

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

**Law Docket No. PUC-11-532**

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**ED FRIEDMAN, et al,**

**Appellants**

**v.**

**MAINE PUBLIC UTILITIES COMMISSION**

**and**

**CENTRAL MAINE POWER COMPANY**

**Appellees**

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**ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION**

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**BRIEF OF APPELLANTS**

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**TABLE OF CONTENTS**

Table of Authorities . . . . . iii

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY. . . . . 1

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . . 10

III. STANDARDS OF REVIEW . . . . . 12

IV. SUMMARY OF LEGAL ARGUMENT. . . . . 13

V. LEGAL ARGUMENT . . . . . 16

    A. The Commission erred by failing to follow statutory mandates to ensure the delivery of safe and reasonable utility services and facilities and to consider all relevant factors in implementing the smart meter program. . . . . 16

    B. The Commission erred in applying the Legislature’s standard for dismissing a ten-person complaint. . . . . 18

    C. The Commission erred in failing to give separate consideration to the Complaint under *Agro v. Public Util. Com., 611 A.2d 566 569 (Me. 1992)*. . . . . 20

    D. The Commission erred in relying on past decisions in its Opt-Out Investigation as a basis for dismissing allegations in this Complaint. . . . . 22

        1. In its Opt-Out Investigation, the Commission refused to consider all allegations of safety, health, or privacy. . . . . 23

            a. The Commission’s stated rationale for refusing to consider and investigate safety and health issues in the Opt-Out Investigation offer no basis for dismissing the issues in this case. . . . . 24

            b. Because the Commission provided *no* rationale for refusing or declining to address privacy issues in the Opt-Out Investigation, its Opt-Out Orders provide no basis for dismissing these issues in this case. . . . . 27

        2. The Commission’s dismissal of property rights and trespass allegations in its Opt-Out Investigation

was clearly erroneous, and its Opt-Out Orders provide no basis for dismissing these issues in this case. . . . .	29
3. The Commission’s Dismissal does not address the Complaint’s allegations of discrimination and the Commission’s dismissal of discrimination allegations in its Opt-Out Investigation cannot be relied upon to impliedly dismiss similar allegations in this case. . . . .	36
E. Opt-Out Orders (Part I & II) must be annulled as unconstitutional because they authorize the collection of data from constitutionally protected areas of the home without a warrant or the express consent of the customer in violation of the Fourth Amendment of the United States Constitution and Article I of the Maine Constitution . . . . .	37
F. Opt-Out Orders (Part I & II) must be annulled as unconstitutional because they require CMP customers to allow CMP to attach equipment to the customers’ homes for CMP’s own purposes, without consent and without compensation in violation of the takings clause in the Fifth Amendment of the United States Constitution and Article I of the Maine Constitution. . . . .	42
G. The Court should order the Commission to stay further implementation of the smart meter program pending a full investigation of the Complaint. . . . .	45
VI. CONCLUSION . . . . .	46
CERTIFICATE OF SERVICE . . . . .	48

## TABLE OF AUTHORITIES

### CASES

<i>Agro v. Public Util. Com.</i> , 611 A.2d 566 (Me. 1992) .....	passim
<i>Alabama Power Co. v. Alabama Pub. Serv. Comm'n</i> , 390 So. 2d 1017 (Ala. 1980).....	23
<i>Brink's, Inc. v. Maine Armored Car &amp; Courier Service, Inc.</i> , 423 A.2d 536 (Me. 1980).....	17
<i>Central Maine Power Co. v. Public Utilities Com.</i> , 382 A.2d 302 (Me. 1978).....	12, 13, 46
<i>City of Portland v. Public Utils. Comm'n</i> , 656 A.2d 1217 (Me. 1995).....	16
<i>City of Shawnee v. AT&amp;T Corp.</i> , 910 F. Supp. 1546 (D. Kan. 1995) .....	30
<i>Dairy Farm Leasing Co. v. Hartley</i> , 395 A.2d 1135 (Me. 1978).....	33
<i>Darney v. Dragon Prods. Co.</i> , 640 F.Supp.2nd 117 (D.Me. 2009)).....	30
<i>Darney v. Dragon Products Company</i> , 2010 ME 39, 994 A.2d 804.....	30
<i>Eastern Maine Electric Cooperative, Inc. v. Maine Yankee Atomic Power Company</i> , 225 A.2d 414 (Me. 1967)) .....	13
<i>Fla. v. Royer</i> , 460 U.S. 491, 495 (1983) .....	42
<i>Gonzalez v. Banco Cent. Corp.</i> , 27 F.3d 751 (1st Cir. 1994).....	22
<i>Heckman v. Pennsylvania Bd. of Probation &amp; Parole</i> , 744 A.2d 371 (Pa. Commw. Ct. 2000).....	17
<i>Holmquist v. New England Tel. &amp; Tel. Co.</i> , 637 A.2d 852 (Me. 1994) .....	36
<i>In re Opinion of Justices</i> , 147 Me. 25 (Me. 1951) .....	45
<i>Indus. Energy Consumer Group v. PUC</i> , 2001 ME 94, 773 A.2d 1038 .....	12, 16

<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974) .....	40
<i>Johnston v. Me. Energy Recovery Co., Ltd., P’ship</i> , 2010 Me. 52 997 A.2d 741 .....	26
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	15, 39, 40, 41, 48
<i>Lewiston, Greene &amp; Monmouth Tel. Co. v. New England Tel. &amp; Tel. Co.</i> , 299 A.2d 895 (Me. 1973).....	38
<i>Lewiston, Greene &amp; Monmouth Tel. Co. v. New England Tel. &amp; Tel. Co.</i> , No. F.C. 1902 (M.P.U.C. 1972) .....	36
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	15, 42
<i>Neudek v. Neudek</i> , 2011 ME 66, 21 A.3d 88 .....	12, 19
<i>New England Tel. &amp; Tel. Co. v. Public Util. Comm’n</i> , 448 A.2d 272 (Me. 1982).....	12
<i>New England Tel. &amp; Tel. Co. v. Public Utilities Com.</i> , 354 A.2d 753 (Me. 1976).....	16
<i>Office of Pub. Advocate v. PUC</i> , 2005 ME 15, 866 A.2d 851 .....	27
<i>Payton v. New York</i> , 445 U.S. 573 (1980).....	41
<i>Public Utilities Comm’n v. Pollak</i> , 343 U.S. 451 (U.S. 1952) .....	40
<i>Savannah Electric &amp; Power Co. v. Horton</i> , 44 Ga. App. 578 (Ga. Ct. App. 1931) .....	31
<i>State v. Hutchinson</i> , 2009 ME 44, 969 A.2d 923 .....	38
<i>Stenzel v. Dell, Inc.</i> , 2005 ME 37, 870 A.2d 133. ....	32, 33
<i>United States v. Ray</i> , 273 F. Supp. 2d 1160 (D. Mont. 2003).....	17
<i>UPS v. NLRB</i> , 92 F.3d 1221 (D.C. Cir. 1996) .....	26
<i>Ward v. McGlory</i> , 358 Mass. 322 N.E.2d 78 (Mass. 1970) .....	30
<i>Whalen v. Down East Cmty. Hosp.</i> , 2009 ME 99, 980 A.2d 1252.....	33

**STATUTES**

4 M.R.S. §7 ..... 45

35-A M.R.S. §101 ..... 3, 12, 16, 24

35-A M.R.S. §104 ..... 17, 26

35-A M.R.S. §301 ..... 3, 10

35-A M.R.S. §301(1) ..... 16

35-A M.R.S. §702 ..... 35

35-A M.R.S. §1302 ..... passim

35-A M.R.S. §1302(1) ..... 4

35-A M.R.S. §1302(2) ..... 13, 19

35-A M.R.S. §1320(8) ..... 37

35-A M.R.S. §3143 ..... 3, 10, 12

35-A M.R.S. §3143(1)(A) ..... 3

35-A M.R.S. §3143(1)(C) ..... 3, 16

35-A M.R.S. §3143(3) ..... 2, 17

35-A M.R.S. §3143(5) ..... 3

35-A M.R.S. §3143(7) ..... 3

16 U.S.C. §2621(d)(14)(A) and (C) ..... 2, 37

**OTHER AUTHORITIES**

Energy Policy Act of 2005, Pub.L. 109-58, 119, Stat. 595 ..... 2

Energy Independence and Security Act of 2007,  
Pub.L. 110-140, 121 Stat. 1492 ..... 2, 3

American Recovery and Reinvestment Act of 2009 Pub.L. 111-5, 123 Stat. 115.....	2
P.L. 2009, c. 539, §2 .....	2, 17
Webster's Third New International Dictionary 756 (1993) .....	18

**REGULATIONS:**

CMR 65-407-815 .....	39
----------------------	----

**CONSTITUTIONAL PROVISIONS:**

Maine Const. Art. I, §5 .....	11, 15, 37, 38, 42
Maine Const. Art. I, §21 .....	11, 15, 37, 41
U.S. Const. Amend. IV .....	11, 15, 37, 38
U.S. Const. Amend V .....	11, 15, 42
U.S. Const. Amend. XIV .....	42

## **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

This appeal is taken from the Maine Public Utility Commission's (the "Commission") dismissal of Appellants' Complaint. Appendix ("App.") at 2. The essence of the allegations in the Complaint are: 1) Central Maine Power Company's ("CMP") "smart meters" have adverse effects on health, safety, privacy, security and property rights; 2) the Commission's orders compelling CMP customers to either accept the meters or pay special confiscatory fees violate Appellants' constitutional and property rights; and 3) the Commission has failed to satisfy its statutory duty to protect the rights of CMP customers by ensuring that all utility services and facilities are safe, reasonable and non-discriminatory. *App.* 8-31.

