SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. PUC-11-532

ED FRIEDMAN, et al.

Appellants

v.

MAINE PUBLIC UTILITIES COMMISSION

and

CENTRAL MAINE POWER COMPANY

Appellees

ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION

REPLY BRIEF OF APPELLANTS

Bruce A. McGlauflin, Esq., Esquire
Petruccelli, Martin & Haddow, LLP
50 Monument Square, PO Box 17555
Portland, ME 04112-8555
(207) 775-0200
Attorneys for APPELLANTS

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I. STATEMENT OF BACKGROUND FACTS

In their Briefs, Appellees do not properly distinguish between Record facts and background information. Central Maine Power Company ("CMP") and the Public Utilities Commission ("Commission") make extensive assertions of fact that are not material to this appeal. They refer to documents submitted in other Commission proceedings, as if they were part of the Record in this case. Appellants object to all such references to the extent that Appellees rely on them substantively as a basis for supporting the Commission's dismissal in this case ("Dismissal"). CMP also makes extensive reference to other documents requesting that the Court take judicial notice of them. Appellants object to the consideration of these documents as well to the extent that Appellees rely on them to support the Dismissal. They may or may not satisfy the evidentiary standard for judicial notice, but this is not an evidentiary proceeding. Appellants do not object to the extent the Court finds these documents useful as background information, and Appellants also reference certain documents for that purpose. *See,* Addendum to this Brief ("Add.").

II. SUMMARY OF LEGAL ARGUMENT

Appellees make several attempts to support the Dismissal by misstating the applicable statutory provisions, procedural rules, and/or standards of review. These attempts cannot avoid the well established rules of law and procedure governing dismissals of complaints where there has been no opportunity for a hearing or an evidentiary proceeding. The Complaint was improperly dismissed with no findings of fact and no evidence entered in the

Record. With no evidence and no findings, the Commission had no basis for disregarding the allegations in the Complaint or concluding, in accordance with 35-A M.R.S. § 1302, that the cause of the Complaint is being adequately addressed by CMP or that the Complaint is without merit.

Preemption and *res judicata* are the only legal arguments upon which Appellees could conceivably prevail, but they both fail as a matter of law. The Complaint is not barred under any doctrine of preclusion, because there is no privity between the Appellants and the parties in the Opt-Out proceedings and because the issues raised here were not decided there. Preemption, which would only apply to the health and safety issue, fails because CMP provides no explanation for why the legal authority it cites should apply to the facts of this case, and more particularly why the requested relief in this case would create an impermissible preemption conflict with FCC rules.

Primarily, Appellees argue without legal authority that the Commission may dismiss a complaint whenever it has "seriously considered" the issues raised. The argument has no merit, especially when the Commission's "serious consideration" does not include any investigation, adjudication or determination about the issues considered. Appellees rely on non-Record documents to support their assertion that there are no credible allegations in the Complaint. For purposes of this appeal, however, all of these non-Record items must be disregarded and the allegations in the Complaint must be accepted as true. Appellants are not required to prove on appeal that which they were given no opportunity to prove below.

Nevertheless, without waiving the above arguments and for background context only, Appellants respond briefly to Appelllees' assertions of fact. For the past few decades, there has been substantial debate in the scientific community about the adverse health effects of radio frequency radiation ("RF"). There is a growing consensus that RF in the range emitted by smart meters pose significant health risks, evidenced by confirmed physiological effects and statistical correlations with cancer and other adverse health conditions. *See Add., 1 and 8; App. at 12-19.* As for privacy concerns one need only read the daily newspaper to appreciate the prevalence of security risks posed by hackers, the inadvertent leaks associated with wireless devices, and the constant privacy intrusions caused by the rampant sales and disclosures to third parties of private data obtained with customer "consent" on the internet. *See App.* at 19-25.

Appellees have only one response to the claims that the Opt-Out Orders must be annulled as unconstitutional – voluntariness. They do not dispute that the installation of smart meters create a physical occupation triggering a takings analysis or that the information gathering capacity of smart meters constitutes a search for Fourth Amendment analysis. They argue only that all constitutional concerns are negated by the "voluntary" decisions made to accept electricity and to acquiesce to the installation of the smart meter. The alleged "voluntariness" of these actions, however, is negated by the monopoly/customer relationship, the lack of informed choice, and the compelled payment of perpetual fees imposed on homeowners seeking to avoid

smart meter installations with their attending physical occupation and search capacities.

III. ARGUMENT

A. Appellees' reliance on documents outside the Record to support the Commission's Dismissal must be rejected.

CMP expends one-half of its brief discussing facts that are not in the Record. The Record is limited to the Complaint, CMP's Response, the Order dismissing the Complaint ("Dismissal"), the Motion for Reconsideration, the Order denying the Motion, and miscellaneous other procedural entries on the Docket. *App.* at 1. No facts were found by the Commission, which necessarily means there are no fact-based determinations for this Court to review on appeal.

