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February 28, 2012

Matthew E. Pollack, Esq.
Executive Clerk of the Supreme Judicial Court,
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Maine Supreme Judicial Court
205 Newbury Street, Room 139
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Re: *Ed Friedman, et al. v. Public Utilities Commission*
Docket No. PUC-11-532

Dear Matt:

Enclosed please for filing in the above-referenced action, please find the original and nine copies of Brief of Appellee Central Maine Power Company. Pursuant to Rule 12A(4), we are also enclosing a compact disk containing an electronic version of this document.

Thank you for your attention to this matter.

Very truly yours,

Catherine R. Connors

CRC/hjs

Enclosures

cc: Bruce A. McGlauflin, Esq.
Jordan Douglas McColman, Esq.
Kenneth W. Farber, Esq.

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PUC-11-532

ED FRIEDMAN, et al.

Plaintiffs-Appellants

v.

MAINE PUBLIC UTILITIES COMMISSION

and

CENTRAL MAINE POWER COMPANY

Defendants-Appellees

ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLEE CENTRAL MAINE POWER COMPANY

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Introduction

The issue presented is whether the Maine Public Utilities Commission (PUC or Commission) erred when it declined to open an investigation as to whether Central Maine Power Company (CMP)'s rates and services are unjust or unreasonable. These rates and services were approved by the PUC in final decisions issued in 2010 (approving the inclusion in rates of the cost of CMP's Advanced Metering Infrastructure (AMI) technology) and 2011 (setting an incremental charge for ratepayers who choose alternative metering).

The PUC's decision not to open another investigation based upon Appellants' complaint was reasonable given that, among other things, the issues Appellants sought to raise were addressed previously, and Appellants provided no additional information compelling re-visitation. Under 35-A M.R.S. § 1302, the Commission must seriously consider the complainants' arguments, which the PUC did.

If the Court nevertheless believes it appropriate to review the PUC's reasoning in previous unappealed decisions, the Commission concluded that, given the benefits from "smart meter" use; the lack of credible scientific evidence suggesting they are a health or safety risk due to their minimal radio frequency (RF) emissions; and, in any event, the fact that the Federal Communications Commission (FCC), not the PUC, sets RF standards, rate recovery for the meters would be granted, but customers could still opt for alternatives if they paid for their incremental costs. This was and remains a

more than reasonable ratemaking approach, within the broad discretion of the Commission to make.

With respect to the property, privacy and constitutional claims also previously raised, it was similarly more than reasonable for the Commission to reject these claims given, among other things, that ratepayer choice eliminates any involuntary entry onto private property.

The Commission's dismissal of Appellants' complaint should be affirmed.

STATEMENT OF FACTS

CMP presumes the PUC shall set forth the facts comprehensively in its Brief, and so only herein highlights a few salient points.

I. Both Congress and the Maine Legislature promote development of the smart grid using smart meters, because the meters are safe, economically beneficial, and good for the environment.

A. Smart grid technology and meters are statutorily promoted given their benefits.

The smart grid is "the integration of information and communications innovations and infrastructure with the electric system to enhance the efficiency, reliability and functioning of the system through smart grid functions." 35-A M.R.S. § 1343(1)(A). The Maine Legislature promotes the use of smart grid technology, finding that "smart grid functions will deliver electricity from suppliers to consumers using modern technology to increase reliability and reduce costs in a way that saves energy and to enable greater consumer choice." *Id.*, § 1343(2)(C).

Use of smart grid technology is also encouraged at the federal level. *See id.*, § 1343(1)(C) ("'Smart grid functions' means those functions that advance

the policy of the United States as specified in the federal Energy Independence and Security Act of 2007, Public Law 110-140, Section 1301, including functions that enable consumers to access information about and to manage and adjust their electricity consumption or to generate and store electricity and functions specified in Section 1306(d) of that Act."); *see also* 16 U.S.C. § 2642(f) ("It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated"); 16 U.S.C. § 2621(d).

Smart grid functions are facilitated by the use of Advanced Metering Infrastructure, or AMI, which are meters and related systems able to measure customer usage in detail, remotely read the meter, and communicate to and from the meter. (*See* Supplement of Legal Authorities or SLA at 1 n. 1; *see also id.* at 2: AMI is "an important technology that will ultimately reduce utility operational costs, improve customer service and provide customers with necessary tools to use electricity more efficiently and lower their electricity bills," citing *Order Approving Installation of AMI Technology*, Docket No. 2007-215(II) at 2 (MPUC July 28, 2009).)

A smart meter, which records and communicates the consumption of electric energy in frequent intervals, "is a good example of an enabling technology that makes it possible to extract value from two-way

communication in support of distributed technologies and consumer participation"). http://energy.gov/oe/downloads/smart-grid-introduction-0 p. 14. As the Commission explained, with smart meters, a utility can use time-differentiated rates, and customers can be provided with information that will let them, for example, "reduc[e] or shift[ ] their usage during high cost periods in response to market price signals." (SLA at 2, citing *Order Approving Installation of AMI Technology*, Docket No. 2007-215(II) at 2.) As one organization summarizes:

> Advanced metering infrastructure (AMI) includes new communications networks and database systems that will modernize our nation's electric grid and provide important benefits to electric companies and consumers. AMI involves two-way communications with "smart" meters and other energy management devices. This allows companies to respond more quickly to potential problems and to communicate real-time electricity prices. These price signals provide consumers with financial incentives to reduce their electricity usage.
>
> In addition, electric companies can send price signals to "smart" thermostats and "smart" appliances to alert them about an upcoming high-cost period. Based on consumer-determined responses, these smart devices can reduce consumer usage until the high-cost period has ended or shift that usage to lower-cost periods.
>
> AMI, along with new rate designs, will provide consumers with the ability to use electricity more efficiently and provide utilities with the ability to detect problems on their systems and operate them more efficiently—ultimately improving reliability and saving money for consumers.

http://www.eei.org/ourissues/electricitydistribution/Pages/AdvancedMetering.aspx

Given these benefits, public utilities, with the approval of their regulators, are rapidly switching over to this technology. (*See* SLA at 6:

"utilities around the country are installing smart grid technology"). *See also* http://www.eei.org/ourissues/electricitydistribution/Pages/AdvancedMetering.aspx (EEI Summary of State Regulatory Smart Grid Decisions (August 2011).)

