingly, Plaintiffs' claims concerning PSNH's "persuading" the PUC as to Resident Power's aggregation status and the "slamming" issue set out in Paragraphs 137(d), 142, 146(h), and 153(c) should be dismissed.

7. Prompting the PUC Staff to initiate a "show cause" proceeding against PNE and Resident Power.

Plaintiffs contend that it was PSNH that caused the PUC to issue the show cause orders in Docket Nos. DE 13-059 and DE 13-060. This was supposedly caused by PSNH "creat[ing] confusion among PNE's former customers" (a claim put to bed by the discussion immediately above) and by PSNH's counsel asking a question to the PUC Staff which, according to the Complaint, "implied" that PNE was still acting in the market after its suspension. Comp. ¶¶ 115-119, 121. This alleged action is cited only to support Plaintiffs' RSA Ch. 358-A claim. Comp. ¶ 146 (i). Since any such claim is exempt from the Act, a response to this alleged conduct is unnecessary. But the claim is without merit.

This is yet another instance in which Plaintiffs' allegations are destroyed by public documents on file at the PUC. When PNE filed its request for a waiver of the notice requirements to customers in order to make an immediate transfer to FairPoint (Docket No. DE 13-049), the February 8, 2013 PUC Letter granting that request stated that "the Commission directed Staff to commence an investigation into PNE's CEPs authorization and the circumstances that necessitated that waiver." Exhibit 6. The investigation that became the

³⁶ Plaintiffs also ignore the fact that the issue of slamming was raised in Docket Nos. DE 13-059 and DE 13-060 and resolved – insofar as any claim against PSNH is concerned – by the settlement agreement in those dockets. See Exhibit 18.

show-cause proceedings was therefore initiated by the PUC *before PSNH was even aware of the matter that is the subject of the Complaint*. Moreover, the reasons underlying the need for the show cause proceedings are set out in the PUC Staff Memo in those dockets. See Exhibit 4. None of those reasons mention any action by PSNH. Plaintiffs attempt to blame PSNH for the show-cause actions taken by the PUC itself is directly contradicted by the record at the PUC.

8. Pursuing an aggressive media campaign that disparaged and tarnished PNE's reputation.

Like the claim immediately above, the alleged “media campaign” is alleged only to support a cause of action for breach of RSA Ch. 358-A and need not be addressed. Comp. ¶ 146(f) But if any response is necessary, suffice it to say that as to this alleged “campaign,” the Complaint suffers from a simple (and fatal) defect. Although replete with references to alleged statements by PSNH to the PUC or to media outlets and to articles in newspapers that allegedly “disparaged PNE’s reputation” and caused a loss of revenue, nowhere does the Complaint allege that statements attributed to PSNH were false. See, e.g., Comp. ¶¶ 84-89, 110, 130-133. And if the alleged “media campaign” included false statements, then why is there no claim for defamation in the Complaint? Perhaps this is because none of PSNH’s statements were false, PNE’s default was a matter of public concern as it impacted approximately 8,000 customers located throughout the State of New Hampshire, and PSNH had a First Amendment right to communicate with the PUC and the press.³⁷

³⁷ Whether or not accurate, PSNH’s statements to the PUC are protected by the First Amendment’s Petition Clause encompassed in what is commonly known as the “Noerr-Pennington Doctrine.” See *Venetian Casino Resort, L.L.C. v. N.L.R.B.*, No. 12-1021, 2015 WL 4153872, at *3 (D.C. Cir. July 10, 2015), quoting U.S. Const. amend. I. See also *Davric Maine Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000). The doctrine provides that parties exercise their right to petition when they advocate their causes and points of view respecting resolution of their business and economic interests, or attempt to influence the passage or enforcement of laws[.]” *Id.* (internal quotations and citations omitted), citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

IV. Plaintiffs' Claims Are Barred by Res Judicata.

In addition to the failure to state a claim, Plaintiffs' Complaint is barred by *res judicata* and by RSA 541:22, which prevents judicial review (except by the Supreme Court) of orders of the PUC. Every claim was either asserted, or could have been asserted, in PNE's PUC complaint creating Docket IR 13-233 (the "PNE-PUC Complaint") (Exhibit 3), decided by the PUC by Order 25,660 (Exhibit 10).

The doctrine of *res judicata* "bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation." *Appeal of Town of Seabrook*, 163 N.H. 635, 654 (2012). When the following three elements are each met, *res judicata* will preclude litigation: (1) the parties are the same, or in privity with one another; (2) the same cause of action was presented in each action; and (3) a final judgment on the merits was rendered in the first action. *Kalil v. Town of Dummer*, 159 N.H. 725, 730 (2010). New Hampshire applies an "expansive definition of 'cause of action.'" *Meier v. Town of Littleton*, 154 N.H. 340, 343 (2006); *see also Gray v. Kelly*, 161 N.H. 160, 165-167 (2010) (finding that although the plaintiff asserted a different underlying legal theory in a second action, his claim was still barred by *res judicata* because his claim relied on the same underlying facts). The term "cause of action" has been broadly defined by the New Hampshire Supreme Court as "the right to recover, regardless of the theory of recovery." *E. Marine Constr. Corp. v. First S. Leasing*, 129 N.H. 270, 274 (1987). "A theory of recovery therefore must be pleaded, or be subject to bar." *Id.*

The PNE-PUC Complaint was filed in June 2013, four months after PNE defaulted with ISO-NE, and just two months after it settled the show-cause proceedings brought by the PUC. The cause of action in that Docket was based on the same transactions that led to this Complaint namely, that PSNH breached the PUC Tariff and other agreements with PNE in connection with

the transfer to FairPoint and PNE's default with ISO. Since the parties are the same (Resident Power being in privity with PNE by virtue of joint ownership) and there was a final order by the PUC, any claim raised, or that could have been raised, in Docket IR 13-233 arising out of the same cause of action (*i.e.*, allegations of PSNH's breach of the Tariff in connection with the PNE default) is barred.

The PNE-PUC Complaint alleged that "PSNH's business relationship with PNE ... is controlled by the [PUC Tariff]" and that PSNH breached that Tariff by withholding amounts allegedly due PNE after PNE's default. Exhibit 3 ¶¶ 4-11. PNE recounted the circumstances that led to its default with ISO (compare ¶ 12 of PNE-PUC Comp. with Plaintiffs' Comp. ¶ 60) and accused PSNH of withholding customer payments to "exacerbate pressure on its competitor PNE" (PNE-PUC Comp. ¶ 16), just as it alleges here that "PSNH seized upon PNE's suspension as an opportunity to increase its revenue and customer base and bring PNE (a competitor) to its knees." Comp. ¶ 64. The PNE-PUC Complaint also raised the issue of PSNH's attempt to harm it while the show cause proceeding was going forward. *Cf.* PNE-PUC Comp. ¶ 16 with Comp. ¶ 116. Most specifically, PNE's PUC action complained that PSNH had wrongfully withheld payments to it and sought the return of the same amounts it asks this Court to award it, together with its attorneys' fees and interest. *Cf.* PNE-PUC Comp. ¶¶ 19, 28-31 and conclusion with Comp. ¶¶ 94-95 and ¶ 129. For example, the Conclusion to the PNE-PUC Complaint seeks the return of \$92,961.31 in PNE customer payments and "attorneys' fees that PNE has incurred in seeking PSNH's payment of these funds." The Plaintiffs' Complaint seeks "\$97,000 in attorneys' fees and costs incurred to initiate and litigate a separate proceeding to recover the outstanding receivables PSNH refused to pay." Comp. ¶ 129.

Docket IR 13-233 was resolved by Order No. 25,660 (Exhibit 10). The PUC ruled that PSNH had not improperly withheld customer payments from PNE following its suspension, Order at 7. This is precisely the same claim that PNE asks this Court redress with damages. Comp. ¶¶ 94-95 and 146 (g). Moreover, the PUC specifically found that PNE was not entitled to its attorneys' fees or interest both because it had waived those claims and because "the [PUC] has also determined that PNE is not entitled to payment of its costs and attorneys' fees by PSNH under RSA 365:38-a." Order No. 25,673 (on rehearing of Order No. 25,660) at 6, attached as Exhibit 19. Having failed to appeal that Order to the Supreme Court under RSA Ch. 541:6, any claim for recovery of either withheld payments or attorneys' fees relating to those payments is barred by *res judicata* and RSA 541:22.

In addition, Order No. 25,660 resolves the Plaintiffs' contention that PSNH "illegally" deleted the pending enrollments for transfer of PNE's accounts to FairPoint. As the Order makes clear, once PNE defaulted, it no longer had the right to transfer any customers because whatever customers had not been transferred no longer belonged to it. *Id.* Deleting instructions to transfer those customers to FairPoint cannot be "illegal" when, as the PUC found, the ISO Tariff terminated PNE's rights and assigned those customers to PSNH. PNE has admitted in pleadings filed in Docket IR 13-233 that it "lost control of its load asset upon default." See PNE's Post-Hearing Memo in Docket IR 13-233 at 4 (attached as Exhibit 20). Thus, the claims in Paragraphs 137(b) and 137(c), 146(d) and 146(e) and 153(a) and (b) are also specifically barred.

But the preclusive effect of Order 25,660 is much broader. PNE's cause of action in Docket IR 13-233 concerned the same alleged breach by PSNH of obligations under the Tariff in connection with the transfer of customers at the time of its ISO-NE default that PNE raises here. PNE could have raised any of the issues it now raises in this Court concerning PSNH's breach of

the Tariff in connection with the events of February-March 2013 and the ISO-NE default at the PUC. For example, if PNE's default with ISO-NE (and the resulting "drop charge" addressed in Order No. 25,660) was the result of PSNH's failure to make an immediate transfer to FairPoint, its failure to inform PNE that it could allegedly immediately transfer all PNE customers to default service, or its alleged negotiation of a later date for that transfer with ISO-NE, PNE could have raised those claims in Docket IR 13-233 as a defense to payment of that charge. In fact, the PNE-PUC Complaint directly raised issues relating to the deletion of the PNE and FairPoint EDI transactions (*id.*, ¶¶ 33-34). And all of the issues raised in the Complaint in this Court were known when Docket IR 13-233 was being litigated. The "show cause" proceeding had just been settled and many of the claims asserted here were in issue in that proceeding. Order No. 25,660 describes the issue in Docket IR 13-233 as follows:

PNE also argued that the circumstances of its default and suspension with ISO-NE did not give PSNH the authority to exercise extra-contractual measures. PNE did not request any specific relief for this alleged improper conduct by PSNH.

Order No. 25,660 (Exhibit 10) at 3. But the fact that PNE did not request relief in that Docket does not mean that *it could not have done so*. *Res judicata* is designed to prevent the piecemeal litigation Plaintiffs seek to raise here. Because every claim asserted here *could have brought* before the PUC,³⁸ all of PNE's complaints about PSNH's conduct, whether now styled as interference with contract or negligence claims, are barred.³⁹

³⁸ *Appeal of White Mountains Educ. Ass'n.*, 125 N.H. 771, 775 (1984); *Scheele v. Village District*, 122 N.H. 1015 (1982); *Town of Durham v. Cutter*, 121 N.H. 243, 246, 428 A.2d 904, 906 (1981). "The doctrine of *res judicata* prevents the parties from relitigating matters actually litigated and matters that could have been litigated in the first action."

³⁹ The RSA 358-A claim could not have been brought because it is barred by the terms of that statute.

V. If This Court Determines That Plaintiffs Have Any Viable Claims, It Should First Defer to the Expertise of the Public Utilities Commission Under the Doctrine of Primary Jurisdiction.

While PSNH believes that none of the Plaintiffs' claims can survive dismissal, if this Court is inclined to let any of them stand, PSNH requests that the Court first defer to the primary jurisdiction of the PUC. As discussed above, Plaintiffs have conceded that these matters "warrant application of the Commission's particular expertise." See page 2 above.

The New Hampshire Supreme Court has recognized that the PUC has very broad jurisdiction to resolve disputes involving public utilities. The Supreme Court recognizes the doctrine of primary jurisdiction favors "that 'a court will refrain from recognizing its concurrent jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it.'" *NH Div. of Human Services v. Allard*, 138 N.H. 604, 607 (1994) citing *Wisniewski v. Gemmill*, 123 N.H. 701 (1983). The doctrine "encourag[es] the exercise of agency expertise, preserv[es] agency autonomy, and promot[es] judicial efficiency," *Metzger v. Brentwood*, 115 N.H. 287, 290 (1975).

As the Supreme Court recognized in *Rainville v. Lakes Region*, RSA 365:1 allows any person to complain to the PUC by filing a petition setting forth any violation or omission of law by a public utility. Plaintiffs could have filed this entire Complaint in the PUC asking it to adjudicate the underlying factual disputes, rather than engage in the instant piecemeal litigation. And as shown in Appendix A, Plaintiffs have not been shy in bringing these matters to the PUC, having addressed these issues in nine separate dockets. As a result, the PUC is very familiar with this dispute.

The following demonstrates that all of these issues are within the PUC's jurisdiction:

- Whether PSNH required to perform an off-cycle meter read. Puc 2004.07 governs this issue.
- Whether PSNH had an obligation to inform Plaintiffs that it could take 90 percent of its PNE customers into its default service. Plaintiffs concede that the PUC Tariff governs the terms of default service. Comp. ¶¶ 49-51.
- Whether PSNH negotiated a later date to take on PNE's customers with ISO-NE. The ISO Tariff governs this issue as set out in the ISO-NE notice to PSNH set out in Part III.B.3 above.
- Whether PSNH was entitled to delete the electronic enrollments from PNE and FairPoint. Plaintiffs concede that this issue is governed by the PUC Tariff. Comp. ¶ 91.
- Whether PSNH was entitled to withhold payments from PNE. The PUC has already decided this issue in Order No. 25,660 (Exhibit 10).
- Whether PSNH created confusion over Resident Power's aggregation status. The PUC dealt with this issue in Dockets DE 13-057, 13-059 and 13-060.
- Whether PSNH caused the PUC to investigate the issue of "slamming." This issue was before the PUC in Docket DE 13-057 and settled between the Plaintiffs and the PUC in Dockets DE 13-059 and 13-060.
- Whether PSNH "prompted" the show cause proceedings in Dockets DE 13-059 and 13-060. The PUC Staff can address the question of why the Commission brought these proceedings.

Assuming, for argument's sake, that the Plaintiffs have alleged facts sufficient to make out a cause of action for interference with contract or negligence, the facts underlying those causes of action should be decided by the PUC. Otherwise, this Court will be put in the position of interpreting tariffs and regulations involving a situation of first impression namely, the default of a CEPS and the fall-out from that default. *See Distigas of Mass. Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1117 (1st Cir. 1982) (doctrine of primary jurisdiction required Federal Energy Regulatory Commission to interpret relevant tariff in the first instance). This is thus a textbook

case for the application of the doctrine of primary jurisdiction.⁴⁰ Accordingly, the Court should dismiss the Complaint or stay it until the PUC has had the opportunity to address each of the Plaintiffs' claims. Depending on the decision of the PUC, this Court can then determine whether, if a regulation or tariff was violated, a civil cause of action can be sustained.

Conclusion

In the end, Plaintiffs have two complaints. First, that PSNH should be found liable for its failure to undertake simultaneous emergency meter readings of approximately 8,000 customer meters located randomly throughout the entirety of New Hampshire over a holiday weekend in order to save Plaintiffs from their voluntary business decision to default on PNE's obligations to ISO-NE. Next, that PSNH should be liable for its decision to delete electronic enrollments transferring PNE's customers to FairPoint when PNE's load was required to be transferred to PSNH's default service as a matter of federal tariff.

The first claim fails because PSNH had no duty under statutes, regulations, or tariffs to undertake the 8,000 emergency meter readings (nor have Plaintiffs even alleged such a duty). As for the second claim, PSNH was required by the ISO Tariff (as the PUC has already ruled) to transfer PNE's customers to PSNH's default service due to PNE voluntary financial default at ISO-NE and once that default occurred, PNE had no customers to transfer to FairPoint. PNE simply asks this Court to reward it for the consequences of its decision to favor its own interests over those of its customers. The old saying is apt: "Lack of planning on your part doesn't

⁴⁰ The Complaint requires determinations that will create precedent on how electric utilities should act in the competitive marketplace. Upon a CEP's default, does a utility have an obligation to take on the CEP's customers IMMEDIATELY, and not have the right to await the deadline set out in the ISO Tariff? If transfers to new suppliers are pending in the EDI system when an existing supplier defaults, can the pre-existing EDI transactions be deleted in order to effectuate placement of the customers onto the utility's default service? Questions like these are plainly matters for the PUC and not civil juries.

constitute an emergency on mine.” Nor does PNE’s self-created emergency impose liability on PSNH. For these reasons, and those set out above, Plaintiffs’ Complaint should be dismissed.

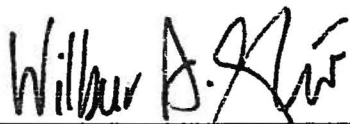
Respectfully submitted,

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

By its attorneys,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 31st day of July, 2015, I served the foregoing Memorandum via electronic mail and first class mail to:

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APPENDIX A¹

PUC Dockets Addressing Issues Related to Plaintiffs' Complaint

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
DM 11-075 PNE Energy Supply, LLC Registration as a Competitive Electric Supplier	(As applicable to the instant complaint) February 19, 2013, filed by PNE.	This filing was made on a confidential basis by PNE and its contents are not publically available, but per PUC Order No. 25,512, the filing pertains to "the short-term competitive strategy and operations of PNE" – a matter directly related to the Complaint.	<p>On May 3, 2013, the PUC approved PNE's application to modify its registration statement subject to the establishment of an escrow created as part of the settlement in Docket DE 13-060 to provide as follows:</p> <p>"Escrow Agent shall pay the funds from the Escrow Account to the NHPUC if the NHPUC notifies Escrow Agent that PNE has not faithfully performed all duties and has not protected the NHPUC and PNE's customers from any damage caused by PNE's non-compliance with or breach of any laws or statutes, or rules or regulations pertaining to the CPES license or permit issued by the NH-PUC."</p> <p>The PUC also "authorized PNE, as of the date of this letter, to resume its business outreach efforts to all classes of customers in New Hampshire, and ruled that the suspension of New Hampshire utilities' obligation to accept</p>

¹ All pleadings and orders may be found on the PUC website www.puc.state.nh.us under the "Virtual File Room," followed by "Docketbook" section of the site..

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
			or process new customer enrollments from PNE is now void, and no longer in effect.”
<p>DE 12-295</p> <p>PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND</p> <p>Petition for Review of Public Service Company of New Hampshire's Services and Charges to Competitive Electric Suppliers</p>	<p>October 1, 2012 Petition filed by PNE</p>	<p>PNE’s Petition was entitled “Petition for Review of the Reasonableness and Appropriateness of PSNH’s Approved Charges for Selection, Billing and Payment and Collection Service to Competitive Electricity Suppliers.”</p> <p>On February 19, 2013, PSNH moved to dismiss the petition asserting that PNE’s default deprived it of standing to raise its claims before the PUC.</p>	<p>Order No. 25,699 July 31, 2014 approved a settlement agreement relating to rates.</p> <p>The order did not consider the reasonableness of PSNH’s charge for transferring customers upon a supplier default (approved in Docket IR 13-233-Order No. 25,660) but agreed with PUC Staff that “PSNH or any other electric distribution utility may incur costs if a competitive supplier in the relevant service territory defaults at ISO-NE.”</p> <p>The order further states: “We also direct PSNH to consider whether it would be advisable to institute a tariff or tariffs for some of the activities that are mandated by a competitive supplier default at ISO-NE and that have a uniform cost, e.g., off-cycle meter reads. Finally, with respect to the pending rulemaking for the readoption and amendment of Puc 2000 rules for competitive suppliers (DRM 13-151), we direct Staff to include language in the draft rules stating clearly that competitive electric suppliers shall pay all incremental costs associated with a default at ISO-NE.”</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p>DE 13-049</p> <p>PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND AND FAIRPOINT ENERGY, LLC</p> <p>Joint Petition for Expedited Waiver of Puc 2004.05(k)</p>	<p>February 7, 2013</p> <p>Joint Filing by Resident Power and PNE</p>	<p>Resident Power ,PNE, and FairPoint Energy requested a waiver of the PUC rules requiring 14 day notice to customers prior to the effective date of any change in customer service.</p> <p>Among other things, in their Petition Plaintiffs represented that:</p> <p>“In particular, every customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served, rather than the 14 period required by the rules.”</p> <p>“No special off-cycle meter read dates will be necessary as a result of this transfer. Customers will transfer suppliers upon their next scheduled meter read date.”</p> <p>“There will be no risk or detriment to PSNH as a result of this transfer or requested waiver. Furthermore, there will be no risk or detriment to</p>	<p>By Commission Letter dated February 8, 2013 the PUC approved the request for waiver of the rule stating:</p> <p>“PNE and FairPoint Energy’s proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.”</p> <p>The Commission Letter also “directed Staff to commence an investigation into PNE’s CEPS authorization and the circumstances that necessitated the requested waiver.”</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
		the transferred customers.”	
<p>DE 13-057</p> <p>RESIDENT POWER, LLC Emergency Petition for Declaratory Judgment</p>	<p>February 22, 2013. Resident Power</p>	<p>Petition For Declaratory Judgment by Resident Power requesting a ruling that Resident Power remained an aggregator in good standing under PUC rules and confirmation of its ability to serve “certain former PNE electrical power supply customers who as of February 20, 2013..... were transferred to default service with ...PSNH.”</p> <p>The Petition also requested, on behalf of Resident Power and PNE that transfer of customer accounts to under circumstances described in the Petition would not constitute “slamming” “under applicable state law and PUC rules.”</p> <p>The Petition recounts many of the facts that serve as the basis for the Plaintiffs’ Complaint, particularly as they relate to notice given to</p>	<p>Order No. 25,467 February 28, 2013.</p> <p>The PUC Order affirmed that Resident Power was a duly registered electric power aggregator but refused to provide a ruling on whether it remained an aggregator for specific former PNE customers or whether the transfer of those customers from default service under certain circumstances would constitute slamming.</p> <p>“For its remaining three requests for declaratory ruling, Resident Power seeks confirmation that it may continue to represent the former PNE customers and that certain courses of business action contemplated by Resident Power for its aggregation customers, in relation to the recent suspension of PNE by ISO-New England and the reversion of a number of customers of PNE to PSNH default service, would not constitute “slamming” under RSA 374:28-a and Puc 2004.10(b). In light of the show-cause Order of Notice issued today regarding the recent business activities of Resident Power and PNE2, and the factual uncertainties surrounding recent events involving Resident Power and PNE, as independently noticed by the Commission and pointed out by the OCA, we are not convinced that the factual background is sufficiently</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
		PNE's and Resident Power's customers and alleged confusion resulting from those notices.	"definite and concrete" for the granting of the declaratory ruling sought by Resident Power for items 2 through 4, above."

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p>DE 13-059 DE 13-060</p> <p>Resident Power, LLC Show Cause as to Whether the Company should be Subject to Penalties, or Registration Suspension or Revocation</p> <p>PNE Energy Supply, LLC Show Cause as to Whether the Company should be Subject to Penalties, or Registration Suspension or Revocation</p>	<p>February 27, 2013 PUC Staff</p>	<p>PUC Staff requested that the PUC open show cause hearings concerning whether PNE and Resident Power should be subject to Penalties or their Registrations Suspended or Revoked</p> <p>Issues in the Docket included the default by PNE, the waiver request by PNE and Resident Power and the event following PNE's default and suspension as well as the confusion created by notices to customers.</p> <p>In this docket, PNE sought to have the PUC issue subpoenas to PSNH witnesses on the following matters: "information related to the PSNH's role and responsibilities in porting (or not porting) PNE customers to Fairport Energy in February 2013" and "information relative to PSNH's interactions with the</p>	<p>The docket involved substantial discovery and hearing before the PUC.</p> <p>Order No. 25,492 dated April 15, 2013 approved a settlement agreement between the Resident Power, PNE and the PUC.</p> <p>Under the settlement PNE agreed to make payment to all former PNE customers placed on PSNH's default service on February 20, 2013 provided that each customer "waiv[ed] any claims against PNE relating to the customer's placement on default service." In addition, PNE was to provide an additional \$200,000 for financial security under PUC regulations.</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
		<p>PUC Staff during the relevant time frame relative to PNE and Resident Power.”</p> <p>PNE also sought to have a subpoena issued to FairPoint Energy.</p>	

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
<p>IR 13-233</p> <p>PNE Energy Supply, LLC Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into Dispute Between PNE Energy Supply, LLC and Public Service Company of New Hampshire</p>	<p>June 21, 2013</p> <p>PNE by Petition pursuant to RSA 365:1</p>	<p>PNE filed a complaint against PSNH related to charges assessed it by PSNH for “drop transactions” when PNE’s former customers were placed on PSNH’s default service as a result of PNE’s default with ISO-NE. PNE alleged that PSNH withheld payments in order to “exacerbate pressure on its competitor PNE.”</p> <p>PNE sought its attorneys’ fees and costs.</p> <p>PNE seeks those same charges, fees and costs in its Complaint.</p> <p>In alleging jurisdiction under RSA 365:1 PNE stated:</p> <p>“PSNH’s business relationship with PNE (and, importantly, other suppliers) is controlled by the PSNH Electricity Delivery Service Tariff— NHPUC No. 8 (the “Tariff”), authorized by the</p>	<p>Order No. 25,660 issued May 1, 2014. Following a voluntary repayment of certain of the amounts withheld by PSNH, the PUC ruled that PSNH did not act improperly in assessing a \$5 per customer “drop charge” for when PNE defaulted and its former customers were placed on PSNH’s default service.</p> <p>“When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE’s load similar to an agency relationship in the very limited sense discussed here.</p> <p>The first issue we framed for this docket was whether PSNH improperly withheld PNE’s customer payments beginning the week after PNE’s suspension from ISO-NE, and if so, what is the appropriate remedy. Because we have determined that PNSH is entitled to the amount of money that it ultimately withheld, and because PNE sought no remedy for PSNH’s temporary withholding of the other money that was earlier in dispute, 2/8/14 Tr. at 11, the first issue is moot.”</p>

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
		Commission on June 28, 2010.”	PNE’s Motion for Rehearing was denied by Order No. 25,673 issued June 2, 2014. No appeal was filed.
DE 14-066 PNE Energy Supply, LLC Petition for Declaratory Ruling regarding Rule Puc 2004.07(b)(1)b.	March 6, 2014 PNE	PNE sought a declaratory ruling on the proper interpretation of Rule Puc 2004.07 with respect to the “availability of off-cycle meter reads” and whether PSNH is “required by [the Rule] to have a provision in its tariff for ‘an off –cycle meter reading.’”	PNE withdrew its Petition without prejudice pending the outcome rulemaking in another docket.
IR 14-132 PNE Energy Supply, LLC and Halifax American Energy Supply, LLC Joint Complaint Against Public Service of New Hampshire	April 10, 2014 PNE and Halifax American Energy Supply, LLC	PNE and Halifax filed a complaint against PSNH pursuant to RSA 365:1 relating to the circumstances under which PSNH could “drop” customers from a CEP and place the customer on default service. The Complaint requests “reparation,” apparently for any customers PSNH took into its default service when	The PUC denied the complaint, finding that the specific instance complained of was resolved by PUC rules and denied PNE’s complaint concerning past and future practices stating: “PNE did not claim it was harmed by PSNH’s alleged violation of the tariff, did not describe how it could have been harmed, and did not itemize any damages. Therefore, the Complaint fails to meet the threshold for further Commission action.”

Docket No. and Name	Date and Party Initiating	Subject of Docket	Resolution
		directly requested by the customer.	

