

**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**

Order Declaring that Cianbro Energy was a Competitive Electric Power Supplier

ORDER NO. 25,775

April 8, 2015

APPEARANCES: James T. Rodier, Esq., on behalf of Freedom Logistics, LLC, d/b/a Freedom Energy Logistics, on behalf of its client Cianbro Energy, LLC; Greenberg Traurig, by Meshach Y. Rhoades, Esq., on behalf of Texas Retail Energy, LLC; and David K. Wiesner, Esq., on behalf of the Staff of the Public Utilities Commission.

In this order, the Commission declares that Cianbro Energy, LLC, was operating in New Hampshire as a competitive electric power supplier from April 5, 2011, through May 5, 2014. Accordingly, Cianbro Energy was required to be registered with the Commission under the Puc 2000 rules and comply with the renewable portfolio standard requirements under RSA 362-F and the Puc 2500 rules during that time period.

I. PROCEDURAL BACKGROUND

Freedom Logistics, LLC, d/b/a Freedom Energy Logistics (FEL), filed a petition for declaratory ruling pursuant to N.H. Code Admin. Rules Puc 207.01, on behalf of its client Cianbro Energy, LLC (Cianbro Energy), regarding the application of Puc 2002.05 to Cianbro Energy and Cianbro Energy's parent company, Cianbro Corporation. FEL requested a ruling from the Commission that Cianbro Energy was not required to have been registered with the Commission as a competitive electric power supplier (CEPS) during the period when it provided electricity to Cianbro Corporation in New Hampshire. The Commission issued an Order of Notice scheduling a pre-hearing conference and setting a deadline for petitions to intervene.

Texas Retail Energy, LLC (Texas Retail), a wholly-owned subsidiary of Wal-Mart Stores, Inc., filed a timely petition to intervene stating it provides electricity to its affiliated retail end use customers and has been registered as a CEPS in New Hampshire since June 1, 2012. Texas Retail's petition to intervene was granted during the pre-hearing conference. Following the pre-hearing conference, a hearing on the merits was scheduled for March 12, 2015. On February 3, 2015, FEL and Commission Staff (Staff) filed a stipulation of facts pursuant to N.H. Code Admin. Rules Puc 203.20, and proposed that a briefing schedule be established to address relevant legal questions. In accordance with the approved schedule, FEL filed a brief on February 23, 2015 and Staff responded on March 6, 2015.

At the hearing on the merits, the Stipulation of Facts was admitted into evidence as Exhibit 1 and an Affidavit executed by Thomas Ruksznis of Cianbro Corporation, confirming that FEL is authorized to make the factual stipulations on behalf of Cianbro Corporation and Cianbro Energy, was admitted into evidence as Exhibit 2.

II. STIPULATED FACTS

Between April 5, 2011, and May 5, 2014, Cianbro Energy acquired electricity through the regional wholesale power markets and provided such electricity in New Hampshire to its affiliate Cianbro Corporation. Cianbro Energy did not provide electricity in New Hampshire to any end use customers other than Cianbro Corporation at any time. Cianbro Corporation is a retail electric customer in New Hampshire, and is under full common ownership with Cianbro Energy, either directly or indirectly through other subsidiaries and affiliates. 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. Cianbro Energy procured, took title to, and sold electricity in specified quantities to Cianbro Corporation for consumption in New Hampshire during some or all of calendar years 2011-2014. Cianbro Energy is a member of the "End User" sector in the New England Power Pool

(NEPOOL), having been required to join that participant sector because of its affiliation with The Cianbro Companies, which is a member of that sector. The NEPOOL sector in which Cianbro Energy participates does not affect the determination whether Cianbro Energy is a CEPS as defined in N.H. Code Admin. Rules Puc 2002.05, or a “provider of electricity,” as defined in RSA 362-F:2, XIV. *See* Exhibit 1 at 1-3.

III. POSITIONS OF PARTIES

A. FEL on behalf of Cianbro Energy

FEL’s basic position is 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. FEL argued 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. *See Luminescent Systems, Inc.*, Order No. 24,172 (May 13, 2003) at 11. FEL suggested 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. *See* Petitioner’s Brief at 3.

According to FEL, 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.” *Id.* at 3-4 (citing *Appeal of Zimmerman*, 141 N.H. 605 (1997)). .

