STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT 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

BRIEF OF APPELLEE MAINE PUBLIC UTILITIES COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions

Cases

Statutes and Regulations

Administrative Rulings

INTRODUCTION

Ed Friedman and seventeen other persons filed a complaint pursuant to the "ten-person complaint" statute, 35-A M.R.S.A. § 1302. The Commission considered the complaint made by Mr. Friedman and dismissed it in part because the complaint had no merit, and in part because the affected utility, Central Maine Power Company, had taken adequate steps to remove the cause of the complaint. Mr. Friedman has appealed the Commission's dismissal of his complaint.

The above paragraph describes the case that is before this Court on appeal; it is a straight-forward appeal of a Commission dismissal of a complaint filed pursuant to 35-A M.R.S.A. § 1302. The question before this Court is whether the Commission abused its discretion when it dismissed the complaint.

Appellants attempt to use Section 1302 as a vehicle for appealing a previous Commission decision; a decision for which the appeal period had run prior to the filing of Mr. Friedman's complaint and to which Mr. Friedman was not a party. However, this appeal is not about whether the Commission properly decided matters in another case. This appeal is not about whether Central Maine Power Company is violating its customers' civil rights or illegally trespassing on their property. And, this appeal is not about whether the Commission's decision in another case violates the Constitution. Appellants argue all of these things, but they are simply not relevant to the question of whether the Commission abused its discretion when it dismissed a ten-person complaint.

Title 35-A M.R.S.A. § 1302 permits the Commission to dismiss a complaint filed pursuant to that Section if the complaint is "without merit" or if the Commission finds that the utility has taken adequate steps to remove the cause of the complaint. In this case, the Commission determined that Section 1302 does not allow for complaints to be filed regarding actions of the Commission – only actions of a utility – and, accordingly dismissed those portions of the complaint filed by Mr. Friedman because they lacked a statutory basis, *i.e.*, they were without merit. The Commission also determined that the allegations in the complaint directed at CMP had been removed by actions taken by CMP. The Commission did not abuse its discretion when it made either determination, and this Court should affirm the Commission's Order dismissing Mr. Friedman's complaint.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Smart Meter Cases

A. The Original Proceeding Approving Advanced Metering Infrastructure

In 2007, Central Maine Power Company ("CMP") proposed to implement an Advanced Metering Infrastructure ("AMI") program (also known colloquially as "Smart Grid") on a company-wide basis. (Supp. 1.); *See also, Central Maine Power Company,* Request for Alternative Rate Plan, Docket No. 2007-215, Alternative Rate Plan Vols. V & VI (May 1, 2007). CMP's AMI proposal included providing electric meters to all of its customers that supported a two-way communications network and a meter data management system (a/k/a "smart meters"). (Supp. 1.) After examining CMP's proposed AMI program, the parties to the proceeding agreed that the Commission should defer making a decision on the program, and continue to examine the costs and benefits. *Id.*

Subsequent to that decision, Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA"). Pub. L. No. 111-5, 123 Stat. 115 (2009). The ARRA included a provision whereby electric utilities could become eligible for grants of matching funds for up to 50% of the cost of a qualifying Smart Grid program. *Id.* § 405; 123 Stat. 115, 143. CMP applied for just such a grant in August of 2009, and in October of 2009 the U.S. Department of Energy ("DoE") notified CMP that it had received a $95.9 million grant. (Supp. 2.)

Shortly after CMP received its grant award from the DoE, the Commission re-started its examination of the AMI program, and held several technical conferences to discuss the capabilities of the AMI program. (Supp.

2.) In January of 2010, the Commission held a public witness hearing at which members of the public were invited to participate and share their views. (Supp. 3.) A few days after the public hearing, the Commission held a formal hearing at which CMP presented its case-in-chief, intervenors, including the Maine Office of the Public Advocate ("OPA") and the International Brotherhood of Electrical Workers Local 1837, cross-examined CMP's witnesses, and all parties presented oral argument. *Id.*

At the conclusion of the proceeding, on February 25, 2010, the Commission approved CMP's AMI project and the associated ratemaking methodology. (Supp. 6-9.) Soon after receiving Commission approval, CMP began implementing its AMI program.

The Commission premised its approval of CMP's AMI program on the system having certain functionalities. The required functionalities include:

- The ability to store electric load information (*i.e.*, electricity usage) on an hourly (or less) interval basis for residential and small commercial customers, on a fifteen-minute interval basis for commercial and industrial customers, and on a less than fifteen-minute interval basis for other specified customers;
- A back-office system capable of billing on a "time-of-use" ("TOU") basis;[1]

[1] TOU pricing allows customers to have an electric rate that varies based on the time of day electricity is used. For example, electricity on wholesale markets is typically less expensive during the late evening/early morning hours, so if a customer chose to run his or her dishwasher in the late evening the customer would pay less for the required electricity than if the customer ran the dishwasher during the middle of the day.

- The ability to measure and store the peak electricity demands of each customer;
- The ability for CMP to remotely connect and disconnect customers' electric service;
- The ability to communicate with, or "poll," individual meters in order to evaluate service outages;
- The ability to monitor and measure variances in voltage; and
- The ability to accommodate "value added" devices such as in-home displays.

(Supp. 7-8.) Furthermore, CMP expected to realize significant operational and supply-side savings, which, over time, could be substantially greater than the cost of the AMI project.[2] (Supp. 6.)

Smart meters are sophisticated devices that can provide customers with more information about, and greater control over, their electricity usage, and give customers the ability to take advantage of TOU pricing programs and, accordingly, lower their electricity bills. Smart meters, by themselves, cannot control appliances or other electronics within the home or store or transmit data other than electricity usage data. "Value added" services such as an in-home network or display or web-based analysis of electricity usage, or TOU pricing programs are strictly voluntary; there is no requirement that consumers participate in any of these programs.

[2] CMP estimates such savings to be in excess of $338 million over twenty years. (Supp. 6.)

B. The "Opt-Out" Investigation

On October 25, 2010, the Commission received a complaint pursuant to 35-A M.R.S.A. § 1302 signed by Elisa Boxer-Cook and eleven other persons ("Boxer-Cook Complaint"). (Supp. 14.) The Boxer-Cook Complaint alleged that CMP's practices with regard to the installation of smart meters were unreasonable, inadequate, and inconsistent with legislative mandates. *Id.* Specifically, the Complaint raised issues of health, safety, and security with regard to smart meters, and cited information the complainants suggested indicated that the radio-frequency ("RF") radiation emitted by smart meters could be a potential carcinogen, and that certain individuals are sensitive to RF radiation to such a degree that a smart meter could potentially be harmful to their health. *Id.* As relief, the Boxer-Cook Complaint requested, among other things, that the Commission require CMP to allow customers to elect not to receive a smart meter (*i.e.*, "opt-out" of the AMI program). (Supp. 15.)

