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' SUR-REPLY IN SUPPORT OF OBJECTION TO PSNH'S MOTION TO DISMISS

In the wartime case of *Liversidge v. Anderson*, (1942) A.C. 206, Lord Atkin addressed, in a now-famous dissent in the UK House of Lords, the danger of absolute power, quoting from a well-known children's novel: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master, that's all." *Id.* at 245 (quoting L. Carroll, *Through the Looking Glass*, ch. 6).

PSNH's Reply expresses a similar, problematic view and demonstrates the danger inherent in yielding so much power to a public utility in a de-regulated marketplace: when PNE defaulted, PSNH unilaterally determined it could use that event as an opportunity to benefit itself, and it used its unique authority in the market to increase its revenue and customer base and bring PNE and Resident Power (two competitors) to their knees. The Reply overlooks facts identified in the Complaint, misinterprets case law, and repeats and recites many of the same arguments from PSNH's Motion to Dismiss. The Court should deny the Motion.

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

A. Causation

1. The FairPoint Contract

PSNH argues "Plaintiffs point to no paragraph of the Complaint alleging that PSNH caused FairPoint not to perform." Reply at 1. This is inaccurate. The Complaint alleges PSNH interfered with the FairPoint Contract, and caused FairPoint not to perform, by

- Deleting the FairPoint Electronic Enrollments;
- Opposing FairPoint's attempts to re-submit the Electronic Enrollments; and
- Opposing Resident Power's efforts to transfer to FairPoint the former PNE customer accounts placed on PSNH's Default Service.

Obj. at 12-13. PSNH does not address these allegations.

Instead, it focuses solely on Paragraphs 98 and 112 of the Complaint, which allege that PSNH's conduct allowed PNE's customers to "choose a supplier other than FairPoint." Reply at 1-2. PSNH contends customers had that right all along, citing Puc 2004.05(l)(2). *See id.* That rule, however, requires only that a CEPS *provide a notice* to customers that they *may* choose an alternate supplier if that CEPS transfers them to another CEPS and ceases to provide service to them. *See* Puc 2004.05(l)(2). PNE and Resident Power complied with that requirement with respect to the transfer of their customers to FairPoint. Compl. ¶ 55. Further, those customers had authorized Resident Power to choose FairPoint as their supplier pursuant to their aggregation agreements. *Id.* ¶ 51. The rule does not authorize PSNH to *disrupt* these transfers and engineer a way for those customers to choose a CEPS other than the one they chose (FairPoint). *See* Puc 2004.05(l)(2).

2. Resident Power

PSNH also argues "the Complaint does not allege that [the aggregation] agreements terminated." Reply at 2. This is incorrect. The Complaint alleges PUC Staff forced PNE and Resident Power to include additional language in a customer notice stating Resident Power was no longer the aggregator for these customers. Compl. ¶ 105. This communication from Resident Power to its customers effectively terminated the agreements. *See id.*

B. Improper Interference

PSNH argues "Counts I and II of the Complaint are devoid" of any claim that "PSNH wrongfully induced FairPoint to breach the contract." Reply at 3. This is inaccurate: PSNH overlooks that New Hampshire courts apply a broad standard when determining whether a plaintiff can show improper interference. *See* Obj. at 6. A plaintiff must show only "'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)) (emphasis added). The defendant's interference need not be directed at the plaintiff; the plaintiff must only be a "known victim" of the defendant's conduct. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1163 (2003).[1]

Here, Plaintiffs allege PSNH *directly* interfered with the FairPoint Contract, and that conduct induced FairPoint to back out of the transaction, by:

---

[1] PSNH attempts to distinguish several cases cited in the Objection by arguing they involved acts that were "wrongful apart from the interference itself." Reply at 3 n.5. This purported distinction lacks merit because, as demonstrated below, the Complaint alleges that PSNH engaged in conduct that was wrongful and/or improper apart from its interference in the FairPoint Contract. *See infra* pp. 3-4.

