

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DM 12-075

PNE Energy Supply LLC d/b/a Power New England

**General Petition of PNE Energy Supply LLC d/b/a Power New England Regarding
Alleged Irregularities in the Registration of Electricity NH, LLC d/b/a E.N.H. Power as a
Competitive Electric Power Supplier**

Order Addressing Petition and Related Motion to Dismiss

ORDER NO. 25,422

October 10, 2012

I. PROCEDURAL HISTORY

On September 22, 2011, PNE Energy Supply LLC d/b/a Power New England (PNE) of Auburn, New Hampshire was granted Commission approval by secretarial letter for its application for registration as a Competitive Electric Power Supplier (CEPS) in New Hampshire, pursuant to the registration rules in N.H. Code Admin. Rules CHAPTER Puc 2000, in Docket No. DM 11-075. On June 8, 2012, Electricity NH, LLC d/b/a E.N.H. Power (ENH) of Auburn, Maine, a competitor of PNE, was granted Commission approval by secretarial letter for its application for registration as a CEPS in New Hampshire, pursuant to CHAPTER Puc 2000, in Docket No. DM 12-075.

On June 15, 2012, PNE filed with the Commission a letter (June 15 Letter) alleging irregularities in ENH's submission to become registered as a CEPS, and improper use of trade names by ENH in its New Hampshire marketing efforts. On June 20, 2012, after informal consultation with ENH personnel, Director Amanda Noonan of the Commission's Consumer Affairs Division sent to ENH a letter to ENH requesting that ENH prepare and submit a "Media Action Plan" outlining ENH's plans to consistently use its approved "E.N.H. Power" trade name

in its marketing efforts in this State, no later than June 27, 2012. On June 27, 2012, ENH requested an extension of one week for the submission of its Media Action Plan. The plan was submitted to the attention of Director Noonan on July 5, 2012.

On July 10, 2012, PNE filed with the Commission a petition styled as a "Petition for Declaration that the Financial Security Posted by [ENH] is Unlawful," (July 10 Petition) in which PNE requested that the Commission order ENH to modify the terms of the financial security supplied by ENH for its CEPS registration pursuant to Puc 2003.03, due to alleged deficiencies in ENH's current security terms. On July 20, 2012, ENH filed a motion to dismiss PNE's July 10 Petition. On July 27, 2012, PNE filed a reply to ENH's motion to dismiss (July 27 Reply), in which PNE requested that the Commission deny ENH's motion, and made further allegations of irregularities in ENH's registration.

On August 8, 2012, ENH filed with the Commission an updated Media Action Plan filing, in which ENH confirmed that it would refer to its approved "E.N.H. Power" trade name in its New Hampshire marketing efforts. This filing superseded ENH's filing of July 27, 2012, in which it requested confidential treatment, by motion, for this material. In its August 8, 2012 filing, ENH withdrew its request for confidential treatment and presented the same material in a public, unredacted form.

II. POSITIONS OF THE PARTIES

A. PNE Energy Supply LLC

In its June 15 Letter, PNE alleged that ENH had failed to abide by New Hampshire Secretary of State -imposed trade name restrictions in its marketing efforts in this State. Specifically, PNE alleged that, even though the Secretary of State required that ENH use its

approved trade name “E.N.H. Power” in its marketing materials, and prohibited ENH from using its formal business name “Electricity NH” as a trade name, ENH was improperly using “Electricity NH” for its New Hampshire marketing efforts as of the date of PNE’s letter.

PNE, in its June 15 Letter, July 10 Petition, and July 27 Reply, made a series of allegations regarding irregularities in, and the resulting inadequacy of, ENH’s financial security provided as part of its registration application, pursuant to Puc 2003.03. In its filings, PNE argued that ENH’s financial security, as provided by the Noble Group of Bermuda and Hong Kong (Noble Group) as its guarantor, was deficient, and that as a consequence, ENH’s “application for registration as a CEPS should not have been approved by the Commission,” as stated in its June 15 Letter.

