STATE OF MAINE
PUBLIC UTILITIES COMMISSION

PUBLIC UTILITIES COMMISSION Notice of Rulemaking, Efficiency Maine Trust Procurement Funding Cap (Chapter 396)	)	**PETITION FOR RECONSIDERATION OF CONSERVATION LAW FOUNDATION, NATURAL RESOURCES COUNCIL OF MAINE, AND MAINE ASSOCIATION OF BUILDING EFFICIENCY PROFESSIONALS** April 29, 2015 **Docket No. 2015-00007**

INTRODUCTION

Under the Public Utilities Commission Rules of Practice and Procedure, chapter 110, section 11(D), Conservation Law Foundation (CLF), Natural Resources Council of Maine (NRCM), and the Maine Association of Building Efficiency Professionals (MABEP) request reconsideration of the Commission's Order Adopting Rule and Statement of Factual and Policy Basis in Docket No. 2015-00007 issued April 9, 2015, regarding the Efficiency Maine Trust Procurement Funding Cap.[1] Despite clearly established law and the overwhelming weight of evidence, the Order misinterprets the phrase "total retail electricity transmission and distribution sales" and erroneously determines in the final rule how to calculate the 4% statutory cap on energy efficiency funding to be included in rates. For the reasons stated in our comment and the additional reasons described herein, CLF, NRCM, and MABEP request that the Commission promptly grant this Petition for Reconsideration and modify the Order to include in the statutory cap revenue from both retail electricity supply sales and delivery services.[2]

[1] *Efficiency Maine Trust Procurement Funding Cap*, Maine Public Utilities Commission, Docket No. 2015-00007, Order (Apr. 9, 2015) [hereinafter "Order"]; *see* 35-A M.R.S. § 10110(4-A).
[2] CLF, NRCM, and MABEP incorporate by reference in this Petition our comment submitted as part of this rulemaking docket. Comment of Conservation Law Foundation and Natural

ARGUMENT

I. The Legislature Intended the Statutory Cap To Include Revenue from Both Retail Electricity Supply Sales and Delivery Services.

A. The Commission's Calculations Show that Interpreting the Cap To Include Only Delivery Services Leads to a *Decrease* in Funding, Violating Legislative Intent.

Title 35-A creates a mandate to realize "all . . . cost-effective, reliable and achievable" potential energy savings, or MACE. *See* 35-A M.R.S. §§ 10104(4) ("The commission *shall* approve *all* elements of the triennial plan it determines to be cost-effective, reliable and achievable and *shall incorporate* into . . . transmission and distribution rates *sufficient revenue to provide for the procurement of energy efficiency resources identified within the plan* . . . ." (emphases added)). To help realize MACE, section 10110(4-A) replaced the System Benefit Charge (SBC) under section 10110(4), as the Order correctly states. *See* Order at 1. The 2013 Omnibus Energy Act also replaced section 10110(5), which already *required* the Commission to assess transmission and distribution utilities to realize "all available energy efficiency and demand reduction resources . . . that are cost-effective, reliable and feasible." 35-A M.R.S. § 10110(5) (2012) (repealed by 35-A M.R.S. § 101, et seq. (2013)); *see* Order at 2 n.2.

The legislature understood that these provisions were insufficient to realize MACE, and the Commission agrees that the Omnibus Energy Act intended to *increase* funding to make achieving MACE possible. Order at 6–7. Thus, the legislature intended this increase to be not only above what the SBC provided, but also sufficient to fulfill the statutory requirement to realize MACE. Despite the Commission's conclusions to the contrary, what the calculations in

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Resources Council of Maine, Notice of Rulemaking, Efficiency Maine Trust Procurement Funding Cap, Docket No. 2015-00007 (Feb. 20, 2015) [hereinafter "CLF/NRCM Comment"]. Failure to include any argument, fact, or issue herein does not constitute a waiver by CLF, NRCM, or MABEP of the right to raise any arguments, facts, or issues on an appeal.

the Order show is that the only way to accomplish the increase the legislature intended is to include revenue from electricity supply sales in the cap.

The Commission highlights that the funding level the Commission approved in EMT's Second Triennial Plan of, on average, $25.5 million per year was a "substantial increase compared to prior years." *Id.* at 2. A 4% cap that includes only transmission and distribution delivery services would yield around $24.6 million in fiscal year (FY) 2016 based on 2013 figures. *Id.* at 7. The Order concludes that this amount increases "the level of funding by almost doubling the approximately $13.1 to $13.3 million of SBC funding that was available for the first two years of the Second Triennial Plan period;" and is "comparable to the average annual Recommended MACE funding level of $25.5 million approved by the Commission for the Second Triennial Plan." Order at 7.

