

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

American Ref-Fuel Company,  
Covanta Energy Group,  
Montenay Power Corporation,  
and Wheelabrator Technologies Inc.

Docket No. EL03-133-000

**NOTICE OF INTERVENTION AND PROTEST  
OF THE MAINE PUBLIC UTILITIES COMMISSION**

In accordance with Rules 211 and 214 and the June 19, 2003 Notice of Filing, the Maine Public Utilities Commission (“MPUC”) hereby submits its notice of intervention and protest in the above-captioned proceeding.

**I.**

**NOTICE OF INTERVENTION**

The MPUC designates the following persons for service and communications with respect to this matter and requests that their names be placed on the official service list for this proceeding:

Lisa Fink  
Mitchell Tannenbaum  
State of Maine  
Public Utilities Commission  
242 State Street  
18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

Harvey L. Reiter  
John E. McCaffrey  
M. Denyse Zosa  
STINSON MORRISON & HECKER LLP  
1150 18<sup>th</sup> Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 785-9100

Under Maine law, the MPUC is the state commission designated by statute with jurisdiction over rates and service of electric utilities in the state. *See* 35-A M.R.S.A. § 101 *et seq.*

## II.

### SUMMARY OF POSITION

On June 13, 2003, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc. (“Petitioners”) petitioned the Commission for a declaratory order finding that contracts executed pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”) do not, absent express provisions to the contrary, convey to the purchasing utility any renewable energy credits or similar tradable certificates (“RECs”). The Petitioners argue that PURPA contracts compensate Qualifying Facilities (“QF”) only for energy and capacity produced by that facility and not for any other attribute associated with the facility.

The Commission may decline to issue any order in this proceeding and leave resolution of the matter to state regulatory processes or to the courts to determine what can be considered contractual disputes. However, if the Commission decides to address the matter on its merits, it should, for the reasons discussed below, issue an order declaring that PURPA contracts executed before the development of RECs include the transfer of those attributes that qualify the generator as a Qualifying Facility under federal and state law.

## III.

### BACKGROUND

During its 1997 session, Maine’s Legislature enacted comprehensive legislation to restructure the State’s electric industry. P.L. 1997, ch. 316 (codified at 35-A M.R.S.A. §§ 3201-3217). This legislation deregulated the retail provision of electricity supply, allowed for retail competition beginning March 2000, and prohibited utilities from

providing electricity supply service. Because utilities were no longer going to be in the generation supply business, Maine's Legislature included a portfolio requirement to ensure that a certain level of renewable and efficient power continued to serve the electricity needs of Maine's ratepayers. Maine's Legislature also acted to ensure that pre-existing QF contracts remained valid after industry restructuring by including language specifying that the rights of the contracting parties may not be abrogated or diminished as a result of industry restructuring. Because Maine's utilities would no longer have a need for power from its QF contracts after restructuring, the Restructuring Act required utilities to periodically sell their entitlements to QF power. The proceeds from the sale of the QF entitlements are used to offset stranded costs for the benefit of Maine's ratepayers. The Legislature included QF power (both renewable and cogenerated) as eligible for Maine's portfolio requirement, which enhanced the value of QF entitlements.

On September 6, 2002, the MPUC initiated a proceeding to consider whether, under its rules, QFs that have PURPA contracts that predate the development of NEPOOL's Generation Information System ("GIS") must transfer associated GIS certificates to utilities so they can be provided to the entities that purchase the entitlements to the QF power. The MPUC initiated this proceeding as a consequence of the development and implementation of the NEPOOL GIS.<sup>1</sup> This system allows for the unbundling of electricity attributes (e.g. fuel source, emission characteristics) from the energy commodity and was developed to provide a more efficient means for electricity suppliers in New England to satisfy certain state laws and regulations (such as portfolio and disclosure requirements) and for state regulators to more efficiently verify

---

<sup>1</sup> The NEPOOL GIS became operational last year.

compliance with such laws and regulations. The GIS works through the creation of “certificates” that represent attributes of electricity that can be traded separately from the energy commodity.

As a result of the development of the NEPOOL GIS, the MPUC initiated rulemaking procedures to consider incorporating GIS as the means for complying with Maine’s portfolio and disclosure requirements. During this process, some interested persons raised the issue of the rights to QF-associated GIS certificates. The issue is important to ratepayers because, among other things, the MPUC and Maine’s utilities had represented to the purchaser of the QF entitlements that the power would qualify under Maine’s portfolio requirement. Maine’s adoption of the GIS, without assurance that the purchaser of the entitlements would obtain the associated certificates, would thus frustrate purchasers’ legitimate expectations. Moreover, the future value of QF entitlements would be reduced without any “renewable premium,” resulting in less offset to stranded costs to the detriment of ratepayers.

