STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2020-00085
April 8, 2020

MAINE PUBLIC UTILITIES COMMISSION
ORDER ADOPTING
EMERGENCY RULE AND
STATEMENT OF FACTUAL
AND POLICY BASIS

MAINE PUBLIC UTILITIES COMMISSION
Criteria to Exclude Small Transmission
Projects and Distribution Projects From
Investigation by the Nonwires Alternative
Coordinator (Chapter 319)

BARTLETT, Chairman; WILLIAMSON and DAVIS, Commissioners

I. SUMMARY

By this Order, the Commission adopts an emergency rule, Chapter 319, pursuant to 5 M.R.S. § 8054 to implement recently enacted legislation. Emergency rules may be effective for up to 90 days. Accordingly, the Commission will complete a rulemaking process regarding Chapter 319 within that timeframe.

II. BACKGROUND

During its 2019 session, the Legislature enacted An Act To Reduce Electricity Costs through Nonwires Alternatives, P.L. 2019, c. 298 (Act). The Act established the position of a Nonwires Alternatives (NWA) Coordinator in the Office of the Public Advocate (OPA). Generally, the duties of the NWA Coordinator are to investigate and identify NWAs to transmission and distribution line projects and to evaluate the costs and benefits of such NWAs compared to utility capital investments in the transmission and distribution system.

Section 13 of the Act, now codified at 35-A M.R.S. § 3132-B, states in part:

3. Excluded projects; criteria. The commission, by rule, shall develop criteria to exclude from investigation by the nonwires alternative coordinator small transmission projects and distribution projects best suited to transmission and distribution investments, including but not limited to projects that are:

A. Necessary for redundant supply to a radial load;
B. Necessary to address maintenance, asset condition or safety needs;
C. Necessary to address stability or short circuit problems; or
D. Required to be in service within one year based on the controlling load forecast.

Section 13 further provides that each investor-owned transmission and distribution (T&D) utility in this State shall annually complete and submit to the OPA, for review by the NWA Coordinator, a planning study for small transmission and distribution
projects and that, except as provided in the excluded projects language cited above, for a proposed project presented in a planning study, the NWA Coordinator:

A. Shall investigate nonwires alternatives if the project is a small transmission project or is a distribution project estimated to cost $500,000 or more; and

B. May investigate nonwires alternatives if the project is a distribution project estimated to cost less than $500,000 and, in the judgment of the nonwires alternatives coordinator, there is a reasonable likelihood that a nonwires alternative would be more cost-effective than the proposed distribution project.

On January 14, 2020, the Commission opened a Notice of Inquiry (NOI)\(^1\) to seek comments from interested stakeholders to assist the Commission in this rulemaking proceeding. The Commission requested comments on the specific criteria that should be included in the rule to determine which transmission and distribution projects are excluded from the requirement for an investigation by the NWA Coordinator. The Commission also requested comment on whether the rule should contain other provisions to facilitate the NWA investigation process. For example, the Commission requested comment on whether the rule should contain provisions on the criteria for the cost/benefit analyses of NWAs. Comments were due January 27, 2020. Comments were filed by the OPA, Natural Resources Council of Maine (NRCM), Conservation Law Foundation (CLF), Efficiency Maine Trust (Trust) and Central Maine Power (CMP).

On March 18, 2020, the Commission initiated an emergency rulemaking proceeding, issued a proposed emergency rule and sought written comment from interested persons by March 23, 2020. The Commission received written comments from the OPA, NRCM, CLF and CMP.