At the hearing, FEL argued for the first time that the definition of “provider of electricity” in RSA 362-F:2, XIV, includes an “electricity supplier,” as defined in RSA 374-F:2, II, and the defined

term “electricity supplier” under that statute includes both aggregators and brokers as well as CEPS. *See* Transcript of March 12, 2015, Hearing (Tr.) at 19-20. Although the argument may not have been fully developed, FEL appeared to suggest that aggregators and brokers could also be required to comply with the state renewable portfolio standard (RPS) requirements under RSA 362-F, through the acquisition of renewable energy certificates (RECs) or the payment of alternative compliance payments (ACPs) in lieu of REC acquisition. FEL’s conclusion on this point would be that because the Commission does not require such compliance by aggregators and brokers, an electricity seller such as Cianbro Energy which is affiliated with an end use customer, should likewise not be required to comply with the RPS and to pay ACPs. Tr. at 21-22.

In response to a question from Commissioner Scott, FEL’s attorney acknowledged that the petitioner was asking for a retroactive rule waiver from the CEPS registration requirements of the Puc 2000 rules, if its legal arguments that these rules are inapplicable to Cianbro Energy were rejected. Tr. at 21. FEL ultimately conceded it was an oversight not to have read and interpreted the applicable rules to require registration and compliance, and it was this oversight that resulted in Cianbro Energy’s failure to register as a CEPS with the Commission. Tr. at 23.

B. Texas Retail

Texas Retail asserted in its petition to intervene that it would be directly affected by any decision interpreting the definition of a CEPS under the Commission’s rules, particularly in light of Cianbro Energy’s argument that it is not required to register as a CEPS because it was only providing electricity to its parent company and is therefore not an electric supplier. At hearing, its representative stated its interest was that electricity supplier affiliates should not be subject to disparate treatment, and he noted that Texas Retail has been registered as a CEPS with the Commission, and has complied with the requirements applicable to a registered CEPS, since 2012. Tr. at 38-39.

C. Staff

Staff disagreed with FEL, pointing out that 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. Staff Reply Brief at 3. According to Staff, the repeal of the quoted exemption language evinced the Commission’s intent to subject self-supply affiliates to regulation as CEPS under the Puc 2000 rules. *Id.* Staff acknowledged that the Commission 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. Staff Reply Brief at 3-4.

Based on FEL’s stipulation that Cianbro Energy had sold electricity in New Hampshire for over three years to its retail end use customer affiliate, Cianbro Corporation, Staff argued that Cianbro Energy was a CEPS during that period, and as such was required to be registered with the Commission and to comply with RPS obligations during that time, including the filing of annual RPS compliance reports and the payment of ACPs. Staff Reply Brief at 4. Staff expressed its belief that the Supreme Court’s *Zimmerman* precedent does not create an “anomalous situation” wherein Cianbro Energy would be subject to regulation as a CEPS but not as a public utility, noting that CEPS are not public utilities by statute, as stated in RSA 374-F:7, I. Staff Reply Brief at 5.

At hearing, Staff countered FEL’s argument regarding the definitions of “provider of electricity” and “electricity supplier,” and the inclusion in the latter term of aggregators and brokers, on grounds of both relevance and statutory interpretation. Staff observed that Cianbro Energy was functioning as a supplier of electricity to its retail customer affiliate, and not merely as an aggregator or broker; therefore, FEL’s argument regarding application of the RPS compliance requirements to

aggregators and brokers would not be relevant to Cianbro Energy's circumstances. Tr. at 29-30. Staff further noted that aggregators and brokers, even if they are included in the definitions of both "electricity supplier" and "provider of electricity," effectively are not required to comply with the RPS and to pay ACPs, because aggregators and brokers do not take title to electricity and supply it to end use customers, but merely arrange for others to furnish such supply, aggregators and brokers are not required to comply with the RPS requirements or to pay ACPs. *Id.*

Staff objected to FEL's request for a retroactive rule waiver covering Cianbro Energy's failure to register as a CEPS, both because of the timing of the request made during legal arguments on the merits of a petition for declaratory ruling, and on the grounds that the petitioner had not stated any sufficient basis for waiver under the applicable standards. Tr. at 29.

Staff noted that FEL's petition implicates policy issues regarding the scope and effect of the CEPS definition that may warrant consideration by the Commission, but argued that such consideration should take place in the context of the pending Puc 2000 rulemaking proceeding rather than in the context of one company's declaratory ruling proceeding. Staff's position on this point is that these policy issues do not change the legal conclusion that Cianbro Energy was a CEPS that failed to comply with the Commission's rules, without having obtained a rule waiver granted by the Commission to excuse such failure. Staff Reply Brief at 2, 6. Tr. at 33-34.