To consider this matter in more detail, the MPUC initiated an Investigation. *Investigation of GIS Certificates Associated with Qualifying Facility Agreements*, MPUC Docket No. 2002-506 (Sept. 6, 2002). In its Notice of Investigation (“Investigation”), the MPUC provided its tentative conclusion that utilities have the right to GIS certificates associated with pre-existing QF contracts. The MPUC’s reasoning was detailed in the Investigation, which is attached hereto as Appendix A. Prior to making any final determination, the MPUC provided all interested persons with an opportunity to comment. The MPUC received several comments from QF interests, most arguing that

the MPUC does not have jurisdiction over the matter, and that the issue is one of contract interpretation for the courts.

Subsequent to the receipt of comments, the MPUC received a request from representatives of some of Maine's QFs that it take no further action in the Investigation to allow time for the QFs and utilities to proceed with discussions to resolve the matter. The MPUC agreed. Recently, the MPUC was informed that discussions have not led to resolution of the matter.

#### IV.

#### ARGUMENT

##### **A. Renewable Attributes Are an Essential Element of PURPA Contracts.**

The PURPA contracts at issue in this proceeding were executed long before the concept of separately tradable attributes were developed. Therefore, the lack of any mention of RECs or tradable attributes in the PURPA contracts cannot be construed to mean that they were retained by the sellers. On the contrary, the fundamental nature of PURPA contracts leads to exactly the opposite conclusion.

PURPA contracts are the result of federal and state policies intended to encourage the development of renewable and efficient electric generation resources. This was accomplished by requiring utilities to purchase the output of any facility that met specific criteria allowing it to be designated a "qualifying facility."<sup>2</sup> It is only by virtue of the existence of certain attributes that facilities were deemed QFs and that utilities became obligated to purchase their power. These attributes must therefore be considered as the

---

<sup>2</sup> FERC defines "qualifying facility" as "a cogeneration facility or small power production facility that is a qualifying facility under Subpart B of [Part 292], 18 CFR ¶ 292.101(a)." The qualifying criteria for small power production facilities and for cogeneration facilities under Subpart B are set out in 18 CFR §§292.201-211.

essence of PURPA contracts in that without such attributes there would be no PURPA contract. Moreover, in Maine, PURPA contracts generally require that QF status be maintained, providing further indication that the continued existence of the “attributes” is an essential element of PURPA contracts.

Petitioners argue that the QF contracts did not transfer RECs to the purchasing utilities because the contracts contain no mention of RECs or other attributes, instead referring to energy and capacity. This argument fails to recognize that the QF contracts do not mention RECs because RECs did not exist when the contracts were executed. Thus, RECs could not have been withheld as part of the transaction.

The absurdity of Petitioners’ argument becomes even more apparent when placed in the context of transactions between buyers and sellers in the market place. For example, under Petitioners’ logic, a car buyer who had purchased a fuel efficient automobile several years before the government granted a tax break to owners of fuel efficient vehicles would not have the right to claim the credit. Instead, the seller would be determined to have retained the right to the credit because, under the terms of the car sale, no mention was made of the then non-existent fuel efficiency-related tax credits.

Petitioners do not mention, moreover, that the unit output of their facilities could not have been sold without conveying the attributes of QF power. PURPA contracts are unit specific and thus, the energy and capacity must come from a particular facility. QFs are not allowed simply to provide energy and capacity from any source, but must provide power from a specified facility with particular attributes. Therefore, it is clear that QFs were obligated to provide a product beyond just energy and capacity. If utilities do not obtain facility attributes such as RECs that are essential to the facilities QF status, they

may reasonably question whether they are continuing to receive the benefit of their bargain (i.e., QF power) with the QFs. Indeed, small power producers and cogenerators must maintain their status as QFs in order to retain their rights under the contracts they executed with utilities. Accordingly, the failure of QFs to transfer RECs associated with their QF contracts could result in a QF breach of these contracts.

**B. QF Contracts Entered Into Prior to Electric Restructuring Transferred a Bundled Product That Included Renewable Attributes.**

The product that QFs were obligated to provide was essentially a bundled product that included attributes along with an energy commodity. The development of the NEPOOL GIS (or other attribute trading systems) did not create the attributes. These attributes always existed as essential elements of a generator's QF status. GIS-type systems simply allow for the trading of attributes separate from the energy commodity. Therefore, there is no new product that is now being taken from the QFs. Instead, QFs already sold a product that they now seek to sell again.

The course of practice for the sale of QF entitlements in Maine supports the view that QF contracts, entered into prior to restructuring, transferred renewable QF attributes. Beginning with the electric restructuring in Maine, utilities routinely informed potential purchasers that the output from QF entitlements could be used to satisfy Maine's portfolio requirement. No one, including QFs, which had access to the QF entitlement bid package, ever questioned that the power being sold counted toward meeting the buyer's renewable portfolio requirement. *See* QF Entitlement Bid Package, attached hereto as Appendix B. Indeed, before the advent of RECs, no one would ever think of disputing a utility's right to claim it was buying renewable power (i.e. the attribute as well as the commodity) and that the power could be resold as such. Now, Petitioners seek to strip the

renewable character of the renewable product that they have sold to utilities. The basis of their claim -- that a new system has been developed that allows for separate attribute trading -- does not support their effort to carve out and resell to a third party the essential attributes of the product they sold to utilities prior to electric restructuring.

