

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 12-295

POWER NEW ENGLAND, LLC

**Petition for Review of the Reasonableness of Certain Charges of Public Service Company
of New Hampshire for Services to Competitive Suppliers**

**Order Denying Power New England, LLC Motion to Compel PSNH to Respond to Certain
Data Requests**

ORDER NO. 25,576

September 25, 2013

I. PROCEDURAL HISTORY

The Commission opened this docket by an Order of Notice dated November 21, 2012 in response to a petition filed by Power New England, LLC (PNE). The PNE petition requested that an investigation be opened to determine whether the Commission should review the reasonableness of certain tariff charges that Public Service Company of New Hampshire (PSNH or Company) bills to competitive electric power suppliers (CEPS) for certain services. The charges subject to this docket are (1) a \$5.00 “selection charge” which is assessed when a customer switches to or from PSNH’s default energy service, (2) the “billing and payment service charge” which PSNH charges on a \$0.50 per bill rendered basis for the billing and payment services PSNH provides to any CEPS which has opted for consolidated billing services, and (3) the “collection services charges” which is billed at a 0.252% of total monthly receivable dollars pursuant to written agreements with CEPS.

Pursuant to the procedural schedule, PSNH filed testimony on July 24, 2013. On August 7, 2013, intervenors, Staff and PNE served data requests on PSNH with responses due by August 21, 2013. PSNH provided an answer to PNE 1-1, and objected to PNE 1-2 through 1-11,

although PSNH provided a partial answer to PNE 1-9. PSNH also objected to PNE's instructions 9 and 10 and any similar instructions, to the extent that they requested that PSNH respond to data requests under oath.

PNE filed a timely motion to compel PSNH to respond to PNE 1-2 through 1-11 on August 20, 2013 to which PSNH objected on August 30, 2013.

II. PNE'S MOTION TO COMPEL PSNH TO RESPOND TO PNE 1-2, 1-3 AND 1-4

A. Positions of the Parties

PNE 1-2 through PNE 1-4 are interrelated, as they deal with the application of the Selection Charge described in Section 2(a) of PSNH's Electricity Delivery Service Tariff—NHPUC No. 8.

PNE 1-2 asks as follows:

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.

PNE 1-3 asks:

If the response to Request No. 2 is anything other than "Yes," please explain in detail.

PNE 1-4 asks:

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.”

PSNH objected to each of these requests, 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.

In its Motion to Compel, PNE requested that the Commission require responses to these data requests “on the basis that PNE’s Request is within the scope of this proceeding since it seeks information on what circumstances PSNH believes that it is entitled to bill the Selection Charge.” Motion to Compel at ¶¶10, 13, and 16. In its Objection, PSNH argued that, by seeking PSNH’s belief of when it is “entitled” to assess charges, PNE is seeking PSNH’s legal interpretations and conclusions. PSNH opined that PNE is able to read the tariff language on its own, that PNE is free to argue its own interpretation of the tariff language to the Commission, and that circumstances under which PSNH believes itself to be entitled to assess charges is beyond the scope of PNE’s arguments that selection charge should be eliminated. PSNH Objection at ¶¶5-8.

B. Commission Analysis

We agree that the question asks for legal interpretation and legal conclusions regarding PSNH’s tariff and, therefore, we deny the motion to compel PSNH to respond to PNE 1-2 through 1-4.

II. PNE'S MOTION TO COMPEL PSNH TO RESPOND TO PNE 1-5

A. Positions of the Parties

PNE's data request 1-5 asks PSNH to produce notes taken at the May 7, 2013 technical session held in the instant docket that relate to the selection charge by PSNH. PSNH objected to this question by stating that the question is seeking information that is irrelevant to this proceeding, may be subject to the attorney attorney-client and/or attorney work-product privileges, and is not reasonably calculated to lead to evidence admissible in this proceeding. PSNH objection at ¶9. In its motion to compel, PNE contends that PSNH must respond because PNE 1-5 "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." PNE Motion at ¶ 19.

In its objection, PSNH noted that although the rules of evidence do not apply in Commission proceedings, the Commission applies the standards applicable in the Superior Court. PSNH argued that "[u]nder the New Hampshire Rules of Evidence, which apply in 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." PSNH claimed that any notes PSNH may have taken during a technical session in the instant docket will not tend to make any fact regarding the justness or reasonableness of PSNH's charges any more or less probable than the charges would be otherwise, and that the motion to compel a response to PNE 1-5 should be denied. PSNH Objection at ¶10.

B. Commission Analysis

We agree with PSNH. Compelling a party to produce notes it took at a technical session (in this instance, PSNH) may interfere with the attorney/client and/or attorney work-product privileges. Presumably, as a party to this docket, PNE had an opportunity to attend that technical session and have its own record of what was said. We find that production of PSNH's notes from the May technical session will not shed light on the reasonableness of PSNH's charges and is not likely to lead to the discovery of admissible evidence. We therefore deny PNE's motion to compel PSNH to respond to PNE 1-5.

III. PNE'S MOTION TO COMPEL PSNH TO RESPOND TO PNE 1-6, 1-7 AND 1-8**A. Positions of the Parties**

PNE 1-6 through PNE 1-8 are interrelated, and further deal with the interpretation of the Selection Charge described in Section 2(a) of PSNH's Electricity Delivery Service Tariff—NHPUC No. 8.