Before the Commission acted on the Boxer-Cook Complaint, on December 13, 2010, the Commission received a second complaint pursuant to 35-A M.R.S.A. § 1302, this time signed by Teresa Swinbourne and nine other persons ("Swinbourne Complaint"). (Supp. 16.) The Swinbourne Complaint was similar to the Boxer-Cook Complaint and requested similar relief. *Id.*

On January 7, 2011, the Commission consolidated the two complaints into one investigation, an investigation which came to be known colloquially as the "Opt-Out Investigation." *Id.* In initiating the investigation, the Commission stated that, given that the Federal Communications Commission ("FCC") is the agency charged with setting standards regarding RF radiation, it was unclear

that the Commission was the appropriate entity to consider the potential health consequences of smart meters. (Supp. 18.) Consequently, the Commission declined to examine the potential health implications of smart meters, deferring to the FCC, and instead focused the investigation on whether CMP's policy of not allowing consumers to "opt-out" of the AMI program was unreasonable, insufficient, or unjustly discriminatory. (Supp. 19.)

Subsequent to the opening of the Opt-Out Investigation, the Commission received several more complaints pursuant to 35-A M.R.S.A. § 1302 regarding CMP's AMI program, three of which the Commission consolidated into the Opt-Out Investigation. (Supp. 21.)

The first of the three consolidated complaints was filed by Suzanne Foley-Ferguson and ten other persons on December 17, 2010 (the "Foley-Ferguson Complaint"). (Supp. 22.) The Foley-Ferguson Complaint specifically asked the Commission to open a proceeding to investigate the health effects of smart meters and asked the Commision to explore alternative modes of data transmission (*i.e.*, non-wireless) from smart meters to the utility. (Supp. 22.) The Commission found that the issues raised in the Foley-Ferguson Complaint were sufficiently similar to the issues in the Opt-Out Investigation, and that it would be efficient to consolidate the investigations. (Supp. 23.) In so doing, however, the Commission reiterated its position that the Commission was not making any determination regarding the potential health implications of smart meters. (Supp. 23.) Further, the Commission declined to investigate the feasibility of a non-wireless smart meter as an alternative smart meter, stating that the viability of such alternatives was considered in the proceeding in

Docket No. 2007-215(II) in which the Commission approved CMP's AMI program. (Supp. 23).

The second consolidated complaint was filed on December 22, 2010 by Stephen and Dianne Wilkins and thirteen other persons (the "Wilkins Complaint"). (Supp. 22.) Like the Boxer-Cook, Swinbourne, and Foley-Ferguson Complaints, the Commission found that the issues raised were sufficiently similar so as to merit consolidation into the Opt-Out Investigation. Specifically, the Wilkins Complaint asked the Commission to investigate whether CMP had a legal right to enter private property to replace existing meters, and whether CMP has a right to enter private property via radio waves. (Supp. 22.) The Commission dismissed the property rights allegations in the Wilkins Complaint as being without merit based on CMP's Terms and Conditions of Service ("T&Cs") that are filed with the Commission pursuant to 35-A M.R.S.A. § 304. (Supp. 24.) The Commission stated that under CMP's T&Cs, CMP has the right to select the type of metering equipment it uses, may change or alter that equipment, and may access a customer's property for "the purpose of reading meters, or inspection or repair of equipment used in connection with its energy, or removing its property, or for any other purpose." (Supp. 24; 86; 84.) All CMP customers agree to CMP's T&Cs as a condition of receiving service from the company. (Supp. 72.)

The third and final consolidated complaint was filed by Julie Tupper and ten other persons on February 23, 2011 (the "Tupper Complaint"). *Julie Tupper, et al.*, Request for Commission Investigation to Allow CMP Customers to Retain Existing Analog Meters, Docket No. 2011-85, Notice of Investigation

and Consolidation at 2 (Apr. 22, 2011) ("Tupper NoI"). Similar to the previous complaints, the Tupper Complaint asked the Commission to require CMP to allow customers to "opt-out" of the AMI program and to investigate the feasibility of reasonably sized "smart meter-free" zones around the homes of customers who had opted-out of the AMI program. *Id.* The Commission consolidated the opt-out portion of the Tupper Complaint into the Opt-Out Investigation. *Id.* at 3. As to the question of "smart meter-free zones," the Commission stated that any term or condition that prevented customers who wanted to participate in the AMI program, and receiving the attendant benefits of the program, from doing so would be an unreasonable utility act or practice and, accordingly, dismissed this portion of the Tupper Complaint as without merit. *Id.* at 4.

1. Non-Opt-Out Issues Resolved by the Commission

As discussed briefly above, in the course of evaluating the various complaints filed pursuant to 35-A M.R.S.A. § 1302 regarding CMP's AMI program, the Commission made dispositive rulings on several issues raised in those petitions. The Commission made these rulings in the context of the NoI opening the Opt-Out Investigation, the NoIs consolidating subsequent complaints, and in the context of Motions for Reconsideration of various Commission orders in the Opt-Out Investigation.

a. Health Issues

The Commission addressed issues regarding the potential heath implications of smart meters on several occasions. In the original January 7, 2011 NoI in Docket Nos. 2010-345 and 2010-389, the Commission cited a

November 8, 2010 review by the Maine Center for Disease Control ("Maine CDC") of the scientific literature on smart meters and health. The Maine CDC concluded that there was no "consistent or convincing" evidence that there was a concern regarding the RF emissions of smart meters. (Supp. 17-18.) The Commission then declined to investigate the health effects of smart meters, stating that it had no clear authority to do so in the face of the FCC's federal authority in the area and, further, that the Commission lacked the requisite expertise to conduct such an investigation. (Supp. 18.)

The Commission reinforced its decision not to investigate health effects in the February 18, 2011 NoI consolidating the Foley-Ferguson and Wilkins Complaints into the Opt-Out Investigation, (Supp. 23), and again in an Order Denying Reconsideration stemming from a motion filed by Suzanne Foley Ferguson regarding the February 18, 2011 NoI where the Commission stated that given the review by the Maine CDC, "a review by the Commission would not advance the state of scientific knowledge on the issue." (Supp. 29-30.)

The Commission stated its position even more succinctly in the Order Denying Reconsideration stemming from a motion filed by Dianne Wilkins regarding the February 18, 2011 NoI. The Commission stated that "the Commission is not the appropriate entity to consider potential health effects from RF related to the smart meter installations." (Supp. 38.) The Commission reiterated its position in its August 24, 2011 Order Denying Reconsideration of Suzanne Foley-Ferguson's Motion to Reconsider the Commission's final orders in this matter, stating that "[t]he FCC is the entity that should address RF-

related emission standards because the FCC has jurisdiction over wireless telephones as well as other household wireless devices." (Supp. 68-69.)

b. Privacy Concerns

Similar to health issues surrounding smart meters, the Commision also consistently declined to investigate privacy concerns related to smart meters. The Commission did so initially in the January 7, 2011 NoI. (Supp. 19.) The Commission addressed privacy concerns in greater detail in the Order Denying Reconsideration stemming from a motion filed by Dianne Wilkins regarding the February 18, 2011 NoI. In that Order, the Commission determined, as a matter of law, that smart meters and their attendant RF emissions are incapable of committing a statutory violation of privacy or statutory or common law trespass. (Supp. 35-37.) The Commission reiterated its position in its August 24, 2011 Order Denying Reconsideration stemming from Suzanne Foley-Ferguson's Motion to Reconsider the Commission's final orders in this matter. (Supp. 69.)

c. Constitutional Issues

In her March 8, 2011 Motion to Reconsider the February 18, 2011 NoI, Ms. Wilkins alleged that CMP had violated the 4th, 5th, and 14th Amendments to the United States Constitution by allowing RF radiation to enter homes. (Supp. 36.) The Commission stated that, while Ms. Wilkins may have a right to bring a claim against CMP, pursuant to 42 U.S.C. § 1983, for violations of her civil rights in this regard, the Commission did not have the jurisdiction to bring such a suit on her behalf. (Supp. 36-37.)