**C. QFs Have Been Fairly Compensated for their Power Including Renewable Attributes.**

Petitioners' primary argument is that the prices in PURPA contracts compensate QFs only for the provision of energy and capacity, not for any attributes. In support of this argument, the Petitioners note that avoided cost calculations are based on the utilities' alternative costs of an equivalent amount of energy and capacity and do not include environmental externalities.

It is certainly true, as Petitioners assert, that they were paid for power at prices based on the avoided costs of the purchasing utilities. But it does not follow that, as a result, they were never compensated for the extra value possessed by renewable and cogenerated power. On the contrary, the statutory scheme under PURPA, as well as FERC's implementing regulations, ensure that QFs receive an enormous benefit precisely because of the renewable nature of their generation.

Avoided cost is a concept intended to ensure QFs an outlet for their power, while also ensuring utility ratepayers that they would not face higher rates as a result of PURPA's requirement for utility power purchases from QFs. *See American Paper Institute v. American Electric Power Service Corporation*, 461 U.S. 402, 404-05 (1983). Avoided cost calculations were based on the *costs of the purchasing utility* and were, therefore, absolutely independent of the *QF's* own costs. In other words, the QF did not receive a cost-based rate for the power it sold. Rather, it was assured of a price for its

power equal to the full avoided cost to the utility (1) even if the QF did not itself face such cost (e.g., pollution abatement if the avoided cost were the cost of a coal or oil-fired plant), (2) even if a non-QF were willing to sell at the same price, and (3) even if the non-QF offered power from a less-polluting source than the QF (e.g., where the QF generated power from wood chips, but the competing supplier offered power from gas-fired combustion turbines).

Thus, many QFs may have been compensated above their costs of providing power. In any event, because avoided costs were never intended to compensate QFs for *their* costs of service, the components of the avoided cost calculation are irrelevant. Adoption of the Petitioners' position would mean that a QF that may have made a profit (or even a very substantial profit) from its utility contract would be entitled to any value of QF attributes simply because the avoided costs calculation did not expressly compensate the QF for this value. The fact is, however, that the QF sellers knew they were selling renewable or cogenerated power to a utility because this was the basis for the seller's QF status. Further, they knew they were assured of a price no less than the utility's full avoided cost, even if their own generation costs were much lower and even if a non-QF was willing to match the same price. QFs made their bargains to sell their renewable power (and in many instances made very lucrative bargains). Thus, as long as utilities continue to pay the contract price, the QFs, by definition, are fairly compensated. Given the fact that non-QF generators were not given the same rights and guarantees, Petitioners' suggestion that QFs were not compensated for the attributes of their power supply is disingenuous.

Indeed, having capitalized on the preferential treatment they received under PURPA, the Petitioners now argue that they still own the characteristic of their power that entitled them to this treatment in the first instance. In a move that would win them the admiration of the legendary seller of the Brooklyn Bridge, they did so well the first time they sold their output that they wish to do it again. The purpose of renewable portfolio requirements, such as the one in Maine, is to create new incentives for renewable power, not to provide previously-compensated QF owners a second round of compensation for a product they have already sold to the utilities.

**D. Utilities' Rights to RECs Do Not Discriminate Between QFs.**

Petitioners claim that conveyance of RECs based solely on avoided costs discriminates between different types of QFs because qualifying renewable generators and qualifying cogenerators would be paid the same amount, even though only the renewable generator would be allocated RECs.

First, the Petitioners' argument ignores the operation of Maine's portfolio requirement. In Maine, all power from QFs (either renewable or cogeneration) can be used to satisfy the portfolio requirement. 35-A M.R.S.A. § 3210. Thus, the Petitioners' discrimination claim can have no applicability in Maine.

Second, the argument again misses the fundamental point that it is the QF attributes themselves that resulted in the right of the QFs to sell power to utilities. The fact that QF renewable facilities may have been paid the same amount as QF cogeneration facilities is irrelevant because there would be no PURPA contract if the QF did not have particular attributes.

**E. Commission Precedent Does Not Support Petitioners' Position.**

Petitioners argue that their position is consistent with Commission precedent. However, the cases cited by Petitioners do not support their position that QFs are entitled to RECs associated with utility contracts that predate the development of attribute trading systems. Petitioners cite several FERC cases for the general proposition that attributes associated with generation can be considered separate and distinct from energy and capacity sold to a utility. The MPUC does not disagree with this general proposition. Generation attributes can be considered separate and distinct from the energy commodity.<sup>3</sup> The cases cited by Petitioners, however, have no bearing on the question of who is entitled to generation attributes of power sold pursuant to contracts that predate the concept of separate attribute trading.