Appendix B to PSNH Memo in Support of Motion to Dismiss

The following is a list of the ten acts Plaintiffs allege to support their causes of action together with a listing of the causes of action they are alleged to support and the paragraph number of the Complaint. Each of these claims are discussed in Part II.B. of the Memo. These claims may be grouped as follows:

1. Actions Taken Before or At PNE's Default:

- a. Refusing to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint. Counts I (Tortious Interference with FairPoint Contract) ¶137(a); Count III (RSA 358-A) ¶146(a); and Count V (Negligence) ¶158(a).
- b. Failing to inform PNE and Resident Power that PSNH could have transferred 90% of their customer accounts on an automated basis. Count III (RSA 358-A) ¶146(b), V (Negligence) ¶158(b).
- c. Negotiating a later date with ISO-NE to assume PNE's remaining load asset on February 20, 2013 rather than on an earlier date as originally required by ISO-NE. Count III (RSA 358-A) ¶146(c) and Count V (Negligence) ¶158(c).

2. Actions Taken After PNE's Default:

- a. "Illegally" deleting 7300 pending Electronic Enrollments for the transfer of PNE's customer accounts to FairPoint, which FairPoint had properly submitted and PSNH had accepted. Count I (Tortious Interference with FairPoint Contract) ¶137(b) and Count III (RSA 358-A) ¶146(d).
- b. "On information and belief" replacing the 7300 enrollments with the new electronic enrollment for transfer of PNE's customer accounts to PSNH's default service. Counts I (Tortious Interference with FairPoint Contract) ¶137(c); Count III (RSA 358-A) ¶146(e) and Count IV (Negligence) ¶153(b).
- c. Withholding customer payments that were due to PNE. Count III (RSA 358-A) ¶146(g).

3. Actions Taken With Respect to the PUC and the Media

- a. Persuading the PUC Staff to oppose and threaten prosecution of FairPoint's attempts to resubmit Electronic Enrollments that PSNH had deleted and Resident Power's lawful efforts to transfer PNE's former customer accounts from PSNH's Default Service. Count I (Interference with FairPoint Contract) ¶137(d), Count II

(Interference with Resident Power's aggregation agreements) ¶142, Count III (RSA 358-A) ¶146(h), and Count IV (Negligence) ¶154(c).

- b. Influencing and persuading PUC Staff to declare to Resident Power's customers that it was no longer their aggregator and to raise the threat of "slamming." Count II (Interference with Resident Power's aggregation agreements) ¶142.
- c. Prompting the PUC Staff to initiate a "show cause" proceeding against PNE and Resident Power. Count III (RSA 358-A) ¶146(i).
- d. Pursuing an aggressive media campaign that disparaged and tarnished PNE's reputation. Count III (RSA 358-A) ¶146(f).

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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

ELECTRICITY DELIVERY SERVICE TARIFF - NHPUC NO. 8

**ISSUED IN LIEU OF
ELECTRICITY DELIVERY SERVICE TARIFF NHPUC NO. 7**

Applicable

in

Various towns and cities in New Hampshire,

served in whole or in part.

(For detailed description, see Service Area)

Issued: July 2, 2010

**Issued by: /s/ Gary A. Long
Gary A. Long**

Effective: July 1, 2010

Title: President and Chief Operating Officer

Authorized by NHPUC Order No. 25,123 in Docket No. DE 09-035, dated June 28, 2010 and Order No. 25,120 in Docket No. DE 09-179, dated June 28, 2010 and Order No. 25,121 in Docket No. DE 09-180, dated June 28, 2010 and Order No. 25,122 in Docket No. DE 10-158, dated June 28, 2010

ISO-NE: The Independent System Operator of New England, the NEPOOL operating center that centrally dispatches the electric generating and transmission facilities owned or controlled by NEPOOL participants to achieve the objectives of the NEPOOL Agreement.

Local Network: The transmission and distribution facilities which are owned, leased and maintained by the Company, which are located in the states of New Hampshire and Maine and that are used to provide Delivery Service under this Tariff. The Local Network does not include any capacity or transmission or distribution facilities owned, leased or supported by the NU System Companies.

NEPOOL: The New England Power Pool.

Northeast Utilities System Companies ("NU System Companies"): The operating companies of Northeast Utilities Service Company other than PSNH.

Parties or Party: PSNH and/or one or more Customers under this Tariff.

Payment Agent: Any third-party authorized by a Customer to receive and pay the bills rendered by the Company for service under this Tariff.

PTF Facilities: All pool transmission facilities included in the NEPOOL Open Access Transmission Tariff on file with the FERC.

PSNH ("Company"): Public Service Company of New Hampshire.

Rate Schedule: The Rate Schedules included as part of this Tariff.

Restated NEPOOL Agreement ("NEPOOL Agreement"): An agreement between the NEPOOL participants dated September 1, 1971 and restated December 31, 1996, as amended from time to time.

Requirements for Electric Service Connections: The booklet prepared by the Company to establish standardized rules and regulations for the installation of electric service connections within the Company's Service Area.

Self-Supply Service: Electric energy and capacity purchased by a Customer directly from the Independent System Operator of New England or the New England Power Pool.

Settlement Agreement: The Settlement Agreement by and between the state of New Hampshire, Northeast Utilities and Public Service Company of New Hampshire dated June 23, 2000, and conformed as of September 22, 2000.

Supplier-Rendered Energy Service ("Supplier Service"): The sale of energy and capacity including ancillary services to a Customer by a Supplier.

Issued: July 2, 2010

Issued by: Gary A. Long

Effective: July 1, 2010

Title: President and Chief Operating Officer

6. Selection of Supplier or Self-Supply Service by a Customer

Any Customer requesting or receiving Delivery Service under this Tariff is responsible for selecting or changing a Supplier or selecting Self-Supply Service. The Company shall process a change in or initiation of Supplier Service or Self-Supply Service within two business days of receiving a valid Electronic Enrollment from a Supplier or notice from the Customer in the case of Self-Supply Service. The Supplier or the Customer in the case of Self-Supply Service must satisfy all the applicable requirements of this Tariff and the Commission's rules prior to the commencement of Supplier Service or Self-Supply Service. The date of change in, or initiation of, Supplier Service or Self-Supply Service shall commence upon the next meter reading date for the Customer provided the Company receives and successfully processes the Electronic Enrollment from a Supplier or notice from the Customer in the case of Self-Supply Service at least two business days prior to the regularly scheduled meter reading cycle date for the Customer.

The Company shall accept no more than one Supplier for a Customer during any particular monthly billing cycle.

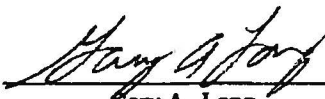
For a new service location for which a Customer requests Delivery Service, the Company must receive an Electronic Enrollment from a Supplier to enable the rendering of Supplier Service in conjunction with Delivery Service or notice from the Customer to enable the rendering of Self-Supply Service in conjunction with Delivery Service. If an Electronic Enrollment has not been received by the Company from a Supplier for any reason or notice has not been received from the Customer to enable the rendering of Self-Supply Service, energy and capacity shall be provided under Default Energy Service.

If an Electronic Enrollment fails to meet the requirements of this Tariff, the Company shall, within one business day of receipt of the Electronic Enrollment, notify the Supplier requesting service of the reasons for such failure.

The Customer or its designee shall ensure that all information provided to the Company for Delivery Service is accurate and shall provide the Company with prompt notification of any changes thereto. The Customer's Supplier shall also ensure that all information contained in the Supplier's Electronic Enrollment is accurate and shall provide the Company with prompt notification of any changes thereto.

Issued: July 1, 2013

Issued by:


Gary A. Long

Effective: July 1, 2013

Title: President and Chief Operating Officer

TERMS AND CONDITIONS FOR ENERGY SERVICE PROVIDERS

The following terms and conditions shall apply to Energy Service Providers ("Suppliers") doing business within the Company's Service Area and to Customers where specified.

1. Obligations of Suppliers

- a. At all times, the Supplier must meet the registration and licensing requirements established by law and/or by the Commission and must comply with all applicable rules promulgated by the Commission.
- b. The Supplier or the Customer in the case of Self-Supply Service must be either a member of NEPOOL or have an agreement in place with a NEPOOL member whereby the NEPOOL member agrees to take responsibility for all the NEPOOL load obligations, including but not limited to losses and uplift costs, associated with supplying energy and capacity to the Customer's delivery point.
- c. The Supplier or the Customer in the case of Self-Supply Service shall be responsible for providing all the capacity and energy needs of the Customer and shall be responsible for any and all losses which include all distribution and transmission losses along the Local Network from the PTF Facilities to the Customer's delivery point.
- d. The Supplier shall provide the Company with at least 30 days' notice prior to either the cancellation of an agreement for load responsibility with NEPOOL or a NEPOOL member, or the termination of business in the Company's Service Area. The Supplier shall accept load responsibility for all its Customers, or have an agreement with a NEPOOL member which provides for accepting load responsibility for all its Customers, until the first meter read date for each respective customer occurring two business days after notice to the Company or transmittal of any Electronic Data Interchange ("EDI") to the Company.
- e. In the case of Self-Supply Service the Customer shall provide the Company with at least 30 days' notice prior to the cancellation of an agreement for load responsibility with either NEPOOL or a NEPOOL member. The Customer shall accept load responsibility or have an agreement with a NEPOOL member which provides for accepting load responsibility for the Customer until the Customer's first meter read date occurring at least two business days after notice has been received by the Company from the Customer.
- f. The Supplier shall satisfy all the EDI standards as approved by the Commission. A Supplier shall be required to complete testing of EDI transactions prior to the rendering of Supplier Service to any Customer.

Issued: July 2, 2010

Issued by: Gary A. Long

Effective: July 1, 2010

Title: President and Chief Operating Officer

- g. Each Supplier shall be required to enter into a service contract with the Company that resolves issues associated with, among other things, information exchange, problem resolution and revenue liability. This contract must be entered into prior to initiation of Supplier Service to any Customer in the Company's Service Area.
- h. The Supplier shall be responsible for obtaining the Customer's authorization, in accordance with the Commission's rules, prior to the commencement of Supplier Service.
- i. The Supplier shall be responsible for obtaining the Customer's written authorization for the release of the Customer's load history to the Supplier by the Company.

In the event a Supplier doing business in the Company's Service Area fails to comply with the obligations specified above, the Supplier shall promptly notify the Company or the Company will promptly notify the Supplier. The Supplier shall undertake best efforts to re-comply with its obligations under this Tariff and the Commission's rules in a timely manner. Until the Supplier has re-satisfied its obligations, the Company reserves the right to deny any new customer enrollments from the Supplier. In the event the Supplier is unable or unwilling to re-satisfy its obligations, the Company may transfer the Suppliers' Customers to service under Default Service after notification to the Commission.

2. Services and Schedule of Charges


Where applicable, the Customer and/or Supplier will be obligated to pay the following fees and charges to the Company for the following services:

(a) Customer Usage Data

Suppliers will be provided with monthly usage data, at no charge, via an EDI transaction in accordance with the guidelines adopted by the Commission. The Supplier is responsible for obtaining the Customer's written authorization to release this information and will be required to maintain the confidentiality of the Customer information. The Supplier may not sell or provide this information, in whole or in part, to another party.

Issued: September 17, 2014

Issued by:


William J. Quinlan

Effective: September 1, 2014

Title: President and Chief Operating Officer

The Company shall also provide, at its option, Billing and Payment Service for Supplier pricing options which require programming changes to the Company's billing systems. Suppliers will be assessed a one-time setup charge at the following rate to enable non-standard Supplier billing arrangements by the Company:

Programming Setup Charge.....\$95.00 per hour

Any request by the Supplier for Rate Maintenance and Error Correction service provided by the Company in support of Billing and Payment Service will be billed on a monthly basis using the hourly rate below. Rate Maintenance and Error Correction will include maintaining Supplier rates and pricing options in the Company's billing systems and calculating Customer billing adjustments due to Supplier errors in pricing.

Rate Maintenance and Error Correction Charge.....\$50.00 per hour

Customer payments received by the Company shall be applied to balances due to the Company and the Supplier in the following order:

(1) utility outstanding deposit obligations, (2) any utility current payment arrangement obligations, (3) any utility budget billing arrangement obligations, (4) utility and supplier aged accounts receivables, with a priority for the utility aged receivables, (5) utility and supplier current charges, with a priority for the utility's current charges, and (6) any miscellaneous nonelectric service product or services.

3. Initiation and Termination of Supplier Service

(a) Initiation

To initiate Supplier Service to a Customer, the Supplier shall submit an Electronic Enrollment which shall comply with the EDI standard, as may be amended from time to time.

If the information on the Electronic Enrollment passes validation, the Company will send the Supplier a "Successful Enrollment" notice. Supplier Service shall commence on the date of the Customer's next meter read date, provided that the Supplier has submitted the Electronic Enrollment to the Company at least two business days prior to the scheduled meter read date. If the Company receives more than one Electronic Enrollment for the same Customer for the same enrollment period, the first successfully processed Electronic Enrollment shall be accepted. All subsequent Electronic Enrollments received during that enrollment period shall be rejected.

Issued: September 17, 2014

Issued by:


William J. Quinlan

Effective: September 1, 2014

Title: President and Chief Operating Officer

2

ISO NEW ENGLAND INC. TRANSMISSION, MARKETS AND SERVICES TARIFF

(Formerly known as FERC Electric Tariff No. 3)

30 minutes after receiving a Dispatch Instruction. A CLAIM30 value is required as part of a Resource's or Dispatchable Asset Related Demand's Offer Data. CLAIM30 values are established pursuant to the provisions of Section III.9.5.3.

CNR Capability is defined in Section I of Schedule 22 and Attachment 1 to Schedule 23 of the OATT.

Coincident Peak Contribution is a Market Participant's share of the New England Control Area coincident peak demand for the prior calendar year as determined prior to the start of each power year, which reflects the sum of the prior year's annual coincident peak contributions of the customers served by the Market Participant at each Load Asset in all Load Zones. Daily Coincident Peak Contribution values shall be submitted by the Assigned Meter Reader or Host Participant by the meter reading deadline to the ISO.

Cold Weather Conditions means any calendar day when that day's Effective Temperatures are forecast to be equal to or less than zero degrees Fahrenheit for any single on-peak hour and that day's total Effective Heating Degree Days are forecast to be greater than or equal to 65.

Cold Weather Event means days when Cold Weather Conditions are forecast to exist and the Seven-Day Forecast indicates a capacity margin less than or equal to 0 MW for an Operating Day. Cold Weather Events are declared by 1100 two days prior to the Operating Day. A Cold Weather Warning will be used for all future days within the Seven-Day Forecast when a capacity margin of less than or equal to 0 MW exists, until such time that the ISO declares a Cold Weather Event.

Cold Weather Warning means days when Cold Weather Conditions are forecast to exist and the Seven-Day Forecast indicates a capacity margin less than 1,000 MW. In addition, a Cold Weather Warning will be used for all future days within the Seven-Day Forecast when a capacity margin of less than or equal to 0 MW exists for days not yet declared as a Cold Weather Event.

Cold Weather Watch means days when Cold Weather Conditions are forecast to exist and the Seven-Day Forecast indicates a capacity margin greater than or equal to 1,000 MW.

Commercial Capacity, for the purposes of the ISO New England Financial Assurance Policy, is defined in Section VII.A of that policy.

Dynamic De-List Bid is a bid that may be submitted by Existing Generating Capacity Resources, Existing Import Capacity Resources, and Existing Demand Resources in the Forward Capacity Auction at prices of \$1.00/kW-month or lower, as described in Section III.13.2.3.2(d) of Market Rule 1.

EA Amount is defined in Section IV.B.2.2 of the Tariff.

Early Amortization Charge (EAC) is defined in Section IV.B.2 of the Tariff.

Early Amortization Working Capital Charge (EAWCC) is defined in Section IV.B.2 of the Tariff.

Early Payment Shortfall Funding Amount (EPSF Amount) is defined in Section IV.B.2.4 of the Tariff.

Early Payment Shortfall Funding Charge (EPSFC) is defined in Section IV.B.2 of the Tariff.

EAWW Amount is defined in Section IV.B.2.3 of the Tariff.

EBITDA-to-Interest Expense Ratio is, on any date, a Market Participant's or Non-Market Participant Transmission Customer's earnings before interest, taxes, depreciation and amortization in the most recent fiscal quarter divided by that Market Participant's or Non-Market Participant Transmission Customer's expense for interest in that fiscal quarter, in each case as shown on the most recent financial statements provided by such Market Participant or Non-Market Participant Transmission Customer to the ISO.

Economic Maximum Limit or Economic Max is the maximum available output, in MW, of a resource that a Market Participant offers to supply in the Day-Ahead Energy Market or Real-Time Energy Market, as reflected in the resource's Supply Offer. This represents the highest MW output a Market Participant has offered for a resource for economic dispatch. A Market Participant must maintain an up-to-date Economic Maximum Limit for all hours in which a resource has been offered into the Day-Ahead Energy Market or Real-Time Energy Market.

Economic Minimum Limit or Economic Min is the maximum of the following values: (i) the Emergency Minimum Limit; (ii) a level supported by environmental and/or operating permit restrictions; or (iii) a level that addresses any significant economic penalties associated with operating at lower levels

Market Credit Test Percentage is calculated in accordance with Section III.B.1(a) of the ISO New England Financial Assurance Policy.

Market Efficiency Transmission Upgrade is defined as those additions and upgrades that are not related to the interconnection of a generator, and, in the ISO's determination, are designed to reduce bulk power system costs to load system-wide, where the net present value of the reduction in bulk power system costs to load system-wide exceeds the net present value of the cost of the transmission addition or upgrade. For purposes of this definition, the term "bulk power system costs to load system-wide" includes, but is not limited to, the costs of energy, capacity, reserves, losses and impacts on bilateral prices for electricity.

Market Participant is a participant in the New England Markets (including a FTR-Only Customer and/or a DRP-Only Customer and/or an ODR-Only Customer) that has executed a Market Participant Service Agreement, or on whose behalf an unexecuted Market Participant Service Agreement has been filed with the Commission.

Market Participant Financial Assurance Requirement is defined in Section III of the ISO New England Financial Assurance Policy.

Market Participant Obligations is defined in Section III.B.1.1 of Appendix B of Market Rule 1.

Market Participant Service Agreement (MPSA) is an agreement between the ISO and a Market Participant, in the form specified in Attachment A or Attachment A-1 to the Tariff, as applicable.

Market Rule 1 is ISO Market Rule 1 and appendices set forth in Section III of this ISO New England Inc. Transmission, Markets and Services Tariff, as it may be amended from time to time.

Market Violation is a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

Material Adverse Change is any change in financial status including, but not limited to a downgrade to below an Investment Grade Rating by any Rating Agency, being placed on credit watch with negative

- d. such Market Participant's "FTR Financial Assurance Requirements" under Section VI below; plus
 - e. such Market Participant's "FCM Financial Assurance Requirements" under Section VII below; plus
 - f. the amount of any Disputed Amounts received by such Market Participant; and
- (vi) a Market Participant's "Transmission Obligations" at any time will be such Market Participant's Transmission Requirements times 2.50.

To the extent that the calculations of the components of a Market Participant's Financial Assurance Obligations as described above produce positive and negative values, such components may offset each other; provided, however, that a Market Participant's Financial Assurance Obligations shall never be less than zero.

B. Credit Test Calculations and Allocation of Financial Assurance, Notice and Suspension from the New England Markets

1. Credit Test Calculations and Allocation of Financial Assurance

The financial assurance provided by a Market Participant shall be applied as described in this Section.

- (a) "Market Credit Test Percentage" is equal to a Market Participant's Financial Assurance Obligations (excluding FTR Financial Assurance Requirements) divided by the sum of its Market Credit Limit and any financial assurance allocated as described in subsection (d) below.
- (b) "FTR Credit Test Percentage" is equal to a Market Participant's FTR Financial Assurance Requirements divided by any financial assurance allocated as described in subsection (d) below.
- (c) "Transmission Credit Test Percentage" is equal to a Market Participant's Transmission Obligations divided by the sum of its Transmission Credit Limit and any financial assurance allocated as described in subsection (d) below.
- (d) A Market Participant's financial assurance shall be allocated as follows:
 - (i) financial assurance shall be first allocated so as to ensure that the Market Participant's Market Credit Test Percentage is no greater than 100%;

If a Market Participant is suspended from the New England Markets in accordance with the provisions of the ISO New England Financial Assurance Policy or the ISO New England Billing Policy, then the provisions of this Section III.B shall control notwithstanding any other provision of the Tariff to the contrary. A suspended Market Participant 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 (other than (A) Commercial Capacity and (B) Non-Commercial Capacity during the Non-Commercial Capacity Cure Period) that cause such suspended Market Participant to incur a financial obligation in the ISO's settlement system or any liability to the ISO, NEPOOL, or the Market Participants, (ii) to submit Demand Bids, Decrement Bids or Increment Offers in the New England Markets, or (iii) to submit offers for Non-Commercial Capacity in any Forward Capacity Auction or reconfiguration auction or acquire Non-Commercial Capacity through a Capacity Supply Obligation Bilateral. Any transactions, including bilateral transactions with a suspended Market Participant (other than transactions for (A) Commercial Capacity and (B) Non-Commercial Capacity during the Non-Commercial Capacity Cure Period) that cause such suspended Market Participant to incur a financial obligation in the ISO's settlement system or any liability to the ISO, NEPOOL, or the other Market Participants and any Demand Bids, Decrement Bids and Increment Offers submitted by a suspended Market Participant shall be deemed to be terminated for purposes of the Day-Ahead Energy Market clearing and the ISO's settlement system. However, if a Market Participant has provided the financial assurance required for a Capacity Supply Obligation Bilateral, then that Capacity Supply Obligation Bilateral will not be deemed to be terminated when that Market Participant is suspended.

b. Load Assets

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. If the suspended Market Participant is responsible for serving an unmetered load asset, such suspended Market Participant shall retain the obligation to serve such unmetered load asset. If a suspended Market Participant has an ownership share of a load asset, such ownership share shall revert to the Market Participant that assigned such ownership share to such suspended Market Participant. If a suspended Market Participant has the obligation under the Tariff

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

PNE ENERGY SUPPLY LLC

Complaint Against Public Service Company of New Hampshire

PNE Energy Supply LLC ("PNE") brings this complaint against Public Service Company of New Hampshire ("PSNH") pursuant to RSA 365:1 and Puc 204.01(a).

INTRODUCTION

Since February 20, 2013, PSNH has withheld \$100,000 in customer payments that belong to PNE and that were directed to PSNH simply by virtue of its role as a host utility billing services provider. Under its Tariff and its supplier agreements, PSNH was required to immediately transmit these funds to PNE and invoice PNE for allowable fees and charges. Instead, PSNH treated these funds as its own, in deliberate and knowing violation of its obligation and with the intention that PNE be denied the \$100,000, as it represents working capital that is very important to PNE's business.

When PNE demanded the release of the \$100,000, PSNH responded it was applying the funds to cover fees and costs allegedly incurred after former PNE customers were placed on PSNH Default Service on February 20. PSNH, however, simply misappropriated PNE's customer payments under the pretext of implementing a self-help remedy that is not authorized by its Tariff or its supplier agreements. PSNH delayed until May 8 – nearly three months after it withheld the \$100,000 – before specifying the alleged fees and costs and disclosing how they were calculated. PNE disputes the legitimacy of all but a fraction of the alleged fees and costs. But more important, PSNH's refusal to pay over the funds constitutes a gross violation of its obligations as a regulated public utility.

PSNH may only assess charges that are “just and reasonable.” RSA 374:1. The PSNH Tariff and supplier agreements strictly regulate the fees PSNH may charge suppliers and establish procedural protections to prevent abuses of the broad powers afforded PSNH as a host utility. PSNH’s position here – that it can unilaterally decide to withhold funds received on behalf of a supplier and apply the funds against unauthorized, unspecified and un-invoiced “charges” – is anathema to the “just and reasonable” standard of RSA 374:1, as well as the protections embodied in the Tariff and the supplier agreements.

PNE now requests that the Commission investigate PSNH’s conduct and order the immediate release to PNE of customer payments improperly held by PSNH, together with such other and further relief as the Commission believes reasonable and just under the circumstances.

PARTIES

1. PNE is a duly registered competitive electric power supplier under Puc 2003.01.
2. PSNH is a New Hampshire electric utility subject to the jurisdiction of the Commission under RSA Chapter 362 and 365, and Chapter Puc 300.

JURISDICTION

3. The Commission has jurisdiction over this matter under RSA 365:1.

FACTS

A. The PSNH Tariff and Supplier Agreements

4. PSNH’s business relationship with PNE (and, importantly, other suppliers) is controlled by the PSNH Electricity Delivery Service Tariff – NHPUC No. 8 (the “Tariff”), authorized by the Commission on June 28, 2010. The Tariff includes “Terms and Conditions for Energy Service Providers” (hereinafter “Tariff Terms and Conditions”), which govern the services PSNH provides

to suppliers, the charges PSNH is permitted to assess PNE and other suppliers for those services, and the manner in which PSNH may assess suppliers for the services.

5. In addition to (and, in a fundamental sense, as part of) the Tariff Terms and Conditions, PSNH has entered into a standard form Electric Supplier Services Master Agreement (“ESSMA”) and Electric Supplier Trading Partner Agreement (“ESTPA”) [collectively “the Agreements”] with PNE and other suppliers. The Agreements require PSNH to provide services to suppliers in accordance with the Tariff Terms and Conditions, and they delineate the manner in which PSNH can charge and collect fees approved by the Tariff Terms and Conditions.

B. Approved Charges to Suppliers

6. PNE utilizes customer billing and payment services provided by PSNH under the Tariff Terms and Conditions and the Agreements.

7. Section 2(f) of the Tariff Terms and Conditions permits PSNH to charge suppliers designated fees for billing and collection services. The ESSMA specifies that these services include reading the customer’s meter, producing a consolidated bill (reflecting both supplier charges and PSNH’s delivery charges), processing payments received from customers, and “transmitting payments allocated to Suppliers on a daily basis.” ESSMA, §VII(A)(emphasis added).

8. Apart from billing and payment services, Section 2(a) of the Tariff Terms and Conditions permits PSNH to assess an approved “Selection Charge” of \$5.00 for effectuating a change in service to a different supplier or to Default Service. Under this Section, the Selection Charge is assessed to the “new Supplier” when the service change is the result of an enrollment request from the new Supplier. The Selection Charge is assessed to the “existing Supplier” when the service change is the result of a “drop transaction” from the existing Supplier.

C. Payment of Approved Charges

9. The Agreements require PSNH to invoice Suppliers on a monthly basis for billing and payment services and other services. See ESSMA, § IX; ESTPA, § IX.

10. The Agreements strictly regulate PSNH's ability to withhold customer payments – which, as noted above, must be transmitted on a daily basis – to pay fees and charges claimed by PSNH.

The Agreements contain identical provisions that provide as follows:

The Company shall have the right to subtract fees that Supplier owes to the Company, and that are sixty (60) days or more past due, from amounts the Company collects on behalf of Supplier for reimbursement to Supplier, if applicable. Amounts subject to a good faith dispute will not be subject to deduction.

See ESSMA, § VIII (emphasis added); ESTPA, § VIII.

11. These provisions make clear that PSNH may subtract its fees from amounts due a supplier only where (a) the fees have been invoiced and are at least 60 days “past due,” and (b) the amounts claimed are not “subject to a good faith dispute.”

D. PSNH's Withholding of PNE Customer Payments

12. In February 2013, a sudden and unprecedented surge in energy prices due to wholesale power market flaws led to PNE's financial default with ISO-NE and, on February 14, its suspension from the New England power market (though PNE remained financially responsible for its customer load at ISO New England through and until February 20). Weeks before these events, PNE and FairPoint Energy had entered into an account purchase agreement calling for the transfer to FairPoint Energy of approximately 8,500 PNE customer accounts in the PSNH service territory. The agreement guaranteed rate protection for customers, by providing that service from FairPoint Energy was to continue at the same rates charged by PNE.

