

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Docket No. CUM-11-532

ED FRIEDMAN, et al,

Appellants

v.

MAINE PUBLIC UTILITIES COMMISSION

and

CENTRAL MAINE POWER COMPANY

Appellees

MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

**Bruce A. McGlaflin, Esquire
Petrucelli, Martin & Haddow, LLP
2 Monument Square, Ste 900, PO Box 17555
Portland, Maine 04112-8555
(207) 775-0200
Attorneys for Appellants**

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-11-532

ED FRIEDMAN, et al,)	
)	
Appellants)	
v.)	
)	APPELLANTS' MOTION TO
MAINE PUBLIC UTILITIES)	FOR RECONSIDERATION
COMMISSION,)	AND/OR CLARIFICATION
)	
Appellee)	

This motion is brought in accordance with M.R. App. 14 (b) seeking reconsideration and/or clarification of the Court's July, 12, 2012 decision ("Decision"). The motion seeks a clarification and/or reconsideration regarding the inclusion of privacy and security issues on remand. And, the motion also seeks reconsideration of the Court's conclusion that Appellants' request for a stay is moot.

I. Privacy and security issues.

The Decision directs the Commission to address on remand those issues that the Commission expressly declined to address and decide in the Opt-Out proceedings. Accordingly, the Decision expressly states that health and safety must be addressed on remand. It does not, however, expressly state that privacy and security must be addressed on remand, although the Commission

expressly declined to address these additional issues, as revealed by the Commission orders quoted in the Decision.

In initiating this investigation, we make no determination on the merits of health, safety, *privacy or security* concerns, the adequacy of existing studies or which federal or state agency has the jurisdiction to make these determinations in this investigation will not include such matters. *Decision* at 10 (*quoting* PUC January 7 notice of investigation, at 7)(emphasis added)

the Commission ultimately reiterated its earlier statement “that it is making no determination on the merits of health, safety, *privacy or security* concerns with respect to wireless smart meters.” *Decision* at 10-11 (*quoting* Opt-Out Order Part II, at 6-7)(emphasis added).

Because the Commission expressly declined to resolve privacy and security issues in the Opt-Out Orders, Appellants infer that these issues must be addressed as well on remand. Appellees will argue to the contrary because the Decision does not expressly require consideration of these issues. Appellants request clarification to ensure that the parties and the Commission have a full and clear understanding of the scope of the issues to be addressed in the Commission’s proceedings on remand.

The Decision makes no mention of the security concerns. This could be because security concerns logically fall under the rubric of safety. The Court could have treated security as a safety concern, and therefore intended security issues to be addressed on remand. Appellees, however, are likely to argue that security should be considered a privacy concern, not a safety concern, because

that is the way Appellants categorized it in their briefs.¹ Because the Decision appears to conclude that “privacy” issues, as they relate to common law trespass and Fourth Amendment issues, were resolved, Appellees, will argue that security issues were resolved as well.

Appellants believe the “privacy” issues referred to by the Court as being resolved with trespass and Fourth Amendment issues, *Decision* at 12-14, are separate and distinct from the privacy and security issues the Commission expressly declined to address and must now address on remand. Not all privacy or security issues necessarily implicate or relate to common law trespass or the Fourth Amendment. The privacy and security issues raised in the Complaint stand on separate ground as factors that must be considered by the Commission in its administrative review of smart meter technology.

Health, safety, privacy and security are all risk factors associated with smart meter technology. Appellants and other CMP customers have legitimate concerns about the risk of adverse health and safety effects of smart meters. They also have legitimate concerns about the risk of their privacy being invaded and their security being compromised if private smart meter data are obtained by third parties through cyber-attacks or disclosures, inadvertent or otherwise. These concerns are independent of trespass and constitutional claims. The Complaint in this case raised all four issues (health, safety, privacy and

¹ Appellants stated in their main brief that “security” concerns pertain to the privacy-related risks of cyber-attacks, hacking, identity theft, and criminal monitoring of vacant homes, and that all references to “privacy” concerns in Appellants’ brief included “security” concerns. *Blue Brief* at 5, n.5.

security) as grounds for determining smart meters are not a reasonable or safe utility service or facility, and that the opt-out fees are unreasonable and/or discriminatory.

To the extent that common law trespass and the Fourth Amendment claims were “resolved” by the Commission, they did not resolve the general privacy and security risks associated with smart meter technology. The Commission explicitly treats these issues separately in its Opt-Out Orders and in its Dismissal² in this case. Appellants’ briefs address these issues separately arguing that the Commission did not address the issues in the Opt-Out proceedings. *Blue Brief* at 27-29. Allegations of common law trespass present a separate question about the scope of CMP’s rights of access to attach smart meters to customers’ homes and about the physical intrusion into customers’ homes with radio frequency waves. As Appellants readily conceded in their brief, the Commission explicitly addressed trespass, albeit erroneously, by concluding that CMP has certain access rights under its Terms and Conditions. The Commission addressed the Fourth Amendment allegations simply by determining it did not have jurisdiction for that question. Neither conclusion addressed or resolved the general concerns about privacy and security risks posed by smart meter technology.

