

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-619

December 2, 1998

PUBLIC UTILITIES COMMISSION
Renewable Resource Portfolio
Requirement (Chapter 311)

ORDER PROVISIONALLY
ADOPTING RULE AND
STATEMENT OF FACTUAL
AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

In this Order, we provisionally adopt rules establishing the requirements and standards governing the implementation of Maine's renewable resource portfolio requirement.

During its 1997 session, the Legislature fundamentally altered the electric utility industry in Maine by deregulating electric generation services and allowing for retail competition beginning on March 1, 2000.¹ At that time, Maine's electricity consumers will be able to choose a generation provider from a competitive market. As part of the restructuring process, the Act requires utilities to divest their generation assets and prohibits their participation in generation markets.²

These changes in industry structure necessarily impact the means by which the State has implemented its energy policy. Traditionally, utilities engaged in a regulated least-cost planning process, subject to Commission oversight, to select the mix of energy resources to meet electric demand in the State. This process ensured compliance with State energy policy currently embodied in the Maine Energy Policy Act, 35-A M.R.S.A. § 3191 (MEPA), the Small Power Production Act, 35-A M.R.S.A. (SPPA), §§ 3301-3309, and the Electric Rate Reform Act, 35-A M.R.S.A. §§ 3151-3155. The Legislature enacted these provisions at a time when the electric utility industry was fully integrated, and the provisions are premised on the existence of that structure.

In enacting the restructuring legislation, the Legislature recognized that, because generation services are being

¹An Act to Restructure the State's Electric Industry (the Act), P.L. 1997, ch. 316 (codified as Chapter 32 of Title 35-A M.R.S.A. §§ 3201 through 3217).

²Utility affiliates may participate in the generation markets. 35-A M.R.S.A. §§ 3205-3207.

deregulated, its energy policies could no longer be implemented through the regulation of utility resource acquisitions. As a result, the Legislature included a provision in the Act to promote renewable and indigenous resources in a restructured environment. That provision contains an explicit pronouncement of legislative policy in this area:

In order to ensure an adequate and reliable supply of electricity for Maine residents and to encourage the use of renewable and indigenous resources, it is the policy of this State to encourage the generation of electricity from renewable resources and to diversify electricity production on which residents of this State rely

35-A M.R.S.A. § 3210(1).

To fulfill this policy, the Legislature required, as a condition of licensing, that each competitive electricity provider supply no less than 30% of its retail sales in the State from renewable resources as explicitly defined in the statute. The Legislature directed the Commission to adopt rules to implement the requirement. 35-A M.R.S.A. § 3210(3).³ In establishing these rules, we have attempted to satisfy the legislative purposes and objectives of the portfolio requirement, while minimizing the cost and complexity of compliance for competitive providers.

Pursuant to 35-A M.R.S.A. § 3210(3), the rules implementing the portfolio requirement are "major substantive rules" as defined and governed by 5 M.R.S.A. §§ 8071-8074. The Commission must adopt these rules "provisionally." The Legislature will review the provisional rules and authorize their final adoption either by approving them with or without change or by taking no action, 5 M.R.S.A. § 8072.

II. RULEMAKING PROCESS

On August 25, 1998, we issued a Notice of Rulemaking and proposed rule on the renewable resource portfolio requirement. Prior to initiating the formal rulemaking process, we conducted an inquiry in Docket No. 97-584 into the implementation of the renewable resource provisions of the Act. As with our other inquiries regarding restructuring matters, the comments and input from interested parties were helpful in allowing us to define the

³The statute also requires the Commission to adopt by rule a program allowing retail customers to make voluntary contributions to fund renewable resource research and development. 35-A M.R.S.A. § 3210(5). This program is established through a separate rulemaking (Docket No. 98-620).

issues and consider alternatives in implementing the legislative policies on renewable resources.

Consistent with rulemaking procedures, interested persons were provided an opportunity to provide written and oral comments on the proposed rule. We received comments from: the Public Advocate on behalf of members of the Maine Electric Consumers Coalition,⁴ Independent Energy Producers of Maine (IEPM), Natural Resources Council of Maine (NRCM), the Union of Concerned Scientists (UCS), MainePower, Green Mountain Energy Resources (GMER), Coalition for Sensible Energy (CSE), AllEnergy Marketing Company, EnergyExpress, Hydro-Quebec (HQ), Representative Carol Kontos, Representative Patrick Colwell, Pamela Prodan, Frederick Munster, Hans Nicolaisen, David Tilton, Chris Carroll, Michael Mayhem, and Ed Holt and Associates. These comments are discussed in section IV below.

