STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2012-00466

January 31, 2013

UNION ATLANTIC ELECTRICITY &
UNION ATLANTIC HYDRO, LLC
Petition for an Advisory Ruling
Regarding Interpretation of Chapter 313

ADVISORY RULING

WELCH, Chairman; LITTELL and VANNOY, Commissioners

I. SUMMARY

Through this Advisory Ruling, we conclude that the lessees and sub-lessees of energy generation facilities and assignees of lease interests in energy generation facilities under the factual circumstances described below do not satisfy the ownership or legal interest requirement of our customer net energy billing rules (Chapter 313) and are, therefore, not eligible for net energy billing arrangements with the utility.[1]

II. BACKGROUND AND COMMENTS

A. Petition for Advisory Ruling

On September 18, 2012, Union Atlantic Electricity (UAE) and Union Atlantic Hydro LLC (UAH) (collectively, Petitioners) filed a Petition for an Advisory Ruling Regarding Interpretation of Chapter 313 or for Waiver as it applies to UAE's interest in various small hydroelectric facilities in the service territory of Central Maine Power Company (CMP), and as it applies to the interests of its wholly-owned subsidiary, UAH, in various small hydroelectric facilities also located in CMP's service territory. UAE and UAH request that the Commission:

1. Determine that UAE, UAH and their lessees, sub-lessees and assigns are eligible for net energy billing contracts with CMP under Chapter 313 [2];

[1] Commissioner Littell dissents from this ruling. See attached Dissenting Opinion.

[2] Net energy billing is a utility metering and billing practice in which a customer is billed on the basis of "net energy" over a billing period. Net energy is the difference between the kilowatt-hours a customer consumes and the kilowatt-hours produced by the customer's generation from a renewable generating facility. Thus, under net energy billing, a customer's generation is used to offset the customer's prior or future usage.

2. Determine that the instruments that UAE and UAH are using to lease, sublease and assign facilities comply with Chapter 313 in rendering the relevant lessees, sub-lessees and assigns eligible for net energy billing (or in the alternative, determine how said instruments need to be modified to permit such eligibility);

3. Issue an order that CMP immediately act to provide UAE, UAH and their lessees, sub-lessees and assigns with a standard net energy billing agreement and negotiate with said parties in good faith to reach an agreement on a contract;

4. Issue an order making any net energy billing agreements entered into pursuant to the Petition retroactive to the effective date of the relevant lease, sublease or assignment agreement, crediting the relevant customers or shared ownership customers with any generation from relevant facilities from that date forward;

5. Waive any requirement of Chapter 313 that the Commission deems not to have been met by UAE, UAH or their lessees, sub-lessees or assigns, in order to afford the above-described relief.

In this Advisory Ruling, we address only the issue of whether UAE, UAH and their lessees, sub-lessees and assigns are eligible for net energy billing contracts with CMP under Chapter 313.[3]

1. Factual Statement

The Petition states the following facts related to the request for an advisory ruling. UAE is a Maine corporation formed in April 2012 and expects to offer a number of energy-related products and services, including development of distributed renewable energy generation and provision of competitive electricity supplier services. UAE has obtained a license from the Commission as a competitive electricity provider, is an active NEPOOL participant, and has received market-based rate authority from FERC.

UAE has recently entered into long-term leases with a number of hydroelectric facilities in Maine, all within CMP's service territory. UAE's wholly owned subsidiary UAH has entered into a purchase and sale agreement to acquire a hydro project in CMP's service territory. UAH expects to

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[3] On October 1, 2012, the Commission issued an opportunity to comment, requesting interested persons to submit comments on the issues raised in the Petition and allowing the Petitioners an opportunity to file reply comments.

lease to CMP customers the facilities UAH owns and UAE expects to sublease or assign rights and obligations to CMP customers in facilities UAE leases.

According to the Petition, the UAE leases are long-term (ten years or longer) and the lease payments are the higher of a per-kilowatt hour payment or the facility's actual costs. UAE has responsibility for facility costs, and each of UAE's leases gives it exclusive ownership of the facility's net output.

2. Legal Analysis

The Petitioners present a legal analysis that the interests of UAE, UAH, and their lessees, sub-lessees and assigns in the hydro facilities qualify for net energy billing under Chapter 313 of the Commission's rules. The Petitioners state that, as required by Chapter 313, each facility will be used primarily to offset part or all of the customer's or shared ownership customers' own electricity requirements, and the customers' will have a legally enforceable ownership interest or legally enforceable rights and obligations in an eligible facility as required by Chapter 313.

