



Paul R. LePage  
GOVERNOR

STATE OF MAINE  
EXECUTIVE DEPARTMENT  
PUBLIC ADVOCATE OFFICE  
112 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0112

Richard Davies  
PUBLIC ADVOCATE

**ELECTRONICALLY FILED ON FEBRUARY 2, 2012**

Karen Geraghty  
Administrative Director  
Public Utilities Commission  
18 State House Station  
Augusta, Maine 04333-0018

RE: BANGOR HYDRO ELECTRIC and MAINE PUBLIC SERVICE COS.  
Request for Exemptions and for Reorganization Approvals  
Docket No. 2011-170

**THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARDCOPY  
SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH  
ITS ELECTRONIC FILING INSTRUCTIONS**

Dear Karen,

Attached please find an original and one copy of the Motion for Dismissal and Sanctions With Incorporated Memorandum of the Public Advocate regarding the above-captioned proceeding.

Copies of the Motion have been sent to all parties on the service list.

Very truly yours,

Eric J. Bryant  
Senior Counsel

EJB/dt  
Enc: Motion for Dismissal  
cc: Service List



PRINTED ON RECYCLED PAPER

PHONE: (207) 287-2445 (Voice)  
TTY: (888) 577-6690

Richard.Davies@maine.gov (e-mail)  
<http://www.maine.gov/meopa>

FAX: (207) 287-4317  
FAX: (207) 287-4300

ELECTRONICALLY FILED ON FEBRUARY 2, 2012

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

<u>BANGOR HYDRO ELECTRIC &amp;</u>	)	
<u>MAINE PUBLIC SERVICE COS.</u>	)	
	)	<b>MOTION FOR DISMISSAL</b>
<b>Re: Request for Exemptions and for</b>	)	<b>AND SANCTIONS WITH</b>
<b>Reorganization Approvals</b>	)	<b>INCORPORATED MEMORANDUM</b>
	)	
<b>Docket No. 2011-170</b>	)	<b>February 2, 2012</b>

Now come the Office of the Public Advocate, Houlton Water Company, the Industrial Energy Consumer Group (“IECG”), and Boralex, Inc. (“Boralex”)(collectively, the “intervenors”) by and through their respective attorneys and move to dismiss these proceedings or to enter judgment against Bangor Hydro Electric Company and Maine Public Service Company (“Petitioners”) based upon the recommended findings of the Examiners’ Report.

**I. INTRODUCTION**

Petitioners have intentionally and recklessly violated the Commission’s Rules of Practice and the Examiners’ January 19, 2011 Scheduling Order by filing Exceptions tainted by prejudicial non-record information and by assisting and/or encouraging First Wind Holdings, LLC (“First Wind”) and Algonquin Power & Utilities Corp. (“APUC”) to file unauthorized comments doing the same. According to the Examiners, these exceptions have been reviewed by the Commissioners. As described herein, further consideration of the case at this point would violate fundamental principles of due process and would be unduly prejudicial to the intervenors in this case. Of equal importance is the fact that the actions of the Petitioners, First Wind and Algonquin Power have damaged the integrity of the adjudicatory process by intentionally exposing the Commissioners and their advisors to information outside of the record that, even if the Commission can ignore, undermines public

confidence in the process. Dismissal with prejudice or judgment against Petitioners are the appropriate remedies and sanctions for Petitioners' violations of the Commission's Rules and the January 19 Scheduling Order.<sup>1</sup>

## II. BACKGROUND

After contentious and exhaustive litigation in this matter, the January 13, 2012 Examiners' Report recommended that the proposed reorganizations be denied.<sup>2</sup> On January 17, 2012, Petitioners requested an extension of "one day" to file their exceptions to the Examiners' Report citing in support of their request:

With so much at stake, Petitioners want to ensure a careful and thoughtful review of the Examiner's Report. More specifically, Petitioners are working hard to prepare their response, which includes considering whether new conditions could be developed or modifications to the Proposed Transactions could be negotiated that address Staff's concerns.

(Emphasis added). Responding to Petitioners' request, the Public Advocate and Boralex filed objections noting that allowing what Petitioners appeared to be proposing would violate intervenors' rights, and the rules, and should not be allowed.<sup>3</sup>

In their January 19, 2012 Scheduling Order, the Examiners granted Petitioners' request for additional time but cautioned that exceptions must comply with the provisions of Chapter 110, which requires exceptions to be based upon the record evidence in the case.

