

November 4, 2021

MAINE PUBLIC UTILITIES COMMISSION
Amendments to Portfolio Requirement
Rule (Chapter 311)

ORDER ADOPTING RULE
AND STATEMENT OF
FACTUAL AND POLICY BASIS

BARTLETT, Chairman; DAVIS and SCULLY, Commissioners

I. SUMMARY

By this Order, the Commission adopts amendments to its Renewable Portfolio Standard (RPS) rule, Chapter 311, to make a change required to implement recently enacted legislation and some cleanup edits to the rule.

II. BACKGROUND

During its 2021 session, the Legislature enacted An Act to Establish the Thermal Energy Investment Program. P.L. 2021, c. 199 (Act). The Act establishes the Thermal Energy Investment Program within the Efficiency Maine Trust (Trust). It specifies that funds collected from alternative compliance payments made by competitive electricity providers (CEPs) to satisfy the portfolio requirements for thermal renewable energy credits (TRECs) be deposited into the Thermal Energy Investment Fund to fund incentives and low-interest or no-interest loans to businesses, municipalities, educational institutions and nonprofit entities in the State for the installation of new thermal energy-derived projects.

On September 21, 2020, the Commission initiated an Inquiry to seek comments and information on the issue of whether CEPs that serve Net Energy Billing (NEB) customers participating in the NEB “kilowatt-hour (kWh) credit program” should be required to meet Maine’s RPS requirements based on metered or billed sales. *Maine Public Utilities Commission Inquiry Into RPS Compliance Requirements for Net Energy Billing Customers*, Docket No. 2020-00274, Notice of Inquiry (Sept. 21, 2020). The RPS rule, Chapter 311, requires a CEP to account for specified percentages of “its total kilowatt-hour sales” with electric energy from specified types of generation resources. “Total kilowatt-hour sales” is not defined in the rule, but current practice has been that compliance is based on billed sales. The Inquiry noted that the Commission had received questions regarding how this provision should be applied in the context of NEB arrangements, in particular, whether “total kilowatt-hour sales” should be measured in terms of billed sales or metered sales. Under the NEB kWh credit program customers are billed on the basis of “net energy”, i.e., the difference between the customer’s actual metered kWh usage and the “kWh credits” applied to the customer’s bill.

The Inquiry also noted that the question is of particular importance at this point in time given the anticipated growth in NEB in the State. In considering potential

implications to its NEB rule, Chapter 313, and its RPS rule, Chapter 311, the Commission posed two series of questions for stakeholder comment. Comments were due October 9, 2020, and June 11, 2021. The Commission received comments from Central Maine Power (CMP), Versant Power (Versant), 3Degrees Group, Inc. (3Degrees), Constellation NewEnergy, Inc. (Constellation) and the Industrial Energy Consumer Group (IECG). In addition, the Commission held a meeting with stakeholders on June 29, 2021, to further discuss these issues.

III. RULEMAKING PROCESS

On August 3, 2021, the Commission issued a Notice of Rulemaking (NOR) and proposed amendments to Chapter 311. Consistent with rulemaking procedures, the Commission provided interested persons with the opportunity to provide oral comments on the proposed rule during a public hearing held on September 1, 2021. There were also two opportunities to file written comments on August 27 and September 13, 2021. The following interested persons provided written comments on the proposed amendments to the rule: Versant, CMP, Constellation and the Retail Energy Supply Association (RESA).

IV. AMENDED RULE PROVISIONS

The provisions of the amended rule are discussed below.

A. Definitions (Section 2) (Retail Sales)

Section 2 of the proposed rule adds definitions for "total kilowatt-hour sales" and "line losses"¹ to clarify that compliance with the RPS must be based on metered usage as opposed to billed sales. The Commission sought comments on whether the intent and objectives of the State's RPS policy are better achieved by determining RPS compliance based on metered usage rather than billed sales and noted that continued measurement on billed sales would result in a significant portion of Maine's actual retail metered load that would not be subject to RPS requirements as the NEB program grows over time.

