

November 12, 2008

PUBLIC UTILITIES COMMISSION  
Energy Infrastructure Corridors  
(Chapter 886)

ORDER ADOPTING RULE  
AND STATEMENT OF FACTUAL  
AND POLICY BASIS

REISHUS, Chairman; VAFIADES and CASHMAN, Commissioners

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## I. SUMMARY

Through this Order, we adopt rules to comply with recently enacted legislation that directs the Commission to adopt by rule, standards and procedures to implement a law that provides for the designation of energy infrastructure corridors and the development of infrastructure within those corridors.

## II. BACKGROUND

During its 2008 session, the Legislature enacted an Act To Protect Maine's Energy Sovereignty through the Designation of Energy Infrastructure Corridors and Energy Plan Development (Act). P.L. 2007, ch. 656. Part A of the Act (codified at 35-A M.R.S.A. § 122) authorizes the Commission to designate "energy infrastructure corridors" and to issue certificates for the development of energy infrastructure within the designated corridors.<sup>1</sup> The Act also grants and limits certain rights of eminent domain with respect to energy infrastructure corridors and authorizes the Commission to exempt, under certain circumstances, development within designated corridors from municipal zoning ordinances and Land Use Regulation (LURC) regulations.<sup>2</sup>

The Act requires that the Commission adopt by rule, standards and procedures to implement the corridor law and specifies that such rules are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. 35-A M.R.S.A. § 122 (9).<sup>3</sup>

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<sup>1</sup> Part A of the Act is repealed on July 30, 2011. 35-A M.R.S.A. § 122(10).

<sup>2</sup> Sections A-1 and A-2 of the Act direct the Commission to adopt by rule, procedures to govern requests for exemptions from municipal ordinances or LURC regulations. The Commission has adopted such rules in a separate rulemaking proceeding. *Land Use Regulation Exemptions (Chapter 885)*, Docket No. 2008-226 (Aug. 19, 2008).

<sup>3</sup> On April 23, 2008, the Chairs of the Utilities and Energy Committee sent a letter to the Commission and the Department of Environmental Protection (DEP) that references the enactment of the Act and asks the two agencies to examine specific

### III. RULEMAKING PROCESS

On August 19, 2008, we issued a Notice of Rulemaking (NOR) and proposed rule that would implement the energy infrastructure corridor law. Consistent with rulemaking procedures, the Commission provided interested persons with the opportunity to provide written and oral comments on the proposed rule. The following interested persons commented on the proposed rule: Central Maine Power Company (CMP), Bangor Hydro-Electric Company (BHE), Maine Public Service Company (MPS), the Public Advocate, and Maine Audubon and the Natural Resources Council of Maine (MA/NRCM).

### IV. RULE PROVISIONS

The Act includes extensive provisions regarding the standards and procedures to be used in implementing the Act. For this reason, much of the language in the adopted rule mirrors the language contained in the Act.

#### A. Purpose (Section 1)

As stated in the adopted rule, the purpose of the rule is to establish standards and procedures to govern the designation and use of energy infrastructure corridors. No one commented on this provision and it is unchanged from the proposed rule.

#### B. Definitions (Section 2)

Section 2 of the adopted rule contains definitions of terms used throughout the rule. Most of the defined terms are contained within the definitions section of the Act. The adopted rule adds definitions of the "Commission" and "person." All the

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standards in support of greenhouse gas reduction with a report back to the Committee by March 15, 2009. The Commission, in conjunction with DEP, is considering such standards through an Inquiry. *Inquiry into the Adoption of Standards in Support of Maine's Goals for Greenhouse Gas Reduction and Participation in the Regional Greenhouse Gas Initiative*, Docket No. 2008-249. Due to the comprehensive nature of the Act and the requirement that a report be provided to the Committee, the Commission is reluctant to include in the rule any additional standards suggested by commenters in the Inquiry. We will amend the rule if, after the report is submitted, we are directed to do so through Legislative action.

definitions in the adopted rule are self-explanatory.<sup>4</sup> No one commented on this section and it is unchanged from the proposed rule.

