

# MAINE STATE LEGISLATURE

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

February 28, 1980

The Honorable Barbara Trafton  
Committee on Public Utilities  
State House  
Augusta, Maine 04333

and

The Honorable Richard Davies  
House Chairman  
Committee on Public Utilities  
State House  
Augusta, Maine 04333

Dear Senator Trafton and Representative Davies:

You have asked two questions concerning the recently enacted Small Power Production Facilities Act, Title 35, M.R.S.A. c. 172, which is designed to encourage the development of energy producing systems using renewable resources.

First, in the event that a small power producer and utility cannot agree on a price for the purchased power, is the Public Utilities Commission (PUC) authorized to require the utility to purchase the power from the small power producer?

Second, if the PUC is indeed authorized to require such purchases, is the PUC then also authorized to establish a price that would discourage the production of energy from renewable resources?

Our answer to both of these questions is a qualified yes. Despite the specific goals and standards of the Small Power

Production Facilities Act, the PUC in establishing utility rates is also required to meet other statutory goals. In specific cases each of the public utility standards of Title 35 might not be in harmony with the others. In such an event the PUC, in its discretion, subject to court review, might very well decide that one standard should be met but not another. This opinion will attempt to describe how at times the PUC must weigh different standards and how the PUC could legitimately act in a manner which might discourage, at least in the immediate future, energy production from renewable resources.

1. RATE REQUIREMENTS OF TITLE 35

In order to answer your questions it is necessary to understand the relationship of the Small Power Production Facilities Act to the more general rate requirements of Title 35 of the Maine Revised Statutes, which regulates Maine's public utilities and carriers. The Act must be read in harmony with 35 M.R.S.A. §51, which sets forth the fundamental standard that the PUC establish for public utilities "just and reasonable rates." The necessity to view the Small Power Production Facilities Act within the context of its role in the Title 35 statutory scheme is a well settled principle of statutory interpretation. Brennan v. Johnson, Me., 391 A.2d 337, 340 (1978) and Sands, C.D., 2A Sutherland Statutory Construction 290 (1972).

A. 35 M.R.S.A. §51: Just and Reasonable Rates

Any rates established under the Small Power Production Facilities Act must be in accordance with 35 M.R.S.A. §51 which requires that all rates be "just and reasonable" to both the regulated utility and to the utility's customers. Just and reasonable rates are "the overriding purpose of the entire public utility statute." New England Tel & Tel. Co. v. PUC, Me., 376 A.2d 448, 454 (1977). The utility's rates cannot be set so low as to be confiscatory of the utility's property, Central Maine Power Co. v. PUC, Me., 136 A.2d 726, 739 (1957), or so high as to constitute an unreasonable burden on the ratepayers. New England Tel. & Tel. Co. v. PUC, Me., 390 A.2d 8, 30 (1978). Thus:

[T]he Commission must strike a nice balance between the essential revenue needs of the

company and the value of the services to the rate payer and his ability to pay. Central Maine Power Co. v. PUC, Me., 109 A.2d 512, 522 (1954).

B. 35 M.R.S.A. c. 172: Small Power Production Facilities Act

Because the "overriding purpose" of Title 35 is to produce rates which are "just and reasonable," New England Tel. & Tel. Co. v. PUC, Me., 376 A.2d 448, 454 (1977), the Small Power Production Facilities Act is most properly viewed as a legislative direction to the PUC as to standards and goals that must be at least considered when devising just and reasonable rates. 1/ The general purpose of 35 M.R.S.A. c. 172 is to "reduce the State's dependence upon fossil fuels." It seeks to accomplish this by allowing the PUC to resolve cost disputes between public utilities and non-regulated small power producers which use renewable resources ( and businesses with a cogenerator capacity). 2/ The Act sets forth standards to guide the PUC in its attempts to resolve a dispute between a public utility and small power producer and to encourage displacement of fossil fuels and nuclear power. These standards are found in §2327 and include:

- (1) the encouragement of long term contracts (sub-§1);

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1/ The recently enacted Electric Rate Reform Act, 35 M.R.S.A. c. 4-A, serves a similar function and specifically shares one of the goals of the Small Power Production Facilities Act: "to promote the maximum efficient utilization of natural energy resources existing in the State in setting electric rates." (§92) In general, the Electric Rate Reform Act seeks to reduce the cost of electricity to consumers by urging the PUC to design rates which encourage conservation and minimize the future need for expensive new electrical generating capacity.

