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PUBLIC UTILITIES COMMISSION
Rulemaking on Qualifying Facility
Rates, Terms, and Conditions in
Restructured Electric Industry
(Chapter 360)

ORDER ADOPTING AMENDED
RULE AND STATEMENT OF
FACTUAL AND POLICY BASIS

WELCH, Chairman; NUGENT and HUNT, Commissioners

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I. INTRODUCTION

In this Order, we adopt amendments to Chapter 36¹ of our rules, Cogeneration and Small Power Production, in accordance with recent legislation that restructures the electric industry in Maine.²

During its 1997 session, the Legislature fundamentally altered the electric utility industry in Maine by deregulating electric generation services and allowing for retail competition beginning on March 1, 2000. At that time, Maine's electricity consumers will be able to choose a generation provider from a competitive market. As part of the restructuring process, the Act requires utilities to divest their generation assets and prohibits their participation in the generation services markets.³ These changes in industry structure create numerous implications for existing contractual relationships between qualifying facilities (QFs) and utilities.

Maine utilities signed power purchase contracts with QFs as a result of federal and state policies adopted to promote the private development of renewable resources and efficient energy production. The federal Public Utilities Regulatory Policy Act (PURPA) and Maine's Small Power Production Act (SPPA) required utilities to enter long-term purchase power contracts with QFs.⁴ Many of the contracts Maine's utilities have entered into with QFs extend beyond the March 1, 2000 implementation of retail competition. The parties entered these contracts at a time when electric utilities provided vertically integrated retail service on a monopoly basis. This industry structure had existed for many decades; as a consequence, the contracts reasonably

¹The Commission's current practice is to use three-digit designations for rules; accordingly, Chapter 36 will become Chapter 360.

²An Act to Restructure the State's Electric Industry (the Act), P.L. 1997, ch. 316.

³Utility affiliates may participate in the generation market. 35-A M.R.S.A. §§ 3205, 3206, 3207.

⁴Qualifying facilities are generally renewable power producers under 80 MW or cogenerators that meet specified efficiency standards. See 35-A M.R.S.A. § 3303.

contemplated that this structure would continue to exist into the future. Thus, efforts to restructure the industry should treat both QFs and utilities fairly, and not unreasonably frustrate the expectations of contracting parties.

II. STATUTORY PROVISIONS

The Act contains several provisions regarding QFs in a restructured industry. Section 5 specifies that QF contracts shall continue in effect after restructuring and that the rights of contracting parties may not be impaired as a result of implementing the Act. Section 6 establishes a method to determine the rates for power purchases in contracts that tie such rates to the utility's retail rates. Under section 7, the Commission must continue to establish short-term-energy-only (STEO) rates to fulfill the terms of existing QF contracts. Section 8 requires the Commission, by rule, to establish a method to set long-term avoided costs and any rate, term, condition or other provision of a QF contract that may be rendered impractical or impossible to perform or implement as a result of industry restructuring. Finally, section 9 states that no utility may be required, pursuant to Title 35-A, Chapter 33, to enter into a contract to purchase power from a QF; the section does not abrogate any existing law or rules that provide QFs with the right to sell energy prior to March 1, 2000 on an "as available" basis.

Chapter 36 of the Commission's rules governs utility power purchases from QFs. We amend Chapter 36 to conform with the Act and establish rules for QF purchases in a restructured industry. Generally, the amended rule eliminates or revises provisions that are premised on requirements that utilities enter long-term contracts with QFs, revises provisions to determine STEO rates and rates for purchases of energy and capacity in a competitive market, provides for existing net energy billing arrangements, and adopts a process for establishing substitute contractual rates, terms or conditions that are rendered impractical or impossible to perform as a result of restructuring. We discuss the specific revisions and amendments to Chapter 36 in section IV below.

III. RULEMAKING PROCESS

On October 31, 1997, we issued a Notice of Rulemaking and proposed rule amending Chapter 36. Prior to initiating the formal rulemaking process, we conducted an inquiry into the

effects of industry restructuring on QF contracts (Docket No. 97-497); we received numerous comments from interested persons on how we should amend Chapter 36 in light of industry restructuring. The comments obtained in the Inquiry were constructive in the development of the proposed rule.

Consistent with rulemaking procedures, interested persons were provided an opportunity to provide written and oral comments on the proposed changes to the rule. The following persons filed comments: the Public Advocate; Cental Maine Power Company (CMP);⁵ S.D. Warren Company, Maine Energy Recovery Company, the Independent Energy Producers of Maine, Wheelabrator-Sherman Energy Company and Benton Falls Associates (Consolidated QFs); Regional Waste Systems (RWS); Maine Renewable Energy (MRE); Renewable Energy Assistance Project (READ); Peter Talmage and Naoto Inoue; and William Lord. The Commission appreciates the efforts of all interested persons in providing comments on the issues presented by this rulemaking. The comments were extremely helpful in our consideration of how Chapter 36 should be amended as a consequence of industry restructuring and to comply with legislative directives contained in the Act.

IV. DISCUSSION OF INDIVIDUAL SECTIONS AND COMMENTS

In this section of the Order, we discuss the individual sections of the amended rule, positions of commenters, and our rationale for either maintaining or modifying the provisions of the proposed rule.

A. Section 1: General Provisions

The proposed rule amended the definitions section to delete, add, or modify existing definitions to be consistent with the changes proposed throughout the rule. CMP, RWS and the Consolidated QFs commented on this section.

