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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

March 12, 2015 - 10:10 a.m.
Concord, New Hampshire

NHPUC MAR26'15 AM 9:31

RE: DE 14-305
FREEDOM LOGISTICS, LLC D/B/A
FREEDOM ENERGY LOGISTICS:
Petition on behalf of Cianbro Energy,
LLC for a Declaratory Ruling regarding
Rule Puc 2002.05.

PRESENT: Chairman Martin P. Honigberg, Presiding
Commissioner Robert R. Scott

Sandy Deno, Clerk

APPEARANCES: Reptg. Freedom Logistics, LLC d/b/a
Freedom Energy Logistics:
James T. Rodier, Esq.

Reptg. Texas Retail Energy, LLC and Walmart:
Chris Hendrix, Dir. of Markets & Compliance

Reptg. PUC Staff:
David K. Wiesner, Esq.
Liz Nixon, Sustainable Energy Div.
David Goyette, Electric Division

Court Reporter: Steven E. Patnaude, LCR No. 52

ORIGINAL

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I N D E X

PAGE NO.

STATEMENTS BY:

Mr. Rodier	6, 35, 41	
Mr. Wiesner	25, 40	
Mr. Hendrix	38	

QUESTIONS BY:

Chairman Honigberg	8, 9, 12, 15, 23, 27, 38	
Commissioner Scott	20, 34	

* * *

E X H I B I T S

EXHIBIT NO.	D E S C R I P T I O N	PAGE NO.
--------------------	------------------------------	-----------------

1	Stipulations of Facts (01-26-15)	4
2	Affidavit of Thomas Ruksznis (03-12-15)	5

P R O C E E D I N G

1
2 CHAIRMAN HONIGBERG: Good morning. We
3 are here this morning -- and this microphone barely sounds
4 like it's on. We're here this morning on DE 14-305, which
5 is a petition filed by Freedom Logistics for a declaratory
6 ruling. We have a Stipulation of Facts. We have
7 memoranda filed by both Freedom Logistics and by Staff.
8 We have some papers up here, but I'm sure you all will
9 tell us what those are. We're here this morning I think
10 to hear from the lawyers about their positions here on how
11 this should be resolved.

12 And, before we get any further into
13 this, why don't we take appearances.

14 MR. RODIER: Mr. Chairman, do you have
15 the attorney stand or is sitting okay or --

16 CHAIRMAN HONIGBERG: Be comfortable.

17 MR. RODIER: Okay.

18 CHAIRMAN HONIGBERG: If you want to
19 stand, you can stand. But be comfortable.

20 MR. RODIER: Yes. All right. It's Jim
21 Rodier, for Freedom Energy Logistics. And, we have -- I
22 just want to mention that Howard Plante is here, and he's
23 getting a cup of water at this point, and Gus Fromuth is
24 the owner or principal. And, the gentleman to the far

1 right is Cianbro, Tom Ruksznis. Who came all the way down
2 from -- had like a four-hour ride to come to this hearing.
3 So, that's who we are.

4 MR. HENDRIX: I'm Chris Hendrix, with
5 Walmart and Texas Retail Energy.

6 MR. WIESNER: Dave Wiesner, Commission
7 Staff Attorney. With me today are Liz Nixon of the
8 Sustainable Energy Division, and David Goyette of the
9 Electric Division.

10 CHAIRMAN HONIGBERG: How are we
11 proceeding this morning?

12 MR. WIESNER: Just one administrative
13 matter, Mr. Chairman. We would like to have marked as
14 identification -- marked for identification as a potential
15 exhibit the Stipulation of Facts. And, I believe the
16 Commissioners have been provided with a copy of that,
17 which has been marked for identification as "Exhibit 1".

18 CHAIRMAN HONIGBERG: It's also been
19 filed in the docket, has it not?

20 MR. WIESNER: That's correct.

21 CHAIRMAN HONIGBERG: Okay. Either way.

22 (The document, as described, was
23 herewith marked as **Exhibit 1** for
24 identification.)

1 MR. WIESNER: There was some question
2 about whether it was necessary. And, so, we would propose
3 to do that. And, in part, I propose to do that because
4 Attorney Rodier, I understand, has an affidavit to
5 accompany that Stipulation of Facts, which I would ask him
6 to speak to, if this is an opportune time to do so?

7 CHAIRMAN HONIGBERG: It seems like a
8 very logical time to do so, since it's up here on our
9 table.

10 MR. RODIER: Well, I think it's
11 tentatively marked as "Exhibit 2", I believe. And, you
12 know, all it is is Tom's affidavit that FEL, me, can
13 commit them to the factual stipulations.

14 CHAIRMAN HONIGBERG: Okay. All right.
15 Good enough. So, we'll mark that as "Exhibit 2".

16 (The document, as described, was
17 herewith marked as **Exhibit 2** for
18 identification.)

19 CHAIRMAN HONIGBERG: And, with that, are
20 we ready to hear from counsel? I guess we'll start with
21 Mr. Rodier. Mr. Hendrix, are you going to want to talk
22 with us this morning?

23 MR. HENDRIX: No, sir.

24 CHAIRMAN HONIGBERG: And, then,

1 Mr. Wiesner. And, then, we'll see how this goes. I'm
2 sure we'll have questions. We may interrupt you or we may
3 let you finish and then ask questions. Make no promises.

4 MR. RODIER: Okay. Interrupting is
5 fine, really.

6 CHAIRMAN HONIGBERG: Okay.

7 MR. RODIER: It's okay.

8 CHAIRMAN HONIGBERG: Mr. Rodier, why
9 don't you begin.

10 MR. RODIER: Okay. We're here on this
11 matter of Cianbro Energy. Which Cianbro Energy, by the
12 way, is a single member LLC, whose single member is
13 Cianbro Corporation. The basic issue is, should they have
14 registered as a competitive provider back in the day? In
15 the Stipulation, it lists the years and the number of
16 kilowatt-hours that were sold. And, we have stipulated
17 that Cianbro Energy didn't. So, okay? And, so that we
18 wouldn't have another factual issue of pouring through,
19 you know, their corporate records of what's a sale and
20 what isn't. So, Cianbro Energy did sell, we concede that,
21 to Cianbro Corporation.

