

BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation Pursuant to RSA 365:4 and N.H. Code Admin. Rules PART Puc 204 Into
Dispute Between PNE Energy Supply, LLC and Public Service Company of New Hampshire**

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MEMORANDUM RE: AGENCY

NOW COMES Public Service Company of New Hampshire (“PSNH”) and submits the following memorandum in response to the memorandum of PNE Energy Supply, LLC (“PNE”) provided to the Commission at the February 18, 2014 hearing in the instant matter. In its memorandum, PNE contends that PNE is not liable for certain selection charges from PSNH in February 2013 because the Independent System Operator – New England (“ISO-NE”) did not initiate any drop transactions in connection with PNE’s default, and that even if it did, ISO-NE did not act as PNE’s agent for such transactions at the time of PNE’s default. To resolve the issues in this docket, the Commission need not rule upon any agency issues, but if it does, PNE’s arguments should be rejected. In support of this memorandum, PSNH states the following:

Initially, PSNH notes, as it did at the February 18, 2014 hearing, that this case is moot. The only funds remaining in dispute, as agreed by PNE and PSNH and as discussed at the February 18, 2014 hearing, are fees relating to PSNH’s selection charge as it was assessed in February 2013. Even more specifically, it is only drop charges assessed to PNE by PSNH when PNE was dropped as a supplier in connection with its February 2013 voluntary decision to default at ISO-NE. As PSNH has made clear, at the time of the events at issue PSNH’s practice under the terms of its tariff was to assess a selection charge to a dropped supplier upon a customer’s change of supplier. In Order No. 25,603 (December 13, 2013) in Docket No. DE 12-

295, a docket in which PNE was the petitioner, the Commission acknowledged that PSNH assessed its selection charge in that manner, and determined that amendments to PSNH's assessment of its selection charge should be made on a prospective basis, that is, after December 13, 2013. *PNE Energy Supply, LLC d/b/a Power New England*, Order No. 25,603 (Dec. 13, 2013) at 15-16. Accordingly, the Commission was aware that PSNH assessed selection charges to dropped suppliers at the time of the events in issue here, and concluded that any amendments to such assessments would be on or after December 13, 2013. Furthermore, the Commission concluded in that Order that no refunds or repayment for charges prior to December 13, 2013 would be ordered. *Id.* at 16. No party sought rehearing of Order No. 25,603, and it is now a final and unappealable order. Therefore, regardless of whether ISO-NE acted as PNE's agent, PSNH, consistent with its practice under its tariff, properly assessed selection charges to PNE when PNE was dropped as the supplier to approximately 8,500 customers in February 2013. In that these selection charges are the only funds in dispute, and that any dispute regarding them has been resolved by Order No. 25,603 in a manner binding upon PNE, the matter is moot and there is no cause to address the agency issue.

Despite the above, should the Commission review the arguments raised by PNE, it will find such arguments unavailing. PNE contends in its memorandum that prior to rendering a determination on whether ISO-NE acted as PNE's agent in connection with the drop transactions in issue it must first be shown that ISO-NE initiated drop transactions on PNE's behalf. According to PNE, ISO-NE did not initiate any drops for PNE because ISO-NE did not actually enter the electronic data interchange ("EDI") transactions that would cause the drops to occur. As a first matter, PSNH notes that PNE's contention that it should not be assessed a charge because ISO-NE did not initiate any drop transactions for PNE is irrelevant for the reasons set

out above. Second, the tariff defining the selection charge make no reference whatsoever to the entering of EDI transactions. Furthermore, even assuming the showing described by PNE is necessary, PNE's argument takes an unduly restrictive view of the transactions at issue, and ISO-NE initiated the transfer of PNE's customers regardless of whether it actually entered any EDI transactions.