III. GENERAL POLICY CONSIDERATIONS

Many commenters discussed the basic structure of the portfolio requirement contained in the proposed rule. Some commenters argued for fundamental changes to the proposed rule, while others asserted that the basic structure is sound and should not be altered. These comments fall into three general categories: (1) whether the 30% requirement should be defined on an individual product basis as opposed to the total sales basis contained in the proposed rule; (2) whether the rule should be structured to encourage certain categories of renewable resources; and (3) whether the rule should exclude resources from utility or crown corporation systems that would otherwise qualify as renewable under the statute. We have concluded that the proposed changes in these three areas would alter the basic framework of the portfolio requirement as established by the Legislature.⁵ For this reason, we have not changed the proposed rule in these fundamental respects.

⁴The Public Advocate indicated that he consulted with the following Coalition members in preparing the comments: Coalition for Sensible Energy, Natural Resources Council of Maine, Independent Energy Producers of Maine, Hans Nicolaisen, Pam Prodan, Union of Concerned Scientists and Ed Holt.

⁵Many of the commenters acknowledged that the language of the current statute does not appear to contemplate their proposed changes to the portfolio requirement structure and that legislative amendments may be required. These commenters ask the Commission to seek necessary legislative modifications to the renewable resource statute.

While some of the arguments in favor of the proposed rule changes are worthy of consideration, they do represent a tradeoff between the cost of compliance (which may translate into higher rates for Maine consumers), and the promotion of various policies, such as encouraging the development and use of renewable and indigenous power. Because the Legislature chose to establish the basic design of the portfolio requirement as part of its comprehensive restructuring Act, changes to the basic structure should be addressed to the Legislature.⁶

We discuss the comments in these areas below.

A. Product Requirement

The proposed rule defined the portfolio requirement as 30% of each provider's total sales within the State. The Public Advocate, IEPM, NRCM, CSE, UCS, GMER, Representative Kontos, Representative Colwell, Ed Holt and Associates, Pamela Prodan and Hans Nicolaisen commented that the 30% requirement should instead apply to each product sold in the State. In this way, the electricity purchased by each customer would contain a minimum of 30% renewable resources. Under the total sales approach, a provider could sell some customers electricity comprising of less than 30% renewables, if it sells other customers electricity produced with more than 30% renewables (so that on a total sales basis the minimum of 30% renewables is achieved).

The proponents of the product approach stated that a total sales requirement would be inequitable, tend to result in the 30% requirement becoming a ceiling rather than a floor, and could restrict the development of smaller "green power" marketers. The portfolio requirement represents a legislative policy that a substantial amount of electricity consumed in Maine should continue to be produced by renewable resources. As such, the proponents of the product approach stated that the costs of this public policy should be borne by all electricity consumers; this would not occur if some customers or customer groups were able to purchase products with less than 30% renewables, while others purchased products that exceed 30%.⁷ The proponents' view

⁶The market power study conducted by the Commission and Attorney General, pursuant to P.L. 1997, ch. 447, identifies some concerns regarding with the current portfolio requirement. To the extent there are significant changes to the statute, there may be a need to conduct further market power analyses.

⁷Proponents expressed concern that, under such a circumstance, customers that are aware of the 30% requirement may reasonably think they are buying from a company that exceeds the requirement when it is, in fact, not doing so.

that a total sales approach would constitute more of a ceiling than a floor is premised on the 30% requirement being satisfied through sales to that segment of the population that desires to buy electricity produced with high percentages of renewables. It is this scenario that raises concerns of restricting the development of smaller specialized marketers in that large marketers would sell high percentage renewable products (above 30% to make up for lower renewable products), thus removing the market for green marketers.

MainePower, EnergyExpress, AllEnergy and HQ oppose the product approach because it is inconsistent with legislative language and intent, would increase both administrative costs and the costs of procuring power, and would be incompatible with the goal of creating a competitive market.

In our view, the proponents of the product approach raise several legitimate points that warrant careful consideration. If the market develops as contemplated by the proponents, there may be inequities deriving from the costs of a statewide public policy being borne by only certain categories of customers. However, the market may not develop in a manner that would necessarily lead to such a result, and a product approach may, under certain circumstances, raise the total cost of electricity for Maine's consumers.