- Delaying the transfer of former PNE customer accounts to FairPoint, in particular, by violating the requirement in Puc 2004.07(b) that it effectuate a one-time, off-cycle transfer and the Tariff provision requiring it to process a change in supplier service within two business days of receiving a valid Electronic Enrollment;

- 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 (contrary to the Tariff provision referenced above);

- 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's Default Service.

Obj. at 9, 24-25, 39.

PSNH's insistence that Plaintiffs have not alleged this interference was "improper" or that Count I does not identify some duty PSNH violated is also incorrect. *See* Reply at 3 & n.5. The Complaint alleges PSNH's conduct was independently wrongful. As noted above, for example, PSNH's delay in transferring former PNE customer accounts to FairPoint violated the requirement in Puc 2004.07(b) that it effectuate a one-time, off-cycle transfer upon request and the Tariff provision requiring it to process a change in supplier service within two business days of receiving a valid Electronic Enrollment. *See* Obj. at 24-25, 39. PSNH also violated this Tariff provision when it deleted FairPoint's 7,300 pending Electronic Enrollments, which ultimately prevented the transfer of those former PNE customer accounts to FairPoint. *Id.* at 24-25.

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

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

PSNH insists the "trade or commerce" alleged in support of Plaintiffs' RSA 358-A claim falls within the scope of the PUC's jurisdiction. Reply at 4-7. This is incorrect. PSNH agrees the PUC "is endowed with only the powers and authority which are *expressly granted or fairly implied by statute*." Obj. at 17. The PUC's authority "*may not be derived from other*

generalized powers of supervision." *Id.* For the CPA exemption to apply, the PUC's statutes must "grant [it] the authority to supervise or regulate the *trade or commerce* in which the defendants' deceptive practice occurred." *Id.* at 15. The PUC agrees its supervisory authority "does not confer jurisdiction over transactions the [PUC] may wish to adjudicate but for which there is no statute that expressly addresses the transaction." *Id.* at 17-18. The PUC is "the arbiter between the interests of the customer and . . . utilities." *Id.* at 18.

The transaction – or "trade or commerce" – here concerns a business relationship between a public utility (PSNH) and two CEPSs (PNE and Resident Power) and PSNH's use of that relationship to impact a transaction between Plaintiffs and FairPoint. Although PSNH identifies several statutes and PUC rules concerning off-cycle meter reads, EDI standards, and a requirement that CEPSs and PSNH enter into service agreements,[2] none of those statutes or rules expressly provides the PUC with jurisdiction to supervise or regulate a business dispute between a utility and CEPS.

The unfair and deceptive conduct here occurred in PSNH's 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 disrupted, prevented, and obstructed the transfer of 7,300 customer accounts from PNE to FairPoint. *Id.* at 19.

PSNH again relies heavily on *Rainville v. Lakes Region Water Company, Inc.*, 163 N.H. 271 (2012), to argue the PUC's jurisdiction governs business disputes between a utility and a CEPS. *See* Reply at 7.[3] In *Elmo v. Callahan*, 2012 DNH 144, the New Hampshire Supreme

---

[2] PSNH did not do this in its Motion.

[3] PSNH also argues RSA Ch. 374-F "provides the PUC with specific authority to regulate CEPSs, utilities, and the trade or commerce under which this dispute arose." Reply at 7-8. As noted above, the PUC expressly agreed that the supervisory authority granted by RSA 374:3 "does not confer jurisdiction over transactions the [PUC] may wish to adjudicate but for which there is no statute that expressly addresses the transaction." Obj. at 17-19. As also

Court clarified the meaning of *Rainville*: it "simply stands for the proposition that in determining whether the exemption applies" "[t]he issue is . . . whether the [deceptive] practice occurred in the conduct of '*trade or commerce' that is subject to the [agency's] jurisdiction.*" *Elmo*, 2012 DNH 144, 35 (emphasis added).[4] 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. In contrast, here, PSNH's deceptive conduct occurred in its interaction and relationship with two competing businesses (PNE and Resident Power), not in some aspect of trade or commerce that is subject to the PUC's jurisdiction (PSNH serving its customers).

