STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-457

July 1, 1998

PUBLIC UTILITIES COMMISSION
Rulemaking: Standards of Conduct for Transmission and Distribution Utilities and Affiliated Competitive Electricity Providers

NOTICE OF RULEMAKING

WELCH, Chairman and NUGENT, Commissioner

I. INTRODUCTION

The Maine Legislature has decided that all Maine electricity consumers shall have the right to purchase generation services from competitive providers beginning on March 1, 2000.[1] In the same Act, the Legislature permitted current electric utilities (through corporate affiliates) to continue to provide electric generation service to consumers within their service territories, but also recognized that incumbent utilities would possess certain advantages over other competitive electricity providers. To promote a new competitive market for generation that would operate fairly and efficiently, the Legislature imposed certain restrictions upon incumbent utilities' entry into the competitive generation market and charged the Commission with further refining and implementing those restrictions through rules.

Title 35-A, Section 3205(4) requires the Commission to adopt rules for large investor-owned distribution utilities that establish: (1) a method of tracking kilowatt-hour sales by affiliated competitive providers; (2) a procedure to govern divestiture of an affiliated competitive provider; and (3) standards of conduct for distribution utilities and affiliated competitive providers. These rules are "major substantive rules" as defined and governed by 5 M.R.S.A. §§ 8071-8074. The Commission must provisionally adopt the rules by March 1, 1999.

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[1]During the 1997 Legislative session, the Maine Legislature enacted P.L. 1997, Chapter 316, "An Act to Restructure the State's Electric Industry," (the Act) codified as Chapter 32 of Title 35-A (35-A M.R.S.A. §§ 3201-3217).

Title 35-A, Section 3206(2) requires the Commission to adopt rules establishing the extent of separation between a small investor-owned distribution utility and an affiliated competitive provider necessary to avoid cross-subsidization and market power abuses. These rules are also “major substantive rules.” The Commission must open the rulemaking proceeding to adopt these rules by July 1, 1998 and must provisionally adopt the rules by March 1, 1999.

Title 35-A, Section 3207(1) prohibits consumer-owned transmission and distribution utilities from selling generation service at wholesale except for incidental sales necessary to reduce the cost of providing retail service. In this rulemaking, we propose to require consumer-owned utilities to notify the Commission if they engage in any wholesale sale. This rule would be a “routine technical rule” as described by 5 M.R.S.A. § 8071 and, therefore, would not normally require legislative review and approval. Section 3207(2) also requires the Commission to adopt a rule limiting or prohibiting the sale of generation service by competitive electricity providers within a consumer-owned utility’s service territory if such sales would cause the consumer-owned utility to lose its tax-exempt status. Having been presented with no evidence that consumer-owned utilities would be in danger of losing their tax-exempt status, the Commission does not propose to adopt any rule under Section 3207(2).

We will include all of the rules described above in the single chapter (304) proposed in this rulemaking. Since all but a small portion of the proposed rule has been designated as major substantive rules, the Legislature must review the provisional rule and authorize its final adoption either by approving it with or without change or by taking no action. 5 M.R.S.A. § 8072.

In this rulemaking, we propose a method of tracking the retail sales made by an affiliated competitive provider within the service territory of its affiliated distribution utility, propose standards of conduct applicable to both large and small investor-owned distribution utilities and affiliated competitive providers, and propose a requirement that consumer-owned utilities notify the Commission of any wholesale generation sales.

II. THE INQUIRY PROCEEDING

We have conducted an Inquiry in Docket No. 98-099 into the issues that would be present in this rulemaking.[2] We received comments from the Public Advocate[3]; Maine Public Service Company; Central Maine Power Company; Bangor Hydro-Electric Company; Dirigo Electric Cooperative[4]; and the Edison Electric Institute. The comments were constructive in suggesting answers to several policy questions and in revealing consensus on several specific subjects.

III. GENERAL POLICY CONSIDERATIONS

In enacting the statutory provisions on affiliate marketing and codes of conduct, the Legislature carefully balanced the potential market abuses and unfair competitive advantages of permitting utility affiliates to sell electricity within their respective service territories with providing those affiliates a reasonable opportunity to compete in the new markets. In adopting strict separation requirements, the Legislature determined that the promotion of a fair and effective competitive market for electricity must be the priority, even though the existence of such restrictions are necessarily at the expense of scope economies that utilities and their affiliates might otherwise enjoy.