These conclusions misinterpret how the previous SBC funding operated, the statutory requirement to realize MACE, and the legislative intent to achieve this mandate. First, the roughly $13 million comes from only *base* electric SBC funding under repealed section 4. *See Efficiency Maine Trust Request for Approval of Second Triennial Plan*, at 31–32 & fig. 2, Docket No. 2012-00449, Order (Mar. 6, 2013) [hereinafter "STP Order"]. But *supplemental* electric SBC funding under repealed section 5 brings the average amount up to $23 million over the first two years of the Second Triennial Plan. *Id.* Importantly, the Order completely disregards the third year—FY 2016—budget, which provides $29,683,677 under the base and supplemental SBCs (which, it should be noted, does not reflect the additional amount from other revenue streams that EMT would use to achieve full Electric MACE, as acknowledged by the Commission). *See id.* at 32, fig. 2 & 50, fig. 6. The $24.6 million amount that the Commission touts as "doubling" previous SBC funding misses the mark. To the contrary, $24.6 million is

clearly *below* the average three-year funding level of $25.5 million, and *below* the nearly $30 million provided by the already approved budget Plan for FY 2016.

Second, the Commission *must* ensure that MACE is realized. 35-A M.R.S. §§ 10104(4), 10110(4-A). That is the law. The cap is *not* a cap on MACE. It is a cap on the amount "included in rates" under subsection 10110(4-A). 35-A M.R.S. § 10110(4-A). The legislature intended this ratepayer funding bucket to be more expansive and less rigid than the other funding bucket, which includes proceeds from sources like the Regional Greenhouse Gas Initiative and the Forward Capacity Market. *See* Order at 2. The way that the statute contemplates determining the amount of funding needed from ratepayers is by calculating the amount available from other sources and then subtracting that from the total amount needed to realize MACE. *See id* §10110(4-A) ("When determining the amount of cost-effective electric energy efficiency resources to be procured under this subsection, the commission shall . . . [c]onsider electric energy efficiency resources that are reasonably foreseeable to be acquired by the trust using all other sources of revenue, including, but not limited to, the Regional Greenhouse Gas Initiative Trust Fund . . . ."). The remainder is the amount needed from the ratepayer bucket. The cap therefore must allow for significant latitude in funding should other sources become unavailable.

Yet the Commission claims that the cap level conceived in its Order ensures that "ratepayer funding levels for MACE would not increase to be substantially higher than levels approved in the Commission's March 6, 2013 order for the Second Triennial Plan." Order at 7. This is misguided. Everyone—including the Commission—agrees that the legislature intended to *increase* funding for MACE, quite the opposite from an intent to ensure that ratepayer funding would remain at or below what the Commission approved as Recommended MACE in the Second Triennial Plan. The Commission's position misconceives how the ratepayer funding

amount is calculated. It is not chosen randomly. That amount is what is *required* to realize MACE after accounting for other sources. By statutory mandate, the legislature intended that the Commission *must approve*, subject to a reasonableness standard, whatever that ratepayer funding amount is in order to meet MACE, limited only by the 4% cap. *See* 35-A M.S.R. §§ 10104(4), 10110(4-A). A cap of $59 million, as projected if the cap includes revenue from both electricity supply sales and delivery services, is thus powerfully meaningful. *Contra* Order at 7 ("[A] cap of $59 million would seem to have no meaning because the EMT funding required to achieve MACE is unlikely to approach that level."). It ensures that the ratepayer bucket allows MACE to be realized should other sources fall short. EMT's projections for what is actually required to meet Electric MACE accentuate this point. In FY 2016, EMT projects a need of $68 million, approximately $39.5 million of that coming from ratepayer funds under the cap. The Commission's projected cap of around $24.6 million is thus contrary to legislative intent and an absurd result. *Contra id.*

Finally, given the Commission agrees that the legislature intended to increase funding for MACE, section 4-A must provide for more funding than repealed sections 4 and 5. The Commission implies that this increase in funding comes from including "large industrial transmission and sub-transmission level customers." *Id.* at 7. But, as demonstrated, this yields an amount not only insufficient to realize MACE, but also *less than* the SBC provided. The increase in funding therefore must come from *something else*. That something else is from rates collected under a cap that includes revenues from electricity supply sales. Only by including revenue from such sales in the cap can the Commission fulfill the legislature's intent.

