

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
OBJECTION TO PNE'S MOTION FOR LEAVE TO FILE RESPONSE TO PSNH'S
MEMORANDUM RE: AGENCY**

NOW COMES Public Service Company of New Hampshire ("PSNH") and objects to the motion for leave to respond and response of PNE Energy Supply, LLC ("PNE") filed on March 4, 2014 in the instant matter. PNE contends that it is entitled to submit a reply to PSNH's February 27, 2104 memorandum regarding agency because PSNH: 1) was permitted "to submit a response solely on the ISO-NE/PNE agency issue;" and 2) included certain attachments to its memorandum that it had not otherwise sought to introduce as evidence. PNE Motion at 1-2. PNE contends that for these reasons it should be able to respond to PSNH's memorandum "as a matter of basic due process." PNE Motion at 2. PNE then goes on to provide a response that restates and expands upon arguments it has made regarding its interpretation of PSNH's tariff and ISO-NE's role in PNE's voluntary decision to default in February 2013. The Commission should deny PNE's motion, and consequently reject the response, because PNE has provided no justification for its motion and its requested relief is merely an attempt to give it a "second bite at the apple" on the agency issue. In support of its objection, PSNH states:

1. As a first matter, PSNH notes that PNE elected to draft a memorandum on the matter of agency in advance of the February 18, 2014 hearing in this matter. In the course of that hearing, it notified the Commission of the existence of that memorandum and admitted that no

party had previously seen it. Transcript of February 18, 2014 Hearing (“Tr.”) at 17-18, 20. Further, PSNH was permitted the opportunity to respond, and PSNH stated that it would either respond or inform the Commission that it would not file a responsive memorandum. Tr. at 20-21, 28-29, 46. In permitting responses to PNE’s memorandum, the Commission was not prescriptive about the manner of addressing the contentions in PNE’s memorandum, nor could it be since no one had yet seen or read it. The Commission, notably, did not say that it would entertain additional arguments beyond responses to PNE’s memorandum. PSNH’s thereafter filed a response to PNE’s memorandum. PNE’s belief about what should have been in PSNH’s memorandum is not a basis for permitting PNE’s additional response. PNE had its opportunity to make its position known and should not now come to the Commission seeking additional opportunities to make its case.

2. As a further matter, PNE’s memorandum, which, again, PSNH had not seen prior to the hearing, stated that PNE would prove that PSNH “acted improperly” by withholding certain funds on the basis that:

neither PNE nor any “customer, supplier, or authorized agent” initiated the “drop transactions” that PSNH claims serve as the basis for imposing Selection Charges on PNE under Section 2(a) of the Terms and Conditions for Energy Service Providers of the governing PSNH Tariff (“PSNH Tariff”).

PNE Memorandum at 2. PSNH, in response to contentions such as these in PNE’s memorandum, presented arguments demonstrating that PSNH did not act improperly and that the directive to drop customers from PNE to PSNH’s default service was initiated by ISO-NE on behalf of its member, PNE. PSNH’s memorandum makes clear that PSNH did not act improperly because the Commission’s decision in Order No. 25,603 upheld PSNH’s tariff for the period in dispute and, as a consequence, the case is moot and the agency issue need not be

addressed. Moreover, PSNH made clear that to the extent there was a need to demonstrate that an agent of PNE had initiated drop transactions, ISO-NE as PNE's agent in this instance did so. PSNH responded to the issues in PNE's memorandum, and PNE's disagreement with PSNH does not provide a basis for PNE's additional submission.

3. As to PNE's argument that it must be permitted to respond because PSNH provided certain attachments as "evidence" and that PSNH had not previously introduced those documents, it is an attempt, after-the-fact, to modify the nature of the proceeding and to hold PSNH accountable for not predicting PNE's arguments. As noted in footnote 1 of PSNH's February 27, 2014 memorandum, the Commission's February 3, 2014 secretarial letter scheduling the hearing stated that the hearing would be "limited to whether PNE as the complainant can meet its burden of proof." PSNH had no reason to prepare or submit any evidence in such a proceeding.¹ When, however, PNE had provided a memorandum on the issue of agency and contended that PSNH would not be able to show that the elements of agency could be met, PSNH responded with information sufficient to demonstrate the required elements.² The inclusion of attachments in PSNH's memorandum in response to the issues raised by PNE does not mean that PNE "as a matter of basic due process" must have some additional opportunity to respond.

¹ PNE also faults PSNH for not seeking "leave to file late pursuant to Puc 203.22." PNE Motion at 2. Puc 203.22, however, addresses exhibits filed at hearing and not "late." In that PSNH had no reason to file any exhibits at hearing, it is not clear what PNE believes PSNH was required to do under the rule. The Commission may accept additional evidence following the close of a hearing pursuant to Puc 203.30. PSNH, however, does not believe there is need for a motion pursuant to that rule in this case because PSNH was authorized by the Commission to respond to PNE's memorandum and provided information directly relevant to the issues in PNE's memorandum. In that PNE contended in its memorandum that PSNH had a burden to prove the agency issue, and that the Commission authorized PSNH to respond to PNE's memorandum, PSNH believes it was authorized to provide information proving that issue in response to PNE.

² Interestingly, PNE contended in its memorandum – again, a memorandum PSNH had not seen before the hearing – that PSNH should bear the burden to prove the agency issue, and it now contends that PSNH is not permitted to include certain information proving that issue because it was not provided at the hearing. PSNH had no way of knowing what PNE would provide at a hearing on its burden of proof, and did not know PNE had prepared a memorandum on the agency issue. PNE is attempting to put PSNH in the impossible position of not knowing about an issue, and then being in error for failing to preemptively respond to that issue.

4. Regarding the items raised in PNE's included response, PSNH refers the Commission to PSNH's memorandum filed on February 27, 2014 and incorporates the arguments and information in that filing by reference here. PSNH, however, must address one specific item in PNE's response itself. In footnote 1 to PNE's response, it states "the Commission noted in the record (which is not yet available) that PSNH would be allowed to file a memorandum," that PSNH "strayed" from the Commission's "explicit directions" regarding that memorandum, and that PSNH addressed matters "beyond the scope of the response allowed by the Commission." PNE Response at 1, fn.1. PNE then contends that the Commission should "ignore" certain portions of PSNH's memorandum for failing to abide by the Commission's directives. *Id.* The Commission's website includes an entry for the transcript in this proceeding on February 28, 2014 and PNE's motion and response were filed on March 4, 2014. That record, which was available to PNE prior to filing its motion, does not contain "explicit directions" from which PSNH "strayed," but does demonstrate that PSNH stated that it would file a response to PNE's memorandum, which, as noted above, made various contentions about PSNH's actions and the authority therefor. There is no basis to "ignore" PSNH's filing.

5. In sum, PNE provided a memorandum at hearing that it had not previously shared with any party contending that PSNH erred in various respects, bore certain responsibilities, and could not prove the elements of agency. The Commission permitted PSNH to respond to PNE's memorandum and it did so in a manner consistent with information available from the Commission, and with arguments and documents addressing the issues raised in PNE's memorandum. PNE's disagreement with PSNH is not a basis for allowing additional pleadings and does not justify PNE's additional filings. PNE offered its arguments, and PSNH responded. The Commission should not be asked to accept further filings to resolve this issue.

WHEREFORE, PSNH respectfully requests that the Commission:

1. Deny PNE's motion for leave to file a response, and reject PNE's response; and
2. Order such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

March 6, 2014
Date

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CERTIFICATE OF SERVICE

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

March 6, 2014
Date


Matthew J. Fossum