22 Now, the issue arises really because, in
23 New Hampshire, as the Commission knows, Cianbro
24 Corporation could have gone directly to NEPOOL/ISO-New

1 England as an end user. That's the so-called *Luminescent*
2 decision, where the Commission declined -- let me just a
3 quick background here how that came about. Mr. Fromuth
4 and I were responsible for the 99th amendment to the New
5 England Power Pool agreement that let end users go
6 directly.

7 So, when we first tried to, after
8 getting it through NEPOOL and ISO-New England we tried
9 to -- we tried to file a membership with FERC. The PUC
10 intervened. At the time, there was this great concern
11 among the regulators the division of the federal versus
12 state jurisdiction, and the Commission was saying "well,
13 we're going to lose our jurisdiction."

14 So, the outcome of that was that, at
15 somebody's suggestion, I filed, it was another petition
16 for declaratory order, I guess, that, or some kind of a
17 request that the Commission would not try to make ISO-New
18 England become a CEPS if they supplied electricity
19 directly to an end user. And, the Commission, you know, a
20 long story being short, the Commission said, you know,
21 they're not going to -- one of our customers can, you
22 know, and we're talking here about St. Anselm's, we're
23 talking about High Liner Food, we're talking about the
24 Union Leader, we're talking about the Town of Hanover, for

1 example. They all go direct to ISO New England for their
2 electricity. There isn't a middleman.

3 What happened here, with the benefit of
4 hindsight, certainly, there would not have been a
5 middleman in this case with Cianbro. But it was just done
6 sort of inadvertently, unintentionally. Nobody did it to
7 game the system or anything like that. It was done
8 because it was sort of the approach taken by Cianbro in
9 the other New England states in which it operates.

10 CHAIRMAN HONIGBERG: I was going to ask
11 you about that. Because Cianbro is operating in multiple
12 states.

13 MR. RODIER: Yes.

14 CHAIRMAN HONIGBERG: And, it has had
15 this structure set up in other states with basically a
16 captive subsidiary that only serves the parent and its
17 other affiliates in that way?

18 MR. RODIER: That's correct. And, the
19 reason that it was, that was the path of least resistance.
20 Because, after New Hampshire, when the issue came up like
21 in Maine, we said "okay, you know, we're just going to do
22 it", so that we don't have to fight through this situation
23 again about whether you're going to be regulating NEPOOL
24 or ISO New England. So, that was the lesson learned in

1 New Hampshire, just to go ahead and create, you know, a
2 single member LLC to be the intermediary, there would be a
3 purchase from ISO-New England, then they would flip it to
4 the end user. So, I think it's Maine and Connecticut?

5 MR. FROMUTH: Yes. Maine and
6 Connecticut is where they --

7 (Court reporter interruption.)

8 CHAIRMAN HONIGBERG: Don't --

9 MR. RODIER: Sorry. Maine and
10 Connecticut.

11 CHAIRMAN HONIGBERG: It's sufficient for
12 me to know that you've got this structure in place in
13 other states.

14 MR. RODIER: Right.

15 CHAIRMAN HONIGBERG: And the specific
16 states isn't that significant.

17 MR. RODIER: Okay. Sorry. So, you
18 know, that's our first line of defense here, is that it
19 shouldn't have -- in retrospect, it's unfortunate that it
20 happened that way. It will never happen again. And, it
21 has certainly never happened with any other end user in
22 New Hampshire.

23 CHAIRMAN HONIGBERG: Well, you just --
24 you just said something that raises a different problem.

1 It's not happening now, and you just said "it's never
2 going to happen again." Why are we here? Is there still
3 a live dispute?

4 MR. WIESNER: If Cianbro Energy was
5 required -- was serving as a competitive supplier during
6 the three years when it concededly sold power to its
7 retail customer affiliate, then it was required to have
8 been registered at the Commission, and it was required to
9 have complied with the Renewable Portfolio Standard
10 requirements of RSA 362-F and the implementing rules of
11 the Commission, including the payment of alternative
12 compliance payments.

13 So, that is essentially the dispute that
14 is still alive. Which is, is Cianbro Energy responsible
15 for having made ACP payments for those three years in
16 which it was doing business as a supplier, in Staff's
17 view, not registered here, but met the definition of
18 "provider of electricity" under 362-F.

19 CHAIRMAN HONIGBERG: This didn't come up
20 this way, though. This didn't come up as an enforcement
21 action or some request for fines by Staff?

22 MR. WIESNER: Not before the Commission,
23 that's correct. I mean, I think it -- I believe that, in
24 the initial petition, it was alleged, and Staff does not

1 dispute that Staff was taking the position that Cianbro
2 Energy should pay the ACP for those periods.

3 CHAIRMAN HONIGBERG: Oh, okay. All
4 right. All right. So, in Staff's view, there is a live
5 controversy?

6 MR. WIESNER: Right.

7 CHAIRMAN HONIGBERG: Okay.

8 MR. WIESNER: And, we're somewhat
9 jumping ahead, but the obligation to make ACP payments in
10 lieu of acquiring RECs to meet an RPS obligation is a
11 statutory requirement. So, arguably, there's no need for
12 the Commission to take enforcement action. It's an
13 obligation that stands on its own.

