

December 16, 2015

MAINE PUBLIC UTILITIES COMMISSION
Efficiency Maine Trust Procurement Funding Cap
(Chapter 396)

ORDER ADOPTING
RULE AND STATEMENT
OF FACTUAL AND
POLICY BASIS

VANNOY, Chairman; McLEAN and WILLIAMSON, Commissioners

I. SUMMARY

In this Order, the Commission adopts Chapter 396, Efficiency Maine Trust Procurement Funding Cap (65-407 C.M.R. ch. 396), which establishes the process and requirements by which the Commission will determine the statutory cap of 4% of the total retail electricity and transmission and distribution sales for the procurement of electric energy efficiency resources pursuant to Title 35-A, section 10110(4-A).

II. BACKGROUND

A. Omnibus Energy Act

During its 2014 session, the Legislature directed the Commission to establish by rule a cap on electricity ratepayer funding for Efficiency Maine Trust (EMT) programs. This legislative requirement was contained in An Act to Reduce Energy Costs, Increase Energy Efficiency, Promote Electric System Reliability and Protect the Environment (Omnibus Energy Act), P.L. 2013, ch. 369. Section A-19 of the Omnibus Energy Act repealed the System Benefit charge (SBC) that had been used to fund the EMT electricity efficiency programs, 35-A M.R.S.A. § 10110(4) (repealed, effective July 1, 2015), and section A-20 of the Omnibus Energy Act replaced that funding mechanism by adopting 35-A M.R.S.A. § 10110(4-A) (effective January 1, 2015), which stated in relevant part:

The commission shall ensure that transmission and distribution utilities on behalf of their ratepayers procure all electric energy efficiency resources found by the commission to be cost-effective, reliable and achievable pursuant to section 10104, subsection 4, except that the commission may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity transmission and distribution sales in the State as determined by the commission by rule.

B. Docket No. 2015-00007

On January 13, 2015, In accordance with section 10110(4-A), as enacted by the Omnibus Energy Act, the Commission issued a Notice of Rulemaking (NOR) and a proposed rule (Chapter 396, Efficiency Maine Trust Procurement Cap) (Docket No. 2015-00007). With regard to determining the amount of sales revenue for the purpose of calculating the ratepayer funding cap, the proposed rule included revenues from the sale of transmission and distribution but not the sale of supply because the then-effective section 10110(4-A) referred to “retail electricity transmission and distribution sales,” without referencing revenue from retail supply sales. NOR at 3. The Commission sought comment on how to calculate total sales for the purpose of calculating the ratepayer funding cap, and the NOR also highlighted questions regarding whether certain other funds should be included in the amount in rates, and on what data to rely to calculate total sales.

Following a public hearing and comment period on the proposed rule, on April 8, 2015 the Commission issued an order in which it concluded that a plain reading of section 10110(4-A) indicated the Legislature intended only sales from transmission and distribution be included when calculating the ratepayer funding cap.¹ The Commission made other minor adjustments to the proposed rule based upon comments submitted to the rulemaking record, and it adopted the rule. By order dated June 24, 2015, the Commission denied petitions for reconsideration filed by the Conservation Law Foundation, Natural Resources Council of Maine, Maine Association of Building Efficiency Professionals, and the Office of the Public Advocate.

On June 23, 2015, the Legislature overrode a Governor’s veto and adopted P.L. 2015, ch. 255, An Act to Provide Lower Energy Costs to Maine Businesses and Residences by Carrying Out the Legislature’s Intent Regarding Funding of the Efficiency Maine Trust. This Act amended Title 35-A, section 10110(4-A) as follows:

The commission shall ensure that transmission and distribution utilities on behalf of their ratepayers procure all electric energy efficiency resources found by the commission to be cost-effective, reliable and achievable pursuant to section 10104, subsection 4, except that the commission may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity *and* transmission and distribution sales in the State as determined by the commission by rule.

35-A M.R.S. § 10110(4-A)(emphasis added)(effective October 15, 2015). Thus, as amended, section 10110(4-A) directs the Commission to include retail electricity and transmission and distribution sales for the purpose of calculating the ratepayer funding cap.

On July 21, 2015, noting the above-quoted legislative changes to section 10110(4-A), the Office of the Attorney General (OAG) informed the Commission it was

¹ Commissioner Littell dissented.

unable to approve proposed Chapter 396, as adopted by the Commission's April 8, 2015 order. On July 27, 2015, the Commission acknowledged receipt of the OAG letter, indicating that it would initiate a rulemaking proceeding to revise Chapter 396 in view of the recent legislative clarification.