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<sup>1</sup> In addition to the inherent power of the Commission, Chapter 110, Section 825 of the Commission's Rules of Practice and Procedure provide that all sanctions available under Maine Rule of Civil Procedure 37 are available to the Commission, including dismissal of the proceeding or an order entering judgment against the disobedient party.

<sup>2</sup> Intervenors have spent a tremendous amount of money, time and effort to get to this point in the process.

<sup>3</sup> The IECG and HWC filed letters in support of the OPA and Boralex's objection. Boralex emphasized the need for the Examiner to ensure that the Petitioners did not "abuse" the system by filing information that was not in the record, including "new" conditions.

On January 23, 2012 Petitioners filed Exceptions to the Examiners' Report. On the same day, First Wind, which has never been a party to this proceeding, also filed "exceptions" and APUC, also never a party, filed a letter to inform the Commission of certain new facts. Although not identified as exceptions, APUC's filing is effectively equivalent to exceptions. The filings of First Wind, APUC and the Petitioners' Exceptions contain new information, not in the record that directly contradicts sworn testimony of Petitioners' witnesses and other evidence given during the proceedings. The exceptions also attempt to recast the proposed transactions based on this new information, in an effort either to negotiate with the Commission through pleadings or to otherwise get around the Examiner's Report. All three of these filings contain this non-record information in blatant disregard of the Commission's rules and the Examiners' January 19, 2012 Scheduling Order. Most troubling, and most directly in violation of the Commission's Rules and the Examiners' January 19 Scheduling Order, the Petitioners' Exceptions contain direct references to and quotes from the First Wind and APUC filings (i.e., Petitioners' Exceptions at 5-6 and 13 respectively) and even append the First Wind "exceptions." Petitioners described their decision to attach First Wind's "exceptions" in a footnote:

Petitioners also support the filing of First Wind. Petitioners do not repeat those points hereto but to the extent that First Wind's filing raises any procedural concerns, Petitioners hereby incorporate the First Wind filing in its entirety by reference and attach that filing here.

Petitioners' Exceptions, page 1, footnote 1 (emphasis added).

On January 24, 2012, in response to Petitioners Exceptions and the filings made by First Wind and APUC, the Public Advocate filed two letters with the Commission requesting that the filings of the Petitioners as well as those of First Wind and APUC be embargoed from the Commissioners.

In a Procedural Order dated January 24, 2012, the Examiners ruled that pursuant to the provisions of section 760-A of the Commission's Rules of Practice and Procedure, the filings by First Wind and APUC were prohibited filings by non-parties.<sup>4</sup> In striking these filings, the Examiners correctly noted that both APUC and First Wind had ample opportunity to intervene in the case and chose not to do so. However, the Examiners revealed in this Order that the Petitioners' Exceptions "have already been reviewed" by the Commissioners.

On January 25, 2012, the Examiners convened a Conference of Counsel to discuss the issues raised by the Public Advocate's letters as well as those set forth in Petitioners' Exceptions. At the conference the intervenors orally moved that the proceeding be dismissed and that the Petitioners' Exceptions be struck in their entirety. Tr. 1-25-12 at 11. Petitioners asserted that certain modifications to the transactions described by APUC are not inconsistent with the transaction documents, which are in the record. *Id.* at 4. The Examiners noted that they were surprised by the information proposing the recasting of the transactions. *Id.* at 6. The intervenors also noted that the conduct by Petitioners, in concert with First Wind, were improper attempts at *ex parte* communications designed to influence the decision of the MPUC, just days before the scheduled deliberations. The Public Advocate set forth references to the provisions of the Commission's rules and orders that were violated. All intervenors supported the Motion to Dismiss and to Strike the Petitioner's Exceptions in their entirety. Petitioners asserted that they had not violated a single Commission rule. *Id.* at 20.

