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**From:** Fojo, Robert M. <rfojo@HASLAW.com>  
**Sent:** Wednesday, March 20, 2013 11:14 PM  
**To:** PUC - Executive.Director  
**Cc:** Carter, Christopher H. M.; Deschenes, Daniel M; Comer, Susan M.  
**Subject:** PNE/Resident Power (DE 13-059/60) - Pre-Hearing Memorandum  
**Attachments:** Pre-Hearing Memorandum redacted.pdf; Pre-Hearing Memorandum confidential.pdf

Ms. Howland:

Please find, attached, an electronic copy of PNE and Resident's Power's Pre-Hearing Memorandum. These documents include the redacted/public version and unredacted/confidential version of the Memorandum.

The Commission's secretarial letter, dated March 15, 2013, directed that this Memorandum be filed by 4:30 pm. on March 19, 2013. However, at the second pre-hearing conference conducted on the morning of March 19, Staff, counsel for PNE and Resident Power, and Attorney F. Anne Ross agreed that this Memorandum could be filed at the close of business on March 20, 2013. As a result of the time needed to respond to the Emergency Motion filed earlier today by Staff, and to prepare certain factual materials requested by Staff in furtherance of the meeting held earlier today with Staff, this Memorandum could not be completed by the close of business as anticipated.

Please let us know if you have any questions.

Regards,

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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**

**PRE-HEARING MEMORANDUM BY RESIDENT POWER NATURAL GAS &  
ELECTRIC SOLUTIONS, LLC AND PNE ENERGY SUPPLY, LLC**

Resident Power Natural Gas & Electric Solutions, LLC (“Resident Power”) and PNE Energy Supply, LLC (“PNE”) submit the following memorandum to address factual issues that they anticipate will be a focus of the March 22, 2013 hearing in this matter.

**I. INTRODUCTION**

On February 27, 2013, Staff filed a Recommendation Memorandum (“Staff Memo”) which alleges that PNE and RP “may” have violated various provisions of the Puc 2000 rules relating to competitive electric power suppliers (“CEPS”) and aggregators. Staff’s allegations appear to center on the following events: (1) applications submitted by PNE and Resident Power in 2011 to operate, respectively, as a CEPS and aggregator of electricity; (2) the February 7, 2013 filing of a Joint Petition by PNE, Resident Power, and FairPoint Energy in DE 13-049; and (3) PNE’s financial default with ISO-NE on February 14, 2013.

The Staff Memo accuses PNE and Resident Power of having acted with disregard for the Puc Rules, and of having concealed or misrepresented material information in filings with the

Commission.<sup>1</sup> These accusations do not withstand scrutiny. The evidence in this case, including Staff's own email correspondence, shows that beginning in 2011, when PNE was the first entity since deregulation to apply for registration as a CEPS to serve residential customers, PNE and Resident Power worked in good faith, and in close cooperation with Staff, to interpret and apply a new and untested set of rules.

Many of the violations alleged in the Staff Memo – including the allegation that PNE or Resident Power engaged in sales or marketing activities prior to registration – not only are unfounded, but were fully addressed with Staff and resolved, before Staff recommended that the Commission approve the PNE and Resident Power registrations. Other allegations relate to actions taken by PNE and Resident Power with Staff's knowledge and at their direction. PNE and Resident Power acknowledge that the Staff Memo identifies examples of what has been characterized as “technical violations” of the Puc 2000 rules. These technical violations were not intended and were the result of a lack of familiarity – by PNE, Resident Power, and Staff – with these rules.

Regarding the events of February 2013, the evidence, once again, does not support Staff's allegations that PNE and Resident Power acted in a reckless or deceptive manner in their efforts to effectuate the sale of PNE customer accounts to FairPoint; in responding to unanticipated and unprecedented increases in electricity rates that resulted in PNE's ISO default; and in attempting to work with Staff and PSNH to implement legitimate, lawful measures to complete the transfer of customer accounts, and to protect those customers from rate increases. The evidence will show that transfer of the customer accounts was thwarted by PSNH, in an opportunistic effort by PSNH to profit from PNE's financial default.