2. Resolution of the Opt Out Investigation

The Opt Out Investigation consisted of several technical conferences, written and oral data requests and responses, and an intensive four-month negotiation among CMP, the complainants, intervenors, and Commission Staff aimed at reaching a mutually agreeable opt-out program.[3] (Supp. 53.) Ultimately, the parties were unable to reach a final agreement. (Supp. 53.) However, the parties agreed to a process that would allow for expedited Commission resolution of the matter, and agreed that Commission staff would submit a bench analysis into the record.[4] (Supp. 53.) The parties would then have an opportunity to provide written comments to the Commission on the bench analysis. (Supp. 53.) The parties declined the opportunity for an evidentiary hearing or oral argument before the Commission. (Supp. 53.)

On April 21, 2011 Commission Staff issued its Bench Analysis summarizing the investigation to date and proposing an opt-out program for the Commission's consideration. (Supp. 53-55); *Elisa Boxer-Cook, et al.*, Request for Commission Investigation in Pursuing the Smart Meter Initiative, Docket No. 2010-345, Bench Analysis (Apr. 21, 2011) ("Bench Analysis"). The

[3] The lead complainant in a Section 1302 complaint is, by operation of law, a party in any proceeding that arises from that complaint. 65-407 C.M.R. ch. 110, § 105(m). The lead complainants in the Opt-Out Investigation were: Elisa Boxer-Cook, Teresa Swinbourne; Suzanne Foley-Ferguson, Dianne and Stephen Wilkins, and Julie Tupper. There were several intervenors in the Opt-Out Investigation that participated in the proceedings to varying degrees. All intervenors were full parties to the Opt-Out Investigation. The intervenors were: the OPA, Averyl Hill, Amy Blake, Melissa Hutchinson, Aaron Scifres, Karen D'Andrea, Rep. Heather Sirocki, Rep. Ellie Espling, and Elysia Drew.

[4] A bench analysis is a report issued by the Hearing Examiner assigned to a given matter that presents to the Commission an analysis of the issues raised in the proceeding and, often, contains Commission Staff's recommended resolution to the proceeding. Unlike an Examiner's Report, a Bench Analysis is not presented in the form of a draft Commission Order.

Opt-Out Program described in the Bench Analysis was the result of the input and information provided by the parties. *Bench Analysis* at 2.

The Bench Analysis recommended that the Commission require CMP to offer its residential and small commercial customers three meter options: retaining their existing analog meter, receiving a smart meter with the communications capability disabled, or receiving a standard wireless smart meter. *Id.* Customers would also have the option to relocate the standard wireless smart meter to another location on the customers' home or property, with such relocation to be done at the customers' expense. *Id.* at 3. The Bench Analysis also recommended initial and ongoing charges to be associated with opting-out, recommended a customer communications program to educate CMP customers about their opt-out options, and recommended a low-income assistance program to make opting-out more affordable for low-income customers. *Id.* at 4-7.

All of the lead complainants in the proceeding (Elisa Boxer-Cook, Teresa Swinbourne, Suzanne Foley-Ferguson, Stephen and Dianne Wilkins, and Julie Tupper) jointly filed comments via counsel in support of the Bench Analysis and asked the Commission to adopt the Staff's recommendations contained therein. *Boxer-Cook, et al.*, Docket No. 2010-345, Reply Comments in Support of Hearing Examiner's and Staff's Bench Analysis and Recommendations (May 4, 2011).[5] Also filing comments in support of the Bench Analysis were

[5] Ms. Foley-Ferguson and Ms. Tupper filed separate comments stating that customers who choose to opt out should not be charged to do so. (Supp. 56); *Suzanne Foley-Ferguson, et al.*, Request for Commission Investigation Into Advanced Metering Infrastructure in Accordance with the Legislature, Docket No. 2010-398, Letter to Commissioners Urging No Cost Opt Outs (May 16, 2011); *Tupper, et al.*, Docket No. 2011-85, Comments in Response to Staff Bench Analysis (Apr. 29, 2011). Ms. Wilkins

intervenors Rep. Heather Sirocki and the OPA, both urging the Commission to adopt the recommendations in the Bench Analysis. *Boxer-Cook, et al.*, Docket No. 2010-345, Comments of Rep. Heather Sirocki (Apr. 26, 2011); *Boxer-Cook, et al.*, Docket No. 2010-345, Comments of the Public Advocate (Apr. 29, 2011). Intervenor Karen D'Andrea expressed her support for the Bench Analysis generally, but disagreed with the Staff's recommendation of an opt-out fee. *Boxer-Cook, et al.*, Docket No. 2010-345, Comments of Karen D'Andrea (Apr. 21, 2011).

On May 19, 2011, the Commission issued its first of two orders in the Opt-Out Proceeding, and on June 22, 2011 the Commission issued its second order. (Supp. 40.) The first order, captioned "Order (Part I)" described the Commission's decision, without background or analysis, the second order, captioned "Order (Part II)" provided the background, analysis, and reasoning for the Commission's decision (collectively the "Opt-Out Orders").[6] (Supp. 40; Supp. 46.)

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filed separate comments urging the Commission to "adopt in full" the Staff recommendations in the Bench Analysis. *Stephen and Dianne Wilkins, et al.*, Request for Commission Investigation into CMP's Violation of Homeowner Rights and the Exposure of the Public Health Risk of Smart Meters, Docket No. 2010-400, Comments in Support of Hearing Examiner's and Staff's Bench Analysis and Recommendations at 2 (Apr. 28, 2011). Ms. Swinbourne also filed separate comments supporting the Bench Analysis. *Teresa Swinbourne, et al.*, Request for Commission investigation into Unreasonable, Insufficient and Discriminatory Decision to Implement the use of Smart Meters to CMP Customers Disregarding Choice in Regards to Wireless Activity and Consumer's Right to Privacy Within Their Homes, Docket No. 2010-389, Comments in Support of Hearing Examiner's and Staff's Bench Analysis and Recommendations (Apr. 29, 2011).

[6] Chapter 110, § 1003 of the Commission's Rules allows the Commission to issue its orders in two parts, with the first part plainly stating the result of the decision and summarizing the factual conclusions reached, and the second part containing full statements or findings of fact. 65-407 C.M.R. ch. 110, § 1003(b).

