

April 9, 2015

MAINE PUBLIC UTILITIES COMMISSION  
Efficiency Maine Trust Procurement Funding Cap  
(Chapter 396)

ORDER ADOPTING  
RULE AND STATEMENT  
OF FACTUAL AND  
POLICY BASIS

VANNOY, Chairman; LITTELL and McLEAN, Commissioners

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## I. SUMMARY

In this Order, we adopt Chapter 396, Efficiency Maine Trust Procurement Funding Cap (65-407 C.M.R. ch. 396) to establish the process and requirements by which the Commission will determine the statutory cap of 4% of the total retail electricity transmission and distribution sales for the procurement of electric energy efficiency resources pursuant to 35-A M.R.S. § 10110(4-A).<sup>1</sup>

## II. BACKGROUND

### A. Omnibus Energy Act

This rulemaking proceeding was initiated in accordance with the legislative directive that the Commission establish, by rule, a cap on electricity ratepayer funding of Efficiency Maine Trust (EMT) programs. This legislative requirement is contained in An Act to Reduce Energy Costs, Increase Energy Efficiency, Promote Electric System Reliability and Protect the Environment (Omnibus Energy Act), P.L. 2013, ch. 369. Several sections of the Omnibus Energy Act amended provisions of the Efficiency Maine Trust Act, the enabling legislation of the EMT. 35-A M.R.S. §§ 10101-10123. Of particular relevance to this rulemaking proceeding, section A-19 of the Omnibus Energy Act repealed the System Benefit charge (SBC) used to fund the EMT electricity efficiency programs, 35-A M.R.S. § 10110(4) (repealed, effective July 1, 2015), and section A-20 of the Omnibus Energy Act replaced that funding mechanism by adopting 35-A M.R.S. § 10110(4-A) (effective January 1, 2015), which states in relevant part:

The commission shall ensure that transmission and distribution utilities on behalf of their ratepayers procure all electric energy efficiency resources found by the commission to be cost-effective, reliable and achievable pursuant to section 10104, subsection 4, except that the commission

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<sup>1</sup> Commissioner Littell dissents. See attached Dissenting Opinion of Commissioner Littell.

may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity transmission and distribution sales in the State as determined by the commission by rule.

B. EMT Triennial Plan Funding

The enactment of the section 10110(4-A) funding mechanism is applicable to calculating the procurement funding for Fiscal Year (FY) 2016 of the Second Triennial Plan of the Efficiency Maine Trust (EMT). On March 6, 2013, the Commission issued an Order approving the Second Triennial Plan of the EMT and establishing a level of funding from electricity ratepayers to achieve Maximum Achievable Cost-Effective (MACE) electricity efficiency. *Efficiency Maine Trust Request for Approval of Second Triennial Plan*, Docket No. 2012-00449, Order (March 6, 2013). As part of that order and in accordance with section 10110(5) of Title 35-A, the Commission recommended that the Legislature's Joint Standing Committee on Energy, Utilities and Technology approve this funding level.<sup>2</sup> The Commission's "Recommended MACE" funding levels were, as contained in the March 6, 2013 order, on average, \$25.5 million per year over the Second Triennial Plan period (FY 2014 - FY 2016).

This approved funding level of 25.5 million per year reflected a substantial increase compared to prior years, during which, in accordance with the system benefit charge (SBC) authorized pursuant to section 10110(4), funding had been in the range of \$13 million per year. In combination with expected funding from other sources, such as proceeds from the Regional Greenhouse Gas Initiative (RGGI) and the ISO-NE Forward Capacity Market (FCM), total funding for electricity programs over the Second Triennial Plan period was anticipated to be approximately \$40.2 million per year. This funding level was consistent with what EMT had proposed at the time of the Commission's review and approval of the Second Triennial Plan, that is, to ramp up to MACE over a ten-year period in equal annual increments. Because of the expected start-up time needed to expand programs, however, requested funding levels over the Second Triennial Plan period were below average in FY 2014 and above average in 2016, such that, over the period, total savings would equate to three years' worth of the MACE target.

C. EMT Funding Request

On October 31, 2014, EMT submitted to the Commission, in the Second Triennial Plan docket referenced above, a filing captioned Compliance Filing and Request for FY 2016 Procurement Order. This filing presents the EMT updated budget and performance metric spreadsheets, and requests that the Commission issue an order

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<sup>2</sup> At the time the Commission approved the Second Triennial Plan, Title 35-A required the Commission to submit its funding recommendation to the Legislature for review and approval. 35-A M.R.S. § 10110(5)(repealed, effective June 26, 2013). The Commission's March 6, 2013 order refers to this level of funding as "Recommended MACE."

directing the electric transmission and distribution (T&D) utilities to remit directly to EMT approximately \$18.5 million, which together with other funding sources would constitute funds sufficient to procure Recommended MACE in accordance with the approved Second Triennial Plan.

On November 12, 2014, the Hearing Examiners issued a request for comment on the EMT's filing, specifically requesting comment on the calculation of the 4% cap and the appropriate process for determining the procurement amount in light of the Legislature's requirement that the 4% cap be determined by Commission rule. The EMT, the Natural Resources Council of Maine, and the Acadia Center filed comments, stating that total sales should be based on U.S. Energy Information Administration (EIA) data for total revenue from retail sales in Maine for both delivery of electricity and supply of electricity. Based on this view, the comments concluded that EMT's total requested funding amount of approximately \$18.5 million would be significantly below an approximately \$59 million figure, which would represent 4% of both delivery and supply sales. Accordingly, these parties stated that the Commission should grant EMT's Request for the FY 2016 Procurement Order without a rule on the funding cap.

#### D. Rulemaking Proceeding

In accordance with section 10110(4-A), on January 13, 2015, the Commission issued a Notice of Rulemaking (NOR), opening the instant docket, Docket No. 2015-00007. With regard to determining the amount of sales revenue for purposes of calculating the statutory EMT funding cap, the NOR included revenues from the sale of electricity transmission and distribution but not supply. The NOR stated:

The basis of the provision that excludes electricity supply is the plain language of the statute that states: "the commission may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity *transmission and distribution* sales in the State." (emphasis added). This language is clear and unambiguous in that the State's transmission and distribution utilities do not engage in the sale of electricity supply. We acknowledge and recognize that the Legislature's Office of Policy and Legal Analysis (OPLA) presented the [Joint Standing Committee on Energy, Utilities and Technology] with an analysis on May 24, 2013 stating that, based on EIA data, the 4% cap based on both supply and delivery services would be in the range of \$59 million. However, the consideration of such legislative history is not appropriate when the language of the statute, as is the case here, is unambiguous. *Carrier v. Secretary of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 1245. The Commission specifically seeks comment as to whether there is any statutory provision indicating this section, as quoted above, is ambiguous and requires a review of legislative history.