2/ "Cogenerator" is defined in 35 M.R.S.A. §2323 as including any business which generates energy for its own commercial purposes but not primarily for sale.

(2) a ceiling on utility prices paid small power producers which equals the price the public utility would have to pay if it had purchased power from another source or generated it itself (sub-§2);

(3) the encouragement of displacement of fossil fuels (sub-§3); and

(4) prices which reflect the reliability (hours, days, seasons) of the power supplied by the small power producer (sub-§4).

C. PUC's Duty to Weigh Standards

A problem with the §2327 standards of the Small Power Production Facilities Act is that they might reasonably be construed in ways which advance one policy at the expense of another. <sup>3/</sup> For example, a conflict could arise because one standard requires the PUC to encourage the displacement of fossil fuels while yet another prohibits it from setting payments to small power producers at a price higher than the competing costs of fossil fuels and nuclear power. Further, in resolving any possible conflict between the standards of the Small Power Production Facilities Act, the PUC at the same time must harmonize the Act with the "overriding" standard of 35 M.R.S.A. §51, which calls for "just and reasonable rates." Finally, in orchestrating all these various standards, the PUC must also consider not only their possible long term effect (e.g., decreased reliance on fossil fuels) but also their possible immediate effect (e.g., heavier burdens on consumers).

Thus, in arriving at the "nice balance" between consumer and utility interests, Central Maine Power Co. v. PUC, Me., 104 A.2d 512, 522 (1954), the PUC has been found to have considerable discretion:

The concept of a "just and reasonable" rate does not signify a particular single rate as the only

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<sup>3/</sup> The Electric Rate Reform Act shares the same possibility. For example, this Act seeks rate designs which at once encourage conservation and also lower consumer costs. However, in the short run, a rate design which discourages consumption might actually result in immediately higher consumer bills.

lawful rate but rather encompasses a range within which rates may be deemed just and reasonable both in terms of revenue level and rate design. It is within the sound discretion of the Commission to fix the exact level and design within that range. Central Maine Power Co. v. PUC, Me., 382, A.2d 302, 327-28 (1978)

It is the considerable breadth of this discretion that no doubt gives rise to your questions.

## 2. PUC's AUTHORITY TO REQUIRE PURCHASES

Your first question was whether the PUC could require a regulated utility to purchase from a small power producer. Our answer is that the PUC does have this authority, assuming the small power producer is willing to accept the ordered contract terms.

It is axiomatic that "the powers of the Public Utilities Commission are derived wholly from statute," Stoddard v. Public Utilities Commission, Me., 19 A.2d 427, 428 (1941). And the specific language of the Small Power Production Facilities Act clearly addresses this question. Section 2326 states:

In the event that the small power producer... and the public utility electric corporation or cooperative are unable to mutually agree to a contract for electricity or to a price for the electricity purchased by the public utility, the commission may require the utility to purchase the power, determine the price, or both. (emphasis added)

However, in setting this price the PUC is constrained by the §51 requirement to establish only rates that are "just and reasonable." Thus, the price they set cannot result in an unfair burden on consumers, nor can they deny public utilities a fair rate of return on their investment. <sup>4/</sup> Since the Act specifically

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<sup>4/</sup> In general terms a "fair rate of return" means that a utility investor would receive a return on his money comparable to the return on an equal investment in another industry with a similar risk.

states that the small power producer is not a regulated public utility (§§2323, 2324), the PUC is not necessarily required to insure that the small power producer receive a fair rate of return. Further, while the PUC can order the utility to enter into a contract, the statute nowhere suggests that the small power producer or cogenerator must accept the PUC designed contract. This is in keeping with the small power producer's stated identity as an unregulated utility and the basic contract principle that requires mutual assent to all contract terms. Zamore v. Whitten, Me., 395 A.2d 435, 443 (1978)

These limits on the rates set by the PUC under the Small Power Production Facilities Act directly influence the answer to your second question.