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<sup>1</sup> During the supplemental pre-hearing conference conducted by Attorney F. Anne Ross on March 19, 2013, Staff represented that they were withdrawing all allegations or claims that PNE or Resident Power violated Rule 2005.01(d)(1) through the alleged “willful misrepresentation of information required by Puc 2003.”

To date, PNE has cured all but approximately [REDACTED] of the ISO default. Payment of this remaining amount will be made no later than March 21, 2013.

## **II. RELEVANT FACTS**

### ***PNE Registration Application***

On April 11, 2011, PNE filed an Application for Initial Registration to become a competitive electric power supplier (“CEPS”) under Puc 2003.01. (See DM 11-075.) PNE was the first entity since deregulation went into effect in New Hampshire to apply for registration as a CEPS to serve residential customers. As a result, the PNE Application presented the first occasion for an applicant and Staff to apply the rules applicable to CEPS serving residential customers.

The Application completed by PNE requested information designated by Puc 2006.01. In response to Question 4 in the Application, asking PNE to identify “any affiliate and/or subsidiary of the applicant that is conducting business in New Hampshire,” PNE identified the only two affiliates that were conducting business in this state: Freedom Logistics d/b/a Freedom Energy Logistics LLC, which is a registered aggregator providing wholesale energy to Market Participant End Users (“MPEUs”); and Halifax-American Energy Company (“HAEC”), a retail electricity marketer for South Jersey Energy (“SJE”).

In response to Question 11 in the Application, asking for a “description of the types of customers the applicant intends to service,” PNE responded: “Applicant intends to serve only residential customers.” At the time PNE completed the Application, this response was accurate, as PNE was formed for the purpose of meeting the residential demand for competitive electricity rates.

The registration standards for a CEPS under Rule PUC 2003 for selling to Commercial and Industrial (C&I) customers are the same as the registration standards for a CEPS to sell to Residential customers.

***Resident Power Registration Application***

By email dated February 15, 2011, Bart Fromuth, on behalf of Freedom Energy, contacted PUC Staff and explained that Freedom Energy was seeking to expand its aggregation services into the residential market, by entering into agency/purchasing authority agreements with residential customers which “would allow Freedom Energy Logistics to lock them into a rate with a supplier.” In the email, Mr. Fromuth noted that Freedom Energy was a registered aggregator, not a CEPS, and that if Freedom “did break off to start a new company, it would be an entirely new entity, separate from Freedom, except for some cross over ownership and employees.” Mr. Fromuth concluded: “I wanted to make sure I had the blessing of the PUC before kicking this off. Since we would be dealing with residential customers and no one has attempted this before, I did not want to run afoul of the PUC and the residential guidelines.” On February 18, 2011, Staff replied: “I don’t see any problem with your idea. As long as you follow all the laws and rules including the customer protection division, there should not be a problem.”

By email dated March 3, 2011, Bart Fromuth requested guidance from Staff on how Freedom Logistics could update its listing on the PUC website to include a second d/b/a, as follows: “Freedom Logistics LLC d/b/a Freedom Energy Logistics d/b/a Resident Power.” Later on March 3, Staff responded that Mr. Fromuth should “send a formal request to the PUC Executive Director.” Accordingly, on March 7, 2011, Mr. Fromuth emailed the Executive Director and requested as follows: “I would like to request the following change regarding

Freedom Logistic's NH PUC website listing. We have just launched a residential aggregator division of Freedom Logistics, named Resident Power and would like to update our listing."

On April 7, 2011, after no action had been taken on Bart Fromuth's request to update the PUC website listing, Staff directed Mr. Fromuth to "send a formal letter with Docket Number as reference and supporting documents" to the Executive Director.