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<sup>4</sup> Both First Wind and APUC deliberately chose not to intervene as a party and First Wind has reminded the Commission of that fact as a defense to discovery. For example, First Wind challenged the IECG's deposition request and subpoena on the basis that "First Wind is not, and has never been, a party to this proceeding". Special Appearance of First Wind Holdings, LLC and Motion to Vacate Subpoenas (October 21, 2011), p. 2 (emphasis in original). FirstWind also objected to data requests or requests for information on the basis that that "First Wind is not a party to this proceeding and is not subject to discovery." *Id.* Ex. B. Likewise, during the technical conferences, First Wind objected to questions for the same reasons. Representatives of First Wind and APUC appeared as witnesses, but only on behalf of Petitioners. When presented with data requests or questions at technical conferences, both answered questions based only upon the personal knowledge of the witnesses and did not present any further facts or information otherwise in the possession of their employers.

By Procedural Order dated January 27, 2012 the Examiners denied the intervenors' request that the Petitioners' Exceptions be rejected in their entirety and ordered Petitioners to file revised Exceptions in accordance with the Examiners January 24 Order. The Procedural Order also required Petitioners to provide a "Statement of Clarification" regarding the proposed changes to the transactions that had been the subject of the litigation. Finally, the Procedural Order declined to rule on intervenors' oral motion to dismiss and established a deadline of February 2, 2012 to file a written motion. This motion is filed in accordance with the January 27 Procedural Order.

### III. ARGUMENT

The right of a party to a Commission proceeding to file exceptions is governed by the Commission's Rules of Procedure and the Maine Administrative Procedures Act. Section 752 of Chapter 110 of the Commission's Rules states that the Examiner's Report "shall be provided to each party, and an opportunity shall be provided for response or exceptions to be filed by each party."<sup>5</sup> (emphasis added). Section 1001 also refers to the filing of exceptions by parties. Nowhere in the Rules is there any indication that non-parties may file exceptions.

Section 760-A(a), entitled "Prohibited Communications After Issuance of Presiding Officer's Report," indicates that a "person" may seek to make a "communication" to a commissioner only "as permitted by order or prior approval of the Commission or presiding officer." This rule was the result of a tumultuous series of events in connection with a telephone rate case in 1995 where the utility (NYNEX), after the filing of the Examiner's Report, encouraged non-party stakeholders to contact

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<sup>5</sup> This provision reflects the Maine Administrative Procedures Act (5 MRSA §9062(4)) which states:

**4. Report.** In the event that the presiding officer prepares any report or proposed findings for the agency, the report or findings shall be in writing. A copy of the report or findings shall be provided to each party and an opportunity shall be provided for response or exceptions to be filed by each party. (emphasis added)

state officials with their views on the Report.<sup>6</sup> The names and addresses of the Commissioners were provided to these stakeholders by NYNEX and many communications were received by them. In a responsive rulemaking, the Commission promulgated section 760-A. Subsection (a) of this rule reads, in full:

In an adjudicatory proceeding, after the issuance of the presiding officer's report or proposed findings, no person shall make any direct or indirect communication to any commissioner, presiding officer, or other advisory staff member in connection with any potential or proposed decision in the proceeding or any issue of fact, law or procedure, except for the filing by a party of a response or exceptions to the report or proposed findings as permitted by section 752(b), or except as permitted by order or prior approval of the Commission or presiding officer, or except as by motion pursuant to section 1004.

(Emphasis added).

This language does not contemplate *any* expansion of the rule that only parties may file exceptions. The ability of a “person” to file a “communication” pursuant to “prior approval” from an Examiner contemplated in this rule applies to those who may wish to file a simple letter or inject a comment on the proceedings. It does not mean that a non-party, like First Wind, who has an intense interest in the outcome, who attended many if not all of the proceedings, but who nevertheless *adamantly* refused to become a party, would be provided a forum at the last point in a proceeding to come forward, inject new, inconsistent and procedurally uncontestable information as fact, and state their case in an attempt to influence the Commission’s ultimate decision.