C. Docket No. 2015-00298

On October 15, 2015, the Commission issued a Notice of Rulemaking (NOR), opening the instant docket, Docket No. 2015-00298, attaching a revised proposed rule and an illustrative calculation of the ratepayer funding cap. The proposed rule reflects the recent legislative changes to Title 35-A, section 10110(4-A) quoted above, as well as other minor proposed modifications to the previously adopted Chapter 396. In that regard, the Commission specifically requested comment on Section 3(C) of the rule, which specifies that sales revenues will be determined using the most recent information for the State of Maine as reported by the U.S. Energy Information Administration (EIA) in its Form-861. Additionally, at section 3(E), the the proposed rule provides that the Commission may establish the statutory cap on a utility-specific basis.

In accordance with the Administrative Procedures Act and the NOR, the Commission held a public hearing on November 19, 2015 and received comment from the Efficiency Maine Trust (EMT), the Conservation Law Foundation (CLF), and Central Maine Power (CMP). EMT, CLF, and CMP also filed written comments in advance of the hearing. The Commission received no supplemental written comments following the hearing. The Commission addresses the received comments below.

III. **ADOPTED PROVISIONS**

A. Purpose (Section 1)

The adopted rule states that the purpose of this Chapter is to establish the process and requirements by which the Commission will determine the statutory cap of 4% of the total retail electricity and transmission and distribution sales for the procurement electric energy efficiency resources pursuant to 35-A M.R.S. § 10110(4-A)(effective October 15, 2015).

The Commission received no comments on this section and adopts section 1 as contained in the proposed rule.

B. Definitions (Section 2)

Section 2 contains the definition of several terms that are used throughout the proposed rule.

Among other definitions, the adopted rule includes a definition of "Maine Yankee Funds" at section 2(E), which refers to funds from litigation relating to the removal and storage of spent nuclear fuel related to Maine Yankee. This section also includes a definition of "Assessments," as the word is used in Title 35-A.

The Commission received no comments on this section and adopts section 2 as contained in the proposed rule.

C. Utility Energy Efficiency Procurement Cap (Section 3)

1. Utility Procurement Obligation (Section 3(A))

This provision of the adopted rule specifies that each transmission and distribution (T&D) utility shall procure all electric energy efficiency resources found by the Commission to be cost-effective, reliable and achievable pursuant to 35-A M.R.S. § 10104(4) subject to the procurement cap. This provision is consistent with 35-A M.R.S. § 10110(4-A), which authorizes the Commission to “issue any appropriate orders to transmission and distribution utilities necessary” to procure all cost-effective energy efficiency resources.

The Commission received no comments on this section and adopts section 3(A) as contained in the proposed rule.

2. Utility Procurement Cap (Section 3(B))

This provision contains the statutory procurement cap that specifies that the Commission may not require the inclusion in rates a total amount that exceeds 4% of total retail electricity and transmission and distribution sales in Maine.

With regard to section 3(B), CMP notes that the text of this section relates to the corresponding statutory language, and therefore it is acceptable to CMP. CLF agrees that the rule provision is consistent with the statutory provision. CMP further states, however, that the rule should be clarified to indicate that the Commission will not “issue a single procurement order to a single utility for the entire 4% cap amount,” and that therefore the utility-specific caps proposed in section 3(E) would be appropriate. At the rulemaking hearing, EMT commented that community owned utilities (COUs) may not be paying into the EMT conservation fund, and that EMT’s preference was for all utilities to be paying proportionately into the conservation fund.

Section 3(E) and the question of utility-specific caps are discussed in more detail below, but the Commission notes that Chapter 396 relates to determining the statutory cap on ratepayer funding for efficiency measures and does not address the methodology for procuring the funding for the efficiency measures from individual utilities. In other words, this rulemaking determines the ceiling on the EMT electricity program budget supported by ratepayer funding, but the allocation of the collection of those funds among the utilities is beyond the scope of this rulemaking.² The Commission therefore declines to clarify this section as requested by CMP.

² Any issues regarding the allocation of the EMT budget among utilities will be decided in the review of the EMT’s triennial plans.

For the foregoing reasons, the Commission adopts section 3(B) as contained in the proposed rule.

3. Determination of Amount of Sales Revenue (Section 3(C))

Section 3(C) of the adopted rule contains the provisions governing the determination of the sales revenues for purposes of the procurement cap, as clarified by the recently amended section 10110(4-A). The rule specifies that the sales revenues will be determined using the most recent information for the State of Maine as reported by the U.S. Energy Information Administration (EIA) in its Form-861.