On February 25, 2010, the Commission issued an order approving the installation of advanced metering infrastructure ("AMI") by Central Maine Power Company ("CMP"). *Supplement of Legal Authorities ("Supp.")* at 1. AMI includes smart meters and related systems that will allow CMP to conduct automated and remote meter reading, collect detailed measurements about customer usage within their premises, collect and store data about such usage, and communicate data to and from customer meters. *Id.*, n. 1. The development of this technology has been encouraged and authorized by both federal and state legislation, but neither the U.S. Congress nor the Maine Legislature has enacted legislation or promulgated public policy that mandates



participation by electricity customers, or that authorizes utilities to implement mandatory programs.

Federal support for the development of smart meter systems began with the Energy Policy Act of 2005, Pub.L. 109-58, 119, Stat. 595, was supplemented with passage of the Energy Independence and Security Act of 2007, Pub.L. 110-140, 121 Stat. 1492, and heavily funded by the American Recovery and Reinvestment Act of 2009, Pub.L. 111-5, 123 Stat. 115, which set aside \$11 billion for the creation of a smart grid. Approximately 50% of the cost of CMP's AMI project was funded by a \$90 million grant from the Department of Energy ("DOE") authorized by the 2009 Act. *Supp. at 2*. The Energy Policy Act of 2005 very clearly establishes an optional standard by which utilities are required to make a time-variable rate structure (often accomplished with wireless, digital smart meters, but also with analog meters and wired meters) available "upon customer request."<sup>1</sup>

In 2009, the Maine Legislature enacted an Act to Create a Smart Grid Policy in the State. P.L. 2009, c. 539, §2. This legislation also does not prescribe or authorize mandatory participation by consumers, nor does it

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<sup>1</sup> "Not later than 18 months after August 8, 2005, each electric utility shall offer each of its customer classes, and provide individual customers *upon customer request*, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology . . . . Each electric utility subject to subparagraph (A) shall provide *each customer requesting* a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively." 16 U.S.C. §2621(d)(14)(A) and (C) (emphases added).

prescribe the use of wireless smart meters. 35-A M.R.S. §3143.<sup>2</sup> It does pronounce State policy to proceed deliberately and prudently in promoting and developing smart grid functionality, “in a timely and responsible manner, with consideration of all relevant factors” consistent with applicable standards for “reliability, safety, security and privacy.” Subsection 3143(3). The Act mandated that the Commission “shall ensure that applicable regional, national and international grid safety, security and reliability standards are met,” and specifically authorized the Commission to promulgate “rules regarding cyber security and protection of consumer privacy, and access to smart grid infrastructure.” Subsections 3143(7) and (5). These policies and requirements are consistent with other statutory mandates requiring that the Commission “ensure safe, reasonable, and adequate services,” and that all utilities “furnish safe, reasonable and adequate facilities and service.” 35-A M.R.S. §§101 and 301.

The AMI system chosen by CMP uses a “mesh” network that requires linkage and communication via radio frequency waves between individual wireless smart meters (located on homes and other buildings) and wireless repeaters (generally located on utility poles) in a “Neighborhood Area Network” that communicates with a “Wide Area Network,” which communicates with a “Head End System.” *Supp.* at 14. The Head End System is the “controller” for

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<sup>2</sup> The Legislature defines “smart grid” as 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. §3143(1)(A). It defines “smart grid functions” with reference to the federal Energy Independence and Security Act of 2007, Pub.L. 110-140, 121 Stat. 1492. *Id.* §3143(1)(C).

the AMI System, and “coordinates information flows between CMP customers and CMP’s Meter Data Management System.” *Id.* The smart meters and the other devices in the system “transmit data by sending radio frequency (RF) signals between various points in the network.” *Id.*

Because of the “mesh” nature of the system, CMP uses and relies on individual smart meters as interconnected units of a whole that communicate with each other within their Neighborhood Area Network. “A radio device in the meters communicates with other meters and network devices within a Neighborhood Area Network.” *Supp.* at 47. Each smart meter is a communication device designed to serve CMP’s overall AMI system. Acting as a relay station within the mesh network, each smart meter receives data transmissions from other meters in the vicinity and transmits the data on to other meters and the wireless repeaters on CMP’s utility poles.

Many CMP customers objected to the installation of the radio frequency technology in their homes without their consent; in particular they objected to the health risks of being exposed to the electromagnetic radiation, the collection of personal information from within their homes, the cyber security risks of having private information “hacked” or leaked, and being compelled to allow CMP to use their property to serve CMP’s “mesh” smart grid system. In 2010, four separate ten-person complaints (the Boxer-Cook, Swinbourne, Foley-Ferguson, and Wilkins Complaints) were filed under 35-A M.R.S. §1302<sup>3</sup>

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<sup>3</sup> This section authorizes complaints by ten or more aggrieved persons alleging that “a regulation, measurement, practice or act of a public utility is in any respect unreasonable, insufficient or unjustly discriminatory.” 35-A M.R.S. §1302(1).

alleging the proposed smart meter program was unreasonable, discriminatory and inconsistent with legislative mandates. *Supp.* at 14, 16, and 22. Another ten-person complaint was filed in February, 2011 (the Tupper Complaint). *Supp.* at 51.<sup>4</sup> These complaints included allegations related to safety, health, privacy, cyber security,<sup>5</sup> property rights and constitutional violations.

The Commission consolidated all five complaints but narrowed the scope of its investigation, stating it would not investigate or make any determinations regarding health, safety, privacy or security concerns. *Supp.* at 19. It dismissed the property rights allegations pertaining to trespass as without merit and dismissed the constitutional claims for lack of jurisdiction. *Supp.* at 24, 36-37. The Commission narrowed its review of relevant factors even further by stating it would not include consideration of the use of “non-wireless” alternatives for smart meters. *Supp.* at 23.

The Commission refers to its investigation of the 2010 complaints as its “Opt-Out Investigation.” On May 19, 2011, the Commission issued the first of two orders (Opt-Out Order (Part I)), specifically authorizing CMP to install smart meters in homes of all customers, unless the customers pay a special opt-out fee or penalty for the right to not participate in the smart meter program. The Commission ordered:

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<sup>4</sup> As of June, 2011, the Commission had received 7 ten-person complaints. *Supp.* at 57.

<sup>5</sup> The “security” or “cyber security” concerns pertain to the risk of losing private information through cyber attacks or hacking and related security risks such as identity theft and criminal monitoring of vacant homes. These risks can be seen as a subset of privacy concerns. In this brief, references to “privacy” concerns include security and cyber security concerns.

CMP to implement an “opt out” program with respect to its smart meter program whereby CMP customers who do not wish to have a wireless “smart meter” may choose to retain their existing analog electric meter or obtain a “smart meter” with the transmission function disabled. Customers choosing to opt-out will incur a one-time charge and a recurring monthly charge designed to allow CMP to recover the incremental costs associated with the design and implementation of the opt-out program. *Supp.* at 41.

The Commission further ordered that customers, who choose not to upgrade their meters to a smart meter, must pay an initial fee of \$40.00 plus a \$12.00 monthly fee, for as long as they remain a customer; the monthly fee could be increased in the future. *Supp.* at 41-42.<sup>6</sup> On June 22, 2011, the Commission issued Opt-Out Order (Part II), reaffirming Opt-Out Order (Part I) and further explaining its rationale. The Commission noted that it received “numerous letters and emails from customers expressing serious concerns regarding wireless smart meters, including potential health and safety impacts, privacy and security risks, and possible interference with wireless devices,” and “continued to receive these communications throughout the deployment of the smart meter program and the Opt-Out Investigation.” *Supp.* at 57. Emphasizing the “magnitude of concerns among a significant portion of its customers,” the Commission concluded that it is “clearly an unreasonable act and practice” to ignore these concerns. *Id.* It estimated that 9,000 customers would choose to opt-out of the smart meter program, *Supp.* at 54-55, and noted

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<sup>6</sup> The Commission also created an alternative option of accepting a smart meter in “receive only mode” with the transmitter turned off. This option requires an initial fee of \$20.00 and monthly fees of \$10.50. *Supp.* at 42, 58.

that these customers are making the “choice to forego [sic] the benefits of the AMI system.” *Supp.* at 58.