The obvious reason why a person has to obtain “prior” approval before filing communications at this critical point in the proceeding is so that the Commission is not exposed to prejudicial information while deciding whether to grant approval. Otherwise the purpose of the *ex parte* rule would fail. Petitioners violated this provision by not seeking approval prior to unilaterally injecting

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<sup>6</sup> PUBLIC UTILITIES COMMISSION, *Rulemaking: Chapter 110, Rules of Practice and Procedure; Proposed Amendments to Ex Parte Provisions*, Order Adopting Rule Amendments; Factual Policy Basis, Docket No. 95-390 (February 1, 1996).

references to the First Wind and APUC exceptions in their filing, and advocating based on such improper submission, thereby deliberately exposing the Commission to prejudicial material in an effort to influence its decision. Petitioners clearly knew what they were doing, and this was no mistake (see footnote 1 to Petitioner's exceptions). Indeed, the reason was because they did not like the Examiners recommendation. Despite the Examiners best efforts to protect the Commission from this improper action, they were unsuccessful because the Examiners did not realize that the Petitioners had included such references in their Exceptions, which had already been reviewed by the Commission.

When adopting the revised *ex parte* rules in 1996, the Commission made the following findings:

The revised prohibition in new section 760-A(a) will apply to all persons. . . As stated in the Notice, during the period following the issuance of an examiners' report, our attention should be focused entirely on the record, the briefs of the parties and the parties' exceptions. We do not believe that it is appropriate for us to consider extra-record comments or other attempts to influence our decision during that time period, or for any person, whether a party or not, to have further opportunity to make such comments. [footnote:] Persons have various rights to influence Commission decisions through extensive established procedures. A person with standing to intervene (under a liberal intervention standard) may participate as a party in a case. Other persons may participate as a party in the discretion of the Commission. All persons may attend and testify or speak at public witness hearings that are held in important cases. Moreover, at all stages during the case prior to the issuance of an examiner's report, persons who are neither parties nor persons legally interested in the outcome of the proceeding, may be able to state their views verbally or in letters to the Commission.

Public Utilities Commission, Rulemaking: Chapter 110, Rules of Practice and Procedure; Proposed

Amendments to Ex Parte Provisions, Docket No. 95-390, ORDER ADOPTING RULE

AMENDMENTS; FACTUAL AND POLICY BASIS (February 1, 1996) at pages 20-21 (emphasis added). The Commission made these findings and adopted this rule in response to attempts by at least one utility to encourage non-parties to communicate with the Commission under the prior *ex parte* rules. Id. at 18-19. The Commission was highly critical of such tactics, describing them as "[a] heavy-



handed lobbying campaign, involving people whom the party apparently believes to have more influence than the party itself or than the merits of its positions, is unreasonable and inappropriate and will not be tolerated.” Id.

By filing their coordinated “exceptions” and letter, First Wind and APUC attempted to subvert the intention and effect of this rule. Therefore, the Examiners correctly excluded APUC’s and First Wind’s filings.

The Petitioners’ actions give rise to particular and very serious concerns. Petitioners have deliberately attempted to inject new evidence into the record “through the back door,” long after the record closed on December 9, 2011 and at that point in the proceeding where other parties are not afforded a chance to respond, test the evidence through cross examination, engage in discovery, present witnesses, or otherwise have the benefit of the procedural safeguards of an evidentiary record. Their Exceptions, containing these new facts, were filed in blatant disregard of at least two of the Commission’s rules and in direct violation of the Examiners’ January 19 Scheduling Order, and in an obvious attempt to influence the outcome. The rules violated are rules of integrity, fundamental fairness and substance, not mere housekeeping rules designed to advance administrative efficiency.

Petitioners violated Chapter 110 section 760-A(a) and (d) of the Commission’s Rules. The filing of “exceptions” by APUC and First Wind violated the *Ex Parte* rule under Section 760-A(a). Petitioners’ subornation of these filings, as evidenced by the references to the filings in Petitioners’ Exceptions, also violates Section 760-A(d) which reads:

No party in a proceeding shall request, encourage, suggest, or provide any assistance to any other person to make a communication that would violate subsection (a) of this section.

Petitioners chose to engage in coordinated, concerted action with First Wind and APUC to assist them in an improper attempt to have a non-party influence the Commission after the date for filing exceptions, and to inject non-record information into evidence, and to couple this with a direct violation by commingling the prejudicial material into Petitioners own Exceptions. Petitioners deliberately cited to, quoted from, and indeed made such filings a part of their own January 23, 2012 Exceptions. Their awareness of procedural issues is revealed by the first footnote in their Exceptions. Petitioners' actions were willful, with the expectation that opposing parties would have no opportunity to respond,<sup>7</sup> and for the primary purpose of influencing this Commission's decision.