14 CHAIRMAN HONIGBERG: Okay.

15 MR. RODIER: Okay. So, that -- this is
16 kind of framing the issue here very well. It's what we
17 are asking, we're saying "okay, we're going to" -- we
18 didn't want to come in here and have to have any facts in
19 dispute. It was a sale. However, we'd like the
20 Commission to understand the context in which that
21 occurred. And, there's a, you know, there's a Commission
22 rule that says "if you sell to customers", plural, not
23 singular, "customers", "you've got to be a CEPS". So, you
24 know, according to the rules, we can orally ask for a

1 waiver. We think that's in the interest of justice in
2 this case. There's not a lot of money, we're talking two
3 grand here, we estimate, in ACP payments.

4 So, having said that, I'm going to move
5 onto the next prong of my discussion here, which has to do
6 with the rule that says "hey, if you're selling to retail
7 customers, you need a license." Now, there's one public
8 policy exception to that Commission rule. Which is that
9 campgrounds are excepted from being competitive suppliers.
10 So, we have one exception to what I think the Staff wants
11 to make a very, very ironclad, literal application of this
12 rule.

13 And, the reason I think, and I'm not
14 trying to be facetious here, that the campgrounds are also
15 excepted from the definition of "public utility". So,
16 apparently, what happened, Staff, or somebody else making
17 comments, said "hey, campgrounds can sell elect" -- you
18 know, a Winnebago can come up from Connecticut and go to
19 Camp Wamsutta, and Camp Wamsutta can sell electricity to
20 the Winnebago. Okay? Somehow that got into -- became a
21 law.

22 CHAIRMAN HONIGBERG: Is that a statute
23 or is that an exception within the rules?

24 MR. RODIER: Both.

1 CHAIRMAN HONIGBERG: So, just to be
2 clear, that means the New Hampshire Legislature decided
3 that campgrounds -- campgrounds should be exempt, correct?

4 MR. RODIER: Right.

5 CHAIRMAN HONIGBERG: Okay.

6 MR. RODIER: It doesn't necessarily mean
7 it has to be in the rule, though. But it makes sense.

8 CHAIRMAN HONIGBERG: But you would agree
9 with me that, if the statute says it, it really doesn't
10 matter what the rules say, right?

11 MR. RODIER: Well, no. Because the
12 statute applies to saying "campgrounds are not public
13 utilities". The statute doesn't have anything to do with
14 saying whether or not they're competitive suppliers. It's
15 the rule that says they're not competitive suppliers.

16 CHAIRMAN HONIGBERG: Okay. So, the
17 exemption from the "competitive supplier" provision is
18 just a rule, not in the statute?

19 MR. RODIER: That's correct.

20 CHAIRMAN HONIGBERG: Okay.

21 MR. RODIER: That's correct. Now, so, I
22 think, again, as I was saying, I could see how that could
23 happen. Well, your campgrounds, the Legislature says
24 they're not public utilities, so, we're not going to say

1 that they're competitive suppliers.

2 However, it raises another set of
3 issues, because that's the statutory exemption from public
4 utilities. There's a whole range of case law exemptions
5 from public utilities. And, I brought up a major one last
6 time, which is *Zimmerman*. Where, if you're selling,
7 selling to a customer who you have an affinity with, is
8 the way -- in other words, the obverse of that is you're
9 not selling to the public, you're selling to a tenant,
10 you're selling to somebody you have an affinity with, you
11 are not a public utility, okay?

12 But my view is the Commission should
13 directly let that inform its thinking about how to apply
14 the CEPS rule. Because we have a situation here where
15 Cianbro Energy can sell to Cianbro to their heart's
16 delight, they never would have been considered a public
17 utility subject to any kind of regulation, but now all of
18 a sudden they're ensnared as a CEPS. And, our view is
19 that 374-F, the restructuring law, as we know, was
20 intended to drop the shackles off people so that they
21 could contract with --

22 CHAIRMAN HONIGBERG: Let's not overstate
23 the level of regulation of CEPS, Mr. Rodier. You and I
24 both know that the differences between CEPS and utilities

1 are profound.

2 MR. RODIER: Yes, they are.

3 CHAIRMAN HONIGBERG: And, the regulated
4 utilities have lots of things related to prices, --

5 MR. RODIER: Right.

6 CHAIRMAN HONIGBERG: -- and profits, and
7 what they can and can't do. The CEPS regulation is
8 extremely light, compared to what the regulated utilities
9 have to go through.

10 MR. RODIER: Right.

11 CHAIRMAN HONIGBERG: Would you not agree
12 with that?

13 MR. RODIER: All I would say is, the
14 applicable statute says the Commission "may enact
15 regulations for competitive providers". It wasn't
16 required to.

17 CHAIRMAN HONIGBERG: And none of those
18 regulations can have anything to do with the prices that
19 those CEPSS charge, correct?

20 MR. RODIER: That's correct. That's
21 excluding price regulation. You're exactly correct.

22 CHAIRMAN HONIGBERG: It's almost all
23 consumer protection, is it not?

24 MR. RODIER: And, you know, that's my

1 point. It's consumer protection. Does Cianbro
2 Corporation, as large as they are, need protection from
3 Cianbro Energy? I don't think so.

4 CHAIRMAN HONIGBERG: So, but -- I get
5 that point. Talk a minute, go back to the rule. I
6 believe that the rule was amended in 2010, was it not? It
7 used to say -- it used to exempt affiliates, but that
8 exemption was removed, was it not?

9 MR. RODIER: That's right.

10 CHAIRMAN HONIGBERG: Didn't that present
11 a problem for you in the literal terms of the rule?

12 MR. RODIER: Well, I would say, I
13 totally understand why that was done, because does that
14 mean that somebody who purchases, I don't want to use any
15 particular manufacturer's name, okay, but can Manufacturer
16 A, a customer of PSNH, sell to B, which is their
17 affiliate? I don't think you can. I don't think that
18 would make sense. And, I think that was starting to
19 become a problem, with customers, large customers with
20 affiliates, were trying to tack on and supply to the, you
21 know, the smaller affiliate. So, I think that's really
22 what it got at. But I never followed that and I never
23 understood that.

