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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

December 2, 2014 - 1:08 p.m.
Concord, New Hampshire

NHPUC DEC22'14 PM 1:27

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.
(Prehearing conference)

PRESENT: Commissioner 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.
Stephen Eckberg, Sustainable Energy Div.
David Goyette, Electric Division

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

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P R O C E E D I N G

1
2 CMSR. HONIGBERG: Good afternoon,
3 everybody. We're here for a prehearing conference in DE
4 14-305, which is a Petition filed by Freedom Logistics on
5 behalf of a customer of it, which I understand is
6 pronounced "Cianbro". The issue -- I won't read from the
7 order of notice, you all know why we're here.

8 Let's take appearances.

9 MR. RODIER: Okay. Mr. Chairman, it's
10 Jim Rodier, representing Freedom Energy Logistics. And,
11 I'm just going to ask these people, if it's okay if they
12 could just give their name for the record and what their
13 title and affiliation is, is that all right?

14 CMSR. HONIGBERG: Sure.

15 MR. FROMUTH: Gus Fromuth, Chairman. I
16 am the Managing Director of Freedom Logistics.

17 CMSR. HONIGBERG: Just for the record,
18 I'm not the Chairman. I may be 24 hours from now, but I'm
19 not right now.

20 MR. RODIER: Commissioner.

21 MR. FROMUTH: Commissioner.

22 MR. RUKSZNIS: Tom Ruksznis. And, I'm
23 the Facilities Manager with Cianbro.

24 MS. VETTER: Marianne Vetter, VP and

1 Chief Administrative Officer at Freedom Logistics.

2 CMSR. HONIGBERG: Okay. Thank you.

3 MR. HENDRIX: Chris Hendrix, with Texas
4 Retail Energy and Walmart.

5 MR. WIESNER: And, Dave Wiesner,
6 representing Commission Staff. With me are Analysts Steve
7 Eckberg of the Sustainable Energy Division and David
8 Goyette of the Electric Division.

9 CMSR. HONIGBERG: I know we have a
10 Motion to Intervene filed by -- it's Walmart, but it's got
11 a different name.

12 CMSR. SCOTT: Texas Retail Energy.

13 CMSR. HONIGBERG: Texas Retail Energy.
14 I assume you've all read the Motion. Does Staff or Mr.
15 Rodier, you have a position on the Motion?

16 MR. RODIER: Well, we don't object,
17 because we think they clearly meet the public interest
18 prong of the intervention test.

19 MR. WIESNER: And, Staff has no
20 objection.

21 CMSR. HONIGBERG: We'll grant the Motion
22 to Intervene.

23 Mr. Rodier, do you want to summarize the
24 position that you're taking here today?

1 MR. RODIER: Yes.

2 CMSR. HONIGBERG: And, feel free to be
3 seated. You can be seated.

4 MR. RODIER: Okay. Okay.

5 CMSR. HONIGBERG: Just make sure your
6 microphone is on and that you're close enough for it to
7 take.

8 MR. RODIER: Okay. We are looking for a
9 declaratory order on the facts that are stated in our
10 Petition. I think we have just a -- we just have a
11 difference of opinion with the Staff on whether Cianbro
12 Energy should have gotten -- should have registered as a
13 CEPS, a competitive electric power supplier. Staff says
14 "yes, they should have", and we say "no".

15 Now, a little background. Cianbro
16 Energy, LLC, that's a single-member LLC. It's own by the
17 parent company, Cianbro Corporation. Cianbro Corporation
18 is a member of the New England Power Pool, ISO-New England
19 markets, and they are what's called a "governmental only
20 participant". Similar, I think the Commission is a
21 governmental only participant, and so is the OCA, a parent
22 company, Cianbro Company.

23 Now, so, Cianbro Energy is a shell LLC,
24 single member, owned by the parent. In New Hampshire,

1 pursuant to long-settled case law, if you want to call it,
2 that's the *Luminescent* order, maybe 2003. The Commission
3 said "an end-user can go straight to the NEPOOL/ISO-New
4 England wholesale markets."