Petitioners violated Chapter 110 section 773 of the Commission's Rules. By including references to First Wind's and APUC's filings, Petitioners also violated section 773 of the Rules which states that "[f]actual information shall be considered in rendering a decision only if such information is in the record as evidence."<sup>8</sup>

Petitioners violated the Examiners' January 19, 2012 Scheduling Order. This Order was issued in response to objections filed by the Public Advocate and Boralex on January 18, 2012 to the very type of filing Petitioners have now made. Rule sections 773, 926 and the Scheduling Order could not have been clearer that only record evidence can be referenced in a party's exceptions.

Petitioners' conduct was in contempt of the Commission's Order (issued through its Examiners) and the integrity of the process and fairness to the parties. It does not matter that

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<sup>7</sup> At the conclusion of the January 25 conference of counsel, counsel for Petitioners asked that the Commission deliberate this matter as originally scheduled and without further process. Tr. 1-25-12 at 38.

<sup>8</sup> Petitioners have also violated section 926 of the rules which governs late-filed exhibits. This is the only method within the Commission's rules that allows for new evidence to be admitted after the close of the record. This rule requires parties seeking to put in new documentary evidence "not in existence or otherwise available at the time of the hearing" to do so between the close of hearings and the filing of briefs. Petitioners, who could not have met the requirements of this rule, simply filed their new evidence in the body of their Exceptions.

Petitioners were “surprised” by the Examiners’ Reports conclusions<sup>9</sup> (which, in fact, were clearly foreseeable to any reasonable person based on the record), that they may have spent a large amount of time and resources pursuing this deal, or that there may be a negative fallout in Boston, Toronto and Halifax if the Commission agrees with its Staff. Process at the Commission is governed the rule of law and by procedural due process safeguards to all parties. The new facts included in Petitioners’ Exceptions violate these fundamental principles and have tainted the record and the process. Petitioners cannot be permitted to benefit from these actions. The remedy to correct these actions must be dismissal or judgment against Petitioners.

In addition to the new information presented by First Wind and APUC, Petitioners have also proposed voluminous new conditions. Petitioners’ Exceptions at Appendices I, II and III. Conditions are at their essence a blend of factual information and expert opinion. Proposed conditions should therefore properly be presented to the Commission through the testimony of experts and other witnesses. The Commission’s prefiled testimony rule requires that such information be filed in a timely fashion as part of the evidentiary record. Chapter 110, Sections 931 and 933. Further, the January 19 Scheduling Order prohibited the presentation of information from outside the record. Petitioners’ presentation of new conditions is nothing more than a transparent attempt to negotiate a settlement with the Commission in the guise of exceptions. By holding back their presentation of such an extensive set of conditions, Petitioners have intentionally deprived the parties of any opportunity to review and test these conditions through ordinary procedural means, including discovery, cross examination, and rebuttal testimony.

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<sup>9</sup> Tr. 1-25-12 at 6. Petitioners were not surprised, however, that their Exceptions have “caused a little confusion and uncertainty among the interveners and staff.” *Id.* at 4. This is because Petitioners fully realized that their actions were outside the rules.

Courts may exercise their inherent powers and invoke dismissal as a sanction in situations involving disregard by parties of orders, rules or settings. *Reffior v. Lansing Drop Forge Co.*, 124 F.2d 440, 444 (6<sup>th</sup> Cir. 1942), *cert. denied*, 316 U.S. 671(1942); *Link v. Wabash R. Co.* 291 F.2d 542 (7<sup>th</sup> Cir. 1961), *aff'd* 370 U.S. 626 (1962). (“Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal.”) *See also*, *Joseph v. Norton Company*, 24 F.R.D. 72 (S.D.N.Y. 1959), *aff'd* 273 F.2d 65 (2<sup>nd</sup> Cir. 1959); *O’Brien v. Frank Sinatra*, 315 F.2d 637, 641 (9<sup>th</sup> Cir. 1963)(“there is inherent power in courts, in interest of orderly administration of justice, to dismiss the action for disobedience of court orders and the dismissal of the complaint and the supplemental complaint, was not, under the circumstances, an abuse of discretion”). Courts have also dismissed actions with prejudice for using undisclosed exhibits or by mailing documents directly to the Court, in contravention of a court order. *See Ladien v. Astrachan*, 128 F.3d 1051 (7<sup>th</sup> Cir. 1997). <sup>10</sup>

