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October 15, 2013

By Regular and Electronic Mail

Debra A. Howland
Executive Director and Secretary
State of New Hampshire
Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: IR 13-233, PNE Energy Supply, LLC v. Public Service Company of New Hampshire

Dear Ms. Howland:

This letter is respectfully submitted on behalf of PNE Energy Supply, LLC ("PNE") in response to the Staff Report dated September 27, 2013.

I. Background

As the Commission will understand, this proceeding was commenced by PNE to seek immediate disgorgement of customer payments improperly withheld by PSNH, as well as investigation of certain charges assessed by PSNH against PNE, consisting of:

(1) $47,735 in improperly billed "Selection Charges," charges unilaterally assessed on PNE in violation of Section 2(a) of the PSNH Tariff Terms and Conditions ("Tariff"); and

(2) $38,570 improperly billed "recoupment costs" allegedly associated with PSNH's assumption of PNE's load asset responsibility at ISO-NE, costs likewise unilaterally assessed by PSNH in violation of express and carefully worded provisions of Section VIII of both the Electric Supplier Services Master Agreement ("ESSMA") and the Electric Supplier Trading Partner Agreement ("ESTPA").

By secretarial letter dated August 8, 2013, the Commission directed Staff to "conduct an independent investigation pursuant to RSA 365:4" and to report back to the parties and the Commission by or before September 30, 2013. PUC Staff

thereafter sought and received certain discovery materials and information from both of the parties, and issued its Report on Friday, September 27, 2013.

II.
Staff's Report

The Staff Report states that Staff reviewed the parties' respective pleadings, propounded "extensive discovery" upon PNE and PSNH and received timely responses from the parties. Staff concluded that there were material issues upon which the parties disagreed, and provided a list – "not meant to be all-inclusive" – of "some of the primary areas of disagreement among the parties." The issues highlighted by Staff included the following:

- Whether PNE ever received appropriate written notice of any "suspension" or "termination" of the ESSMA and/or ESTPA (collectively, "the Agreements"), both of which govern certain aspects of the parties' relationship and, in some measure, give effect to the legislative mandate in RSA 374-F, when PNE was temporarily suspended by the ISO-NE in February 2013;

- Whether PSNH improperly charged PNE for $38,570 for certain "recoupment costs" allegedly associated with PSNH's assumption of PNE's load asset responsibility at ISO-NE, although neither the Agreements nor the Tariff expressly permits or contemplates any such self-help measures; and

- Whether PSNH improperly charged PNE $47,735 in "Selection Charges" pursuant to Section 2(a) of the Tariff, even though PSNH essentially concedes that it never received a "drop transaction" request from PNE for all or the vast majority of the supplier change transactions for which PSNH has invoiced PNE.

Staff's Report determines, therefore, that "material factual and legal disputes exist between" the parties and that PNE's complaint may warrant further action against PSNH. Staff concludes that the Commission "could appropriately begin adjudicative proceedings to examine PNE's allegations against PSNH," but encourages the Commission to "consider whether, given the matters of contractual interpretation and common law likely at hand, a discretionary change in this dispute's venue to Superior Court…would be more appropriate…."

III.
PNE's Response to Staff's Report

PNE agrees with most aspects and conclusions of Staff's Report, including in particular Staff's recitation of the basic areas of disagreement among the parties.

Curiously, however, Staff's Report does not highlight an issue clearly and repeatedly raised by PNE: the fact that PSNH withheld from PNE customer payments in apparent – and in PNE's view, plain and obvious – violation of the Agreements' provisions and protocols for the handling of customer payments by the regulated utility. Perhaps the principal issue raised in PNE's original Complaint in this matter was the impropriety of PSNH's unilateral decision to withhold PNE customer payments from PNE under the plain language of the Agreements. Staff's decision not to highlight that issue may well flow from the fact that PSNH essentially failed to – and indeed, cannot as a practical matter – refute that allegation. For example, PNE alleged that the Agreements expressly permit PSNH to "subtract fees that Supplier owes to the Company…that are sixty (60) days or more past due, from the amounts Company collects on behalf of Supplier." Agreements, Section VIII. And PSNH conceded that it did not subtract fees that were 60 days in arrears pursuant to an invoice or other formal explanation. Instead, PSNH asserts that, sometime in February 2013, notwithstanding the agreements that were in place, and without the Commission's approval, it "made the determination…to exercise its common law rights of setoff and recoupment, [to withhold] payments that would otherwise have been remitted to PNE." PSNH July 8, 2013 Response, ¶10.[1]

Staff's Report does highlight the dispute concerning PSNH's imposition of $47,735 in Selection Charges, supposedly authorized by Section 2(a) of the Tariff Terms and Conditions. PSNH has acknowledged that it routinely imposes, "since at least July 2010," a Selection Charge of $5.00 on both the new, enrolling supplier and the old, legacy supplier. PNE indicated to Staff in the course of the proceedings leading up to its Report that it had initiated only 690 requests for "drop transactions" during the time period covered by the PSNH invoice – not the 9,547 "drop transactions" claimed by PSNH. The term "drop transaction," as it is used in Section 2(a) of the Tariff, has a specific meaning involving an Electronic Data Interchange ("EDI") transaction to which the relevant parties have been adhering for over a decade – a transaction initiated by an existing Supplier desiring to terminate its relationship with a customer and return the customer to Default Service where the