RWS expressed concern with adding a reference to transmission and distribution utilities to the definition of avoided costs as potentially creating ambiguity in contracts. We disagree. In amending Chapter 36 in light of restructuring, we must recognize that electric utilities will become transmission

⁵Bangor Hydro-Electric Company filed a letter indicating general agreement with CMP's comments.

and distribution (T&D) utilities. Additionally, RWS did not explain how such a change may create ambiguity in contracts.

CMP stated that the definition of "avoided costs" is problematic because it assumes that T&D utilities will continue to have an obligation to obtain resources to provide retail generation service after retail competition begins. CMP suggested that the definition state that, after February 28, 2000, avoided costs should equal a market rate. RWS opposed such a change, stating that avoided costs were never intended to be a market rate. We agree with CMP's comments and have amended the definition to state that, after the initiation of retail competition, avoided costs shall mean the market value of the power supplied by the QFs.⁶

CMP also commented that the definition of "long-term contract" is unnecessary because the term is not contained in the proposed rule. We agree and have deleted the definition.

CMP noted that the definition of "net energy billing" implies the use of a single meter when this is not required by the rule. We decline to change the definition that has been in place since the original adoption of Chapter 36. The net billing provision continues to specify that a utility may install a second meter as long as the QF is not charged for its associated costs.

The Consolidated QFs commented that the proposed rule deleted the definitions of "affiliate" and "associate" and both may still be necessary because of the continued provision (section 4(A)(3)) that QFs may generate or distribute electricity through its or its associates' private property for its or its associates' use, without approval or regulation by the Commission. The proposed rule removed the definition of "affiliate" and "associate" because it deleted the affiliate wheeling provision that contained those terms. Because the amended rule contains the term associate and the definition of

⁶We note that the concept of avoided costs in Maine has evolved to effectively mean the market value of power; this occurred through policies requiring competitive bidding and by recognizing that existing utility resources may be avoided at a market price. Additionally, section 7 of the Act defines STEO rates as a wholesale market price.

that term refers to affiliate, we have reinstated both definitions.

The Consolidated QFs also suggested that the added definition of "existing contracts" be modified to include amendments to existing contracts. We agree and have added such language to the definition.

We have deleted the definition of "production run" because that term is not used in the amended rule.

Finally, CMP commented that, with respect to provision in section 1 that allows for exceptions to the rule to "further the purposes and policies of this Chapter," the Commission should include a basis statement that references the relevant sections of the Act. Such a basis statement is included. We have also added language clarifying that the Commission on its own motion may consider deviations from the rule's provisions.

Except for the changes described above, the amended rule maintains the modifications contained in this section of the proposed rule.

B. Section 2: Qualifying Cogeneration and Small Power Production Facilities

This section contains the requirements for a generating facility to be considered a QF. Because QF contracts will remain effective after retail competition, the proposed rule did not amend this section. However, in our Notice of Rulemaking, we commented that there may be a need to amend subsection D (Ownership Criteria) which states that a QF may not be owned by an entity primarily engaged in the generation or sale of electricity. We noted that it appears that this section was intended to prevent electric utilities from obtaining QF status and that, after industry restructuring, the current rule would prevent competitive electricity providers from owning QFs. Because of the possibility that this provision may create unintended results in a restructured industry, we asked for comments on whether and how it should be amended.

The Consolidated QFs provided the only response to this matter, proposing that effective on the date of retail competition the existing language should be replaced with a

prohibition on QF ownership by a T&D utility or affiliate. The amended rule contains this modification.

CMP proposed that this section of the rule include monitoring requirements to ensure that facilities are maintaining the standards necessary for QF status. The Consolidated QFs, Benton Falls and MRE opposed such requirements, arguing that monitoring provisions should be a matter of the individual contracts, rather than administrative requirements, that the proposal is outside the scope of the rulemaking, and that it is an unfair leverage tactic.

We have not considered CMP's proposed monitoring program because it is beyond the scope of this rulemaking proceeding, which relates to the impact of restructuring on QF contractual relationships. In an appropriate proceeding, we would consider adopting monitoring requirements that are not unreasonably burdensome if CMP demonstrates that a reasonable possibility of non-compliance exists to justify such data collection and verification requirements.⁷

C. Section 3: Administrative Determination of Avoided Costs

1. Proposed Rule and Comments

In this section of the proposed rule,⁸ we removed filing requirements premised on an integrated retail monopoly industry structure and replaced them with requirements that are consistent with the emerging competitive markets for electricity. The deleted items included long-term load forecasts, long-term energy resource plans, the projected cost of planned capacity additions, and long-term avoided costs calculated as the difference between total production costs of various energy resource plans. The proposed rule also eliminated, as no longer necessary, the requirement that utilities notify the Commission if avoided costs have changed by 10% or more.

⁷For example, we would expect CMP to provide us information on QF non-compliance found in other jurisdictions and evidence it has that Maine QFs may not be in compliance.

⁸This section of the rule was originally titled "Availability of Electric Utility System Cost Data."

The proposed rule included new provisions requiring estimated market prices for wholesale energy in Maine, estimated market value of wholesale capacity in Maine, projections of capacity excesses and deficiencies, and the estimated cost of installing new peaking capacity in New England. In our Notice of Rulemaking, we stated that this market-based capacity and energy cost data would allow the Commission to continue to set energy and capacity rates through an administrative process, and if we adopt a formula approach to establishing avoided capacity and energy costs, the provisions of section 3 would cease to apply as unnecessary beginning on the date of retail access.