13. On February 28, the Commission convened two dockets – DE 13-059 and DE 13-060 – to investigate PNE’s financial default and other matters concerning PNE and Resident Power Natural Gas & Electric Solutions, LLC (“Resident Power”). On March 27, the Commission Staff, PNE and Resident Power entered into a Settlement Agreement resolving all allegations in DE 13-059 and DE 13-060. The Commission issued an Order approving the Settlement on April 15.

14. PNE cured its financial default at ISO-NE on March 22, and on May 3 it resumed operations as a registered competitive electric power supplier.

15. Since February 20, PSNH has unlawfully retained \$100,000 in customer payments owed to PNE. On February 20, PNE customers that had not been transferred to FairPoint Energy were transferred to Default Service. At that point, PSNH had received, and it continued to receive after that date, customer payments that were owed to PNE for electric energy services provided to PNE customers before February 20. After February 20, however, PSNH stopped transmitting those payments to PNE on a daily basis as required by the Agreements. PSNH took this action without PNE’s consent (and later, as set forth below, despite PNE’s repeated demands for return of the customer payments).

16. The withheld customer payments represented working capital that was very important to PNE’s survival, its ability to cure the ISO-NE default and ordinary business operations. As PSNH knew, during this period PNE was working simultaneously to cure the ISO-NE default and address customer complaints arising from former PNE customers being placed on PSNH Default Service. Further, after February 27 and as PSNH was also aware, PNE was forced to divert substantial additional resources to address the issues raised in DT 13-059 and DT 13-060. PSNH was fully and keenly aware of the state of PNE operations and challenges and, on information and belief, withheld the customer payments to exacerbate pressure on its competitor PNE.

17. By February 28, PSNH had withheld a total of nearly a quarter of a million dollars (e.g., \$248,017.47) in customer payments from PNE. At that point and in response to demands from PNE, PSNH released some payments to PNE, but it withheld \$100,000. PSNH alleged it was applying these funds to cover Tariff fees, as well as Selection Charges and other costs allegedly associated with transferring accounts to Default Service. PSNH had not invoiced PNE for the alleged fees and charges, or disclosed with any precision how it calculated the amount allegedly owed.

18. By letters dated April 15 and April 30, 2013, PNE made formal demand for PSNH to release the \$100,000 in customer payments. See Exhibit 1 (4/15/13 letter); See Exhibit 2 (4/30/13 letter). PSNH responded to these demands by letter dated May 8, wherein PSNH alleged it would return only \$7,038.61, and that it intended to keep the \$92,961.39 balance. See Exhibit 3 (5/8/13 letter).

19. With the May 8 letter PSNH produced invoices that disclosed, for the first time, the details used to calculate its alleged fees and costs. According to the invoices, the \$92,961.31 is comprised of: (a) \$38,570 in costs allegedly associated with assuming PNE's load responsibility; (b) \$47,735 in Selection Charges relating to the placement of 9,547 accounts on Default Service; and (c) \$6,656 in Tariff charges for collection and billing services provided in February and March 2013. Although PSNH has returned to PNE \$7,038.61, it retains \$92,961.39 collected by PSNH from PNE customers.

Count I –
PSNH Lacks Authority to Withhold PNE Customer Payments

20. As a regulated public utility, PSNH may only assess charges that are “just and reasonable.” RSA 374:1. The Tariff ensures compliance with this standard by regulating the fees PSNH charges to suppliers. In addition, the Tariff and the Agreements establish procedural

protections to ensure all fees and charges are disclosed and to prevent abuses of the broad power afforded PSNH as a public utility.

21. As referenced above, PSNH must transmit customer payments to suppliers “on a daily basis.” See ESSMA, §VII(A). PSNH also must invoice suppliers on a monthly basis for billing and collection services. See ESSMA, § IX; ESTPA, § IX. Only where invoiced amounts are at least 60 days overdue, and where the amounts claimed are not “subject to a good faith dispute,” may PSNH then resort to “self-help” and pay itself from customer payments received on a supplier’s behalf. See ESTPA, § VIII; ESSMA, § VIII.

22. Here, PSNH stopped transmitting customer payments to PNE as required by the Agreements, and instead applied those payments to fees and charges that PSNH had allegedly incurred and that had not been invoiced or otherwise specified or charged to PNE. PSNH did this even though payment on the un-invoiced fees and charges was not overdue, and a good faith dispute exists over the legitimacy of the fees and charges claimed by PSNH.

23. In its May 8 letter, PSNH conceded it had not invoiced PNE for the fees and charges at issue. PSNH alleged the “bills were held by PSNH and not sent to PNE” as a result of “uncertainty regarding PNE’s continued status as a going concern.” However, alleged “uncertainty” over PNE’s status, even if well-founded (which PNE rejects), would not justify PSNH’s failure to issue monthly invoices as required by the Agreements. This is particularly true given that PNE requested invoices as soon as PSNH first began withholding customer payments on February 20. Further, on information and belief, PSNH knew that PNE cured the ISO-NE default on March 22 and would be resuming operations as a supplier. PSNH had no reason to withhold invoices for its charges, apart from preventing PNE from challenging the legitimacy of the charges.

24. In the May 8 letter, PSNH alleged the “withholding of amounts payable” to PNE was “done as a normal, prudent business measure in light of PNE’s admitted ‘cash flow issues.’” PSNH did not argue this conduct was authorized by the Tariff, the Agreements, or any rule or statute governing PSNH’s operations as a regulated utility. PSNH’s improper conduct simply had the predictable effect of unnecessarily exacerbating any PNE “cash flow issues.”

25. The notion that an electric utility can unilaterally decide to withhold funds owed a supplier and apply the funds against charges that are not invoiced or specified to the Supplier as required under the Agreements or permitted under the Tariff, is anathema to the “just and reasonable” standard of RSA 374:1, as well as the protections embodied in the Tariff and the Agreements.

26. It was unlawful for PSNH withhold any portion of the \$100,000 in customer payments. This entire sum should be returned to PNE, together with interest and restitution of the fees, including attorney’s fees, and costs incurred by PNE in this matter.

Count II
Certain Fees and Charges Claimed By PSNH Are Not Authorized by the Tariff or the Agreements

27. Apart from the unlawful process used by PSNH in appropriating the PNE funds, most of the charges PSNH applied against those funds are not authorized under the Tariff or the Agreements.

28. PSNH contends it may recover \$47,735 in Selection Charges relating to the placement of accounts on Default Service and recoup \$38,570 in costs allegedly associated with assuming PNE’s load responsibility.

29. While the Tariff permits PSNH to assess a single \$5.00 Selection Charge for a change in service – presumably to recoup its costs of carrying out that service, it does not authorize PSNH to recoup the cost of carrying out its responsibilities as the host utility under the ISO-NE market rules.

In demanding Selection Charges and recoupments costs, PSNH in large part seeks, in the first instance, to recover twice for essentially the same service performed relative to the same transactions, i.e., the transfer of PNE accounts to FairPoint Energy or, alternatively, Default Service.

30. Equally significant, however, PSNH failed to cite in its May 8 letter any provision of the Tariff or the Agreements that authorizes PSNH to impose any charges, much less holdback or retain any PNE customer payments, for alleged costs incurred in performing tasks associated with its role as a host utility and Default Service provider – namely, assuming as Default Service customers on February 20 certain PNE customers enrolled by FairPoint Energy that were not successfully transferred to PNE prior to that date. Lacking any authority under the Tariff or the Agreements to impose such costs, PSNH may not recover any portion of the \$38,570 in alleged recoupment costs.

31. Regarding the \$47,735 in Selection Charges, according to the PSNH invoices, this amount represents a \$5.00 charge for 9,547 change transactions in February and March 2013. However, over 90% of these transactions were initiated by FairPoint Energy or PSNH and not PNE. Consequently, PNE is not liable for Selection Charges associated with those transactions.

32. During January and February 2013, PNE in its capacity as the existing supplier requested only 690 drop transactions. Under Section 2(a) of the Tariff Terms and Conditions, as noted above, these transactions result in Selection Charges totaling only \$3,450 (\$5 x 690).

33. As for the balance of the change transactions cited by PSNH, FairPoint Energy initiated EDI enrollments for approximately 8500 accounts covered by the agreement between PNE and FairPoint Energy. Of these, approximately 1188 accounts were actually transferred to FairPoint Energy. Under the Section 2(a) of the Tariff, FairPoint Energy, as the new supplier, and not PNE as the existing supplier, is responsible for the Selection Charges for these transferred accounts.

34. Of the approximately 7312 remaining accounts enrolled by FairPoint Energy, none was transferred to FairPoint Energy because PSNH cancelled the EDI enrollments for them. In any case, PNE never initiated or requested drop transactions for these accounts or any of the other accounts alleged by PSNH other than the 690 drop transactions referenced in Paragraph 32 above – PSNH did that.

35. PSNH lacks authority under its Tariff and the Agreements to assess Selection Charges against PNE for accounts where PNE, as the existing supplier, never requested a drop transaction. Thus, PSNH lacked authority to charge PNE \$44,285 of the \$47,735 in Selection Charges assessed against PNE.

CONCLUSION

In sum, PSNH should be directed to immediately release to PNE the remaining \$92,961.31 in PNE customer payments still held by PSNH. PSNH's decision to withhold these funds – without invoicing PNE and before any amounts claimed were overdue – clearly violated Section VIII of the Agreements. Furthermore, of the \$92,961.39 in charges now claimed by PSNH, only \$10,108 – \$3,450 in Selection Charges (for the 690 drop transactions requested by PNE), and \$6,656 in fees due under the Agreements – are valid. This amount, however, should be further reduced by accrued interest for the period of time that PSNH withheld these customer payments from PNE and the attorneys' fees that PNE has incurred in seeking PSNH's payment of these funds under the Agreements.

WHEREFORE, PNE requests the Commission to:

- A. Order PSNH to immediately pay over \$92,961.31 to PNE;
- B. Order PSNH to make reparation and/or restitution to PNE for attorneys' fees and costs incurred by PNE in securing the return of its customer payments as well as interest on customer payments unjustly withheld by PSNH since February 20, 2013 ; and
- C. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

By its Attorneys,

Sheehan Phinney Bass + Green Professional
Association

Dated: 6/21/13

 for

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STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: February 27, 2013
AT (OFFICE): NHPUC

FROM: *SEM* Steven E. Mullen, Assistant Director – Electric Division
A.O. Amanda O. Noonan, Director – Consumer Affairs Division

SUBJECT: Resident Power, LLC (Aggregator)
PNE Energy Supply, LLC (Competitive Electric Power Supplier)

**Staff's Recommendation for an Immediate Show Cause Hearing
as to Whether Resident Power, LLC and/or PNE Energy Supply,
LLC Should be Subject to Penalties or their Registrations
Suspended or Revoked Pursuant to Puc 2005**

TO: Chairman Amy Ignatius
Commissioner Robert Scott
Executive Director Debra Howland



Staff hereby requests that the Commission immediately schedule a hearing at which Resident Power, LLC (Resident Power) and PNE Energy Supply, LLC (PNE) both appear to show cause as to why they should not be subject to penalties or their registrations to operate as an aggregator and a competitive electric power supplier (CEPS), respectively, should not be revoked or suspended in accordance with N.H. Code Admin. Rules Puc 2005. In support of this request, Staff has identified the following rules which it believes may have been violated by PNE and/or by Resident Power:

- 2003.01(d)(2) Evidence that the CEPS is able to obtain supply in the New England energy market. Such evidence may include, but is not limited to, proof of membership in the New England Power Pool (NEPOOL) or any successor organization, or documentation of a contractual relationship with a NEPOOL member.
- 2003.01(i) Following registration, a CEPS shall continue to maintain compliance with the requirements of Puc 2000.
- 2004.05 (m) The CEPS shall provide a copy of the notice described in (l) above to the commission at the same time notice is sent to affected customers.
- 2004.07 (f) Any CEPS that ceases to sell electricity within the state shall, prior to discontinuing such service: (1) Provide at least 30 days written notice to any affected utility and to the commission; and (2) Provide each

customer written notice of its intent to cease operations at least 30 days prior to the start date of the customer's next billing cycle.

- 2004.08 (a) (2) Provide notice to customers of the nature of any business relationships or affiliations with any CEPS or utility.

In addition to the rules listed above, Staff also notes that, in accordance with 2006.01(a)(11), PNE's application stated it intended to serve only residential customers. Reports filed in accordance with Puc 2003.03 (b) indicate that PNE has been serving non-residential customers since the fourth quarter of 2011, the first quarter following approval of PNE's registration as a competitive electric power supplier by the Commission.¹

Staff requests this joint hearing partly due to recent events that have occurred, and that continue to develop, that involve business and ownership relationships between the two entities that are so intertwined that attempting to investigate the companies separately would result in an unnecessarily complicated process. Due to the overlapping facts and circumstances that have resulted in this recommendation, Staff believes that having a combined hearing would be the most efficient and expeditious process.

Background

Resident Power is a registered aggregator authorized to operate in New Hampshire pursuant to Puc 2003 (see Docket No. DM 11-081). PNE is a registered CEPS authorized to operate in New Hampshire pursuant to Puc 2003 (see Docket No. DM 11-075). On February 7, 2013, PNE and FairPoint Energy, LLC (FairPoint Energy)² filed a Joint Petition for Expedited Waiver of Puc Rule 2004.05(k) with respect to providing a required 14 day advance notice of PNE's intent to sell its right to serve its customer accounts. That filing was assigned Docket No. DE 13-049. The waiver request was related to a Purchase and Sale Agreement entered into by PNE and FairPoint Energy on February 6, 2013 pursuant to which PNE would transfer approximately 8,500 residential and very small commercial accounts to FairPoint Energy. In addition, PNE would assign all of its right, title and interest in certain customer contacts to FairPoint Energy and FairPoint Energy would assume all of PNE's responsibilities and obligations under the contracts. Included with that filing was the notice that would be provided to customers, a copy of which is attached to this recommendation as Exhibit 1. The waiver request was granted by the Commission on February 8, 2013, and in its letter of approval, the Commission stated the following:

PNE and FairPoint Energy's proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.

¹ A secretarial letter approving PNE's registration as a CEPS was issued on September 22, 2011.

² Staff notes that by its recommendation, it is not suggesting that FairPoint Energy be investigated for its involvement in the unfolding circumstances.

The notice of the transfer was sent to the affected customers of PNE in a letter dated February 11, 2013, with the letters actually mailed out on the dates of February 13 and 14, 2013. While the Commission was not provided with the notice at the same time it was sent to customers as is required in Puc 2004.05 (m), a copy of the notice was posted on the PNE website. The notice provided to customers included the following representations:³

- PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.
- This transfer between suppliers will occur at NO COST to you.
- Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.
- Under the FairPoint Energy terms and conditions you will have no termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.
- All billing and payment will continue to be done through PSNH.
- Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.
- Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.
- Please note that the current PSNH default service rate is \$0.0954 per kWh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.

Significant events occurred subsequent to the Commission's approval of the waiver request in DE 13-049 resulting in the planned transfer of customers from PNE to FairPoint Energy being interrupted and not fully completed. Specifically, on February 14, 2013, PNE's status as a market participant was suspended **BEGIN CONFIDENTIAL** [REDACTED] **END CONFIDENTIAL** ⁴ by ISO New England (ISO-NE). As a result, and pursuant to ISO-NE's rules, PNE's remaining load asset as of 12:01am, Wednesday, February 20, 2013 was transferred to Public Service

³ The notice on the website, while substantially the same as that provided in the waiver request in DE 13-049, has some minor differences. See Exhibit 2.

⁴ As reported in a New Hampshire Business Review article dated February 20, 2013, "'It was a financially related suspension,' said August 'Gus' Fromuth, managing director of Resident Power and PNE, related companies that are both based in Manchester."

Company of New Hampshire (PSNH) as PSNH is the "host utility" and default service provider for the affected customers. As of that time and date, approximately 1,200 former PNE customers had been transferred to FairPoint Energy on their scheduled meter read dates, with the remaining approximately 7,300 becoming default customers of PSNH. In the days leading up to PNE's suspension by ISO-NE, PNE communicated to Staff **BEGIN CONFIDENTIAL** [REDACTED]

END CONFIDENTIAL

Related to those events, pursuant to a filing dated February 15, 2013 that was officially received by the Commission on February 19, 2013 and filed in Docket No. DM 11-075, PNE submitted the sworn affidavit of the President of PNE in which PNE a) advised the Commission that it would be voluntarily ceasing operations as a CEPS for the period⁶ **BEGIN CONFIDENTIAL** [REDACTED]

END CONFIDENTIAL

As noted above, among the representations made to customers of PNE was that *"Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers."* That sentence, which apparently was made on behalf of Resident Power, was the only mention of Resident Power in the notice provided to customers. It is important to note, however, that most, if not all, of the 8,500 customers of PNE became customers of PNE through Resident Power's role as an aggregator of customer accounts. In its role as an aggregator, Resident Power, in its Terms and Conditions provided to customers (attached as Exhibit 3), states:

You hereby appoint Resident Power as your exclusive agent, for a period of 12 months from the date of enrollment, to act in your name, place and stead in any way which it could act with respect to researching, negotiating, executing, terminating, assigning, rescinding and delivering,

⁵ The information redacted in this section related to telephone conversations held with PNE regarding certain financial and business information. Although there has been no formal request by PNE to have the information treated confidentially, Staff is erring on the side of caution and has redacted the information subject to a later ruling by the Commission.

⁶ The information regarding PNE's voluntary cessation of operations as a CEPS was filed pursuant to a Motion for Confidential Treatment in that February 15, 2013 submittal, but it was disclosed in a notice issued by Resident Power to certain customers shortly before midnight on February 21, 2013 (see Exhibit 4).

electricity supply and service agreements with competitive energy suppliers, sellers or service providers.

Resident Power and PNE are affiliates with common ownership. As events unfolded over the past two weeks, Bart Fromuth, a representative of both Resident Power and PNE, engaged in several discussions with Staff on behalf of PNE and Resident Power. To the best of Staff's knowledge, Resident Power failed to disclose this affiliation to its customers as is required in Puc 2004.08 (a)(2).

On February 21, 2013, it was brought to Staff's attention that PNE was in the process of enrolling a large commercial and industrial customer, despite a) PNE having previously been suspended as a market participant by ISO-NE, b) having informed the Commission that it would be voluntarily ceasing operations beginning BEGIN

CONFIDENTIAL[REDACTED]

END CONFIDENTIAL, and d) PNE's CEPS registration indicating that it only intended to serve residential customers.

Shortly before midnight on February 21, 2013, Resident Power sent a notice (attached as Exhibit 4) to those of its customers for which the "transfer of your account from PNE Energy Supply to FairPoint Energy has regrettably not gone through as expected." In that notice, those customers were informed that their account was now being served by PSNH. In addition, Resident Power instructed customers how they could "renew" their accounts with Resident Power if they wished to remain customers of Resident Power. Further, if customers "renew" with Resident Power, Resident Power "...will get to work, right away, to find you an alternative to PSNH default service..." Renewal, in and of itself, seems to suggest that some sort of termination of an existing relationship is at hand. Resident Power's notice also contained information describing circumstances by which customers became default service customers of PSNH, an account which differs from the information contained in the filing described immediately below. In that same notice, Resident Power stated that "PNE temporarily and voluntarily suspended their own service of the New Hampshire market, *and was not forcibly suspended or removed from the market as others have suggested...*" (emphasis added), a statement at odds with the formal suspension action taken by ISO-NE.

On February 22, 2013, Resident Power filed a Verified Emergency Petition for Declaratory Judgment⁷ in which, among other things, it made certain representations regarding discussion with PUC Staff counsel regarding the subject of "slamming," a subject described in Puc 2004.10(b) as "...initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization" and in RSA 374:28-a as any practice that changes a consumer's telecommunications or energy-related service carrier or provider without the customer's knowledge or consent. For purposes of RSA 374:28-a, a "customer" shall mean the person to whom the telecommunications or energy-related services are billed, or that person's designee. In its petition, Resident Power seeks various forms of relief including an order from the Commission finding that:

⁷ That filing was assigned Docket No. DE 13-057.

- Resident Power's registration as an aggregator has not been revoked, suspended or withdrawn;
- No provision of the Commission's rules prevents or prohibits Resident Power from continuing to represent its customers, including those that were formerly customers of PNE;
- For those Resident Power customers with whom an aggregation agreement exists, who were transferred to PSNH's default service, enrollment by Resident Power of any of those customers to FairPoint Energy or any other CEPS shall not constitute slamming; and
- For those Resident Power customers with whom Resident Power has reconfirmed a prior aggregation agreement and were transferred to PSNH's default energy service, enrollment by Resident Power of any of those customers to FairPoint Energy or any other CEPS shall not constitute slamming.

Although the "Emergency Petition" was filed and signed on behalf of only Resident Power, the second paragraph of the "Introduction" includes a statement that "*PNE and R[esident] P[ower]* are requesting the Commission to rule that, under the circumstances described below, transfer of these customer accounts to a competitive energy supplier does not constitute "slamming" under applicable state law and PUC rules, is otherwise permissible under applicable New Hampshire law and PUC Rules, and is in the best interests of the customers involved." (emphasis added). In paragraph 3 of the "Emergency Petition," the Purchase and Sale Agreement that was the subject of DE 13-049 is described as being entered into by PNE, FairPoint Energy and Resident Power.⁸ As mentioned above, the filing in DE 13-049 only described the Purchase and Sale Agreement as being agreed to between PNE and FairPoint Energy.

Beginning February 20, 2013, the Consumer Affairs Division began to receive calls from former PNE customers. In the three day period ending February 22, 2013, 83 calls were received by the Consumer Affairs Division from former PNE customers. Customers were responding either to the notice from PNE dated February 11, 2013, recent news articles or the February 21, 2013 e-mail from Resident Power. There is considerable confusion about the information provided in the two notices, some of which is contradictory, as well as confusion about what options are available to them as customers. Given the suspension of PNE's status as a market participant by ISO-NE on Thursday, February 14, 2013, much of what PNE conveyed to customers is no longer accurate. Despite efforts to get them to do so, PNE has yet to provide a supplemental notice to customers. The notice provided by Resident Power has served only to create further customer confusion.

⁸ Given the knowledge that both PNE and Resident Power are parties to the Purchase and Sale Agreement, Staff recommends that the Commission order PNE and Resident Power to produce the Purchase and Sale Agreement and all other relevant information. Such information is vital to understanding issues such as to what extent the statement in the notice to customers from PNE regarding Resident Power no longer being their aggregator was valid and whether that statement was made with the knowledge and consent of Resident Power.

The PNE notice dated February 11, 2013 stated that Resident Power would no longer be an aggregator for those customers, except to cooperate with FairPoint to assist in the transition between electricity suppliers. The Resident Power notice to customers recognizes this and asks the customer to affirmatively renew his or her account with Resident Power, indicating that if the customer does not renew with Resident Power, he or she will remain on PSNH's default service rate until another supplier is chosen. The Verified Emergency Petition For Declaratory Judgment filed by Resident Power on February 22, 2013 asks the Commission to make a ruling as to whether the Resident Power agreements with former PNE customers are valid and, therefore, any action by Resident Power to change the supplier of former PNE customers would not constitute slamming, something which seems contradictory to the notice provided by Resident Power the previous evening.

Recommendation

To date, documents have been issued by PNE or Resident Power indicating, among other things, that Resident Power is either no longer the aggregator for the former PNE customers, still their aggregator, or that those customers can "renew" their aggregation relationship with Resident Power. Representatives of PNE and Resident Power alternately seem to speak for one entity, the other or both, but at other times appear to fall back to relying on the companies' statuses as separate legal entities to disclaim knowledge of each other's actions. Customers, Staff and the general public are getting confusing and conflicting information, which continues to change over time.

The ongoing situation is very fluid with new information being received each day by Staff, customers and the general public. This recommendation is not meant to encompass all facts and circumstances involving PNE and Resident Power, but given the confusing and at times contradictory information being provided by the two companies, Staff recommends that the Commission have PNE and Resident Power appear before it to answer the numerous questions generated by their recent actions. Toward that end, Staff recommends that the Commission schedule a show cause hearing as soon as practicable. At the hearing, PNE and Resident Power should be required to produce the following information:

1. An organizational chart that details the corporate structure of PNE, Resident Power and all other companies affiliated by cross-ownership, key employee, officer, director or member in a detailed manner that breaks ownership down to individuals;
2. Records of the companies demonstrating ownership of PNE and Resident Power;
3. Financial records showing the financial position of PNE for each day of February 2013;
4. Any type of financial projections prepared by or on behalf of PNE covering time periods in calendar year 2013;

REDACTED

5. Any written projections of what PNE's ISO-NE financial obligations would be for the months of February, March and April 2013;
6. Written projections of PNE's ability to meet those ISO-NE financial obligations;
7. Copies of all communications from ISO-NE with respect to PNE's financial obligations;
8. A list of all commercial and industrial customers of PNE including an indication of which customers were aggregated by Resident Power;
9. A copy of all notices provided to customers of Resident Power pursuant to Puc 2004.08(a)(2) disclosing the nature of any business relationships or affiliations with any CEPS;
10. The date each customer of Resident Power entered into an aggregation agreement and the date each notice referred to in item #9 above was sent to the customer; and
11. A copy of the February 6, 2013 Purchase and Sale agreement entered into by PNE, Resident Power and FairPoint Energy and all other information related to that transaction that is relevant to this recommendation.

In addition, considering PNE's current lack of status as a market participant with ISO-NE and its voluntary suspension of operations in New Hampshire, Staff recommends that the Commission order that PNE cease enrolling new customers, to the extent it has not already done so, and that the New Hampshire electric utilities not be required to accept any customer enrollments from PNE, to the extent they receive any.

Please let us know if you have any questions regarding this recommendation.

cc: David Shulock, Director – Legal Division

CUSTOMER NOTICE OF SERVICE PROVIDER CHANGE

[DATE]

Dear Customer,

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, www.fairpointenergy.com. A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

Specifically, please note the following:

- PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.
- This transfer between suppliers will occur at NO COST to you.
- Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.
- Under the FairPoint Energy terms and conditions you will no longer have any termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.
- All billing and payment will continue to be done through PSNH.
- Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.
- Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless

you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

- Please note that the current PSNH default service rate is \$0.0954 per kwh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.
- The contact information for FairPoint Energy is:

FairPoint Energy, LLC
1055 Washington Blvd.
Stamford, CT 06901
Phone: 866-842-1084
Email: support@fairpointenergy.com
www.fairpointenergy.com

Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England
816 Elm Street Suite 364
Manchester, NH 03101
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England



February 11, 2013

Dear Customer,

RE Account Number: 1234567890

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, www.fairpointenergy.com. A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

Specifically, please note the following:

PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.

This transfer between suppliers will occur at NO COST to you.

Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.

Under the FairPoint Energy terms and conditions you will have no termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.

All billing and payment will continue to be done through PSNH.

Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.

Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

Please note that the current PSNH default service rate is \$0.0954 per kWh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.



The contact information for FairPoint Energy is:

FairPoint

Fairpoint Energy uses its name under a license agreement with Fairpoint Communications Inc.

FairPoint Energy, LLC
1055 Washington Boulevard,
7th floor
Stamford, CT 06901
Phone: 866-842-1084
Email: support@fairpointenergy.com
www.fairpointenergy.com

Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England
816 Elm Street Suite 364
Manchester, NH 03101
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England



Terms and Conditions

Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power") operates as a registered aggregator of electricity in New Hampshire and Maine. "We", "us" and "our" refers to Resident Power. "You" or "your" refers to you the Customer. Resident Power will maintain your information with the strictest confidentiality and will utilize it only in the course of providing the services contemplated under these terms and conditions. Please read the terms and conditions below carefully as offers and opportunities may vary depending on utility, state and region of service.

1. Appointment of Agent: You hereby appoint Resident Power as your exclusive agent, for a period of 12 months from the date of enrollment to act in your name, place and stead in any way which it could act with respect to researching, negotiating, executing, implementing, signing, rescinding and delivering electricity supply and service agreements with competitive energy suppliers, sellers or service providers.