Nevertheless, the Commission concluded that charging special fees to the estimated 9,000 customers, who prefer to forgoe the benefits of AMI because of their “serious concerns,” would be a reasonable practice or act, because “[t]he AMI smart meters are now CMP’s standard meter,” *i.e.*, because the Commission has mandated it. *Supp.* at 59. The amount of the fees is based on estimated costs associated with employing meter readers and with the hypothetical need to install additional network devices required to avoid gaps in the mesh network. *Id.* CMP predicts that gaps will be created because there will be no radio frequency antennae attached to the homes of opt-out customers to act as repeaters or relays within the mesh network chosen by CMP.

On July 29, 2011, the Appellants filed their ten-person Complaint under Section 1302. The Complaint includes extensive citations to peer-reviewed science reports and other documents and publications in support of the allegations. Some of the allegations in the Complaint are summarized and paraphrased below:

**Health and safety.** According to scientific research, the adverse health effects of radio frequency radiation, similar to that transmitted by smart meters, may include a variety of physiological malfunctions, such as adverse nervous system effects, psychological disorders, behavioral changes, blood disorders, enzyme and other biochemical changes, metabolic disorders, gastro-

intestinal disorders, and genetic and chromosomal changes. Scientific writings describe several biological mechanisms that may cause these adverse health effects, including removal of, or changes to, calcium ions bound to cellular membranes, the leakage of calcium ions into neurons, fragmentation of DNA in cells, changes in the blood-brain barrier after microwave exposure, and others. *App.* at 6-7. Some people have become electrically hypersensitive and many are unable to use rooms located near a smart meter. Children are particularly vulnerable as are pregnant women and those with compromised immune systems. The presence of metal implants in the body (such as metal pins in bones) may concentrate the absorption of radiation at the location of implantation, causing thermal effects from lower power densities than would ordinarily cause such harm. Some implants, such as pace makers and deep brain stimulators for Parkinson's disease, may malfunction and this can be fatal. *App.* at 8. On May 31, 2011, the International Agency for Cancer Research/World Health Organization (IARC/WHO) issued a press release announcing it had classified radiofrequency electromagnetic fields as possibly carcinogenic to humans (Group 2B). *App.* at 10.

**Privacy.** Alleged privacy and security concerns include identity theft, identifying and monitoring personal behavior patterns and appliance use, real-time surveillance, and targeted home invasions. *App.* at 20-21. Smart meters, with the capacity to record in real-time when specific appliances or pieces of electric equipment are being used, can reveal "whether a building is occupied or vacant, show residency patterns over time, and reflect intimate details of

people's lives and their habits and preferences.” *App.* at 23. This technology will be susceptible to hacking and cyber attacks exposing private information to unauthorized third parties. *App.* at 21-23.

**Property rights.** CMP is trespassing by electronically entering the home via radiofrequency waves, exceeding the terms and conditions of the authorized service. *App.* at 20. CMP is also trespassing by using customers' homes as a facility to store and move other customers' data. *App.* at 27. CMP's rights of access are limited essentially to providing, accessing and servicing their meters, and their choice of meter is within this context. CMP customers have not consented to the transmission of radio frequency waves into their homes to collect data or to the use of their homes to collect and transmit data from other CMP customers. *App.* at 19-20.

**Constitutional violations.** CMP is acting as an agent of the government (the PUC or State) which endorsed and promoted the smart meter program, soliciting and awarding bids to implement it as part of a smart grid. *App.* at 20. Law enforcement can obtain access to utility records without a warrant. *App.* at 23. Smart meters will vastly increase law enforcement access to private information inside the home without a warrant or consent in violation of the right to be free from unreasonable search and seizure. *App.* at 19-20. Imposing either the installation of smart meters or a special fee is an unconstitutional taking. *App.* at 26.



**Discrimination.** Penalizing the class of customers having concerns regarding this technology by imposing fees not charged to other customers is discriminatory. *App.* at 8, 28.

CMP responded to the Complaint with a one page submission on August 11, 2011. *App.* at 1. On August 31, 2011, the Commission dismissed the Complaint on the grounds that “CMP has taken and is taking adequate steps to remove the cause of the Complaint,” and stating that all of the issues raised in the Complaint were resolved in the Opt-Out Investigation. *App.* at 6 (the “Dismissal”). The Appellants filed a Motion to Reconsider, specifically asking the Commission to reconsider its conclusion that the issues of safety, health, privacy, property rights and constitutional violations were adequately addressed and resolved in the Opt-Out Investigation. *App.* at 1. The Motion for Reconsideration was denied on October 11, 2011, by operation of law on the expiration of the 20-day period for processing such motions, *App.* 1, and the Appellants filed a timely appeal to this Court in accordance with 35-A M.R.S. §1302.

## **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Whether the Commission has failed to follow its statutory mandates to investigate valid complaints in accordance with 35-A M.R.S. §1302, to ensure safe, reasonable, and non-discriminatory services in accordance with 35-A M.R.S. §301, and to consider all relevant factors in implementing the smart meter program in accordance with 35-A M.R.S. §3143.

Whether the Public Utilities Commission (the “Commission”) erred in

applying the statutory standard for dismissing ten-person complaints and in its determination that Central Maine Power Company (“CMP”) has taken and is taking adequate steps to remove the causes of the Complaint in accordance with 35-A M.R.S. §1302.

Whether the Commission erred by failing to give separate consideration to the Complaint as required by *Agro v. Public Util. Com.*, 611 A.2d 566, 569 (Me. 1992).

Whether the Commission erred in relying on past decisions in its Opt-Out Orders as a basis for dismissing the Complaint.

Whether Opt-Out Orders (Part I & II) must be annulled to the extent that they compel the collection of data from constitutionally protected areas of the home without a warrant or the express and informed consent of the customer in violation of the Fourth Amendment of the United States Constitution and Article I of the Maine Constitution.

Whether Opt-Out Orders (Part I & II) must be annulled as unconstitutional to the extent that they compel CMP customers to allow CMP to attach equipment to the customers’ homes without compensation in violation of the takings clause in the Fifth Amendment of the United States Constitution and Article I of the Maine Constitution.

Whether, on remand, this Court should order the Commission to stay CMP’s implementation of the smart meter program, pending a full investigation of the Complaint.

### III. STANDARDS OF REVIEW

There are three statutory standards or mandates applicable to the circumstances of this case. The first is that the Commission must ensure safe, reasonable, and adequate services and rates that are just and reasonable.

35-A M.R.S.A. §101. The second is that the Commission must consider “all relevant factors” in making decisions to promote and develop a smart grid system. 35-A M.R.S. §3143. The third is that the Commission may dismiss a ten-person complaint without investigation, only when the complaint is without merit or the utility has taken adequate steps to resolve the causes of the complaint. 35-A M.R.S. §1302.

On appeal, the Commission’s Dismissal is reviewed for questions of law and determinations of fact not supported by the record. Determinations of fact made by the Commission will be upheld by this Court if they are supported by substantial evidence in the record. *New England Tel. & Tel. Co. v. Public Util. Comm’n*, 448 A.2d 272, 278 (Me. 1982). On review of the dismissal of a complaint, however, each allegation of fact in the complaint must be taken as true. *Neudek v. Neudek*, 2011 ME 66, P12, n.1, 21 A.3d 88, 91.

This Court will vacate a Commission decision, “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,” all of which present questions of law. *Indus. Energy Consumer Group v. PUC*, 2001 ME 94, P11, 773 A.2d 1038, 1041. And, this Court has a “longstanding practice of [examining] closely proceedings of the Commission to ensure that they comply

with statutory and other standards.” *Central Maine Power Co. v. Public Utilities Com.*, 382 A.2d 302, 313 (Me. 1978) (quoting *Eastern Maine Electric Cooperative, Inc. v. Maine Yankee Atomic Power Company*, 225 A.2d 414, 415 (Me. 1967)).

#### **IV. SUMMARY OF LEGAL ARGUMENT**

At stake in this appeal is the integrity and vitality of the Commission’s role as guardian of the public interest in the regulation of electric utilities. The Commission issued Opt-Out Orders (Part I & II) and the Dismissal giving no consideration to customer complaints about safety, health, or privacy, and only cursory consideration to property rights. By doing so it has forsaken its most fundamental duty to *ensure* that all utility services and facilities are safe, reasonable, adequate and non-discriminatory and its duty to consider all factors in reviewing the smart meter program.