PNE pointed to three grounds of alleged deficiency in the Noble Group guarantee provided as part of ENH’s application for CEPS registration. First, PNE pointed out that the Commission, as beneficiary of the Noble Group guarantee, was improperly referred to within the prefatory language of the guarantee as entering into a “trading relationship” with Noble Americas Energy Solutions LLC, a Noble Group Affiliate, and ENH . Second, PNE pointed out that the guarantee’s potential termination after 30 days’ notice to the Commission by Noble Group violated the requirement, established pursuant to Puc 2003.03(a)(5), that a CEPS guarantee have an expiration date of not less than 5 years and 150 days after the CEPS application is filed. Lastly, PNE asserted that the Noble Group guarantee was defective because it included wording that the Staff had raised concerns about in their review of PNE’s own guarantee. The variance, according to PNE, is that the ENH guarantee describes the obligations

guaranteed as those of the CEPS to the Commission, rather than also including obligations from the CEPS to its customers.

In its July 27 Reply, PNE further alleged that an ENH official had made a written statement regarding ENH being a “start-up company” in its CEPS application that was contradicted by the same official making a press statement, subsequent to ENH’s CEPS application being approved, that ENH was “not a startup company.” PNE asserted that ENH thereby provided false information to the Commission. Also, in its July 27 Reply, PNE asserted its standing to bring forth a petition before the Commission regarding these matters pursuant to N.H. Code Admin. Rule Puc 202.01(a), and noted its status as a market competitor of ENH.

B. ENH

ENH, in its motion to dismiss, argued generally that PNE lacked standing to challenge the Commission’s approval of ENH’s financial security as part of its CEPS application, and that PNE failed to establish the legal parameters and standards for the relief sought by PNE. Regarding the merits of PNE’s arguments related to the alleged deficiencies in ENH’s financial security, ENH made several arguments in support of the adequacy of the Noble Group guarantee under Puc 2003.03. ENH argued that the “trading relationship” prefatory language of the guarantee did not impair the Commission’s status as beneficiary, nor did it void the guarantee’s validity under applicable laws. Also, ENH asserted that, as the Noble Group guarantee had no set expiration date, the 30-day notice of termination clause in the guarantee was not in violation of the terms of Puc 2003.03(a)(5). Moreover, ENH argued that the Commission properly approved, in its own discretion, the Noble Group guarantee as part of its approval of ENH’s CEPS registration application after a recommendation by Staff for approval, and that Staff’s

previous guidance to PNE was not germane to the Commission's approval of ENH's own guarantee and CEPS application, in light of the Commission's discretionary authority.

III. COMMISSION ANALYSIS

PNE's July 10 Petition (and related filings) has arisen in the context of a business dispute between two, recently-arrived competitors in the New Hampshire CEPS market. This Commission does not serve as a referee for every business dispute arising between such market competitors. If conduct of a regulated entity indicates a violation of Commission statutes or rules, however, we have authority to investigate. PNE's filings present a rather inchoate set of requests for relief, but PNE has made specific allegations of deficiencies under Commission rules, in particular, Puc 2003.03. Despite the lack of clarity in PNE's filings, we will deny ENH's motion to dismiss and consider the merits of these allegations.

As an initial matter, on the basis of ENH's Media Action Plan, as updated at the request of Commission Staff, and Staff's review of ENH's compliance with the plan, we are satisfied that the issue raised by PNE related to ENH's trade name used in New Hampshire marketing is now moot. We will however, order ENH to continue to consistently use "E.N.H. Power" in all marketing activities directed to potential customers in this State.