24 But I think there's broader reasons than

1 something that arises in the context of somebody just
2 trying to purchase electricity wholesale from the Pool. I
3 mean, I don't have really a good answer for you.

4 CHAIRMAN HONIGBERG: You had my hopes --
5 you did have my hopes up for a minute, because I think you
6 started that last one with "I know why that was done."
7 And, in all honesty, I'm trying to -- I don't know why
8 that change was made. You're alluding to relationships
9 between large companies and smaller affiliates where the
10 larger would purchase and resell.

11 MR. RODIER: Yes.

12 CHAIRMAN HONIGBERG: I don't know.
13 Maybe that is why, something was going on --

14 MR. RODIER: I think that's one of the
15 reasons, you know, that was involved. Was it targeted at
16 situations like Cianbro? I don't know. That one slipped
17 by me. We don't know. I do know that, if affiliates
18 could sell to -- if a company could sell to its affiliate,
19 without any restrictions, we would be the first one trying
20 to set those deals up. No question about it. We can't.

21 So, that's all I've got on that point,
22 Mr. Chairman. If I could --

23 CHAIRMAN HONIGBERG: Okay.

24 MR. RODIER: So, again, just to conclude

1 this point here, we are suggesting to the Commission that,
2 if somebody would not be considered a utility under the
3 laws, why would they conceivably, in the name of consumer
4 protection, have to involve, you know, a licensed
5 supplier, their affiliate, which they control?

6 So, having said that, because I've only
7 got one more, one more point here. And, I think this is
8 one that we're going to have some disagreement with the
9 Staff on. But, by the way, there is one other thing I
10 wanted to mention. Campgrounds are exempted, but marinas
11 aren't. I know this, I used to live over near the
12 Wentworth Marina. And, big boats would pull in. And,
13 there's meters for each slip. They sell electricity
14 there. You have a lot of situations like that in New
15 Hampshire, by the way. Sales of electricity are very
16 common. People try to hide it the best they can, but
17 there are a lot of sales of electricity. And, I do know,
18 at marinas, they do meter the usage and sell to the
19 customer. So, that's the kind of hodgepodge. It's a
20 Balkanized kind of situation we've got in NH.

21 You know, you also got some sale of
22 electricity, you know, there's a situation in New
23 Hampshire, a third party comes in on a manufacturer's
24 website, plants a cogeneration unit, sells the electricity

1 to the end user; sale of electricity. So, and I think the
2 Staff did recognize that at some point. There's a lot of
3 things, new things are going to be happening out there,
4 with solar, I mean, a landlord puts in solar and sells to
5 a tenant. And, we're going to have to -- you know, and we
6 have distributed generation and all that, the laws and the
7 rules are going to have to change.

8 So, finally, the catch-all here is, even
9 if Cianbro Energy didn't have to be a CEPS, they -- I
10 think the Staff would contend that they're a provider of
11 electricity. Under the laws, a person who's required to
12 meet the RPS, Renewable Portfolio Standard requirements,
13 is a provider of electricity, not just a CEPS, a provider
14 of electricity. So, the statute 374-F:2, I'll just read
15 it quickly: "Electricity suppliers", in quotes, "means
16 suppliers of electricity generation services and includes
17 actual electricity generators and brokers, aggregators,
18 pools," etcetera. So, a provider, under a literal reading
19 of the law, includes "aggregators" and "brokers". So, I
20 tell Mr. Fromuth about this, he's a brokerage, aggregator,
21 whatever, you know, and, you know, it raises another "Wow,
22 are we going to get another kiss in the mail from the PUC
23 that says "now we owe for RPS"."

24 So, that -- I raise that, it's not a

1 frivolous argument, it really isn't. But it's just
2 another thing, and it would go to my point that there
3 should be some looseness in the joints here, and when we
4 have a situation like Cianbro, the Commission should show
5 some understanding and flexibility as to how to resolve
6 this. Thank you.

7 CHAIRMAN HONIGBERG: Commissioner Scott.

8 COMMISSIONER SCOTT: I apologize, I'm
9 somewhat confused. So, can you -- maybe we can go through
10 what the asks are that you have. So, if I heard you
11 correctly, in the first instance, you're not -- you made
12 the statement that "this would never happen again", as far
13 as -- is that predicated on the rules not changing, is
14 that what you're saying, or the Company has no intention
15 of reproducing this issue that we're discussing and having
16 not paid the RPS fees, is that --

17 MR. RODIER: Right, right, right. I
18 think it's safe to say, as long as FEL is involved, it
19 will never be another intermediary in New Hampshire.

20 COMMISSIONER SCOTT: Okay. And, that's
21 your desire or is that based on your reading of the rules?

22 MR. RODIER: Well, if there's an adverse
23 decision here, then, you know, it's the duty of FEL to
24 decline to do the best for them. And, if that's going

1 to -- creating an entity that's going to have to get a
2 license as a CEPS and everything else that goes with it,
3 it's not going to be done, because it's an option whether
4 or not you do that.

5 COMMISSIONER SCOTT: Okay.

6 MR. RODIER: So, that's what we're --
7 that's the position. Now, when I say "it's never going to
8 be done", FEL would never have done this in the first
9 place had it understood and known what -- that we would be
10 here today on something like this.

11 COMMISSIONER SCOTT: Okay.

12 MR. RODIER: And never done it for
13 anybody else before.

14 COMMISSIONER SCOTT: And, you mentioned
15 the word "waiver" earlier. So, are you asking a
16 retroactive waiver?

17 MR. RODIER: Yes. I'm asking, well, if
18 the Commission says "hey, under the Rule 2002.05, you were
19 a CEPS", if that's the legal analysis, I'm going to say
20 "okay, could you please waive the rule this one time just
21 for this very unusual situation."

22 COMMISSIONER SCOTT: Okay. And, if I
23 heard you, as you were closing, did I understand you to
24 say that it's your opinion that, regardless of whether FEL

1 is a CEP, if it's a broker or an aggregator, you're
2 suggesting they have a obligation under the RPS. Is that
3 what I heard you say?

