

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

IR 13-233

PNE ENERGY SUPPLY, LLC

**Investigation into Dispute between PNE Energy Supply, LLC, and
Public Service Company of New Hampshire**

Order Denying Motion to Reconsider

ORDER NO. 25,673

June 2, 2014

In this order we deny PNE's motion to reconsider Order No. 25,660. We reaffirm our findings that PNE waived its claim for interest damages and that the PSNH tariff authorized the imposition of selection charges after ISO-New England suspended PNE.

I. PROCEDURAL HISTORY

Public Service of New Hampshire (PSNH) provided consolidated billing services to PNE Energy Supply, LLC (PNE), a competitive electricity supplier. *Joint Statement of Agreed Facts*, Hearing Exhibit 1, at 1-2. In the normal course, PSNH billed customers for both PSNH's and PNE's charges, collected a single payment, and then transferred to PNE its share. *Id.* at 2-3. PSNH later invoiced PNE for the consolidated billing and other tariff charges, including a \$5 "selection charge" imposed each time a supplier acquired or lost a customer. *Id.* at 5. The selection charge was imposed upon "any changes initiated by a Customer, Supplier, or an authorized agent, to a different Supplier, to Default Service, or to Self-Supply Service." PSNH Tariff at 1st Revised Page 33 (PSNH tariff).

In February 2013, ISO-New England (ISO-NE), the organization that operates the regional bulk electricity transmission system, suspended PNE's ability to buy electricity. Exhibit 1 at 3.

The suspension resulted in the transfer of 7,669 PNE customers to PSNH's default service. *Id.* at 4. For about one week after PNE's suspension, PSNH withheld all customer payments normally due to PNE. *Id.* PSNH accumulated more than \$250,000 of customer payments due to PNE by February 28, 2013, when PSNH released all but \$100,000 to PNE. *Id.* at 4. PSNH voluntarily returned \$7,039 to PNE in May 2013 along with an invoice explaining why it kept the \$92,961 balance. *Id.* at 5.

In June 2013 PNE filed a complaint seeking return of the \$92,961 plus attorney's fees and costs, and seeking "interest on customer payments unjustly withheld by PSNH since February 20, 2013." *Complaint Against Public Service Company of New Hampshire*, filed June 21, 2013, (Tab 2) at 11. PSNH returned an additional \$38,570 to PNE in December 2013. PSNH letter filed December 17, 2013 (Tab 10). At the hearing, PNE narrowed its request to \$38,345 of the remaining money that PSNH held, which represented the \$5 selection charge that PSNH imposed for each of the 7,669 PNE customers transferred to PSNH default service. Transcript of February 18, 2014, Hearing (Tr.) at 42.

The issues addressed at the hearing were whether PSNH had authority to withhold customer payments and whether the selection charge applied when the customer transfers resulted from PNE's suspension. Tr. at 5, 12; *see* February 3, 2014, secretarial letter (Tab 12).

In *PNE Energy Supply, LLC*, Order No. 25,660 (May 1, 2014), (the May 1, Order) we denied PNE's claims. We concluded that PSNH properly imposed the \$5 selection charge to the customers transferred to PSNH's default service, and that PNE's claims for damages arising from PSNH's withholding PNE customer payments were moot. *Id.* at 7. PNE timely filed a motion for rehearing pursuant to RSA 541:3.

II. POSITIONS OF THE PARTIES

A. PNE

PNE presents two arguments. First, PNE claims that it was error to find moot PNE's claims for damages flowing from PSNH's withholding of PNE customer payments because PNE "sought no remedy for PSNH's temporary withholding." May 1 Order at 7. PNE claims that the Commission "failed to consider PNE's express and unambiguous request for interest and attorneys' fees." Motion at 1-2. Second, PNE repeats its arguments that the plain meaning of the terms "initiate" and "agent" in the PSNH tariff compelled an outcome in PNE's favor. According to PNE, the \$5 selection charge did not apply to the transfer of PNE customers to PSNH default service because neither PNE nor any agent initiated the transfer. Motion at 2.

B. PSNH

PSNH objects to PNE's motion for rehearing. PSNH first argues that PNE's motion did not meet the standard for rehearing, but merely presented "restatements of its prior contentions." Objection at 4. On the merits, PSNH argues the Commission properly determined that PNE waived any claim to interest on the withheld customer payments, making that claim moot. *Id.* at 2-3. PSNH also argues the Commission correctly decided that the \$5 selection charge applied to the PNE situation. PSNH characterizes as unreasonable PNE's interpretation of the PSNH tariff. *Id.* at 4.

III. COMMISSION ANALYSIS

The Commission may grant rehearing or reconsideration for "good reason" when the moving party demonstrates that the decision is "unlawful or unreasonable." RSA 541:3, RSA 541:4; see *Rural Telephone Companies*, Order No. 25,291 at 9 (Nov. 21, 2011). Good reason may exist if there are matters that the Commission "overlooked or mistakenly conceived in the

original decision,” *Dumais v. State*, 118 N.H. 309, 311 (1978) (additional quotation and citation omitted), or if the movant presents new evidence not previously available, *Hollis Telephone, Inc.*, Order No. 25,088 at 14 (Apr. 2, 2010). A motion for rehearing that merely restates prior arguments and asks for a different outcome will fail. *Public Service Co. of N.H.*, Order No. 25,168 at 10 (Nov. 12, 2010).