On April 15, 2011, Resident Power filed a Notice of Intent to aggregate/broker electricity pursuant to Puc 2003. (See DM 11-081.)

On April 20, 2011, Bart Fromuth emailed Meredith Hatfield of the Office of Consumer Affairs ("OCA") to advise that Freedom Logistics "is accepting on-line enrollments for Resident Power," and asked if the OCA had any "questions, comments, or suggestions about the service as we are very interested in gaining the full and public support of the OCA once we become more established." In response, Ms. Hatfield thanked Mr. Fromuth for the information, and advised: "I will ask folks in the office if they have any feedback on your website or materials."

On April 21, 2011, Resident Power filed a "statement regarding affiliation with supplier interests" in DM 11-081, in which it stated: "RP does not intend to represent any one supplier interest, however, due to the limited electricity market currently willing to service residential and small business customers, we may be limited in our ability to choose which suppliers we wish to do business."

On May 6, 2011, Bart Fromuth emailed Staff to advise: "We intend to separate Resident Power from Freedom Logistics, LLC and form it as its own entity with its own broker license."

***Staff's Recommended Approval of the Resident Power and PNE Applications***

On May 11, 2011, Staff attorneys sent separate letters to PNE and Resident Power to address PNE's pending Registration Application, and Resident Power's pending Notice of Intent to aggregate electricity. The letters cited Staff's concerns about various issues, including: (a) Resident Power marketing to residential customers as a d/b/a of Freedom Logistics; (b) the affiliation between Freedom Logistics and Resident Power; and (c) the affiliation between PNE, HAEC, and SJE. The letters requested representatives of PNE and Resident Power to attend a meeting with Staff on May 19, 2011.

On May 19, 2011, representatives of PNE and Resident Power met with Staff and Staff attorneys. The issues discussed at the meeting included the affiliation between PNE, Resident Power, Freedom Logistics, Freedom Energy, and HAEC. PNE and Resident Power provided Staff with complete, accurate information about the relationships between these entities.

On May 21, 2011, as a result of Staff's request at the May 19 meeting, Resident Power filed an Amended Notice of Aggregation Registration, which stated: "Resident Power was first started as a division of Freedom Logistics and has been marketing to residential customers in New Hampshire since March 2011 under that arrangement." The Amended Notice stated further that Resident Power subsequently was created as "a stand alone legal entity," and that it would not be soliciting business "under this new entity name until approved to do so by the Commission."

On June 16, 2011, Staff filed a Recommendation which noted that Staff's concerns regarding Resident Power's marketing activities "were discussed in detail" at the May 19 meeting, that Staff and Resident Power had agreed to measures "to resolve the issues that arose during the application process," and that Staff "recommends that [Resident Power] be registered

to provide electric aggregation service in New Hampshire effective May 25, 2011.” On June 28, 2011, the Commission issued a secretarial letter approving Resident Power’s application to provide aggregation services.

Regarding PNE’s Registration Application, on May 31, 2011, PNE filed a motion to extend time to provide information requested by the Application. The motion cited the “unprecedented initiative of PNE to assemble an organization to serve residential customers in New Hampshire (some 12 years after ‘deregulation’ went into effect).” On June 10, 2011, the Commission issued a secretarial letter that recognized PNE’s characterization of the “unprecedented” nature of its initiative to establish a CEPS to serve residential customers, and granted the requested extension until July 29, 2011. On July 29, 2011, PNE filed a supplementation to its Registration Application, in which it provided: (a) proof of the acceptance of PNE’s application to NEPOOL; (b) evidence of financial security in the amount of \$100,000; and (c) proved that PNE had retained EDI capability and completed EDI testing with PSNH.

On September 19, 2011, Staff filed a Recommendation that “PNE’s application for Registration as a CEPS be approved to serve only PSNH customers at this time.” On September 22, 2011, the Commission issued a secretarial letter approving PNE’s application “to be registered as a competitive electric power supplier in the franchise area of” PSNH.

