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August 16, 2010

Karen Geraghty, Administrative Director
Maine Public Utilities Commission
State House Station 18
Augusta, Maine 04333-0018

RE: MAINE PUBLIC UTILITIES COMMISSION, Long-Term Contracting for Offshore Wind Energy and Tidal Energy Projects, Docket No. 2010-235

Dear Ms. Geraghty:

Enclosed please find an original and one copy of the Comments of the Industrial Energy Consumer Group in the above-captioned matter.

Sincerely,

Anthony W. Buxton
Todd J. Griset
Counsel to Industrial Energy Consumer Group

AWB/mag
cc: Parties on Service List (via e-mail only)

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2010-235

August 16, 2010

MAINE PUBLIC UTILITIES COMMISSION
Long-Term Contracting for Offshore Wind Energy and Tidal Energy Projects

COMMENTS OF THE INDUSTRIAL ENERGY CONSUMER GROUP ("IECG")

NOW COMES the Industrial Energy Consumer Group ("IECG"), by and through its attorneys, Preti, Flaherty, Beliveau & Pachios, LLP, pursuant to the Commission's July 20, 2010 Request for Comments in the above-captioned proceeding and the subsequent procedural order, and submits the following reply comments.

I. The Act Remains Unambiguous: Industrials Are Protected from Ocean Energy Costs.

The plain language of the Act is clear that under current law, transmission and sub-transmission class customers cannot face any rate increase resulting from costs that might be associated with long-term contracts for ocean energy resources. The rate impact limitation provision in the Act is unambiguous.

> The commission may not approve any long-term contract under this section that would result in an increase in electric rates in any customer class that is greater than the amount of the assessment charged under Title 35-A, section 10110, subsection 4 at the time that the contract is entered.[1]

As noted in IECG's earlier comments, the fundamental guiding principle is that where the language is unambiguous, the plain meaning of the language should be applied so long as it does not lead to an absurd, illogical, or inconsistent result.[2] Statutes may not be read selectively; each and every clause must be construed so as to have meaning, and so that "no part will be inoperative or superfluous, void or insignificant."[3]

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[1] P.L. 2009, Ch. 615, § A-6.
[2] *Id.*
[3] 73 Am.Jur 2d Statutes §165.

Moreover, it is a well established principle, that any section of statute must be interpreted in the context of the statute as a whole. In Maine, the principle is applied to encourage application of the statute as a whole. "We consider the statutory scheme as a whole to achieve a "harmonious result," and avoid a statutory construction that creates absurd, illogical, or inconsistent results." Koch Ref. Co. v. State Tax Assessor, 724 A.2d 1251, 1252-53 (Me. 1999); *see also* Fairchild Semiconductor Corp. v. State Tax Assessor, 740 A.2d 584, 587 (Me. 1999). By seeking statutory harmony, the Court aspires to apply the intent of the Legislature. *See* Estate of Whittier, 681 A.2d 1, 2 (Me. 1996) ("[we] consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.")

Because it violates these rules of statutory construction, the legal analysis offered by the Public Advocate fails to capture the proper interpretation of this provision. The Public Advocate concludes that all customers, in any customer class, may have a rate impact of up to 0.145 cent/kWh. To reach this conclusion, the Public Advocate engages in a selective reading of the Act's rate impact limitation provision. The Public Advocate does not dispute that the Legislature acted to limit ratepayers' exposure to ocean energy costs. The Public Advocate does not dispute that the Legislature tied this protective limitation on cost exposure to the "the amount of the assessment charged under Title 35-A, section 10110, subsection 4 at the time that the contract is entered". Nor does the Public Advocate dispute that under current law, the amount of the assessment charged to customers in transmission and subtransmission classes under Title 35-A, section 10110, subsection 4 is zero.

Beyond this point, the Public Advocate's reading goes astray.