On February 14, 2013, PSNH received a directive from ISO-NE pursuant to the ISO-NE tariff approved by FERC that PSNH was to assume the load asset that had been held by PNE within 3 business days. For PSNH to do so all of PNE's customers had to be dropped from its service as of a specific date – otherwise, there would be a mismatch between the retail supplier and the wholesale load-holder. Accordingly, by notifying PSNH of this requirement, ISO-NE initiated a process whereby all of PNE's customers would be dropped from PNE's service and moved to the host market participant, PSNH, by a date certain. PNE suggests that regardless of the requirement communicated to PSNH by ISO-NE and the actions required to comply with that communication, no change was actually “initiated” regarding the movement of customers to PSNH's Default Service until EDI transactions appeared in PSNH's systems. Such a restrictive view is neither reasonable nor part of PSNH's tariff.

To accept the argument raised by PNE and conclude that the entry of an EDI transaction is the triggering event for initiation, would ignore the facts that: PSNH did not act, and would not have acted, on its own; many of the changes required to move customers involved extensive manual intervention by PSNH in addition to EDI transactions; and the tariff provision implementing the selection charge does not point to the entry of an EDI transaction as the triggering event.

First, PSNH did not undertake, and would not have undertaken, to move PNE's customers on its own initiative. PSNH only began a process of moving customers upon the direction of ISO-NE pursuant to FERC-approved tariff requirements and therefore did not initiate the transfer. Thus, PSNH did not initiate the transfer; if PNE's argument is accepted, it would also mean that neither PNE nor ISO-NE initiated the transfer. Certainly, it was not the case that no one initiated the transfer of PNE's customers.

Additionally, as detailed in the March 26, 2013 Statement of Robert A. Bersak in Docket Nos. DE 13-059 and DE 13-060 and referenced in PSNH's July 8, 2013 filing in this case, PSNH was required to implement certain manual activities to ensure that customers would move, uninterrupted, from PNE's service to PSNH's service. *See* July 8, 2013 Response of PSNH in Docket No. IR 13-133 at 2-3. PSNH would not have undertaken the extensive manual interventions necessary to change customers to Default Service absent the initiation of the process by another. Accordingly, if it must be shown that ISO-NE initiated the drops for which PNE was charged, such initiation is demonstrated here.

Finally, "PNE contends that PSNH improperly assessed Selection Charges for 8,857 customers because neither PNE nor any agent of PNE ever initiated any changes under Section 2(a) of the PSNH Tariff, in particular, any customer drop transactions under the Electronic Data Interchange Protocol ("EDI drop transaction") for these customers." PNE Memorandum at 3. In other words, PNE appears to contend that PSNH's tariff requires the entry of an EDI transaction to initiate a customer transfer. For the reasons stated above, the Commission has already resolved this issue in Order No. 25,603.

Additionally, the selection charge portion of PSNH's tariff does not include any requirement that entry of an EDI transaction is the activity that triggers the imposition of the

selection charge. The tariff provision in question begins by stating, “The Company will be entitled to make a Selection Charge for any changes initiated by a Customer, Supplier, or an authorized agent to a different Supplier or to Default Service or Self-Supply Service.” PSNH Tariff, page 32, Section 2(a). Accordingly, to the extent the showing claimed by PNE is necessary, the requisite showing would only be that ISO-NE acted in the capacity of an agent for PNE in this matter.

As to the agency issue, PNE contends that ISO-NE was not acting as its agent in this instance because “PNE never expressly or impliedly authorized ISO-NE to act as its agent” and PSNH presents no “evidence as to whether ISO-NE viewed itself as PNE’s agent.”¹ PNE Memorandum at 5. As an initial matter, PSNH notes that the views of PNE or ISO-NE are not dispositive because “An agency relationship, or lack thereof, does not turn solely upon the parties’ belief that they have or have not created one.” *Dent v. Exeter Hospital, Inc.*, 155 N.H. 787, 792 (2007).

