STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

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

v.

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

Docket No. 216-2015-CV-265

ORDER

Plaintiffs, PNE Energy Supply, LLC ("PNE") and Resident Power Natural Gas and Electric Solutions, LLC ("Resident Power"), have filed claims against defendant, Public Service Company of New Hampshire ("PSNH"), for tortious interference with contractual relations (Counts I and II), violations of the Consumer Protection Act (Count III), and negligence (Counts IV and V). Defendant moves to dismiss for failure to state a claim and on res judicata grounds, or alternatively, to refer the complaint to the Public Utilities Commission ("PUC") based on the primary jurisdiction doctrine. The Court held a hearing on November 9, 2015. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Background

The following facts are taken from plaintiffs' complaint and the documents attached to the parties' pleadings. See Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). Defendant is the largest utility company in New Hampshire. (Complaint

¶ 13.) It supplies electricity that it generates or procures to customers. (Id.) It also delivers electricity to customers through wires and other infrastructure that it owns. (Id.)

PNE is a Competitive Electric Power Supplier ("CEPS"). (Id. ¶ 25.) As such, it supplies electricity that it procures to customers. (Id.) Defendant is PNE's "host utility," meaning it owns and controls the distribution infrastructure in PNE's service area and so is responsible for delivering electricity supplied by PNE to PNE customers. (Id.) Resident Power is an "aggregator," meaning it gathers customers and delivers them individually or in bundles to CEPSs. (Id. ¶¶ 39–40.) Customers appoint Resident Power as their exclusive agent for the purpose of researching, negotiating, and executing electricity supply agreements with CEPSs. (Id. ¶ 51.) In January 2013, PNE had approximately 8,500 customer accounts, all of whom belonged to customers who had executed aggregation agreements with Resident Power. (Id. ¶ 50.)

ISO New England, Inc. ("ISO-NE") manages the New England wholesale electricity market. (Id. ¶ 47.) The ISO-NE Transmission, Markets and Services Tariff ("ISO-NE Tariff") requires, among other things, that CEPSs maintain a minimum level of financial security. (Id. ¶ 48; Def.'s Ex. 2.) If a CEPS cannot meet the financial security requirements it may be suspended from supplying energy. (Complaint ¶ 48.)

The PUC governs electricity distributors and generators in New Hampshire. The PUC's Electricity Delivery Service Tariff ("the PUC Tariff"), governs electricity delivery in defendant's service area. (Id. ¶ 26; Def.'s Ex. 1.) This tariff requires that defendant transfer accounts among electricity suppliers, subject to certain regulations, when the supplier to receive the accounts submits an "electronic enrollment." (Complaint ¶ 26.) It

also requires that defendant arrange "Default Service," that is, service provided by defendant, if a customer cannot receive service from a CEPS. (Id.)

On February 6, 2013, plaintiffs and FairPoint signed a purchase and sales agreement ("the P&S") in which PNE agreed to sell around 8,500 accounts to FairPoint. (Id. ¶ 50.) These accounts involved customers who had aggregation agreements with Resident Power. (Id.) Around this time, wholesale electricity rates in New England were volatile and higher than in previous years. (Id. ¶ 52.) This caused ISO-NE to raise the amount of financial security required of PNE. (Id. ¶ 53.)

On February 9, FairPoint submitted electronic enrollments to transfer 8,500 customer accounts from PNE to FairPoint. (Id. ¶ 56.) Under PUC regulations, defendant must wait until a customer's scheduled monthly meter readings before transferring his or her account. On February 12, defendant began executing the transfers. (Id. ¶ 60.) PNE contacted defendant on this date to discuss transferring the accounts to FairPoint immediately rather than waiting for the scheduled meter readings. (Id. ¶ 66.) Defendant told PNE it lacked the resources to transfer that many customers to FairPoint at once. (Id. ¶ 68.) Defendant did not inform PNE that it could have quickly transferred ninety percent of PNE's customer accounts to Default Service. (Id. ¶ 73.)

On February 14, PNE defaulted on its security obligations. (Id. ¶ 61.) ISO-NE suspended PNE from the New England electricity market and informed defendant PNE was suspended. (Id. ¶ 71.) ISO-NE instructed defendant to assume responsibility for PNE's load asset as soon as possible. (Id. ¶ 72.) Defendant negotiated with ISO-NE and agreed to assume PNE's load asset on February 20. (Id. ¶ 74.)