CMP commented that, after retail access, T&D utilities should not have to supply generation cost data because they will no longer be in the generation business and it would require maintaining expertise in the area. CMP noted that use of market rates would be more accurate and less subjective than estimating avoided costs. CMP also questioned requiring such data prior to retail access because until then the Commission will continue calculating avoided costs using historic methods of calculating avoided costs.

The Consolidated QFs stated that this section of the rule should contain more specifics as to how avoided costs will be determined, including a more precise definition of wholesale energy and a requirement that costs be set for a one year period. The Consolidated QFs also suggested that the rule specify the term of capacity purchases and the estimated cost of peaking capacity in Maine rather than New England.

2. Discussion

The amended rule maintains the deletions contained in the proposed rule, and includes methodologies for determining avoided costs (rather than the detailed list of cost data included in the proposed rule). These changes update this section of Chapter 36 to include information we now use when determining avoided costs and to eliminate provisions that have become outdated. The deleted provisions are premised on the existence of long-term generation planning by utilities, which no longer occurs because: (1) utilities have had surplus generation; (2) utilities have been meeting generation needs through shorter term purchases; and (3) utilities will only be acquiring and supplying generation for about two more years. We agree with the Consolidated QFs, however, that the rule should be more specific

as to how we will calculate avoided costs administratively. We have added provisions that specify how administratively-set avoided costs will be calculated. These calculations will be much as they are now, but will also reflect recent and future changes in how utilities provide energy and capacity.

The information filing requirements and the administrative methodologies for calculating avoided costs will remain only until the beginning of retail access. We concur with CMP that an objective measure of market rates is a better way to set avoided costs after retail access than administratively-determined estimates of future wholesale prices. As discussed below, we have adopted an approach for establishing both long-term and short-term avoided costs that relies on actual market prices for QF power that should avoid the need for administrative estimates after retail access. Accordingly, the amended rule specifies that the provisions of section 3 will not be effective beginning with the date of retail access.

D. Section 4: Arrangements Between Utilities and Qualifying Facilities

1. Proposed Rule

Consistent with section 9 of the Act, the proposed rule eliminated all provisions of the Chapter premised on a continued requirement that utilities enter new purchased power contracts pursuant to Title 35-A, Chapter 33, and maintained the requirement and related provisions to purchase energy on an as-available basis at STEO rates. The proposed rule also eliminated outdated methods of calculating avoided cost and the fourth decrement avoided costs listed in section 4(C)(3).

As mentioned above, sections 7 and 8 of the Act require the Commission to periodically set STEO rates and to adopt a method for establishing terms related to long-term avoided costs. The proposed rule implemented these requirements in separate subsections governing the rates for short-term energy purchases and for capacity and energy purchases. Both subsections specified that, prior to the date of retail access, the Commission would continue to establish rates for purchases through an administrative process based on the information filed in accordance with section 3 of the rule. Both subsections also contained two alternatives to establish rates after the date of retail access: (1) a formula approach that would determine rates monthly based on ISO-NE clearing prices; or (2) an administrative

process that would determine rates annually based on projections of wholesale electricity prices.

The proposed rule also maintained the existing provisions on factors affecting purchase rates. Such factors include dispatchability, coordinated scheduled outages, and reduced line losses. In light of the proposed rule's reliance on actual market information to establish rates, we requested comment on whether these provisions remain appropriate.

CMP and the Consolidated QFs provided numerous comments on the "utility obligations" and "rates for purchases" subsections.

2. Utility Obligations

CMP commented that, consistent with section 9 of the Act, this provision should specify that the utilities' obligation to purchase energy on an as available basis at STEO rates would not exist after the beginning of retail access. We agree and have included language in the amended rule stating that the obligation ceases on February 28, 2000.

CMP also expressed concern that the provision requiring utilities to sell T&D services to QFs not convey any special rights or entitlements. The Consolidated QFs stated this provision should specify that utilities shall not discriminate against QFs in providing T&D services. The language in the proposed rule mirrors that in the existing rule and clearly conveys that utilities shall provide service to QFs in the same manner as any other customer -- without undue discrimination or special entitlement. We see no reason to modify the language of the proposed rule.

Finally, CMP suggested that a requirement should be added that QFs meet the utility's technical interconnection requirements prior to being interconnected. This is not a matter affected by industry restructuring, and we are not aware of any problems in this regard under the existing rule; accordingly, we decline CMP's suggestion.

3. Rates for Purchases

a. Prior to Retail Access

Both CMP and the Consolidated QFs stated that it would be useful for the Commission to specify the methodology it will use to establish avoided cost rates prior to retail access. As discussed in section IV(C) of this Order, we agree that the amended rule should contain a description of the methodologies we will use to establish STEO and energy and capacity avoided costs prior to retail access. Such provisions are contained in section 3 of the amended rule.

b. After Retail Access

i) Comments

With respect to the two alternatives presented in the proposed rule, CMP preferred the formula to that of an administrative approach, but believes there is a better alternative. CMP suggested that the price obtained from its sale of the rights to the power from QF contracts be used to establish both STEO rates and avoided energy and capacity costs. CMP stated this approach would avoid the possibility of creating additional stranded costs. CMP opposed the administrative process alternative because it would require T&D utilities to propose rates that reflect future wholesale generation costs that, after February 2000, will become an area irrelevant to their core business.

CMP stated that dispatchability, maintenance scheduling, and line loss adders would be reflected in either the price received for QF contract output or the ISO-NE clearing price. Additionally, by definition STEO is intermittent, as-available energy that is not pre-scheduled (for dispatchability or maintenance) so that references to adjustments for dispatchability and scheduled maintenance should be deleted from the STEO section. Finally, CMP stated that, because T&D utilities will not be selling generation, there will in effect be no associated line loss saving from having generation sources closer to retail customers; because there is no line loss benefit being provided, no corresponding adjustment should be made to rates paid to QFs.

