

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

PNE ENERGY SUPPLY, LLC D/B/A POWER NEW ENGLAND

Petition for Review of Public Service Company of New Hampshire's Services and Charges to
Competitive Electric Suppliers
Docket No. DE 12-295

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO MOTION
TO COMPEL OF PNE ENERGY SUPPLY LLC D/B/A POWER NEW ENGLAND**

NOW COMES Public Service Company of New Hampshire ("PSNH" or the "Company") and, pursuant to Puc 203.07(e) and 203.09, hereby objects, with the exceptions noted below relative to questions 9, 10 and 11, to the Motion to Compel PSNH to Respond to PNE Data Requests Nos. 2 Through 11 filed by PNE Energy Supply, LLC d/b/a Power New England ("PNE") on August 20, 2013. In support hereof, PSNH says the following:

1. On October 10, 2012, PNE requested that the Commission open a docket for the purpose of reviewing certain charges assessed by PSNH to competitive electric power suppliers operating in PSNH's service territory. On June 25, 2013 the Commission issued Order No. 25,528 in this docket in response to motions to compel filed by PSNH on various parties to the docket. As part of that order the Commission clarified the scope of the docket by stating:

At the outset, we note that PSNH's motion reflects the mistaken assumption that the purpose of this docket is to review whether PSNH's charges to CEPs have impeded the development of the competitive market. Although Power New England, LLC made that claim in the filing that led to this docket, and that claim is recited in the Order of Notice opening this docket, the scope of this docket is to investigate whether PSNH's charges for customer selection, billing and collection are just and reasonable. We will not expand it to examine the effects of the charges on the development of the competitive market, or the effect of the charges on the profitability of competitive suppliers.

Order No. 25,528 (June 25, 2013) at 5.

2. On August 1, 2013, PNE submitted 11 data requests to PSNH and on August 12, 2013 PSNH timely objected to request numbers 2 through 11. On August 20, 2013 PNE filed a motion to compel responses to each of the questions to which PSNH had objected. PNE's motion to compel provides no convincing reason for the Commission to require PSNH to respond to the questions to which it objected and should be denied.

3. "In a discovery dispute, the Commission applies by analogy the standard applicable to litigation in Superior Court, which requires a party seeking to compel discovery to show that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence." *Public Service Company of New Hampshire*, Order No. 25,334 (March 12, 2012) at 9. Accordingly, PNE bears the burden of demonstrating that the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence. PNE has not met this burden.

4. In that PNE's data requests 2, 3 and 4 are interrelated, PSNH addresses them collectively. Those requests are as follows:

Request No. 2: Is PSNH entitled to bill the Selection Charge in only the following three circumstances:

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 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.

The Selection Charge will be assessed to the Customer if the Customer terminates Self-Supply Service and receives Default Service or initiates Self-Supply Service when receiving Default Service or Self-Supply Service.

Request No. 3: If the response to Request No. 2 is anything other than “Yes,” please explain in detail.

Request No. 4: Are there any other circumstances other than those listed in Request No. 2 in which PSNH is entitled to assess the Selection Charge? If the answer is “Yes,” please describe said circumstances in detail and also quote the exact Tariff language upon which PSNH relies as a basis for the assessment.

To each of these requests, PSNH objected by stating:

Objection: PSNH objects to the question as being beyond the scope of the current docket, thus the question is not reasonably calculated to lead to the production of evidence admissible in this proceeding. To the extent the question seeks information about the operation of PSNH’s tariff, the document speaks for itself.

5. Each of these questions explicitly seek information about the circumstances in which PSNH is “entitled” to assess the Selection Charge. The circumstances under which PSNH is “entitled” to assess charges, including the Selection Charge, are set out in PSNH’s publicly-filed tariff. As such, these questions are seeking to have PSNH interpret the tariff on behalf of PNE. In that the circumstances in which PSNH is entitled to assess the Selection Charge are defined by the tariff, it is more appropriate for PNE to refer to the terms of the tariff itself, rather than require that PSNH offer its interpretation of the tariff. The tariff is the best evidence of the circumstances in which the Selection Charge is to be assessed. As was noted in PSNH’s objection, to the extent that these are questions seeking information about the operation of PSNH’s tariff, PNE is able to read the document for itself and should not be relying upon PSNH to interpret the tariff for it.

6. Moreover, the questions are little other than requests for legal conclusions about the requirements of PSNH’s tariff in the guise of questions about the charges at issue in the docket. As the New Hampshire Supreme Court has noted “Because a tariff has the same force and effect as a statute, we interpret a tariff in the same manner that we interpret a statute.” *Appeal of*

Verizon New England, Inc., 158 N.H. 693, 695 (2009) (citations omitted). Thus, PNE is, in essence, requesting that PSNH provide its interpretation of a statute.