PNE 1-6 asks as follows:

When a competitive energy power supplier enrolls a customer currently taking Supplier Service from another competitive electric power supplier and that 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 Charged assessed to each party or parties?

PNE 1-7 asks:

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?

PNE 1-8 asks:

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.

In its Motion to Compel, PNE requested that the Commission require responses to these data requests “on the basis that PNE’s Request is within the scope of this proceeding since it seeks information on what circumstances PSNH believes that it is entitled to bill the Selection Charge.” Motion to Compel at ¶¶ 22, 25, and 28. PSNH argued that these requests should be denied for all the same reasons PSNH raised with regard to PNE 1-2 through 1-4, because the questions seek PSNH’s legal interpretation of its tariff, which PNE is equally capable of reading and interpreting.

B. Commission Analysis

We have reviewed the arguments of both parties and the data requests. We have concluded that the data requests ask about hypothetical situations and that they are, therefore, not likely to lead to the discovery of admissible evidence in this docket concerning the reasonableness of PSNH’s charges to competitive suppliers. On that basis we deny PNE’s motion to compel for PNE 1-6 through 1-8.

IV. PNE’S MOTION TO COMPEL PSNH TO RESPOND TO PNE 1-9, 1-10 AND 1-11

A. Positions of the Parties

PNE 1-9 through 1-11 are also interrelated and bear upon charges that PSNH’s affiliate companies charge to competitive suppliers.

PNE 1-9 asks:

Do the following utility companies—Connecticut Light & Power, Western Massachusetts Electric Company, NSTAR—charge competitive 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?

PNE 1-10 asks:

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

PNE 1-11 asks:

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 suppliers.

PSNH objected to each of these requests, 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.

PSNH raised an additional objection to PNE 1-11, stating: "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 argued that information regarding the practices of PSNH's affiliates is within the scope of this proceeding because those practices 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 ¶¶31, 34, and 37. PNE also argued that PNE 1-10 and 1-11 seek information regarding in what circumstances PSNH believes that it is entitled to bill the Selection Charge. *Id.* at ¶¶34 and 37. Lastly, PNE argued that Northeast Utilities Service Company provides centralized services to the Northeast Utilities operating subsidiaries and that one of PSNH's witnesses is the Director of Rates and Forecasting for Northeast Utilities Service Company. *Id.*

In its Objection, PSNH agreed to provide a matrix of supplier charges that PSNH believes will be responsive to PNE 1-9 through 1-11 without attempting to define whether the

charges are similar to the charges at issue, without conceding that the charges are relevant, and without waiving its other objections. PSNH argued that the charges imposed by its affiliates are irrelevant to whether PSNH's charges are just and reasonable. Additionally, PSNH claimed that common ownership of affiliated companies does not render information about the out-of-state affiliated companies somehow relevant. With respect to PNE 1-11, PSNH objects to providing further information about whether and how those charges recover additional costs because it would require a special undertaking by PSNH. PSNH states that does not have the information and therefore should not be required to produce it. Objection at ¶¶13-16.

B. Commission Analysis

Notwithstanding its objection, PSNH provided a partial response to PNE 1-9 that included a supplier service charge matrix for its affiliated distribution utilities in Massachusetts and Connecticut. We find that this is a sufficient response to PNE 1-9 through PNE 1-11 and that discovery of the various billing practices of PSNH's affiliates is not likely to lead to the discovery of any admissible evidence in this proceeding, the scope of which is the reasonableness of PSNH's charges to competitive suppliers in New Hampshire.

V. PNE's INSTRUCTION TO ANSWER DATA REQUESTS UNDER OATH

We note that in PNE's instructions for responses to PNE 1-9 and PNE 1-10, PNE specifically asked that answers be provided under oath. Discovery in Commission proceedings is governed by N.H. Code Admin. Rules Puc 203.09. The rules do not require that responses to data requests be submitted under oath. Insofar as we have denied PNE's motion to compel, the instructions are moot. Nonetheless, we caution parties that although other tribunals may require discovery responses to be made under oath, the Commission's rules do not require responses to data requests to be provided under oath in adjudicated proceedings before the Commission. We


note that pursuant to Puc 202.08, the Commission has the discretion to refer for prosecution any person who willfully falsifies any information “regarding any material matter, believing the content to be untrue, with the intent to mislead or deceive any commissioner, presiding officer or staff member, “ regardless whether the information is provided under oath. NH Admin. Code Rules Puc 202.08; *see also* RSA 641:1 and :2.

Finally, while we denied PNE’s motion to compel responses PNE 1-2 through 1-4 and 1-6 through 1-8, regarding interpretation of the tariff, we find that it is relevant to this docket to understand the circumstances in which PSNH has actually applied the Selection Charge and will allow examination at hearing on how PSNH has applied this charge in the past. We will not, however, allow questions on hypothetical interpretations of the Selection Charge.

Based upon the foregoing, it is hereby

ORDERED, that PNE’s motion to compel PSNH to respond to PNE’s data requests is hereby DENIED.


By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of September, 2013.


Amy L. Ignatius
Chairman


Michael D. Harrington
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director