STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-345

August 27, 2004

MORIN BRICK COMPANY
Request for Advisory Ruling

ADVISORY RULING

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this ruling, we conclude that neither NEPOOL nor the ISO-NE would be required to obtain a license or otherwise be subject to Maine Commission jurisdiction if a retail customer in Maine takes service directly from the NEPOOL market. However, the actual suppliers of electricity to the grid would be providing retail electric service to the public under such circumstances and would thus need to be licensed under Maine law. Because the licensing of such entities is not practical, a consumer in Maine can obtain the benefits of taking power directly from the NEPOOL market through the formation of an affiliate that would purchase power from the pool and resell it to the customer. The affiliated supplier would be required to be licensed as a competitive electricity provider in Maine.

II. BACKGROUND

On May 28, 2004, the Commission received a letter from the Morin Brick Company (Morin), stating its intent to participate in the NEPOOL market as a Market Participant End User (MPEU). Specifically, Morin plans to "self supply" its own electricity needs by participating directly in the NEPOOL market and would thus not purchase from a licensed retail electricity supplier in Maine. Morin states that to participate in the NEPOOL market in this manner, it must be able to certify that neither NEPOOL nor the ISO-NE would be subject to regulation in Maine as a retail electricity supplier. Morin asks that the Commission determine that its participation in the NEPOOL market as a MPEU would not subject NEPOOL or the ISO-NE to Commission jurisdiction as retail suppliers of electricity.[1]

On June 24, 2004, the Commission issued a Notice of Proceeding, stating that Morin's letter would be treated as a request for an advisory ruling. The Notice also requested comments from interested persons on issues raised by the Morin request. The Commission received comments from Morin, the Public Advocate, Constellation

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[1] Morin notes that the New Hampshire Public Utilities Commission has determined that it does not have jurisdiction over NEPOOL or ISO-NE under similar circumstances. *Petition of Luminescent Systems, Inc.,* Order No. 24,172 (NHPUC May 13, 2003).

NewEnergy/Constellation Power Source, Competitive Energy Services, Dominion Retail, Independent Energy Producers of Maine, BOC Group, Industrial Energy Consumer Group, James T. Rodier, Central Maine Power Company, and the NEPOOL Participants Committee.

III. DISCUSSION

A. Overview

The Morin letter primarily raises legal questions of statutory interpretation that must be resolved by reference to the language and purposes of Maine's Restructuring Act. We provide our legal analysis below. However, Morin's effort to take power directly from the NEPOOL market has a variety of implications. These implications were discussed to varying degrees by the commenters. At the outset of the discussion of the issues in this proceeding, we present our views on some of the implications if a customer receives service directly from the NEPOOL market and avoids taking service from a licensed supplier.

At its most fundamental level, Morin's desire to reduce its electricity costs by purchasing directly from the regional spot market is consistent with the basic goal of the Restructuring Act to allow for and promote customer choice. Moreover, there is nothing inherently unreasonable about Morin's effort to cut out the "middleman" in its purchases of electricity. Nevertheless, any circumstance in which an end user can purchase electricity at retail outside the Commission's licensing process raises certain concerns. The licensing requirement for retail suppliers of electricity allows the Commission to manage the transition to a newly created competitive market by providing for a certain level of market oversight and consumer protection. 35-A M.R.S.A. § 3203(1).[2] In addition, the broad application of the licensing requirement (as well as the other Commission rules applicable to electricity suppliers) tends to promote competitive fairness in that suppliers are subject to the same requirements.[3]

The most serious concern in this regard is the potential circumvention of Maine's eligible resource portfolio requirement. 35-A M.R.S.A. § 3210. Morin states that this should not be a concern in that it is within the Commission's authority to

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[2] In providing the Commission with licensing authority, the Legislature explicitly stated that the Commission shall license competitive suppliers "[i]n order to provide effective competition in the market for the generation and sale of electricity in the State and to provide an orderly transition from the current form of regulation to retail access . . . " *Id.*

[3] In their comments in this proceeding, competitive suppliers generally expressed concern that the avoidance of the licensing requirement would result in the circumvention of important policies and customer protections and create an unfair competitive advantage.

condition self-supply through NEPOOL on compliance with the portfolio requirement.[4] We disagree that such a condition is within our authority. The question of whether a license is required is one of law and the statutory portfolio requirement is explicitly an obligation of licensed suppliers, not customers. Our task in this proceeding is to interpret the licensing requirement statute; we have no discretion to condition our finding on customer compliance with the portfolio requirement.