2. Authority to Sign/Enroll: By accepting the terms and conditions and completing the online or hard copy enrollment form you are representing that you have the authority to sign on behalf of the electricity account/s listed, and that you are either the account owner or the owner's duly authorized representative. **NOTICE:** Anyone enrolling customers without their express permission shall be liable for any and all suits, complaints, damages, fines or charges resulting therefrom. Resident Power does not condone or tolerate customer "slamming" and will turn in any person or persons discovered to be engaged in any such activity to the proper authorities. If you feel that you have been a victim of improper or unauthorized enrollment please contact Resident Power at info@residentpower.com and include INVALID ENROLLMENT in the subject line. If you are already with another supplier or aggregator [other than the utility] and you enroll with Resident Power it is your responsibility to inform Resident Power in writing as to when your current supply/aggregation contract expires. Resident Power is not responsible for any early termination penalties that may be charged to you by other suppliers or aggregators as a result of your enrollment with Resident Power.

3. Price Guarantee: Resident Power guarantees that your new electricity rate will be lower than the 12 month average residential rate offered by your local utility company at the time of enrollment with your new competitive electricity provider ("CEP"). **Note:** The 10% savings guarantee applies to PSNH customers only and reflects Resident Power's commitment to price you, the Customer 10% or more below the average residential rate offered by PSNH over the prior 12 months. All other utility customers are guaranteed a savings against the posted residential rate offer by their utility; however it may be a savings of less than the PSNH savings percentage referenced above. If Resident Power is unable to secure a rate that is lower than the previous 12 month average residential rate offered by your local utility company Resident Power will not enroll you with a new CEP and you will remain with the utility company at no additional charge, until such time as a new rate is found or you terminate your membership in the Resident Power program.

Please note that Resident Power cannot find you a lower cost source for your transmission and distribution charges as those charges are the domain of your utility company and will remain as such even after we find you a new electricity supplier/CEP. Therefore, our guarantee of a lower price relates ONLY to the per kWh electricity charge for electricity supply and does not extend to, describe or pertain to any other service offering, product, or charge levied by your local utility company.

Please note that many utility companies fluctuate their prices every 1, 3 or 6 months. It is for this reason that Resident Power uses a utility's previous 12 month average as the price to compare.

4. Term: Your enrollment in our energy program starts on the day of sign up and submission and lasts for a period of 12 months from that date. If you wish to be removed from the Resident Power program you must inform us in writing 30 days prior to the expiration of your 12 month term, or you will be automatically renewed for another 12 months. This term listed under this Appointment of Agent does not relate to any Agreement entered into on your behalf with a CEP while acting under the authority provided herein. When a new electricity rate and CEP have been secured on your behalf, you will be notified of your new terms and conditions at that time, by the CEP or their agent.

5. Cancellation: Under this Agreement you are enrolled with Resident Power for a period of 12 months from the date of sign up. At the expiration of the 12 month period, either party may cancel this Appointment of Agent 30 days prior to its expiration, or terminate you will have been required to renew for another 12 month interval. You will continue to auto renew for 12 month intervals until such time as either party cancels. In order to successfully cancel, the canceling party must submit a written notice of cancellation at least thirty (30) days prior to the next termination date. In the event that you have already been enrolled with a CEP, cancellation of your Agreement with Resident Power will have no impact on the terms and conditions entered into between you and the CEP. **NOTICE:** If you move within state, please notify us of your new account number(s) within (90) days for re-enrollment and your early termination fee will be waived.

6. Right of Rescission: By law the residential consumer has the right to rescind when Resident Power has found you a new rate and new CEP. You will remain a Resident Power customer, however, when we have found you a new rate with a CEP you will be notified by email of your new rate and terms and conditions. At which point you will have the following right of rescission depending on the form of the communication:
a. Residential customers and small commercial customers shall have 3 business days from the date of personal or electronic delivery of the written terms or receive a statement required by (a) above to rescind authorization and

www.ResidentPower.com
EMAIL: info@residentpower.com
603 232 9293 (Phone)
603 625 8448 (Fax)

816 Elm Street, Suite 364, Manchester, NH 03104

- b. Residential customers and small commercial customers receiving the terms of service statement required by (a) above via the United States postal service shall have 5 business days from the postmarked date to rescind authorization.
7. **Early Termination:** In order to provide our price guarantee, you may not sign with another electricity broker or supplier while under contract with Resident Power. You have authorized Resident Power as your exclusive procurement agent for electricity; therefore if you leave prior to proper cancellation, Resident Power reserves the right to charge a \$100 early termination fee. See Section 4 Cancellation for more details.
8. **Information Release Authorization:** Through your enrollment via web, mail, telephone or other method you agree with the terms and conditions contained within this document and authorize Resident Power to act on your behalf, with your local utility company (i.e. PSNH, Unitil, NGRID, NH CO-OP, etc...) to release or allow access to us any pertinent account information including, but not limited to account number, usage information, payment history etc.
9. **Dispute Resolution:** In the event of a billing dispute or a disagreement involving any essential element of this Agreement, the parties will use their best efforts to resolve the dispute. If you have any concerns about your bill, you may call our Customer Service department (M-F 9AM-5PM EST) at 603 232 9293 or send a letter to Resident Power, 816 Elm Street, Suite 364, Manchester, NH 03104, or send an e-mail to info@residentpower.com.
10. **Low Income Eligibility:** A discount electric rate is available to qualifying residential customers by your utility company. If you are currently on such a rate with the utility company, we suggest that you do not enroll in our program as we cannot guarantee a lower electricity rate against non published, specialized enrollment rates, such as those for low income eligibility.
11. **Governing Law and Regulations:** This Agreement shall be governed by, construed, enforced and performed in accordance with the laws of the State of New Hampshire, if action is taken by federal or state governmental authorities which might significantly changes the way Resident Power does business with you. Resident Power may terminate this Agreement, after which you can enroll for service from another aggregator or supplier.
12. **Emergency Service:** In the event of an electric emergency or service interruption, you should immediately call your local utility company immediately.
13. **Assignment:** Resident Power may assign or transfer your account/s to another entity at any time under the same or substantially similar terms and conditions, unless otherwise agreed between Resident Power and the other entity. In such cases, Resident Power will use best efforts to provide you with 30 days notice via electronic mail. If you have not provided an electronic mailing address to Resident Power, Resident Power reserves the right to inform you by publishing such notice on their website at www.ResidentPower.com.
14. **Supplier Notice to Customers:** Resident Power will notice you when a new supplier rate is secured for your home or small business as noted above. Customers do have the ability to opt out of any sale offered for the time periods outlined in Section 6. Resident Power will utilize the mailing or email address provided by customer and is not liable for any undelivered supplier notices resulting from incorrect electronic or physical mailing addresses. Customers are encouraged to double check their enrollment forms to ensure that all information is input completely and accurately.

Thank you for your enrollment and we appreciate your support. Don't forget to Like Us on Facebook at <http://www.facebook.com/ResidentPower>

The Resident Power Team

E-mail Users: Don't forget to allow e-mail from ResidentPower.com, as some mail servers may direct our letters and notices into your SPAM filter

Coming Soon: Resident Power GREEN

7030000628012-1



www.ResidentPower.com
[EMAIL: info@residentpower.com](mailto:info@residentpower.com)
603 232 9293 (Phone)
603 625 8448 (Fax)

816 Elm Street, Suite 364, Manchester, NH 03104



Dear Resident Power Customer:

IMPORTANT UPDATE – REPLY REQUESTED

If you are receiving this message the transfer of your account from PNE Energy Supply to Fairpoint Energy has regrettably not gone through as expected. Your account had been enrolled for transfer to Fairpoint Energy at the same low rates, terms and conditions that you enjoyed with PNE Energy. However, the transfer of your account has been halted, and your account is now back with Public Service of New Hampshire (PSNH), whose rates are considerably higher than those you enjoyed with PNE Energy and would have enjoyed with Fairpoint Energy.

If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH rates, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

If you renew with us, we will get to work, right away, to find you an alternative to PSNH default service at rates that continue to be well below PSNH. If you do not renew with us, please be advised that you will remain on PSNH's high default service rate of \$.0954 per kwh, until you choose another supplier on your own, or you re-sign with Resident Power.

While we are writing you, we would like to clear up some inaccuracies in the media the last few days.

1. Despite what was reported by the Nashua Telegraph and other news outlets this morning, Resident Power has not been suspended by the ISO or the New Hampshire PUC. The Telegraph and others have since changed their online versions to reflect the truth. We remain in good standing and continue to serve you (should you renew with us) and all of our 14,000 NH customers with superior rates and service.
2. Your account has gone back to PSNH as of Wednesday, February 20, 2013. A request was made to PSNH to transfer your account to Fairpoint Energy automatically and protect your rates, however PSNH declined to make the switch. PSNH stated that although they had the ability to do the automatic transfer, they lacked the "resources" to effect the transfer in the time provided.
3. Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (Fairpoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire's only locally owned and operated electricity supplier in the next few weeks.

When we started Resident Power, almost two years ago now, all we wanted to do was provide EVERY New Hampshire rate payer with a competitive choice, not just the large businesses. In the early days, the only supplier that would work with us, and be the first to offer service to residential and small commercial customers, was PNE Energy. As their partner these last two years, we salute them for being bold enough to do to what no competitive supplier had done before. Today, almost 50,000 New Hampshire customers have chosen an alternative supplier to help save them money on their electricity bills, and PNE Energy Supply is a major reason for that.

In closing, we hope that you decide to remain with Resident Power. It has been our pleasure to serve you and we hope you give us the chance to continue that relationship.

Please remember, that if you wish to stay with Resident Power, please REPLY to this

email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at **603 232 9293**, and speak with one of our associates, between 9 am and 5 pm, M-F.

Sincerely,

Your Resident Power Enrollment Team



[follow on Twitter](#) | [friend on Facebook](#) | [forward to a friend](#)

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Enrollment from Website www.residentpower.com

Our mailing address is:

Resident Power

816 Elm St.

Suite 304

Manchester, NH 03104

[Add us to your address book](#)

[unsubscribe from this list](#) | [update subscription preferences](#)

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 13-__

**PNE Energy Supply LLC, d/b/a Power New England and
FairPoint Energy, LLC**

JOINT MOTION FOR EXPEDITED WAIVER OF PUC RULE 2004.05(k)

NOW COME PNE Energy Supply LLC, d/b/a Power New England ("PNE") and FairPoint Energy, LLC ("FairPoint Energy") (together, the "Parties") by and through their attorneys, and hereby move the Commission for an expedited waiver of Puc Rule 2004.05(k) regarding the 14 day notice requirement, prior to transfer of a customer account. In support of their Motion, the parties state the following:

1. PNE is a duly-registered CEPS in PSNH's service territory.¹
2. FairPoint Energy is a duly-registered CEPS in PSNH's service territory.²
3. PNE and FairPoint Energy have entered into a Purchase and Sale Agreement ("PSA"), dated February 6, 2013, for the transfer of approximately 8,500 residential and very small commercial³ customer accounts. Pursuant to the PSA, PNE will assign all of its right, title and interest in certain customer contracts to FairPoint Energy. FairPoint Energy will assume all of PNE's responsibilities and obligations under the contracts.
4. The affected customers will not see any change in the rates and contract term as set out in their PNE contracts.
5. Pursuant to Rule Puc 2004.05(k), PNE must provide written notice 14 days prior to the effective date of any change of a customer's service provider.
6. The Parties desire that FairPoint Energy begin enrolling the transferred customers immediately following grant of the requested waiver, and before the expiration of the 30 day

¹ See DM 11-075.

² See DM 11-175.

³ I.e. all customers are served by Small Profile Meters.

notice period described in the following paragraph.⁴

7. The parties represent that service will be provided at the same rates and contract term for fixed rate customers under which they are receiving service now. Variable rate customers will remain on a variable rate plan. Furthermore, the parties represent that every customer will be extended all, or more, of the rights due them under Puc 2004.05(1). In particular, every customer will have the right to find an alternate provider during the initial 30 day period after notice of transfer is served, rather than the 14 period required by the rules. Moreover, notwithstanding that FairPoint Energy may have begun enrolling customers during the 30 day period and notwithstanding that the customer may currently have committed to a set term of service with PNE there will also not be any termination fees during this time. (Note that under the FairPoint Energy terms and conditions there are never any termination fees.) A copy of the proposed customer notice is attached hereto as Exhibit 1.

8. FairPoint Energy represents to the Commission that it has the technical, managerial and financial capability to acquire and service the large quantity of customer accounts contemplated by this transfer

9. No special off-cycle meter read dates will be necessary as a result of this transfer. Customers will transfer suppliers upon their next scheduled meter read date.

10. Rule Puc 201.05 provides that the Commission may waive the provisions of any of its rules if (1) the waiver serves the public interest and (2) the waiver will not disrupt the orderly and efficient resolution of matters before the Commission.

11. Rule Puc 201.05 provides further that, in determining the "public interest," the Commission may find a waiver request to be in the public interest if "the purpose of the rule would be satisfied by an alternative method proposed." There will be no risk or detriment to PSNH as a result of this transfer or requested waiver. Furthermore, there will be no risk or detriment to the transferred customers. Every customer will be extended all, or more, of the rights contained within Rule 2004.05(1), and FairPoint Energy will ensure that the customers'

⁴ Please refer to Confidential Exhibit 2, paragraphs 2 through 4, attached hereto, for an affidavit detailing the circumstances that necessitate the requested waiver.

PNE fixed rate and remaining contract term will not change.⁵ They will be affected no differently than if the waiver had not been granted.

12. Finally, because customer transfers of this type do not involve the Commission other than review of the notice, grant of this waiver will not disrupt the orderly and efficient resolution of matters before the Commission.

WHEREFORE, the Parties respectfully request the Commission waive, on an expedited basis, the customer transfer rules as discussed in this Petition.

Respectfully submitted,

Dated: February 7, 2013

By: 

FairPoint Energy, LLC
Jan L. Fox, Esq.
Senior Vice President
& General Counsel
1055 Washington Blvd.
Stamford, CT 06901
(203) 517-0130

PNE Energy Supply LLC
By its Attorneys,

DEVINE, MILLIMET & BRANCH, PA
Harry N. Malone, Esq.
111 Amherst Street
Manchester, NH 03301
(603) 695-8532

⁵ Please refer to Confidential Exhibit 2, paragraphs 5 and 6, attached hereto, for an affidavit describing further assurances regarding this transfer.

CHAIRMAN
Amy L. Ignatius

COMMISSIONERS
Michael D. Harrington
Robert R. Scott

EXECUTIVE DIRECTOR
Debra A. Howland

THE STATE OF NEW HAMPSHIRE



PUBLIC UTILITIES COMMISSION

21 S. Fruit Street, Suite 10
Concord, N.H. 03301-2429

TDD Access: Relay NH
1-800-735-2964

Tel. (603) 271-2431

FAX (603) 271-3878

Website:
www.puc.nh.gov

February 8, 2013

Harry N. Malone, Esq.
Devine, Millimet & Branch PA
111 Amherst Street
Manchester, NH 03101

Re: DE 13-049 – PNE Energy Supply LLC and FairPoint Energy, LLC Joint Motion for Expedited Waiver of PUC Rule 2004.05(k) and PNH Energy Supply LLC Motion for Confidential Treatment

Dear Attorney Malone:

On February 7, 2013, you filed on behalf of PNE Energy Supply LLC (PNE) and FairPoint Energy, LLC (FairPoint Energy) a joint motion for expedited waiver of N.H. Code of Admin. Rule Puc 2004.05(k) along with a motion for confidential treatment. According to the motion for expedited waiver of Puc 2004.05(k), PNE and FairPoint Energy have entered into a purchase and sale agreement dated February 6, 2013 (PSA) for the transfer of approximately 8,500 residential and very small commercial customer accounts. Both PNE and FairPoint Energy are competitive electric power suppliers (CEPS) authorized to do business in New Hampshire. Pursuant to the PSA, PNE will assign all of its right, title and interest in certain customer contracts to FairPoint Energy, and FairPoint Energy will assume all of PNE's responsibilities and obligations under the contracts.

PNE has asked the Commission to waive Puc 2004.05(k). This rule requires 14-days advance notice by a CEPS to an affected customer of any transfer or sale of the right to serve that customer. The rule also sets forth a CEPS responsibilities and customer rights during such a transfer. PNE and FairPoint Energy have requested that the Commission waive the timing of the advance notice requirement and permit the notice to issue upon the granting of the waiver. PNE and FairPoint Energy intend to fulfill all other requirements of the rule, and they have provided copies of the notice and FairPoint Energy's terms of service for the Commission's review.

On February 8, 2013, the Commission reviewed the waiver request and, pursuant to Puc 201.05, determined that the waiver is in the public interest inasmuch as the waiver does not disrupt the orderly and efficient resolution of matters before the Commission, and the purpose of

Harry N. Malone, Esq.
February 8, 2013
Page 2

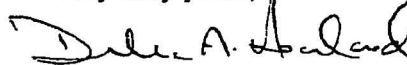
the rule is satisfied by the alternative method proposed by PNE and FairPoint Energy. PNE and FairPoint Energy's proposed notice and transfer process complies with the purpose of the rule and includes providing each customer with 30 days to elect default service or another competitive supplier.

The Commission limited the waiver to customers located in Public Service Company of New Hampshire service territory. As a condition of the waiver, the Commission directs PNE to provide the Commission with a listing of all customer accounts transferred by the PSA within 5 business days of this letter. This listing is to be in electronic, Excel format, and shall include the name, address, service class, and service territory for each customer account. The Commission found that such a list constitutes confidential proprietary financial information, and will treat the list confidentially when the filing is made without the necessity of filing a motion for confidential treatment. As an additional condition to the waiver, the Commission requires FairPoint Energy to make a filing within 10 business days of this letter demonstrating that the surety provided under Puc 2003.03 is adequate given the additional customer base assumed in the PSA.

Also on February 8, 2013, the Commission reviewed the motion for confidentiality and attached affidavit of Howard Plante. The Commission granted the motion for confidential treatment after determining that all of the information for which confidential treatment was sought is proprietary and confidential financial information and is exempt from public disclosure pursuant to RSA 91-A:5, IV.

Lastly, the Commission directed Staff to commence an investigation into PNE's CEPS authorization and the circumstances that necessitated the requested waiver.

Very truly yours,



Debra A. Howland
Executive Director

cc: Docket Related Service List

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov
achesley@devinemillimet.com
al-azad.m.iqbal@puc.nh.gov
amanda.noonan@puc.nh.gov
Christina.Martin@oca.nh.gov
hmalone@devinemillimet.com
steve.mullen@puc.nh.gov
susan.chamberlin@oca.nh.gov
tom.frantz@puc.nh.gov

Docket #: 13-049-1 Printed: February 11, 2013

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.

ACCOUNT PURCHASE AND SALE AGREEMENT

THIS ACCOUNT PURCHASE AND SALE AGREEMENT is made and entered into this 6th day of February, 2013 (the "**Effective Date**"), by and between PNE Energy Supply, LLC, a New Hampshire limited liability company, with a principal business address at 497 Hooksett Road, Suite 179 ("**Seller**"), Resident Power Natural Gas & Electric Solutions, LLC ("**Resident Power**"), and FairPoint Energy, LLC, a Nevada limited liability company, with a principal business address at 1055 Washington Blvd., Floor 7, Stamford, Connecticut 06901 ("**Buyer**"). For value received, and in consideration of the mutual promises contained in this Agreement, the parties agree to the following recitals, terms and conditions.

1. Recitals.

(a) Seller is engaged in the business of supplying power to residential and small commercial electricity customers in New Hampshire and other states.

(b) Resident Power is engaged in the business of aggregating electricity to end use customers, including with respect to Seller's retail electricity supply business and the retail electricity supply businesses of other suppliers.

(c) Seller desires to sell, and Buyer desires to purchase, those Customer Accounts listed on Schedule 1(c) in accordance with the terms and conditions set forth in this Agreement. For purposes of this Agreement, "**Customer Account**" shall mean each residential and small commercial electricity customer account listed on Schedule 1(c), and "**Customer**" shall mean each customer pursuant to a Customer Account.

(d) This Agreement supersedes in its entirety that certain Letter of Intent by and among Seller, Resident Power and Buyer dated January 30, 2013, as set forth in Section 16(i).

2. Transfer of Customer Accounts; Termination of Customer Aggregation Agreements.

(a) At the Closing, Seller shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase, accept and assume from Seller, the Customer Accounts. Seller shall use commercially reasonable efforts to deliver to Buyer, and Buyer shall accept from Seller, copies of any and all records and documentation in the possession or control of Seller with respect to each Customer Account, whether maintained on hard copy, electronically or otherwise (including any and all records relating to confirmation of enrollment of Customer Accounts by: (1) an independent third-party telephone verification service provider; (2) receipt of a written confirmation received in the mail from the customer after the customer has received an information package confirming any telephone agreement; (3) a customer signature on a document fully explaining the nature and effect of the change in service; or (4) a customer's consent obtained through electronic means, including, but not limited to, a computer transaction), within ten (10) business days following Closing; in any case, copies of all such records and documentation in the possession or control of Seller shall be delivered to Buyer no later than thirty (30) calendar days after Closing, it being understood by the parties that Seller

may not have in its possession or control (and thus may not deliver) confirmations with regard to each of the Customer Accounts.

(b) Resident Power shall use commercially reasonable efforts to deliver to Buyer, and Buyer shall accept from Resident Power, copies of all aggregation agreements entered into with Customers (such agreements, the "Customer Aggregation Agreements") within ten (10) business days following Closing; in any case, copies of all such records and documentation in the possession or control of Resident Power shall be delivered to Buyer no later than thirty (30) calendar days after Closing. All such Customer Aggregation Agreements shall be terminated as of the Closing Date for each such Customer. Notwithstanding anything to the contrary in this Agreement, Buyer shall have no rights or obligations arising pursuant to the Customer Aggregation Agreements on or after the Closing.

3. Liabilities. The Customer Accounts shall be sold and conveyed to Buyer at Closing free and clear of all liabilities, obligations, liens, security interests and encumbrances; notwithstanding the foregoing and anything to the contrary herein, at Closing each of Seller and Resident Power shall assign to Buyer, and Buyer shall assume, each and every obligation of Seller and Resident Power arising in connection with the Customer Accounts on or after the Closing, including without limitation the obligation of Seller to deliver electricity to each Customer Account on or after the Flow Date applicable to such Customer Account. Buyer shall in no event assume or be liable for any obligation not specifically assumed in this Agreement.

4. Consideration.

(a) Purchase Price. Buyer will pay to Seller an amount equal to Seventy Five Dollars (\$75.00 US)(such amount, the "QRCE Price") per Qualifying Residential Customer Equivalent (as defined in Section 4(b) below) relating to the Customer Accounts. The aggregate of all amounts to be paid to Seller with regard to the Customer Accounts pursuant to this Section 4 is referred to herein as the "Purchase Price." The Purchase Price shall be paid by Buyer to Seller in cash or by wire transfer of immediately available funds at the following times:

(1) Daily Post Closing Payments. Commencing on the Closing Date, and on every day thereafter through and including the thirtieth (30th) calendar day following Closing, Buyer shall pay to Seller within one business day (1) day after each applicable Flow Date (as defined in Section 4(b) below), an amount equal to the QRCE Price multiplied by the total Qualifying Residential Customer Equivalents measured on such applicable Flow Date (such amount, a "Daily Post-Closing Payment"), as reduced by all previous Daily Post-Closing Payments already made to Seller (the cumulative total of such Daily Post-Closing Payments, the "30-Day Payment");

(2) 40-Day Payment. Within forty-five (45) days after the Closing Date, Buyer shall pay to Seller an amount equal to the QRCE Price multiplied by the total Qualifying Residential Customer Equivalents measured at (40) days after the Closing Date ("40-Day Payment"), less the 30-Day Payment;

(3) 50-Day Payment. Within fifty-five (55) days after the Closing Date, Buyer shall pay to Seller an amount equal to the QRCE Price multiplied by the total Qualifying Residential Customer Equivalents measured at (50) days after the Closing Date ("50-Day Payment"), less the 40-Day Payment; and

(4) 60-Day Payment. Within sixty-five (65) days after the Closing Date, Buyer shall pay to Seller an amount equal to the QRCE Price multiplied by the total Qualifying Residential Customer Equivalents measured at sixty (60) days after the Closing Date ("60-Day Payment"), less the 50-Day Payment.

(5) 75-Day Payment. Within eighty (80) days after the Closing Date, Buyer shall pay to Seller an amount equal to the QRCE Account Price multiplied by the total Qualifying Residential Customer Equivalents measured at seventy-five (75) days after the Closing Date ("75-Day Payment"), less the 60-Day Payment.

(b) Certain Definitions. For purposes of this Agreement, the following definitions shall apply: (i) "Flow Date" with regard to a particular Customer Account means that date that Buyer commences the supply of electricity to such Customer Account, and (ii) "Qualifying Residential Customer Equivalent" means the aggregate of the annual usage, in kWh, of each Customer Account acquired from Seller, measured at each of the relevant flow dates for which a drop request has not been received, divided by 10,000 kWh. Annual usage shall be calculated by Buyer in a commercially reasonable manner in accordance with industry practice based on historical data provided by the applicable utility through Buyer's EDI vendor. To the extent that historical data for a given Customer Account is not available, then the average annual usage for the applicable Customer rate class as reported by the New Hampshire Public Utilities Commission shall be used. Buyer shall furnish to Seller its calculations of Qualifying Residential Customer Equivalents with respect to each Flow Date and each payment calculation described in Section 4(a) above, which shall include the historical data relied upon and reasonable detail regarding the calculations undertaken by Buyer.

(c) Non-Solicitation. In order to provide Buyer with the full benefit of the Customer Accounts, each of Seller, Resident Power, August Bart Fromuth and August G. Fromuth will execute and deliver at the Closing a Non-Solicitation Agreement in the form attached hereto as Exhibit A (each, a "Non-Solicitation Agreement"), pursuant to which they, directly or indirectly, will not to solicit any Customer Account for two (2) years following the Flow Date, *provided, however* that nothing herein shall be deemed to prohibit any general solicitations for customers not specifically directed at any Customer Account, including general advertising on television, radio, in print and electronic media, on social media, and as part of direct mail campaigns not specifically targeting Customers.

5. Closing. Upon the terms and subject to the conditions set forth in this Agreement, the closing of the sale and purchase contemplated by this Agreement shall take place on February 6, 2013 (the "Closing Date") at 10 AM, at the Manchester, NH offices of Sheehan Phinney Bass + Green PA or at such other time or at such other place as shall be mutually agreed upon by the parties.

6. Closing Documentation.

(a) Seller's Documents. At closing, Seller shall provide Buyer with the following:

(i) An executed counterpart of an Assignment and Assumption of Customer Accounts in the form attached to this Agreement as Exhibit B (the "Assignment and Assumption of Customer Accounts");

(ii) Fully executed Non-Solicitation Agreements executed by Seller, Bart Fromuth and August Fromuth substantially in the form attached hereto as Exhibit A; and

(iii) Limited liability company resolutions of Seller authorizing the transactions contemplated by this Agreement, accompanied by a certification of the Manager or other duly authorized person of Seller to the effect that such resolutions are in full force and effect and have not been amended, modified or rescinded, together with a good standing certificate from the New Hampshire Secretary of State.

(b) Resident Power's Documents. At closing, Resident Power shall provide Buyer with the following:

(i) A fully executed Non-Solicitation Agreement executed by Resident Power substantially in the form attached hereto as Exhibit A; and

(iii) Limited liability company resolutions of Resident Power authorizing the transaction contemplated by this Agreement, accompanied by a certification of the Manager or other duly authorized person of Resident Power to the effect that such resolutions are in full force and effect and have not been amended, modified or rescinded, together with a good standing certificate from the New Hampshire Secretary of State.