By February 19, defendant had transferred 1,200 customer accounts from PNE to FairPoint. (Id. ¶ 77.) PNE's remaining load asset consisted of the 7,300 accounts not transferred to FairPoint. (Id. ¶ 79.) On February 20, defendant deleted the pending electronic enrollments for the accounts' transfer to FairPoint and replaced them with electronic enrollments for the accounts' transfer to Default Service. (Id.) Defendant also urged the PUC to block Resident Power and FairPoint from resubmitting electronic enrollments for the accounts' transfer to FairPoint. (Id. ¶ 89.) The PUC, in turn, informed PNE and Resident Power that attempts to transfer customers from Default Service to FairPoint would constitute "slamming," or the transfer of a customer account from one supplier to another without customer authorization. (Id. ¶ 93.)

On February 21, the PUC emailed PNE, copying FairPoint, instructing PNE to inform its customers they had been transferred to Default Service and to contact FairPoint directly to enroll with FairPoint. (Id. ¶ 96.) The PUC later directed plaintiffs to notify customers Resident Power was no longer their aggregator. (Id. ¶ 105.) PNE responded it would not agree to this. (Id. ¶ 106.) The PUC replied, copying FairPoint, that if Resident Power took steps to transfer customers from Default Service to FairPoint, FairPoint would face slamming charges. (Id.) FairPoint ultimately backed out of the P&S. (Id. ¶ 112.)

On February 21, PNE emailed defendant requesting usage data for a customer from a particular time period for billing purposes. (Id. ¶ 117.) Defendant forwarded this email to the PUC and asked, "Is PNE still entitled to participate in the New Hampshire retail energy market?" (Id. ¶ 118.) This prompted PUC staff to institute show cause proceedings in which the PUC alleged that plaintiffs may have violated various PUC

rules. (Id. ¶ 121.) Plaintiffs and the PUC reached a settlement in March 2013 that released plaintiffs of all issues raised in the show cause proceedings. (Id. ¶ 126.) Finally, in February 2013, defendant launched "an aggressive public relations campaign" highlighting PNE's suspension and disparaging PNE's reputation. (Id. ¶ 82.)

PNE and Resident Power have brought claims of tortious interference with contractual relations (Counts I and II), violations of the Consumer Protection Act (Count III), and two counts of negligence (Counts IV and V). Defendant now moves to dismiss for failure to state a claim and based on res judicata, or in the alternative, to transfer these claims to the PUC, under the doctrine of primary jurisdiction.

Analysis

I. Legal Standard

The standard applied to a motion to dismiss for failure to state a claim is whether the allegations in a complaint "are reasonably susceptible of a construction that would permit recovery." See Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000). The threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). The Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences 'in the light most favorable to the plaintiff.'" Bohan v. Ritzo, 141 N.H. 210, 212 (1996). The Court also considers "documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint." Beane, 160 N.H. at 711 (alterations in original) (citing Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). Dismissal is appropriate "[i]f

the facts as pled cannot constitute a basis for legal for relief[.]" Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998).

II. **Res Judicata**

Defendant argues plaintiffs' complaint is barred by res judicata because plaintiffs could have asserted their claims in PNE's PUC complaint resulting in PUC Order 25,660. (Def.'s Ex. 10). In that case, PNE claimed defendant wrongfully calculated supplier charges and wrongfully withheld customer payments from PNE following PNE's suspension. (Id.)

The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action. Merriam Farm, Inc. v. Town of Surry, __ N.H. __ (decided Sept. 22, 2015), at 3. Res judicata applies if the following elements are met: "(1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." Id.

Plaintiffs argue res judicata does not apply here because the same cause of action is not before the Court in both instances. A "cause of action" includes "all theories on which relief could be claimed on the basis of the factual transaction in question." Sleeper v. Hoban Family P'ship, 157 N.H. 530, 534 (2008) (quotation omitted). "Generally, in determining whether two actions are the same cause of action for the purpose of applying res judicata, [the Court] consider[s] whether the alleged causes of action arise out of the same transaction or occurrence." Id. (quotation omitted).

PUC Order 25,660 did not arise from the same transaction or occurrence as the present action. Although the two cases share some background facts, PUC Order 25,660 was limited to payments defendant allegedly owed PNE. This case, in contrast, primarily concerns defendant's refusal to facilitate the transfer of customer accounts from PNE to FairPoint. Thus, res judicata does not apply.

