STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
Northern District

Docket No. 216-2015-CV-265

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

Plaintiffs

v.

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

Defendant

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

Plaintiffs PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas & Electric Solutions, LLC ("Resident Power") [collectively, "Plaintiffs"] object to PSNH's Motion to Dismiss the Complaint or, Alternatively, for Referral to the Primary Jurisdiction of the PUC.

INTRODUCTION

The Complaint alleges viable claims for tortious interference of contract based on PSNH's interference with PNE's contract to sell customer accounts to FairPoint, and with Resident Power's aggregation agreements with those customers. The Complaint also states claims for negligence and violation of RSA 358-A, based on a series of actions by PSNH by which it sought to exploit the temporary suspension of PNE's operations as a CEPS. PSNH's anti-competitive conduct is actionable under RSA 358-A, and the Superior Court has jurisdiction over this dispute.

The alleged complexity with which PSNH attempts to cloak this dispute – and upon which it relies to argue the matter should be referred to the PUC – serves only to explain the

history and environment in which this dispute unfolded. The Complaint otherwise presents mostly undisputed facts that chronicle PSNH's anti-competitive conduct in interfering with the FairPoint Contract and seeking to manipulate PUC Staff to expose Plaintiffs to regulatory sanctions.

In a similar case, *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 462 F. Supp. 1072 (N.D. Ill. 1978), the district court denied a motion to dismiss filed by the defendant (AT&T and its affiliated companies) against the plaintiff's antitrust allegations. *Id.* at 1104. The plaintiff, MCI Communications, obtained construction permits for a microwave transmission system that, if approved, would compete with AT&T, which owned 90% of the market yet was responsible for connecting MCI's transmission system with the intracity network. *Id.* at 1077. AT&T engaged in conduct designed to preserve its monopoly in the market: among other things, it created barriers to MCI's interconnection; imposed restrictions on customers purchasing or retaining MCI's services; and launched an aggressive publicity campaign – aimed at state and federal regulators, Congressmen, and the executive branch – that disparaged the safety and reliability of MCI's services, personnel, and financial position. *Id.* at 1077-78. The district court held the FCC did not have jurisdiction to determine and remedy acts of unfair competition MCI had suffered, and AT&T's alleged "lobbying" activities above were not protected because they were designed to "injure or destroy [MCI] as a competitor." *Id.* at 1096-97, 1104.

The Complaint here alleges similar conduct. PSNH's feigned disapproval of Plaintiffs' alleged "lack of planning" does not accurately characterize Plaintiffs' actions, and it instead reflects *PSNH's* predicament: Its own "lack of planning" has saddled the utility with a $422 million price tag (that can be recouped only through its Default Rate) for the pollution control

system it installed in its Merrimack power plant, and forced it to cope with a steady loss of thousands of customers since the deregulation of the electric industry. *See* Compl. ¶¶ 39-45. In contrast, before PNE's default, Plaintiffs carefully implemented a strategy to preserve their 8,500 customers' lower electricity rates: PNE ensured another NEPOOL member, FairPoint, would accept load responsibility for its customers, and the agreement with FairPoint *required* FairPoint to honor PNE's lower rates through the end of those customers' agreements with PNE.

PSNH had a duty to administer its tariff and its influential role in the electricity market in a manner that did not harm competing suppliers that operated in its territory. Like MCI above, these suppliers had a right to expect impartial, commercially-neutral treatment from PSNH. However, as demonstrated below, faced with an increasing financial burden and the loss of customers to CEPSs offering electricity at rates 10% to 20% lower than Default Service, PSNH initiated a series of events calculated to preserve its monopoly and injure and destroy two competitors (PNE and Resident Power). By retaining PNE's former customers on its Default Service and attempting to eliminate PNE and Resident Power from the market, PSNH *gained much-needed revenue* it would not have had but for these events.

The Complaint states valid claims for relief, and the Court should deny PSNH's Motion to Dismiss in its entirety.

ARGUMENT

I. Standard of Review

"The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Gordonville Corp. N.V. v. LR1-A Ltd. P'ship*, 151 N.H. 371, 376-77 (2004). PSNH concedes "all plausible allegations pled in the Complaint must be taken as true for purposes of [its]

Motion." Memo[1] at 16. Further, "all reasonable inferences are construed in the light most favorable to the plaintiff." *Gordonville*, 151 N.H. at 377. A "trial court [is] not obligated to consider factual allegations not raised in the plaintiffs' writ." *Jenks v. Menard*, 145 N.H. 236, 239 (2000). If the plaintiff's allegations "constitute a basis for legal relief," the Court must deny a motion to dismiss. *Gordonville*, 151 N.H. at 377.

II. Counts I and II (Tortious Interference with Contract) State Valid Claims for Relief

PSNH argues Counts I (tortious interference with the FairPoint Contract) and II (tortious interference with Resident Power's aggregation agreements) fail to state claims for relief because, PSNH contends, the Complaint does not allege "improper" interference or causation.[2] *See* Memo at 4, 17-19. This is inaccurate.

A. Plaintiffs allege "improper" interference.

PSNH claims Plaintiffs do not allege "improper" interference 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 [Staff][3] were false." Memo at 17. This argument fails because: (1) Plaintiffs have alleged sufficient facts concerning PSNH's improper interference with the FairPoint Contract and Resident Power's aggregation agreements; and (2) it

---

[1] "Memo" refers to PSNH's Memorandum in support of its Motion to Dismiss.

[2] PSNH argues in passing that Count I fails because PSNH never saw the FairPoint Contract. Whether PSNH reviewed the contract itself is irrelevant. PSNH concedes it *knew* of the FairPoint/PNE transaction. This is sufficient to support a tortious interference claim. *See Tessier v. Rockefeller*, 162 N.H. 324, 337 (2011) ("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 damages by such interference.) The Complaint alleges "PNE and Resident Power had a valid [FairPoint Contract] with FairPoint for the sale of PNE customer accounts to FairPoint," and "PSNH was *aware* of the [FairPoint Contract]." Compl. ¶¶ 135-36. These allegations must be taken as true. *Gordonville*, 151 N.H. at 377.

[3] "The PUC" constitutes the Chairman and two Commissioners. In contrast, "PUC Staff" refers to a separate set of PUC personnel, including the Executive Director, General Counsel, Chief Auditor, and Directors of various divisions within the agency. *See* http://www.puc.state.nh.us/home/AboutUs/commissioners-staff.htm.

is well-settled that determining whether interference was "improper" requires a fact-intensive inquiry that is not appropriate for resolution on a motion to dismiss.

1. Plaintiffs allege improper interference with the FairPoint Contract and Resident Power aggregation agreements.

PSNH appears to argue that, for its interference to be "improper," Plaintiffs must have alleged PSNH either violated some duty or Tariff provision or made false statements to PUC Staff. PSNH cites no authority for this proposition. *See id.* PSNH appears to concede that a violation of the Tariff supports a claim for tortious interference with contract. Indeed, in *Balaber-Strauss v. New York Telephone & American Telephone & Telegraph Co.*, 203 B.R. 184 (Bkrtcy. S.D.N.Y. 1996), the court held a utility tortiously interfered with a merger between the debtor (a pay telephone company) and a third party. *Id.* at 208-09, 210-11. The debtor leased local lines from the utility, which – like PSNH – was a state-chartered and regulated monopoly and the debtor's largest competitor. *Id.* at 188-89. Like the Plaintiffs here, the debtor was dependent on the utility to provide local telephone service. *Id.* at 188. The utility, in turn, billed the debtor for certain local and long-distance charges. *Id.* at 189. Under the governing tariff, the utility could not terminate or interrupt service for non-payment of certain long-distance charges. *Id.* In its merger negotiations, the debtor represented it owed the utility approximately $600,000 in long-distance charges, for which the debtor's merger partner had agreed to provide funding. *Id.* at 190-91. The utility, however, claimed the debtor owed approximately $1 million, which the debtor disputed, and – in violation of the tariff – threatened to cancel service if payment was not made. *Id.* at 191. As a result, the merger partner canceled the merger, and the debtor filed for bankruptcy. The court held that the utility's violation of the tariff, in part, supported a finding that its interference in the merger was improper or wrongful. *Id.* at 208-09, 210-11.

Apart from *Balaber*, the standard for determining whether interference with a contract is "improper" is much broader. A plaintiff must "'show that the interference with his contractual relations was either desired by the [defendant] or known by him to be a substantially certain result of his conduct.'" *Laramie v. Cattell*, Nos. 06-C-224, 06-C-225, 2007 N.H. Super. LEXIS 6, at *15-*16 (N.H. Super. Aug. 27, 2007) (quoting *Demetracopoulos v. Wilson*, 138 N.H. 371, 373-74 (1994)).

A plaintiff need not plead that the defendant was *solely* or *directly* responsible for the failure of the contract, or that the defendant acted with the purpose to interfere with the plaintiff's contract. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1162-63 (2003). There is "no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff." *Id.* at 1163. The claim may be pursued so long as "the interfered-with party remains an intended (or at least known) victim of the interfering party—albeit one that is indirect rather than direct." *Id.* (citation omitted).

For example, in *Lloyd v. Jefferson*, 53 F. Supp. 2d 643 (Del. Dist. Ct. 1999), the court held the plaintiff (a public instructor and corporate officer of a trailer park) had established "there was an immediate and direct chain of events initiated by the defendants that led" to the termination of her employment contract. *Id.* at 677. The plaintiff alleged the defendant state employees, in investigating a complaint about an open septic system at the park, conspired to cause the non-renewal of her contract, where one of the defendants first initiated communication with the plaintiff regarding the septic system, and then communications between the two were escalated to their supervisors. *Id.* at 651-52. During the communications between the parties, the plaintiff also alleged the defendants discriminated against her based on her gender. *Id.*

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

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

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

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

Courts in other states apply a similarly broad standard – developed, in part, from some or all of the factors above: "[T]he ultimate inquiry is whether the conduct was 'both injurious and transgressive of generally accepted standards of common morality or of law.'" *Sustick v. Slatina*, 48 N.J. Super. 134, 144 (App. Div. 1957) (citation omitted); *see also Harris v. Perl*, 41 N.J. 455, 461 (1964) ("sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated"). "Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interests interfered with." *Scott v. McDonnell-Douglas Corp.*, 37 Cal. App. 3d 277, 292 (1974); *see also Freed v. Manchester Servs., Inc.*, 165 Cal. App. 2d 186, 190-91 (1958) ("whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasion"). "In other words, was the interference by defendant 'sanctioned by the "rules of the game"'" and

considered "right and just dealing." *Sustick*, 48 N.J. at 144 (citation omitted); *see also Ass'n Group Life Ins. v. Catholic War Veterans*, 120 N.J. Super. 85, 99 (App. Div. 1971) (whether the defendant's conduct was "consonant with good business morality"). "Not only must defendants' motive and purpose be proper but so also must be the means." *Sustick*, 48 N.J. at 144. If there is no crystallized determination of whether interference is improper or not, the determination is usually left to a jury. *Ass'n Group Life*, 120 N.J. Super. at 99.

For example, courts have held the following types of interference to be "improper":

- Violation of a tariff. *See, e.g.*, *Balaber, supra* pp. 5-6.
- Intimidation of a business and its customers. *See, e.g.*, *Evenson v. Spaulding*, 150 F. 517 (9th Cir. 1907) (affirming injunction against business association whose members followed and harassed plaintiff business's agents and made false representations about plaintiff's goods and services); *Gilly v. Hirsh*, 48 So. 422 (La. 1909) (affirming injunction against store owner from placing signs in his window that reflected negatively on neighboring auctioneer's business).
- Misrepresentation. *See, e.g.*, *Jandro v. Foster*, 53 F. Supp. 2d 1088, 1099 (D. Colo. 1999) (denying motion to dismiss, where plaintiff alleged defendant terminated plaintiff's employment, thereby denying plaintiff employment benefits and advancement opportunities; gave plaintiff an unsubstantiated negative performance review; and spread rumors about plaintiff's employment "deficiencies."); *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365 (1975) (reversing dismissal of plaintiff's claim for intentional interference with his opportunity to be elected to office, where plaintiff alleged that defendants mailed misleading voter guides that urged recipients to "Vote Democratic" but listed another person as the candidate for city controller).
- Threats of civil suits. *See, e.g.*, *Maytag Co. v. Meadows Mf'g Co.*, 35 F.2d 403 (7th Cir. 1929) (affirming injunction against defendant – a "powerful corporation, with income of many millions of dollars per year" – from filing lawsuits against plaintiff, whose purpose and effect were to interfere with the sale of plaintiff's products and increase plaintiff's expenses so its business would be destroyed, and where suits were not necessary to protect defendant's interests).
- Unlawful conduct. *See, e.g.*, *Mobile Mech. Contractors Ass'n v. Carlough*, 456 F. Supp. 310 (S.D. Ala. 1978) (finding defendants interfered with plaintiff business by causing demands and a strike, in violation of federal law, to force business to join a union), *reversed, in part, on other grounds*, *Mobile Mech. Contractors Ass'n v. Carlough*, 664 F.2d 481 (5th Cir. 1981).

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

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

Here, Plaintiffs allege PSNH improperly interfered with the FairPoint Contract and the aggregation agreements by, for example:

- Delaying the transfer of former PNE customer accounts to FairPoint;

- Preventing the transfer of former PNE customer accounts to FairPoint by deleting 7,300 pending Electronic Enrollments that FairPoint had previously submitted and PSNH had accepted;

- Claiming former PNE customer accounts as its own; and

- Interfering both with FairPoint's attempts to re-submit the Electronic Enrollments that PSNH had deleted, and with Resident Power's lawful efforts to transfer its customers from PSNH Default Service.

Compl. ¶¶ 137, 142. Plaintiffs have pled that PSNH "improperly" interfered with the FairPoint Contract and Resident Power's aggregation agreements.

2. The issue of whether interference is "improper" is not appropriate for resolution on a motion to dismiss.

"The question of whether [a defendant's] conduct was merely competitive or improper is a factual question which cannot be decided on a motion to dismiss." *Gen. Beverage Sales Co.-Oshkosh v. East Side Winery*, 396 F. Supp. 590, 594 (E.D. Wis. 1975); *see also Grunstein v. Silva*, No. 3932-VCN, 2009 Del Ch. LEXIS 206, at *61 (Del. Ch. Dec. 8, 2009) (same). "[W]rongfulness of conduct is, by its nature, a factually intensive question." *Healthwerks, Inc. v. Spine*, No. 14-cv-93-pp, 2015 U.S. Dist. LEXIS 64216, at *37 (E.D. Wis. May 15, 2015). This issue "requires an 'inquiry into the mental and moral character of the defendant's conduct.'"

City of Keene, 2015 N.H. LEXIS at *12; *see also Jandro*, 53 F. Supp. 2d at 1099 ("Whether an actor's conduct is improper is a factual inquiry largely dependant upon the actor's motives."). Thus, "it would be improper for [a] court to dismiss [a] tortious interference claim" on that basis. *Healthwerks*, 2015 U.S. Dist. LEXIS at *37.

For example, in *Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC*, No. 07 Civ. 7998 (HB), 2008 U.S. Dist. LEXIS 28999 (S.D.N.Y. Apr. 10, 2008), the district court rejected the plaintiffs' argument that the defendant's counterclaim for tortious interference with contract failed to allege the plaintiffs' interference was improper and without justification. *Id.* at *9-*16. The counterclaim alleged only that the plaintiffs (licensors of a beer trademark) "intentionally, knowingly and by wrongful means interfered with defendant's contracts" "by . . . surreptitiously circulating communication addressed to third-party licensees of plaintiffs . . . and defendant's other accounts, which . . . falsely represented that defendant was in breach of its License Agreement" and "falsely implied that defendant's License Agreement had been properly terminated." *Id.* at *12-*13. The court was "unwilling at this stage of the litigation to dismiss Defendant's counterclaim," because, "whether the actions of one party or the other were improper or justified ought not be decided at this juncture." *Id.* at *16.

Similarly, in *WaveDivision Holdings, LLC v. Highland Capital Management L.P.*, No. 08C-11-132-JOH, 2010 Del. Super. LEXIS 126 (Del. Super. Mar. 31, 2010), the court rejected an argument by the defendants (a series of investment funds, fund managers, and affiliated entities) that a claim by the plaintiffs (disappointed buyers of cable systems) for tortious interference with a contract to sell did not allege the defendants' interference was "improper" or lacked justification. *Id.* at *22-*23. The complaint alleged the defendants conspired to block the sale of certain cable systems to the plaintiffs, by offering the seller a more beneficial deal. *Id.* at

*5. The defendants countered that their actions were an appropriate response to the plaintiffs' offer for purchase, and they were merely acting to further their legitimate economic interests. *Id.* at *8-*9. The court reasoned that "[a] motion to dismiss is not the appropriate avenue to challenge this highly factual determination," and the "issue can be re-raised in a motion for summary judgment after discovery, if appropriate." *Id.* at *23-*24.[4] The court held the plaintiff's complaint stated a claim for tortious interference with contract. *Id.* at *22-*24.

PSNH's arguments – that PSNH did not violate a Tariff provision, or that PSNH's statements to PUC Staff were not false – require fact-specific inquiries that are impossible to resolve at this juncture based solely on the allegations in the Complaint. For example, determining whether or not a statement PSNH made to PUC Staff was false requires testimonial evidence from the individuals involved in those communications, documentary evidence – such as email – concerning those communications, and other physical evidence, like handwritten notes, taken by PSNH or PUC Staff personnel during their communications. This question and others raised by PSNH should be addressed at the close of discovery, not now.

Plaintiffs have alleged PSNH's interference was "improper." *See Gen. Beverage*, 396 F. Supp. at 596 (denying motion to dismiss counterclaim for tortious interference with business relationships because question of whether plaintiff's conduct was improper and could not be resolved on a motion to dismiss).

---

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

B. Plaintiffs allege causation.

PSNH argues "Plaintiffs fail to allege causation" because "[t]hey do not claim that FairPoint failed to perform because of something PSNH did," and "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." Memo at 17-18. This is inaccurate.

1. The FairPoint Contract

The Complaint alleges PSNH interfered with the FairPoint Contract by deleting the FairPoint Electronic Enrollments, opposing FairPoint's attempts to re-submit the Electronic Enrollments, and then opposing Resident Power's efforts to transfer to FairPoint the former PNE customer accounts placed on PSNH's Default Service. Compl. ¶¶ 137, 142. These allegations must be taken as true.

Moreover, the Complaint cites specific evidence to show these allegations *are* true. For example, the Complaint quotes from a February 20, 2013 email in which PSNH's in-house counsel, Robert A. Bersak, railed against allowing Electronic Enrollments to FairPoint to proceed, alleging: "Unless *we*" – PSNH and PUC Staff acting in concert – "act expeditiously, customer confusion will grow; customer choice will be limited; and those that caused this mess will still benefit." Compl. ¶ 89. The Complaint alleges that, as a result of PSNH's conduct, PUC Staff alleged that "PNE's and Resident Power's attempts to transfer customer accounts from PSNH's Default Service would constitute 'slamming.'" *Id.* ¶ 93. Then, PUC Staff forced PNE to inform customers that they would not be transferred to FairPoint. *Id.* ¶ 97. PUC Staff also forced PNE and Resident Power to include additional language in a customer notice stating that Resident Power was no longer the aggregator for these customers. *Id.* ¶ 105. FairPoint was involved in, and witnessed, these communications. *Id.* ¶¶ 96, 105. PUC Staff then "informed

FairPoint that, if Resident Power undertook steps to transfer customer accounts from PSNH's Default Service to FairPoint, FairPoint could be exposed to slamming charges that would generate enough fines and penalties to 'close the state's budget deficit.'" *Id.* ¶ 106. PSNH's deletion of FairPoint's Electronic Enrollments and efforts to prevent Resident Power or FairPoint from transferring PNE's customer accounts from Default Service prevented the consummation of the FairPoint Contract. *Id.* ¶ 98.

The Complaint sums up these events by alleging PSNH's efforts "succeeded in disrupting the entire PNE/FairPoint transaction." *Id.* ¶ 112. The Complaint alleges facts showing that PSNH's intentional and improper interference with the FairPoint Contract and Plaintiffs' later attempts to transfer customers from Default Service caused FairPoint not to perform its end of the bargain. *See supra* pp. 11-12.

