

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-161

June 13, 2002

PUBLIC UTILITIES COMMISSION
Interim Electric Energy Conservation
Programs

ORDER ON
INTERIM FUNDING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

By this Order, we assess transmission and distribution utilities for the full amount of money collected from ratepayers, since March 1, 2000, that was collected to be spent on conservation programs, but has not been spent on such programs. From now until the “permanent” program plan, including funding level, is established in Docket No. 2002-162, we will assess T&D utilities for the amount of conservation expenses included in each T&D utility’s rates, less any amounts spent on “prior conservation efforts” as defined in 35-A M.R.S.A. § 3211-A(1).

II. BACKGROUND

By Proposed Order on April 26, 2002, we established a process to decide whether to implement any interim conservation programs pursuant to subsection 7 of P.L. 2001, ch. 624 (the Conservation Act). In that Order, we stated that we read subsection 7 to constitute a legislative preference to implement conservation programs before the Commission has completed the tasks required for “permanent” programs that are stated within subsections 2 and 3 of the Act. We remain on schedule to implement interim programs during June through August, 2002. To implement interim programs, we must have money in the Conservation Program Fund (established pursuant to subsection 5). Therefore, initial funding decisions must be made now, and cannot be delayed until the “permanent” program decisions are made in Docket No. 2002-162.

On March 1, 2000, when electric restructuring was implemented and transmission and distribution (T&D) utilities were created, conservation programs were governed by now-repealed 35-A M.R.S.A. § 3211. We promulgated the current version of Chapter 380 to implement the policy established by section 3211. By section 3211 and Chapter 380, T&D utilities were required to implement conservation programs consistent with a plan developed by the State Planning Office (SPO). The costs of the conservation programs were to be recovered in rates from customers of the T&D utilities. The State Planning Office had not completed its program plan by March 1, 2000, when the initial rates for

the newly-created T&D utilities had to be established. In the various T&D ratemaking proceedings, the Commission adopted a policy on conservation spending by which rates were to be set using the best estimate for prospective conservation program spending, with the understanding that the actual conservation spending would be reconciled with the estimate used to set rates.

For Maine Public Service Company (MPS) and Bangor Hydro-Electric Company (BHE), which had minimal conservation spending in the years immediately prior to restructuring, we set rates assuming conservation spending at the statutory floor, 0.5% of the total T&D revenue. For Central Maine Power Company (CMP), which had been spending on conservation programs close to the statutory maximum, 1.5 mils per kWh, rates were set assuming CMP spent at the statutory maximum. The level of collection for conservation was not explicitly stated in most COUs' rate proceedings.

For various reasons, although a State Planning Office program plan was developed, it was never implemented. Accordingly, CMP, BHE and MPS have significantly underutilized conservation funds since March 1, 2000. Although CMP budgeted to spend on its "prior conservation programs" at the amount reflected in rates, actual spending has been less. For the period March 1, 2000 through December 31, 2001, CMP underspent approximately \$2,257,000, including carrying costs, for its Power Partner Program, and approximately \$67,000, including carrying costs, for all other conservation programs.

In Docket No. 2002-124, its annual price change filing made as part of the ARP 2000 rate plan, CMP proposed to return the unspent money associated with its Power Partner Program to customers.¹ CMP did not propose to return to customers the unspent dollars associated with its other conservation programs. In Docket No. 2002-124, the Examiner suggested that the issue of the proper treatment of the Power Partner underspending not be decided in the ARP annual review proceeding, but rather in one or more of the Conservation Act proceedings. CMP and the other parties accepted the Examiner's suggestion.

Because the interim program decisions were scheduled to be made in June, the Commission Staff assigned to this docket brought CMP's funding issue to the Commission on an expedited basis. The staff advisors issued a recommendation on interim funding, allowing CMP and other interested persons

¹The estimated underspending would result in a 0.98% decrease in distribution rates.

the opportunity to file written comments or exceptions before the issue was presented to the Commission for decision.²

The Advisors recommended that, for interim program funding, the Commission assess T&D utilities for, and put into the Commission's Conservation Program Fund, the full amount of the pre-Conservation Act underspending. For the interim period going forward, until the long-term funding decisions are made by the Commission, the Advisors recommended that the Commission assess the T&D utilities in the amount that was included in the initial rate cases (the so-called mega cases) for conservation-related spending. This would result in CMP's being assessed at (or near) the statutory maximum while BHE, MPS and the COUs would be assessed at the statutory minimum during the interim period.

Comments or exceptions were filed by the Public Advocate, CMP, Richard M. Esteves on behalf of the Residential/Small Commercial Service Providers Coalition (the Coalition), the Industrial Energy Consumers Group (IECG), Blue Rock Industries and FMC Corporation.