#### ***PNE and Resident Power’s Cooperation With Staff***

After PNE and Residential Power were registered and began operations, they continued to cooperate with Staff by providing full visibility into their operations for the purpose of confirming that the requirements of the Puc 2000 rules were being met. On occasions, when Staff asked PNE and Resident Power to modify their operations to conform to the Staff’s concerns and interpretation of the rules, PNE and Resident Power complied. In certain instances,



Staff's concerns were prompted by inaccurate reports by PSNH, which for the first time faced competition in the residential supply market.

By email dated October 27, 2011, Staff informed Resident Power and PNE that PSNH had "forwarded to the Commission" copies of the Resident Power customer notice and the PNE term sheet that Resident Power and PNE purportedly were providing to customers. The email alleged that Staff had "found a handful of areas where [the customer notice and term sheet were] not compliant with Commission rules, specifically Puc 2004.02(b)." By email dated October 28, 2011, PNE and Resident Power replied that PSNH had provided the Commission with an incomplete document that was "missing two full pages." On November 2, 2011, PNE and Resident Power provided Staff with a revised PNE term sheet that reflected comments Staff had made about this document. On November 3, 2011, Staff advised PNE that the revised term sheet "complies fully with the Commission's rules."

By email dated April 20, 2012, Staff requested that PNE submit quarterly sales reports, and it submitted a proposed form for PNE to use when completing the reports. The form called for the reporting CEPS to identify the number of customers supplied during the reporting period, and the rate classes of the customers served. By email dated April 30, 2012, PNE provided Staff with completed quarterly sales reports for Q4 of 2011, and for Q1 of 2012. The completed reports stated that, in Q1 2012, PNE had supplied four customers in the "GV," or "General Voltage," rate classification.<sup>2</sup> Neither at that time, nor at any time prior to February 2013, did Staff allege that PNE's CEPS registration restricted PNE to supplying residential customers, or that PNE was not authorized to supply C&I customers.

By email dated July 31, 2012, Staff forwarded an "anonymous" complaint to Resident Power which alleged "some level of impropriety" as a result of the affiliation between Resident

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<sup>2</sup> "GV" or "General Voltage" refers to a rate classification reserved only for commercial and industrial customers.

Power and PNE. Later that day, Resident Power replied that the “relationship between PNE and Resident has been extensively discussed” at the May 18, 2011 meeting with Staff and Staff attorneys; that Resident Power had enrolled “customers with other suppliers in New Hampshire and other states”; and that “[w]hile Resident Power has placed significant numbers of customers with PNE in NH, this is due in large part to the lack of other suppliers in NH that are willing to serve residential class customers and/or willing to work with brokers/aggregators.” Upon receiving this information, Staff replied “Thanks,” and the matter was concluded. Neither at that time, nor at any other time prior to February 2013, did Staff allege that the affiliation between PNE and Resident Power had not been properly disclosed.

***Events Leading to FairPoint Transaction***

In November 2012, PNE began entertaining the idea of selling off all or part of its residential and small commercial customers as a result of the market entry of three new major residential suppliers in the state. On January 30, 2013, PNE entered into negotiations with FairPoint for the sale to FairPoint of PNE’s residential and small commercial accounts in the PSNH service territory.

In the weeks before the PNE-FairPoint negotiations began, electricity rates available to NEPOOL members through ISO-NE had been far above the historical January/February average rate (of approximately \$.055 per kwh). The high rates had resulted in a corresponding increase in financial security required in PNE’s financial assurance (“FA”) account with ISO-NE. However, by the time PNE’s negotiations with FairPoint began on January 30, rates had dropped to \$.0409 per kwh, far below the recent high of \$.2385 per kwh on January 25.