Because the cap is calculated to guide the establishment of the EMT budget amount to be included in rates for the upcoming year, the adopted rule specifies that EMT funding amounts that are embedded in revenues for the year corresponding to the EIA report will be excluded from total revenue.

With regard to the use of EIA data to determine the statutory cap, CLF and CMP stated they have no objection. CMP further noted, however, that the Commission either has or could obtain sales revenue data from the transmission and distribution utilities and competitive electricity providers, and thus it may be unnecessary for the Commission to rely on EIA data. On the other hand, EMT stated that EIA data is acceptable because it is reasonably easy for parties to identify, it is reasonably accurate in reflecting the full value Maine consumers are paying for electricity, it is transparent, and it is predictable. EMT suggested amending the rule to allow reliance on EIA data unless more recent data of equal or better integrity can be collected with relative ease.

The Commission agrees with the Trust that the use of EIA data is preferable because the source of the EIA data is transparent, the availability of the data is reliable, and the data is reasonably accurate for the purpose of setting the statutory cap. Although the Commission agrees with EMT that it may be desirable to use data that is more current, such data is not readily available. Moreover, EIA data, which should reflect the sales revenue from the year two calendar years prior to the applicable assessment period, is reasonably current and unlikely to bias the cap calculation in a particular direction. Nonetheless, we adopt EMT's suggestion that, should more recent reliable data become reasonably available, the Commission may rely on such sources of data. The Commission amends the proposed rule in that regard, and otherwise adopts section 3(C) as contained in the proposed rule.

4. Determination of Amounts in Rates (Section 3(D))

Section 3(D) of the adopted rule contains provisions on the determination of what amounts in rates should be included in the calculation of the 4% cap on EMT funding. In determining that the amount in rates does not exceed 4% of total retail electricity and

transmission and distribution sales, the adopted rule states that the Commission shall: include amount in rates related to the procurement of energy efficiency through procurement orders; long-term contracts entered into pursuant Commission order in Docket No. 2012-00408 or pursuant to 35-A M.R.S. § 3210-C; and other amounts in rates that reflect funds transferred to the EMT from utilities for purposes of electric energy efficiency programs. The adopted rule specifies that any amounts transferred by utilities to the EMT referred to in the rule as “external funds,” which currently includes primarily Maine Yankee Department of Energy (DOE) litigation settlement funds transferred to the EMT pursuant to Section A-27 of the Omnibus Energy Act, are not included in the determination of the amount in rates for purposes of the procurement cap.

CMP commented that it agrees with the Commission’s approach and rationale with respect to the items that should be included and excluded from the determination of what amount is to be considered in rates for electric energy efficiency resources. CLF commented that the statutory cap should not apply to funds EMT receives from long-term contracts. CLF’s comment is addressed below.

a. Long-term contract funds

The amounts in utility rates related to long-term energy efficiency contracts are not in any significant way different in nature than amounts in rates to procure energy efficiency pursuant to 35-A M.R.S. § 10110(4-A) and, accordingly, there appears to be no reason for the Legislature to distinguish between these sources of funding for purposes of determining the 4% cap. Both are means to fund Trust programs through utility rates. Given that the revenue associated with transmission and sub-transmission sales is included in the denominator of the 4% cap formula, it would be logically inconsistent to exclude the costs associated with their EMT programs, which are reflected by the long-term contract funds. For these reasons, the proposed rule included the amount in rates associated with long-term contracts in determining whether the rate cap is implicated.

CLF nonetheless asserts that including long-term contract funds as an amount in rates is contrary to the plain meaning of 35-A M.R.S. § 10110(4-A). CLF states including the long-term contracts in rates will frustrate the intent of procuring all cost-effective, reliable, and achievable electric energy efficiency resources by limiting other sources of funding.

The Commission considered comments similar to those of CLF in the prior rulemaking docket, Docket No. 2015-00007, and as before the Commission is not persuaded by CLF’s interpretation of the statute. Section 10110(4-A) states that the Commission shall direct T&D utilities to procure all electric energy efficiency resources found to be “cost-effective, reliable and achievable pursuant to section 10104, subsection 4” Section 10104, subsection 4 (which governs the triennial plan), explicitly recognizes that the triennial plan will include funds generated pursuant to section 3210-C among other funding sources for the Trust. Section 10104(4)(D) states that the “commission shall reject elements of the plan that propose to use funds generated pursuant to sections 3210-C, 10110, 10111 or 10119 if the plan fails to

reasonably explain how these elements of the program would achieve the objectives and implementation requirements of the programs established under those sections....”