In developing the proposed rule, we have attempted to implement the marketing provisions of the Act consistent with its language and purpose. We are mindful that the proposed rule places restrictions on the relationship between utilities and their marketing affiliates that do not apply to other competitive providers or their affiliates, and that such restrictions may place marketing affiliates at some competitive disadvantage.

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[2]Inquiries are conducted pursuant to the Commission's Rules, Ch. 110, Part 12.

[3]The Public Advocate noted that in preparing the OPA's comments, his office had consulted with the Industrial Energy Consumers Group, Enron and the Independent Energy Producers of Maine.

[4]The Dirigo Electric Cooperative is composed of Maine's consumer-owned electric utilities, including Eastern Maine Electric Cooperative, Fox Islands Electric Cooperative, Houlton Water Company, Kennebunk Light and Power District, Madison Electric Works, and Van Buren Light and Power District.

This, however, results from application of the legislative balance struck between permitting utility affiliates a fair opportunity to participate in the competitive electricity market and the need to restrict unfair advantages that incumbent utility affiliates would otherwise possess. The Commission has attempted to faithfully maintain that balance in the proposed rule.

IV. DISCUSSION OF INDIVIDUAL SECTIONS

Section 1: Purpose of Rule

Section 1 describes the main purpose of the proposed rule: to establish standards of conduct governing the relationship between a distribution utility and an affiliated competitive provider. The standards are intended to promote a fair and efficient competitive market by limiting any unfair advantages that would otherwise accrue to the affiliated competitive provider from its unique relationship with the distribution utility.

Section 2: Definitions

Section 2 contains definitions. Some of the definitions are included in the statute (35-A M.R.S.A. §§ 3201 & 3205) and are adopted by the proposed rule to retain consistent terminology. The definitions are largely self-explanatory. In contrast to the remaining provisions of the Restructuring Act, Section 3205 uses the term “distribution utility” to describe any investor-owned transmission and distribution utility that has an affiliated competitive provider. The proposed rule employs the same terminology, which is also used in this Notice to maintain consistency.

Section 3: Standards of Conduct

Section 3 contains the specific standards adopted to regulate the conduct of distribution utilities and affiliated competitive providers. The lettering system for subsections (A through P) is the same as the system used in Section 3205(3) to retain consistency in referencing parallel statutory and rule provisions. New standards not provided in the statute are added at the end of Section 3 (subsections Q and R).

Subsection A incorporates the statutory language. It prohibits a distribution utility from giving preferential treatment to its affiliated competitive provider or customers of its affiliate when providing any regulated product or service.

Subsection B incorporates the statutory language. It requires a distribution utility to make its regulated products and services available to all customers and competitive electricity providers simultaneously and without undue or unreasonable discrimination.

Subsection C prohibits a distribution provider from providing regulated products or services to its affiliated competitive provider without either simultaneously posting the offering on its Internet web site or otherwise making a sufficient offering to the market. If the product or service is provided pursuant to the terms of a filed tariff, no further public offering to the market is required; the tariff itself serves as public notice of the availability of the product or service. In any other situation where the offering is not posted on the utility's web site, the utility must obtain the Commission's prior approval for any alternative means of making a sufficient public offering of a product or service.

Subsection D incorporates the statutory language. It requires a distribution utility to process all similar requests for a regulated product or service in the same manner, regardless of the identity of the party making the request.

Subsection E incorporates the statutory language. It prohibits a distribution utility from tying its products, services or rates to the provision of any product or service in which an affiliated competitive provider is involved.

Subsection F incorporates the statutory language with minor stylistic changes. It requires a distribution utility to process all similar requests for information in the same manner and within the same time period. The subsection prohibits a distribution utility from providing information to an affiliated competitive provider without a request when other competitive providers receive the same information only if they request it. It prohibits a distribution utility from providing its affiliated competitive provider with preferential access to nonpublic or customer-specific information that is not provided to other competitive providers upon request. Finally, it requires a distribution utility to instruct its employees not to provide any competitive provider with preferential access to nonpublic information.

Subsection G incorporates the statutory language with minor changes. First, it prohibits employees of a distribution utility from sharing with any competitive electricity provider market information obtained from any other competitive provider unless

the latter consents to the disclosure. Second, distribution utility employees may not share with any competitive electricity provider any market information developed by the distribution utility in responding to requests for distribution service.

