

DE 03-007

LUMINESCENT SYSTEMS, INC.

Petition of Luminescent Systems, Inc. for
Expedited Waiver of Rule Puc 2000 as Applied to
NEPOOL and for Authorization to Self-Supply as a
NEPOOL Market Participant End User

Final Order

O R D E R N O. 24,172

May 13, 2003

I. BACKGROUND AND PROCEDURAL HISTORY

On January 17, 2003, Luminescent Systems, Inc. (Luminescent), a supplier of lighting and electronic equipment located in Lebanon, New Hampshire, petitioned the New Hampshire Public Utilities Commission (Commission) for a Waiver of N.H. Code Admin. Rules Puc 2000 as applied to the New England Power Pool (NEPOOL),¹ and for authorization to self-supply as a NEPOOL Market Participant End User (Petition).

Luminescent states that it has applied to NEPOOL to participate as a Market Participant End User for the express purpose of purchasing its full electricity requirements directly from the NEPOOL market. Luminescent acknowledges that in order to achieve this result, "it would be required to register as a

¹ NEPOOL refers to the New England Power Pool, an integrated electric power pool created and governed by an operating agreement (the Restated NEPOOL Agreement or RNA), and the member entities voluntarily and collectively participating in NEPOOL as Participants. NEPOOL Participants include investor-owned utility systems, municipal and consumer-owned systems, joint-marketing agencies, power marketers, load aggregators, generation owners and end-users.

Load Asset in the market system administered by the ISO and would be subject to the full reporting and financial obligations of the RNA, including the NEPOOL Tariff, the NEPOOL Market Rules, and the ISO's Capital Funding Tariff and Tariff for Transmission Dispatch and Power Administration Services."² (*Petition* at ¶3.)

The petition states that Luminescent is currently a delivery customer of Granite State Electric Company (GSEC). Luminescent does not own or operate any behind-the-meter generation, and subsequent to its petition stated that its intention to purchase power from NEPOOL is limited to its own electricity needs.³

Luminescent's application before NEPOOL has, apparently, raised a number of concerns for NEPOOL, including whether the purchase of energy from the NEPOOL Market might cause NEPOOL or ISO-NE to be viewed as a retail electric supplier and thereby subject NEPOOL and/or ISO-NE to regulation by the state of New Hampshire as a retail electric supplier. According to Luminescent, NEPOOL is reluctant to permit Luminescent, or any end user, from participating directly from

² ISO or ISO-NE refers to the Independent System Operator - New England, the not-for-profit, private corporation responsible for managing the New England region's electric bulk power generation and transmission systems and administering the regions open access transmission tariff.

³ In a letter to the Commission dated March 5, 2003, *infra*, Luminescent confirmed that the electricity it seeks to purchase pursuant to its proposal will be strictly for its own use.

the NEPOOL market if such participation causes NEPOOL or ISO-NE to be subject to state regulation as the electric supplier for that end user's electric load. (*Petition* at ¶5.)

N.H. Code Admin. Rules Puc 2002.04 defines a "Competitive Electric Power Supplier" (CEPS) as "any person or entity that sells or offers to sell electricity to retail customers by using the transmission and/or distribution facilities of any public utility in this state." Accordingly, if the purchase by Luminescent of its electricity requirements directly from the NEPOOL Market is determined to fall within this definition, NEPOOL or ISO-NE conceivably could become subject to the registration and consumer protection provisions of the Commission's Competitive Electric Supplier Rules, Puc 2000. In order to avoid this outcome, Luminescent requested a waiver, pursuant to N.H. Code Admin. Rule Puc 201.05, of the provisions of Puc 2000 as they may be applied to NEPOOL.⁴

On March 4, 2003, the Commission's General Counsel issued a letter seeking additional information and comment by March 19, 2003 from interested persons with regard to the *Petition*. The letter stated that the Commission was "disinclined to conclude that NEPOOL and ISO were intended to be captured within the definition of a CEPS," but before it acted

⁴ Although the *Petition* was silent on this point, the Commission assumed that a similar waiver was sought with respect to ISO-NE. This was verified in *Petitioner's* March 5, 2003 letter.

on the matter, sought comments on "whether the underlying purchase by a retail customer directly from the NEPOOL Market raise[d] any specific concerns regarding the terms and conditions for the provision of transition or default service, or any other concerns, and whether such issues may be addressed by a conditional approval or whether they warrant denial of the request." The letter was distributed to all electric public utilities, all registered competitive electric suppliers, and the Office of Consumer Advocate.