It is irrelevant that PSNH's conduct may have been related to areas over which the PUC supervises with respect to utilities' relationships with their customers (such as off-cycle meter reads or the EDI process). PSNH does not address *Elmo*, and it also does not address *State v. Empire Automotive Group*, 163 N.H. 144 (2011).[5] *See* Reply at 4-7. In both cases, the fact that the conduct alleged 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. Obj. at 19-20. Those areas over which the agency had jurisdiction had nothing to do with the fraudulent conduct at issue in those cases. *Id.* Here, the PUC's requirements concerning utilities' relationships with their customers – e.g., off-cycle meter reads, the EDI process, or service agreements between utilities and CEPSs – do not relate to PSNH's deceptive conduct in disrupting and interfering with a business transaction between Plaintiffs and FairPoint.

---

demonstrated above, PSNH does not identify a single section of RSA Ch. 374-F that governs this dispute. *See* Reply at 7-8.

[4] PSNH quotes this exact language in its Reply. *See* Reply at 7.

[5] PSNH also fails to address the remaining authorities cited by Plaintiffs in this section of the Objection.

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

PSNH reiterates that the Complaint does not identify a duty on its part that could support a negligence claim. Reply at 8-9. This is inaccurate. A duty of care may be derived from a broad number of sources, and it exists simply if the resulting harm was reasonably foreseeable; the Objection identifies several sources of PSNH's duty of care. Obj. at 22-24.[6] PSNH does not identify a single authority holding that it did *not* have such a duty in these circumstances.

PSNH also contends a negligence claim cannot be asserted without a supporting violation of an obligation in the Tariff. *See* Reply at 8-9. It cites no authority for this proposition. The Objection demonstrates PSNH's duty of care derives from several foreseeable risks, not just those identified in the Tariff. Obj. at 22-24. Indeed, PSNH's own Motion concedes the Tariff "does not contemplate the circumstances of this case where customers of a suspended supplier were switched through a process involving ISO-NE." Obj. at 23-24.

Here, PSNH's duty of care is derived from the general risks it reasonably should have perceived in its unique role in the market: it "owns and controls the distribution system through which electricity supplied by its *competitors* is delivered to customers." *Id.* PSNH cannot credibly assert that these conflicting responsibilities do *not* pose inherent and foreseeable risks of abuse such that a duty of care would not arise from PSNH to its competitors. Otherwise, taking PSNH's view, a public utility in these circumstances could act with impunity, abuse its power, harm its competitors, and undermine the goals of the de-regulation of the marketplace.

[6] PSNH argues again that the Complaint alleges "that the source of every duty relating to the transfer of accounts and to default service is the PUC Tariff." *See* Reply at 9. This is inaccurate, and Plaintiffs do not concede PSNH's duty derives entirely from the Tariff. *See* Obj. at 23-24.

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

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

PSNH raises three points to argue this alleged fact should not survive its Motion to Dismiss. First, it claims "the desired transfer of customers to FairPoint was not immediate but . . . was to occur only at the next meter reading cycle date for each customer." Reply at 10. This contention overlooks that the Complaint alleges PSNH "transferred" 314 customer accounts on February 15, the day after PNE defaulted. Obj. at 28. PSNH then transferred additional accounts after February 15, totaling approximately 1,200 accounts by February 19. *Id.* These allegations are not "amorphous accusatory statements." *See* Reply at 9. They are facts that must be taken as true.