NOR at 3.

In accordance with the Administrative Procedures Act and the NOR, the Commission held a public hearing on February 20, 2015 and received comment from the Office of the Public Advocate (OPA), the EMT, Central Maine Power (CMP), the

Natural Resources Council of Maine (NRCM), and State Representative Sarah Gideon. The Commission received additional written comment from the EMT, the Conservation Law Foundation (CLF), NRCM, Industrial Energy Consumer Group (IECG), and collectively from members of the State of Maine House of Representatives who were members of the Joint Standing Committee on Energy, Utilities and Technology when the Omnibus Energy Act bill was passed during the prior legislative session.

In addition to identifying the issue of how to calculate total sales for the purpose of calculating the 4% cap, the NOR also highlighted questions arising from the proposed rule regarding whether certain other funds should be included in the amount in rates, and on what data to rely to calculate total sales. All of these issues are discussed below.

### **III. STATUTORY INTERPRETATION OF RATEPAYER FUNDING CAP (SECTION 3(C))**

Section 3(C) of the proposed rule contains the provisions governing the determination of the sales revenues for purposes of the procurement cap. Most notably, section 3(C) specifies the total T&D sales includes revenues from transmission, distribution, and stranded costs rates<sup>3</sup>, but does not include revenues from the sales of electricity supply. We address the comments received on section 3(C) of the proposed rule below, and for the reasons discussed, we adopt the provision as contained in the proposed rule.

Title 35-A, section 10110(4-A) directs the Commission to adopt rules to determine the 4% cap on the amount of money that may be collected from ratepayers to fund the electric efficiency programs approved in the Trust's triennial plans, and thus the Commission must interpret the phrase "total retail electricity transmission and distribution sales," as set forth in statute.

To interpret section 10110(4-A), we "first look to the plain meaning of the statute, interpreting its language to avoid absurd, illogical or inconsistent results." *Carrier v. Secretary of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 1245 (citations and quotations omitted). Courts will turn "to legislative history and other extraneous aids in interpretation of a statute only when [courts] have determined that the statute is ambiguous." *Id.* The "cardinal rule of statutory interpretation is to give effect to the intention of the Legislature." *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271, 275. While there are many sources to consult to determine legislative intent, the first step is to determine whether the language of a statute is plain and unambiguous. *Dickau v. Vermont Mut. Ins. Co.*, 2014 ME 158, ¶ 19, \_\_\_ A. 3d \_\_\_ (citations omitted). Only when the words of a statute "are susceptible of multiple meanings, or render the enactment an absurdity or nullity, should the court explore indicia of legislative intent." *Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, ¶ 19, 745 A.2d 387, 392.

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<sup>3</sup> The term stranded costs refers to costs incurred by utilities and made unrecoverable as a result of the restructuring of the electric industry. In accordance with Title 35-A and subject to regulation, utilities may recover these costs in rates. 35-A M.R.S. § 3208.

The Law Court has further explained that “[i]n the absence of legislative definitions, [courts] afford terms their plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them, but [courts] must also honor the idiosyncratic meanings and connotations of terms of art, particularly in specialized areas of law . . . .” *Dickau*, 2014 ME 158, ¶ 22 (citations and quotations omitted). “[T]echnical or trade expressions should be given a meaning understood by the trade or profession.” *Cobb*, 2006 ME 48, ¶ 12 (citation and quotation omitted); see also 1 M.R.S. § 72(3) (providing technical statutory words and phrases that have peculiar or technical meaning are to be construed to convey that meaning).

A. Section 10110(4-A) is not ambiguous

The Trust, NRCM, CLF, and IECG collectively assert section 10110(4-A) is ambiguous. They state that the phrase “total retail electricity transmission and distribution sales” is a newly created, undefined phrase, not appearing in any pre-existing state or federal law or regulation. They also argue that the more limited phrase, “retail electricity,” is an existing term of art, and that it must be interpreted to convey its meaning as has been employed in Title 35-A and the Commission’s rules. In that regard, they argue the term “retail” does not logically modify “transmission and distribution,” and that it must be given some meaning, namely, in the context of electricity sales and in contrast to wholesale electricity sales. Further, they contend that by employing the word “total,” the Legislature indicated its intent to combine two categories of sales, retail supply of electricity and the T&D of electricity. For these reasons, these comments conclude section 10110(4-A) is ambiguous and that it is therefore appropriate to determine legislative intent by reviewing legislative history.<sup>4</sup>

The Commission, however, concludes that the plain language of section 10110(4-A) unambiguously establishes a 4% cap based upon two components, “transmission and distribution sales.” Therefore, we do not reach a consideration of legislative history.<sup>5</sup> The initial part of the phrase “total retail electricity” is a modifier of

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<sup>4</sup> The rulemaking comments urge the Commission to consider a range of extraneous sources to discern the Legislature’s intent with respect to section 10110(4-A), but it appears the only materials that could be properly treated as legislative history are those materials referenced in the NOR at page 3, namely legislative papers authored by the Office of Policy and Legal Analysis (OPLA) and revisions apparently made by the Office of Revisor of Statutes to the Omnibus Energy Act bill. See *Stone v. Bd. of Registration in Medicine*, 503 A.2d 222, 226-27 n.8 (Me. 1986)(discussing what is properly treated as legislative history).

<sup>5</sup> NRCM and CLF assert that the phrase “total retail electricity transmission and distribution” is a new, undefined term of art that creates ambiguity, thus presenting an appropriate instance to review legislative history. See *Maine Ass’n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 37, 923 A.2d 918, 928 (concluding new terms of art susceptible to reasonable disagreement as to meaning are ambiguous). Even if we were to agree that section 10110(4-A) contains a new, ambiguous term of art, we conclude, as discussed in the text below, that legislative history supports the conclusion

“transmission and distribution sales,” and thus this statutory provision does not contain language that refers to the sale of the supply of electricity. Further, the term “total” directs the Commission to include all retail transmission and distribution sales, including sales to large industrial transmission and sub-transmission level customers, who are subject to neither the SBC nor procurement order funding; efficiency programs for these customers are funded by the Commission’s long-term contracting authority. 35-A M.R.S. § 3210-C, § 10110(6).

The Trust, NRCM, CLF, and IECG urge the Commission to insert the word “and” in section 10110(4-A), arguing that the Legislature intended section 10110(4-A) to read “total retail electricity *and* transmission and distribution sales.” Reading an “and” into the statute where it does not appear, however, would change the plain, unambiguous meaning of the statute and overstep the Commission’s authority. Section 10110(4-A), as enacted by the Legislature and as published by the Office of the Revisor of Statutes (ROS), does not contain the word “and” between “total retail electricity” and “transmission and distribution.” To read the word “and” into the statute, as argued by commenters, would, in effect, amount to the Commission re-writing legislatively adopted statutes. Legislative history shows that, prior to publication by the ROS, section 10110(4-A) returned to the Legislature numerous times in its enacted form.<sup>6</sup> The Commission, therefore, declines to add a word to Title 35-A that would in essence re-write a piece of legislation. If any change is necessary with respect to section 10110(4-A), it is properly a legislative function.