For these reasons, the Commission declines to modify the proposed rule as requested by CLF.

b. Other funds/non-transmission alternatives

For purposes of determining the procurement cap, amounts transferred to the EMT from utilities for other purposes, such as non-transmission alternatives (NTAs), and are recovered in rates for electric efficiency, are also considered included in rates. Thus, adopted rule section 3(D)(3) includes other funds transferred to the EMT from utilities for electric efficiency, for example, such as for NTAs, that are recovered in rates.

c. Maine Yankee and Other External Funds

With regard to inclusion in rates, our view is different with respect to Maine Yankee funds or similar funds that the Legislature directs be transferred from utilities to the EMT but are not recovered in rates. These funds are intended to compensate ratepayers for amounts they previously paid in rates for nuclear waste storage and, therefore, these funds would generally be used to lower utility rates. However, these amounts are not “included in rates” and there is no indication that the Legislature intended that the Commission impute these amounts as being in rates for purposes of the determining whether the cap has been reached.

Accordingly, the Commission adopts section 3(D) as contained in the proposed rule.

5. Determination of Procurement Cap (Section 3(E))

The proposed rule stated that the utility procurement cap for each year of the EMT’s triennial plan shall be 4% of total retail electricity and transmission and distribution sales in Maine as set forth in Section 3(C). This section of the proposed rule further provided that, at its discretion and in order to fulfill the intent of Title 35-A, section 10110, subsection (4-A), the Commission may establish Utility Procurement Caps on a utility-specific basis.

Regarding setting the statutory cap on a utility-specific basis, as noted above with regard to section 3(B) or the proposed rule, CMP stated that it supports the idea of establishing the statutory cap on a utility-specific basis. In its comments, EMT seeks clarification as to under what circumstances the Commission would apply utility-specific caps, and further seeks clarification as to whether the Commission intends to exempt any transmission and distribution utility from paying its pro rata share of the procurement amount.

Upon further reflection, utility specific caps would not be helpful in giving effect to the legislature’s direction that the Commission establish a cap on the EMT’s budget that is funded through electricity rates. The cap is to be distinguished from the setting of EMT’s budget and procuring the ratepayer portion of that budget. Those issues, namely

determining MACE, the appropriate budget to fund MACE, as well as the methodology for procuring ratepayer funding from the utilities, are beyond the scope of this rulemaking and better addressed in the context of the Commission's review and approval of EMT's triennial plans.

Therefore, the Commission removes the reference to possible utility-specific statutory caps from the rule, and otherwise adopts section 3(E) as proposed.

6. Utility Annual Report (Section 3(F))

Each transmission and distribution utility shall file an annual report by March 1 of each year, identifying the amount in rates from prior Procurement Orders, Assessments, Long-Term Contract Funds, or other amounts associated with funding for electricity energy efficiency programs as reflected in approved Triennial Plans .

CMP commented that it expects to be able to satisfy the reporting requirements, and the Commission received no further comments. Therefore the Commission adopts section 3(F) as contained in the proposed rule.

7. Cost Recovery (Section 3(G))

Consistent with the provisions of the Omnibus Energy Act (Section A-20), the adopted rule specifies that the cost of procurement of cost-effective electric energy efficiency resources pursuant to this Chapter constitutes a just and reasonable utility expense that shall be recovered through transmission and distribution utility rates.

CMP commented that the proposed rule is consistent with Title 35-A and therefore acceptable to CMP. The Commission received no further comment on this section and therefore adopts section 3(G) as contained in the proposed rule.

D. Waiver or Exemption (Section 4)

This section of the rule contains the Commission's standard language on the waivers or exemption of provisions of the rule.

CMP commented that it has no objection to this proposed language, and the Commission received no further comment on this section. The Commission therefore adopts section 4 as contained in the proposed rule.

Accordingly, we

O R D E R

1. That the attached Chapter 396, Efficiency Maine Trust Procurement Funding Cap, is hereby approved:

2. That the Administrative Director shall file the rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following of this rulemaking proceeding:
 - a. All transmission and distribution 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 who commented in this rulemaking; and
 - d. All parties in Docket No. 2012-00449 and Docket No 2015-00007.
2. That the Administrative Director shall send copies of this Order and attached rule to the Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Hallowell, Maine, this 16th day of December, 2015.

BY ORDER OF THE COMMISSION

/s/ Harry Lanphear
Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Vannoy
McLean
Williamson

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 of 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.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).

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.