III. EMERGENCY RULE REQUIREMENTS AND FINDING OF EMERGENCY

The Commission may adopt an emergency rule if it determines that the timelines set forth in 5 M.R.S. §§ 8052 and 8053 would present an immediate threat to public health, safety or general welfare. The Commission may only modify those rulemaking procedures to the minimum extent required to enable adoption of rules designed to mitigate or alleviate the threat found. As there are projects that T&D utilities need to complete prior to the summer and during this construction season that have an immediate and urgent need, the Commission finds that not having a rule in place quickly creates a threat to the general welfare. Therefore, the Commission may proceed pursuant to the emergency rulemaking provisions of the Administrative Procedures Act, 5 M.R.S. § 8054. As required by 5 M.R.S. § 8054, this emergency rule shall be in effect only until the Commission amends Chapter 319 in accordance with 5 M.R.S. §§ 8052

and 8053 but in no event shall the emergency rule remain in effect for longer than 90 days from the date the emergency rule is adopted.

IV. EMERGENCY RULE PROVISIONS

The provisions of the emergency rule are discussed below.

A. Purpose (Section 1):

Section 1 contains the general purpose of the emergency rule which is to establish criteria to exclude from investigation by the NWA Coordinator small transmission and distribution projects best suited for transmission and distribution investments. NRCCM and CLF asked the Commission to make clear in the rule that the NWA exclusions only apply to small transmission and distribution projects. The Commission believes the proposed emergency rule was already clear on this point as it restated in Section 1 and Section 3 of the rule the statutory language that the exclusion criteria applies to small transmission and distribution projects, the rule’s statutory authority cites the Act and “small transmission projects” are defined in the Act. However, the Commission has added a reference to the authorizing statutory section, Title 35-A, section 3132-B, in the emergency rule for additional clarity. The emergency rule also corrects a typo by removing the word “small” before distribution projects in this section of the emergency rule.

B. Definitions (Section 2):

Section 2 of the emergency rule contains definitions of terms used throughout the rule. Almost all of the definitions are contained in the statute. The emergency rule adds a definition for “controlling load forecast.” CLF commented that the Commission should add a definition for “investigation” and state that the term means a NWA investigation pursuant to Title 35-A, section 3132-B, subsection 2. The Commission does not believe this is necessary particularly given the added language in Section 1 of the emergency rule referencing Title 35-A, section 3132-B. The proposed emergency rule contained the definition of “small transmission project” contained in Title 35-A, section 3132-B. The emergency rule simply states that “small transmission project” has the same meaning as in Title 35-A, section 3132-B tying it to the statutory section that defines that term as the other definitions in the rule do.

C. Exclusions from NWA Coordinator Investigations (Section 3):

As noted above, the Act states that the Commission, by rule, shall develop criteria to exclude from investigation by the NWA Coordinator small transmission projects and distribution projects best suited to transmission and distribution investments. The Act further provides four categories of projects that are to be excluded at a minimum. The Commission interprets this language as directing it to adopt a rule excluding, at a minimum, the four categories identified in the statute and, to the extent necessary, provide guidance of how the Commission interprets those exclusion
categories. The proposed emergency rule does this by listing specific types of projects that would fall under the exclusion categories, but the list is not exhaustive. Stakeholders in the NOI recommended that the Commission interpret the exclusions narrowly so as to allow as many NWA as possible. The Commission intends to interpret the statute consistent with legislative intent; however, the emergency rule recognizes that the Commission cannot initially detail every project that could be subject to the NWA exemption.

CLF commented that to prevent efforts to broaden the scope of the applicability of these exclusions, the Commission should add language to the first paragraph of Section 3 of the emergency rule that explicitly states that only projects that are subject to Title 35-A, Section 3132-B may qualify for exclusion under these criteria. The Commission believes this is unnecessary particularly given the language added to Section 1 and Section 2 of the emergency rule.