Second, PSNH imputes a right into the ISO-NE Tariff that does not exist so it can justify its deletion of FairPoint's Electronic Enrollments. *See* Reply at 10-11. Notably, PSNH does not dispute that it could have decided *not* to delete FairPoint's Enrollments or that its EDI system required their deletion (whereby those customer accounts would then have been transferred to FairPoint, following a brief stay on PSNH's Default Service, on their next meter reading date). *See id.* PSNH alleges, instead, that, because it became "the de facto supplier" for PNE's former customer accounts, and the Tariff provides PSNH "shall accept no more than one Supplier per month," PSNH was "within its rights to delete the FairPoint enrollments, *i.e.*, to avoid the transfer to a second supplier in the same meter reading period." *Id.*

PSNH cites no authority for this action, and no support for this strained interpretation of the ISO-NE Tariff. PSNH is not a "Supplier" under the Tariff: the Tariff language restricts *PSNH* from "accepting" more than one Supplier [other CEPSs] per month; it does not confer "Supplier" status on *PSNH* when PSNH must assume the responsibility of supplying electricity

to customers of a defaulted supplier. Obj. at 27. Indeed, applying the Tariff language here would be illogical: PSNH cannot *accept itself* as a Supplier. *See id.*[7]

Third, PSNH argues Plaintiffs' reading of the Tariff language concerning the acceptance of more than one supplier in a month is "foreclosed by Order No. 25,660 . . . wherein the PUC decided that under the terms of the ISO-NE Tariff, PNE by its default and suspension 'initiated the drop of its own customers' to PSNH's default service." Reply at 11. That is inaccurate. Order No. 25,660 characterizes the transfer of PNE's load asset to PSNH as an "assignment." Obj. at 26. It characterizes that transfer as a "drop" solely for purposes of determining whether PSNH was entitled to impose a selection charge on PNE. *See id.*

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

PSNH's interpretation of Puc 2004.07(b) and argument that it does not apply are incorrect.[8] When examining the language of a statute or rule, a court "ascribe[s] the plain and ordinary meaning to the words used." *Evans v. J Four Realty*, 164 N.H. 570, 571 (2013). A court will "interpret legislative intent from the statute as written and *will not consider what the legislature might have said or add language that the legislature did not see fit to include*." *Id.* (emphasis added) "If the language is plain and unambiguous," a court "'need not look beyond the statute for further indications of legislative intent.'" *Doggett v. Town of N. Hampton Zoning Bd. Of Adjustment*, 138 N.H. 744, 745 (1994) (quoting *Silva v. Botsch*, 120 N.H. 600, 601

[7] PSNH also implies Plaintiffs' argument concerning customer choice is meritless because these customers were not provided a choice. *See* Reply at 11. This is inaccurate. As demonstrated above, PNE's former customers authorized Resident Power to choose FairPoint as their supplier under their aggregation agreements. *See supra* p. 2.
[8] Plaintiffs did not request PSNH to "read nearly 8,000 customer meters scattered throughout New Hampshire over a holiday weekend." *See* Reply at 11. Rather, their request invoked Puc 2004.07(b), which requires the parties to negotiate an extension of the time necessary to complete the meter readings, *see* Memo, Exhibit 8, and they offered to pay up to $65,000 for PSNH's costs in facilitating this one-time transfer. Compl. ¶ 66.

(1980)). A court departs from this approach only if it "would lead to an absurd or unjust result." *Doggett*, 138 N.H. at 745.

The phrase "[w]hen a residential or small commercial electric customer has failed to meet any of the terms of its agreement for service" appears in the *preceding* section (a) in Puc 2004.07. It does not appear in or modify section (b), which contains the requirement concerning requests for one-time, off-cycle transfers. That section states, without restriction, "*[n]othing* shall prevent a CEPS from requesting an off-cycle meter reading." Puc 2004.07(b) (emphasis added) If the PUC saw it fit to place conditions on that right, it would have included the same or a similar prefacing phrase in Puc 2004.07(b). It did not. Accordingly, only if a CEPS does not comply with the five-day written notice requirement can a utility deny an off-cycle request.[9] However, a utility then must "negotiate" an extension of time for completion of the requested meter reading. This flexibility alleviates any hardship a utility may experience in conducting a large number of meter reads in a short period of time. *See id.* PSNH concedes it failed to comply with Puc 2004.07(b). *See* Reply at 11-12.[10]