Instead, a showing of agency rests upon demonstrations of: “(1) authorization from the principal that the agent shall act for him or her; (2) the agent’s consent to so act; and (3) the understanding that the principal is to exert some control over the agent’s actions.” *Id.* Further, “The granting of actual authority and consent to act with such authority may be either express or implied from the parties’ conduct or other evidence of intent.” *Id.* “Express authority arises when the principal explicitly manifests its authorization of the actions of its agent.” *Bouffard v. State Farm Fire & Casualty Company*, 162 N.H. 305, 311 (2011) (quotation, citation and ellipsis omitted). “Implied authority, on the other hand, follows as a reasonable incident or construction

¹ In that there has been no testimony filed and no evidentiary hearings held in this docket, until now there has been neither a need nor opportunity for PSNH to provide “evidence” regarding ISO-NE’s agency status. Further, in that the purpose of the proceeding held on February 18, 2014 was to determine whether PNE could meet its burden of proof, *see* February 3, 2014 Secretarial Letter Scheduling Hearing in Docket No. IR 13-233, there was no cause for PSNH to prepare or submit evidence on this issue.

of the terms of express authority, or results from acquiescence by the principal in a course of dealing by the agent.” *Id.* at 311-12. “Such authority can arise from words used, from customs, or from the relations of the parties.” *Id.* at 312. “Like actual authority, a finding of apparent authority incorporates the three factual elements listed above and exists where the principal so conducts itself as to cause a third party to reasonably believe that the agent is authorized to act.” *Dent*, 152 N.H. at 792. Lastly, “Control by the principal does not mean actual or physical control at every moment; rather, it turns upon the principal manifesting some continuous prescription of what the agent shall or shall not do.” *Id.* (quotation omitted).

As to whether ISO-NE had authorization, either express, implied, or apparent, to act for PNE, PNE contends that it never granted such authority. PNE, however, states in its memorandum that “both PNE and PSNH *have agreed to be bound* by the terms of ISO-NE’s Transmission, Markets & Service Tariff in order to participate in the New England energy market.” PNE Memorandum at 4 (emphasis added). Thus, PNE admits that it made the affirmative choice to be bound by ISO-NE’s tariff including that document’s provisions regarding default, and ISO-NE’s authority to terminate and reassign load assets in the event of default.² Therefore, by making the voluntary choice to participate in the marketplace administered by ISO-NE, PNE expressly authorized ISO-NE to act in its place in certain circumstances as outlined in ISO-NE’s tariff.

Further, as PSNH has noted previously, in this instance ISO-NE directed PSNH that it was to assume PNE’s load asset, and that ISO-NE would sign the necessary documents “*on*

² See Exhibit 2 to February 18, 2014 Hearing in Docket No. IR 13-233, ISO-NE Financial Assurance Policy, ¶III, B, 3, b: “**Load Assets**” - 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.

behalf of” PNE to effectuate that process. As stated in PSNH’s February 19, 2013 Supplemental Motion to Dismiss in Docket No. DE 12-295:

1. On February 14, 2013, at 4:38 p.m., ISO-New England (“ISO-NE”) notified PSNH electronically that PNE’s participation in the New England market had been “suspended effective immediately.” The e-mail from ISO-NE stated in full:

Company PNE Energy Supply LLC (51393) has been suspended effective immediately. The customer has waived their possibility to cure. PNE is the Lead Load Asset Owner and has 100% Ownership Share of load asset 39637, PNE_PSNH_LOAD in Metering Domain PSNH NODE (687). Per the RTO Tariff, Section I, Exhibit ID, “ISO New England Billing Policy”, this load asset will need to be retired as soon as practicable, but no later than 00:01, Wednesday February 20, 2013 (3 business days following the date of the suspension). We will be sending you a pre-populated Load Asset Registration Form reflecting the retirement. Please upload a signed version of the Asset Registration Form through Ask ISO with an effective date as soon as practicable. ***ISO-NE will sign on behalf of the suspended Market Participant.*** If the asset is not retired prior to Wednesday February 20, the ISO will take action to retire the asset effective on that date. Please let me know if you have any questions.

Chad Nelson
Generation & Load Administration
ISO New England
(413) xxx-xxxx

February 19, 2013 Supplemental Motion to Dismiss of PSNH in Docket No. DE 12-295 at 2 (emphases added). A copy of that directive from ISO-NE is included as Attachment 1 to this memorandum. In that ISO-NE stated that it would take certain actions “*on behalf of*” PNE, and that those actions are contemplated in the tariff to which PNE has voluntarily agreed to be bound, ISO-NE had authority (be it express, implied or apparent) to act for PNE in this instance.