For example, in the event the market includes providers that serve only certain customer classes (e.g., only residential customers), it may be difficult for other providers to maintain a strategy of selling products with high renewable percentages to certain customer classes to make up for selling other products containing less than 30% renewables to other customer groups. For such a strategy to work, there would need to be a "naturally occurring" market for electricity products containing significantly more than 30% renewables;⁸ the demand for such electricity products is impossible to predict. To the extent a significant naturally-occurring market for products with greater than 30% renewables develops, a product approach could raise the total cost of electricity by, in effect, increasing the total amount of renewable kWhs consumed in the State above the 30% floor that occurs under the total sales approach. Finally, under either approach, smaller green marketers would have the opportunity to market products with higher percentages of renewables than that generally available.

⁸For example, if there were no naturally occurring market for products above 30% renewables, the strategy would likely fail because customers would tend to buy a cheaper product containing the minimum of 30% renewables (assuming that price of the product increases with the percentage of renewables).

In provisionally adopting the portfolio requirement rules, we rely on the following statutory language:

As a condition of licensing pursuant to section 3203, each competitive provider in this State must demonstrate . . . that no less than 30% of its portfolio of supply sources for retail electricity sales in the State are accounted for by renewable resources.

35-A M.R.S.A. § 3210(3). In our view, this language clearly contemplates that the 30% requirement would apply to each competitive provider, rather than to individual products, with the result that at least 30% of kWhs sold in the State would be generated with renewable resources.⁹

B. Promotion of Certain Resources

Several commenters stated that the portfolio requirement should be designed to encourage the development or use of certain categories of renewable resources. The UCS stated that the portfolio requirement as structured in the proposed rule would not satisfy the policy of encouraging the development and use of renewable and indigenous resources. These comments are based on an analysis of renewable supply and demand in the New England region that concluded that providers would not have to rely on new renewable resources or in-state biomass and solid waste facilities¹⁰ to satisfy the requirement. To address this concern, the UCS suggested several alternative mechanisms for consideration. These include specifying a required percentage of sales from categories of resources judged to be of particular policy significance, or from new resources placed in service

⁹During the hearing, the UCS and IEPM expressed concern that, if a product approach is not adopted, there may be a need for regulations that prohibit a marketer from claiming its product contains more renewables than the statutorily required 30%, if that product is making up for its lower renewable products. MainePower and AllEnergy oppose restrictions on their ability to market products. A claim that a product exceeds the statutory requirement, when the marketer is merely meeting the requirement, would be clearly false and misleading and thus likely to violate state and federal laws, as well as our consumer protection rules. For this reason, there is no need to address the concern in this rule.

¹⁰The UCS stated that biomass and waste facilities tend to be relatively more expensive than hydro and other renewable facilities that are available to meet the portfolio requirement.

after a stated date (the initial percentages may increase over time).¹¹

The IEPM, GMER and NRCM expressed serious concern that Maine's statutory definition (and consequently, our rule's definition) of "renewable resources" includes facilities that use fuels not commonly understood to be renewable. This concern derives from the Legislature's inclusion of cogeneration facilities (which often use fossil fuels), as eligible to satisfy the portfolio requirement. These commenters stated that this situation will create customer confusion, jeopardize credibility, and impede efforts to market green power; they believe the Legislature should reconsider its inclusion of cogeneration that is not fired by renewable fuels as eligible to satisfy the requirement. If cogeneration remains eligible, the IEPM and UCS proposed that a maximum percentage for cogeneration be used to avoid an outcome whereby a substantial percentage of the portfolio requirement is satisfied by non-renewable resources.

MainePower, EnergyExpress, GMER and HQ commented that mandating percentages of specific fuel sources to favor, discourage, or eliminate particular resource categories should not be adopted. Such mechanisms would be overly prescriptive, would increase compliance costs through added complexity, would inhibit customers' ability to express preferences and the ability of marketers to design products to meet their preferences, and may result in driving up the electricity prices.

As with comments supporting a product approach, many of the points in favor of promoting certain categories of resources have merit depending on the relative importance of the various policy goals. Moreover, we agree that including cogeneration as part of a renewable resource portfolio requirement could be confusing to the public.¹² However, the current renewable statute does not contemplate specifying categories for maximum or minimum percentages and explicitly includes cogeneration as an eligible "renewable" resource. The statute states that the 30% of each provider's portfolio shall be accounted for by renewable resources, 35-A M.R.S.A. § 3210(1), and that the term "renewable resource" means certain enumerated facilities that include qualifying cogeneration under federal standards, 35-A M.R.S.A. § 3210(2). Thus, the current statute was structured to ensure

¹¹The UCS notes that this approach has been adopted by Massachusetts, Connecticut, Arizona and Nevada.