PSNH speculates there could be "any number of reasons" why FairPoint did not perform, and suggests the transaction might have failed because PNE breached the FairPoint Contract. Memo at 18. These allegations are inaccurate: FairPoint never alleged PNE breached the Contract, and PSNH has not argued otherwise. Also, PSNH's argument, at most, raises factual disputes that should not be resolved on a motion to dismiss. For example, PSNH alleges PNE breached the Contract by failing to supply customers with electricity until their service was transferred to FairPoint. Those customers *were* supplied with electricity as required by the Contract, and the Complaint contains no allegation that FairPoint contested this fact. This and other "reasons" PSNH speculates could have prompted FairPoint not to perform its obligations under the Contract are not alleged in the Complaint. The Court must disregard them and take as true the allegations in the Complaint that FairPoint backed out of the FairPoint Contract because of PSNH's interference. *Gordonville*, 151 N.H. at 377.

2. Resident Power aggregation agreements.

The Complaint also alleges PSNH interfered with Resident Power's aggregation agreements with the PNE customers that were to be sold to FairPoint. As demonstrated above, following PSNH's urging, PUC Staff threatened Resident Power with "slamming" charges if it attempted to transfer customer accounts from PSNH's Default Service, Compl. ¶ 93; forced PNE and Resident Power to include language in a customer notice stating "a customer leaving PNE could do so only if that customer chose to be transferred to a CEPS other than FairPoint or return to PSNH's Default Service, *id.* ¶ 98; and forced PNE and Resident Power to include additional language in a customer notice stating Resident Power was no longer the aggregator for these customers. *Id.* ¶ 105. These allegations identify facts sufficient to raise a strong inference that PSNH's interference caused Resident Power's aggregation agreements to terminate.

PSNH argues, incorrectly, that under the FairPoint Contract, the customers' separate aggregation agreements with Resident Power terminated "as of the Closing Date" of the FairPoint Contract. *See* Memo at 18-19. Plaintiffs and FairPoint executed an Amendment to the FairPoint Contract on February 14, 2013, that provided that the Resident Power aggregation agreements would remain in force until the "flow date," meaning the date the customers' accounts would be transferred to FairPoint. *See Exhibit A* (First Amendment to Account Purchase and Sale Agreement). Thus, as alleged in the Complaint, following PSNH's interference with the PNE/FairPoint transaction, "the aggregation agreements remained valid and enforceable," "Resident Power did not intend to cancel" them, and "Resident Power intended to fulfill its obligations . . . under the agreements." Compl. ¶ 101. As demonstrated above, PSNH's interference caused those agreements to terminate. *See supra* p. 13.

III. Count III (Violation of RSA 358-A) States a Valid Claim for Relief

PSNH next argues that Plaintiffs' claim under RSA 358-A, the New Hampshire Consumer Protection Act ("CPA"), should be dismissed because the conduct they allege PSNH committed constitutes "trade or commerce" that is exempt under RSA 358-A:3, I. *See* Memo at 19-20. This argument lacks merit for two reasons: (a) The conduct alleged does not relate to "trade or commerce" that falls within the PUC's jurisdiction; and (b) PSNH fails to meet its burden of proving the exemption applies.

A. The conduct alleged does not relate to "trade or commerce" that falls within the PUC's jurisdiction.

"[T]o determine whether trade or commerce is 'subject to the jurisdiction of' a regulator, the court 'must examine the statutes that define the [regulator's] powers and authority." *LeDoux v. JP Morgan Chase, N.A.*, No. 12-cv-260-JL, 2012 U.S. Dist. LEXIS 166756, at *21 (D.N.H. Nov. 20, 2012) (citation omitted). The exemption PSNH claims "does not depend on the identity or status of the entity seeking its protection." *Monzione v. U.S. Bank, N.A.*, 2013 DNH 12, 6. "Rather, the dispositive question is whether [PSNH] . . . *engaged in trade or commerce* subject to the jurisdiction" of the PUC. *Id.* For the CPA not to apply, those statutes must "grant the [regulator] the authority to supervise or regulate the *trade or commerce* in which the defendants' deceptive practice occurred." *LeDoux*, 2012 U.S. Dist. LEXIS at *21 (citation omitted).

Accordingly, if the conduct alleged does not relate to "trade or commerce" that falls within the PUC's jurisdiction, it is not exempt under the CPA. *State v. Empire Automotive Group*, 163 N.H. 144, 146-47 (2011). The New Hampshire Supreme Court rejected an argument similar to PSNH's in *Empire*. In that case, the Court affirmed the denial of the defendant's motion to dismiss two indictments charging it with felony violations of the CPA. *Id.* at 145. The Court rejected an argument by the defendant that, because it was licensed by the New Hampshire

Bank Commissioner as a seller of motor vehicles subject to retail installment sales contracts, its alleged conduct fell within the Bank Commissioner's jurisdiction. *Id.* at 146. The Court explained that the alleged conduct – the defendant fraudulently sold two vehicles as having passed state inspection requirements – "ha[d] nothing whatsoever to do with" "the fact that the two motor vehicles in question may have been sold under retail installment contracts." *Id.* The Court held "the 'trade or commerce' involved . . . is the sale of motor vehicles . . . . not the sale of motor vehicles pursuant to retail installment contracts within the jurisdiction of the bank commissioner." *Id.* at 147. The Court concluded the claims "are not exempt from the CPA." *Id.*

Similarly, in *Elmo v. Callahan*, 2012 DNH 144, the District Court denied, in part, the defendant's motion for summary judgment. *Id.* at 44. The defendants – an attorney and his law firms – argued that the plaintiffs' CPA claim, based on allegations that the defendants represented both the plaintiffs, as the sellers, and the buyer in a merger transaction, was exempt because the conduct – which allegedly involved the sale of securities – was subject to the jurisdiction of the director of securities regulation. *Id.* at 2, 31. The District Court disagreed. *Id.* at 31. It concluded "the director's jurisdiction extends broadly over the issuance, offer, and sale of securities." *Id.* at 32-33. It held, however, that the defendants' alleged unfair and deceptive conduct did not fall within that jurisdiction because it "did not occur in the course of the issuance, offer, or sale of securities." *Id.* at 33. Rather, "[t]he trade or commerce in which defendants' conduct occurred was the practice of law." *Id.* The District Court held "that particular trade or commerce is not subject to the director's jurisdiction," and the CPA exemption . . . does not apply." *Id.* at 35.

Here, the "trade or commerce" subject to the PUC's jurisdiction is limited. PSNH relies on *Rainville v. Lakes Region Water Company, Inc.*, 163 N.H. 271 (2012), to argue the PUC

exercises "broad" jurisdiction over matters such as business relationships between PSNH and CEPSs pursuant to the PUC's "general authority." *See* Memo at 19. This is inaccurate. Although RSA 374:3 states the PUC has "general supervision of all public utilities," that power exists only "so far as necessary to carry into effect the provisions of this title."

Indeed, PSNH took the opposite view in 2011. In a proceeding concerning the PUC's review of the merger between PSNH's then-parent company, Northeast Utilities, and NSTAR, PSNH's then-Assistant Secretary and Assistant General Counsel, Robert A. Bersak, submitted a letter addressing the PUC's jurisdiction. *See Exhibit B* (Docket No. DE 11-014, 3/01/11 PSNH Response to OCA and NEPGA Comments).[5] Attorney Bersak wrote, "It is a well-settled principle in New Hampshire that the [PUC]'s authority is limited." *Id.* at 2. The PUC, according to Attorney Bersak and PSNH, "is endowed with only the powers and authority which are *expressly granted or fairly implied by statute*." *Id.* (quoting *Appeal of Public Serv. Co.*, 122 N.H. 1062, 1066 (1982)) (emphasis added). The PUC's authority to do anything "*may not be derived from other generalized powers of supervision*." *Id.* (emphases added) "If the transaction is outside the scope of authority delegated to the [PUC]," argued Attorney Bersak, it "cannot assert jurisdiction in reliance upon general 'broad powers.'" *Id.*

The PUC agrees it has limited jurisdiction. In the same proceeding, the PUC stated it "cannot simply 'take jurisdiction' over a matter if there is no statutory grant of authority to do so." *See Exhibit C* (*Northeast Utilities, Inc.-NSTAR Merger Review*, Order No. 25,211) at 9.[6] It further agreed the supervisory authority granted by RSA 374:3 "does not confer jurisdiction over

[5] http://www.puc.state.nh.us/regulatory/CASEFILE/2011/11-014/LETTERS-MEMOS-TARIFFS/11-014%202011-03-01%20PGMI%20RESPONSE%20TO%20OCA%20NEPGA%20COMMENTS.PDF

[6] http://www.puc.state.nh.us/regulatory/CASEFILE/2011/11-014/ORDERS/11-014%202011-03-03%20ORDER%20NO%2025-211%20ADDRESSING%20COMMISSION%20JURISDICTION.PDF

transactions the [PUC] may wish to adjudicate but for which there is no statute that expressly addresses the transaction." *Id.* at 9 n.1.

The PUC does not have broad authority over business relationships between public utilities and CEPSs. Rather, the PUC is merely "the arbiter between the interests of the *customer* and the interests of the regulated *utilities*." RSA 363:17-a (emphasis added). The applicable statutes that prescribe what the PUC can and cannot do set forth the specific areas over which the PUC has jurisdiction. None of these statutes confers the PUC with authority over the dispute giving rise to this action. Instead, they grant the PUC authority in the following areas:

- Review and approval of rates and charges for services rendered by public utilities, RSA 374:2, 374:2-a; RSA Chapter 378;
- Approval of alternative forms of regulation, RSA 374:3-a, 374:3-b;
- Supervision of public utilities' capitalization, franchises, and their lines and property are managed and operated, RSA 374:4;
- Supervision of additions and capital improvements by public utilities, RSA 374:5;
- Investigation of the quality of gas supplied by public utilities, and the methods used in manufacturing, transmitting, or supplying gas or electricity, RSA 374:7;
- Establishment of accounting systems, RSA 374:8;
- Establishment and use of a depreciation account, RSA 374:10-11;
- Requests for public utilities to file reports, RSA 374:15, 374:17;
- Production of records by public utilities, RSA 374:18;
- Licensing and approval of local exchange carriers, foreign electric utilities, and water companies, RSA 374:22, 374:24, 374:26;
- Authorization for a public utility to discontinue service, or order withdrawing from a public utilities its authority to engage in business, RSA 374:28;
- Public utility leases or interests in property, RSA 374:30, 374:31, 374:32;
- A public utility's acquisition of stock of another public utility, RSA 374:33, 374:33-a;
- Regulation of pole attachments, RSA 374:34-a;
- Investigation into the fairness of existing markets in New Hampshire, RSA 374:36;
- Investigation of accidents in connection with the operation of public utilities, RSA 374:37 – 374:40;
- Institution of proceedings for a public utility's failure to perform duties under applicable law and PUC orders, RSA 374:41 – 374:44;
- Public utility's purchase of generating capacity, transmission capacity, or energy, RSA 374:57; and
- Proceedings to acquire property rights, RSA Chapter 371.[7]

[7] Other areas over which the PUC has jurisdiction include: supervision of telephone utilities' service territories, RSA 374:22-e - 374:22-g; transmission of electricity outside New Hampshire, RSA 374:35; authorization and limited

The PUC itself agrees with these limited bases of authority and explains, on its website, that it "is vested with general jurisdiction over electric, telecommunications, natural gas, water and sewer utilities as defined in RSA 362:2 *for issues such as rates, quality of service, finance, accounting, and safety*. It is the NHPUC's mission to ensure that *customers* of regulated utilities receive *safe, adequate and reliable service at just and reasonable rates*." (Emphases added)[8]

The unfair and deceptive conduct here did not occur in the course of PSNH's relationship with its customers. Rather, the trade or commerce in which PSNH's conduct occurred was its interaction with CEPSs with respect to the transfer of customer accounts. It was in the course of that interaction, and *not* in the relationship between PSNH and its customers, that PSNH did everything at its disposal to disrupt, prevent, and obstruct the transfer of 7,300 customer accounts from PNE to FairPoint: it refused to assist the Plaintiffs before the default; it delayed the assumption of PNE's load asset; it deleted the 7,300 pending Electronic Enrollments that FairPoint submitted; and it then aggressively pursued avenues to expose Plaintiffs to PUC sanctions and tarnish Plaintiffs in the media. *See* Compl. ¶ 146.

That this conduct may have been somewhat related to PSNH's service to customers is irrelevant. Both *Elmo* and *Empire* are instructive here. In both cases, the fact that the conduct complained of was tangentially related to the limited trade or commerce that fell within the agency's jurisdiction (the issuance/sale of securities in *Elmo*; the sale of vehicles under retail installment sales contracts in *Empire*) did not matter. *Elmo*, 2012 DNH 144, 33-35; *Empire*, 163 N.H. at 146-47. Those areas over which the agency had jurisdiction had nothing to do with the

---

regulation of shared tenant services, RSA 374:22-l - 374:22-n; limited regulation of competitive telecommunications providers, RSA 374:22-o; limited regulation of telephone service, RSA 374:22-p; changes in a consumer's telecommunications or energy-related service provider, RSA 374:28-a; regulation of telephone number conservation and area code implementation, RSA 374:59; appointment of a receiver for a public utility that is not providing adequate and reasonable service to customers, RSA 374:47-a; supervision and regulation of underground facility damage prevention systems, RSA 374:48 – 374:56; and regulation of renewable energy and energy efficiency project loan programs, RSA 374:61.

[8] *See* http://www.puc.state.nh.us/Home/aboutus.htm

fraudulent conduct at issue in those cases. *Elmo*, 2012 DNH 144, 33-35; *Empire*, 163 N.H. at 146-47. Here, likewise, PSNH's routine service and rates charged to customers had nothing to do with the deceptive conduct identified above; the conduct Plaintiffs allege would violate the CPA regardless whether or not PSNH was properly serving customers.[9]

The PUC lacks the authority to supervise or regulate private business transactions and the conduct of a public utility in connection with those transactions. That particular "trade or commerce" is not subject to the PUC's jurisdiction. Thus, the exemption identified in RSA 358-A:3, I does not apply, and the Court should deny PSNH's request to dismiss Count III.

B. PSNH fails to meet its burden of proving the exemption applies.

The burden of proving that PSNH's conduct is exempt from the CPA is on *PSNH.* RSA 358-A:3, V; *see also LeDoux*, 2012 U.S. Dist. LEXIS at *22. In *LeDoux*, the District Court denied the defendants' motion to dismiss, in which they argued in part that JP Morgan Chase (one of the defendants) was exempt under RSA 358-A:3, I. The Court observed that the defendants "scarcely address[ed] [the plaintiff's CPA] claim" in their motion to dismiss; they merely "assert[ed] in a footnote that Chase is exempt." *Id.* at *20. In their reply, the defendants argued that the Office of the Comptroller of the Currency ('OCC') was "responsible" for Chase, but they did not "identify any statutory basis for the OCC's authority. *Id.* at *22. They "also fail[ed] to explain, moreover, how being 'responsible for' a defendant is equivalent to having 'the authority to supervise or regulate the trade or commerce in which the defendants' deceptive

[9] PSNH's reliance on *Rainville* is unavailing. "*Rainville* simply stands for the proposition that in determining whether the exemption applies" "[t]he issue is not whether a party's deceptive practice is subject to the [agency's] jurisdiction, but whether the practice occurred in the conduct of 'trade or commerce' that is subject to the [agency's] jurisdiction." *Elmo*, 2012 DNH 144, 35. In *Rainville*, the deceptive practice (selling and distributing unsafe water to the public) occurred in trade or commerce that was subject to the PUC's jurisdiction (selling and distributing water to the public). 163 N.H. at 275. Indeed, in that case, *utility customers* – not a competing business – filed the lawsuit against the utility. *Id.* at 272-73. In contrast, as demonstrated above, PSNH's deceptive conduct occurred in its interaction and relationship with two competing businesses (PNE and Resident Power), not in trade or commerce that is subject to the PUC's jurisdiction (PSNH serving its customers).

practice occurred.'" *Id.* The District Court concluded that the "defendants have not carried that burden" of proving the exemption applies. *Id.*

PSNH has failed to meet its burden here. As noted above, to determine whether the exemption applies, this Court "'must examine the statutes that define the [regulator's] powers and authority.'" *LeDoux,* 2012 U.S. Dist. LEXIS at *21 (citation omitted). PSNH provides the Court with less than a page of examination and no substantive analysis explaining why the PUC has authority over this dispute. Instead, PSNH claims "Plaintiffs concede that the relationship between them and PSNH is governed by tariff provisions and regulations adopted by the PUC and ISO-NE." Memo at 19. Plaintiffs do not "concede" their relationship with PSNH is governed exclusively by the PUC.[10] Rather, the Complaint states only that the *Tariff* (not the PUC's regulations or PUC-related statutes) contains certain "terms and conditions regarding PSNH's delivery service and its interaction with CEPSs." Compl. at 2. Plaintiffs do *not* state the Tariff or the PUC govern every conceivable interaction between them and PSNH. *See id.* Indeed, Plaintiffs identify only three obligations, drawn from these authorities,[11] as *background*

[10] In addition to out-of-context statements taken from the Complaint, PSNH, in part, relies on a sentence from PNE's complaint in Docket IR 13-233 that states, "PSNH's business relationship with PNE (and, importantly, other suppliers) is controlled by the . . . Tariff." *See* Memo at 8. That statement, however, in context, merely introduces the notion that PSNH's and PNE's "business relationship" at issue in that proceeding concerned a more limited affiliation: PSNH's administration of PNE's customer payments and authority to assess selection charges for supplier changes. *See id.* Immediately following that statement, PNE explained the specific provisions of the Tariff that governed the dispute in that case. *See id.* Regardless, that statement, alone, does not support PSNH's argument that the PUC has jurisdiction over this dispute because a determination of an agency's jurisdiction, as demonstrated above, requires examining the agency's governing statute. *See supra LeDoux*, 2012 U.S. Dist. LEXIS at *21.

[11] Those obligations are: "First, [the Tariff] mandates that all customer account transfers from one CEPS to another be coordinated through PSNH. Second, it mandates that, when requested, all customer account transfers from *PSNH* to a CEPS also be coordinated through PSNH. Third, it states that, if a customer cannot receive service from another CEPS "for any reason," PSNH must "arrange Default Service," under which the customer is returned to service with PSNH. This latter obligation ensures that, in instances of uncertainty or disruption in service from CEPSs, customers are protected from experiencing extended periods of financial injury, and no confusion infiltrates the marketplace." Compl. at 2.

for explaining the competitive electric marketplace and checks on PSNH's influential role in that environment. *See id.*[12]

PSNH does not: identify a specific statutory basis for the PUC's alleged jurisdiction over this dispute; explain how – in contrast to PSNH's 2011 assertions – the PUC's general supervisory authority provides the PUC with jurisdiction; or otherwise address the Plaintiffs' CPA claim in any detail. It has not carried its burden of proving the exemption applies.

IV. Counts IV and V (Negligence) State Valid Claims for Relief

PSNH's contention that Plaintiffs' negligence claims should be dismissed lacks merit in two respects: PSNH (a) misunderstands the nature of its duty to Plaintiffs; and (b) incorrectly asserts that Plaintiffs did not allege PSNH violated the Tariff. *See* Memo at 5 n.7, 20.

A. PSNH's duty of care covers *several* foreseeable risks, not just those identified in the Tariff.

PSNH appears to concede that a violation of the Tariff gives rise to a claim for negligence. Indeed, courts have held that a utility's violation of a tariff, statute, or regulation gives rise to a claim for negligence over which a court may exercise jurisdiction. *See, e.g., State Farm Fire & Cas. Co. v. PECO*, 54 A.3d 921, 925-26 (Pa. Super. 2012) ("The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts.") (citations omitted); *Behrend v. Bell Tel. Co.*, 363 A.2d 1152, 1157-58 (Pa. Super. 1976), *vacated and remanded on other grounds*, 374 A.2d 536, (same); *Consumers Guild of Am., Inc. v. Ill. Bell Tel. Co.*, 103 Ill App. 3d 959, 963 (1981) (same); *Mobile Elec. Serv. v. Firstel, Inc.*, 649N.W.2d 603, 605 (S.D. 2002) (public utility "may not insulate itself from liability for ordinary negligence and breach of contract by unilaterally

[12] PSNH's only other support for arguing the exemption applies is *Rainville*. *See* Memo at 19. *Rainville*, however, concerns a different utility (a water company) and different provisions of the PUC statute. 163 N.H. at 272-73, 275.

drafting and filing a tariff with the PUC"); *Olson v. Pac. Nw. Bell Tel. Co.*, 65 Ore App. 422, 425 (1983) (commercial telephone subscriber entitled to recover under negligence, gross negligence, or breach of contract when public utility fails to perform its statutory duty).