The Public Advocate generally supported the Advisors' recommendations. CMP, however, disagreed with both recommendations. In CMP's view, the Advisors erred in concluding the Conservation Act was ambiguous and in referring to the Act's preamble to resolve that ambiguity. CMP concluded the Act is clear and prohibits adding unspent conservation expenses to the Commission's Conservation Program Fund.³ CMP stated that, for the future, the Act creates a presumption that all T&D utilities will be assessed at a proportionate level, unless the Commission finds a different amount is justified. Because the Commission has decided to postpone such funding issues to the long-term program proceeding, CMP concluded that the Commission should

²By means of data requests, the Commission staff has attempted to confirm the precise amounts of underspending that is available either to put into the conservation fund or be returned to customers. The precise amounts cannot be confirmed without further investigation into how CMP's and BHE's (and some of the COUs') megacase orders and stipulations should be interpreted for purposes of accounting for conservation spending (the MPS stipulation appears clear in this matter) and whether the utilities' accounting treatment complies with Chapter 380 §3(B)(2). We estimate the pre-Conservation Act assessments of CMP, BHE and MPS to total approximately \$3 million. However, further analysis must occur before the precise amounts are determined. With this analysis, further process will be granted to interested persons, likely including a technical conference with the T&D utilities' revenue requirement and accounting experts.

³CMP does not explain why unspent Power Partners expenses should be treated differently than unspent funds associated with other conservation programs.

assess CMP proportionately and therefore should reduce CMP'S assessment to the statutory floor, the amount all other T&D utilities are assessed.⁴

The Coalition agreed with the Advisors' Recommendations. The Coalition disagreed with the Advisors' description that the funds unspent were an "overcollection." The utilities collected the correct amount, the amount reflected in their rates. The correct description of the funds, in the Coalition's view, should be that they are unspent or under-utilized. The Coalition stated that the residential, low-income and small commercial customers should receive a more representative amount of the interim funding. The Coalition also suggested that because significant cost effective conservation is available, to assure itself that conservation funding is more beneficial than rate reductions, the Commission should require conservation spending to produce at least twice the utility bill savings than would returning the funds to ratepayers.

The IECG stated that it opposed CMP's proposal to return unspent Power Partners dollars to ratepayers and supported the use of these dollars to fund interim programs. The IECG reasoned that the funds were collected for conservation-related spending and ratepayers expected the money to be spent for that purpose. The IECG also objected to CMP's proposal (actually made in Docket No. 2002-124) to return the funds only to distribution customers. The IECG stated that little or none of the funds would then be returned to industrial customers, even though 25% to 40% of the funds were collected from them.⁵

Blue Rock Industries and FMC Corporation stated that they objected to using the unspent funds for conservation. As customers, they preferred lower rates. They also objected to requiring CMP's customers to pay for a disproportionate level of conservation spending compared to other T&D customers.

III. DECISION

In conjunction with the interim program decisions, we must decide two funding questions. Prior to the Conservation Act, the T&D utilities collected significantly more conservation-related revenue than they spent on conservation programs. We must decide whether those pre-Conservation Act funds should be

⁴If CMP is assessed at the statutory floor, CMP describes that entire amount as available for "new" conservation programs, and not to be used to fund its existing Power Partners program. If assessed at the statutory maximum, CMP states that the assessment will be used to fund both Power Partners and new programs.

⁵CMP filed a response to this last assertion. CMP stated that since distribution and stranded cost rates were unbundled, all conservation costs are recovered from distribution-level customers. Transmission-level customers do not pay for conservation expenses.

transferred to the Commission's Conservation Program Fund or continue to be deferred by the T&D utilities for later return to ratepayers. In addition, we must decide the amount to assess the T&D utilities during this interim program period, either to fund interim programs or to fund future programs implemented as part of the Commission's "permanent" conservation program plan, until final funding decisions are made in the "permanent" conservation proceeding.

A. Funds Collected Before the Conservation Act

The Conservation Act authorizes the Commission to assess T&D utilities for money to pay for conservation programs and Commission administrative costs. The Act directs the Commission to establish a Conservation Program Fund and a Conservation Administrative Fund as the accounts in which to deposit the money received from utilities. The language of the Act, however, does not refer to or otherwise mention the money that utilities have collected from ratepayers for conservation programs pursuant to repealed section 3211 but that remain unspent.

CMP asserts that the failure of the Legislature to mention funds collected by utilities pursuant to now-repealed section 3211 in the newly-enacted section 3211-A(5) is a clear and unambiguous statement that such funds should not be placed in the Commission's Conservation Program Fund.

