

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 MEMORANDUM CONCERNING ALLEGED
AGENCY RELATIONSHIP BETWEEN PNE ENERGY SUPPLY, LLC
AND ISO-NEW ENGLAND**

NOW COMES the Petitioner PNE Energy Supply, LLC ("PNE"), and respectfully submits the following memorandum concerning the alleged agency relationship between PNE and ISO-New England ("ISO-NE"). PNE submits this memorandum in connection with the hearing scheduled for February 18, 2014, at 1:30 p.m.

INTRODUCTION

On February 3, 2014, PNE and Public Service Company of New Hampshire ("PSNH") (collectively, the "Parties") were notified via Secretarial Letter in the above-referenced docket that the Commission had decided to schedule a hearing on February 18, 2014, to address "all outstanding issues." The notice specifies the outstanding issues in a numbered list, including Issue 1(a): "Did PSNH act improperly when it withheld payments otherwise due PNE beginning in February 2013, and, if so, what is the appropriate remedy?" and Issue 2(a): "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?" At the upcoming hearing, PNE will prove that PSNH acted improperly when it withheld \$54,391.39 in customer

payments from PNE and subsequently assessed \$44,285 in Selection Charges, because, among other things, 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”).

In its December 16, 2013 letter to the Commission PSNH has raised an affirmative defense to PNE’s wrongful withholding claim, namely that ISO-NE, acting as PNE’s “authorized agent,” initiated the drop transactions by requesting PSNH to assume the suspended PNE load asset, and, therefore, PSNH permissibly imposed Selection Charges on PNE under Section 2(a). PNE submits this memorandum to aid the Commission in its assessment of PSNH’s “ISO as agent” affirmative defense.

I.
PSNH Should Bear the Burden of Proving its Agency Defense

PNE acknowledges that, as the party seeking relief, it “shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.” Puc 203.25. Accordingly, PNE relies on the Joint Statement of Agreed Facts submitted in this docket and, as may be necessary, will introduce additional evidence at the hearing to establish that PSNH improperly withheld customer payments and improperly assessed PNE \$44,285 in Selection Charges in violation of the Electric Supplier Services Master Agreement (“ESSMA”) and the Electric Supplier Trading Partner Agreement (“ESTPA”) [collectively “the Agreements”] and Section 2(a) of the PSNH Tariff. However, PNE should not bear the burden of proving that ISO-NE is not its authorized agent. PSNH has asserted the affirmative defense of agency to justify its unlawful withholding and assessment of Selection Charges and, therefore, must bear the burden of proving that defense. See, e.g., Donnelly v. Eastman, 149 N.H. 631, 633 (2003) (ruling that

defendant has burden of proving affirmative defenses); Meaney v. Rubega, 142 N.H. 530, 534 (1997) (holding same); Glines v. Bruk, 140 N.H. 180, 181 (1995) (holding same); State v. Little, 121 N.H. 765, 772 (1981) (“The burden of proof to establish an affirmative defense is on the defendant, who must carry this burden on a balance of the probabilities.”). Cf. In re Wilton Telephone Co., No. DT08-028, Order 25, 043, 94 N.H.P.U.C. 642 (Nov. 10, 2009) (noting party raising affirmative defense of preemption bears burden of proof). PNE should not be forced to prove a negative when PSNH injected the—otherwise irrelevant—agency issue into this dispute.

II.

PSNH’s Agency Defense Fails Because ISO-NE Never Initiated Any Drop Transactions for PNE

Section 2(a) of the PSNH Tariff states, in pertinent part, “[PSNH] will be entitled to make a Selection Charge for any changes initiated by a Customer, Supplier, or an authorized agent” (Emphasis added.) Section 2(a) goes on to state, in pertinent part, that “[F]or 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.”¹ (Emphasis added.) 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. PSNH responds by arguing that it legally assessed Selection Charges against PNE because ISO-NE directed PSNH to assume load responsibility for these customers as PNE’s “authorized agent.”

¹ PNE notes that under a plain reading of Section 2(a) of the PSNH Tariff the only time Selection Charges can be assessed against Suppliers is when PSNH receives an enrollment transaction from a new Supplier or a drop transaction from an existing Supplier. The PSNH Tariff does not authorize the assessment of Selection Charges against Suppliers in other instances, e.g., when the change in customer status occurs by “operation of law,” *i.e.*, the requirements of the ISO-NE Tariff, or when PSNH initiates the EDI drop transaction itself.

Not only was ISO-NE not acting as PNE's authorized agent, but PSNH fails to consider that it must first prove that ISO-NE actually initiated EDI drop transactions on PNE's behalf.