4 MR. RODIER: I would say that's the way
5 the law reads. However, it strikes me as absurd it would
6 have that obligation. But we read -- we interpret the
7 statutes, as you know, Commissioner, in New Hampshire, the
8 plain meaning of "what does it say?" That's what it says,
9 in my view. You may hear a different opinion on that.

10 COMMISSIONER SCOTT: Okay.

11 MR. RODIER: But that's what it says.
12 And, therefore, there really is a bigger picture here that
13 I think, I'm hoping the Commission will, you know, show
14 some tolerance here for the issue that we have brought
15 here before you today.

16 COMMISSIONER SCOTT: Okay. And, again,
17 I'm trying to paraphrase, so I understand. So, I don't
18 want to put words in your mouth.

19 MR. RODIER: Yes.

20 COMMISSIONER SCOTT: So, one more attack
21 at this. So, your position is, your client effectively
22 didn't -- it was unclear what the rules of the road were.
23 Now, you understand -- now, you feel, between the rule
24 changes and the discussions now, moving forward what's

1 required in your mind. And, your suggestion is, "since
2 the rules weren't clear, (a) there shouldn't be any
3 requirement to back pay fees, and, if we did decide there
4 was, we should waive that." Is that a fair summary of
5 what --

6 MR. RODIER: I wouldn't exactly say "the
7 rule wasn't clear". I would say that this was just a --
8 it was an oversight. Did we say that that rule wasn't
9 clear after they removed the thing about "affiliates"?
10 That's really our job to know that. And, you know, this
11 was just done at a level, just like they were doing in
12 other, they were doing this in New Hampshire. Nobody
13 stopped to think what the consequences of it were going to
14 be. So, it was -- my only point, Commissioner, this is
15 not that we've done something, you know, in the dead of
16 night to try to circumvent any obligation whatsoever.

17 COMMISSIONER SCOTT: Thank you.

18 CHAIRMAN HONIGBERG: I'm surprised you
19 didn't argue somewhat that the Union Leader can do this,
20 there are other entities that can go straight out to the
21 market and purchase, they don't have these obligations.
22 When you've got a captive subsidiary that only serves its
23 affiliates, there's no economic difference between that
24 and what the Union Leader is doing. Why are we creating

1 these obligations for this captive intermediary, that may
2 have been created for other reasons, multi-state, you
3 know, --

4 MR. RODIER: Yes.

5 CHAIRMAN HONIGBERG: -- operations,
6 multi-division operations.

7 MR. RODIER: Well, it was administrative
8 simplicity. It's what they were doing in Mass. and
9 Connecticut. And, it was just done. It's, basically, you
10 know, it was done in these other states to avoid a fight
11 over whether the Maine PUC could call NEPOOL the supplier
12 under their CEPS rules. Okay? We didn't have any, I
13 think the Commission had more foresight. And, so, it was
14 just done as a way -- as a work-around, to get things
15 moving forward, rather than get bogged down in more
16 hearings.

17 CHAIRMAN HONIGBERG: Couldn't the entity
18 have purchased itself without using the intermediary? Did
19 it not have that ability to do what the Union Leader is
20 doing?

21 MR. RODIER: No, Cianbro could have done
22 that. We should have done that. The Cianbro Corporation
23 could have done that, and we should have done that.

24 CHAIRMAN HONIGBERG: Okay.

1 MR. RODIER: And, by the way, it's not
2 Cianbro's fault.

3 CHAIRMAN HONIGBERG: Oh, I understand --
4 I'm not --

5 MR. RODIER: Yes.

6 CHAIRMAN HONIGBERG: I'm not putting it
7 that way. Just in terms of corporate structures, --

8 MR. RODIER: Of course, they could have.

9 CHAIRMAN HONIGBERG: -- that's doable,
10 right?

11 MR. RODIER: Yes. They own -- what do
12 they got? Four facilities in New Hampshire, their name's
13 on the electric bills.

14 CHAIRMAN HONIGBERG: Okay. I'm
15 confident we'll circle back to you, Mr. Rodier.

16 MR. RODIER: Okay.

17 CHAIRMAN HONIGBERG: Mr. Wiesner.

18 MR. WIESNER: In Staff's view, Mr.
19 Chairman, Commissioner Scott, this is a very clear case.
20 The question is "what is the scope of the Commission's
21 regulations applicable to competitive electric power
22 suppliers?" And, "was Cianbro Energy selling power to an
23 end-use customer during the three years that it -- within
24 the definition of the CEPS rules during the three years

1 when it concededly were making those sales in New
2 Hampshire?" Which only ended, I believe, in May of last
3 year, according to the Stipulation of Facts. Staff's view
4 is the definition of "competitive electric power
5 supplier", following the 2010 amendments to the 2000
6 rules, is broad enough to cover self-supply affiliates,
7 such as Cianbro Energy, such as Texas Retail Energy, which
8 is here with us today, an affiliate of Walmart, and
9 there's another company, Devonshire Energy, which is an
10 affiliate of Fidelity Investments. Those companies, those
11 other two companies, the Walmart affiliate, the Fidelity
12 affiliate, they are registered here.

13 They have been granted waivers from some
14 of the consumer protection provisions of the 2000 rules.
15 But they are registered, they pay -- they comply with the
16 RPS requirements and pay the ACP if they come up short on
17 RECs. They are now obligated to pay a \$10,000 annual
18 assessment to the Commission under legislation passed last
19 year. And, there is no meaningful distinction between
20 what Cianbro was doing for a three-year period and what
21 those other two companies do.

22 Much of Attorney Rodier's argument here
23 this morning, I believe, is really a policy argument that
24 the rules should be other than what they are, or that they

1 should be interpreted differently than they have been.

