

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

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**

REPLY BRIEF OF COMMISSION STAFF

Pursuant to the Commission's secretarial letter dated February 4, 2015, the petitioner in this proceeding, Freedom Logistics, LLC, d/b/a Freedom Energy Logistics (FEL), acting on behalf of its client Cianbro Energy, LLC (Cianbro Energy), filed a brief on February 20, 2015 addressing two legal issues:

1. Whether the sale by Cianbro Energy to Cianbro Corporation is a "sale" within the meaning of Rule Puc 2002.05; and
2. Whether Cianbro Energy was required at any time to have been registered as a competitive electric power supplier (CEPS) with the Commission.

The petitioner's brief recites some but not all of the facts set forth in the Stipulation of Facts filed on February 3, 2015. The petitioner argues that the sale of electricity to a retail end user by an affiliated company should not be subject to CEPS regulation by the Commission if the end user is authorized to participate directly in the regional wholesale power market administered by ISO New England, Inc. (ISO-NE). According to FEL, the use of an intermediary by the end use customer is merely an "optional intra-corporate accounting mechanism so that the books of Cianbro Corporation are handled in the same manner as other states where Cianbro Energy needs and does have a retail license." Petitioner's Brief at 3. The petitioner asserts that the purpose of the CEPS rules is to provide a means by which certain disclosures, financial assurances, and consumer protection provisions will apply to entities

seeking to sell electricity to New Hampshire retail customers, citing *Luminescent Systems, Inc.*, Order No. 24,172 (May 13, 2003) at 11. The petitioner implies that these rules should not be applicable to a company selling electricity only to its affiliated end user, where the end user could purchase its power requirements directly from the ISO-NE spot market under Commission precedent. *Id.* The petitioner further argues that regulation of Cianbro Energy as a CEPS would result in an “anomalous situation” in which the electricity seller would be subject to regulation as a CEPS “but not as a public utility,” citing *Appeal of Zimmerman*, 141 N.H. 605 (1997).

Petitioner’s Brief at 3-4.

For the reasons set forth below, Commission Staff (Staff) believes that the petitioner’s legal arguments lack merit and should be rejected. The FEL petition expressly or implicitly raises policy issues regarding the scope of CEPS regulation that would be more appropriate for consideration in the context of the pending Puc 2000 rulemaking proceeding, Docket No. DRM 13-151, rather than in the context of one company’s request for a declaratory ruling.

1. The Definition of CEPS Under Puc 2002.05 Includes Self-Supply Affiliates of Retail End Use Customers in New Hampshire

Under the electric utility restructuring statute, the Commission is authorized to adopt rules establishing requirements, excluding price regulation, for CEPS, “including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements.” RSA 374-F:7, I. Pursuant to this authority, the Commission has adopted the Puc 2000 Competitive Electric Power Supplier and Aggregator Rules, which cover CEPS registration, contract terms and conditions, information disclosures, customer solicitation and enrollment, customer account transfers, financial security, enforcement, sanctions, remedies, and reporting obligations. *See* N.H. Code Admin. Rules Chapter Puc 2000.

Under Puc 2003.01, every CEPS is required to be registered with the Commission. A CEPS is defined in Puc 2002.05 as

any person or entity, that sells or offers to sell electricity to retail customers in this state. The term does not include any utility or any municipal or county corporation operating within its corporate limits or submetering at campgrounds as described in RSA 362:3-a.

Each CEPS is also required under RSA 362-F to comply with the New Hampshire renewable portfolio standard (RPS) requirements. Pursuant to RSA 362-F:10, II and Puc 2503.03(c), a CEPS must pay alternative compliance payments (ACP) to the Commission, to the extent the CEPS has not met its RPS compliance obligations through the acquisition of renewable energy certificates, at the same time it files its Annual RPS Compliance Report with respect to retail electric sales during the preceding calendar year.

Prior to mid-2010, the definition of a CEPS in the Puc 2000 rules expressly excluded electric supply affiliates, such as Cianbro Energy, stating that “a CEPS sells to the public and does not include an entity that sells only to its affiliate.” *See* Puc 2002.04 (effective until August 26, 2010). This exemption was repealed when the rules were readopted in 2010, and affiliated electric suppliers have registered as CEPS since that time. There are currently two affiliated electric supply companies registered as CEPS: Devonshire Energy, LLC, an affiliate of Fidelity Investments (Docket DM 11-147), and Texas Retail Energy, LLC, an affiliate of Wal-Mart Stores, Inc., and an intervener in the instant proceeding (Docket DM 12-086).