PSNH relies once more on PUC Order 25,660. *See* Reply at 12-13. It alleges the Order contradicts Plaintiffs' argument that their customers were assigned to FairPoint *before* PNE's default, apparently because the Order holds that PNE's default "automatically assigned" these customers to PSNH *after* the default. *See* Reply at 12-13. This assertion is logically invalid. Under the FairPoint Contract, PNE assigned 8,500 customer accounts to FairPoint. PNE and FairPoint then undertook practical efforts to effectuate that transition: FairPoint submitted

---

[9] PSNH reiterates that PNE's default rendered its one-time, off-cycle meter reading request moot. *See* Reply at 12-13 & n.16. PSNH again fails to identify any authority holding that PNE's default mooted a request for an immediate transfer of customer accounts to a *third party* (FairPoint). *See id.*

[10] PSNH fails to explain how Plaintiffs' prior representation that "no such off-cycle meter reads would be necessary" is relevant, or excuses PSNH for its failure to comply with Puc 2004.07(b). Indeed, the rule does not preclude a CEPS from modifying its needs if exigent circumstances arise.

Electronic Enrollments for the transfer of the accounts from PNE to FairPoint, and PSNH processed those Enrollments and began transferring accounts right away. The fact PNE's load asset was assigned to PSNH upon its default was of no consequence: the ISO-NE Tariff provision cited by PSNH allowed PSNH, following the assignment of PNE's customer accounts to PSNH, to "*assign[] the obligation to serve such load to another asset.*" Memo, Exhibit 2 (emphasis added). PNE and FairPoint had set the stage for the completion of the assignment of PNE's remaining customer accounts to FairPoint – *if* PSNH had not deleted the remaining 7,300 Enrollments. PUC Order No. 25,660 explains PSNH became an "agent" of PNE: it should have honored PNE's pending request for a one-time, off-cycle transfer of PNE's former customer accounts, or simply allowed PNE's remaining customer accounts to transfer to FairPoint pursuant to the remaining Enrollments. PSNH cites no authority or basis for its elective decision not to honor either request and interfere with the PNE/FairPoint transaction.[11]

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 claims that, because the PUC Tariff contains no requirement that PSNH transfer PNE's former customer accounts to Default Service on an automated basis (or inform PNE of that ability), PSNH had no duty to do so,[12] and, thus, it has no liability for its failure to inform PNE of the same. *See* Reply at 13-14. This contention misses the point. Plaintiffs have not

---

[11] PSNH alleges "Plaintiffs . . . questioned the applicability of Puc 2004.07" in a March 2014 declaratory judgment proceeding before the PUC. Reply at 12 n.17. This is inaccurate. The declaratory judgment petition Plaintiffs filed requested only that PSNH include a provision in its Tariff concerning off-cycle meter readings. Reply, Exhibit C at 1. The petition is consistent with Plaintiffs' argument here: it argues "the availability of an off-cycle meter read is not constrained to circumstances where a customer has failed to meet any of the terms of its agreement with a CEPS." *See id.*

[12] PSNH again alleges it "had no duty to tell PNE what PNE already knew" because PUC Order 25,660 "made a specific finding that 'PNE knew that its suspension would result in the automatic assignment of its customers' to PSNH's default service." Reply at 13. That Order does not apply here. It focuses only on the narrow, Tariff-specific issue of *how* PNE's customers were placed 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. *See* Memo, Exhibit 10 at 6-7.

asserted a claim for breach of the Tariff; rather, the allegation above supports Plaintiffs' claims in Count III (violation of RSA 358-A) and Count V (negligence). *See* Compl. ¶¶ 146, 158. 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). The Complaint further alleges PSNH could have transferred approximately 90% of PNE's former customer accounts to Default Service on an automated basis. *Id.* ¶ 73. It is reasonable to infer that – given the fluid circumstances concerning PNE's default – this duty implies PSNH should have informed Plaintiffs of its ability to transfer customers to Default Service on an automated basis. *See id.*[13]