5 And, just by way of very brief
6 background, if you wanted to hear more, I can do it. But,
7 and back then, when we first started doing these end-users
8 joining NEPOOL, there was a clash of jurisdictional
9 issues, where the regulators, particularly in New
10 Hampshire, intervened in FERC in one of the cases, because
11 of the concern they were going to lose jurisdiction or
12 ability to regulate certain sales. The end result was, in
13 New Hampshire, they said *Luminescent*, which is located, I
14 believe, in Lebanon or Hanover?

15 MR. FROMUTH: True.

16 MR. RODIER: Yes. Could buy directly
17 from NEPOOL, get their own account. And, so, they have
18 been doing that. I mean, there's others, too, like Union
19 Leader and Saint Anselms and others, that buy directly.

20 MR. FROMUTH: They're not subject to --

21 MR. RODIER: Right. There is no -- they
22 buy directly. There is no supplier in between them and
23 the wholesale market.

24 Along comes Cianbro. And, for matters

1 of just convenience and administrative simplicity,
2 *etcetera*, they have inserted Cianbro Energy into the mix.
3 They didn't have to do it, they did it. And, I don't
4 think anybody at the time realized that it could
5 potentially subject Cianbro Energy, LLC, to have to get a
6 license from the Commission. So, that's the background.

7 Here's the issue. The CEPS, according
8 to the Commission's rules, is an entity that sells to an
9 end-user. I think it's pretty much that simple. So, one
10 of the issues is, is Cianbro Energy selling to an
11 end-user? Well, we believe that the -- first of all, it
12 wasn't necessary to insert this middleman into the mix,
13 but they did. Are they selling? We don't think that a
14 subsidiary, a wholly-owned entity can lawfully sell -- or,
15 really sells to a parent. It's not -- I think, my view, a
16 sale requires, you know, bargaining, an exchange of, let's
17 say, money for a product or a service, a certain arm's
18 length relationship. And, I don't see that there is a
19 sale there. So, number one, it shouldn't be in the mix.
20 Number two, we don't think there's a sale.

21 And, the last thing, Commissioners, that
22 I have pointed out, I pointed out the *Zimmerman* case,
23 which is very interesting. That settled a major issue, it
24 was a big deal at the time. Just to sort of recall that,

1 in the *Zimmerman* case, Mr. Zimmerman was a landlord, and
2 he was -- you know, he had offices in the buildings that
3 he owned, he was the landlord and he was providing
4 telecommunication services. So, the Commission, I think
5 there was a show cause order, you know, "you're a public
6 utility."

7 Zimmerman appealed it to the Supreme
8 Court. The Supreme Court said, "Hey, to be a public
9 utility, you've got to, you know, the hallmark of that is
10 selling to the public; this guy is selling to tenants. He
11 has an affinity with the people that he's selling to. He
12 is not a public utility."

13 So, we're urging the Commission to maybe
14 consider that kind of analysis, where if anybody ever
15 has -- you know, we're on the other side now, where the
16 guidelines should be a little looser than on the regulated
17 utility side. And, if anybody ever had an affinity with a
18 so-called customer, it would be Cianbro Energy, which is,
19 you know, owned by this company. So, we would, you know,
20 urge the Commission to perhaps apply the holding in the
21 *Zimmerman* case.

22 So, for those reasons, you know, we felt
23 it might be important and in the public interest to get
24 this issue clarified. Thank you very much.

1 CMSR. HONIGBERG: Mr. Hendrix.

2 MR. HENDRIX: Yes, sir. We, as Texas
3 Retail Energy, are a wholly-owned subsidiary of Walmart,
4 and purchase electricity through NEPOOL for the Walmart
5 stores, Sam's Clubs, and warehouses in New Hampshire. So,
6 we're simply situated to Cianbro. So, that is our
7 interest in the case.

8 CMSR. HONIGBERG: And, do you have any
9 position on this that's any different from what Mr. Rodier
10 just articulated?

