THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DE 15-491

PNE ENERGY SUPPLY, LLC, et al.
v.
PSNH D/B/A EVERSOURCE ENERGY

OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY TO PLAINTIFFS' MOTION FOR REHEARING OF ORDER NO. 25,942

PNE Energy Supply, LLC and Resident Power Natural Gas & Electric Solutions, LLC, ask the Commission to Rehear Order No. 25,942 (September 12, 2016).[1] This Commission grants rehearing under RSA 541:3 only where "good reason" is stated, that is, a showing made "by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either 'overlooked or mistakenly conceived.'" *Verizon New Hampshire Wire Center Investigation*, 91 NH PUC 248, 252 (2006), quoting *Dumais v. State*, 118 N.H. 309 (1978). *See also Lambert Canst. Co., Inc. v. State*, 115 N.H. 516, 519 (1975). "One must do more in a rehearing motion than simply request a differently worded order. Rather, the movant is obliged to state why the previously entered order is unlawful or unreasonable." *See Connecticut Valley Electric Co.,* 88 NH PUC 355, 356 (2003). Plaintiffs' Motion for Rehearing ("MFR") does not come close to meeting this standard.

Plaintiffs have previously filed over a hundred pages of pleadings and had oral arguments in the Superior Court and this Commission addressing the matters set forth in the MFR. The additional 28 pages they now add repeat arguments Plaintiffs have already made or could have

[1] The Commission referred to Eversource Energy as PSNH, and PSNH does so here. PNE and Resident Power are collectively referred to as the Plaintiffs. Order No. 25,942 is referred to as the "Order."

made.[2] Nothing in their filing is new and nothing offers any basis for reconsidering the Order. Likewise, the Commission did not overlook any matter or mistakenly conceive any of the Plaintiffs' arguments. MFR at 3.

The Superior Court asked this Commission for its expertise in interpreting tariffs, rules and regulations under its jurisdiction. In responding to that request, the Commission recognized that the Plaintiffs' claims arose out of a highly unusual (indeed first of its kind) situation: the voluntary default and failure to cure of PNE. Order at 26. As the Commission found, those circumstances and the tariffs, regulations, and Commission orders governing that default justified PSNH's actions in dealing with this "one-off" event. Plaintiffs' prolix pleadings have consistently sought to divert attention from or to ignore the consequences of their own voluntary business decision. *See* Staff Memo in Dockets DE 13-059 and 13-060, Exhibit 4 at 4, 5, 8 and Exhibit 2. The Motion should be denied.

The Scope of the Commission's Review

The Plaintiffs devote half of the MFR to an attack on this Commission's alleged failure to consider whether PSNH acted improperly even if its actions, as alleged in the Complaint, did not violate any tariff or regulatory provision. MFR at 3-12 and 24-28. Plaintiffs spent half of their Brief ("P.Br.") to the Commission on the same issue. P.Br. at 9-13 and 25-29. As the Commission noted, Plaintiffs assert that PSNH can be liable for tortious interference with contract based on "principles of common morality" notwithstanding that its actions were protected by law. Order at 19. The Commission rightly rejected this argument.

There are two fundamental problems with Plaintiffs' position. It is neither the law of this case nor the law of New Hampshire. The Superior Court resolved this issue in its Orders: "if

[2] The Commission can easily determine the extent to which Plaintiffs simply rehash arguments by looking to Part II of the Order.

[PSNH's] conduct was protected by law, it was not 'improper.'" Order on Motion to Dismiss at 10. In reaching this conclusion, the Court cited New Hampshire case law contrary to the position Plaintiffs have espoused and now restate before the Commission. *Id.* *See* PSNH Reply Memo at 13-16. The Commission therefore correctly concluded that its task was to look only to the authorities referenced by the Superior Court, *i.e.*, the tariffs and regulatory provisions. Order at 18-19. The Commission reached the same conclusion in Order No. 25,881 (the "Initial Order") at 2.

Despite this clear authority, Plaintiffs now attempt to clarify what the Court already made clear by offering a grammar lesson on prefatory and operative clauses. MFR at 4-8. Apart from their failure to raise this issue previously, the lesson is irrelevant.[3] The Superior Court made quite clear what it sought in the Transfer Order, what it expected the Commission to consider and what New Hampshire law required. Plaintiffs' efforts to explain what the Superior Court meant are contrary to what that Court explicitly said.[4]

If Plaintiffs were confused by what the Court directed the Commission to do there was a readily available remedy. Plaintiffs could have moved for reconsideration or for clarification of the Superior Court's orders. They failed to do so. They could also have asked the Commission for reconsideration of the Initial Order before the briefing directed by the Commission. Again,

[3] Plaintiffs' argument is puzzling. They assert that if the Court's Transfer Order is read correctly, it means "[b]ecause of the tariff and regulatory provisions....did [PSNH] act improperly within the meaning of a tortious interference claim?" But this still requires the determination to be made with relation to the tariff and regulatory provisions. What Plaintiffs also forget is that the Commission has limited jurisdiction. It was asked to consider the tariff and regulatory provisions, and not tort law, because those are the only matters within its jurisdiction. If Plaintiffs have a complaint regarding the meaning of the transferred question (which is actually quite clear), it is with the Superior Court, not the Commission.