**B. A 4% cap based upon T&D sales does not lead to an absurd result**

The Trust, NRCM, CLF, and IECG also assert that interpreting section 10110(4-A) to exclude retail electricity sales from the 4% cap would lead to a funding level of only about \$23 million. This cap, they state, would be well below a 4% cap of \$59 million, which would be the result if retail electricity supply sales were included in calculating the 4% cap. The lower cap figure, they argue, would be insufficient to meet the Trust’s required funding for FY 2016 and insufficient to achieve the statutory requirement to procure MACE. For these reasons, these commenters conclude that reading section 10110(4-A) to exclude retail electricity sales from the 4% cap would lead to an absurd result, and thus it is appropriate to determine legislative intent by reviewing extraneous aids.

The Commission disagrees. A 4% cap based on T&D sales pursuant to section 10110(4-A) is consistent with the Omnibus Energy Act’s intent to increase funding for

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that our reading of section 10110(4-A) leads to neither an absurd result nor renders the Omnibus Energy Act a nullity.

<sup>6</sup> The legislative history shows that the Omnibus Energy Act bill was read before the House on June 5, 2013, and read before the Senate on June 6, 2013. On June 7, 2013 the House passed the bill to be enacted. On June 7, 2013 the Senate also passed the bill to be enacted. On June 20, 2013, the House overrode the Governor’s veto of the bill. On June 26, 2013, the Senate overrode the Governor’s veto, and the Act became law.

energy efficiency programs to obtain MACE, and is consistent with the funding levels set for EMT's approved Second Triennial Plan. Calculating the cap for FY 2016 based upon 4% of transmission and distribution sales for 2013 results in a cap of approximately \$24-\$25 million.<sup>7</sup> As discussed in the background section above, rather than decreasing efficiency funding, the 4% cap of T&D sales would increase the level of available funding by almost doubling the approximately \$13.1 to \$13.3 million of SBC funding that was available for the first two years of the Second Triennial Plan period. As further discussed above, at 4% of T&D sales, the cap would be comparable to the average annual Recommended MACE funding level of \$25.5 million approved by the Commission for the Second Triennial Plan. This funding level, in combination with other funding sources, such as proceeds from the Regional Greenhouse Gas Initiative (RGGI) and the Forward Capacity Market (FCM), would be consistent with funding levels needed to acquire MACE over the ten-year period proposed by EMT. Thus, unless the ten-year MACE ramp-up period were to be shortened or other funding sources were substantially reduced or eliminated, a funding cap in that same range of \$25 million/year would not lead to an absurd result. On the contrary, a cap at this level would ensure that the ratepayer funding levels for MACE would not increase to be substantially higher than levels approved in the Commission's March 6, 2013 order for the Second Triennial Plan which, as noted above, would achieve the Commission's Recommended MACE over the ten year phase-in period proposed by EMT.<sup>8</sup> Viewed in this light, a cap of \$59 million would seem to have no meaning because the EMT funding required to achieve MACE is unlikely to approach that level.

For all of these reasons, the Commission concludes that section 10110(4-A) is unambiguous and that a plain reading of its terms does not lead to an absurd result.

#### **IV. REMAINING PROPOSED RULE PROVISIONS, DISCUSSION, AND DECISION**

##### **A. Purpose (Section 1)**

The proposed rule states that the purpose of this Chapter is to establish the process and requirements by which the Commission will determine the statutory cap of 4% of the total retail electricity transmission and distribution sales for the procurement of electric energy efficiency resources pursuant to 35-A M.R.S. § 10110(4-A).

The Commission received no comments on this section and adopts section 1 as proposed in the draft rule.

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<sup>7</sup> This calculation is based on T&D revenue as reported by the utilities in their 2013 PUC Annual Reports. Total T&D revenue was \$615 million. At 4% of T&D revenue, the cap would be \$24.6 million.

<sup>8</sup> According to the two most recent Efficiency Maine Annual Reports, it spent \$22 million on electric programs during FY 2014 and \$24 million on electric programs during FY 2013.

B. Definitions (Section 2)

Section 2 contains the definition of several terms that are used throughout the proposed rule.

CMP commented that the proposed definition of “Maine Yankee Funds” at section 2(E) refers to funds from litigation concerning decommissioning costs related to Maine Yankee. CMP states, however, that the litigation relates to the removal and storage of spent nuclear fuel, and suggests that the Commission modify the definition accordingly.

The Commission agrees with the comments of CMP and amends the draft rule to reflect this clarification. Additionally, for clarity we have added a definition of “Assessments,” as the word is used in Title 35-A. The Commission otherwise adopts section 2 as proposed.

C. Utility Energy Efficiency Procurement Cap (Section 3)

1. Utility Procurement Obligation (Section 3(A))

This provision of the proposed rule specifies that each T&D utility shall procure all electric energy efficiency resources found by the Commission to be cost-effective, reliable and achievable pursuant to 35-A M.R.S. § 10104(4) subject to the procurement cap.

The Commission received no comments on this section and adopts section 3(A) as proposed in the draft rule.

2. Utility Procurement Cap (Section 3(B))

This provision contains the statutory procurement cap that specifies that the Commission may not require the inclusion in rates a total amount that exceeds 4% of total retail electricity transmission and distribution sales in Maine.

The Commission received no comments on this section and adopts section 3(B) as proposed in the draft rule.

3. Determination of Amount of Sales Revenue (Section 3(C))

The issue of statutory interpretation with respect to the terminology “4% of total retail electricity transmission and distribution sales” is addressed above.

With regard to total revenue provisions, CMP sought clarification about the treatment of the EMT funding and other assessments, such as for the state-wide low-income program. Because the cap is being calculated to guide the setting of the EMT funding amount to be included in rates for the upcoming year, it is logical to remove the funding amount that was included in prior year revenue and that would be replaced by an amount to be set for the upcoming year in accordance with the cap. With respect to



other assessments, we see no reason to modify the rule to remove those amounts. Thus, we have added clarification to this section to specify that prior EMT procurement amounts are excluded.

Other than the clarification noted above, the Commission adopts section 3(C) as set forth in the NOR and draft rule.