The Commission's own rules of procedure state that any material that the Commission uses in making a decision "shall be offered and made a part of the record" of the proceedings. 65-407 CMR ch. 110 §773. The Commission did not enter into this Record any of the materials that were submitted to the Commission in the Opt-Out proceedings, and it made no reference to them in the Dismissal. For instance, it did not include or reference the November 8, 2010, report by the Maine Center for Disease Control ("CDC"), or CMP's "expert testimony", which CMP refers to as "Exponent Testimony."[1] According to its

[1] The Exponent Testimony was submitted in written form with CMP's response to one of the Complaints in the Opt-Out proceedings. The Complainants in that case had no opportunity to cross-examine the witness or to submit opposing evidence on the issue of health and safety because the Commission decided in a deliberation meeting to not include those issues in the Opt-Out proceedings.

own rules, the Commission could not rely on these documents in dismissing the Complaint and the Appellees may not rely on them on appeal.[2] *Id.*

B. The Complaint is properly pled under Section 1302.

In search of a discretionary standard to justify its Dismissal, the Commission contends that the Complaint, or most of its allegations, should have been brought under Section 1321 of Title 35-A or Section 1201 of the Commission's procedural rules (65-407 C.M.R. ch. 110 §1201). Essentially, the Commission argues that all allegations about actions taken by CMP in accordance with the Commission's Opt-Out Orders, are allegations "against the Commission" not against CMP and are not cognizable in a ten-person complaint under Section 1302. This is contrary to the plain language of all three provisions. Section 1302 expressly authorizes complaints about regulated rates and other regulations, which are necessarily authorized by the Commission. 35-A M.R.S. § 1302 (2011). And neither Section 1321 nor Section 1201 authorizes complaints or petitions brought by utility customers; they both contemplate a process commenced only on the Commission's own initiative.

The Complaint properly pleads allegations *against* CMP complaining about its installation of smart meters and its imposition of fees for opting out. The fact that these utility actions have been authorized by the Commission is beside the point. Virtually all utility action is in some manner or other authorized by the Commission. The Commission's approach, if adopted, would

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[2] The Commission does, of course, refer to its Opt-Out Orders in the Dismissal, and Appellants have included copies of those Orders in the Supplement of Legal Authorities ("Supp.").

frustrate the Legislature's intent to provide a meaningful process for Maine citizens to be heard when a regulated monopoly adversely affects their lives.

C. The Commission must do more than "seriously consider" the complaint to justify a dismissal under Section 1302, and must apply standard rules of practice when evaluating the allegations in a Complaint.

CMP argues that the Dismissal must be upheld because the Commission "seriously considered" the Complaint (in the Opt-Out proceedings) and nothing further is required, citing *Holmquist v. PUC,* 637 A.2d 852, 853 (Me. 1994). The *Holmquist* Court used this phrase in the context of a dismissal after the parties had full opportunity to present direct and cross-examination testimony, and documentary evidence. That did not occur here, or in the Opt-Out proceedings. We note that the Commission itself does not make this argument in its brief and we assume it does not endorse it. Complainants were not even given the opportunity to speak at the Commission's brief deliberation about the Complaint.

The Commission does, however, argue that it is not bound by standard rules of practice and procedure governing the dismissal of allegations in a complaint. The Legislature has required that "the practice and rules of evidence are the same as in civil actions" in all actions taken under Section 1302. 35-A M.R.S.A. § 1311 (2011). The Commission's own rules state that its procedures are to be governed by the Maine Rules of Civil Procedure. 65-407 CMR Ch. 101. *See also First Hartford Corp. v. CMP,* 425 A.2d 174 (Me. 1981)(applying Civil Rule 12(c)). Yet, the Commission contends that it may disregard credible allegations in a complaint without evaluating them in an

evidentiary proceeding. The Commission argues that the inclusion of a statutory standard (without merit) in Section 1302 displaces the rules of procedure governing dismissals. But, there is nothing in the statute, the Commission's rules, or case law that authorizes or even suggests an alternative to standard rules of practice for evaluating the merits of a complaint

The Commission necessarily relied on non-Record facts to evaluate the allegations in the Complaint, but its own rules state: "Factual information shall be considered in rendering a decision only if such information is in the record as evidence." 65-407 CMR Ch. 110, §773. The Commission appears to contend that it reasonably relied on facts gathered in the Opt-Out proceedings to evaluate and reject the allegations in this Complaint. As explained more fully below and in Appellants' main brief, this contention necessarily relies on the doctrine of preclusion, which does not apply because the parties are not in privity and no facts were determined in those proceedings that are pertinent to the allegations in this Complaint.

D. The Dismissal is not barred by and cannot be justified by the Opt-Out Orders.

The only credible legal theory offered by Appellees for dismissing all of the allegations in the Complaint based on the Opt-Out Orders is *res judicata* or collateral estoppel, and these fail as a matter of law. Relying on *Beal v. Allstate Ins. Co.*, 2010 ME 20, P20, 989 A2d 733, CMP contends that the Complaint is barred even though Complainants did not participate in the prior proceedings, because they had the "same interests" as the complainants in those

proceedings. Privity requires more than just a common interest; it requires "a commonality of ownership, control, and interest in a proceeding." *Id.*

Even if there was such a commonality here, the issues raised in this proceeding (health, safety, privacy, property rights) were not adjudicated or determined in the prior proceedings. The Complainants in the Opt-Out proceedings were not provided with a full opportunity to counter the CDC Report or the Exponent Testimony, because the Commission expressly decided not to investigate the issues. The only "determination" it made about health, safety and privacy was that it declined to make a determination. *Supp.* 19, 52.