These principles of fair play apply to administrative agencies. “Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. *Morgan v. United States*, 34 U.S. 1, 22 (1938). Further, Title 35-A contains substantial statutory and inherent powers for the Maine Commission to sanction or penalize utilities or other persons who violate their orders or the rules. Underlying these principles is the fact that the Commission is a quasi judicial agency whose operation is based on integrity and fair conduct of the parties. Thus, the system in which the Commission operates is critical to its role of protecting the interest of the public. 35-A MRSA § 101 states that “[t]he purpose of this Title is to ensure that there is a regulatory system for public utilities in

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<sup>10</sup> The sanction of entering default judgment is likewise available for failure of a party to obey a court order or other wrongful conduct. *E.g. Global NAPS, Inc v. Verizon New England Inc.*, 603 F.3d 71, 94 (1<sup>st</sup> Cir 2010), *cert denied* 131 S.Ct. 1044 (2011).(The court ruled these defendants had violated the court's past discovery orders and the rules of discovery)

the State that is consistent with the public interest and with other requirements of law.” (emphasis added). The legislature provided for specific provisions or penalties and sanctions, adopted the procedures of a Court, and also gave the Commission inherent authority: “The commission has all implied and inherent powers under this Title, which are necessary and proper to execute faithfully its express powers and functions specified in this Title.” 35-A MRSA § 104.

Petitioners fully understood that they were disobeying the January 19th Scheduling Order when they acted in concert with First Wind and APUC and filed prejudicial material in the form of exceptions that relied on facts and arguments not in the record. *First Iowa Hydro Electric Coop. v. Iowa-Illinois Gas and Electric Co.*, 245 F.2d 613, 628, (8<sup>th</sup> Cir. 1957); *cert. denied*, 355 U.S. 871 (1957); (trial court committed no abuse of discretion in dismissing the cause upon the refusal of president and secretary treasurer of the cooperative to testify as ordered on depositions and upon plaintiffs' refusal to make required deposit to cover master's fees). The Court stated:

It is contended for appellants that they ‘were not contumacious’ and that ‘their motives were not contumacious’ in refusing to testify and in refusing to make the deposit for costs ordered by the court and that ‘dismissal was a harsh and unjustified penalty to impose upon confused laymen,’ but there is no claim that the individual plaintiffs did not fully understand that they were disobeying the order of the court when they refused to testify and when they refused to make the deposit or that their disobedience was other than willful and deliberate. Under Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure as well as in the exercise of its inherent power the District Court is authorized to dismiss the action of any individual plaintiff who willfully disobeys a proper order of the court to compel the giving of security or the giving of testimony on deposition and to dismiss the action of a corporation plaintiff whose managing agent so offends. We think the contention that dismissal was unduly harsh or unjustified is without merit. It was the right of the plaintiffs to prosecute the action for the recovery of \$120,000,000 against the defendants regardless of the burden it imposed on defendants, but only in the orderly course and in obedience to proper court orders. The Court would not have been justified in granting leniency or indulgence to the plaintiffs at the expense of the defendants. We find there was no abuse of discretion in the application by the Court of the sanction that was authorized by the Federal Rules of Civil Procedure, and by the inherent powers of the Court.

Courts have dismissed actions with prejudice for using undisclosed exhibits or by mailing documents directly to the Court, in contravention of a court order. See *Ladien v. Astrachan*, 128 F.3d 1051 (7<sup>th</sup> Cir. 1997).

