

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. 12-295

PNE POWER SUPPLY, LLC d/b/a/ POWER NEW ENGLAND

**Petition for Review of the Reasonableness and Appropriateness of Certain Tariff Charges
by Public Service Company of New Hampshire upon Competitive Electric Suppliers**

**PETITIONER PNE POWER SUPPLY LLC'S CLOSING STATEMENT AND
MEMORANDUM OF LAW**

This Closing Statement and Memorandum of Law is respectfully submitted by the
Petitioner PNE Energy Supply, LLC ("PNE"). Below, PNE highlights several issues for the
Commission's consideration based on the evidence presented at the hearing on the merits.

Introduction

PNE commenced this matter by a Petition seeking the Commission's review of the
reasonableness and appropriateness of certain PSNH Tariff Charges under Section 2 of the Tariff
Terms and Conditions ("the Tariff"): the Selection Charge under Section 2(a); the Billing and
Payment Service Charge under Section 2(f); and the Collection Services Charge under Section
2(g) (collectively, "the Charges"). PNE has asked the Commission to exercise its plenary
authority over a public utility to review these Charges for their reasonableness. At the October 3,
2013 hearing on the merits, the Commission received/heard pre-submitted and live testimony,
and other evidence, from PNE (Mr. Fromuth) and representatives from three Intervenor, North
American Power Group ("NAP") (Mr. Tschamler), Electricity-NH ("ENH") (Mr. Dean), and the
Retail Electrical Supply Association ("RESA") (Mr. Allegretti), and two PSNH witnesses (Mr.
Goodwin and Ms. Tebbetts).

Summary of the Argument

Below, PNE raises four issues for the Commission's consideration. First, PNE believes that the public utility should bear the ultimate burden of proof and persuasion that the Charges are reasonable and that PSNH may appropriately continue to impose the Charges on the Competitive Electric Power Suppliers ("the Suppliers"). Second, the evidence demonstrated that PSNH has, at least since July 2010, improperly doubled the "\$5.00" Selection Charge in connection with customer changes from one Supplier to another Supplier, charging \$5.00 to the new Supplier and \$5.00 to the legacy Supplier. Third, the evidence failed to demonstrate in any material way that the Charges are reasonable and appropriate, with PSNH essentially taking the position that it would provide no meaningful data in respect to the costs associated with the various Charges until some subsequent rate-making proceeding makes it worth PSNH's while to capture and address any such specific cost-related information. Lastly, PNE respectfully suggests a series of remedial measures that the Commission should promptly adopt.

I.

PSNH Should Bear the Ultimate Burden of Persuasion that the Charges are Just and Reasonable

A. PSNH Must Bear the Burden of Persuasion

PNE acknowledges that, in accordance with Puc 203.25, "unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence." PNE believes that "a distinction" – acknowledged in past matters before the Commission – "be made between the burden of going forward to present an affirmative or prima facie case and the burden of persuasion on the issues so established where a public utility is involved." In re Wilton Telephone Co., PUC Order No. 23,744 (July 26, 2001). In other words, the PNE and the

Intervenors should properly bear the burden of establishing the basis for complaint, and the utility must then bear the burden of actually demonstrating, in this matter, the justness and reasonableness of the Charges to which the Suppliers are subject under the Tariff.

Allocation of the so-called burdens in this manner is completely consistent with the Commission's mandate under RSA 378:7, which provides that:

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the...charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the...practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, ...the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed.

RSA 378:7. The economic justification and reasonableness of the charges at issue here – at least one of which PSNH Senior Management promised in 1999 to revisit¹ – are peculiarly and solely within PSNH's capacity to produce. As the Commission noted in Wilton, the allocation of the burden of persuasion on the utility "is also in accord with the policy of imposing the burden on the party with the best access to relevant evidence...." In re Wilton Telephone Co., PUC Order No. 23,744 at 24. The Suppliers do not have any access to information bearing on these costs, apart from amounts they have been charged, without disclosure from PSNH.²

¹ See Pre-Filed Testimony of Kevin Dean, Exhibit B at page 7 (testimony of Gary Long and Stephen Hall of PSNH). See also Pre-Filed Testimony of Charles Goodwin and Stephen Hall at page 10, lines 10-14.

