MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO.: PUC-16-353

CONSERVATION LAW FOUNDATION,
Appellant

v.

MAINE PUBLIC UTILITIES COMMISSION, et al.
Appellees

ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION

REPLY BRIEF FOR APPELLANT

Emily K. Green
Sean Mahoney
Greg Cunningham
CONSERVATION LAW FOUNDATION
53 Exchange St., Suite 200
Portland, Maine 04101
(207) 210 - 6439

TABLE OF CONTENTS

TABLE OF AUTHORITIES………………………………………………... ii
INTRODUCTION……………………………………………………………1
SUPPLEMENTAL STATEMENT OF FACTS………………………….. 2
I. The Legislative Mandate for Energy Efficiency………………… 2
a. Avoided Costs ……………………………………………… 4
b. Discount Rate ………………………………………………6
c. Gross and Gross to Net Efficiency Savings …………………... 6
d. Natural Gas MACE…………………………………………7
ARGUMENT ……………………………………………………….. 9
I. The Commission Failed To Make Use of Best Practices Across the Region to Calculate Avoided Energy Costs …………………9
II. The Third Triennial Plan's Discount Rate Disregards Regional Best Practices in Violation of Law……………………………..13
III. The Commission Violated the Act By Considering Net and Gross Savings When Determining Electric Energy Efficiency That Is Cost-Effective, Reliable, and Achievable………………... 16
IV. The Commission Violated the Act's Mandate to Capture All Cost-Effective, Reliable, and Achievable Natural Gas Energy Efficiency…………………………………………………….... 18
CONCLUSION……………………………………………………..... 20

TABLE OF AUTHORITIES

Statutes

Efficiency Maine Trust Act, 35-A M.R.S. §§ 10103-10123.………. 2
35-A M.R.S. § 10103(1)…………………………………….... 1
35-A M.R.S. § 10104(4)……………………………………… 1, 3
35-A M.R.S. § 10104(4)(A)………………………………….. 7
35-A M.R.S. § 10110(4-A)…………………………………… 1, 3, 7, 10, 17
35-A M.R.S. § 10110(4-A)(B)………………………………... 1, 2, 4, 6, 9, 13
35-A M.R.S. § 10111(2)……………………………………… 1, 3, 7, 18

Public Laws

An Act to Reduce Costs, Increase Energy Efficiency, Promote Electric System Reliability and Protect the Environment, P.L. 2013, ch. 369 ……………………………………………2
P.L. 2013, ch. 369 § A-19……………………………………4
P.L. 2013, ch. 369 § A-20 ……………………………………4
P.L. 2013, ch. 369 § A-25……………………………………7

Regulations

95-648 C.M.R. ch, 380, § 4(A)……………………………. 6

Cases

Quiland, Inc., v. Pub. Utils. Comm'n, 2008 ME 135, 956 A.2d 127………………………………………………. 9
Office of Pub. Advocate v. Pub. Utils. Comm'n, 2005 ME 15, 866 A.2d 851……………………………………………..9

Administrative Orders

Efficiency Maine Trust, Request for Approval of Third Triennial Plan, No. 2015-175, Order Approving Stipulation (Me. P.U.C. July 6, 2016)……………………………………………….. *passim*
Efficiency Maine Trust, Request for Approval of Second Triennial Plan, No. 2012-449, Order (Me. P.U.C. Mar. 6, 2013)……………. 3, 6, 13

Public Utilities Commission, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-71, Order – Phase 2 (Me. P.U.C. Sept. 14, 2016)………………………………. 11

INTRODUCTION

Using less energy saves families and businesses money. The Efficiency Maine Trust ("Trust") is the entity charged by the Legislature with translating that fundamental truth into action. 35-A M.R.S. § 10103(1). It does so by proposing a plan every three years that identifies the maximum achievable cost-effective energy efficiency savings ("MACE") and then developing and implementing programming to assist Mainers in achieving those savings. *Id.* § 10104(4).