A. PNE Waived its Claim for Interest Damages.

PNE first claims we erred in finding moot PNE’s claim for “interest on customer payments unjustly withheld by PSNH” (hereinafter “interest damages”). PNE Complaint at 11. PNE arguably had a claim for interest damages for the money above \$100,000 that PSNH returned in late February 2013, the \$7,039 PSNH returned in early May 2013, and the \$38,570 PSNH returned on December 16, 2013. Exhibit 1 at 4-5. PNE argues we “failed to consider PNE’s express and unambiguous request for interest and attorneys’ fees.” Motion at 1-2. PNE relies on the prayer for relief in its complaint:

PNE requests the Commission to ... Order PSNH to make reparation and/or restitution to PNE for attorneys’ fees and costs incurred by PNE in securing the return of its customer payments as well as interest on customer payments unjustly withheld by PSNH since February 20, 2013.

PNE Complaint at 11.

We found PNE’s request for interest damages moot because PNE abandoned the underlying claim. May 1 Order at 7. At the hearing on this matter, counsel for PNE stated:

[W]e got the so-called “self-help” recoupment costs back [S]hortly after [PSNH] sent in the December 16th letter, they paid us 38,000 and some dollars, which were the alleged recoupment costs. So, at least as far as we’re concerned, at this point, *that issue is moot*. What we’re looking at now is the invoiced Selection Charges, and not the recoupment charges. So, this fine point of “can they go off and use set-off under common law, when they’re bound very specifically as to how they’re supposed to proceed in

terms of a material breach?" *I think they can't do it. But, I think, for purposes of today, that discussion is really moot any way.*

Tr. at 43-44 (emphasis added). This was PNE's opportunity to clarify that it wished to pursue the legal claim that PSNH wrongfully withheld the customer payments and PNE's request for the resulting interest damages.

Staff provided another opportunity when it asked whether PNE persisted in its request for interest damages: "The complaint that PNE filed initially asked for ... some interest for not having access to the money and the like. [Staff] has not heard whether that's officially in or out of this case." Tr. at 37-38. Counsel for PNE responded:

[T]he Staff raised the issue of interest. To the extent that we are – if we were to be awarded now our somewhat reduced Selection Charges ... we just want the statutory rate of interest on whatever that would be, that final award.

Tr. 45. By this statement PNE limited its request for interest to statutory interest on a judgment on its claim for return of selection charges. *See* RSA 336:1, II; RSA 524:1-b. We interpret this second statement to confirm that PNE waived its request for interest damages on its claim that PSNH wrongfully withheld customer payments.

Even if PNE's claim for interest were still alive, we would reject it. PNE presented no evidence supporting an award of interest damages. PNE had the burden of calculating the precise interest due for the money PSNH withheld. PNE's failure to present that evidence would require us to reject the claim (and indeed it confirms PNE's intent to abandon the legal claim and any resulting interest damages).

Finally, we previously denied PNE's request for attorneys' fees and costs:

The Commission has also determined that PNE is not entitled to payment of its costs or attorneys' fees by PSNH under RSA 365:38-a in connection with this instant proceeding, as PNE is neither a utility nor a retail customer.

Secretarial letter filed November 12, 2013 (Tab 8). PNE has given us no reason to revisit that denial.

B. The May 1 Order Reasonably Interpreted the PSNH Tariff.

PNE's second argument on rehearing is that we erred by not giving the terms "initiate" and "agent" their plain meaning while interpreting the PSNH tariff. This is not a new argument and PNE presents us with no reason to reconsider our previous ruling. We therefore deny PNE's request for rehearing. Were we to consider the arguments again, we disagree with PNE's position. PSNH assessed PNE the selection charge for the 7,669 customer transfers precipitated by ISO-NE's suspension of PNE. We found that the PSNH tariff is not "plain and unambiguous" when applied to transfers resulting from an ISO-NE suspension because the PSNH tariff does not address that situation. May 1 Order at 7. The PSNH tariff does not mention "ISO-NE" or "suspension."

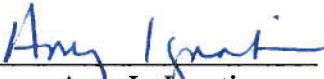
The parties attached to the agreed statement of fact portions of the ISO tariff, and PNE introduced additional sections of the ISO-NE tariff at the hearing. Attachment to Exhibit 1 at 29; Exhibit 2. PNE "recognized the ISO-New England tariff as the applicable tariff here," and stated that "there's one section in that [ISO-NE] tariff that talks about what happens when a market participant is suspended." Tr. at 17; *see* Exhibit 2.

The PSNH tariff's silence regarding customer transfers resulting from an ISO-NE suspension rendered it ambiguous in this case and caused us to "look beyond [the PSNH tariff] to determine its intent." *In re Verizon New England, Inc.*, 158 N.H. 693, 695 (2009). The ISO-NE tariff provided guidance to resolve the ambiguity. Our resulting interpretation of "initiate" and "agent" represented our best judgment to resolve that ambiguity and interpret the PSNH tariff in a reasonable manner. May 1 Order at 7.

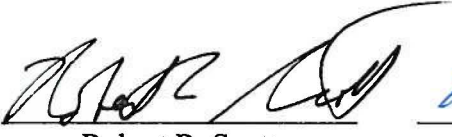
Based upon the foregoing, it is hereby

ORDERED, that PNE's motion for rehearing is DENIED.


By order of the Public Utilities Commission of New Hampshire this second day of June,
2014.



Amy L. Ignatius
Chairman

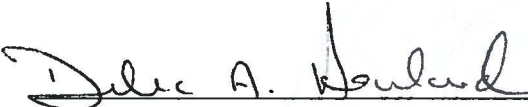


Robert R. Scott
Commissioner



Martin P. Honigberg
Commissioner

Attested by:



Debra A. Howland
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