Moreover, the Commission generally has authority over utilities and licensed suppliers, rather than customers. Thus, our electric restructuring rules were not designed for an end use customer taking power directly from the NEPOOL market. As a consequence, rules that are essential to the smooth operation of the retail market in Maine (e.g. application of opt-out fees, settlement processes) would not be applicable.

Morin suggests that the consumer protections inherent in the Commission licensing and oversight process are not necessary for a large sophisticated end-user. We agree that those consumer protections are less important for sophisticated end-users. Nevertheless, Maine has many large, sophisticated users of electricity, but the Legislature has not chosen to create a licensing requirement exemption for service to such customers. As noted, Commission licensing and oversight requirements are not solely for the purpose of consumer protection, but are also intended to allow the Commission to manage and oversee the transition of Maine's electricity market.

To conclude, the Commission has no fundamental opposition to customers having the option of obtaining power at NEPOOL spot market prices. The existence of such a customer option is clearly consistent with the customer choice goals of the Restructuring Act. However, the exercise of the option must be consistent with statutory requirements and accomplished in a manner that does not disrupt the smooth and fair operation of the retail electricity market in Maine.

A. Status of NEPOOL and ISO-NE

As stated above, the issue of whether NEPOOL or the ISO-NE would be subject to Commission jurisdiction as a retail electricity supplier under the circumstances described in the Morin letter is one of statutory interpretation. Maine's Restructuring Act requires that the Commission license all "competitive electricity providers" (CEP) in the State. 35-A M.R.S.A. § 3203(1). A CEP is defined as:

> A marketer, broker, aggregator or any other entity selling electricity to the public at retail.

35-A M.R.S.A. § 3201(5). The entities included in the CEP definition are defined in the Restructuring Act as follows:

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[4] Morin indicates that it could comply with the portfolio requirement by purchasing certificates through the NEPOOL GIS system.

> "Marketer" means an entity that as an intermediary purchases electricity and takes title to the electricity for sale to retail consumers. 35-A M.R.S.A. § 3201(13).
>
> "Broker" means an entity that acts as an agent or intermediary in the sale and purchase of electricity but that does not take title to electricity. 35-A M.R.S.A. § 3201(4).
>
> "Aggregator" means an entity that gathers individual consumers together for the purpose of purchasing electricity. 35-A M.R.S.A. § 3201(3).

There is a consensus among the commenters that neither NEPOOL nor the ISO-NE would be a CEP under Maine law primarily on the grounds that these entities do not take title to electricity. We agree that NEPOOL and the ISO-NE cannot be considered as selling electricity to consumers in that they never have title to electricity. Rather, as pointed out by the commenters, the sellers of electricity within the NEPOOL spot market are those individual participants that provide power to the grid in excess of any load obligations.

Thus, neither NEPOOL nor ISO-NE is a "marketer" and therefore does not meet the definition of a CEP under that criterion. However, an issue remains whether either entity would be a CEP as a result of acting as a "broker" or "aggregator" if Morin takes power directly from the NEPOOL market. Under Maine law, brokers and aggregators do not take title to electricity, but act to facilitate the retail sale of electricity among buyers and sellers.

We conclude that the existence of retail purchases directly from the NEPOOL market would not make either NEPOOL or the ISO-NE a broker or an aggregator under Maine's Restructuring Act. By its definition, an aggregator gathers individual customers together for the purpose of purchasing electricity on a group basis.[5] Neither NEPOOL nor ISO-NE acts in this manner and would thus not be aggregators as contemplated by Maine law. Whether either entity would be a "broker" under Maine's statutory definition is a closer question. Although the language used to define brokers might be considered broad enough to include the activities of NEPOOL and the ISO-NE, our view is that such an interpretation would not be consistent with the intent or purposes of the Restructuring Act. There is no indication that the Legislature intended that the Commission license and have oversight jurisdiction over entities other than those that act in a direct manner to bring sellers and buyers of electricity together so that purchase and sale transactions can occur. Thus, our view is that the Legislature intended the term "broker" to have its ordinary meaning (i.e., an entity that works on