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

PSNH's challenge to this allegation again amounts to an attempt at a factual dispute. *See* Reply at 14. It claims "[t]he notice and Plaintiffs' prior admissions directly contradict this claim," and that it is "simply a conclusion unsupported by *any* fact." *Id.* The Court, however, is not required to resolve factual disputes at this stage: PSNH concedes in its Motion to Dismiss that "all plausible allegations pled in the Complaint *must be taken as true* for purposes of [its] Motion." Memo at 16. The ISO-NE notice and Plaintiffs' prior statements concerning PSNH's assumption of PNE's remaining load asset do not address whether PSNH and ISO-NE negotiated a different date by which PSNH would be required to assume PNE's remaining load asset. *See* Reply at 14-15. PSNH offers no other support for its assertion that the allegation that PSNH

[13] PSNH's insinuation that PNE could not have initiated an immediate transfer of customer to PSNH's Default Service because of the PUC Rules' requirement to provide 14 days' notice to each customer before the transfer is inaccurate. *See* Reply at 13-14. PNE and FairPoint requested and obtained a waiver of that requirement from the PUC on February 8, 2013, six days before PNE's default. Compl. ¶ 54.

negotiated a later date is "not plausible." *See id.* Plaintiffs' allegation must be taken as true for purposes of PSNH's Motion. *Gordonville*, 151 N.H. at 377.

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

PSNH isolates a single pleading it filed with the PUC (a supplemental motion to dismiss a petition filed by PNE) and argues that pleading constitutes the *only* fact Plaintiffs have alleged to support the claim that PSNH persuaded PUC Staff to oppose Resident Power's and FairPoint's attempts to re-submit the Electronic Enrollments. *See* Reply at 15-16. This is inaccurate.

PSNH filed its supplemental motion on February 19 (*not* February 27, as alleged in the Reply).[14] The Complaint alleges the language in that pleading that mischaracterized PNE's notice to its customers represented the *first* in a series of steps PSNH undertook to oppose Resident Power's efforts to transfer customer accounts from PSNH's Default Service. *See* Compl. ¶¶ 102-03. The Complaint then alleges PUC Staff – several days before it filed its Recommendation Memorandum to commence the "show cause" proceeding – adopted PSNH's position and forced the Plaintiffs to include similar language in a customer notice. *Id.* ¶ 105. The language PUC Staff insisted be inserted in the notice was nearly identical to PSNH's unqualified and inaccurate assertion in its February 19 supplemental motion. *See id.* ¶¶ 103, 105. PUC Staff followed this exchange with a threat to FairPoint that it could be exposed to slamming charges if it undertook steps to transfer customer accounts from PSNH's Default Service. *See id.* ¶ 106. Then, on February 23, PSNH challenged Resident Power's emergency petition for declaratory relief in private email communications with PUC Staff. *See id.* ¶¶ 109-10. PSNH, in part, misrepresented that PNE and Resident Power were abusing corporate formalities, and

[14] http://www.puc.state.nh.us/regulatory/Docketbk/2012/12-295/MOTIONS-OBJECTIONS/12-295%202013-02-19%20PSNH%20SUPP%20MOTION%20TO%20DISMISS.PDF

accused the Plaintiffs of being responsible for "this entire mess." *Id.* ¶ 110.[15] PUC Staff filed its Recommendation Memorandum several days later, on February 27.

PSNH also challenges Plaintiffs' allegation that PSNH first raised the issue of slamming to PUC Staff, stating, for the first time, that the assertion in PSNH's February 20, 2013 email to PUC Staff "reflects PSNH's *legal position* on the PUC Tariff and on its face, has nothing to do with slamming." Reply at 16 (emphasis added). This is incorrect. In his February 20 email, 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." Compl.¶ 89. 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.* PUC 2004.10(b) defines "slamming" as "initiating the transfer of a customer to a new CEPS or aggregator *without the customer's authorization.*" (Emphasis added.) Attorney Bersak's email focuses on customer "choice," and it urges PUC Staff to block the transfer of customer accounts to FairPoint. It raises facts sufficient to draw an inference that PSNH, in this email, insinuated threats of slamming against FairPoint.