Also at stake are Appellants’ fundamental statutory and constitutional rights – their rights to receive electricity in their homes through utility services and facilities that are safe, reasonable, adequate and non-discriminatory; and their rights to be free from unreasonable government-sanctioned searches within their homes and to receive just compensation when the government sanctions the use of their property by physical occupation without their consent.

The Commission’s Dismissal must be vacated because the Commission failed to follow its statutory mandate to investigate all ten-person complaints unless the “complaint is without merit,” or the utility has “taken adequate

steps to remove the cause of the complaint.” 35-A M.R.S. §1302(2). Although the Dismissal asserts that CMP has taken adequate steps to remove the cause of the complaint, there is no basis in the record to support this conclusion. In fact, the actions taken by CMP to implement the Opt-Out Orders, along with the Opt-Out Orders themselves, *are* the cause of the Complaint. The Dismissal also disregards this Court’s holding in *Agro v. Public Util. Com.*, 611 A.2d 566 (Me. 1992).

It is likely that Appellees will urge the Court to uphold the Dismissal on the alternative ground that this Complaint is somehow barred by the Commission’s decisions in the Opt-Out Investigation. But, there are no doctrines of preclusion or judicial restraint that require or even authorize such a result. Even if such a legal doctrine could be theoretically operative in this case, the past decisions would have to have been squarely on point and correctly decided, which is not the case here. The Commission cannot, as a matter of law, rely upon the Opt-Out Orders with regard to issues of health, safety, and privacy because the Commission made no determinations on these issues. And, the Commission should not be allowed to rely on its previous dismissal of property rights allegations because those decisions were cursory and clearly erroneous.

The Commission did not rule on the merits of the constitutional claims, and these issues are now ripe for resolution on the merits by this Court. Requiring the installation of smart meters or the payment of a special fee to avoid the meter-associated risks, is a violation of the right to be free of

unreasonable searches under the Fourth Amendment of the United States Constitution and Article I of the Maine Constitution, because the meters are capable of collecting detailed private data from inside customers' homes without the customers' consent or a warrant. *Kyllo v. United States*, 533 U.S. 27 (2001). And, requiring customers to allow CMP to attach its radio frequency antennae and transceivers to customers' homes for CMP's own purposes, without consent or compensation, is a violation of the takings clause in the Fifth Amendment of the United States Constitution and Article I of the Maine Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 425-426 (1982).

CMP has installed over two-thirds of the smart meters in the program, potentially jeopardizing the health, safety, privacy and property rights of Maine residents and it is collecting confiscatory fees from those Maine residents who declined the smart meters in order to protect themselves, their families and their property rights. A remand without a stay will provide an inadequate remedy, because the Commission has so clearly and repeatedly failed to follow its statutory mandates and because the Appellants and other Maine residents and utility users are currently suffering harm or the threat of harm as a result of the Commission's abdication of its legislatively mandated duties. Accordingly, this Court should annul Opt-Out Orders (Part I & II) as unconstitutional, vacate the Dismissal, and direct the Commission to conduct a full investigation of the Complaint and to stay further implementation of the smart meter program pending the outcome of the investigation.

## V. LEGAL ARGUMENT

### A. The Commission erred by failing to follow statutory mandates to ensure the delivery of safe and reasonable utility services and facilities and to consider all relevant factors in implementing the smart meter program.

The Legislature has delegated to the Commission full authority for the regulation of public utilities, except where it has expressly limited that authority. *City of Portland v. Public Utils. Comm'n*, 656 A.2d 1217, 1220 (Me. 1995) (citations omitted). The Legislature's delegation of authority to the Commission is set out with extensive guidance and direction in Title 35-A of the Maine statutes. Section 101 of Title 35-A reads as follows:

The purpose of this Title is to ensure that there is a regulatory system for public utilities in the State which is consistent with the public interest and with other requirements of law. The basic purpose of this regulatory system is *to ensure safe, reasonable and adequate service* at rates which are just and reasonable to customers and public utilities. 35-A §101 (emphasis added).

Ensuring that utility facilities are "safe, reasonable and adequate" and those rates, tolls and charges are "just and reasonable" is the "essence of the regulatory approach undertaken" by the Legislature. *New England Tel. & Tel. Co. v. Public Utilities Com.*, 354 A.2d 753, 756 (Me. 1976). The "basic purposes then, are to (1) *ensure* safe, reasonable, and adequate services and (2) to *ensure* that rates are "just and reasonable" for both the customer and the public utility." *Indus. Energy Consumer Group v. PUC*, 2001 ME 94, P12, 773 A.2d 1038, 1041 (citing 35-A M.R.S. §101) (emphasis added). The Legislature further mandates that "[e]very public utility shall furnish safe, reasonable and adequate facilities and service." 35-A M.R.S. §301(1). And finally, the

Legislature emphasizes that all other provisions in Title 35-A must “be interpreted and construed liberally to accomplish the purpose.” 35-A M.R.S. §104.

Before the Commission commenced its Opt-Out Investigation, the Legislature enacted an Act to Create a Smart Grid Policy in the State, P.L. 2009, c. 539, which directed the Commission to consider “all relevant factors” in making decisions related to the development a smart grid system. 35-A M.R.S. §3143(3). Section 104 requires that this provision be construed liberally to accomplish the fundamental purpose of ensuring safe, reasonable, and adequate services and rates are just and reasonable, which necessarily means that safety is one of the “relevant factors.”

Thus, it cannot be overemphasized that the Commission’s most fundamental duty is to *ensure* safe and reasonable utility services and facilities. Nor can it be overemphasized that when fulfilling this duty with respect to the smart meter program, the Commission must consider all relevant factors, including safety. The Commission is entrusted by the Legislature as “the primary guardian of the public interest.” *Brink's, Inc. v. Maine Armored Car & Courier Service, Inc.*, 423 A.2d 536, 538 (Me. 1980). “Ensure” is the operative word chosen by the Legislature and emphasized by the Court to describe the Commission’s fundamental duty. “Ensure” means to “guarantee or to warrant” that something is accomplished or occurs. *United States v. Ray*, 273 F. Supp. 2d 1160, 1165 (D. Mont. 2003); *see also, Heckman v. Pennsylvania Bd. of Probation & Parole*, 744 A.2d 371, 375 (Pa. Commw. Ct. 2000) (“to make sure



[or] certain' or to 'guarantee.'" quoting Webster's Third New International Dictionary 756 (1993)).

The Legislature also endowed all utility customers with the statutory right to seek redress when ten or more of them complain that a facility or service is "in any respect unreasonable, insufficient or unjustly discriminatory; or that a service is inadequate or cannot be obtained." 35-A M.R.S. §1302. Although the Legislature does not include the word "safe" in Section 1302, it is axiomatic that an unsafe facility or service is neither "reasonable" nor "adequate." Thus, in the first instance, it is the Commission's most fundamental duty to make sure or guarantee all utility services and facilities are safe, reasonable, adequate, and non-discriminatory and to consider all factors in its review of the smart meter program, and in the second instance to fully investigate and take corrective or remedial action in response to complaints alleging unsafe, unreasonable, inadequate or discriminatory services or facilities.

In disregard of these statutory mandates, the Commission dismissed all allegations in the Complaint, including allegations that smart meters have adverse effects on safety, health, privacy and property rights, without any investigation or hearing. Therefore, the Dismissal must be vacated with direction to conduct a full investigation on remand.

**B. The Commission erred in applying the Legislature's standard for dismissing a ten-person complaint.**

To further protect utility customer rights, the Legislature has restricted the Commission's authority to dismiss complaints. A ten-person complaint

may be dismissed only upon a finding that 1) the utility has taken adequate steps to remove the cause of the complaint, or 2) the complaint is without merit. 35-A M.R.S. §1302(2). The Court has interpreted “without merit” in this context as authorizing dismissal only if there is “no statutory basis for the complaint.” *Agro v. Public Util. Com.*, 611 A.2d 566, 569 (Me. 1992). If the complaint is not dismissed it must be investigated. *Id.*

Extensive information was provided in the Complaint in support of allegations of adverse effects on safety, health, privacy, security, property rights and constitutional rights. On appellate review, each of the allegations must be taken as true. *Neudek v. Neudek*, 2011 ME 66, P12, n.1, 21 A.3d 88, 91. In its Dismissal, the Commission acknowledges these allegations and does not make a determination that they are without merit.<sup>7</sup> Instead, the Commission concluded that “CMP has taken and is taking adequate steps to remove the cause of the Complaint.” *App.* at 6.