¹²For example, a marketer could accurately claim that it has satisfied Maine's 30% renewable requirement while having little or no renewables (as the term is commonly understood) in its portfolio.

that a substantial amount of kilowatt-hours consumed in Maine after restructuring will continue to be generated by the types of facilities (small power production and cogeneration) that the Legislature had promoted in the past through the SPPA and MEPA. The Legislature may, however, decide to re-evaluate the portfolio structure it has adopted in light of both the additional benefits and costs that might derive from designing the requirement to include or favor certain categories of renewables (as well as eliminating resources that are not commonly considered as renewable).¹³

C. Exclusion of Facilities From Utility Systems

The Public Advocate, IEPM, UCS, Ed Holt and Associates, and Pamela Prodan proposed that energy from facilities that are a part of the systems of utilities and crown corporations should not be eligible to satisfy the portfolio requirement. These commenters stated that such an exclusion is necessary to create a fair competitive environment for renewable resources; because such facilities are paid for by ratepayers, utilities or crown corporations will be able to under-price power in the competitive market. Additionally, some commenters are concerned that it would be difficult to separate facilities within systems to satisfy the 100 MW or less criterion.

HQ argued against such a restriction as protectionist, contrary to commercial laws and treaties, highly anti-competitive, and an obvious attempt to discriminate against generation from Quebec. MainePower, AllEnergy and EnergyExpress also commented that renewables from system power should not be excluded because it is the characteristics of the facility, not ownership, that should determine eligibility, and such a restriction could increase electricity prices.

The renewable statute does not exclude facilities that are part of a system, and we have not included such an exclusion in the provisional rule. The argument to exclude such entities from the renewable market would logically extend to excluding such entities from electricity markets in general. Any suggestion that specific entities be excluded from the markets should be viewed with caution and should only occur upon sound and demonstrable justification. An exclusion of specific entities, especially on the grounds that they may sell low cost power, may well increase the price of electricity to Maine consumers.

¹³Non-utility cogeneration facilities were promoted in the past through State and federal policies because they are an efficient means of generating electricity. Because such facilities are relatively efficient, they should be competitive in the new markets.

We are not aware of any evidence that "subsidized" power would be dumped into Maine's renewable market at below cost, thus preventing fair competition. It would appear that such a situation could only occur if the entity had excess supply that is being paid for by its ratepayers. Even under this circumstance, the entity would nevertheless be expected to only price down to its short-run marginal cost (otherwise the entity would lose money with each sale), which is what would be expected in any market where competitors have excess capacity. Finally, we note that it will not be any more difficult to verify that power from utility or crown corporation systems is eligible to satisfy the portfolio requirement than power from any other entity that owns numerous generation facilities.

IV. DISCUSSION OF INDIVIDUAL SECTIONS

A. Section 1: Purpose

The provisional rule summarizes the purpose of the Chapter as implementing the State's policy to encourage generation of electricity from renewable and indigenous resources through the adoption of a 30% portfolio requirement. The proposed rule did not reference indigenous resources. The Public Advocate commented the term should be added, consistent with the statement of policy in the statute, 35-A M.R.S.A. § 3210(1). We agree and have made the requested change.

B. Section 2: Definitions

This section contains definitions of terms used throughout the provisional rule. The definitions are self-explanatory. The proposed rule modified the statutory definition of "aggregator" to clarify the type of entity that is not subject to the rule's requirements. The provisional rule adds similar language to the statutory definition of broker. This language will ensure that all providers that have a direct sales relationship with retail customers are subject to the rule's requirements, regardless of whether they technically take title to electricity.

C. Section 3: Provider Obligation

Section 3(A) defines the 30% portfolio obligation as an energy requirement applicable to each competitive provider's total kilowatt-hour sales within the State over a 12-month period. The provision specifies that the requirement applies to standard offer providers. For the reasons discussed in section III(A) above, the provisional rule defines the 30% requirement in terms of total sales rather than individual products and does not create mandated percentages of specified categories of resources.