B. Smart meters emit RF signals far below the highest level that the governing regulatory authority, the FCC, deems safe, as confirmed by the Maine Center for Disease Control.

RF is a form of non-ionizing radiation which does not directly damage living cells and is of limited health concern.[1] No studies accepted as reliable by the scientific and health communities have found a causal relationship between RF and any non-thermal effects on humans. (Exponent testimony at 16-17.)

The FCC, which has jurisdiction over the safety of wireless devices, followed a rigorous process in establishing standards in 1996 for safe levels of RF exposure to ensure that the public health is protected. *See* 47 U.S.C. §§ 301, 302(a); 47 C.F.R. §§ 1.1307, 1.1310 & 15.247. (*See also* Exponent testimony at 21-22 and *infra*, Argument, § II.) CMP's smart meters are certified to meet these FCC standards (Exponent testimony at 31), and public exposure

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[1] *See Boxer-Cook, Swinbourn, Foley-Ferguson, Wilkins and Tupper Requests for Commission Investigation*, Docket No. 2010-345 (MPUC), written testimony of L. Erdreich, W. Bailey & Y. Shklinikov at 13-15, contained in CMP's Response to Notice of Complaint, dated Nov. 16, 2010, available through http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_query (hereinafter referred to as Exponent testimony). CMP cites testimony from the previous decisions because the issue presented is whether the Commission must re-visit issues upon which it previously ruled, with the test focusing on whether the PUC seriously considered the claims raised by the petitioners. To answer that question, the Court could deem relevant what the Commission reviewed previously in rejecting the issues that Appellants seek to raise again. These materials, which remain on the Commission's web site, were, in any event, filed in public proceedings of which the Court can take judicial notice. *See Town of Norwood v. New England Power Co.*, 202 F.3d 408, 412 n.1 (1st Cir. 2000).

to RF from the meters will be a very small fraction of the applicable FCC standards even during peak exposure conditions. (*Id.* at 29-34: RF exposure from CMP's smart meters will be 1/7000 of the FCC standard at twelve inches from the smart meter outside of the house and 1/1,000,000 of the FCC standard at three feet from the back of the meter inside the house.)[2]

The safety of the levels of RF emitted from CMP's smart meter technology was not only established by the expert testimony that CMP submitted in previous proceedings, and by the FCC when it set RF standards far above the level emitted by CMP's smart meters, but also by the Maine Center for Disease Control (CDC). *Maine CDC Executive Summary of Review of Health Issues Related to Smart Meters* (Nov. 8, 2010), available at https://www.maine.gov/dhhs/boh/smart_meters.shtml.

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[2] This amount of RF emission is substantially less than that from use of cell phones or microwave ovens. (*See* Exponent testimony at 27; *see id.* at 32: "Even as close as 1 foot from the Smart Meter, a typical exposure is 600 times lower than exposure during a typical cell phone call with a cell phone held next to the head and 35 times lower than during a typical cordless phone call. This means that RF exposure using a cell phone or cordless phone is much greater than from a Smart Meter, even if a person were as close as 1 foot from a Smart Meter during the short time it is operating, which is unlikely. These comparisons are for outdoor exposure. Indoor exposure from the Smart Meter will be by far lower than the outdoor exposure because the radio signal will be significantly reduced (attenuated) as it passes through the walls of the building, and because of the much lower RF signal transmitted in the direction of the house.") Any stray RF emission from a neighboring meter would, in turn, be exponentially even more miniscule than this amount. (*See id.* at 35: "A Smart Meter that is at a distance of 2 feet produces 1/4 the exposure of a Smart Meter that is 1 foot away, and a Smart Meter at a distance of 10 feet, produces 1/100 the exposure of a Smart Meter that is 1 foot away. A meter that is only 100 feet away produces 1/10,000 the exposure of a Smart Meter that is 1 foot away.") These emissions are even less than the RF emissions produced by the earth or generated by the human body itself. (*See id.* at 32-33; *see* graph at 28-29.)

The CDC's Report was prepared at the request of the Public Advocate. (SLA 16.) The agency made a comprehensive review of the existing health studies and assessments by government agencies and various organizations, and concluded that there was no credible basis to conclude smart meters posed a health or safety risk:

> Our review of these agency assessments and studies do not indicate any consistent or convincing evidence to support a concern for health effects related to the use of radiofrequency in the range of frequencies and power used by smart meters. They also do not indicate an association of EMF exposure and symptoms that have been described as electromagnetic sensitivity.

(SLA 16, citing Report at 4.)