V. Res Judicata Does Not Bar the Complaint

PSNH misunderstands the standard for *res judicata*. *See* Reply at 16. The doctrine requires a party, in a given case, to raise "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) (emphases added). Courts must determine whether the type of relief available in the first action is also available in the second action. *Gray v. Kelly*, 161 N.H. 160, 165 (2010). PSNH, in part, *reverses* this standard: it argues Plaintiffs should have raised all *factual* issues

[15] PSNH again omits any reference to PSNH's private email exchanges with PUC Staff. *See* Reply at 15-16.

concerning off-cycle meter reads, EDI enrollments, and when default service begins, etc., in PUC Docket IR 13-233, because they "arise from the same PUC Tariff [and] the same regulation." *See* Reply at 16. This interpretation of the *res judicata* standard is incorrect and should not be applied here. *See* Obj. at 38-43.

To the extent PSNH argues the claims in this proceeding arose out of the same factual transaction at issue in PUC Docket IR 13-233, that contention lacks merit. IR 13-233 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. Obj. at 40. 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. *Id.* It could have recovered *only* the customer payments PSNH had withheld and the selection charges PSNH had assessed. *Id.* The claims here concern different facts altogether, and the relief sought was not available and could not have been sought in IR 13-233. *See* Obj. at 41-42. *Res judicata* does not bar Plaintiffs' claims.

VI. The Doctrine of Primary Jurisdiction Does Not Apply, and the Court Should Exercise Jurisdiction Over This Case

Plaintiffs did not misconstrue the doctrine of primary jurisdiction. *See* Reply at 16. Rather, the Objection cites several cases in which a court exercised jurisdiction over a matter even where an administrative agency had *concurrent* jurisdiction or regulated the issues being decided. *See, e.g.*, Obj., *Exhibit D* (temporarily suspending PUC proceeding to allow intervenor to proceed with claims for negligence, unjust enrichment, violation of RSA 358-A, and breach of contract in Superior Court because the Court had jurisdiction over intervenor's dispute with PUC petitioner); *Nevada Power Co. v. Eighth Judicial District Court.*, 102 P.3d 578, 586-87 (Nev. 2004) (district court properly exercised 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); *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); *see also* Obj. at 46-47. PSNH does not address any of these authorities. *See* Reply at 16-18.

Instead, it argues, without support, that the PUC has jurisdiction over Plaintiffs' claims. Reply at 17. This contention overlooks *Nelson v. Public Service Co. of New Hampshire*, 119 N.H. 327 (1979),[16] where the New Hampshire Supreme Court held "[t]he language of RSA 365:1" – the statute that permits filing a complaint with the PUC – "contains no reference to exclusive *or primary jurisdiction.*" *Id.* at 329. The Court further held the "the statutory grant of jurisdiction to the district courts [like that of the superior courts] is broad and specific." *Id.* at 330. RSA 365:1 "does not deprive the district courts of their jurisdiction." *Id.*[17] PSNH's generalized argument fails to cite a single statute that provides the PUC with even *concurrent* jurisdiction over any of the claims in this case. *See* Reply at 16-18.