1. Projects Necessary for Redundant Supply to a Radial Load (Section 3(A)):

The proposed emergency rule included a combination of qualifying projects suggested by stakeholders in the NOI. The OPA’s comments on the draft rule commented that in general, this exclusion is justified in light of the number of load areas in the State served by radial lines with no alternative means to serve them but that the exclusion category should be carefully crafted to limit its application to the initial construction of and repairs to a redundant feed into a load area. Including “new or upgraded transmission lines or distribution circuits” projects and other “transmission and/or distribution facility upgrades” within the exclusion, as the proposed emergency rule does, has the potential, in the OPA’s view, to exclude a large number of projects from the scope of Section 3132-B. In particular, a utility’s transmission and distribution network is interconnected to provide loop or parallel feeds to serve loads. Excluding upgrades to these from the requirement of NWA review, the OPA stated, has the potential to eliminate such review from virtually any upgrade related project. To the extent demand growth within a load area triggers the need to upgrade the capacity of existing lines, the OPA believes that NWA have a significant potential to address such a need and ignoring this potential would undermine the intent of Section 3132-B. The OPA in its comments recommended some draft language. There were no other comments on this section of the rule.

The OPA’s suggested language, in the Commission’s view, is too limiting given the Act’s language for this exclusion category. The Act specifies that a small transmission or distribution project necessary for redundant supply to a radial load is exempt from investigation by the NWA Coordinator. While the Commission understands the OPA’s concern, the Commission does not believe it has the authority to limit the exemption as suggested by the OPA. The emergency rule is unchanged from the proposed emergency rule.
2. **Projects Necessary to Address Maintenance, Asset Condition or Safety Needs (Section 3(B))**:

The proposed emergency rule included a combination of qualifying projects suggested by stakeholders in the NOI including “extreme asset condition” as suggested by the OPA. In the OPA’s comments in the NOI, it cited operation failure as an example of an extreme asset condition. The OPA, in its comments on the proposed emergency rule, supported the Commission’s proposed language in Section 3(B) of the proposed rule. The OPA noted that it strongly supports limiting the asset condition exclusion as provided in the draft rule stating that all facilities have some amount of deterioration and ordinary wear and tear should not qualify a replacement project for exclusion. The OPA suggested that an “extreme asset condition” need is identified through preventive or ongoing maintenance programs that find equipment replacement essential to maintain grid reliability. The OPA stated that currently, several projects submitted to the NWA Coordinator are proposed based on asset condition; however, the T&D utilities have not presented, and do not appear to have reviewed, alternate wire or non-wires solutions for these proposed projects. The OPA believes that NWA have a significant potential to address such a need and modifying the term is therefore essential to preventing possible abuse of this exclusion to justify the construction of many projects that may benefit from a NWA analysis. The OPA noted that there is likely not sufficient time in this emergency proceeding to develop more detailed criteria for this exclusion and urged the Commission to do so in developing a permanent rule. No other stakeholders commented on this section of the rule.

The Commission agrees that more detailed criteria is needed regarding asset condition projects that qualify for this exclusion category. The emergency rule removes the word “extreme” as it relates to asset condition projects under this exclusion category and notes that the extent to which asset condition projects can be further clarified or defined will be examined in the regular rulemaking proceeding to follow adoption of the emergency rule. The emergency rule also corrects a typo in Section 3(B)(1) by making “emergency replacement project” plural.

3. **Projects Necessary to Address Stability or Short Circuit Problems (Section 3(C))**:

The OPA stated that it generally supports the Commission’s proposed language in Section 3(C) of the proposed emergency rule regarding projects necessary to address stability or short circuit problems. The OPA suggested clarifying this provision to limit its application to stability or short circuit problems that exist under current load conditions and identified by the utility’s planning need with reasonably anticipated fluctuations in load. The emergency rule includes this language suggested by the OPA.

The OPA further suggests excluding dynamic reactive device installations (e.g., static synchronous compensators (STATCOM) and static var compensators) from this exclusion category. CMP in its comments in the NOI suggested that this exclusion
category include STATCOM and static var compensators. It is the Commission’s view that when these are used other alternatives are not likely to be feasible. As a result, the emergency rule includes language that encompasses STATCOM and static var compensators in this exclusion category. This issue may be explored further in the regular rulemaking following adoption of the emergency rule.