Section 3(B) specifies that the 30% requirement must be met over a 12-month period. The use of annual compliance periods offers providers greater flexibility to meet the requirement, which should translate into a reduced cost of compliance. For example, a provider's reliance on a hydro facility to meet the portfolio requirement would be problematic unless the requirement extended over sufficient time because the output of such facilities often varies greatly over a year. The Commission did not receive any comments on this provision, and it is unchanged from the proposed rule.

Section 3(C) specifies the compliance period for providers that offer service to Maine customers for less than a calendar year. If the service begins more than 6 months prior to the following December 31, then the 30% requirement must be met over a shortened compliance period from the beginning of service to the next December 31. However if the service begins less than 6 months prior to December 31, the compliance period extends beyond the year to the second December 31 following the beginning of service. The provision is structured this way because there could be a significant burden in meeting a 30% portfolio requirement over a period of time less than 6 months. However, for a period greater than 6 months, there should be enough time for the provider to meet the 30% requirement. This approach seems reasonable, especially in light of the cure period provision contained in section 6 of the provisional rule. The Commission did not receive any comments on this provision, and it is unchanged from the proposed rule.

Section 3(D) exempts aggregators and brokers from the portfolio requirement because, by definition, such entities do not sell electricity directly to consumers. The provision is unchanged from the proposed rule.

D. Section 4: Eligible Resources¹⁴

This section governs the eligibility of generation resources that may be counted towards satisfying the portfolio requirement. For the reasons discussed in section III(B), above, section 4(A) of the provisional rule, consistent with the statute, specifies that eligible generation facilities include qualifying small power production and cogeneration facilities as defined under federal regulations, and facilities with maximum

¹⁴We have changed the title of this section from "Eligible Renewable Resources," because some of the eligible resources are not commonly understood to be renewable. See discussion in section III(B), above. We have made corresponding changes to terminology throughout the rule.

nameplate capacities that do not exceed 100 MW and that use specified fuels and technologies. The provision remains unchanged from the proposed rule. Pamela Prodan commented that use of nameplate capacity may be problematic in certain circumstances in determining whether a resource should be eligible and suggested a variety of factors that should be considered.¹⁵ We agree that there may well be situations that warrant case-by-case review, and it is for this reason that we included the advisory ruling provision (discussed below). However, our view remains that use of nameplate capacity is the best means to implement the legislative intent that the portfolio requirement apply to smaller facilities.

Section 4(B) interprets the statutory requirement that renewable resources be a source of power that "can physically be delivered to the control region in which the New England Power Pool, or its successor . . . has authority over transmission." The provisional rule requires that the energy from an eligible facility actually be delivered to the ISO-NE control area¹⁶ and that the energy must be counted in meeting load in New England pursuant to the ISO-NE rules. Because the ISO-NE rules do not recognize individual generation facilities of less than 5 MW, we have also included energy as physically deliverable if it is in any way used to satisfy load within the ISO-NE control area.

The section also has an identical provision for the Maritimes control area. The northern part of the State is not within the NEPOOL control area, but is in the Maritimes control area. We believe it to be an oversight that the Legislature omits reference to a resource being delivered to the control area which includes northern Maine. We have included language specifying that the energy from an eligible facility can also be delivered to the Maritimes control area if such energy is recognized by the rules of that control area as serving load within its geographic area; we will ask the Legislature for a corresponding amendment to the statute in the context of its major substantive rule review. Section 4(B) is unchanged from the proposed rule.

Section 4(C) clarifies that if a facility uses more than one fuel or technology, only energy generated by a fuel or technology that constitutes renewable generation can count towards the portfolio requirement. The provisional rule is unchanged from the proposed rule. The Public Advocate suggested that this multi-fuel provision be extended to small power and cogeneration facilities under section 4(A)(1) and (2) of the rule

¹⁵As an example, Ms. Prodan cites a 300 MW wind power farm made up of numerous small generators.

¹⁶The ISO-NE control area is identical to the NEPOOL control area.

instead of just renewable generation under section 4(A)(3). We have not adopted this change because the statute specifies that energy from small power and cogeneration facilities is eligible if the facilities meet specified federal regulations.

Similar to the previous provision, section 4(D) clarifies that energy from a pumped-storage hydro facility that uses a fuel or a technology that does not constitute renewable generation for its pumping requirements may not be used to satisfy the portfolio requirement. The Commission did not receive any comments on this provision, and it is unchanged from the proposed rule.