The Petitioners state that, whether the individual or entity seeking to engage in net energy billing is a "customer" or a "shared ownership customer," there are several forms of legal interest apart from fee ownership that render the customer eligible for net energy billing. The customer need only have "legally enforceable rights and obligations" in the facility. The Petitioners state that the Commission explicitly intended this language to allow for other legal arrangements (such as a technical lease arrangement) that mirror legal ownership in operation. Order Adopting Provisional Rule and Statement of Factual and Policy Basis, Docket No. 2008-410, at 5 (Jan. 8, 2009) (Order Adopting Provisional Rule).

The Petitioners cite to a previous Commission advisory ruling that established that net energy billing rules do not require a customer to have an actual ownership interest in an eligible facility, *G.M. Allen & Sons, Endless Energy Corporation, Request for an Advisory Regarding a Net Energy Billing Contract*, Docket No. 2001-259 (June 12, 2001) (*G.M. Allen & Sons)*. Petitioners state that *G.M. Allen & Sons* stands for the proposition that interests such as power purchase agreements and leases are sufficient to qualify a customer for net energy billing.

Finally, the Petitioners state that the Commission's stated concern in the Order Adopting Provisional Rule about sham transactions that more closely resemble a retail sale than an ownership arrangement applies solely to shared ownership customers and not to instances where a single customer seeks to engage in net billing, noting that *G.M. Allen & Sons* involved a retail sale. *Order Adopting Provisional Rule* at 6.

B. CMP Comments

On October 15, 2012, CMP filed comments stating that the Petitioners' proposed subleasing arrangement does not qualify for net energy billing under Chapter 313, either as individual customers or shared ownership customers, because the customers will not have the requisite "ownership interest" in the renewable facility. CMP states that the arrangements are effectively power sales arrangements with the customers paying a market price for electricity, trued up for annual facility costs. Other than the fact that it is called a lease, CMP argues that there is nothing to differentiate this transaction from any other power sales transaction in that there are set quantities and set prices and the customers have no rights or obligations in the facilities other than a right to receive the output of the facility. In CMP's view, providing a net energy billing subsidy to the transactions proposed by the Petitioners would be inconsistent with the intent of Chapter 313, poor public policy and an unfair shifting of dollars from one customer to CMP's general body of customers.

Finally, CMP argues that, in the event that the Commission authorizes any net energy billing arrangements proposed by the Petitioners, the Commission should deny the request to make any such net energy billing agreements retroactive to effective date of the relevant lease, sublease or assignment agreement. Based on the Petition, there appears to be only one existing sublease entered into by UAE, which is the sublease for the Wight Brook facility with Coffee by Design, having an effective date of November 1, 2012. CMP states that retroactive application of any netting requirements would not be proper in this case in that CMP has not yet received a net energy billing request from Coffee by Design, who would be the customer and CMP's counterparty in such a net energy billing arrangement. Likewise, CMP has not received any other specific net energy billing proposals from UAE.

C. Petitioners' Reply

On October 24, 2012, the Petitioners' submitted a reply to CMP's comments, stating that CMP fails to recognize that the "individual customer" route requires fewer indicia of "ownership" than the "shared ownership customer" route. The Petitioners argue that the requirement of an "ownership interest" is reserved for shared ownership customers only, pursuant to section 3(B)(1) of Chapter 313, while an "individual customer," under section 3(A), is eligible if it merely "owns or has the legal rights to energy generated using an eligible facility." Thus, the Petitioners argue that ownership is not necessary if the customer has the legal rights to the energy generated by an eligible facility, and that under the power purchase agreement and the Petitioners' leases, sub-leases and assignments, the customers have the legal rights to energy generated in eligible facilities.

In particular, the Petitioners state that the sublease and assignment agreements are different from ordinary power purchase agreements and share a number of common features that make them more "ownership-like" than power purchase agreements: (1) comparatively long term; (2) unusually restrictive termination provisions; (3) direct responsibility by sublessees or assignees for facility costs; and (4) a high level of control over major capital expenditures and ordinary course operation and maintenance expenses. The Petitioners state that ordinary retail customers do not have title to specific facility output, have obligations to pay the costs of facility maintenance, operation and capital expenses, or experience any of the indicia of ownership that UAE's sublessees and assigns experience.

IV. RULING

For the reason discussed below, we conclude that the lessees, sub-lessees and assigns described in the Petition for Advisory Ruling do not satisfy the ownership or legal interest requirement of our customer net energy billing rules (Chapter 313) and are, therefore, not eligible for net energy billing arrangements with the utility.

