

STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

Complaint Against Public Service Company of New Hampshire

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S  
RESPONSE TO COMPLAINT OF PNE ENERGY SUPPLY, LLC**

Pursuant to RSA 365:2, N.H. Code Admin. Rule Puc 204.02 and 204.03, and the Commission's secretarial letter dated June 26, 2013, Public Service Company of New Hampshire ("PSNH" or "the Company") hereby responds to the complaint of PNE Energy Supply, LLC ("PNE") filed on June 21, 2013. PSNH disputes that complaint.

In support of this response, PSNH answers as follows:

1. The underlying facts of this matter are well known to the Commission. PSNH hereby requests that, pursuant to Puc 203.27, the Commission take administrative notice of the record and ancillary documents contained in Commission Docket Nos. DM 11-075; DE 13-049; DE 13-057; DE 13-059; and DE 13-060.

2. On February 7, 2013, PNE and FairPoint Energy, LLC ("FairPoint") filed a joint petition for an expedited waiver of certain Commission rules requiring 14 days' advance notice to customers prior to a competitive supplier selling or transferring customer accounts to another supplier. *See* Docket No. DE 13-049. The waiver request was related to a purchase and sales agreement between PNE and FairPoint to transfer approximately 8,500 customers within PSNH's service territory from PNE to FairPoint. *Id.* In its Joint Petition, PNE represented to the Commission, *inter alia*, that: "9. No special off-cycle meter read dates will be necessary as a result of this transfer. Customers will transfer suppliers upon their next scheduled meter read date." and "11. ... There will be no risk or detriment to PSNH as a result of this transfer or

requested waiver. Furthermore, there will be no risk or detriment to the transferred customers.” Joint Petition in Docket No. DE 13-049 at 2. Based upon the representations contained in the Joint Petition, the Commission granted the requested waiver one day later by secretarial letter, and, at the same time, directed Staff to begin investigating PNE’s authorization to continue operating as a competitive electric power supplier in New Hampshire. *See* February 8, 2013 Secretarial Letter in Docket No. DE 13-049.

3. Following the Commission’s waiver ruling, the Electronic Data Interchange (“EDI”) transactions relating to these customers were entered by FairPoint over a period beginning on February 8 and continuing through February 16. On February 11, 2013, in the normal course of business, customers began moving from PNE to FairPoint on the dates of their meter readings.

4. On February 12, 2013, PSNH was contacted by counsel for PNE to determine whether all remaining customers could be transferred very quickly, perhaps within the next business day. *See* March 26, 2013 Public Statement of Robert A. Bersak in Docket Nos. DE 13-059 and DE 13-060 at 3. The request was made to PSNH despite PNE’s representation to the Commission only 5 days prior in its petition to obtain a waiver that no special off-cycle meter readings would be needed to complete the transfer, that customers would transfer suppliers upon their next scheduled meter read date, and that there would be no detriment to PSNH as a result of the this transfer or requested waiver. *See* Joint Motion for Expedited Waiver of Puc Rule 2004.05(k) in Docket No. DE 13-049 at 2.

5. Internal discussions concerning PNE’s request took place at 8:30 a.m. on February 14, *see* March 26, 2013 Public Statement of Robert A. Bersak in Docket Nos. DE 13-059 and DE 13-060 at 4. During that meeting, it was determined that PSNH did not have the

personnel resources necessary to manually transfer 8,500 customers to a new competitive supplier on the same, near-term date. *Id.* Each transaction would require manual entry of new account information; new supplier information; the new supplier's customer account number; asset IDs; rate information; billing options; and an estimated meter-read. *Id.* For customers with more than one meter, this would have to be done separately for each meter. *Id.* This manual process would take a significant amount of time, and was subject to many errors as a result of the tedious manual data-entry process. *Id.* Subsequent to that meeting, and following a discussion with Commission Staff, on Thursday, February 14, 2013, PSNH informed PNE that it was not able to accommodate PNE's request to transfer the thousands of customers simultaneously and without meter read data as it requested. *Id.* at 4.

6. Later that same day, citing Puc 2004.07(b), PNE requested that PSNH dispatch its meter readers to obtain special off-cycle meter readings for all of PNE's 8,500 customers. *Id.* Very shortly following that request, also on February 14, 2013, PSNH was informed by the Independent System Operator – New England (“ISO-NE”) that PNE had been suspended from the ISO-NE marketplace effective immediately, that PNE had waived its ability to cure the suspension, and that by the end of the day on Tuesday, February 19, 2013, PNE's customer load asset was to be retired and assumed by PSNH. *Id.* at 4-5, *see also*, PSNH's February 19, 2013 Supplemental Motion to Dismiss in Docket No. DE 12-295 at 2. PSNH notes that Monday, February 18, 2013 was a federal holiday.