² PNE submits that other provisions of law similarly suggest – and really, warrant – the imposition of the burden of proof on the utility here, including RSA 365:2 (stating that the Commission may require from any public utility "that charges be answered"); RSA 365:5 (permitting the Commission on its own motion to investigate or make inquiry in a manner to be determined by it as to any rate charged or proposed); RSA 365:23 (mandating the duty of every public utility to observe every requirement of orders served upon it); RSA 374:2 (providing that all charges made or demanded by a public utility "for any service

B. The Suppliers Have Established a Prima Facie Case that the Charges are Material, Growing and Probably Unjust, Unjustified and Unreasonable

The Suppliers' pre-filed and live testimony established a sufficient prima facie case to shift the burden of persuasion to PSNH to demonstrate the reasonableness of the charges. For example, in the pre-filed and live testimony of both Mr. Dean (ENH) and Mr. Tschamler (NAP), ENH and NAP have described the amount and materiality of the charges imposed upon their respective companies. See Pre-filed Testimony of Kevin Dean at page 5, lines 3-6; page 8, lines 6-9; page 10, lines 22-25; Pre-Filed Testimony of Taff Tschamler at page 4, lines 12-22; see also Exhibit 11 (PSNH Response to ENH Data Request 1-2). For its part, PSNH has conceded that at least one of the Charges, the Selection Charge – and indeed, the most expensive of them – actually has no basis in actual cost-analysis or cost-recovery. See Pre-Filed Testimony of Kevin Dean (ENH), Exhibit B at page 7 (testimony of Gary Long and Stephen Hall of PSNH) (“PSNH did not prepare a cost analysis of the administrative costs” associated with Supplier transactions). PSNH also squarely acknowledges that the “amount of revenue from all of the charges at issue was approximately \$500,000 in calendar year 2012, “over \$1 million for the 12-month period ending May 31, 2013;” and “over \$800,000” in calendar 2013 through May.” Pre-Filed Testimony of Charles Goodwin and Stephen Hall at page 6, lines 1-3. PSNH also essentially concedes that it possesses the data necessary to evaluate the reasonableness of the charges, but will not do so except in the context and procedure of “a rate case.” Pre-Filed Testimony of Goodwin and Hall at page 4, line 4, pages 8-9 n. 1; Transcript at 138-39; 142-44; 153-55.

In short, the Suppliers have established that the Charges: are material to their businesses and to the rapidly emerging competitive marketplace; have no meaningful cost-recovery justification (to which the Suppliers have access); and will continue at least until, in PSNH's

rendered by it...shall be just and reasonable” and prohibiting “every charge that is unjust or unreasonable, or in excess of that allowed by law”); and RSA 374-F generally.

view, they can somehow be “revisited” in the context of a future, as yet unscheduled rate case.

Transcript at 155-56. PSNH must properly bear the burden of proving that the Charges are just and reasonable.

II.

PSNH Improperly “Double Charges” the Selection Charge Under Certain Circumstances

The hearing exposed a very substantial difference of opinion between PNE (and the other Suppliers) and PSNH over the interpretation of Section 2(a) of the PSNH’s Tariff regarding the assessment of Selection Charges by PSNH.³ The evidence, as presented below, demonstrates that PSNH has, at least since July 2010, improperly doubled the \$5.00 Selection Charge in connection with customer changes from one Supplier to another Supplier, effectively charging a \$10.00 fee by charging \$5.00 to the new Supplier and \$5.00 to the legacy Supplier.

Section 2(a) of the Tariff provides, in relevant part, as follows:

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 who are currently taking Supplier Service, Default Service or Self Supply 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 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....**

Selection Charge.....\$5.00 per Request

Exhibit 6, at page 32 (Tariff, Section 2(a) (emphasis added)).

³ In other words, the hearing exposed not only a failure to provide the data that might support an argument that the Charges are just and reasonable. The hearing demonstrated that, even if the \$5.00 Selection Charge could be considered reasonable, PSNH has been doubling that Charge in certain specific circumstances, in violation of the language of the Tariff Section 2(a). In PNE’s view, PSNH is imposing an unreasonable Charge – and doubling it.

At the October 3 hearing, PSNH (Ms. Tebbetts) indicated that where “PNE had a customer, [and] the customer, for whatever reason, signed up with NAPG,” Transcript at 120, “the new supplier, NAPG, gets billed \$5.00, and the supplier that was left behind [PNE], that the customer left, also gets billed the \$5.00 Selection Charge.” Id. at 121. More generally perhaps, PSNH asserted that “...the supplier who has received the enrollment gets charged \$5.00, and the supplier who has been dropped also receives a \$5.00 charge,” id., and PSNH collects \$10.00. Id.

PSNH conceded that, in its view, the totality of its authority to charge the Selection Charge in this manner was the language of the first sentence of Section 2(a). See Transcript at 126. Ms. Tebbetts testified:

“As you read under Section (a), it states that ‘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.’ So, in that statement right there is where I read that we are able to collect the \$5.00 charge on the drop and the enrollment.”

Id. at 125-26. PSNH also explained that “[t]he first sentence is the overall concept of the Supplier Selection Charge. The rest of the sentences are more specific, to explain different instances, but it is not all-encompassing. The first sentence is all-encompassing of how we charge.” Id. at 127. Nonetheless, PSNH conceded that the supplier who has been dropped does not initiate any transaction. Id. at 127-28.

In response to Commissioner Ignatius’s inquiry, PSNH vaguely conceded that it assessed the Selection Charge on the Supplier being dropped simply because it could:

Q. And, so, your – the reason under your tariff that you would charge in that case, **it’s not because you’ve gotten a request from that company, and it’s not because the company initiated a change, it’s just the final piece of the two transactions that you see happening?**

A. (Tebbetts) It's the information sent back to the supplier, the EDI transaction to the supplier to say "Your customer has dropped you. We don't know why, but they have dropped you." So, it's information again sent between the supplier and the Company.

Q. Well, I understand there's two transactions that are happening, to make the entire thing make sense. It's just whether there's a -- under the tariff, whether there's a request that would trigger the Selection Charge under the language of your tariff?

A. (Tebbetts) As far as the drop?

Q. Yes, the drop.

A. (Tebbetts) And, again, like I said, we don't ask as to why the customer has -- why we have received anything or, you know, what's going on. So, **you are correct that there are times when the supplier has initiated an enrollment and the other supplier gets charged for a drop.**

Transcript at 251-52 (emphasis added); id. at 209-10 (inquiry by Commissioner Harrington).⁴

Respectfully, PSNH's interpretation of this part of the Tariff is simply spurious. The first sentence of Section 2(a) plainly contemplates the imposition of "a Selection Charge" of "\$5.00 per Request" for changes "initiated" by a Customer or Supplier or an authorized agent of a Customer or Supplier. PSNH relies solely on the first sentence of Section 2(a) to impose the Charge twice. Transcript at 126. The ensuing two sentences make it absolutely clear that a **single fee** is contemplated, and is to be imposed only on the party or entity initiating the change of supply relationship. For example, in the second sentence of Section 2(a), the Tariff plainly and explicitly addresses the situation, stating that "[f]or customers 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." The third sentence of

⁴ Suppliers testified that they only see the \$5.00 charge on their bills from PSNH; prior to this proceeding and the discovery in it and elsewhere, they have been and are totally unaware that PSNH was charging the "Selection Charge....\$5.00" twice. See Transcript at 61; Pre-Filed Testimony of Daniel Allegretti, at page 4, lines 18-19 (noting other utilities do not impose a Selection Charge).