Appellees are left to argue that the Commission somehow has the discretion, free of the Section 1302 standard, to dismiss any issue or allegation that it "considered" in the past. This relies on the "seriously considered" standard put forth by CMP, which fails as explained above. The Commission did not "dismiss" the health, safety and privacy allegations in the Opt-Out proceeding in accordance with Section 1302. It "declined" to investigate them. *Commission Brief,* 7; *Supp.* 19, 52. "Seriously considering" and then declining to investigate does not satisfy the legislative standard for a dismissal under Section 1302.

Even if, under some yet to be articulated legal theory, the Commission could rely on its prior "serious consideration" of the issues, the substance of the materials put forth by Appellees do not support the Dismissal. The Complaint makes credible allegations about the unreasonable risks, property rights intrusions, and constitutional violations posed by smart meters.

Under any rational standard of review Appellees have not shown that these allegations fail to state a claim or even that there are no disputed issues of fact about the allegations.

Appellees rely heavily on CMPs alleged compliance with FCC exposure standards to contend that there are no health or safety risks. What Appellees don't mention is that these standards do not consider non-thermal effects of RF. Nor do they mention that the FCC, whose purpose is to foster and manage the efficient use of the airwaves by radio and telecommunication companies, has no special expertise in the area of health and safety and must balance efficiency concerns with safety concerns. *See Farina v. Nokia,* 625 F.3d 97, 129 (3rd Cir. 2010). The FCC relied on the Environmental Protection Agency ("EPA") and the Federal Food and Drug Administration ("FDA") for assistance in developing the RF exposure standards. *Id.; FCC OET Bulletin 56* (stating at 27, "the FDA is, however, the lead federal health agency in monitoring the latest research developments and advising other agencies with respect to the safety of RF-emitting products used by the public"). The FCC's focus is on the efficient creation and use of a national communications system, not safety and health.

In a letter dated July 16, 2002, the EPA explains that in promulgating the standards, the FCC "did not consider information that addresses non-thermal, prolonged exposures . . . ." *Add., 5.* The letter further states "there are reports that suggest that potentially adverse health effects, such as cancer, may occur." *Id.* And, "exposures that comply with the FCC's guidelines generally have been represented as 'safe' . . . ." even though there is uncertainty about possible risks from non-thermal, intermittent exposures that

may continue for years." *Id.* And finally, the letter points out what the FCC did not do: "[W]hen developing exposure standards for other physical agents such as toxic substances, *health risk uncertainties,* with emphasis given to sensitive populations, are often considered." (emphasis added). *Add.*, 6. The FCC standards do not take into account the growing consensus in the scientific community about the health risk uncertainties created by non-thermal effects. *See Add.*, 8.

The health risks specifically posed by smart meters are well established and acknowledged in the health care community. In January of 2012, the American Academy of Environmental Medicine issued a letter to the Public Utilities Commission of the State of California opposing the installation of wireless smart meters in homes and schools and calling for an immediate moratorium on their installation. *Add.*, 1. "Chronic exposure to wireless radio frequency radiation is a preventable environmental hazard that is sufficiently well documented to warrant immediate preventative public health action." *Id.*

As the EPA letter suggests, and the American Academy letter demands, good public policy is based on prudent standards that encourage preventative action to avoid well-documented health risks. The FCC guidelines, the CDC report, and the Exponent Testimony, are all based on the assumption that no health risk exists until there is scientific proof of the biological mechanism by which the observed adverse effects are caused by RF. This is a tort litigation standard of proof that has no place in setting wise public policy. Our daily exposure to RF and other electromagnetic radiation is growing at exponential rates and is vastly outpacing the capacity of our public health science to

understand its effects. Effective studies can take decades to complete, by which time the technology being studied has changed or may have expanded beyond the capacity of regulatory controls to manage them.

The legislative mandates to ensure and provide safe facilities place a heavy burden on Appellees to ensure safety. 35-A M.R.S. §§ 101, 301 (2011). The height of that burden is at its zenith when the facilities are being installed in hundreds of thousands of homes across Maine within reach of infants, children and elderly residents. We are not talking about the safety of a power line located at a distance from dwellings, we are talking about devices located on the other side of a bedroom wall or under its floor. The FCC guidelines, the CDC Report and the other documents referred to by Appellees do not establish safety. Dr. Dora Mills, who was the then director of the CDC directly responsible for the CDC Report, sets the record straight on that point in an e-mail dated October 15, 2010. She states: "I never said 'smart meters are safe' . . ." *Add.*, 7.