A. Net Energy Billing Rules

Chapter 313 of the Commission's rules governs net energy billing in Maine. Chapter 313 allows individual customers or "shared ownership" customers to elect net energy billing against the output of eligible renewable facilities that they own or for which they have legal rights. Chapter 313, section 3 (A) and (B). There is no dispute that the hydro facilities listed in the Petition are eligible facilities under the rules. The sole issue presented by the Petition is whether the described assignments, leases and sub-leases will result in the end-use customers having the requisite ownership or legal interest in the facilities as required by the Rule.

Chapter 313, section 3 (A) and (B) provide:

> A. **Customer Qualification**. Any customer of a transmission and distribution utility that *owns or has the legal rights* to energy generated using an eligible facility may elect net energy billing.
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> **********
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> B. **Shared Ownership Customers Qualification**. Shared ownership customers of a transmission and distribution utility that *own or have the legal rights* to energy generated using an eligible facility may elect net energy billing….

Emphasis added. Chapter 313, section 2(H) contains a definition of "ownership interest" which states:

H. **Ownership Interest**. "Ownership interest" means a legally enforceable ownership interest or legally enforceable rights and obligations in an eligible facility.

The term "ownership interest" is used in the context of shared ownership net energy billing. Chapter 313, section 2(I) specifies that:

I. **Shared Ownership Customers**. "Shared ownership customers" mean customers that have an ownership interest in an eligible facility.

In addition, Section 3(B)(1) provides:

1. **Ownership Interest**. Shared ownership customers must have a legally enforceable ownership interest or legally enforceable rights and obligations in the eligible facility under which the customers have joint responsibility for the costs of the shared ownership facility and have the rights to the benefits of the output of the shared ownership facility in proportion to the cost responsibilities.

B. Requisite Ownership or Legal Interest

In supporting their position, the Petitioners interpret the facility interest requirement in Chapter 313 as less strict for individual customers than for shared ownership customers, with the rule requiring only a legally enforcement interest in the output of the generation facility for an individual customer. The Petitioners support this position by noting that term "ownership interest" is only used in the definition of "shared ownership customers." Although this is the case with the language of the rules, we disagree with the interpretation that the required interest is different for individual customers then for shared ownership customers. We can discern no rationale for such a difference in qualification among individual customers and shared ownership customers. In both cases, the purpose of the required interest in the facility is the same--to require either ownership of the facilities or an arrangement that is akin to an ownership interest. This view is consistent with the actual qualification provisions for individual and shared ownership customers contained in Chapter 313, sections 3(A) and (B), which contains the same requirement—that customers own or have legal rights to energy generated by the eligible facility.

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In January 2009, the Commission, pursuant to Resolve 2007, ch. 183, submitted a Report on Net Energy Billing (2009 Report) to the Legislature. The discussion in that Report is helpful in determining the purpose and intent of the "ownership interest" requirement. At the time of the 2009 Report, the Commission's net energy billing rules applied to individual customers and facilities "located on or in the vicinity of the customer's premises" (referred to as the "proximity requirement") (section 3(C) of the then exiting rule). The 2009

Report included a discussion of shared ownership of eligible facilities in which the Commission stated:

> A modification of net energy billing to allow for group or shared ownership does not suggest or require a change to the basic structure and intent of net energy billing. Thus, the annualized approach is consistent with shared ownership net energy billing as a means to promote the installation and use of facilities for the customer group's own use, rather then for sale into the markets….

2009 Report at 20.

In addition, as also required by the Legislative Resolve 2007, ch. 183**,** the Commission submitted provisional rules that would allow for shared ownership net energy billing. In its January 8, 2009 Order Adopting Provisional Rule, the Commissioned stated that other than the elimination of the facility proximity requirement, the basic structure of the current rules have been incorporated into the shared ownership net billing provisions. Order Adopting Provisional Rule at 1. Specifically, the Commission stated:

> The provisional rule maintains the existing qualification provision for a customer and clarifies that a customer must either own or have legal rights to the output of the facility.
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> **********
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> The intent of the language is to allow for arrangements that are akin to ownership (such as the right to all the output of a particular facility).

Id.

Although the term "ownership interest" is used in Chapter 313 only with respect to "shared ownership customers," sections 2(I) and 3(B)(1), as stated above, the qualification language for both customers and shared ownership customers is the same and requires either ownership or legal rights to the generated energy. Ch. 313, section 3(A) and (B). Thus we conclude that the intent of the rule is that the extent of the ownership or legal interest in the eligible facility is the same regardless of whether there is an individual customer or shared ownership customers.