Section 4(E) provides that a provider or other interested person can request an advisory ruling from the Commission as to whether any particular generation facility is an eligible facility under the rule. We have included this provision because the comments in the Inquiry revealed that there may be a variety of situations in which it is not obvious whether a particular "facility" satisfies the requirements of the rule. Rather than attempting to anticipate all such situations, this provision allows the Commission to make such determinations as necessary if the case arises. The Public Advocate, IEPM and Hans Nicolaisen commented that this provision should explicitly provide interested persons notice and an opportunity to be heard on requests for advisory rulings. We have added such a provision to the provisional rule.

E. Section 5: Verification; Reporting

Section 5(A) of the provisional rule specifies that it is the obligation of the competitive provider to demonstrate compliance with the portfolio requirement. At the current time, there appears to be no mechanical or automatic mechanism to ensure compliance with the requirement. The provisional rule, therefore, places the burden on competitive providers to demonstrate that they have complied with the requirement; this will occur through reporting requirements and periodic Commission audits.

Section 5(B) states that energy that a provider counts towards Maine's portfolio requirement may not be sold, or otherwise claimed as serving load, in other jurisdictions. One of our largest concerns in this area is that eligible generation not be, in essence, "double-counted" by having the same kilowatt-hour used to satisfy the portfolio requirement in Maine and for example, marketed as "green power" in another state. This section makes it absolutely clear that such "double-counting" violates the portfolio requirement.

Although not disagreeing with the spirit of the provision, MainePower commented that some of the language in the proposed rule may be problematic. The proposed rule referred to "energy sold, marketed, disclosed, or otherwise claimed or represented as applicable to load served in other jurisdictions." MainePower stated that the language could be read, for example, to prohibit compliance with another state's requirement that a company's regional portfolio requirement be disclosed; or to prohibit a provider from using its regional portfolio as part of its marketing. MainePower suggested that we remove "marketed" and "disclosed" from the language. We have adopted MainePower's modified language and have made corresponding changes to sections 5(C)(4) and 5(D) of the provisional rule.

Section 5(C) requires each competitive provider to file an annual report on or before May 1 of each year, demonstrating compliance with the portfolio requirement over the prior calendar year. We have structured this provision to be consistent with the more generic annual reporting requirement in our licensing rule, Chapter 305, in that both provisions use a calendar year as the reporting period and May 1 as the filing date. This approach is intended to ease the administrative burden of compliance on competitive providers.

The annual report provision specifies some minimum information requirements, primarily the provider's total sales in Maine and the resources used to meet the portfolio requirement. However, the provider is obligated to include enough additional information in the annual report to allow for a reasonable demonstration that the portfolio requirement has been satisfied.

We have adopted this reporting approach in response to comments on the proposed rule from potential providers. The proposed rule contained a lengthy list of detailed reporting requirements designed to obtain enough information to verify compliance. MainePower, GMER, AllEnergy, and EnergyExpress commented that the annual reporting requirement would be burdensome, costly, and contain unnecessary information. GMER suggested contractual commitments from suppliers that the kilowatt-hours are not sold or allocated to other retail providers may provide an adequate means to ensure that kilowatt-hours are not double counted.

At this point, it is unclear what type of information would reasonably verify compliance. For this reason, we have minimized specific information requirements and provided competitive providers with flexibility in making a reasonable demonstration of compliance.¹⁷ This approach, in conjunction

¹⁷We understand that, under this approach, there is no clear standard for satisfying the reporting requirement and, as a result, providers may be concerned about the potential for a

with the Commission's ability to obtain additional information and conduct periodic audits (pursuant to subsections F and G), should allow for a workable mechanism to verify compliance with the rule's requirement.

Section 5(D) requires a certification that the portfolio requirement has been met and that kilowatt-hours designated for this purpose have not been "double-counted" in other jurisdictions. This certification requirement adds additional assurance that the provider's demonstration of compliance is accurate.

Section 5(E) requires an applicant for a competitive provider license to provide an initial demonstration statement describing how the portfolio requirement will be met. This provision is required by the licensing section of the statute. 35-A M.R.S.A. § 3203(2)(D). We understand that, at the time of licensing, a competitive provider may only have a general plan for how it anticipates meeting the portfolio requirement. For this reason, the initial demonstration statement requires only a general description of how the provider intends to satisfy the requirement.

Sections 5(F) specifies that the Commission may obtain additional information from competitive providers if it finds that such information is necessary for it to monitor or enforce compliance with the portfolio requirement.