To support this conclusion, the Commission cites the actions taken by CMP to implement the Opt-Out Orders. *Id.* Ironically, those very actions -- the installation of smart meters and the imposition of special fees on CMP customers who wish to avoid their installation – are the cause of the Complaint. As will be explained in more detail below, the Opt-Out Orders expressly declined to address, or summarily dismissed, all of the allegations in the Opt-Out Investigation about safety, health, privacy, property rights and

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<sup>7</sup> The Commission did determine that the allegations against the Commission itself were without merit and were dismissed on that basis, *App.* at 6, but appellants do not appeal that aspect of the Commission’s decision, except to the extent their constitutional claims are against the Commission.

constitutional violations, and the Commission granted no relief with respect to any of these allegations in the Opt-Out Orders.

How could the Commission have properly determined whether the smart meter program is safe, reasonable and adequate; or whether an opt-out program, as opposed to an opt-in program, would be reasonable and non-discriminatory without addressing valid concerns about safety, health, privacy, property rights and constitutional violations? How could the Commission determine whether it is reasonable, just and non-discriminatory to impose special fees on those who choose to opt-out, if it gives no consideration to the health, safety, privacy reasons for opting out? If the Opt-Out Investigation gave no consideration to these concerns, how could CMP's actions implementing the Opt-Out Orders adequately address the concerns? As a matter of logic, they could not, and as a matter of fact, they have not.

The fact that the Commission makes the illogical, if not Orwellian, assertion that actions taken by CMP, which are the actual cause of the Complaint, are somehow resolving the cause of the Complaint, incontrovertibly demonstrates that the Dismissal was based on clear error and must be vacated.

**C. The Commission erred in failing to give separate consideration to the Complaint under *Agro v. Public Util. Com.*, 611 A.2d 566, 569 (Me. 1992).**

In effect, the Commission dismissed the Complaint because it concluded the allegations do not deserve consideration separate from the Opt-Out Investigation. This is directly contrary to the holding in *Agro v. Public Util.*

*Com.*, 611 A.2d 566, 569 (Me. 1992), where the Court stated: “In view of the protection the statute accords to ten-person complaints, the PUC cannot dismiss outright such a complaint that the PUC admits has substantive merit, solely on the basis that it does not deserve separate consideration.” *Id.* This speaks directly to what the Commission did in this case. Although the two proceedings in *Agro* were brought before the Commission concurrently, the principle should apply equally to a subsequent proceeding unless the Section 1302 standards are met with respect to the subsequent case.

Appellants readily acknowledge the Commission has a difficult job and receives many ten-person complaints, most likely far more in connection with smart meters than with any other issue. It must balance principles of efficiency and fairness in deciding when to consolidate concurrent matters or dismiss subsequent matters. But, it must do so in the context of the legislative mandate to investigate all complaints unless they are without merit or their causes have been adequately addressed. *Agro* would not preclude a dismissal of a subsequent complaint under Section 1302 if the utility company had in fact taken actions in the first case that adequately addressed and resolved the allegations presented in the subsequent case. But that is not what happened here and there is nothing in record to support such a conclusion, indeed it is clear from the record that the opposite is true.

Yes, there were similar allegations about health and safety, privacy, security, and trespass made in the 2010 Complaints that led to the Opt-Out Investigation. But the question to be determined when viewing both cases in

the lens of the Section 1302 standard, as interpreted by *Agro*, is whether the allegations about health and safety, privacy, security, and trespass in this case were adequately addressed and resolved on their merits by the Commission in its Opt-Out Orders and/or resolved by actions taken by CMP in implementing the Opt-Out Orders. They were not adequately addressed or resolved on their merits in the Opt-Out Orders or by CMP's actions implementing the Orders, which is precisely why they are alleged anew in this case. Accordingly, under the holding in *Agro*, the decision must be vacated and remanded with directions to conduct a full investigation of the allegations in the Complaint separate from the Opt-Out Investigation.

**D. The Commission erred in relying on past decisions in its Opt-Out Investigation as a basis for dismissing allegations in this Complaint.**

It is likely that the Commission will argue its decision should be upheld on the alternative ground that the Complaint is somehow precluded or barred by its decisions in the Opt-Out Orders. Judicial principles of preclusion do not apply, however, because there is no identity of parties between the two proceedings and the circumstances do not justify extension of the doctrine to non-parties. *See, Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 758 (1st Cir. 1994) (discussing application to a nonparty who “either participated vicariously in the original litigation by exercising control over a named party or had the opportunity to exert such control”). They also do not apply with respect to claims related to health, safety and privacy, because the Commission expressly made no determinations on these issues in the Opt-Out Investigation

proceeding. To the extent that *stare decisis* applies generally to administrative bodies, *see, Alabama Power Co. v. Alabama Pub. Serv. Comm'n*, 390 So. 2d 1017 (Ala. 1980), it has no application here, because all of the issues raised in the Complaint were either not decided in the Opt-Out Orders or were decided erroneously. The Commission, and certainly this Court, is not bound by the Commission's past erroneous decisions. We address separately the Commission's treatment in the Opt-Out Orders of the issues raised in the Complaint.

**1. In its Opt-Out Investigation, the Commission refused to consider all allegations of safety, health, or privacy.**

The Commission could not have been more explicit about its refusal to investigate allegations about safety, health, or privacy. At the commencement of its Opt-Out Investigation, it stated:

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 and this investigation will not include such matter. *Supp.* at 19. (emphasis added).

It repeated this statement at the conclusion of its investigation.

The Commission specifically stated that it is making no determination on the merits of health, safety, privacy or security concerns with respect to wireless smart meters. *Supp.* at 52.

The Commission made no determinations on the merits of these issues and made no ruling that could be called a dismissal under Section 1302. Having made no determinations in the previous proceeding that would authorize a dismissal of the allegations under Section 1302, the Commission cannot now

rely on its “resolution” of those allegations in that proceeding to dismiss similar allegations in this proceeding.

These points are explored in more detail in two separate subsections below because of the Commission’s differing treatment in its Opt-Out Orders of the health and safety allegations, separate from the privacy allegations.

**a. The Commission’s stated rationale for refusing to consider and investigate safety and health issues in the Opt-Out Investigation offer no basis for dismissing the issues in this case.**

The Commission’s stated rationale in the Opt-Out Investigation for removing safety and health concerns from consideration was as follows:

The Commission has the clear authority to determine whether a utility is providing safe, reasonable and adequate service. 35-A M.R.S.A. §101. However, it is unclear whether the Commission is the appropriate entity to consider potential health effects from RF related to the Smart Meter installations, 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 health impacts. *Supp.* at 18.

The Commission failed to recognize it has the statutory *duty*, not just the authority, “to determine whether a utility is providing safe, reasonable and adequate service,” and to consider all factors in its review of smart meters. As a result, its ultimate determination mandating the installation of the meters and charging special fees to customers who are concerned about the health and safety of smart meters, is fundamentally flawed. The Commission engaged in circular reasoning when it stated it is appropriate to charge special fees to opt-out customers, despite their concerns, because smart meters are now the

“standard meter.” *Supp.* at 59. The whole purpose of the Opt-Out Investigation was to determine whether it is just and reasonable to compel customers to accept smart meters in their homes, which is tantamount to determining whether the smart meter should be mandated as the “standard meter.” Without considering or investigating most of the legitimate concerns driving customers’ opt-out choice, the Commission decrees the smart meter to be the “standard meter” and therefore, *ipso facto*, it is just and reasonable for opt-out customers to pay a special fee to keep their previously standard meters.

One of the complainants in the Opt-Out Investigation specifically objected to the Commission’s refusal to consider allegations about health and safety. Dianne Wilkins (Docket No. 2010-400) filed a motion for reconsideration arguing, in part, that the Commission should make a finding with regards to the safety of smart meters. *Supp.* at 33. The Commission declined to widen the then narrowed scope of its investigation to include safety, inaccurately stating that it had “already determined that it did not have the authority or expertise to make determinations regarding the potential health implications of RF.” *Supp.* at 38. The Commission had made no such determination in its previous order regarding health or safety effects. To the contrary, it merely stated that “it is *unclear* whether the Commission is the appropriate entity to consider potential health effects,” ignoring its very clear duty to make such determinations. *Supp.* at 18 (emphasis added).



In denying Ms. Wilkins' Request for Reconsideration the Commission expanded its stated rationale somewhat, citing the doctrine of primary jurisdiction.

Under the doctrine of primary jurisdiction, the Commission is not the appropriate entity to consider potential health effects from RF related to the smart meter installations given that the FCC is the federal agency charged with determining RF-related emission standards and the Commission does not have institutional expertise regarding potential RF health impacts. *Supp.* at 38.