This appeal asserts that the Public Utilities Commission's ("Commission") approval of the Trust's third triennial plan failed to follow legislative mandates and as a result did not properly assess MACE or provide an adequate budget to procure MACE savings. *See Efficiency Maine Trust,* Request for Approval of Third Triennial Plan, No. 2015-175, Order Approving Stipulation (Me. P.U.C. July 6, 2016) ("3rd TP Order"),[1] Appendix ("A.") 23-40; Stipulation (May 25, 2016) ("3rd TP"), A. 41-84. In particular, the Commission failed to (1) ensure that the 3rd TP made use of best regional practices, (2) calculate MACE based on projections of gross savings, and (3) assess the maximum amount of natural gas energy efficiency achievable. *See* 35-A M.R.S. §§ 10110(4-A), (4-A)(B), 10111(2). These failures

[1] For simplicity, hereinafter, citations to filings from the proceeding underlying this appeal, *Efficiency Maine Trust*, Request for Approval of Third Triennial Plan, No. 2015-175 (Me. P.U.C.), will refer only to the document title and date.

resulted in an underfunding of the Trust by more than $30 million and a reduction in overall savings of $250 million for Maine electric and natural gas customers. *Compare* Petition for Approval of the Triennial Plan for Fiscal Years 2017-2019 (Dec. 17, 2015) at 1-2, A. 85-86, *with* 3rd TP Ex. A at 1, 4-5, 8-9, 12, A. 73, 76-77, 80-81, 84.

SUPPLEMENTAL STATEMENT OF FACTS

I. The Legislative Mandate for Energy Efficiency

The Efficiency Maine Trust Act, 35-A M.R.S. §§ 10103-10123 ("Act") directs the process of determining the appropriate amount of money for the Trust to spend on energy efficiency programs and initiatives. Although the parties to this appeal disagree on the Legislature's motives for amending the Act in 2013, *see An Act to Reduce Energy Costs, Increase Energy Efficiency, Promote Electric System Reliability and Protect the Environment*, P.L. 2013, ch. 369, (emergency, effective June 26, 2013) ("Omnibus Energy Act"), there is no dispute that the statute made three very specific changes relevant to the amount of energy efficiency savings to be pursued under the triennial plan.

First, in determining how two key components of electric MACE are calculated, avoided energy costs and the discount rate, the Legislature directed that they be "reasonable, based on sound evidence and make use of best practices across the region." 35-A M.R.S. § 10110(4-A)(B) (emphasis added). Second, in

determining electric MACE, only gross savings shall be considered, whereas net savings are considered to determine the amount of ratepayer-backed funding of the procurement of MACE.[2] *Id.* § 10110(4-A). And third, the Act now requires the Commission to fund the Trust as necessary to capture all natural gas MACE. *Id.* § 10111(2).

The Commission contends that it approached the 3rd TP in the same way that it approached the second triennial plan (the "2nd TP"). In evaluating the 2nd TP in 2013, prior to the Omnibus Energy Act, the Commission applied "aggressive and asymmetrical assumptions that limit the likelihood that money collected from ratepayers will be spent unnecessarily or on programs with marginal benefit." *Efficiency Maine Trust,* Request for Approval of Second Triennial Plan, No. 2012-449, Order (Me. P.U.C. Mar. 6, 2013) ("2nd TP Order"), Supplement of Legal Authorities ("SLA") at 15-16. CLF agrees with an approach that prevents spending public money on programs that are of marginal benefit. But a critical counterpart to that approach is that *underspending* on energy efficiency leads to overspending on other energy costs, such as new transmission lines, electric generating units, or natural gas pipelines, the costs of which are passed on to electric and natural gas customers.

---

[2] The difference between those two numbers can be substantial – for instance, in the 3rd TP, the default net-to-gross ratio is 0.75. 3rd TP at 16, A. 56.

With the Omnibus Energy Act, the Legislature decided the appropriate balance between underspending and overspending. It removed ideology and politics from the process by taking final approval of the triennial plans out of the hands of the Legislature and placing it into the hands of the Commission. Omnibus Energy Act §§ A-19 & A-20. And the Legislature further defined the Commission's role in assuring the proper amount of spending by directing that its assessment of MACE be "reasonable, based on sound science and make use of best practices across the region." 35-A M.R.S. § 10110(4-A)(B).