C. <u>Purpose of Ownership or Legal Interest Requirement.</u>

As stated above, the Commission's rules do allow for the eligibility of interests in renewable facilities that are not strictly legal ownership interests. In its Order Adopting Provisional Rule, the Commission explained:

> The definition is broader than legal ownership to allow for flexibility to include other legal arrangements that are similar in operation to legal ownership.
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> **********
>
> The provisional rule specifies that the shared ownership customers must have a legally enforceable ownership interest or rights and obligations in an eligible facility under which the customers have joint responsibility for the costs of the shared facility and have the rights to the benefits of the output of the facility in proportion to the cost responsibilities. This provision is intended to exclude arrangements that can be considered sham transactions that more closely resemble a retail sale than an ownership arrangement.

Id at 5-6. As stated above, the ownership or legal interest requirements are the same for individual customers and shared ownership customer and are intended to allow for arrangements that are akin to an ownership interest, rather than arrangements that are essentially power purchase agreements.

D. Petitioners Leases, Sub-Leases and Assignments.

The question raised by the Petition for Advisory Ruling is whether a customer that will obtain electricity through the Petitioners' leases, subleases and assignments as described above will have the requisite ownership or legal interest in the eligible facilities. We agree with CMP that they do not.

We conclude that the arrangements as described in the Petition are essentially power purchase agreements that are not akin to ownership arrangements. Although the transactions are characterized as leases, sub-leases or assignments, the transactions are, in effect, power sales to end-use customers.[4] There is a set quantity (the entire output of the facility) and a set price, rather than an obligation for the costs of operation.[5] The lessees, sub-lessees and assigns would not have a share of the profits from the hydro-electric

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[4] The terminology use to describe the agreements (e.g. a lease as opposed to a power purchase agreement) cannot be outcome-determinative. The underlying actual rights and obligations of the parties are the primary factors for consideration.

[5] The pricing provision that requires payment of the higher of 105% of market costs or the costs of operation does not, in our view, provide persuasive support for the proposition that the arrangement involves a genuine ownership interest, because the operating costs of a hydro-electric facility will likely be lower than market prices and thus the costs of operation will likely never be the basis for setting the price.

facility nor other indices of ownership, such as a right to obtain the value of the output of the facility, rather than a payment based on an external index to market prices. The lessees, sub-lessees and assigns would have no rights or obligations in the hydro-electric facilities other than a right to receive the output of the facility and the obligation to pay for that output. Moreover, either party can terminate the agreements without further responsibilities or obligations. .

We note that there are several differences between the Lease Agreement between UAH and Small Hydro East Regarding Wright Brook and the Sublease Agreement between UAH and Coffee by Design regarding the output from the Wright Brook facility. Coffee by Design is the retail customer that would have a net energy billing arrangement with CMP. The Lease Agreement has a term of 30 years, while the Coffee by Design sublease agreement is for 10 years. The Sublease Agreement allows both parties to cancel the Sublease upon 180 days notice, and under the Agreements, UAH, not Coffee by Design, will have the obligation to operate, maintain and obtain insurance with respect to the facility. Although these differences provide additional support for the conclusion that the sublease arrangement with Coffee by Design is essentially a power purchase agreement, we find that even the lease arrangements suffer from essentially the same deficiencies in indicia of ownership as the subleases.[6]

The Petitioners cite to *G.M. Allen & Sons* to support their position that the Commission rules allow for net billing in the case of a power purchase agreement. In *G.M. Allen & Sons*, a wind energy developer constructed a 50-kW windpower project on the premises of G.M. Allen & Sons' blueberry processing facility, pursuant to a lease of land. *G.M. Allen & Sons* at 1-2. Specifically, the developer leased a 30-foot by 30-foot lot on the premises to build the turbine to serve the needs of the processing facility, and agreed to provide all the power generated from the facility to G.M. Allen & Sons. *Id.* at 3. Although the precise obligations of the end-user are not specified in the advisory ruling, the ruling does specify that the generation facility is located on the customer's premises and "dedicated" to offset the customer's electricity requirements. *Id.* We also note that the *GM Allen and Sons* ruling was made before the 2009 amendments to the net energy billing rules that clarified the required ownership or legal interest.

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[6] On December 11, 2012, CMP submitted supplemental comments in this proceeding, stating that the UAE/UAH hydro facilities are currently committed to participate in the FCM and must therefore make its energy available in the ISO market. As a result, CMP argued that UAE/UAH would be credited twice for the same energy if allowed to net energy bill. On December 16, 2012, the Petitioners filed a response disputing CMP's argument. Because we rely on the provisions of the Lease and Sublease agreements to conclude that the arrangement is not eligible for net energy billing, we do not need to address the argument presented by CMP in its supplemental comments.

