

**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 FOR RULING BURDEN OF PROOF

Resident Power Natural Gas & Electric Solutions, LLC (“Resident Power”) and PNE Energy Supply, LLC (“PNE”)[collectively “Movants”], respectfully move for a pre-hearing ruling that PUC Staff will have the burden of proving the rule violations alleged in Staff’s February 27, 2013 Recommendation memo (“Staff Memo”) and cited in the Commission’s February 28, 2013 Order of Notice. Staff’s position – that Movants bear the burden of proving they have not committed the alleged violations – is incorrect and, if accepted, would violate Movants’ due process rights.

1. The Staff Memo asserts that Staff “identified the following rules which it believes may have been violated,” and it lists seven or more provisions of Puc Rule 2000. See Staff Memo at 1. The Staff Memo recites certain background facts, but it does not provide notice of the factual basis for Staff’s position that PNE and/or Resident power violated each of the cited Puc Rules. The Staff Memo also does not discuss the close cooperation between Movants and Staff since PNE and Resident Power were registered to operate as a CEPS and aggregator; Staff’s knowledge and acceptance of the affiliation between PNE and Resident Power; or Movants’ efforts during the month of February 2013 to obtain Staff’s cooperation in the

implementation of remedies to prevent any disruption in the service or rates provided to PNE's customers.

2. To date, there has been no adjudication that any of the cited Puc Rules have been violated. However, the Staff Memo recommended that the Commission schedule a hearing at which PNE and Resident Power would be required to "show cause as to why they should not be subject to penalties or their registrations to operate as an aggregator and competitive electric power supplier ... should not be revoked or suspended." See Staff Memo at 1.

3. Furthermore, the Staff Memo noted that Staff's recommendation was "not meant to encompass all facts and circumstances involving PNE and Resident Power," thus indicating that at any hearing, Staff intends to offer evidence that may not have been disclosed to Movants.

4. The Commission's February 28 Order of Notice accepted Staff's recommendation, and scheduled a "hearing on the merits" for March 20 and 22, at which Movants must "show cause why either company should not be sanctioned" under Puc 2005 and the Commission's general supervisory powers." See Order at 7-8.

5. In a proceeding before the Commission, the administrative rules clearly establish that, "[u]nless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence." Puc 203.24 (emphasis added). Similarly, the Federal Administrative Procedure Act, to which the Commission has looked for guidance in applying its own rules (see below), states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (emphasis added).

6. Here, the burden is on Staff to prove the truth of the allegations in its Recommendation – and referenced and summarized in the Order of Notice – by a preponderance of the evidence.

7. This standard is consistent with the requirements of due process. The New Hampshire Supreme Court has held that, “[w]here governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution . . . guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” Appeal of Concord Steam Corp., 130 N.H. 422, 428 (1988). The “[C]ourt long has recognized that the PUC has important quasi-judicial duties, and . . . therefore require[s] the PUC’s ‘meticulous compliance’ with the constitutional mandate where the agency acts in its adjudicative capacity, implicating private rights.” Id.; Appeal of Public Serv. Co., 122 N.H. 1062, 1073 (1982).

8. In Concord Steam, the Court further stated that “[t]he PUC’s due process obligation is apparent . . . in the statute delineating the agency’s broad investigative authority, see RSA 365:5 and :19, 378:5, and in the provisions of the Administrative Procedure Act, see RSA 541-A:16, :18.” Appeal of Concord, 130 N.H. at 428. Indeed, RSA 541:16 requires the Commission to adopt and follow “rules of practice” for “adjudicative proceedings.” Moreover, “[i]n any case in which the commission may hold a hearing . . . , whenever [its] investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard.” RSA 365:19.

9. These standards require that, to protect Movants’ due process rights, the burden is and should be on Staff to prove the truth of the allegations in its Recommendation.

10. Staff will likely cite the Commission’s ruling in Wilton Telephone Company, Order No. 23,744, 86 NH PUC 498 (July 26, 2001). In that Wilton, the Commission shifted a portion of the burden of proof onto the public utility, stating that “the burden is on the complainant or the Commission, through its Staff, to establish the basis of the complaint and an

initial demonstration of non-compliance or violation of an order, rule or statutory requirement,” and that “[o]nce this affirmative case has been made, the ultimate burden of persuasion on the subject matter of the complaint or investigation is on the public utility.”

11. First, Wilton differs from the instant matter as it principally involves a parties’ non-compliance with prior Settlement Agreement between the utility and the PUC. Those circumstances are not presented here.

12. Regarding the burden of proof, the Wilton Order cites no reliable authority for the proposition that the burden of proof may be placed on a respondent (there, a public utility) to prove that it has not violated a rule or statute and should not be sanctioned. Instead, the Wilton Order cites RSA 365:23, RSA 374:1, RSA 374:8, and RSA 374:13, not none of those statutes imposes a burden on a utility of proving that it did not violate a given statute or requirement. Rather, these statutes merely impose obligations on utilities to comply with the law. In addition, the only cases cited in the Wilton that address the burden of proof in an administrative proceeding -- Environmental Defense Fund, Inc. v. Environmental Protection Agency, 548 F.2d 998 (D.C. Cir. 1976), and National Labor Relations Board v. Transportation Management Corp., 426 U.S. 393 (1983) – have been reversed by the United States Supreme Court.

13. The Wilton Order cites those cases held that the meaning of the term “burden of proof” in the requirement in the Federal Administrative Procedure Act that, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof,” 5 U.S.C. § 556(d), did not mean the “ultimate burden of persuasion” but meant only the “burden of going forward.”

14. In Director, Office of Workers’ Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994), the U.S. Supreme Court called into the question the reasoning in Environmental Defense Fund and Transportation Management and rejected this holding. 512 U.S. at 276-77. It

stated that the “burden of proof” in section 556(d) meant the “burden of persuasion.” Id. at 276. This standard is now the prevailing rule in the First Circuit. See, e.g., Truczinskas v. Dir., OWCP, 699 F.3d 672, 680 (1st Cir. 2012) (“the burden of proof to show a covered cause or set of causes by a preponderance of the evidence rests upon the claimant”); Bath Iron Works Corp. v. Fields, 559 F.3d 47, 52 (1st Cir. 2010) (“it is the claimant’s burden to prove the requisite elements of coverage”); Frontier Fishing Corp. v. Evans, 429 F. Supp. 2d 316, 327 n.12 (D. Mass. 2006) (agency “retains the ultimate burden of persuasion even after it has established a prima facie case”).

15. Therefore, under both state and federal law, the burden in this administrative proceeding is on Staff, not the Movants, to prove the truth of the allegations asserted.

WHEREFORE, Movants respectfully request that the Commission grant this motion and issue an order establishing that the burden is on Staff to prove the allegations against Movants in its Recommendation and the February 28, 2013, Order of Notice at the “show cause” hearing scheduled for March 20 and 22, 2013.

Respectfully submitted,

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

By their attorneys,

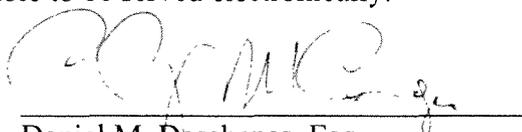


Dated: March 15, 2013

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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.



Daniel M. Deschenes, Esq.

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