The Commission cites no legal authority for its invocation of this doctrine. It is a judicial doctrine by which courts avoid ruling on matters before administrative agencies have had the opportunity to review and decide the facts and merits of the matter. *Johnston v. Me. Energy Recovery Co., Ltd., P'ship*, 2010 Me. 52, P. 18, 997 A.2d 741, 746. The doctrine does not apply to an agency's own determinations, *UPS v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996), and it is certainly not a legitimate rationale for abdicating the Commission's statutory duties.

Even if the Federal Communication Commission or some other agency has greater expertise than the Commission on the health effects of radio frequency waves that does not absolve the Commission of its statutory duty to investigate credible complaints about the safety and reasonableness of services, such as smart meters, and about the rates associated with those services. The Commission has all "implied and inherent powers" that may be "necessary and proper" to perform its duties, 35-A M.R.S. §104, including the power to seek information and opinions from a variety of sources with technical expertise.

The Commission is not permitted to disregard a mandate “solely because it is difficult to achieve or because certainty is not possible.” *Office of Pub. Advocate v. PUC*, 2005 ME 15, P35, 866 A.2d 851, 860. While 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. The Commission engaged in no such analysis. It simply declined to consider safety or health as a matter worthy of any consideration on its part.

In conclusion, the Commission made no determinations in the Opt-Out Investigation about adverse health and safety effects of smart meters that could support or justify a determination in this case that the allegations in the Complaint about health and safety should be dismissed.

**b. Because the Commission provided no rationale for refusing or declining to address privacy issues in the Opt-Out Investigation, its Opt-Out Orders provide no basis for dismissing these issues in this case.**

In the Dismissal, the Commission references its January 7, 2011 Order in the Opt-Out Investigation, where it “expressly excluded privacy issues from that investigation.” *App.* at 5. But no explanation or rationale can be found in the January 7 Order for excluding privacy issues. *Supp.* at 13-20. Once again, the Commission simply concluded that customer privacy was not a matter

worthy of its consideration, it *excluded* the issue without “dismissing” it under Section 1302.

The allegations regarding privacy concerns are very real and valid, and on this appeal must be taken as true. Smart meter technology creates a new system of data collection, communication, and information sharing related to energy usage. It has the capacity to collect, store and share private customer information without customer control. Utilities will be able to obtain a highly detailed picture of activities within a home. Time patterns associated with those activities create the potential to detect the number of individuals in a dwelling unit, the presence of specific types of energy consumption or generation equipment, whether the dwelling is empty or occupied by more people than usual, and when in real time all of this is occurring. Law enforcement and other unknown parties may be given access. Others will obtain access by accidental data breaches or cyber attacks. Even conservative industry groups such as the Association of Home Appliance Manufacturers have expressed concerns about consumer privacy, stating in a December 2009 white paper: “The boundary of the utility’s reach should end at the smart meter. Communication or interaction inside the home should be under the control of the consumer.” *App.* at 21-22; *Complaint* pp. 14-15.

If CMP installed web cams in the homes of all of its customers for the purpose of monitoring their customers’ use of electric appliances, there would be little doubt the Commission would have a statutory duty to investigate complaints that this service was unreasonable or unsafe because it invades the

privacy of CMP customers and potentially exposes them to security risks. The analysis is the same with respect to the complaints that smart meters collect personal household information albeit in a digital as opposed to a visual format. In conclusion, the Commission made no determinations in the Opt-Out Investigation about privacy concerns that could support or justify its dismissal of allegations in this case about privacy.

**2. The Commission’s dismissal of property rights and trespass allegations in its Opt-Out Investigation was clearly erroneous, and its Opt-Out Orders provide no basis for dismissing these issues in this case.**

In dismissing the trespass and property rights allegations, the Commission references its Opt-Out Orders dated February 18, 2011; April 15, 2011; and August 24, 2011. *App.* at 5. Because the August 24, 2011 Order merely cites the February 18 and April 15 Orders, only the latter two orders are discussed here. *Supp.* at 69.

In the February 18 Order, the Commission dismissed all property rights allegations in the Wilkins Complaint relying entirely on certain Terms and Conditions (“T&C”) that are incorporated by reference into CMP’s contract with customers for the delivery of electricity. *Supp.* at 24 (citing “T&C” 12.1 and 10.4). These terms and conditions address CMP’s rights of access to a customer’s premises and CMP’s right to select the type of meter used to measure its delivery of electric service. *App.* at 84, 87.

In its April 15, 2011 Order, the Commission rejects other property rights allegations, including common law and statutory trespass. It concludes that a claim of trespass by radio frequency waves is not cognizable at common law

because it does not involve the invasion of property by “tangible matter.” *Supp.* at 37. (citing *Darney v. Dragon Prods. Co.*, 640 F.Supp.2d 117, 124 (D.Me. 2009)). The *Darney* case, however, does not stand for the proposition that common law trespass in Maine requires the invasion of property by some tangible matter. In fact, the District Court in *Darney* certified that very question to the Law Court and the Law Court declined to answer the question to avoid issuing an advisory opinion. *Darney v. Dragon Products Company*, 2010 ME 39, 994 A.2d 804.

Other jurisdictions have ruled that the transmission of electricity or electromagnetic pulses over or under property without consent is a trespass. In *Ward v. McGlory*, 358 Mass. 322, 365, 265 N.E.2d 78, 80 (Mass. 1970), the Massachusetts Supreme Judicial Court held that the act of transmitting electricity through wires installed by others on the Plaintiff’s land was a trespass because each transmission was “an affirmative voluntary intrusion onto the plaintiff’s property.” *See also, City of Shawnee v. AT&T Corp.*, 910 F. Supp. 1546, 1561-1562 (D. Kan. 1995) (holding that by “sending pulses of information [via fiber optic cables], AT&T intentionally caused a ‘thing’ to enter Shawnee’s land”). “To hold otherwise would deny Shawnee its historical right as a landowner to exclude non-owners from using its property.” *Id.* In this case, CMP’s system sends “pulses of information” carried by radio frequency waves over the customer’s property between the customer’s meter and other meters in the neighborhood as well as the larger system. An even more compelling fact in this case, not present in *Shawnee* or *Ward*, is that the radio

frequency waves or pulses are also specifically targeted at the interior private spaces of the customer's home.

Even if the "intangible," albeit measurable, nature of the waves and pulses would defeat a trespass claim, the attachment of the radio frequency antenna and transceiver to the customer's home does constitute a tangible intrusion or trespass. *Savannah Electric & Power Co. v. Horton*, 44 Ga. App. 578 (Ga. Ct. App. 1931) (finding trespass by electric company in attaching brackets or supports to the outer wall of plaintiff's brick garage used to convey electric current to several of its customers in the vicinity).

Ultimately, however, the Commission is not a common law court; it is without the capacity or authority to decide common law niceties related to tangible and intangible invasions of property. The questions for the Commission to decide within the context of Section 1302, is whether it is a reasonable and safe practice, act or service to mandate (without express, informed consent): 1) attaching a radio antenna on a customer's home, and/or 2) traversing the customer's property with radio frequency waves and targeting the interior of the home with the same waves. If either the attachment or the traversing and targeting can give rise to common law trespass, then smart meters are *per se* unreasonable. If not, the analysis does not end there.

The broader question under Section 1302 requires full consideration of all relevant factors, including the threat of harm to health and safety, the intended purpose of collecting private information from within the private spaces of the customer's home, and the intended purpose of using the

customer's home as a relay station for other people's data within CMP's mesh network to collect and transmit radio frequency waves from other neighborhood homes. Because the Commission refused to give any consideration to any of these factors, its determinations about property rights issues were erroneous as a matter of law. By excluding such relevant factors, the Commission applied a very narrow lens to its analysis of the "consent" question, permitting it to reach the simplistic conclusion that CMP's "contract" right to select the type of meter constitutes an unlimited grant of consent by CMP customers to install any type of meter on their homes for any type of use or purpose. The Commission concludes CMP has the contractual right to select the meter, regardless of any alleged concerns about safety, health, or privacy created by CMP's selection. Using that analysis, CMP would be authorized to install meters that create other safety concerns, such as potential fire hazards; or meters that employ x-ray technology to obtain data about electricity usage in the home; or meters that use video cameras to obtain visual images of electric equipment in use.

The Commission's construction of the Terms and Conditions is erroneous even if the factors of health, safety and privacy are excluded from the analysis, because the Commission failed to apply two standard rules of contract construction. First, the contract language must be construed against CMP, because it is essentially a contract of adhesion that is presented to the customer on a "take it or leave it" basis. As a contract of adhesion, it must be construed against the drafter. *Stenzel v. Dell, Inc.*, 2005 ME 37, P21, 870 A.2d

133, 142. On general principles of equity, any standard-form contract that is presented on a "take it or leave it" basis should be "construed to meet the reasonable expectations of the party in the inferior bargaining position." *Dairy Farm Leasing Co. v. Hartley*, 395 A.2d 1135, 1140 (Me. 1978). It verges on legal fiction to refer to CMP's relationship with retail customers as a "contract" in the traditional sense of a freely bargained agreement from which the Commission can infer the customer's consent to specific terms and conditions; there is no negotiation and it is safe to say that few customers even know the CMP Terms and Conditions exist.