Nevertheless, PSNH misunderstands the broader nature of the duty of care it owed to the Plaintiffs. A duty of care may be derived from a broad number of sources. Generally, a duty exists if the resulting harm was reasonably foreseeable: "'The risk reasonably to be perceived defines the duty to be obeyed . . . . ' Thus, persons owe a duty of care only to those who are foreseeably endangered by their conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Werst v. Wal-Mart Stores, Inc.*, 2011 DNH 162, *7 (citation omitted). For example, "business owners have a duty to protect and/or warn their customers, employees, and business invitees against known and reasonably foreseeable dangers on the premises." *Id.* at *8.[13]

Here, PSNH's duty of care is derived from the general risks it reasonably should have perceived in its role as "the only electric utility in New Hampshire (and in all of New England) that both *generates* or *procures* the electricity it delivers . . . and *delivers* electricity supplied by *competing* energy suppliers." *See* Compl. ¶ 24. Plaintiffs do not "concede" PSNH's duty "derives entirely from the PUC Tariff." *See* Memo at 20. The Complaint identifies several Tariff provisions, in Paragraphs 26-38, and alleges only that they "ensure . . . PSNH does not interfere with customer choice or the transfer of customer accounts to or between CEPSs." Compl. ¶ 26. PSNH admits in its Memo that the Tariff "does not contemplate the circumstances of this case where customers of a suspended supplier were switched through a process involving

[13] "[A] duty finds its 'source in existing social values and customs.'" *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983) (citation omitted). "The concept of a 'duty' . . . is only an expression of the sum total of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . [C]ourts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.'" *Luoni v. Berube*, 729 N.E.2d 1108, 1113 (Mass. 2000) (citation omitted).

ISO-NE." Memo at 23 (quoting PUC Order No. 25,660 at 7). Plaintiffs identify the Tariff provisions early in the Complaint to explain how the Tariff attempts to provide a system of "checks and balances" against this "unique, and potentially troubling, situation," where "PSNH owns and controls the distribution system through which electricity supplied by its *competitors* is delivered to customers." *See* Compl. ¶ 25. The parties here and the PUC agree that the Tariff does not cover every instance of conduct, particularly what occurred in this case.

Accordingly, PSNH's duty covers foreseeable risks much broader than the circumstances contemplated by the Tariff. Given PSNH's role, Plaintiffs allege PSNH had a duty "to act as a neutral, agnostic gatekeeper between [Plaintiffs] and their customers, . . . facilitate the transfer of [Plaintiffs'] customer accounts to FairPoint," and "immediately intervene and provide Default Service for those customer accounts should any service disruption occur." Compl. ¶¶ 152, 157. Plaintiffs contend this broad duty exists because of the risks PSNH should have reasonably foreseen – and from which it should have protected CEPSs, like PNE – based on the many functions it serves as identified in the Complaint: the transfer of customer accounts; arranging Default Service for customers when necessary; administering and processing Electronic Enrollments; administering customer payments for CEPSs that choose consolidated billing; and interfacing with ISO-NE and PUC Staff concerning supplier defaults. *See* Compl. ¶¶ 24-38, 61-63, 70, 94-95. Indeed, nothing in the Tariff provides that PSNH must act like "a neutral, agnostic gatekeeper." Thus, the Complaint alleges sufficient facts to demonstrate that PSNH's duty of care broadly covers several foreseeable risks, not just those identified in the Tariff.

B. Plaintiffs allege PSNH violated Tariff provisions.

As noted above, Plaintiffs identify several Tariff provisions that are relevant to this case: First, the Tariff "requires PSNH to process the change of supplier service 'within two business

days of receiving a valid Electronic Enrollment from a Supplier.'" Compl. ¶ 30 (quoting Tariff § 6). Second, "[i]f an Electronic Enrollment is invalid, PSNH is required, within one business day of receiving the Electronic Enrollment, to notify the CEPS requesting service of the reasons for such failure." Compl. ¶ 33 (quoting Tariff § 6). Third, the Tariff "requires PSNH to 'arrange default service' for any customer that 'is not receiving Supplier Service from a Supplier for any reason.'" Compl. ¶ 36 (quoting Tariff § 4).

Regardless whether PSNH's duty is derived solely from the Tariff or from a broader range of sources, Plaintiffs allege PSNH violated *all* the Tariff provisions above. First, PSNH failed to follow through with "processing the change of supplier service" from PNE to FairPoint because it deleted 7,300 pending Electronic Enrollments for the transfer of those customer accounts to FairPoint, and then persuaded PUC Staff to oppose, and threaten prosecution of, FairPoint's attempts to re-submit the Enrollments. Compl. ¶ 153. Second, PSNH failed to notify FairPoint or PNE that FairPoint's Electronic Enrollments were not properly submitted or otherwise invalid. *Id.* ¶ 58. Third, PSNH failed to "arrange default service" as soon as practicable because it failed to inform Plaintiffs that it could have transferred approximately 90% of their customer accounts on an automated basis to Default Service, and it negotiated a later date with ISO-NE by which it would assume PNE's remaining load asset. *Id.* ¶¶ 73, 158.

The Court should deny PSNH's request to dismiss Counts IV and V because they state valid claims for relief.

V. The "Wrongful Acts" PSNH Challenges Support Valid Claims for Relief

PSNH next argues the Court should depart from established standards governing motions to dismiss (under which the facts alleged in the Complaint are assumed to be true), and conclude that PSNH was blameless with respect to all of the conduct cited in the Complaint. *See* Memo at

21-33. According to PSNH, either the conduct did not concern a breach of duty by PSNH, "public documents or documents" prove the conduct was "not wrongful," or the issues "have or should have been decided in the PUC." *Id.* at 21. These arguments lack merit.[14]

A. PSNH's deletion of FairPoint's Electronic Enrollments.

PSNH claims this allegation is "barred by Order No. 25,660 and by the ISO-NE and PUC Tariffs" on two bases: (1) PSNH was allegedly required to take responsibility for PNE's load asset; and (2) it "assumes that customer accounts that had not yet been transferred to FairPoint remained with PNE," or that "PNE retained its customers." Memo at 26-27. Neither rationale has merit.

PSNH's responsibility to assume PNE's load asset had no impact on FairPoint's Electronic Enrollments. First, the authority PSNH relies on – Order No. 25,660 and the ISO-NE and PUC Tariffs – governs only the assignment of PNE's load asset to PSNH. *See* Memo at 26-27. It does not address (or preclude a claim concerning) the impact of such assignment on a valid transaction entered into between PNE and a third party (FairPoint) that pre-dated PNE's default and suspension. *See id.* PSNH cites no other authority supporting its contention that, but for PNE's suspension, the transfer of PNE's customer accounts to FairPoint would have "been completed as 'routine.'" *See id.* at 15. In contrast, the Tariff requires PSNH to honor customer

[14] To the extent PSNH is arguing that each of these acts should be considered alone and, when done so, each one does not expose it to liability, it is incorrect. *See* Memo at 21-33. The CPA prohibits both a single "unfair act" and a "practice" of unfair and deceptive acts. *See* RSA 358-A:2. For example, while several indiscriminate acts (such as a breach of contract), alone, may not give rise to liability under a statute prohibiting unfair and deceptive practices, a "pattern" or "practice" of such acts designed to exact harm constitutes an unfair and deceptive practice. *See, e.g., Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 40-41 (1st Cir. 2000) (upholding finding of liability under Mass. Chapter 93A, where reinsurer's conduct – raising multiple, shifting defenses in lengthy pattern of "foot-dragging and stringing insurer along, with intent of pressuring it to compromise its claim – was extortionate); *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55-56 (1st Cir. 1998) (upholding a finding that a defendant violated 93A by withholding payment and "stringing out the process" with the intent to "force [the plaintiff] into an unfavorable settlement"); *Community Builders, Inc. v. Indian Motorcycle Assocs.*, 692 N.E.2d 964, 978-79 (Mass. App. Ct. 1998) (upholding a finding of 93A liability for extortionate conduct, where a defendant raised "specious defenses" to payment and engaged in "foot dragging" and "a pattern of stringing [the plaintiff] along").

choice and process the change of supplier service after receiving a valid Electronic Enrollment from a supplier. Compl. ¶ 30. The Tariff restricts PSNH from "accepting 'more than one Supplier for a Customer during any particular monthly billing cycle.'" *Id.* ¶ 91. PSNH is not a "Supplier" under this language. *See id.* ¶ 32. PSNH agrees and concedes that, "[i]f . . . 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***." Memo at 9 (emphasis added).

PNE's customers – by virtue of their aggregation agreements with Resident Power – chose to switch their service to FairPoint when PNE sold those accounts to FairPoint. PSNH *accepted* FairPoint's Electronic Enrollments for those accounts. Compl. ¶¶ 57-58. Due to the Tariff's restriction above (no more than one "Supplier" can serve a customer during a single month), PSNH then *deleted* these Enrollments (and replaced them with Enrollments for transfer to its Default Service) so these customers could be free to choose a "Supplier" other than FairPoint. *See id.* ¶ 98.

PSNH's deletion of FairPoint's Electronic Enrollments for their transfer prevented these customers' choices from being consummated. *Id.* ¶¶ 79, 91. PSNH could have assumed PNE's load asset *and* honored these customers' choices to be transferred to FairPoint. *Id.* ¶ 32. The Complaint alleges "PSNH did not and could not cite any legal authority or valid explanation for its decision to delete FairPoint's Electronic Enrollments." *Id.* ¶ 80. PSNH still has not identified any justification for its conduct. It now cites "the ISO-NE directive and the PUC Tariff," but neither authority obligated PSNH to delete 7,300 pending Enrollments, or explains why such deletion was necessary. *See* Memo at 12.

Second, PSNH continued transferring PNE customer accounts to FairPoint *after* PNE's default and suspension. PNE and FairPoint executed the FairPoint Contract on February 6, 2013. *Id.* ¶ 50. FairPoint began submitting Electronic Enrollments for the transfer of PNE's customer accounts on February 9. *Id.* ¶ 56. PSNH then "began transferring PNE customer accounts to FairPoint" on February 12. *Id.* ¶ 60. PSNH admits it "transferred customer accounts at a rate of 300-400 per business day." *Id.* This includes 314 customer accounts on February 15, *the day after* PNE defaulted and – according to PSNH – had its load asset "automatically assigned" to PSNH. *See id.* PSNH transferred additional accounts after February 15, totaling approximately 1,200 accounts by February 19. *Id.* ¶¶ 60, 77. If, as PSNH contends, PNE's load asset was "automatically assigned" to PSNH as of the date PNE defaulted and was suspended (February 14), and PNE had no further rights to participate in the electricity market, *see* Memo at 27, then PSNH would logically have ceased transferring PNE customer accounts on *February 14*. Indeed, PSNH alleges PNE's request for a one-time, off-cycle transfer of its customer accounts to FairPoint immediately became "moot" on February 14 once PNE defaulted. *See id.* at 22. Yet, as demonstrated above, PSNH continued transferring PNE customer accounts to FairPoint on February 14 and through February 19. PSNH cannot have it both ways. Its own conduct demonstrates its assumption of PNE's load asset had no impact on FairPoint's pending Electronic Enrollments.

B. PSNH's refusal to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint.

PSNH claims it had no obligation to accommodate PNE's request to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint, and that PNE's default rendered the request "moot." *See* Memo at 21-24. This is incorrect.

PSNH *had* an obligation to accommodate PNE's request. Puc 2004.07(b) authorizes a CEPS to request an off-cycle meter reading. It provides only one condition upon which a utility may deny a request: "if [5 business days' written] notice . . . is not provided." *See* Puc 2004.07(b)(2). Puc 2004.07(c) then states that, if a utility denies a request that lacks proper notice, "the utility and CEPS *shall* negotiate a reasonable extension of time for the completion of the off-cycle meter reading request."[15] (Emphasis added) Accordingly, this PUC rule *requires* a utility to accommodate a request for an off-cycle meter reading.

The Complaint alleges PNE first requested a one-time, off-cycle meter reading on February 12, 2013. Compl. ¶¶ 66-68. PSNH refused. *Id.* ¶ 68.[16]

PSNH now attempts to justify its refusal by alleging that PNE's default rendered its request "moot." Memo at 22. PSNH cites page 140 of the ISO-NE Tariff and PUC Order 25,660 (which cites the same Tariff provision) for this proposition.[17] *See id.* It does not support PSNH's contention. That ISO-NE Tariff provision states that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) *unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset.*" *Id.*, Exhibit 2 (emphasis added). It does not address how a default impacts a pending request by a suspended supplier for a one-time, off-cycle transfer request.

---

[15] Based on this requirement, PSNH's contention that, "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" is incorrect. *See* Memo at 22.

[16] PSNH attempts to cast doubt on whether Plaintiffs requested the off-cycle meter read on February 12 or February 14. *See* Memo at 21-22. This represents yet another attempt by PSNH to dispute an allegation in the Complaint that must be taken as true. *Gordonville*, 151 N.H. at 377. Further, the February 14, 2013 letter on which PSNH relies does not contradict the allegations in the Complaint. *See* Memo, Exhibit 8.

[17] PSNH also declares that, "[c]learly, 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." Memo at 22. It fails to explain, however, why its view of the PUC rules is so "clear." Further, it is undermined by the fact that, just several days later, PSNH would have to undertake a similar process to transfer PNE's customer accounts to its Default Service. *See* Compl.¶ 68.

The ISO-NE Tariff *does*, however, contemplate the PNE/FairPoint transaction, and PNE did precisely what the italicized language above provides – it assigned the obligation to serve its load asset to FairPoint *before* it defaulted. Thus, under the language above, although PNE's load asset was assigned to PSNH upon its default, the obligation to serve that load asset would ultimately have been assigned to FairPoint *if* PSNH had not deleted the remaining 7,300 Enrollments: PSNH was aware that PNE closed a transaction for the sale of its customer accounts to FairPoint on February 6, 2013, and FairPoint had submitted Electronic Enrollments for the transfer of those accounts in the days following the closing. *See* Compl. ¶ 66. It is reasonable to conclude, based on the allegations above, that PSNH should have honored PNE's pending request for a one-time, off-cycle transfer of PNE's former customer accounts.

PSNH's reliance on PUC Order No. 25,660 *supports* this obligation. *See* Memo at 22-23. The Order concludes that, under the ISO-NE Tariff, PNE's suspension "result[ed]in the automatic *assignment* of its customers" to PSNH, and "the ISO-NE Tariff gave ISO-NE the authority to direct PSNH to assume PNE's load similar to an *agency relationship*." *Id.* at 23 (quoting PUC Order No. 25,660 at 7) (emphases added). PSNH, therefore, became an *agent* of PNE. *See id.* PSNH cites no authority holding that the appointment of an agent (PSNH, pursuant to the ISO-NE Tariff) automatically extinguishes pending actions initiated or undertaken by the principal (PNE). *See* Memo at 23. Rather, like its obligation to serve PNE's remaining load asset, PSNH should have honored PNE's request to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint.[18]

[18] PSNH's repeated references to the "voluntary" nature of PNE's suspension (both, in connection with PUC Order 25,660 and elsewhere in its Memo) are immaterial. *See* Memo at 22-23. PSNH fails to explain how a "voluntary" suspension (as opposed to an "involuntary" one, which PSNH does not define) relieved it of its obligation to follow Puc 2004.07(b). *See id.* Indeed, the ISO Tariff provision cited in PUC Order 25,660 does not make that distinction. *See id.* at 23.

The Court should reject PSNH's request to "dismiss" the allegations in Paragraphs 137(a), 146(a), and 158(a) of the Complaint.

C. PSNH's failure to inform Plaintiffs that PSNH could have transferred 90% of their customer accounts to Default Service on an automated basis.

PSNH argues the Complaint does not allege PSNH had a "duty to inform PNE that it could take its customers onto its default service immediately." Memo at 24. This is inaccurate. The Complaint alleges PSNH owed Plaintiffs a duty to "provide Default Service for [Plaintiffs'] customer accounts should any service disruption occur," Compl. ¶ 157, because the Tariff "requires PSNH to 'arrange default service' for any customer that 'is not receiving Supplier Service from a Supplier for any reason.'" *Id.* ¶ 36 (quoting Tariff § 4).[19] It is reasonable to infer that this duty logically implies an obligation by PSNH to inform Plaintiffs of its ability to transfer customers to Default Service on an automated basis. *See id.*

PSNH's suggestion that PNE's claims seek to "blame" PSNH for PNE's default, or litigate issues "resolved" by Order No. 25,660 lack merit. *See* Memo at 24-25. First, allegations concerning PSNH's ability to effect an automatic transfer do not "blame" PSNH for PNE's default. Rather, they support the claim that PSNH *delayed* assuming PNE's load asset and allowed PNE's BlackRock account with ISO-NE to continue to be depleted. *See* Compl. ¶¶ 72-73. As a result, "PNE could not continue to meet its financial security obligations with ISO-NE." *Id.* The allegations above demonstrate PSNH allowed the financial bleeding to continue.[20]

---

[19] PSNH also disputes the allegation that it had the ability to transfer PNE's former customers to Default Service immediately. *See* Memo at 24 n.29. The Court should disregard this assertion because Plaintiffs' allegations must be taken as true for purposes of PSNH's Motion. *Gordonville*, 151 N.H. at 377.

[20] PSNH does not appear to understand why PNE has alleged PSNH should have informed it of its ability to transfer these customers to Default Service on an automated basis. *See* Memo at 24. It labels this contention a "bizarre allegation and claim." *See id.* It is fairly straightforward: once PSNH denied PNE's request for a one-time, off-cycle transfer, the next best option for PNE to relieve its financial assurance obligations was for PSNH to immediately assume PNE's remaining load asset. *See* Compl. ¶ 72. PSNH's neglect to inform Plaintiffs that it could have transferred 90% of PNE's customer accounts to Default Service forced PNE to continue replenishing its BlackRock account with ISO-NE. *See id.* ¶¶ 72-73.

Second, PUC Order 25,660 does not address the "cause" of PNE's default. *See* Memo, Exhibit 10. Rather, it renders a decision on PNE's claims in that proceeding concerning PSNH's wrongful calculation of supplier charges and withholding of customer payments following PNE's default. *See* Memo, Exhibit 10 at 1. When discussing the "automatic assignment" of PNE's load asset to PSNH, the Order did not address the "cause" of PNE's default; instead, it focused on the narrow, Tariff-specific issue of *how* PNE's customers ended up on PSNH's Default Service for purposes of calculating certain selection charges, which PSNH could assess on a supplier that initiated a change in service. *Id.* at 6-7. Because the PUC concluded PNE's default resulted in the "automatic assignment" of its load asset to PSNH, *PNE* "initiated" the drop of its customers, and, thus, PSNH could assess charges against PNE. *See id.*

D. PSNH's negotiation of a later date with ISO-NE to assume PNE's remaining load asset.

PSNH's challenge to this allegation amounts to nothing more than a factual dispute: it argues ISO-NE's notice established February 20, 2013 as the deadline for PSNH to assume PNE's load asset, and it insinuates PSNH would never contemplate negotiating such an issue because it "is contrary to the federal Tariff." Memo at 25-26. Plaintiffs' allegations, however, must be taken as true for purposes of PSNH's Motion. *Gordonville*, 151 N.H. at 377.

E. PSNH's withholding of PNE's customer payments.

PNE's allegations concerning PSNH's withholding of PNE's customer payments concern a different claim than the one PNE brought before the PUC. In Docket No. IR 13-233, PNE alleged, in Count I, a violation of RSA 374:1 (providing that PSNH may only assess charges that are "just and reasonable"); and, in Count II, a claim for breach of the Tariff and the supplier agreements between PNE and PSNH. *See* Memo, Exhibit 3 at 6-10. In contrast, here, PSNH admits PNE raises the same conduct to allege, in part, that PSNH violated RSA 358-A, *see*

Memo at 28 n.33, by intending to harm PNE and damage PNE's relationship with its electric suppliers. *See* Compl. ¶¶ 94-95. As further demonstrated below, the latter claim was *not* resolved by PUC Order 25,660. *See* Memo, Exhibit 10 & *infra* pp. 37-39.