PSNH next argues that, because "this action involves an issue of first impression," it should be referred to the PUC. Reply at 17-18. In support, it relies on *Syntek Smiconductor Co.*

---

[16] PSNH cites and briefly discusses *Nelson* in a footnote. *See* Reply at 17 n.21. But it fails to harmonize its contention that the PUC has jurisdiction with the holding in *Nelson.*

[17] PSNH alleges Plaintiffs' reliance on *Wisniewski v. Gemmill*, 123 N.H. 701 (1983), and *Frost v. Commissioner, New Hampshire Banking Department*, 163 N.H. 365 (2012), is "misplaced." Reply at 17 n.22. This is inaccurate. In both cases, the New Hampshire Supreme Court held the trial court properly exercised its jurisdiction over a matter because the statute at issue did not grant the administrative agency jurisdiction. *See* Obj. at 47-48. Here, *Nelson* holds (and PSNH agrees) the statute governing claims before the PUC does not grant the PUC with *primary* jurisdiction. *See* Obj. at 44. PSNH fails to cite any other statute that grants the PUC with jurisdiction over the claims in this case. *See* Reply at 16-18. Accordingly, under *Wisniewski* and *Frost*, this Court should not refer this case to the PUC.

v. Microchip Tech., Inc., 307 F.3d 775 (9th Cir. 2002), and *Rovai v. Select Portfolio Servicing, Inc.*, No. 14-CV-1738-BAS (WVG), 2015 U.S. Dist. LEXIS 62297 (S.D. Cal. May 11, 2015). *Id.* These cases are inapposite. In *Syntek*, the district court held the issue in dispute – "whether decompiled object code qualifies for registration as source code under the Copyright Act and regulations" – was an issue of first impression *and* concerned the validity of a copyright *registration*, which is an issue normally considered by the Register of Copyrights in the first instance. 307 F.3d at 781. In *Rovai*, the plaintiff's claims concerned a discreet issue governed by specific IRS rules – whether the defendant loan servicing company had accurately reported the interest paid in the plaintiff's 1098 forms – and "[t]he IRS' position [was] therefore necessary . . . to determine whether Defendant's actions breached any duties to Plaintiff." 2015 U.S. Dist. LEXIS at *6.

In contrast, here, Plaintiffs' claims do not raise complex issues regarding electricity rates, a utility's fair return, the distribution of rates, or other matters normally addressed by the PUC's expertise. Instead, they raise pure questions of law regarding whether PSNH's undisputed acts were proper under the theories of relief set forth in the Complaint, and straightforward questions of fact concerning PSNH's anti-competitive and tortious conduct. *See* Obj. at 48-49.

PSNH's revisionist take on page 18 of its Reply concerning the issues in this case is inaccurate and meritless. It "describe[s]" the questions to be decided as "what measures was PSNH allowed or required to take under New Hampshire statutes, regulations, PUC orders and the PUC Tariff," and "was PSNH entitled to delete enrollments pending . . . ?" Reply at 18.

First, this description omits many questions and issues raised in the Complaint, such as PSNH's delay in accommodating Plaintiffs' one-time, off-cycle meter read request, delay in assuming PNE's remaining load asset, and attempts to expose Plaintiffs to regulatory sanctions.

Second, it misconstrues the Complaint. Many of the facts in this case are undisputed: Plaintiffs are not asking the Court to decide what PSNH was allowed to do under these set of facts; it is requesting a fact-finder to determine whether, for example, the *undisputed* fact that PSNH deleted FairPoint's pending Electronic Enrollments constitutes tortious interference with the FairPoint Contract, or whether PSNH's incessant (and also *undisputed*) prodding of PUC Staff to disrupt FairPoint's and Resident Power's attempts to re-submit the Enrollments constitutes a violation of RSA 358-A.[18]

Third, PSNH's description presumes that specific statutes, PUC orders, and regulations exist that govern its conduct in this case. It has failed, however, to cite a single source of authority (let alone any PUC rule, regulation, or Tariff provision) that permitted it to engage in the conduct described in the Complaint. Accordingly, the Complaint alleges common-law and statutory theories of relief that require a determination in the Superior Court.

[18] If PSNH was interested in "what measures" it was allowed to undertake, it could have filed a declaratory judgment action. It is not for CEPSs such as PNE and Resident to seek such determinations. The onus was on PSNH – which is presumed to know and understand the law – to conduct itself appropriately.

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: October 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 Middleton
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105

Dated: October 1, 2015

Robert M. Fojo