III. Tortious Interference with Contractual Relations (Count I)

Count I alleges defendant tortiously interfered with the P&S by: (a) refusing to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint; (b) illegally deleting 7,300 pending electronic enrollments for the transfer of PNE customers to FairPoint; (c) replacing those enrollments with electronic enrollments for the transfer of PNE customers to Default Service; and (d) persuading PUC staff to oppose and threaten prosecution of FairPoint's attempts to resubmit the electronic enrollments that defendant deleted and Resident Power's efforts to transfer PNE's former customer accounts from Default Service. (Complaint ¶ 137.)

To establish a claim for tortious interference with contractual relations, plaintiffs must show: "(1) the plaintiff[s] 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[s] [were] damaged by such interference." Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 40–41 (2005). Plaintiffs must also demonstrate defendant's interference caused the damages. See Roberts v. Gen. Motors Corp., 138 N.H. 532, 539 (1994).

A. Causation

Defendant argues plaintiffs have not adequately pled that defendant's interference caused its damages. The Court disagrees. The complaint alleges numerous wrongful acts by defendant and states defendant "succeeded in blocking PNE's and FairPoint's efforts to consummate the sale of PNE's customers to FairPoint," that "FairPoint ultimately backed out of the deal," and that "[a]s a result of PSNH's actions, PNE and Resident Power have suffered damages." (Complaint ¶¶ 98, 112, 138.) Although the complaint could make clearer why FairPoint backed out of the deal, "New Hampshire is a notice pleading jurisdiction, and, 'as such, [the Court] take[s] a liberal approach to the technical requirements of pleadings." City of Keene v. Cleaveland, __ N.H. __, 118 A.3d 253, 263 (2015) (brackets omitted) (quoting Porter v. City of Manchester, 151 N.H. 30, 43 (2004)). Thus, construing all inferences in the light most favorable to plaintiffs, the complaint implies FairPoint broke the P&S, at least in part, because of defendant's wrongful conduct. See Witte v. Desmarais, 136 N.H. 178, 187 (1992) ("A more particular claim of causation, tying a specific breach to a specific harm, would of course be more helpful to the defendants and the court, but it is not required to survive a motion to dismiss.").

B. Noerr-Pennington Doctrine

Count I, paragraph 137(d), alleges defendant persuaded the PUC to oppose and threaten prosecution of FairPoint's attempts to resubmit electronic enrollments and Resident Power's efforts to transfer former PNE customers from Default Service. Defendant seeks dismissal of this count under the Noerr-Pennington doctrine. Under this doctrine, "many actions under various antitrust or tort theories against businesses

or individuals are prohibited where the challenged activity involves lobbying, despite the defendant's anticompetitive or otherwise injurious purpose or effect." Hamilton v. Accu-tek, 935 F. Supp. 1307, 1316 (E.D.N.Y. 1996). "The doctrine developed in large part to protect the First Amendment right to petition government. Shielded activity includes petitioning . . . administrative bodies . . . ." Id. (citations omitted). Noerr–Pennington immunity applies to "a wide range of activities in addition to traditional lobbying, including publicity campaigns, sales and marketing efforts, and court litigation." Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173, 189 (S.D.N.Y. 2006). As such, Noerr-Pennington immunity applies to defendant's act of persuading the PUC to take certain action with respect to plaintiffs.

Although the Noerr-Pennington doctrine initially developed as a shield against antitrust claims, it now applies to various state law claims. The New Hampshire Supreme Court has applied it to Consumer Protection Act claims. Green Mountain Realty Corp. v. Fifth Estate Tower, LLC, 161 N.H. 78, 89–90 (2010). Other jurisdictions apply it to various tort claims including tortious interference with contract. Hamilton, 935 F. Supp. at 1317; see Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 102 (2d Cir. 1983) (applies to tortious interference with business expectancy claims); Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) (applies to "claims brought under federal and state laws, including . . . common law tortious interference with contractual relations"). Accordingly, the doctrine applies to the tortious interference claims in this case.