F. PSNH's attempts to persuade PUC Staff to oppose Resident Power's and FairPoint's attempts to re-submit Electronic Enrollments

PSNH claims allegations concerning its attempts to persuade PUC Staff to oppose Resident Power's and FairPoint's attempts to re-submit Electronic Enrollments should be dismissed because (1) Resident Power, not PSNH, caused the "confusion" that prompted PUC Staff to question Resident Power's aggregation authority; and (2) PSNH did not raise a claim of "slamming" (as to FairPoint) with PUC Staff. These arguments lack merit.[21]

Throughout its Memo, PSNH suggests and insinuates its communications and filings with the PUC were benign, did not incite or persuade PUC Staff to target the Plaintiffs with regulatory sanctions, or were otherwise part and parcel of normal business practices. Indeed, these instances of conduct – among others, PSNH's attempts to persuade PUC Staff to oppose the re-submission of the Electronic Enrollments and threaten slamming charges against FairPoint and Resident Power; false insinuation that PNE was attempting to enroll a customer after it was suspended; and advice to PUC Staff on how to reject Resident Power's request for emergency declaratory relief concerning its aggregation authority – may, in a vacuum, appear harmless.

[21] In a footnote, PSNH briefly argues that "PSNH's statements to [PUC Staff] are protected by the First Amendment's Petition Clause" under the "Noerr Pennington Doctrine." Memo at 33 n.37. As a threshold matter, the determination of whether the *Noerr-Pennington* doctrine applies cannot be made on a motion to dismiss because it involves deciding questions of fact. *Hoffman La Roche, Inc. v. Genpharm, Inc.*, 50 F. Supp. 2d 367, 380 (D.N.J. 1999). In addition, the doctrine protects "those who *petition* government for redress" "from antitrust liability." *Thermalloy, Inc. v. AAVID Eng'g*, 935 F. Supp. 63, 65 (D.N.H. 1996); *see also Green Mt. Realty Corp. v. Fifth Estate Tower*, 161 N.H. 78, 83 (2010) ("Under the *Noerr-Pennington doctrine*, '[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability.'") PSNH's statements to PUC Staff do not fall within the protection of the *Noerr-Pennington* doctrine. PSNH did not "petition" the PUC for any new regulation. Instead, it persuaded PUC Staff to: interfere with a valid business transaction between Plaintiffs and FairPoint; oppose Resident Power's and FairPoint's attempts to re-submit Electronic Enrollments for the transfer of PNE's former customer accounts to consummate that transaction; and initiate a "show cause" proceeding against Plaintiffs. *See* Compl. ¶¶ 89, 93, 103-07, 115-19, 121. This conduct is not protected under the doctrine.

Yet, when strung together, they reflect a coordinated and calculated strategy by PSNH, implemented by one or more high-level PSNH officers, to leave PUC Staff members with no doubt that PNE and Resident Power had to be eliminated from the market. This conduct supports a valid cause of action. As noted above, in *MCI Communications*, the district court denied a motion to dismiss filed by AT&T against MCI's antitrust allegations. 462 F. Supp. at 1104. The court held, in part, that AT&T's alleged "lobbying" activities – its sham tariff filings and disparagement of MCI to regulatory authorities – were not protected because their intent (as alleged in the complaint) was to harm MCI. *Id.*[22] As shown below, PSNH's conduct as a matter of law supports the claims for relief presented in the Complaint.

1. PSNH's disputes concerning who or what prompted PUC Staff to question Resident Power's authority should be disregarded.

PSNH's contention that *Resident Power* caused PUC Staff to challenge Resident Power's aggregation authority is a factual dispute that cannot be resolved now. *See* Memo at 28-31. PSNH acknowledges Resident Power alleges PSNH submitted a filing with the PUC that questioned Resident Power's status as an aggregator, and that PUC Staff then adopted that same position. *See* Memo at 28. PSNH then disputes that allegation. *See id.* at 29-31.

First, it claims it did not mischaracterize the notice Resident Power sent to its customers following the execution of the FairPoint Contract. *Id.* at 29. That notice states, "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," and it "did not specify a date when the aggregation agreements would terminate." Compl. ¶ 55. In contrast, PSNH's PUC pleading stated Resident Power "would no longer be an aggregator on [PNE's] customer accounts,"

[22] An opinion from the Ninth Circuit Court of Appeals, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), disagreed, in part, with an unrelated, separate issue in *MCI* – whether repetitive suits are necessary to have an actionable antitrust violation. *See id.* at 1256 n.24.

without the qualifying language following that statement. Memo at 29. PSNH alleges this omission "did *not* say that Resident Power was no longer an aggregator for all purposes." *See id.* That is a distinction without a difference. Its characterization of the notice, alone, indicated Resident Power's aggregation authority had ceased. *See id.* The Complaint alleges sufficient facts demonstrating Resident Power's authority remained valid. *See* Compl. ¶ 101. It further alleges sufficient facts to show PSNH misrepresented that fact to PUC Staff. *See id.* ¶ 103.

Second, PSNH's insistence that Resident Power's own communications with customers (not PSNH's conduct) prompted PUC Staff to challenge Resident Power's aggregation authority is inaccurate. *See* Memo at 29-31. The Complaint alleges that "PUC Staff initially advised that it agreed with *Resident Power's* position that Resident Power's aggregation agreements with customers who had not been transferred to FairPoint remained valid," but then, following PSNH's representations, "PUC Staff adopted PSNH's position." Compl. ¶ 104. Indeed, during negotiations with PNE and Resident Power on February 21, PUC Staff insisted on including language in a notice from PNE to its customers that was *identical* to the statement in PSNH's pleading: "Resident Power is no longer your aggregator . . . ." *Id.* ¶ 105. These allegations – which must be taken as true – raise facts sufficient to raise an inference that *PSNH's conduct* caused PUC Staff to challenge Resident Power's aggregation authority.

Third, PSNH omits any reference to the email communications between its counsel (Attorney Bersak) and PUC Staff concerning Resident Power's February 22 emergency petition for declaratory relief. *See* Compl.¶¶ 109-10. Although it was not a party to the proceeding, PSNH (through Attorney Bersak), in part, misrepresented that PNE and Resident Power were abusing corporate formalities, and accused the Plaintiffs of being responsible for "this entire mess." *Id.* ¶ 110.

2. The Complaint alleges PSNH *first* raised the threat of "slamming" with PUC Staff.

PSNH argues, incorrectly, that "[t]he Complaint does not even allege that PSNH raised [slamming against FairPoint] with [PUC Staff]." *See* Memo at 31.[23] As demonstrated above, the Complaint alleges PSNH persuaded PUC Staff to oppose both FairPoint's attempts to re-submit the Electronic Enrollments that PSNH had deleted and Resident Power's lawful efforts to transfer PNE's former customer accounts from PSNH Default Service. Compl. ¶¶ 137, 142. Plaintiffs allege that PSNH – through Attorney Bersak – "urged PUC Staff to block Resident Power and FairPoint from re-submitting Electronic Enrollments." *Id.* ¶ 89. In his February 20, 2013 email to PUC Staff, Attorney Bersak asserted, "if FairPoint is allowed to submit EDI transactions to acquire all of PNE's customers, that EDI submission will block any such choice for at least a month." *Id.* He continued, "Unless *we*" – PSNH and PUC Staff acting in concert – "act expeditiously, customer confusion will grow; customer choice will be limited; and those that caused this mess will still benefit." *Id.* These allegations raise facts sufficient to draw an inference that *PSNH* first raised threats of slamming against FairPoint to PUC Staff. *See id.*

G. PSNH's prompting of PUC Staff to initiate a "show cause" proceeding against PNE and Resident Power.

PSNH claims this allegation should be dismissed because (1) it concerns Plaintiffs' claim under 358-A and is "exempt," and (2) PUC filings demonstrate PSNH had no role in PUC Staff's decision to initiate a "show cause" proceeding. These arguments also lack merit.

---

[23] PSNH argues, in several instances in its Memo, that FairPoint should have re-submitted its Electronic Enrollments, and that "Plaintiffs . . . sat on any alleged right to transfer the customers in question and never in fact re-initiated those transfers." *See, e.g.*, Memo at 13 n.18; *see also id.* at 16 ("Resident Power decided not to take the risk of going forward by having the transfers of customers resubmitted into the EDI system."). The Complaint alleges that PUC Staff threatened both Resident Power and FairPoint with "slamming" charges if either attempted to salvage the transfer of these customers to FairPoint. *See* Compl. ¶¶ 106-07. PSNH cannot credibly suggest that either Resident Power or FairPoint would have attempted to re-submit the Enrollments after receiving these threats.

First, for the reasons stated above, this allegation should not be dismissed because Plaintiffs state a valid claim for relief under RSA 358-A. *See supra* pp. 14-22.

Second, PUC filings do not exonerate PSNH from having prompted PUC Staff to initiate a "show cause" proceeding. The February 8, 2013 PUC Letter granting PNE's waiver request mentions only that "the Commission directed Staff to commence an investigation into PNE's CEPS authorization and the circumstances that necessitated that waiver." *See* Memo at 32. It does *not* direct PUC Staff to initiate a "show cause" proceeding. *See id.* PUC Staff's February 27, 2013 Recommendation Memorandum demonstrates the reasons why PUC Staff initiated the proceeding had no connection to that February 8 Letter and, instead, was prompted by PSNH's conduct. *See* Compl. ¶ 122. The Memorandum (a) alleged that "two customer notices PNE and Resident Power sent on February 13-14 and February 21 confused customers by 'indicating, among other things, that Resident Power is either no longer the aggregator for the former PNE customers," – which PSNH had alleged – "still their aggregator, or that those customers can 'renew' their aggregation relationship with Resident Power,'" (b) alleged that, "[o]n February 21, 2013, it was brought to Staff's attention" – by PSNH's Attorney Bersak – "that PNE was in the process of enrolling a large commercial and industrial customer, despite . . . PNE having previously been suspended as a market participant by ISO-NE," and (c) "parroted the allegations in [Attorney Bersak's] February 22 email" that "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." *Id.* These facts raise a strong inference that PSNH's conduct prompted PUC Staff to initiate a "show cause" proceeding against the Plaintiffs based on baseless allegations for which *the PUC* ultimately released the Plaintiffs of liability.

H. PSNH's aggressive media campaign that disparaged and tarnished PNE's reputation.

PSNH claims this allegation should be dismissed because (1) it also concerns Plaintiffs' claim under 358-A and is "exempt," and (2) the Complaint does not allege the statements attributed to PSNH were false. Memo at 33. These arguments also lack merit.

First, for the reasons stated above, this allegation should not be dismissed because Plaintiffs state a valid claim for relief under RSA 358-A. *See supra* pp. 14-22.

Second, PSNH cites no authority holding that statements made to the media cannot form the basis for a claim under RSA 358-A. *See* Memo at 33. Here, PSNH's statements form part of the unfair and deceptive conduct alleged in the Complaint because they (1) disregarded the confidentiality of information communicated by ISO-NE to utilities, CEPS, and regulators; (2) inaccurately alleged PNE "lacked standing" to contest PSNH's service charges; and (3) misrepresented the fact that PNE's customer accounts had been purchased by FairPoint. Compl. ¶¶ 83-85. These allegations are sufficient at this stage to support a RSA 358-A claim.

VI. Res Judicata Does Not Bar the Complaint

PSNH argues the entire Complaint is barred by *res judicata* and RSA 541:22 because every claim here "was either asserted, or could have been asserted," in the complaint that PNE filed with the PUC on June 21, 2013, to contest PSNH's withholding of customer payments owed PNE, see Docket IR 13-233, and that was decided by PUC Order 25,660. Memo at 34. This is inaccurate.

First, PNE's claims in this matter were not asserted in IR 13-233, because the PUC lacks the authority to award the damages sought here. *See infra* pp. 48-49. In addition, as demonstrated above, the scope of Docket IR 13-233 and the PUC's decision in Order 25,660 did not cover the factual and legal issues involved in this case. *See infra* pp. 48-49; *supra* pp. 25-26.

Second, "[a] party invoking res judicata . . . carries the burden of proof as to the identity of issues and the finality of their determination." *Strobel v. Strobel*, 123 N.H. 363, 365-66 (1983). Although PSNH relies on cases stating that, for purposes of *res judicata*, New Hampshire courts apply an "expansive" definition of "cause of action," that definition has limits. *See id.* "A cause of action is 'the underlying right that is preserved by bringing a suit or action.'" *Morgenroth & Assocs. v. State*, 126 N.H. 266, 270 (1985) (citation omitted). It means "all theories on which relief could be claimed arising out of the *same factual transaction in question*." *Goffin v. Tofte*, 146 N.H. 415, 417 (2001) (citation omitted) (emphasis added). In "determining whether a claim is precluded under *res judicata*, courts must determine whether the type of relief available in the first action is also available in the second action: if the same type of relief is available in both cases, *res judicata* applies. *Gray v. Kelly*, 161 N.H. 160, 165 (2010).

For example, where one transaction occurs and completes before a second sequence begins, courts have held a claim arising from the first transaction is not the same "cause of action" as a claim arising from the second. *See Warren v. Town of E. Kingston*, 145 N.H. 249, 254-55 (2000) (holding plaintiff's allegation that the defendant blocked his appointments to employment positions after his dismissal as a town firefighter involved events separate and subsequent to his dismissal and, therefore, was not based on the same allegations of fact as his claims for wrongful termination).

In *Goffin*, the New Hampshire Supreme Court reversed the dismissal (on *res judicata* grounds) of the plaintiff homeowner's negligence claim. 146 N.H. at 417. The defendant contractor sued the plaintiff homeowner for failure to pay the full price on a contract for work he performed on the plaintiff's house. *Id.* at 416. The homeowner counterclaimed, alleging the work was incomplete and unsatisfactory. *Id.* Three years later, the homeowner filed a

negligence action against the contractor, alleging that, while the contractor was working on her house three years before, she injured herself because of the contractor's negligent management of the construction area. *Id.* The Supreme Court held *res judicata* did not apply because the homeowner's negligence action was "based on a factual transaction distinguishable from her [breach of contract] counterclaims" and "constitute[s] a different cause of action." *Id.* at 417. The homeowner's counterclaims in the first action "arose from her contractual relationship with [the contractor]," and "involved the parties' mutual promises concerning their construction contract and whether those promises had been fulfilled." *Id.* The "factual transaction" in the second action "involve[d] [the contractor's] alleged negligent contact with [the homeowner] while he was working on her house and her physical injuries stemming from that contact." *Id.* The Court concluded "her negligence claim does not flow from the same factual transaction as her [breach of contract] counterclaims" and, thus, was not barred. *Id.* The Court also did not hold that the negligence claim needed to be asserted with the contract claims. *See id.*

Here, the facts underlying Plaintiffs' claims are not part of the same "transactions or occurrences" as those that supported PNE's complaint in IR-13-233. That complaint concerned *two limited* "factual transactions": (a) PSNH's withholding of customer payments normally due to PNE; and (b) PSNH's assessment of certain selection charges on PNE. *See* Memo, Exhibit 3 at 6-10 & Exhibit 10 at 2-3. Based on these facts, PNE alleged a violation of RSA 374:1 (providing that PSNH may only assess charges that are "just and reasonable") and a claim for breach of the Tariff and the supplier agreements. *See id.*, Exhibit 3 at 6-10. It could have recovered *only* the customer payments PSNH had withheld and the selection charges PSNH had assessed.

PSNH's assertion that the claims in Docket IR 13-233 are based on the "same transactions that led to this Complaint" is incorrect. *See* Memo at 34. Nor are the "transactions" here that PSNH breached the PUC Tariff, other agreements with PNE, and its duties to CEPSs in connection with the transfer to FairPoint and PNE's default with ISO. *See id.* at 34-35. Indeed, this latter assertion appears to be a legal theory, not a set of facts.

Rather, the claims here concern *different* facts, which PSNH identifies in its Memo:

- PSNH's refusal to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint;
- PSNH's failure to inform Plaintiffs that PSNH could have transferred 90% of their customer accounts to Default Service on an automated basis;
- PSNH's negotiation with ISO-NE of a later date by which it would assume PNE's remaining load asset;
- PSNH's deletion of FairPoint's pending Electronic Enrollments for transfer of PNE's customer accounts to FairPoint, and replacement of those Enrollments with new Enrollments for the transfer of those accounts to Default Service;
- PSNH's persuasion of PUC Staff to oppose Resident Power's and FairPoint's attempts to re-submit the Electronic Enrollments that had been deleted;
- PSNH's efforts to prompt PUC Staff to initiate a "show cause" proceeding against Plaintiffs; and
- PSNH's aggressive media campaign that disparaged PNE's reputation.

See Memo at 21-33. Although PNE also identifies the facts concerning PSNH's withholding of PNE's customer payments, PNE does not seek recovery of those payments, and the claim based on those facts (violation of RSA 358-A) is distinct from the claims alleged in IR-13-233 and must be brought in this Court. *See supra* pp. 14-22.

Based on the facts above – and as demonstrated in earlier sections of this Objection – Plaintiffs have alleged claims for tortious interference, violation of RSA 358-A, and negligence. These claims are separate and distinct from the issues before the PUC in IR 13-233.

Plaintiffs also seek relief here in connection with the facts above that was not, and could not have been, sought in Docket IR 13-233 in connection with the two limited claims made there:

- $750,000 for the sale of PNE's customer accounts to FairPoint;
- $53,000 for payments made by PNE to former customers that PSNH transferred to its Default Service, to compensate those customers for the difference between PSNH's default rate and PNE's lower rate;
- $12,000 for the labor and expense PNE incurred to contact its former customers and administer the payments identified above;
- $190,000 for Plaintiffs' attorney's fees and costs they incurred to litigate the March 2013 "show cause" proceeding;
- $97,000 for PNE's attorney's fees/costs incurred to pursue the customer payments PSNH refused to pay;[24] and
- $48,000 for Plaintiffs' efforts to salvage the FairPoint deal.

Compl. ¶ 129.

Plaintiffs could not have asserted the claims here in IR 13-233 because they did not arise out of the facts alleged in that Docket. For example, the facts concerning PSNH's deletion of FairPoint's Electronic Enrollments have no relation to PSNH's withholding of customer payments or its assessment of selection charges against PNE. Whether or not PSNH's deletion of the Enrollments was proper would have had no tendency to prove or disprove any element of PNE's claims concerning customer payments and selection charges in Docket IR 13-233. Thus, PNE did not assert them, and did not need to do so. PSNH's argument that the conclusion in Order 25,660 that PNE's load asset was "automatically assigned" to PSNH, again, ignores the fact that such assignment had no impact on FairPoint's Electronic Enrollments: PSNH could

[24] PSNH admits PNE could not seek its attorney's fees and costs in Docket IR 13-233 because it was not entitled to them under RSA 365:38-a, which governs the recovery of fees and costs in proceedings before the PUC. *See* Memo at 36.

have assumed responsibility for PNE's remaining load asset and then, on each customer's next meter read date, allowed each account to be transferred. *See supra* pp. 25-27.

PSNH's insistence that Order 25,660's "preclusive effect" "is much broader" is erroneous. *See* Memo at 36. First, the Complaint *does not* allege, as a separate Count, a breach of the Tariff. *See* Compl. ¶¶ 134-59; *see also supra* pp. 21-24. Second, PSNH's attempt to connect facts alleged here – such as PSNH's failure to perform a one-time, off-cycle transfer of PNE's customer accounts to FairPoint, or PSNH's failure to inform Plaintiffs that it could have transferred 90% of PNE's customer accounts to Default Service on an automated basis – to PNE's claim in IR 13-233 concerning PSNH's assessment of selection charges (as "defenses" PSNH alleges PNE could have raised) overlooks the standard for applying *res judicata*. *See* Memo at 37. Application of the doctrine depends on whether "all *theories* on which relief could be claimed arising out of the *same factual transaction in question*" have been raised. *See Goffin*, 146 N.H. at 417 (emphases added). If a theory of recovery – i.e., a *claim* or *cause of action*, not a specific factual allegation – has not, but could have been, raised, it is precluded. *See id.* The doctrine does not require a party to identify *every conceivable fact* associated with a claim. *See id.* PNE pursued the recovery of its customer payments and reimbursement of selection charges *only* in Docket IR 13-233. It did not seek a right to relief concerning the disruption of its transaction with FairPoint or other damages it suffered in connection with that event.