(c) Further Assurances. From time to time after the Closing Date, at Buyer's request, and without further consideration, Seller and Resident Power shall execute and deliver such other instruments of conveyance and transfer and take such other actions as Buyer may reasonably request in order to more effectively convey, transfer, assign or deliver the Customer Accounts to Buyer. Upon request, and as part of such further assurances, Seller and Resident Power shall use commercially reasonable efforts to take such actions, during the seventy-five day post-closing period referenced in Section 4(a) above, that promote the transfer to Buyer of the Customer Accounts as set forth in this Agreement, including but not limited to the provision of notifications by Resident Power to the Customer Accounts following distribution of Buyer's Press Release (see Section 14 below) of the impending transfer of accounts and anticipated issuance of notice of same by Seller, and the termination of Customers Aggregation Agreement with Resident Power. Any notices from Seller or Resident Power to Customers pursuant to this section shall be subject to the prior review and approval of Buyer, which approval shall not be unreasonably withheld, conditioned or delayed.

(d) Buyer's Documents. At closing, Buyer shall deliver or cause to be delivered to Seller the following:

- (i) An executed counterpart of the Assignment and Assumption of Customer Accounts; and;
- (ii) Limited liability company resolutions of Buyer authorizing the transaction contemplated by this Agreement, accompanied by a certification of the Manager of Buyer to the effect that such resolutions are in full force and effect and have not been amended, modified or rescinded, together with good standing certificates for Buyer from the Nevada and New Hampshire Secretaries of State.

7. Transition of Customer Accounts.

(a) Account Transfer File. On the Closing Date, Seller will transfer to Buyer an electronic file of the list of Customer Accounts (the "Account Transfer File"), which may be provided in Excel format, which shall include customer enrollment data reasonably necessary for a successful enrollment of each Customer with Buyer, including without limitation the following information: Customer name, service address, mailing address, Ldc account number, contact name, contact phone number, rate and whether it is fixed/variable, rate code, and meter reading cycle (with regard to the meter reading cycle, if Seller is unable to provide as of Closing, then such information shall be provided as soon as possible thereafter). Buyer shall promptly load the Account Transfer File into its Electronic Data Interface ("EDI") systems with the applicable electric distribution company (each, a "Distribution Company") such that each Customer Account will be transferred to Buyer's service on that Distribution Company's system immediately after each such Customer Account's electric meter is read by the applicable Distribution Company on each such Customer Account's next regularly scheduled meter read date (such date that Buyer commences supplying electricity to the Customer Accounts is the "Flow Date" for each such Customer Account).

(b) Customer Account Notification. As quickly as reasonably possible following the Closing, but no later than seven (7) calendar days thereafter, Seller and Buyer shall, at Buyer's sole cost and expense, jointly notify each of the Customers of the purchase of their Customer Account by Buyer and the assumption by Buyer of Seller's delivery obligations arising in connection therewith. The form and content of the notification shall be as set forth in Exhibit C hereto.

(c) Obligations During Transition. With respect to each Customer Account, during the period of time between the Closing Date and such Customer Account's Flow Date (the "Transition Period"), Seller will supply electricity to such Customer Account and will not, without the prior written approval of Buyer, change the pricing structure or methodology for such Customer Account. Seller will pay all direct electricity costs, ancillary costs, RBC costs and any other cost or expense related to electricity supplied to each Customer Account during the Transition Period. Seller will collect and be entitled to retain payments from the applicable Distribution Company for electricity used by each Customer Account during the applicable Transition Period. Under no circumstances shall Buyer be liable for any brokerage commissions arising from payments received by Seller from the applicable Distribution Company on account of usage by each Customer Account during the applicable Transition Period.

(d) Obligations After Transition. Buyer will supply electricity to each Customer Account and pay for electricity supplied to each Customer Account on and after the applicable Flow Date. Buyer will collect and be entitled to retain payments from the applicable Distribution Company for electricity used by each Customer Account on and after the applicable Flow Date.

(f) Transfer Delays. Notwithstanding the foregoing, Seller, Resident Power and Buyer each acknowledge that, due to circumstances beyond their control and despite Buyer's best efforts, any particular Customer Account may not be transferred to Buyer's service on that Customer Account's first meter read date following the Closing Date, in which event Seller and Resident Power shall use commercially reasonable efforts to assist Buyer to effectuate such transfer at that Customer Account's next meter read date, or earlier if practicable.

8. Warranties and Representations.

(a) Seller. Seller represents and warrants to Buyer, as of the Effective Date and as of the Closing Date, that:

(i) Seller is a limited liability company duly organized and in good standing under the laws of the state of New Hampshire, with all requisite power and authority to carry on its business as it is presently conducted.

(ii) August G. Fromuth is the sole member of Seller.

(iii) Seller has full power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement.

(iv) The transactions contemplated by this Agreement have been duly authorized by appropriate limited liability company action by Seller and, upon execution and delivery, this Agreement shall be a valid and binding obligation of Seller.

(v) Neither the execution and delivery by Seller of this Agreement nor the performance by Seller of the transactions contemplated herein will be contrary to or violate, breach, or constitute a default under, or permit the termination or acceleration of maturity of, or result in the imposition of any lien, claim or encumbrance upon any Customer Account pursuant to any provision of, any note, bond, indenture, mortgage, deed of trust, evidence of indebtedness or lease agreement, other agreement or instrument or any judgment, order, injunction or decree by which Seller is bound, to which Seller is a party, or to which the assets of Seller are subject; nor is the effectiveness or enforceability of this Agreement or such other documents adversely affected by any provision of the articles of organization or operating agreement of Seller.

(vi) Seller has all necessary licenses and permits to carry on its business, and Seller's business is being operated in material compliance with all applicable laws, ordinances and regulations the violation of which would have a material adverse effect on the value of the Customer Accounts.

Seller: (vii) Except as set forth on Schedule 8(a)(vii), to the knowledge of

1. there are no legal actions, suits, arbitrations, or other legal, administrative, regulatory or other proceedings or investigations pending or credibly threatened against Seller with respect to any of the Customer Accounts, and Seller is not aware of any fact which may be reasonably expected to result in any such action, suit, arbitration or other proceeding or investigation;

2. has not received any written or verbal complaints from customers which would materially affect the value of the Customer Accounts;

3. With regard to the Customer Accounts, Seller is not in default with respect to any currently effective judgment, order, writ, injunction, decree, demand or assessment issued of which it is aware by any court or of any federal, state, municipal or other governmental agency, board, commission, bureau, instrumentality or department.

(viii) As of the Effective Date and the Closing Date, Seller is the owner of the Customer Accounts, and has title to the Customer Accounts free and clear of all debts, encumbrances, restrictions and liens of every kind, except to the extent explicitly noted herein.

(ix) Seller has not entered into any other binding contract for the sale of the Customer Accounts.

(x) Seller is not in default in connection with any performance obligations relating to any Customer Account. As of the Closing Date, all Customer Accounts will be in full force and effect, valid and enforceable in accordance with their respective terms, except to the extent explicitly noted herein. There are no existing defaults of Seller under any performance obligations relating to any Customer Account or events of default that, with the giving of notice, would constitute defaults of Seller of its performance obligations relating to any Customer Accounts. No Customer is more than sixty (60) days past due in payment in relation to any Customer Account; Seller has no knowledge of any other material Customer defaults under the Customer Accounts.

(xi) Seller has complied, and through the Closing and each applicable Flow Date will continue to comply, in all material respects with federal, state and local laws, rules and regulations applicable to the Customer Accounts.

(xii) Neither Seller nor Resident Power hold any Customer deposits or pre-payments with regard to the Customer Accounts.

(xiii) There are no "cash back" or incentive payments due on any of the Customer Accounts.

(xiv) Copies of the current terms and conditions applicable with respect to the Customer Accounts are attached as Schedule 8(a)(xiv) (the "Customer Terms and Conditions"). Each Customer Account is subject to terms and conditions substantially similar to the Customer Terms and Conditions. In particular, and without limiting the generality of the foregoing, each of the Customer Accounts is fully assignable.

(xv) Seller shall use commercially reasonable efforts to (a) cause to be fulfilled and satisfied all of the conditions to the Closing which are the responsibility of Seller; and (b) cause to be performed all of the matters required upon the Closing which are the responsibility of Seller.

(xvi) To the knowledge of Seller, no representation or warranty by Seller in this Agreement contains any untrue statement of a material fact.

(b) Resident Power. Resident Power represents and warrants to Buyer as follows, as of the Effective Date and as of the Closing Date, that:

(i) Resident Power is a limited liability company duly organized and in good standing under the laws of the state of New Hampshire, with all requisite power and authority to carry on its business as it is presently conducted.

(ii) Resident Power has full power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement.

(iii) The transactions contemplated by this Agreement have been duly authorized by appropriate limited liability company action by Resident Power and, upon execution and delivery, this Agreement shall be a valid and binding obligation of Resident Power.

(iv) Neither the execution and delivery by Resident Power of this Agreement nor the performance by Resident Power of the transactions contemplated herein will be contrary to or violate, breach, or constitute a default under, or permit the termination or acceleration of maturity of, or result in the imposition of any lien, claim or encumbrance upon any Customer Account pursuant to any provision of, any note, bond, indenture, mortgage, deed of trust, evidence of indebtedness or lease agreement, other agreement or instrument or any judgment, order, injunction or decree by which Resident Power is bound, to which Resident Power is a party, or to which the assets of Resident Power are subject; nor is the effectiveness or enforceability of this Agreement or such other documents adversely affected by any provision of the articles of organization or operating agreement of Resident Power.

(v) Resident Power has all necessary licenses and permits to carry on its business, and Resident Power's business is being operated in material compliance with all applicable laws, ordinances and regulations the violation of which would have a material adverse effect on the value of the Customer Accounts.

(vi) Except as set forth on Schedule 8(b)(vi), to the knowledge of Resident Power:

1. there are no legal actions, suits, arbitrations, or other legal, administrative, regulatory or other proceedings or investigations pending or credibly threatened against Resident Power with respect to any of the Customer Accounts, and Resident Power is not aware of any fact which might be reasonably expected to result in any such action, suit, arbitration or other proceeding or investigation; and

2. With regard to the Customer Accounts, Resident Power is not in default with respect to any currently effective judgment, order, writ, injunction, decree, demand or assessment issued of which it is aware by any court or of any federal, state, municipal or other governmental agency, board, commission, bureau, instrumentality or department.

(c) Seller and Resident Power Representations and Warranties.

1. Any reference in this Agreement to the "knowledge" of Seller or Resident Power shall refer solely to the actual knowledge of Augustus Fromuth, Bartholomew Fromuth and Marianne Vetter as of the date in question.

2. All of the foregoing warranties and representations of Seller and Resident Power shall survive until the date that is six (6) months following the Closing Date.

3. NEITHER SELLER NOR RESIDENT POWER IS MAKING ANY REPRESENTATION OR WARRANTY EXCEPT FOR THOSE EXPLICITLY SET FORTH IN THIS SECTION 8, AND EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT OTHERWISE THE CUSTOMER ACCOUNTS ARE BEING SOLD AND TRANSFERRED "AS IS, WHERE IS." SELLER AND RESIDENT POWER ARE NOT MAKING ANY OTHER REPRESENTATIONS OR WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, CONCERNING THE CUSTOMER ACCOUNTS AND/OR ANY OTHER ASSETS TRANSFERRED HEREBY.

(d) Buyer. Buyer represents and warrants to each of Seller and Resident Power as follows, as of the Effective Date and as of the Closing Date:

(i) Buyer is a limited liability company duly organized and in good standing under the laws of the state of Nevada and is registered to do business in the State of New Hampshire, with all requisite power and authority to carry on its business as it is presently conducted.

(ii) Buyer has full power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement.

(iii) The transactions contemplated by this Agreement have been duly authorized by an appropriate limited liability company action and, upon the execution and delivery of this Agreement, it shall be a valid and binding obligation of the Buyer.

(iv) Neither the execution and delivery by Buyer of this Agreement nor the performance by Buyer of the transactions contemplated herein will, with or without the giving of notice or passage of time, or both, be contrary to or violate, breach, or constitute a default under, or permit the termination or acceleration of maturity of, any note, bond, indenture, mortgage, deed of trust, evidence of indebtedness or lease agreement, other agreement or instrument or any judgment, order, injunction or decree by which Buyer is bound, to which Buyer is a party, or to which the assets of Seller is subject; nor is the effectiveness or enforceability of this Agreement or such other documents adversely affected by any provision of the articles of organization or operating agreement of Buyer.

(v) Solvency of Buyer. Buyer is able to make, and has made, payment when due of all obligations arising in the ordinary course of business and has the ability to provide for payment of all other obligations, including, without limitation, the obligations set forth in this Agreement.

9. Expenses of Sale. Each Party agrees to bear its own legal, accounting and other expenses in connection with the preparation and consummation of this Agreement.

10. [Intentionally omitted.]

11. Inspection. Each party hereto acknowledges and agrees that prior to the date hereof each party has given the other parties and their management personnel, legal counsel, accountants, and technical and financial advisors, full access and opportunity to inspect, investigate and audit (a) the books, records, contracts, other documents and computerized records and data files of Seller as they relate to the Customer Accounts, and (b) the books, records, contracts, and other documents of Resident Power as they relate to the Customer Accounts and the Customer Aggregation Agreements.

12. Conditions Precedent. The parties' obligations pursuant to this Agreement are subject to the satisfaction of the following conditions on or before the Closing Date (the "Conditions Precedent"):

(a) Buyer's Obligations. Buyer's obligations pursuant to this Agreement are subject to the satisfaction of the following conditions on or before the Closing Date:

(i) Representations and Warranties. All representations and warranties of Seller or Resident Power contained in this Agreement shall be true and correct in all material respects at and as of the Closing, and Seller and Resident Power shall have performed and satisfied in all material respects all agreements and covenants required by this Agreement to be performed and satisfied by them at or prior to the Closing.

(ii) Absence of Material Litigation. There must be no pending or threatened material claims or litigation involving the Customer Accounts or Seller's or Resident Power's ability to convey the Customer Accounts not disclosed herein.

(b) Seller's and Resident Power's Obligations. Seller's and Resident Power's obligations pursuant to this Agreement are subject to the satisfaction of the following conditions on or before the Closing Date:

(i) Representations and Warranties. All representations and warranties of Buyer contained in this Agreement shall be true and correct in all material respects at and as of the Closing, and

(ii) Performance of Agreements. Buyer shall have performed and satisfied in all material respects all agreements and covenants required by this Agreement to be performed and satisfied by Buyer at or prior to the Closing.

13. [Intentionally omitted]

14. Confidentiality and Communications.

(a) Confidentiality. The parties have previously entered into a Confidentiality and Nondisclosure Agreement dated as of January 28, 2013 in connection with the transaction contemplated by this Agreement, and agree that the terms of such Confidentiality Agreements shall control their confidentiality obligations in connection herewith, and that the provisions of the Confidentiality Agreements shall survive the termination of this Agreement.

(b) Public Disclosure.

1. Prior to the issuance of a press release by any party, all parties hereto shall agree on the terms of a joint press release, to be issued by Buyer, announcing the transfer of Customer Accounts from Seller to Buyer contemplated by this Agreement ("Buyer's Press Release"), which shall be issued no later than three (3) business days after the Closing. No party will make any public disclosure or issue any other press releases pertaining to the existence of this Agreement or to the proposed transactions between the parties prior to the issuance of the Buyer's Press Release without having first obtained the written consent of the other parties, except for communications with employees, customers, suppliers, the local electric distribution companies, brokers, governmental agencies, and other groups as may be legally required or necessary or appropriate (i.e., any securities filings or notices) to the consummation of the transactions contemplated herein, and which are not inconsistent with the prompt consummation of the transactions contemplated in this Agreement.

2. After issuance of Buyer's Press Release, the parties may make such commercially reasonable statements to the media and other third parties about the transaction, including the transfer of Customer Accounts from Seller to Buyer, as deemed necessary and prudent by Seller, Resident Power, and Buyer, separately and independently, provided no such

statement reveals or discusses the specific financial terms of this Agreement or individual Customer Accounts, except for communications with employees, customers, suppliers, the local electric distribution companies, brokers, governmental agencies, and other groups as may be legally required or necessary or appropriate (i.e., any securities filings or notices) to the consummation of the transactions contemplated herein, and which are not inconsistent with the prompt consummation of the transactions contemplated in this Agreement. Notwithstanding the foregoing, Buyer may disclose the terms of the transaction contemplated by this Agreement in connection with the any potential sale of Buyer's business, provided that the third party to whom such disclosure is contemplated shall first execute a confidentiality agreement with terms and conditions at least as stringent as those contained in the Confidentiality Agreement.

15. Indemnification.

(a) By Seller. Seller shall indemnify, defend and hold harmless Buyer from and against any costs, expenses, judgments, fines, penalties, losses, claims, liabilities, obligations or damages (collectively, "Damages") to the extent they are the result of, or arise out of, any breach of any representation, warranty or covenant made by Seller in this Agreement.

(b) By Resident Power. Resident Power shall indemnify, defend and hold harmless Buyer from and against any Damages to the extent they are the result of, or arise out of, any breach of any representation, warranty or covenant made by Resident Power in this Agreement.

(c) By Buyer. Buyer shall indemnify, defend and hold harmless each of Seller and Resident Power from and against (i) any Damages to the extent they are the result of, or arise out of, any breach of any representation, warranty or covenant made by Buyer in this Agreement, and (ii) any liabilities or obligations arising out of, or relating to, Buyer's performance or failure to perform its obligations to Customers, including its power delivery obligations, following the Closing Date.

(d) The aggregate liability of Seller and Resident Power pursuant to this Article 15 shall be limited to the aggregate Payment Price actually paid to Seller and Resident Power pursuant to this Agreement. This Article 15 shall be the exclusive remedy for Buyer for the matters covered hereby, provided however that nothing herein shall relieve any party for liability for fraud or intentional wrongdoing.

16. Miscellaneous Provisions.

(a) Notices. All notices, demands or other communications required to be given under this Agreement shall be in writing and shall be mailed by certified mail, return receipt requested, to the parties at the addresses set forth above, and shall be deemed given three business days after mailing. Any party may, by written notice to the other party, change the place to which all further notices to such party shall be sent.

(b) Binding Effect. This Agreement shall inure to the benefit of, and shall be binding upon, the parties and their respective heirs, representatives, administrators, successors and assigns.

(c) Interpretation; Governing Law; Venue. This Agreement shall be governed by and shall be construed in accordance with the laws of the state of New Hampshire without giving effect to any choice or conflict of law provision or rule that would cause the application of the law of any state other than the State of New Hampshire. Venue of any legal proceeding related to this Agreement shall exclusively be brought in the state or Federal courts located in the City of Concord, NH. The paragraph headings have been used solely for convenience, and are not intended to describe, interpret, define or limit the scope of this Agreement.

(d) Severability. If any term or provision of this Agreement is deemed invalid, such invalidity shall not affect or invalidate the remainder of this Agreement.

(e) Counterparts. This Agreement may be executed in any number of counterparts (including via facsimile or electronic means, including PDF copies), each of which shall be deemed an original, but all of which, when taken together, shall constitute but one and the same instrument.

(f) Assignability. Buyer may freely assign its rights and obligations pursuant to this Agreement to any person that directly or indirectly through one or more intermediaries controls or is controlled by or is under common control with the person in question; provided, however, that no such assignment shall release Buyer from any of its obligations arising hereunder. Seller may not assign its rights under this Agreement to any other person or entity without the prior written consent of Buyer.

(g) No Brokers. Each party represents and warrants that it has dealt with no broker or finder in connection with this Agreement and, insofar as it knows, no broker or other person is entitled to any commission or finder's fee in connection with the consummation of the transactions contemplated by this Agreement.

(h) Time of Essence. The parties hereto agree that time is of the essence of this Agreement.

(i) Entire Agreement. This Agreement, and the attached Schedules and Exhibits, constitute the entire and sole agreement of the parties and supersede and replace any previous verbal or written agreements that the parties may have made. Any modification or amendment of this Agreement must be in writing and signed all parties to this Agreement.

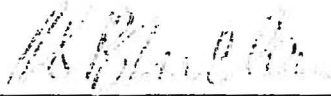
[SIGNATURES ON THE FOLLOWING PAGES]

Execution Copy

The parties have executed this Agreement on the date first written above.

BUYER:

FAIRPOINT ENERGY, LLC

By: 
Name: *Ray Butler*
Title: *CEO*

From: "Howard Plante" <hmplante@comcast.net>
To: Robert A. Bersak/NUS@NU,
Cc: "Gus Fromuth" <august.fromuth@felpower.com>
Date: 02/14/2013 03:11 PM
Subject: Off-Cycle Meter Read Request

Dear Attorney Bersak:

Please find attached a letter requesting off-cycle meter reads for the residential and small commercial accounts referenced in the letter.

Sincerely,

Howard M. Plante
President
PNE Energy Supply LLC
497 Hooksett Road
Suite 179
Manchester, NH 03104
P: 603-413-6602
P: 888-669-1685
www.powernewengland.com



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February 14, 2013

Mr. Robert A. Bersak
Public Service Company of NH
780 N. Commercial Street
Manchester, NH 03101

Re: Request for Special Off-Cycle Meter Reads

Dear Attorney Bersak:

I am writing on behalf of PNE Energy Supply LLC (PNE). Extensive discussions have taken place this week between PSNH and PNE regarding PNE's request for an electronic bulk transfer of certain of PNE's residential and small commercial accounts from PNE's load asset to FairPoint Energy's load asset. This is pursuant to a Purchase & Sales Agreement the parties (PNE and FairPoint Energy) signed on February 6, 2013.

In accordance with NH PUC Rule 2007.04(b) PNE hereby requests an electronic off-cycle meter read for all of the afore-mentioned residential and small commercial customers presently enrolled with PNE. PNE will terminate service to these customers on the date of the meter read. These customers should then be immediately enrolled with FairPoint pursuant to FairPoint's existing EDI instructions.

Thank you for your assistance in this matter.

Sincerely,
PNE Energy Supply LLC

Howard M. Plante
President

----- Forwarded by Donald E. Bergeron/NUS on 02/14/2013 04:44 PM -----

From: "Nelson, Chad" <CNelson@iso-ne.com>
 To: Donald E. Bergeron/NUS@NU, Carmel M. Gondek/NUS@NU
 Cc: Aaron J. Downing/NUS@NU, Janet R. Kelliher/NUS@NU
 Date: 02/14/2013 04:38 PM
 Subject: Customer Suspension

Company PNE Energy Supply LLC (51393) has been suspended effective immediately. The customer has waived their possibility to cure. PNE is the Lead Load Asset Owner and has 100% Ownership Share of load asset 39637, PNE_PSNH_LOAD in Metering Domain PSNH NODE (687). Per the RTO Tariff, Section I, Exhibit 1D, "ISO New England Billing Policy", this load asset will need to be retired as soon as practicable, but no later than 00:01, Wednesday February 20, 2013 (3 business days following the date of the suspension). We will be sending you a pre-populated Load Asset Registration Form reflecting the retirement. Please upload a signed version of the Asset Registration Form through Ask ISO with an effective date as soon as practicable. ISO-NE will sign on behalf of the suspended Market Participant. If the asset is not retired prior to Wednesday February 20, the ISO will take action to retire the asset effective on that date. Please let me know if you have any questions.

Chad Nelson
 Generation & Load Administration
 ISO New England
 (413) 540-4508
 Cell(860) 922-8380

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**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation into Dispute between PNE Energy Supply, LLC, and
Public Service Company of New Hampshire**

Order Denying PNE Request

ORDER NO. 25,660

May 1, 2014

APPEARANCES: Sheehan, Phinney, Bass & Green, PA, by Robert P. Cheney, Jr., Esq. on behalf of PNE Energy Supply, LLC; Matthew J. Fossum, Esq. on behalf of Public Service Company of New Hampshire; and Michael J. Sheehan, Esq. on behalf of Commission Staff.

In this order, we deny PNE's claims that PSNH wrongfully calculated supplier charges and wrongfully withheld customer payments following the suspension of PNE's ability to buy electricity and the transfer of PNE's customers to PSNH and other suppliers in February of 2013.

I. PROCEDURAL HISTORY

The relationship between PNE Energy Supply, LLC (PNE), and Public Service Company of New Hampshire (PSNH) was governed by three documents: an Electric Supplier Services Master Agreement (ESSMA); an Electric Supplier Trading Partner Agreement (ESTPA) (collectively, the Agreements); and PSNH's Electricity Delivery Service Tariff – NHPUC No. 8 (the PSNH Tariff). Joint Statement of Agreed Facts, Exhibit 1, at 1-2,¹ and at Attachments A and B. These documents described the services PSNH provided to PNE and the manner in which PSNH charged and collected fees from PNE. Ex. 1 at 2.

PSNH's services included consolidated billing. In the normal course PSNH sent customers a single bill for both PSNH's and PNE's charges. PSNH collected a single payment

¹ The Commission commends the parties for preparing a comprehensive statement of agreed facts.

from customers and transferred PNE's portion of the payments to PNE. PSNH later invoiced PNE for the consolidated billing and other charges. PSNH also imposed a \$5 "selection charge" for "any changes initiated by a Customer, Supplier, or an authorized agent, to a different Supplier, to Default Service, or to Self-Supply Service." PSNH Tariff at 1st Revised Page 33.

On February 14, 2013, ISO-New England (ISO-NE), the organization that operates the regional bulk electricity transmission system, suspended PNE's ability to buy electricity. ISO-NE- notified PSNH that it would be required to assume the electricity supply load for PNE's customers by February 20, 2013. *Id.* at 3. Some PNE customers were transferred to another supplier before February 20. PSNH moved the remaining 7,669 PNE customers to PSNH's default service on or shortly after February 20. *Id.* at 4.

Beginning approximately February 20, 2013, PSNH withheld all customer payments normally due to PNE under the Agreements. PSNH accumulated more than \$250,000 of PNE's money over the next week at which time PSNH released to PNE all but \$100,000. *Id.* at 4. On May 8, 2013, PSNH invoiced PNE \$92,961.39. Of that amount, \$38,570 was for costs incurred by PSNH to transfer PNE's customers to PSNH default service. An additional \$47,735 was for \$5 selection charges relating to the 9,547 customers whose service was transferred either to the other supplier or to PSNH default service. Finally, PSNH invoiced \$6,656.39 in other tariff charges. *Id.* at 5. PSNH returned the \$7,038.61 balance to PNE.

PSNH later withdrew its claim for \$38,570 in costs incurred to transfer PNE customers and paid that amount to PNE. PNE did not contest the \$6,656.39 in other tariff charges. *Id.* PNE agreed during the hearing that the disputed selection charges should be reduced to \$38,345. Hearing Transcript of February 18, 2014 (2/18/14 Tr.) at 42. Thus, only two disputes remain for decision. First, PNE and PSNH contest whether PSNH should have withheld customer payments

as it did or should have first transferred those payments to PNE and later billed PNE as the Agreements contemplated in the normal course. Second, they contest whether it was appropriate for PSNH to impose the \$38,345 in selection charges for the 7,669 customers that were transferred to PSNH default service.

II. POSITIONS OF THE PARTIES

A. PNE

PNE claimed, first, that PSNH did not have authority to unilaterally withhold customer payments otherwise due to PNE because the Agreements obligated PSNH to immediately transfer the customer payments to PNE. PNE argued that the provisions in the Agreements that allowed PSNH to withhold money did not apply because they required PNE to be 60 days in arrears. ESSMA at 7; ESTPA at 5. PNE also argued that the circumstances of its default and suspension with ISO-NE did not give PSNH the authority to exercise extra-contractual measures. PNE did not request any specific relief for this alleged improper conduct by PSNH. 2/18/14 Tr. at 11.