2 It's Staff's view that a specific exception was present in
3 the rules prior to 2010, that that exception was deleted
4 in the amended rules as adopted in 2010, that that
5 amendment evinces the Commission's intent to cover
6 self-supply affiliates as competitive suppliers,
7 notwithstanding any different treatment of campgrounds or
8 marinas or distributed generation or any other category,
9 which may or may not be covered. Self-supply affiliates
10 were exempted prior to 2010; they no longer are.

11 CHAIRMAN HONIGBERG: Mr. Wiesner, is
12 there any record of what the purpose of that change was?

13 MR. WIESNER: I don't believe there is
14 in that rulemaking docket. It's not entirely clear what
15 the reason for those amendments were, to be perfectly
16 honest with you. But the rule reads as it is. And, I
17 think Staff's view is that the rule is clear. The
18 application of that rule to similarly situated companies
19 has been consistent. And, that there's no meaningful
20 distinction between what Cianbro is doing and what those
21 other companies are doing. And, therefore, Cianbro was
22 required to be registered here. Most likely would have
23 been granted the waivers as the other companies have been,
24 and would have been required to meet RPS obligations,

1 including payment of the ACP.

2 Attorney Rodier -- well, let me say also
3 that, for the purposes of this proceeding here today,
4 Staff is not contesting the continued validity of the
5 *Luminescent* precedent. Where this Commission decided that
6 an end user could participate directly in the ISO spot
7 market, buy power for its own consumption, and that no one
8 involved in that transaction, not the end user, not the
9 ISO, not the wholesale suppliers that feed power into the
10 ISO, which is different every hour, none of those people
11 needed to be registered as a competitive supplier in this
12 state. That precedent holds, in our view. Our
13 understanding is, the Union Leader and some other entities
14 in New Hampshire take advantage of that.

15 But, when you set up the intermediary,
16 when you set up the supplier, and there are business
17 reasons to do so, I'm sure that Walmart understands that
18 that's a potential, but they set up an affiliate. Once
19 they do that, that affiliate is selling power at retail,
20 is a competitive electric power supplier, and is required
21 to be registered with the Commission, under the rules as
22 adopted in 2010, force and effect of law, presumed to be
23 valid under RSA 541-A as a result of that adoption.

24 Finally, I do want to address, well, two

1 things. For the first time, Attorney Rodier is now asking
2 for a rule waiver. This was brought to the Commission as
3 a Petition for Declaratory Ruling. I don't -- sitting
4 here today, I'm not going to say that there's no reason
5 that he shouldn't raise the request for a rule waiver, but
6 that's not been addressed in the briefs, and there's a
7 somewhat different standard for that. I think we would
8 oppose that request on policy grounds, as well as in the
9 interest of consistent enforcement with similarly situated
10 companies. That's one point I want to make.

11 The other issue, which Mr. Rodier
12 addressed for the first time this morning, is the
13 definition of "provider of electricity", and the
14 incorporation in that 362-F definition of the 374-F:2
15 definition of "electricity supplier". And, 374-F:2 has a
16 very broad definition of "electricity supplier", which
17 does include "aggregators" and "brokers". And,
18 aggregators and brokers are required to be registered as
19 such with the Commission under the 2000 rules.

20 Two points I want to make about that,
21 well, three. First of all, it's the first time we've
22 heard that, that argument presented to the Commission. It
23 was not addressed in the Petitioner's legal brief.

24 Number two, it strictly speaking is not

1 relevant, because there's no argument, as I understand it,
2 that Cianbro Energy was functioning as an aggregator or
3 broker. It was actually taking title to power at
4 wholesale and selling it at retail to its affiliated
5 end-use customer.

6 And, finally, even if it were relevant,
7 aggregators and brokers are not required to comply with
8 the RPS. Even though they may be technically -- they may
9 technically come within the definition of "provider of
10 electricity", the operative section in 362-F is Section 3.
11 That is the section that requires providers of electricity
12 to meet the RPS requirements for each class based on their
13 acquisition of RECs or payment in the alternative of the
14 ACP. That requirement is based on a percentage of power,
15 electricity supplied by the Company to its electric
16 end-use customers. And, it's Staff's view, and I believe
17 this is the best statutory interpretation, that
18 aggregators and brokers are not supplying electricity to
19 retail end users. They are arranging for that supply, and
20 that the actual supply is provided by a competitive
21 supplier. And, to impose the RPS obligations on both
22 sides of that equation would be double-counting. And,
23 that doesn't make sense. We believe it's inconsistent
24 with the statutory scheme as a whole. And, so,

1 effectively, even if Cianbro or another company could be
2 seen as an aggregator or broker, rather than a supplier,
3 there doesn't seem to be any basis for assessing that
4 aggregator or broker, that middleman, if you will, for RPS
5 requirements. And, it has not been the practice of the
6 Commission to do so. In fact, aggregators and brokers are
7 not even required to file the annual RPS report with the
8 Commission. Mainly because they would report zero, and
9 there seems to be no point in imposing that administrative
10 burden on companies where there's no need for them to buy
11 RECs or pay the ACP.

12 CHAIRMAN HONIGBERG: You're done?

13 MR. WIESNER: I'm done.

14 CHAIRMAN HONIGBERG: Commissioner Scott,
15 do you have questions for Attorney Wiesner?

16 COMMISSIONER SCOTT: Not at this second.

17 CHAIRMAN HONIGBERG: I think I
18 understand --

19 MR. RODIER: Mr. Chair, may I?

20 CHAIRMAN HONIGBERG: Well, I have
21 questions for him.

22 MR. RODIER: Oh, for him. I'm sorry.

23 CHAIRMAN HONIGBERG: Yes. I can ask him
24 a question.

1 MR. RODIER: You sure can.

2 CHAIRMAN HONIGBERG: I asked you
3 questions, I'm going to ask him questions.

4 MR. RODIER: No. That's good.

5 CHAIRMAN HONIGBERG: It's your view, I
6 think you said this, that it's a "policy call" about
7 including companies like the intervenor, like Cianbro
8 Energy, when the economic substance of the transaction
9 that they're doing, as opposed to what the Union Leader is
10 doing, is really the same to the corporate entity, to the
11 corporate family, it ends up looking the same. But, if
12 they, for their own reasons, set up some intermediary
13 within the larger entity to do the purchasing and
14 reselling, it's their decision, they make that decision,
15 whatever reasons they make, that carries with it
16 consequences. And, so, it is a policy call that, as our
17 rules currently state, they are covered. Those rules
18 could be amended. But it's the policy call to be made
19 here, in your view, I think is what I heard you say?