11 MR. HENDRIX: No, sir.

12 CMSR. HONIGBERG: Mr. Wiesner.

13 MR. WIESNER: Staff looks forward to
14 developing the factual record further so that the
15 Commission can make a final determination in this case.
16 As a preliminary matter, I would say Staff's preliminary
17 position, based on the review of the Petition and the
18 facts stated in the Petition, are that Cianbro Energy is
19 basically following a business model similar to what is
20 followed by Texas Retail Energy and Devonshire Energy,
21 which is an affiliate of Fidelity Investments, both of
22 which are registered suppliers in the state, and comply
23 Renewable Portfolio Standard obligations under RSA 362-F,
24 including filing annual reports and making alternative

1 compliance payments, to the extent that they haven't
2 covered their obligation with renewable energy
3 certificates.

4 We don't see a meaningful difference
5 between what Cianbro Energy was doing until June 2014,
6 according to the Petition, in supplying its parent company
7 with power acquired through the wholesale market
8 administered by the ISO, and the similar activities of
9 Walmart's affiliate and Fidelity's affiliate. And, I'll
10 just note for the record that Hannaford Brothers
11 Supermarket chain also had a similar affiliate
12 relationship, but it discontinued that arrangement earlier
13 this year.

14 I'll note also, by way of background,
15 that, until 2010, the PUC 2000 rules, which govern
16 competitive suppliers and aggregators, had a specific
17 exception for this type of arrangement. I'll just read
18 the language that was contained in that earlier version of
19 the rules: "A CEPS sells to the public and does not
20 include an entity that sells only to its affiliate." That
21 specific exception was repealed, deleted from the rules
22 when they were readopted in 2010. And, since that time,
23 companies like Hannaford and Texas Retail and Devonshire
24 have been required to be registered here with the

1 Commission and to meet RPS obligations, including the
2 payment of ACPs.

3 So, I think, at this point, my
4 understanding is that Cianbro has discontinued the
5 intermediary model that Mr. Rodier described, and may be
6 buying directly in New Hampshire or perhaps no longer has
7 load in New Hampshire. But our view, Staff's preliminary
8 view is that, until that time, they were doing business in
9 the same manner as the other companies I mentioned, that
10 they should have been registered here as a competitive
11 supplier, and that they should have been meeting their
12 obligations with respect to the Renewable Portfolio
13 Standard.

14 I'll also note that these affiliated
15 supply companies, when they are registered with the
16 Commission, typically are granted broad waivers from the
17 consumer protection provisions of the 2000 rules. So, for
18 example, they're not required to maintain financial
19 security, provide disclosure labels, they're not subject
20 to some of the marketing restrictions that apply to
21 competitive suppliers, which are marketing to a broader
22 segment of the retail customer base.

23 With that, I think that we look forward
24 to, as I said, working with the parties here to further

1 develop the factual record. There are some specific
2 factual nuances to Cianbro's situation that Mr. Rodier has
3 noted in the Petition, including a difference in which
4 sector of NEPOOL the Company belongs to. I think our
5 preliminary view is that that really doesn't matter, the
6 business model is the same. And that, by virtue of
7 setting up the intermediary, you have created an entity
8 which is an electric supplier meeting the definition of
9 "CEPS" under the Commission's rules, and therefore should
10 be registered here, with the waivers that are typically
11 granted, and should meet the RPS obligations, similar to
12 Texas Retail and Devonshire.

13 MR. RODIER: Commissioner, at the right
14 time, I would just --

15 CMSR. HONIGBERG: Just a minute.

16 MR. RODIER: Thank you.

17 CMSR. HONIGBERG: Let me see if
18 Commissioner Scott has any questions, --

19 MR. RODIER: Thank you.

20 CMSR. HONIGBERG: -- maybe they will
21 help with what you're planning on.

22 MR. RODIER: Sorry.

23 CMSR. HONIGBERG: But let's find out.

24 CMSR. SCOTT: No questions.

1 CMSR. HONIGBERG: I guess, Mr. Wiesner,
2 you just maybe answered the question I was going to ask,
3 which is how much is there in factual dispute here?