Second, PNE argued that PSNH was not entitled to a \$5 selection charge for each of the 7,669 customers returned to default service because PNE did not “initiate” the drop of those customers. The PSNH Tariff states that PSNH may impose “a Selection Charge for any changes initiated by a Customer, Supplier, or an authorized agent.” PNE argued that if anyone initiated the drops it was ISO-NE, and ISO-NE was not acting as PNE’s agent. PNE argued that the drops occurred by operation of law according to the terms of the ISO New England Inc. Transmission, Markets and Services Tariff (ISO Tariff). Exhibit 2. PNE concluded that since it did not initiate the drops, PSNH could not impose the selection charges.

PNE also distinguished *PNE Energy Supply, LLC*, Order No. 25,603 (Dec. 13, 2013), on two points. First, the focus in that docket was whether PSNH could impose a \$5 selection charge on both suppliers involved in a supplier-to-supplier transfer, for a total of \$10. The issue here, PNE argued, is whether *any* selection charge is appropriate when the only supplier involved in the transfer does not initiate the change. Second, regarding PNE's request for reimbursement in this case, PNE argued that the Commission's denial of similar relief in Order No. 25,603 does not control because the parties in that case did not specifically request a refund, whereas PNE did so here.

B. PSNH

PSNH argued that it lawfully imposed the \$5 selection charges on PNE for two reasons. First, PSNH imposed the charge in a manner consistent with its long-standing interpretation of its Tariff. PSNH argued that Order No. 25,603 confirmed its practice of assessing the \$5 selection charge on the supplier involved in a transfer to or from PSNH, even though the Commission ruled in Order No. 25,603 that PSNH could no longer impose two selection charges, one on each supplier in a supplier-to-supplier transaction. Second, PSNH argued it had never interpreted "initiate" in the manner supported by PNE.

PSNH argued that the Commission need not address whether PSNH had the right to withhold customer payments given the discussion above, but that PSNH nonetheless had such authority. PSNH argued that the Agreements did not preclude the right to use collection procedures outside the language of the Agreements. *See* ESSMA at 9; ESTPA at 7 ("The enumeration of the foregoing remedies shall not be deemed a waiver of any other remedies to which either party is legally entitled"). PSNH argued it always had the common law right to set off the money PNE owed from the customer payments in PSNH's custody:

III. COMMISSION ANALYSIS

As a preliminary matter, we grant PNE's *Motion for Leave to File Response to PSNH Memorandum Re: Agency*. PNE's response was concise and addressed arguably unanticipated issues in PSNH's post-hearing memorandum.

On the merits, the Commission framed the issues in this docket as follows:

a) Did PSNH act improperly when it withheld payments otherwise due PNE beginning in February 2013, and, if so, what is the appropriate remedy?

b) Independent of the issue above, did PSNH improperly calculate and assess the approximately \$50,000 in Competitive Supplier Charges that it withheld from PNE? If so, what is the proper allocation of those charges between PNE and PSNH and what is the appropriate remedy?

February 3, 2014, secretarial letter. We address the second issue first.

The parties agreed that this second issue has been narrowed to whether PSNH could assess the \$5 selection charge when ISO-NE suspended PNE and directed PSNH to assume the load of PNE's 7,669 remaining customers. 2/18/14 Tr. at 42. PNE argued that the PSNH Tariff permits the imposition of a selection charge only upon a supplier that "initiated" a "drop," and that it did not initiate the drop of these customers. As a result, the terms of the PSNH Tariff did not apply. PSNH argued that Order No. 25,603 let stand its practice of imposing the selection charge on the supplier involved in a transfer with PSNH without regard to who initiated the switch.

The relevant PSNH Tariff language follows:

Selection Charge -- The Company will be entitled to make a Selection Charge for any changes initiated by a Customer, Supplier or authorized agent to a different Supplier or to Default Service or Self Supply. For customers who are currently taking Supplier Service, Default Service or Self-Supply Service, the Selection Charge will be assessed to the new Supplier at the time the Company receives an enrollment transaction from the new Supplier. For Customers who are currently taking Supplier Service, the Selection Charge will be assessed to the existing Supplier at the time the Company receives a drop transaction from the existing Supplier. The Selection Charge will be assessed to the

Customer if the Customer terminates Self-Supply Service and receives Default Service or initiates Self-Supply Service when receiving Default Service or Supplier Service.
Selection Charge -- \$5.00.

PSNH Tariff at 1st Revised Page 33. The noticed issue in Order No. 25,603 was to examine “the circumstances in which PSNH has actually applied the Selection Charge,” but the case focused on PSNH’s practice of assessing two \$5 selection charges for a single supplier-to-supplier switch. Order No. 25,603 at 15. PSNH applied its Tariff to impose two \$5 selection charges, but the suppliers argued that the PSNH Tariff only permitted a single selection charge for a single transfer. They noted that PSNH did not impose the selection charge on itself when a customer moved to or from default service. *Id.* at 15-16.

We ordered PSNH to assess a single charge in the supplier-to-supplier situation, but our ruling was broad and made clear that a selection charge was appropriate when a switch involved PSNH, without regard to who initiated the change: “We must therefore conclude that only one switch charge is appropriate when a customer moves from one supplier to another, whether the switch is between two competitive suppliers *or a competitive supplier and PSNH.*” *PNE Energy Supply*, Order No. 25,603 at 16 (emphasis added). The highlighted language governs here and leads to our finding that a single selection charge on the 7,669 customers PSNH moved to default service was proper.

PNE nonetheless argued that the word “initiated” in the PSNH Tariff’s first sentence means that PSNH may only assess the selection charge on the entity or its agent that initiated the transfer. Because neither PNE nor its agent initiated the drops at issue here, PNE argued, it is not responsible for the selection charge. We did not specifically address this agency argument in Order No. 25,603, but it does not alter our conclusion.

The PSNH Tariff does not contemplate the circumstances of this case where the customers of a suspended supplier were switched through a process involving ISO-NE. The ISO-NE Tariff, however, does address such circumstances: "Any load asset registered to a suspended Market Participant [PNE] shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned" to another entity such as the distribution utility. Ex. 2 at 143. When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of that term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE's load similar to an agency relationship in the very limited sense discussed here.

The first issue we framed for this docket was whether PSNH improperly withheld PNE's customer payments beginning the week after PNE's suspension from ISO-NE, and if so, what is the appropriate remedy. Because we have determined that PSNH is entitled to the amount of money that it ultimately withheld, and because PNE sought no remedy for PSNH's temporary withholding of the other money that was earlier in dispute, 2/8/14 Tr. at 11, the first issue is moot.

Based upon the foregoing, it is hereby

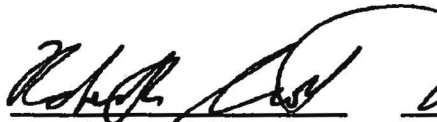
ORDERED, that PNE's claim for \$38,345 in selection charges is **DENIED**; and it is

FURTHER ORDERED, that PNE's claim for relief for PSNH withholding customer payments is **DENIED**.

By order of the Public Utilities Commission of New Hampshire this first day of May,


2014.


Amy L. Ignatius
Chairman


Robert R. Scott
Commissioner


Marcia P. Honigberg
Commissioner

Attested by:


Lori A. Davis
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov
alexander.speidel@puc.nh.gov
amanda.noonan@puc.nh.gov
ccole@sheehan.com
Christina.Martin@oca.nh.gov
david.shulock@puc.nh.gov
matthew.foosum@nu.com
michael.sheehan@puc.nh.gov
rcheney@sheehan.com
steve.mullen@puc.nh.gov
susan.chamberlin@oca.nh.gov
tom.frantz@puc.nh.gov

Docket #: 13-233-1 Printed: May 01, 2014

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.

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Dear Resident Power Customer:

IMPORTANT UPDATE – REPLY REQUESTED

If you are receiving this message the transfer of your account from PNE Energy Supply to Fairpoint Energy has regrettably not gone through as expected. Your account had been enrolled for transfer to Fairpoint Energy at the same low rates, terms and conditions that you enjoyed with PNE Energy. However, the transfer of your account has been halted, and your account is now back with Public Service of New Hampshire (PSNH), whose rates are considerably higher than those you enjoyed with PNE Energy and would have enjoyed with Fairpoint Energy.

If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH rates, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

If you renew with us, we will get to work, right away, to find you an alternative to PSNH default service at rates that continue to be well below PSNH. If you do not renew with us, please be advised that you will remain on PSNH's high default service rate of \$.0954 per kwh, until you choose another supplier on your own, or you re-sign with Resident Power.

While we are writing you, we would like to clear up some inaccuracies in the media the last few days.

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1. Despite what was reported by the Nashua Telegraph and other news outlets this morning, Resident Power has not been suspended by the ISO or the New Hampshire PUC. The Telegraph and others have since changed their online versions to reflect the truth. We remain in good standing and continue to serve you (should you renew with us) and all of our 14,000 NH customers with superior rates and service.
2. Your account has gone back to PSNH as of Wednesday, February 20, 2013. A request was made to PSNH to transfer your account to Fairpoint Energy automatically and protect your rates, however PSNH declined to make the switch. PSNH stated that although they had the ability to do the automatic transfer, they lacked the "resources" to effect the transfer in the time provided.
3. Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (Fairpoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire's only locally owned and operated electricity supplier in the next few weeks.

When we started Resident Power, almost two years ago now, all we wanted to do was provide EVERY New Hampshire rate payer with a competitive choice, not just the large businesses. In the early days, the only supplier that would work with us, and be the first to offer service to residential and small commercial customers, was PNE Energy. As their partner these last two years, we salute them for being bold enough to do to what no competitive supplier had done before. Today, almost 50,000 New Hampshire customers have chosen an alternative supplier to help save them money on their electricity bills, and PNE Energy Supply is a major reason for that.

In closing, we hope that you decide to remain with Resident Power. It has been our pleasure to serve you and we hope you give us the chance to continue that relationship.

Please remember, that if you wish to stay with Resident Power, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

Sincerely,

Your Resident Power Enrollment Team

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February 21, 2013

Dear Customer,

Natural gas prices have soared since the colder than normal weather hit New England in the last week of January. As a consequence, power prices also soared because they are strongly linked to the price of natural gas. Natural Gas is increasingly popular as a household heating fuel because *normally* it is priced at 1/4th to 1/5th the cost of an equivalent amount of heating oil. At the same time its growth in household applications has expanded, several very large power plants in New England either converted to natural gas or were constructed with gas as their only fuel. Therein lies the problem. Colder weather creates heightened demand and rationing gas supplies causes protracted price spikes. As I write this, power prices are hung up in the 15 cent per kWh range – a far cry from the 4.4 cent average of the last three years.

Our business is to serve you with the lowest available power cost at any given point in time. If the wholesale market isn't the best value, then, in accordance with our agreements and/or practices we will move your load over to the host utility. The tariff permits it and it is, under the circumstances, the least cost environment for you at this time. How long are these pricing conditions likely to persist? In my ten plus years of electric deregulation experience, this is a first. The power pool can usually be counted on to dispatch generation sufficient to evoke a price response (down). I am confident that will happen, but the onset of warmer weather may be needed to fully coral this pricing tempest. In the meantime we will stay in close touch with you on when your electric load should be prudently returned to buying directly from the wholesale market.

You may have read or heard in the media that PNE [Power New England] has been "unplugged" from the ISO-NE's power grid. That is true, but it was voluntary and is only temporary. It suffered from cash flow issues, stemming from record market volatility. It found a buyer for its residential customer book but will remain a supplier to its commercial and industrial customers.

Thank you very much for your continued commitment and support as we make our way together through these challenging times.

August Fromuth

Managing Director
PNE

PNE Energy Supply LLC
497 Hooksett Road - Suite 179
Manchester, NH 03104

603.413.6602

www.powernewengland.com

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. IR 13-233

PNE ENERGY SUPPLY, LLC

Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into
Dispute Between PNE Energy Supply, LLC and Public Service Company of New
Hampshire

PNE ENERGY SUPPLY LLC'S MOTION FOR REHEARING

NOW COMES the Petitioner, PNE Energy Supply LLC ("PNE"), by and through its attorneys, Sheehan Phinney Bass & Green, P.A., and hereby respectfully requests that the New Hampshire Public Utilities Commission ("Commission") rehear the issues decided in Order 25,660 pursuant to RSA 541:4.

**I.
INTRODUCTION**

On May 1, 2014, the Commission issued Order 25,660 in which it rendered two findings. First, the Commissioner essentially declined to consider the issue of whether the Public Service Company of New Hampshire ("PSNH") properly withheld \$38,570 in so-called recoupment costs from PNE, holding that that issue is moot because PNE "sought no remedy for PSNH's temporary withholding."¹ Order at 7. Second, the Commission found that PSNH properly imposed \$38,345 in selection charges upon PNE for the 7,669 PNE customer accounts that were transferred to PSNH default service on or about February 20, 2013 because PNE initiated the transfers by virtue of its agreement to the terms of the ISO-NE Tariff.² Id. Respectfully, PNE requests that the Commission reconsider both findings. The Commission erred on Issue 1 because it failed to consider PNE's express and unambiguous request for interest and attorneys'

¹ Per the Commission's Order, this issue shall be hereinafter referred to as Issue 1.

² Per the Commission's Order, this issue shall be hereinafter referred to as Issue 2.

fees. The Commission also erred on Issue 2 because it failed to ascribe the plain and ordinary meaning to the terms “initiate” and “agent” in Section 2(a) of the Terms and Conditions for Energy Service Providers in the PSNH Tariff (“Section 2(a)”)— contrary to settled principles of tariff and statutory interpretation—when it ruled that either PNE or ISO-NE³ “initiated” the disputed drop transactions.

II. STANDARD OF REVIEW

Pursuant to RSA 541:4, a party seeking a rehearing of an order issued by the Commission “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” *Id.* The purpose of a motion for rehearing is to “direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites a reconsideration upon the record upon which that decision rested.” Lambert Constr. Co. v. New Hampshire, 115 N.H. 516, 519 (1975).

III. ARGUMENT

A. **Because PNE Requested Interest and Attorneys’ Fees Attributable to PSNH’s Wrongful Withholding of Recoupment Costs, the Commission Erred in Holding that Issue 1 is Moot.**

The Commission mistakenly found that Issue 1 is “moot” “because PNE sought no remedy for PSNH’s temporary withholding of other money that was earlier in dispute.” Order at 7. Put simply, the pleadings indicate otherwise, and PSNH’s eventual, but by no means prompt or reasonable, capitulation on the general issue did not resolve entirely the issues relating to its improper withholding of PNE customer payments. Since the start of this case, PNE has

³ It is unclear whether the Commission found that PNE initiated the disputed drop transactions or that ISO-NE initiated the drop transactions as PNE’s “agent”. PNE addresses both contingencies below.

requested an award of: (i) the interest on customer payments wrongfully withheld by PSNH, and (ii) the attorneys' fees and costs incurred in securing the return of its customer payments. See PNE Complaint at 11 ("Prayer for Relief: "PNE requests the Commission to: B. Order PSNH to make reparation and/or restitution to PNE for attorneys' fees and costs incurred by PNE in securing the return of its customer payments as well as interest on customer payments unjustly withheld by PSNH since February 20, 2013."); see also id. at 10 ("This amount, . . ., should be further reduced by accrued interest for the period of time that PSNH withheld these customer payments from PNE and the attorneys' fees that PNE has incurred in seeking PSNH's payment of these funds under the Agreements."). In order to issue its mootness finding, the Commission necessarily and mistakenly overlooked PNE's express request for interest and fees.

PNE has never conceded that Issue 1 is moot. At the February 18, 2014 hearing in this matter, the Commission asked the undersigned to address both Issues 1 and 2. Counsel focused heavily on Issue 2 because PSNH had already returned the \$38,570 in alleged recoupment costs. During questioning, the undersigned stated that the issue of PSNH returning the actual recoupment costs "is moot" because PSNH returned those monies many months later. Feb. 8, 2013 Transcript at 44. At no time, however, did the undersigned or PNE ever waive its claim to the interest attributable to PSNH's late payment or its attendant attorneys' fees claim, or its claim requesting a ruling that PSNH violated the terms of the governing Trading Partner Agreements by unilaterally withholding PNE's customer payments as unauthorized recoupment costs. To the contrary, the undersigned emphasized the consequences of PSNH's failure to comply with the governing Trading Partner Agreements, which discussed and governed the agreed-upon time for transferring customer payments to PNE—and nowhere discussed any right of PSNH to withhold PNE customer payments for purposes of set off or recoupment. Id. at 11. Therefore, in finding

Issue 1 moot, the Commission erroneously failed to rule on an issue that is crucial to PNE (and probably other competitive suppliers and signatories to the Trading Partner Agreements): whether PSNH can withhold suppliers' customer payments for its own discretionary purposes in plain and material violation of the Trading Partner Agreements, and simply escape the consequences of such a breach by capitulating and returning the funds withheld several months later if a Supplier has the gumption to bring a legal action. The Commission's refusal to rule on this important issue allows PSNH to continue its illegal practice of withholding money in direct violation of its governing contracts and tariff. Respectfully, the Commission was in error in finding the issues on this question "moot," and must reconsider its mootness ruling and rehear the parties on Issue 1.

B. The Commission Erred on Issue 2 Because it Failed to Ascribe the Plain and Ordinary Meaning to the Terms of PSNH's Tariff as Required by Law.

Respectfully, when the Commission found that PNE or ISO-NE initiated the challenged drop transactions, the Commission failed to interpret Section 2(a) according to its plain and ordinary meaning. The New Hampshire Supreme Court has held that when interpreting a utility's tariff, "[w]e begin by examining the language used in the tariff, ascribing the plain and ordinary meaning to the words used. Where the tariff's language is plain and unambiguous, we will not look beyond it to determine its intent." In re Verizon New England, Inc., 158 N.H. 693, 695 (2009). Here, the Commission disregarded this settled principle of interpretation when it ruled that:

When PNE agreed to the ISO-NE Tariff as a condition of becoming a supplier, PNE knew that its suspension would result in the automatic assignment of its customers. In that sense, PNE initiated the drop of its own customers when it engaged in the conduct that caused its suspension. Although not an agent in the usual meaning of the term, the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE's load similar to an

agency relationship in the very limited sense discussed here.”
Order at 7.

ISO-NE was not PNE’s “agent” according to the plain and ordinary meaning of that term. As discussed in PNE’s Memorandum Concerning Alleged Agency Relationship Between PNE and ISO-NE, agent is a defined legal term that requires the presence of three elements: authorization, consent and control. See PNE Memo. at 5. ISO-NE could not have initiated the drop transactions as its “agent” because PNE relinquished control over its accounts upon suspension from the market and, more fundamentally, PNE never had control over ISO-NE. Nevertheless, the Commission held that ISO-NE was *similar* to an agent, and thus had the power to require PSNH to assume PNE’s load asset. Id. (“Although not an agent in the usual meaning of the term ...”). PNE does not dispute that ISO-NE had the power to force PSNH to accept PNE’s load asset. PNE does vigorously dispute, however, the Commission’s apparent conclusion that the parties’ agency-like relationship allowed ISO-NE to “initiate” drop transaction as PNE’s “agent.” Either ISO-NE was PNE’s agent or it was not. PNE’s unbending position is that ISO-NE was not its agent; PSNH has offered no rebuttal evidence. The Commission’s finding on this issue is unsupported by established law, the record, and the plain terms of the PSNH Tariff.

To the extent the Commission ruled that PNE initiated the disputed drop transactions, it similarly misinterpreted the term “initiate” in Section 2(a). Initiate means “to start or begin something” or “to cause the beginning of something.” See Merriam-Webster Online Dictionary (May 12, 2014). It is undisputed that PNE did not affirmatively initiate the drop transactions through an oral or written request to PSNH. Notwithstanding, the Commission ruled that PNE initiated the challenged drop transactions because it knew that its suspension from the New England energy market would result in the automatic assignment of customers by ISO-NE to

PSNH. Order at 7. The Commission's finding on this point was erroneous. PNE did not "initiate" the disputed drop transactions simply by agreeing to the terms of the ISO-NE Tariff. To the contrary, the drop transactions in this case occurred by operation of law under the terms of the ISO-NE Tariff. In fact, no one initiated the drop transactions here. ISO-NE notified PSNH that it was required to accept PNE's accounts into default service and PSNH moved the accounts into default service. Because neither PNE nor any authorized agent took the affirmative action required by Section 2(a), the Commission improperly endorsed PSNH's imposition of selection charges on PNE.

Even though PNE knew that its suspension by ISO-NE would result in the lapse of its customers to PSNH default service, PNE could not have possibly foreseen that PSNH would then impose a selection charge on PNE because neither the PSNH nor the ISO-NE Tariffs contain any provision authorizing the imposition of the selection charge upon a move to default service. Order at 7. ("The PSNH Tariff does not contemplate the circumstances of this case."). This fact is confirmed by PSNH's request in related Docket 12-295 for the Commission's approval to assess a selection charge on a supplier that defaults with ISO-NE. No such request would be necessary if the PSNH Tariff contemplated the imposition of these charges in the first place. Therefore, the ease with which the Commission approves PSNH's retention of the challenged selection charges is concerning. Through its ruling, the Commission has effectively created a new selection charge—a charge upon suppliers when they are suspended by ISO-NE. The Commission's decision to read between the lines and give something other than the plain and ordinary meaning to the terms "agent" and "initiate" in Section 2(a) violates the rule of interpretation cited above in In re Verizon New England, Inc., 158 N.H. at 695. Consequently, PNE respectfully requests that the Commission also reconsider its ruling on Issue 2.

WHEREFORE, PNE respectfully requests that the Commission:

- A. Grant this Motion for Rehearing; and
- B. Grant such further relief as justice may require.

Respectfully submitted,
PNE ENERGY SUPPLY, LLC

By its Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: May 21, 2014

By: *John D. Cheney for Chris Cole*
Christopher Cole, Esquire
Robert P. Cheney, Jr., Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 627-8223

CUSTOMER NOTICE OF SERVICE PROVIDER CHANGE

[DATE]

Dear Customer,

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, www.fairpointenergy.com. A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

Specifically, please note the following:

- PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.
- This transfer between suppliers will occur at NO COST to you.
- Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.
- Under the FairPoint Energy terms and conditions you will no longer have any termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.
- All billing and payment will continue to be done through PSNH.
- Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.
- Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless

you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

- Please note that the current PSNH default service rate is \$0.0954 per kwh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.
- The contact information for FairPoint Energy is:

FairPoint Energy, LLC
1055 Washington Blvd.
Stamford, CT 06901
Phone: 866-842-1084
Email: support@fairpointenergy.com
www.fairpointenergy.com

Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England
816 Elm Street Suite 364
Manchester, NH 03101
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England



February 11, 2013

Dear Customer,

RE Account Number: 1234567890

PNE Energy Supply, LLC, your current electricity supplier, is pleased to announce that we have reached an agreement with FairPoint Energy LLC, in which FairPoint Energy will assume the duties of providing your electric power. This transfer is expected to occur at the beginning of your next billing cycle, but may take two billing cycles to occur. It is important to note that your current rates and contract length will not change as a result of this transaction. You will still receive your low rates on your monthly PSNH bill; however, the only difference is that now it will read "FairPoint Energy" on page 2 of your PSNH bill rather than "PNE Energy Supply."

This means that the service you currently receive from PNE Energy Supply will be provided by FairPoint Energy, and you will become a customer of FairPoint Energy, www.fairpointenergy.com. A copy of the FairPoint Energy Terms and Conditions are attached for your review. You are not required to do anything to continue receiving the high-quality service and competitive rates that you have come to expect from PNE Energy Supply. PNE Energy Supply will work closely with FairPoint Energy to ensure a seamless transfer of service without interruption or inconvenience to you. Payments, and customer records, for services that were previously provided to PNE Energy Supply will be transferred to FairPoint Energy as well.

Specifically, please note the following:

PNE Energy Supply will be transferring your electricity supply account to FairPoint Energy at the end of your current monthly billing cycle or as soon as the transfer can be processed by PSNH.

This transfer between suppliers will occur at NO COST to you.

Your current price plan and contract term will not change as a result of FairPoint Energy becoming your new electricity supplier.

Under the FairPoint Energy terms and conditions you will have no termination fees. If you are a fixed term customer your contract may be renewed at the end of the fixed term or you will roll to FairPoint Energy's variable rate plan unless you elect to cancel your contract.

All billing and payment will continue to be done through PSNH.

Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.

Your account will automatically be assigned to FairPoint Energy. You do not have to respond to this Notice. Your account will remain assigned to FairPoint Energy, unless you contact and select another energy supplier or return to the default service provider (PSNH). If you select another supplier or return to PSNH within 30 days from receipt of this notice, there will be no cost to you to do so, even if the beginning of the next billing cycle (and therefore the change of provider) occurs beyond this 30 day period. Furthermore, under the FairPoint Energy Terms and Conditions there will be no early termination fees.

Please note that the current PSNH default service rate is \$0.0954 per kWh. Your current PNE Energy Supply rate is lower than the PSNH default service rate, and, as noted above, your rate plan will not change as a result of the transfer to FairPoint Energy.



The contact information for FairPoint Energy is:

FairPoint

FairPoint Energy uses its name under a license agreement with Fairpoint Communications Inc.

FairPoint Energy, LLC
1055 Washington Boulevard,
7th floor
Stamford, CT 06901
Phone: 866-842-1084
Email: support@fairpointenergy.com
www.fairpointenergy.com

Here at PNE Energy Supply it has been our pleasure to provide you with access to affordable electricity service, and we emphasize that you will be treated as a valued customer of FairPoint Energy. We recognize that you have a choice of energy providers. FairPoint Energy is committed to honoring your contract price and contract term with PNE Energy Supply and keeping you satisfied; thus we hope that you choose to remain a customer with FairPoint Energy and thereby continue the same affordable service that you have received from PNE Energy Supply.

Until the actual transfer date, PNE Energy Supply will continue to be responsible for addressing all customer service and billing issues. After the transfer date, you should refer your questions to FairPoint Energy for handling. We appreciate your understanding and support during this transition period. If you have any questions regarding this notice, our address and on-going toll-free customer contact number and address are as follows:

PNE Energy Supply, LLC d/b/a Power New England
816 Elm Street Suite 364
Manchester, NH 03101
Phone: (877) 248-1478

Sincerely,

PNE Energy Supply, LLC d/b/a Power New England

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. _____

RESIDENT POWER, LLC

VERIFIED EMERGENCY PETITION FOR DECLARATORY JUDGMENT

Introduction

Resident Power LLC (“RP”) respectfully petitions the Public Utilities Commission (the “PUC” or “Commission”) for emergency review and (1) confirmation of RP’s status as a registered aggregator in good standing under PUC 2004.04, and (2) confirmation of RP’s authority to continue to act as an aggregator on behalf of certain former PNE electrical power supply customers, who as of February 20, 2013, and, as explained in more detail below, were transferred by the rules of the Independent System Operator for New England (“ISO-NE”) from competitive energy supply service with PNE Energy Supply, LLC (“PNE”) to default service with Public Service Co. of NH (“PSNH”). A proposed order is attached hereto as Exhibit A.

In addition, at the time of the transfer to PSNH default service, as mandated by ISO-NE, the PNE customer accounts for which RP acted and acts as aggregator were in the process of being transferred to another qualified and registered competitive electric power supplier (“CEPS”). PNE and RP are requesting the Commission to rule that, under the circumstances described below, transfer of these customer accounts to a competitive energy supplier does not constitute “slamming” under applicable state law and PUC rules, is otherwise permissible under applicable New Hampshire law and PUC Rules, and is in the best interests of the customers involved.