The Maine Law Court in *Unifund CCR Partners v. Demers*, 966 A.2d 400, 403 (2009), has also recognized the inherent authority of a Court to impose the sanction of Dismissal With Prejudice: “The functions to be served may be several; to penalize non-compliance, remedy the effects of non-compliance, and to serve as a deterrent.” *Pelletier v. Pathiraja*, 519 A.2d 187, 190 (Me. 1986); see also *Baker's Table, Inc. v. City of Portland*, 743 A.2d 237, 243 (Me. 2000), (stating that, when determining the appropriate sanction to be imposed for failure to comply with procedural rules, “the court should take into account the purpose of the specific rule at issue, the party's conduct throughout the proceedings, the party's bona fides in its failure to comply, prejudice to other parties, and the need for the orderly administration of justice”). The Law Court in *Unifund, supra*, stated:

In considering the imposition of the specific sanction of dismissal, the court need not find “willfulness, bad faith, or fault of the party to justify the imposition of the dismissal sanction.” *Pelletier*, 519 A.2d at 189–90. Instead, “the trial court should evaluate the effect pretrial violations have on the adverse party and also consider the purpose the sanctions are to serve in exercising its discretion.” *Id.* at 190. “[S]erious instances of non-compliance with pretrial procedures can support a trial court's imposition of dismissal as a sanction.” *Id.* (affirming the Superior Court's dismissal of the case as a sanction for the plaintiff's failure to produce requested documents in violation of M.R. Civ. P. 16(d) and 37(b)(2), noting that such failure could well have “seriously and irreparably affected the [d]efendant's ability to proceed to a fair resolution of the claims against him”).

Because of the potential harshness to some parties of dismissal with prejudice, the Law Court cautions that before dismissal, consideration should be given to whether the conduct was intentional or innocent. Here, as has been shown, Petitioners' conduct was intentional.

The Law Court also suggested that it would be well for a trial court to consider the imposition of lesser sanctions. However, an administrative \$5,000 fine or contempt proceedings, would not be sufficient to protect the public and parties from the harm caused by the actions of Petitioners.

Here no lesser sanction than dismissal with prejudice or judgment against Petitioners could guarantee or affect the orderly progress of the litigation or remove the taint or appearance of unfairness. *See Francis-Sobe v. University of Maine*, 28 Fed. Rules Service, 400 (Me. 1979). Indeed the actions of Petitioners were calculated and deliberate – and constitute with a serious violation of Commission procedures, rules and orders. The First Circuit in *Aoude v. Mobil Oil Corp.* 892 F.2d 1115, 1118 (1st Cir 1989), summarized:

The courts' inherent power includes "the ability to do whatever is reasonably necessary to deter abuse of the judicial process." We need go no further. Appellant chose to play fast and loose with Mobil and with the district court. He was caught out. The judge considered the relevant factors and acted well within his discretion: appellant's brazen conduct merited so extreme a sanction; Mobil, having undergone extra trouble and expense, had a legitimate claim to dismissal; and the court, jealous of its integrity and concerned about deterrence, was entitled to send a message, loud and clear.

In addition to violating the Examiners' January 19 Scheduling Order, the Petitioners conduct was aggravated by violations of the Commissions' rules and the concerted *ex parte* contact with the Commission, which succeeded despite the best efforts of the Examiners to shield the Commission. This contact succeeded because Petitioners, in concert with First Wind and APUC, utilized a variety of means to ensure that the Commission viewed the unlawful material before it deliberated – direct filing by First Wind and APUC, attaching and incorporating into the body of the Petitioner's own exceptions, and making sure it was published in the newspaper. This Commission has previously commented and placed utilities on notice that it will not tolerate such behavior.

In its Order in *CMP Natural Gas, LLC, Petition for Approval to Furnish Gas Service in the Municipalities Of Westbrook and Gorham, and Central Maine Power Company and CMP Natural Gas, L.L.C., Request for Approval of Affiliated Interest Transaction, Sale of Assets*, Docket Nos. 1999-739 and 1999-477, at page 33, Order (Dec. 13, 1999), the Commission stated:

CMP NG and CMP Group are hereby notified that direct communications to the Commissioners on matters of substance during a pending case outside of any procedural context are inappropriate and may be subject to penalties provided in 35-A M.R.S.A. §§ 1503 and 1504. This is the case even if the communication is copied to all parties, because it presents untested allegations to the decision-makers outside the procedural framework of the case, leaving parties without an opportunity to cross-examine the proponent or to provide a meaningful response. Moreover, it is unfair to the parties, as well as distracting to the Commission and its staff, to inject unnecessary, [\*70] unreliable, and inappropriate communications into the proceeding.