In its Opt-Out Orders, the Commission concluded that CMP's failure to provide customers with the ability to choose an alternative to a wireless smart meter was an unreasonable utility act and practice under 35-A M.R.S.A § 1306. (Supp. 56.) Accordingly, the Commission ordered CMP to allow customers who did not want a smart meter with wireless communications capability to either retain their existing analog meter (or its functional equivalent) or to obtain a smart meter with the wireless communications feature disabled. (Supp. 41.) To offset the projected cost to CMP for additional personnel and infrastructure to support an incomplete smart meter network, the Commission ordered that customers who choose to opt-out of the smart meter program pay a one-time up-front charge and a smaller recurring monthly charge. (Supp. 57-58.) The Commission also adopted the low-income assistance program recommended by Commission Staff. (Supp. 59.)

Of the lead complainants, only Suzanne Foley-Ferguson filed a Motion to Reconsider the Commission's Opt-Out Orders. (Supp. 66; *Foley-Ferguson, et al.*, Docket No. 2010-398, Motion to Reconsider Order (July 13, 2011). The Commission denied Ms. Foley-Ferguson's Motion by an Order issued on August 24, 2011. (Supp. 64.) No party appealed the Opt-Out Orders.[7]

II. The Friedman Complaint

On July 29, 2011, Ed Friedman and seventeen other persons filed a complaint against both CMP and the Commission pursuant to 35-A M.R.S.A. § 1302 (the "Friedman Complaint"). (A. 8.) The Friedman Complaint alleged that

[7] Dianne Wilkins appealed the February 18, 2011 NoI consolidating the Wilkins Complaint with the other Opt-Out Complaints. On November 21, 2011, this Court dismissed Ms. Wilkins's appeal for failure to file a brief. *Wilkins v. Pub. Utils. Comm'n*, No. PUC-11-275, Order Dismissing Appeal (Nov. 21, 2011).

new information regarding the health effects of RF radiation had come to light subsequent to the issuance of the Opt-Out Orders, and that previous Commission Orders did not adequately address privacy and trespass issues. *Id.* As relief, the Friedman Complaint asked (1) that the Commission stay the further installation of wireless smart meters; (2) if a stay is not possible that future installations be "opt-in"; (3) that any future opt-outs be at no cost to customers; (4) that communications from CMP include information that expresses the RF-related health concerns of the complainants; and (5) that CMP establish a toll-free hotline for smart meter complaints. *Id.*

On August 31, 2011, the Commission dismissed the Friedman Complaint on two grounds. (A. 2.) First, the Commission dismissed the portions of the Friedman Complaint that were directed at the Commission itself. (A. 6.) The Commission explained that 35-A M.R.S.A. § 1302 allowed ten or more persons to file a complaint regarding the practices of a utility, but that there was no mechanism in Section 1302 for such a complaint against the Commission itself. *Id.* Accordingly because the portions of the Friedman Complaint directed at the Commission were without a statutory basis, the Commission dismissed them as without merit.[8] *Id.*

As to the portions of the Friedman Complaint directed at CMP, the Commission explained, in detail, that all of the allegations raised had been considered by the Commission in various orders in the Opt-Out Investigation, and that the Commission had resolved all of those issues through its direction

[8] As discussed in greater detail in Argument Section I(C), *infra*, the Friedman Complaint appears to be primarily directed at the actions of the Commission, but certain aspects of the Complaint may also be directed at the actions of CMP.

to CMP in the Opt-Out Orders; direction that CMP was, and is, complying with. *Id.* Accordingly, the Commission dismissed the portions of the Friedman Complaint that were directed at CMP on the basis that, by complying with the Commission's Orders, CMP was taking adequate steps to remove the cause of the Complaint. *Id.*

On September 19, 2011, Mr. Friedman filed a Motion to Reconsider the Commission's denial of his Complaint. *Ed Friedman, et al.*, Request for Commission Investigation into Smart Meters and Smart Meter Opt-Out, Docket No. 2011-262, Petition for Reconsideration (Sept. 19, 2011). In his Motion, Mr. Friedman asked for reconsideration based on his belief that the Commission did not properly analyze the issued presented by his Complaint and did not read the information submitted with his Complaint. *Id.* at 1. On October 11, 2011, Mr. Friedman's Motion was denied by operation of law twenty days after its submission.[9] 65-407 C.M.R. ch 110, § 1004.

On October 31, 2011, Mr. Friedman appealed the Commission's Order dismissing the Friedman Complaint.

[9] The twenty-day period expired on October 10, 2011. However, October 10, 2011 was a holiday (Columbus Day), thus the twenty-day period effectively expired on October 11, 2011.

ISSUE PRESENTED

1. Under 35-A M.R.S.A. § 1302, did the Commission properly dismiss the Complaint filed by Ed Friedman and seventeen other persons?

STANDARD OF REVIEW

Complaints filed pursuant to 35-A M.R.S.A. § 1302 may be dismissed 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. 35-A M.R.S.A. § 1302(2); *Agro v. Pub. Utils. Comm'n*, 611 A.2d 566, 568 (Me. 1992).

The Law Court's "review of a Commission decision is deferential," and the Court will "sustain findings of fact issued by the Commission unless not supported by substantial evidence in the record." *Dunn v. Pub. Utils. Comm'n*, 2006 ME 4, ¶ 5, 890 A.2d 269, 270. When the Commission is engaged in economic fact-finding, the Law Court has followed a "long-standing policy of according the Commission considerable deference in the realm of economic fact-finding." *Central Me. Power Co. v. Pub. Utils Comm'n*, 405 A.2d 153, 182 (Me. 1979). The Law Court "possesses neither the resources, the expertise, nor the inclination to act as a '*super-commission*,'" and "cannot substitute [its] judgment of the economic facts presented for that of the Commission." *Id.* (emphasis in original).

Further, "the Commission is entitled to deference in its statutory interpretations and will not be overturned unless the Commission fails to follow a statutory mandate or it commits an unsustainable exercise of its discretion." *Bertl v. Pub. Utils. Comm'n*, 2005 ME 115, ¶ 8, 885 A.2d 776, 777 (quoting *Office of Pub. Advocate v. Pub. Utils. Comm'n*, 2005 ME 15, ¶ 18, 866 A.2d 851, 856. It is "[o]nly when the Commission abuses the discretion entrusted to it, or fails to follow the mandate of the legislature, or to be bound by the prohibitions

of the constitution" that the Law Court may intervene. *Id.* (citing *Guilford Transp. Indus. v. Pub. Utils. Comm'n*, 2001 ME 31, ¶ 6, 746 A.2d 910, 912).

ARGUMENT

I. The Commission Properly Dismissed the Friedman Complaint Pursuant to 35-A M.R.S.A. § 1302

Title 35-A M.R.S.A. § 1302 ("Section 1302") provides public utility customers the ability to file complaints with the Commission regarding the rates, acts, and practices of the utility. 35-A M.R.S.A. § 1302(1). Once ten or more utility customers file such a complaint, the Commission must immediately notify the affected utility and give the utility an opportunity to respond to the complaint. *Id.* § 1302(2). Once the Commission receives the utility's response, which must be filed within ten days, the Commission may either dismiss the complaint, or set a date for a public hearing on the matter. *Id.* However, as was the case in the Opt-Out Investigation, the Commision may allow for the parties to attempt to resolve the complaint to their mutual satisfaction prior to scheduling a public hearing on the matter. *Id.*

The statute provides two grounds for dismissing a complaint filed under Section 1302: (1) the complaint is "without merit;" or (2) the utility is taking adequate steps to remove the cause of the complaint. *Id.* § 1302(2). This Court has interpreted the statutory term "without merit" to mean "that there is no statutory basis for the complaint, i.e. that the [Commission] has no authority to grant the relief requested or that the rates, tolls, or services are not 'in any respect unreasonable, insufficient, or unjustly discriminatory . . . or inadequate.'" *Agro v. Pub. Utils. Comm'n*, 611 A.2d 566, 569 (Me. 1992) (quoting 35-A M.R.S.A. § 1302(1)).