On March 5, 2003, Luminescent submitted a letter to Executive Director Howland clarifying certain points raised by the Petition and stated that it supported and concurred with the proposed revisions to GSEC's tariff pages filed with the Commission on February 21, 2003 (subsequently docketed as NHPUC Docket No. DE 03-042). These revisions, according to Luminescent, "fully address the terms and conditions for transition and default service appropriate for self-supply" from the NEPOOL market. The Commission suspended GSEC's proposed tariff changes pending resolution of the instant docket.⁵

II. COMMENTS OF INTERESTED PARTIES

Comments responding to the General Counsel's letter were received from four parties: Constellation Power Sources,

⁵ See April 9, 2003 Letter from Commission Counsel to Laura Olton, Associate Counsel, GSEC, ratified by the Commission on April 11, 2003.

Inc., (a wholesale provider of transition service throughout New England and to GSEC in New Hampshire) and Constellation NewEnergy, Inc., (a CEPS licensed or registered in 14 states, including New Hampshire) (collectively "Constellation"); Select Energy, Inc., (a licensed CEPS in New Hampshire) (Select); Unutil Energy Systems, Inc., (UES); and GSEC.

Constellation concurs with the initial inclination of the Commission, as stated in the General Counsel's letter, that NEPOOL and ISO-NE were not intended to be captured within the definition of a "CEPS" in Puc 2002.04. Constellation, however, argues that fairness to competitive retail suppliers and consumer protection concerns require that all retail suppliers comply with the Commission's rules and that wholesale suppliers selling to retail customers through the NEPOOL market should not be able to avoid such rules. On this basis, Constellation recommends that Luminescent be required to either find or form an entity qualified to register as a CEPS and effectuate retail sales under Commission jurisdiction, and only then, in light of the particular transaction, should the Commission determine whether any of its registration rules should be waived.

Select states that all competitive suppliers should be subject to the same rules and requirements in order to ensure a workably competitive market, to prevent an "end run around the New Hampshire Electric Restructuring Act," and to protect

customers. These include: registering with the Commission, providing contact information, having a registered agent for service of process in the state, providing a description of the geographic and types of customers it intends to serve, demonstrating its technical ability for data transfer with the applicable regulated distribution company, providing evidence of financial security in the form of a bond or other security instrument, and filing an application fee; and providing various consumer protections such as notice requirements, bill disclosures and protections in the event of termination. Select submits that Luminescent's Petition is "contrary to the Restructuring Act's requirement that the rules governing market activity be applied to all buyers and sellers in a fair and consistent manner."

Finally, Select states that the filing is confusing as it is not clear whether Luminescent's petition was even authorized by NEPOOL or whether Luminescent is seeking supply from NEPOOL or ISO-NE, and that NEPOOL and ISO-NE are indispensable parties to this proceeding. Select concludes that if the Petition is granted, it be on the condition that its supplier be made subject to and required to comply with the CEPS rules. Additionally, to the extent additional requirements, such as reporting or renewable portfolio requirements, are

placed on CEPS in the future, those requirements should be applied to all suppliers on a non-discriminatory basis.

UES takes no position on the Petition's specific request, but, referencing the tariff revisions filed by GSEC in Docket No. DE 03-042, suggests that if the Petition is granted, the Commission provide an opportunity for all electric distribution companies to make appropriate adjustments to any applicable tariffs. UES also recommends that it be clear that end use customers purchasing supplies through the NEPOOL market bear all appropriate distribution charges, consider whether such customers be responsible for direct charges related to the metering system reporting that the distribution system may have to undertake to report customer loads to NEPOOL, and that such customers be responsible for bidding their load into NEPOOL and for all financial assurances associated with participation in NEPOOL.

GSEC takes no position with respect to Luminescent's request for end user service at NEPOOL. GSEC believes that the CEPS rules were not intended to apply directly to NEPOOL or ISO-NE and, therefore, Luminescent's Petition should be granted. GSEC raises two concerns, however. First, it should be clear that Luminescent is not bypassing the transmission or distribution infrastructure and remains responsible for paying all retail delivery service charges to GSEC. Such charges

include the customer charge, distribution demand and energy charges, transmission charge, stranded cost charge, systems benefit charge and the electricity consumption tax. Second, Luminescent be required to comply with GSEC's tariff regarding the timing and eligibility for transition and default service, and the tariff changes proposed by GSEC in Docket No. DE 03-042.