Appellees contend that "serious consideration" is being given to issues of privacy now, after the Dismissal was issued and after the Commission was directed to do so by the Legislature. *Report on Cyber Security and Privacy Issues Relating to Smart Meters* (January 15, 2012) ("Privacy Report").[3] The Commission concludes that no further action is needed at this time to protect homeowners because the federal government is developing privacy guidelines. But these guidelines "do not explicitly address all of the cyber security

[3] Although this document qualifies as an "official public document," it was not in existence at the time of the Complaint.

concerns of smart meters," and "do not or may not apply to distribution level smart grid facilities." *Privacy Report,* at 5 and 10. The Commission recites some revealing comments by the Retail Energy Supply Association ("RESA") expressing its eagerness to obtain access to smart meter data and complaining that CMP and other transmission utilities should be required to share this "more valuable and detailed information about consumer usage patterns." *Id.* at 15. The great ease with which such eager service providers are able to obtain access to customer data with "consent" has become a ubiquitous feature of modern life. *See United States v. Jones,* __ U.S. __, 132 S. Ct. 945, 957; 181 L. Ed. 2d 911, 926 (2012) (J. Sotomayar concurring). Yet, the Commission states that it sees no need at this time to consider and address the "methods for customers' consent to the release of their information." *Id.* at 17. We have become all too familiar with the Commission's utility-friendly view of the concept of consent, contending that the mere acceptance of electric service constitutes sufficient consent for purposes of evaluating the constitutional rights of homeowners.

In summary, the Opt-Out Orders and Appellees' non-Record materials provide no basis for dismissing the allegations in this Complaint.

E. This case is not about the Commission's rate-setting of opt-out fees.

Both Appellees argue that this case is really just a challenge to the Commission's rate-setting determination of the amount to be paid for opt-out fees. On the contrary, it is a challenge to the very concept of an opt-out fee Any fee is *per se* unreasonable and discriminatory under the statute because it

is imposed without any consideration of the health, safety, privacy and property rights concerns, and because the need for the charge is driven by CMP's choice of a mesh network system designed to have devices in every home to function properly. The fees are unconstitutional because they are used for the purpose of, or at least with the effect of, compelling homeowners to allow a taking of their property without just compensation and to allow a search of their constitutionally protected home environments.

F. The Commission's consideration of health and safety risks is not preempted by Federal Law.

The only other cognizable legal argument made by CMP is preemption. This would apply only to allegations of health and safety risks, but in any case, it fails as a matter of law. The Commission says it "deferred" to the FCC," (Commission Brief at 7) and does not make a legal argument about preemption on appeal. Apparently, it believes it had the discretion to disregard its fundamental mandate to ensure safety, merely because it prefers to defer to another agency on the subject.

CMP argues that the FCC occupies the field by setting generally applicable standards of RF exposure. It cites no case law holding that state regulation of smart meters is preempted by the FCC regulations. Instead, it relies on mobile phone cases, correctly noting that there is conflicting authority for preemption of mobile phone safety regulations. *See Pinney v. Nokia, Inc.,* 402 F.3d 430 (4th Cir. 2005)(no preemption of State regulation of mobile phone safety); *Farina v. Nokia,* 625 F.3d 97, 106 (3rd Cir. 2010)(finding preemption of class action tort claims alleging unsafe mobile phones); *see also Freeman v.*

Burlington Broadcasters, Inc., 204 F.3d 311, 324-325 (2nd Cir. 2000)(finding preemption of state regulation of RF interference by cell phone towers, but distinguishing regulation of health and safety); *CTIA v. City and County of San Francisco,* 2011 U.S. Dist. Lexus 124505 (N.D. Cal. October 27, 2011)(no preemption of safety disclosure requirements for mobile phones).

CMP relies on the Third Circuit's decision in *Farina,* but does not explain why this or any other mobile phone case should require preemption in this case. Preemption in those cases is based on FCC authority to regulate "mobile services." 47 USC §§153(27) and (332). CMP does not explain how a smart meter qualifies as a "mobile service." Even, with respect to mobile phones, the Third Circuit agreed that there is no express preemption or field preemption of state safety regulations. *Farina,* 625 F.3d at 120. It does conclude that there is conflict preemption. *Id.* at 134. Under conflict preemption, CMP has the burden to show that compliance with both federal law and a Commission ruling on this Complaint is a "physical impossibility" or that the ruling would be an "obstacle" to the goals and objectives of Congress. *Pinney* 402 F.3d at 457. The Third Circuit concluded that imposing state tort liability against manufacturers who comply with federal law would create an impermissible obstacle. In contrast, the Fourth Circuit in *Pinney* concluded that imposing a headset requirement (the specific relief sought in *Pinney)* would not be an obstacle to Congress's goal of creating a nation-wide network for wireless communications. *Id.* at 458. CMP does not explain why the relief sought here would pose a "physical impossibility" or an impermissible "obstacle", or why this case is more like *Farina* than *Pinney.*

The specific relief sought in this case is: (1) an investigation about the safety concerns, and (2) a determination that compelling homeowners to pay perpetual fees to avoid the safety issues is unreasonable and/or unconstitutional. Neither one poses a preemption conflict.[4]

G. Appellants' takings claim is governed by *Loretto*, not the landlord/tenant cases cited by CMP.

Each of the cases cited by CMP is inapposite because each involves the reasonable economic regulation of commercial relations between landlords and tenants, not the relation between a monopoly and a homeowner. And none of the cited cases involve the choice between acquiescing to a physical occupation or paying a perpetual fee to avoid it. CMP relies on *FCC v. Florida Power Corp.*, 480 US 245 (1987), where the challenged law merely regulated the rates charged by a utility company to rent pole space to a cable company. The purpose of the law was to protect the cable companies from the monopolistic control of the utilities. The case would be analogous only if the utility was compelled to either provide the space free of charge or pay a fee to the cable companies, and even then the monopolistic relation is reversed. In *Yee v. City of Escondido,* 503 US 519, 538 (1992), the challenged rent control ordinance did not compel a landlord to either rent to a tenant or pay the tenant fees for every month that he refuses the tenant's occupation of his apartment building.