4 MR. WIESNER: I think that, for example,
5 the Petition refers to an "accounting mechanism", rather
6 than a "sale". And, that may just be a matter of
7 semantics, but I think that's something that we would want
8 to explore somewhat. So, I think it is our belief, and
9 this is something we'll address during the technical
10 session. There is a need for some further discovery to
11 develop the factual record. I also suspect that it may be
12 possible in this case to come up with a list of stipulated
13 facts, and then present this as more or less a legal or
14 policy issue for the Commission to determine.

15 CMSR. HONIGBERG: Thank you. Mr.
16 Rodier, you wanted to say something?

17 MR. RODIER: Yes. I had just one quick
18 thing. Attorney -- Staff Attorney Wiesner, he raised a
19 point that is a good one. We see that Cianbro can be
20 distinguished and should be distinguished from Devonshire
21 and Texas Retail. Now, we know Texas Retail supplies
22 Walmart stores and warehouses, *etcetera*. Devonshire is
23 Fidelity Investments, and they -- Devonshire exists to buy
24 electricity at wholesale and then sell it to the Fidelity

1 facilities in Rhode Island, New Hampshire, Massachusetts,
2 wherever else. They are members -- they joined ISO-New
3 England as a supplier. They are suppliers. They're in
4 the supplier sector. They identify themselves as a
5 supplier, okay? They could have gone in as an end-user,
6 pursuant to the *Luminescent* decision; they did not. And,
7 I will be -- I do know that, when the rule changed, David
8 is on point, that there were -- they assumed they would
9 now have to register as a supplier. And, I talked to some
10 of the lawyers, there was discussion about it. And, so,
11 they just went ahead and did it, based upon the change in
12 the rule. We don't think the change in the rule obviated
13 the *Luminescent* decision. That's it.

14 CMSR. HONIGBERG: Okay. I don't want to
15 get too far into the merits of the arguments. But it does
16 sound to me like there should be a lot factually on which
17 everyone can agree.

18 MR. RODIER: Right.

19 CMSR. HONIGBERG: And maybe, as
20 Mr. Wiesner used the word "nuances" that need to be
21 understood and distinguished, if necessary. But this
22 doesn't sound like a factually complicated situation.
23 There may be distinctions and differences between and
24 among the various companies that have done something

1 similar, and maybe those will become legally significant.
2 But I would certainly encourage you all, as you work
3 through the technical session and then engage in whatever
4 discovery is necessary, to look for opportunities to agree
5 where you can, so that this can be -- the issues can be
6 narrowed as much as possible.

7 Mr. Scott, Commissioner Scott, do you
8 have anything else?

9 CMSR. SCOTT: No.

10 CMSR. HONIGBERG: Any of the parties
11 have anything else, before we leave you to your technical
12 session?

13 MR. WIESNER: I guess I would just add,
14 and perhaps I should have said this during my opening
15 statement. But, you know, it's a concern of Staff that
16 similarly situated companies are treated the same. And,
17 it's not clear to us that the distinctions that Mr.
18 Rodier's Petition draws are meaningful, and that is
19 something that we want to explore further and see if there
20 is a basis to make that decision. If not, then this
21 really is a case about, you know, legal interpretations
22 and the effect of a repeal of a prior rule, and the policy
23 implications of the choices that may be made in this
24 situation.

1 I think Mr. Rodier has correctly
2 described prior Commission precedent, that it is possible
3 for end-users to purchase directly from the ISO markets.
4 But, in the cases that we're concerned with here, there is
5 an intermediary, and our view is that that intermediary is
6 a supplier that should be registered here.

7 CMSR. HONIGBERG: All right. Well,
8 thank you very much.

9 **(Whereupon the prehearing conference**
10 **was adjourned at 1:25 p.m., and a**
11 **technical session was held**
12 **thereafter.)**