The rates in the days before, and immediately after, the start of the FairPoint negotiations were as follows:

- January 22: \$.1285 per kwh
- January 23: \$.1783 per kwh
- January 24: \$.2091 per kwh
- January 25: \$.2385 per kwh**
- January 26: \$.1759 per kwh
- January 27: \$.1783 per kwh
- January 28: \$.1678 per kwh
- January 29: \$.0666 per kwh
- January 30: \$.0409 per kwh
- January 31: \$.0500 per kwh
- February 1: \$.1103 per kwh
- February 2: \$.1776 per kwh
- February 3: \$.1281 per kwh
- February 4: \$.1768 per kwh
- February 5: \$.1243 per kwh
- February 6: \$.1127 per kwh
- February 7: \$.1664 per kwh
- February 8: \$.1255 per kwh

*P&S Agreement With FairPoint*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Joint Petition For Waiver*

On February 7, 2013, PNE and FairPoint filed a Joint Petition for Expedited Waiver of Puc Rule 2004.05(k) with respect to providing a required 14 day advance notice of PNE’s intent to sell its right to serve its customer accounts. (See DE 13-049.)

Staff attorneys were contacted by counsel for PNE and FairPoint prior to the submission of the Joint Petition, and were advised as to both the relief requested in the Motion and the circumstances necessitating the request.

Included with the Joint Petition was the Affidavit of Howard Plante, PNE’s President. [REDACTED]

Also included in the Joint Petition was a proposed Customer Notice that had been approved by Staff, and that was to be provided to PNE’s customers to explain the FairPoint transfer. The Notice contained the following statement: “Resident Power will no longer be an aggregator for your account, but will cooperate with FairPoint Energy to assist in the transition between electricity suppliers.” FairPoint required this language to reflect the provision in the P&S that the Resident Power aggregation agreements were terminated upon transfer of the customer service to FairPoint.

On Friday, February 8, the Commission issued a secretarial letter granting the requested waiver of the 14 day notice requirement. On or about Saturday, February 9, all PNE customers that were sold to FairPoint were entered for enrollment in the EDI for transfer to FairPoint at the time of each customer's next regularly scheduled meter read. On February 12, following the two-day waiting period required by PSNH policies, PSNH began transferring PNE customer accounts to FairPoint at the rate of 300-400 accounts per business day. For unexplained reasons, none of the relevant customer accounts were transferred by PSNH on Friday, February 15. Transfers resumed on February 16, and continued until February 19.

***Winter Storm "Nemo" and Rate Increases***

As shown above, electricity rates dropped sharply after January 25. While some rate fluctuations continued to occur, on Friday, February 8, the rates were \$.1255 per kwh, nearly half of the level reached on January 25.

On February 8 and 9, however, a severe winter storm, designated Winter Storm "Nemo," struck New England. Damage caused by the storm, which disrupted power transmission lines and caused the shutdown of the Pilgrim nuclear power plant and other electricity generators, caused unanticipated and sudden increases in electricity rates. Rates remained at extraordinarily high levels during the week of February 11, even as the New England region was experiencing unseasonably warm temperatures. During this period, rates rose over 500%, increasing from \$.0409 on January 30, to \$.2415, \$.2241, and \$.2273 on February 10, 11, and 12, respectively.

The rates during this period were as follows:

February 9: \$.1813 per kwh  
February 10: \$.2415 per kwh  
February 11: \$.2241 per kwh  
February 12: \$.2273 per kwh  
February 13: \$.1802 per kwh

As a result of these events, PNE was unable to continue to meet its financial obligations with ISO-NE. On February 13, PNE's counsel, Harry Malone, informed Staff that PNE was in danger of a financial default with ISO-NE.

On February 14, 2013, ISO-New England suspended PNE's participation in the New England power market due to PNE's financial default before ISO-NE. As a result, ISO-NE scheduled PNE's load asset account to be terminated at 12:01 a.m. on Wednesday, February 20, 2013. ISO-NE transferred to PSNH default service the remaining meters in PNE's load asset at ISO-NE, including approximately 7,300 PNE residential and small commercial customer accounts that had not yet been transferred to FairPoint.