B. The Commission Ignores Omission of the Word "and" by the Revisor of Statutes and Ignores Clearly Established Law Dealing with Scrivener's Error.

The Order glosses over the clerical error the Revisor of Statutes (ROS) made by omitting

the word "and" from the statute. Several parties raised this issue at length in comments. *See* CLF/NRCM Comment at 8–10; EMT Comment at 7, 13–15. The Commission states that reading the word "and" into the statute would "overstep the Commission's authority" and "amount to the Commission re-writing legislatively adopted statutes." Order at 6. This interpretation turns Maine law on its head and confuses a "plain language interpretation . . . with a literal interpretation." *Dickau v. Vermont Mutual Insurance Co.*, 2014 ME 158, ¶ 20; *see also Brackett v. Chamberlain*, 115 Me. 335, 98 A. 933, 935–36 (Me. 1916) ("A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the meaning of the makers." (quoting *Oates v. National Bank*, 100 U. S. 239, 244 (1879))).

Several parties submitted evidence that after the statute left Committee but before it reached the full legislature, the ROS accidentally omitted the word "and." True, the legislature passed this long and complicated act with the "and" omitted. But there is no indication that the Energy, Utilities and Technology Committee or the legislature was aware of the omission or ever amended, reviewed, or debated the cap language after the "and" was omitted. Because omitting the "and" was in error, the Commission must interpret the statute to *include* the "and," not exclude it.

Title 1 M.R.S. section 93 supports this outcome and directly addresses this issue. The ROS has no authority to make any substantive statutory changes. *See* 1 M.R.S. § 93. If it appears to do so, those changes are given no effect. *Id.* Where, as here, legislative intent is clear and the record demonstrates that the legislature did not consider and was unaware of the omission, section 93 directs the Commission to ensure the error does not substantively change the statute. The Commission has done the opposite, completely ignoring section 93.

C. The Order Fails To Follow Clearly Established Maine Law.

The Order quotes the relevant Maine law on statutory interpretation but then fails to follow it. The Commission must "first look to the plain meaning of the statute, interpreting its language to avoid absurd, illogical or inconsistent results." *Carrier v. Sec'y of State*, 2012 ME 142, ¶ 12 (citations and internal quotation marks omitted). It must "honor the idiosyncratic meanings and connotations of terms of art, particularly in specialized areas of the law." *Dickau*, 2014 ME 158, ¶ 22. "[T]echnical or trade expressions should be given a meaning understood by the trade or profession." *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 12; *see also* 1 M.R.S. § 72(3) (stating technical statutory words and phrases that have peculiar or technical meaning are to be construed to convey that meaning).

For the reasons discussed above, the Commission's interpretation is inconsistent with both the legislative intent in revising the statute through the Omnibus Energy Act and the statutory directive to realize MACE. As explained in our comment to this docket, and as the dissent recognizes, the term "retail electricity" is a technical term of art understood in the industry and by this Commission to refer to the supply, not the distribution, of electricity. *See* CLF/NRCM Comment at 3; Order at 16–19 (dissenting opinion of Comm'r Littell). The Commission never squarely addresses this argument.

Moreover, the Order omits a critical directive from the Law Court: the interpretation must make sense in "the context of the whole statutory scheme." *Goudreau v. Pine Springs Road and Water, LLC*, 2013 ME 20, ¶ 5. Reducing the amount of funding for MACE that can be included in rates under the procurement cap *below* what was provided under the repealed SBC is inconsistent with the entire statutory scheme aimed at realizing MACE.

In a single paragraph, the Commission dispatches with all parties' arguments. *See* Order at 5–6. The justification for its reasoning boils down to two sentences:

> The initial part of the phrase 'total retail electricity' is a modifier of 'transmission and distribution sales,' and thus this statutory provision does not contain language

> that refers to the sale of the supply of electricity. Further, the term 'total' directs the Commission to include all retail transmission and distribution sales, including sales to large industrial transmission and sub-transmission level customers, who are subject to neither the SBC nor procurement order funding; efficiency programs for these customers are funded by the Commission's long-term contracting authority.

Id. The Order completely disregards the very law it quoted. The Commission has allowed a nonsensical, literal interpretation to undermine both legislative intent and established Maine law, irrespective of whether the statute is found to be ambiguous.

For all the reasons set forth in our comment on the rulemaking, it is clear that the legislature intended the cap language—even if found unambiguous and read without the "and"—to include revenue from both electricity supply sales and delivery services.