IV. CONCLUSION

For the reasons stated above, we conclude that the lessees, sub-lessees and assignees, under the facts presented by Petitioners, are not eligible for net energy billing arrangements under Chapter 313 of our rules. We note that this Advisory Ruling is based on the specific contractual relationships set forth in the Petition and should not be considered as a determination that all leases and assignments arrangements are not eligible for net energy billing. As specified in Chapter 110, § 7(A)(4) of our procedural rules, this advisory ruling shall not constitute res judicata or legal precedent with respect to the issues raised before the Commission. [7]

Dated at Hallowell, Maine, this 31st day of January, 2013.

BY ORDER OF THE COMMISSION

/s/ Karen Geraghty
Karen Geraghty
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Vannoy

COMMISSIONER VOTING AGAINST: Littell

[7] We also note our intent to reopen Chapter 313 to clarify more precisely the ownership/legal interest requirement of the rule.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

Dissenting Opinion
Of
Commissioner David Littell

I dissent from the advisory ruling issued by the majority of the Commission. Union Atlantic Electricity (UAE) is asking for the Commission's guidance on how to structure lease and sub-lease arrangements to comply with Chapter 313, Customer Net Energy Billing. Although I acknowledge the issues presented are a close call because they turn on application of our rules to the facts presented, I find the lease is a real lease as a matter of law and therefore constitutes sufficient ownership under Chapter 313. I further find that the leases and sub-lease comply with the Chapter 313 ownership/legal interest requirement and would so advise this small company. Lastly, if I were to find that the leases and subleases are not eligible for net energy billing, I would provide guidance back to the company on whether and how a sublease could qualify in an advisory mode.

The sublease between UAE and Coffee By Design submitted for our review is more than a power purchase agreement, it is a real sublease. While UAE, the lessor to Coffee By Design is designated as the operator of the facility, Coffee By Design is not restricted in its control of the hydro-electric facility. Indeed under the sublease, Coffee By Design has the full legal rights that a sublease enjoys at law.

There is no restriction on Coffee By Design's liability. While UAE is required to maintain insurance, there is no requirement that such insurance name Coffee By Design as co-insured or a third-party beneficiary. Thus, if some accident occurs on site, Coffee By Design would only have potential indemnity claims against UAE. Coffee By Design would likely be named in tort suit and need to rely on its own insurance to defend the suit. The typical protections that turn a sublease into a truly passive investor akin to a limited partner are not present here. By way of guidance requested by UAE, if the subleasee's liability was more limited as well as control of the site than in the arrangements presented, I would tend to agree with the majority Advisory Ruling conclusion that this is really a power purchase arrangement rather than a lease. In other words, the subleasee having legal control and liability is important to my conclusion that this is a real sublease and real ownership interest.

The lease is terminable on 180 days and liability for lease payments is limited. This is closer to a lease terminable at will. However, this does support the Advisory Ruling conclusion that this is not a typical commercial lease. In my view, it is a real sublease and nothing suggests this is a sham transaction or the sublease is ineffective as a legal instrument. I do not agree that the provisions that predicate lease payments on the price of energy and the cost of operating and maintaining the facility allows us to put aside the other attributes that indicate it is indeed a real lease at law.

Chapter 313, Section 3 appears to distinguish the qualifications for individual customers seeking to enter into net energy billing arrangements from

shared ownership arrangements. Section 3(A) of the rule provides that for individual customers:

> Any customer of a transmission and distribution utility that owns or has the legal rights to energy generated using an eligible facility may elect net energy billing.

Section 3(B) in contrast has a more detailed and longer qualification requirement for shared ownership including that "Shared ownership customers must have a legally enforceable ownership interest or legally enforceable rights and obligations in the eligible facility under which the customers have joint responsibility for the costs of the shared ownership facility…."

The arrangements presented in this proceeding appear to satisfy both of the prongs of Section 3(A). Coffee By Design owns and has rights to the energy generated from the facility. Because Section 3(A) is disjunctive, I would find that it satisfies both requirements whereas only one is necessary for qualification.

In any event, I suggest the Commission should revisit Chapter 313 to clarify its intent in light of this Advisory Ruling. That said, the parties requesting the advisory opinion relied upon the current Chapter 313 language in structuring their transactions and I would apply the rule's literal terms in fairness to those parties until the rule is changed.