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May 8, 2009

Senator Philip L. Bartlett II, Chair
Representative John L. Martin, Chair
Joint Select Committee on Maine's Energy Future
100 State House Station
Augusta, ME 04333-0100

Dear Senator Bartlett and Representative Martin:

The Commission is writing to comment on the Committee Bill draft of An Act Regarding Maine's Energy Future. We hope these comments are helpful, and we are ready to discuss this in more detail or answer any questions relating to the draft bill.

As a general matter, the draft places the Commission in the position of regulating another entity that is itself an instrumentality of the state. The Efficiency Maine Trust would be created by statute and governed by a board of trustees whose appointment is set forth in statute. The purpose of the EMT is established in statute; its duties are proscribed by statute; it has rulemaking authority; it reports annually to the legislative committee of jurisdiction; and its funding is largely determined by statute. In most respects, it is a sister state agency to the Commission. Charging one agency with the responsibility to oversee another may not produce clarity of authority and accountability – objectives that have been among the driving forces for many of the restructuring proposals.

Turning to the language of the draft bill, § 10104(3) would require the Commission and the EMT to establish quantifiable measures of performance through a negotiation process.

Asking the Commission to "negotiate" such measures without providing a standard to guide the Commission seems problematic. The draft would also require the Commission to either approve the Triennial Plan established by the EMT, or to reject parts of the Triennial Plan. See § 10104(4). We believe the new structure would be more accountable, clear, efficient and workable if it simply required the EMT alone to establish a Triennial Plan. Further, the EMT might include quantifiable measures of performance in the Triennial Plan, also developed by the EMT alone.

Should the Committee determine that some oversight by the Commission is warranted, this approach would allow such oversight. If the Commission were not involved in creating the Triennial Plan and the measures of performance, the Commission would be better positioned to objectively review them through its usual administrative process. Specifically, the Commission could receive the plan, open a docket, take public comment,



and issue an order approving the plan, disapproving the plan, or instructing the EMT to make changes to the plan. Keeping the plan approval processes separate and distinct from the process of developing the plan would at least yield a more workable approach with greater clarity of responsibility and greater accountability.

A similar comment applies to the “independent evaluation” of the EMT set forth at § 10119(2). As an independent agency, we see nothing that would prevent the EMT from arranging for an independent evaluation of the major programs it administers. That evaluation could be submitted directly to the legislative committee of jurisdiction, with an appropriate reporting date established. If the legislature so determines, the Commission could also review the independent evaluation and provide comments back to the EMT and to the committee of jurisdiction.

We are also concerned with § 10119(4), which would give the Commission the power to investigate practices or acts of the EMT and issue orders to ensure EMT’s compliance with state law. This puts the Commission in the position of not only overseeing a sister state agency, but of actually enforcing the law against it. The duty is open ended, and would require extensive ongoing monitoring by the Commission. We do not know of an example of another state agency determining that a sister agency is not in compliance with state law.

We hope these comments are helpful to the Committee. We will be present for the work session on Monday if the Committee should have any questions.

Sincerely,

John R. Brautigam, Director
Energy Programs Division