Second, the meaning and purpose of these Terms and Conditions must be construed within the context of the scope of the entire contract, "viewing it as a whole." *Whalen v. Down East Cmty. Hosp.*, 2009 ME 99, P15, 980 A.2d 1252, 1256. The Commission effectively construed the contract against the consumer as if the terms and conditions had been freely and knowingly bargained and without reading the contract as a whole. When the contract is reviewed in the proper context, the Terms and Conditions relied on by the Commission (rights of access and of selecting meters) cannot be reasonably construed as a grant of consent to install radio frequency antennae and transceivers designed to collect private usage data from the customer's home and surrounding homes and to communicate the data to other meters and to CMP. CMP's contractual right of access to the home is limited to the purposes of reading meters, or installing, inspecting or repairing CMP equipment, or some other "proper purpose."



The Company shall have the right of access to said premises and to all property furnished by the Company installed therein, at all reasonable times during which service is provided to the customer, and on its termination, for the purpose of reading meters, or installation, inspection and repair of equipment used in connection with its energy, or removing its property, or for any other proper purposes. *Supp.* at 84.

Smart meters are designed to read data from the customer's appliances and equipment within the home, and to serve as a relay station within CMP's mesh network. Such functions do not fall into the scope of reading, installing, inspecting or repairing CMP's equipment on the customer's premises. The Commission does not appear to have relied on the broad phrase "other proper purposes," but if it did, the interpretation must be rejected because the Commission misquotes the language as "any other purpose," dropping the adjective "proper." *Supp.* at 24. If the Commission applied the misquoted phrase, the decision is erroneous as a matter of law. If the Commission applied the correct phrase, the decision is erroneous anyway because the Commission failed to consider all relevant factors that must be considered in determining whether a purpose is "proper."

It is likely that the Commission relied more heavily on CMP's contractual right of selection, which states:

The measurement of electric service shall be by meters installed, owned, and maintained by the Company. The Company will select the type and make of metering equipment, and may, from time to time, change or alter the equipment. *Supp.* at 86.

In other words, CMP has the right to select meters for the "measurement of electric service." Customers contract with CMP for the delivery of electricity.

“Residential service is defined as the *delivery of electric service* to dwelling units.” *Supp.* at 79. (emphasis added). “The residential service rate is predicated upon the delivery of all energy for residential purposes through one meter.” *Id.* When read in conjunction with these provisions and construed to meet the reasonable expectation of the customer, the phrase “measurement of electric service” in T&C 12.1 means measuring the electricity delivered to the home. It cannot be seriously argued that it was in the contemplation of “contracting” parties, that CMP’s right to select meters under T&C 12.1 included meters capable of doing more than measuring the delivery of electricity to the home.

CMP’s smart meters do far more than measure the delivery of electricity to the home. They detect when and how the customer *uses* the electricity after it has entered the home; they communicate that information to CMP; and they serve as a relay station in CMP’s mesh network. These extra functions or services do not, as a matter of law, fall within the plain meaning of metering the delivery of electricity to the home. The Commission committed error of law in summarily concluding otherwise in its February 18 Order, and that determination cannot justify dismissal of property rights and trespass allegations in this case.

**3. The Commission's Dismissal does not address the Complaint's allegations of discrimination and the Commission's dismissal of discrimination allegations in its Opt-Out Investigation cannot be relied upon to impliedly dismiss similar allegations in this case.**

“It is unlawful for a public utility to give any undue or unreasonable preference, advantage, prejudice or disadvantage to a particular person.” 35-A M.R.S. §702. Customers should pay "comparable rates and charges" for “comparable services.” *Holmquist v. New England Tel. & Tel. Co.*, 637 A.2d 852, 853 (Me. 1994) (quoting, *Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, No. F.C. 1902 (M.P.U.C. 1972)). The basic service that is comparable to all CMP customers is the delivery of electricity. Until the Commission issued the Opt-Out Order, all CMP customers were charged comparable rates for the delivery of their electricity. CMP is now providing an additional service of detecting when and how customers use their electricity so that they can theoretically save money on the delivery rates. Customers choosing this service pay no additional fee.

Customers choosing to decline the service because of the risks involved are paying special fees, and a higher overall rate for the delivery of electricity. The opt-out customers are paying for the smart meter infrastructure three times, through tax dollars, electric rates and special fees. Opt-in customers pay less money than opt-out customers, yet they receive more services. While a small portion of the opt-out fee is for the cost of keeping a few Maine people employed as meter readers, the largest portion of the fee is for the cost associated with installing more repeaters if and when the absence of

smart meters in a neighborhood create a gap in the mesh network. It is worth asking why there is a cost associated with filling the gap. The answer is that CMP will have to either install a repeater on one of its poles or on another building, where it have to pay money to rent space on the building to install its repeater antenna. To avoid allowing CMP to use his or her house as a radio frequency relay station for free, the opt-out customer must pay to fund CMP's monthly rent of space on a private building down the street.

The unjust discriminatory result is made more egregious by the fact that most of the customers declining the service do so to protect their health, privacy and property rights. This discriminatory treatment arises directly from CMP's practices and the Commission's orders and finds no justification in either state or federal enabling legislation. The federal enabling legislation clearly intended that smart grid services be provided upon the request of the customer. 16 U.S.C. §2621(d)(14)(A) and (C).

**E. Opt-Out Orders (Part I & II) must be annulled as unconstitutional because they authorize the collection of data from constitutionally protected areas of the home without a warrant or the express consent of the customer in violation of the Fourth Amendment of the United States Constitution and Article I of the Maine Constitution.**

In dismissing the constitutional claims in this case, the Commission relied on its Opt-Out Order dated April 15, 2011. In that Order, the Commission dismissed civil rights claims alleging violations of the Fourth Amendment of the United States Constitution and Article I of the Maine

Constitution.<sup>8</sup> This dismissal, however, was made on jurisdictional grounds without addressing the merits. *Supp.* at 36-37. Because constitutional issues related to utilities are uniquely within the purview of this Court, the question is ripe for a determination on the merits on this appeal. *See, Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895, 905 (Me. 1973) The Court may order the Commission to hear and report additional evidence to the extent necessary to determine the constitutional issues before it. 35-A M.R.S. §1320(8). The undisputed facts that may be discerned from the limited record and the Opt-Out Orders include the following:

1. CMP was authorized by the Commission to attach smart meters to customers' homes with radio frequency antennae and transceivers, unless the customers pay special fees.
2. The smart meters will have the capacity to obtain information from within the private spaces of the customer's home that could not otherwise be obtained without consent or physical intrusion into the home.
3. CMP will use the smart meters as relay stations collecting and transmitting other customers' data within its mesh network.
4. The Commission estimates that 9,000 CMP customers will decline to give CMP their consent to have smart meters attached to their homes.

Undisputed facts 1, 2 and 4, are directly analogous to the material facts in a recent Fourth Amendment case, in which the U.S. Supreme Court stated:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a

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<sup>8</sup> Generally, this Court has treated the federal and state provisions as providing identical protections, although it has also recognized that the Maine Constitution may offer additional protections. *State v. Hutchinson*, 2009 ME 44, P18, 969 A.2d 923, 929 n. 9.

constitutionally protected area, constitutes a “search” and is “presumptively unreasonable without a warrant.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

In *Kyllo*, the police used an infrared camera to obtain information about the activities occurring within the home of a suspected marijuana grower. That information could not otherwise have been obtained without a physical intrusion, and therefore it was an unconstitutional search if obtained without a warrant.

Like infrared cameras, smart meters use “sense-enhancing technology” employing electromagnetic (radio frequency) waves to obtain information about activities occurring inside the home, which could not otherwise be obtained without physical intrusion into the home. A smart meter is potentially far more intrusive than an infrared camera, which “emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house.” *Kyllo*, 533 at 30 (U.S. 2001). (emphasis added). Smart meters are designed to transmit rays into the home as well as receive rays carrying specific data about activities occurring in the home.<sup>9</sup>

While *Kyllo* involved a search by law enforcement, the direct involvement of law enforcement is only one step removed in this case. CMP and other electric utilities regularly provide electricity consumption data to law enforcement agencies under subpoena power, as authorized by the Commission’s own regulations. CMR 65-407-815. In the *Kyllo* case, the police

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<sup>9</sup> Unlike infrared technology, a smart meter’s more intrusive capacity would satisfy Justice Stevens’s “through-the-wall,” as opposed to “off-the-wall,” standard for what constitutes a “search.” *Kyllo*, 533 U.S. at 41 (J. Stevens dissenting).

obtained monthly electric utility records by subpoena to determine energy use in the home as part of their evidence of a marijuana growing operation. *Kyllo*, 533 U.S. at 540. Regardless of the purpose for which the information is collected, constitutional protections apply when government has sanctioned or authorized the search as the Commission did with its Opt-Out Orders. The Orders constitute direct state action.