Subsection H requires each distribution utility to keep a log of all requests for information received from any competitive electricity provider. The log is subject to Commission review and is also available to any competitive electricity provider upon request. The public nature of the log will ensure that all competitive electricity providers can monitor the flow of information between a distribution utility and its affiliated competitive provider. The log must include the nature and date of all requests for information from competitive providers, identify any requests made by the distribution utility's affiliated competitive provider and describe the date and nature of the distribution utility's response to each request. The proposed rule does not define any categories of information requests that are so trivial as to not merit inclusion in the log. As distribution utilities gain experience in keeping the log, we expect that certain types of information requests will become so routine that we may be able to exempt certain categories of requests. We are not prepared, however, to speculate as to the nature of those requests at this time.

Subsection I incorporates the statutory language with one minor addition. It prohibits a distribution utility from releasing proprietary customer information without the prior affirmative written authorization of the affected customer. The Rule adds the requirement that the written authorization be "affirmative." This is done to avoid the use of negative option check-offs or similar blanket authorizations that do not indicate the customer's true subjective intent regarding disclosure of proprietary information. "Proprietary customer information" is defined in Section 2 as equivalent to "customer specific information" as that term is defined in Chapter 820 of our Rules.[5] Although some commenters suggested that "customer specific information" is broader than "proprietary customer information," we believe that the Chapter 820 definition encompasses all information to which customers may legitimately desire to limit access and preserves consistency between Chapter 820 (which governs *all* utility affiliates) and this proposed rule.

[5]Chapter 820 is a major substantive rule that has been provisionally, but not finally adopted by the Commission. Final adoption will occur after the effective date of Resolve 113, the resolve that provides the necessary legislative approval and authority for final adoption (June 30, 1998).

Subsection J incorporates the statutory language with minor stylistic changes. It prohibits a distribution utility from giving the appearance of speaking on behalf of its affiliated competitive provider and prohibits the distribution utility from promoting its affiliated competitive provider. It also prohibits a distribution utility from promoting any product or service offered by its affiliated competitive provider. Paragraph 1 prohibits both the distribution utility and the affiliated competitive provider from suggesting that any customer could gain an advantage with regard to distribution services as a result of dealing with the affiliated competitive provider.

Subsection J, Paragraph 2 repeats the statutory prohibition against joint advertising or marketing programs by a distribution utility and its affiliated competitive provider. It also specifies that “joint advertising or marketing” includes any use of a name or logo that is sufficiently similar to the distribution utility’s name or logo to trigger royalty payments for good will under Chapter 820. Our view is that this prohibition is required under the statutory language prohibiting joint advertising and marketing. If the utility and affiliate share a name or logo, every appearance of that name or logo in an advertisement or letterhead would carry a dual meaning to consumers, inextricably linking the companies in a manner that the Legislature clearly meant to prohibit. By prohibiting joint advertising and marketing, the Legislature sought to require the separate companies to develop separate public identities and to avoid any inference that a customer might benefit in some way from the companies’ relationship.

Even if we were to find that the statute did not mandate this result, however, we would reach the same decision for compelling policy reasons. If a distribution utility and affiliated competitive provider were permitted to use similar names and logos, consumers would inevitably focus upon that connection; that is, in fact, the reason that affiliates choose to use the name of a parent corporation. Some of those consumers will also assume that they will receive better service due to that relationship. Particularly in a developing competitive market, it is imperative that steps be taken to ensure the incumbent utility does not possess an unfair advantage in attracting consumers.

Paragraph 3 of Subsection J also requires the Commission to maintain a list of competitive electricity providers available to provide generation service to customers in each distribution utility’s territory. At least every 60 days, the Commission must

update the list and rearrange the names on the list in a random sequence. Distribution utility employees will provide a copy of the list to customers who request information about competitive electricity providers.

The prohibition on joint advertising and marketing does not, however, prevent employees of the distribution utility or affiliated competitive provider from truthfully answering inquiries regarding the relationship between the two entities. Under Paragraph 4 of Subsection J, the employee must inform the questioner that the affiliate is not regulated by the Commission, that the customer will not gain any advantage by virtue of the affiliate's relationship to the distribution utility and that the customer may select another competitive provider. These disclaimers must be provided in conformity with a written script to be prepared by the distribution utility and submitted as part of the utility's implementation plan required under Section 5 of the proposed rule.

