



**From:** Fojo, Robert M. [<mailto:rfojo@HASLAW.com>]

**Sent:** Thursday, March 21, 2013 6:00 PM

**To:** PUC - Executive.Director; Iqbal, Al-Azad; Noonan, Amanda; Martin, Christina; Shulock, David; [howard.plante@powernewengland.com](mailto:howard.plante@powernewengland.com); Mullen, Steve; Chamberlin, Susan W; Amidon, Suzanne; Frantz, Tom; [bart.fromuth@residentpower.com](mailto:bart.fromuth@residentpower.com); Eckberg, Stephen R.; Speidel, Alexander; Hollenberg, Rorie

**Cc:** Carter, Christopher H. M.; Deschenes, Daniel M; Comer, Susan M.

**Subject:** PNE/Resident Power (DE 13-059/60) - Resident Power's Motion to Dismiss Claims

Dear all:

Please find, attached for filing, an electronic copy of Resident's Power's Motion to Dismiss Alleged Violations.

Please let us know if you have any questions.

Regards,

Robert M. Fojo

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**THE STATE OF NEW HAMPSHIRE  
BEFORE THE PUBLIC UTILITIES COMMISSION**

**DE 13-059**

**RESIDENT POWER NATURAL GAS & ELECTRIC SOLUTIONS, LLC**

**DE 13-060**

**PNE ENERGY SUPPLY, LLC**

**Investigation and Show Cause Hearing on Penalties and Suspension or Revocation of  
Aggregator and CEPS Registrations and Order that PNE Temporarily Cease Enrolling  
New Customers**

**MOTION TO DISMISS ALLEGED VIOLATIONS AGAINST RESIDENT POWER**

Resident Power Natural Gas & Electric Solutions, LLC moves for an order dismissing all Puc rule violations that are alleged in Staff's February 28, 2013 Recommendation Memorandum ("Staff Memo") against Resident Power. In support of the Motion, Resident Power states as follows:

1. The Staff Memo asserts that Staff "identified the following rules which it believes may have been violated by PNE and/or by Resident Power," and it lists at least seven provisions of Puc Rule 2000: 2003.01(d)(2), 2003.01(i), 2004.05(m), 2004.07(f), 2004.08(a)(2), 2006.01(a)(11), and 2003.03(b). Staff Memo at 1. The Commission's February 28 Order of Notice, in turn, scheduled a hearing as to whether Resident Power "should be subject to penalties or suspension or revocation of [its] registrations pursuant to NH Admin. Code Puc 2005" and "the Commission's general supervisory powers." Order of Notice at 1, 7 (emphases added). The Commission's "general supervisory powers" are set forth in RSA 374:3.

2. Staff's allegations against Resident Power fail to state valid claims for relief because the Commission does not have the authority to impose sanctions on aggregators, such as Resident Power, for two reasons.

3. First, the Commission's "general supervisory powers" under RSA 374:3 do not include authority over aggregators. RSA 374:3 states that the Commission "shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title." (Emphasis added.) The term "public utility" does not reference or include aggregators. See RSA 362:2. RSA 374-F:7, II confirms that "Aggregators of electricity load that do not take ownership of power or other services and do not represent any supplier interest are not public utilities pursuant to RSA 362:2." (Emphasis added) Accordingly, the Commission does not have any authority over aggregators under RSA 374:3.

4. Second, Puc 2005 does not include any authority to impose sanctions on aggregators. The Order of Notice references Puc 2005, which sets forth the procedures under which the Commission is authorized to impose sanctions. The statutory source for the Commission's authority to impose sanctions is RSA 374-F:7, III. This statute states: "The commission is authorized to assess fines against, revoke the registration of, and prohibit from doing business in the state, any competitive electricity supplier which violates the requirements of this section or any other provision of this title applicable to competitive electricity suppliers." (Emphasis added.) It is true that the term "electricity supplier" may include aggregators, since it is defined as "suppliers of electricity generation services and includes actual electricity generators and brokers, aggregators, and pools that arrange for the supply of electricity generation to meet retail customer demand." RSA 374-F:2, II (emphasis added). Nevertheless, the Commission does not have the authority to sanction aggregators because it has failed to promulgate or adopt rules necessary to implement its authority under RSA 374-F:7, III.

