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Via Electronic Filing

September 13, 2021

Mr. Harry Lanphear
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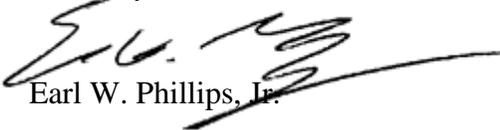
Re: **Docket No. 2021-00213, Public Utilities Commission Amendments to Portfolio Requirement Rule (Chapter 311)**

Dear Mr. Lanphear:

Attached please find the Comments of Retail Energy Supply Association in connection with the above-referenced matter.

Please feel free to contact me if you have any questions or require additional information. Thank you.

Sincerely,



Earl W. Phillips, Jr.

Attachments

September 13, 2021

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

**COMMENTS OF
RETAIL ENERGY SUPPLY
ASSOCIATION**

The Retail Energy Supply Association (“RESA”)¹ hereby submits its comments in response to the Public Utilities Commission’s (“Commission”) August 3, 2021 Notice of Rulemaking (“Notice”)² in connection with the above-referenced matter.

INTRODUCTION

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York, and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Maine retail electric market. Several RESA member companies are licensed by the Commission to serve residential, commercial, and industrial customers in Maine and are presently providing electricity supply to customers in the State. Accordingly, RESA and its members have an interest in ensuring that the amendments adopted in this proceeding do not have an adverse effect on RESA members, their customers, or the continued success of the retail electric market in Maine.

¹ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

² Notice of Rulemaking (Aug. 3, 2021).

BACKGROUND

On September 21, 2020, the Commission initiated an inquiry to seek comments and information on the issue of whether competitive electricity providers (“CEPs”) serving Net Energy Billing (“NEB”) customers that participate in the NEB kilowatt-hour credit program (“NEB kWh Credit Program”) should be required to meet Maine’s renewable portfolio standard (“RPS”) requirements based on metered or billed sales.³ Chapter 311 requires a CEP to account for specified percentages of “its total kilowatt-hour sales” with electric energy from specified types of generation resources.⁴ “Total kilowatt-hour sales” is not currently defined in Chapter 311.⁵

The 2020 Notice of Inquiry noted that the Commission had received questions regarding how this provision should be applied in the context of NEB arrangements, in particular, whether “total kilowatt-hour sales” should be measured in terms of billed sales or metered sales.⁶ As part of the Commission’s inquiry, it received comments and held a stakeholder meeting.⁷

On August 3, 2021, the Commission issued the Notice and initiated a proceeding to amend Chapter 311.⁸ With the Notice, the Commission also issued proposed revisions to Chapter 311 (the “Proposed Rule”). Among other things, the Proposed Rule added definitions of “line

³ Docket No. 2020-00274, *Maine Public Utilities Commission Inquiry Into RPS Compliance Requirements for Net Energy Billing Customers*, Notice of Inquiry (Sep. 21, 2020) (“2020 Notice of Inquiry”).

⁴ 65-407-311 Code Me. R. (“Chapter 311”) §§ 3(A), (B), 4(A).

⁵ See Notice, at 1; 2020 Notice of Inquiry, at 1.

⁶ See Notice, at 1.

⁷ See Notice, at 2; see, generally, Docket No. 2020-00274, *Maine Public Utilities Commission Inquiry Into RPS Compliance Requirements for Net Energy Billing Customers*.

⁸ Notice.

losses” and “total kilowatt-hour sales.”⁹ The Commission sought comments on, and scheduled a public hearing to discuss, the Proposed Rule.¹⁰

The Commission received initial comments in advance of the hearing.¹¹ Central Maine Power Company (“CMP”) filed comments in favor of basing RPS compliance obligations on billed sales.¹² Constellation NewEnergy, Inc. (“Constellation”) filed comments urging the Commission to make any changes to RPS obligations only on a prospective basis and requesting further clarification of the definition of “total kilowatt-hour sales.”¹³ In particular, Constellation recommended clarifying or defining “total kilowatt-hour sales” as “the supply obligation, determined by the customer’s transmission and distribution utility and adjusted for line losses applicable to the customer’s load, and reported to ISO New England.”¹⁴ RESA hereby submits its comments in response to the issues identified in the Notice, in CMP’s and Constellation’s initial comments, and at the hearing.