Finally, Appellants appear to misperceive the ability of CMP's smart meters to communicate information regarding home use for the purposes of their privacy arguments. CMP's meters will report residential customers' hourly usage (with capacity to record shorter intervals); confirm whether a customer is receiving power at a point in time; allow CMP to remotely disconnect and connect a customer; and allow CMP to remotely assess whether voltage to the home is in the proper range. The smart meters do not provide further details of consumer activities within the home – *e.g.*, what appliance is being used, where or when, or any other information identifying what a customer is doing in the home. Customers will have the option to install within the home, on a voluntary basis, a home area network device, which in the future may allow the customer to vary appliance usage (such as using a dryer at night) to take advantage of when during the day electricity prices are at their lowest. (*See* Docket No. 2010-345, Technical Conference dated

Jan. 24, 2011 at 107, 108, 179-185; Technical Conference dated Jan. 26, 2011 at 105; *see also Investigation into Central Maine Power Company AMI-Related Programs*, Docket No. 2010-132, Examiner's Report, MPUC, Feb. 12, 2012 (discussing proposed dynamic pricing programs for CMP's customers to take advantage of smart meters).[3]

II. The issues Appellants seek to raise were reviewed in previous final and unappealed PUC decisions, and Appellants filed no new information in their complaint that would compel another re-visitation.

A. Docket No. 2007-215(II) (the initial rate case): the PUC, after an extensive multi-year review and cost-benefit analysis, concluded that CMP may include the costs of switching to AMI technology in its rates, because the investment is prudent.

Consistent with Legislature's mandate, PUC review of CMP's use of smart meters began in a rate case.[4] (*See* SLA at 1.)

In its July 28, 2009 decision, the Commission approved CMP's rate request, subject to receipt of a substantial Department of Energy (DOE) grant.[5] The PUC found that AMI technology will reduce utility operational costs, improve customer services, and help customers use electricity more efficiently and lower their electricity bills. *Central Maine Power Company Request for*

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[3] These materials are also available on the PUC's virtual case file website, http://mpuc.informe.org/easyfile/easyweb.php?func_easyweb_query.

[4] 35-A M.R.S. §1343(8) ("**Cost recovery.** The commission shall, upon petition, permit a transmission and distribution utility to adjust its rates to recover the utility's prudently incurred incremental costs associated with implementing smart grid functions and associated infrastructure, technology and applications or otherwise taking reasonable actions consistent with the policies of this section, to the extent that the costs are not already reflected in the utility's rates and the adjustment does not result in rates that are unjust or unreasonable.").

[5] Consistent with federal promotion of smart grid technology, stimulus funds were made available for the switch to AMI. *See* the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

Alternative Rate Plan, Docket No. 2007-215(II), Order Approving Installation of AMI Technology (MPUC July 28, 2009) at 2. Preceding that Commission decision was a multi-year investigation in which the Public Advocate, representing CMP ratepayers, 35-A M.R.S. § 1702, along with many others, participated. *See* the 2007-215 docket, available through http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_query.

CMP was subsequently awarded the DOE grant, so that federal stimulus money is defraying $95.9 million[6] of the $165.9 million cost of installing the new meters. (*See* SLA at 2.)

Ratepayers thus obtain the benefit of a reduction in the costs to make the switch through federal money, as well as gain long-term savings from a more efficient grid. (*See* SLA at 6, noting the benefits of the switch, stating "Maine should not fall behind other states in the use of the latest technology to make electric usage more efficient" and "Maine cannot miss an opportunity to reduce its electricity rates".)

The PUC's decision in Docket No. 2007-215(II) became final February 25, 2010. No one appealed. Appellants do not appear now to be attempting to challenge the economic decision that "the operational and supply side savings over time will be substantially greater than the cost of the AMI investment" (SLA at 6), making smart meters a prudent utility investment. (*See* SLA at 2.)

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[6] Approximately $13.6 million from DOE is for half of the undepreciated value of CMP's electromechanical meters that have or will be replaced. CMP has received about $8.7 million of that amount for the meters replaced to date and estimates that it will receive an additional $4.9 million for the remaining undepreciated meters that are replaced over the next few months.

B. <u>Docket No. 2010-345 (Opt-Out)</u>: the PUC concluded that providing a mechanism to opt-out of the switch to smart meters is the appropriate response to individual ratepayer concerns, and rejected the argument that CMP lacks the legal right to install the meters on customer property, given, *inter alia*, the terms and conditions of CMP's contracts with its customers.

After its 2010 decision approving the switch to AMI technology, the PUC received complaints, pursuant to 35-A M.R.S. § 1302, from various ratepayers, citing various health, safety, privacy and constitutional concerns. In response, the Commission rejected general re-visitation, but opened a new docket to explore the appropriateness of opt-out alternatives, consolidated Docket No. 2010-345. (*See* SLA 13, 40, 46.)

After further review and consideration, the PUC approved two metering alternatives for residential and small commercial ratepayers who did not want to make the switch. (SLA 40, 46.) These ratepayers could either keep their old electro-mechanical meters, or have a standard wireless smart meter installed, with the internal network interface card operating in receive-only mode. (SLA 41.)[7] For the first option, ratepayers paid a one-time charge of $40.00 and a recurring monthly charge of $12.00. For the second option, there was an initial charge of $20.00 and a recurring monthly charge of $10.50. (SLA 43.) These charges are based on the actual costs associated with the options. (*See*

[7] CMP uses the past tense here because, as of the date of this filing, 97.4% of the meters have been installed, at a total cost of approximately $150 million (including the stimulus funds). Installation shall be complete by June 30, 2012. Approximately 1.2% of CMP's residential customers have chosen to opt-out.

SLA 57).[8] The Public Advocate again participated. (SLA 53.) There is no claim in this appeal that the incremental charges set by the Commission for these alternatives do not reflect CMP's actual cost differential in installing, operating and servicing the alternatives.[9]

In arriving at this approach, the Commission's analysis was as follows.