7. At the time of PNE's default, approximately 1,200 customers had been transferred to FairPoint in the normal course of business. *See* February 27, 2013 Staff Recommendation in Docket Nos. DE 13-059 and DE 13-060 at 3-4. On February 19, 2013, the Commission received a filing from PNE in Docket No. DM 11-075 dated February 15, 2013 stating that PNE was

*voluntarily* ceasing operations as a supplier in New Hampshire. February 27, 2013 Staff Recommendation in Docket Nos. DE 13-059 and DE 13-060 at 4.<sup>1</sup> Similarly, Resident Power, PNE's business affiliate, informed all of its customers that, "PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business." See Message of Resident Power (Attachment 1 to this Response) at ¶ 3.

8. Upon receiving notification from ISO-NE that PSNH was directed to retire PNE's load asset, PSNH began making the preparations necessary to assume PNE's customer load on both the wholesale and retail levels. PSNH's efforts included making substantial changes to its systems on an expedited basis, as well as the manual processing of thousands of transactions. See March 26, 2013 Statement of Robert A. Bersak in Docket Nos. DE 13-059 and DE 13-060 at 5. The changes made by PSNH's personnel over the holiday weekend were sufficient to allow PSNH to cancel any as yet unprocessed transfers on February 19 and to move the remaining customers to PSNH's default energy service as directed by ISO-NE. *Id.* PSNH emphasizes, consistent with the information it supplied to Commission Staff and PNE about the capabilities of PSNH's systems, that the changes necessary to transfer customers were sufficient only to transfer the customers to PSNH's default energy service and that transferring the customers to another supplier in the same timeframe would have been extremely difficult and could not have been accomplished by the deadline set by ISO-NE. By its accounting, PSNH incurred \$38,570 in costs to make the changes necessary to accommodate PNE's unprecedented voluntary

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<sup>1</sup> PSNH notes that the public version of this filing remains entirely redacted despite Staff's notation that at least some of the information in the filing, in particular PNE's decision to voluntarily cease operations, has been otherwise disclosed. See February 27, 2013 Staff Recommendation in Docket Nos. DE 13-059 and DE 13-060 at 4, fn.6. PSNH questions what other information in that filing, or other filings relating to the same events, has been otherwise disclosed or is not properly held as confidential. To the extent the Commission deems appropriate, PSNH believes that revised filings should be made.

cessation of its business. These costs were incurred for this specific purpose, and are above and beyond any other costs PSNH incurs in the regular operation and maintenance of its EDI, customer information, and other systems to accommodate the requirements of competitive suppliers in New Hampshire.

9. During this same period, PSNH made the determination, given PNE's admitted financial difficulties and the voluntary cessation of its business, to exercise its common law rights of setoff and recoupment, and withheld payments that would otherwise have been remitted to PNE to cover any potential costs or damages incurred by PSNH to address PNE's default. By the end of February, PSNH determined that the reasonable amount of retention was \$100,000, and all amounts in excess of that amount were remitted to PNE. Ultimately, PSNH determined that the amounts owed PSNH for tariff services provided PNE in February and March totaled \$54,391.39, which, when added to the \$38,570 cost to PSNH/NUSCO for work required to assume load responsibility from PNE, totaled \$92,961.39. The amount withheld over and above that \$92,961.39 was remitted to PNE in early May. *See* May 8, 2013 Letter of Robert A. Bersak to Robert P. Cheney (Exhibit 3 to PNE Complaint) at 3.

10. On February 22, 2013, Resident Power filed a "Verified Emergency Petition for Declaratory Judgment" with the Commission. By that petition, Resident Power noted that it was a party to the original purchase and sales agreement involving PNE and FairPoint, and contended that all of the customer accounts covered by that purchase and sales agreement belonged to it, rather than PNE. *See* Verified Emergency Petition for Declaratory Judgment in Docket No. DE 13-057 at 2-4. Neither of those facts appear in the Joint Petition for Expedited Waiver of Puc Rule 2004.05(k) in Docket No. DE 13-049. *See* February 27, 2013 Staff Recommendation in Docket Nos. DE 13-059 and DE 13-060 at 6. In its petition, Resident Power sought a declaration

from the Commission that it remained in good standing despite PNE's default, and that it always had the right and authority to migrate all of its aggregated customers to any other supplier of its choosing despite the requirement of ISO-NE that the customers not transferred prior to the end of the day on February 19 were to be, and in fact had been, transferred to PSNH's service.

Accordingly, at the time of that filing on February 22 by PNE's business affiliate and until the date of the Commission's decision on that filing, PSNH could not be certain what additional costs it might be required to incur should Resident Power have sought to again transfer these customers to one or more new suppliers if the Commission agreed that the customers' accounts had been under the control of Resident Power rather than PNE. On February 28, 2013 the Commission issued Order No. 25,467 and confirmed that Resident Power remained in good standing, but otherwise denied the request for a declaratory ruling in light of its decision to open a show cause proceeding covering PNE and Resident Power.