20 MR. WIESNER: Well, let me clarify.
21 That my view is -- our view is the policy call was made at
22 the time when the Commission amended its rules in 2010.

23 CHAIRMAN HONIGBERG: But we could amend
24 them again.

1 MR. WIESNER: And you could amend them
2 again. And, there may be legitimate policy considerations
3 that would support an amendment that would reintroduce
4 that exception, and maybe cover marinas and other similar
5 entities. Those are policy decisions that may be made by
6 the Commission under its authority in RSA 374-F:7. But
7 that's for another day, in our view. Those policy
8 considerations, regarding basically the scope of the
9 definition of "competitive supplier" and the purpose of
10 those 2000 rules are best addressed in the generic
11 rulemaking proceeding, which is currently open, although
12 has not advanced very far, I'm sorry to say. Not in this
13 proceeding, which is a Petition for Declaratory Ruling
14 regarding the specific facts of one particular company.

15 CHAIRMAN HONIGBERG: Okay. I think I
16 understand that. And, so -- and, there is an open
17 rulemaking docket on these rules. And, so, a company,
18 like Freedom or Cianbro or Texas Energy, if they wanted to
19 make recommendations about how the rules should read going
20 forward, that's an opportunity, right?

21 MR. WIESNER: We would welcome that,
22 that input from all stakeholders. And, I think that
23 companies such as these would have a greater incentive to
24 participate in the process than they may have in 2010.

1 But there are -- I mean, I can think of a number of
2 legitimate policy considerations regarding the scope of
3 the definition of "competitive supplier" under the
4 Commission's rules. And, they should be addressed, in
5 another proceeding, not in this docket.

6 CHAIRMAN HONIGBERG: All right. You
7 have questions? Commissioner Scott.

8 COMMISSIONER SCOTT: So, just to clarify
9 that train of logic you and the Chair just went through.
10 So, under the existing rules, the existing interpretation
11 of those rules, instead of Cianbro having an affiliate to
12 manage these purchases from the wholesale market and then
13 be the pass-through, and if they had hired -- all the
14 individual New Hampshire entities of Cianbro had hired a
15 broker to effectively secure that power for those
16 individual entities, would we be having this discussion?

17 MR. WIESNER: Well, I mean, a broker
18 would have helped them arrange supply.

19 COMMISSIONER SCOTT: Right.

20 MR. WIESNER: A broker would presumably
21 put them in touch with a supplier.

22 COMMISSIONER SCOTT: Right.

23 MR. WIESNER: And, then, the supplier
24 would be selling power to them, and that supplier would

1 have an RPS obligation, that supplier would have to be
2 registered here, and be a member of NEPOOL and everything
3 that goes with that.

4 I think our view is that the
5 Commission's rules are clear. That the choice that's made
6 to pursue one structure or another for purchasing power is
7 really a business decision by the various companies.

8 COMMISSIONER SCOTT: And, you suggest
9 the broker would go to different CEPSs. Is it possible
10 that a broker could be used to do the administrative work
11 to allow a company to buy directly from ISO-New England?

12 MR. WIESNER: In that context, "broker"
13 might not be the right word. But, you know, let's say
14 someone registered as a broker here, as an aggregator,
15 could perform a consulting function to help a company set
16 up a relationship where they could purchase directly from
17 the ISO spot market. And, then, under the *Luminescent*
18 precedent, that end user, like the Union Leader, would not
19 have to be registered here as a CEPS, and would
20 effectively not have to comply with the RPS requirements.

21 COMMISSIONER SCOTT: Thank you.

22 CHAIRMAN HONIGBERG: Mr. Rodier, you --

23 MR. RODIER: Well, just two things,
24 very, very briefly as a reply. Let's see, I made a note

1 "no meaningful distinction", but I can't remember what I
2 had in mind, though.

3 CHAIRMAN HONIGBERG: I think I may have
4 used that phrase. I thought it was brilliant when I said
5 it.

6 (Laughter.)

7 MR. RODIER: I guess my other -- oh. We
8 just wanted to point out, I understand what the Staff is
9 saying, and this is kind of a sideshow a little bit, I'm
10 going to be very brief, about "providers of electricity".
11 But the definition, by law, is that an electricity
12 supplier includes "aggregators" and "brokers". Their
13 argument "well, no, they don't supply." It's true. They
14 arrange the supply. But the definition of "suppliers"
15 includes them. So, --

16 CHAIRMAN HONIGBERG: Just don't go too
17 far with that, I don't think.

18 MR. RODIER: I'm not going to.

19 CHAIRMAN HONIGBERG: Because, I mean,
20 that's not really central to anything we have to decide
21 here, is it?

22 MR. RODIER: No.

23 CHAIRMAN HONIGBERG: Okay.

24 MR. RODIER: Now, the only other thing I

1 wanted to say is that no meaningful distinction between
2 our friends at Texas Retail Energy, a/k/a Walmart, and
3 Cianbro. I do want to point out that Cianbro Energy is
4 actually what's called an MPEU, it's regarded by ISO-New
5 England, is an end user. Texas Retail Energy is a
6 supplier.