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[5] The Restructuring Act defines "aggregate" to mean the organization of individual electricity consumers into a group or entity for the purpose of purchasing electricity on a group basis. 35-A M.R.S.A. § 3201(2).

behalf of a seller or buyer to facilitate a transaction). Rather than acting as brokers in the usual sense, NEPOOL and the ISO-NE function in manner analogous to a stock exchange in that they operate a trading platform and manage a market. NEPOOL and the ISO-NE should not be considered electricity brokers in the same way that the New York Stock Exchange is not commonly thought of as a securities broker.

B. Status of Selling Participants

The determination that neither NEPOOL nor the ISO-NE would be a CEP raises two questions. Who are the sellers of electricity when a retail customer buys directly from the regional market and are those sellers required to be licensed by the Commission as CEPs? As mentioned above, the sellers are those market participants that have more electricity supply in the market at any point in time than is necessary to cover their load obligations (if any). However, as the commenters point out, there is no practical way to identify the actual sellers of electricity to a consumer purchasing directly from the NEPOOL market. Participants in the NEPOOL market do not contract directly with each other. Rather, deliveries to a customer are made from supplies available to the pool that would be difficult to trace to individual participants.

Despite the impracticalities presented by this situation, Maine law requires the sellers of electricity at retail to be licensed by the Commission. There is no provision for the waiver of this requirement. Although the Commission has no fundamental objection to a customer buying directly from the NEPOOL market (assuming certain rules can be made applicable to the buyer), we conclude that such a transaction cannot occur under the current law in that retail sales would be made by unlicensed suppliers. However, as discussed below, the same result can legally occur through the use of an affiliate.

C. Purchases from an Affiliate

In our view, the Restructuring Act's licensing requirement is premised on the notion that some entity in the chain of supply will be a licensed CEP. Accordingly, we are prepared to treat an affiliate of Morin, created for the purpose of buying power from the NEPOOL wholesale market and reselling it to Morin, as a CEP in lieu of requiring the sellers into the NEPOOL market to be licensed as retail suppliers in Maine. [6] In this manner, Morin can obtain the benefits of purchasing directly from the NEPOOL market consistent with Maine law. [7]

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[6] The newly adopted NEPOOL rules that govern direct end user purchases explicitly allow for such purchases to occur through an affiliate created to serve the load of an end user.

[7] The formation of a corporation is generally straightforward and not costly. Thus, a need to form an affiliate under these circumstances should not be a significant burden, especially for an entity sophisticated enough to take power directly from the NEPOOL market and comply with its rules and processes (e.g. settlement processes).

We do not conclude in this ruling that an entity that sells only to an affiliated end user would necessarily be a CEP under Maine law. As long as the entity is willing to be licensed in Maine as a CEP, however, there is no need to definitively resolve that issue. Moreover, we emphasize that this approach applies only to the facts presented to us by Morin. For example, if an affiliate of an end user were buying power from a supplier that obtained its power from the NEPOOL market (as opposed to the affiliate obtaining power directly from the NEPOOL market), it might be appropriate for the supplier to be the licensed entity, rather than the affiliate of the end user. We would address such a factual situation if it were to arise in the future.

D. Conclusion

To conclude, the licensing procedures in Maine are not burdensome or costly. The Commission typically processes licensing requests within a month. Thus, having an electricity user access the NEPOOL market through a licensed affiliate has the practical advantage of providing the end user with the benefits of acquiring electricity at spot market prices in a manner that is consistent with current statutory and regulatory requirements,[8] while avoiding any retail market implications that would result from a customer purchasing at retail outside of Commission licensing procedures and other competitive supplier regulations.

Dated at Augusta, Maine, this 27th day of August, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Diamond
Reishus

COMMISSIONER ABSENT: Welch

[8] We note that direct purchases from the NEPOOL market (without use of an intervening affiliate) could be reasonably accommodated through statutory modifications. In particular, the Restructuring Act could be modified to make direct purchases of electricity subject to the portfolio requirement and other applicable regulations. Morin or other interested persons may wish to consider pursuing such statutory changes.

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.