11. At nearly midnight on March 20, 2013, PNE and Resident Power filed a pre-hearing memorandum in Docket Nos. DE 13-059 and DE 13-060 that assigned blame for the events leading to PNE's default on high energy prices, the Commission Staff's "oversight and lack of familiarity with the Puc rules" and on PSNH based upon PNE's allegation that "PSNH thwarted the transfer of the customer accounts in an opportunistic effort to profit from PNE's financial default." Pre-Hearing Memorandum of Resident Power and PNE in Docket Nos. DE 13-059 and DE 13-060 at 2, 15. In essence, PNE disclaimed any and all responsibility for a default it had already stated was voluntary and caused by its own financial difficulties, and, now, PNE has disclaimed any responsibility for the costs associated with that voluntary business decision to default.

12. After the close of business on March 26, 2013, Staff filed a Settlement and Stipulation of Facts in Docket Nos. DE 13-059 and DE 13-060. This settlement, presented to the Commission at a hearing on March 27, 2013, required PNE to provide an opportunity for customers transferred to PSNH's service to receive a nominal payment and to provide a different financial assurance than it had previously provided. Upon fulfilling those conditions, and curing its default at ISO-NE, PNE would be permitted to serve customers in New Hampshire again. On April 15, 2013, the Commission issued Order No. 25,492 approving the settlement agreement and on May 3, 2013, the Commission issued a secretarial letter permitting PNE to resume business in New Hampshire.

13. Interwoven with the above events have been discussions between PNE and PSNH regarding the \$100,000 PSNH retained for potential setoff and recoupment in the exercise of its business judgment. PSNH retained the funds to setoff the cost of services delivered to PNE pursuant to PSNH's tariff during the period of PNE's suspension by the Commission, and for which PNE was not invoiced during that period due to the uncertainty that PNE would, or could, continue its business. In addition, the funds were retained for recoupment of the costs incurred by PSNH to complete the extraordinary work required to ensure the seamless transfer of customers on February 19 as required by ISO-NE and necessitated by PNE's "voluntary" decision to default on its obligations. PSNH maintains that it has a legitimate and appropriate claim to the remaining \$92,961.39 to compensate the Company for the tariffed services it has provided and for the costs it has incurred in responding to PNE's voluntary default.

14. On June 21, 2013, PNE filed its complaint with the Commission contending that PSNH withheld the money in violation of the Electric Supplier Services Master Agreement ("ESSMA"), and the Electric Supplier Trading Partner Agreement ("ESTPA") (collectively, the

“Agreements”) between PSNH and PNE, and that PSNH’s claim to certain funds violated PSNH’s tariff. Copies of the ESSMA, ESTPA, are attached to this Response as Attachments 2 and 3 respectively.<sup>2</sup> PNE contends that PSNH is permitted to recover, at most, \$10,108, but that even this amount should be reduced by both PNE’s carrying costs and its attorneys’ fees. PSNH disagrees.

15. As noted above, PSNH withheld the funds to protect its, and its customers’, financial interests in the event that PNE was unable to meet its financial obligations and PNE contends that PSNH is without authority under the Agreements or its tariff to withhold those funds. With respect to the ESSMA, PNE contends that PSNH was required to transmit funds to PNE on a daily basis and that by withholding funds PSNH is in violation of the ESSMA since the ESSMA does not authorize such “self-help” measures.

16. Section VI of the ESSMA, captioned “Conditions Precedent” states that certain requirements are conditions precedent to PSNH fulfilling its obligations under the agreement. One of the identified conditions is that the supplier, PNE, must register and obtain the necessary licensing from the Commission. SSMA, Attachment 2 at 2. As was noted in PSNH’s supplemental motion to dismiss filed on February 19, 2013 in Docket No. DE 12-295, PNE’s suspension by ISO-NE placed it in violation of the Commission’s rules requiring that suppliers be able to obtain supply in the New England energy market. *See* PSNH’s February 19, 2013 Supplemental Motion to Dismiss in Docket No. DE 12-295 at 3; Puc 2003.01(d)(2). Due to PNE’s suspension, PNE was not able to obtain such supply and thus no longer had the necessary licensing from the Commission to conduct business as a competitive supplier in New Hampshire.

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<sup>2</sup> Some of the information on the ESSMA and ESTPA could, potentially, be considered confidential. In that the complaint has not been made a docket at the Commission and that the relevant documents have been provided only to the Commission, Staff and the Office of Consumer Advocate, PSNH does not seek confidential treatment at this time. Should the status of this matter change, PSNH would seek appropriate treatment of sensitive materials.

Thus, by that filing PNE was placed on notice that PSNH considered PNE to have violated a requirement that was a condition precedent to PSNH's performance under the ESSMA, which would include remitting payments to PNE.