3. PUC's AUTHORITY TO ESTABLISH A PRICE DISCOURAGING TO  
SMALL POWER PRODUCERS

The difficulty of your second question is due to the wide range of revenues and rate designs in which the PUC can exercise its discretion as to exactly what is a "just and reasonable" rate. Could the PUC authorize a price to be paid the small power producer that would discourage the production of energy from renewable resources? The answer would again seem to be yes. The PUC could conceivably set a price for a particular small power producer that would be so low as to not encourage other entrepreneurs to develop such resources. It might even be so low as to cause the specific small power producer who petitioned for PUC assistance to decide to forego the PUC ordered contract. The reason this is possible is, as we have explained, that the PUC in any given case might be required to weigh and resolve not only the different standards of the Small Power Production Facilities Act but also standards present in other Title 35 chapters. The two following examples illustrate ways in which the PUC might set a "discouraging" price.

The first example concerns the price ceiling required by the Small Power Production Facilities Act. In ordering prices under this Act the PUC is prohibited from setting a price for purchases from a small power producer that exceeds the price of alternative power sources, such as oil or nuclear power. Thus, in arriving at the small power producer price the PUC must first set a ceiling by calculating the competing costs of power produced by nuclear or fossil fuel generators. <sup>5/</sup> These costs (the ceiling) cannot be set so high as to result in rates that are unjust or unreasonable to consumers. At a particular time, depending on historical or seasonal factors, the PUC might establish a ceiling so low as to result in prices that do not give small power producers what they would consider to be a fair rate of return on their investments.

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<sup>5/</sup> The results of this calculation might vary according to the PUC's cost analysis procedure.

Assume the PUC adopts a long run marginal cost approach (consideration of not only the current price of oil but also the future price if expensive new generating plants must eventually be built). This approach might result in a price for oil that is higher than the current market price and thus allow the PUC to set an encouragingly high price for small power producer energy. However, the PUC might also decide that this approach is neither just nor reasonable when the immediate effect of the resulting high rates on consumers is considered. New England Tel. & Tel. Co. v. PUC, Me., 390 A.2d 8, 30 (1978). Thus, their decision might be a price that is discouraging to small power producers.

Alternatively, the PUC might decide that their prophetic skills in judging long run incremental costs were unsure and that it would be more reasonable to settle for prices based on more solid, present experiences, Central Maine Power Co. v. PUC, 153 Me. 228, 240 (1957). ("The efforts of regulatory commissions...should be directed to a reduction and not to an increase in the weight of prophecy.") Again, the result might not be encouraging to small power producers.

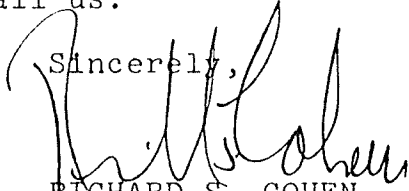


A second example of how a discouraging price might be set would be if the PUC determined that the reliability of the small power producer did not justify the prices sought by the producer. Section 2327, sub-§4, requires the PUC to consider the reliability and availability of the power in setting the price. Power generated by renewable resources (e.g., hydro electric) might increase or decrease depending on weather conditions or time of year. This is not usually the case with competing nuclear or fossil fuel generators and the PUC might decide, in order to insure just and reasonable rates, to set the small power producer price considerably below the sub-§2 statutory ceiling.

Thus, despite the fact that the Small Power Production Facilities Act specifically encourages the PUC to promote small power producer operations, it seems possible that the PUC, in considering the cost of a particular small power producer's energy, the competing cost of fossil and nuclear power, and the reliability and availability of the small power producer might calculate a "just and reasonable" price that is indeed "discouraging" either to the particular small power producer or to other entrepreneurs.

If we can be of any further assistance on this question, please do not hesitate to call us.

Sincerely,



RICHARD S. COHEN  
Attorney General

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