ISO-NE never initiated any EDI drop transactions for PNE. Moreover, both PNE and PSNH have agreed to be bound by the terms of ISO-NE's Transmission, Markets & Service Tariff ("the ISO Tariff") in order to participate in the New England energy market. Joint Statement of Agreed Facts ¶16. The ISO Tariff governs the terms and conditions of PNE's and PSNH's participation in the market. When ISO-NE notified PNE that it was in default of ISO-NE rules for failing to maintain adequate collateral in February 2013, PNE responded to ISO-NE that it would be unable to cure and waived its right to cure. Joint Statement of Agreed Facts ¶17. ISO-NE subsequently notified PNE it would be suspended from the market and, by operation of Section III(B)(3)(b) of the ISO-NE Tariff,² PSNH was obligated to accept PNE's load asset as host utility. Id. Although ISO-NE notified PSNH of PNE's suspension and of PSNH's legal duties under the ISO Tariff, ISO-NE never initiated any EDI drop transactions for PNE's customers. Indeed, even if ISO-NE were not involved in notifying PSNH and monitoring the transfer of PNE's load asset to PSNH, the transfer would have occurred by operation of the Tariff. See Joint Statement of Agreed Facts ¶ 17 ("Further, on that same date, ISO-NE notified PSNH that pursuant to the ISO-NE Tariff, as the host utility PSNH must assume the load assets that had been held by PNE by 0001 hours on February 20, 2013."). PSNH has failed to produce any documents that evidence ISO-NE's initiation or submission of EDI drop transactions. Consequently, PSNH's agency argument must fail.

² Section III(B)(3)(b) states, in pertinent part, "Any load asset registered to a suspended Market Participant shall be terminated, and the obligation to serve the load associated with such load shall be assigned to the relevant unmetered load asset(s) unless the host Market Participant for such load assigns the obligation to serve such load to another asset."

III.
Even if ISO-NE Initiated EDI Drop Transactions of PNE Customers,
It Was Not Acting as PNE's Authorized Agent

No agency relationship exists, or ever existed, between PNE and ISO-NE. An agency relationship requires: “(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.” Dent v. Exeter Hospital, Inc., 155 N.H. 787, 792 (2007). An agent must act with either actual authority (express or implied) or apparent authority from the principal. “Express authority arises when the principal ... explicitly manifests its authorization of the actions of its agent. Implied authority, on the other hand, follows as a reasonable incident or construction of the terms of express authority, or results from acquiescence by the principal in a course of dealing by the agent.” Bouffard v. State Farm Fire & Cas. Co., 162 N.H. 305, 311-12 (2011). Under the doctrine of apparent authority, a principal is liable for the unauthorized acts of his agent “if the principal has either so conducted his business as to give third parties the right to believe that the act in question is one he has authorized his agent to do, or that it is one agents in that line of business are accustomed to do.” Sinclair v. Town of Bow, 125 N.H. 388, 392 (1984).

PNE never expressly or impliedly authorized ISO-NE to act as its agent. If necessary, PNE’s representative, August Fromuth, will testify at the February 18th hearing that PNE never authorized ISO-NE to act as its authorized agent, to initiate EDI drop transactions of its customers, or to undertake any other “changes” under Section 2(a) of the PSNH Tariff. PSNH has not, and cannot, offer any evidence as to whether ISO-NE viewed itself as PNE’s agent. PSNH has neither offered testimony from ISO-NE to suggest that PNE expressly authorized ISO-NE to act as its agent nor pointed to any contractual or Tariff language that shows PNE gave ISO-NE authority to act as its agent. This lack of rebuttal evidence similarly prevents PSNH

from establishing that ISO-NE was acting with implied authority. See Demetracopoulos v. Strafford Guidance Ctr., 130 N.H. 209, 215 (1987) (“In determining whether implied authority exists, the court focuses upon the agent’s understanding of his authority: whether the agent reasonably believed, because of conduct of the principal (including acquiescence) communicated directly or indirectly to him, that the principal desired him so to act.” (Emphasis added.)).

Similarly, no apparent authority existed for ISO-NE to act as PNE’s agent. “Like actual authority, a finding of apparent authority incorporates the three factual elements [of agency] 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, 155 N.H. at 792 (emphasis added). PNE never told PSNH, or anyone else, that ISO-NE had the authority to consummate EDI drop transactions of its customers or otherwise act on its behalf. PSNH has offered no evidence to counter this assertion because none exists. Because PNE did not confer express or apparent authority on ISO-NE, PSNH cannot establish the first prong of the agency relationship. The Commission need go no further.

PSNH also cannot establish the other two elements of an agency relationship—the agent’s consent and the principal’s continuing control over the agent. With regard to consent, again PSNH has offered no testimony or evidence to prove that ISO-NE consented to act on PNE’s behalf. Likewise, PNE exercised no control over ISO-NE’s actions. ISO-NE controls PNE’s participation in the energy market, not the reverse. It is telling that once PNE was suspended from the energy market, the ISO Tariff expressly required PNE to relinquish any control of its load asset. This fact, among others, reveals the absurdity of PSNH’s argument that PNE somehow controlled ISO-NE.

Based on the above, PNE requests that the Commission find that ISO-NE was not acting as PNE's authorized agent in February 2013 and never initiated any customer drop tractions as PNE's agent under Section 2(a) of the PSNH Tariff. PSNH's failure to offer any evidence to support its novel agency defense is fatal.

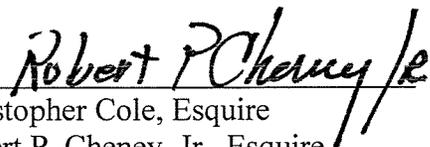
Respectfully submitted,

PNE ENERGY SUPPLY, LLC

By its Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
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Dated: February 18, 2014

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