The Consolidated QFs argued that the formula approach to establishing STEO rates in the proposed rule

is not appropriate because it is a New England price that might not reflect Maine-specific factors; the approach does not satisfy the specific requirements of section 7 of the Act and is thus not permitted by the law. The Consolidated QFs supported a revised version of the second alternative that explicitly incorporates the section 7 criteria and provides a clear mechanism for developing Maine-based STEO rates.⁹

For similar reasons, the Consolidated QFs opposed the formula approach and supported a revised version of the administrative process alternative for capacity and energy. They argued that use of a current market price for capacity would not comply with section 8 of the Act because it would not be equivalent to long-term avoided costs as historically determined by the Commission and that it would not capture the value of longer term commitments. The Consolidated QFs urged the Commission to develop a methodology for establishing true long-term avoided costs.¹⁰ Finally, the Consolidated QFs, Benton Falls and MRE disagreed with CMP that the rule's factors affecting rates (e.g., dispatchability, scheduled maintenance, line loss reduction) are either captured in a market rate or inapplicable in a restructured industry.

ii) Discussion

The amended rule does not include either of the proposed rule's alternatives for STEO or capacity and energy avoided costs. Instead, the amended rule adopts the basic approach initially proposed by CMP that uses the sale of the output of QF contracts, pursuant to 35-A M.R.S.A. § 3204(4), as the basis for establishing avoided costs. The approach has several important advantages: it will accurately reflect the market value of the power at the time of the sale; it will be easy to administer; it is consistent with the Act's directives; and it will eliminate the potential to create new stranded costs,

⁹The Consolidated QFs did not propose any such mechanism nor did it explain the concept of Maine-based STEO rates. Maine is part of an integrated New England electricity market; for the most part, there is no Maine-specific market.

¹⁰Again, the Consolidated QFs did not propose any specific methodology.

because it precisely matches what the utility pays QFs with what the utility receives for the power in the market.¹¹

Specifically, we will require that the sale of QF contract output pursuant to 35-A M.R.S.A. § 3204(4) contain separately stated capacity and energy prices for on-peak and off-peak periods for each month of the duration of the sale.¹² Utilities that have QF contracts with STEO or avoided capacity and energy provisions will make periodic filings containing monthly, time-differentiated energy and capacity rates that will equal the section 3204(4) sale prices. The STEO avoided costs will be the energy-only rates and the capacity and energy avoided costs will be the capacity and energy rates. The STEO filing will be made annually and contain rates for the following 12 months.¹³ The capacity and energy rates filing will contain rates for the entire sale duration; new filings are required after each new section 3204(4) QF output sale.¹⁴

¹¹Although CMP proposed this approach in the Inquiry that preceded this rulemaking, we did not include it in the proposed rule because, at the time, CMP included its QF contracts as part of its divestiture bid package. Because of the bid design, it would have been impossible to implement CMP's proposal without administrative processes to transform the QF sale results into time-differentiated, unbundled energy and capacity rates as required by the Act. Thus, although divestiture would have provided information the Commission would use in setting avoided costs, it would not have obviated the need for administrative proceedings to set avoided costs. Now that CMP has determined it will not sell the QF output as part of its divestiture but pursuant to Commission rules proscribing the terms of the sale, this approach becomes workable.

¹²We will determine the sale duration in the section 3204(4) rulemaking so as to maximize bid prices and hedge against risk.

¹³If the sale duration is more than 1 year (e.g., 3 years), the utility's initial STEO filing will contain the first year's sale prices; in the second year, the utility's STEO filing will contain the second year's sale prices; the third year filing will contain the third year's sale prices.

¹⁴If our section 3204(4) rulemaking reveals that our decisions here are either unworkable or might tend to reduce the

Utilities will file the avoided costs on January 15, beginning in 2000, and provide copies to interested persons on a predetermined service list. Interested persons may object to the avoided cost filing by February 15. The objections must include a showing that the filed rates do not reasonably represent wholesale prices in Maine or are otherwise contrary to law. If no objections are received, the rates will become effective unless suspended by the Commission or its Director of Technical Analysis. If objections are received, the Commission or its Director of Technical Analysis may suspend the rates from becoming effective. If not suspended, the rates will become effective on March 1. In the event the rates are suspended, the Commission will adopt a procedure to determine the avoided cost rates.

This approach complies with the section 7 requirements regarding STEO rates. Under the amended rule, the Commission will establish STEO rates "no less frequently than annually . . . for the 12-month period succeeding the annual date of establishment . . ." The rates will be time-differentiated, using current peak and off-peak periods and represent an accurate estimate of wholesale energy costs in Maine that include fuel, start-up, and variable operating and maintenance costs. Section 7 states that STEO rates should be "adjusted to reflect line loss costs or savings." To the extent there are line loss effects, they should be captured in the market prices. Accordingly, we have not included a line loss adjustment. Under the amended rule, however, QFs may argue for a line loss adjustment by objecting to the utility's filed rates. We have also declined to include specific adjustments for scheduled maintenance and dispatchability as generally not applicable because STEO rates are for as-available energy. As stated above, the amended rule allows the Commission to establish different rates upon a showing that the bid prices are not representative of wholesale costs in Maine. In such a situation, the Commission, consistent with the provisions of section 7 of the Act, would consider historic market prices, as well as generally available indicators of market prices. Interested persons would also have an opportunity to make a showing that the Commission should allow an adjustment

value utilities might receive for QF power, we will immediately reopen this Chapter and adopt alternative avoided cost methodologies.

for scheduled maintenance or dispatchability, as well as line losses.