III. PETITIONER'S REPLY TO COMMENTS

On March 20, 2003, Luminescent submitted a reply to the comments of UES, stating that it did not object to any of the conditions suggested therein. Luminescent agreed that end-users purchasing directly from the NEPOOL Market should be required to take delivery under the same delivery tariffs and terms and conditions as customers purchasing from a licensed CEPS or taking default or transition service; that end-users should be required to pay all direct metering costs, if any (Luminescent states that based on its discussions with ISO-NE personnel, existing metering and load reporting protocols will be used and no changes will be necessary); that an end-user is inherently responsible for its own loads and financial assurance, as it would be required to register as a Load Asset and subject to the full reporting and financial requirements of the RNA; and that no bidding of load into NEPOOL will be involved.

On March 28, 2003, Luminescent filed a second reply, this time to the comments of Select. Luminescent disagrees with Select's contention that the Commission needs to subject NEPOOL to the same rules and regulations as other CEPS, and asserts that Select cannot seriously contend that NEPOOL does not have the financial or technical capabilities to operate in the New England marketplace. Luminescent also argues that Select's main objection, the potential loss of business to NEPOOL, should not be of concern to the Commission, and that its Petition involves an example of the use of an innovative approach to the supply and delivery of electricity which the Commission has previously suggested was necessary for the successful restructuring of the electric industry.

On one point, Luminescent acknowledges that Select's comment has merit: that self-supply be conditioned upon compliance by the end-user with any future New Hampshire portfolio requirement. Finally, Luminescent notes that as N.H. Code Admin. Rule Puc 2002.04 provides that a CEPS does not include "an entity that sells only to its affiliate," Luminescent would be able to achieve its objective of self-supply from the NEPOOL Market by creating an affiliated entity to purchase from NEPOOL and resell to Luminescent, but that this step would be unnecessary if the Commission approves the Petition.

IV. COMMISSION ANALYSIS

As set forth above, in its Petition (as amended by subsequent correspondence), Luminescent seeks two actions by the Commission: 1) a waiver of the provisions of N.H. Code Admin. Rules Puc 2000 as applied to NEPOOL and the ISO-NE; and 2) authorization to self-supply as a NEPOOL Market Participant End User. While Select is correct that the filing was confusing, as well as incomplete in a number of respects, the filing nevertheless raises important public policy issues. Consequently, we address Luminescent's requests as set forth below.

The waiver provision of our rules, N.H. Code Admin. Rule Puc 201.05, provides (in part) that:

(a) The Commission shall waive the provisions of any rule, except where precluded by statute, upon request by an interested party or commission staff if the commission finds that:

- (1) The waiver serves the public interest;
and
- (2) The waiver shall not disrupt the orderly proceeding of the Commission.

Luminescent's request of a waiver for NEPOOL and ISO-NE raises a procedural question. As Select correctly points out, Luminescent fails to state, in the Petition or elsewhere, whether the request for a waiver has ever been authorized by either NEPOOL or ISO-NE. Luminescent, in a footnote to its March 28 response, claims that Select's suggestion that the

filing may not have been authorized is "unwarranted," but provides no direct evidence of NEPOOL or ISO-NE's authorization other than a representation that a copy of the Petition in this docket was served upon NEPOOL's counsel. Even this assertion, which is not directly probative of the question, is not made with respect to ISO-NE's counsel. The concern we have is not simply academic: were we to grant the relief requested, we arguably may create a precedent whereby a waiver may be obtained by one party of the application of our rules to a third party, without requiring assurance that the party to whom the rule applied concurred in the waiver, or even knew that such a waiver was sought.

We find, however, that it is not necessary that we resolve this particular question in order to address the issues presented by the Petition. As indicated in the General Counsel's letter of March 4, and as Constellation and GSEC agree in their comments, the question is not one of waiver, but whether the provisions of the Competitive Supplier Rules were intended to apply directly to NEPOOL and the ISO-NE. We find that the intent of these rules is to provide a means by which certain disclosures, financial assurances and consumer protections will be available from entities seeking to sell electricity to retail customers in New Hampshire, as well as a means for Commission enforcement of these requirements.