Res judicata does not bar Plaintiffs' claims.

VII. The Court Should Exercise Jurisdiction Over This Case

PSNH argues that, if Plaintiffs' claims are not dismissed, the Court should defer all of them to the PUC under the doctrine of primary jurisdiction. Memo at 38. This argument lacks

merit. First, that doctrine does not apply here, and these claims fall within this Court's jurisdiction. Second, the PUC lacks jurisdiction to award the damages Plaintiffs seek.

A. The doctrine of primary jurisdiction does not apply.

RSA 365:1 states, "Any person *may* make a complaint to the [PUC]" concerning the actions of a utility. This language confers the PUC with *permissive* jurisdiction over a limited set of matters: In a 1979 decision *involving PSNH,* the New Hampshire Supreme Court held that the PUC "does not have exclusive jurisdiction over all matters concerning public utilities." *Nelson v. Pub. Serv. Co. of N.H.*, 119 N.H. 327, 329 (1979). Rather, it only has exclusive jurisdiction over cases involving "complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the [PUC]." *Id.* at 330. Courts may decide cases "involving a claim by a ratepayer that he has been overcharged." *Id.*

In *Nelson*, PSNH argued that the district court lacked jurisdiction over a ratepayer's small claims action seeking a refund of an overcharge, and that the matter should have been brought before the PUC under RSA 365:1. *Id.* at 329. The Court reasoned: "The language of RSA 365:1 contains no reference to exclusive or primary jurisdiction." *Id.* The Court noted "[t]he legislature ha[d] established such jurisdiction of other State agencies and commissions," by, for example, expressly stating in an agency's governing statute that it had "primary jurisdiction" or "exclusive jurisdiction" over a specific area or set of violations. *Id.* Such language was "dissimilar to the permissive language of RSA 365:1." In contrast, "the statutory grant of jurisdiction to the district courts is broad and specific." *Id.* at 330. The Court held "[t]he permissive jurisdiction granted to the [PUC] . . . does not deprive the district courts of their jurisdiction." *Id.* at 330.[25]

---

[25] Other jurisdictions have held that courts – not an administrative agency – are the proper forums in which to resolve disputes for a utility's improper billings, equipment defects, or similar errors. *See, e.g., Nev. Power Co. v.*

The PUC recently applied these principles in a decision in which it temporarily suspended a proceeding concerning a petition by Unitil Energy Systems for a declaratory ruling regarding Unitil's liability for overpayments made by RiverWoods Company (a retirement community) as a result of a defective meter installed by Unitil. *See Exhibit D* (8/1/11 Secretary Letter). RiverWoods filed a writ of summons in Rockingham Superior Court – alleging claims for negligence, unjust enrichment, violation of RSA 358-A, and breach of contract, and seeking recovery of damages – *after* Unitil had filed its petition with the PUC. *See* Docket No. 11-105.[26] The PUC concluded the Superior Court had jurisdiction over RiverWoods' dispute with Unitil and "determined to temporarily suspend the proceeding pending a ruling of the Superior Court in the pending suit." *See Exhibit D.*

In addition, in *Nevada Power Co. v. Eighth Judicial District Court.*, 102 P.3d 578 (Nev. 2004), the Nevada Supreme Court held the district court properly exercised its discretion in refusing to defer a utility customer's claims for breach of contract, breach of the covenant of good faith and fair dealing, and unfair practices to the PUC under the doctrine of primary jurisdiction. *Id.* at 588. It held district courts have "original jurisdiction over claims sounding in tort, contract, and consumer fraud." *Id.* at 586-87. The Court reasoned that, while the complaint included allegations concerning a meter's proper placement and the reasonableness of rates, the customer was not requesting the district court to determine the reasonableness of the meter tariff or the rate. *Id.* at 586-87. "Rather, the causes of action focus on [the utility's]

Eighth Judicial Dist. Ct., 102 P.3d 578, 586 (Nev. 2004) (district court properly exercised jurisdiction over claims relating to tort, contract, and consumer fraud resulting in an increased utility charge due to location of meter); *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393 (Iowa 1988) (claims involving meter errors are properly resolved by the courts); *Oliver v. Iowa Power & Light Co.*, 183 N.W.2d 687, 689 (Iowa 1971) (same); *Spintman v. Chesapeake & Potomac Tel. Co.*, 255 A.2d 304, 307 (Md. 1969) (same).

[26] http://www.puc.state.nh.us/regulatory/Docketbk/2011/11-105.html

misrepresentations and failures to disclose information to certain of its customers, resulting in over billing." *Id.* at 587. "These claims fall within the district court's original jurisdiction." *Id.*

Other jurisdictions have held that courts have jurisdiction over contract and common-law tort claims against a public utility, even where either the subject matter of the conduct (or some components of it) is regulated by an administrative agency. *See, e.g., Summit Props., Inc. v. Pub. Serv. Co.*, 118 P.3d 716, 722 (N.M. Ct. App. 2005) ("jurisdiction over contract or tort claims made against a public utility usually rests with the courts"); *Poorbaugh v. Pa. PUC*, 666 A.2d 744, 749-51 (Pa. Commw. 1995) (jurisdiction over plaintiff's claims for negligence in failing to prevent overvoltage from power lines, which resulted in barn fire, rested with trial court, not the PUC); *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72, 76 (Ohio App. 1994) (holding trial court properly exercised jurisdiction over negligence claim concerning power surge that caused a fire, and stating Public Utilities Commission of Ohio "does not have exclusive jurisdiction over every claim brought against a public utility. Contract and pure common-law tort claims against a public utility may be brought in a common pleas court."); *Lynn v. Houston Lighting & Power Co.*, 820 S.W.2d 57, 58 (Tex. App. 1991) (reversing dismissal of claim for wrongful termination of service, and holding courts have the power "to adjudicate tort claims against a public utility"); *DeFrancesco v. W. Pa. Water Co.*, 453 A.2d 595, 597 (Pa. 1982) (jurisdiction over suit in trespass and assumpsit against public utility alleging failure to provide adequate water pressure caused fire to burn and damage property rested with courts, not the PUC); *Campbell v. Mountain States Tel. & Tel. Co.*, 586 P.2d 987, 992-93 (Ariz. Ct. App. 1978) (reversing dismissal of claims for tortious interference with telephone service, intentional infliction of emotional distress, and invasion of privacy, and holding primary jurisdiction did not

apply, because claims were "the type of traditional claims with which our trial courts of general jurisdiction are most familiar and capable of dealing").[27]

Accordingly, if a claim concerns determination of an issue that falls outside the factual scope of an agency's expertise, *as expressed in the agency's governing statute*, a court may exercise its jurisdiction over that issue. Indeed, in *Wisniewski v. Gemmill*, 123 N.H. 701 (1983) (cited in PSNH's Memo), the New Hampshire Supreme Court reversed the decision of the superior court granting the defendant landowners' motion to dismiss an action by their neighbors for damages caused by the landowners' diversion of a river. *Id.* at 706-07. It noted that, for the doctrine of primary jurisdiction to apply – and for a court to refrain from exercising its concurrent jurisdiction to decide an issue – the agency to which deference is made *must have jurisdiction* to decide the issue. *Id.* at 706. The Court held the doctrine did not apply "because RSA chapter 483-A granted the [New Hampshire] water resources board *no jurisdiction over disputes between private parties involving an infringement of riparian rights*" and remanded for a trial. *Id.* at 706-07 (emphasis added).[28]

In addition, in *Frost v. Commissioner, New Hampshire Banking Department*, 163 N.H. 365 (2012), the New Hampshire Supreme Court affirmed the superior court's order permanently

---

[27] *See also Steffen v. Gen. Tel. Co.*, 60 Ohio App. 2d 144, 148 (1978) (reversing dismissal of claims against telephone companies for malicious or willful violation of plaintiffs' rights of privacy, and stating "[i]ntentional, willful and malicious torts committed by a public utility within the course of its service business are not within the exclusive jurisdiction of the Public Utilities Commission of Ohio, but may be litigated in the courts."); *Feingold v. Bell of Pa.*, 477 Pa. 1, 8-11 (1977) (reversing dismissal of claim for negligence and holding that courts retain jurisdiction over a suit for damages based on negligence); *Durica v. Commonwealth Edison Co.*, 30 N.E.3d 499 (Ill. App., 1st Dist. 2015) (reversing dismissal of claims for trespass and conversion against public utility, and stating statute governing public utilities did not preempt property owners' rights to assert tort claims or seek common law remedy of monetary damages arising from conduct covered by statute).

[28] The Court also rejected the landowners' argument that RSA Chapter 483-A vested *exclusive* jurisdiction in the New Hampshire Water Resources Board over actions involving state waters and eliminated the neighbors' common law right to bring a private action for violation of their riparian rights. *Id.* at 705-06. "We will not," the Court held, "construe a statute as abrogating the common law unless the intention to do so is *clearly expressed in the statute*." *Id.* at 706 (emphasis added). RSA Chapter 483-A did not "contain[] any language which would indicate that the legislature intended to eliminate an individual's right to bring an action in the superior court to enforce his riparian rights when another party has acted in violation of the statute." *Id.*

enjoining the New Hampshire Banking Department from pursuing an administrative proceeding against an individual, a mortgage loan originator, for allegedly violating certain regulations in connection with two mortgage loan transactions. *Id.* at 367-38. The Court concluded the doctrine of primary jurisdiction did not apply because the statute at issue (RSA Chapter 397-A) did not grant the Department jurisdiction over the two transactions that occurred. *Id.* at 373. The Court reasoned that "agencies' powers 'come solely and directly from the statutes that create them or give them authority and from the necessary implications of those statutes.'" *Id.* at 372 (citation omitted). The Court also held that, "[w]here . . . the issue or issues . . . involve purely questions of law, the matter will not be referred to an agency." *Id.* at 371. The superior court did not abuse its discretion in not refraining from exercising its jurisdiction. *Id.*

None of the issues PSNH identifies here should be deferred to the PUC:[29]

- Whether PSNH was required to perform an off-cycle meter read.
- Whether PSNH should have informed Plaintiffs that it could transfer 90% of PNE's customer accounts to its Default Service on an automated basis.
- Whether PSNH should have deleted FairPoint's Electronic Enrollments.

The PUC statute does not provide the PUC with jurisdiction to decide these issues. Further, they are purely questions of law. There is no dispute PSNH, for example, *refused* to perform an off-cycle meter read, did not inform Plaintiffs of its ability to transfer 90% of PNE's customer accounts to Default Service, and deleted FairPoint's Electronic Enrollments. *See supra* pp. 24-32. The only remaining questions are whether these acts were proper under the common-law theories of relief asserted in the Complaint. These issues should not be referred to the PUC. *Frost*, 163 N.H. at 371.

---

[29] PSNH insinuates that, in Docket IR 13-233, the Plaintiffs agreed that the issues in this case should be decided before the PUC. *See* Memo at 2. This is inaccurate. In the PUC filing upon which PSNH relies, PNE argued that matters other than the two at issue in that proceeding (PSNH's withholding of customer payments and assessment of selection charges) would "be suitable for Superior Court review." *Id.*

- Whether PSNH negotiated a later date with ISO-NE to assume PNE's remaining load asset.
- Whether PSNH caused PUC Staff to investigate the issue of "slamming."
- Whether PSNH created confusion over Resident Power's aggregation status.
- Whether PSNH prompted the "show cause" proceedings against Plaintiffs.

The PUC statute also does not provide the PUC with jurisdiction to decide these issues. These issues are not complex inquiries concerning rates or fair return. Rather, they represent straightforward questions of fact concerning PSNH's anti-competitive conduct that pertain to Plaintiffs' common-law and RSA 358-A claims and should be decided in this Court. These issues should not be referred to the PUC. *Nelson*, 119 N.H. at 329-30.

- Whether PSNH should have withheld PNE's customer payments.

This issue is also purely a question of law as to Plaintiff's claim for violation of RSA 358-A. PNE does not seek recovery of these payments. Rather, it raises this fact to support its RSA 358-A claim and, under that statute, seeks recovery of its attorney's fees and costs, which PSNH admits PNE could not recover in Docket IR 13-233.[30] This issue should remain here.

[30] Plaintiffs' reliance on other cases is unavailing. In *New Hampshire Division of Human Services v. Allard*, 138 N.H. 604 (1994), the New Hampshire Supreme Court concluded a state agency (the New Hampshire Division of Human Services) had, in part, *exclusive* – not just *primary* – jurisdiction over the dispute. *Id.* at 606-07. The Court defined both doctrines: When, on the one hand, there is "*exclusive jurisdiction*," "an agency proceeding is a definitional prerequisite to any superior court proceeding." *Id.* at 606 (emphasis added). When, on the other hand, there exists concurrent jurisdiction (the agency and superior court share jurisdiction), then, under "the doctrine of '*primary jurisdiction*,' . . . 'a court will refrain from exercising its concurrent jurisdiction to decide a question until it first has been decided by a specialized agency that also has jurisdiction to decide it.'" *Id.* at 607 (citation omitted) (emphasis added). In *Allard*, the Court held *both* of these doctrines "prohibit[ed] the superior court from exercising original jurisdiction" to adjudicate the dispute. *Id.* at 607. The Court concluded the relationship between a nursing home and the Division and the issue in dispute – whether the Division was entitled to repayment of certain Medicaid funds (i.e., "recapture") received by the nursing home for depreciable assets – were "largely governed by State regulations." *Id.* at 605. Further, the Division initiated that dispute by sending a notice of recapture to the nursing home stating the nursing home could request a hearing before the Division pursuant to *specific* procedure identified in the regulations. *Id.* The nursing home invoked that process. *Id.* The Court held the superior court could not "exercise[e] original jurisdiction to determine whether recapture is due, and once the administrative process has commenced, [it was also] prohibit[ed] [] from reviewing agency determinations until rehearing efforts have proven unsuccessful." *Id.* at 607. In addition, *Metzger v. Brentwood*, 115 N.H. 287 (1975), involved the *exhaustion of administrative remedies*, not the application of primary jurisdiction. *See id.* at 290-91.

The doctrine or primary jurisdiction does not apply, and this Court should not defer any claims to the PUC.[31]

B. The PUC lacks jurisdiction to award Plaintiffs the relief they seek.

While this Court has jurisdiction to resolve Plaintiffs' claims and award them a full recovery, the PUC's authority to award a monetary remedy against a utility is limited to RSA 365:29 (reparations by utility to customers only for payments made within two years before filing of complaint) and RSA 365:41 (civil penalty up to $25,000 in action by attorney general and paid into state treasury). *See Exhibit E* (PUC Order No. 23,734) at 11-12. The PUC has recognized it does not have jurisdiction over "a civil lawsuit, in which the contending parties generate competing evidence, a verdict is rendered and the wronged party is made whole. Neither the statutes governing the [PUC], nor the Administrative Procedure Act, permit the [PUC] to provide such a remedy." *Id.* at 15. The PUC "is only a mechanism for motivating utilities via administrative sanctions to comply with the relevant requirements." *Id.* at 13.

Here, the PUC's inability to redress Plaintiffs' claims further supports the determination that this Court should resolve those claims. *See Nev. Power Co.*, 102 .3d at 586 (reasoning that the PUC's lack of power to grant relief sought by plaintiffs, which included claim for unfair and deceptive practices based on utility's misrepresentations relating to certain equipment, supported conclusion that the court should adjudicate and resolve the case). The relief the PUC can provide is far less than the full relief sought by Plaintiffs and that is available in this Court. The Court should not defer this case to the PUC.

[31] PSNH also alleges this case constitutes "piecemeal litigation," and that the PUC should adjudicate this dispute since it is, in part, "very familiar" with it. *See* Memo at 38. PSNH cites no authority for this proposition.

VIII. If the Court Grants Any Part of PSNH's Motion, Plaintiffs Request Leave to Amend.

If the Court believes the Complaint may lack sufficient clarity in any respect, Plaintiffs respectfully request that the Court grant Plaintiffs leave to amend to address those issues.

IX. Oral Argument

Plaintiffs request oral argument on PSNH's Motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) deny PSNH's Motion to Dismiss in its entirety, (2) alternatively, grant Plaintiffs leave to amend the Complaint if the Court deems necessary, and (3) grant any other relief deemed just and proper.

Respectfully submitted,

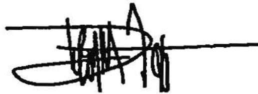
PNE ENERGY SUPPLY, LLC

and

RESIDENT POWER NATURAL GAS
AND ELECTRIC SOLUTIONS, LLC

By Their Attorneys,

FOJO DELL'ORFANO, P.L.L.C.



Dated: September 1, 2015

Robert M. Fojo, Esq. (#19792)
889 Elm Street, Fifth Floor
Manchester, NH 03105
(888) 545-0305
rfojo@FojoDell.com

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the foregoing by email to:

Wilbur A. Glahn, III
Alexandra Geiger
McLane, Grad, Raulerson & Middleton, Professional Association
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105

Dated: September 1, 2015

Robert M. Fojo

EXHIBIT A

FIRST AMENDMENT TO

ACCOUNT PURCHASE AND SALE AGREEMENT

This First Amendment ("First Amendment") to the ACCOUNT PURCHASE AND SALE AGREEMENT with an Effective date of February 6, 2013 ("Agreement"), is entered into and made on February 14, 2013 ("Amendment 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"). Capitalized terms used herein and not defined shall have the meaning ascribed to them in the Agreement.

For value received, and in consideration of the mutual promises contained in this First Amendment, the parties agree to the following recitals, terms and conditions.

1. Amendment.

a. Section 2(b). The penultimate sentence of Section 2(b) shall be deleted in its entirety and replace with the following sentence:

"All such Customer Aggregation Agreements shall be terminated as of the Flow Date for each such Customer, and during the Transition Period, Resident Power shall: (i) not direct or send any Customer Account to any electricity provider other than Buyer, (ii) only use such Aggregation Agreement authority to coordinate the smooth transition of Customer Accounts from Seller to Buyer, and (iii) only communicate to Customers in a manner consistent with the purposes of coordinating such transition."

b. Section 4(a)(6). A new Section 4(a)(6) shall be added to the Agreement which reads:

"Notwithstanding anything to the contrary in this Agreement, Buyer shall withhold from the Purchase Price an amount equal to Twenty-Five Thousand Dollars (US$25,000) (the "Refund Escrow"), which such funds shall be used by Buyer for the sole purpose of addressing any Customer complaints made to Buyer stemming from the temporary supply of default electricity service from Public Service of New Hampshire ("PSNH") during the Transition Period ("PSNH Temporary Service"). Buyer shall be permitted to use Refund Escrow funds to offer a refund to any complaining Customer in an amount equal to the additional monies paid by Customer over and above what such Customer would have paid under Customer's contract with Seller during such period of PSNH Temporary Service. If any monies remain in the Refund Escrow after all such complaining Customers are paid such refund (such refund being available to Customers for a period of ninety (90) calendar days after the last Customer Flow Date), Buyer shall promptly pay to Seller an

amount equal to any unused Refund Escrow. Buyer shall provide to Seller a commercially reasonable accounting of the use of the Escrow.

2. Effect of First Amendment. Except as expressly modified in this First Amendment, the Agreement will remain fully valid, binding and enforceable according to its respective terms through the duration, and the provisions that will survive the expiration or earlier termination of the Agreement will continue following that expiration or earlier termination.

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of February 14, 2013.

FAIRPOINT ENERGY, LLC

By: [signature]
Name: Michael Fallquist
Title: CEO

RESIDENT POWER NATURAL GAS AND ELECTRIC SOLUTIONS, LLC

By: [signature]
Name: Bart Fromuth
Title: Managing Director

PNE ENERGY SUPPLY LLC

By: [signature]
Name: August G. Fromuth
Title: Managing Director

EXHIBIT B

Public Service of New Hampshire

780 N. Commercial Street, Manchester, NH 03101

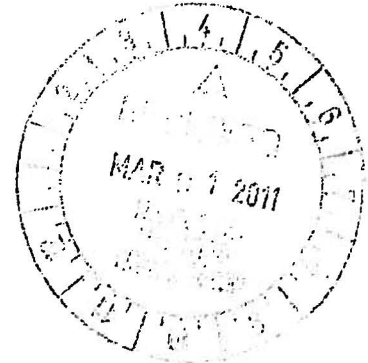
Public Service Company of New Hampshire
P. O. Box 330
Manchester, NH 03105-0330
(603) 634-3355
(603) 634-2438 - fax

bersara@psnh.com

A Northeast Utilities Company

Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

March 1, 2011



Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

Re: ***Northeast Utilities-NSTAR Merger Review***
Docket No. DE 11-014

Dear Secretary Howland:

On February 25, 2011, the Office of Consumer Advocate ("OCA") and the New England Power Generators Association, Inc. ("NEPGA") filed comments with the Commission on the pending transaction in which Northeast Utilities ("NU"), parent holding company of Public Service Company of New Hampshire ("PSNH", and together with NU, the "Companies"), will acquire NSTAR. OCA and NEPGA urge the Commission to assert jurisdiction over the transaction, but they base their arguments on factual inaccuracies and mischaracterizations of the transaction and the law. The Companies are submitting this letter to respond to those inaccuracies and mischaracterizations.

OCA Comments

The OCA concedes that the proposed transaction is structured as an acquisition of NSTAR (OCA Comments at 1), but argues that the Commission with its "broad grant of power" has the "statutory authority to review and approve the merger under RSA 374:33,[1] and in this case more specifically also has jurisdiction pursuant to RSA 369-B:3, IV (b)(4), subparagraphs (A) and (B)" (OCA Comments at 2). As demonstrated in the discussion below, the OCA's arguments are flawed on a number of grounds.

[1] The OCA's recognition that the transaction involves an acquisition of NSTAR by NU clearly demonstrates the applicability of the Commission's decision in *National Grid Group, PLC*, Petition for Approval of Merger, Order No. 23,640, 86 NH PUC 95 (2001), wherein the Commission has previously determined that it does not have jurisdiction over the acquisition of an out-of-state utility holding company by the holding company of a New Hampshire public utility.

The authority to regulate public utilities is a legislative function that has been delegated to the Commission. *Legislative Utility Consumers' Council v. Public Service Company of New Hampshire*, 119 N.H. 332, 340 (1979); *Appeal of Richards*, 134 N.H. 148, 158 (1991). It is a well-settled principle in New Hampshire that the Commission's authority is limited as provided by statute. *State of New Hampshire v. New Hampshire Gas & Electric Co.*, 86 N.H. 16 (1932); *H.P. Welch Co. v. State*, 89 N.H. 428 (1938); *Blair and Savoie v. Manchester Water Works*, 103 N.H. 505 (1961); *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394 (1961). The New Hampshire Supreme Court has stated that the Commission "is a creation of the legislature and as such is endowed only with the powers and authority which are expressly granted or fairly implied by statute . . . and may not be derived from other generalized powers of supervision. *Appeal of Public Service Co.*, 122 N.H. 1062, 1066 (1982). The Commission has consistently recognized that it possesses only the powers granted to it by the legislature. *See, e.g., Re Congestion on the Telephone Network Caused by Internet Traffic*, 89 NH PUC 173, 175 (2004); *Re Public Service Company of New Hampshire*, 88 NH PUC 239 (2003); *Re Public Service Company of New Hampshire*, 87 NH PUC 295 (2002).

Contrary to the assertions of OCA, the Commission cannot disregard the legal structure of the proposed transaction. If the transaction is outside the scope of authority delegated to the Commission in RSA 374:33 and RSA 369-B:3, IV (b)(4), the Commission cannot assert jurisdiction in reliance upon general "broad powers" or the characterizations of the proposed transaction being advanced by the OCA. The record in this docket clearly establishes that NU's acquisition of NSTAR is outside the scope of each of these statutes.

The OCA claims that RSA 374:33 applies because the transaction "involves the acquisition of approximately 43.7% of the stock of a public utility holding company doing business in New Hampshire (*i.e.*, NU) by the stockholders of a public utility holding company (*i.e.*, NSTAR)." OCA Comments at 3. OCA's statement is incorrect. In fact, NU is not being acquired and none of the currently outstanding NU shares are being transferred or sold as part of the transaction. The current NU shareholders are not transferring their shares, but must approve the issuance of *additional* NU shares by the company, as the merger consideration to be paid to NSTAR shareholders in exchange for their shares of NSTAR.[2] Following the transaction, there will be a larger number of NU shares (as authorized by current NU shareholders), NSTAR shares will cease to exist, and its former shareholders will hold NU shares. The former NSTAR shareholders will hold approximately 43.7% of larger pool of NU shares, but this cannot occur unless and until authorized by current NU shareholders. Thus, contrary to the assertions of OCA, there is no public utility, public utility holding company, or for that matter, any other entity that "shall directly or indirectly acquire more than 10 percent, or more than the ownership level which triggers reporting requirements under 15 U.S.C., section 78-P, whichever is less, of the stocks or bonds of" NU, for purposes of jurisdiction under RSA 374:33.

The OCA also claims that "post-merger decision making for NU will be shared 50-50 with NSTAR," and raises concerns regarding changes to the NU Board of Trustees ("NU Board") and the designation of a new chief executive officer of NU (OCA Comments at 2).

[2] OCA also incorrectly states that the transaction will result in NSTAR shareholders owning 1.312 million NU shares. This is incorrect. The figure "1.312" is the exchange ratio, meaning that NSTAR shareholders will receive 1.312 NU shares for each NSTAR share they own.

However, changes to public utility and holding company boards and management occur in the ordinary course of business, are not subject to Commission jurisdiction and do not equate to an acquisition or transfer of corporate control for purposes of RSA 374:33 or RSA 369-B:3, IV (b)(4). NU and PSNH will not be "acquired or otherwise sold or merged" in the transaction, and the corporate governance and management changes that are contemplated do not alter those facts. Further, the OCA cites to no statutory authority that would allow the Commission to assert jurisdiction over such changes, in a merger context or otherwise. NU has had five different chief executive officers in the last 30 years. Shareholders have routinely elected NU Board members at the annual shareholder meetings, and the number of trustees on the NU Board has varied substantially over the years. None of these changes, nor the issuance of additional NU shares upon approval of the shareholders, are subject to review and approval by the Commission. The fact that they are occurring as part of NU's acquisition of NSTAR does not bring the transaction within the scope of RSA 374:33 or RSA 369-B:3, IV (b)(4) or otherwise provide any basis for the Commission to assert jurisdiction.

Finally, the Companies note that the corporate governance changes of concern to OCA are not well-founded. Following the transaction, the NU Board will consist of 14 trustees, all with a fiduciary duty to NU shareholders. The NU Board will continue to be governed by its existing independence guidelines that comply with rules of the New York Stock Exchange (as approved by the Securities and Exchange Commission), and that require a majority of trustees on the NU Board to be independent from the company. This will continue to be the case following the transaction.

NEPGA Comments

The NEPGA comments do not address RSA 374:33, RSA 369-B:3, IV (b)(4) or any other statute, and therefore provide no assistance to the Commission in assessing the limits of its jurisdiction over the transaction. Instead, NEPGA urges the Commission to act based upon NEPGA's unfounded, nonspecific and overstated concerns regarding generation development, customer impacts and competitive markets, all of which are contrary to the information provided to the Commission in this docket.

Unconstrained by the information in this docket,[3] NEPGA freely mischaracterizes the transaction ("will create a new entity"), the companies' future plans ("definitive plans to aggressively expand development of renewable and other generation resources") and impacts ("potential to undermine competitive markets, competition and established competitive practices") (NEPGA Comments at 2-3). Indeed, NEPGA's comments are deficient at the most basic level; they provide no explanation or description whatsoever of the competitive "impacts" that they allege, much less why it is plausible to believe such impacts (whatever they are) would result from a merger between two utilities having *de minimis* generation ownership and whose activities are subject to comprehensive regulation by multiple state and federal agencies. NEPGA does not refute the Companies' legal analysis, or that the transaction will not change or

---

[3] As a participant in the other state and federal proceedings related to the transaction, NEPGA also has access to all of the docket information filed with the Massachusetts Department of Public Utilities, the Maine Public Utilities Commission, the Connecticut Department of Public Utility Control and the Federal Energy Regulatory Commission.

limit the Commission's continuing jurisdiction over PSNH. PSNH will continue to be regulated by the Commission as a public utility, will remain subject to all outstanding orders and commitments, and the interests of customers will be fully protected following the transaction, as they are today, through the Commission's continuing authority over the rates, terms, services and operations of PSNH.

NEPGA's allegations of concern regarding PSNH's generation are particularly disingenuous given the fact that NEPGA members own or control approximately 90% of the New England's generating capacity,[4] own approximately 280,000 megawatts of generating capacity that is developed or in development,[5] and include major utilities such as Constellation Energy, Dominion Resources, Dynegy, Entergy, Exelon, GenOn Energy (Mirant), NextEra Energy Resources (FPL), NRG Energy and PSEG Power. In contrast, PSNH owns a scant 1150 megawatts of generation, all of which is used to supply default service needs.

RSA 369:8, II(b)(1)

The OCA also addressed RSA 369:8, II(b)(1), which establishes an expedited process for certain mergers or acquisitions if the transaction is otherwise subject to Commission approval under other statutes, such as RSA 374:33. The Companies explained in their February 1, 2011 filing that the transaction is not subject to the Commission's jurisdiction under other statutes, and therefore the provisions set forth in RSA 369:8, II(b)(1) do not apply. However, notwithstanding these limitations, the process described in RSA 369:8, II(b)(1) may be instructive to the Commission in determining next steps in this docket.

RSA 369:8, II(b)(1) states that "*the approval of the commission shall not be required* if the public utility files with the commission a detailed written representation no less than 60 days prior to the anticipated completion of the transaction that the transaction will not have an adverse effect on the rates, terms, service or operation of the public utility within the state" (emphasis added). The Companies provided such written representation in their February 1, 2011 filing. This written representation was further supported by many thousands of pages of information filed with the Commission in this docket, and by the information provided by Mr. McHale during the public information session on February 7, 2011. Mr. McHale has also provided an affidavit, which is attached, to attest to the filed information in support of the Companies' written representation.[6]

---

[4] NEPGA member companies represent approximately 27,000 megawatts in New England. NEPGA Comments at 2. According to ISO-New England, the Total New England Installed Capability (Summer) is approximately 30,000 megawatts.

[5] Based on publicly available information on NEPGA member websites, a table providing the derivation of member generating capacity is attached to this response.

[6] The instant transaction is different than the situation discussed by the Commission in *New England Electric System,* Order Approving Petition, Order No. 23,308, 84 NH PUC 502 (1999), on two counts. First, as described herein, the Companies have demonstrated that NU's acquisition of NSTAR is not subject to the Commission's jurisdiction under RSA 374:33 and RSA 369-B:3, IV (b)(4). Second, neither PSNH nor its parent, NU, are being acquired or merged, as was the case in the *New England Electric System* ("NEES") case, where National Grid was acquiring NEES, and its subsidiary companies including Granite State Electric Company. The Commission's subsequent decision in *EnergyNorth Natural Gas, Inc.*, Order Approving Settlement Agreement, Order No. 23,470, 85 NH PUC 360 (2000), further demonstrates that RSA 369:8 is inapplicable. There, discussing RSA 369:8, the Commission held, "the Commission must independently verify that no adverse effect on the rates, terms, service or

The Companies have demonstrated that NU's acquisition of NSTAR is not subject to the Commission's jurisdiction under RSA 374:33 and RSA 369-B:3, IV (b)(4). Notwithstanding these statutes, the process set forth in RSA 369:8, II(b)(1) could provide a way for the Commission to proceed without having to address the contested question of jurisdiction, by acknowledging that "the approval of the commission shall not be required" based on the absence of an adverse effect on the rates, terms, service or operation of PSNH.

PSNH appreciates this opportunity to respond to the comments filed by OCA and NEPGA and will be pleased to provide any further information deemed necessary by the Commission concerning NU's acquisition of NSTAR.

Sincerely,

Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

Enclosures

cc: Service List
Office of Consumer Advocate
NEPGA
N.H. Legal Assistance

---

operation *of the utility to be acquired* will occur." (Emphasis added). In the instant case, "the utility to be acquired" is NSTAR and its subsidiary companies, none of which conduct business in New Hampshire.

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
bersara@psnh.com
butlergb@nu.com
dhartford@clf.org
edward.damon@puc.nh.gov
f.anne.ross@puc.nh.gov
Meredith.A.Hatfield@oca.nh.gov
Rorie.E.P.Hollenberg@oca.nh.gov

Docket #: 11-014-1 Printed: March 01, 2011

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 & SECRETARY
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.**

EXHIBIT C

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-014

NORTHEAST UTILITIES, INC.

Northeast Utilities, Inc.-NSTAR Merger Review

Order Addressing Commission Jurisdiction

O R D E R N O. 25,211

April 5, 2011

I. PROCEDURAL HISTORY

On October 18, 2010, Northeast Utilities, Inc. (NU), the parent company of Public Service Company of New Hampshire (PSNH), announced a proposed merger with NSTAR, a Massachusetts-domiciled gas and electric utility company. NSTAR has no plant, operations, customers or public-utility subsidiaries in New Hampshire. NU and NSTAR entered into an Agreement and Plan of Merger (Merger Agreement) on October 16, 2010 (amended on November 1, 2010 and December 16, 2010), which provides for the acquisition of NSTAR by NU, subject to obtaining the necessary approvals of shareholders and those regulatory authorities having jurisdiction over the planned merger. This order addresses the Commission's jurisdiction over the proposed transaction.

The Merger Agreement contemplates the purchase of NSTAR by NU through a share-exchange transaction, in which each holder of NSTAR common shares will be entitled to a pro rata distribution of newly-issued NU shares on the basis of an exchange ratio between NSTAR and NU shares, specifically, 1.312 NU common shares per each NSTAR common share

exchanged. After the share exchange, it is expected that the former shareholders of NSTAR will control approximately 1.312 million shares of NU, which would represent 43.7% of NU's shares. Immediately following the share-exchange transaction, through a series of interim corporate merger transactions, NSTAR's current subsidiary companies, including NSTAR Electric Company and NSTAR Gas Company, would be held under NSTAR LLC, a holding company wholly-owned by NU. NSTAR Electric Company and NSTAR Gas Company, which are utilities under the jurisdiction of the Commonwealth of Massachusetts, would continue to be regulated by that state. The Merger Agreement specifies that following the merger, the NU Board of Trustees would be composed of seven designees of the pre-merger NU, and seven designees of the pre-merger NSTAR. The Merger Agreement also specifies that the current chief executive of NSTAR, Mr. Thomas J. May, would become the chief executive of NU 18 months after consummation of the proposed merger.

In recognition of the potential impact that the proposed merger of NU and NSTAR could have on the citizens and ratepayers of this State, in which PSNH is the largest electric utility, the Commission, by secretarial letter, opened this docket on January 18, 2011 "... to gather information regarding any impacts that the proposed merger might have on PSNH and its customers, and to hear arguments concerning the Commission's jurisdiction under New Hampshire law to exercise prior approval authority over the merger." To that end, a public informational session was scheduled for February 7, 2011, at which NU and NSTAR representatives were instructed to "... present detailed information regarding the proposed merger's expected impact on PSNH and its affiliates, with special attention paid to any expected effects on PSNH's rates, terms, services, or operations and any changes in the provision of

services currently provided by NU's service-company affiliates to PSNH." On February 1, 2011, NU and PSNH jointly filed a letter providing information regarding the expected impacts of the merger, together with NU-PSNH's arguments regarding the Commission's jurisdictional authority for review and approval of the proposed merger under New Hampshire law.

At the informational session NU and NSTAR representatives provided the Commission, Staff, and attendees with a presentation outlining the proposed merger. At that time the Commission directed NU and NSTAR to submit to Staff copies of all filings provided by NU and NSTAR to other regulatory authorities, together with any updates or amendments related to the merger proposal, on an ongoing basis. The Commission also invited interested persons to submit written comments regarding the NU-NSTAR transaction.

On March 1, 2011, NU and PSNH provided a response to the comments submitted by the Office of the Consumer Advocate (OCA) and the New England Power Generators Association, Inc. (NEPGA), both submitted on February 25, 2011. The NU-PSNH response included an affidavit from David R. McHale, Executive Vice President and Chief Financial Officer of NU and PSNH (McHale Affidavit), reiterating Mr. McHale's oral representations regarding the NU-NSTAR proposed merger provided at the February 7 informational session. The Commission also received written comments from the International Brotherhood of Electrical Workers, Local #1837 on March 2, 2011. All written comments, as well as the transcript of the Commission's informational session, are available at: www.puc.nh.gov/Regulatory/Docketbk/2011/11-014.html.

II. REPRESENTATIONS OF NU-PSNH

In their letter of February 1, 2011, orally at the February 7 informational session, and in their March 1, 2011 written response to OCA's and NEPGA's comments, NU and PSNH presented arguments seeking to establish that: (1) the Commission has no approval jurisdiction over the NU-NSTAR merger proposal; and (2) in any case the proposed merger of NU and NSTAR would have no adverse impact on PSNH or its customers, and would result in no immediate changes in NU's management of PSNH.

NU and PSNH represented that, under their interpretation of New Hampshire law and Commission precedent, the Commission would not have approval jurisdiction over the proposed merger between NU and NSTAR. NU and PSNH argue that the Commission's approval jurisdiction arises only in situations where a public utility or holding company would acquire a controlling interest in a public utility or holding company incorporated in or doing business in New Hampshire. NU-PSNH 2/1/11 Letter at 3. Conversely, NU and NSTAR argue that the Commission's jurisdiction is not triggered if the proposed transaction involves a utility with no New Hampshire corporate or operational presence being acquired by the parent holding company of a New Hampshire public utility.

To bolster their interpretation of the NU-NSTAR proposed merger's jurisdictional implications for the Commission, NU and PSNH provided detailed analysis seeking to establish that NU would act as a *bona fide* acquirer of the NSTAR holding company structure, located entirely outside of New Hampshire. Specifically, NU and PSNH represented that: NU's corporate existence would remain intact after the merger with NSTAR; NU shares would continue to be traded, both before and after completion of the merger; and PSNH's position as a

wholly-owned independent subsidiary of NU would remain unchanged after the proposed merger. NU-PSNH 2/1/11 Letter at 1-6. In summary, NU and PSNH argue that no approval jurisdiction rests with the Commission given the facts at hand, with NU acquiring a utility holding company, NSTAR, that has no New Hampshire corporate or operational presence. NU-PSNH 2/1/11 Letter at 3-4.

In seeking to demonstrate that the proposed merger would have no adverse impact on PSNH or its customers, NU and PSNH described NU's and PSNH's operations following the merger. NU and PSNH represented that the proposed NU-NSTAR merger would not: change PSNH's corporate structure; result in a merger or consolidation for PSNH; cause a change in control of PSNH or NU; nor affect PSNH's outstanding debt, its dividend policy, or capital structure. *See* McHale Affidavit at 1.

In relation to the proposed merger's impact on PSNH customers, NU and PSNH stated that PSNH's rates will be unaffected by the proposed merger, and will remain at current levels unless and until a change in rates is authorized by the Commission. *See* NU-PSNH Letter dated February 1, 2011, at 6. To the extent that the proposed merger would result in efficiencies, cost savings, or potential new business practices for PSNH, these issues would be addressed by the Commission in future rate cases and related proceedings. NU-PSNH 2/1/11 Letter at 6. NU and PSNH also stated that the Commission would retain its full jurisdiction with respect to PSNH's provision of electric service, the condition of its plant and equipment, and its manner of operations, and that PSNH would also continue to be subject to all compliance obligations under applicable New Hampshire statutes, rules, and Commission Orders. NU-PSNH 2/1/11 Letter at

6. NU and PSNH also noted that no acquisition premium would be paid for NU's merger with NSTAR that could result in increased rates for PSNH customers. NU-PSNH 2/1/11 Letter at 6.

III. PUBLIC COMMENTS

During the pendency of this docket, a number of oral and written comments were submitted regarding potential impacts of the NU-NSTAR proposed merger on PSNH customers, and the Commission's jurisdictional powers.