4. Determination of Amounts in Rates (Section 3(D))

Section 3(D) of the proposed rule contains provisions on the determination of what amounts in rates should be included in the calculation of the 4% cap on EMT funding. In determining that the amount in rates does not exceed 4% of total retail electricity transmission and distribution sales, the proposed rule states that the Commission shall: include amount in rates related to the procurement of energy efficiency through procurement orders; long-term contracts entered into pursuant Commission order or pursuant to 35-A M.R.S. § 3210-C<sup>9</sup>; and other amounts in rates that reflect funds transferred to the EMT from utilities for purposes of electric energy efficiency programs. The proposed rule specifies that any amounts transferred by utilities to the EMT referred to in the proposed rule as “external funds,” which includes primarily Maine Yankee Department of Energy (DOE) litigation settlement funds transferred to the EMT pursuant to section A-27 of the Omnibus Energy Act, are not included in the determination of the amount in rates for purposes of the procurement cap.

While CMP commented that it agrees with the Commission’s approach and rationale with respect to the items that should be included and excluded from the determination of the amount in rates, EMT filed comments suggesting alternative approaches. EMT’s comments are addressed below.

*a. Long-term contract funds*

The NOR explained that the amounts in utility rates related to long-term energy efficiency contracts are not in any significant way different in nature than amounts in rates to procure energy efficiency pursuant to 35-A M.R.S. § 10110(4-A) and, accordingly, there appears to be no reason for the Legislature to distinguish between these sources of funding for purposes of determining the 4% cap. For this reason, the proposed rule includes the amount in rates associated with long-term contracts in determining whether the rate cap is implicated. Moreover, given that the revenue associated with transmission and sub-transmission sales is included in the denominator of the 4% cap formula, it would be logically inconsistent to exclude the costs associated with their EMT programs, which are reflected by the long-term contract funds.

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<sup>9</sup> EMT’s large customer program is funded pursuant to 35-A M.R.S. § 3210-C. Prior to changes made by the Omnibus Energy Act, the large customer program was funded pursuant to 35-A M.R.S.A. § 3210-C(12)(Supp. 2012)(*repealed* by Omnibus Energy Act, secs. A-2, 29) and Commission order authorizing long-term contract funding in this context, Docket No. 2012-00408, Order (October 17, 2014).

In its comments, the Trust argues that section 10110(4-A) is unambiguous and includes in the rate cap only amounts for which utilities “procure” efficiency under section 10110(4-A) and would, therefore, not include amounts in rates related to programs funded from long-term contract pursuant to 35-A M.R.S. § 3210-C. Section 10110(4-A), however, states that the Commission shall direct T&D utilities to procure all electric energy efficiency resources found to be “cost-effective, reliable and achievable pursuant to section 10104, subsection 4. Section 10104, subsection 4 (which governs the triennial plan), explicitly recognizes that the triennial plan will include funds generated pursuant to section 3210-C among other funding sources for the Trust. Section 10104(4)(D) states that the “commission shall reject elements of the plan that propose to use funds generated pursuant to sections 3210-C, 10110, 10111 or 10119 if the plan fails to reasonably explain how these elements of the program would achieve the objectives and implementation requirements of the programs established under those sections...”

Section 10110(4-A) requires T&D utilities to “procure” energy efficiency, while section 3210-C authorizes utilities to enter into long-term contracts for the purchase of energy efficiency. Both are means to fund Trust programs through utility rates and there does not appear a reason for the Legislature to distinguish between these sources of funding for purposes of determining the 4% ratepayer cap. For these reasons, we adopt section 3(D)(2) as set forth in the NOR and draft rule.

*b. Other funds/non-transmission alternatives*

For purposes of determining the procurement cap, amounts transferred to the EMT from utilities for other purposes, such as non-transmission alternatives (NTAs),<sup>10</sup> and are recovered in rates for electric efficiency, are also considered included in rates. Thus, proposed rule section 3(D)(3) includes other funds transferred to the EMT from utilities for electric efficiency, for example, such as for NTAs, that are recovered in rates.

Consistent with the analysis for long-term contract funds above, if such funds are, or the Commission determines they should be, part of the triennial plan under section 10104(4), they will be included in the 4% cap. If not, such funds will be considered to be outside the 4% rate cap.

*c. Maine Yankee Funds*

With regard to inclusion in rates, the Commission’s view is different with respect to Maine Yankee funds or similar settlement funds that the Legislature directs be transferred from utilities to the EMT but are not recovered in rates. These funds are intended to compensate ratepayers for amounts they previously paid in rates for nuclear waste storage and, therefore, these funds would generally be used to lower utility rates. However, these amounts are not “included in rates” and there is no indication that the

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<sup>10</sup> Non-transmission alternative means the employment of energy efficiency and conservation, load management, demand response, or distributed generation to reduce the need for the construction of a transmission line or project. 35-A M.R.S. § 3131(4-B).

Legislatures intended that the Commission impute these amounts as being in rates for purposes of the determining whether the cap has been reached.

Other than CMP's general comment noted above, the Commission received no comments regarding the exclusion of Maine Yankee funds from rates, and therefore adopts section 3(D)(4) as set forth in the draft rule.

5. Determination of Procurement Cap (Section 3(E))

The proposed rule states that the utility procurement cap for each year of the EMT's triennial plan shall be 4% of total retail electricity transmission and distribution sales in Maine for the prior calendar year applied to the transmission and distribution rates in effect at the beginning of the new calendar year. This approach would apply the most recent completed calendar year sales to recently established utility rates. The proposed rule does not contemplate any reconciliation based on actual sales and revenues during the applicable EMT year; however, the Commission sought comments on whether such a reconciliation based on actual revenue during the applicable EMT year should be included in the rule.

EMT filed comments stating that the rule need not be based upon a forward-looking forecast of revenues, and that a backward-looking approach, relying on EIA data, would lend predictability to the Trust's planning and budgeting process. The Trust did not favor reconciliation, but rather suggested that the Commission could apply averaging of a period of prior years' total revenues to smooth out any fluctuations. With respect to the methodology in the proposed rule, CMP sought clarification as to how to calculate the transmission component with respect to transmission and sub-transmission level customers. CMP also supported the use of the most recent annual period of sales as being as accurate as any other methodology.

Based on these comments, the Commission modifies section 3(E) so that prior sales are not applied to existing rates. Rather, we conclude that it is preferable and more straightforward to use the prior calendar year's T&D revenue. Although EMT suggested relying on EIA data, the Commission declines to amend the rule in that regard. EIA data may be dated by as much as two years before it is available, and the underlying data upon which it relies may not be readily apparent. Because data generated by the T&D utilities will be more recent, the Commission will collect T&D utility sales and revenue reports, as discussed in more detail below regarding section 3(F).