COMMENTS

RESA appreciates the Commission’s efforts to address the impact that NEB has on the RPS. However, CEPs should only be required to satisfy the RPS compliance obligations associated with on the actual number of kilowatt-hours (“kWh”) billed to the customer by the CEP as measured at the customer meter without any gross-up adjustment for line losses (i.e., “billed sales”). Consequently, for the reasons discussed more fully below, RESA urges the Commission to modify the Proposed Rule before adopting it in final. Moreover, to protect

⁹ See Proposed Rule, § 2.

¹⁰ See Notice, at 4-5.

¹¹ See Initial Comments of Central Maine Power Company (Aug. 30, 2021) (“CMP Comments”); Constellation NewEnergy, Inc. Comments (Aug. 31, 2021) (“Constellation Comments”).

¹² See CMP Comments, at 2.

¹³ Constellation Comments.

¹⁴ See *id.* at 1-2.

ratepayer expectations, any changes that are made to Chapter 311 should only be applied prospectively.

I. RPS COMPLIANCE OBLIGATIONS SHOULD BE BASED ON BILLED SALES

The Proposed Rule would add the following definition for “total kilowatt-hour sales”:

[T]he metered sales of retail customers as measured by the transmission and distribution utility and adjusted for line losses applicable to the customer’s load. If such metered sales are not available for a particular customer, total kilowatt-hour sales shall be as reasonably estimated by the customer’s transmission and distribution utility consistent with the basis for determining the supply obligations of the competitive electricity provider serving the customer.¹⁵

The addition of the “total kilowatt-hour sales” definition is designed to avoid a situation in which “a significant portion of Maine’s actual retail metered load that would not be subject to RPS requirements as the NEB program grows over time.”¹⁶

Under the NEB kWh Credit Program, customers are billed on the basis of net energy - the difference between the customer’s actual metered kilowatt-hour usage and the “kilowatt-hour credits” applied to the customer’s bill.¹⁷ If the proposed definition is adopted, compliance with the RPS will be based on “metered sales.” As a consequence, RPS compliance will be determined not on the number of kWh actually sold by a CEP to the customer but on the basis of both the number of kWh sold by the CEP *and* the number of kWh generated by the customer. However, this is inconsistent with the Maine RPS statute. Further, this change will not have the intended effect. In fact, it could actually result in a reduction of CEP RPS obligations. Thus, the Commission should base CEP RPS obligations on billed sales.

¹⁵ Proposed Rule, § 2(FF).

¹⁶ Notice, at 2.

¹⁷ See Notice, at 1; *see also* 65-407-313 Code Me. R. § 3(J).

First and foremost, Maine law expressly bases CEP RPS compliance obligations on “retail electricity *sales*.”¹⁸ In fact, Maine’s statutorily defined goals for increasing the consumption of electricity from renewable resources are to meet specified targets for “retail *sales*” from renewable resources.¹⁹ Similarly, Chapter 311 requires that each CEP account for specified percentages of “its total kilowatt-hour *sales* to customers in Maine with electric energy” associated with certain types of resources.²⁰ Moreover, established exemptions from RPS obligations apply to retail sales.²¹ Thus, basing RPS obligations on anything other than retail sales of electricity would contravene the plain language of Maine’s RPS statute and Chapter 311.

¹⁸ See 35-A M.R.S. § 3210(3) (Class II resources), (3-A)(Class I resources), (3-B)(Class IA resources), (3-C) (thermal renewable energy credits) (emphasis added).

¹⁹ See 35-A M.R.S. § 3210(1-A) (“The State’s goals for increasing consumption of electricity in the State that comes from renewable resources are as follows: A. By January 1, 2030, 80% of *retail sales* electricity in the State will come from renewable resources; and By January 1, 2050, 100% of *retail sales* electricity in the State will come from renewable resources.”) (emphasis added).

²⁰ Chapter 311, §§ 3(A) (Class I resources), (B) (Class IA resources), 4(A) (Class II resources) (emphasis added); see also Chapter 311, § 5(A) (“Each competitive electricity provider, including standard offer providers, must demonstrate that it has purchased thermal renewable energy credits in an amount at least equal to the following percentages of its portfolio of supply sources for *retail electricity sales* in this State other than to customers who have elected to have their supply exempt pursuant to section 3(G) of this Chapter.”) (emphasis added).

²¹ See 35-A M.R.S. § 3210(3-A)(D) (“Retail electricity *sales* pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on the effective date of this subsection is exempt from the requirements of this subsection until the end date of the current term of the supply contract or standard-offer service arrangement.”) (emphasis added); 35-A M.R.S. § 3210(3-B)(D) (same); 35-A M.R.S. § 3210(3-C) (“Retail electricity *sales* pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on September 19, 2019 are exempt from the requirements of this subsection until the end date of the existing term of the supply contract or standard-offer service arrangement.”) (emphasis added); Chapter 311, § 3(G) (“As long as the election remains in effect, all retail *sales* of electricity to that customer are exempt from the Class IA requirement”) (emphasis added); Chapter 311, § 6(F) (“The *sale* of electricity by a competitive electricity provider to a qualified Pine Tree Development Zone business established under Title 30-A is exempt from the requirements of this Chapter”) (emphasis added); see also Proposed Rule, §§ 3(F), 5(D) (proposing comparable exemptions for certain “retail electricity *sales*” from RPS compliance obligations) (emphasis added).

Because “sales” is not defined in Maine’s RPS statute or Chapter 311, the term should be understood based on its common meaning.²² At their core, sales involve the transfer of property for a price.²³ NEB kWh Credit Program customers are only billed and, therefore, only pay a price, for their excess usage.²⁴ Consequently, the only sales that a CEP makes to a NEB kWh Credit Program customer are sales of excess usage. Thus, CEP RPS compliance obligations for such customers should be based only on such sales (i.e., billed sales).

Moreover, as a practical matter, basing RPS obligations on supply obligations reported to ISO-NE will in certain instances actually result in a reduction in RPS obligations,²⁵ which is inconsistent with the Commission’s stated goal.²⁶ During the hearing, it was suggested that “metered sales” could be determined based on the supply obligations reported to ISO New England, Inc. (“ISO-NE”). If that were the case, “metered sales” would differ from “billed sales” only in the case of the NEB kWh Credit Program.²⁷ For NEB kWh Credit Program customers

²² See *State v. Murphy*, 2016 ME 5, ¶ 7 (“When we interpret a statute, we look first to the plain meaning in order to discern legislative intent, viewing the relevant provision in the context of the entire statutory scheme to generate a harmonious result. In considering the plain language of a statute, we construe any undefined words and phrases according to their common meaning.”) (citation omitted); *State v. Blum*, 2018 ME 78, ¶ 10 (interpreting a term in a statute based on a dictionary definition in the absence of statutory definition of the term).

²³ See *State Tax Assessor v. MCI Commc’ns Servs., Inc.*, 2017 ME 119, ¶ 14 (“[A] ‘sale’ is fundamentally an exchange of goods or services for a price or consideration”); see also 11 M.R.S. § 2-106(1) (defining “sale” as “the passing of title from the seller to the buyer for a price”); Black’s Law Dictionary (11th ed. 2019) (s.v. “sale,” definition 1) (“The transfer of property or title for a price”) (citation omitted); Merriam-Webster’s Collegiate Dictionary (11th ed. 2014) (s.v. “sale,” definition 1) (“the act of selling,” “the transfer of ownership of and title to property from one person to another for a price”).

²⁴ 65-407-313 Code Me. R. § 3(J)(2); Tr., at 17-18 (providing a hypothetical example demonstrating that a CEP serving a NEB kWh Credit Program customer is paid only for the customer’s excess usage).

²⁵ See, e.g., Tr., at 10 (“When we bill customers and a customer has a banked kilowatt-hour, the billed kilowatt-hours where we show the reduction in the customer’s billed usage, if you’re drawing from the bank, would be in a different period potentially than the month that we’re reducing the supplier’s load obligation in the wholesale energy market.”), 11-12, 16-18; see also Attachment A hereto (demonstrating how this mismatch would appear for a hypothetical NEB kWh Credit Program customer if the RPS obligation is based on load reported to ISO-NE).

²⁶ See Notice, at 2.

²⁷ See CMP Comments at 2 (“With respect to whether RPS compliance should be based on metered sales rather than billed sales, there should no difference in these two values except when net energy billing is involved.”); see also Tr., at 11 (explaining that there would be no difference between billed sales and metered sales for the NEB tariff program).

billed sales and metered sales would reflect all metered kilowatt-hours delivered to the customer.²⁸ However, for NEB kWh Credit Program customers, billed sales would consist only of excess kilowatt-hour usage.²⁹

In most circumstances, load data reported to ISO-NE will not match billed sales data for NEB kWh Credit Program customers.³⁰ In fact, as demonstrated on Attachment A hereto, using the load data reported to ISO-NE could actually result in a negative RPS obligation for NEB kWh Credit Program customers who always generate excess electricity and a significantly reduced RPS obligation for NEB kWh Credit Program customers who have a mix of excess supply and excess usage during a year.³¹ Consequently, data reported to ISO-NE should not be used as the basis for calculating CEP RPS obligations. Instead, consistent with the plain language of the Maine RPS statute, RPS obligations should be based on billed sales.

RESA understands that basing compliance obligations on billed sales, in accordance with Section 3210 of Title 35-A of the Maine Revised Statutes and Chapter 311, would not account for NEB kWh Credit Program customers' behind-the-meter consumption.³² However, if the Commission's goal is to ensure that these customers contribute to the RPS in proportion to the amount of energy that they consume, there are other ways to accomplish this goal. For instance, customer-generators (or NEB generating facilities) could be required to retire RECs in specified

²⁸ See Proposed Rule, § 2(FF).

²⁹ See Notice at 1 (“Under the NEB kWh credit program customers are billed on the basis of “net energy”, i.e., the difference between the customer’s actual metered kWh usage and the ‘kWh credits’ applied to the customer’s bill.”); 65-407-313 Code Me. R. § 3(J)(2) (“If the customer’s . . . kilowatt-hour usage exceeds the electricity generated by the eligible facility during the billing period plus any kilowatt-hour credits pursuant to subparagraph 1, the customer . . . shall be billed for the excess kilowatt-hour usage at the applicable retail rate for electricity service.”).

³⁰ See, e.g., Attachment A hereto (demonstrating that the only time that load data reported to ISO-NE will match billed sales data for NEB kWh Credit Program customers is when those customers have excess usage each and every month).

³¹ See *id.*

³² See Notice, at 2 (“The Commission notes that continued measurement of compliance based on billed sales would result in a significant portion of Maine’s actual retail metered load that would not be subject to RPS requirements as the NEB program grows over time.”).

percentages of behind-the-meter consumption.³³ Accordingly, in order to ensure that, consistent with the plain language of Section 3210 of Title 35-A of the Maine Revised Statutes and Chapter 311, CEP RPS obligations are based on “retail electricity sales,” RESA urges the Commission to base those obligations on billed sales (i.e., the kWh of electricity actually billed to the customer as measured at the customer meter).

II. RPS COMPLIANCE OBLIGATIONS SHOULD NOT BE GROSSED-UP FOR LINE LOSSES

The Proposed Rule provides that “total kilowatt-hour sales” would be “adjusted for line losses applicable to the customer’s load.”³⁴ Line losses would “be based on the line loss factors from the most recent and available utility line loss study applicable to the total kilowatt-hour sales of a competitive electricity provider.”³⁵ Thus, CEPs’ RPS compliance obligations would include a line loss adjustment. The text of the Proposed Rule does not make clear whether this adjustment would involve grossing-up “the metered sales of retail customers as measured by the transmission and distribution utility.”³⁶ However, such an adjustment would also be inconsistent with the plain language of Section 3210 of Title 35-A of the Maine Revised Statutes and Chapter 311.

Grossing up metered sales results in RPS obligations that are based on wholesale load obligations. However, as noted above, Maine law expressly bases CEP RPS compliance

³³ Cf. Docket No. 2008-00173, *Lincoln Paper and Tissue, LLC, Request for Certification for RPS Eligibility*, Order Granting New Renewable Resource Certification (Jan. 27, 2009), at 8 (requiring a customer in connection with certification of behind-the-meter generation as a Class I new renewable resource to retain GIS certificates or otherwise obtain GIS certificates necessary to satisfy Maine’s RPS for that portion of its load that is served by the facility); Docket No. 2020-00274, *Maine Public Utilities Commission Inquiry Into RPS Compliance Requirements for Net Energy Billing Customers*, Stakeholder Meeting Transcript (Jun. 29, 2021), at 25 (explaining that the *Lincoln Paper and Tissue, LLC* requirement that a customer-generator comply with the RPS for behind-the-meter generation is generally imposed as a condition of Class I and Class IA renewable resource certification).

³⁴ Proposed Rule, § 2(FF).

³⁵ *Id.* § 2(M).

³⁶ *Id.* § 2(FF).

obligations on “retail electricity sales.”³⁷ Thus, consistent with that requirement, RPS obligations should be based solely on the actual quantity of electricity sold to the customer by the CEP as measured at the customer meter without any gross-up adjustment for line losses.³⁸

III. THE COMMISSION SHOULD PROTECT EXISTING RATEPAYER EXPECTATIONS

In order to protect existing ratepayer expectations, any changes to the manner in which RPS obligations are determined should be adopted on a prospective basis only (i.e., should only be applicable to contracts entered into or renewed after the effective date of the rule change). As the Commission most certainly appreciates, while the Proposed Rule is being considered, the competitive electricity market in Maine continues to advance, and CEPs continue to enter into contractual obligations with customers, often with multi-year terms of service.³⁹ When entering into these arrangements, CEPs do not take market positions or enter into agreement terms with customers based on the release of proposed regulatory revisions. Rather, since proposed regulatory revisions may be subject to change based on legislative considerations as well as the regulatory input process, CEPs take market positions and enter into agreements based only on currently effective regulatory requirements officially promulgated by the governing regulatory authority. In this way, customers are not exposed to undesirable contracting arrangements, unnecessary price increases, and/or pricing volatility as a result of speculative regulatory changes that may never be adopted or that may be significantly modified through the regulatory process

³⁷ See 35-A M.R.S. § 3210(3) (Class II resources), (3-A)(Class I resources), (3-B)(Class IA resources), (3-C) (thermal renewable energy credits) (emphasis added) (emphasis added).

³⁸ See, e.g., New Hampshire Annual Renewable Portfolio Standard (RPS) Compliance for 2020 Compliance Year, Instructions (Updated Apr. 26, 2021) (, available at: <https://www.puc.nh.gov/sustainable%20energy/RPS/SE-RPS-NH-Form-E-2500-2020-20210428.xlsx>) ¶ 5 (“For a Competitive Electric Power Supplier (CEPS), the total kWh of electricity sold or delivered to New Hampshire end-use customers . . . must be based on the supplier energy service sales recorded at the end-use customer meter, as provided by the electric distribution utility.”).

³⁹ See, e.g., Maine Office of the Public Advocate, Electricity Supply, <https://www.maine.gov/meopa/electricity/electricity-supply> (displaying numerous fixed price offers that extend 12-24 months into the future) (last visited Sep. 9, 2021).

before such changes ultimately become effective. Thus, only once the Commission officially adopts changes to Chapter 311 will CEPs modify their market positions and/or the terms of their agreements with customers to account for those changes.

Furthermore, when a new obligation is imposed or existing obligations are modified and applied to existing contracts, such changes affect existing contracts that were not priced to reflect such obligations and may have a term of service that extends over multiple years.⁴⁰ While CEPs may have contractual and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial impact on customers who have contracted for a fixed-price and may now be subject to unanticipated charges that are not within their budgets. These unanticipated charges place customers in an untenable position as they may be required to pay new and unanticipated costs per the terms of their contractual agreements. Moreover, they undermine the customers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire, like fixed-price products, and have contracted to meet their energy needs.

Accordingly, consistent with prior practice,⁴¹ RESA requests that the Commission create an exemption (subject to CEPs' providing appropriate documentation) from any modification of

⁴⁰ See Constellation Comments, at 1 (“Regulatory changes can significantly impact these existing contractual arrangements. The implementation of such clauses could have a direct and immediate financial impact on customers that have otherwise contracted for budget certainty by fixing their electricity price.”); cf. Maine Office of the Public Advocate, Electricity Supply, <https://www.maine.gov/meopa/electricity/electricity-supply> (displaying numerous fixed price offers that extend 12-24 months into the future) (last visited Sep. 9, 2021).

⁴¹ See, e.g., See 35-A M.R.S. § 3210(3-A)(D) (“Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on the effective date of this subsection is exempt from the requirements of this subsection until the end date of the current term of the supply contract or standard-offer service arrangement.”); 35-A M.R.S. § 3210(3-B)(D) (same); 35-A M.R.S. § 3210(3-C) (“Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on September 19, 2019 are exempt from the requirements of this subsection until the end date of the existing term of the supply contract or standard-offer service arrangement.”); Chapter 311, § 3(G) (“As long as the election remains in effect, all retail sales of electricity to that customer are exempt from the Class IA requirement”); see also Proposed Rule, §§ 3(F), 5(D) (proposing comparable exemptions for certain “retail electricity sales” from RPS compliance obligations).

the way in which RPS obligations are determined until the expiration of any contracts existing as of the effective date of the regulations instituting that change. In this way, the Commission can protect existing ratepayer expectations.

CONCLUSION

For all the foregoing reasons, the Commission should modify the Proposed Rule consistent with the above comments before adopting final rule changes.

Respectfully submitted,
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