One of PNE's allegations relates to statements Commission Staff made in discussions with PNE when PNE was seeking registration, and the suggestion that ENH was allowed to use wording that the Staff had raised concerns about in the PNE review. Specifically, Staff recommended that PNE include a reference to its obligations to its customers when it described the obligations to be guaranteed. Staff, in its role as developer of recommendations for Commission action on CEPS registrations, routinely provides informal guidance to applicants to

assist them in compliance with Commission rules. Staff provided such assistance to both PNE and ENH in each of their CEPS application processes. Such informal guidance does not constitute a basis for collateral estoppel, in which Staff guidance provided in the context of one proceeding precludes alternative resolutions (within the framework of New Hampshire law and Commission rules) in other proceedings. In fact, Staff in its PNE review supported alternate ways for PNE to comply with Commission rules, at PNE's request, something that does not give rise to other competitors challenging PNE's certification. The Commission Staff attempts to be flexible in responding to the particular needs of applicants to further the entry of competitors into the electric markets in support of the intent of the purpose of RSA 374-F:1.

The ultimate determination regarding the adequacy of a security under Puc 2003.03 however, rests with the Commission, based on our review of the facts and circumstances of the CEPS application, including any Staff recommendation. In light of PNE's assertions that certain flaws did exist in ENH's Noble Group security guarantee, we have again reviewed the guarantee. With the exception of language regarding a "trading relationship" and the lack of a reference to ENH's obligations to customers in the obligations guaranteed, we find the surety proposed by ENH to be similar to many of those supplied by CEPS that have been approved by this Commission. Other than the trading relationship and customer obligation language, the surety, taken as a whole, serves to protect wholesale providers and end-use customers as intended under our administrative rules and is acceptable.

We agree with PNE's assertion that the "trading relationship" formulation in the prefatory language of the Noble Group guarantee is awkward, and may serve to confuse the basic roles of the Commission as beneficiary of the guarantee, and an independent regulatory agency,

with that of Noble Group as the guarantor. We also agree that the ENH guarantee should include a reference to ENH's obligations to customers as a part of the obligations covered by the guarantee. Therefore, we order that ENH cure this "trading relationship" reference and include a reference to customer obligations, by revision of, or addendum to, the Noble Group guarantee not later than November 9, 2012

We do not agree with PNE's assertion that the formulation of the termination clause in ENH's Noble Group guarantee violates Puc 2003.03(a)(5). The terms of the guarantee provide that it covers all obligations arising before it is terminated regardless of whether claims are asserted before or after termination and the term of the guarantee is indefinite. As a result, the guarantee is in effect until termination and the Commission is to receive 30 days notice prior to such termination. Numerous CEPS have been registered with similar termination clauses, and we find no basis to revoke those certifications or to require ENH to change the termination provisions of its surety. PNE's final allegation concerns ENH's claim that it is a "start-up company," when in fact, according to PNE, it is established in Maine. We note that, while ENH is a newcomer in the New Hampshire market, its principals are established participants in the Maine electricity market, through an affiliate using the name "Electricity Maine" and, thus, is both a start-up as it relates to New Hampshire, and established as it relates to Maine. We find no basis to take regulatory action against ENH on this issue. Our role as regulator granting certification does not carry with it the duty to referee all disputes that inevitably arise among competitors.

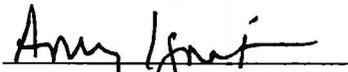
Based upon the foregoing, it is hereby

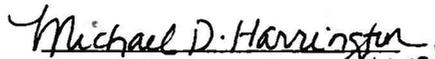
ORDERED, that motion to dismiss filed by ENH is DENIED; and it is

FURTHER ORDERED, that ENH consistently use the approved trade name "E.N.H. Power" in its New Hampshire marketing; and it is

FURTHER ORDERED, that ENH modify the terms of the Noble Group guarantee pursuant to the terms of this Order, and file the updated guarantee with the Commission in Docket No. DM 12-075 no later than November 9, 2012.

By order of the Public Utilities Commission of New Hampshire this tenth day of October, 2012.


Amy G. Ignatius
Chairman


Michael D. Harrington (c/s)
Commissioner


Robert R. Scott
Commissioner

Attested by:


Debra A. Howland
Executive Director