7. In addition, PNE contends that the information it seeks is relevant because “[t]here appears to be a compelling and substantial difference of opinion between PNE and PSNH over the interpretation of Section 2(a) of the PSNH’s [*sic*] Tariff”. PNE Motion to Compel at 2. To the extent that PNE has a specific interpretation of PSNH’s tariff it believes the Commission should apply, or require PSNH to apply, it is free to argue for the validity of that interpretation to the Commission. The fact that PNE may have a “difference of opinion” from PSNH does not, however, make the requested interpretations by PSNH relevant or necessary.

8. Further, in instituting this proceeding PNE contended that “the incremental costs incurred by PSNH in performing the foregoing automated services [including the changing of suppliers] are very low, and possibly zero. . . . Even if the incremental costs incurred by PSNH were not zero, the Commission may require PSNH to recover such costs through base rates and not through explicit charges on the competitive suppliers if it believes such an approach would eliminate a drag on the development of a competitive market for small customers.” October 1, 2012 Testimony of August G. Fromuth at 3. Thus, PNE is seeking that the charges be either eliminated or that the costs should be recovered by some means other than by charging suppliers. It has not contended that there is some manner of assessing a selection charge that would be just or reasonable, only that the charge itself is unjust and unreasonable. This appears to be the same point of view shared by other parties that have filed testimony in this docket. *See, e.g.*, March 26, 2013 Testimony of Kevin Dean on behalf of ENH Power at 13-14; March 26, 2013 Testimony of Taff Tschamler on behalf of North American Power and Gas at 9-10. As such, to the extent the Commission is reviewing the justness and reasonableness of the charges, including

the Selection Charge, it does so in the face of arguments that these charges should be eliminated and that any costs should be recovered by another method. Thus, it is the act of charging at all, regardless of the circumstances, that is of concern to PNE, and any information about particular circumstances under which PSNH considers itself “entitled” to assess the charge are beyond the scope of the proceeding. Accordingly, the Commission should deny PNE’s motion to compel responses to questions 2, 3 and 4.

9. PNE’s request 5 stated: “Please provide a copy of all notes taken by PSNH at the Technical Conference held in Docket No. DE 12-295 on May 7, 2013, that relate to the assessment of the Selection Charge by PSNH.” PSNH objected to this question by stating: “Objection: PSNH objects to the question as seeking information that is irrelevant to this proceeding. In addition, the information requested may be subject to the attorney-client and/or attorney work-product privileges. Moreover, the question is not reasonably calculated to lead to the production of evidence admissible in this proceeding.” In its motion to compel, PNE contends that PSNH must respond because “PNE’s Request is within the scope of this proceeding since it seeks non-privileged information and documents on what circumstances PSNH believes that it is entitled to bill the Selection Charge.” Motion to Compel at 4.

10. With respect to the contention that PSNH must respond because the information will demonstrate under what circumstances PSNH “believes” it is entitled to bill the Selection Charge, this question, as with questions 2, 3 and 4, is seeking PSNH’s interpretation of its tariff and is, for the same reasons set out above, an inappropriate question. Furthermore, while PSNH recognizes that the rules of evidence do not apply in Commission proceedings, as noted above, in discovery disputes, the Commission applies the standards applicable in the Superior Court. Under the New Hampshire Rules of Evidence, which apply in the Superior Court, relevant

evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.H. R. Evid. 401. Any notes that PSNH personnel may have taken during a technical session in this docket will not tend to make any fact of consequence in determining the justness or reasonableness of PSNH’s charges any more or less probable than it otherwise would be. There is simply no basis to conclude that any notes taken by PSNH’s personnel will aid the Commission in any determination about whether the charges at issue are just and reasonable. Accordingly, the question itself is inappropriate, the information sought is not relevant, and the question is not reasonably calculated to lead to admissible evidence. Thus, the motion to compel a response to question 5 should be denied.

11. As with questions 2, 3 and 4, questions 6, 7 and 8 are interrelated and PSNH addresses them collectively. Those requests are as follows:

Request No. 6: When a competitive energy power supplier enrolls a customer currently taking Supplier Service from another competitive electric power supplier and the transfer in Supplier Service is made at the next scheduled meter read date, what party or parties are assessed a Selection Charge by PSNH and how much is the Selection Charge assessed to each party or parties?

Request No. 7: If the answer to Request No. 6 is that both the competitive electric power supplier providing Supplier Service at the time the new enrollment is submitted and the competitive electric power supplier submitting the new enrollment are assessed a Selection Charge, when did PSNH initiate that practice?

Request No. 8: If the answer to Request No. 6 is that both the competitive electric power supplier providing Supplier Service at the time the new enrollment is submitted and the competitive electric power supplier submitting the new enrollment are assessed a Selection Charge, please quote the exact Tariff language upon which PSNH relies as a basis for both assessments.