Statutes, case law, and the Commission's rules all require that the Commissioners confine themselves to the record established at the public hearing. This fundamental principle is embodied in the due process clause of the Constitution. *E.g. Chambers v. Kootenai County Bd. of Comm'rs*, 867 P.2d 989, 992 (1994). Agency proceedings that have been blemished by *ex parte* communications are voidable, based on the principle that it is simply unacceptable for any person directly or indirectly to influence a decision of a judicial officer in a pending case outside of formal public proceedings or in violation of rules or orders. "[A]n *ex parte* contact is condemnable, when it is relevant to the merits of the proceeding between an interested person and an agency decision maker. Finally, lest there be any doubt, we categorically reject any suggestion that *ex parte* contacts in Kentucky are, or should be, the 'bread and butter' of administrative proceedings to be tolerated with a knowing wink." *Louisville Gas and Elec. Co. v. Com. ex rel. Cowan*, 142 P.U.R.4th 464, 862 S.W.2d 897 (Ky.App,1993)(citing *Louisiana Association of Independent Producers and Royalty Owners v. Federal Energy Regulatory Commission*, 958 F.2d 1101, 1113 (D.C.Cir.1992).



In *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1544 (9<sup>th</sup> Cir. 1993), the Federal Court emphasized: “*Ex parte* contacts are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication. We agree with the observations of the District of Columbia Circuit regarding this principle:

We think it a mockery of justice to even suggest that judges or other decisionmakers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudications are viable only so long as the integrity of the decisionmaking process remains inviolate. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decisionmakers through *ex parte* contacts.” *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 570 (D.C.Cir.1982) ( *PATCO v. FLRA II* ).

The fact that these communications came at a crucial time - right before deliberations - made them even more egregious. “No communication from any other person is more likely to deprive the parties and the public of their right to effective participation in a key governmental decision at a most crucial time.” *Id.* As Justice Spottworth stated: “[u]ltimately, an agency must be the guardian of its own honor. If it permits interested persons to show contempt for its formal adjudicatory processes by the subversion of *ex parte* pleas and approaches, then those processes will indeed become contemptible” *PATCO, supra* 685 F.2d 547, at 601.

Petitioners’ behavior in this proceeding warrants the dismissal of this proceeding or entry of judgment based upon the relevant case law. For the reasons described herein, the conduct of Petitioners in presenting prejudicial non-record information in their Exceptions and by encouraging First Wind and APUC to do the same through unauthorized *ex parte* communications, “seriously and irreparably affected the . . . ability to proceed to a fair resolution of the claims.” *Pelletier, supra*, at 190. Further, these actions “violated . . . clearly articulated orders.” *Ladien, supra*, at 1057.

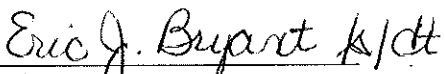
Here no lesser sanction than dismissal with prejudice or entry of judgment could guarantee or affect the orderly progress of the litigation or remove the taint or appearance of unfairness. *Francis-Sobe, supra*. Anything less would reward Petitioners for their actions, and would cause prejudice to the parties who have complied with the rules and fair play, and the public who expect nothing less. Dismissal, particularly given the recommendations of the Examiners, would be consistent with the public interest and the Commission's responsibility to ensure that the regulatory "system" protects those interests.

#### IV. CONCLUSION

For the reasons stated herein, the following parties respectfully request that the Commission dismiss the Petitions with prejudice, and for such other and further sanctions, including but not limited to rendering judgment against Petitioners as reflected in the Examiner's Report with regard to 35-A MRSA Section 708 that the risks of the proposed First Wind and APUC transactions set forth in this consolidated case even when mitigated by conditions outweigh the benefits of the transactions, thus, the "no net harm" standard is not met and the Proposed Transactions cannot and are not approved.

Respectfully submitted,

**Public Advocate**

  
Eric J. Bryant, Esq.  
Agnes Gormley

**Houlton Water Company**

Alan G. Stone *12/11/11*

Alan G. Stone, Esq.

**Industrial Energy Consumers Group**

Anthony W. Buxton *12/11/11*

Anthony W. Buxton, Esq.

Andrew Landry, Esq.

**Boralex, Inc.**

Charles C. Soltan *12/11/11*

Charles C. Soltan, Esq.