The repeal in 2010 of the specific exemption language quoted above evinces the Commission’s intent to subject self-supply affiliates to regulation as CEPS under the Puc 2000 rules. The Commission, however, has upon request granted waivers to these companies from many of the consumer protection provisions of the Puc 2000 rules, such as financial security and customer disclosure requirements, in recognition of the lessened need for protection of their

retail customer affiliates. *See, e.g.*, Commission Secretarial Letter dated August 5, 2011 in DM 11-147.

2. Cianbro Energy was a CEPS because it Engaged in Sales of Electricity to Cianbro Corporation within the meaning of Puc 2002.05

The petitioner has conceded that Cianbro Energy provided electricity to its affiliate, Cianbro Corporation, which is a retail end use customer in New Hampshire, between April 5, 2011 and May 5, 2014, that the transactions whereby Cianbro Energy provided electricity to Cianbro Corporation in New Hampshire represented “sales” of electricity, notwithstanding any accounting mechanism used for or accounting treatment given to such transactions, and that the fact that Cianbro Energy and its affiliate are members of the end user sector in the New England Power Pool does not affect the determination whether Cianbro Energy is a CEPS as defined in Puc 2002.05 or a “provider of electricity” as defined in RSA 362-F:2, XIV. *See* Stipulation of Facts at 1-3.

Cianbro Energy therefore sold electricity to a retail customer in New Hampshire for over three years without being registered as a CEPS or complying with any RPS obligations. Under the broad definition of CEPS contained in the Commission’s rules, Cianbro Energy was operating as a CEPS during this period and, as such, was required to register with the Commission and to comply with the RPS obligations during that time, including the filing of annual RPS compliance reports and the payment of ACPs. Cianbro Energy’s failure to register and to meet its RPS obligations was and is a violation of the Commission’s rules, for which it may be subject to penalties under Puc 2005.01(b) based on failure to register, failure to pay ACPs when due, and failure to submit the Form E2500 when due. *See* N.H. Code Admin. Rules Puc 2005.01(b).

3. CEPS are not Public Utilities so the *Zimmerman* Precedent Does Not Apply

The Petitioner has cited the *Zimmerman* case as support for its argument that literal interpretation and implementation of the Puc 2002.05 CEPS definition “would result in the anomalous situation wherein Cianbro Energy would be subject to regulation as a CEPS but not as a public utility.” Petitioner’s Brief at 3. In *Zimmerman*, the Supreme Court overturned the Commission’s ruling that a commercial landlord was a public utility because he offered telecommunications services to his tenants, finding he was not a public utility based on the underlying landlord-tenant relationship with those persons who use the telecommunications services that is “sufficiently discrete as to differentiate them from the relevant public.” *Zimmerman*, 141 N.H. at 612.

The petitioner’s reliance on the *Zimmerman* case is inapposite because a CEPS is not a public utility by statute. RSA 374-F:7, I expressly provides that CEPS “are not public utilities pursuant to RSA 362:2, though a competitive energy supplier may seek public utility status from the commission if it so chooses.” As non-utilities, CEPS are not subject to the Commission’s broad regulatory authority over public utilities, but are regulated under rules adopted by the Commission pursuant to its authority under RSA 374-F:7. FEL’s argument is based on the alleged anomaly of CEPS regulation in the absence of public utility regulation; however, as described above, no such anomaly exists and FEL’s argument therefore lacks merit and should be rejected.

4. Conclusion

The legal arguments advanced by the petitioner to support its position that Cianbro Energy was not required to be registered as a CEPS and comply with RPS obligations, notwithstanding the fact that it concededly sold electricity to its retail customer affiliate for over

three years, are unavailing and should be rejected. The petitioner has offered no compelling reason to treat Cianbro Energy differently from other similar self-supply affiliates that have registered as CEPS and fully comply with their RPS obligations. Staff maintains that Cianbro Energy's failure to register and to meet its RPS obligations was and is a violation of the Commission's rules, for which it may be subject to penalties under Puc 2005.01(b), based on failure to register, failure to submit the annual RPS report when due, and failure to pay ACPs when due. The policy issues implicated by the FEL petition may warrant consideration by the Commission in the context of the pending Puc 2000 rulemaking proceeding, but these policy considerations do not change the legal conclusion that Cianbro Energy has failed to comply with the Commission's rules, without having obtained a rule waiver granted by the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served a copy of this filing upon each party on the official Service List compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 6th day of March, 2015.



David K. Wiesner, Esq.