² Although the Dismissal addresses privacy and trespass issues in the same paragraph, it refers to separate Opt-Out Orders where those issues were addressed separately, stating that trespass was “addressed” in the February and April Orders while privacy was “dismissed as without merit” in the January Order; this being where it was dismissed along with health and safety. *App.* at 5 (*Dismissal* at 4).

Even if it could be ultimately determined that CMP has sufficient rights of access to install smart meters and that their installation and use is not an unconstitutional search,³ the question remains whether smart meters pose unreasonable health, safety, privacy or security risks; *i.e.* whether any or all of these risks are sufficiently substantial to conclude that smart meters are unreasonable or discriminatory utility facilities and/or services. Some customers oppose the installation of smart meters because they fear for their health and safety. Others oppose installation because they want to protect their privacy and their security and they fear the associated risks of both. All four issues were legitimately alleged in the Complaint and have not been reviewed or addressed by the Commission. Just as the Commission was in no position to determine whether opt-out fees are reasonable and non-discriminatory, without assessing the safety and health risks, it was in no position to do so without assessing the privacy and security risks.

The Court concluded that the Commission did not resolve the issues of health and safety, “[b]ecause the commission explicitly declined to make determinations on the merits of the health and safety concerns.” *Decision* at p.11. The same analysis and conclusion apply equally to the privacy and security issues, although they may not have been expressly addressed in the *Decision* due to confusion over naming and categorizing these issues. The Commission’s explicit refusal to address or decide an issue, whether it be

³ Neither question has been determined by a court of law.

safety or privacy, health or security, necessitates the conclusion that the issue was not resolved and must be investigated on remand.

II. Request for a stay.

The Decision concludes by stating that Appellants' request for a stay was moot based on the determination that the constitutional claims were properly dismissed by the Commission. Appellants' stay request, however, was not focused solely on constitutional claims. In their briefs, Appellants argued that "a remand without a stay will provide an inadequate remedy" and that the smart meter program and the special fees should be stayed "pending a full investigation into the allegations of adverse effects on safety, health, and privacy." *Blue Brief* at 15, 45 and 56. Although some of the phraseology in section G of Appellants' brief may have linked the request for stay to the Court's consideration of the constitutional questions, the scope of the request was not so limited.

The Court's decision effectively invalidated the Commission's determination that opt-out fees are reasonable and non-discriminatory.

Having never determined whether smart meter technology is safe, the commission is in no position to conclude in this proceeding that requiring customers who elect either of the opt-out alternatives to pay a fee is not "unreasonable or unjustly discriminatory." (Decision at 11).

Yet, thousands of Maine residents are paying monthly fees based on a decision the Commission was in no position to make. Those who have declined to pay the fees on principal are receiving dunning letters and disconnection notices.

Unless and until the Commission determines smart meter technology is safe, these fees are presumptively unreasonable, discriminatory and invalid. Unless and until the Commission determines smart meters are safe, CMP customers are being compelled to either acquiesce to the installation of technology in their homes with no assurance of its safety from the Commission (the public body entrusted with ensuring safety) or to pay special fees to avoid the technology.

A stay is necessary to avoid unjust and inequitable results. Remand without a stay of the fees will result in an inadequate remedy, if the general rule applies that rates may not be retroactively adjusted or refunded. *First Hartford Corp v CMP*, 425 A.2nd 174, 181 (ME. 1981). If Appellants prevail at some future date, measured in months or years from this date, Appellants and other Maine residents will suffer the irreparable injury of having paid fees for which they would have no right to seek a retroactive remedy. This Court, has full authority to prevent that inequitable result and to protect the rights of Appellants and other CMP customers by directing a stay of that portion of the Opt-Out Order that imposes the opt-out fees, pending a Commission investigation on remand. 4 M.R.S. §7.

III. Conclusion.

For the foregoing reasons, Appellants respectfully request that the Court clarify the Decision, directing the Commission to address the privacy and security issues that the Commission expressly declined to address in the Opt-Out proceedings. Appellants further request that the Court reconsider the request for a stay and direct the Commission to stay that portion of the Opt-

Out Orders that imposes opt-out fees, pending a final decision of the issues to be investigated on remand.

Dated at Portland, Maine this 25 day of July, 2012.

/s/ Bruce A. McGlaulin

Attorney for Appellants

Bruce A. McGlaulin, Esquire

PETRUCCELLI, MARTIN & HADDOW, LLP

Two Monument Square, Ste 900

Portland, Maine 04112-8555

(207) 775-0200

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-11-532

ED FRIEDMAN, et al,

Appellants

V.

MAINE PUBLIC UTILITIES
COMMISSION,

Appellee

CERTIFICATE OF SERVICE

I, Bruce A. McGlaulin, counsel for Appellants, hereby certify that I have served Appellants' Motion for Reconsideration and/or Clarification 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

Kenneth Farber, Esquire
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

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

Dated at Portland, Maine this 25 day of July, 2012.

/s/ Bruce A. McGlaughlin

Bruce A. McGlaulin, Esquire

PETRUCCELLI, MARTIN & HADDOW, LLP
2 Monument Square, Ste 900, Post Office Box 17555
Portland, Maine 04112-8555
(207) 775-0200