Plaintiff suggests defendant's conduct is not subject to Noerr-Pennington because the doctrine "withholds immunity from 'sham' activities, which although

'ostensibly directed toward influencing governmental action, [are] a mere sham to cover an attempt to interfere directly with the business relationships of a competitor." Green Mountain, 161 N.H. at 89–90 (alteration in original) (quoting Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (1993)). However, a "successful effort to influence governmental action certainly cannot be characterized as a sham." Prof'l Real Estate Investors, 508 U.S. at 58 (quotation and ellipses omitted). Because the complaint alleges defendant succeeded in persuading the PUC, defendant's efforts were not a sham.

Plaintiffs argue Noerr-Pennington immunity cannot apply on a motion to dismiss because it involves questions of fact. While the Noerr-Pennington doctrine may sometimes be inappropriate on a motion to dismiss, see Hoffman-La Roche Inc. v. Genpharm Inc., 50 F. Supp. 2d 367, 380 (D.N.J. 1999), there is no absolute bar to applying it on a motion to dismiss, see Suburban Restoration Co., 700 F.2d at 99; Doron Precision, 423 F. Supp. 2d at 192. Here, based on the Noerr-Pennington doctrine, the facts pled in Count I, paragraph 137(d), cannot constitute a legal basis for relief. Accordingly, Count I, paragraph 137(d), of plaintiffs' complaint is dismissed.

C. Improper Conduct

Defendant argues the remaining conduct giving rise to Count I was not improper because it was protected by PUC and ISO-NE regulations and tariffs. If defendant's conduct was protected by law, it was not "improper." Hughes, 152 N.H. at 41 (exercising statutory right not improper); Roberts, 138 N.H. at 540 (exercising contractual right not improper).

With respect to Count I, paragraph 137(a), defendant argues refusing to perform a one-time, off-cycle transfer of PNE accounts to FairPoint was not improper because it was permissible under tariffs and regulations. Under the PUC Tariff, defendant may only transfer a customer at the time of the customer's meter reading. Puc 2004.07(b) provides a CEPS may request an off-cycle meter reading subject to "at least 5 business days' written notice to the utility" and that the utility "may deny any request for an off-cycle meter reading if proper notice . . . is not given." The Complaint alleges PNE requested an "immediate[]" off-cycle meter reading. (Complaint ¶ 66.) Thus, defendant argues it had an absolute right to refuse to make an off-cycle meter reading and off-cycle transfer. Plaintiffs respond that Puc 2004.07(b)(3) requires that, if a utility denies a request for an off-cycle reading based on lack of proper notice, then the utility must negotiate a reasonable extension of time for the completion of the off-cycle meter reading. Plaintiffs argue defendant did not do this, and so it did not comply with the applicable tariffs and regulations.

With respect to Count I, paragraphs 137(b) and (c), defendant argues tariffs and regulations required it to delete the electronic enrollments for the transfer of PNE accounts to FairPoint and replace them with enrollments for transfer to Default Service. Specifically, the ISO-NE Tariff required defendant to take responsibility for PNE's load asset after PNE defaulted. Further, the ISO-NE Tariff states that once a CEPS is suspended, it "shall have no ability so long as it is suspended (i) to be reflected in the ISO's settlement system, including any bilateral transactions, as either a purchaser or a seller of any products or services sold through the New England Markets." (Def.'s Ex. 2 at 140.) Likewise, Puc 2003.01(d) provides suspended CEPSs cannot participate in

retail electricity markets. Therefore, once PNE defaulted, defendant argues, it lost any rights respecting its former customers and could not transfer its customers to FairPoint. Moreover, defendant contends it had to delete the pending enrollments for transfer to FairPoint to prevent customers from being assigned to multiple suppliers in a single billing period, which the PUC Tariff forbids.

Plaintiffs argue defendant remained obligated to transfer its customer accounts to FairPoint even after defendant assumed responsibility for PNE's load asset. They rely on the ISO-NE Tariff statement that "any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load asset shall be assigned to the relevant unmetered load asset(s) unless and until the host Market Participant for such load assigns the obligation to serve such load to another asset." (Def.'s Ex. 2 at 140.) Plaintiffs argue this means PNE could assign its load asset despite its default.

