

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 MOTION FOR LEAVE TO FILE
RESPONSE TO PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MEMORANDUM OF LAW RE: AGENCY**

NOW COMES the Petitioner, PNE Energy Supply LLC ("PNE"), by and through its attorneys, Sheehan Phinney Bass & Green, P.A., and hereby moves the New Hampshire Public Utilities Commission ("Commission") to accept PNE's Response to Public Service Company of New Hampshire's ("PSNH") Memorandum of Law Re: Agency ("Memorandum"). In support thereof, PNE states:

1. On February 18, 2014, the Commission held a hearing in the above-captioned docket.
2. At the close of the hearing, PNE submitted a memorandum of law that addressed an argument raised by PSNH, namely that PSNH was justified in assessing Selection Charges to PNE under Section 2(a) of the PSNH Tariff because ISO-New England ("ISO-NE") was acting as PNE's authorized agent when it required PSNH to accept PNE customers into default service.
3. Pursuant to Puc 203.32, the Commission gave PSNH until Friday, February 28, 2014, to submit a response solely on the ISO-NE/PNE agency issue.
4. On February 27, 2014, PSNH filed its Memorandum Re: Agency ("Memorandum").

5. PSNH appended three new attachments (Attachments 1-3) to its Memorandum that it neither introduced as evidence at the parties' February 18th hearing nor sought leave to file late pursuant to Puc 203.22. PSNH used these attachments to bolster its agency argument in its Memorandum.

6. PSNH had never previously produced or referenced Attachments 1-3 at any point in this litigation. Accordingly, PNE deserves the opportunity to respond to PSNH's argument as a matter of basic due process.

7. PNE now requests that the Commission grant PNE leave to submit a brief response to PNE's Memorandum in the form attached as Exhibit A hereto.

WHEREFORE, PNE respectfully requests that the Commission:

- A. Grant this Motion; and
- B. Consider PNE's Response to PSNH's Memorandum Re: Agency.

Respectfully submitted,
PNE ENERGY SUPPLY, LLC

By its Attorneys,

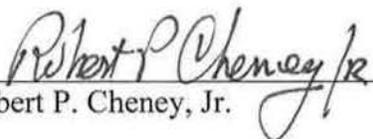
**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: March 4, 2014

By: 
Christopher Cole, Esquire
Robert P. Cheney, Jr., Esquire
Sheehan Phinney Bass & Green, P.A.
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CERTIFICATE OF SERVICE

I, Robert P. Cheney, Jr., hereby certify that on this 4th day of March, 2014, a copy of the foregoing Motion was hand-delivered to the Public Utilities Commission and sent via electronic mail to all counsel of record and persons on the Commission's distribution list for this docket.



Robert P. Cheney, Jr.

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 RESPONSE TO PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE'S MEMORANDUM OF LAW RE: AGENCY**

The Petitioner PNE Energy Supply, LLC ("PNE") respectfully submits the following response to Public Service Company of New Hampshire's ("PSNH") memorandum concerning the purported agency relationship between PNE and ISO-New England ("PSNH Memorandum"). PNE files this reply primarily to respond to arguments in PSNH's Memorandum that are based on three documents, Attachments 1-3 of PSNH's Memorandum, that PSNH neither admitted into evidence at the February 18, 2014 hearing nor sought leave to file late pursuant to Puc 203.30. PNE should be allowed to respond to the arguments flowing from these improper attachments pursuant to Puc 203.32 and as a matter of due process.¹

I.**PSNH Cannot Impose a Selection Charge Without an Attendant EDI Drop Transaction**

Section 2(a) of the Terms and Conditions for Energy Service Providers in PSNH's Electricity Delivery Service Tariff – NHPUC No. 8 ("Tariff") states that PSNH can "make" a

¹ At the conclusion of the hearing on February 18, 2014, the Commission noted in the record (which is not yet available) that PSNH would be allowed to file a memorandum addressing the issues of agency under New Hampshire law in response to a memorandum of law on those issues filed by PNE at the hearing. In the second paragraph of its Memorandum Re: Agency, however, PSNH strayed from those explicit directions and asserted, once again, that the IR 13-233 proceeding has been rendered moot by the Commission's ruling in DE 12-295 (an argument that PNE opposed at the hearing and continues to oppose). Since PSNH's argument regarding mootness in its Memorandum filed after the hearing is beyond the scope of the response allowed by the Commission, PNE will not address those arguments in its response to PSNH's Memorandum (unless some additional response from PNE is requested by the Commission) and requests that the Commission ignore those portions of PSNH's Memorandum that go beyond the scope of the response allowed by the Commission at the hearing.

\$5.00 selection charge for any changes “*initiated* by a Customer, Supplier or an authorized agent to a different Supplier or to Default Service.” (Emphasis added.) Contrary to PNE’s position, PSNH argues that Section 2(a) does not define initiation to require an EDI drop transaction and, therefore, it properly assessed Selection Charges to PNE when ISO-NE called upon PSNH to carry out its duties under the ISO-NE Tariff and accept PNE’s load asset. See PSNH Memorandum at 3. PSNH claims ISO-NE obviously initiated the drop transactions because PSNH would never have voluntarily assumed PNE’s load asset due to the costs associated with such efforts.² See id.