17. Furthermore, the ESSMA states, at section V, that "Each party represents that it is and shall remain in compliance with all applicable laws, tariffs and NHPUC regulations during the term of this Master Agreement." ESSMA, Attachment 2 at 2. PNE did not remain in compliance as required by the agreement. PNE was not in compliance with the Commission's regulations and, as such, PNE has no basis upon which to claim that PSNH is in violation of any portion of the ESSMA by withholding funds since any performance by PSNH was excused by PNE's voluntary default at ISO-NE and consequent inability to obtain supply in the New England energy market.

18. With respect to the ESTPA, it too contains provisions stating that as a condition precedent to PSNH's performance under that agreement the supplier must obtain all necessary licensing, and another provision declaring that each party is and shall remain in compliance with all applicable laws, tariffs and NHPUC regulations. ESTPA, Attachment 3 at 2. For the same reasons as set out above, PNE failed to abide by these requirements. Thus, a condition precedent to PSNH's performance was not met, and PSNH was within its rights to cease its full performance by withholding certain payments.

19. Moreover, at section VI the ESTPA contains the following:

To the extent reasonably practicable, Supplier shall notify the Company no less than forty-eight (48) hours prior, to an event reasonably within Supplier's knowledge, and of which Supplier has reason to believe the Company has no knowledge, and that will render Supplier or its agent unable to maintain Supplier's status with NEPOOL required to serve load.

ETSPA, Attachment 3 at 3. PNE does not contend that it provided PSNH with the notice required by the ESTPA. In its May 29, 2013 letter to PSNH, PNE admits that prior to its voluntary decision to default, it had ongoing communications with ISO-NE about its financial situation and the impact that financial situation would have on PNE's ability to serve load. May 29, 2013 letter from Robert P. Cheney to Robert A. Bersak, Attachment 4 at 3. Thus, PNE's financial distress and voluntary default was an event that was both reasonably within PNE's knowledge and an event that would render it unable to maintain its status. Moreover, PNE filed its "waiver" request docketed as DE 13-049 on February 7, 2013, but did not have any contact with PSNH until February 12 – five days after it initiated proceedings before the Commission related to its financial difficulties. Even then, the only contact was to inquire about the ability of PSNH to transfer the customers expeditiously. As noted above, PSNH was not made aware of PNE's financial situation and its voluntary default until it received a communication from ISO-NE, not PNE, on February 14 stating that PNE had defaulted and that it had waived its ability to cure. As such, PNE had breached the express terms of the ESTPA no later than February 14, well in advance of any withholding by PSNH. *See* Complaint at 5.

20. In addition, the ESSMA contains a provision stating, in relevant part:

Notwithstanding anything to the contrary elsewhere in this Master Agreement, any party, by written notice to the other party ("Breaching Party"), may terminate this Master Agreement in whole or in part with respect to such Breaching Party or suspend further performance without terminating this Master Agreement upon the occurrence of any of the following: (a) the Breaching Party terminates or suspends doing business . . . No delay by either party in enforcing any of its rights hereunder shall be deemed a waiver of such rights.

*See* ESSMA, section XI, Attachment 3 at 9. Other than omitting the word "Master" there is an identical provision in the ESTPA. *See* ESTPA, section XI, Attachment 4 at 7. In this case, PNE voluntarily suspended its business operations in light of the issues it faced at ISO-NE and PSNH

was within its rights under the Agreements to suspend further performance without terminating the Agreements. PSNH notes, as it has above, that by filing its supplemental motion to dismiss in Docket No. DE 12-295 on February 19, PNE was put on written notice that PSNH considered PNE to have violated the Agreements.

21. Even if notice through PSNH's filing in Docket No. DE 12-295 may not be deemed sufficient, PSNH properly informed PNE no later than March 21, 2013, that it was not "business as usual" between them, and that all activities involving PNE and Resident Power would be subject to internal legal review prior to being acted upon. *See* April 5, 2013 Letter of Robert Cheney, Jr. (Attachment 5) at 1 (noting that PSNH had sent an email informing PNE of the change in the business relationship).<sup>3</sup> All activities would, of course, include the remitting of certain payments to PNE unless and until internal legal review regarding those payments was completed. As such, PNE was again placed on notice of the suspension of PSNH's regular performance under the Agreements and any delay of PSNH in so informing PNE does not act as a waiver of PSNH's rights.

22. As to PSNH's tariff, PNE contends that the tariff ensures that PSNH's fees are just and reasonable and that it includes "procedural protections" to "prevent abuses of the broad power afforded PSNH as a public utility." Complaint at 6-7. PSNH, for its part, offers no opinion on the alleged purposes of the tariff as described by PNE. PSNH does note, however, that the first item in the portion of its tariff applicable to suppliers states:

At all times, the Supplier must meet the registration and licensing requirements established by law and/or by the Commission and must comply with all applicable rules promulgated by the Commission.

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<sup>3</sup> Similar to the above note relating to the ESSMA and the ESTPA, certain materials accompanying the letter may be confidential, but in light of the current level of review and the parties involved, PSNH is not seeking confidential treatment at this time. Should the status of this matter change, PSNH would seek appropriate treatment of sensitive materials.

PSNH Tariff No. 8, Original Page 31, Section 1.a. Similar to the above information relating to PNE's failure to maintain compliance with the Agreements, PNE did not meet this obligation due to its voluntary cessation of business and suspension. In addition, PSNH's tariff requires that:

The Supplier . . . shall be responsible for providing all the capacity and energy needs of the Customer and shall be responsible for any and all losses which include all distribution and transmission losses along the Local Network from the PTF Facilities to the Customer's delivery point.

PSNH Tariff No. 8, Original Page 31, Section 1.c. Further:

The Supplier shall provide the Company with at least 30 days' notice prior to either the cancellation of an agreement for load responsibility with NEPOOL or a NEPOOL member, or the termination of business in the Company's service area.

PSNH Tariff No. 8, Original Page 31, Section 1.d. By its voluntary default and waiver of its ability to cure, PNE was in violation of each of these tariff provisions. PNE was no longer able to supply capacity and energy to customers and did not provide notice to PSNH prior to the termination of its business operations. PSNH did not "abuse" any power under its tariff. It responded to an entity that had failed to abide by the terms of the tariff.

23. In sum, PNE has contended that by withholding payments PSNH violated the Agreements and its tariff. However, by the time PSNH believed, in the exercise of its business judgment and its common law right of setoff, that any withholding was appropriate, PNE had: violated a condition precedent to PSNH's performance under the Agreements; violated the requirement of the Agreements to remain in compliance with all applicable regulations; breached an express term of the ESTPA; and, violated numerous obligations of a supplier under PSNH's tariff. Despite PNE's failings, PSNH has continued to perform in all respects save for the remittance of the funds now in dispute. To the extent PSNH may be said not to have performed

by withholding those funds, that withholding was authorized by the Agreements and is not a basis for PNE to claim that PSNH has violated either the Agreements or its tariff.

24. As a further issue, PNE contends PSNH is not permitted to assess the charges for the tariffed services that PSNH believes PNE to owe. Specifically, PNE challenges PSNH's assessment of selection charges to PNE contending that because the change transactions were commenced by FairPoint, PNE is not liable for any selection charges. PNE's argument is incorrect, untimely made, and inconsistent with the Joint Motion it filed in Docket No. DE 13-049 where it stated that PSNH would not be subject to any risk or detriment from this transfer.

25. Under PSNH's tariff, when a new supplier submits a customer enrollment, that supplier is assessed a selection charge and the supplier that is to be dropped is also assessed a charge. PSNH has consistently applied its Tariff No. 8 in this manner since that tariff became effective on July 1, 2010 and applied its tariff in that manner here. PSNH has not altered, and did not alter, any application of its tariff charges in response to this situation.

26. Further, PNE has been registered with the Commission as a competitive supplier in PSNH's service territory since September 2011. Since that time and up to the date of PNE's default, PNE paid the selection charge under PSNH's tariff in line with the above description, which has not changed in that time. Moreover, PNE has filed multiple petitions with the Commission for the purpose of addressing specific concerns PNE had with that charge. *See* April 3, 2012 Petition in Docket No. DE 12-093 and October 1, 2012 Petition in Docket No. DE 12-295. As such, through approximately 18 months of experience PNE knew, or should have known, the manner in which that charge has been assessed. Only in this complaint does PNE

now claim a different understanding of the manner in which the tariffed charges are assessed<sup>4</sup> and uses that new understanding as a basis to claim that PSNH may not recover charges assessed consistent with its tariff. PNE may not maintain a claim based upon this newly-formed understanding.

27. Beyond the language of the Agreements and the tariff, PNE has also contended that it was unlawful for PSNH to withhold “any portion” of the funds because “an electric utility” cannot “unilaterally decide to withhold funds owed a supplier.” Complaint at 8. Such claims do not reflect the state of the law in New Hampshire, or in the United States in general. In light of PNE’s voluntary cessation of business and its well-publicized financial difficulties, PSNH took reasonable and prudent measures to mitigate any potential harm to it, or its customers, should PNE not be able to continue as a viable entity. The United States Supreme Court has on several occasions noted the “right ‘which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.’” *Gratiot v. United States*, 15 Pet. 336, 370, 10 L. Ed. 759; *McKnight v. United States*, 98 U.S. 179, 186, 25 L. Ed. 115.” *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239, 67 S. Ct. 1599, 1602, 91 L. Ed. 2022 (1947). Similar rights exist under New Hampshire law. See RSA 515:7, Mutual Debts. “If there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff’s action, one debt or demand may be set off against the other.”; *In re Liquidation of Home Ins. Co.*, 158 N.H. 677, 680 (2009) (“Setoff is the process by which two contracting parties reduce mutual debts and credits to arrive at a net balance. Setoff allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.”)(internal