4. Projects Required to be in Service within One Year Based on the Controlling Load Forecast (Section 3(D))

The proposed emergency rule did not provide language regarding the specific projects that would qualify for this exclusion stating that this category seemed self-explanatory. NRCM commented that while this does seem self-explanatory, it is possible that this exemption could create an incentive for utilities to wait until a project must be completed within one year to avoid triggering an NWA investigation. The rule should be clarified, in NRCM’s view, to avoid creating this incentive. If a project is known based on the controlling load forecast for more than a year, NRCM stated, a utility must not be able to avoid a NWA investigation through inaction or delay.

The OPA’s comments on the proposed emergency rule also stated that it believed this provision would benefit from additional guidance. The OPA stated that the Legislature’s inclusion of the phrase “based on the controlling load forecast” suggests an intent to prevent utilities from avoiding NWA review of a project by inadvertently or intentionally failing to properly plan for load growth and that the Commission should clarify the rule to prevent T&D utilities from exploiting the provision in this manner by requiring any “prevailing load forecast” to reflect material changes from a prior prevailing load forecast that justify the need for an upgrade. The OPA stated that if the prevailing load forecast on which a utility proposes to rely was available sufficiently in advance to have allowed the project to be identified more than one year ago, it should be subject to NWA review regardless of when it is proposed. To provide otherwise, the OPA stated, would invite utilities to delay disclosing projects until their construction is less than one year away as a means to avoid NWA review.

The OPA also commented that the Act went into effect in September 2019 and at that time, there were undoubtedly a number of projects in the planning process that were scheduled for construction within one year and this provision should not be allowed to be used to avoid NWA alternative review for such projects unless the need for the project was identified as the result of a recent material change in the prevailing load forecast. The OPA also stated that it has no objection to certain projects that have commenced construction, or which had been previously approved by the Commission prior to the Act becoming effective proceeding without NWA review.

In its comments on the proposed emergency rule, CMP noted that the OPA had recommended in the NOI that there should be an initial NWA screening of these projects to determine whether low-cost NWA and/or operational options are unavailable. CMP stated that while CMP and the OPA are working collaboratively to make the role of the NWA Coordinator and its NWA analysis a successful part of T&D
planning, CMP respectfully disagrees with the OPA’s recommendation. CMP stated that it is concerned that a screening of these projects would create additional delays and would ultimately impact the utilities ability to address these time sensitive needs.

In addition, CMP stated that the OPA’s recommendation is also inconsistent with the testimony/recommendations of Gregory Booth, the OPA’s expert in Docket 2016-00049. In that docket, Mr. Booth testified that a NWA must be analyzed well in advance of required implementation and that implementation can take years to complete. He specifically recommended that an NWA be considered for transmission projects at least five years before the year that the transmission solution is required and at least three years before the year that the distribution solution is needed. (See Docket 2016-00049, Rebuttal Testimony of Gregory Booth, PE on behalf of the Office of the Public Advocate, June 30, 2017, pages11-12.) CMP stated that, in its view, it does not make sense to devote resources to analyze the feasibility of NWAs for these sorts of projects when there are other more suitable projects where such a review will be useful, productive, and likely lead to implementation of NWAs.

In its comments on the proposed emergency rule, the OPA further commented that the electric industry is in a period of transition as Maine’s utilities, regulators, other government agencies, and various distributed resource providers adjust to a process of integrating NWA into the transmission and distribution investment model. Some projects initiated before the NWA legislation became effective are candidates to proceed simply because they fall within this transition period. However, to determine whether a project should be permitted to proceed, T&D utilities remain obligated to provide the historical data on which they rely for making the capital investment to the NWA Coordinator. The OPA recommended that for each in-progress and under-construction project, the utilities should provide the following information:

- Project need, whether the project is proposed due to load growth, asset condition, or reliability need;
- Timeframe of when the utility identified the need;
- Project’s expected in-service date;
- Project’s priority status;
- Project’s progress status and percentage completion to date;
- Whether or not utility can maintain reliability and serve the customer under the outage condition; and
- Whether any alternate wire or non-wire solutions were reviewed.