A. Office of the Consumer Advocate

OCA provided the Commission with oral and written comments regarding the potential impacts of the proposed NU-NSTAR merger on PSNH and PSNH customers, and the OCA's opinion regarding the scope of the Commission's approval jurisdiction over the transaction. At the February 7, 2011 informational session, OCA expressed concern that, without a formal Commission approval process, the Company's representations that PSNH rates and operations would not be adversely impacted by the merger would have limited enforceability. *See* Transcript of February 7, 2011 Informational Session (Tr.) at 62-65. In OCA's comment letter dated February 25, 2011, OCA presented arguments in support of its position that the Commission does possess approval jurisdiction over the proposed NU-NSTAR merger.

OCA, referencing the approximate 44 percent post-consummation ownership of NU shares by former NSTAR shareholders, argued that, "through its stockholders," NSTAR would indirectly acquire more than 10 percent of NU, giving rise to Commission jurisdiction under New Hampshire law. OCA also argued that the proposed composition of the post-consummation NU Board of Trustees, which would have seven NU nominees and seven NSTAR nominees, together with the proposed nomination of NSTAR's Mr. May as the post-consummation chief

executive of NU, indicated that the proposed merger had the functional effect of an "acquisition" of NU by NSTAR, "through its stockholders," providing additional support for the exercise of approval jurisdiction by the Commission over the proposed merger.

B. New Hampshire Legal Assistance

At the February 7, 2011 informational session, New Hampshire Legal Assistance (NHLA) stated that it was concerned about potential impacts that the proposed merger could have on PSNH's low-income-assistance and community-development programs, specifically, PSNH's Electric Assistance, Low-Income Energy Efficiency, and Neighbor Helping Neighbor programs. *See* Tr. at 58-60. NHLA lauded PSNH's commitment to these programs, and expressed its expectation of PSNH's on-going support for these efforts after consummation of the proposed NU-NSTAR merger. Tr. at 59-60. NHLA requested that PSNH provide a written or oral representation that its community-development efforts would not be adversely impacted by consummation of the proposed merger. Tr. at 59. PSNH orally affirmed that no adverse effect on PSNH's community-development efforts was expected to arise from consummation of the proposed merger. Tr. at 60-62.

C. New England Power Generators Association, Inc.

By letter dated February 25, 2011, NEPGA, a regional trade association representing non-utility electric power generators in the New England states, expressed its generalized concerns regarding the proposed NU-NSTAR merger. NEPGA noted NU's potential market power in the New England electricity market after consummation of its merger with NSTAR, which, in NEPGA's view, could harm its members' competitive position. *See* NEPGA Letter dated February 25, 2011 at 2-3. NEPGA also opined that NU and NSTAR's post-merger plans

to develop additional generation capacity could negatively impact NEPGA members' market participation, and lead to additional costs for PSNH ratepayers. On the basis of these concerns, NEPGA urged the Commission to exercise an unspecified approval jurisdiction over the proposed merger. NEPGA Letter at 4-6.

D. International Brotherhood of Electrical Workers Local #1837

By letter dated March 2, 2011, the International Brotherhood of Electrical Workers, Local #1837, Dover, New Hampshire, expressed concerns that the proposed NU-NSTAR merger would impact staffing levels at PSNH, as well as the terms and conditions of employment for its members.

IV. POSITION OF COMMISSION STAFF

Staff has reviewed the materials provided by NU and PSNH in this docket, and anticipates that NU's and PSNH's representations regarding ongoing informational submissions to the Commission and Staff regarding future impacts of the merger on PSNH and its customers will be adhered to. Staff plans to communicate regularly with NU and PSNH regarding needed informational filings, before and after consummation of the proposed merger, and expects NU and PSNH to be responsive to Staff's requests.

V. COMMISSION ANALYSIS

Having reviewed NU and PSNH's submissions, Staff's recommendations and the comments tendered, we conclude that the threshold issue is whether the Commission has jurisdiction for review and approval of the proposed NU-NSTAR transaction under New Hampshire law. This Commission is a creation of the New Hampshire Legislature and, as such, is endowed with only the powers and authority which are expressly granted or fairly implied by

statute. *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (*citing Petition of Boston & Maine R.R.*, 82 N.H. 116, 116 (1925)); *see also Re Public Service Company of New Hampshire*, 88 NH PUC 239 (2003); *Re Public Service Company of New Hampshire*, 87 NH PUC 295 (2002). We cannot simply "take jurisdiction" over a matter if there is no statutory grant of authority to do so. We have identified four potential sources of authority to consider in determining whether the proposed transaction between NU and NSTAR is subject to the Commission's jurisdiction: RSA 374:30; and RSA 374:33; RSA 369-B:3, IV(b)(4) and RSA 369:8.[1] Having examined each statutory provision, we conclude that the Commission lacks jurisdiction for review and approval of the proposed NU-NSTAR merger. The reasons are discussed below.

A. RSA 374:30

RSA 374:30 establishes the Commission's authority to make findings and issue orders prior to the consummation of certain transactions entered into by New Hampshire public utilities. Specifically, RSA 374:30 states: "Any public utility may transfer or lease its franchise, works or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise." RSA 374:30.

Applying the plain meaning of this statute, we conclude that it does not apply to the proposed NU-NSTAR merger. NU's wholly-owned New Hampshire public utility subsidiary, PSNH, would remain in control over its franchise, works, and system after the proposed merger,

[1] RSA 374:3 grants the Commission general supervisory authority over all public utilities under the Commission's jurisdiction; while this statute authorizes Commission broad reach in seeking information, it does not confer jurisdiction over transactions the Commission may wish to adjudicate but for which there is no statute that expressly addresses the transaction.

without any transfer or lease of same being made to either NSTAR, NSTAR's subsidiaries, or a third party. Indeed, PSNH's corporate relationship with NU would not change in any significant way as a consequence of the proposed merger, as represented by PSNH and NU. Because there is no transfer or lease of the franchise, works or system of a New Hampshire utility, RSA 374:30 does not apply.

B. RSA 374:33

RSA 374:33 confers jurisdiction over any transaction under which a public utility or public utility holding company, as defined by the statute, acquires more than 10 percent of a public utility or public utility holding company incorporated in or doing business in New Hampshire. In this case, NU, which is a public utility holding company as defined, seeks to acquire more than 10 percent of NSTAR. Though NSTAR is a public utility, it is not one that is incorporated in or doing business in New Hampshire. Therefore, we conclude that RSA 374:33 does not apply to the proposed merger of NU and NSTAR.

C. RSA 369-B:3, IV(b)(4)

RSA 369-B:3, IV(b)(4) was enacted by the New Hampshire Legislature in 2000, in the context of PSNH's request for the Commission's authorization to issue rate reduction bonds at that time. The Legislature required the Commission to impose, in the language of its authorization orders for the issuance of such bonds, a series of specific conditions on PSNH. RSA 369-B:3, IV(b); *see also* Commission Order No. 23,549 (September 8, 2000). One such condition, related to mergers and acquisitions involving NU and PSNH, may be found at RSA 369-B:3, IV(b)(4)(A)-(B). This condition requires that, "[i]n the event that PSNH or its parent company is acquired or otherwise sold or merged: . . . [s]uch merger, acquisition, or sale shall be

subject to the jurisdiction of the commission under RSA 369, RSA 374, RSA 378 or other relevant provisions of law, and the merger, acquisition, or sale shall be approved only if it is shown to be in the public interest . . . [and] should PSNH or its parent company be acquired or otherwise sold or merged, such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement. . . ." The Commission, by Order No. 23,550 (September 8, 2000) in Docket No. DE 99-099, approved PSNH's issuance of rate reduction bonds and, as required by the Legislature, integrated the language of RSA 369-B:3, IV(b)(4)(A)-(B) as conditions of the Order.

In interpreting the language of this statutory provision, in the context of the proposed NU-NSTAR merger, we note that, as a threshold matter, the provision, within both the preamble and subpart (B) of RSA 369-B:3, IV(b)(4), sets forth the following formulations for the statute's applicability: "In the event that PSNH or its parent company is acquired *or otherwise* sold or merged" (*emphasis added*); RSA 369-B:3, IV(b)(4)(B) states in part: ". . . should PSNH or its parent company be acquired *or otherwise* sold or merged . . ." (*emphasis added*). Presently, the parent company of PSNH is NU; the statute clearly applies to transactions in which PSNH itself, or its parent NU, is to be acquired by another entity. Likewise, the statute clearly applies to transactions in which PSNH or NU, or both, would be sold to another entity.

With regards to *mergers*, however, the adverbial phrase "*or otherwise,*" *in pari materia* with the word "acquired," serves as a limitation on the range of corporate transactions to which the statutory grant of jurisdiction to the Commission would apply. "Or otherwise," following the word "acquired," thereby functionally limits the jurisdiction of the Commission under RSA 369-B:3 to such mergers that are the equivalent of an acquisition of NU or PSNH by a third party.

Furthermore, RSA 369-B:3, IV(b)(4)(B) provides that "such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement." "Original proposed settlement" is a defined term at RSA 369-B:2, VIII and refers to the "Public Service Company of New Hampshire Restructuring Settlement Agreement" filed with the Commission on August 2, 1999 in DE 09-099. The relevant jurisdictional standard in the original proposed settlement is found at page 68 in section XIV under paragraph C, "Sale of PSNH or NU," which states, in relevant part: "If NU itself is acquired or otherwise sold or merged . . . it agrees that notwithstanding any contrary provision of law, the merger, acquisition or sale shall be subject to the jurisdiction of the PUC under RSA Chapters 369, 374, 378 or other relevant provisions, and that the merger, acquisition or sale shall be approved only if it be shown to be in the public interest. *A merger of NU that is subject to this section shall not include acquisitions by NU of other entities." (Emphasis added.)* The first quoted sentence of this section is restated, almost verbatim, by RSA 369-B:3, IV(b)(4)(A). The last sentence, as part of the jurisdictional standard referenced under RSA 369-B:3, IV(b)(4)(B), clarifies that a merger of NU subject to PUC jurisdiction under this section "shall not include acquisitions by NU of other entities."

The factual context of the proposed NU-NSTAR merger does not support a finding that the proposed merger, if consummated, would be the equivalent of NU and PSNH being acquired by NSTAR. Rather, NU would acquire NSTAR with a new issuance of NU shares as consideration. Also, while NSTAR's (the parent holding company's) corporate existence would cease as a consequence of the proposed merger, NU would continue to serve as the parent holding company of PSNH, and would also serve as the parent holding company of NSTAR's

current Massachusetts utility subsidiaries going forward. Moreover, NU's, and PSNH's, current corporate assets would not be alienated to NSTAR in any way; rather, individual shareholders of NSTAR would receive newly issued NU shares in exchange for their current NSTAR shareholdings, at a fixed ratio, with currently-issued NU shares still outstanding. We therefore conclude that the statutory provisions of RSA 369-B:3 do not form a basis for our review of the proposed NU-NSTAR merger.

D. RSA 369:8

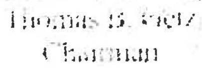
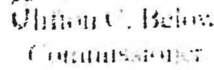
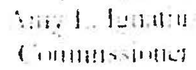
Finally, we turn to RSA 369:8, II. Sections II (a) and (b) establish fast track procedures under which public utilities may provide detailed representations to the Commission, with 60 days' prior notice, regarding the impact of certain corporate actions, including in section II(b)(1), "any corporate merger or acquisition involving parent companies of a public utility whose rates, terms, and conditions of service are regulated by the commission . . . ." The jurisdictional basis for Commission review under these provisions, however, is only in cases in which there is a separate statute requiring Commission approval; that is, RSA 369:8 is not an independent grant of authority. RSA 369:8, II(a) states, "*[t]o the extent that the approval of the commission is required by any other statute* for any corporate restructuring, financing, change in long-term and short-term indebtedness, or issuance of stock involving parent companies of a public utility regulated by the commission . . ." (*emphasis added*). RSA 369:8, II(b)(1) states, "*[t]o the extent that the approval of the commission is required by any other statute* for any corporate merger or acquisition involving parent companies of a public utility . . ." (*emphasis added*). Because we find no other statute requiring Commission approval of the transaction presented in the instant docket, the provisions of RSA 369:8, II are not triggered.

While the Commission does not have the statutory authority to approve or reject the proposed transaction, it does retain jurisdiction over PSNH going forward. PSNH is the state's largest electric utility, serving approximately 500,000 homes and businesses in all corners of the State. The Commission's continuing jurisdiction over PSNH's operations, rates, affiliate contracts, and plant are not affected by the proposed merger. Furthermore, we agree with Staff that PSNH must continue to provide detailed information, including responses to questions that arise as Staff evaluates the information, as part of the Commission's ongoing supervisory responsibility over PSNH and its parent, NU. *See, e.g.,* RSA 365:5-7, RSA 366, RSA 374:3-4. We expect that NU and PSNH will respond to Staff's data requests in this docket in a timely and responsive manner, with copies of all information that is not the subject of a motion for confidential treatment posted on the Commission's website for interested parties to review. We will continue to exercise our general supervisory powers over PSNH to ensure that its rates and terms of service are not adversely impacted.

Based upon the foregoing, it is hereby

ORDERED, that the Commission does not have jurisdiction for approval of the proposed merger between NU and NSTAR.

By order of the Public Utilities Commission of New Hampshire this fifth day of April, 2011.

Thomas B. Getz Chairman	Clifton C. Below Commissioner	Amy L. Ignatius Commissioner

Attested by:

Debra A. Howland
Executive Director

ROBERT BERSAK
PUBLIC SVC OF NEW HAMPSHIRE
780 N COMMERCIAL ST
PO BOX 330
MANCHESTER NH 03105-0330

04/05/11 Order No. 25,211 issued and forwarded to all parties. Copies given to PUC Staff.

GREGORY B BUTLER
NORTHEAST UTILITIES SERVICE COM
PO BOX 270
HARTFORD CT 06141-0270

DORENE HARTFORD
CONSERVATION LAW FOUNDATION
27 NORTH MAIN ST
CONCORD NH 03301

MEREDITH A HATFIELD
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301

RORIE HOLLENBERG
OFFICE OF CONSUMER ADVOCATE
21 SOUTH FRUIT ST STE 18
CONCORD NH 03301-2429

RICHARD A KANOFF
MURTHA CULLINA LLP
99 HIGH ST
BOSTON MA 02110

ALAN LINDER
NH LEGAL ASSISTANCE
117 N STATE ST
CONCORD NH 03301-4407

THOMAS F RYAN
IBEW NH
74 SOUTH MAIN ST STE 3
ROCHESTER NH 03867

Docket #: 11-014 Printed: April 05, 2011

FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:

DEBRA A HOWLAND
EXEC DIRECTOR & SECRETARY
NHPUC
21 SOUTH FRUIT STREET, SUITE 10
CONCORD NH 03301-2429

EXHIBIT D

CHAIRMAN
Thomas B. Getz

COMMISSIONERS
Clifton C. Below
Amy L. Ignatius

EXECUTIVE DIRECTOR
AND SECRETARY
Debra A. Howland

THE STATE OF NEW HAMPSHIRE

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

Tel. (603) 271-2431

FAX (603) 271-3878

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

Website:
www.puc.nh.gov

August 1, 2011

Re: DE 11-105, Unitil Energy Systems, Inc.
Petition for Declaratory Ruling and Approval of Adjustment to Certain Account Balances
Motion to Dismiss or Stay

To the Parties:

On June 21, 2011, The RiverWoods Company at Exeter (RiverWoods) petitioned for intervention in this docket. Attached to its petition was a copy of its Writ of Summons dated June 20, 2011 with a return date of August 2, 2011, against Unitil Energy Systems, Inc. (Unitil) in the Rockingham County Superior Court. The writ asserts claims for damages arising from overpayments made to Unitil for electric service between 2004 and 2011.

On July 11, 2011, RiverWoods filed a Motion to Dismiss or Stay to which Unitil Energy Systems, Inc. and the Office of the Consumer Advocate objected on July 21, 2011. In its motion, RiverWoods alleges that the Rockingham County Superior Court has jurisdiction over its dispute with Unitil and asks that the Commission either dismiss or stay this proceeding.

The Commission has determined to temporarily suspend the proceeding pending a ruling of the Superior Court in the pending suit. The Commission will promptly commence the instant proceeding if the Court declines to hear the matter.

Sincerely,

Debra A. Howland
Executive Director

EXHIBIT E

DE 01-023

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Complaint of Ann and Tim Guillemette

Order Following Pre-Hearing Conference and Denying Motion to Dismiss

O R D E R N O. 23,734

June 28, 2001

APPEARANCES: James T. Rodier, Esq. for Ann and Tim Guillemette; Christopher J. Allwarden, Esq. for Public Service Company of New Hampshire; and Marcia A.B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY AND POSITIONS OF THE PARTIES

This case is an outgrowth of a consumer complaint that was first brought to the attention of the New Hampshire Public Utilities Commission (Commission) in 1997. Complainants Ann and Tim Guillemette are residents of Bedford and customers of Public Service Company of New Hampshire (PSNH). They allege that voltage fluctuations in the service provided to their residence by PSNH have resulted in extensive damage to their personal property.

The Staff of the Commission conducted an informal investigation. On July 11, 2000, Commission Chief Engineer Michael D. Cannata advised the complainants of his determination that the problems at their home were not the result of "improper system conditions or operations on the part of PSNH." In light of further communications with the

complainants, noting their disagreement with this conclusion, Mr. Cannata requested that the Commission open this docket and conduct a formal investigation pursuant to RSA 365:1. PSNH filed a response on January 5, 2001, denying "the contention that the quality of electric service provided by PSNH to the Guillemette residence is deficient."

The Commission issued an Order of Notice on March 22, 2001, scheduling a Pre-Hearing Conference for April 18, 2001. However, due to a deficiency in the service of the Order of Notice, the Pre-Hearing Conference did not take place as scheduled.

On April 24, 2001, at the suggestion of Staff, the Complainants submitted a written preliminary statement of their position. In their letter, the complainants stated that (1) they have suffered serious damage and economic loss at their residence as a result of PSNH service, (2) they are in a position to offer expert testimony that the damage in question has not been caused by any wiring problems on the customer side of their PSNH meter, (3) PSNH knew as early as December 31, 1996 about a poor connection at the complainants' meter, which was a "principal cause of voltage surges and sags experienced by the Complainants," and (4) the complainants intend to challenge the applicable Commission rules pertaining

to service quality "to the extent they are relied upon by PSNH as a defense."

Staff responded to this filing on April 25, 2001, expressing the concern that the complaints are seeking to pursue tort claims against PSNH over which the Commission lacks jurisdiction. According to Staff, the Commission's enabling statutes do not confer the authority to make the complainants whole via an award of civil damages - a remedy which, in Staff's view, the complainants are seeking here. Finally, Staff took the position that a challenge to any applicable Commission rules is beyond the scope of this proceeding, contending that PSNH could indeed defend itself here by demonstrating that it complied with the applicable rules.

On May 3, 2001, PSNH filed a motion to dismiss the proceeding. In its motion, PSNH (1) characterized this proceeding as "fundamentally a civil claim for damages to property" properly cognizable in court and over which the Commission should decline to assert jurisdiction, (2) alleged that there has been "no petition or other proper pleading filed by complainants in this case which clearly specifies what act or omission by PSNH in violation of any law, rule, regulation or order is the basis of [the Guillemettes']

complaint, as required by RSA 365:1," and (3) contended that, because this is not a rulemaking proceeding, the Commission lacks the jurisdiction in this docket to hear the complainants' challenge to any of the Commission's rules.

The Commission issued a revised Order of Notice on April 27, 2001, scheduling a Pre-Hearing Conference for May 8, 2001. The Pre-Hearing Conference took place as scheduled. The focus of the Pre-Hearing Conference was the issues raised in the various filings described above relative to the Commission's jurisdiction and authority. The Commission encouraged PSNH and the complainants to conduct settlement discussions, and requested that the complainants file a "bill of particulars" so as to permit PSNH and the Commission to have a more precise idea as to the specific allegations they complainants were making against the Company. Following the Pre-Hearing Conference, the parties and Staff met for a technical session. At the technical session, there was agreement to await resolution of the pending dismissal motion prior to submitting a proposed procedural schedule.

The complainants filed an objection to PSNH's dismissal motion on May 17, 2001. In their objection, the complainants contended that PSNH's request for dismissal ignores the express provisions of the Commission's Order of

Notice, which noted that the docket is proceeding as an investigation pursuant to RSA 365:1. The complainants further took the position that PSNH has violated RSA 374:1 (setting forth utilities' duty to "furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable") and, therefore, is guilty of a felony pursuant to RSA 365:41, subjecting the company to a fine of up to $25,000.