As with questions 2, 3 and 4, to each of these questions PSNH responded:

Objection: PSNH objects to the question as being beyond the scope of the current docket, thus the question is not reasonably calculated to lead to the production of

evidence admissible in this proceeding. To the extent the question seeks information about the operation of PSNH's tariff, the document speaks for itself.

12. As with questions 2, 3 and 4, these questions are seeking to have PSNH interpret its tariff on behalf of PNE. As noted above, the assessment of charges is based upon PSNH's tariff and the tariff provides the best evidence of the manner in which the charges are assessed. PNE is equally able to read and interpret PSNH's tariff. In fact, PNE makes clear that it is seeking to have PSNH interpret its tariff for PNE when, in question 8, it asks PSNH to quote the language of the tariff as part of any response. For all of the reasons set out in relation to questions 2, 3 and 4, above, the motion to compel responses to questions 6, 7 and 8 must be denied.

13. Lastly, PSNH notes that questions 9, 10 and 11 are also interrelated and, as with the above, addresses them collectively. Those requests state:

Request No. 9 . Do the following utility companies – Connecticut Light & Power, Western Massachusetts Electric Company, NSTAR – charge competitive electric power suppliers fees or charges similar to the \$5.00 Selection Charge, \$0.50 per bill billing and payment service charge, and 0.252% collection service charged by PSNH to competitive electric power suppliers in NH?

Request No. 10 If the response to Request No. 9 is “yes,” please identify those charges and their current rates or amounts.

Request No. 11. If the response to Request No. 10 is “no,” please identify the charges or cost recovery mechanisms used by those utilities, if any, to recover the additional costs to those utilities of providing Supplier Services to competitive electric power suppliers.

To questions 9 and 10, PSNH objected by stating: “PSNH objects to the question as seeking information that is irrelevant to this proceeding and beyond the scope of the current proceeding. Moreover, the question is not reasonably calculated to lead to the production of evidence admissible in this proceeding.” As to question 11, PSNH objected by stating:

PSNH objects to the question as seeking information that is irrelevant to this proceeding and beyond the scope of the current proceeding. Moreover, the question is not reasonably calculated to lead to the production of evidence

admissible in this proceeding. In addition, a response to this question would require PSNH to undertake a special study or analysis on behalf of the requestor.

In its motion to compel, PNE contends that the “practices and procedures in place at PSNH’s affiliates would be highly relevant and informative in determining whether PSNH’s practices and procedures for customer selection, billing and collection are just and reasonable.” Motion to Compel at 5-6.

14. While PSNH does not agree that the practices and procedures in place at PSNH’s affiliates are relevant to this docket, PSNH does agree to provide a matrix of supplier charges in the various NU operating companies in a supplemental response. In so doing, however, PSNH notes that the matrix is a compilation of many charges, and PSNH does not attempt to define which charges PNE may consider “similar” to the charges at issue and which charges it might not consider to be “similar”. In that the matrix will show a variety charges for numerous services, PSNH believes that the matrix will be responsive to questions 9, 10 and 11.

15. Notwithstanding the above, PSNH maintains that whether other companies, in other states, with different legal and regulatory requirements, assess charges like those at issue here is not relevant to any determination by the Commission on the justness or reasonableness of PSNH’s charges. The mere fact that these out-of-state entities share common ownership with PSNH does not somehow make information about their costs or cost recovery as it relates to competitive suppliers relevant.

16. Lastly, and with respect to question 11 specifically, PSNH notes that to the extent a list of charges is not sufficient, PSNH would object to providing any further information and to the extent the question and the motion could be read to seek further information, the motion should be denied. Through that question, PNE is requesting that PSNH determine what charges or cost recovery methods are used by other companies in other states, and, to the extent those


methods differ from the ones in place in New Hampshire, that PSNH identify whether and how those charges “recover the additional costs to those utilities of providing Supplier Services to competitive electric power suppliers.” While PSNH may be able to provide information about what the charges are, to provide further information about whether and how those charges recover the “additional” costs would require a special undertaking by PSNH. PSNH would be required to determine the “additional” costs incurred by each company and determine how the charges specific to that company are recovering those “additional” costs as opposed to any other costs. PSNH does not have that information and should not be required to produce it, particularly since any information produced would do nothing to inform the Commission about the charges at issue in this docket. Accordingly, PSNH will provide a matrix of supplier charges assessed by its affiliates, but to the extent the questions or the motion to compel seek further information, the motion to compel responses to questions 9, 10 and 11 should be denied.

WHEREFORE, PSNH respectfully requests that, subject to the exception noted above relative to questions 9, 10 and 11, the Commission deny PNE’s Motion to Compel, and order such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

August 30, 2013
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.

August 30, 2013
Date


Matthew J. Fossum