A brief discussion of the critical inputs relevant to this appeal – avoided costs, discount rate, gross and net benefits, and MACE – bears repeating.

a. Avoided Costs

The Omnibus Energy Act added language requiring the Commission to "[e]nsure that calculations of avoided energy costs . . . are reasonable, based on sound evidence and make use of best practices across the region" when determining electric MACE to be procured by ratepayer funds. 35-A M.R.S. § 10110(4-A)(B). As a result, in preparing its 3rd TP, the Trust "made a considerable effort to identify and apply the 'best practices across the region'" by working with a varied stakeholder group to develop the Avoided Energy Supply Costs in New England: 2015 Report ("AESC Report"). Rebuttal Testimony of Efficiency Maine Trust (Mar. 16, 2016) at 9:1-6. The AESC Report is a comprehensive study that

projects avoided costs due to energy efficiency programs, and that every energy efficiency program administrator in New England uses. Ex. EMT-7 at 12, A. 147; Direct Testimony of Tim Woolf (Feb. 17, 2016) ("TW Direct") at 10:6-7, A. 163.

Commission staff ("Staff") identified significantly lower avoided costs when it relied on estimations that were more current than the AESC Report but that were prepared for a different purpose in an unrelated proceeding.[3] Bench Analysis (Feb. 24, 2016) ("Bench Analysis") at 15-17, A. 265-267; *see Maine Energy Cost Reduction Act: Cost benefit analysis of ECRC proposals*, London Economics International LLC (June 20, 2015) ("LEI Report"). The LEI Report is not used outside of Maine, and its projections were generated on a more limited basis than those in the AESC Report. Nevertheless, the 3rd TP adopted Staff's approach, 3rd TP at 15, A. 55, and the Commission approved the use of the LEI Report for calculating avoided costs. 3rd TP Order at 13, A. 35.

b. Discount Rate

Selection of an appropriate discount rate is critical for properly comparing costs incurred up front with benefits that accrue over time. As with avoided costs, the 2013 amendments to the Act require that the discount rate used must be "reasonable, based on sound evidence and make use of best practices across the

---

[3] The Commission retained London Economics International ("LEI") to examine whether Maine should enter into a contract for a new natural gas pipeline. *See Investigation of Parameters for Exercising Authority Pursuant to Maine Energy Cost Reduction Act,* 35-A M.R.S. § 1901, No. 2014-71.

region." 35-A M.R.S. § 10110(4-A)(B).[4]

In its original proposed 3rd TP, the Trust used a discount rate of 4.36% for ratepayer funds, which it derived from the AESC Report, and which was also consistent with Chapter 380 of the Trust's rules, calling for the use of the current yield of long-term U.S. Treasury securities. ODR 001-029 (Jan. 25, 2016), A. 250; 95-648 ch. 380, § 4(A)(3). In contrast, Staff chose a discount rate nearly twice that, relying solely on the number the Commission employed in the 2nd TP Order, which predated the Omnibus Energy Act.[5] Staff made no effort to evaluate or utilize regional best practices as to the appropriate discount rate.[6] The 3rd TP utilized a blended discount rate, adopting Staff's discount rate of 8.50% for ratepayer funds. 3rd TP at 16, A. 56.

c. Gross and Gross to Net Efficiency Savings

Since enactment of the Omnibus Energy Act, the Act has required the Commission to calculate electric MACE based on gross savings. *See* 35-A M.R.S.

---

[4] In its 2nd TP Order, the Commission used a discount rate between 7-10% to reflect a "conservative approach." SLA at 39. This reflected the Commission's judgment before the Legislature directed it as to how to select a discount rate with the Omnibus Energy Act, and it does not reflect a best regional practice.

[5] Transcript (Mar. 2, 2016) at 34:24-35:4.

MR. STODDARD: Was the Bench Analysis influenced at all by the discount rates that are used in other New England states?

MS. HUNTINGTON: The -- the Bench Analysis was influenced solely by what was in the Commission's order in the prior case.

[6] Transcript (Mar. 2, 2016) at 80:23-81:3.

MR. VOORHEES . . . the discount rate that you used just from the previous triennial plan, it does -- you didn't include a reference -- by reference, other states that -- their discount rates?

MS. HUNTINGTON: No, we just used the midpoint of the range that the Commission established in the prior order.

§ 10110(4-A). The Commission considers *both* gross and net savings, screening out those that are "naturally occurring," to determine the appropriateness of the ratepayer-based funding level identified by the Trust. SLA 41; 35-A M.R.S. § 10110(4-A). Approval of the gross-based MACE amount enables the Trust to pursue the capture of MACE through other revenue streams.