In their objection to the dismissal motion, the complainants stated that they are seeking damages not through a tort claim but pursuant to the terms and conditions of PSNH's delivery service tariff. The complainants invoked case law noting that the Commission has plenary authority over utility tariffs, which do not simply state the terms of the contractual relationship between a utility and its customers but also have the force and effect of law. According to the complainants, their request for damages "is based upon the terms of PSNH's tariff and its quasi-legislative binding effect on PSNH, not an express delegation of authority by the legislature to the PUC."

The complainants further concede that, under the Administrative Procedure Act, the Commission's rules are "prima facie evidence of the proper interpretation of the

matter that they refer to." RSA 541-A:22, II (subject to exception when Joint Legislative Committee on Administrative Rules denies approval of rule). But, according to the complainants, "the merest inquiry by the Commission would quickly establish as a matter of common sense that Rule Puc 304.02, as interpreted by PSNH, is totally at odds with RSA 374:1." According to the complainants, nothing in the applicable law precludes the Commission from conducting such an inquiry here.

PSNH submitted a reply on May 18, 2001. In it, PSNH took the position that the Commission's Order of Notice is purely a procedural device for instituting the docket and does not confer any jurisdiction on the Commission that it would not otherwise have pursuant to statute. PSNH further characterized as a "surprising revelation" the position asserted in the complainants' objection that they are seeking fines in accordance with RSA 365:41 upon a determination that the company is guilty of a felony. According to PSNH, the Superior Court and not the Commission is the appropriate forum for adjudicating felony proceedings under New Hampshire law. PSNH further contended that it is entitled to trial by jury in such a proceeding, as well as every other constitutional and statutory protection accorded a criminal defendant. PSNH

additionally asserted that prosecution of felony requires indictment by grand jury and is also subject to the authority of the Attorney General or relevant County Attorney to determine whether to proceed.

Finally, PSNH in its reply argued that there is no merit to the complainants' assertion that the company's tariff provides a basis for the Commission to entertain their bid for economic damages. According to PSNH, the tariff does indeed carry the force and effect of law - but, in this instance, simply with the result that the tariff establishes the causation standard that the complainants would have to meet in any tort action brought by the complainants in court.

Although the Office of Consumer Advocate (OCA) had not previously entered an appearance on behalf of residential ratepayers, OCA filed a response to PSNH's reply memorandum on May 29, 2001. OCA objected to PSNH's contention that the Commission is without authority to impose a monetary penalty against the company pursuant to RSA 365:41. OCA relied upon *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606 (1986). Specifically, OCA invoked the New Hampshire Supreme Court's reference to a "'constitutional calculus' in which the interests of investors, like the interests of customers, are variables." *Id.* at 639. The

Court was referring to the constitutional requirements of ratemaking. According to OCA, the same "constitutional calculus" should be applied to the Commission's imposition of fines and penalties, with the result that such sanctions be deemed within the Commission's lawful powers. According to OCA, "[t]here is no logic to the view that the Commission somehow has the authority to make decisions that can effect hundreds of millions of dollars['] worth of stockholder value, but is not able to impose penalties because of due process."

The Commission Staff has not taken a position on PSNH's dismissal motion.

On June 4, 2001, the complainants filed a document entitled "Statement of Ann and Tim Guillemette" that was intended to be responsive to the Commission's request at the Pre-Hearing Conference that the complainants supply a bill of particulars. The June 4 filing states that (1) the complainants suffered "extensive loss and damage caused by electricity" for which they have incurred repair and replacement costs of at least $26,000, plus compensation for "continuing emotional distress" as well as "foreseeable and consequential damage," (2) the complainants intend to submit "compelling evidence" that the damage in question was caused by electricity, such evidence consisting of "testimony from

appliance repairmen as well as authenticated repair records," (3) the complainants "will offer expert testimony from at least one licensed electrician to support their contention that the damage has not been caused by wiring problems on the Guillemettes' side of the meter," plus an internal PSNH document from 1996 indicating that a PSNH employee received a report from an unspecified "electrician" that "one of the phases was only partially installed at meter socket, indicating that PSNH knew as early as 1996 "that a poor connection at Complainants' meter existed."

II. COMMISSION ANALYSIS

It has long been established as a matter of New Hampshire law that the Commission "is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (citing *Petition of Boston & Maine R.R.*, 82 N.H. 116, 116, 129 A. 880, 880 (1925)). The Commission's "generalized powers of supervision" over utilities is not a source of such authority. *Id.*

There is no question that the Commission has the statutory authority to conduct the formal investigation requested by the complainants. RSA 365:1 expressly permits

any person to "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." RSA 365:2 provides for the forwarding of such complaint to the subject utility with a demand for an answer, and RSA 365:3 relieves the Commission of any obligation to act where the utility makes "reparations for any injury alleged and . . . cease[s] to commit or to permit the violation of law, franchise or order charged in the complaint." Finally, pursuant to RSA 365:4,

> [i]f the charges are not satisfied as provided in RSA 365:3, and it shall appear to the commission that there are reasonable grounds therefor, it *shall* investigate the same in such manner and by such means as it shall deem proper, and, after notice and hearing, take such action within its powers as the facts justify.

(Emphasis added.)

We have considered the record adduced at the prehearing conference and have reviewed the papers submitted by the parties and Staff, including the detailed response provided by PSNH, and, while we take note of Staff's view upon informal investigation that the allegations of the complainants lack merit, we nevertheless find that sufficient

questions remain unanswered to provide reasonable grounds within the meaning of RSA 365:4 to conduct a full and formal investigation, along the lines set forth below. Accordingly, we must deny PSNH's motion to dismiss the proceeding.

However, we share with the parties and Staff a view that it will be helpful and efficient if we confront at the outset the nature of the relief sought by the complainants. Although the Commission enjoys full authority to investigate matters related to New Hampshire utilities, Chapter 365, which governs complaints to, and proceedings before, the Commission, provides the Commission with less than plenary authority to redress customer complaints.

The Commission may order a utility to "make due reparation" to a customer, with such reparation covering "only payments made within 2 years before the date of filing the petition for reparation" in cases where a complaint has been made "covering any rate, fare, charge or price demanded and collected" by a utility. RSA 365:29. Assuming that such a remedy would be appropriate here, *see Granite State Transmission Co. v. State*, 105 N.H. 454, 456-57 (1964) (noting Commission's authority under RSA 365:29 "to prevent unreasonable prejudice or disadvantage to customers"), it is far more limited in scope than the damages and penalties the

complainants apparently seek.

The only other provision of Chapter 369 that speaks to a monetary remedy against a utility is RSA 365:41, which provides that

> [a]ny public utility which shall violate any provisions of this title, or fails, omits or neglects to obey, observe or comply with any order, direction or requirement of the commission, shall be guilty of a felony and, shall be subject to a civil penalty, as determined by the commission, not to exceed $25,000. No portion of any fine, nor any costs associated with an administrative or court proceeding which results in a fine pursuant to this section, shall be considered by the commission in fixing any temporary, permanent, or emergency rates or charges of such utility.[1]

RSA 365:41 penalties and any other forfeiture incurred under the provisions of Chapter 365, "shall be recovered in an action brought by the attorney general in the name of the state, and when recovered shall be paid to the state treasurer." In other words, such recovered sums are not available to compensate individual wronged customers.

Given these provisions, and the general principle noted above that the Commission has only the authority expressly conferred by statute or fairly implied from such an

---

[1] A separate provision makes officers or agents of utilities potentially liable for a civil penalty of up to $10,000 when they willfully violate, or procure, aid or abet the violation of, commission orders or enabling statutes. *See* RSA 365:42.

enactment, we conclude that we lack the authority to award civil damages to a utility customer as a result of service provided by a utility that is of deficient quality. The Legislature appears to have made a policy choice, between vesting the Commission with the authority to make such aggrieved customers whole - a function traditionally reserved to courts - and giving the Commission only a mechanism for motivating utilities via administrative sanctions to comply with the relevant requirements.

This hardly reduces investigations under RSA 365:4 into empty exercises. Authority to redress customer complaints by ordering utilities to take appropriate action is both explicitly conferred by Chapter 365 and may be fairly implied by its provisions as well as other of the Commission's enabling statutes. *See, e.g.*, RSA 365:2 (noting that Commission may require "that the matters complained of be satisfied" at time complaint is forwarded to utility); RSA 365:4 (upon investigation, commission may "take such action within its powers as the facts justify"); RSA 365:23 (imposing upon utilities duty to "observe and obey every requirement" of commission orders); RSA 365:40 ("Every public utility and all offers and agents of the same shall obey, observe, and comply with every order made by the commission under authority of

this title so long as the same shall remain in force."); RSA 374:7 ("The Commission shall have power to investigate and ascertain . . . the methods employed by public utilities in manufacturing, transmitting or supplying . . . electricity for light, heat or power . . . and, after notice and hearing thereon, shall have power to order all reasonable and just improvements in service or methods."). Obviously, the Legislature would not have imposed upon utilities the duty to comply with Commission directives if it did not intend to confer upon the Commission the authority to direct utilities to take actions as a result of formal investigations. This has been long recognized. *See, e.g., State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 29-30 (1932) (noting Commission's "plenary" authority to issue orders directly affecting service or rates).[2] We do not opine here on whether a determination that the Commission makes in a complaint case may also have a collateral estopped or res judicata effect.

---

[2] In order to enforce such directives, the Commission is empowered to "lay the facts before the attorney general, and to direct him immediately to begin an action in the name of the state praying for appropriate relief by mandamus, injunction or otherwise." RSA 374:41. Although the New Hampshire Supreme Court has suggested that, in exercising this authority, the Commission "acts in a supervisory or inquisitorial capacity, in which its function is not unlike that of a grand jury," *New Hampshire Gas & Electric Co.*, 86 N.H. at 33, the Court has never held that we lack the power to order utilities to enforce specific service quality standards.

Given these statutory directives, our conception of an RSA 365:4 investigation differs from the one described by the complainants in the various papers they have filed thus far in this proceeding. The complainants would apparently have us superintend something very much like a civil lawsuit, in which the contending parties generate competing evidence, a verdict is rendered and the wronged party is made whole. Neither the statutes governing the Commission, nor the Administrative Procedure Act, permit the Commission to provide such a remedy. The statutory scheme does permit other, more flexible, approaches when appropriate. *See* RSA 541-A:31 (describing requirements for adjudicative proceeding in contested cases). We regard RSA 365:4 proceedings, when triggered by consumer complaints that are unrelated to payments, as an opportunity to pinpoint and solve problems with service quality in a manner that promotes fidelity to the utilities' statutory obligation to provide "such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable." RSA 374:1. In other words, an RSA 365:4 proceeding is simply a second and more formal phase, subject to the requirements of the Administrative Procedure Act, of the consumer dispute resolution process that begins whenever a ratepayer contacts

the Commission's Consumer Affairs Department with a complaint.

As the complainants note, a Commission-approved tariff of a New Hampshire utility does not simply define the contractual relationship between the utility and its customers but has "the force and effect of law." *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566 (1980). In suggesting that this special character of tariffs somehow confers upon the Commission the authority to adjudicate a claim for civil damages that implicates the terms of the tariff, the complainants misapprehend the significance of the concept in question. In the *Pennichuck* case, the New Hampshire Supreme Court made the point in connection with its determination that when the Commission considers a proposed tariff it must adhere to the constitutional limitations on the exercise of legislative functions. *Id.* at 565-66. More generally, the notion that a tariff has the force and effect of law means that in disputes arising under a tariff certain defenses typically applicable to contract claims may not be invoked, *see Appeal of Vicon Recovery Systems, Inc.*, 130 N.H. 801, 805 (1988), all customers are presumed to be aware of the tariff's terms, *see Bellsouth Telecommunications, Inc. v. Kerrigan*, 55 F.Supp.2d 1314, 1318 (N.D.Fla. 1999), the tariff supercedes any other agreements made by a utility and a customer, *see*

id., and language in a tariff may limit a utility's liability to a customer from what it would otherwise be under generally applicable legal principles,[3] *see Disk 'n' Data, Inc. v. AT&T Communications*, 616 N.E.2d 76, 77 (Mass. 1993). Even though our imprimatur confers upon a tariff the force and effect of law, we are no more empowered to adjudicate civil damages claims implicating the tariff than the Legislature would be the appropriate forum for adjudication of a civil damages claim that implicates a provision of the New Hampshire Revised Statutes.

On the question of whether the complainants may use this proceeding to vindicate their contention that our rule governing voltage variation, Puc 304.02, is, as complainants allege, "totally at odds with RSA 374:1," we agree with PSNH, subject to one caveat. Under the Administrative Procedure Act, duly promulgated rules are not simply "prima facie evidence of the proper interpretation of the matter that they refer to" but also "have the force of law unless amended or

---

[3] As the complainants point out, PSNH's delivery service tariff contains certain language that speaks to the company's potential liability to customers for damages and we recently declined to permit PSNH to revise this provision. *See* Order No. 23,659 (March 22, 2001). This decision implicates the Commission's quasi-legislative function and has no bearing on the extent of our quasi-judicial authority to resolve disputes.

revised or unless a court of competent jurisdiction determines otherwise." RSA 541-A:23, II. The Commission's promulgation of the specific voltage variation standards set forth in Puc 304.02 constitutes the agency's considered judgment that compliance with such standards is consistent with the more general statutory prescription for safe and adequate service contained in RSA 374:1. Because this judgment has the force of law, PSNH was, and is, entitled to rely upon it. The case cited by the complainants, *Petition of Smith,* 139 N.H. 299 (1994), is simply an illustration of the principle enshrined in RSA 541-A:23, II, that a court of competent jurisdiction may declare a rule invalid because it is inconsistent with the statute it purports to implement. It does not suggest that the Commission may sanction a utility for conduct that is in compliance with a rule that has been duly promulgated by that same commission.

This is not to say, however, that we will refuse to entertain evidence proffered in an RSA 365:4 proceeding in an effort to demonstrate that a duly promulgated rule is inadequate to assure safe and reliable utility service. We do not rule out the possibility that the complainants are correct in their assertion that our rule governing voltage variation does not provide them with the protections to which they are

otherwise entitled by law. Were we to so determine, we are confident that we have the power to take appropriate action – either by ordering appropriate customer-specific or utility-specific action here, by exercising our emergency rulemaking authority, *see* RSA 541-A:18 (allowing for emergency rule promulgation in case of "imminent peril to the public health or safety"), or by instituting a formal rulemaking proceeding under RSA 541-A:3 and related provisions. Therefore, complainants should not hesitate to pursue their theory at hearing that Puc 404.02 provides them with insufficient protection and requires revision. They should bear in mind, however, that absent evidence that PSNH misinterpreted or misapplied the rule, we will not sanction the Company, which was entitled to rely upon these duly promulgated guidelines that have the force and effect of law until we determine otherwise.

We next take up PSNH's contention that the Commission is without jurisdiction to sanction a utility under RSA 365:41 in light of the constitutional and statutory safeguards that attend felony criminal proceedings, including the right to trial by jury, indictment by grand jury and the exercise of prosecutorial discretion. There is obviously no question that the Commission is without the jurisdiction to

adjudicate criminal cases of any kind. But there is a well-recognized distinction between criminal charges, which are the exclusive province of the criminal courts, and civil forfeitures, which do not require the same procedural safeguards and which can be imposed by administrative agencies in appropriate circumstances without application of the same stringent constitutional limitations. *See, e.g., Lopez v. Director, New Hampshire Div. of Motor Vehicles,* ___ N.H. ___, ___, 761 A.2d 448, 450 (2000) (concluding that, because administrative driver license suspension statute is not criminal, "criminal law does not apply to these proceedings"); *State v. Fitzgerald,* 137 N.H. 23, 26 (1993) (discussing distinction between civil penalties and criminal fines for double jeopardy purposes); *Peaslee v. Koenig,* 122 N.H. 828, 830 (1982) (noting that civil burden of proof may apply in case arising under statute with both civil and criminal provisions as long as only civil penalties are imposed); *see also Helvering v. Mitchell,* 303 U.S. 391, 400 (1938) (concluding that IRS could constitutionally impose fine and noting that "[f]orfeiture of goods or their value and the payment of fixed or variable sums of money are . . . sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789").

Our understanding of the criminal provisions of RSA 365:41 is identical to that of PSNH. If, hypothetically, a formal or informal investigation by the Commission revealed misconduct that, in our judgment, was of a sufficiently serious nature to warrant felony prosecution under RSA 365:41, the only avenue of recourse would be to make the relevant facts known to the Attorney General and request that he institute criminal proceedings in the appropriate court. However, PSNH is incorrect in its suggestion that we lack additional and separate authority under RSA 365:41 to impose a civil forfeiture.[4] We express no view as to whether such a result would be appropriate in this case, concluding only that nothing about RSA 365:41 or the complainants' invocation of it warrants dismissal of the proceeding on jurisdictional grounds.[5]

Next we take up PSNH's contention that we should dismiss the proceeding because the complainants have failed to provide a petition or other proper pleading setting forth what

---

[4] As already noted, although we have the authority to impose such a penalty, the Attorney General has the obligation of recovering the sum from the subject utility in an appropriate civil action. *See* RSA 365:43.

[5] Given this determination, it is not necessary for us to consider OCA's position with regard to the potential applicability of the "constitutional calculus" described in the *Conservation Law Foundation* case.

acts or omissions by PSNH form the basis of their complaint. We agree that RSA 365:1 contemplates that the submission of such a writing will ordinarily comprise the triggering event of a formal investigation under RSA 365:4. In this instance, Staff initiated the proceeding and, by letter to PSNH, established a deadline for the company to file a written response pursuant to RSA 365:2. PSNH duly made such a filing, without raising any issues at that time as to the manner in which the formal investigation was instituted or the lack of a formal written petition from the complainants. It is now too late to impose such a procedural default on the complainants. In any event, we find that the complainants' June 4 filing sufficiently sets forth a complaint within the parameters of what is contemplated by RSA 365:1.

Finally, we deem it appropriate to advise the parties as to how we intend to conduct the remainder of this proceeding. First, the complainants are to advise the Commission in writing, within ten days of entry of this Order, whether they intend to continue to pursue their complaint in light of our ruling herein on the scope of remedies available to them.

Second, the prehearing conference record and the papers submitted thus far make two things clear: (1) the

complainants allege they have suffered recurring voltage-related problems at their residence that have caused them significant property damage, a situation that PSNH does not deny and that common sense suggests should not be allowed to persist, and (2) the complainants have never permitted PSNH to inspect the wiring in their home, on the customer side of the meter, to test PSNH's hypothesis that the problems experienced by the complainants are the result of that wiring and not the service provided by the company. In our judgment, a full and thorough investigation of this matter requires the inspection by a competent and objective electrical engineer of the complainants' premises wiring.

Therefore, we intend to engage the services of an independent engineering or licensed electrician consultant to perform such an inspection and provide a report to the Commission, with copies provided to the complainant and PSNH. We will assess the cost of such inspection to PSNH. *See* RSA 365:37, II. We will also allow PSNH to observe the inspection and comment on the report. The complainants are required to advise the Commission in writing, within ten days of the entry of this Order, as to whether they will permit such an inspection. Should they fail to grant such permission, we will dismiss the proceeding with prejudice and conclude our

investigation without any further action.

In addition, in order to help determine whether any alleged voltage surge or sag continues to exist, we will require PSNH to attach a voltage recording device to the complainant's meter for a continuous period of two months.

Based upon the foregoing, it is hereby

ORDERED, that the motion to dismiss filed by Public Service Company of New Hampshire is DENIED; and it is

FURTHER ORDERED, that the complainants shall advise the Commission in writing within ten days of the entry of this Order as to whether: 1) they intend to continue to pursue their complaint; and 2) they will permit inspection of their premises wiring by an independent inspector appointed by the Commission and accompanied by an observer from PSNH, as set forth above; and it is

FURTHER ORDERED, that, assuming complainants permit such inspection, the Executive Director, in consultation with the Chief Engineer of the Commission, appoint such independent inspector and provide that the costs of such appointment be assessed to PSNH; and it is

FURTHER ORDERED, that PSNH attach a voltage recording device to the complainant's meter for a continuous period of two months.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of June, 2001.

Douglas L. Patch Chairman	Susan S. Geiger Commissioner	Nancy Brockway Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary