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September 25, 2019

Mr. Harry Lanphear
Administrative Director
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333-0018

Re: **Docket No. 2019-00177: Public Utilities Commission Amendments to Portfolio Requirement Rule (Chapter 311)**

Dear Mr. Lanphear:

Attached please find the Supplemental 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.

Attachment

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2019-00177

September 25, 2019

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

SUPPLEMENTAL COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] hereby submits its supplemental comments in response to the Public Utilities Commission's ("Commission") August 9, 2019 Notice of Rulemaking ("Notice")[2] in the above-captioned matter.

BACKGROUND

On June 26, 2019, the Governor signed L.D. 1494, An Act To Reform Maine's Renewable Portfolio Standard (the "Act").[3] On July 30, 2019, the Commission opened this proceeding to amend its Portfolio Requirement Rule (Chapter 311) to incorporate the changes from the Act.[4] Subsequently, the Commission issued the Notice, which included proposed amendments to Chapter 311 ("Proposed Amendments"),[5] invited stakeholders to comment on the Proposed Amendments as well as specific questions set forth in the Notice, and scheduled a

[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. 9, 2019).

[3] 3 P.L. 2019, c. 477.

[4] The Act also creates a new thermal renewable energy resource requirement. *Id.* However, because that requirement does not begin until 2021, the Commission intends to address that requirement in a separate rulemaking proceeding. Notice, at 2.

[5] *See* Notice attachments (providing clean and redlined versions of the Chapter 311 rule reflecting the Proposed Amendments).

public hearing on the Proposed Amendments.[6] Further, the Notice indicated that supplemental comments may be filed after the hearing.[7]

RESA,[8] Brookfield Renewable Energy L.P.,[9] Eastern Maine Electric Cooperative ("EMEC"),[10] the Governor's Energy Office ("GEO"),[11] the Industrial Energy Consumer Group ("IECG"),[12] Maine Renewable Energy Association ("MREA"),[13] Natural Resources Council of Maine ("NRCM"),[14] ReEnergy Biomass Operations LLC ("ReEnergy"),[15] and The Nature Conservancy in Maine ("Nature Conservancy")[16] each filed comments before the public hearing. The Commission held the public hearing on September 12, 2019.[17] RESA hereby submits its supplemental comments in response to the Notice, the comments of other stakeholders filed before and made during the public hearing, and Commission Staff's requests during the public hearing for additional guidance on certain matters.

SUPPLEMENTAL COMMENTS

RESA appreciates the opportunity to put forth supplemental comments in response to the Notice. For the reasons discussed more fully below and in the RESA Initial Comments, in order to mitigate the effects of the Proposed Amendments and control ratepayer costs, RESA urges the Commission to modify the Proposed Amendments before adopting them in final.

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[6] *See generally* Notice.

[7] *Id.* at 7.

[8] Initial Comments of Retail Energy Supply Association (Sep. 9, 2019) ("RESA Initial Comments").

[9] Comments of Brookfield Energy L.P. (Sep. 9, 2019).

[10] Comments of Eastern Maine Electric Cooperative (Sep. 9, 2019) ("EMEC Initial Comments").

[11] Comments on Notice of Rulemaking (Sep. 9, 2019) ("GEO Initial Comments").

[12] Preliminary Comments of Industrial Energy Consumer Group (Sep. 9, 2019) ("IECG Initial Comments").

[13] Comments of Maine Renewable Energy Association (Sep. 9, 2019) ("MREA Initial Comments").

[14] NRCM Comments on Proposed Amendments to Rules for the Renewable Portfolio Standard (Sep. 9, 2019).

[15] Comments of ReEnergy Biomass Operations LLC (Sep. 9, 2019) ("ReEnergy Initial Comments").

[16] Comments of The Nature Conservancy in Maine (Sep. 9, 2019).

[17] *See* Public Hearing Transcript (Sep. 12, 2019) ("Tr."), at 1.

Alternative Compliance Payment Mechanism

Competitive electricity providers ("CEPs") can satisfy the Class I and Class IA portfolio requirements through an alternative compliance payment ("ACP") mechanism.[18] The Act specifies that the ACP rate must not be any higher than fifty dollar ($50.00) per megawatt-hour.[19] The Proposed Amendments include a comparable provision.[20] In the Notice, the Commission requested "comment on whether the ACP should be initially set at a level that is closer to, but still above, current market prices, and then escalated in subsequent years until the cap is reached."[21]

Consistent with the Act,[22] RESA and other commenters supported the Commission setting the initial ACP near market prices.[23] However, in their comments, MREA, NRCM, and ReEnergy supported setting the ACP rate at the fifty dollar ($50.00) cap.[24] In support of this position, MREA even asserted that the Maine Legislature's Committee on Energy, Utilities and Technology expected the ACP to be set at the cap immediately.[25] However, this claim contravenes the rule of statutory construction that "[w]ords in a statute must be given meaning and not treated as meaningless and superfluous."[26] The Act states, in pertinent part: "The commission shall set the alternative compliance payment rate by rule, which ***may not be greater than*** $50, and shall publish the alternative compliance payment rate by January 31st ***of each***

[18] Act, § 1 (modifying subsection 9 of 35-A MRSA § 3210).

[19] *Id.* ("The commission shall set the alternative compliance payment rate by rule, which may not be greater than $50 . . . .").

[20] Proposed Amendments, § 3(D).

[21] Notice, at 3.

[22] Act, § 1 (modifying subsection 9 of 35-A MRSA § 3210) ("In setting the [ACP] rate, the commission shall take into account prevailing market prices . . . .").

[23] *See* RESA Initial Comments, at 3; GEO Initial Comments at 2-3; *cf.* IECG Initial Comments, at 2.

[24] MREA Initial Comments, at 1; Tr. at 6-7 (NRCM); ReEnergy Initial Comments at 1-2.

[25] MREA Initial Comments, at 1; Tr. at 9.

[26] *Teele v. West–Harper*, 2017 ME 196, ¶12, 170 A.3d 803, 808 (2017) (*quoting Wong v. Hawk*, 2012 ME 125, ¶ 8, 55 A.3d 425) (alteration in original).

year."[27] If the legislature had intended for the Commission to set the ACP at $50 immediately, it could have said so. Instead, it left it to the Commission to set the ACP at no higher than $50. Moreover, if the legislature had intended the Commission to set the ACP at $50 immediately, there would be no need for the Commission to publish the ACP "each year."

During the public hearing, Commission Staff requested further guidance on how an ACP below the cap should be set.[28] RESA continues to support the Commission's proposal to initially set the ACP slightly above current market prices with annual adjustments based on the change in the Consumer Price Index[29] until the cap is reached.[30] By setting the 2020 ACP based on the current market price for Class I RECs, the Commission will ensure that the ACP as closely as possible reflects a fair price established by willing buyers and willing sellers interacting at arms' length.[31] In doing so, the Commission will also protect existing market conditions without exposing ratepayers to unnecessary costs. Conversely, if the Commission were to set the ACP at or near the cap now, based on RESA's experience, this would artificially inflate the cost of RECs to the detriment of ratepayers.

When properly set, an ACP should facilitate robust competition in the market and restrict the ability of sellers that may acquire market power from raising REC prices beyond a specified

[27] Act, § 1 (modifying subsection 9 of 35-A MRSA § 3210) (emphasis added).

[28] Tr. at 27.

[29] *See* 65-407 C.M.R. Ch. 311, § 3(C)(2) (providing that "the Commission will adjust the alternative compliance payment rate by the annual change in the U.S. Bureau of Labor Statistics Consumer Price Index"); Proposed Amendments, § 3(D)(2) (same).

[30] *See* RESA Initial Comments, at 3.

[31] Although the Class IA requirement is new, certain Class I resources qualify as Class IA resources. *See* Act, § 1 (adding the "Class IA resource" definition to subsection 2 of 35-A MRSA § 3210). Thus, the Class I REC prices provide a good proxy for the expected market prices of Class IA RECs.

threshold.[32] If there is a constrained supply of RECs,[33] entities selling those RECs will have little (if any) incentive to price their RECs materially below the ACP rate. Thus, under these conditions, the level at which the Commission sets the ACP will effectively set the market price for RECs. Moreover, because CEPs will incorporate the cost of RECs into the prices that they charge, the level at which the Commission sets the ACP will immediately impact the prices that all customers in investor-owned utility service territories pay for retail electric supply.[34] Accordingly, the Commission should make every effort to avoid setting an artificially high price for RECs.

Contract Exemption

The Act exempts from the Class IA requirement retail electric sales under supply contracts entered into before the effective date of the Act through the term of such contracts.[35] To implement this exemption, the Proposed Amendments include the following provision:

> Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on or before September 19, 2019, is exempt from the requirements of this section until the end date of the current term of the supply contract or standard-offer service arrangement.[36]

[32] *See* Tr. at 16 (GEO comments) ("Because the ACP is never intended, of course, to be a substitute for the market. It's supposed to be sort of the relief valve, and that's how it should function.").

[33] *See* Tr. at 28 (IECG comments) (observing that with new mandates and increased requirements, conditions of tight or binding supply could arise).

[34] *See* Act, § 1 (requiring CEPs to comply with the Class IA requirement); *see also* 35-A M.R.S. § 3203(2) (requiring CEPs to be licensed); 65-407 C.M.R. Ch. 301, § 3(A) (requiring suppliers of Standard Offer service for investor-owned utilities to be licensed as CEPs); Notice, at 6 (noting that consumer-owned utilities have not been required to obtain a CEP license).

[35] Act, § 1 (adding subsection 3-B, which contains the Class IA requirement, to 35-A MRSA § 3210).

[36] Proposed Amendments, § 3(F).

In the Notice, the Commission requested "comments on whether the rule should contain a definition of 'supply contracts,'" including whether the exemption should "apply to a renewal or extension of an existing contract."[37]

The majority of stakeholders who commented on this issue, including RESA, indicated that the exemption should apply to contracts, including renewals or extensions, in effect as of September 19, 2019.[38] However, in its comments, ReEnergy urged the Commission not to "allow renewals or extensions to qualify as an existing contract."[39] In addition, during the public hearing, Commission Staff expressed concern that a "renewal option" in an existing contract could qualify as exempt.[40]

RESA did not propose, nor does it support, exempting renewals or extensions that were executed after September 19, 2019 from the Class IA requirement.[41] However, consistent with the process the Commission employed when it adopted the Class I exemption,[42] the Commission should exempt renewals or extensions that were entered into ***on or before*** that date because they will be "existing contracts"[43] that are "in effect on or before September 19, 2019."[44] If the Commission believes additional clarification is necessary to ensure that this is understood by all

[37] Notice, at 4.

[38] RESA Initial Comments, at 4-5; MREA Initial Comments, at 2; IECG Initial Comments, at 3; EMEC Initial Comments; *see also* Tr. at 16 (GEO comments) ("We weren't saying that if somebody had just signed a new extension and that extension gave parameters and details, that that should necessarily be excluded. We were thinking of it in terms of when the statute goes into effect, that what the legislature intended was that there not be extensions beyond what was in effect at the time the statute came into effect.").

[39] ReEnergy Initial Comments, at 3.

[40] Tr. at 10.

[41] RESA Initial Comments, at 4-5.

[42] *See, e.g.*, Maine CEP Annual Report Form, Sheet E-Excluded Sales (*available at* https://www.maine.gov/mpuc/online/documents/CEPForms/2018/2019-CEP-Reporting-FINAL-5.10.19%20v1.0.xlsx) (last visited Sep. 25, 2019).

[43] *Accord* ReEnergy Initial Comments, at 2-3.