We disagree that subsection 5 is a clear and unambiguous statement that prohibits the Commission from assessing the utilities for their unspent pre-Conservation Act funds. Subsection 5 establishes the Commission's program fund, and directs the Commission to deposit all conservation program assessments in the fund. It also directs the treatment for interest earned by the fund and for any grants received by the Commission from other government or private sources. Last, it requires that unspent program funds in any fiscal year be carried forward to be used for conservation programs.⁶

⁶The complete text of subsection 5 is:

5. Conservation program fund. The commission shall establish a conservation program fund to be used solely for conservation programs.

A. The commission shall deposit all assessments collected pursuant to this section, other than funds deposited in the administration fund, into the program fund.

B. Any interest earned on funds in the program fund must be credited to the program fund.

Subsection 5 merely describes the account in which assessed money is to be kept, and provides other details about the account. Subsection 5 is silent on how the Commission should determine the amount of an assessment.

Subsection 4 authorizes the Commission to assess T&D utilities “to collect funds for programs and administrative costs...” Subsection 4 provides for a floor and cap amount for assessments, but does not mention the unspent funds that were collected by utilities before the Conservation Act. We also do not read subsection 4’s silence about pre-Act funds to be a clear and unambiguous statement that the Commission is not permitted to assess pre-Act funds for inclusion into our program fund. Likewise, it is not a clear and unambiguous statement that pre-Act funds must be assessed.

We conclude that the Act itself is ambiguous as to the Legislature’s intent concerning the disposition of collected-but-not-spent conservation funds. This ambiguity, however, is clarified in the emergency preamble of the Act. The relevant paragraph of the preamble reads:

Whereas, funds for conservation programs have been allocated pursuant to existing law, and there is an immediate need to put in place changes to the law in order to ensure efficient and effective use of these funds[.]

We do not believe it plausible that the Legislature could intend “efficient and effective use” to mean that such funds should be refunded to customers without any consideration by the Commission whether the money could be used to fund

C. Funds not spent in any fiscal year remain in the program fund to be used for conservation programs.

D. The commission may apply for an receive grants from state, federal and private sources for deposit in the program fund and also may deposit in the program fund any grants or other funds received by or from any entity with which the commission has an agreement or contract pursuant to this section if the commission determines that receipt of those funds would be consistent with the purposes of this section. If the commission receives any funds pursuant to this paragraph, it shall establish a separate account within the program fund to receive the funds and shall keep those funds and any interest earned on those funds segregated from other funds in the program fund.

conservation programs that meet the statutory criteria for interim or “permanent” programs. The words “efficient and effective use” are words typically used in conjunction with conservation and not rate refunds. CMP disagrees and asserts that “efficient and effective use” could mean used for rate refunds, especially in the instance of CMP, whose ratepayers have spent more for conservation than other Maine T&D utilities.⁷

We are assisted in defining the words “efficient and effective” in the preamble because the words are used in the Conservation Act. In section 3211-A(3)(C)(1), the Commission may select a service provider without using competitive bidding when selection by another means will “promote the efficient and effective delivery of conservation programs...” Thus, within the Act, the phrase “efficient and effective” is used to describe conservation programs. We believe that this use of the phrase adds support to the conclusion that the Legislature intended unspent, pre-Conservation Act funds to be available to pay for Commission-sponsored conservation programs.

We also decide that we should require the T&D utilities to transfer their unspent conservation funds to the Commission’s Conservation Program Fund. In a companion order on interim programs issued today in this docket, we decide to implement cost effective programs that in all reasonable likelihood will require all of the unspent funds to pay for the programs. By requiring the utilities to forward their unspent conservation funds and using those funds to pay for the interim programs, we will fulfill the Legislature’s intent that such funds be put to an efficient and effective use.

CMP also asserts that by assessing to collect the unspent funds now, we reduce our flexibility in the use of that money. We agree that by assessing the unspent funds for inclusion into our program fund, the money must be used to pay for programs or carried forward in the Conservation Fund. This result, however, is acceptable for two reasons. First, we will likely spend the money in the interim period. And as an administrative matter, we do not want to wait to assess the utilities until bills are due to be paid by the Commission. Second, as a practical matter, the loss of flexibility is not significant. Even if we do not spend all of the money in the interim period and carry forward the unspent amounts, future assessments by the Commission can be lowered, effectively returning the money to ratepayers.

⁷We disagree with CMP’s underlying logic that having more, rather than less, cost effective conservation available to its ratepayers is somewhat unfair to them. By passing the Act, the Legislature obviously has decided cost effective conservation is beneficial to ratepayers.