With respect to energy and capacity costs, the amended rule is consistent with section 8 of the Act that requires the Commission to adopt a method for establishing terms related to long-term avoided costs that preserve the intent and purposes embodied in the contractual provisions. As we stated above, avoided cost calculations in Maine measure market value of power and, as such, reliance on direct market indicator to establish avoided costs cannot be considered as violative of the intent and purposes of QF contracts. Additionally, any approach that relies on longer term projections of future cost (either administratively determined or by formula) risks creation of stranded costs because the avoided costs paid to the QF would not match what CMP obtains for the very same power on the market. Our view is that the Legislature did not intend to preclude a methodology that establishes future avoided costs in a manner that minimizes the possibility of creating new stranded costs by relying on an easily determined value of QF power in the market.

Although section 8 requires the Commission to maintain the intent and purposes of contracts, the contracting parties do not have a reasonable expectation for any particular methodology for establishing avoided costs or that an existing methodology would remain unchanged indefinitely. Even without industry restructuring, the Commission could have amended the methodology in Chapter 36 to a market-based or formula approach. In fact, this is what the Commission did in effect when it moved to a competitive bidding system for all QFs greater than a 1 MW. The language in section 8 of the Act cannot reasonably be read to require the Commission to set future avoided costs using outdated processes that ignore the reality that the industry has changed. In response to the Consolidated QFs' argument that our methodology must reflect the value of long-term commitments to provide power, we agree with CMP comments during the rulemaking hearing. As a general principle, the value of power over the long term should equate to the sum of shorter term prices; thus our approach does not violate any expectations in this regard.¹⁵

¹⁵The Consolidated QFs' view appears to be based on the capacity and regulatory situation in the 1980s when there was a generally accepted value to a commitment to provide power over relatively long periods. It was this generally held perception that has resulted, to some degree, in the current stranded cost

Finally, the amended rule maintains the list of "factors affecting rates for purchases" (e.g., dispatchability, scheduled maintenance), modified to be consistent with other changes to the amended rule. Our view is that the rule's market approach will capture the benefits of the listed items (if those benefits continue to exist). The consideration of the listed factors is permissive under the amended rule, allowing us to adjust to purchase rates if, in the context of a suspended avoided cost filing, it is demonstrated that an adjustment is warranted.

Except for the changes described above, the amended rule maintains the modifications contained in this section of the proposed rule.

E. Section 5: Net Energy Billing

1. Proposed Rule

When initially adopted, Chapter 36 contained a provision allowing QFs with an installed capacity of 100 kW or less the option to buy and sell electricity on a net energy basis. The purpose of this provision was to facilitate the development of very small QFs by allowing them to sell their excess generation to utilities without incurring the costs associated with a second meter. The proposed rule maintained the existing net energy billing provision until March 1, 2000 and included two alternatives for similar arrangements after that date.¹⁶

For QFs with existing net energy billing agreements that extend past March 1, 2000, the proposed rule specified that T&D utilities would continue to bill on a net energy basis; the proposed rule also contemplated that the T&D utility would purchase any excess generation and include it with generation from all other existing QF contracts for sale under the terms of 35-A M.R.S.A. § 3204(4). We sought comment,

problem. In the future unregulated market, generation providers may instead offer discounts to customers (either wholesale or retail) that commit to buy power over long periods of time.

¹⁶These provisions were moved to a separate section in the rule.

however, on whether it would be more desirable for the rule to allow competitive providers or to direct or allow standard offer providers to purchase the excess generation.

For net billing arrangements after March 1, 2000, the proposed rule contained two alternatives. The first alternative would maintain the definition of net energy billing as it currently exists and allow a net billing customer to choose any competitive provider that is willing to offer service and purchase energy on a net basis pursuant to agreed upon rates. If the customer takes generation service from the standard offer, the proposed rule required the standard offer provider to purchase excess energy on a net basis at STEO rates established under this rule.

The second alternative would change the approach to net energy billing by requiring the installation of two meters, one measuring the energy the customer draws from the system and the other measuring the energy the customer provides to the system. At the end of the billing cycle, the customer would be billed for the usage shown on the first meter and paid for the energy provided as shown on the second meter. The proposed rule defined this approach as instantaneous net energy billing.¹⁷ The customer's options to purchase from the competitive market and sell excess generation to its competitive provider, or purchase and sell to the standard offer provider(s) were the same as the first alternative. We sought comment on whether the use of two meters for customers with small generating facilities is necessary or desirable and, if so, whether the billing and metering approach contained in the second alternative would be more accurate; we also asked if it would be more appropriate to directly charge the customer for the second meter and associated connection costs.

With respect to either of the net billing alternatives, we asked for comment on whether the 100 kW or less qualification for net energy billing should be reduced (e.g., 10

¹⁷ We proposed the second alternative as a result of information and arguments provided in a recently-concluded proceeding, Talmage/Inoue Petitions, Docket Nos. 97-513/97-532, in which CMP revealed that, despite the existing rule's premise of a single meter, it has routinely installed two meters because of the need to identify the amount of energy consumed for state sale tax purposes.

kW) and whether the option should be limited to residential customers. We also asked for comment on whether only generation-related costs should be billed on a net energy basis. Finally, we sought comment on whether the net energy billing rule should contain a provision for a Commission-approved standard form contract.