The 3rd TP provides that "[b]enefit-to-cost ratios will be determined on a net basis" for the purpose of determining electric MACE, and the default net-to-gross ratio is 0.75. 3rd TP at 16, A. 56. The Commission's 3rd TP Order approved that approach. 3rd TP Order at 14, A. 36.

d. Natural Gas MACE

The Omnibus Energy Act completely overhauled the Act's approach to natural gas energy efficiency. Omnibus Energy Act, § A-25. The Act now directs the Commission, for the first time, to fund the capture of natural gas MACE. 35-A M.R.S. § 10111(2). To facilitate this new requirement, the Legislature directed the Trust to evaluate all potential natural gas energy efficiency savings at least once every five years. *Id.* § 10104(4)(A).

The Trust commissioned a natural gas potential study in 2014, which generated two levels of potential natural gas savings. Ex. EMT-5, *2014 Assessment of Natural Gas Energy Efficiency Opportunities in Maine,* GDS Associates, Inc. (Sept. 2014) ("Natural Gas Study") at 8-9, A. 141-142. Both the "high case" and "low case" reflect cost-effective energy efficiency measures only. *See id.* at 9, A.

142. The difference hinges on the incentive level – the Natural Gas Study assumes that if the Trust offers a 50% incentive for each measure, market penetration will reach only 50%, whereas, if the Trust offers a 75% incentive, market penetration will reach 80%. *Id.* at 8-9, A. 141-142. Thus, according to the Natural Gas Study, the more the Trust invests in natural gas energy efficiency, the greater the adoption rate, and the higher the overall energy efficiency savings. In both scenarios, the benefits outweigh the costs by more than 3 to 1. *Id.* at 10. Although only the high case scenario reflects the *maximum* amount of energy efficiency savings possible, the Trust relied upon the low case in its proposed 3rd TP. Ex. EMT-1 at 46. From there, Staff applied different assumptions, including those regarding avoided costs and discount rates discussed herein, to yield even lower projections of natural gas MACE savings. *See, generally* Bench Analysis, A. 251. The 3rd TP utilized a calculation of MACE that was based on Staff's assumptions. *Compare* 3rd TP Ex. A, A. 73-84, *with* Supp. Testimony of Efficiency Maine Trust (Mar. 24, 2016) ("Trust Supp.") at 1, 8 (presenting revised natural gas budget and costs reflecting "the adjustments to avoided costs, discount rates and net-to-gross contemplated in the Bench Analysis").[7]

---

[7] In recalculating its numbers using Staff's adjustments, the Trust was clear that it did "not concede any issues that have been identified as the topic of litigation in this case. The purpose of this supplemental testimony is to add to the record the calculations of the impacts that would result from the points made in the Trust's rebuttal testimony and to have these calculations available for illustrating and analyzing issues under consideration in Settlement discussions and in the litigation proceeding." Trust Supp. at 1:21-27.

ARGUMENT

The Commission erred as a matter of law when it approved the 3rd TP despite its inconsistency with unambiguous Legislative directives. This Court "will overturn a decision if the Commission fails to follow a statutory mandate or if it commits an unsustainable exercise of its discretion." *Quiland, Inc., v. Pub. Utils. Comm'n*, 2008 ME 135, ¶ 15, 956 A.2d 127, 133 (quoting *Office of Pub. Advocate v. Pub. Utils. Comm'n*, 2005 ME 15, ¶ 18, 866 A.2d 851, 856). The Commission's approval of the 3rd TP violates the Act by not making use of best regional practices or calculating the gross benefits of electric MACE, thus not properly assessing or funding electric MACE, and by failing to fund the capture of MACE for natural gas. The Court should overturn the Commission's approval of the 3rd TP and, on remand, direct the Commission to amend the 3rd TP to reflect the legislatively mandated MACE for electric and natural gas energy efficiency.

I. The Commission Failed To Make Use of Best Practices Across the Region to Calculate Avoided Energy Costs

The Commission violated the Act by failing to determine[8] and "make use of best practices across the region" in calculating avoided energy costs for the purpose of determining electric MACE. 35-A M.R.S. § 10110(4-A)(B). The

---

[8] Transcript (Apr. 8, 2016) 71:2-4.
MR. TETTLEBAUM: And so at this point in time you've not determined what would make something a best practice?
MR. TANNENBAUM: That's correct.

Commission seeks to characterize its approach as a choice amongst regional best practices, explaining that "[n]o single report, however, can claim the title of regional best practice under statute . . ." 3rd TP Order at 13, A. 35; Comm'n Br. 30-31. Notably, though, the Commission has never claimed that the LEI Report constitutes a regional best practice for calculating avoided costs.[9, 10] The record contains no evidence that the LEI Report has been used anywhere outside of the state of Maine.[11] In fact, the LEI Report was sponsored solely by the Commission and was developed without coordination with any stakeholders outside of the State.[12] Even if a report used exclusively in one state could somehow qualify as a regional practice, its use in the energy efficiency context is certainly not a *best* practice. The Commission's claim that energy forecasts are fungible is an oversimplification. In reality, all projections rely on assumptions, and those are dictated by context and desired outcome. An energy price forecast is a complex

---

[9] Although the Commission does claim, generally, that its approach to avoided costs gave "meaning to each prong of [*sic*] three-part test set forth in section 10110(4-A)." Comm'n Br. 30.

[10] The Trust argues that the use of the LEI Report was "best practice," ignoring the latter half of the statutory clause. Trust Br. 10.

[11] Transcript (Apr. 8, 2016) 116:14-117:6.
MR. TETTLEBAUM: . . . [H]ave any other state utilities commissions or their equivalents used these reports that you prepared for that proceeding?
MS. FREYER: . . . To our knowledge, we have not -- well, we have not been asked to testify at any other states' regulatory proceedings on the materials in our reports that Marie just referred to. . . And to our knowledge, we don't know how they have been used.

[12] Transcript (Apr. 8, 2016) at 117:14-25.
MR. TETTLEBAUM: Thank you for that clarification. And am I to understand these reports were not sponsored by anyone other than the Maine Public Utilities Commission?
MS. FREYER: . . . That's correct . . . Our analysis was not developed in coordination with any other stakeholders outside of the Maine process.

model dependent upon the underlying assumptions and goals of the modeller (input includes, for instance, projections of gas supply curves, gas pipeline capacity expansions, and transmission updates, *see* LEI Report, Section 7). The LEI Report was not developed for the purpose of determining energy efficiency cost-effectiveness, and the underlying assumptions were not vetted by stakeholders across the region.[13] In fact, many of the assumptions contained therein proved to be wrong shortly thereafter. *E.g*., Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-71, Order – Phase 2 (Me. P.U.C. Sept. 14, 2016) at 23 ("The cancellation of the NED project . . . raises issues about LEI's Regional Analysis and results, given that both of LEI's baseline scenarios included 552 MMcf/day of supply associated with then-existing contractual commitments with the NED project."); Transcript (Mar. 2, 2016) at 22:11-15 ("MR. BURNES: does [the LEI Report] account for Pilgrim retiring and the most recent forward capacity market clearing price? MS. HUNTINGTON: It does not account for either of those"). The LEI Report is not a regional practice, much less a regional best practice.

Based on the record before the Commission, there was only one way to calculate avoided costs using best practices across the region: by employing the

[13] Nor have the models and assumptions been vetted by parties in this proceeding, as certain underlying assumptions were deemed proprietary and remain confidential. *See, e.g.,* Procedural Order (Redaction of LEI Reports) (Apr. 11, 2016) (explaining that the LEI Report was redacted).

AESC Report, as the Trust did. The Commission has not disputed that the AESC Report is utilized by all other states in New England, nor that it "employs proper modeling approaches, uses appropriate input assumptions, is thoroughly vetted by stakeholders, and is credible, reliable, and transparent." Blue Br. 24. The Commission notes that the AESC Report was not designed to be a mandatory practice, which makes it all the more compelling that *every state in New England* has chosen to use it. Comm'n Br. 31, n. 26; TW Direct at 10:6-7, A. 163.

The Commission justifies its departure from the regional norm by noting that the AESC Report was outdated.[14] Comm'n Br. 30. But "best practice" does not simply mean the most recent energy price forecast. If it did, the 3rd TP would still be noncompliant, as the Commission relied upon the June 2015 version of the LEI Report despite the availability of a February 2016 update to that study. *See* Transcript (Mar. 2, 2016) at 23:18-24:6. In fact, in describing an incorrect assumption underlying the LEI Report, Staff opined that "London Economics would consider this forecast to be somewhat dated for those -- those two reasons, you know, and perhaps others, but these are -- these are the numbers that we used." Transcript (Mar. 2, 2016) at 22:15-18. Staff also characterized the LEI report as "quite old." *Id.* at 24:5-6. The Commission's desire to use current numbers does

---

[14] The Commission also notes that the AESC Report was not made subject to discovery in the underlying proceeding. Comm'n Br. 16-17. However, just as the Commission notes that CLF requested discovery on the LEI Report, so, too, could any party (or Staff) have requested discovery on the AESC Report.

not alleviate its obligation to use the best practice across the region, particularly where the AESC Report itself is subject to regular updates that could have easily been incorporated into the Stipulation.[15]

Finally, the Commission argues that the 3rd TP did in fact use the AESC methodology to calculate avoided costs. But post-hoc comparison of two studies to highlight similarities is not equivalent to determining and using best practices across the region, as the Act requires. In any case, this argument is belied by Staff's own explanation of their approach: "Staff relied on forecasts provided by LEI to either replace or adjust the AESC 2015 avoided costs . . ." Bench Analysis at 15, A. 265. The 3rd TP simply adopted staff's approach, 3rd TP at 15, A. 55, and the Commission endorsed the "reliance on, among other things, the LEI forecasts for the purpose of calculating avoided costs." 3rd TP Order at 13, A. 35.

II. The Third Triennial Plan's Discount Rate Disregards Regional Best Practices in Violation of Law

The Omnibus Energy Act amended the Act to require the Commission to ensure that the discount rate is "reasonable, based on sound evidence and make[s] use of best practices across the region." 35-A M.R.S. 10110(4-A)(B). Yet, throughout the proceeding, the Commission and Staff adhered steadfastly to their pre-amendment approach, relying *solely* on the 2nd TP Order in their choice of

[15] Indeed, the 3rd TP as it is written already provides for a revision process. *See* 3rd TP at 17-20, A. 57-59.

discount rate and making no effort to evaluate or utilize regional best practices.[16] Transcript (Mar. 2, 2016) at 34:24-35:4. The Commission itself rationalized the Stipulation's choice of a discount rate as lawful because it was "consistent with the Commission's findings and conclusions regarding discount rates in the order approving the Second Triennial Plan." 3rd TP Order at 13-14, A. 35-36.

Now, the Commission offers a post-hoc rationalization for its approval of the discount rate in the 3rd TP. The Commission notes that the 3rd TP utilizes two discount rates, one consistent with the AESC Report for non-ratepayer funds and one nearly twice as high for funds procured from ratepayers, and argues that blending them leads to a number somewhere in the range of the AESC Report. Comm'n Br. 38-39. But even if the Commission's arbitrarily selected number fell within the range of New England[17] states by chance, this does not constitute compliance with the legislative directive, which necessarily entails identifying regional best practices in the first place. In any case, the 8.5% discount rate is *not* within the relevant range. It is higher than all the discount rates used for energy

---

[16] Transcript (Mar. 2, 2016) at 85:17–22.
MR. VOORHEES: And with regard to — to discount rate, do you think there's a best practice reference point or —
MS. HUNTINGTON: I don't — I don't know.

[17] The Commission's suggestion that CLF takes a calculated approach to construing "region" is inaccurate. *See* Comm'n Br. 38, n 34. In its 3rd TP Order, the Commission itself defines the applicable region as New England, explaining that "a look at the discount rates utilized by various New England states shows that the states take a varied approach, and the blended rate used by the Stipulation falls within the varied range of discount rates utilized in the New England region." 3rd TP Order at 14, A. 36.

efficiency in the region, even the outlier Connecticut, which itself is more than twice the next highest rate.[18]

The Commission suggests that because there is variation amongst discount rates in the region, no best practices exist. For support, the Commission points to the NEEP Report for its explanation that the choice of a discount rate should be tailored to each state's specific energy policy goals. Comm'n Br. 37. But the NEEP Report does nothing to alleviate the Commission of its statutory obligation. In fact, the Legislature did precisely as the NEEP Report recommends -- tailoring the choice of discount rate to Maine's energy policy goals -- by directing the Commission to accord with best practices across the region. It is entirely appropriate, and consistent with the NEEP Report, for the Legislature to make such policy decisions, and the Commission is obligated to adhere to them.

Best practices across the region do exist, though CLF does not argue, as the Commission contends, that they are necessarily enshrined in the AESC Report. Comm'n Br. 37. Rather, states in the region employ certain rationales and practices in their selections of discount rates. "[E]nergy efficiency expenditures are low-risk investments from the perspectives of both the distribution company and the

---

[18] The discount rates used for energy efficiency investments in New England are: Massachusetts, 0.6%; Rhode Island, 1.2%; New Hampshire, 2.5%, Vermont, 3.0%, and Connecticut, 7.4%. Ex. TW-7 at 44, A. 237. Even accounting for Connecticut, the average of these discount rates is 2.94%, depicting a strong practice in the region of using a discount rate below that of the AESC Report.

ratepayers." Rebuttal Testimony of Efficiency Maine Trust at 10:17-19 (quoting Mass. D.P.U., "Investigation by the Department of Public Utilities on its own Motion into Updating its Energy 4 Efficiency Guidelines Consistent with An Act Relative to Green Communities," D.P.U 08-50-A, March 16, 5 2009, p. 21). "Distribution companies recover their costs through charges to their customers, while customers reap the long-term benefits of low-cost energy efficiency measures." *Id.* Application of these principles tends to yield discount rates at or below the AESC Report discount rate of 4.36%.[19] The Commission provides no explanation for why energy efficiency investments in Maine are riskier than anywhere else. Thus, consistency with regional best practices means consistency with these principles, and a discount rate that reflects these rationales. By using a discount rate of 8.50% for ratepayer funds, the Commission violates the Act's requirement that it make use of best practices across the region.

III. The Commission Violated the Act By Considering Net and Gross Savings When Determining Electric Energy Efficiency That Is Cost-Effective, Reliable, and Achievable

As the Commission now puts it, MACE is determined "on a net basis for the purpose of setting the level of ratepayer funding, and MACE is determined on a gross basis for the purpose of allowing the Trust to pursue additional potential for energy savings" with other revenue sources. Comm'n Br. 40. Yet, the record

---

[19] *See* n. 24.

contains no evidence that the Commission conducted an analysis of MACE based on gross savings alone.[20] The Commission's failure to calculate electric MACE based on gross savings is contrary to law and prevents the Trust from maximizing energy efficiency. *See* 35-A M.R.S. § 10110(4-A).

The Commission argues that because the Trust did not identify the sources from which it would pursue additional funds and because it supplemented its initial submission that had included gross-based savings, the Commission was relieved of *its* statutory obligation to consider gross savings. Comm'n Br. 40-41. The law does not condition the Commission's mandate upon the Trust's request. The Commission's argument rings particularly hollow in light of its contention that it owes no deference at all to the Trust's proposed plan. Comm'n Br. 4 n. 5.

Importantly, this deviation from the law is not without consequence. Even as the Act allows the Commission to account for free riders when assessing ratepayers, it still requires the full capture of electric MACE. By never approving MACE on a gross basis, the Commission prevents the Trust from pursuing additional funding. Thus, by failing to consider gross energy savings to determine electric MACE and using the 3rd TP's default net-to-gross ratio of 0.75, 3rd TP at 16, A. 56, the Commission guarantees that electric savings stay below 75% of MACE, in violation of the Act.

---

[20] *See* 3rd TP Order at 14, A. 36 (conflating both sections of the statute).

IV. The Commission Violated the Act's Mandate to Capture All Cost-Effective, Reliable, and Achievable Natural Gas Energy Efficiency

The Commission's approval of the 3rd TP underestimates and therefore underfunds natural gas MACE because it is premised on an estimate that does not maximize achievable efficiency savings. The Trust's Natural Gas Study provides an exhaustive review of energy efficiency opportunities in Maine. The study developed two sets of parameters to create a high and low level of achievable potential based on different incentive levels and assumed adoption rates. Ex. EMT-5 at 8-9, A. 141-142. Importantly, the difference between the scenarios had nothing to do with projections of customers or load growth, and instead turned upon the amount of incentives offered for energy efficiency measures. The Natural Gas study projected more than $331 million in savings under the high case scenario, and under the low case, more than $210 million.[21] *Id.* at 10. Thus, the high case scenario yields higher savings. So long as the high case scenario is cost-effective and achievable, which the Natural Gas Study demonstrates it is, *id.*, the Commission must pursue it, because the Act requires the capture of the *maximum* amount of cost-effective and achievable energy efficiency possible. 35-A M.R.S. § 10111(2).

The Trust undersold potential natural gas efficiency savings from the get-go

---

[21] The study timeframe is ten years. Ex. EMT-5 at 10.

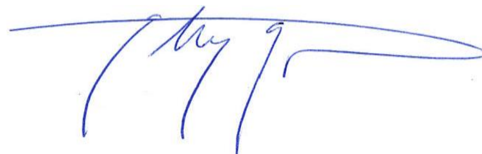
by basing its savings projections and proposed budget on the Natural Gas Study's low-case scenario. EMT-1 at 46. From there, the numbers only got lower – Staff's adjustments resulted in a decrease of projected natural gas savings from 114,428 MMBtu to less than 65,000 for 2017 alone, and a reduction in the natural gas efficiency budget by nearly one third. *Compare* Ex. EMT-1 App. A at 1-2 *with* Trust Supp. at 8. The Commission approved the 3rd TP's assessment of MACE, based on Staff's adjustments to the Trust's initial calculation of MACE. 3rd TP Order at 14-15, A. 36-37; 3rd TP, Ex. A at 1-2, A. 73-74.

The Commission claims that the adjustments it approved to the natural gas budget were consistent with an updated forecast, and therefore consistent with the Commission's obligation to fund MACE. But the Commission's analysis is fundamentally flawed because it relies, as a baseline, upon a set of assumptions that were never designed to actually achieve MACE. As with any superlative, by definition there can only be one calculation of *maximum* achievable cost effective efficiency savings. The Natural Gas Study's high level scenario was cost-effective and achievable. By using as a framework a lower level of achievable savings than the maximum possible, the Commission did not properly assess MACE and therefore underfunds the capture of MACE in violation of law.

CONCLUSION

For the reasons stated above, this Court should overturn the Commission's approval of the 3rd TP. On remand, CLF urges the Court not to vacate the 3rd TP now in effect, which would risk seriously disrupting the Trust's ongoing programs and funding. Rather, this Court should leave the current budget in place until the Commission has complied with the Court's order. On remand, this Court should direct the Commission to, within a specified amount of time: properly calculate electric MACE using regional best practices, specifically, using the AESC Report to determine avoided costs and using a discount rate equal to or lower than that determined in the AESC Report; consider only gross efficiency savings for the purpose of determining electric MACE; and calculate natural gas MACE at a level consistent with or higher than that presented by the high case scenario in the Natural Gas Study; and assess each electric and natural gas utility accordingly.

DATED: February 7, 2017



Emily K. Green, Bar No. 5095
Greg Cunningham, Bar No. 7718
Sean Mahoney, Bar No. 8661
CONSERVATION LAW FOUNDATION
53 Exchange St., Suite 200
Portland, Maine 04101
(207) 210-6439

Attorneys for Appellant Conservation Law Foundation

CERTIFICATE OF SERVICE

I, Emily K. Green, Esq., hereby certify that two copies of this Reply Brief for Appellant were served upon counsel at the addresses set forth below by first class mail on February 7, 2017:

Agnes Gormley Esq.
Office of the Public Advocate
112 State House Station
Augusta ME 04333

Benjamin J. Smith Esq.
Skelton Taintor & Abbott
95 Main Street
Auburn ME 04210

Christopher C. Taub Esq.
Office of the Attorney General
6 State House Station
Augusta ME 04333-0006

Justin P. Atkins Esq.
Iberdrola USA
52 Farm View Drive
New Gloucester ME 04260

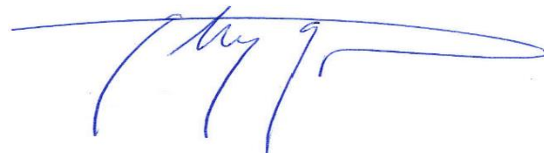
N. Joel Moser Esq.
Bernstein Shur
100 Middle Street
Portland ME 04101-5029

Timothy A. Pease Esq.
Emera Maine
P.O. Box 932
Bangor ME 04402-0932

Mitchell M. Tannenbaum Esq.
Amy B. Mills Esq.
Public Utilities Commission
18 State House Station
Augusta ME 04333

Liam J. Paskvan Esq.
Pierce Atwood LLP
254 Commercial St.
Portland ME 04101

Anthony W. Buxton Esq.
Todd J. Griset Esq.
Preti Flaherty
PO Box 1058
Augusta ME 04330



Emily K. Green, Bar No. 5095
CONSERVATION LAW FOUNDATION
53 Exchange St., Suite 200
Portland, Maine 04101