[1] Respectfully, PSNH's suggestion that it suspended, or terminated, or "suspended without necessarily terminating," the Agreements is plainly wrong and not supported by any evidence in the record. The Agreements contain express and important notice provisions, and make clear that Suppliers should not have to guess that its Agreements might have been terminated, or the reasons for such termination. See, e.g., ESTPA at §XI (requiring written notice from the other party "specifying the nature of [the alleged breach]"). PSNH's argument that it could somehow withhold customer payments based on a supposed "suspension" or "termination" of the Agreements is nearly silly, particularly where it repeatedly communicated through its counsel with PNE over the subject matter of the withheld $100,000 and never unambiguously stated, for example, "this letter constitutes notice that the ESSMA and ESTPA are [suspended/terminated]," the specific reasons therefor, and notification of the cure period. The examples of "written notice of termination" described in PSNH's July 8, 2013 Answer instead require PNE to read tea leaves.

Supplier sends an 814 transaction request to the Utility via the EDI, and the utility responds through the EDI with an 814DA "drop transaction" confirmation. Of the Selection Charges imposed and invoiced by PSNH, adding up to $47,735, PNE would be prepared show that it never sent an 814 transaction request (except for the 690 PNE-initiated drop transaction requests) during the period from February 7 to February 22.[2]

PNE emphatically opposes any transfer of this matter and these Supplier-Utility disputes, to the Superior Court. Certainly, the contractual issues – whether PSNH could withhold customers payments; whether PSNH "suspended" or "terminated" or, indeed, provided any appropriate notice of its actions, and the like – turn on the language of the Agreements and might, in some circumstances, be suitable to Superior Court review. But these "issues of contractual interpretation and common law" are central to the operating relationship between Competitive Electricity Suppliers, such as but not limited to PNE, and to carrying out the mandate of RSA 374-F – matters not only with the Commission's jurisdiction but matters warranting application of the Commission's particular expertise.[3]

The issues relating to the imposition of the Selection Charge in these circumstances call directly into question the language and meaning of the Tariff, and the justness and reasonableness of the charges imposed by PSNH on PNE. PSNH withheld customer payments – again, in apparent violation of the express and plain language of the Agreements – in order to retain and capture these Tariff charges. The issues cannot simply be characterized as garden variety contract disputes; they go to the heart of the Utility's relationship with Competitive Electricity Suppliers and to the advancement of a competitive marketplace in New Hampshire.

In the end, PSNH's current position – if allowed to languish in Superior Court, if understood only as garden variety contract issues, or if validated by the Commission's construction of the Tariff language – will leave PNE and other

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[2] PSNH's liberties with respect to Selection Charges were recently amply canvassed in the October 3, 2013 hearing on the merits in Docket No. 12-295, during which PSNH matter-of-factly conceded that it double-charges the Selection Charge in every transfer of a customer account from one CEPS to another CEPS, inexplicably relying on the Tariff language that permits "a Selection Charge" to be imposed "for any changes initiated" by a Supplier.

[3] See, for example, the Testimony of Kevin Dean, the co-owner of another Competitive Electric Power Supplier, Electricity NH, LLC ("ENH"), in PUC Docket 12-295. Mr. Dean acknowledges that ENH similarly executed the ESSMA, and, like PNE, "had limited or no practical ability to negotiate the terms of this contract with PSNH." Dean Testimony dated March 26, 2013, PUC 12-295, at page 3. The Agreements – and the manner in which they are construed, their relationship to the delivery of a competitive electrical power supply to New Hampshire consumers, and their overall place in the development of a competitive marketplace – cannot simply be unhinged from the Tariff Terms and Conditions at issue in this matter.

Competitive Electricity Suppliers extraordinarily vulnerable to PSNH's discretionary decisions to essentially disregard the Agreements (which were drafted by PSNH and favor PSNH in the first instance), and the billing/payment and dispute resolution procedures set forth therein, and use its leverage as the initial recipient of the customer payments to exact substantial financial advantages in bad faith. The issues presented bear fundamentally on the basic principles set forth by the Legislature in RSA 374-F:1 to establish a competitive market: to "reduce costs for all consumers of electricity by harnessing the power of competitive markets." PNE believes that PSNH's conduct was inconsistent with the market principles for competitive electric supply that the New Hampshire legislature intended and that the matters raised here, both contractual and Tariff-related, warrant the Commission's attention and review.

Accordingly, PNE hereby requests that the Commission conduct an independent investigation pursuant to RSA 365:4 and commence an adjudicative proceeding pursuant to Puc Rule 204.05.[4]

Very truly yours,

Christopher Cole

Cc: Distribution List
August Fromuth
James T. Rodier, Esquire
Robert C. Cheney, Esquire

[4] Finally, Staff's Report also strongly suggests that the parties should settle this matter. PNE is not steadfastly "against" settlement. At the same time, however, it must be understood that PSNH essentially retained payments made to and for the benefit of PNE, in very clear violation of the Agreements, which permit PSNH to withhold payments or to "subtract fees that Supplier owes to the Company…that are sixty (60) days or more past due, from the amounts Company collects on behalf of Supplier." PSNH's actions denied PNE not only the money it badly needed, and the use of that money to, among other things, assist in the payment of its collateral needs at the ISO, but also the "due process" contemplated by the Agreements that would have placed the parties on a relatively equal footing in relation to a dispute over amounts owed. PSNH took the upper hand, by violating the Agreements. It is hard to contemplate a "settlement" under such circumstances.