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[4] CMP's contention that this Court should defer to the PUC's determination on preemption (citing *S.D. Warren v. BEP*, 2005 ME 27, 868 A.2d 210) misstates the rule. The Court defers to the PUC only in areas where it has special expertise. *Id.* It goes without saying that it has no special expertise on the legal doctrine of preemption. See *Wyeth v. Levine*, 555 US 555, 576-577 (2009).

The facts in this case are most analogous to those in *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982), with the additional twist that the property owner may avoid the compelled physical occupation by paying a perpetual fee. If the landlord in *Lorretto* was allowed to avoid the cable company's physical occupation by paying a perpetual monthly fee, the challenged regulation would be no less unconstitutional. The U.S. Supreme Court in *Florida Power Corp.*, succinctly stated the constitutional distinction between the cable company in that case and the cable company in *Lorretto*: "the unambiguous distinction between a commercial lessee and an interloper with a government license." *Florida Power Corp.*, 480 US at 290. Like the cable company in *Lorretto*, CMP is the interloper with the government license; more accurately, it is a monopolistic interloper with a government license.

Appellees do not dispute that CMP uses smart meters as relay stations to serve and manage its mesh network, or that CMP pays rental fees to other property owners for the same purpose. They do not deny that a large part of the cost used to justify the opt-out fees is the cost CMP will incur to replace relay capacity where opt-outs cause a gap in the mesh network. A good illustration of the extent to which CMP relies on the physical occupation of residences to serve its mesh network is demonstrated by a recent submission filed with the California Public Utilities Commission detailing the number of different types of transmissions by smart meters in a 24-hour period. *Pacific Gas and Electric Company's Response to ALJ's October 18, 2011 Ruling Directing it to File Clarifying Radio Frequency Information*, CA. PUC, App. 11-03-014 (3/24/2011). The maximum number of daily transmissions related to

reading the homeowner's electric usage is 6. The average number for mesh network management is 96,000 and the maximum is 190,000 transmissions in a 24-hour period. *Id.* at 5.

H. The "voluntary" choice of accepting electric service and a smart meter does not negate any constitutional concerns. Imposing a perpetual fee to avoid a search negates any voluntary nature of choosing or acquiescing to the search.

Appellees do not dispute that the collection of private information from within the constitutionally protected space of home with a smart meter constitutes a warrantless "search." The United States Supreme Court recently confirmed the significance of a physical intrusion in determining whether a search triggers constitutional analysis. *United States v. Antoine Jones*, __ U.S. __, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)(warrantless attachment of a GPS unit to a vehicle violated the Fourth Amendment because it involved a physical occupation of private property to obtain information).

Both Appellees rely solely on the argument that homeowners consent to the search by accepting the terms and conditions associated with electric service and by accepting or acquiescing to the smart meter installation. Neither CMP nor the Commission acknowledges the monopolistic character of the relation between CMP and its customers. Neither disputes the adhesion nature of the contract between CMP and its customers. Neither contends that customers are actually informed about the access rights claimed by CMP under its Terms and Conditions. Neither contends that customers are actually informed that law enforcement will have warrantless access to all private

information collected by the smart meter. Neither contends that customers are actually informed about CMP's use of the smart meter as a relay station.

As CMP, the monopoly, blithely says: "No rate payer is forced to take electricity from CMP." *CMP Brief* at 23. That may be true, but ask an elderly couple on a fixed income, or a single mother with infants and toddlers, if they can survive without electric service. CMP says "no one is forced to have smart meters installed on their property . . . they simply have to pay . . . the cost of receiving an agreed-upon service." *Id.* Here, Appellees fail to acknowledge that homeowners who opt-out are not paying for a service. A perpetual fee is imposed for declining a service they do not want and a device they believe poses serious risks to themselves and their families.

The State has the burden to prove the consent was voluntary; a question that is "determined from all the circumstances." *State v. Ullring,* 1999 ME 183, P. 10, 741 A.2d 1065, 1068-1069. The Appellees cite to no Fourth Amendment cases that have circumstances even remotely similar to those in this case. Analogous circumstances would involve the government ordering a homeowner to open his house for a physical search, but allowing the homeowner to opt-out of the search by paying a fee. Or the police in *Kyllo v. United States,* 553 U.S. 27 (2001) requiring and accepting a payment to not search the suspect's home with infrared rays. Or the police in *Jones* requiring and accepting a payment to not attach the GPS unit to the suspect's car. To be more precise, the circumstances in those cases would be analogous only if the policeman tells the homeowner that he will be back the next month and every month

thereafter, *ad infinitum,* to collect fees if the homeowner wishes to continue avoiding the physical search, the infrared rays, or the GPS unit.