First, one set of complainants (Foley-Ferguson) argued that the PUC had not properly considered in Docket No. 2007-215(II) the relative costs and benefits of the switch to the new technology when taking into account security, interference and health issues. (SLA 28.) The Commission rejected this argument, noting that the original AMI proceeding "was an extensive, several year review" of the costs and benefits of the switch. (SLA 29.) The Commission noted that the particular technology chosen was identified through a competitive bid process, which the PUC concluded was the appropriate mechanism "to determine the precise design of an AMI system that meets the desired operational requirements in the most cost effective manner." (SLA 29.)

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[8] Ratepayers also always retain the ability to relocate their meters, smart or otherwise, to different locations on their property, paying re-location costs, but no recurring charges. (SLA 57.)

[9] Instead, Appellants argue that it is unfair to charge them those additional charges attributable to the operability of mesh technology. (*See* Appellant Br. at 37.) As the Commission noted in its decision in Docket No. 2010-345, "the primary incremental costs associated with the opt-out options are for the meter readers and additional network devices (e.g., repeaters) needed to avoid gaps in the mesh network that would otherwise exist due to there being fewer standard smart meters receiving and transmitting data." (SLA 59 n. 14.) Given that these incremental costs are a direct consequence of retaining, maintaining and operating the old electro-mechanical meters, it was reasonable for the PUC to allocate those costs to those choosing to opt out. (*See* SLA at 59.) In this opt-out order (SLA 46), the Commission adopted the incremental pricing recommended by the Commission staff. (See Attachment 1 to the Bench Analysis, Docket No. 2010-345 (April 21, 2001), available at http://mpuc.informe.org/easyfile/easyweb.php?func_easyweb_query.

No one had claimed that the bid process was deficient or flawed, and thus there was "no basis to re-open and reconsider the original AMI approval proceeding." (*Id.*)

With respect to health and safety concerns raised by this and various other complainants, the Commission reasoned as follows. It cited the CDC's report noting the lack of any credible scientific evidence of a health or safety risk, and ruled that any additional investigation by the Commission "would not advance the state of scientific or medical knowledge on the issue." (SLA 30; *see also* SLA 16, 18.) Additionally, the PUC recognized that the FCC, not the Commission, sets RF standards. (SLA 38: "The Commission ... **does not have the authority** or expertise to make determinations regarding RF health implications." (emphasis supplied; *see also* SLA 16, 18, 29.)

In response to a motion to reconsider asserted in July 2011, after issuance of the CDC report, the Commission rejected the claim that the new material cited – a World Health Organization (WHO) RF reclassification – warranted re-open the issue, noting that WHO's conclusion was specific to users of wireless telephones, which expose users to RF potentially much higher than from smart meters. (*See* SLA 68.) The PUC also repeated, again, "The FCC is the entity that should address RF-related emission standards." (SLA 69.)

Thus, the Commission rejected a global re-visitation of the use of smart meters based on health and safety concerns because the FCC is the body in charge of analyzing RF safety issues; the levels used in CMP's smart meters are

far below the standards the FCC has ruled could raise any health or safety concern; and no material had been provided additional to that reviewed by the CDC to suggest a scientific basis for concluding there is in fact any health or safety concern.

With respect to complaints that CMP lacked the legal right to enter private property to replace the meters or via RF waves (*e.g.*, SLA 22), the PUC rejected these claims on its merits, noting, *inter alia*, that pursuant to 35-A M.R.S. § 304, all public utilities must file their term and conditions with the PUC; and that under its terms and conditions, CMP has the right to select the type and make of its metering equipment, and may change or alter that equipment. (SLA 24, citing CMP Terms and Conditions §§ 10.4, 12.1 (SLA 84, 86).) The PUC stated that CMP's right to access the property of its customers was clear, and "[i]ndeed, customers agree to allow this access by virtue of their agreement to purchase service from CMP." (SLA 24; *see id.* at 36: "customers give consent for the installation of electric meters by virtue of their acceptance of electricity service.")

Despite the fact that the costs and benefits of AMI technology had been previously reviewed in Docket No. 2007-215(II) and no new information had been provided to raise any credible health or safety issue (which was an issue for the FCC, not the PUC, in any event), and despite the fact that no use of smart meters was compulsory since the contractual ratepayer-utility relationship is voluntary, the Commission nevertheless, while rejecting a general re-visitation of the use of smart meters as CMP's standard equipment,

ruled that individual ratepayers should have the opportunity to opt-out of the use of these meters. The Commission reasoned that, because some individual ratepayers had expressed sincere health and safety concerns, however unsubstantiated or within the bailiwick of the FCC, not the PUC, opt-out alternatives were appropriate, because a public utility should be responsive to such concerns if there is a technical and economically feasible mechanism to do so. (SLA 57.)

Finally, in response to arguments that the incremental costs of the op-out alternatives should be borne by ratepayers as a whole and not those choosing the opt-out, the PUC noted that "[i]t has been the practice in Maine that customers that desire alternatives to the utility's standard meters pay the incremental cost of the alternative metering." (SLA 59, citing 65 CMR 407, ch. 322, § 5(A)(2).) This is also the general rule in ratemaking – customers who request non-standard services pay the incremental costs. (SLA 59.) "In our view it would be inconsistent with ratemaking principles and basically inequitable for CMP to recover the costs caused by an individual customer's decision to opt-out of receiving a standard wireless meter from its general body of ratepayers." (*Id.*)

No one appealed the Commission's final decision in Docket No. 2010-345 or its related consolidated dockets.

C. Docket No. 2011-262 (the decision on appeal): The PUC dismisses Appellants' repetitive complaint.

Instead of participating in Docket No. 2007-215(II), or Docket No. 2010-345, or seeking to appeal these or their associated dockets, Appellants decided to file another Section 1302 complaint. (App.10.) Appellants requested the Commission to open an investigation to, *inter alia,* review property right issues they felt had not been satisfactorily addressed in Docket No. 2010-345. They also raised the health issue again and accused CMP and the Commission of extortion in violation of the Hobbs Act. (App. 4, 12.)