6. Utility Annual Report (Section 3(F))

Consistent with the discussion above, we modify section 3(F) of the proposed rule regarding utility annual reports to remove the requirement that the report apply prior year sales to rates in the current year. Instead, this provision requires that the annual report include revenues from the prior year (removing revenue associated with prior procurement orders). Specifically, the annual reports will include: (1) the total billed retail electricity transmission and distribution revenue for the prior calendar year; (2) the total revenue amount in rates during the prior calendar year pursuant to prior EMT

assessments or procurement orders; and (3) all other amounts for EMT funding expected to be included in rates during the upcoming FY, such as for previously-approved long-term contracts. The reports should also include the utility's calculation of the procurement order amount that in its view would be indicated by this information.

The provision also specifies that interested persons may comment on the transmission and distribution utility annual report within 30 days of its submission and that the Commission will determine the procurement cap within 60 days of the utility annual report filing. The Commission requested comments on whether the timing of the cap determination would create issues for EMT planning purposes.

CMP filed comments, stating that it anticipated being able to comply with the January 30<sup>th</sup> deadline contemplated in the draft rule. The Commission received no other comments regarding this section, and adopts it with changes discussed above.

7. Cost Recovery (Section 3(G))

Consistent with the provisions of the Omnibus Energy Act (section A-20), the proposed rule specifies that the cost of procurement of cost-effective electric energy efficiency resources pursuant to this Chapter constitutes a just and reasonable utility expense that shall be recovered through transmission and distribution utility rates.

The Commission received no comments on this section and adopts section 3(G) as set forth in the draft rule.

D. Waiver or Exemption (Section 4)

This section of the proposed rule contains the Commission's standard language on the waivers or exemption of provisions of the rule. The Commission received no comment on this section and adopts it as set forth in the draft rule.

Accordingly, we

O R D E R

1. That the attached Chapter 396, Efficiency Maine Trust Procurement Funding Cap, is hereby approved:
2. That the Administrative Director shall file the rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following of this rulemaking proceeding:
  - a. All transmission and distribution utilities in the State;

- b. All persons who have filed with the Commission within the past year a written request for notice of rulemakings;
  - c. All persons who commented in this rulemaking;
  - d. All parties in Docket No. 2012-00449.
2. That the Administrative Director shall send copies of this Order and attached rule to the Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Hallowell, Maine, this 9th day of April, 2015.

BY ORDER OF THE COMMISSION

*/s/ Harry Lanphear*

Harry Lanphear  
Administrative Director

COMMISSIONERS VOTING FOR:      Vannoy  
   McLean

COMMISSIONER DISSENTING:      Littell

**NOTICE OF RIGHTS TO REVIEW OR APPEAL**

5 M.R.S. § 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 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.ch. 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. Any petition not granted within 20 days from the date of filing is denied.
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. § 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. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

Dissenting Opinion of Commissioner Littell

For the reasons discussed below, I respectfully dissent from the majority decision in this rulemaking proceeding. With respect to the 4% cap, the new terminology, *4% of total retail electricity transmission and distribution sales* is ambiguous on its face. The language is new, undefined and anything but clear, and in our Notice of Rulemaking we specifically asked for comments on whether the proposed interpretation was correct. The breadth and amount of comments and discussion we received suggests it is indeed not clear language. If we look, as we are required to do when a term is unclear, the legislative history makes the language clear. Further, it is undisputed that there was a clerical error made by the Office of the Revisor of Statutes that inadvertently removed the word “and” from the statutory language which, when considered and voted by the Energy, Utilities and Technology Committee, read *4% of total retail electricity and transmission and distribution sales*. Because of this clerical error, the law that was enacted did not include a word that the Committee intended to be there and this history makes the intent of the language completely clear.

The “cardinal rule of statutory interpretation is to give effect to the intention of the Legislature.” *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271, 275. The Law Court has explained that, in interpreting the language of a statute, courts “must take pains to avoid an overly simplistic or overly broad interpretation . . . that wrecks havoc on, rather than preserves, the Legislature’s intent.” *Dickau v. Vermont Mut. Ins. Co.*, 2014 ME 158, ¶ 23, \_\_\_ A. 3d \_\_\_ (citations omitted).

As a general matter, courts and this Commission must consider indicia of legislative intent if the statutory language is ambiguous. *Carrier v. Secretary of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 1245. ). “A statute is ambiguous if it is reasonably susceptible to different interpretations.”<sup>11</sup> *Cobb*, 2006 ME 48, ¶ 12. “In other words, if a statute can reasonably be interpreted in more than one way and comport with the actual language of the statute, an ambiguity exists.” *Maine Ass’n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 35, 923 A.2d 918, 928. Only when the words of a statute “are susceptible of multiple meanings, or render the enactment an absurdity or nullity, should the court explore indicia of legislative intent.” *Kimball v. Land Use Regulation Comm’n*, 2000 ME 20, ¶ 19, 745 A.2d 387, 392. An “absurdity may occur when the enactment is so contrary to the plain understanding of legislative intent and the entire statutory scheme within which the amendment falls that enforcement of the

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<sup>11</sup> In the context of judicial review, courts will defer to and uphold an agency’s interpretation of an ambiguous statute in the agency’s field of expertise, unless the statute plainly compels a contrary result. *Hannum v. Bd. of Env’tl. Prot.*, 2006 ME 51, ¶ 9, 898 A.2d 392, 396.

plain language would be wholly unreasonable.” *Kimball*, 2000 ME 20, ¶ 23 (citation omitted).

The Law Court has further explained, however, that a “plain language interpretation should not be confused with a literal interpretation . . . . Rather, courts are guided by a host of principles intended to assist in determining the meaning and intent of a provision even within the confines of a plain language analysis.” *Dickau*, 2014 ME 158, ¶ 20 (citations omitted). Among the guiding principles “is that [courts] must interpret the plain language by taking into account the subject matter and purposes of the statute, and the consequences of a particular interpretation. In determining a statute’s practical operation and potential consequences, [courts] may reject any construction that is inimical to the public interest or creates absurd, illogical, unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results.” *Id.* ¶ 21 (citations and quotations omitted). In other words, the plain rule of statutory construction provides that courts will accord statutory words their plain meaning, but in doing so courts must give due consideration to the overall purpose of a statute, enabling courts to avoid a simplified reading that is illogical or absurd.

With further regard to guiding principles, the Law Court has explained that courts “examine the entirety of the statute, giving due weight to design, structure, and purpose as well as to aggregate language. [Courts] reject interpretations that render some language mere surplusage. In the absence of legislative definitions, [courts] afford terms their plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them, but [courts] must also honor the idiosyncratic meanings and connotations of terms of art, particularly in specialized areas of law . . . .” *Id.* ¶ 22 (citations and quotations omitted). “[T]echnical or trade expressions should be given a meaning understood by the trade or profession.” *Cobb*, 2006 ME 48, ¶ 12 (citation and quotation omitted); see also 1 M.R.S. § 72(3) (providing technical statutory words and phrases that have peculiar or technical meaning are to be construed to convey that meaning). On the other hand, new statutory terms, for which there is neither common understanding nor inherent meaning as a term of art, are susceptible to reasonable disagreement as to meaning and, thus, are ambiguous. See *Maine Ass’n of Health Plans*, 2007 ME 69, ¶ 37, 923 A.2d at 928.