V. CONCLUSION

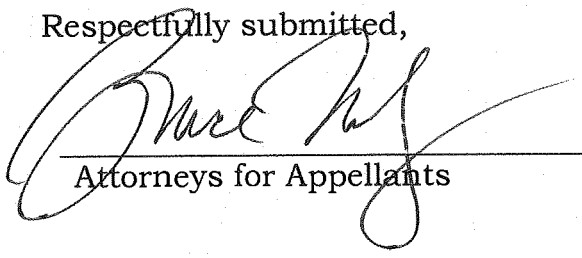
A truly remarkable feature of this case is the Commission's failure to grasp that it has disregarded, and continues to disregard, its fundamental duty to protect Maine citizens -- to "ensure safe" facilities and to make CMP "furnish safe, reasonable and adequate facilities and service." 35-A M.R.S. §101 & §301(1) (2011). CMP chose a "mesh network" system that was designed to include RF devices in every home across the State without exception. The Commission authorized the system without any determination about the health, safety or privacy risks involved and with only cursory consideration of property rights. Because the "mesh" character of the system contemplated universal participation to function as designed, new costs may arise whenever homeowners exercise their rights to say no. Despite the fact that these costs are driven by CMP's design choice and by the failure to design opt-outs (or opt-ins) into the system, the Commission concluded (again with no consideration of the health, safety, privacy or property rights) that the homeowners must pay for exercising their rights to protect their families and their homes.

Appellees provide no legal or rational basis for upholding the Dismissal, or for upholding the constitutionality of the Commission's order compelling homeowners to either pay perpetual fees or acquiesce to physical occupations of their property and searches of their private data. The Dismissal must be vacated. The Opt-Out Orders must be annulled as unconstitutional, and on remand, the Commission should be ordered to stay further implementation of

the smart meter program pending the outcome of a full investigation of the Complaint.

Dated at Portland, Maine this 13th day of March, 2012.

Respectfully submitted,



Attorneys for Appellants

Petruccelli, Martin & Haddow, LLP
Post Office Box 17555
50 Monument Square, 6th Floor
Portland, Maine 04112-08555
(207) 775-0200

By: Bruce A. McGlauflin, Esquire
Bar. No. 8337

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. PUC-11-532

ED FRIEDMAN, et al. Appellants v. MAINE PUBLIC UTILITIES COMMISSION, et al. Appellees	)	CERTIFICATE OF SERVICE

I, Bruce A. McGlauflin, Esq., counsel for Appellants, hereby certify that I have served two copies of the Reply Brief of Appellant by depositing same in United States Mail, postage prepaid, addressed as follows:

Jordan D. McColman, Esquire
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333

Catherine R. Connors, Esquire
Pierce Atwood LLP
245 Commercial Street
Portland, Maine 04101

Dated at Portland, Maine this 13th day of March, 2013.

Bruce A. McGlauflin, Esquire

PETRUCCELLI, MARTIN & HADDOW, LLP
50 Monument Square, Post Office Box 17555
Portland, Maine 04112-8555
(207) 775-0200

ADDENDUM

American Academy of Environmental Medicine

6505 E Central • Ste 296 • Wichita, KS 67206
Tel: (316) 684-5500 • Fax: (316) 684-5709
www.aaemonline.org

January 19, 2012

Decision Proposed Decision of Commissioner Peevy (Mailed 11/22/2011)
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
On the proposed decision 11-03-014

Dear Commissioners:

The Board of the American Academy of Environmental Medicine opposes the installation of wireless "smart meters" in homes and schools based on a scientific assessment of the current medical literature (references available on request). Chronic exposure to wireless radiofrequency radiation is a preventable environmental hazard that is sufficiently well documented to warrant immediate preventative public health action.

As representatives of physician specialists in the field of environmental medicine, we have an obligation to urge precaution when sufficient scientific and medical evidence suggests health risks which can potentially affect large populations. The literature raises serious concern regarding the levels of radio frequency (RF - 3KHx – 300 GHx) or extremely low frequency (ELF – 0Hx – 300Hx) exposures produced by "smart meters" to warrant an immediate and complete moratorium on their use and deployment until further study can be performed. The board of the American Board of Environmental Medicine wishes to point out that existing FCC guidelines for RF safety that have been used to justify installation of "smart meters" only look at thermal tissue damage and are obsolete, since many modern studies show metabolic and genomic damage from RF and ELF exposures below the level of intensity which heats tissues. The FCC guidelines are therefore inadequate for use in establishing public health standards. More modern literature shows medically and biologically significant effects of RF and ELF at lower energy densities. These effects accumulate over time, which is an important consideration given the chronic nature of exposure from "smart meters". The current medical literature raises credible questions about genetic and cellular effects, hormonal effects, male fertility, blood/brain barrier damage and increased risk of certain types of cancers from RF or ELF levels similar to those emitted from "smart meters". Children are placed at particular risk for altered brain development, and impaired learning and behavior. Further, EMF/RF adds synergistic effects to the damage observed from a range of toxic chemicals. Given the widespread, chronic, and essentially inescapable ELF/RF exposure of everyone living near a "smart meter", the Board of the American Academy of Environmental Medicine finds it unacceptable from a public health standpoint to implement this technology until these serious medical concerns are resolved. We consider a moratorium on installation of wireless "smart meters" to be an issue of the highest importance.