II. The Statute Is Ambiguous Because It Is Reasonably Susceptible to Different Interpretations.

A. The Order Misinterprets Maine Law on Ambiguity.

For the reasons stated in our comment, the procurement cap language is ambiguous under Maine law. Additionally, the Commission's Order misconstrues the law concerning ambiguity. The Order correctly cites the law: "Only when the words of a statute 'are susceptible of multiple meanings, *or* render the enactment an absurdity or nullity, should the court explore indicia of legislative intent.'" Order at 4 (emphasis added) (quoting *Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, ¶ 19). The Commission, however, appears to read the "or" as an "and." It concludes that the statute is not ambiguous because "a plain reading of its terms does not lead to an absurd result." Order at 7.

Even assuming the Commission's interpretation does not lead to an absurd result—which it does, as previously explained—the Commission misreads the law. A statute is ambiguous if it is susceptible of multiple meanings <u>or</u> if the plain words of the statute render it absurd. *Kimball*,

2000 ME 20, ¶ 19. The Commission fails to explain how the interpretation forwarded by CLF, NRCM, and EMT is not an interpretation to which the statute is susceptible.

Further, the Commission neglects a holding of the Law Court quoted by the dissent: a statute is ambiguous if it "'can reasonably be interpreted in more than one way and comport with the actual language of the statute.'" *Id.* at 15 (dissenting opinion of Comm'r Littell) (quoting *Maine Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 35¶ 8 (citation omitted)). The Commission fails to explain how our interpretation does not comport with the statutory language. It also fails to explain how its interpretation *does comport* with the statutory scheme, given the Order's erroneous funding calculations discussed in subsection I.A. above.

B. The Commission Misconstrues What Is Properly Considered Legislative History.

The Commission claims that were it to find the statute ambiguous, it would come to the same conclusion because "the only materials that could be properly treated as legislative history are those materials referenced in the NOR at page 3, namely legislative papers authored by the Office of Policy and Legal Analysis (OPLA) and revisions apparently made by the Office of Revisor of Statutes to the Omnibus Energy Act bill. *See Stone v. Bd. of Registration in Medicine*, 503 A.2d 222, 226–27 n.8 (Me. 1986) (discussing what is properly treated as legislative history)." Order at 5 nn.4 & 5. The Order cites the relevant case law but fails to apply it accurately.

Stone states the law:

> For extrinsic material to constitute legislative history, the proponent must show that the material was widely available and generally relied upon by legislators considering a bill. To serve as external context material must be (1) relevant; (2) reliable and reliably revealed; (3) reasonably available to the legislative audience (that is, shared by author and audience); and (4) taken into account (that is, relied on), as constituting part of the communication, by both author of the bill and legislative audience.

Stone, 503 A.2d at 227 n.8 (alterations, citation, and internal quotation marks omitted). At the least, CLF and NRCM's Exhibit B attached to our Comment satisfies this test. *See* Omnibus Language Review, Governor's Energy Office (2013) (CLF Exh. B) (explaining that the procurement cap would lead to a "massive increase in cap of electric charges"). This document from the Governor's Energy Office is relevant to how the legislature viewed the statute, was reliable and revealed publicly to the legislature, was made available to the legislature, and was considered by the legislature. In addition to the documents it considered to be proper extrinsic aids, the Commission should at least consider this document if the Commission finds the statute ambiguous on reconsideration. Nonetheless, even considering only the materials the Commission accepted as proper extrinsic aids, the legislative history, in conjunction with the entire statutory scheme, make clear the legislature's intent to include revenue from electricity supply sales in the funding cap.

RECONSIDERATION REQUESTS

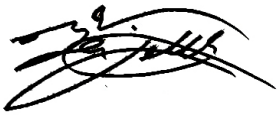
For all the foregoing reasons, we request that the Commission grant this Petition and reconsider its Order and Rule as follows:

- Amend the Order and Rule so that the procurement cap includes revenue from both electricity supply sales and delivery services.

Additionally, we request that the Commission:

- Acknowledge the ROS's error and interpret the statute to include the word "and."
- Reconsider: (1) whether the statute is ambiguous in light of this Petition; and (2) what extrinsic aids are valid under the *Stone* test.

Respectfully submitted,



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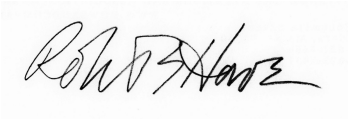

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