[44] Proposed Amendments, § 3(F).

stakeholders,[45] RESA recommends that the Commission revise Section 3(F) of the Proposed Amendments to read:

> Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed, renewed or extended by a competitive electricity provider that is in effect on or before September 19, 2019, is exempt from the requirements of this section until the end date of the current term of the supply contract or standard-offer service arrangement.[46]

ReEnergy also urged the Commission "to require a filing of the pre-existing supply contract that details the terms of the agreement, including volumes, point of sale, and end date."[47] The Commission has already developed a process for CEPs to report exempt sales,[48] which it has used for years. The form calls for the following information (as applicable): (i) excluded sales (in megawatt-hours); (ii) the date on which the contract was entered into; (iii) the contract end date; (iv) other exclusions; and (v) total excluded sales.[49] Reporting the data regarding exemptions in this way has proven workable and is not unduly burdensome. Furthermore, RESA is not aware of any issues or concerns that have arisen as a result of the use of this process that would warrant changing it.

Conversely, it would be administratively burdensome for CEPs to have to produce and for Commission Staff to have to review every single contract to determine if it qualified for an exemption. For instance, as of July 2019, 108,155 customers are currently enrolled with CEPs.[50] Under ReEnergy's proposal, CEPs would need to produce, and Commission Staff would need to review each and every one of these contracts (as well as any other contracts that were executed,

[45] *See, e.g.*, Tr. at 17 (requesting assistance in defining what contracts would qualify for the exemption).

[46] Proposed additions shown as double underlined text.

[47] ReEnergy Initial Comments, at 3.

[48] *See* Maine CEP Annual Report Form, Sheet E-Excluded Sales.

[49] *See id.*

[50] *See* Maine Market Migration to Competitive Electricity Providers (*available at* http://www.maine.gov/tools/whatsnew/attach.php?id=180998&an=1) (last visited Sep. 25, 2019).

extended or renewed between July and September 19) to confirm they qualify for the Class IA exemption. Requiring those efforts is unreasonable and unduly burdensome, particularly when the Commission already has in place well-established procedures for reporting the exemptions. Accordingly, RESA recommends that the Commission implement the Class IA exemption and require annual compliance reporting of contracts subject to the exemption consistent with the process it employed when it adopted the Class I exemption.[51]

Verification; Reporting

In its comments, ReEnergy expressed concern that Section 6 of the Proposed Amendments suggests that, in demonstrating compliance, CEPs "in the ISO-NE control area utilize only GIS certificates and that CEPs in NMISA utilize only NAR certificates."[52] However, the Commission is not proposing to substantively change the existing rule or processes by which it determines a CEP's compliance.[53] In fact, the only substantive changes to Section 6 incorporate the Class IA resource requirement and reflect that Northern American Renewables Registry ("NAR") certificates (instead of "market settlement data and other documentation that reveal the resources used to serve customers") are now used to evidence renewable energy that has been physically delivered to the Northern Maine Independent System Administrator ("NMISA") area.[54] Thus, RESA does not believe that further changes to the Proposed Amendments are necessary to address ReEnergy's comment. Nevertheless, to the extent the Commission believes stakeholders could benefit from additional clarity, rather than making

[51] To the extent the Commission has concerns with the Excluded Sales reported by a particular CEP, it could request copies of that CEP's contracts. *See* 65-407 C.M.R. Ch. 305, § 5(B) ("The Commission may at any time request and obtain individual service contracts from competitive electricity providers.").

[52] ReEnergy Initial Comments, at 3.

[53] *See* Proposed Amendments, § 6; *see also* Notice, at 6 ("Section 6 of the proposed rule contains the provisions for compliance reporting and verification. The provisions already exist in the current rule.").

[54] *Compare* 65-407 C.M.R. Ch. 311, § 6 *with* Proposed Amendments, § 6.

language changes to the Proposed Amendments that will not be subject to comment, the Commission can address ReEnergy's concern by explaining the purpose of the changes in its order adopting the amendments.