Subsection K incorporates the statutory language with minor stylistic changes. It prohibits employees of a distribution utility from stating any opinion to customers or applicants regarding the capabilities of any competitive electricity provider.

Subsection L deals with restrictions on the employees of a distribution utility and affiliated competitive provider. Where the statutory provision (Section 3205(3)(L)) required that employees of a distribution utility and its affiliated competitive provider must be physically separated, the proposed rule clarifies that employees must be located in separate buildings and served by separate telecommunications and computer systems. These provisions minimize the potential for accidental sharing of information otherwise prohibited under the standards of conduct. The proposed rule also clarifies the statutory prohibition on sharing employees by stating that an employee is considered to be shared when the employee is directly employed by one entity any is simultaneously performing work for another entity. This prohibition also applies to the joint use of employees from other any other affiliate of the distribution utility. This ensures that subcontracting work between a utility and an affiliated competitive provider cannot be used to avoid the employee sharing prohibition. The proposed rule also prevents an employee who is transferred between a distribution utility and an affiliated competitive provider from returning to the former employer for at least one year. While all of these restrictions apply to both large and small distribution

utilities, the impact is eased by the availability of the exemption permitted under the statute.

Subsection M repeats the statutory requirement that distribution utilities and affiliated competitive providers must keep separate books of account and records.

Subsection N implements the statutory requirement that a distribution utility establish a dispute resolution process to address complaints alleging violations of 35-A M.R.S.A. §§ 3205 & 3206, the applicable provisions of Chapter 820, the distribution utility's implementation plan and the proposed rule. Paragraph 1 describes the contents of the complaint log that a distribution utility must maintain.

Subsection O repeats the statutory provisions requiring a distribution utility to keep its books of account and records separate from those of the affiliated competitive provider.

Subsection P addresses the distribution utility's implementation plan. A distribution utility must file an implementation plan with the Commission. The plan must detail the procedures adopted by the distribution utility to ensure compliance with the standards of conduct, including proper training of employees. An up-to-date copy of the implementation plan must be publicly available and must be given to each employee.

Subsection Q is added by the proposed rule. It requires a distribution utility to immediately notify the Commission if any entity acquires 10% or more of its stock or acquires sufficient stock, in combination with previously-owned stock, to achieve 10% ownership after June 26, 1997 (the effective date of the Restructuring Act). This information is needed to enforce the ban on retail sales and possible divestiture provided for in Section 3205(6). The affected utility appears to be in the best position to be aware of any such stock purchase and, therefore, is charged with notifying the Commission if that event occurs.

Subsection R is added by the proposed rule. It simply states that a distribution utility and its affiliated competitive provider are bound by any applicable provisions of Chapter 820, which regulates the relationship between utilities and affiliates generally.

Section 4 of the proposed rule implements the statutory limitation on the amount of retail sales made by an affiliated competitive provider. The statute restricts the retail sales

made by an affiliated competitive provider to no more than 33% of the total kilowatt hours sold within the distribution utility's service territory. This amount includes any sales made by the affiliated competitive provider as part of the territory's standard offer service under Chapter 302. Under Section 3205(2), the affiliate is also limited to providing no more than 20% of the standard offer service within the service territory.

The proposed rule clarifies that the market share limitations shall be determined over a calendar year. The affiliated competitive provider and the distribution utility must file quarterly reports with the Commission, detailing the affiliate's retail sales or contracts for sales and the total sales within the service territory, respectively. The affiliated competitive provider must also report its sales by customer class to enable the Commission to review market developments.

Section 5 governs the filing of the distribution utility's implementation plan. No formal Commission approval of an implementation plan is required. A plan does not take effect, however, until 30 days after it has been filed with the Commission. During this period, the Commission may suspend the effectiveness of all or part of the plan and open an investigation into the sufficiency of the plan. If the plan is found to be deficient, the Commission may order changes to be made to the plan. A distribution utility's request for subsequent changes to an implementation plan are treated similarly.

Section 6 requires the Commission to conduct audits of distribution utilities and affiliated competitive providers to ensure compliance with the standards of conduct. For the initial three years following adoption of the rule, audits will be conducted annually. Thereafter, large distribution utilities will be audited at least once every three years and small distribution utilities will be audited at least once every five years. Under the proposed rule, the shareholders of the distribution utility will pay for these audits, which may be performed by outside contractors on behalf of the Commission. The Commission will seek legislative clarification of the Commission's authority to impose the audit costs on shareholders.

Section 7 contains the sanctions available as punishment for violations of the standards of conduct; three separate sanctions may be imposed. First, Subsection A authorizes the Commission to impose an administrative penalty of up to $10,000 per day for any violation of Sections 3205 and 3206 and the proposed rule. Second, Subsection B provides a specific penalty for violations

of the market share limitations imposed on affiliated competitive providers. If the affiliated competitive provider's market share exceeds 33% but not 35%, the penalty is computed to roughly equal any profit received by the affiliated competitive provider from the excessive sales. This penalty provides a fairly substantial cushion against inaccuracies in the affiliate's projected sales within the distribution utility's service territory. If the affiliated competitive provider's sales exceed 35%, however, the affiliate forfeits *all* revenue from the excessive sales. This sanction provides a powerful incentive for the affiliated competitive provider to limit its sales to avoid serious violations. The Commission is aware that this penalty scheme may, under certain facts, exceed the maximum administrative penalty authorized under Section 3205(5). Additionally, our authority to impose any penalty on a small distribution utility and its affiliate is unclear. We will seek clarification on these points in the upcoming legislative session.

Finally, Subsection C restates the statutory provisions governing divestiture of an affiliated competitive provider as a sanction for serious violations. The Commission chose not to further refine the divestiture procedures in the proposed rule, since it may never be necessary to apply such a draconian penalty. If circumstances warrant divestiture in the future, the process and application will be determined at that time.

Section 8 is the only provision of the proposed rule that applies to consumer-owned distribution utilities. It requires any consumer-owned distribution utility to report the details of any wholesale sale or sales of generation that, over any 12-month period, cumulatively exceed 5% of the total kilowatt hours sold at retail by the utility over the same period. This information is necessary to monitor and enforce Section 3207(1)(B), which permits wholesale sales only if they are incidental and necessary to reduce the cost of providing retail service. The 5% threshold is intended to eliminate the need to report clearly *de minimis* sales.

Section 9 provides the Commission's standard provisions permitting a waiver of the proposed rule's provisions.

III. COMMENT PERIOD

This Rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. **Written comments** on the proposed rule may be filed with the Administrative Director no later than **August 7, 1998.** Please refer to the Docket Number of this proceeding, Docket No. 98-457,

when submitting comments.

IV. HEARING

No public hearing on this matter is presently scheduled, but one will be held if requested by any five interested persons. Persons wishing to request a public hearing on this rule must notify the Administrative Director, Public Utilities Commission, 242 State Street, State House Station 18, Augusta, Maine 04333-0018 (telephone: (207) 287-3831), or on before July 17, 1998.

Whether a hearing is held or not, a **technical conference** will be held on August 19, 1998 at 9:00 a.m. at the Commission's offices, 242 State Street, Augusta, Maine 04333 for the purpose of discussing and asking questions about the comments that must be filed by August 7, 1998. Any person, whether that person filed a comment or not, may attend and participate in that conference.

Please notify the PUC if special accommodations are needed in order to make the technical conference (or a hearing, if one is held) accessible to you by calling 1-287-1396 **or** TTY 1-800-437-1220. Requests for reasonable accommodations must be received 48 hours before the scheduled event.

V. FISCAL AND ECONOMIC EFFECTS

In accordance with 5 M.R.S.A. § 8057-A(l), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested parties to comment on the **fiscal** impact and all other implications of this proposed rule.

VI. SERVICE

The Administrative Director shall send copies of this Order and the attached rule to:

1. All electric utilities in the State;

2. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

3. All persons listed on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

4. All persons listed on the service list or who filed comments in the Inquiry, *Public Utilities Commission, Inquiry into Standards of Conduct and Other Requirements for Transmission & Distribution Utilities and Affiliated Competitive Electricity Providers,* Docket No. 98-099;

5. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

6. Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

By law, the Commission must conclude this rulemaking proceeding and adopt a provisional rule by March 1, 1999.

Accordingly, it is

O R D E R E D

1. That the Administrative Director send copies of this Order and the attached proposed rule to all the persons listed above and compile a service list of all such persons and any persons submitting written comments on the proposed rule.

2. That the Administrative Director send a copy of the Notice of Rulemaking to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053.

Dated at Augusta, Maine this 1st day of July, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: WELCH
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