Section 2(a) addresses the Supplier's decision to initiate a drop when, for example, a customer is not paying for service: "For Customers who are 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." Here again, the language of the Tariff plainly contemplates and provides for a single \$5.00 charge to the Supplier that determined that the customer, for whatever reason, had to be dropped. Nowhere in Section 2(a) does the Tariff provide for a doubling of the Selection Charge.

III.

The Tariff Charges Are Actually or At Least Presumptively Unreasonable and Unfair

Again, PSNH has opted to provide no data in respect to the reasonableness of the Charges. PSNH asserts that the Charges can only be examined in the context of a future rate-making proceeding, Transcript at 142; Exhibit 8 (PSNH Response to ENH Data Request 10), and that any change to the Charges (presumably meaning a reduction or a moratorium on their imposition) would constitute an exogenous event under the Settlement. Transcript at 157-58. Yet, in the absence of any data to even suggest, for example, that imposing a \$5.00 Selection Charge on every customer change in Suppliers constitutes reasonable cost-recovery, it is clear that the Charges must be presumed to be unjust and unreasonable. See, e.g., Petition of Public Service Co. of N.H., 130 N.H. 265, 274 (1987) (holding that "to produce a rate that is just and reasonable" a regulatory body must "engage in a rational process of balancing consumer and investor interests").

A. The Selection Charge

PSNH has conceded that the "Selection Charge...\$5.00," as set forth in Section 2(a) of the Tariff was adopted as a placeholder without any "cost analysis of the administrative costs," using the fee then – but no longer – charged by Granite State Electric. Transcript at 135. In

1999, PSNH senior management plainly and unambiguously promised to “revisit the fee in the future when actual costs are known.” See Pre-Filed Testimony of Kevin Dean (ENH), Exhibit B at page 7 of 11 (testimony of Gary Long and Stephen Hall). Fourteen years have passed, and the Selection Charge remains in place. This period is presumably a long enough duration for PSNH to have collected the data to determine and demonstrate the “actual costs” of “supplier transactions including customer enrollments, drops and moves,” and provide the economic analysis necessary to demonstrate the reasonableness of the Charge. Mr. Goodwin acknowledged that none of the Charges, including the Selection Charge, has been the subject of any formal study, analysis or elucidation since 1999. Transcript at 135-36; Exhibit 8 (PSNH Response to ENH Data Request 10). He conceded that “PSNH has not tracked the cost/expense information necessary” to describe “the cost associated, in whole or part, with PSNH’s provision of Supplier Services.” See Exhibit 7 (PSNH Response to ENH Data Request 8); Transcript at 136-37. Mr. Goodwin and PSNH insisted that the elucidation of such costs and cost-analysis would require “a special study,” which PSNH would not do (presumably without being required to do so by the Commission). Id.; Exhibit 17 (PSNH Response to NAPG Data Request 16). PSNH also acknowledged that it does not record costs associated with switching Suppliers from Default Service to Supplier service “or any other costs incurred by PSNH to provide supplier services.” Transcript at 144; Exhibit 9 (PSNH Response to RESA Data Request 5).⁵ PSNH finally confirmed that “there is no sound analysis” or cost justification for the Selection Charge, and that PSNH simply adopted the \$5.00 fee in 1999 because Granite State Electric was then

⁵ PSNH is in fact a competitor to the Suppliers as a Default Service Provider. But PSNH never absorbs any “Charge” for its enrollment or drop, in the manner in which it imposes the Selection Charge on Suppliers. To the extent that the EDI “events” involve “costs” (and PNE agrees with ENH that there are actually no costs associated with the automated EDI systems), one must assume that PSNH absorbs these EDI costs associated with entering and leaving Default Service as “embedded” costs in the transmission and delivery rates. The result of this – double charging the Suppliers and not “charging” PSNH Default Service at all – is an anticompetitive subsidy by the Suppliers of PSNH’s Default Service rate.