2. Comments

Messrs. Talmage and Inoue provided extensive comments on the net billing issues. As a general matter, Messrs. Talmage and Inoue commented that net billing provides a simple, inexpensive and easily-administered mechanism to allow Maine residents to contribute more directly to the State's goal of encouraging customers to invest in generating technologies that use renewable and indigenous resources. Messrs. Talmage and Inoue supported leaving the obligation with the T&D utilities as a default for dealing with existing contracts that extend past March 1, 2000, but giving customers the option of voluntarily transferring the arrangements to competitive electricity providers. Regarding new net billing arrangements after March 1, 2000, Messrs. Talmage and Inoue supported the first alternative of the two presented in the proposed rule as maintaining the advantages associated with the existing net billing requirements (single meter simplifying interconnection, meter reading, and accounting). They commented that the second alternative is not a true net billing approach and is rather a net purchase and sale arrangement that is inferior to the first alternative because it increases cost and complexity by requiring the use of two non-standard meters, results in inequitable pricing, and distorts incentives for energy use by customers.

Messrs. Talmage and Inoue also suggested an additional alternative that they consider the preferred approach. Under this alternative, any excess generation in a given billing period is credited or rolled over to the following month, thereby eliminating the need for the purchase of excess generation by a utility or a competitive provider; the roll-over continues until the end of the calendar year, at which time any unused credit is granted back to the competitive provider without any compensation to the customer. The approach simplifies the arrangement by eliminating what may be a costly and cumbersome process associated with having competitive providers purchase very small amounts of energy. It also discourages net billing customers from oversizing their systems to generate more electricity than they consume over the year, since they will not be compensated

for any unused credit; this is consistent with the implicit goal of net energy billing of allowing customers to offset their own electricity purchases rather than to produce power for sale in a wholesale market. Messrs. Talmage and Inoue indicated that several states, including California, Maryland, Nevada, New York, and Rhode Island, either allow or require annualization of the net billing calculation.

Messrs. Talmage and Inoue also commented that if the Commission continues to allow two meters, the customer should not pay for the second meter because it would unnecessarily discourage the installation of small renewable facilities. They proposed that net billing arrangements continue to be required for customers with generating facilities that have peak generation capacity of 100 kW or less; this capacity limit would allow the use of solar, wind, and microhydro systems for residential, small commercial, and farm-scale applications, while excluding larger, utility-scale facilities that use technologies designed to generate both power for sale on the interstate grid. The 100 MW capacity limit also corresponds with the most common capacity limit in other states that offer net billing. They also stated that there is no reason to limit net billing to residential customers and suggested that the rule include renewable resource technologies as defined in section 3210 of the Act. Messrs. Talmage and Inoue commented that customers should be allowed to net generation as well as T&D costs so as not to dramatically reduce the economic benefits of net billing and thus discourage customers from investing in small-scale renewable generation. Finally, Messrs. Talmage and Inoue stated that it is important to have a Commission-approved standard form contract to avoid the need and expense of having to negotiate with utilities over terms and conditions of interconnection and operation.

Mr. Lord, MRE, REAP, and the Public Advocate also provided comments in favor of the continuation of net billing. Mr. Lord and the Public Advocate supported Messrs. Talmage and Inoue's proposal for annualized net billing, the use of a single meter, and the use of a standard contract. MRE and REAP strongly supported the continuation of net billing for small generators as essential to further the intention of the Legislature in promoting renewable and distributed generation and argued that the second alternative negates this goal by changing the character of net billing to a purchase and sale arrangement. MRE stated that the purpose of net billing is not only to avoid the cost of installing a second meter, but represents a method for small generators to purchase back-up power at non-discriminatory

and reasonable rates. MRE also expressed concerns that T&D rates and stranded cost charges may, if designed to be less usage sensitive, significantly reduce the economics of the small systems. MRE commented that the cost of the second meter should not be charged to the customer, because the utilities have provided no credible argument that these costs place an undue burden on utilities. MRE and REAP supported the continuation of the 100 kW threshold in light of the lack of any evidence to suggest that this has created any problems. REAP opposed limiting the option to residential customers because businesses with small generating facilities should not be precluded from such arrangements. The Public Advocate supported requiring the standard offer provider, rather than the T&D utility, to purchase excess generation. Finally, MRE stated the qualifications in the current rule should be replaced by a simple requirement that customers use waste heat to meet a significant part of the heat requirement that would otherwise require the consumption of additional fossil fuels.

The consolidated QFs stated that the "existing contracts" provision in the net billing section of the rule be modified to specify existing contracts for net billing customers so as not to create confusion regarding other QF contracts.

CMP commented that net billing arrangements result in unnecessary costs, because it, in effect, pays for the netted generation at retail rates, and that it must install a second meter for purposes of computing sales tax liability.¹⁸ CMP suggested that small QFs should be treated like any other QFs and commented that the second alternative differs from this treatment only in that it does not require the QF to pay for the second meter. Of the two alternatives presented, CMP prefers the second alternative. If new net billing arrangements are required, CMP stated they should be limited to residential electricity usage and should be limited to an installed capacity of 10 kW or less. CMP commented that net energy billing should focus on the offsetting of retail load and, therefore, the proper size limitation should correspond to that necessary to offset the

¹⁸CMP also argued that the net billing provisions are not in accordance with either federal or state law and should be deleted in their entirety. The Commission has addressed the legality of existing provisions and found them to be lawful under both federal and state law. Talmage/Inoue, Docket Nos. 97-513/97-532 (Oct. 27, 1997).

average retail load of a residence; 100 kW is far in excess of the amount necessary to offset retail load at a typical residence, 10 kW is a much more realistic number. Finally, CMP commented that, assuming these arrangements continue, customers should pay the full T&D costs because such costs are not avoided as long as these customers remain on the system.