The phrase “total retail electricity transmission and distribution sales” is a newly created, undefined statutory phrase that does not appear in any existing state or federal statute or rule. It is not a term of art in the electricity world. On the other hand, the more



limited phrase, “retail electricity,” is an existing term of art that must be interpreted to convey its meaning as has been employed in Title 35-A and the Commission’s rules.<sup>12</sup>

Like “retail electricity”, the next term “transmission and distribution” (or “T&D”) is a well-known term of art in the electricity world. It is so well known that our staff and commissioners, as well as commissions, utilities, and others in the electricity world across the United States simply use the term “T&D” to refer to transmission and distribution plant and revenue or sales of T&D utilities.<sup>13</sup> If one searches on Maine.gov

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<sup>12</sup> The following statutory and Commission rules support the proposition that the term “retail” refers to the sale of electricity supply:

- With regard to statute: 35-A M.R.S. § 3132(14)(referring the “*retail electricity market*” in context of customer cost impact in CPCN proceeding), and §§ 3210(3), 3210(3-A)(A) & (D)(referring to “*retail electricity sales*” in context of portfolio requirements).
- With regard to Commission rule: *Standard Offer Service, Chapter 301*, § 1(B)(2)(“Competitive electricity provider means . . . any [] entity selling electricity to the public at retail in Maine.”), § 1(B)(8)(“Retail access means the right of a retail consumer of electricity to purchase generation service from a competitive electricity provider.”), § 1(C)(“Standard offer service is not available to an electricity consumer in amounts less than the consumer’s *total retail electricity purchases* . . . .”); *Chapter 304*, § 7(B)(relying on “*retail sales*” to determine market share violations); Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity, *Chapter 305*, § 1(A)(“This Chapter applies to *competitive electricity providers who must be licensed to sell electricity at retail* in Maine.”); Portfolio Requirement, *Chapter 311*, § 3(F)(“*Retail electricity sales* pursuant to a supply contract or *standard-offer service* arrangement executed by a competitive electricity provider . . . .”), and § 6(I)(“The initial demonstration statement [of a *competitive electricity provider*] shall contain an estimate of retail sales in Maine.”).

(emphasis added). These statutory references show that retail has meaning as a statutory term and a term of art in the context of electricity supply for both standard offer service and competitive electricity supply known as “retail electricity” supply. Retail in contrast has no meaning in statute, rule or usage modifying either “electricity transmission and distribution” or “transmission and distribution” or either of those terms with “sales” added at the end.

<sup>13</sup> Title 35-A, section 102 defines a transmission and distribution utility:

**20-B. Transmission and distribution utility.** "Transmission and distribution utility" means a person, its lessees, trustees or receivers or trustees appointed by a court, owning, controlling, operating or managing a transmission and distribution plant

for T&D, one readily sees a variety of Commission documents using this “T&D” terminology.<sup>14</sup>

“Sales” appears to mean both retail electricity and T&D sales totaled together. Transmission and distribution sales is readily understood as the revenue of a transmission and distribution utility which is a well-known term. Transmission and distribution revenue is a term the Commission uses regularly in ratemaking proceedings. For example, the MPUC website explains electricity T&D rates with reference to T&D revenue.<sup>15</sup> So the new seven-word term that is undefined in statute uses two well-known terms of art added together with the word “total” before them and “sales” after the two terms.

This interpretation has the most credibility because it gives meaning to the terms “retail” and “total” which otherwise have no meaning because the majority simply looks at transmission and distribution sales. First, the term “retail” does not logically modify “transmission and distribution,” nor is “retail transmission and distribution” a recognized term in the electricity world. “Retail electricity transmission and distribution” likewise has no meaning as a term of art or in the electricity world. “Retail” does not make sense modifying T&D, but it does make sense modifying “supply.” And “retail supply” makes no sense modifying T&D. Therefore, the most credible interpretation is that “retail” modifies “electricity” and “retail electricity” has independent meaning of T&D.

Again, reasoning from terms we do know: “retail electricity sales” is a well-known term. And “retail” must therefore be given some meaning and can be given meaning using terms the Commission is well familiar with in our expertise as electricity

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for compensation within the State, except where the electricity is distributed by the entity that generates the electricity through private property alone solely for that entity's own use or the use of the entity's tenants and not for sale to others.

<sup>14</sup> For example, a search for T&D on Maine.gov yields among other results a Maine PUC document explaining electricity delivery rates. MPUC: Electricity: Delivery Rates – Maine.gov. Clicking on the link takes one to the Maine Commission’s document explaining electricity delivery rates for T&D utilities. The fourth column of each of the 13 summary spread sheets is entitled “Annual T&D Revenue.” See [http://www.maine.gov/mpuc/electricity/delivery\\_rates.shtml](http://www.maine.gov/mpuc/electricity/delivery_rates.shtml). This simply illustrates that the Commission knows exactly what transmission and distribution or T&D means. On the other hand, the Commission has no prior history with the term “total retail electricity transmission and distribution sales.”

<sup>15</sup> See *supra*, footnote 4, the Maine PUC explains T&D rates with reference to “Annual T&D Revenue.” See [http://www.maine.gov/mpuc/electricity/delivery\\_rates.shtml](http://www.maine.gov/mpuc/electricity/delivery_rates.shtml).

regulators. Retail electricity sales is used in contrast to wholesale electricity sales to mean sales of electricity supply to retail end users of electricity, e.g. ratepayers. Its logical meaning in the context of the regulation of public utilities is that it refers to retail electricity sales as that is consistent with the term's regular usage and distinguishes the two types of electricity supply sales: retail and wholesale.

Now turning to "total." Why is total in this term? Logically, by employing the word "total," the Legislature indicated its intent to combine two or more categories. Total means the sum of different parts or pieces. T&D sales does not need a "total" in front to mean all T&D sales or revenue. T&D sales means total T&D sales or revenue without a "total" in front. So the question becomes how should the Commission give meaning to the word "total." When one realizes that total is not necessary to mean all T&D sales or revenue, it is apparent that some other elements are intended to be added together. For this reason, it appears the majority's interpretation does not give meaning to the word "total" and also fails to give meaning to "retail electricity" and these three words become mere surplusage.