C. Designation of Energy Infrastructure Corridors (Section 3)

Section 3 of the adopted rule contains provisions governing the major substantive rulemaking process required for designating a corridor, the requirements for a petition to designate a corridor, consultation and notification requirements, and standards for corridor designations.

1. Rulemaking Process (Section 3(A))

As required by the Act, the adopted rule specifies that the Commission may only designate an energy infrastructure corridor through a major substantive rulemaking process, and that process must allow for two sets of written comments and examination of the petitioner at the rulemaking hearing. The adopted rule also states that the Commission must address all written comments submitted during the process and a designation of a corridor must be based on substantial evidence in the rulemaking proceeding. No one commented on these provisions and they are unchanged from the proposed rule.

2. Petitions for Corridor Designation (Section 3(B) (C) (D) (E))

Subsections B, C, D and E contain provisions governing who may file petitions, the contents of the petitions, the dismissal of petitions, and areas that may not be designated as energy infrastructure corridors.

As required by the Act, subsection B specifies that a petition to initiate a rulemaking process to designate a corridor may only be filed by the Public Advocate, the Office of Energy Independence and Security (OEIS) or an "interested person." As stated in the Act, interested person is defined as an entity with the financial and technical capability to engage in the development of energy infrastructure. No one commented on this provision and it is unchanged from the proposed rule.

Subsection C specifies the information that must be included in a petition for corridor designation. This information includes a detailed map of the proposed corridor, a statement of the intended use of the corridor, a demonstration that the geographical area of the proposed corridor is no greater than necessary to achieve the purpose of the designation, and a demonstration that the designation would satisfy the standards for designation as specified in section 3(G) of the rule. The Public

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<sup>4</sup> The definition of "energy infrastructure" explicitly excludes "generation interconnection transmission facilities" (often referred to as "generator leads"). However, section A-4 of the Act requires the Department of Environmental Protection (DEP) to examine whether such facilities should be included in the definition and to provide a report of its findings to the Legislature by March 2009.

Advocate noted that it would be useful if the Commission provided further specificity or guidance on acceptable ways to demonstrate financial and technical capability, and how to show that the geographical area of the proposed corridor is no greater than necessary. Because of the variety of purposes for which a corridor may be designated, potential differences in infrastructure and changes in technology, it is likely to be counterproductive to attempt greater specificity or guidance in the rules as suggested by the Public Advocate and we therefore decline to do so. MA/NRCM recommended that that the contents of the petition include a description of the alternatives that were considered. We agree that such a provision could be useful and have added language to the adopted rule.

As required by the Act, subsection D states that the Commission shall dismiss a petition for corridor designation if it determines that sufficient information to support a corridor designation has not been submitted or the petition was not filed by the required entities under subsection B (i.e., the Public Advocate, OEIS or an “interested person”). No one commented on this provision and it is unchanged from the proposed rule.

Finally, the Act specifies that a designated corridor may not include specified tribal lands, park lands or federally owned land. Subsection E contains the legislatively required prohibitions. MA/NRCM proposed that the designated prohibitions in the rule be expanded to include public lands and wildlife management areas similar to park lands. Because the Act is so comprehensive in its provisions, we are reluctant to expand on the statutory list of prohibitions. However, in any proceeding to designate an energy infrastructure corridor, parties can argue against designation on the grounds that the corridor includes public lands or wildlife management areas similar to parks and should therefore be protected from infrastructure development.

### 3. Consultation and Notification (Section 3 (F))

The Act requires that, during the corridor designation process, the Commission notify, consult with and accept comments from a variety of entities. These are:

- the DEP;
- state and federal energy and natural resource protection agencies;
- municipalities in which the proposed corridor would be located;
- the LURC if any portion of the proposed corridor is located in unorganized or deorganized territories; and
- affected tribes whose lands are not exempted under section 3 (E).

