STATE OF 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

PNE ENERGY SUPPLY LLC'S MOTION FOR REHEARING

NOW COMES the Petitioner, PNE Energy Supply LLC ("PNE"), by and through its attorneys, Sheehan Phinney Bass & Green, P.A., and hereby respectfully requests that the New Hampshire Public Utilities Commission ("Commission") rehear the issues decided in Order 25,660 pursuant to RSA 541:4.

I. INTRODUCTION

On May 1, 2014, the Commission issued Order 25,660 in which it rendered two findings. First, the Commissioner essentially declined to consider the issue of whether the Public Service Company of New Hampshire ("PSNH") properly withheld $38,570 in so-called recoupment costs from PNE, holding that that issue is moot because PNE "sought no remedy for PSNH's temporary withholding."[1] Order at 7. Second, the Commission found that PSNH properly imposed $38,345 in selection charges upon PNE for the 7,669 PNE customer accounts that were transferred to PSNH default service on or about February 20, 2013 because PNE initiated the transfers by virtue of its agreement to the terms of the ISO-NE Tariff.[2] Id. Respectfully, PNE requests that the Commission reconsider both findings. The Commission erred on Issue 1 because it failed to consider PNE's express and unambiguous request for interest and attorneys'

[1] Per the Commission's Order, this issue shall be hereinafter referred to as Issue 1.
[2] Per the Commission's Order, this issue shall be hereinafter referred to as Issue 2.

fees. The Commission also erred on Issue 2 because it failed to ascribe the plain and ordinary meaning to the terms "initiate" and "agent" in Section 2(a) of the Terms and Conditions for Energy Service Providers in the PSNH Tariff ("Section 2(a)")— contrary to settled principles of tariff and statutory interpretation—when it ruled that either PNE or ISO-NE[3] "initiated" the disputed drop transactions.

II.
STANDARD OF REVIEW

Pursuant to RSA 541:4, a party seeking a rehearing of an order issued by the Commission "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Id. The purpose of a motion for rehearing is to "direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites a reconsideration upon the record upon which that decision rested." Lambert Constr. Co. v. New Hampshire, 115 N.H. 516, 519 (1975).

III.
ARGUMENT

A. Because PNE Requested Interest and Attorneys' Fees Attributable to PSNH's Wrongful Withholding of Recoupment Costs, the Commission Erred in Holding that Issue 1 is Moot.

The Commission mistakenly found that Issue 1 is "moot" "because PNE sought no remedy for PSNH's temporary withholding of other money that was earlier in dispute." Order at 7. Put simply, the pleadings indicate otherwise, and PSNH's eventual, but by no means prompt or reasonable, capitulation on the general issue did not resolve entirely the issues relating to its improper withholding of PNE customer payments. Since the start of this case, PNE has

[3] It is unclear whether the Commission found that PNE initiated the disputed drop transactions or that ISO-NE initiated the drop transactions as PNE's "agent". PNE addresses both contingencies below.

requested an award of: (i) the interest on customer payments wrongfully withheld by PSNH, and (ii) the attorneys' fees and costs incurred in securing the return of its customer payments. See PNE Complaint at 11 ("Prayer for Relief: "PNE requests the Commission to: B. Order PSNH to make reparation and/or restitution to PNE for attorneys' fees and costs incurred by PNE in securing the return of its customer payments as well as interest on customer payments unjustly withheld by PSNH since February 20, 2013."); see also id. at 10 ("This amount, . . ., should be further reduced by accrued interest for the period of time that PSNH withheld these customer payments from PNE and the attorneys' fees that PNE has incurred in seeking PSNH's payment of these funds under the Agreements."). In order to issue its mootness finding, the Commission necessarily and mistakenly overlooked PNE's express request for interest and fees.

PNE has never conceded that Issue 1 is moot. At the February 18, 2014 hearing in this matter, the Commission asked the undersigned to address both Issues 1 and 2. Counsel focused heavily on Issue 2 because PSNH had already returned the $38,570 in alleged recoupment costs. During questioning, the undersigned stated that the issue of PSNH returning the actual recoupment costs "is moot" because PSNH returned those monies many months later. Feb. 8, 2013 Transcript at 44. At no time, however, did the undersigned or PNE ever waive its claim to the interest attributable to PSNH's late payment or its attendant attorneys' fees claim, or its claim requesting a ruling that PSNH violated the terms of the governing Trading Partner Agreements by unilaterally withholding PNE's customer payments as unauthorized recoupment costs. To the contrary, the undersigned emphasized the consequences of PSNH's failure to comply with the governing Trading Partner Agreements, which discussed and governed the agreed-upon time for transferring customer payments to PNE—and nowhere discussed any right of PSNH to withhold PNE customer payments for purposes of set off or recoupment. Id. at 11. Therefore, in finding

Issue 1 moot, the Commission erroneously failed to rule on an issue that is crucial to PNE (and probably other competitive suppliers and signatories to the Trading Partner Agreements): whether PSNH can withhold suppliers' customer payments for its own discretionary purposes in plain and material violation of the Trading Partner Agreements, and simply escape the consequences of such a breach by capitulating and returning the funds withheld several months later if a Supplier has the gumption to bring a legal action. The Commission's refusal to rule on this important issue allows PSNH to continue its illegal practice of withholding money in direct violation of its governing contracts and tariff. Respectfully, the Commission was in error in finding the issues on this question "moot," and must reconsider its mootness ruling and rehear the parties on Issue 1.