Section 5(G) provides that the Commission may conduct periodic audits of providers' compliance and obtain all necessary information to do so. This provision was not included in the proposed rule; as discussed above, we have added it to the provisional rule in conjunction with minimizing the specified annual information requirements.

GMER, MainePower and Ed Holt and Associates suggested that providers should be allowed to show compliance through a certified audit by an independent auditor (such as a certified financial auditor).¹⁸ The use of independent audits in this regard has appeal. However, at this time, we are not confident that independent entities with the requisite expertise can be readily identified. Before relying on the use of independent audits, we would have to be assured that the auditors are both qualified and credible. Certified financial auditors may

subsequent Commission determination that the information contained in the report is not sufficient. Accordingly, we will take the lack of specificity in the rule into account in any review of provider compliance with the reporting provision.

¹⁸MainePower stated that such audits should be optional because they may be expensive.

potentially serve this function, but it is currently unclear whether such entities would be both willing and able to audit compliance with portfolio requirements. If qualified and credible independent auditors emerge, we will consider allowing or requiring such audits as part of the verification process.

Subsection H provides for the confidentiality of information presented as part of the rule's verification process. GMER expressed general concern over the treatment of sensitive business information. The Commission understands that the generation markets will be competitive and, as a result, some of the information that may be required under this section will be sensitive. As in the past, the Commission will act to protect materials that are legitimately claimed as confidential.

F. Section 6: Non-compliance; Sanctions

This section of the provisional rule contains provisions concerning non-compliance with the portfolio requirement and sanctions for such violations.

Section 6(A) provides for a "cure period" for competitive providers who do not serve 30% of their sales in Maine with eligible resources, but have done so with at least 20% of their sales. We have included this provision because there may be situations where, despite good faith efforts, a provider cannot meet the full 30% requirement.

The cure period provision provides an additional year for the provider to satisfy the 30% requirement so that, over the 2-year period, 30% of the kilowatt-hour sales are served by eligible resources. Moreover, the provision specifies that the Commission may extend the cure period upon a showing that the provider has an interest in an eligible facility that will be in service within two years and whose energy output will allow for compliance. This provision provides added flexibility for providers to rely on new renewable resources, rather than depending on the existing market. AllEnergy commented that the cure period provision provides flexibility that should minimize compliance costs, resulting in lower prices for consumers. We did not receive others comments on this provision, and it is unchanged from the proposed rule.

Section 6(B) contains sanctions for providers that do not comply with the portfolio requirement rules. The section provides the Commission with a variety of sanctions that may be exercised as a matter of discretion, allowing the Commission flexibility to address a wide variety of circumstances that may arise in the new electricity market. The section provides for license revocation and monetary penalties pursuant to the Commission's general rules governing sanctions for competitive

provider rule violations (Chapter 305), as well as other appropriate sanctions that are authorized by law. The section also provides for an "optional payment" that would allow a provider to avoid a license revocation by making a payment into the renewable resource research and development fund established pursuant to 35-A M.R.S.A. § 3210(5). The amount of the payment will be based on the difference between the market price of energy from eligible facilities and energy from other facilities.¹⁹ Essentially, this provision would allow a provider to voluntarily surrender amounts that it may have saved through non-compliance into a fund whose purpose is to promote renewable resources through research and development. We did not receive any comments on this provision; we have modified the section to clarify that the Commission may impose, within its discretion, impose one or more of the sanctions listed in the rule.

Section 6(B)(4) allows the Commission to waive the imposition of sanctions upon a showing that a competitive provider could not, in good faith, satisfy the requirement due to market conditions. This provision is a result of concerns that there may be a market concentration of renewable resources that could result in such resources not being available at reasonable prices.²⁰ This provision will allow the Commission the flexibility to address such a situation if market concentration is shown to exist. The IEPM, Hans Nicolaisen and CSE commented that this provision should explicitly provide interested persons with notice and opportunity to be heard prior to the granting of a waiver of sanction. We have added such a provision to the provisional rule.

G. Section 7: Waiver or Exemption

This section contains the Commission's standard language for a waiver or exemption from the provisions of the rule that are not inconsistent with its purposes or those of Title 35-A. The IEPM and Hans Nicolaisen commented that the Commission should provide notice and opportunity to be heard to interested persons before granting any waivers or exemptions. We have not included such language in this provision of the rule.