The Board of the American Academy of Environmental Medicine also wishes to note that the US NIEHS National Toxicology Program in 1999 cited radiofrequency radiation as a potential carcinogen. Existing safety limits for pulsed RF were termed "not protective of public health" by the Radiofrequency Interagency Working Group (a federal interagency working group including the FDA, FCC, OSHA, the EPA and others). Emissions given off by "smart meters" have been *classified by the World Health Organization International Agency for Research on Cancer (IARC) as a Possible Human Carcinogen.*

Hence, we call for:

- An immediate moratorium on "smart meter" installation until these serious public health issues are resolved. Continuing with their installation would be extremely irresponsible.

- Modify the revised proposed decision to include hearings on health impact in the second proceedings, along with cost evaluation and community wide opt-out.

- Provide immediate relief to those requesting it and restore the analog meters.

Members of the Board
American Academy of Environmental Medicine

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 8 2002

OFFICE OF
AIR AND RADIATION

Janet Newton
President
The EMR Network
P.O. Box 221
Marshfield, VT 05658

Dear Ms. Newton:

Thank you for your letter of January 31, 2002, to the Environmental Protection Agency Administrator Whitman, in which you express your concerns about non-thermal effects of radiofrequency (RF) radiation and the adequacy of the Federal Communications Commission's RF radiation exposure guidelines. The Administrator has asked us to critically examine the issues you bring to our attention, and we will be responding to you shortly.

We appreciate your interest in the matter of non-thermal RF exposure, possible health risks, and Federal government responsibility to protect human health.

Sincerely,

Frank Marcinowski, Director
Radiation Protection Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 16 2002

OFFICE OF
AIR AND RADIATION

Ms. Janet Newton
President
The EMR Network
P.O. Box 221
Marshfield, VT 05658

Dear Ms.Newton:

This is in reply to your letter of January 31, 2002, to the Environmental Protection Agency (EPA) Administrator Whitman, in which you express your concerns about the adequacy of the Federal Communications Commission's (FCC) radiofrequency (RF) radiation exposure guidelines and nonthermal effects of radiofrequency radiation. Another issue that you raise in your letter is the FCC's claim that EPA shares responsibility for recommending RF radiation protection guidelines to the FCC. I hope that my reply will clarify EPA's position with regard to these concerns. I believe that it is correct to say that there is uncertainty about whether or not current guidelines adequately treat nonthermal, prolonged exposures (exposures that may continue on an intermittent basis for many years). The explanation that follows is basically a summary of statements that have been made in other EPA documents and correspondence.

The guidelines currently used by the FCC were adopted by the FCC in 1996. The guidelines were recommended by EPA, with certain reservations, in a letter to Thomas P. Stanley, Chief Engineer, Office of Engineering and Technology, Federal Communications Commission, November 9, 1993, in response to the FCC's request for comments on their Notice of Proposed Rulemaking (NPRM), Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (enclosed).

The FCC's current exposure guidelines, as well as those of the Institute of Electrical and Electronics Engineers (IEEE) and the International Commission on Non-ionizing Radiation Protection, are thermally based, and do not apply to chronic, nonthermal exposure situations. They are believed to protect against injury that may be caused by acute exposures that result in tissue heating or electric shock and burn. The hazard level (for frequencies generally at or greater than 3 MHz) is based on a specific absorption dose-rate, SAR, associated with an effect

that results from an increase in body temperature. The FCC's exposure guideline is considered protective of effects arising from a thermal mechanism but not from all possible mechanisms. Therefore, the generalization by many that the guidelines protect human beings from harm by any or all mechanisms is not justified.

These guidelines are based on findings of an adverse effect level of 4 watts per kilogram (W/kg) body weight. This SAR was observed in laboratory research involving acute exposures that elevated the body temperature of animals, including nonhuman primates. The exposure guidelines did not consider information that addresses nonthermal, prolonged exposures, i.e., from research showing effects with implications for possible adversity in situations involving chronic/prolonged, low-level (nonthermal) exposures. Relatively few chronic, low-level exposure studies of laboratory animals and epidemiological studies of human populations have been reported and the majority of these studies do not show obvious adverse health effects. However, there are reports that suggest that potentially adverse health effects, such as cancer, may occur. Since EPA's comments were submitted to the FCC in 1993, the number of studies reporting effects associated with both acute and chronic low-level exposure to RF radiation has increased.

While there is general, although not unanimous, agreement that the database on low-level, long-term exposures is not sufficient to provide a basis for standards development, some contemporary guidelines state explicitly that their adverse-effect level is based on an increase in body temperature and do not claim that the exposure limits protect against both thermal and nonthermal effects. The FCC does not claim that their exposure guidelines provide protection for exposures to which the 4 W/kg SAR basis does not apply, i.e., exposures below the 4 W/kg threshold level that are chronic/prolonged and nonthermal. However, exposures that comply with the FCC's guidelines generally have been represented as "safe" by many of the RF system operators and service providers who must comply with them, even though there is uncertainty about possible risk from nonthermal, intermittent exposures that may continue for years.