When a Market Participant purchases its full requirements directly from the NEPOOL Market, however, neither NEPOOL nor the ISO-NE buys or sells power in that market. Rather, it is the individual Participants themselves that buy and sell power pursuant to the NEPOOL arrangements as provided in the RNA.

Thus, since neither NEPOOL nor the ISO-NE would be selling or seeking to sell energy to the New Hampshire retail customer under the self-supply option Luminescent is pursuing, we hold that neither falls within the scope of the Competitive Supplier Rules for purposes of that sale, are not within the definition of a CEPS as set forth in Puc 2002.04 and are not subject to the provisions of RSA 374-F:7. The Commission, therefore, will not assert or attempt to assert jurisdiction over either NEPOOL or the ISO-NE where a New Hampshire retail customer purchases all or a portion of its retail electricity requirements from the NEPOOL Market as a Market Participant End User.⁶

The question remains whether any entity should be required to register under our rules as a CEPS. An end user, or any entity, buying out of the NEPOOL spot market, administered by ISO-NE, will buy power from a shifting and large number of

⁶ The Commission's determinations in this order do not extend to any competitive electric supplier rules that may be applicable to Luminescent should the company decide to engage in the resale of electricity within New Hampshire.

different sellers over any given period, and the identity of the seller will not be knowable (if at all) until the market is settled, well after the fact. The spot market is an anonymous market by design.

It would be impractical to assert the CEPS rules in such circumstances, and the need to apply the rules is attenuated. Thus, to the extent applicable, a waiver is appropriate. The preconditions to participating as a buyer in this market are considerable, and as a practical matter, end users who choose to buy from the spot market should and likely will be sophisticated customers who must be prepared to take on the risks of participation in a volatile market. In such circumstances, it is impractical and unnecessary to assert New Hampshire PUC jurisdiction over each spot market sale to an end user, and we decline to do so.

Our decision today advances the legislative intent to foster retail competition and choice. It provides for an innovative means for larger and more sophisticated consumers to gain access to regional electricity markets. Because of the unique characteristics of this vehicle, it is unnecessary to apply the CEPS rules to such purchases. Consumers choosing this option do so without the protections of the CEPS rules, but take this risk in hopes of gaining the benefits of the spot market.

With respect to the second action sought by Luminescent in its Petition, authorization to self-supply as a Market Participant End-User, we find that this question is more properly addressed by NEPOOL. If NEPOOL finds that Luminescent meets the requirements for membership as a Market Participant End-User, the Commission will not object.

We agree with UES and GSEC that Luminescent or any end use customer purchasing supplies through the NEPOOL market must bear all appropriate distribution charges, shall be responsible for direct charges related to the metering system reporting that the distribution system may have to undertake to report customer loads to NEPOOL, and shall be responsible for bidding its load into NEPOOL and for all financial assurances associated with participation in NEPOOL.

In addition, nothing in this decision provides any basis for Luminescent or any end use customer to bypass the transmission or distribution infrastructure of the distribution utility, and Luminescent or any such customer remains responsible for paying all retail delivery service charges to the utility. Such charges include the customer charge, distribution demand and energy charges, transmission charge, stranded cost charge, systems benefit charge and the electricity consumption tax. Further, Luminescent and any such end use customer shall be required to comply with the distribution

utility's tariff regarding the timing and eligibility for transition and default service.

Finally, by copy of this order, all electric distribution utilities are on notice that they shall file with Commission proposed adjustments to any applicable tariffs they deem necessary in light of this order, within 30 days.

Based upon the forgoing, it is hereby

ORDERED, that, under the plan proposed herein whereby Luminescent will purchase all or a portion of its electricity directly from the NEPOOL Spot Market as a Market Participant End User, neither RSA 374-F:7 nor the Competitive Supplier Rules shall be deemed to apply to NEPOOL, the ISO-NE or the entities from whom Luminescent ultimately purchases in the spot market; and it is

FURTHER ORDERED, that Luminescent or any end user purchasing all or a portion of its electricity directly from the NEPOOL Market as a Market Participant End User shall bear all appropriate distribution charges, shall be responsible for direct charges related to the metering system reporting that the distribution system may have to undertake to report customer loads to NEPOOL, and shall be responsible for bidding its load into NEPOOL and for all financial assurances associated with participation in NEPOOL, and shall remain responsible for paying all retail delivery service charges to the utility.

By order of the Public Utilities Commission of New
Hampshire this thirteenth day of May, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary