

**From:** James T. Kilbreth <[JKilbreth@dwmlaw.com](mailto:JKilbreth@dwmlaw.com)>  
**Sent:** Friday, August 20, 2021 12:38 PM  
**To:** Dunn, Michael <[Michael.Dunn@maine.gov](mailto:Michael.Dunn@maine.gov)>  
**Subject:** Mainers for Local Power

Mike,

This is in response to the staff recommendation of a \$2500 penalty in the above-referenced matter. As we have discussed, we appreciate staff's recognition that, in keeping with past practice, the two notice issues should be treated as one, as well as your recommendation that the same rationale used with respect to the identical Clean Energy Matters issue should be used here. Where we part company, however, is in not applying that rationale consistently with respect to the penalty.

The amounts involved in Clean Energy Matters were roughly three times greater than the contributions here and the initial penalty of \$50,000 approximately twice the amount as the initial penalty here, assuming you imposed penalties for two violations rather than the one you've recommended. I'm not sure I understand the "final-result" approach described in your memo, but to the extent that means that there should be some kind of baseline penalty involved, that doesn't mean that violations of significantly different magnitudes are treated the same. The issue is not whether the Commission should use a formula or a "final-result" approach—the issue is one of fundamental fairness. Put another way, the amount of penalty waived for Clean Energy Matters was \$47,500, or 95% of the initial penalty; even combining the initial penalties for two violations, which I appreciate is not the approach you are taking, the penalty calculated on the same basis as the Clean Energy Matters penalty would be only \$1365, not \$2500. Although I recognize that in some respects you are treating this case similarly to the Clean Energy Matters case, this difference in the amount of the penalty contradicts that objective. Indeed, assessing the same penalty here for grossly disparate initial penalties fundamentally violates the principal of like things being treated in a like manner-- if decision makers "do not feel obligated to treat materially identical cases alike, the law will largely depend upon who happens to be making the decision, and our adherence to the rule of law will be diminished." *United States v. Cardales-Luna*, 632 F.3d 731, 736 (1st Cir. 2011) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) (opinion of Souter, J.) ("the principle 'that litigants in similar situations should be treated the same' is 'a fundamental component of . . . the rule of law generally'")). See also *Desist v. United States*, 394 U.S. 244, 258–259 (1969) (Harlan, J., dissenting). Particularly in the context of the NECEC referendum campaign, to penalize one side out of proportion to the penalty imposed on the other raises significant fairness issues. If there is some baseline that needs to be met, and you are uncomfortable with the unassailable notion of applying the same formula as I have suggested previously, then in this case it seems that half the penalty imposed on Clean Energy Matters would be the maximum appropriate amount, or \$1250.

I understand that you will convey these concerns to the Commission. As I've mentioned, I won't be able to attend the meeting Monday but believe that this email and our conversations adequately convey our concerns.

Regards,

Jamie

**James T. Kilbreth**

Attorney

207.253.0555 Direct

[JKilbreth@dwmlaw.com](mailto:JKilbreth@dwmlaw.com)

84 Marginal Way, Suite 600, Portland, ME 04101-2480

800.727.1941 | 207.772.3627 Fax | [dwmlaw.com](http://dwmlaw.com)

**Drummond**Woodsum  
ATTORNEYS AT LAW

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