Petitioners quote from a FERC decision regarding Clean Air Act Amendments (“CAAA”) emission allowances.<sup>4</sup> This decision is clearly distinguished on its facts from the present proceeding. The *Southern Company* decision was essentially a ratemaking matter that involved whether the cost of compliance with the CAAA was an “incremental” cost of providing energy. The CAAA specified that, with one exception, generators are entitled to emission allowances.<sup>5</sup> In contrast, the ownership of RECs is not determined by any statute. Moreover, the New England GIS rules explicitly state that

---

<sup>3</sup> This separation of attributes is the entire basis underlying the New England GIS (as well as other attribute trading systems), which the MPUC supports as an effective means to promote competitive retail electricity markets.

<sup>4</sup> *Southern Company Services, Inc.*, 69 FERC ¶ 61,437 (1994) (“Southern Company”).

<sup>5</sup> *Southern Company*, *supra*, 69 FERC at 62,559.

attribute certificate ownership is not addressed.<sup>6</sup> Thus, *Southern Company* is not applicable to the facts of the present proceeding.

**F. A Ruling That Maine Utilities Are Entitled to RECs for QF Contracts Entered Into Prior to Restructuring Is Consistent With the Promotion of REC Trading.**

Petitioners argue that their position is consistent with policies promoted through REC trading in that the intent of such programs is to allow for the unbundled trading of attributes separate from the sale of power. Petitioners' point is that the position that RECs are automatically transferred, with QF output, is inconsistent with such policies. Additionally, Petitioners state that revenue from the sale of RECs is intended to compensate the owner of the renewable facility and promote further investment in renewable resources.

There is simply no logic to Petitioners' contention that denial of their Petition will undercut attribute unbundling policies intended to promote *future* development or operation of renewable resources. The MPUC's position is not that attributes must be an inseparable part of power sales or that renewable resource developers should not be entitled to revenue from RECs. On the contrary, the MPUC is a strong proponent of attribute unbundling as an incentive for renewable power. Indeed, the Maine renewable portfolio requirement is designed to create such incentives. In contrast, Petitioners' effort to strip renewable attributes from existing pre-restructuring era QF contracts does nothing to promote renewable generation policy.

---

<sup>6</sup> See, Rule 2.6 of the NEPOOL GIS Operating Rules.

**G. Declaring the QF Attributes Were Transferred to Maine Utilities as Part of Pre–Restructuring QF Contracts Does Not Require Any Redetermination of Avoided Costs.**

Petitioners assert that arguments in favor of utility rights to QF attributes “rely in large part” on the view that estimates of long-term avoided costs incorporated into many QF contracts turned out to be substantially higher than actual avoided costs. Petitioners quote language out of context from the MPUC Investigation (discussed above and attached to this Protest) to support its assertion.<sup>7</sup>

Although it is true that, at least in Maine, estimates of avoided costs that are incorporated into long-term QF contracts turned out to be many times higher than the *utilities’* actual avoided costs of power, MPUC’s arguments in no way rely on this fact. The MPUC agrees that avoided cost determinations should not be revisited. Rather, MPUC’s point is that the avoided cost test assured QFs of prices unrelated to *their* costs and therefore, are not tied to compensation for any particular cost or attribute. For all the reasons discussed above, the MPUC disagrees with any assertion that a finding that utilities have the rights to QF attributes amounts in any way to a recalculation of avoided costs as asserted by the Petitioners.

**V.**

**CONCLUSION**

Whether Maine utilities own the rights to RECs associated with PURPA contracts that predate the unbundling of electricity is important to Maine and its ratepayers. Any

---

<sup>7</sup> The statement quoted by the Petitioners is merely an observation that QFs are already being paid prices that are substantially above-market. The primary point of the paragraph is that the failure of QFs to transfer GIS certificates to utilities (who would then make them available to the purchasers of the QF entitlements) would unfairly enrich the QFs at the expense of ratepayers and frustrate the goals of the Maine Legislature in its design of the State’s portfolio requirement.

ruling that utilities are not entitled to such RECs would require the MPUC to reconsider its support for the NEPOOL GIS, as well as its incorporation of the GIS into the MPUC portfolio requirement and disclosure rules.<sup>8</sup> A refusal by the MPUC to recognize GIS certificates, an action that is clearly within a state's regulatory authority, would place the parties in the position they would have been in prior to the development of attribute trading. Utilities would be able to market their QF entitlements as renewable or efficient power that satisfies Maine's portfolio requirement and that can be designated as such on disclosure labels. For all of the reasons stated above, the MPUC respectfully asks the Commission, if it rules on this matter, to determine that Maine utilities own the renewable attributes of power sold to them through QF contracts entered into prior to the date of electric restructuring in Maine.