But, to the extent that the actual installation and use of the meters becomes the focus of the constitutional analysis, CMP qualifies as a “state actor.” State regulation of a privately-owned utility company is not sufficient to make the company a state actor. *See, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). But, the acts of “a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be ‘state’ acts.” *Id.* at 351. The Commission itself acknowledges CMP’s monopoly status. “CMP is a public utility that provides a monopoly service.” *Supp.* at 57. CMP customers do not have the option of buying electricity from a different provider. *Id.* State actor status will also be found when the challenged acts are specifically authorized by the state regulator with full awareness of the constitutional complaint. *See, Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 462 (U.S. 1952). In *Pollak*, the Public Utilities Commission of the District of Columbia authorized a regulated street railway corporation to transmit radio programs through receivers in its passenger vehicles. Finding that the regulated entity was a state actor, the Supreme Court, relied particularly upon the fact that the challenged activity was

authorized by the Commission after investigating protests against the activity, which describes exactly the situation in this case.

The Court in *Kyllo* drew a “bright” and “firm line at the entrance to the house.” *Kyllo*, 533 U.S. at 40(quot<sup>ing</sup> *Payton v. New York*, 445 U.S. 573, 590 (1980)). The Commission crossed that line by requiring homeowners to allow CMP to attach sense-enhancing radio frequency antennae on the sides of their homes specifically targeted at the interior spaces of the home. Traditional meters do not cross the line because the information is collected at the point of entry into the home. Smart meters have the capacity 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; information that cannot be obtained without crossing the Supreme Court’s bright, firm line.

The Appellants and thousands of other CMP customers have made it very clear that they do not consent to the installation of CMP’s smart meters as readily acknowledged by the Commission estimate of 9,000 customers opting out. Thus, there can be no dispute about express consent being withheld. And, as explained above in Section D.2., the terms and conditions of the “contract” between a consumer and CMP cannot be reasonably construed to constitute *implied* contractual consent for “meters” collecting private information from within the home in addition to the standard function of measuring the delivery of electricity to the home. There are no words in the Terms and Conditions that expressly or impliedly authorize access to the home for the purpose of collecting data from the customer’s home, or other



neighborhood homes, about the use of particular appliances or other electrical equipment. Under the Fourteenth Amendment, consent to a search must be voluntary, i.e., the product of a free and unconstrained choice, not the product of an adhesion contract. “Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given.” *Fla. v. Royer*, 460 U.S. 491, 495 (1983). Thus, even if the meaning of the Terms and Conditions could be stretched to infer or imply CMP’s authority to install a meter with a radio frequency antenna capable of accessing private data within the home, such implied authority cannot, as a matter of law, constitute consent freely and voluntarily given for purposes of constitutional analysis.

Accordingly, Appellants request that the Court annul the Opt-Orders (Part I & II) and direct the Commission to recognize the constitutional rights of individual customers to decline the installation of smart meters in their homes without incurring special fees for having made the choice.

**F. Opt-Out Orders (Part I & II) must be annulled as unconstitutional because they require CMP customers to allow CMP to attach equipment to the customers’ homes for CMP’s own purposes, without consent and without compensation in violation of the takings clause in the Fifth Amendment of the United States Constitution and Article I of the Maine Constitution.**

A taking occurs when a state regulation forces a property owner to submit to a permanent physical occupation. *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 425-426 (1982). The circumstances in this case are directly analogous to the circumstances in *Loretto*, where a New York statute

required a landlord to permit the permanent installation of cable television equipment on his property by a cable company. The Supreme Court concluded that the permanent physical attachment to the property was a *per se* taking "without regard to the public interests that it may serve." *Id.* at 426. The fact that the equipment imposed only a minimal impact on the property was also not relevant. "Permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430.

The Commission's Opt-Out Orders are State regulations that impose upon utility customers a permanent occupation of their buildings by CMP's radio frequency equipment. There is no constitutional infirmity when the purpose of the equipment is limited to performing CMP's contract to deliver electricity to the customer's home. That purpose, however, is sufficiently performed by traditional meters. Smart meters have additional equipment designed to serve CMP's own purpose of collecting private data from the customer's home and other customers in the neighborhood and transmitting the private data to CMP. To the extent the customer wants the anticipated benefits to be obtained from sharing private data with CMP, and is willing to accept the associated burden of serving as a relay station within CMP's mesh network, the customer can choose to consent. In that case, no taking has occurred.

But, requiring customers to allow CMP to attach radio frequency equipment to the home to collect private data the customer does not want to share, and to facilitate CMP's collection of data from other homes, imposes a permanent physical occupation of the house without consent and without just compensation. If the Commission issued an order directing a CMP customer to allow CMP, without compensation, to install a free-standing radio frequency antenna on the customer's house to be used as a relay station for neighborhood smart meters, there would be no question about the unconstitutional nature of the order. Even if the purpose of the free-standing antenna was limited to gathering information from within the customer's own home for CMP's use against the homeowner's consent, the result should be the same. The fact that the antenna is built into the smart meter instead of being a free-standing piece of equipment does not alter the analysis. And, obviously, allowing the customer to opt out by paying a confiscatory fee to fund the installation of the antenna on a pole or different building does not cure the constitutional violation.

Accordingly, Appellants request that the Court annul the Opt-Orders (Part I & II) and direct the Commission to recognize the constitutional rights of individual customers to decline the installation of smart meters in their homes without incurring special fees for having made the choice.

**G. The Court should order the Commission to stay further implementation of the smart meter program pending a full investigation of the Complaint.**

If the Court decides it cannot, on this record, determine the constitutional questions and remands the matter for fact-finding on those questions, then the remand should further direct the Commission to stay implementation of the smart meter program and special fees pending the Court's final determination. CMP should also be directed to take actions to prevent adverse effects on customer credit ratings for customers asserting their right not to pay confiscating fees. Even if the Opt-Out Orders are annulled, further implementation of the smart meter program should be stayed pending a full investigation into the allegations of adverse effects on safety, health, and privacy. The Supreme Judicial Court, sitting as the Law Court, "may issue all writs and processes, not within the exclusive jurisdiction of the Superior Court, necessary for the furtherance of justice or the execution of the laws." 4 M.R.S. §7. "[T]he Supreme Judicial and Superior Court have concurrent original jurisdiction in equity." *In re Opinion of Justices*, 147 Me. 25, 30 (Me. 1951). In this case, a remand order that directs the Commission to conduct an investigation of the Complaint without staying further implementation of the program will not be an adequate remedy. Otherwise, CMP's installation of the smart meter program will continue unabated, with all of its attendant risks to safety, health and privacy, pending the Commission's investigation.

If the Commission had faithfully followed its statutory mandates, no smart meters would have been installed before it conducted a full and adequate investigation of the allegations of adverse effects on health, safety, privacy and property rights. To fully comply with the mandates to ensure safe, reasonable and non-discriminatory services, and to consider all relevant factors in the promotion and development of a smart grid, the Commission must not only investigate the Complaint, but also cease any further implementation of the smart meter program until the investigation is completed.

In accordance with this Court's "longstanding practice of [examining] closely proceedings of the Commission to ensure that they comply with statutory and other standards," *Central Maine Power Co. v. Public Utilities Com.*, 382 A.2d 302, 313 (Me. 1978), it is equitable and just for the Court exercise its equitable powers by ordering the Commission to stay any further implementation of the smart meter program and the special fees imposed upon customers who have chosen to not have a smart meter installed in their home, pending a full investigation of the Complaint.

## **VI. CONCLUSION**

The Dismissal must be vacated because the Commission failed to comply with the Section 1302 standard for dismissing ten-person complaints, failed to comply with the holding in *Agro*, and has failed to comply with its fundamental duty to ensure safe, reasonable, adequate and non-discriminatory utility services, and its duty to consider all relevant factors in its review of the smart meter program. The Opt-Out Orders must be annulled as unconstitutional to

the extent that they compel mandatory participation in the smart meter program or the payment of special confiscatory fees. On remand, the Commission should be ordered to stay further implementation of the smart meter program pending the outcome of a full investigation of the Complaint.

Dated at Portland, Maine this 10th day of January, 2012.

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

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