A. The Commission Properly Dismissed the Friedman Complaint insofar as the Complaint Referred to Actions of the Commission

The Friedman Complaint alleged, *inter alia*, that the Commission, in its Opt-Out Orders, inadequately considered the privacy and trespass claims raised by the Complaints in the Opt-Out Investigation, unreasonably required CMP customers to pay a fee to opt-out of the wireless smart meter program, and failed to properly consider information regarding the health effects of RF radiation. (A. 8.) As the Friedman Complaint clearly states, these allegations were directed at CMP and "at the [Commission] because of its May 19 and June 22, 2011 Orders (Part I and Part II) . . . ." *Id.*

Section 1302 is a vehicle for customers to file complaints regarding the practices of public utilities. Nowhere in Section 1302 is there a provision, or even the suggestion, that the statute may be used to file a complaint regarding the practices of the Commission itself. Further, there is no suggestion in Section 1302 that the statute may be used as a means to bring about a review of prior Commission action. Indeed, Title 35-A and the Commission's Rules contain mechanisms for requesting the Commission reconsider or reopen its prior decisions.

Title 35-A M.R.S.A. § 1320 allows any person who participated in a Commission proceeding, and is adversely affected by the result of that proceeding, to file an appeal directly with this Court. 35-A M.R.S.A. § 1320(2). Title 35-A M.R.S.A. § 1321 gives the Commission the ability to "rescind, alter or amend any order it has made" after giving notice to the affected utility and the parties to the proceeding notice and an opportunity to present evidence or

argument. 35-A M.R.S.A. § 1321. Chapter 110, § 1004 of the Commission's Rules effectuates this statute by allowing petitions to "change, modify, rescind, clarify, reconsider or vacate any decision or order of the Commission." 65-407 C.M.R. ch. 110, § 1004.

Persons or entities may also request that the Commission exercise its authority under 35-A M.R.S.A. § 1321 to rescind, alter, or amend its orders, *See, e.g.*, *Verizon New England, Inc. d/b/a Verizon Maine, et al. & FairPoint Maine Telephone Companies*, Request for Approval of Affiliated Interest Transaction and Transfer of Assets of Verizon's Property and Customer Relations to be Merged with and into FairPoint Communications, Inc., Docket No. 2007-67, FairPoint Petition to Apply SQI Multiplier Rebate Amounts to Broadband at 1 (Feb. 25, 2011) ("[FairPoint] hereby petitions the Commission to exercise its authority under 35-A M.R.S.A. § 1321 to amend its February 1, 2008 Order in [Docket No. 2007-67] . . . ."), or may request that the Commission exercise its authority under Chapter 110, § 1201 of the Commission's Rules, 65-407 C.M.R. ch. 110, § 1201, to initiate an inquiry into whether an adjudicatory proceeding ought to be initiated. *See, e.g., Telephone Association of Maine*, Request for Inquiry Into Implementation of the Requirements of 35-A M.R.S.A. § 8301, Docket No. 2008-174, Request for Inquiry (Apr. 8, 2008) ("[TAM] hereby requests that the Commission initiate an inquiry subject to Section 1201 of Chapter 110 of the Commission's rules . . .").

The Friedman Complaint is, in effect, a late-filed petition for reconsideration of a prior Commission decision to which Mr. Friedman was not a party. Under the Commission's Rules, petitions for reconsideration must be

filed within twenty days "after entry of the Commission's final decision or order." 65-407 C.M.R. ch. 110, § 1004. Even assuming, *arguendo*, that Commission had treated the Friedman Complaint as a petition for reconsideration, the Complaint was filed more than a month after the Commission issued the Part II Opt-Out Order and the Commission could have dismissed the Complaint on that ground alone.[10] Alternatively, the Appellants could, as discussed above, have filed a request that the Commission reexamine its decision pursuant to its authority under 35-A M.R.S.A. § 1321 or Chapter 110, § 1201 of the Commission's Rules, but chose not to do so.

The distinction between a complaint filed pursuant to Section 1302 and a petition or request filed pursuant 35-A M.R.S.A. § 1321 or Ch. 110, §§ 1104 or 1201 of the Commission's Rules asking for the very same relief is more than merely semantic. Section 1302 contains specific statutory grounds for dismissing complaints; grounds that have been interpreted by this Court. Title 35-A M.R.S.A. § 1321 and Ch. 110, §§ 1004 and 1201, however, contain no such standards, giving the Commission greater discretion regarding how to consider such petitions or requests, and whether or not to dismiss them.

As discussed above, there is no statutory underpinning to the Friedman Complaint insofar as it relates to the actions of the Commission itself. Thus, under this Court's interpretation of the statutory term "without merit," the Commission properly dismissed the portions of the Friedman Complaint that

[10] The Commission is not arguing that, and expresses no opinion on whether, it could have properly treated a complaint clearly titled "Ten-Person Complaint Pursuant to 35-A M.R.S.A. Section 1302" as a petition to reconsider under 65-407 C.M.R. ch. 110, § 1004.

alleged improprieties on the part of the Commission or insufficiencies in the Opt-out Orders.

B. The Commission Properly Dismissed the Friedman Complaint insofar as the Complaint referred to the Actions of Central Maine Power Company

Unlike the portions of the Friedman Complaint aimed at the Commission, the portions of the Complaint directed at CMP had a proper statutory basis under Section 1302. However, all of the allegations of improper CMP practices contained in the Friedman Complaint were addressed, in some cases several times, by various Commission orders in the Opt-Out Investigation. As a part of the resolution of these issues as reflected in the Opt-Out Orders, the Commission required CMP to take certain actions, including the offering of an opt-out to those customers who choose not to have a wireless smart meter. The Commission considered these actions, taken by CMP, to be a resolution of the issues contained in the various complaints that led to the Opt-Out Investigation. Thus, upon appropriate action by CMP in compliance with the Commission's Opt-Out Orders, the cause of the complaints would necessarily have been removed. CMP has indeed taken the actions required of it by the Commission, and the cause of the complaints has accordingly been removed. Because the Friedman Complaint raised nearly identical issues to those that were investigated and considered in the course of the Opt-Out Investigation, the actions of CMP have also removed the cause of the Friedman Complaint. Thus, the Commission properly dismissed the Friedman Complaint pursuant to Section 1302 by finding that the utility had taken adequate steps to remove the cause of the complaint.

C. Specific Allegations in the Friedman Complaint

It is difficult to determine from the Friedman Complaint precisely which actions taken by CMP (that are not a direct result of CMP's compliance with the Opt-Out Orders) the Appellants consider to be unjust or unreasonable.