Determining whether the conduct alleged in Count I was improper requires interpretation of a complex array of provisions from the ISO-NE Tariff, the PUC Tariff, and PUC regulations. As such, it is appropriate, based on the doctrine of primary jurisdiction, for the PUC, rather than this Court, to resolve this question. This doctrine provides, "a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it." N.H. Div. of Human Servs. v. Allard, 138 N.H. 604, 607 (1994) (quoting Wisniewski v. Gemmill, 123 N.H. 701, 706 (1983)); see United States v. W. Pac. R. Co., 352 U.S. 59, 64 (1956) (doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution

of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body"). When the doctrine applies, the Court may suspend the proceedings before it "pending referral of such issues to the administrative body for its views." W. Pac. R. Co., 354 U.S. at 64. "Application of the doctrine is discretionary with the court." Nev. Power Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 102 P.3d 578, 588 (Nev. 2004).

The PUC clearly has concurrent jurisdiction to resolve this dispute, as the complaint alleges wrongful acts by a public utility and requires interpretation of the tariffs and regulations governing CEPSs. See RSA 365:1 (granting the PUC jurisdiction over "any thing or act claimed to have been done . . . by any public utility in violation of any provision of law"); RSA 374-F:3, IV (granting the PUC the authority to monitor companies providing transmission or distribution services); RSA 374-F:7 (granting the PUC authority to regulate CEPSs).

Nonetheless, plaintiffs argue the Court should not defer the case to the PUC because it involves straightforward questions of law that are proper for this Court. The New Hampshire Supreme Court held it proper for the district court to construe a statute affecting utilities. Nelson v. Pub. Serv. Co. of N.H., 119 N.H. 327, 330 (1979). The Court reasoned:

> The issue before us does not involve the type of rate case that is usually within the commission's sole expertise. It is simply a case involving a claim by a ratepayer that he has been overcharged, the resolution of which involves interpretation of a statute. The courts may properly decide this purely legal question. This case does not involve the complex issues of rates, fair return, distribution of rates among classes, or other matters better left to the commission.

Id. (citations omitted). However, courts may properly exercise the primary jurisdiction doctrine in matters requiring tariff interpretation. See Distrigas of Mass. Corp. v. Bos. Gas Co., 693 F.2d 1113, 1118 (1st Cir. 1982).

The resolution of whether the conduct in Count I, paragraphs (a) through (c), was improper requires interpretation not just of statutes, but of tariffs and regulations within the scope of the PUC's expertise. The questions to be resolved are hardly straightforward. While "jurisdiction over contract or tort claims made against a public utility usually rests with the courts," Summit Props, Inc. v. Pub. Serv. Co. of N.M., 118 P.3d 716, 722 (N.M. Ct. App. 2005), this is not a typical tort claim. Rather, complex matters of tariff and regulatory interpretation are integral to this claim, indicating the PUC is best equipped to fairly decide whether defendant's conduct was improper. Therefore, the Court declines to dismiss Count I and instead refers Count I to the PUC to determine if defendant acted improperly based on the conduct alleged in paragraphs 137(a) through (c). Should the PUC find defendant acted improperly, this Court will decide the remainder of this claim.

IV. Tortious Interference with Contractual Relations (Count II)

Count II alleges defendant tortiously interfered with Resident Power's aggregation agreements by persuading PUC staff to inform Resident Power's customers that Resident Power was no longer their aggregator and by threatening Resident Power and FairPoint with "slamming" charges. (Complaint ¶ 142.) As previously discussed, defendant is entitled to Noerr-Pennington liability on this claim. Both bases for this claim allege successful efforts by defendant to influence the PUC. As such, plaintiffs cannot sustain a claim for tortious interference with contractual

relations based on these actions and so Count II is dismissed. Hamilton, 935 F. Supp. at 1316; Green Mountain, 161 N.H. at 89–90.

V. Consumer Protection Act (Count III)

Count III alleges defendant violated the Consumer Protection Act ("CPA") by engaging in the following unfair or deceptive practices: (a) refusing to perform a one-time, off-cycle transfer of PNE customer accounts to FairPoint; (b) failing to inform plaintiffs it could have transferred around ninety percent of their customer accounts to Default Service on an automated basis; (c) negotiating a later date with ISO-NE by which defendant would assume PNE's load asset; (d) deleting 7,300 pending electronic enrollments for the transfer of PNE's customer accounts to FairPoint; (e) replacing those enrollments with enrollments for the transfer of PNE's accounts to Default Service; (f) pursuing an aggressive media campaign that disparaged and tarnished PNE's reputation; (g) withholding customer payments due to PNE; (h) persuading PUC staff to oppose and threaten prosecution of FairPoint's attempts to resubmit the electronic enrollments that defendant deleted and Resident Power's efforts to transfer PNE's former customer accounts from Default Service; and (i) prompting PUC staff to initiate "show cause" proceedings against plaintiffs. (Complaint ¶ 146.)