Without such an exchange of data, it is not possible, in the OPA’s view, to validate that a project should be excluded as being in-progress at the effective date of Section 3132-B or otherwise meets an exclusion category. After the exchange of data, the parties can expeditiously come to agreement on a list of projects that will proceed during the 2020 construction period.
To provide additional clarity regarding this category of exclusions, the emergency rule adds a definition in Section 2 for “controlling load forecast” and adds additional language to Section 3(D) of the emergency rule stating that projects are required to be in service within one year of the time the NWA Coordinator conducts its investigation of the portion of the T&D utility’s service territory in which these projects will be located. The Commission does not adopt the OPA’s recommendations regarding this category of exclusions given concerns that delays could result that would impair the utilities’ ability to address time sensitive needs. As a result, the emergency rule does not contain the OPA’s suggested language. To the extent the NWA Coordinator, OPA, or any other party, believes that a utility is systematically gaming the rules to artificially create exclusions, the matter may be brought to the Commission...

Finally, NRCM and CLF noted that the proposed emergency rule in Sections 3(A)-(D) uses the phrases “necessary for”, “necessary to”, and “required to” in describing the category of projects excluded from NWA investigation. NRCM commented that these standards are too vague and should be further explained to delineate what criteria must be met to qualify for the exception. CLF suggested that language be added to describe how these determinations of what is “necessary” and what is “required” are to be made, including who should be involved in making the determinations, and how the determinations should be assessed by the Commission adding that the Commission should not simply defer to investor-owned utilities that have incentives to develop wires solutions, and that have a data access advantage that gives them an edge in the process of judging need. CLF commented that a carefully defined set of criteria will prevent utilities from gaming the system to avoid NWA investigations. This language comes from the statute and the Commission does not see a need at this time to further explain the language in the emergency rule.

5. Customer or Generator Funded Interconnection Related Projects (Section 3(E)):

The proposed emergency rule had incorporated a suggestion from CMP in the NOI to add an exclusion category for customer funded interconnection related projects. The proposed emergency rule provided that this category would include all transmission and/or distribution facility upgrades and expenses driven by a request for new or upgraded service. The rationale being that upgrades specifically required to accommodate the requested interconnection of new customer load or generation, NWA would not be suitable to address the interconnection needs and since these investments are fully funded by the interconnecting customer, there would also be no opportunity for an alternative solution to reduce costs for the general body of utility customers. The OPA supported adding this exclusion category in its comments on the proposed emergency rule.

CLF and NRCM commented that the language in this category may be too broad. NRCM commented that depending on the location or number of other interconnection requests, there may be the potential for a NWA solution and that allowing each individual project to be excluded could result in a missed opportunity in the aggregate. CLF suggested that the language be modified to limit the exclusion to facility upgrades.
that are required to satisfy customer needs that, based on evidence presented by the utility, cannot be satisfied in whole or part by NWAs, and that are required solely to satisfy a request for new or upgraded service. CLF cited some reasons why such modifications, in its view, are warranted: 1) given the potential range of, and variation among, future interconnection requests, there may be future projects which fall within this fifth category, and for which NWAs may be suitable alternatives to meet some or all of the needs; and 2) there may be projects that are driven by multiple factors, beyond just a request for new or upgraded service. The emergency rule contains additional qualifying language in response to CLF’s comments.

The OPA also recommended adding generator interconnection requests as an additional exclusion noting that generator leads are explicitly excluded from requiring a certificate of public convenience and necessity under Title 35-A, Section 3132(1-B). The OPA commented that although such an exclusion may be implicit, no similar explicit exclusion is included in Section 3132-B and that the adoption of Chapter 319 provides the Commission an opportunity to make it explicit. The emergency rule includes language to incorporate this point.