3. Discussion

a. Net Billing Prior to Retail Access and Existing Arrangements

The amended rule maintains the provisions of the existing rule for net billing prior to retail access. Thus, any existing arrangements and any new arrangements entered before March 1, 2000 would function as they do now. However, we have added a provision limiting new contracts to terms expiring no later than the initial date of retail competition. This is consistent with section 9 of the Act that provides that existing law and rules with respect to as-available energy be maintained until March 1, 2000. Additionally, no commenter presented any persuasive rationale supporting any change in the net billing rules prior to the implementation of retail competition.

For existing contracts that extend beyond retail access, we have added provisions that allow customers at their option to arrange for net billing arrangements with competitive providers. If the customer takes standard offer service, the standard offer provider(s) is required to provide service on a net basis and purchase any excess generation at the existing contract rates. The amended rule also requires T&D utilities to continue to bill both for their service and for standard offer service on a net basis. These provisions remain in effect throughout the duration of each existing contract. The additions are consistent with sections 5 and 8 of the Act that require contracts be maintained and that we adopt provisions that preserve the intent purposes of existing contracts. Requiring the standard offer providers to purchase any excess generation will avoid the need for the T&D utility to buy and then sell the energy in its section 3204(4) bid process. To address the concern raised by the Consolidated QFs, we have clarified that the provision on existing contracts governs only net billing contracts.

b. New Arrangements After Retail Access

The net energy billing provision was originally included in Chapter 36 as a means of reducing costs for very small QFs so their power could economically be sold to utilities. This was done by avoiding the costs of a second meter and, instead, using a single meter that registered power flows in both directions. The original rationale for net billing, however, is no longer applicable as we enter a restructured environment for several reasons. First, CMP has routinely installed a second meter for purposes of measuring usage for retail sales tax purposes so that the intended cost savings have not occurred.¹⁹ Second, and more importantly, the concept of QFs' generating power and selling it to utilities at their avoided cost is rendered obsolete by a restructuring of the industry that allows for retail competition and restricts utilities from engaging in the generation and sale of electricity. We note that our changes to Chapter 36 are essentially to deal with the remnants of QF contracts and policies that extend beyond the initial date of retail access; when all existing QF contracts expire, there will no longer be any need for Chapter 36.

After considering the comments on this topic, we agree with Messrs. Talmage and Inoue and other commenters that net billing has become more than simply a way of reducing metering costs; rather, it has developed into a means of encouraging the use of small-scale renewable technologies designed primarily to serve the customer's own electricity needs. The promotion of such an outcome is consistent with legislative policies favoring renewable generation and energy efficiency. 35-A M.R.S.A. §§ 3210, 3211. As a result, our view is that a long-standing billing and metering practice that facilitates customers' abilities to meet their own loads through renewable resources is not a practice that should be eliminated solely as a result of industry restructuring. Instead, the practice should be modified so as to be workable in a restructuring environment.

For the reasons stated above, however, new net billing arrangements after the initiation of retail access

¹⁹Earlier in this process and in other proceedings, CMP maintained that there were other reasons for installing two meters. CMP's current position is that the retail sales tax requirements is the reason for two meters.

should not be included in a rule governing QFs and their power sale relationships with utilities that will phase-out over time as existing contracts terminate. It is more appropriate that such a provision be included in a rule generally governing the promotion of renewable resources in a restructured industry. We therefore have not included in the amended Chapter 36 a provision for new net billing arrangements after the advent of retail access; we will instead include such a provision in our rule on renewable resources, that will be promulgated pursuant to 35-A M.R.S.A. § 3210. This provision will be designed to facilitate the use of small-scale renewable generation to serve customers' own needs.

The new net billing provision that we anticipate including in the renewable resource rule will be the annualized methodology, proposed by Messrs. Talmage and Inoue and supported by Mr. Lord and the Public Advocate, in which usage and generation are netted against one another on a rolling basis for a 12-month period. Under this approach, customers can store, or bank, their generation from month-to-month for one year. After the end of the year, neither the T&D utility nor any generation provider would be obligated to pay for any net generation from these customers.²⁰ This approach has many advantages. For example, the annual netting will facilitate certain renewable technologies (such as small hydro and wind power) whose output varies greatly over the year. The absence of any power sales removes any incentive to size facilities to generate more power than necessary to serve the customer's own electricity requirements. It also avoids the anomalous result of a T&D utility that is not in generation business actually paying a customer if excess power is generated. Finally, the approach will be relatively easy to administer and will avoid complexities involved in requiring the purchase of very small amounts of energy.

The specific aspects of the annualized net billing provisions that we intend to include in the renewable rule are discussed below. To qualify for net billing, a customer will have to employ one of the technologies or fuel types listed in section 3210 and have a maximum installed capacity of 100 kW or less. There is no need to reduce the capacity limit because the absence of the sale of power should ensure that facilities

²⁰The provider of generation service will obtain the value, if any, of any excess generation.

are installed to meet customer loads rather than for energy sales. Additionally, we would not restrict availability to residential customers; there is no reason to exclude small businesses that wish to generate their own electricity from taking advantage of net billing.