IV. COMMISSION ANALYSIS

Under the electric utility restructuring statute, RSA 374-F:7, I, 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." Pursuant to that 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 RPS requirements. Pursuant to RSA 362-F:10, II, and Puc 2503.03(c), a CEPS must pay ACPs to the Commission, to the extent the CEPS has not met its RPS compliance obligations through the acquisition of RECs, at the same time it files its annual RPS compliance report with respect to retail electric sales during the preceding calendar year.

In this proceeding, we are presented with a question of interpretation of the CEPS definition quoted above as applied to a particular class of electricity sellers, namely those that supply electricity only to their affiliated retail end use customers. Prior to an amendment in 2010, the definition of CEPS specifically excluded “an entity that sells only to its affiliate.” *See* Puc 2002.04 (effective until August 26, 2010). We find that the intent of the amended CEPS definition in the current rules is clear and its scope is broad enough to cover such affiliated suppliers.

It is also an important objective of our regulation that similarly-situated market participants be treated consistently and fairly. We find no meaningful distinction between the market activities of Cianbro Energy in selling electricity to its affiliated end user during the 2011-2014 timeframe and those of other affiliated suppliers that were registered with the Commission and complied with RPS requirements during the same general period. The fact that any of the end user affiliates could have purchased electricity directly from the ISO New England spot market without registering as a CEPS or complying with the RPS under our precedent does not relieve its affiliated supplier from having to

comply with applicable laws and rules, once the business decision is made to purchase the electricity through an affiliated intermediary. FEL's legal arguments based on the *Zimmerman* precedent and the definitions of "provider of electricity" and "electricity supplier" are neither relevant nor persuasive, for the reasons given by Staff.

We therefore find that Cianbro Energy was selling electricity at retail to its affiliated end use customer during the period between April 5, 2011, and May 5, 2014, and was therefore required to have been registered with the Commission as a CEPS and to have complied with RPS obligations, including the payment of any applicable ACPs, during that entire time period.

At the hearing, FEL indicated it was requesting a retroactive waiver from application of the CEPS registration rules, if Cianbro Energy were found to have been subject to such rules during the relevant period of time. We review requests for a rule waiver under Puc 201.05, and grant the requested waiver if the waiver serves the public interest and will not disrupt the orderly and efficient resolution of matters before the Commission. *See* Puc 201.05(a). In determining the public interest, the Commission must waive a rule if compliance with the rule "would be onerous or inapplicable given the circumstances of the affected person," or if the "purpose of the rule would be satisfied by an alternative method proposed." *See* Puc 201.05(b).

In this case, FEL's request fails to meet either prong of the "public interest" standard set forth in Puc 201.05(b). It has not proposed an alternative method of satisfying the purpose of the CEPS registration rules and related RPS compliance requirements, nor can it credibly maintain that compliance would have been onerous or inapplicable given that similarly-situated companies were able to comply with the requirements during the same general time period. We therefore deny the request for a retroactive rule waiver.

Finally, we acknowledge that FEL's petition implicates a number of potential policy concerns regarding the scope and effect of the broad CEPS definition contained in Puc 2002.05. We agree with Staff that any such policy concerns are more appropriately addressed in a different context

than a proceeding to consider a single company's petition for declaratory ruling as to its regulatory status during an historical period. We believe the most appropriate context for consideration of these policy concerns is the pending rulemaking proceeding, Docket No. DRM 13-151, in which potential amendments to the Puc 2000 rules will be reviewed and evaluated.

Based upon the foregoing, it is hereby

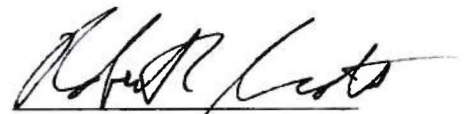
ORDERED, that Cianbro Energy, LLC, is declared to have been operating as a competitive electric power supplier in New Hampshire between April 5, 2011, and May 5, 2014, and as such was required to have been registered with the Commission during that time period; and it is

FURTHER ORDERED, that Cianbro Energy, LLC, as a competitive electric power supplier, is declared to have been a "provider of electricity" under RSA 362-F:2, XIV, and as such was and is required to comply with renewable portfolio standard requirements, with respect to the time period from April 5, 2011, through May 5, 2014.

By order of the Public Utilities Commission of New Hampshire this eighth day of April, 2015.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director