This statutory analysis suggests retail electricity is separate and distinct from transmission and distribution and is not a modifier of transmission and distribution. Why? For several important reasons based on the statute alone. First, it is the most consistent interpretation with the actual language. Second, because by distinguishing the terms "retail electricity" and "transmission and distribution" this interpretation produces two terms which the Commission knows the meaning of: retail electricity and transmission and distribution. Third, this interpretation is most credible because it uses all the words the Legislature enacted. Yet Section 3.C.4 of the final rule seemingly writes the first three words "total retail electricity" out of the statute. I am at a loss for why my colleagues would say a new seven-word term "total retail electricity transmission and distribution sales" is clear yet means only what the last four words say without giving meaning to the entire seven words.

It appears on its face that total could well instruct the Commission to add together retail electricity sales and T&D sales. But if the language is not clear, the Commission should look to the legislative history which makes it clear that "total" is intended to combine retail electricity *and* T&D sales. Again, one with knowledge of the Commission's statutes and electricity terminology can infer this from the unclear language, but this interpretation is made absolutely clear from the legislative history the Commission received in comments as well as its own research after the Notice of Rulemaking was issued.

The legislative intent shows an undisputed clerical error that occurred during the legislative review process. On May 24, 2013, the Committee voted the Omnibus Energy Act bill as "ought to pass," and the relevant legislative papers were delivered to

the Office of the Revisor of Statutes (ROS). These legislative papers show that section 10110(4-A), as voted out of Committee, contained the phrase “4 percent of total retail electricity and transmission and distribution sales in the State as determined by the commission by rule.” (emphasis added). A language review of Omnibus Energy Act bill occurred before the Committee on May 30, 2013 and the language presented contained the terminology: “4 percent of total retail electricity and transmission and distribution sales in the State as determined by the commission by rule.” (emphasis added). However, upon the return of the legislative papers from the ROS, section 10110(4-A) contained the phrase “4% of total retail electricity transmission and distribution sales in the State as determined by the commission by rule,” that is, the “and” between “total retail electricity” and “transmission and distribution sales” had been inadvertently removed.

As discussed above, the disputed language can be read to include supply revenue as well as T&D revenue and is certainly susceptible to differing interpretations. The majority interprets the language another way, but that reading is strained because it is inconsistent with statutory use of terms elsewhere and common use of this terminology in the electricity world. Moreover, the majority’s decision setting the cap based only on 4% of T&D revenue leads to an absurd result of the Legislature approving an overall higher level of efficiency funding and then ratcheting it back despite the intent to raise funding - that is clearly contrary to the purposes of the statute.

Title 1 M.R.S. section 93, although not dictating the outcome in this proceeding,<sup>16</sup> speaks to and supports the basic principle that clerical errors should be corrected when, as in this case, the intent was clear and the clerical error causes an obvious ambiguity in the statutory language. Section 93 provides that the ROS is not authorized to make any substantive statutory changes and, to the extent it does so, those changes are to be given no effect. These same principles appear to apply to this case. Section 93 suggests the Commission can consider the scope of authority of the ROS.

As explained on the ROS website<sup>17</sup>, the ROS performs four primary functions: legislative drafting and editing; engrossing; publishing of statutes; and maintaining a statutory database. All legislative instruments, including bills and amendments, are initially filed with the ROS where they are produced in final form for introduction. Title 1, however, provides that the role of the ROS is limited. While the ROS may, for example, correct misspellings, improper capitalization and punctuation, or obvious clerical,

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<sup>16</sup> Title 1 M.R.S. section 93 applies to clerical errors in which the language voted on the floor of the House and Senate is subsequently altered during the Revisor of Statutes process of codification.

<sup>17</sup> <http://legislature.maine.gov/ros/about-the-office-of-the-revisor-of-statutes/>

typographical, and grammatical errors, the ROS is not authorized to make substantive changes. 1 M.R.S. § 93. Title 1 provides, in relevant part: “Any change made by the revisor may not change the substantive meaning of any statutory unit. Any error or inadvertent substantive change made by the revisor must be construed as a clerical error and given no effect.”<sup>18</sup> *Id.*

It is also important to emphasize that the record shows that, in a May 24, 2013 memorandum, OPLA presented a written analysis to the Committee that explained that section 10110(4-A) as set forth in the Omnibus Energy Act bill provided that “the Commission may not require the inclusion in rates under this section a total amount that exceeds 4% of total retail electricity and transmission and distribution sales in the State . . . .” (emphasis added). OPLA’s analysis in the memorandum is based upon 2010 data for Maine, as calculated by the U.S. Energy Information Administration (EIA). The EIA captioned its Maine data as regarding “retail electricity sales statistics.” This U.S. EIA data includes the total “revenue from retail sales,” and includes the sale of energy *and* the sale of delivery services. Based upon this legislative history including the Legislative OPLA analysis, it is clear that the 4% cap was understood by the Legislative OPLA office and the Joint Select Legislative Committee on Energy, Utilities, and Technology (EUT) that drafted the bill to set a cap in the \$59 million range.<sup>19</sup>

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<sup>18</sup> Based upon the testimony at the public hearing, notes and emails from the Commission’s Legislative Liaison, there is no indication in the Legislative history that this cap terminology in section 10110(4-A) was amended, changed or even reviewed by the Committee either subsequent to vote and upon return from the ROS.

<sup>19</sup> In addition to the OPLA papers discussed above, the rulemaking record contains additional pieces containing further evidence of a legislative intent of a \$59 million cap:

- An (undated) letter from the Governor’s Energy Office, reviewing the funding changes proposed by the Omnibus Energy Act. With regard to then-pending section 10110(4-A), this review provided:

Moving to a limit of efficiency spending limited to 4 percent of total retail electricity and transmission and distribution sales is a significant change. This could lead to a 4-fold increase in the assessment on ratepayers. There should be a restriction on what the annual increase can be proposed as well.

- An (undated) summary of the Omnibus Energy Act prepared by Preti Flaherty’s Energy Group, stating that the changes made by the Act will provide “a long-term source of efficiency funding from ratepayers with a cap of 4 percent of total retail electricity and transmission and distribution sales in Maine.” (emphasis added); and

The EUT voted on the language with the “and” in it on May 24, 2013 and did final language review on language with an “and” in it on May 30, 2013 following language review. The final language review version is attached to this opinion.<sup>20</sup> Commission staff found all the records of EUT votes and reviewed their notes and emails. Those notes show a May 24 EUT Committee vote and May 30 language review of the Omnibus Energy Bill from the Legislative fiscal office consistent with the Legislative history described above. Then with no legislative change, no amendment to the eight words that became seven words or even to this portion of the legislative bill neither in committee nor on the floor, the “and” disappeared. The clerical error appeared in the June 4 printed version of the bill creating the language now before us.<sup>21</sup>

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- A June 3, 2013 email from EMT Director Michael Stoddard to Grant Pennoyer at OPLA and Paulina Collins and Nancy Goodwin at the PUC explaining that “as to the cap, note that it is not limited to T&D sales but more precisely to total electricity sales, including both T&Ds and competitive suppliers.” See Email from M. Stoddard to G. Pennoyer, P. Collins, N. Goodwin, A. Stephenson, Regarding EUT Committee Omnibus Bill – Questions”, June 3, 2013.