The Freidman Complaint alleges that there should be no cost to customers to opt-out. (A. 8.) This issue was decided by the Commission in the Opt-Out Orders and was investigated as a part of the Opt-Out Investigation. (Supp. 42; 57-58.) CMP has no independent authority to decline to charge the fees to its customers; indeed, CMP choosing to waive the fee would be a direct violation of a Commission order. Thus, the Friedman Complaint allegations as to the cost to customers for opting-out are a complaint against the Commission and were properly dismissed as without merit.

The Friedman Complaint alleges that the Commission did not properly address the health effects of RF radiation in its Opt-Out Orders. (A. 8.) This allegation is clearly aimed solely at the Commission and is not an action by CMP. Thus, the Friedman Complaint allegations as to the insufficiency of the Commission's investigation of the health implications of smart meters are a complaint against the Commission and were properly dismissed as without merit.

The Friedman Complaint alleges that the Commission did not adequately consider concerns about privacy and trespass. *Id.* Again, this is an allegation against the Commission itself alleging insufficiency of the Opt-Out Investigation and not an allegation of an unreasonable practice on the part of CMP. Thus, the Friedman Complaint allegations as to the privacy and trespass

are a complaint against the Commission and were properly dismissed as without merit. It might be possible, however, to construe the Friedman Complaint as alleging that CMP not somehow shielding RF from entering the home constitutes a trespass, or that CMP is failing to take appropriate measures to safeguard the privacy of its customers. In that case, CMP's has taken adequate steps to remove the cause of the complaint by allowing its customers to choose not to have a wireless smart meter installed at their home, thus eliminating any potential trespass or privacy issue. Accordingly, the Commission properly dismissed the allegations as to privacy and trespass insofar as they may relate to actions of CMP because CMP has taken adequate steps to remove the cause of the complaint.

II. Appellants' Contention that *Agro v. Pub. Utils. Comm'n* Requires Separate Consideration of the Allegations in the Friedman Complaint is Misplaced and Misinterprets This Court's Holding

Appellants argue that, under *Agro*, the Commission was required to give the Friedman Complaint consideration separate and apart from the Opt-Out Investigation, notwithstanding the fact that the Friedman Complaint and the Opt-Out Investigation contained what Appellants concede were "similar allegations." (Blue Br. 20-21.) Appellants contend that the "Section 1302 standard, as interpreted by *Agro*, is whether the allegations [in the Friedman Complaint] were adequately addressed and resolved on their merits by the Commission in the Opt-Out Orders and/or resolved by actions taken by CMP in implementing the Opt-Out Orders." (Blue Br. 21-22.)

Putting aside the fact, discussed above, that Section 1302 is an improper vehicle for complaints against the Commission, Appellants' reliance on *Agro* in

this instance is misplaced. In *Agro*, the Commission dismissed a complaint filed under Section 1302 by Mr. Agro and at least ten other persons as being without merit because there were two open and pending dockets at the Commission that dealt with the same or similar issues that formed the cause of Mr. Agro's complaint. *Agro*, 611 A.2d at 568. As discussed above, this Court interpreted the phrase "without merit" to mean that there is no statutory basis for the complaint. *Id.* at 569. In the case of Mr. Agro's complaint, the Commission conceded that there was indeed a statutory basis for the complaint, but, in the eyes of the Court, the Commission dismissed the complaint for expediency's sake given the other open and pending dockets. *Id.* at 569-70. The Court held that this type of expeditious dismissal was not permitted under Section 1302. *Id.* at 570. The Court did, however, leave open the option that in future similar situations, the Commision could, as an alternative to dismissal, combine investigations regarding common issues. *Id.* at 570 n. 5. Indeed, that is precisely what the Commission did with regard to the five Section 1302 complaints that made up the Opt-Out Investigation.

What *Agro* did not speak to, however, is a situation like the one before the Court in this case: the Commission's dismissal of a Section 1302 complaint filed *after* the resolution, in a prior proceeding, of the very issues raised by the complaint. It cannot be the case that the Commission must, in every instance, open a new investigation into matters that have already been resolved by the Commission based solely on the fact that a group of utility customers files a Section 1302 complaint. Such a situation would be untenable and a wasteful use of limited Commission resources. Taken to its extreme, the day after an

investigation concluded, ten people could file a new Section 1302 complaint on the same issues, requiring the Commission to investigate the issues anew, and at the conclusion of that investigation a different ten people could file another Section 1302 complaint on the same issues, *ad infinitum*. Clearly this cannot be what the Legislature intended when it enacted Section 1302.

Further, in *Agro* this Court interpreted the phrase "without merit" in the context of situations where the Commission "ignore[s] complaints on the basis of expediency." *Id.* at 569. Read fairly, the *Agro* case means that where the *sole* justification for dismissal is expediency, dismissal is inappropriate. It cannot, however, mean that because a dismissal based on other grounds consistent with the statute that are also "expedient" – in the sense that opening an investigation would be a waste of Commission resources – makes the dismissal improper. In this case, the Commission had already concluded that claims substantively identical to those in the Friedman Complaint were fully addressed in the Opt-Out Investigation. The Commission was faced in the Friedman Complaint with two categories of claims: those it had just found to be without merit or outside the Commission's purview, and claims that were fully resolved through the opt-out provisions in the Opt-Out Orders. The "expediency" issue in *Agro* was never implicated because the proceedings completed immediately prior to the Friedman Complaint had been *completely* resolved, either through findings of "no merit" or by utility action (mandated in those proceedings) to address the cause of the Complaint. The reading of *Agro* offered by Appellants would put the Commission in the untenable position of

never being able to dismiss Section 1302 complaints filed regarding issues that have been resolved by earlier Commission proceedings.

III. Appellants Misstate the Appropriate Standard of Review

Appellants state, "On review of the dismissal of a complaint, . . . each allegation of fact in the complaint must be taken as true." (Blue Br. 12.) As support for this proposition, Appellants cite to a parenthetical in a citation in a footnote in *Neudek v. Neudek*, 2011 ME 66, ¶ 12, n.1, 21 A.3d 88, 91. The cited footnote reads:

> In addition to our conclusion that a motion to dismiss was not the appropriate method for disputing Arthur's motion to modify, we note that given the broad language of the underlying order, Arthur did not assert sufficient facts in his motion to survive a motion to dismiss. *See Fortin v. Roman Catholic Bishop of Portland, 2005 ME 57, ¶ 10, 871 A.2d 1208, 1213* (requiring that, on a motion to dismiss, all of the asserted facts must be taken as true).

Id.

The Commission does not take issue with the proposition that a court, when considering whether to grant a motion to dismiss, must construe the complaint in the light most favorable to the non-moving party, or even, as Appellants claim, that the facts in the complaint must be taken as true. However, there was no motion to dismiss before the Commission in this case. Courts and administrative agencies dismiss complaints and proceedings for a myriad of reasons, each with their own standards. In this case, the Friedman Complaint was filed with the Commission pursuant to Section 1302, and the Commission dismissed the Complaint using standards for dismissal contained in Section 1302. The Commission was under no obligation to take anything

alleged in the Friedman Complaint as true; instead, the Commission was required by Section 1302 to determine if the Friedman Complaint was without merit or whether CMP was taking or had taken adequate steps to remove the cause of the complaint.