using it. Id. at 139; see also Transcript at 211 (inquiry of Commissioner Harrington: Q: “[A]nd you have nothing [other than the fact that Granite State Electric once charged the fee] to back up the \$5.00 charge? A: (Tebbetts) Yes. That’s correct.”).⁶

Respectfully, the justness and reasonableness of a “Charge” made by a public utility must be informed by some meaningful analysis or cost-justification. PSNH emphasized in its testimony that it caviled with the definition of “cost,” as that term was used by the Suppliers. See Transcript at 154, 166. But the Selection Charge has never been justified by any baseline analysis of the cost of the services that underlie switching Suppliers, either between and among other Suppliers (the “\$10.00” Selection Charge) or from a Supplier to Default Service (a “\$5.00” transaction). Here anyway, it is irrelevant whether it is “incremental costs” or “embedded costs” or “marginal costs” that are the recovery target of the Charge. See Transcript at 167-69, 173-74; see also Petition of PSNH, 130 N.H. at 274.⁷ It is not overstating the matter to say that the Selection Charge – now amounting to many hundreds of thousands of dollars in revenue to PSNH – is made up out of whole cloth, with literally no basis in fact for the Charge. See Exhibit 11 (PSNH Response to ENH Data Request 2) (providing the total amount of Selection Charges then billed to Suppliers by PSNH from 2007 through June 2013).

B. The Billing and Payment Service Charge and Collection Service Charge

As to the other Supplier Charges, these are similarly unjust and unreasonable. Here again, PSNH has essentially refused to provide data concerning the costs – however “cost” is

⁶ Mr. Goodwin testified that, notwithstanding several rate-making proceedings in the interim, the Selection Charge has remained in place simply because no one, until now, has challenged the fee or asked a meaningful question about its continued (no less its original) reasonableness. Transcript at 141-43; Exhibit 8 (PSNH Response to ENH Data Request 10).

⁷ Suppliers also pointed out that the services provided for this \$5.00 Charge are limited to an automated transaction on the Electronic Data Interchange (EDI). See, e.g., Pre-Filed Testimony of Kevin Dean (ENH) at page 4, lines 22-23 and 5, lines 1-2. The value of the “services” is almost certainly miniscule in relation to the Charge. See id. at pages 5-6, generally.

defined – concerning the services and activities that these Charges intend to defray or recover. It is certain, however, that Supplier Charges of just less than \$17,000 were assumed and incorporated into distribution rates in the 2008 rate case and Settlement, see Transcript at 204-05, and that revenues from these Charges have been vastly higher than \$17,000 over the past few years. See Transcript at 204; Exhibit 11 (PSNH Response to ENH Data Request 2).⁸ And most if not all of the services contemplated by these Billing and Delivery and Collection Services Charges are services that PSNH would have to charge and does charge for its distribution services in any event. See Pre-Filed Testimony of Taff Taschamler (NAPG) at pages 12-14.⁹

Thus, it appears that through these Charges PSNH effectively realizes an unfair and unreasonable double recovery for meager services provided to Suppliers: first in the distribution rate it may charge its customers, and then again in connection with the Billing and Delivery Services (Tariff Section 2(f)) and Collection Services (Tariff Section 2(g)) Charges imposed on the Suppliers. See Pre-Filed Testimony of Kevin Dean (ENH) at page 8, lines 20-23, and 9, lines 1-8 (“PSNH’s [1999] cost estimate appears to reflect the total cost of billing and payment services, even though bill creation, remittance processing, maintenance and operation of PSNH’s customer information system, and management of customer accounts, are all costs of PSNH’s distribution services. This may result in an unreasonable subsidization of PSNH’s distribution services by competitive suppliers”); id. at page 11, lines 13-20, and page 12, lines 22-23 and page 13, lines 1-3 (concerning the Collection Services Charge); see also Pre-Filed Testimony of Taff Taschamler (NAPG) at pages 6-11 generally (concerning both Section 2(f) and Section 2(g) Charges) .