First, the Public Advocate claims that the long phrase "the amount of the assessment charged under Title 35-A, section 10110, subsection 4 at the time that the contract is entered" bears only one relationship to the rate impact limitation language: namely, "capping the amount that can be added to rates of 'any customer class'". Even if this were true, it does not lead to the Public Advocate's desired result of socializing costly ocean energy contracts across all customer classes. Rather, the Public Advocate's interpretation would make sense only if the Act did not specifically apply the

limitation on what customers may pay in ocean energy costs on a class-by-class basis. The Public Advocate's reading is thus as if the statute read:

> The commission may not approve any long-term contract under this section that would result in an increase in electric rates ~~in any customer class~~ that is greater than the amount of the assessment charged under Title 35-A, section 10110, subsection 4 at the time that the contract is entered.

This is clearly not what the Legislature said. The Legislature chose to insert the phrase "in any customer class". By so doing, the Legislature made it clear that the Commission may not approve any contract that would result in an increase in rates in any customer class – for example the transmission-level class – is greater than the amount of the assessment charged to members of that class. The Legislature articulated the required analysis: take a given class of customer, look at what that class of customer pays under 35-A M.R.S.A. § 10110, and weigh that dollar cost against the proposed ocean energy contract's dollar cost to that class of customer. If any customer class faces ocean energy costs in excess of that class's 35-A M.R.S.A. § 10110 costs, the Commission may not approve the contract. This does not mean that no customer class may be charged for ocean energy costs; rather it means that by employing the Commission's discretion to use rate design to allocate costs among customers, the statute may be implemented by charging non-transmission and subtransmission customers for ocean energy costs.

Second, the Public Advocate appears to make the following argument: Because the ocean energy statutory limitation refers only to section 10110 (4) and not to section 10110 (6), the ocean energy limitation is limited only by section 10110 (4). Therefore, the ocean energy limitation is $0.0145 for every class for "any" class of customers.

Unfortunately, this argument is both tautological and myopic, however well intended. Both failures occur because section 10110 (4) has been effectively amended by section 10110 (6). Section 10110 (6) was later enacted as a new section to 35-A MRSA section 10110 for the explicit purpose of ensuring that section 4 could not be implemented to charge any conservation expenses to transmission and subtransmission classes. Because it exists, section 10110 (4) cannot lawfully be read to require these classes to pay more than zero for conservation expenses. (The classes may be charged for solar expenses pursuant to another provision of law, for

which no exemption or exception exists.) Section 10110 (4) therefore cannot be read for any purpose to require a payment equal to the payment otherwise required of other classes for conservation purposes, unless that amount is zero. To do otherwise is to strip section 10110(6) of its legal effect.

For the Public Advocate to be correct, a statute – even a sentence or paragraph of a statute – must be read in isolation, in deliberate ignorance of other sentences, paragraphs or statutes which have been enacted to change its meaning. This violates the law of statutory construction, which forbids interpreters from ignoring "the whole statutory scheme for which the section at issue forms a part" so that a harmonious result may be achieved.[4] Statutes are organic wholes; they are to be read as one, not like a menu from which one may choose based on the day's appetite. In fact, even different statutes relating to the same subject matter must be construed together. "It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter...the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they should be construed together."[5] The legislature is presumed to be fully aware of all relevant sections of the law when it enacts new law; Representative Fletcher's comments, addressed in more depth below, prove that awareness.

At most, the Public Advocate's argument reveals a statute that might be read in two conflicting ways: one way reflection the existence of section 10110 (6) and one failing to consider that same section and paragraph. This would create an ambiguity in which the proper course of action is to consider the legislative history of the two sections. Their origins, as Rep Fletcher's comments reveal, is conclusive as to how the statute should be read.

II. National Energy Marketers' Association Is Correct.

IECG agrees with the perceptive comments offered by the National Energy Marketers' Association (NEM). All consumers of energy have the right to purchase generation services directly from competitive electricity providers.[6] As NEM observes,

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[4] Estate of Whittier, 681 A.2d 1, 2 (Me. 1996)
[5] Sutherland on Statutory Construction Section 51:2, Pages 205 - 207 (West Group 2000)
[6] 35-A M.R.S.A. § 3202.