[4] As the Superior Court noted, "The resolution of whether the conduct in Count l, 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." Superior Court's November 25, 2015 Order on Motion to Dismiss at 14.

they failed to do so. Their current attempt at reconsideration is not only contrary to the Superior Court Orders and New Hampshire law, it is too late.[5]

The Deletion of the Enrollments of PNE and FairPoint

The Commission's Order concludes that "under the circumstances, which resulted from PNE's wholesale market suspension and waiver of the possibility to cure, PSNH was required to provide default service to PNE's former customers at least until their next regular meter read dates." Order at 23. It further found that as a result, PSNH's "deletion of pending electronic enrollments for the transfer of PNE customers to FairPoint....represented a reasonable and appropriate action consistent with the respective obligations of PSNH and PNE under the ISO-NE Tariff." *Id.*

Plaintiffs contend that the Order contains no support for this finding and assert that because PSNH was required to process changes in supplier service within two business days, PSNH was required to transfer all of PNE's 7,300 accounts to FairPoint notwithstanding PNE's default. P.Br. 13-17. Plaintiffs are wrong.

First, Plaintiffs have repeatedly argued in their pleadings before the Commission that PSNH did not have the authority to delete the FairPoint enrollments or EDIs, or to replace them

[5] Plaintiffs allege that the Commission went outside of the allegations in the Complaint by considering PSNH's explanation for the transfer of one customer, Milan Lumber, after PNE's default. MFR at 9-12. Order at 25. But, contrary to Plaintiffs' own admonition that matters "not raised in the Complaint...should be disregarded" (P.Br., fn.2), there was no allegation concerning the Milan Lumber transfer in the Complaint. Instead, Milan Lumber was raised for the first time in Plaintiffs' Brief and in a letter from Plaintiffs' counsel to the Commission. P.Br. at 19 and Exhibit A. PSNH addressed this matter in its Reply Brief at 9-11. The Commission was fully entitled to consider differences between customers on PSNH's manual and automated billing processes as those matters are on file with the Commission. Order at 25. Likewise, the Commission was entitled to conclude that the notice published on February 21, 2013 made the Milan Lumber matter irrelevant since once the notice was published, no transfer to FairPoint could be made without the customer's consent. Plaintiffs also assert that the Commission's conclusion that PSNH had to delete the FairPoint enrollments (Order at 23-26) is incorrect because that finding "was not in the Complaint or any judicially-noticed document." MFR at 12. This is true but irrelevant. The Commission's finding was not a statement of fact but rather its interpretation of the tariff and regulations as applied to the circumstances facing PSNH after PNE's default.

with enrollments to place those customers on PSNH's default service. P.Br. at 17-25; Plaintiffs' Sur-Reply at 4-7. Plaintiffs simply repeat each of those arguments in requesting reconsideration.

Second, Plaintiffs' contention that the Commission "cites no authority for its conclusion that PSNH's deletion of the enrollments was 'reasonable and appropriate'" is contradicted by their MFR. Plaintiffs concede that the Commission relied on Order No. 25,660 and the ISO-NE Tariff. MFR at 14. They simply disagree with the Commission's conclusion in Order No. 25,660[6] and the current Order that once PNE defaulted, the ISO-NE Tariff *required* PSNH to assume PNE's load and that PSNH thus had no alternative but to transfer those customers to its default service. Order at 22. Moreover, the Commission cited to the specific ISO Billing and Financial Assurance Policies requiring this result. *Id.*

Third, Plaintiffs misread the terms of the PUC Tariff on which they rely for reconsideration. With respect to the replacement of pending electronic enrollments with enrollments "confirming the customer transfers to default service," the Commission concluded that once PSNH was required to assume responsibility for PNE's customers, it "follows…that PSNH was warranted in replacing those enrollments" to transfer PNE's customers to its default service. *Id.* Plaintiffs simply repeat their prior argument that because the PUC Tariff required a processing of a change in supplier service within two business days of receipt of an enrollment from FairPoint, all of PNE's customers should have been transferred immediately. P.Br. at 14. But as the Commission points out, the Tariff does not provide for a transfer within that two-day period. Order at 24. Instead, it provides that the actual change will occur "upon the next meter

[6] Order No. 25,660 was issued in Docket No. IR 13-233 on May 1, 2014. Plaintiffs' request for rehearing of Order No. 25,660 was denied by the Commission in Order No. 25,673 dated June 2, 2014. Plaintiffs did not appeal from Order No. 25,673. Plaintiffs' collateral attack on that order are untimely and should be disregarded.

reading date" after the EDI is processed. *Id.*, citing PSNH Tariff Section 6.[7] As the Commission further found, following PNE's default, PSNH did transfer customers with meter read dates prior to the date on which PSNH was required to assume PNE's load, but then transferred the remaining customers to default service at the date imposed by ISO-NE. *Id.* And finally, the Commission found that in light of the notice posted on the Commission's website prohibiting transfers of PNE's customers to FairPoint without their express consent, it was reasonable for PSNH not to make further transfers.