Respectfully submitted,

MAINE PUBLIC UTILITIES  
COMMISSION

/s/ Harvey L. Reiter

By: \_\_\_\_\_  
Harvey L. Reiter  
John E. McCaffrey  
M. Denyse Zosa  
Stinson Morrison Hecker LLP  
1150 18<sup>th</sup> Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 785-9100

Lisa Fink  
Mitchell Tannenbaum  
State of Maine  
Public Utilities Commission  
242 State Street – 18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

Dated: July 10, 2003

Its Attorneys

---

<sup>8</sup> The MPUC did ultimately incorporate GIS into its portfolio and disclosure rules. However, because the QF attribute dispute was not resolved, the MPUC allowed for exception for the QF entitlements so that the purchaser may use the QF output for purposes of satisfying the portfolio requirement and for the disclosure label without possessing the associated GIS certificates. Although this satisfied the Maine Legislature's intent that the QF entitlements be eligible for Maine's portfolio requirement, it has resulted in a possibility of double counting attributes. This is unfortunate in that one of the primary goals of a GIS-type system is the prevention of the double counting of attributes.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document by first class mail upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 10th day of July, 2003

/s/ Harvey L. Reiter

\_\_\_\_\_  
Harvey L. Reiter

## **APPENDIX A**

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2002-506

September 6, 2002

PUBLIC UTILITIES COMMISSION  
Investigation of GIS Certificates  
Associated with Qualifying Facility  
Agreements

NOTICE OF INVESTIGATION

MAINE PUBLIC  
UTIL. COMM.

2002 SEP - 6 AM 10: 00

RECEIVED

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

**I. SUMMARY**

Through this Notice, we initiate an Investigation concerning the rights to GIS certificates associated with ongoing qualifying facility (QF) power purchase agreements (PPAs). The issue we address in this proceeding is whether QFs that have PPAs with utilities that predate the implementation of the NEPOOL GIS must transfer the GIS certificates to the utilities so they can be provided to the purchasers of the QF entitlements. We tentatively conclude that the utilities have the rights to GIS certificates associated with pre-existing QF contracts, but will provide interested persons with the opportunity to comment before making any final determination.

**II. BACKGROUND**

Over the last several months, NEPOOL has been working to implement a system that would allow for the unbundling of electricity attributes (e.g. fuel source, emission characteristics) from the energy commodity. This system, known as the Generation Information System or GIS, was developed to allow for a more efficient means for electricity suppliers in New England to satisfy certain state laws and regulations, such as portfolio and disclosure requirements. The system is also intended to allow for a more effective means by which regulators could verify compliance with such laws and regulations. The GIS works through the creation of "certificates" that represent the attributes of electricity, which can be traded separately from the energy commodity.

As a result of the development of the GIS, the Commission recently initiated an Inquiry, primarily to consider whether Maine's portfolio requirement (Chapter 311) and disclosure requirement (Chapter 306) rules should be amended to incorporate the use of the tradable certificates created pursuant to the GIS. *Inquiry into Modifications of Portfolio Requirement and Disclosure Rules*, Docket No. 2002-300 (June 4, 2002).

Based on the comments received in the Inquiry, we anticipate proposing amendments to both rules to incorporate the GIS as the means for compliance verification.<sup>1</sup>

Among numerous implementation issues raised in the Inquiry was whether QFs that have pre-existing PPAs with utilities should be required to transfer GIS certificates associated with their generation units to those utilities so that they can be provided to the entities that have purchased the QF entitlements pursuant to Chapter 307. Central Maine Power Company, Bangor Hydro-Electric Company and Constellation Power Source commented that the Commission should act to require QFs to transfer the certificates to the utilities who would then provide them to the purchasers of the entitlements. The Independent Power Producers of Maine commented that the issue is a private contractual matter. The Union of Concern Scientists urged that the Commission attempt to resolve the matter as soon as possible.

### III. DISCUSSION

Chapter 360 of our rules governs the relationship between utilities and QFs. Section 7(B) of the rule states that the Commission may at any time initiate an investigation of any matter relevant to the provisions of the Chapter. We hereby initiate this Investigation, pursuant to 35-A M.R.S.A. § 1303 and Chapter 360, to consider whether utilities that are purchasing energy from QFs under pre-existing PPAs are entitled to the GIS certificates associated with the QFs generating units.<sup>2</sup>

We initiate this Investigation because the issue of the rights to the GIS certificates is crucial to our consideration of whether the GIS should be adopted for use in Maine. We would find it extremely difficult to make any final decision on the adoption of the GIS for purposes of our rules in the absence of a resolution of the issue of the rights to certificates associated with QF generation. Additionally, prompt resolution of the matter is necessary to eliminate market uncertainty regarding the status of the certificates. We thus intend to resolve the matter in this proceeding after input from interested persons. To facilitate the process, we present our preliminary views below. These views may change upon review of comments from interested persons.

We tentatively conclude that QF agreements to sell electricity to utilities pursuant to Chapter 360 include both the energy commodity and the attributes. Thus, our view at this time is that utilities that purchase power from QFs pursuant to PPAs that pre-date the GIS are entitled to the GIS certificates associated with the QF generation. Consistent with the basic intent of the Chapter 307 entitlement agreements, utilities would then provide the certificates to the entities that have purchased the QF entitlements. Accordingly, our inclination is to issue a declaratory ruling in this

---

<sup>1</sup> We are in the process of initiating a Notice of Rulemaking to amend the portfolio requirement rule (Docket No. 2002-494). We will begin the rulemaking process to amend the disclosure rule in the near future.