What PSNH’s argument misses, however, is that there are two parts to Section 2(a): “initiation” and “assessment.” Section 2(a) broadly states that PSNH can “make” a selection charge when PNE or its authorized agent initiates a change. Even if “initiate” does not require a drop transaction in the first instance, Section 2(a) does not end there. Section 2(a) later clarifies that a Selection Charge can only be *assessed* to the new supplier or existing supplier, “at the time the [PSNH] receives a drop transaction.” Therefore, a general ability to “make” Selection Charges upon initiation means nothing without the eventual assessment of the charge, which can only occur upon PSNH’s receipt of an EDI drop transaction from PNE, a PNE customer, or PNE’s authorized agent. Because PSNH admits that it never received EDI drop transactions for the disputed PNE customer accounts that PSNH moved to default service, PSNH improperly assessed Selection Charges to PNE and those amounts must be returned.

II.

ISO-NE Was Not PNE’s Agent Even if it Acted on PNE’s Behalf or as PNE’s Representative

² PSNH’s claim that it would never have voluntarily moved PNE customers to default service because it was costly and time consuming is disingenuous. PNE’s Exhibit 2, admitted at the February 18th hearing, demonstrates that PSNH was obligated as a host utility to accept PNE’s retired load asset upon PNE’s default pursuant to the ISO-NE Tariff.

PSNH appends Attachments 1-3 to its Memorandum as evidence that ISO-NE was acting as PNE's authorized agent when ISO-NE called upon PSNH to move PNE customers to default service. Attachments 1-3 show that: (a) ISO-NE signed an Asset Registration Form "on behalf of" PNE; (b) an ISO-NE manual required ISO-NE to submit an Asset Registration form "as a representative of" PNE; and (c) ISO-NE actually signed the Asset Registration Form as PNE's representative. Without more, none of these documents establishes an agency relationship under applicable law.

The words of ISO-NE's forms and manuals do not, *ipso facto*, create an agency relationship between PNE and ISO-NE. Whether an agency relationship exists is a question of fact. Herman v. Monadnock PR-24 Training Council, 147 N.H. 754, 758 (2002). New Hampshire courts do not rely upon the words of contracts or writings when evaluating the existence of an agency relationship. See, e.g., VanDeMark v. McDonald's Corp., 153 N.H. 753, 761 (2006) (conducting three-part agency analysis despite language in franchise agreement that franchisee was not agent of franchisor). Although PSNH has mined ISO-NE's documents and cherry picked some choice phrases that sound "agency-like," the Commission must still evaluate these phrases in the overall context of the three-part New Hampshire agency test: (a) authorization; (b) consent; and (c) control.

PNE never controlled ISO-NE's actions after default and, therefore, PSNH's agency argument fails. Indeed, "there are many relations in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is not control by the beneficiary." Restatement (Second) of Agency § 14 (1958). Put simply, although ISO-NE might have acted for the benefit of PNE and/or its customers to ensure that PSNH complied with its duties under the ISO-NE Tariff, PNE had no control over ISO-NE's actions during this

process. Query: what would have happened if PNE instructed ISO-NE not transfer its load asset to PSNH? Most certainly, ISO-NE would have ignored PNE and proceeded under the unambiguous terms of the ISO-NE Tariff. ISO-NE's actions on PNE's behalf are analogous to a trustee managing property for a beneficiary's benefit. Like a trustee, who holds property in trust for a beneficiary but who is ultimately guided in her duties by the terms of trust, ISO-NE was ultimately guided by the terms of ISO-NE tariff, which expressly governed what must occur upon a supplier's default. PSNH admits that "[control]. . . turns upon the principal manifesting some *continuous* prescription of what the agent shall or shall not do." PSNH Memorandum at 6 (quoting Dent v. Exeter Hosp., at 792) (emphasis added). This admission is fatal.

Finally, PSNH's argument that PNE "acquiesced to the course of action that ISO-NE would take as a result of suspension" does not pass muster. PNE's knowledge that ISO-NE would require PSNH to accept PNE's load asset does not indicate that PNE somehow *controlled* ISO-NE's actions. To the contrary, PNE lost control of its load asset upon default. Moreover, PSNH's Memorandum makes it appear that PNE had a choice regarding default. Although PNE did notify ISO-NE that it would waive its cure period, it was because the financial result was inevitable at that point in time. PSNH is grasping at straws. Its agency argument is simply another attempt to justify the unlawful imposition of Selection Charges on PNE. The facts are simple. Neither PNE nor an authorized agent initiated or submitted the requisite supplier drop transactions to PSNH. Under the plain and unambiguous terms of Section 2(a) of the PSNH Tariff, PSNH had no right to impose the disputed Selection Charges on PNE.

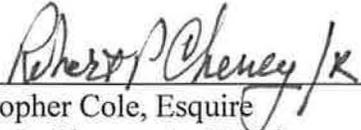
Respectfully submitted,

PNE ENERGY SUPPLY, LLC

By its Attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: March 4, 2014

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