***PSNH's Interference With the Transfer of Customers to FairPoint***

Before the ISO default, PNE attempted to obtain the cooperation of PSNH to complete the transfer of the former PNE customers that – as of February 9 – had been entered for enrollment with FairPoint. Beginning on February 12, PNE had begun discussions with Robert Bersak of PSNH regarding the porting over of PNE customers to FairPoint immediately (e.g. before the next meter read PNE). As an ISO default became unavoidable, PNE intensified its efforts to obtain PSNH's cooperation in transferring PNE customers, and thereby avoid a scenario where customers would be placed on PSNH default service at a higher "default rate." The applicable tariff allowed PSNH to make the requested "off-meter" transfers, and PNE offered to pay PSNH for all additional costs associated with the transfers. After first advising it would consider this approach, PSNH ultimately refused.

Instead, PSNH alleged that, after PNE's load asset account with ISO-NE was terminated on February 20, PSNH had no obligation to transfer any more customers to FairPoint, despite the fact that those customer accounts had been acquired by FairPoint and enrolled in the EDI for

transfer to FairPoint. Furthermore, PSNH terminated the FairPoint enrollment action in EDI and informed Staff and PNE that those accounts belonged to PSNH as a result of the cram down.

In addition, PSNH opposed any attempt by Resident Power or PNE to remove customers from default service. On February 19, PSNH filed a Supplemental Motion in support of its pending Motion to Dismiss the October 1, 2012 Petition filed by PNE in DE 12-295 (Petition For Review of PSNH Service and Charges to CEPS). In the Supplemental Motion, PSNH argued that PNE “lacked standing” to contest PSNH’s charges as a result of its suspension from ISO-NE. In footnote #4 of the Supplemental Motion, PSNH inserted the irrelevant and unnecessary allegation that Resident Power was no longer the aggregator of the former PNE customer accounts as a result of the Customer Notice issued to announce the FairPoint transaction.

PSNH’s position regarding Resident Power’s alleged inability to aggregate the former PNE accounts, while profitable to PSNH, was harmful to customers who were subjected to higher rates while on default service. In addition, PSNH’s position ignored the terms of the FairPoint P&S Agreement, which provided that it was only after a customer was transferred FairPoint that Resident Power would no longer be the aggregator for that customer. The Customer Notice, fairly construed, likewise informed customers that Resident Power would no longer be their aggregator after their transfer to FairPoint.

Staff initially advised that it agreed with Resident Power’s position that its aggregation agreements with customers who had not been transferred to FairPoint remained valid. After February 19, however, PUC Staff adopted PSNH’s position. Staff reportedly stated to FairPoint to the effect that, if Resident Power took steps to port customers from PSNH default service to FairPoint, FairPoint could be exposed to slamming charges that would generate enough fines and penalties to “close the state’s budget deficit.”

### III. CONCLUSION

Staff's allegations lack merit. Many of the violations it alleges were fully addressed and resolved before Staff recommended that the Commission approve the PNE and Resident Power registrations. Other allegations relate to actions taken by PNE and Resident Power with Staff's knowledge and at their direction. Any purported "technical violations" resulted from PNE, Resident Power, and Staff's oversight and lack of familiarity with the Puc rules. In addition, the events of February 2013 show no reckless or deceptive behavior on the part of PNE and Resident Power. Rather, PSNH thwarted the transfer of the customer accounts in an opportunistic effort to profit from PNE's financial default. Finally, PNE will have cured the ISO default no later than March 21, 2013. Accordingly, PNE and Resident Power respectfully request that the Commission decline to impose any penalties, suspensions, or revocations on them.

Respectfully submitted,

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

By their attorneys,



Dated: March 20, 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.



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Christopher H.M. Carter, Esq.

#51477947