We will not limit net billing to the generation portion of the electricity bills, but will apply it to T&D charges only to the extent they are usage sensitive. This approach mirrors the results of a customer who invests in energy efficiency. Customers may use their own generation to offset the total price of electricity but must pay any fixed charges designed to cover the costs of T&D system to which the customer remains connected.

We will also include a provision similar to that for existing contracts that allow customers the option of voluntarily arranging for net billing from a competitive provider. If a net billing customer takes service from the standard offer, the provider(s) will be required to provide generation on a net basis.

Finally, we will maintain the current provisions that net billing customers will not be charged the costs of a second meter, if one is necessary,²¹ and that net billing service will be pursuant to a Commission-approved standard contract.

To conclude, our intent is to include in the final renewable resource rule a net billing provision as described above. We will, however, include the provision in the proposed rule and obtain comments to ensure that the specific aspects of the provision are workable and to consider variations that might be more desirable.

F. Section 6: System Emergencies

The substantive provisions of this section were not changed in the proposed rule. CMP provided the only comment on this section, stating that it agreed with its content. We have adopted this section without any change from the proposed rule.

²¹As with all costs, we expect utilities to explore any legitimate means to avoid the costs of the second meter.

G. Section 7: Commission Procedures

Section 8 of the Act requires the Commission to establish methods for determining any rates, terms, conditions of QF contracts, including long-term avoided costs, that are rendered impractical or impossible to perform or implement as a result of industry restructuring. In section IV(D) of this Order, we discussed above our method to establish long-term avoided costs. This section of the rule governs the establishment of other contract terms. Because such provisions may be varied and are likely to be contract-specific, the proposed rule included a procedure whereby the Commission would establish rates, terms, and conditions, consistent with the requirements of section 8 of the Act, as disputed issues arise.

Similar to existing practice, the proposed rule required the QF and utility to first attempt to resolve any differences over their contract terms. If, after good faith negotiations, the parties could not come to an agreement, either the utility or QF may file a petition for the Commission to establish the disputed term. In resolving the dispute, the Commission would make a finding that the disputed rate, term, or condition has been rendered impractical or impossible to perform as a result of industry restructuring. If it makes such a finding, the Commission, consistent with section 8 of the Act, would establish a rate, term, or condition that preserves the intent and purposes embodied in the original contract.

The proposed rule also deleted many of the detailed procedures currently contained in section 6 of the rule as either inapplicable due to industry restructuring or unnecessarily specific. The proposed rule did, however, maintain a general provision stating that the Commission may investigate, either as a result of a petition or on its own motion, any matter relevant to the provisions contained in the rule.

CMP provided the only comment on this section, stating that it agreed with its content. We have adopted this section without any change from the proposed rule.

H. Section 7 (existing rule): Commission Procedures Upon Petition to Issue Order Requiring Wheeling

Section 7 of the existing rule implements the affiliate wheeling section of Title 35-A, section 3182. The proposed rule deleted this entire provision because it has become obsolete with

the enactment of the Energy Policy Act of 1992 and the Federal Energy Regulatory Commission's promulgation of its Open Access Rule, FERC Order No. 888. We received no comments on this section. The section is deleted in the amended rule.

I. Section 8: Small Electric Utilities

This section contains provisions and requirements regarding small electric utility purchases of power from QFs. The proposed rule added a provision specifying that this section would no longer be effective as of the date of retail access, because at that time utilities will no longer be under any requirements to purchase QF power. We received no comments on this section. We have adopted this section without any change from the proposed rule.

V. OUT YEAR AVOIDED COSTS

The Consolidated QFs, Benton Falls Associates (commenting separately) and RWS urged the Commission to acknowledge in this rulemaking that so-called "out-year" or "orphan decrement" avoided costs have already been established. This matter concerns language in certain QF contracts describing the rates for purchases for years in which avoided costs had not been determined at the time the parties executed the initial contracts. The QFs stated that they are not asking the Commission to resolve a contract dispute, but rather to state affirmatively the action the Commission took when it last set avoided costs for CMP.

We decline to address this matter for two reasons. First, this proceeding is a rulemaking docket opened for the explicit purpose of amending Chapter 36 in light of industry restructuring. The matter raised by the QFs involves existing contracts and is not related to either industry restructuring or this rulemaking. Second, although the QFs characterize their request as asking the Commission to state what it did in a past case, the request is in the nature of a contract interpretation to resolve a dispute. The official actions of the Commission are described in its written decisions. Any further description of what it did in a prior case would essentially include a consideration of whether rates have already been set for purposes of the contracts in question. In effect, this would involve contract interpretation.

It is unclear whether the Commission has jurisdiction to interpret or otherwise act to resolve disputes regarding existing QF contracts. It is clear that, if such jurisdiction exists, the current rulemaking is not a vehicle to exercise that jurisdiction.

Accordingly, we

O R D E R

1. That the attached Chapter 360, Cogeneration and Small Power Production, is hereby adopted;

2. That the Administrative Director shall send copies of this Order and the attached rule to:

A. All electric utilities in the State;

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

C. All persons on the Commission's electric restructuring service list, Docket No. 95-462;

D. All persons that provided comments in this rulemaking, Public Utilities Commission, Rulemaking Qualifying Facilities Rates, Terms, and Conductio in Restructured Electric Industry, Docket No. 97-794;

E. All persons that provided comments in the rulemaking, Public Utilities Commission, Bidding Processes and Terms and Conditions for Standard Offer Electric Service, Docket No. 97-739;

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

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

Dated at Augusta, Maine this 10th day of March, 1998.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Hunt