6. Broadening Exclusion Criteria Beyond Small Transmission and Distribution Projects

CMP recommended in the NOI that the exclusion criteria in this rule be applied to all transmission and distribution projects, subject to the cost criteria included in the statute, regardless of size and not applied to only small transmission and distribution projects. CMP recognized that its recommendation could be subject to legal challenge given the specific language in the statute and suggested as a means of alleviating this concern that a project review process be adopted that would essentially accomplish broadening the exclusion criteria to larger projects where NWAs are most likely not viable. Such a process would be very similar to the process currently in place under Chapter 330 of the Commission’s rules for minor transmission projects and rebuilds. In its Notice accompanying the proposed emergency rule, the Commission noted that the statute explicitly states that the purpose of the rulemaking is to establish the criteria for exclusions from investigation by the NWA Coordinator of small transmission projects and distribution projects best suited to transmission and distribution investments and that, in the Commission’s view, it is beyond the Commission’s authority to do as CMP suggests in this rulemaking proceeding. CLF agreed. The emergency rule is unchanged from the proposed emergency rule on this issue.

CLF also stated in its comments that in light of this attempt to broaden the scope of the exclusion criteria the Commission should add language to the first paragraph of section 3 of the rule that expressly indicates that only projects that are subject to Title 35-A, Section 3132-B may qualify for exclusion. While the Commission believes that the proposed emergency rule was already clear on this point, references to the authorizing statutory section have been added to Sections 1 and 2 of the emergency rule.
D. Process For Determining Additional Projects or Exclusion Categories (Section 4):

As the language in Section 3 of the emergency rule makes clear, the exclusion categories or qualifying projects within those exclusion categories, are not exhaustive. As a result, the Commission has added a new section, Section 4, to the emergency rule regarding the process for determining additional projects or exclusion categories not identified at the time of this emergency rulemaking. Section 4 provides that upon request, and following appropriate process, the Commission, by Order, may determine other projects, or categories of projects, that qualify for exclusion from investigation by the NWA Coordinator. There can also be further discussion about this process in the regular rulemaking proceeding to follow adoption of the emergency rule.

E. Waiver or Exemption (Section 5):

Section 5 of the emergency rule contains the Commission’s standard waiver provision. This is unchanged from the proposed emergency rule.

V. OTHER ISSUES

The emergency rule does not contain other provisions to facilitate the NWA investigation process including the criteria for the cost/benefit analyses of NWA. Stakeholders continue to discuss these issues. As the OPA suggested in the NOI that preceded this emergency rulemaking proceeding, the Commission directs stakeholders to present a recommended, mutually agreed upon NWA investigation process, including the cost/benefit analysis methodology, to the Commission. The Commission will open a separate docket to review these issues.

VI. ORDERING PARAGRAPHS

Accordingly, the Commission

ORDERS

1. That Chapter 319 – Criteria to Exclude From Investigation by the Nonwires Alternative Coordinator Small Transmission Projects and Distribution Projects Best Suited to Transmission and Distribution Investments - as described in the body of this Order and as set forth in the attached emergency rule is hereby adopted;

2. That the Administrative Director shall file the adopted emergency rule with the Secretary of State;

3. That the Administrative Director shall notify the following of the adoption of the emergency rule:
a. All electric utilities in the State;

b. The Office of the Public Advocate;

c. All persons that filed comments or are on the notification list for this proceeding; and

d. All persons who have filed with the Commission within the past year a written request for notice of rulemakings.

4. That the Administrative Director shall send a copy of the adopted emergency rule to the Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine, 04333-0015.

Dated at Hallowell, Maine, this 8th day of April, 2020

BY ORDER OF THE COMMISSION

/is/ Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Bartlett
Williamson
Davis
NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 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 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 11(D) 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. 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).

**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.