Background

1. RP is a limited liability company organized and existing under RSA 304-C.
2. RP is a duly registered aggregator pursuant to Part Puc 2003 for the purpose, *inter alia*, of providing aggregation services to New Hampshire electricity customers.
3. On February 6, 2013, PNE and RP entered into an Account Purchase and Sales Agreement ("P&S Agreement") with FairPoint Energy LLC ("FPE"), pursuant to which approximately 8,500 residential and small commercial accounts in the PSNH service territory would be transferred from PNE to FPE.
4. By on or about February 8, 2013, all of these customers were duly enrolled in the PSNH electronic data interchange for transfer to FPE at the time of the next regularly scheduled meter read.
5. Beginning on February 9, 2013, and continuing through February 14, 2013, PSNH transferred certain PNE customer accounts to FPE at the rate of 300-400 accounts per business day.
6. On February 11, 2013, PNE sent out a notice to its customers announcing the agreement with FPE and the impending transfer of PNE customer accounts to FPE. That notice, attached as Exhibit B, contained the following statement: "Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers."
7. On February 14, 2013, ISO-NE suspended PNE's trading account from participation in the ISO-NE markets for financial default under ISO-NE rules. As a result ISO-

NE scheduled PNE's load asset account to be terminated at 12:01 AM on Wednesday, February 20, 2013.

8. For reasons that are not yet entirely clear to PNE Energy and RP, none of the relevant customer accounts were transferred by PSNH on Friday, February 15, 2013.

9. On Saturday, February 16, 2013, PSNH resumed transferring PNE customer accounts to FPE.

10. By the end of the day on Tuesday, February 19, approximately 1,196 PNE customer accounts had been successfully transferred to FPE.

11. On Wednesday, February 20, 2013, at 12:01 AM, pursuant to the ISO-NE Financial Assurance Rules, ISO-NE transferred the remaining PNE load asset at ISO-NE consisting of all PNE residential and small commercial customer accounts, including the remaining PNE residential and small commercial customer accounts that had not already been transferred to FPE— approximately 7,300 accounts – to the “host utility” for these accounts, PSNH. Upon receipt of this load asset from ISO-NE, on information and belief, PSNH assigned the customer accounts associated with this load asset moved to PSNH by ISO-NE to PSNH default service.

A. The RP Aggregation Agreements with Former PNE Customers are Valid

12. All of the former PNE customer accounts moved to PSNH default service by order of ISO-NE are aggregation customers of RP and have executed aggregation agreements in the forms attached hereto as Exhibit C, and appoint RP as their exclusive agent for the purpose, *inter alia*, of researching, negotiating and executing electricity supply agreements with electric energy suppliers where the competitive electricity rate will be lower than the posted utility rate, in this case, the PSNH default service rate.

13. Each RP aggregation customer is subject to certain terms and conditions.

Attached hereto as Exhibit D are the RP standard terms and conditions. Section 5 of the RP standard terms and conditions provides that RP or any customer may cancel the aggregation agreement with RP provided any such notice of cancellation is in writing and provided to the other party no less than 30 days prior to expiration of the aggregation agreement.

14. RP has not sent and does not intend to send any written notice of cancellation to any of those customer accounts that were transferred from PNE competitive electricity service to PSNH default service on or after February 20, 2013.

15. As of February 21, 2013, RP has received approximately 5 written notices of cancellation from customer accounts that were transferred from PNE competitive electricity service to PSNH default service on February 20, 2013.

16. The intent of RP is to continue to work on behalf those customers who have not submitted to RP a written notice of cancellation in accordance with those Aggregation Agreements, and move their accounts off of the PSNH default service and to a CEPS with a rate plan that is lower than PSNH default service.

B. RP's Continued Representation of Customers Transferred to PSNH Default Service and Placement with CEPS Will Not Constitute "Slamming"

17. Based upon communications with PUC counsel, Petitioner understands that based on the statement in the PNE notice set forth at Paragraph 6 above, any attempt by Petitioner to place one of its aggregation customers now on PSNH default service as a result of the ISO-NE mandate described in Paragraph 11 above with a CEPS may constitute "slamming" under the Commission's rules.

18. Petitioner sought clarification of the PUC counsel's position, in an email dated February 20, 2013 from Robert P. Cheney, Esquire, to PUC counsel. While PUC counsel

responded, it has not provided sufficient or adequate clarification. The uncertainty surrounding the status of RP's relationship with its customers and the consequences of RP's doing business with and for those customers (to, for example, provide those customers with better rates than allowed by PSNH default service) is damaging RP's ability to do business and is having a deleterious impact on consumers of electric power in New Hampshire.

19. PUC 2004.10(b) defines "slamming" as follows: "For the purposes of this paragraph, slamming means initiating the transfer of a customer to a new CEPS or aggregator without the customer's authorization." PUC counsel's position – or indeed, its lack of clarity in respect to the position currently occupied by RP – requires a definitive judgment under these factual circumstances from the Commission.

20. Neither RP or, to the best of RP's knowledge, any customer of RP has sent the other party a written notice of cancellation pursuant to Paragraph 6 of the Resident Power Terms and Conditions, except as noted above in Paragraph 15. Thus, for staff or counsel for the PUC to assert that RP is no longer an aggregator for the PNE accounts intended to be, or being transferred to FPE, staff and counsel would have to claim that PNE was acting as an agent of Resident Power intending to cancel the aggregation agreements when PNE sent its notice to its customers on February 11.

21. While RP was a signatory to the Account Purchase and Sale Agreement between PNE and Fairpoint Energy, nothing in that agreement created an agency relationship empowering PNE to cancel the RP Aggregation Agreements. RP's aggregation authority remains in place with respect to its customers. Its communications "initiating the transfer of a customer to a new CEPS" cannot constitute slamming within the meaning of the PUC Rules.

C. RP's Re-Confirmation of its Representation of Customers Transferred to PSNH Default Service and Placement with CEPS Will Not Constitute "Slamming"

22. A cumbersome and, in light of the above, unnecessary alternative that Petitioner has initiated is to individually contact each of its customer accounts that were transferred to PSNH default service as described in Paragraph 11 above and request that customer to re-confirm and affirm that he or she desires RP to continue acting as an aggregator of his or her account in order to move from PSNH default service to a CEPS.

23. When contacted by Petitioner's counsel, PUC counsel could not provide an unequivocal response that RP's placement of its customers with a CEPS and the subsequent enrollment of such customers following re-confirmation and affirmation by RP's customers as described in Paragraph 22 would not constitute "slamming" under the Commission's rules given the facts outlined above.

24. As noted above, the uncertainty surrounding the status of RP's relationship with its customers and the consequences of RP's doing business with and for those customers is damaging RP's ability to do business and is having a deleterious impact on consumers of electric power in New Hampshire.

25. PUC counsel's position – or indeed, its lack of clarity in respect to the position currently occupied by RP – requires a definitive judgment under these factual circumstances from the Commission.

Relief Requested

Under the foregoing circumstances, RP seeks the following relief from the Commission:

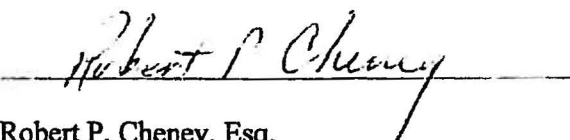
- A. An Order recognizing that the registration of Resident Power LLC as an aggregator of electric load under PUC 2003.04 has not been revoked, suspended or withdrawn, and remains valid and in full force and effect;
- B. An Order that no provision of the Commission's rules prohibits or prevents Resident Power from continuing to represent its customers in accordance with such terms and conditions, including those customers that were formerly customers of PNE Energy Supply, LLC ("PNE") for electric supply services, subject, of course, to cancellation by any customer of RP in accordance with the terms and conditions of the Aggregation Agreement between Resident Power and said customer;
- C. An Order that RP's, or any CEPS' to whom RP offers an aggregated load, proposed enrollment of those RP customers with whom an aggregation agreement exists, who were formerly customers of PNE and were transferred to PSNH default service on February 20, 2013, as a result of the suspension of PNE by ISO New England, for electric service to be provided by FairPoint Energy LLC or any other competitive electric power supplier at an energy service rate less than the PSNH default service rate, shall not constitute "slamming" under applicable New Hampshire law, including PUC 2004.10(b), provided such customer of RP has not provided notice of cancellation to RP in accordance with the terms and conditions of his or her Aggregation Agreement with RP on or before the date of enrollment of such customer in the applicable electronic data interchange; and

D. An Order that RP's, or any CEPS' to whom RP offers an aggregated load, proposed enrollment of those RP customers with whom RP has re-confirmed a prior aggregation agreement, who were formerly customers of PNE and were transferred to PSNH default service on February 20, 2013, as a result of the suspension of PNE by ISO New England, for electric service to be provided by FairPoint Energy LLC or any other competitive electric power supplier at an energy service rate less than the PSNH default service rate, shall not constitute "slamming" under applicable New Hampshire law, including PUC 2004.10(b), provided such customer of RP has not provided notice of cancellation to RP in accordance with the terms and conditions of his or her Aggregation Agreement with RP on or before the date of enrollment of such customer in the applicable electronic data interchange.

Dated: February __, 2013

Resident Power, LLC
By its Attorneys,

SHEEHAN PHINNEY BASS + GREEN, PA



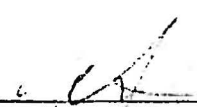
Robert P. Cheney, Esq.
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ccole@sheehan.com
rlucic@sheehan.com

c

Verification of Allegations

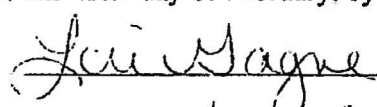
The undersigned, Bart Fromuth, hereby certifies that the facts alleged in the foregoing
Petition are true and correct to the best of his knowledge and belief.



Bart Fromuth

STATE OF New Hampshire
COUNTY OF Merrimack

Sworn and subscribed to, before me, this 22nd day of February, by Bart Fromuth.



Print Name: Lori Gagne

Notary Public / My Commission Expires: 8/24/16



STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DE 13-057

**OFFICE OF THE CONSUMER ADVOCATE'S OBJECTION TO RESIDENT POWER'S
VERIFIED EMERGENCY PETITION FOR DECLARATORY JUDGMENT AND
MOTION FOR NOTICE AND HEARING**

Now Comes the Office of Consumer Advocate (OCA) and respectfully objects to Resident Power's (RP) Verified Emergency Petition and moves the Public Utilities Commission (PUC) to Provide Notice and a Hearing for Resident Power to demonstrate compliance with Chapter Puc 2000 Competitive Electric Power Supplier Rules. In support of this pleading the OCA states:

1. On February 22, 2013 RP filed before the PUC a Verified Emergency Petition for Declaratory Judgment seeking the following relief:
 - a. Confirmation of RP's status as a registered aggregator in good standing pursuant to Puc 2003.04 and;
 - b. Confirmation of RP's authority to act as an aggregator on behalf of certain former PNE Energy Supply, LLC. (PNE) customers.
2. OCA objects to granting this request without notice and a hearing. Customers received inconsistent communication from PNE, RP and the news media regarding changes to customers' competitive energy supplier and aggregator.
3. For example, the PNE "Customer Notice of Service Provider Change" dated February 11, 2013 states "Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between energy

suppliers.” Customers could reasonable interpret this statement as a representation to RP customers that RP has terminated or surrendered its rights and obligations as an aggregator as delineated in its Terms and Conditions (See Exhibits B and D to the Emergency Verified Petition).

4. Similarly, in its own notice to customers, RP sates, “If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH, please reply to this email and type “RENEW MY ACCOUNT” See Attachment A.
5. For RP to now argue that its aggregator status remains unchanged is inconsistent with previous notices to customers, whether from RP or PNE. Customers should not now be given another piece of confusing information. To do so undermines the integrity of the competitive market place. At a minimum, a public hearing must be held to explain to customers what has taken place.
6. Further, residential customers and their representatives must have notice and an opportunity to be heard regarding enforcement of Puc rules on competitive electric suppliers and aggregators.
7. RP must show compliance with Chapter Puc 2004 consumer protection requirements including, but not limited to, Puc 2004.08 (2), which requires disclosure of “[T]he nature of any business relationships or affiliations with any CEPS [Competitive Electric Power Supplier] or utility”.
8. It is not clear that RP and PNE are operating as independent organizations. From a customer’s perspective, RP and PNE are related organizations. Customers must be able to rely on official statements from suppliers and aggregators regarding the status

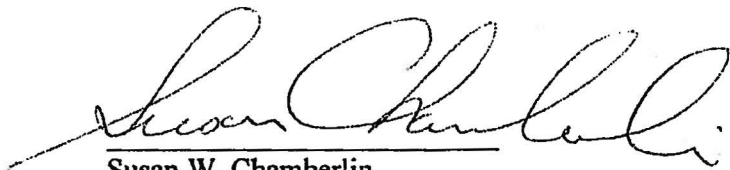
of their service. When PNE issues a statement that Resident Power is no longer the customers' aggregator, customers reasonably rely on such a statement. Customers should not be required to navigate the actual agency relationship between the two companies. If there is a less than an arms-length relationship, the nature of that relationship must be disclosed to the PUC to avoid improper market behavior or "gaming." See Puc 2004.08 (2).

9. There is evidence that the two companies have a structural interdependence. In docket DE 12-097 Mr. August Fromuth testifies that he is "the Managing Director of Freedom Logistics, PNE and Resident Power." See *In Re: Electric Utility Customers Investigation into Purchase of Receivables, Customer Referral and Electronic Interface for Electric Distribution Utilities*, DE 12-097 Testimony filed July 16, 2012. Furthermore, RP's manager, Bart Fromuth, also serves as the registered agent for PNE Energy Supply, LLC . See *The Certificate of Formation for Resident Power as a Limited Liability Company* (April 15, 2011) and *PNE Energy Supply, LLC petition to become a Competitive Electric Power Supplier* (April 8, 2011). The PUC must determine if there is a financial interdependence as well.
10. In addition RP's contract with customers makes a guarantee of a "cheaper electricity rate than you currently pay". (See Verified Emergency Petition, Exhibit C.) RP must show how it plans to implement this guarantee.

Wherefore the OCA respectfully requests the Commission:

- a. Deny RP's Verified Emergency Petition for Declaratory Judgment;
- b. Provide Notice and an Opportunity to be Heard on RP's compliance with PUC rules;
- c. Require RP make a showing of how RP will honor its publicized guarantee to its customers;
- d. Grant such other relief as justice requires.

Respectfully submitted,

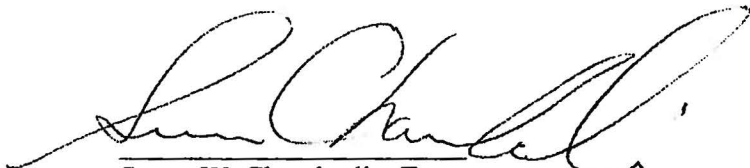


Susan W. Chamberlin
Office of the Consumer Advocate
21 S. Fruit St., Ste. 18
Concord, N.H. 03301
(603) 271-1172

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

February 27, 2013



Susan W. Chamberlin, Esq.

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Dear Resident Power Customer:

IMPORTANT UPDATE – REPLY REQUESTED

If you are receiving this message the transfer of your account from PNE Energy Supply to Fairpoint Energy has regrettably not gone through as expected. Your account had been enrolled for transfer to Fairpoint Energy at the same low rates, terms and conditions that you enjoyed with PNE Energy. However, the transfer of your account has been halted, and your account is now back with Public Service of New Hampshire (PSNH), whose rates are considerably higher than those you enjoyed with PNE Energy and would have enjoyed with Fairpoint Energy.

If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH rates, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

If you renew with us, we will get to work, right away, to find you an alternative to PSNH default service at rates that continue to be well below PSNH. If you do not renew with us, please be advised that you will remain on PSNH's high default service rate of \$.0954 per kwh, until you choose another supplier on your own, or you re-sign with Resident Power.

While we are writing you, we would like to clear up some inaccuracies in the media the last few days.

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1. Despite what was reported by the Nashua Telegraph and other news outlets this morning, Resident Power has not been suspended by the ISO or the New Hampshire PUC. The Telegraph and others have since changed their online versions to reflect the truth. We remain in good standing and continue to serve you (should you renew with us) and all of our 14,000 NH customers with superior rates and service.

2. Your account has gone back to PSNH as of Wednesday, February 20, 2013. A request was made to PSNH to transfer your account to Fairpoint Energy automatically and protect your rates, however PSNH declined to make the switch. PSNH stated that although they had the ability to do the automatic transfer, they lacked the "resources" to effect the transfer in the time provided.

3. Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (Fairpoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire's only locally owned and operated electricity supplier in the next few weeks.

When we started Resident Power, almost two years ago now, all we wanted to do was provide EVERY New Hampshire rate payer with a competitive choice, not just the large businesses. In the early days, the only supplier that would work with us, and be the first to offer service to residential and small commercial customers, was PNE Energy. As their partner these last two years, we salute them for being bold enough to do to what no competitive supplier had done before. Today, almost 50,000 New Hampshire customers have chosen an alternative supplier to help save them money on their electricity bills, and PNE Energy Supply is a major reason for that.

In closing, we hope that you decide to remain with Resident Power. It has been our pleasure to serve you and we hope you give us the chance to continue that relationship.

Please remember, that if you wish to stay with Resident Power, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

Sincerely,

Your Resident Power Enrollment Team



Trans

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**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 13- 057

**RESIDENT POWER NATURAL GAS AND ELECTRIC SOLUTIONS, LLC
d/b/a RESIDENT POWER**

Petition for Declaratory Ruling

Order Granting Petition In Part, and Dismissing In Part

ORDER NO. 25,467

February 28, 2013

On February 22, 2013, Resident Power Natural Gas and Electric Solutions, LLC d/b/a Resident Power (Resident Power), a registered electric power aggregator headquartered in Manchester, New Hampshire, filed a petition for a declaratory ruling by the Commission regarding its aggregation activities.¹ Specifically, Resident Power requested that the Commission, pursuant to N.H. Code Admin. Rules Puc 207.01, issue an Order ruling that:

(1) The registration of Resident Power as an electric power aggregator with the Commission has not been revoked, suspended, or withdrawn, and remains valid and in full force and effect;

(2) No provision of the Commission's rules prohibits or prevents Resident Power from continuing to represent its customers for electric supply services, in accordance with the terms and conditions specified by the aggregation agreement in place between Resident Power and such customers, including those customers that were formerly customers of PNE Energy Supply, LLC (PNE), a competitive electric power supplier (CEPS) registered with the Commission and headquartered in Auburn, New Hampshire, subject to cancellation by any customer of Resident Power in accordance with the terms and conditions of the aggregation agreement in place;

(3) That the proposed enrollment by Resident Power, or any CEPS with which Resident Power offers an aggregated load, of those Resident Power customers with whom an aggregation agreement exists, who were formerly customers of PNE and were transferred to Public Service

¹ In its petition, Resident Power referred to its legal name as "Resident Power, LLC." However, the full legal name of Resident Power, as submitted in its application for registration as an electric power aggregator in Docket No. DM 11-081, and approved by the Commission by a secretarial letter dated June 28, 2011, is "Resident Power Natural Gas and Electric Solutions, LLC," with a trade name of "Resident Power." These names also remain registered with the New Hampshire Secretary of State, and are used in this Order.

Company of New Hampshire (PSNH) default service on February 20, 2013, as a result of the suspension of PNE by ISO-New England, for electric service to be provided by FairPoint Energy LLC or any other CEPS at an energy service rate less than the PSNH default service rate, shall not constitute "slamming" under applicable New Hampshire law, including N.H. Code Admin. Rules Puc 2004.10(b), provided such customer of Resident Power has not provided notice of cancellation to Resident Power in accordance with the terms and conditions of his or her aggregation agreement with Resident Power on or before the date of enrollment of such a customer in the applicable electronic data interchange; and

(4) That the proposed enrollment, by Resident Power, or any CEPS with which Resident Power offers an aggregated load, of those Resident Power customers with whom Resident Power has re-confirmed a prior aggregation agreement, who were formerly customers of PNE and were transferred to PSNH default service on February 20, 2013, as a result of the suspension of PNE by ISO-New England, for electric service to be provided by FairPoint Energy LLC or any other CEPS at an energy service rate less than the PSNH default service rate, shall not constitute "slamming" under applicable New Hampshire law, including Puc 2004.10(b), provided such customer of Resident Power has not provided notice of cancellation to Resident Power in accordance with the terms and conditions of his or her aggregation agreement with Resident Power on or before the date of enrollment of such customer in the applicable electronic data interchange.

On February 27, 2013, the Office of the Consumer Advocate (OCA) filed an objection to Resident Power's motion for a declaratory ruling. In its objection, the OCA cited the lack of factual clarity regarding the recent events surrounding Resident Power and PNE, which militated in favor of a public hearing to examine facts in dispute in advance of any Commission grant of declaratory relief to Resident Power. The OCA, through its objection, also made certain factual allegations regarding the business relationship between Resident Power and PNE, and Resident Power's guarantees to customers, which, in OCA's view, required investigation by the Commission.

The Commission analyzes petitions for declaratory rulings pursuant to the terms of N.H. Code Admin. Rule Puc 207.01, which states, in part (c), that the Commission shall dismiss a petition for declaratory ruling that (1) fails to set forth factual allegations that are definite and

concrete; or (2) involves a hypothetical situation or otherwise seeks advice as to how the Commission would decide a future case.

In this instance, Resident Power first seeks a simple confirmation of its status as a registered electric power aggregator in New Hampshire. We affirm that, as of this date, Resident Power is a duly registered electric power aggregator in this State, as approved in Docket No. DM 11-081 on June 28, 2011.

For its remaining three requests for declaratory ruling, Resident Power seeks confirmation that it may continue to represent the former PNE customers and that certain courses of business action contemplated by Resident Power for its aggregation customers, in relation to the recent suspension of PNE by ISO-New England and the reversion of a number of customers of PNE to PSNH default service, would not constitute “slamming” under RSA 374:28-a and Puc 2004.10(b). In light of the show-cause Order of Notice issued today regarding the recent business activities of Resident Power and PNE², and the factual uncertainties surrounding recent events involving Resident Power and PNE, as independently noticed by the Commission and pointed out by the OCA, we are not convinced that the factual background is sufficiently “definite and concrete” for the granting of the declaratory ruling sought by Resident Power for items 2 through 4, above. Moreover, pursuant to Puc 207.01(c)(2), we may not provide advice as to how, on a facts-and-circumstances basis, the Commission would resolve future slamming complaints brought forward by consumers after Resident Power takes either of its proposed courses of business action. Therefore, we will grant Resident Power’s request for a declaratory ruling with regards to its registration status, a matter of public record not in dispute, and will dismiss Resident Power’s remaining declaratory ruling petition items.

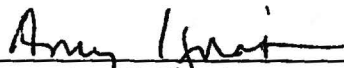
² See Docket Nos. DE 13-059 and DE 13-060.

ruling with regards to its registration status, a matter of public record not in dispute, and will dismiss Resident Power's remaining declaratory ruling petition items.


Based upon the foregoing, it is hereby

ORDERED, that the petition for a declaratory ruling by Resident Power is **GRANTED** **IN PART** and **DISMISSED IN PART**, subject to the terms discussed herein.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of February, 2013.

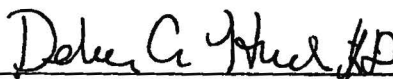


Amy L. Ignatius
Chairman



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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steve.mullen@puc.nh.gov
susan.chamberlin@oca.nh.gov
tom.frantz@puc.nh.gov

Docket #: 13-057-1 Printed: February 28, 2013

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**

10

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 13-059

RESIDENT POWER NATURAL GAS & ELECTRIC SOLUTIONS LLC

DE 13-060

PNE ENERGY SUPPLY, LLC

Investigation and Show Cause Proceeding

Order Approving Settlement Agreement

ORDER NO. 25,492

April 15, 2013

APPEARANCES: Hinckley, Allen & Snyder LLP, by Christopher H.M. Carter, Esq. and Daniel M. Deschenes, Esq., on behalf of Resident Power Natural Gas & Electric Solutions LLC and PNE Energy Supply, LLC; Susan W. Chamberlin, Esq. of the Office of Consumer Advocate, on behalf of residential ratepayers; and Alexander F. Speidel, Esq., for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On February 27, 2013, Staff submitted a memorandum requesting that the Commission immediately schedule a show cause hearing in connection with recent market events involving Resident Power Natural Gas & Electric Solutions LLC (Resident Power), a registered electric power aggregator headquartered in Manchester, New Hampshire, and its affiliate, PNE Energy Supply, LLC (PNE), a registered competitive electric power supplier (CEPS) headquartered in Auburn, New Hampshire.

On February 28, 2013, the Commission issued an order of notice, finding that a proceeding was warranted for Resident Power and PNE (together, the Companies) to show cause why the Companies should not be subject to sanctions pursuant to N.H. Code Admin. Rules Puc 2005 and the Commission's general supervisory powers. As part of this order of notice, the

Commission ordered the Companies to produce certain categories of information by March 7, 2013, and determined that a combined proceeding for both Docket No. DE 13-059 (Resident Power) and Docket No. DE 13-060 (PNE) would best serve the interests of justice and facilitate efficient resolution of the matters considered within the combined proceeding. The Commission also ordered PNE to cease enrolling new customers during the pendency of this combined proceeding, and suspended any other New Hampshire utilities' obligations to accept or process new customer enrollments from PNE.

On March 11, 2013, the Office of the Consumer Advocate (OCA) filed a letter of participation in this docket on behalf of residential ratepayers pursuant to RSA 363:28. There were no other intervenors.

In March 2013, during the pre-hearing phase of this combined proceeding, Resident Power, PNE, and Staff engaged in discovery, along with a number of procedural motions relating to scheduling, burden of proof, requests for confidentiality, and other matters. Those matters were ruled on by the Commission in a series of decisional documents: (1) March 7, 2013 secretarial letter, communicating the Commission's approval of the Companies' joint request for an extension of time for filing responses to the Commission's order of notice inquiries from March 7 to March 12, 2013; (2) Order No. 25,473 (March 13, 2013), granting Commission approval for the Companies' joint request for a prehearing conference to be scheduled on March 15, 2013; (3) March 18, 2013 secretarial letter, ordering the scheduling of a supplemental prehearing conference on March 19, 2013; (4) Order No. 25,475 (March 20, 2013), ruling that the burden of proof rested with Commission Staff; (5) March 21, 2013 secretarial letter, communicating the Commission's approval in part of Staff's request for an extension of time for

the hearing date, by scheduling the hearing for March 26, 2013; (6) March 25, 2013 secretarial letter, communicating the Commission's approval of Staff's motion, assented to by the Companies and OCA, for a continuance of the hearing date to March 27, 2013; (7) Order No. 25,478 (March 26, 2013), in which the Commission denied Resident Power's motion to dismiss; and (8) Order No. 25,479 (March 26, 2013), in which the Commission addressed the Companies' motion for confidential treatment.

In a separate but related matter, Resident Power submitted a request to renew its status as an electric power aggregator. The matter has been docketed in DM 13-089 and will be addressed subsequently by the Commission. PNE separately filed, on March 20, 2013 in Docket No. DM 11-075, a request for modification of its CEPS registration to incorporate service to commercial and industrial customers, which will also be addressed subsequently by the Commission.

Interested persons may review these decisional documents, and related filings, other than any information for which confidential treatment is requested of or granted by the Commission, on the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2013/13-059.html> or <http://www.puc.nh.gov/Regulatory/Docketbk/2013/13-060.html>.

On March 26, 2013, Staff filed a settlement agreement signed by Resident Power, PNE, and Staff. *See* Hearing Exhibit 4 (Updated Settlement Agreement, filed March 27, 2013, incorporating Commission bench ruling on confidential treatment). *See also* Transcript of March 27, 2013, Public Hearing (Tr.) at 10-27. Staff requested that the Commission accept, pursuant to its waiver authority under N.H. Code Admin. Rules Puc 201.05, the late-filed settlement. The Commission held a hearing on the merits as scheduled on March 27, 2013, and accepted the settlement for its review.

II. TERMS OF THE SETTLEMENT AGREEMENT

The settling parties, Resident Power, PNE, and Staff, recommended that the Commission approve the settlement agreement as a just and reasonable resolution of the matters examined in this combined proceeding. The settlement agreement outlined a series of steps required of the Companies in re-establishing their normal operations, and presented a set of facts to which the Companies and Staff stipulated, outlining, in general terms, the events leading to the suspension of PNE's participation in the New England power market by ISO-New England on February 20, 2013. *See* Hearing Exhibit 4, appendix (Stipulation of Facts).