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<sup>4</sup> In its May 29, 2013 letter to PSNH (Attachment 4) PNE indicates that this understanding was arrived at after some information was relayed to Mr. Cheney from an unknown source following a recent technical session in Docket No. DE 12-295. PSNH states that it never conveyed such information at that technical session, or any other time.

citations and quotations omitted); *Hathorn v. Loftus*, 143 N.H. 304, 309 (1999) (“Recoupment . . . encompasses the right of a defendant to reduce or eliminate the plaintiff’s demand either because (1) the plaintiff has not complied with some cross-obligation under the contract on which the plaintiff sues, or (2) the plaintiff has violated some legal duty in making or performing that contract.”). To accept PNE’s position would be counter to these established principles, and would mean that PSNH would have been required to continue transmitting funds to PNE regardless of the costs PSNH had or would incur to address the issues created by PNE’s voluntary business decision to default, and regardless of whether PNE had the capability of ever finding a remedy for its financial difficulties. Should that be the case, not only would PSNH be prevented from taking the reasonable steps necessary to lessen its losses as the law permits, it would also have risked being found imprudent by this Commission for failing to take those same reasonable measures – an impossible situation. That is not the law in New Hampshire and PSNH’s status as a public utility does not mean that it may disregard reasonable commercial responsibilities.

28. Briefly, PSNH notes two other issues. First, PNE speculates that PSNH withheld the funds “to exacerbate pressure on its competitor PNE” (Complaint at 5) or “in an opportunistic effort to profit from PNE’s financial default” (Pre-Hearing Memorandum of Resident Power and PNE in Docket Nos. DE 13-059 and DE 13-060 at 15). PSNH flatly denies any such intent. PSNH’s decision to withhold funds for purposes of setoff and recoupment was based on the facts that it had incurred, and believed it would continue to incur, costs to address matters involving a company with obvious financial troubles, and that it sought to protect itself and its customers from any potential adverse impacts. PSNH’s decision had nothing to do with

PNE, its line of business, or the relationship of that business to PSNH. Any contention to the contrary is completely unfounded.

29. Second, PNE makes certain general arguments about what an electric utility may or may not do in contending that PSNH erred here. Regardless of whether PSNH, or the Commission, or anyone else, agree with PNE's characterization of the role or obligations of an electric company, such arguments are irrelevant to this specific dispute. PSNH is owed money for services provided to PNE under PSNH's Commission-approved tariff, as well as for special actions PSNH was required to take to account for PNE's voluntary default, and PSNH took the reasonable step of retaining funds sufficient to cover those items pending a resolution of the claims between PSNH and PNE, consistent with the rights of a creditor to setoff debts owed it.

30. In light of the above, PSNH disputes the claims that it violated the Agreements or its tariff in withholding specific funds from PNE and disputes PNE's claim to the remaining withheld funds as well as the other costs PNE seeks. Contrary to PNE's representations to the Commission in its February 7, 2013 Joint Petition for Waiver, PSNH did suffer risk or detriment as a result of the transfer or requested waiver. PSNH contends that its exercise of the right of setoff for services provided under its tariff and for recoupment of the special costs caused by PNE's voluntary business decision to default on its obligations to ISO-NE and to its retail customers in New Hampshire was both reasonable and proper. The Commission should dismiss this complaint.

WHEREFORE, PSNH respectfully requests that the Commission:

- A. Dismiss PNE's Complaint;
- B. Conclude that PSNH did not violate the Agreements or its tariff;
- C. Conclude that PSNH's rights to setoff and recoupment entitle it to apply the remaining \$92,961.39 in retained funds as compensation for tariffed services and other costs; and
- D. Grant such further relief as is just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

By Its Attorney

Dated: 7/8/13

By: 

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**CERTIFICATE OF SERVICE**

I certify that a copy of this response has been served on counsel for the complainant pursuant to Rule Puc 204.02(c).

Dated: 7/8/13

By:   
Matthew J. Fossum

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**Dear Resident Power Customer:**

### **IMPORTANT UPDATE – REPLY REQUESTED**

If you are receiving this message the transfer of your account from PNE Energy Supply to Fairpoint Energy has regrettably not gone through as expected. Your account had been enrolled for transfer to Fairpoint Energy at the same low rates, terms and conditions that you enjoyed with PNE Energy. However, the transfer of your account has been halted, and your account is now back with Public Service of New Hampshire (PSNH), whose rates are considerably higher than those you enjoyed with PNE Energy and would have enjoyed with Fairpoint Energy.

If you would like to still be a customer of Resident Power and authorize us to place you with an electricity provider other than PSNH at rates below PSNH rates, please REPLY to this email and type "RENEW MY ACCOUNT" and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.

If you renew with us, we will get to work, right away, to find you an alternative to PSNH default service at rates that continue to be well below PSNH. If you do not renew with us, please be advised that you will remain on PSNH's high default service rate of \$.0954 per kwh, until you choose another supplier on your own, or you re-sign with Resident Power.

While we are writing you, we would like to clear up some inaccuracies in the media the last few days.