<sup>20</sup> The relevant portion of the Omnibus bill language voted on by the EUT on May 24 and reviewed on May 30 is attached to this Opinion as Appendix A “Omnibus Bill Voted by the Joint Selection Legislative Committee on Energy, Utilities and Technology on May 24 and reviewed on May 30, 2013.” The language at issue appears on page 9 of 13.

<sup>21</sup> The Commission’s Legislative Liaison notes summarized in the rulemaking record reflect the following:

- EUT voted on the omnibus energy bill on May 24
- On May 30 – EUT met to do a language review of the omnibus energy bill. EUT went through the OPLA draft (different parts were dated May 26, May 29 and May 30)
  - Rep Hobbins (House Chair) said the Presiding Officers wanted the review of the bill that day, EUT would deal with any technical changes/corrections, scriveners’ errors and expected the bill would go to the floor the following week. Said EUT did not want to open the bill back up
  - Senator Cleveland (Senate Chair) noted EUT had no authority to vote on anything without authority from the Presiding Officers. The language review was to see if the language was consistent with what EUT voted. Rep Hobbins agreed, EUT did not want to open the bill back up
  - 35-A MRS §10110(4-A) in the OPLA draft read: The commission shall ensure that electric ratepayers in the State procure all electric energy efficiency resources found by the commission to be cost-effective, reliable and achievable pursuant to section 10104, subsection 4, provided that the commission may not require the inclusion in rates under this subsection a total amount that exceeds 4 percent of total retail electricity and

The Commission should properly interpret the language with our specialized knowledge. Failing that, the Commission should look at legislative history to understand what the Legislature intended. If these two modes of interpretation fail, the Commission can also apply the scrivener's error doctrine. Given what is indicated in the legislative papers and history that the deletion of "and" was simply an error by the ROS, it is appropriate to apply the "scrivener's error" doctrine in this rulemaking. The scrivener's error doctrine generally refers to the concept that, where an error is clearly the result a clerical error, then a court may look beyond the plain language of a statute to determine legislative intent, but generally only does so when the error causes ambiguity in the statute or is obvious from the legislative history. See, e.g., *Kimball v. Land Use Regulation Comm'n*, 1997 WL 35018794 (Me. Super. 1997) (Kennebec County, *Humphry, J.*)(appealed to the Law Court and reported in a case discussed in the text above, *Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, 745 A.2d 387). While the Law Court has not recognized the scrivener's error doctrine by name, the Law Court has corrected legislative oversight and omissions where failing to correct such clerical errors would lead to absurd results in cases back as far as 1916.<sup>22</sup> With this legal

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transmission and distribution sales in the State as determined by the commission by rule....

- My notes say bill would now go to the Revisor's Office and that the Chairs expected the bill would be voted on in the House the following week.
- On June 4 - I emailed around the final version of the omnibus energy that the fiscal office had sent to me, Michael Stoddard, Tim Schneider, Patrick Woodcock and a few others the night before for us to double check any fiscal impacts to our agencies based on the final bill
  - Section 4-A read: "...except that the commission may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity transmission and distribution sales in the State as determined by the commission by rule."
- On June 5 - I emailed around LD 1559 (the omnibus energy bill had now been printed with an LD). Section 4-A read: "except that the commission may not require the inclusion in rates under this subsection of a total amount that exceeds 4% of total retail electricity transmission and distribution sales."
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See Email from PUC Legislative Liaison Paulina Collins to PUC Acting General Counsel Mitch Tannenbaum, March 13, 2015.

<sup>22</sup> See, e.g., *Bracket v. Chamberlain*, 98 A. 933, 935 (Me. 1916) (declining to treat claims against insolvent estates versus solvent estates differently where such inequality was caused by a "clear case of accidental omission" on the part of legislative drafting); *Whorff v. Johnson*, 58 A.2d 553, 557 (Me. 1948)(declining plain reading of inheritance tax statute where an omitted word would "return to the barbaric ideas of yesterday," including disparate treatment of illegitimate children); *Farris ex rel. Bowker v. Libby*, 44 A.2d 216, 217-18 (Me. 1945) (declining literal reading of statute where omissions and ambiguities would lead to dire consequences, including nonpayment of city worker wages and salaries).

precedent, there is no reason why this Commission in its expertise cannot recognize that the language at issue is a new term, appears to include two other recognized terms of art (retail electricity and transmission and distribution sales) and interpret that term consistently with existing known terms, particularly given the clear legislative history.

Although not technically “legislative history” for purposes of statutory interpretation, I take seriously the letters filed in this rulemaking docket from every current legislator that was on the EUT Committee at the time the Omnibus Energy Act was considered stating that the clear intent of the bill was to set a cap based on 4% of both supply and T&D revenues. Legislators both favorably inclined and skeptical of energy efficiency funding during the consideration of this Omnibus Energy Bill signed this letter to the Commission. The bi-partisan breadth of signatories is something the Commission can take notice of and confirms what the legislative history shows.

Finally, the majority’s interpretation leads to an obvious absurd result in that a cap based on 4% of T&D revenues would be lower than the EMT’s current budget to obtain all cost-effective energy efficiency, as mandated by the Omnibus Energy Act, and could limit necessary EMT funding in future years to meet statutory efficiency goals. The result is that the Omnibus Energy Act’s fundamental intent to capture all cost-effective energy efficiency is frustrated by the majority’s misinterpretation of the statutory language.

On other issues in this rulemaking proceeding, I disagree with the majority that the “amount in rates” for purposes of calculating the 4% cap should include utility costs for the purchase of energy efficiency under long-term contracts authorized pursuant Title 35-A, section 3210-C. It is apparent that the Legislature intended that the section 10110(4-A) requirement that utilities procure all cost-effective energy efficiency is a replacement for the pre-existing energy efficiency assessment known as the System Benefit Charge (SBC). Because long-term contract programs under section 3210-C were not previously funded pursuant to the statutory assessment, amounts in rates associated with such contracts should not be counted against the statutory rate cap.

I do generally agree with the majority that other ratepayer funds that are not part of the Triennial Plan should not be included in the calculation of the 4% cap.

I would calculate the cap based on the most recent EIA sales data. Although I recognize such data may be relatively old (up to 2 years), the method is most consistent with legislative intent that relied upon EIA sales data.

For these reasons, I respectfully dissent from the majority opinion.