RESA, Constellation and CMP argue that compliance should continue to be based on billed sales. RESA argues that CEPs should only be required to satisfy the RPS compliance obligations associated with the actual number of kilowatt-hours billed

¹ The proposed rule defined "total kilowatt-hour sales" as the metered sales of retail customers as measured by the transmission and distribution (T&D) utility and adjusted for line losses applicable to the customer's load. The proposed definition also provides that if such metered sales are not available for a particular customer, total kilowatt-hour sales shall be as reasonably estimated by the customer's T&D utility consistent with the basis for determining the supply obligations of the CEP serving the customer. Under the proposed rule, "line losses" are defined as based on the line loss factors from the most recent and available utility line loss study.

to the customer by the CEP as measured at the customer meter without any gross-up adjustment for line losses. RESA states using metered load, compliance would be based on both the number of kWh sold by the CEP and the number of kWh generated by the customer which RESA argues is inconsistent with Maine's RPS statute. RESA states that Maine law expressly bases CEP RPS compliance obligations on "retail electricity sales",² that Maine's statutorily defined RPS goals are to meet specified targets for "retail sales" from renewable resources³, established exemptions from RPS obligations apply to "retail sales"⁴ and Chapter 311 requires CEPs to account for specified percentages of their "total kilowatt-hour sales to customers." Therefore, basing compliance on something other than retail sales of electricity would, in RESA's view, be contrary to the plain language of the statute and Chapter 311.

Because "sales" is not defined in Maine's RPS statute or Chapter 311, RESA argues that the term should be understood based on its common meaning⁵ and that at their core, sales involve the transfer of property for a price.⁶ RESA maintains that NEB

² RESA Comments at 5 (citing 35-A M.R.S. § 3210(3) (Class II resources), (3-A)(Class I resources), (3-B)(Class IA resources), (3-C) (thermal renewable energy credits) referring to retail electricity sales in the context of the portfolio requirements).

³ *Id.* (citing 35-A M.R.S. § 3210(1-A) ("The State's goals for increasing consumption of electricity in the State that comes from renewable resources are as follows: A. By January 1, 2030, 80% of retail sales electricity in the State will come from renewable resources; and By January 1, 2050, 100% of retail sales electricity in the State will come from renewable resources."))

⁴ *Id.* (citing *e.g.*, 35-A M.R.S. § 3210(3-A)(D) ("Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on the effective date of this subsection is exempt from the requirements of this subsection until the end date of the current term of the supply contract or standard-offer service arrangement."))

⁵ *Id.* at 6 (citing *State v. Murphy*, 2016 ME 5, ¶ 7 ("When we interpret a statute, we look first to the plain meaning in order to discern legislative intent, viewing the relevant provision in the context of the entire statutory scheme to generate a harmonious result. In considering the plain language of a statute, we construe any undefined words and phrases according to their common meaning.") (citation omitted); *State v. Blum*, 2018 ME 78, ¶ 10 (interpreting a term in a statute based on a dictionary definition in the absence of statutory definition of the term).

⁶ *Id.* (citing *State Tax Assessor v. MCI Commc'ns Servs., Inc.*, 2017 ME 119, ¶ 14 ("[A] 'sale' is fundamentally an exchange of goods or services for a price or consideration"); see also 11 M.R.S. § 2-106(1) (defining "sale" as "the passing of title from the seller to the buyer for a price"); Black's Law Dictionary (11th ed. 2019) (s.v. "sale," definition 1) ("The transfer of property or title for a price") (citation omitted); Merriam-Webster's Collegiate Dictionary (11th ed. 2014) (s.v. "sale," definition 1) ("the act of selling," "the transfer of ownership of and title to property from one person to another for a price"))).

kWh Credit Program customers are only billed and, therefore, only pay a price, for their excess usage. Consequently, the only sales that a CEP makes to a NEB kWh Credit Program customer are sales of excess usage and so CEP RPS compliance obligations for these customers should be based only on those sales (i.e., billed sales).