"an important factor in the Commission's determination of customer applicability of the rate increase is the concomitant issue of the treatment of customers that have chosen to purchase their energy from a competitive supplier."[7] NEM recommends that the rate impact be charged to "those customers that are receiving utility commodity supply and directly benefitting from the long-term supply contracts".[8] As a policy matter, because customers exercising their rights to purchase competitive supply on the open market will not reap the benefit of the ocean energy contracts, nor should such "shopping customers" be required to pay for such contracts. Indeed, requiring additional payments of competitively-supplied customers is discriminatory and anti-competitive, in violation of longstanding law and precedent. NEM's comments are thus consistent with the unambiguous language of the statute.[9]

III. Representative Fletcher's Important Perspective

The comments submitted by Representative Kenneth Fletcher confirm IECG's read of the Act. Representative Fletcher was instrumental in the enactment of Act, and is the drafter of the rate impact limitation provision in question. He provides a cogent narrative of the bill's original focus on paying for deep-water over the horizon wind ("DWOHW") by displacing fossil fuels for home heating and transportation. As Rep. Fletcher comments:

> It was not by chance or oversight that LD 1810 specifically excluded transmission and sub-transmission (i.e. industrial class customers) from the DWOHW long term provisions. As the Utilities and Energy Committee modified the provisions of LD 1810, I submitted the amendment that specified that the potential above market costs associated with long term contracts for DWOHW would be based on those customers who were subject to the SBC assessment.[10]

Representative Fletcher confirms that the Legislature considered the policy issues raised by NEM regarding equitable, fair treatment of all consumers:

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[7] Comments of NEM at 1-2.
[8] Id. at 2.
[9] NEM also raises the alternative suggestion that the rate increase from ocean energy contracting be passed to customers through utility delivery rates. Provided that this is done in conformity with the rate impact limitation provision discussed above, IECG sees this as a possible alternative.
[10] Comments of Rep. Kenneth Fletcher at 1-2.

> if the justification for an above market rate for a DWOHW long term market contract is to make the 'investment' for home heating and transportation transformation, the industrial class would not be direct customers or beneficiaries. Secondly, the industrial class already utilizes the competitive field for selecting their electricity suppliers as opposed to the Standard Offer. Therefore, a commercialized DWOHW would have minor if any direct benefit to this customer class.[11]

In light of this lack of benefit to industrial consumers from ocean energy contracts, the Legislature properly and clearly excluded such customers from the cost responsibility therefor.

IV. Eastport Tidal Power LLC Proves the Legislature's Vision Can Be Fulfilled.

IECG replies briefly to the comments submitted by Eastport Tidal Power LLC. First, Eastport Tidal Power LLC shares IECG's plain-language reading of the Act. As Eastport Tidal Power LLC comments, the statutory language explicitly states that for any given customer class, the rate impact from long-term ocean energy contracts can be no larger than the rate impact on that customer class from the system benefit charge under 35-A M.R.S.A. § 10110. On a customer class by customer class basis, the Commission must evaluate each class's exposure to both the system benefit charge and ocean energy contract costs. Because transmission and subtransmission customers face a system benefit charge assessment of zero, such classes of customers cannot face costs from the ocean energy contracts.

IECG is also heartened to see Eastport Tidal Power LLC's confidence that ocean energy projects can be developed as a cost-competitive alternative to traditional resources. Projects that do not add to ratepayers' expenses are exactly the kind of projects that Maine needs.

V. Conclusion

The plain language of the Act is clear. The Legislature has clearly prevented the Commission from entering into ocean energy contracts that would result in any rate increases to industrial customer classes. No other interpretation of the Act's rate impact

[11] Id. at 2.

limitation provision makes sense or is consistent with the Legislature's plainly expressed intent.

Dated: August 16, 2010

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