Thermal Renewable Energy ACP

At the hearing, Maine Pellet Fuels Association requested that the Commission adopt the ACP for the thermal renewable resource requirement as part of the Proposed Amendments.[55] However, the Notice specifically stated that "the rule amendments related to the thermal renewable resource requirement will be conducted in a subsequent rulemaking proceeding."[56] Thus, stakeholders who are only interested in the rules related to the thermal renewable energy requirement would have no basis to believe that the thermal ACP would be adopted as part of this proceeding. As a consequence, if the thermal ACP is adopted as part of the rulemaking in this proceeding, those stakeholders will not have a meaningful opportunity to provide comment on this issue. Moreover, adopting the thermal ACP in this proceeding would run afoul of applicable notice requirements.[57] Accordingly, the Commission should not adopt the thermal ACP or any other rules specifically related to the thermal renewable energy requirement in this proceeding.

Transmission and Subtransmission Customer Options

The Act provides an option for electricity customers that receive service at the transmission or subtransmission voltage level ("Large Customers") to elect that their supply service not be subject to the Class IA requirement.[58] The Proposed Amendments include a

[55] Tr. at 2-3 ("I would encourage you to also set the ACP for TRECs, the Thermal RECs.").

[56] Notice, at 2.

[57] *See* 5 M.R.S. § 8053(3)(D) (requiring that notices of rulemaking "[i]f possible, contain the express terms of the proposed rule or otherwise describe the substance of the proposed rule, stating the subjects and issues involved and indicate where a copy of the proposed rule may be obtained").

[58] Act, § 1 (adding subsection 10 to 35-A MRSA § 3210).

provision to implement this change, including a requirement that a Large Customer making such an election inform both the Commission and its CEP of the election.[59] Once a Large Customer makes its election, it will remain in effect until December 31, 2027 unless rescinded earlier by the Large Customer.[60]

In its initial comments, RESA recommended that the Commission maintain on its website a registry or database of Large Customers who provide it notice of their election not to be subject to the Class IA requirement[61] and/or their subsequent rescission of this election[62] to ensure that customers and CEPs can determine if a Large Customer has made the election.[63] At the hearing, there was some discussion of whether such a registry or database should be published (but no actual opposition to doing so).[64]

RESA supports making such a registry public or, at a minimum, available to Large Customers, CEPs, Aggregators and Brokers. During the eight years the election could be in place,[65] a Large Customer may not recall making the election or subsequently rescinding the election. Availability of a registry with this information will enable all entities involved in the purchase and sale of retail electricity to verify if an election is in place so that they can make appropriate pricing decisions (i.e., ensuring that the pricing offered to a Large Customer that has made the election does not include costs associated with Class IA compliance and pricing offered to a Large Customer that did not make the election or subsequently rescinded the election does

[59] *See* Proposed Amendments, § 3(G).

[60] Proposed Amendments, § 3(G).

[61] *Id*. (requiring the Large Customer give the Commission notice of the election).

[62] *Id*. (requiring the Large Customer give the Commission notice of rescission of the election).

[63] RESA Initial Comments, at 5.

[64] *See* Tr. at 27-29.

[65] *See* Proposed Amendments, § 3(G) (A Large Customer must make the election by December 31, 2019 and, unless rescinded earlier, it will remain in effect until December 31, 2027).

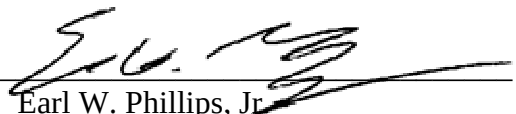
include such costs). Thus, making a registry with Large Customer election and rescission information available would streamline the pricing and contracting process.

Moreover, without ready access to this information, customers could pay too much or too little for their energy supply. Either way, CEPs would likely spend more than is necessary either by purchasing Class IA RECs that they do not need for customers who have made the election or by being forced to pay an ACP because they did not procure sufficient Class IA RECs for customers that rescinded a prior election. Making a registry with Large Customer election and rescission information available would avoid these situations. Accordingly, RESA urges the Commission to maintain on its website a registry or database that is, at a minimum, accessible by Large Customers, CEPs, Brokers and Aggregators of Large Customers who elect the exemption and/or their subsequent rescission of this election.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the RESA Initial Comments, the Commission should modify the Proposed Amendments before adopting final rule changes.

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By: 

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