B. The Commission Erred on Issue 2 Because it Failed to Ascribe the Plain and Ordinary Meaning to the Terms of PSNH's Tariff as Required by Law.

Respectfully, when the Commission found that PNE or ISO-NE initiated the challenged drop transactions, the Commission failed to interpret Section 2(a) according to its plain and ordinary meaning. The New Hampshire Supreme Court has held that when interpreting a utility's tariff, "[w]e begin by examining the language used in the tariff, ascribing the plain and ordinary meaning to the words used. Where the tariff's language is plain and unambiguous, we will not look beyond it to determine its intent." In re Verizon New England, Inc., 158 N.H. 693, 695 (2009). Here, the Commission disregarded this settled principle of interpretation when it ruled that:

> 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 the 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." Order at 7.

ISO-NE was not PNE's "agent" according to the plain and ordinary meaning of that term. As discussed in PNE's Memorandum Concerning Alleged Agency Relationship Between PNE and ISO-NE, agent is a defined legal term that requires the presence of three elements: authorization, consent and control. See PNE Memo. at 5. ISO-NE could not have initiated the drop transactions as its "agent" because PNE relinquished control over its accounts upon suspension from the market and, more fundamentally, PNE never had control over ISO-NE. Nevertheless, the Commission held that ISO-NE was *similar* to an agent, and thus had the power to require PSNH to assume PNE's load asset. Id. ("Although not an agent in the usual meaning of the term ..."). PNE does not dispute that ISO-NE had the power to force PSNH to accept PNE's load asset. PNE does vigorously dispute, however, the Commission's apparent conclusion that the parties' agency-like relationship allowed ISO-NE to "initiate" drop transaction as PNE's "agent." Either ISO-NE was PNE's agent or it was not. PNE's unbending position is that ISO-NE was not its agent; PSNH has offered no rebuttal evidence. The Commission's finding on this issue is unsupported by established law, the record, and the plain terms of the PSNH Tariff.

To the extent the Commission ruled that PNE initiated the disputed drop transactions, it similarly misinterpreted the term "initiate" in Section 2(a). Initiate means "to start or begin something" or "to cause the beginning of something." See Merriam-Webster Online Dictionary (May 12, 2014). It is undisputed that PNE did not affirmatively initiate the drop transactions through an oral or written request to PSNH. Notwithstanding, the Commission ruled that PNE initiated the challenged drop transactions because it knew that its suspension from the New England energy market would result in the automatic assignment of customers by ISO-NE to

PSNH. Order at 7. The Commission's finding on this point was erroneous. PNE did not "initiate" the disputed drop transactions simply by agreeing to the terms of the ISO-NE Tariff. To the contrary, the drop transactions in this case occurred by operation of law under the terms of the ISO-NE Tariff. In fact, no one initiated the drop transactions here. ISO-NE notified PSNH that it was required to accept PNE's accounts into default service and PSNH moved the accounts into default service. Because neither PNE nor any authorized agent took the affirmative action required by Section 2(a), the Commission improperly endorsed PSNH's imposition of selection charges on PNE.

Even though PNE knew that its suspension by ISO-NE would result in the lapse of its customers to PSNH default service, PNE could not have possibly foreseen that PSNH would then impose a selection charge on PNE because neither the PSNH nor the ISO-NE Tariffs contain any provision authorizing the imposition of the selection charge upon a move to default service. Order at 7. ("The PSNH Tariff does not contemplate the circumstances of this case."). This fact is confirmed by PSNH's request in related Docket 12-295 for the Commission's approval to assess a selection charge on a supplier that defaults with ISO-NE. No such request would be necessary if the PSNH Tariff contemplated the imposition of these charges in the first place. Therefore, the ease with which the Commission approves PSNH's retention of the challenged selection charges is concerning. Through its ruling, the Commission has effectively created a new selection charge—a charge upon suppliers when they are suspended by ISO-NE. The Commission's decision to read between the lines and give something other than the plain and ordinary meaning to the terms "agent" and "initiate" in Section 2(a) violates the rule of interpretation cited above in In re Verizon New England, Inc., 158 N.H. at 695. Consequently, PNE respectfully requests that the Commission also reconsider its ruling on Issue 2.

WHEREFORE, PNE respectfully requests that the Commission:

A. Grant this Motion for Rehearing; and

B. Grant such further relief as justice may require.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

By its Attorneys,

SHEEHAN PHINNEY BASS + GREEN, PROFESSIONAL ASSOCIATION

Dated: May 21, 2014

By: Jason D. Gray-Hopkins for Chris Cole

Christopher Cole, Esquire
Robert P. Cheney, Jr., Esquire
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
(603) 627-8223