The Act also states that the Commission shall notify, consult and accept comments from “appropriate state and federal energy and natural resource protection agencies, as specified by rule....” The proposed rule stated that the Commission would notify, consult and accept comments from “State and federal energy and natural resources protection agencies that have jurisdiction over or oversight

responsibilities concerning environmental protection, land use, or development of energy infrastructure within the area of the proposed corridor.” The NOR sought comment on whether the rule should specify individual agencies and, if so, what specific State and federal agencies should be explicitly included in the rule. To the extent that agencies are specified in the rule, the NOR stated that the following State agencies appear appropriate: Department of Conservation, Bureau of Parks and Lands, State Planning Office, Department of Inland Fisheries and Wildlife, Department of Agriculture, and Department of Marine Resources.

CMP commented that a specific list of agencies should be included in the rule to provide for a clear and efficient notification and comment process. CMP suggested that the State Historic Preservation Office should be included in the list and suggested the following federal agencies: Army Corp of Engineers, the US Fish and Wildlife Service, the Environmental Protection Agency, and the National Marine Fisheries Service if the corridor is located along the coast. We agree that including a list of agencies in the rule would improve the notification process and that an inclusive list would be preferable. Accordingly, the adopted rule contains all of the agencies listed in the NOR and those suggested by CMP.

BHE commented that the list of entities that will be notified should include the transmission and distribution utility in whose service territory a corridor is proposed to be located. We agree and have made the change to the adopted rule.

#### 4. Designation Standards (Section 3 (G))

Subsection G incorporates the Act’s required findings that must be made for the designation of an energy infrastructure corridor. As specified in the Act, the adopted rule provides that the Commission may only make a corridor designation if it finds that infrastructure development within the corridor is reasonably likely to be in the public interest, taking into account whether the corridor will:

- encourage collocation of energy infrastructure;
- enhance the efficient utilization of existing energy infrastructure;
- and
- limit impacts of the development of energy infrastructure on the landscape.

The proposed rule stated that the Commission “may” consider the listed items. MA/NRCM commented that the proposed rule is inconsistent with the Act, which makes consideration of the items mandatory. We agree and have replaced “may” with “shall” in the adopted rule.

In addition, as specified in the Act, the adopted rule requires a finding that development within the corridor is reasonably likely to be consistent with

environmental and land use laws and rules.<sup>5</sup> The Act refers only to laws and rules of the State and the proposed rule referenced only the laws and rules of the State. MA/NRCM commented that the rule should also reference federal environmental and land use laws and rule. We agree and have made the addition to the adopted rule.

Finally, the adopted rule requires a finding that geographic area of the corridor is no greater than necessary to achieve the purposes of the designation. This required finding implements the requirement in the Act that the Commission limit the area of the designated corridors to that necessary to accomplish the purposes of the Act.<sup>6</sup>

D. Use of Designated Corridors (Section 4)

Section 4 of the adopted rule contains the requirements, procedures and standards for development of energy infrastructure within previously designated corridors.

1. Transmission and Distribution Utilities (Section 4 (A))

Subsection A contains the requirements for transmission and distribution (T&D) utilities to develop energy infrastructure within designated corridors. Subsection A (1) specifies that, to develop a transmission line, a T&D utility must obtain from the Commission a certificate of public convenience and necessity approving the line in accordance with statutory requirements. To develop other energy infrastructure, a T&D utility must obtain from the Commission a corridor use certificate approving the project in accordance with the Act and section 4(C) of the rule. In all cases, the T&D utility is required to obtain a consolidated environmental permit from the DEP in accordance with the requirements of the Act. No one commented on this provision and it is unchanged from the proposed rule.

2. Energy Infrastructure Developers (Section 4 (B))

Subsection B contains the requirements for developers that are not T&D utilities. In all such cases, the developer is required to obtain a corridor of use

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<sup>5</sup> The Act specifies that such a finding will not have any evidentiary value in the DEP permitting process required before infrastructure development can occur within a designated corridor. 35-A M.R.S.A. § 122(2)(D)(2).