RESA acknowledges that basing compliance on billed sales would not account for NEB kWh customer BTM generation/consumption but argues that there are other ways to address this issue (e.g., require NEB facilities to retire RECs for the BTM consumption).

CMP argues that RPS requirements should be based on billed sales because:

when customers receive kWh credits from NEB projects, the consumed load of the customer is reduced by generation from a facility that uses a renewable fuel or technology as specified in Title 35-A, Section 3210(2)(B-3), to arrive at a billed consumption. Given that the power produced by a NEB facility meets Maine RPS requirements, it seems logical to base the supplier's reporting requirements on the billed sales, rather than the consumed values. Requiring suppliers to provide energy for 100% of the consumed value would appear to double-count the credits generated from the NEB facility.

Constellation argues that one of the purported goals of the proposed rule is to accurately calculate RPS requirements as they relate to NEB customers but argues that using metered load would simply shift the inaccuracy of RPS calculations to CEPs. Today, a CEP calculates RPS requirements based on the total billed amount, which accounts for the amount of electricity delivered to its customers. Constellation states that if the RPS is based on metered usage as reported by the utility to ISO-NE, the calculation becomes inaccurate because the NEB customer does not receive the benefit of banked credits within the month the credits are generated. Constellation and RESA state that the resulting load data reported to ISO-NE could result in a negative RPS obligation for NEB customers who always generate excess electricity and could reduce RPS obligations for NEB customers who have a mix of excess supply and excess usage during a year. As a result, Constellation and RESA advocate for continuing to calculate RPS obligations based on billed sales.

The Commission agrees with the plain language arguments made by RESA and is also concerned that making the proposed change would have the effect of shifting the RPS compliance cost from customers with NEB arrangements to those without NEB arrangements. While the Commission is concerned that continued measurement on billed sales will result in a significant portion of Maine's actual retail metered load that will not be subject to RPS requirements as the NEB program grows over time, the Commission is constrained by the plain language of the statute and cannot rectify the issue unless the Maine Legislature decides to make changes to the RPS or NEB statutes. As a result, the Commission declines to adopt the proposed rule change that RPS compliance be based on metered usage as opposed to billed sales. Because the Commission does not adopt the proposed rule change, the Commission does not

discuss the comments related to when, or how, the utilities could report based on metered usage or RESA and Constellation's request that any such change apply prospectively.

B. Exemption (Section 3(F) and Section 5(D))

The proposed rule added language to Section 3(F) and Section 5 to be consistent with the statute. There were no comments on these sections of the proposed rule and the amended rule is unchanged from the proposed rule.

C. Alternative Compliance Mechanism (Section 5(C)(3))

Pursuant to the Act, the proposed rule directed that funds collected from the alternative compliance mechanism made by CEPs to satisfy the thermal portfolio requirement must be deposited into the Thermal Energy Investment Fund, established pursuant to Title 35-A, section 10128(2), instead of the Energy Efficiency and Renewable Resource Fund, established pursuant to Title 35-A, section 10121(2). There were no comments on this section of the rule and the amended rule is unchanged from the proposed rule.

D. Verification; Reporting (Section 7(G))

Section 7(G) of the proposed rule adds language requiring that any retail electricity sales for which a CEP is claiming an exemption pursuant to the provisions of Sections 3 or 5 must be identified and supported with appropriate documentation in the report. There were no comments on this section of the proposed rule and the amended rule is unchanged from the proposed rule.

V. ORDERING PARAGRAPHS

Accordingly, the Commission

O R D E R S

1. That the amendments to Chapter 311 – the RPS rule - as described in the body of this Order and as set forth in the attached amended rule are hereby adopted;
2. That the Administrative Director shall file the amended rule with the Secretary of State;
3. That the Administrative Director shall notify the following of the adoption of the amended rule:
 - a. All transmission and distribution utilities in the State;

NOTICE OF RIGHTS TO REVIEW OR APPEAL

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

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. ch. 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. § 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. § 1320(5).

Pursuant to 5 M.R.S. § 8058 and 35-A M.R.S. § 1320(6), review of Commission Rules is subject to the jurisdiction of the Superior Court.

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.