<sup>2</sup> Because the GIS is only applicable in the ISO-NE control area, this Investigation does not include QF transactions in northern Maine.

Investigation stating that purchases of QF power under Chapter 360 include purchases of the associated GIS certificates. Before making any final decision in this regard, however, we will provide interested parties the opportunity to comment.<sup>3</sup> Interested persons may file comments by September 20, 2002. Reply comments may be filed by September 27, 2002.

At the outset, we note that the GIS does not purport to determine any issues with regard to the rights to GIS certificates. Pursuant to the GIS Operating Rules (Rule 2.6), certificates are initially assigned to generating units, but this is explicitly done "without prejudice" to the entity that has the ownership rights to the certificates. Thus, the initial provision of certificates to the owners of generation units has no bearing on the ultimate issue of certificate ownership.

All QF contracts in Maine derive from the requirements of the federal Public Utility Regulatory Policies Act (PURPA), 16 U.S.C.A. 2601 *et seq.*, and from the State's Small Power Production Act (SPPA), 35-A M.R.S.A. § 3301 *et seq.* One of the primary purposes of these Acts was to encourage the development of renewable generation resources and efficient generation resources (cogeneration) by requiring utilities to purchase power from entities that satisfied certain qualifications (i.e. QFs). See 35-A M.R.S.A. §§ 3302, 3306.

The Commission promulgated Chapter 360 to implement the requirements of PURPA and SPPA. Chapter 360 contains detailed requirements for a generating unit to be designated a QF and thus obtain the right to sell power to utilities at certain prices. Ch. 360 § 2. Among these qualification requirements are fuel use or efficiency criteria. These are precisely the type of attributes that can now be represented by GIS certificates. It is only by virtue of the existence of these types of attributes that facilities are deemed QFs and utilities become obligated to purchase their power. The attributes are thus part of the essence of QF PPAs. Moreover, generating facilities are required to maintain the requirements for QF status, showing further that the attributes that make an entity a QF are an essential feature of the QF PPAs.

It is certainly true that the unbundling of electricity attributes was not contemplated when Chapter 360 was promulgated and the QF PPAs were signed. However, this does not change the fact that electricity attributes were a fundamental part of the QF transactions. The development and implementation of the GIS did not create the attributes; rather, the system simply allows for the trading of attributes separate from the energy commodity. The QF transactions were, in effect, a bundled sale of energy and attributes that at the time represented a single product. The adoption of a system that allows for unbundling does not transform the essential nature of QF PPAs as a "bundled" transaction into one that includes only the commodity. The restructuring of the electric industry presents an analogy to the situation raised by the creation of GIS certificates. Prior to restructuring, utilities sold electricity as a bundled

---

<sup>3</sup> We specifically seek comment on whether this issue has been addressed in other states.

product. After restructuring, electricity service was unbundled so that generation service and transmission and distribution service could be provided separately as distinct products. The act of unbundling electricity service did not in and of itself create any new product nor relieve utilities of pre-existing obligations to provide both components of electricity.<sup>4</sup>

The argument that the attributes are part of the QF transactions with utilities is further supported by the common understanding of what was being bought and sold during the Chapter 307 entitlement sales. During the Chapter 307 processes, utilities informed potential purchasers of the QF output that the offered power was renewable or efficient cogeneration that would satisfy Maine's portfolio requirement. There could be no question that the power being sold was intended to include the attributes of the QFs in addition to the energy commodity. No QF at the time of the Chapter 307 auctions disputed representations to this effect, which supports the common understanding that when an entity buys QF power its is buying renewable or cogenerated power.

Moreover, the purchasers of the entitlements understood they were obtaining attributes along with the energy and that the entitlements could be used to satisfy Maine's portfolio requirement. Any claim that the utilities do not have the right to the attributes of QF power would appear contrary to the entitlement purchasers legitimate expectations that they were buying power with certain attributes. As a consequence, if the entitlement purchasers do not obtain the certificates associated with the QF power, the Commission would be forced to consider recognizing the entitlements (without the use of certificates) as satisfying the portfolio requirement so as to avoid the inequitable frustration of legitimate expectations. If this occurs, to prevent the double counting of eligible resources, the Commission may not allow QF associated certificates to be used for any purpose in Maine. This would be an extremely unfortunate outcome in that it would negate much of the benefit to be derived from the GIS and jeopardize the use of the GIS in Maine.