The 4 W/kg SAR, a whole-body average, time-average dose-rate, is used to derive dose-rate and exposure limits for situations involving RF radiation exposure of a person's entire body from a relatively remote radiating source. Most people's greatest exposures result from the use of personal communications devices that expose the head. In summary, the current exposure guidelines used by the FCC are based on the effects resulting from whole-body heating, not exposure of and effect on critical organs including the brain and the eyes. In addition, the maximum permitted local SAR limit of 1.6 W/kg for critical organs of the body is related directly to the permitted whole body average SAR (0.08 W/kg), with no explanation given other than to limit heating.

I also have enclosed a letter written in June of 1999 to Mr. Richard Tell, Chair, IEEE SCC28 (SC4) Risk Assessment Work Group, in which the members of the Radiofrequency Interagency Work Group (RFIAWG) identified certain issues that they had determined needed to be addressed in order to provide a strong and credible rationale to support RF exposure guidelines.

Federal health and safety agencies have not yet developed policies concerning possible risk from long-term, nonthermal exposures. When developing exposure standards for other physical agents such as toxic substances, health risk uncertainties, with emphasis given to sensitive populations, are often considered. Incorporating information on exposure scenarios involving repeated short duration/nonthermal exposures that may continue over very long periods of time (years), with an exposed population that includes children, the elderly, and people with various debilitating physical and medical conditions, could be beneficial in delineating appropriate protective exposure guidelines.

I appreciate the opportunity to be of service and trust that the information provided is helpful. If you have further questions, my phone number is (202) 564-9235 and e-mail address is hankin.norbert@epa.gov.

Sincerely,

Norbert Hankin
Center for Science and Risk Assessment
Radiation Protection Division

Enclosures:

1) letter to Thomas P. Stanley, Chief Engineer, Office of Engineering and Technology, Federal Communications Commission, November 9, 1993, in response to the FCC's request for comments on their Notice of Proposed Rulemaking (NPRM), Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation
2) June 1999 letter to Mr. Richard Tell, Chair, IEEE SCC28 (SC4) Risk Assessment Work Group from the Radiofrequency Radiation Interagency Work Group

Lovejoy, Elaine

From: Mills, Dora A.
Sent: Friday, October 15, 2010 9:33 AM
To: Zukas-Lessard, Chris
Subject: RE: smart meters

Thanks! Unfortunately, the headlines yesterday were a misquote. I never said, "smart meters are safe", and I've been emailing my exact points to opponents who have been sending upset emails. Dora

-----Original Message-----
From: Zukas-Lessard, Chris
Sent: Friday, October 15, 2010 9:31 AM
To: 'Mills, Dora A.'
Subject: FW: smart meters

fyi
-----Original Message-----
From: Mary Ross [mailto:mary.ross1@myfairpoint.net]
Sent: Friday, October 15, 2010 9:11 AM
To: Zukas-Lessard, Chris; PUC, Maine
Subject: smart meters

http://emfsafetynetwork.org/?page_id=2292

Good morning, Upon realizing that Maine was implementing smart meter technology and that Dora Mills deemed them safe, I thought perhaps you would review some of these testimonials. There are doctors statements included that are quite compelling. As a person who limits usage of computers, cell phones and microwaves and has replaced all cordless phones with corded ones, I am greatly disturbed by the prospect of having daily exposure imposed upon myself and my community. Not only do I object to having the technology affect my own home, I live in a very densely populated area and I am concerned about the technology in my surroundings. There are valid findings that raise concerns about smart meter technology. Please consider that this technology may impose adverse affects upon the health and well being of the citizens of Maine.

Bibliography of Sources with internet hyperlinks
re: Health Risks of RF and Smart Meters

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http://www.bioinitiative.org/freeaccess/report/index.htm Blackman, C., Blank, M. et al., *BioInitiative Report: A Rationale for a Biologically-based Public Exposure Standard for Electromagnetic Fields.*

http://www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf In 2011, the World Health Organization (WHO) declared the type of radiofrequency radiation from Cell Phones, Smart Meters and WIFI a Possible Carcinogen.

http://www.ntia.doc.gov/legacy/broadbandgrants/comments/6E05.pdf Sage and Carpenter 2009 published review of health studies.

http://electromagnetichealth.org/quotes-from-experts/ -Expressions of Concern from Scientists, Physicians, Health Policy Experts & Others regarding averse health effects of RF.

http://iemfa.org/index.php/publications - International EMF Alliance list of publications and position statements regarding RF and EMF health risks.

http://iemfa.org/index.php/appeals -International Doctors and Scientist Warnings against EMF.

http://www.ehhi.org/cellphones 2012 Environment & Human Health, Inc. The *Cell Phone Problem*; a group of American doctor's review of literature about the adverse health evidence of RF radiation.

http://www.ewg.org/cellphoneradiation/executivesummary Environmental Working Group, review of studies regarding adverse health effects of RF.