B. Program Funds Collected During Interim Period

Before the Conservation Act became law, a conservation program plan was to be developed by the State Planning Office and programs implemented by the T&D utilities. T&D rates were set to include the best estimate of the conservation-related expenses that the T&D utilities would incur carrying out the SPO's plan. Even now that the Conservation Act has repealed SPO's authority and removed the implementation responsibility from the utilities, the T&D utilities continue to collect money from ratepayers designed to pay for conservation expenses.

During 2002, as described in Docket No. 2002-162, the Commission will develop its conservation program plan. As part of that plan, the Commission must decide certain funding issues including whether to fund programs at the floor level (0.5% of T&D revenue) or the cap level (1.5 mils per kWh), or somewhere in between. Our funding decisions:

must result in total conservation expenditures by each transmission and distribution utility that:

A. Are based on the relevant characteristics of the transmission and distribution utility's service territory, including the needs of customers[.]

35-A M.R.S.A. § 3211-A(4).

In addition, while we examine the characteristics of each T&D utility, our funding decisions must result in conservation spending that is "proportionally equivalent" to the spending by other T&D utilities, "unless the Commission finds that a different amount is justified[.]" 35-A M.R.S.A. § 3211-A(4)(D). Thus, the Commission must set conservation spending that is proportionally equivalent⁸ among all T&D utilities, unless our examination of each T&D service territory causes us to decide that different spending is reasonable. The Legislature has further prohibited us from achieving proportional equivalency by simply raising the assessments of some T&D utilities to the higher level of other T&D assessments for the sole purpose of achieving proportional equivalency. As mentioned above, BHE's and MPS's rates reflect the floor amount of expenses, while CMP's reflect the cap. The Commission cannot achieve proportional equivalency simply by raising BHE and MPS to the cap amount. To raise BHE and MPS to the cap (and thereby achieve proportional equivalency with CMP) the Commission must find that assessment and spending

⁸ "Proportionally equivalent" is not defined. The Commission will define the term, for example, by total kWh, total customers, or some other means.

at the cap is reasonable and proper based upon the relevant characteristics of the MPS and BHE service territories.

The funding decisions that the Commission must make are varied and complex. These decisions will not be made, and programs will not be implemented based upon these funding decisions, until 2003. In the meantime, we must implement interim programs during 2002. The Advisors recommended that we postpone deciding the “proportionally equivalent” issues and, for the interim period, assess the T&D utilities in the amount that conservation expenses are currently reflected in the T&D rates, CMP at the cap and the other T&Ds at the floor.

In its exceptions, CMP argues that the Commission should not, even in the interim period, authorize this disparate treatment. Because the Commission has not conducted the necessary investigation of each T&D utility service territory to determine that different funding levels between CMP and the other T&D utilities is justified, CMP urges the Commission to follow the presumption created by 3211-A(4)(D), and reject the disparate treatment recommended by the Advisors.

We do not accept CMP’s argument. We are authorized, even encouraged, to implement interim programs. So that we “avoid a significant delay,” we are “not required to satisfy the requirements of Title 35-A, section 3211-A before implementing [interim] programs.” P.L. 2001, ch. 624, § 7. Clearly, we are not prohibited from assessing CMP a different amount during the interim period, even without a “justification” investigation.

Neither are we persuaded that we should follow the requirements of subsection (4)(D) in the interim period. We recognize that, in the context of long-term programs, we must address these important funding issues raised by CMP. For the interim period, however, we have been presented with information on a wide variety of programs, which appear to satisfy at least some formulations of the cost effectiveness test that we have been directed to apply. Collecting at “current rate” levels allows the greatest degree of flexibility in ensuring that funds are available for interim programs.⁹ Similar to the unspent pre-Conservation Act funds, if the Commission ultimately spends less than its interim period assessments on interim programs, the money in the program fund can be used to smooth the transition to implementing the long-term program funding decisions or to compensate for future expenses associated with existing Power Partners contracts. Accordingly, our assessments during this interim period will reflect the amounts expected to be collected in T&D rates over the remainder of 2002.

⁹We will assume that Consumer-Owned Utilities whose initial T&D rate cases did not explicitly address conservation expenses have been collecting at the statutory floor.

Accordingly, the Administrative Director will issue assessments to all T&D utilities consistent with this Order. The ongoing assessment shall be issued quarterly. If the accounting questions discussed in footnote 2 can be resolved before June 21, 2002, assessments will be based upon the actual financial data. If the questions cannot be answered by June 21, 2002, the Administrative Director shall assess before June 24, 2002 the lowest amount that is not in question as to computation, and assess any additional amount after any accounting or computational issues are resolved.

Dated at Augusta, Maine, this 13th day of June, 2002.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

THIS DOCUMENT HAS BEEN DESIGNATED FOR PUBLICATION

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5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

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