¹⁹The rule explicitly states that the payment will be "based on" the market price difference. This is to avoid a requirement for the Commission to make a precise determination of the cost difference, if that difference is difficult to assess.

²⁰This issue is part of the market power study conducted by the Commission and the Attorney General pursuant to P.L. 1997, ch. 447.

The language in this section is standard in Commission rules. It is, however, Commission practice to seek input from interested parties before allowing substantial deviations from its rules through the general waiver provision.

H. Tradable Credits

The proposed rule did not contain a mechanism for tradable credits in conjunction with the portfolio requirements, and we have not incorporated such a mechanism in the provisional rule.

A tradable credit system essentially involves the creation of a secondary market in which "renewable credits" can be bought and sold separately from the sale of the energy (kWhs) to satisfy the portfolio requirement. Such a system could provide additional flexibility in meeting the portfolio requirement that may translate into lower costs of compliance.

We have decided not to include a tradable credit system because the creation of such a system would be complex in relation to Maine's retail electricity market, would require an entity to administer and verify the system, and would likely be incompatible with regional efforts to implement uniform customer disclosure requirements.²¹ Under the disclosure system endorsed by the New England Conference of Public Utilities Commissioners (NECPUC) and adopted by the Massachusetts Department of Telecommunication and Energy, all kilowatt-hours sold in the region must be ascribed fuel and emission attributes. Under a Maine portfolio tradable credit system, once a credit is sold separate from the kilowatt-hour, that kilowatt-hour no longer has the attribute to report for disclosure purposes. Thus, it appears that the two systems cannot co-exist.

GMER, IEPM, the Public Advocate, NRCM, Ed Holt and Associates and CSE commented that a tradable credit system has many desirable attributes, but that such a system should be pursued on a regional or national basis.²² We agree that Maine should not work towards such a system in isolation. We will continue our active participation in regional efforts to develop competitive electricity markets and will pursue opportunities to develop regional mechanisms that are in the public interest.

²¹The Commission will adopt provisional rules on customer disclosure requirements in a pending rulemaking proceeding (Docket No. 98-708).

²²The IEPM expressed concern that if Maine implemented a credit system on its own, it might disadvantage Maine's renewable energy facilities; this would occur if, as a result, it is easier to trade out-of-state power into Maine than it would be to trade in-state generated power out of Maine.

To conclude, we note that the flexibility for compliance contained in the provisional rule (e.g., annual energy requirement, cure period) should offset, to some degree, the flexibility lost by not adopting a tradable credit system. Moreover, we expect that the selling of portions of the output of renewable generation will constitute a sufficiently robust market to allow any provider, regardless of the characteristics of its "owned" generation, to participate in Maine's market.

Accordingly, we

O R D E R

1. That the attached Chapter 311, Renewable Resource Portfolio Requirement is hereby provisionally adopted;

2. That the Administrative Director shall submit the provisionally adopted rule and related materials to the Legislature for review and authorization for final adoption;

3. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and

4. That the Administrative Director shall send copies of this Order and attached rule to:

(a) All electric utilities in the State;

(b) All persons who have filed with the Commission within the past year a written request for notice of rulemaking;

(c) All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

(d) All persons on the service list or who filed comments in the Inquiry, Public Utilities Commission, Inquiry into a Renewable Resource Portfolio Requirement, Docket No. 97-584;

(e) All persons who filed comments in Docket No. 98-619; and

(f) The Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

Dated at Augusta, Maine this 2nd day of December, 1998.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond

SEPARATE CONCURRING OPINION: Nugent

SEPARATE CONCURRING OPINION OF COMMISSIONER NUGENT

In voting to approve this rule I am especially mindful that the restructuring venture on which we have embarked is designed primarily to reduce Mainers' electricity rates. Mainers' residential rates are currently the second highest in New England, and its industrial users' rates are much higher than those of competitors located in other regions of the country.

It is appropriate and within the province of the Legislature to "exhaust" Mainers' tolerance for higher rates to achieve important public policy objectives. However, the likely effect of going to a "product" standard or specifying preferences for certain renewables is higher prices in a market whose operations and vitality are not yet clear. It is my view that, while meeting the current requirements of the restructuring law, we should focus on lowering prices in the first year(s) of competition. Once that objective seems assured, we can look to changing the standards included in the current law. At such time, though, we may wish to consider modifying the standards so as also to address global climate change in addition to a special status for renewable products.