5. RSA 374-F:7, V provides that the Commission “shall adopt rules, under RSA 541-A, to implement this section,” including RSA 374-F:7, III. The Commission subsequently adopted a set of rules, but only for CEPS.

6. Puc 2005 sets forth these rules. Puc 2005.01 – entitled “Sanctions for Failure to Comply” – authorizes the Commission “pursuant to RSA 374-F:7, III” to impose various sanctions on CEPS under specific circumstances. These circumstances include, but are not limited to, the following: (1) the Commission can impose a \$1,000/day penalty on a CEPS for failing to register, violating Puc 2003 or Puc 2004, and violating a Commission order enforcing RSA 374-F:7 or Puc 2000; (2) the Commission can suspend a CEPS’s registration for a second and third violation of Puc 2004 or a second violation of an order; and (3) the Commission can revoke a CEPS’s registration for willful misrepresentation of information required by Puc 2003 and other specific violations.

7. By contrast, there are no administrative rules regarding penalties, suspensions, or revocations against aggregators.

8. Under New Hampshire law, an agency must adopt rules and regulations to clarify the requirements of a statute when there is a provision requiring their adoption. See Appeal of Behavior Science Inst., 121 N.H. 928, 934-35 (1981). In Behavior Science, a healthcare provider sought review of the decision of the New Hampshire Department of Health and Human Services (“DHHS”) finding that its application for a certificate of need to build a new hospital lacked sufficient information. DHHS reached its decision based on an interpretation of then-RSA 151-C:6, which set forth the requirements and process for the submission of a certificate of need. That statute also required DHHS to adopt rules and regulations to augment and enforce these requirements. The Supreme Court determined that the requirements and process in RSA

151-C:6 were ambiguous and inconsistent. Accordingly, it reversed DHHS's decision because it found DHHS had failed to promulgate rules governing the certificate-of-need application process. It ordered that the application process begin anew, and it directed that, "[b]efore any application is acted on by the State agency, the agency must review RSA ch. 151-C to determine what rules and regulations are needed to augment and enforce the provisions of the statute, and must expeditiously promulgate such rules and regulations as may be needed." Id. at 937.

9. Here, as explained above, Puc 2005 contains no provisions under which the Commission may sanction an aggregator; it only sets forth the specific procedures for sanctions against CEPS. The only such authority for proceeding against aggregators lies in RSA 374-F:7, III. Unlike Puc 2005.01, however, the provisions for sanctions in RSA 374-F:7, III fail to set forth any standards or guidelines for enforcement. For example, they fail to provide (1) under what circumstances "fines" are imposed, (2) the amount of "fines" that may be imposed, (3) under what circumstances a registration may be revoked, and (4) under what circumstances an aggregator may be prohibited from doing business. The Commission has not adopted rules similar to Puc 2005.01 to "augment and enforce" the provisions of RSA 374-F:7, III or to clarify when, how, and to what extent an aggregator may be sanctioned. Thus, because Puc 2005 contains no provisions for sanctioning aggregators and the Commission has not adopted any other rules governing this area, it cannot, as a matter of law enforce the lone authority for such sanctions – RSA 374-F:7, III – against aggregators. See Behavior Science Inst., supra.

10. The Staff Memo's claims against Resident Power under Puc 2005 should, therefore, be dismissed.

WHEREFORE, Resident Power respectfully requests that the Commission grant this motion and issue an order dismissing all allegations of violations against Resident Power in the Staff Memo.

Respectfully submitted,

RESIDENT POWER NATURAL GAS &  
ELECTRIC SOLUTIONS, LLC and  
PNE ENERGY SUPPLY, LLC

By their attorneys,

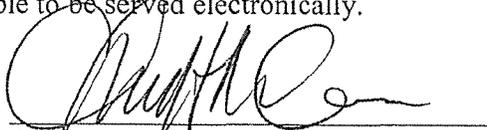


Dated: March 21, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on the above date I have forwarded a copy of the foregoing to the Office of Consumer Advocate via electronic mail, and persons listed on the service list via electronic mail, and U.S. mail for those unable to be served electronically.



Christopher H.M. Carter, Esq.

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