IR 13-233

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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:

On behalf of PNE Energy Supply, LLC, I am responding to the December 16, 2013 letter from counsel for Public Service Company of New Hampshire ("PSNH"), in which PSNH announces that it has decided to release $38,570 of the customer payments that PSNH has unilaterally withheld from PNE since February 2013. PNE is pleased it will finally receive these long-overdue funds. However, PNE disagrees with PSNH's assertion that this belated concession, combined with the Commission's Order No. 25,603 in DE 12-295 (the "Order"), disposes of all open issues raised in this docket. Specifically, the Order does not address or resolve: (a) PSNH's unlawful retention of customer payments that PSNH received on behalf of PNE; and (b) PSNH's use of customer payments to pay itself Selection Charges not allowed under the PSNH Tariff Terms and Conditions ("Tariff"). Accordingly, PNE strongly opposes PSNH's suggestion that proceedings in IR 13-333 should be closed.

As a threshold matter, the Order addresses the Selection Charges that PSNH may legitimately impose on CEPS. The Commission's findings on this issue, as detailed in the Order, are relevant to a central issue in this docket, namely, the legitimacy of PSNH's allegation that its imposition of $47,735 in Selection Charges on PNE are authorized by Section 2(a) of the Tariff.

In the Order, the Commission rejected PSNH's position that Section 2(a) authorizes PSNH to impose two $5.00 Selection Charges when a customer moves from one CEPS to another (or between one CEPS and Default Service). The Commission concluded that

> [o]nly one switch charge is appropriate when a customer moves from one supplier to another, whether the switch is between two competitive suppliers or a competitive supplier and PSNH.

Order at 16.

The competitive suppliers in DE 12-295 (including PNE) have requested that PSNH be required to rebate or refund prior illegitimate Selection Charges. In the Order, the Commission declined to order such a rebate or refund, apparently for two reasons: first, because the scope of the DE 12-295 docket was limited to a determination of "whether it is useful for the Commission to conduct a review of the reasonableness of the approved tariff charges separate from a review of PSNH's revenue requirements in the context of a future rate case;" Order at 13-14, and, second, because in DE 12-295 the Commission made no finding that PSNH's long practice of double-billing of the Selection Charges constituted "an illegal or unjustly discriminatory rate, fare, charge, or price … collected for any service" by PSNH. On these bases, the Commission concluded that this relief is beyond the scope of DE 12-295.

In its Complaint lodged in IR 13-233, however, this is exactly what PNE has claimed – that PSNH was not authorized under the Tariff to impose a $5.00 Selection Charge on PNE since PNE was not initiating the switch (except with regard to 690 drop requests made by PNE in January and February 2013) or another CEPS paid the Selection Charge for the switch, and, hence, imposing those charges on PNE is unlawful and illegal. The DE 12-295 proceeding was a general inquiry into the manner in which PSNH might be able to assess the Selection Charge. This proceeding raises the different, and more specific, question of whether PSNH could properly assess the Selection Charge where PNE initiated no switch, made no drop requests, and where PSNH used a self-help measure not provided for in the Tariff to seize PNE customer payments.

Ignoring for a moment the primary thrust of the PNE complaint – that PSNH was unambiguously bound by its Master and Trading Partner Agreements to hand-over all of the PNE customer payments and then bill PNE for any proper charges under the Tariff and trading agreements and was not entitled to unilaterally withhold those payments – the Order in DE 12-295 makes clear that PSNH should not have charged PNE a $5.00 Selection Charge for the approximately 1188 customers transferred from PNE to FairPoint Energy ("FPE") – an amount equal to approximately $5,940, for which FPE presumably paid the $5.00 Selection Charge as the CEPS that initiated the switch from PNE to FPE. Closing of this docket, as PSNH urges, simply allows PSNH to retain monies it should never have kept in the first place and should not retain now.

But, respectfully, more important is the further interpretation of Section 2(a) of the Tariff that the Commission leaves unaddressed in DE 12-295. Although the

Commission finds that "only one switch charge is appropriate" – whether the switch is between two CEPS or a CEPS and Default Service – the Commission fails to clearly identify in its Order who properly pays the Selection Charge. Section 2(a) answers that question – the charge "will be assessed to the new Supplier at the time [PSNH] receives an enrollment transaction from the new Supplier" or "to the existing Supplier at the time [PSNH] receives a drop transaction from the existing Supplier." (Emphasis added.)

According to the language of the Tariff, the foregoing are the only two instances that a Selection Charge can be imposed on a CEPS. While the Commission notes that "that tariff language [referring to Section 2(a)] is, at best, unclear," the Commission has yet to rule that the predicate to the imposition of Selection Charges on CEPS under the existing Tariff is the initiation by a CEPS of an enrollment request or a drop request. Among the issues that PNE has raised in IR 13-233 is whether PSNH unlawfully and illegally charged PNE over **$42,000** for some approximately **8,857** "drops" that PNE never initiated or requested.[1]

In short, as noted above, there are important, non-theoretical facts and issues that underlie PNE's Complaint in IR-233 that remain unresolved notwithstanding the Commission's recent ruling in DE 12-295. PSNH's long-overdue decision to finally remit to PNE $38,570 in PNE customer payments that PSNH has held for almost ten months (without interest) in clear contravention of the Master and Trading Partner Agreements **does not resolve and leaves unaddressed PNE's primary issue in this docket – i.e., PSNH cannot unilaterally ignore the Master and Trading Partner Agreements ("Agreements") and engage in self-help remedies with CEPS utilizing consolidated billing**. As it is, the Agreements tilt strongly in favor of the utility. Even if PSNH now returned to PNE all of the customer payments sought by PNE in its Complaint, PNE's Complaint raises the issue whether PSNH is authorized to ignore the Agreements, engage in self-help remedies, and withhold customer payments in light of the facts presented in that complaint. This issue alone is sufficient reason for this matter to proceed forward to a hearing before the Commission.

PNE respectfully requests that the Commission go forward and schedule a hearing in IR-233 in order that these remaining important issues relating to the

[1] Further, PNE objects to and disputes PSNH's assertion that ISO acted in any way as an "agent" of PNE in any of its actions or communications with PSNH relative to PSNH's assumption of PNE's customers as the "host utility" under ISO's tariff and rules. This is a significant issue and assertion – conspicuously raised for the first time as PSNH seeks to close this docket. It is an assertion that should not be relied on by the Commission in any way for any purpose in this docket without further analysis, investigation, and discovery by both parties and Commission staff.

interpretation and actual application of Section 2(a) of the Tariff and the associated trading agreements are fully considered by the Commission.

Many thanks.

Very truly yours,

Christopher Cole (LJL)

Christopher Cole

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