In the end, Plaintiffs fail to recognize that PNE's voluntary default resulted in "unique and extraordinary circumstances" for which there was no precedent. Order at 26. Although the Commission found that PSNH's actions were required by the ISO-NE Tariff and the PSNH Tariff, it further found that these unique circumstances should be considered in determining the reasonableness of PSNH's actions. The Commission is best suited to make that determination.[8]

The Commission's Interpretation of its Regulation Concerning Off-Cycle Meter Readings

Plaintiffs contend that the Commission "unlawfully and unreasonably" interpreted its own rule concerning off-cycle meter readings. P.Br. at 17-24. Again, Plaintiffs repeat arguments the Commission considered and rejected. P.Br. at 13-17; Sur-Reply at 3-4.

The Commission correctly interpreted Puc 2004.07, and is entitled to significant deference in that determination. *Vector Marketing v. Dept. of Rev. Admin.*, 156 N.H. 781 (2008). The words "[n]othing shall prevent a CEPs from requesting ***an*** off-cycle meter reading" (emphasis added) refer to a singular request and thus do not support the conclusion that a CEPs

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[7] *See also* Order No. 22,919, "EDI Working Group Report," issued on May 4, 1998, in Docket No. DR 96-150, where the Commission noted, "The Commission agrees with the EDI Working Group that competitive suppliers must provide a minimum of two-days notice to distribution companies for the termination of service ***to become effective on the customer's next meter read date***." (Emphasis added.)

[8] "[C]omplex 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." Superior Court's November 25, 2015, Order on Motion to Dismiss at 14.

can seek thousands of meter readings at the same time. Yet while the Commission did not explicitly so state, it is logical to conclude that it looked to the overall context and specific language of the particular in considering whether it made sense to construe words relating to a singular request to apply more broadly, as the Plaintiffs claimed. Plaintiffs have repeatedly contended that they may pick one subpart out of the Rule and read it in a way that makes no sense when the remainder of the Rule is considered.[9] The Commission rightly rejected that argument. Order at 20-21.

Plaintiffs do make one new argument, albeit one that could have been made in prior pleadings. Recognizing the force of the Commission's finding that PSNH had an absolute right to deny an off-cycle meter reading request if it was not made at least five business days before the requested reading (Order at 21), Plaintiffs now assert for the first time that their written notice on February 14, 2013 (just minutes before their default) was timely. P.Br. at 22. According to Plaintiffs, because PSNH was not required to assume PNE's load until February 20, PSNH had six-days written notice and should have negotiated a time for the readings. *Id.* But by virtue of its default, PSNH was required under the ISO-NE Tariff to assume PNE's load before the requested off-cycle meter reads could take place. Put simply, within minutes of Plaintiffs' request, that request had become moot. In any event, Plaintiffs misstate the language of Puc 2004.07 and miscount the correct number of days' notice they claim PSNH received. As the Commission noted, the Rule requires notice five *business* days prior to the requested reading date. February 14, 2013 was a Thursday. Given that Monday, February 18, 2013 was a holiday,

[9] Further, Plaintiffs' requests here are among a number of inconsistencies in the MFR. In one breath, Plaintiffs contend in construing its regulations, the Commission may look to language in other portions of the rule (MFR at 18-19), and in the next breath argue that the Commission may not look to the title of the regulation for the same purpose (MFR at 19-20). Either the Commission may review the context surrounding the subject rule, or it may not.

PNE gave only two business days' notice (at best) (Friday and Tuesday; *see* Puc 202.03, Computation of Time) before it concedes it was out of business.[10]

Relief Requested on Reconsideration

Finally, Plaintiffs ask the Commission to award relief it is not permitted to order, namely, to deny PSNH's Motion to Dismiss made at the Superior Court and to enter an order finding that they have stated a valid claim for tortious interference with contract. Both of those orders are within the exclusive province of the Superior Court. The Court did not ask the Commission to make findings on tort law. Rather, it asked for guidance on matters within the Commission's expertise after concluding that if PSNH did not violate the tariff and regulatory provisions within that expertise, it did not act improperly. Now that the Commission has provided that guidance, it is up to the Superior Court to determine whether Plaintiffs have stated a claim and to rule on the motion to dismiss.

For these reasons and those stated in PSNH's prior pleadings, the Plaintiffs' Motion should be denied.

[10] Plaintiffs claim that PSNH did not deny its request for the meter reading on the basis of improper notice based on PSNH's response to an oral request. But this does not mean that when inadequate written notice was given PSNH was not entitled to deny the request. In fact, however, PSNH had no chance to consider it because PNE had defaulted with ISO-NE before PSNH even received the written request for off-cycle readings. And although claiming that the Commission was not entitled to consider facts not included in the Complaint or in public documents, Plaintiffs assert that the Commission erred by not addressing "facts" presented by their counsel at the hearing on June 9th. P.Br. at 19. Plaintiffs cannot have it both ways. In any event, these "facts" are irrelevant since PNE did not give the requisite notice.

Respectfully submitted,

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

By its attorneys,

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Dated: October 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I caused the foregoing Objection to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

Wilbur A. Glahn, III