The PUC rejected the complaint because all the arguments raised by Appellants had been asserted and addressed in the previous proceedings and unappealed rulings, and Appellants offered no information to warrant the opening of an investigation to reconsider the Commission's previous conclusions. (App. 5.) Because CMP was taking the opt-out alternative steps that the Commission had ruled appropriate in the previous decisions, the Complaint was dismissed. (App. 6.) *See* 35-A M.R.S. § 1302(2) ("if the commission is satisfied that the utility has taken adequate steps to remove the cause of the complaint or that the complaint is without merit, the complaint may be dismissed.")

ARGUMENT

Summary

Nothing in 35-A M.R.S. § 1302 requires the Commission, once it has ruled, to continually re-visit those rulings. The PUC need only promptly and seriously consider issues raised in a Section 1302 complaint, and if, as here, a

complainant provides no new basis for re-visiting a previous ruling, the PUC need not re-visit that ruling.

In any event, the Commission's reasoning in the previous rulings which Appellants seek to challenge here was more than reasonable. Given the benefits and legislative promotion of smart grid and meter technology, and in the absence of any credible evidence of a health or safety concern, as reflected in, *e.g.*, the CDC's Report, and given that the FCC has exclusive authority over RF standards in any event and has deemed smart meters safe, it was wholly within the PUC's authority to permit CMP to use smart meters as its standard equipment, but still allow ratepayers to choose an alternative if they pay for the alternative's cost. As the Commission also reasoned, this ability to opt-out of the use of smart meters, along with the voluntary nature of the utility-ratepayer relationship as a threshold matter, also eliminates any issue as to intrusion upon privacy or property rights, constitutional or otherwise, from the installation of smart meters.

Because the Commission met its duty under Section 1302, its dismissal of Appellants' complaint should be sustained. If, however, the Court did find a basis for requiring further Commission review of Appellants' complaint, no stay pending that review would be warranted given, *inter alia*, the fact that the meters have already been installed.

I. Section 1302 does not require endless re-visitation of issues already addressed by the Commission in other, final and unappealed dockets.

CMP relies upon the arguments that it anticipates the Commission will make in its Brief, and hence, to avoid anticipated repetition, will not discuss, *e.g.*, the burden of proof under Section 1302, the standard of review, and how individuals cannot repeatedly resuscitate claims and arguments in which a full and fair opportunity to be heard has previously been provided simply by filing another repetitive complaint. The PUC's decision on appeal, read in light of its previous examinations of the issues raised in Appellant's petition, demonstrates that the Commission "promptly and seriously consider[ed]" their complaints, which is all Section 1302 requires. *See Holmquist v. PUC*, 637 A.2d 852, 853 (Me. 1994).

Every claim that Appellants seek to assert here was made and addressed in previous final and unappealed dockets. (*E.g.*, the argument that the PUC had failed to make a determination regarding whether the meters were "safe" under 35-A M.R.S. §§ 101 and 301, was addressed, *inter alia*, at SLA 38.) Appellants' complaint, filed in July 29, 2011, raised no new credible authority on health and safety issues, as reflected in, *inter alia*, the Commission's order denying reconsideration in Docket No. 2010-345, dated August 24, 2011. (SLA 64.) There was and is no such authority, and, in any event, the only duty of the Commission under Section 1302 is to consider a complainant's arguments seriously, which it did, not only in its decision rejecting Appellants' complaint,

but the many decisions in other dockets preceding its rejection of that complaint.

Not only does nothing in Section 1302 countenance endless, repetitive claims, and not only could the Commission not function absent closure, but the PUC's interpretation of Section 1302, to which the Court defers, allowing it to reject complaints if they do not raise new issues or information, is also fully consistent with the principles supporting the Court's analysis of res judicata and offensive collateral estoppel doctrines.[10]

The inquiry can thus end here, and the instant appeal should be rejected.

If the Court nevertheless believes that it would profit by additional discussion of the legitimacy of the Commission's previous rulings, CMP hereinafter supplements what it anticipates the PUC's arguments to provide fuller explanations regarding: the exclusivity of the FCC's authority over RF

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[10] The Court has repeatedly rejected collateral attacks on final administrative decisions. *E.g., Wright v. Town of Kennebunkport,* 1998 ME 184, ¶ 6, 715 A.2d 162, 164-5. *See generally City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 336-37 (1958). With respect to collateral estoppel, even if an individual has not participated in a decision, the conclusions made in that decision will estop him from re-litigating them, if the parties that did appear had the same interests to raise the same arguments as he does. *See, e.g. Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶¶ 17-23, 989 A.2d 733, 749. Here, not only did multiple other ratepayers with the same concerns participate in the previous proceedings, but so did the Public Advocate, who by statute represents consumer interests. Nor is there any indication that Appellants were prevented in any way from participating in the other final and unappealed dockets. *See Beal,* 2010 ME 20, ¶14, 939 A.2d at 739 (the "purpose of collateral estoppel is to prevent harassing and repetitious litigation, to avoid inconsistent holdings which lead to further litigation, and to give sanctity and finality to judgments") (citations omitted).

issues; the lack of merit of Appellants' property and constitutional claims; and the lack of viability of any claim for a stay.