IV. The Opt-Out Orders Were Properly Decided

As discussed above, the Commission properly dismissed the Friedman Complaint pursuant to 35-A M.R.S.A. § 1302, and this Court should affirm the Commission's decision and need not look to the Opt-Out Investigation or the Opt-Out Orders. However, should the Court feel it is necessary to engage in an examination of the Opt-Out Investigation, the Commission's Opt-Out Orders were reasonable, appropriate, and properly decided.

A. The Commission Properly Addressed Issues Regarding the Health Implications of Smart Meters

The Friedman Complaint requested that the Commission open an investigation partly because of new information regarding the health effects of smart meters. (A. 8.) To this end, the Friedman Complaint cited other studies regarding the health effects of RF emissions from smart meters, including a study by the World Health Organization ("WHO") issued subsequent to the issuance of the Opt-Out Orders. (A. 11.) However, the WHO study had been presented to the Commission previously as a part of Ms. Foley-Ferguson's July 12, 2011 Motion to Reconsider. *Foley-Ferguson, et al.*, Docket No 2010-398, Motion to Reconsider Order, WHO Attachment (July 12, 2011).

Appellants argue that "[w]hile the investigation could possibly lead to a conclusion that the safety and health concerns have been adequately protected by standards promulgated by other agencies, this basic conclusion cannot be

reached without some findings and determinations pertaining to the applicability of the standards to the particular equipment, its installation, its exposure to the public and individual customers, and the safeguards to be implemented by the utility to ensure safety and health." (Blue Br. 27.) Appellants contend that the Commission engaged in no such analysis and that "[i]t simply declined to consider safety and health as a matter worthy of any consideration on its part." (Blue Br. 27.) Appellants seem to ignore the fact that in determining the scope of the opt-out investigation, the Commission had for its review a thorough examination of the health impacts of smart meters conducted by the Maine CDC. The Maine CDC report was conducted at the request of the OPA and the Commission specifically noted in its January 7, 2011 NoI in Docket Nos. 2010-345 and 2010-389 that the Maine CDC found that:

> In conclusion, 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.

(Supp. 17-18.)

After reviewing the report submitted by the Maine CDC, along with the various studies submitted by Opt-Out Investigation complainants and arguments put forth by CMP, the Commission found that because the FCC was the federal agency charged with determining RF-related emission standards, and the Commission did not have the agency expertise to determine potential RF health impacts, it would limit the scope of the investigation to whether an

opt-out option was feasible. By ultimately concluding that CMP was required to offer an opt-out option to its customers, any health concerns or electromagnetic sensitivities those customers might have regarding the RF emissions from a smart meter on their home would necessarily be alleviated by the customer choosing to opt-out.

Appellants claim that the Commission did not make an initial determination in the January 7, 2011 NoI in Docket Nos. 2010-345 and 2010-389 about whether it had the authority to investigate health or safety. (Blue Br. 24.) Appellants note that when Ms. Wilkins filed a Motion for Reconsideration arguing that the Commission should make a finding with regards to the safety of smart meters, the Commission stated that it "already determined that it did not have the authority or expertise to make determinations regarding the potential health implications of RF." (Blue Br. 25.) Appellants argue that this is in contrast to the Commission's statement in the NoI, where it stated that "it is unclear whether the Commission is the appropriate entity to consider potential health effects." (Blue Br. 25.) However, Appellants fail to quote the entire sentence, in which the Commission continues to say that it is unclear whether the Commission is the appropriate entity, "particularly in that (1) the FCC is the federal agency charged with determining RF-related emission standards and (2) the Commission does not have institutional expertise regarding potential RF impacts."[11] (Supp. 14.)

[11] Indeed, the FCC has set RF exposure limits. *See, e.g.*, 47 C.F.R. § 1.1310. The FCC sets those limits in conjunction with recommendations from multiple agencies and organizations, including the U.S. Environmental Protection Agency, the Food and Drug Administration, the Institute of Electrical and Electronics Engineers, the National Council on Radiation Protection and Measurements, and other federal health and safety agencies. *See Application of Pacific Gas and Electric Company for Approval of*

As mentioned above, in its Order dismissing the Friedman Complaint, the Commission noted that the information presented in Appellant's complaint regarding the WHO study is the same information presented by Ms. Foley-Ferguson in her Motion for Reconsideration in Docket 2010-398. (A. 5.) The Commission saw no new information in Appellant's complaint that would warrant the opening of an investigation to reconsider its conclusion. *Id.*

The Commission also considered, and declined to implement, a moratorium or stay on the installation of wireless smart meters. In so doing, the Commission explained that numerous health and safety studies regarding RF emissions were currently available, and additional study by the Commission would not be appropriate:

> We will not order a moratorium on the installation of smart meters to allow for further study of the health impacts of RF related to smart meter systems. Given the numerous studies on the topic that already exist, and the review conducted by Maine's CDC, we do not believe that a moratorium to allow the Commission to conduct further study would advance the state of the scientific or medical knowledge on these issues.

(Supp. 18.)

Modifications to its SmartMeter Program and Increased Revenue Requirements to Recover the Costs of the Modifications, A.11-03-014, Decision Modifying Pacific Gas and Electric Company's SmartMeter Program to Include an Opt-Out Option at 13-14 (Ca. P.U.C., issued Feb. 9, 2012) (quoting Letter dated April 21, 2011 from Julius P. Knapp, Chief, FCC Office of Engineering to Hon. Lynn C. Woolsey, U.S. House of Representatives). The FCC sets exposure limits at levels that ensure the public is not exposed to potentially harmful levels of RF energy. *Id.*

B. The Commission Properly Addressed Issues Regarding Privacy and Trespass

1. Appellants' Statements Regarding the Technical Capabilities of Wireless Smart Meters are Misleading and Unsupported

Appellants make multiple statements, without citation to any source, regarding the technical capabilities of wireless smart meters that are unfounded. In fact, Appellants say that some of these statements are "undisputed facts," yet make no reference to the origin of such statements or why they believe they are undisputed. (Blue Br. 38.) Appellants then use such statements as a basis for their argument that smart meters violate privacy rights. (Blue Br. 38-40.)