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<p>1. Despite what was reported by the Nashua Telegraph and other news outlets this morning, Resident Power has not been suspended by the ISO or the New Hampshire PUC. The Telegraph and others have since changed their online versions to reflect the truth. We remain in good standing and continue to serve you (should you renew with us) and all of our 14,000 NH customers with superior rates and service.</p> <p>2. Your account has gone back to PSNH as of Wednesday, February 20, 2013. A request was made to PSNH to transfer your account to Fairpoint Energy automatically and protect your rates, however PSNH declined to make the switch. PSNH stated that although they had the ability to do the automatic transfer, they lacked the “resources” to effect the transfer in the time provided.</p> <p>3. Your former supplier, PNE Energy Supply, suffered from cash flow issues, stemming from record market volatility that caused them to seek out a buyer for their residential customers (Fairpoint Energy). PNE temporarily and voluntarily suspended their own service of the New Hampshire market, and was not forcibly suspended or removed from the market as others have suggested, nor has PNE Energy gone out of business. PNE Energy tells us that it intends to return to the market as New Hampshire’s only locally owned and operated electricity supplier in the next few weeks.</p> <p>When we started Resident Power, almost two years ago now, all we wanted to do was provide EVERY New Hampshire rate payer with a competitive choice, not just the large businesses. In the early days, the only supplier that would work with us, and be the first to offer service to residential and small commercial customers, was PNE Energy. As their partner these last two years, we salute them for being bold enough to do to what no competitive supplier had done before. Today, almost 50,000 New Hampshire customers have chosen an alternative supplier to help save them money on their electricity bills, and PNE Energy Supply is a major reason for that.</p> <p>In closing, we hope that you decide to remain with Resident Power. It has been our pleasure to serve you and we hope you give us the chance to continue that relationship.</p> <p>Please remember, that if you wish to stay with Resident Power, please REPLY to this email and type “RENEW MY ACCOUNT” and your first and last name in the email body or subject line. Or you may also call our office at 603 232 9293, and speak with one of our associates, between 9 am and 5 pm, M-F.</p> <p>Sincerely,</p> <p>Your Resident Power Enrollment Team</p>			

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**Re: \$100,000 Holdback by PSNH**

Dear Attorney Bersak:

This letter is sent in response to your letter to me dated May 8, 2013, in which Public Service Company of NH (“PSNH”) states that it will return an additional \$7,038.61 in PNE customer payments made to PSNH, but will continue to retain \$92,961.39 in PNE customer payments for “tariff services provided in February and March [2013]” and “work required to assume load responsibility from PNE and to make the related retail customer transfers.” We believe this to be wrongful for the reasons that follow.

First, as stated in my letters of April 15 and April 30, PSNH’s continued retention of these PNE customer payments is contrary to the express provisions of the Electric Supplier Services Master Agreement and Electric Supplier Trading Partner Agreement (the “Agreements”) executed by PSNH and PNE. Under those Agreements as spelled out in my earlier letters, PSNH can only withhold payment of funds to a supplier if the supplier has been invoiced, has not invoked the dispute resolution provisions of those Agreements, and is more than 60 days overdue in paying the invoiced amounts. In this case, PSNH has withheld PNE customer payments since February 20, 2013, yet PNE only received an itemized list of the proposed charges with your May 8 letter and has already invoked the dispute resolution process. As you are well aware, those Agreements have never been terminated by either PSNH or PNE and remain valid and in effect. Under those Agreements PSNH must return to PNE the remaining \$92,961.39 immediately. While PSNH in its opinion may “deem it necessary to withhold sufficient payments to PNE to satisfy the payment via setoff and recoupment costs,” such action is contrary to the Agreements binding the parties, and PSNH cites no provision of the Agreements or the PSNH tariff to the contrary.

Second, PSNH has no legal basis for imposing \$54,391.39 for “tariff services.” In particular, \$47,735 of this amount is a “Selection Charge” of \$5.00 per transaction “for

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enrolling or dropping a customer.”<sup>1</sup> PSNH asserts that PNE dropped 9,547 accounts in February and March. However, over 90% of these drop transactions were initiated either by FairPoint Energy or PSNH itself. During this entire time period PNE has requested only 690 drops. The PSNH tariff reads as follows:

## 2. Services and Schedule of Charges

Where applicable, the Customer and/Supplier will be obligated to pay the following fees and charges to the Company for the following services:

### (a) Customer Change of Supplier

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 Service. For customers [sic] who are currently taking Supplier 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 .... (Emphasis added.)