II. The PUC is preempted from deviating from FCC conclusions as to the safety of RF emissions from smart meters.

FCC regulations specify the limits on the permissible RF exposure to ensure public safety. *See* 47 C.F.R. §§ 1.1307, 1.1310 & 15.247. These standards – which, as noted previously, CMP's smart meters not only meet, but their emissions are far below any such limit – were promulgated pursuant to the FCC's exclusive authority to set RF safety standards. Thus the PUC could not enter this field, even if it had the expertise to, and even if there were any basis to challenge the FCC limits, which there is not.[11]

The Communications Act of 1934 ("Act"), 47 U.S.C. § 301, gives the FCC authority to license the use of radio frequencies, prohibits any "transmission of energy or communications or signals by radio" without FCC authorization, and states that the purpose of these provisions is to "maintain the control of the

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[11] Attached hereto as Addendum 1 is a copy of an FCC letter explaining how it regulates smart meters and why it deems them safe. This letter was originally sent to a member of Congress and is found on the CDC website at http://www.maine.gov/dhhs/mecdc/environmental-health/documents/smart-meter-fcc-letter-august-2010.pdf. The letter was also filed with the California Public Utilities Commission in *Application of Pacific Gas and Electric Co. for Approval of Modifications to Its Smart Meter Program and Increased Revenue Requirements to Recover the Costs of Modifications*, Application 11-013-14, as Attachment A to Pacific Gas & Electric Company's Response to Administrative Law Judge's October 18, 2011 Ruling Directing It to File Clarifying Radio Frequency Information. *See Decision Modifying Pacific Gas and Electric Company's Smart Meter Program to Include an Opt-out Option*, Application 11-013-13 (CPUC Feb. 9, 2012) (hereinafter CPUC Decision) at 12-13 (citing FCC explanation regarding the safety of smart meters and the research upon which its conclusions are based). In the CPUC Decision, the California Public Utilities Commission followed the same course as did the PUC here: it approved use of smart meters, with an opt-out option for ratepayers, charged for the alternative. *See id., available at* www.cpuc.ca.gov/puc/documents.

United States over all the channels of radio transmission[.]" 47 U.S.C. § 302a(a)(1) specifically authorizes the FCC to make regulations "governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications[.]"

Although these provisions standing alone would strongly indicate an intent by Congress to occupy the field, this intent is confirmed in 47 U.S.C. § 302a(f), which expressly authorizes states and localities to adopt very limited and specific laws concerning radio interference, and by implication preempts them from adopting any such laws not within the scope of that authorization.

Federal courts construing these provisions have held uniformly that Congress has preempted the field with respect to regulation of radio transmission and particularly with respect to claims of harm caused by emission of radio energy. In *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320-321 (2d Cir. 2000), the Second Circuit reviewed the statutory language and legislative history in detail, and concluded that the grant of jurisdiction to the FCC "was intended to be exclusive and to preempt local regulation." Among other things, the court relied on an explicit and unambiguous statement of preemptive intent in the legislative history:

> The House Conference Report states with respect to enacting section 302a, which empowers the FCC to set manufacturing standards for home electronic equipment to minimize the RF interference effects of signals from nearby transmitters:
>
> > The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such

> matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.
>
> H.R. Conf. Rep. No. 97-765, at 33 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2277. This statement from the legislative history is consistent with our inference of pre-emption from Congress's comprehensive legislation in the field and Congress's explicit delegation of authority to the FCC to regulate the instrumentalities of radio broadcasting throughout the United States.

204 F.3d at 320-321.

The Third, Sixth, and Tenth Circuits have all reached similar conclusions. *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1192 (10th Cir. 1999) (Congress intended federal regulation of RF issues to be so pervasive as to occupy the field); *Farina v. Nokia, Inc.*, 625 F.3d 97, 134 (3d Cir. 2010) (state tort claim related to mobile phone RF emissions conflict preempted by FCC authority to regulate RF safety); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997-998 (6th Cir. 1994) (federal law precludes common-law nuisance suit under state law alleging that radio broadcaster's operations interfered with home electronics).[12]

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[12] The Fourth Circuit has found that state law tort claims as to the safety of cell phones against a manufacturer are not preempted. *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). To the extent its analysis were relevant to the preemption issue in this AMI context, it is not only contrary to the case authority cited above, but the decision of the PUC to accept the alternate view is one to which this Court gives great deference. *See S.D. Warren v. Board of Environmental Protection*, 2005 ME 27, ¶ 5, 868 A.2d 210, 213-4, *aff'd on alternate grounds*, 547 U.S. 370 (2006).

Even if, moreover, the PUC were not preempted from examining health and safety issues, it was still entirely reasonable for the Commission to do what it did here: defer to the expertise of the FCC, which finds no safety issues, but nevertheless provide an opt-out option for ratepayers not convinced by the FCC and all credible scientific studies.

Contrary to Appellants' argument, the PUC has no obligation independently to make RF health and safety findings. Indeed, when an agency reviews arguments requiring expert input, it is per force deferring to an expert's opinions. When the PUC defers to the FCC (and the CDC and the expert testimony filed by CMP in the previous dockets), it is determining that they are the experts, and that their conclusions as to health and safety justify an approach that permits installation of smart meters as standard equipment, but still allows for opt-outs to address any possible, as-yet undiscovered health and safety concern.

Given ratepayer ability to opt-out, the question presented here is not a matter of health and safety at all, but rather cost allocation. There is nothing in Maine law that precludes the Commission from allocating the actual costs of using alternate equipment to ratepayers who choose that equipment, whether they do so based on unsupported but genuine health and safety concerns, or for any other reason. (*See* CPUC Decision at 15-16.) There is no authority anywhere that stands for the proposition that a public utility commission cannot take this approach, and Appellants cite none. There is nothing wrong with having a customer pay the cost of serving that customer.

III. An opt-out eliminates any property or constitutional concern.

There are a host of flaws in Appellants' argument that the entry of smart meters and the RF signals from those meters conflicts with their privacy and property rights and thus raises questions regarding the Fourth, Fifth, Fourteenth Amendment and common law protections against trespass. The fundamental and most obvious problem with their argument is that the entry onto their property is voluntary.