The failure to transfer the certificates to the utilities could also, in our current view, unfairly enrich the QFs at the expense of ratepayers and frustrate the reasonable expectations of the Legislature in enacting the portfolio requirement. The QFs have received what turned out to be above-market prices by virtue of their status as either a renewable or cogeneration resource. Any attempt by a QF to sell certificates to entities other than the utility with which it has a PPA would provide extra profit to the QF by lowering the value of the utilities' entitlements. Because the proceeds from the entitlement sales are use to offset stranded costs, a lower value for the entitlements

---

<sup>4</sup> In addition to unbundling the components of electricity service, the Maine Restructuring Act also prohibited utilities from providing generation service. In recognition of the utilities' pre-existing obligation to provide bundled service pursuant to long-term discounted retail contracts, the Maine Legislature included a provision in the Act that maintained the benefit and burdens of such contracts by assuring that customers received both components of the recently unbundled product at the previously contracted prices. 35-A M.R.S.A. § 3204(10).



## **APPENDIX B**



Central Maine Power

(207) 623-3521

General Office, 83 Edison Drive, Augusta, Maine 04336

September 9, 1999

Mr. Dennis L. Keschl  
Administrative Director  
Maine Public Utilities Commission  
State House Station 18  
Augusta, ME 04333

RE: CENTRAL MAINE POWER COMPANY, Request for Approval of  
Request for Bids and Associated Waivers for Sale of Electric Capacity and  
Energy Pursuant to 35-A M.R.S.A. §3204(4) and Chapter 307 of the  
Commission's Rules and Regulations, Docket No. 99-349

Dear Mr. Keschl:

Enclosed for filing in the above-captioned proceeding, please find CMP's  
Amended Request for Approval of Revisions to Request for Bid Package.

Please give me a call at (207) 621-6546 if you have any questions or concerns.

Sincerely,

Richard P. Hevey  
Counsel

Encs.

cc: Public Advocate

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

CENTRAL MAINE POWER COMPANY,  
Request for Approval of Request for Bids  
and Associated Waivers for Sale of Electric  
Capacity and Energy Pursuant to 35-A M.R.S.A.  
§ 3204(4) and Chapter 307 of the Commission's  
Rules and Regulations

) Docket No. 99-349

)  
) September 9, 1999

)  
) AMENDED REQUEST FOR  
) APPROVAL OF REVISIONS TO  
) REQUEST FOR BID PACKAGE  
)  
)

---

On September 8, 1999, Central Maine Power Company ("CMP") filed a Request for Approval of Revisions to Request for Bid Package in this proceeding. CMP's proposed revisions were made necessary due to data received, or events occurring, since the original bid package was prepared.

One of the revisions set forth in CMP's September 8 filing was to place the Rumford Cogeneration Company Power Purchase Agreement in a new Category 6. In its proposed revisions, CMP proposed offering Category 6 to bidders with the stipulation that CMP could unilaterally terminate any Category 6 Entitlement Agreement on or before January 14, 2000, without any further obligation to the Buyer(s), in event that CMP was able to restructure the Rumford Cogeneration Company PPA on or before that date. Due to concerns raised by the Commission Staff, CMP has removed this stipulation from its proposed revisions. CMP will offer Category 6 to bidders on the same terms as any other category, except that no bids for other categories may be made contingent on being a winning bidder for Category 6.

Enclosed are copies of the revised pages to the RFB, including the cover letter that will be sent to potential bidders by Warburg Dillon Read. These revised pages differ from the September 8 filing only with respect to the issue described in the previous paragraph.

CMP would like to provide these revised materials to potential bidders as soon as possible, in order to allow potential bidders as much time as possible to evaluate the revised information. Therefore, CMP requests that the Commission approve these revisions as soon as reasonably possible.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard P. Hevey", with a long, sweeping flourish extending to the right.

Richard P. Hevey  
Attorney for  
Central Maine Power Company

**Warburg Dillon Read Letterhead**

September 9, 1999

Contact Name  
Title  
Company  
Address

Dear \_\_\_\_\_:

**SUBJECT: Revision 1 to Request for Bid Package, Sale of Capacity and Energy**

This package contains Revision 1 to the Central Maine Power Company (CMP) Request for Bid (RFB) package sent to you in early August. The revised pages enclosed with this letter reflect updates to energy and capability estimates due to data received, or events occurring, since the original bid package was prepared. The revisions affect categories 1, 2 and 4. New or revised text and numbers are indicated on each revised page. The revised pages should replace those in your original RFB documents.

One of the Category 2 cogeneration resources has been removed from Category 2 and put into a new category – Category 6. Please see the attachment to this letter for information on this Category.

Also enclosed with this letter is a diskette with the Bid Form Spreadsheets.

Lastly, please note that any Data Requests not already submitted should be submitted immediately, in order to insure a response in time for consideration. The last day for Data Requests is Friday, September 17<sup>th</sup>.

**Information Document and Appendix A**

The enclosed updates to the text and tables of the Information Document reflect the following:

- Updated estimates of energy and capability due to a recent restructuring of one biomass resource in Category 1.
- Updated estimates of installed capability for Category 1, due to more recent data for some of the hydro resources.
- Updated estimates of energy and capability for Category 2 due to one recent capability audit of a cogeneration unit, one contract restructuring, and the moving of one cogeneration resource to a new Category 6.
- Revised selected text in Sections 4 and 7 and updated estimates of energy and capability for Category 2, resulting from moving one cogeneration resource to a new Category 6.
- Updated estimates of Hydro-Quebec annual deliveries in Category 4.