Defendant argues these acts are exempt from the CPA under RSA 358-A:3, I, which exempts claims arising out of "trade or commerce that is subject to the jurisdiction of . . . the public utilities commission." "The burden of proving [this] exemption[] . . . shall be upon the person claiming the exemption." RSA 358-A:3, V. To determine whether trade or commerce is "'subject to the jurisdiction' of the PUC, [the Court] examine[s] the statutes that define the PUC's powers and authority." Rainville v. Lakes

Region Water Co., Inc., 163 N.H. 271, 275 (2012). "The issue is not whether a party's *deceptive practice* is subject to the PUC's jurisdiction, but whether the practice occurred in the conduct of '*trade or commerce*' that is subject to the PUC's jurisdiction." Id. at 276 (brackets omitted). "[T]he exemption . . . does not depend on the identity or status of the entity seeking . . . protection." Monzione v. U.S. Bank, N.A., No. 12-CV-433-LM, 2013 WL 310013, at *2 (D.N.H. Jan. 25, 2013).

If the unfair practice is incidental to the trade or commerce subject to the PUC's jurisdiction, the exemption does not apply. See State v. Empire Auto. Grp., Inc., 163 N.H. 144, 146 (2011); Elmo v. Callahan, No. 10-CV-286-JL, 2012 WL 3669010, at *9–10 (D.N.H. Aug. 24, 2012). For example, in Empire Automotive Group, the defendant argued his act of falsifying car inspection stickers was exempt from the CPA based on the CPA provision exempting trade or commerce subject to the jurisdiction of the bank commissioner. 163 N.H. at 145. The bank commissioner regulates persons who sell or finance motor vehicles using retail installment contracts. Id. at 146. Although the defendant was licensed to engage in such business by the bank commissioner, the claim involving falsified inspection stickers had "nothing to do with" the financing of vehicles and so the Court held it was not exempt. Id.

"The PUC . . . is endowed with only the powers and authority which are expressly granted or fairly implied by statute." In re Pub. Serv. Co. of N.H., 122 N.H. 1062, 1066 (1982). Plaintiffs argue the PUC's jurisdiction is limited to disputes between customers and utilities because RSA 363:17-a designates the PUC as "the arbiter between the interests of the customer and the regulated utilities." However, nothing in that statute confines the PUC solely to that role. To the contrary, the PUC has "the

general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title." RSA 374:3; see also RSA 365:1 ("Any person may make complaint to the commission by petition setting forth in writing any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law . . . .").

Further, RSA 374-F, which governs the deregulation of New Hampshire's electricity market, shows the PUC may regulate disputes between CEPSs and utilities. For example, RSA 374-F:7 authorizes the PUC to regulate CEPSs and aggregators. Further, RSA 374-F:3, IV provides, "[n]on-discriminatory open access to the electric system for wholesale and retail transactions should be promoted," and authorizes the PUC to "monitor companies providing transmission or distribution services and take necessary measures to ensure that no supplier has an unfair advantage in offering and pricing such services." Plaintiffs' claims arise out of allegations that defendant, in the course of providing distribution services, took anti-competitive measures to harm PNE in its capacity as a CEPS. Therefore, plaintiffs' claims arise out of trade or commerce that is plainly subject to the PUC's jurisdiction under RSA 374-F and so is exempt from the CPA. Therefore, Count III is dismissed.

VI. Negligence (Counts IV and V)

Counts IV and V allege defendant acted negligently by breaching its duty to act as a neutral and agnostic gatekeeper between plaintiffs and their customers and to facilitate the transfer of plaintiffs' customer accounts to FairPoint. Count IV alleges defendant breached this duty by: (a) deleting 7,300 pending electronic enrollments for the transfer of PNE customer accounts to FairPoint; (b) replacing those enrollments with

new enrollments for the transfer of PNE accounts to Default Service; and (c) persuading PUC staff to oppose and threaten prosecution of FairPoint's attempts to resubmit the electronic enrollments that defendant deleted. (Complaint ¶ 153.) Count V alleges defendant breached this duty by: (a) refusing to perform a one-time, off-cycle transfer of PNE accounts to FairPoint; (b) failing to inform PNE and Resident Power that it could have transferred approximately ninety percent of their customer accounts on an automated basis; and (c) negotiating with ISO-NE to assume PNE's remaining load asset on February 20, 2013, rather than an earlier date. (Complaint ¶ 158.)