The settlement agreement incorporated the following provisions:

(1) All former PNE customers placed on default service with PSNH on February 20, 2013, would receive a one-time payment of \$9.50 as a result of being placed on default service. Each customer's acceptance of said \$9.50 payment would be conditioned on the customer waiving any claims against PNE relating to the customer's placement on default service. The \$9.50 payment to each customer would be reduced by any amount owed by the customer to PNE under the PNE terms and conditions prior to February 20, 2013;

(2) PNE would provide instructions to affected customers on receiving the payment described in point (1) above;

(3) Within 3 days of the approval of the settlement agreement, the \$100,000 from the escrow account established by PNE with Sovereign Bank pursuant to N.H. Code Admin. Rules Puc 2003.01(d)(4) and Puc 2003.03, would be delivered by the Commission to counsel for PNE (Hinckley, Allen & Snyder LLP), and would be held by counsel for PNE in a client IOLTA account pending the delivery of all one-time customer payments described in point (1) above.

Counsel for PNE would release the said \$100,000 to PNE after delivery of all said customer payments;

(4) Prior to resuming operations as a CEPS in New Hampshire, PNE would establish an escrow account in the minimum amount of \$200,000 in satisfaction of the requirements set forth in N.H. Code Admin. Rules Puc 2003.01(d)(4) and Puc 2003.03. PNE would be required to increase the amount of the escrow account as required by N.H. Code Admin. Rules Puc 2003.03(a)(2);

(5) Staff recommended that, upon establishment of the escrow account described in point (4) above, the Commission should terminate operation of the provision in the February 28, 2013 order of notice, which directed PNE to cease enrolling new customers pending the outcome of this proceeding, and released New Hampshire utilities from the obligation to accept or process new customer enrollments from PNE;

(6) PNE agreed to develop a notice for former PNE customers, and to provide that notice to the Commission's Consumer Affairs Division for its review. PNE and the Consumer Affairs Division would work cooperatively and in good faith on the content of this notice, which would be provided to the former PNE customers by e-mail, posting on the PUC website, and via a PUC press release, no later than April 12, 2013; and

(7) PNE, Resident Power, and Staff agreed that the settlement agreement serves as a full release of all issues and allegations raised in the February 27, 2013 Staff recommendation, and the February 28, 2013 order of notice.

III. POSITIONS OF THE PARTIES AND STAFF REGARDING THE SETTLEMENT; PUBLIC COMMENT

A. The Companies

PNE and Resident Power requested the Commission's approval of the settlement agreement at hearing, and described the compensation provided to former PNE customers within the terms of the settlement agreement as fair. Tr. at 84-85.

B. Staff

Staff, at hearing, presented the direct testimony of Steven E. Mullen, Assistant Director of the Electric Division, and Amanda O. Noonan, Director of the Consumer Affairs Division. Tr. 40-78. Staff supported the settlement agreement as a means of providing an efficient resolution of the matters involving the Companies, providing a useful framework of stipulated facts, offering speedy and fair compensation to former PNE customers placed on PSNH Default Service, and offering useful regulatory lessons going forward. Tr. at 86-87. Staff also noted that it had the expectation that counsel for PNE would independently verify the delivery of all one-time customer payments in advance of releasing the \$100,000 in escrow funds to PNE. Tr. 74-78.

C. Office of the Consumer Advocate

The OCA did not sign the settlement agreement, and it outlined its concerns at hearing. The OCA viewed the \$9.50 customer compensation amount as lower than its expected per-customer estimate of economic harms resulting from PNE customers being placed on PSNH Default Service, which OCA estimated to be in the range of \$12-15. Tr. at 84. The OCA also expressed its concern that the Companies' customers did not receive the benefit of their bargain as a result of the events of February 2013, and also suffered ancillary harms connected with

customer confusion, and lack of knowledge of the affiliate relationship between Resident Power and PNE. Tr. at 82-85.

D. Public Comment (Public Service Company of New Hampshire)

PSNH, though not a party to this proceeding, submitted a written public comment to the Commission regarding its views on the recent events involving the Companies and outlined its negative position towards the settlement agreement. PSNH's comment identified a series of allegations regarding PSNH's recent business interactions with the Companies, described the \$9.50 in customer compensation as inadequate, and also decried the settlement agreement's exclusion of compensation for PSNH, for its alleged financial losses related to its recent interactions with the Companies.

IV. COMMISSION ANALYSIS

Pursuant to RSA 541-A:31, V(a), informal disposition may be made of any contested case at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default. N.H. Code Admin. Rules Puc 203.20(b) requires that, prior to approving disposition of a case by settlement, the Commission determine that the settlement results are just and reasonable and in the public interest.

We have reviewed the settlement agreement, in light of testimony provided by the parties at hearing, the facts stipulated to by the Companies and Staff, and our own independent analysis of the facts at hand regarding the events involving the Companies. On the basis of this review, we find that this settlement agreement offers a fair level of compensation for former PNE customers, through the verified mechanism of the \$9.50 payment, while offering a way forward for the Companies' re-integration into and provision of service in the New Hampshire

competitive electric power market. In light of recent events, we strongly support the settlement term requiring that PNE provide additional surety, in the minimum amount of \$200,000, on a verifiable basis before re-starting operations. We also strongly support the development of a joint notice to PNE customers, with the collaboration of PNE and the Consumer Affairs Division, to reduce customer confusion and to provide useful guidance to customers going forward; however, we do note, that as a matter of administrative necessity, we must modify *sua sponte* the date by which this notice must be provided, from April 12, 2013, to April 19, 2013.

Regarding the comments made by OCA and PSNH at the hearing, we acknowledge, as Staff acknowledges, that there is much work to be done in enhancing New Hampshire's new regulatory framework for competitive energy suppliers as the competitive retail electricity market continues to develop. That said, customers do bear a burden of due diligence in selecting a competitive supplier, with the understanding that such suppliers are subject to a much lighter regime of regulatory oversight and can, as recent events show, encounter financial difficulty.¹

Having reviewed the record, including the settlement and the evidence presented at hearing, we find that the resolution of this matter through the terms of the settlement agreement is just and reasonable and in the public interest. We find that the terms of the settlement represent an appropriate balancing of the interests of the Companies' customers and the Companies, and are consistent with the public interest. We will adopt and approve the terms of the settlement agreement, with the understanding that the public notice to be jointly prepared by PNE and the Consumer Affairs Division shall be issued no later than April 19, 2013. We await

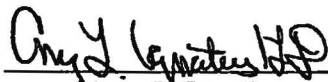
¹ RSA 374-F:3,II "Customer Choice. Allowing customers to choose among electricity suppliers will help ensure fully competitive and innovative markets. Customers should be able to choose among options such as levels of service reliability real time pricing, and generation sources, including interconnected self generation. Customers should expect to be responsible for the consequences of their choices...."

the establishment of the \$200,000 escrow account, as verified by Staff, in anticipation of the lifting of the suspension of PNE's business outreach activities. We note that our approval of this settlement agreement does not limit our disposition of similar matters in the future.

Based upon the foregoing, it is hereby

ORDERED, that the terms of the settlement agreement presented by the parties are hereby adopted and approved as discussed herein.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of April, 2013.


Amy L. Ignatius
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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tom.frantz@puc.nh.gov

Docket #: 13-060-1 Printed: April 15, 2013

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation into Dispute between PNE Energy Supply, LLC, and
Public Service Company of New Hampshire**

Order Denying Motion to Reconsider

ORDER NO. 25,673

June 2, 2014

In this order we deny PNE's motion to reconsider Order No. 25,660. We reaffirm our findings that PNE waived its claim for interest damages and that the PSNH tariff authorized the imposition of selection charges after ISO-New England suspended PNE.

I. PROCEDURAL HISTORY

Public Service of New Hampshire (PSNH) provided consolidated billing services to PNE Energy Supply, LLC (PNE), a competitive electricity supplier. *Joint Statement of Agreed Facts*, Hearing Exhibit 1, at 1-2. In the normal course, PSNH billed customers for both PSNH's and PNE's charges, collected a single payment, and then transferred to PNE its share. *Id.* at 2-3. PSNH later invoiced PNE for the consolidated billing and other tariff charges, including a \$5 "selection charge" imposed each time a supplier acquired or lost a customer. *Id.* at 5. The selection charge was imposed upon "any changes initiated by a Customer, Supplier, or an authorized agent, to a different Supplier, to Default Service, or to Self-Supply Service." PSNH Tariff at 1st Revised Page 33 (PSNH tariff).

In February 2013, ISO-New England (ISO-NE), the organization that operates the regional bulk electricity transmission system, suspended PNE's ability to buy electricity. Exhibit 1 at 3.

The suspension resulted in the transfer of 7,669 PNE customers to PSNH's default service. *Id.* at 4. For about one week after PNE's suspension, PSNH withheld all customer payments normally due to PNE. *Id.* PSNH accumulated more than \$250,000 of customer payments due to PNE by February 28, 2013, when PSNH released all but \$100,000 to PNE. *Id.* at 4. PSNH voluntarily returned \$7,039 to PNE in May 2013 along with an invoice explaining why it kept the \$92,961 balance. *Id.* at 5.

In June 2013 PNE filed a complaint seeking return of the \$92,961 plus attorney's fees and costs, and seeking "interest on customer payments unjustly withheld by PSNH since February 20, 2013." *Complaint Against Public Service Company of New Hampshire*, filed June 21, 2013, (Tab 2) at 11. PSNH returned an additional \$38,570 to PNE in December 2013. PSNH letter filed December 17, 2013 (Tab 10). At the hearing, PNE narrowed its request to \$38,345 of the remaining money that PSNH held, which represented the \$5 selection charge that PSNH imposed for each of the 7,669 PNE customers transferred to PSNH default service. Transcript of February 18, 2014, Hearing (Tr.) at 42.

The issues addressed at the hearing were whether PSNH had authority to withhold customer payments and whether the selection charge applied when the customer transfers resulted from PNE's suspension. Tr. at 5, 12; *see* February 3, 2014, secretarial letter (Tab 12).

In *PNE Energy Supply, LLC*, Order No. 25,660 (May 1, 2014), (the May 1, Order) we denied PNE's claims. We concluded that PSNH properly imposed the \$5 selection charge to the customers transferred to PSNH's default service, and that PNE's claims for damages arising from PSNH's withholding PNE customer payments were moot. *Id.* at 7. PNE timely filed a motion for rehearing pursuant to RSA 541:3.

II. POSITIONS OF THE PARTIES

A. PNE

PNE presents two arguments. First, PNE claims that it was error to find moot PNE's claims for damages flowing from PSNH's withholding of PNE customer payments because PNE "sought no remedy for PSNH's temporary withholding." May 1 Order at 7. PNE claims that the Commission "failed to consider PNE's express and unambiguous request for interest and attorneys' fees." Motion at 1-2. Second, PNE repeats its arguments that the plain meaning of the terms "initiate" and "agent" in the PSNH tariff compelled an outcome in PNE's favor. According to PNE, the \$5 selection charge did not apply to the transfer of PNE customers to PSNH default service because neither PNE nor any agent initiated the transfer. Motion at 2.

B. PSNH

PSNH objects to PNE's motion for rehearing. PSNH first argues that PNE's motion did not meet the standard for rehearing, but merely presented "restatements of its prior contentions." Objection at 4. On the merits, PSNH argues the Commission properly determined that PNE waived any claim to interest on the withheld customer payments, making that claim moot. *Id.* at 2-3. PSNH also argues the Commission correctly decided that the \$5 selection charge applied to the PNE situation. PSNH characterizes as unreasonable PNE's interpretation of the PSNH tariff. *Id.* at 4.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for "good reason" when the moving party demonstrates that the decision is "unlawful or unreasonable." RSA 541:3, RSA 541:4; *see Rural Telephone Companies*, Order No. 25,291 at 9 (Nov. 21, 2011). Good reason may exist if there are matters that the Commission "overlooked or mistakenly conceived in the

original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (additional quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (Apr. 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (Nov. 12, 2010).

A. PNE Waived its Claim for Interest Damages.

PNE first claims we erred in finding moot PNE’s claim for “interest on customer payments unjustly withheld by PSNH” (hereinafter “interest damages”). PNE Complaint at 11. PNE arguably had a claim for interest damages for the money above \$100,000 that PSNH returned in late February 2013, the \$7,039 PSNH returned in early May 2013, and the \$38,570 PSNH returned on December 16, 2013. Exhibit 1 at 4-5. PNE argues we “failed to consider PNE’s express and unambiguous request for interest and attorneys’ fees.” Motion at 1-2. PNE relies on the prayer for relief in its complaint:

PNE requests the Commission to ... Order PSNH to make reparation and/or restitution to PNE for attorneys’ fees and costs incurred by PNE in securing the return of its customer payments as well as interest on customer payments unjustly withheld by PSNH since February 20, 2013.

PNE Complaint at 11.

We found PNE’s request for interest damages moot because PNE abandoned the underlying claim. May 1 Order at 7. At the hearing on this matter, counsel for PNE stated:

[W]e got the so-called “self-help” recoupment costs back ... [S]hortly after [PSNH] sent in the December 16th letter, they paid us 38,000 and some dollars, which were the alleged recoupment costs. So, at least as far as we’re concerned, at this point, *that issue is moot*. What we’re looking at now is the invoiced Selection Charges, and not the recoupment charges. So, this fine point of “can they go off and use set-off under common law, when they’re bound very specifically as to how they’re supposed to proceed in

terms of a material breach?" I think they can't do it. But, I think, for purposes of today, that discussion is really moot any way.

Tr. at 43-44 (emphasis added). This was PNE's opportunity to clarify that it wished to pursue the legal claim that PSNH wrongfully withheld the customer payments and PNE's request for the resulting interest damages.

Staff provided another opportunity when it asked whether PNE persisted in its request for interest damages: "The complaint that PNE filed initially asked for ... some interest for not having access to the money and the like. [Staff] has not heard whether that's officially in or out of this case." Tr. at 37-38. Counsel for PNE responded:

[T]he Staff raised the issue of interest. To the extent that we are – if we were to be awarded now our somewhat reduced Selection Charges ... we just want the statutory rate of interest on whatever that would be, that final award.

Tr. 45. By this statement PNE limited its request for interest to statutory interest on a judgment on its claim for return of selection charges. *See* RSA 336:1, II; RSA 524:1-b. We interpret this second statement to confirm that PNE waived its request for interest damages on its claim that PSNH wrongfully withheld customer payments.

Even if PNE's claim for interest were still alive, we would reject it. PNE presented no evidence supporting an award of interest damages. PNE had the burden of calculating the precise interest due for the money PSNH withheld. PNE's failure to present that evidence would require us to reject the claim (and indeed it confirms PNE's intent to abandon the legal claim and any resulting interest damages).

Finally, we previously denied PNE's request for attorneys' fees and costs:

The Commission has also determined that PNE is not entitled to payment of its costs or attorneys' fees by PSNH under RSA 365:38-a in connection with this instant proceeding, as PNE is neither a utility nor a retail customer.

Secretarial letter filed November 12, 2013 (Tab 8). PNE has given us no reason to revisit that denial.

B. The May 1 Order Reasonably Interpreted the PSNH Tariff.

PNE's second argument on rehearing is that we erred by not giving the terms "initiate" and "agent" their plain meaning while interpreting the PSNH tariff. This is not a new argument and PNE presents us with no reason to reconsider our previous ruling. We therefore deny PNE's request for rehearing. Were we to consider the arguments again, we disagree with PNE's position. PSNH assessed PNE the selection charge for the 7,669 customer transfers precipitated by ISO-NE's suspension of PNE. We found that the PSNH tariff is not "plain and unambiguous" when applied to transfers resulting from an ISO-NE suspension because the PSNH tariff does not address that situation. May 1 Order at 7. The PSNH tariff does not mention "ISO-NE" or "suspension."

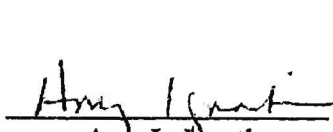
The parties attached to the agreed statement of fact portions of the ISO tariff, and PNE introduced additional sections of the ISO-NE tariff at the hearing. Attachment to Exhibit 1 at 29; Exhibit 2. PNE "recognized the ISO-New England tariff as the applicable tariff here," and stated that "there's one section in that [ISO-NE] tariff that talks about what happens when a market participant is suspended." Tr. at 17; *see* Exhibit 2.

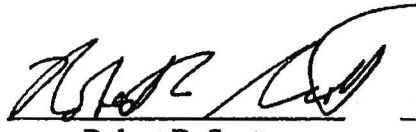
The PSNH tariff's silence regarding customer transfers resulting from an ISO-NE suspension rendered it ambiguous in this case and caused us to "look beyond [the PSNH tariff] to determine its intent." *In re Verizon New England, Inc.*, 158 N.H. 693, 695 (2009). The ISO-NE tariff provided guidance to resolve the ambiguity. Our resulting interpretation of "initiate" and "agent" represented our best judgment to resolve that ambiguity and interpret the PSNH tariff in a reasonable manner. May 1 Order at 7.


Based upon the foregoing, it is hereby

ORDERED, that PNE's motion for rehearing is **DENIED**.

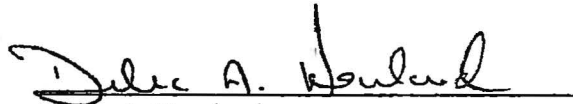
By order of the Public Utilities Commission of New Hampshire this second day of June,
2014.


Amy L. Ignatius
Chairman


Robert R. Scott
Commissioner


Martin P. Honigberg
Commissioner

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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Docket #: 13-233-1 Printed: June 02, 2014

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into
Dispute Between PNE Energy Supply, LLC and Public Service Company of New
Hampshire**

**PNE ENERGY SUPPLY LLC'S MOTION FOR LEAVE TO FILE
RESPONSE TO PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MEMORANDUM OF LAW RE: AGENCY**

NOW COMES the Petitioner, PNE Energy Supply LLC ("PNE"), by and through its attorneys, Sheehan Phinney Bass & Green, P.A., and hereby moves the New Hampshire Public Utilities Commission ("Commission") to accept PNE's Response to Public Service Company of New Hampshire's ("PSNH") Memorandum of Law Re: Agency ("Memorandum"). In support thereof, PNE states:

1. On February 18, 2014, the Commission held a hearing in the above-captioned docket.
2. At the close of the hearing, PNE submitted a memorandum of law that addressed an argument raised by PSNH, namely that PSNH was justified in assessing Selection Charges to PNE under Section 2(a) of the PSNH Tariff because ISO-New England ("ISO-NE") was acting as PNE's authorized agent when it required PSNH to accept PNE customers into default service.
3. Pursuant to Puc 203.32, the Commission gave PSNH until Friday, February 28, 2014, to submit a response solely on the ISO-NE/PNE agency issue.
4. On February 27, 2014, PSNH filed its Memorandum Re: Agency ("Memorandum").

5. PSNH appended three new attachments (Attachments 1-3) to its Memorandum that it neither introduced as evidence at the parties' February 18th hearing nor sought leave to file late pursuant to Puc 203.22. PSNH used these attachments to bolster its agency argument in its Memorandum.

6. PSNH had never previously produced or referenced Attachments 1-3 at any point in this litigation. Accordingly, PNE deserves the opportunity to respond to PSNH's argument as a matter of basic due process.

7. PNE now requests that the Commission grant PNE leave to submit a brief response to PNE's Memorandum in the form attached as Exhibit A hereto.

WHEREFORE, PNE respectfully requests that the Commission:

- A. Grant this Motion; and
- B. Consider PNE's Response to PSNH's Memorandum Re: Agency.

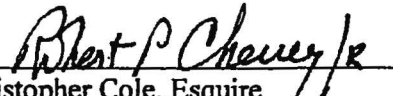
Respectfully submitted,

PNE ENERGY SUPPLY, LLC

By its Attorneys,

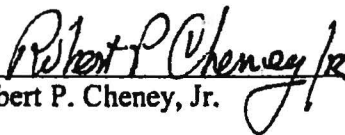
**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: March 4, 2014

By: 
Christopher Cole, Esquire
Robert P. Cheney, Jr., Esquire
Sheehan Phinney Bass & Green, P.A.
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(603) 627-8223

CERTIFICATE OF SERVICE

I, Robert P. Cheney, Jr., hereby certify that on this 4th day of March, 2014, a copy of the foregoing Motion was hand-delivered to the Public Utilities Commission and sent via electronic mail to all counsel of record and persons on the Commission's distribution list for this docket.


Robert P. Cheney, Jr.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into
Dispute Between PNE Energy Supply, LLC and Public Service Company of New
Hampshire**

**PNE ENERGY SUPPLY LLC'S RESPONSE TO PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE'S MEMORANDUM OF LAW RE: AGENCY**

The Petitioner PNE Energy Supply, LLC ("PNE") respectfully submits the following response to Public Service Company of New Hampshire's ("PSNH") memorandum concerning the purported agency relationship between PNE and ISO-New England ("PSNH Memorandum"). PNE files this reply primarily to respond to arguments in PSNH's Memorandum that are based on three documents, Attachments 1-3 of PSNH's Memorandum, that PSNH neither admitted into evidence at the February 18, 2014 hearing nor sought leave to file late pursuant to Puc 203.30. PNE should be allowed to respond to the arguments flowing from these improper attachments pursuant to Puc 203.32 and as a matter of due process.¹

I.

PSNH Cannot Impose a Selection Charge Without an Attendant EDI Drop Transaction

Section 2(a) of the Terms and Conditions for Energy Service Providers in PSNH's Electricity Delivery Service Tariff – NHPUC No. 8 ("Tariff") states that PSNH can "make" a

¹ At the conclusion of the hearing on February 18, 2014, the Commission noted in the record (which is not yet available) that PSNH would be allowed to file a memorandum addressing the issues of agency under New Hampshire law in response to a memorandum of law on those issues filed by PNE at the hearing. In the second paragraph of its Memorandum Re: Agency, however, PSNH strayed from those explicit directions and asserted, once again, that the IR 13-233 proceeding has been rendered moot by the Commission's ruling in DE 12-295 (an argument that PNE opposed at the hearing and continues to oppose). Since PSNH's argument regarding mootness in its Memorandum filed after the hearing is beyond the scope of the response allowed by the Commission, PNE will not address those arguments in its response to PSNH's Memorandum (unless some additional response from PNE is requested by the Commission) and requests that the Commission ignore those portions of PSNH's Memorandum that go beyond the scope of the response allowed by the Commission at the hearing.

\$5.00 selection charge for any changes “initiated by a Customer, Supplier or an authorized agent to a different Supplier or to Default Service.” (Emphasis added.) Contrary to PNE’s position, PSNH argues that Section 2(a) does not define initiation to require an EDI drop transaction and, therefore, it properly assessed Selection Charges to PNE when ISO-NE called upon PSNH to carry out its duties under the ISO-NE Tariff and accept PNE’s load asset. See PSNH Memorandum at 3. PSNH claims ISO-NE obviously initiated the drop transactions because PSNH would never have voluntarily assumed PNE’s load asset due to the costs associated with such efforts.² See id.

What PSNH’s argument misses, however, is that there are two parts to Section 2(a): “initiation” and “assessment.” Section 2(a) broadly states that PSNH can “make” a selection charge when PNE or its authorized agent initiates a change. Even if “initiate” does not require a drop transaction in the first instance, Section 2(a) does not end there. Section 2(a) later clarifies that a Selection Charge can only be *assessed* to the new supplier or existing supplier, “at the time the [PSNH] receives a drop transaction.” Therefore, a general ability to “make” Selection Charges upon initiation means nothing without the eventual assessment of the charge, which can only occur upon PSNH’s receipt of an EDI drop transaction from PNE, a PNE customer, or PNE’s authorized agent. Because PSNH admits that it never received EDI drop transactions for the disputed PNE customer accounts that PSNH moved to default service, PSNH improperly assessed Selection Charges to PNE and those amounts must be returned.

II. ISO-NE Was Not PNE’s Agent Even if it Acted on PNE’s Behalf or as PNE’s Representative

² PSNH’s claim that it would never have voluntarily moved PNE customers to default service because it was costly and time consuming is disingenuous. PNE’s Exhibit 2, admitted at the February 18th hearing, demonstrates that PSNH was obligated as a host utility to accept PNE’s retired load asset upon PNE’s default pursuant to the ISO-NE Tariff.

PSNH appends Attachments 1-3 to its Memorandum as evidence that ISO-NE was acting as PNE's authorized agent when ISO-NE called upon PSNH to move PNE customers to default service. Attachments 1-3 show that: (a) ISO-NE signed an Asset Registration Form "on behalf of" PNE; (b) an ISO-NE manual required ISO-NE to submit an Asset Registration form "as a representative of" PNE; and (c) ISO-NE actually signed the Asset Registration Form as PNE's representative. Without more, none of these documents establishes an agency relationship under applicable law.

The words of ISO-NE's forms and manuals do not, *ipso facto*, create an agency relationship between PNE and ISO-NE. Whether an agency relationship exists is a question of fact. Herman v. Monadnock PR-24 Training Council, 147 N.H. 754, 758 (2002). New Hampshire courts do not rely upon the words of contracts or writings when evaluating the existence of an agency relationship. See, e.g., VanDeMark v. McDonald's Corp., 153 N.H. 753, 761 (2006) (conducting three-part agency analysis despite language in franchise agreement that franchisee was not agent of franchisor). Although PSNH has mined ISO-NE's documents and cherry picked some choice phrases that sound "agency-like," the Commission must still evaluate these phrases in the overall context of the three-part New Hampshire agency test: (a) authorization; (b) consent; and (c) control.

PNE never controlled ISO-NE's actions after default and, therefore, PSNH's agency argument fails. Indeed, "there are many relations in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is not control by the beneficiary." Restatement (Second) of Agency § 14 (1958). Put simply, although ISO-NE might have acted for the benefit of PNE and/or its customers to ensure that PSNH complied with its duties under the ISO-NE Tariff, PNE had no control over ISO-NE's actions during this

process. Query: what would have happened if PNE instructed ISO-NE not transfer its load asset to PSNH? Most certainly, ISO-NE would have ignored PNE and proceeded under the unambiguous terms of the ISO-NE Tariff. ISO-NE's actions on PNE's behalf are analogous to a trustee managing property for a beneficiary's benefit. Like a trustee, who holds property in trust for a beneficiary but who is ultimately guided in her duties by the terms of trust, ISO-NE was ultimately guided by the terms of ISO-NE tariff, which expressly governed what must occur upon a supplier's default. PSNH admits that "[control]. . . turns upon the principal manifesting some *continuous* prescription of what the agent shall or shall not do." PSNH Memorandum at 6 (quoting Dent v. Exeter Hosp., at 792) (emphasis added). This admission is fatal.


Finally, PSNH's argument that PNE "acquiesced to the course of action that ISO-NE would take as a result of suspension" does not pass muster. PNE's knowledge that ISO-NE would require PSNH to accept PNE's load asset does not indicate that PNE somehow *controlled* ISO-NE's actions. To the contrary, PNE lost control of its load asset upon default. Moreover, PSNH's Memorandum makes it appear that PNE had a choice regarding default. Although PNE did notify ISO-NE that it would waive its cure period, it was because the financial result was inevitable at that point in time. PSNH is grasping at straws. Its agency argument is simply another attempt to justify the unlawful imposition of Selection Charges on PNE. The facts are simple. Neither PNE nor an authorized agent initiated or submitted the requisite supplier drop transactions to PSNH. Under the plain and unambiguous terms of Section 2(a) of the PSNH Tariff, PSNH had no right to impose the disputed Selection Charges on PNE.

Respectfully submitted,
PNE ENERGY SUPPLY, LLC

By its Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: March 4, 2014

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