<sup>6</sup> BHE commented that, when the Commission designates a corridor, it should explicitly condition the designation on the incumbent utility's right "to undertake any infrastructure upgrades contemplated by the application for such designation." The Commission is unsure of what is meant by this comment. We note that to the extent a utility has a "right" to undertake an infrastructure upgrade, the right will not be infringed by a corridor designation.

certificate from the Commission and a consolidated environmental permit from the DEP. No one commented on this provision and it is unchanged from the proposed rule.

3. Corridor Use Certificate (Section 4 (C))

Subsection C contains the procedural requirements and necessary findings required for the issuance of a corridor use certificate.<sup>7</sup> The subsection requires that a petition for corridor use certificate be filed that contains specific information, including a description of the proposed energy infrastructure, detailed cost projections, a demonstration of the petitioners financial and technical capability to develop the project, and a description of alternatives to the project. The Public Advocate commented that it would be helpful to specify that the alternatives include generation, energy efficiency, and demand response measures. We agree and made the addition to the adopted rule.

The subsection requires the Commission to process a petition for corridor use in an adjudicatory proceeding (as required by the Act), and that certain findings be made in issuing a corridor of use certificate. These findings are that the project is in the public interest and reasonably likely to:

- minimize utility rates or increase the reliability of utility service;
- have the net effect of reducing the release of greenhouse gases; or
- enhance economic development within the State.

MA/NRCM commented that the required findings to issue a corridor use certificate should be expanded to include the findings necessary for designating a corridor (collocation of energy infrastructure will be encouraged, efficient utilization of existing infrastructure will be enhanced, and impacts on the landscape will be limited). Because of the comprehensive nature of the Act, we are reluctant to modify the Legislature's statutorily required findings and therefore have not added the MA/NRCM's suggested language. We note, however, that the these findings will be have to be made to designate the corridor in the first place and any party may argue that a corridor use certificate would not be in the public interest on the grounds that collocation is not encouraged, efficient utilization of infrastructure is not enhanced or that impacts on the landscape are not limited.

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<sup>7</sup> The Act specifies that the ability of an entity to obtain a corridor use certificate does not modify existing restrictions on entities providing service within a public utility's service territory. 35-A M.R.S.A. § 122 (8). BHE commented that the rule should contain a similar provision "to avoid any question about the Commission's intention to follow the enabling legislation." The Commission did not include language in the proposed rule that mirrored the Act's language because such language in a rule would be unusual and unnecessary. To the extent that BHE requires assurance, the Commission intends to follow the requirements of the law.

E. Eminent Domain (Section 5)

As mentioned above, the Act grants and limits certain rights of eminent domain with respect to development within energy infrastructure corridors.

1. Transmission and Distribution Utilities (Section 5 (A))

As stated in the Act, subsection A specifies that the eminent domain authority of a T&D utility within a designated corridor is governed by the existing eminent domain authority for transmission line development, 35-A M.R.S.A. § 3136.

2. Energy Infrastructure Developers (Section 5 (B))

Subsection B contains the statutory eminent authority for entities other than T&D utilities with respect to development within designated corridors. As specified in the Act, this authority is subject to Commission approval and may be exercised in the same manner and under the same conditions as stated in Title 35-A, chapter 65. The adopted rule also contains the land and property excluded from the eminent domain authority as listed in the Act.

MA/NRCM commented that list of eminent domain exclusions should be expanded to include nonprofit conservation organizations. The comprehensive nature of the eminent domain provisions of the Act indicates that they were carefully considered by the Legislature. For this reason, we are reluctant to expand the list beyond the exclusions specified in the Act and therefore have not done so in the adopted rule.

3. Commission (Section 5 (C))

Subsection C describes the Commission's statutory authority to take land within a designated corridor, as well as the Act's procedural requirements, limits on the eminent domain authority, method of obtaining funds for the purchase of lands, provisions for the subsequent transfer of lands, and legislative reporting requirements. As specified in the Act, the adopted rule states that the Commission may exercise its eminent domain authority only through an adjudicatory proceeding initiated by petition of the Public Advocate or OEIS, and only upon a finding that the exercise of eminent domain is "urgently needed to avoid substantial harm to electricity consumers regarding anticipated activity associated with an energy infrastructure corridor."<sup>8</sup> The adopted rule specifies:

- that the Commission may exercise its right of eminent domain under the requirements and procedures set forth in 35-A M.R.S.A §§ 6501-6512;

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<sup>8</sup> The Act specifies that such a determination constitutes reviewable final agency action.