We know that as a result of its transaction with PNE FairPoint Energy initiated EDI enrollments of approximately 8500 customer accounts with PSNH, of which some 1188 accounts were ultimately transferred to FairPoint Energy. According to the tariff provision quoted above, FairPoint Energy – as the new Supplier – is responsible for the Selection Charge for these transferred accounts (I understand that PSNH representatives were clear on this point – i.e., only one party pays the Selection Charges when a customer is transferred from one supplier to another – at a recent technical conference in DE12-295.) Of the remaining approximately 7300-7400 accounts, PNE understands that PSNH deleted or cancelled the FairPoint Energy EDI enrollments and moved the accounts to PSNH Default Service on or about February 14 - 20. What is certain is that PNE never initiated any drop transactions for these accounts – PSNH did that. From the time period February 1, 2013, to March 31, 2013, PNE initiated zero enrollments and just 690 drop requests – not the 9,547 drops cited in the PSNH invoice included with your May 8 letter. Pursuant to the above quoted PSNH tariff provision PNE is only obligated to pay PSNH and PSNH is only entitled to receive \$3,450 -- i.e., \$5.00 x 690 drop transaction requests. Thus, the invoiced amount of \$54,391.39 for tariff services should be reduced to \$9,020.10 ((\$53,305.10 - \$47,735) + \$3,450). In short, not only does PSNH not have any legal authority under the existing Agreements and PSNH tariff to withhold PNE customer payments from PNE as it has done since February 20, it has

<sup>1</sup> As indicated in the schedule included in one of your May 8, 2013, emails sent to me, the transactions for which the Selection Charges are being assessed are all drop transactions.

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no authority under these Agreements or the PSNH tariff to impose any Selection Charges on PNE, except for the 690 drop requests initiated by PNE between February 1 and March 31, 2013.

Third, as with the bulk of the Selection Charges noted above, there is no provision of the Agreements or the PSNH tariff that authorizes PSNH to impose “recoupment costs” on PNE for carrying out its responsibilities as the host utility under the ISO-New England market rules, much less withhold these amounts from PNE customer payments due PNE under the Agreements and PSNH tariff as it has done since February 20. Such unilateral action by PSNH – to withhold PNE customer payments and to impose “recoupment costs” and Selection Charges (essentially recovering twice for the same transactions) – is contrary to the Agreements, the PSNH tariff, and the role of agnostic gatekeeper envisioned for distribution companies in the competitive marketplace and is unjust and unreasonable. Furthermore, given the relatively quick return to normal wholesale market rates for electricity following the unexpected and extraordinary peaking of market prices in January and February 2013, PNE, on information and belief, believes that many of PSNH’s other Default Service customers have benefitted from the transfer of and additional revenues generated by the former PNE accounts to Default Service. Consequently, PSNH should offset as mitigation against its alleged “recoupment costs” the benefits received by PSNH from servicing these accounts.

Last, PSNH misconstrues – deliberately or not, we will not be sure unless or until there is discovery to confirm it – the nature of PNE’s interactions with ISO-New England in February 2013. As wholesale electric prices spiked sharply and unexpectedly, PNE could not keep up with the cash collateral demands of its ISO financial assurance account. Its voluntary act was to provide ISO-New England with continual and realistic assessments of its ability to meet its obligations under the ISO-New England tariff. As PSNH knows, if PNE had said nothing to ISO-New England, allowed its load obligations to exceed its financial assurance account, and been unable to pay its twice weekly ISO-New England invoice, then ISO-New England could have been forced into a payment default allocation proceeding aimed at getting all the other participants in ISO-New England to cover the shortfall. 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. We believe that, based on communications between PNE and ISO-New England and on likely communications between PSNH managers and ISO-New England, that PSNH is, in fact, altogether aware that this is the case.

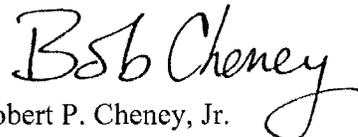
In sum, PSNH is required and obligated to follow the terms of the Agreements and immediately return the remaining \$92,961.39 to PNE. PNE acknowledges that had PSNH only billed PNE for 690 drop transactions and billing and collection services as

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set forth in the May 8 invoice, PNE would have paid that amount to PSNH without deduction. At this time, however, 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. As for the \$38,570 in alleged recoupment costs, PNE believes that PSNH incurred those costs by virtue of its role as the host utility in the ISO-New England Open Access Transmission Tariff and as obliged under the ISO-New England market rules, as well as its prior refusal to accept PNE's offer of \$65,000 to transfer the PNE customers to FairPoint Energy prior to or over the Washington's Birthday weekend.

If PSNH continues to ignore the Agreements and fails to immediately return the withheld PNE customer payments, then it is unlikely that this matter will be resolved through informal dispute resolution. PNE will, if it must, address these claims and rights in an appropriate forum. It will suffice to say now that PSNH and all document custodians within PSNH and Northeast Utilities should make every effort to preserve all of the documents, correspondence and communications, however stored and in whatever form, in the event of litigation, including without limitation any and all communications, etc., between and among PSNH/NU and ISO-New England during the time period from January 1, 2013 to the present.

Sincerely yours,



Robert P. Cheney, Jr.

RPC/lag  
Enclosures

Cc (via email only): Christopher Cole, Esq.  
NHPUC  
OCA