## 4. SELECTED SALES PROVISIONS

### 4.1 Term

CMP is offering for sale its hydroelectric, biomass, waste-to-energy, cogeneration, nuclear and market electric capacity and energy contract Entitlements for the period March 1, 2000 through February 28, 2002, inclusive. The actual power purchase contracts and their obligations will remain with CMP. The power entitlement from Category 4 Hydro-Quebec ("HQ") Firm Energy Contract ("FEC") will be sold for its remaining term. The HQ FEC initial termination was expected to terminate August 31, 2000. However, that date has been extended in accordance with the terms of the HQ FEC in order to allow for delivery of deficiencies after that date. (The extension is to September 2004, but the current estimate for when the delivery of deficiencies will be completed is August 2001.) The buyer for the Category 4 Entitlements will be entitled to all power remaining to be delivered under that contract.

### 4.2 Renewable Credit

It is expected (but not guaranteed) that the market value for power from renewable resources will be at a premium to other resources. Maine legislation contains a 30% renewable or efficient cogeneration requirement commencing March 1, 2000 for retail electricity sellers (see Section 3.2.1). All of the entitlements in Categories 1 (hydro and biomass resources) and the waste-to-energy entitlements in Category 2 meet the requirements for renewable resources. The cogeneration entitlements in Categories 2 and 6 are expected to meet the requirements for efficient cogeneration, based upon representations made by the six facilities. As allowed in MPUC Rules, Chapter 311, buyers of Entitlements from Categories 1, 2 and 6 will have the right to claim the capacity and energy as derived from a "renewable resource" or "efficient cogeneration". The buyers may also have the right to claim some purchased Entitlements as renewable under similar legislation in other states. The total annual energy supply in 1998 from Categories 1, 2 & 6 were approximately 446,426 MWh, 1,196,668 MWh, and 635,766 MWh, respectively.

### 4.3 Entitlements

CMP will transfer all the NEPOOL products it receives from the undivested assets being sold. These Entitlements supply significant amounts of three of the seven NEPOOL products: Installed Capability, Operable Capability and Energy. The amount of these Entitlements sold will be the actual amount available from the Undivested Assets. The total energy production for these Entitlements, over the last ten years, is provided in the Historical Annual Deliveries summaries set forth in Section 7. Many of the contracts have specific performance provisions which also include damages. Any damages that CMP collects as a result of a default under the terms and conditions of a power purchase contract will be shared on a pro rata basis with the

**7. ENTITLEMENT DESCRIPTIONS BY CATEGORY**  
(INCLUDING HISTORIC AND REFERENCE PERIOD INSTALLED CAPABILITY AND ENERGY)

The six Categories are:

1. Hydroelectric and biomass sources which qualify as a renewable resource under 35-A M.R.S.A. § 3210;
2. Cogeneration and Waste-to-Energy which qualify as either an efficient cogeneration resource or a renewable resource under 35-A M.R.S.A. § 3210;
3. Nuclear power entitlements
4. Hydro-Quebec entitlements
5. Market Electric Energy and Capacity
6. Rumford Cogeneration

**7.1 Categories 1, 2 and 6 - Renewable Resource Entitlements**

In Categories 1, 2, and 6 Central Maine Power is offering for sale the Entitlements in ~~36~~<sup>36</sup> facilities that are classified by the Maine State Legislature as "eligible resources" under 35-A M.R.S.A. §3210.<sup>1,2</sup> As described in Section 3.2.1., Maine is requiring that 30% of a competitive generation provider's portfolio or a standard offer energy provider's portfolio sold in Maine must come from "eligible" resources. "Eligible resources" includes both "renewable resources" and "efficient" resources. The estimated Installed Capability provided by these facilities ranges from ~~327 to 350~~ megawatts, with an estimated annual energy of 2.3 million megawatt-hours. These eligible resource Entitlements are segregated into Categories 1, 2 and 6, as described above.

**7.1.1 Installed Capability Credit for Qualifying Facilities**

The current NEPOOL rules for determining the Installed Capability (ICAP) rating of generators are documented primarily in NEPOOL Criteria Rules and Standards No. 4 (CRS 4). In addition, certain rules relating exclusively to the determination of ICAP ratings for Qualifying Facilities are contained in NEPOOL CRS 26. NEPOOL and ISO-New England have amended and reformatted the outdated ICAP audit provisions contained in these CRS's to conform to NEPOOL's new market structure. The new ICAP rating and audit provisions are documented in

<sup>1</sup> 13.8 MW of biomass capacity has the option to deliver from the market starting in 2001.

<sup>2</sup> The 196 MW of cogeneration capacity represented in the 6 cogen facilities in Category 2 are expected to meet the efficiency requirement in the definition of "efficient resource."