In addition, even when making technically true statements about the capability of smart meters, Appellants irresponsibly do not put those capabilities in context. Appellants confuse what smart meters are *theoretically capable* of only if in the future proactive steps are taken by a consenting customer, and how smart meters as installed on homes right now are functioning. For instance, Appellants state that smart meters have the ability "to collect a vast array of information about the amount, frequency, and timing of the customer's usage of specific electrical equipment within the home." (Blue Br. 41.) As an initial matter, Appellants do not provide any references for this statement or cite to any source whatsoever for support for this proposition. Further, what Appellants leave out of this statement is that the only way smart meters can identify the energy usage of specific appliances or control those appliances, or do anything other than transmit the total energy used by customers or information relating to the function of the meter itself (*e.g.* meter

voltage, meter operational status), is if customers take affirmative actions to enable such functionalities. *See Boxer-Cook, et al.*, Docket No. 2010-345, Transcript at 179-84 (Jan. 24, 2011). For example, a customer could set up a home network to monitor electricity usage in his or her home on a near-real-time basis, or purchase appliances embedded with a device that could communicate with the smart meter and then proactively program that appliance to communicate with their smart meter. *See Id.*

There are many reasons customers might choose to enable the enhanced functionalities of a smart meter, including having greater control over their energy usage, particularly with the advent of time-of-use, or "dynamic" pricing where retail electricity prices are set hourly according to predicted demand (*e.g.*, demand is lower in the overnight hours, so the retail price of that electricity is lower). Such a program tailored to CMP's smart meters is currently being developed and when it is offered, it would be the customer's choice whether or not to enroll in the program.[12] (Supp. 10.) If a customer were inclined to sign up for dynamic pricing and then decided, for instance, to buy a dishwasher equipped with a functionality that would allow communication with their smart meter, they would then be able to control their electricity usage in a way that could save them money. Indeed, the Commission, in approving CMP's AMI program, required that smart meters have the capability to accommodate "value added" systems and devices. (Supp. 8.)

[12] Voluntary dynamic pricing programs are currently being developed for CMP and Bangor Hydro Electric Company in Commission Docket Nos. 2010-132 and 2010-14.

2. The Commission is Adequately Addressing Privacy Concerns

The Commission has and continues to take steps to address customer privacy concerns with regard to smart meters. During the 2011 Legislative session, the Maine Legislature enacted Resolve, to Examine Cyber Security and Privacy Issues Relating to Smart Meters. Resolves 2011, ch. 82 (the "Resolve"). The Resolve directed the Commission to open an inquiry for comments, examine cyber security and privacy issues regarding smart meters, and provide a report to the Legislature. On August 17, 2011, the Commission opened an Inquiry to obtain information, viewpoints and recommendations from interested persons on the issues identified in the Resolve. *Maine Public Utilties Commission*, Inquiry into Cyber Security and Privacy Issues Regarding Smart Meters and Related Systems, Docket No. 2011-274, Notice of Inquiry (Aug. 17, 2011). Comments and reply comments were received in September of 2011. The Commission submitted its report to the Maine Legislature on January 15, 2012. Me. Pub. Utils. Comm'n, Report on Cyber-Security and Privacy Issues Relating to Smart Meters (Jan. 15, 2012) ("Report"). Along with examining current cyber security guidelines for smart meters, the Report also examined customer privacy issues related to smart meters. *Report* at 10-17. The Report concluded there were no substantial regulatory gaps with respect to protecting customer information because current Commission rules, 65-407 C.M.R. ch. 815, § 4, prohibit utilities from giving customer information, including usage information, to third parties without customer consent. *Id.* at 12-14. The Report noted that issues of customer privacy will be addressed in the current

dynamic pricing program proceedings when developing time-of-use pricing. *Id.* at 18.

C. The Commission Appropriately and Reasonably Addressed Issues Regarding the Cost of Choosing to Opt-Out

During the Opt-Out Investigation, CMP submitted detailed cost data reflecting the incremental cost to CMP of an opt-out program. These costs are reflected in Attachment 1 to the April 21, 2011 Bench Analysis. The incremental costs included, but were not limited to:

- Additional network infrastructure necessary to compensate for gaps in the wireless mesh network caused by analog meters;
- Additional charges from the smart meter installation vendor for customers who opt-out at the time of smart meter installation;
- Additional license fees for enhanced manual meter reading devices;
- Costs associated with the deployment of analog meters to customers who opt-out after receiving a smart meter;
- Costs associated with development and implementation of a customer communication program to explain the opt-out program;
- Costs associated with the development of a non-wireless smart meter;
- Additional costs for managing electric system load information in the absence of hourly usage data from analog meters;
- Additional personnel to read analog meters; and
- Additional vehicles for the extra meter readers.

Bench Analysis, Attachment 1.

All of these costs were presented during the original Opt-Out Investigation, and the complainants and intervenors had an opportunity to

question CMP regarding the accuracy of the information. The Commission considered the cost information from CMP and the discussions of the parties when determining the up-front and monthly fees for the opt-out program. The Commission also made a policy determination regarding which costs would be shared equally among all CMP customers, and which costs would be borne by the customers who chose to opt-out. (Supp. 59.)

This sort of economic fact-finding is entitled to substantial deference by this Court. This Court has followed a "long-standing policy of according the Commission considerable deference in the realm of economic fact-finding." *Central Me. Power Co.*, 405 A.2d at 182. This Court has stated that it "possesses neither the resources, the expertise, nor the inclination to act as a '*super-commission*,'" and "cannot substitute [its] judgment of the economic facts presented for that of the Commission." *Id.* (emphasis in original).

V. The Opt-Out Orders do not Violate Either the United States or Maine Constitutions

In their Brief, Appellants claim that the Opt-Out Orders are unconstitutional because they authorize a "search" of the homes of CMP customers without their consent. (Blue Br. 37-42). Consent is indeed a key concept in the area of Fourth Amendment jurisprudence. This Court has stated that "a search conducted pursuant to consent is one of the well-settled and established exceptions to the requirements of both a warrant and probable cause." *State of Maine v. Nadeau*, 2010 ME 71, ¶ 17, 1 A.3d 445, 454 (internal quotations omitted; *quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). This Court has also stated that the standard of review for factual findings addressing the existence of consent is "clear error." *Id.* ¶ 18.

In this case, assuming, *arguendo*, that a "search" of a customer's home is even occurring by virtue of what Appellants style as smart meters transmitting "rays into the home as well as receiv[ing] rays carrying specific data about activities occurring in the home," (Blue Br. 39), such a "search" is consensual. First, as discussed in Argument Part IV(B)(1), *supra*, the only way that CMP could garner information regarding a customer's specific appliances or electric equipment is if the customer enables the collection of such data via a home network and compatible equipment. The purchase and installation of such compatible electronics by a customer certainly constitutes "consent" on the part of the customer.

Second, and perhaps more importantly, under the Opt-Out Orders customers have the choice to simply refuse to have a smart meter installed on their house. Such a meter is non-standard equipment and requires additional personnel and infrastructure to support. However, the fact that customers are required to pay their share of what would otherwise be unnecessary personnel and infrastructure costs does not somehow turn the customer's choice of an analog meter into an act of coercion robbing the customer of his or her free will. The availability of this choice vitiates Appellants' constitutional arguments and, instead, makes this an issue of prudent rate design. To that end, individual customer charges for non-standard services are commonplace. For example, a customer is free to relocate their meter to another location on his or her house, but that customer must pay the cost of that relocation. (Supp. 57 n. 10.) This type of economic and rate-setting determination is uniquely within the purview of the Commission, and the Commission is due

substantial deference from this Court when engaged in such economic fact-finding.

CONCLUSION

For all of the reasons discussed above, the Maine Public Utilities Commission respectfully requests that this honorable Court affirm the August 31, 2011 Order Dismissing Complaint in Commission Docket No. 2011-262.

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CERTIFICATE OF SERVICE

I, Jordan D. McColman, hereby certify that I have served two copies of the above Brief of Appellee Maine Public Utilities Commission upon the following parties in the above described matter by hand delivery or U.S. Mail, first class, with all charges prepaid:

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