A requirement of any negligence action is that the defendant owed a common law duty of care to the plaintiff. Marquay v. Eno, 139 N.H. 708, 714 (1995). "Unless and until some relationship exists between the person injured and the defendant, by which the latter owes a duty to the former, there can be no liability for negligence." Am. Jur. 2d Negligence § 89 (1989). Although relationships giving rise to duty may be created by statute or regulation, not every statute or regulation creates a common law duty of care. Marquay, 139 N.H. at 714; Am. Jur. 2d Negligence § 89. "The question of whether, in any particular set of circumstances, one party owes a duty of care to another is entirely one of law to be determined by the courts." Donohue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 877 (1978).

Plaintiffs cite no authority setting forth a duty for a host utility to act as a neutral, agnostic gatekeeper between CEPSs and their customers. Rather, they allege this duty arises from the general risks defendant should have perceived in its role as a utility that delivers electricity for competing suppliers. Plaintiffs point to several tariff provisions to support this contention.

The Court finds defendant owed no common law duty of care to plaintiffs. Defendant and PNE are merely competitors that owe certain statutory and regulatory obligations to each other. At common law, competitors owe no duties to one another. Stolz v. Wong Commc'ns Ltd. P'ship, 31 Cal. Rptr. 2d 229, 238 (1994). The fact that statutes, regulations, and tariffs require host utilities to transmit CEPSs' electricity and take certain other actions respecting CEPSs does not create a common law duty of care.[1] These statutes and regulations have not abrogated host utilities' right to compete against CEPSs. Creating a general duty of care owed by host utilities to CEPSs, in contrast, would largely undermine host utilities' right to compete against CEPSs. Moreover, the PUC has implemented an array of regulations and tariffs to balance host utilities' roles in delivering their competitors' electricity. To impose additional common law duties would undermine the PUC's careful efforts to balance the competing interests of host utilities and CEPSs. As such, plaintiffs have failed to state a claim for negligence because defendant owed no common law duty of care to plaintiffs. Accordingly, Counts IV and V are dismissed.[2]

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[1] Plaintiffs argue, "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." (Pl.'s Obj. 22.) The Court disagrees with plaintiffs' characterization of the cases it cites for this proposition. At best, the cited cases suggest that, when a common law duty of care otherwise exists, a customer or member of the public may maintain a negligence action against a utility company, despite the existence of a tariff. See Consumers Guild of Am., Inc. v. Ill. Bell. Tel. Co., 431 N.E.2d 1047, 1051 (Ill. App. Ct. 1981); State Farm Fire & Cas. Ins. Co. v. PECO, 54 A.3d 921, 925–26 (Pa. Super. 2012); Behrend v. Bell Tel. Co., 363 A.2d 1152, 1158 (Pa. Super. Ct. 1976), vacated and remanded on other grounds, 374 A.2d 536 (Pa. 1977); Mobile Elec. Serv., Inc. v. FirsTel, Inc., 649 N.W.2d 603, 605 (S.D. 2002); see also Olson v. Pac. Nw. Bell Tel. Co., 65 Or. App. 422, 425 (1983) (allowing negligence actions by customer for utility's statutory violation based on Oregon statute allowing such actions). These cases say nothing of a CEPS's right to sue a host utility and do not create a *per se* right to sue in negligence for violation of a utility tariff or regulation.

[2] Even if defendant did owe a duty of care to plaintiffs, Count IV, paragraph 153(c), and Count V, paragraph 158(c), would be dismissed pursuant to the Noerr-Pennington doctrine.

Conclusion

Accordingly, for the foregoing reasons, defendant's motion to dismiss is GRANTED, with respect to Count I, paragraph 137(d); Count II; Count III; Count IV; and Count V. The remainder of Count I is referred to the PUC to determine whether defendant acted "improperly" based on the conduct alleged in paragraphs 137(a) through (c). The proceedings in this Court are stayed pending that determination.

SO ORDERED.

11/25/15
Date

K. C. Brown
Kenneth C. Brown
Presiding Justice