

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

IR 13-233

PNE ENERGY SUPPLY, LLC

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

Order Denying PNE Request

ORDER NO. 25,660

May 1, 2014

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

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

I. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

II. POSITIONS OF THE PARTIES

A. PNE

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

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

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

B. PSNH

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

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

III. COMMISSION ANALYSIS

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

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

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

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

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

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

The relevant PSNH Tariff language follows:

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

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

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

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

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

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

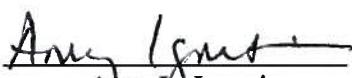
The first issue we framed for this docket was whether PSNH improperly withheld PNE’s customer payments beginning the week after PNE’s suspension from ISO-NE, and if so, what is the appropriate remedy. Because we have determined that PSNH is entitled to the amount of money that it ultimately withheld,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

Based upon the foregoing, it is hereby

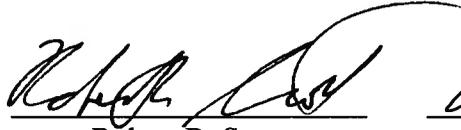
ORDERED, that PNE’s claim for \$38,345 in selection charges is DENIED; and it is

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

By order of the Public Utilities Commission of New Hampshire this first day of May,
2014.



Amy I. Ignatius
Chairman



Robert R. Scott
Commissioner



Martin P. Honigberg
Commissioner

Attested by:



Lori A. Davis
Assistant Secretary