- that the amount of taken land may be no greater than that required to avoid the harm to ratepayers;
- that the eminent authority does not apply personal property, fixtures or improvements that constitute T&D plant;
- that the Commission may assess T&D utilities to obtain funds necessary to pay for taken lands;
- that the Commission may, upon petition by the Public Advocate or OEIS, transfer taken lands and must provide T&D utilities first opportunity to acquire lands that are necessary and useful to perform utility duties; and
- that the Commission report to the Utilities and Energy Committee the circumstances of any taking of land pursuant to the eminent domain authority granted in the Act.

a. Procedure (Subsection C(2))

This subsection contains the requirement that the Commission exercise its eminent domain authority in the same manner and under the same conditions as set forth in Title 35-A, chapter 65. CMP argues, with MPS support, that a Commission taking of property is unconstitutional unless it is reviewable by the county commissioners followed by a de novo court proceeding. CMP recognizes that clarification of this issue may not be appropriate for the rule, but a statement of complete review rights would be necessary to fulfill the agency's requirement that it provide notice of appeal rights.

As recognized by CMP, it is not necessary for the Commission to resolve the issue in the context of this rulemaking and we decline to do so. At the time a determination is made to exercise eminent domain, the Commission will provide interested persons an appropriate notice of their appeal rights.

b. Assessment (Subsection C(5))

As provided for in the Act, subsection C(5) states that the Commission may assess T&D utilities to pay for property taken by eminent domain.

CMP argues that an assessment on utilities to pay for taken property is unconstitutional. Because the land is being taken by the State, CMP argues that the State must pay for it through taxes. The case CMP cites to support its argument, *Rangeley Water C. v. Rangeley Water District*, 1997 ME 32, 691 A.2d 171, is not on point. The case holds only that ratemaking principles do not control the determination of the value of utility property for purposes of a condemnation process. It does not discuss whether property taken by the State must be paid for through taxes. Moreover, as an administrative agency, the Commission assumes the constitutionality of State statutes. *Dickinson v. Maine Public Service Co.*, 223 A.2d 435 (Me. 1966).

CMP, with MPS support, also commented that a utility may not be assessed to pay for its own property on the grounds that a utility is entitled to full

compensation for the property. We agree that a utility must be fully compensated for the value of the property. However, this will be the case as long as the utility may recover the cost of the assessment from ratepayers. As a required expense, a utility will be allowed to recover the cost of any assessment through the ratemaking process.

c. Transfer of Property (Subsection C(6))

This provision contains the process required by the Act for the Commission to transfer property taken by eminent domain. CMP argues that without an explicit standard in statute governing the transfer of property, the law is unconstitutionally vague. CMP also suggests that a Commission effort to specify a standard would be unconstitutional, but states that this constitutional defect could be avoided if it is interpreted as a mechanism for disposing property no longer needed by the State.

Once again, it is inappropriate for the Commission to consider the constitutionality of a State statute. *Id.* Although it is likely that the Commission would not transfer property unless it is no longer needed by the State, we will defer consideration of a proper standard to a proceeding in which a property transfer is at issue.

F. Repeal (Section 6)

As mentioned above, the Act provides the energy infrastructure corridor provisions are repealed on July 30, 2011. Accordingly, section 6 of the adopted rule states that the Chapter is repealed on July 30, 2011, unless the Legislature extends the Commission's authority to designate corridors beyond that date.

F. Waiver (Section 7)

The last section of the adopted rule contains the Commission's standard waiver and exemption provision.

Accordingly, we

O R D E R

1. That Chapter 886, Energy Infrastructure Corridors, is hereby adopted;
2. That the Administrative Director shall file the adopted rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following of the adoption of the rule:
  - a. All transmission and distribution utilities in the State;



## 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.
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.