Moreover, regarding the consent to act, in its Load Asset Registration Form Requirements User Guide, *see* Attachment 2 to this memorandum, last published January 14,

2013, (prior to PNE's default) ISO-NE repeatedly states that when a load asset is retired it will take certain actions, "*on behalf of*" the existing load asset owner. See Attachment 2 at 11-12, Bates pages 12-13.³ In this case, the existing load asset owner was PNE. The ISO-NE user guide also states that when an asset form is submitted, the "submitted by" field will include the name of the person acting "*as a representative of*" the load asset owner. See Attachment 2 at 4, Bates page 5. In this instance, the asset owner was identified on ISO-NE's "Load Asset Registration Form (ARF)" as "PNE Energy Supply LLC" and the field identified as "*Representing Lead Load Asset Owner/Asset Owner*" reads "ISO New England Inc.", the "submitted by" field identifies ISO-NE's Chad Nelson, and the "Authorized Signature" in Section 4 of the ARF is also from Mr. Nelson. See Attachment 3 to this memorandum, ARF Retiring PNE's Load Asset. Therefore, as made clear through its own documents, in this instance ISO-NE acted "on behalf of," "as a representative of," or as one who could provide an "authorized signature" for PNE, and PNE was, or should have been aware that ISO-NE could and would act on its behalf in the event of a default.

Regarding the final element, control by the principal, as noted control is demonstrated by the principal "manifesting some continuous prescription of what the agent shall or shall not do." *Dent*, 155 N.H. at 792. PNE contends that it "exercised no control over ISO-NE's actions." PNE Memorandum at 6. However, ISO-NE only acted as it did because it responded to the voluntary decisions of PNE, and PNE had the power to stop ISO-NE from acting as it did. PNE was aware of its financial and other requirements, and what action ISO-NE would take on its behalf should PNE fail to abide by those requirements. Further, as PSNH noted in its July 8, 2013 filing in this case, PNE stated that:

³ The user guide is available from the ISO-NE website at: http://www.iso-ne.com/support/user_guides/index.html.

Because of PNE's ongoing communications with ISO-New England during the period in question, realistic assessment of the demands on its financial assurance account, and ***voluntary determination that an agreed to suspension*** before PNE's load obligations fully depleted the financial assurance account was a lesser evil than a default in fact after the available balance in the financial assurance account was exceeded, a wider and potentially deeper disruption to the ISO-New England marketplace was averted.


Attachment 4 to July 8, 2013 Response of PSNH in Docket No. IR 13-233 at 3 (emphasis added). Thus, based upon ongoing communications with ISO-NE, PNE "waived their possibility to cure" (see Attachment 1, *supra*) and made a voluntary business decision by agreeing to be suspended by ISO-NE. See also Attachment 4 to this memorandum (Message from PNE's Affiliate, Resident Power, stating, that PNE "voluntarily" suspended its service) at Bates 18. Thus, PNE made the voluntary decision to be suspended and acquiesced to the course of action that ISO-NE would take as a result of that suspension. PNE was not forced to be suspended and was not forced to waive its right to cure. Instead, PNE voluntarily determined that it would allow ISO-NE to suspend it with full knowledge of the further actions ISO-NE would take on PNE's behalf to retire its load asset. In the circumstances of this case, ISO-NE undeniably had the requisite authority to act on behalf of PNE, and PSNH could reasonably rely upon ISO-NE's exercise of that authority.

For the above reasons, the Commission should conclude that this matter is moot because it has been resolved by Order No. 25,603. Should the Commission conclude that it has cause to address the agency issue, ISO-NE's actions align with the principles of agency in New Hampshire and demonstrate that ISO-NE acted "on behalf of" PNE as PNE's agent in this matter and, to the extent it is relevant, demonstrate that ISO-NE initiated the drop process for all retail customers served by energy from ISO-NE load asset 39637 held by PNE, a drop process for which PNE was properly charged.

Respectfully submitted,

Public Service Company of New Hampshire


February 27, 2014
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached memorandum to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

February 27, 2014
Date


Matthew J. Fossum