7 Now, we're not saying that the sector
8 that they belong in governs whether or not there's a sale.
9 We're saying there's a sale here. But there is a
10 distinction, I think. Cianbro Energy is an MPEU, Market
11 Participant End User. They belong to the end-user sector.
12 For all I know, Walmart probably figured out the dues for
13 the supplier sector were less, and so they went into the
14 supplier sector. I don't know why they did that. But
15 they did that, and so didn't Devonshire. Devonshire is
16 Fidelity. They had their reasons for doing it.

17 FEL's expertise is in the end-use sector
18 at NEPOOL. And, Mr. Fromuth used to be, whatever it is,
19 the Vice President of NEPOOL in charge of the end-use
20 sector. That's it. We stick to the end-use sector. And,
21 we not ever have been involved in suppliers. I think it's
22 somewhat different. There is a distinction there.

23 And, Chris is here, you know, and I
24 don't know.

1 MR. HENDRIX: Can I respond to that?

2 CHAIRMAN HONIGBERG: Sure, Mr. Hendrix.
3 I was going to give you an opportunity to participate
4 again, because I was sure you were following this
5 conversation closely. So, --

6 MR. HENDRIX: Well, thanks. So, we
7 registered as Texas Retail Energy. So, like Cianbro
8 Energy, we're a single member LLC, to supply energy to
9 Walmart Stores, Sam's Clubs, and our warehouses, here in
10 New Hampshire and in the rest of New England. When we
11 registered at ISO-New England, it was ISO-New England's
12 viewpoint that we should register as an "other supplier".
13 So, that's why we're registered in the supplier segment.
14 No other reason than that.

15 Likewise, when we registered here in New
16 Hampshire, so, we did New Hampshire last in our kind of
17 rollout of New England in 2012. And, after reading the
18 rules and talking to the Commission Staff, that's why we
19 registered as a CEPS at that time.

20 CHAIRMAN HONIGBERG: Do you have any
21 opinions on how this dispute should be resolved? I mean,
22 you intervened here asserting that your interests would,
23 you know, would be affected.

24 MR. HENDRIX: Well, we intervened

1 because we feel like we're similarly situated. So, we
2 feel like, I mean, kind of in a bigger scale, but we,
3 since we serve more facilities in New Hampshire, that you
4 could kind of replace Cianbro Energy with us. And, it
5 seems like there was a disparate treatment between the two
6 parties. So, that's why we intervened in the case.

7 Likewise, from the -- I mean, the
8 discussion that was going on about the Union Leader, it
9 seems like there's a gap there in the rules of "who does
10 the RPS apply to?" So, should it apply to all sales or
11 should it apply to some that are carved out.

12 CHAIRMAN HONIGBERG: Well, I think what
13 Mr. Wiesner said is that whoever would be selling to the
14 Union Leaders of the world have to comply -- would have to
15 comply. So, rather than get it in multiple locations or
16 multiple places within the series of transactions, you do
17 it once, you get it there.

18 MR. HENDRIX: But my viewpoint would be,
19 is if we changed our registration here to be an aggregator
20 for Walmart, then the Walmart Stores themselves would be
21 buying directly from ISO New England.

22 CHAIRMAN HONIGBERG: Uh-huh.

23 MR. HENDRIX: And there would be no
24 supplier -- there would be no supplier, there would be no

1 CEPS in New Hampshire. So, therefore, there would be no
2 RPS obligation to those sales.

3 CHAIRMAN HONIGBERG: Uh-huh. Okay.

4 MR. WIESNER: I just want to respond to,
5 with the Chairman's --

6 CHAIRMAN HONIGBERG: Go ahead.

7 MR. WIESNER: Okay.

8 CHAIRMAN HONIGBERG: One of the
9 beautiful things about not having this as an evidentiary
10 hearing, we can do this --

11 MR. WIESNER: Right.

12 CHAIRMAN HONIGBERG: -- with many fewer
13 restrictions.

14 MR. WIESNER: Yes. And, to that point,
15 I just want to point out that, you know, Attorney Rodier
16 just essentially made the argument that it does matter
17 what sector of NEPOOL Cianbro Energy is in. And, I'd
18 refer your attention to the Stipulation of Facts,
19 Paragraph 12, where it is stipulated that "The NEPOOL
20 sector in which Cianbro Energy participates does not
21 affect the determination whether it is a "competitive
22 electric power supplier", as defined in the Commission's
23 rules, or a "provider of electricity", as defined in the
24 RPS statute."

1 And, you know, we did not come here this
2 morning prepared to speak in any sense to the factual
3 distinction between those, although we could, if the
4 Commission wants to hear it. We tried to remove that
5 issue from this discussion. And, I think that is the
6 basis for the argument that there's no meaningful
7 distinction between what Cianbro is doing for three years
8 and what the other two companies were doing and are doing.
9 And, that's Staff's position. That is based on the
10 Stipulation of Facts.

11 When the Petition was first filed,
12 Freedom, on behalf of Cianbro, was trying to make the
13 argument that there were essentially two factual
14 distinctions. No sale, merely an accounting mechanism,
15 and that the sector of NEPOOL in which Cianbro Energy
16 participates is a meaningful grounds for distinguishing it
17 from the other two companies. And, Staff disagrees with
18 that position on the merits, but it is also covered in the
19 Stipulation of Facts, in order to remove it from
20 consideration today.

21 MR. RODIER: That's correct. So, I
22 apologize for that. I kind of forgot about that. But
23 that is -- that is true.

24 CHAIRMAN HONIGBERG: Not to worry.

1 MR. RODIER: Okay.

2 CHAIRMAN HONIGBERG: Commissioner Scott,
3 do you have any other questions for anyone?

4 (No verbal response)

5 CHAIRMAN HONIGBERG: I don't think I do.
6 Does anyone have anything else that they think we should
7 hear before we adjourn?

8 (No verbal response)

9 CHAIRMAN HONIGBERG: Seeing none. I
10 thank you all for your time. And, we are adjourned.

11 **(Whereupon the hearing was adjourned at**
12 **11:00 a.m.)**

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