Indeed, a ratepayer's consent is two-fold. First, as the Commission noted in its decisions, no ratepayer is forced to take electricity from CMP, and the ratepayer who does so agrees to CMP's service terms and conditions. Second, under the opt-out terms, no one is forced to have smart meters installed on their property in order to continue to receive service; they simply have to pay the costs for these alternatives. The obligation to pay the cost of receiving an agreed-upon service is the violation of no property right, and Appellants cite no authority for this novel proposition.

Appellants try to shoehorn their claim into the facts presented in *Loretto v. Tele-prompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There, the Supreme Court held that the compelled installation of a cable box onto private property was a taking in violation of the Just Compensation Clause, because the installation constituted a permanent physical occupation of the owner's property. *Id.* at 426. There, however, the occupation was against the owner's will, with no ability to choose not to have the box installed. The Supreme

Court explained the importance of this distinction in, among other decisions, *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987).

In *Florida Power*, a utility challenged an FCC action under the federal Pole Attachments Act, setting the rates utilities could charge when other entities sought to co-locate upon their poles. The Supreme Court held that there was nothing in either the Act or the FCC regulation that constituted a physical taking, because there was no compelled occupation:

> while the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id. at 251 (emphasis in original).

Because of the voluntary nature of the installation, the question becomes not one involving a physical taking, but rather whether the PUC's decision imposing the cost of the opt-out exceeds the regulator's authority. *See id.* at 252 ("'So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity'."), citing *Loretto*, 458 U.S. 440 (emphasis added in *Florida Power*).

Here, Appellants do not even argue that requiring a property owner to pay for the actual costs of their meter constitutes a regulatory taking, as well they could not under this test. *See Florida Power*, 480 U.S. at 254 ("Appellees

have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost ... is confiscatory").[13]

In sum, as the Court in *Florida Power* stated: "This element of required acquiescence is at the heart of the concept of occupation." 480 U.S. at 252. Decisions subsequent to *Florida Power* only underscore this point. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Because the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a *per se* taking under *Loretto*"); *Pennell v. San Jose,* 485 U.S. 1, 12, n. 6 (1988).

Appellants fare no better when they argue that the meters violate their rights under the Fourth Amendment. It is black letter law that consent negates any claim of an unconstitutional search or seizure. *See State v. Nadeau*, 2010 ME 71, ¶ 17, 1 A.3d 445, 454 ("well-settled"), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). While Appellants assert, conclusorily, that any consent could not be voluntary in this context, they provide no explanation for their position, because there is none. Involuntariness requires duress or coercion. *State v. Ullring*, 1999 ME 183, ¶ 10, 741 A.2d 1065, 1067. Having to

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[13] While at one point in their brief Appellants use the term "confiscatory" (p. 44), they never argue or even explain this reference, which is not used in their complaint to the PUC and is thus waived. (App. 8.) In any event, absent compulsion to purchase a product, there can be no taking, regulatory or otherwise, for imposing a pecuniary charge, as here. *See Maine Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 98 (Me. 1995), citing *Wellman v. Department of Human Servs.*, 574 A.2d 879, 885 (Me.1990) ("In order for there to be a taking ... there must be a physical invasion of private property or a substantial impairment of its use and enjoyment. The concept of a taking does not apply to an overpayment of money to the state by a citizen..." (citations omitted)).

pay the costs for the service one receives is not coercive. Indeed, even the choice between consent and prison does not render consent involuntary. *See id., citing In re York,* 9 Cal.4th 1133, 40 Cal.Rptr.2d 308, 892 P.2d 804, 814 (1995) ("Although it may be true that a defendant who is faced with the choice of agreeing to the challenged conditions or remaining incarcerated has a considerable incentive to agree to the conditions, that circumstance, alone, does not render the consent coerced or involuntary.")

The same analysis applies to Petitioners' allusions to common law rights, such as those against trespass. *See Shaw v. Mussey,* 48 Me. 247 (1860) ("The administrator is clothed with the rights of, and represents, his intestate. The latter, while living, could not have maintained an action of trespass against the defendant, because he consented to the entry and possession. *Volenti non fit injuria.*")[14]

Thus, while there are many other reasons why these claims lack merit (*e.g.*, even Appellants admit (p. 31) that the Commission is "not a common law court" and is not tasked to decision whether action constitute trespass), the voluntary nature of the utility-ratepayer relationship, combined with the additional voluntariness in choosing not to opt-out, defeats any constitutional or common law privacy or property rights concerns. Properly framed, the question is whether the Commission may approve rates that charge the additional costs of alternate meters on the customers choosing to use those

[14] Accordingly, there is no indication of any consent in the Georgia decision Appellants cite in support of their trespass argument. *See Savannah Elec. & Power Co. v. Horton,* 44 Ga.App. 578, 162 S.E. 299 (1932).

meters. The answer is yes. *See e.g., New England Telephone & Telegraph Co. v. PUC*, 449 A.2d 272, 279 (Me. 1982) ("The Court defers to the Commission's expert judgment in choosing among various ratemaking techniques or methodologies.")[15]

IV. If there were a remand, a stay would be inappropriate.

Finally, if the Court did conclude that the Commission erred such that a remand were required, Appellants' argument that the Court should halt the ongoing the installation of smart meters lacks merit.