⁸ The PSNH Response states that revenues from all of the Charges since 2008 have been \$72,399 (2009); \$133,366 (2010); \$187,356 (2011); \$547, 464 (2012); and \$824,005 (2013). Exhibit 11.

⁹ Unitil and Liberty Utilities do not impose either of these Charges on the Suppliers. Pre-Filed Testimony of Taff Taschamler (NAPG) at page 13, lines 12-13, and 14, line 18.

IV.
The Commission Should Fashion a Broad Remedy That Follows the Legislative Mandate of
RSA 374-F

PNE respectfully requests that the Commission fashion a broad remedy to address PSNH's actions, and its unwillingness to provide cost-related data. PNE asks the Commission to impose the following remedies:

1. The Commission should immediately order that PSNH cease imposing the \$5.00 Selection Charge pursuant to Section 2(a) of the Tariff Terms and Conditions, until and unless PSNH can meaningfully demonstrate that the costs, however defined, of providing the switching services mandate a Selection Charge of any sort at a reasonable amount;
2. The Commission should order PSNH to provide an accounting of each and every transaction in which it has imposed a \$10.00 Selection Charge – that is, a \$5.00 Selection Charge on a new Supplier and a matching \$5.00 Selection Charge on the legacy Supplier – expressly in order to facilitate and require rebates or disgorgement of the improperly imposed, additional \$5.00 Charge;
3. The Commission should order an immediate moratorium on the imposition of the Tariff Section 2(f) Billing and Delivery Service Charge, and on the Section 2(g) Collection Charge, until and unless PSNH can meaningfully demonstrate that the costs, however defined, of providing those services are reasonable in relation to the services provided and the amount of those two Charges;
4. The Commission should retain jurisdiction pursuant to this Docket and order Staff to investigate, determine and report to the Commission (and to the Suppliers):

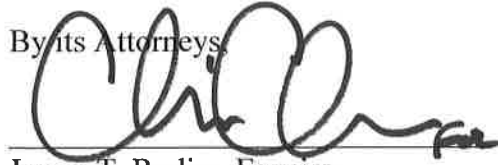
- a. When exactly PSNH began assessing the Selection Charge to both Suppliers in transactions in which one Supplier replaced another Supplier as the customer's electricity provider;
- b. When exactly (if ever, since their inception) the Charges could have been considered just and reasonable; and
- c. Such other and further relief as the Commission deems necessary and just.

Respectfully submitted,

PNE ENERGY SUPPLY, LLC

Date: October 28, 2013

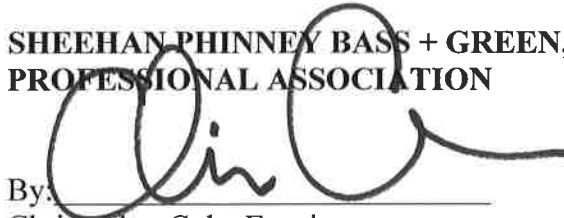
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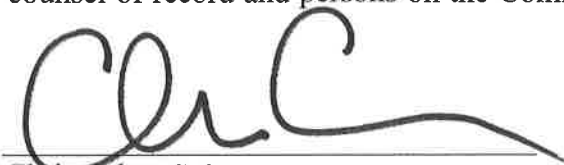
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CERTIFICATION OF SERVICE

I, Christopher Cole, hereby certify that on this 28th day of October 2013 a copy of the foregoing was sent via electronic mail to all counsel of record and persons on the Commission's distribution list.



Christopher Cole