First, as noted *supra* at n. 7, the installation of the smart meters is almost complete, and will be completed by the time this appeal is resolved, in the ordinary course. Pursuant to 35-A M.R.S. § 1320(1) and (7), the Legislature has deemed that there shall be no stay of PUC action during an appeal of a final Commission decision. If Section 1320(7) were read to allow an

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[15] The fact that the PUC is simply approving a rate request to include charges for CMP's meters also shows that there is no state action implicating constitutional rights. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

While federal and state law promotes smart meters, the PUC did not order CMP to use them. Rather, CMP chose this equipment, then proposed that their cost be allowed in its rates. *Cf. Staples v. Bangor Hydro Electric Co.*, 561 A.2d 499, 501 (Me. 1989) (utility decision to terminate employee not state action, citing *Jackson*).

appellant to seek a stay pending appeal from the Chief Justice, Appellants here did not. Nor did they seek to expedite this matter.

In any event, the question posed by Appellants is whether the Commission erred in not opening an investigation. The proper remedy, should the appeal be granted, would be to open such an investigation consistent with any directions by the Court in its decision. To order affirmative injunctive relief pending Commission review would not only be unprecedented, but lack statutory authority. *Cf.* 5 M.R.S. § 11007(4) (court may affirm, remand, reverse or modify administrative decisions).

CONCLUSION

For the reasons given above and in the Brief submitted by the Public Utilities Commission, the Commission's ruling dismissing Appellants' petition pursuant to 35-A M.R.S. § 1320 should be sustained.

DATED: February 28, 2012

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CERTIFICATE OF SERVICE

I, Catherine R. Connors, Esq., hereby certify that one copy of this Brief of Appellee Central Maine Power Company was served upon counsel at the address set forth below by email and two copies by first class mail, postage-prepaid on February 28, 2012:

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August 6, 2010

Ms. Cindy Sage
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Dear Ms. Sage:

Thank you for your letter of March 15, 2010, in which you request that we review compliance with FCC radiofrequency (RF) exposure limits for the "Smart Meter" technology being implemented by utilities across the country. In particular, you expressed concern about multiple adjacent Smart Meter installations used to service multiple dwellings such as condominiums, and the effect of increased data traffic on exposure from collector or controller units.

The FCC Equipment Authorization (EA) program in the Office of Engineering and Technology has taken a very conservative approach to RF exposure compliance for low-power network devices such as Wi-Fi base stations and Smart Meter transceivers. For such devices that are not expected to be used close to the body, it is generally unnecessary to perform routine specific absorption rate (SAR) evaluations as field strength or power density is a sufficient and appropriate measure of exposure. The maximum field strength at a distance can be derived from the effective radiated power (ERP). Also, FCC field strength limits, like the SAR limits, are time-averaged. Accordingly, for devices that will not be used within 20 centimeters of the body, we rely on the "source-based" time-averaged ERP and require that it be less than our specified values of 1.5 or 3 watts, depending on frequency,[1] in order to ensure compliance with our exposure limits. This does not imply that FCC exposure limits will be exceeded at distances less than 20 cm, but only that detailed evaluation of the SAR is not required if the 20 cm separation distance can be maintained.

It is useful in considering this issue to recognize that the power level specified on the Grants of Equipment Authorization issued by the EA program is the peak power as this is the power relevant to interference concerns. For exposure evaluations, however, the average power is relevant, which is determined by taking into account how often these devices will transmit. Since the purpose of these devices is to provide very infrequent information they transmit in occasional bursts. Thus, for exposure purposes the relevant power is maximum time-averaged power that takes into account the burst nature of transmission, and based on the typical maximum time-averaged transmitter power for many of these devices, they would generally be compliant with the local SAR limit even if held directly against the body.

With respect to multiple adjacent Smart Meter installations, since the antennas for each device are mounted individually on each utility meter, the separation distance from people for most of the transmitting antennas is relatively large compared to 20 cm and the

[1] See Section 2.1091(c) of the FCC rules.

meters' contributions to the total potential exposure at any location are small, as only the nearest few transmitters can add meaningfully to the total. Further, as a practical design matter, when several of these meters are placed in a cluster, they have to communicate with a single controller. In order to ensure that the controller receives the information properly, only one transmitter can communicate with the controller at a time, eliminating the potential for exposure to multiple signals at the same time.

The general issue of cumulative exposure from an arbitrary group of transmitter installations or from all transmitters distributed in the environment can appear to be complex, but as discussed, the need for orderly communications requires that a few sources normally dominate. In addition, the exponential decrease in signal strength over distance and additional signal losses due to non line-of-sight conditions for distant sources ensures that only the contributions of nearby transmitters are significant.

In summary, compliance for Smart Meters is determined according to the operating and installation requirements of each type of meter during equipment certification, and is based on the maximum transmission duty cycle for the device, including relay functions. Necessary installation requirements to maintain compliance for each meter are specified in the Grant. Irrespective of duty cycle, based on the practical separation distance and the need for orderly communications among several devices, even multiple units or "banks" of meters in the same location will be compliant with the public exposure limits. These conditions for compliance are required to be met before a Grant can be issued from the EA program and auditing and review of Grants is a routine function of the FCC laboratory.

With respect to interference to medical devices, which you also raise in your letter, Smart Meters typically operate under Part 15 of the FCC Rules. Those rules specify power limitations to avoid interference. The Smart Meter wireless technologies used today are not significantly different from Wi-Fi devices, cell phones and other typical consumer products. Certain medical devices may need specific precautions in many other environments; these are generally considered during FDA approval of the individual medical device.

I hope that this information will be helpful. In addition, some technical information on the subject has been developed by the Electric Power Research Institute (EPRI) and we have enclosed that information for reference.

Please know that the FCC is continually monitoring the issue of RF exposure and related health and safety concerns, both in the general terms of the continuing propriety of its regulations, and in individual cases where substantive concerns are raised.

Sincerely,

Julius P. Knapp
Chief
Office of Engineering and Technology