

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

August 31, 2011

ORDER DISMISSING  
COMPLAINT

ED FRIEDMAN, ET AL,  
Request for Commission Investigation into  
Smart Meters and Smart Meter Opt-Out

Docket No. 2011-262

WELCH, Chairman; VAFIADES and LITTELL, Commissioners<sup>1</sup>

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## I. SUMMARY

Through this Order, we dismiss the Complaint filed by Ed Friedman and eighteen other persons against Central Maine Power Company (CMP) and this Commission.

## II. BACKGROUND

### A. Opt-Out Investigation

On January 7, 2011, the Commission initiated a proceeding to consider whether CMP should provide customers with the option to opt-out of the installation of a smart meter on their premises. *Elisa Boxer-Cook, et al., Request for Commission Investigation in Pursuing the Smart Meter Initiative*, Docket No. 2010-345, *Teresa Swinbourne, et al., Request for Commission Investigation into Unreasonable, Insufficient and Discriminatory Decisions 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, Notice of Investigation (Jan. 7, 2010). The Investigation was initiated in response to two ten-person complaints and the Commission limited the scope of the proceeding to the issue of whether CMP's position of not providing opt-out alternatives to the installation of a smart meter was an unreasonable, insufficient or unjustly discriminatory utility practice. The Commission subsequently received three other ten-person complaints regarding CMP's smart meter program, and these complaints were consolidated into the investigation commenced as a result of the Boxer-Cook and Swinbourne complaints. *Suzanne A Foley-Ferguson, et al., Request for Commission Investigation Into Advanced Metering Infrastructure In Accordance with the Legislature*, Docket No. 2010-398, *Stephen & Diane 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, Notice of Investigation (Feb. 18, 2011); *Julie Tupper, et al., Request for Commission Investigation*

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<sup>1</sup> Chairman Welch did not participate in the above captioned proceedings, did not participate in the Commission's deliberations of these matters, and takes no part in this Order.

to Allow CMP Customers to Retain Existing Analog Meters; Docket No. 2011-85, Notice of Investigation (Apr. 22, 2011) (collectively with the Boxer-Cook and Swinbourne complaints, the Opt-Out Investigation).

B. Opt-Out Orders

During the Opt-Out Investigation, the Commission's Advisory Staff submitted an analysis containing the components of an opt-out program for customers that choose not to have a standard smart meter installed and the parties filed comments on the Staff analysis. On May 19, 2011, the Commission issued the Part I Order and on June 22, 2011 issued the Part II Order jointly in all five Dockets cited above (collectively, the "Opt-Out Orders").<sup>2</sup> The Opt-Out Orders directed CMP to include opt-out alternatives as part of its smart meter initiative. Specifically, the Commission concluded that CMP's residential or small commercial customers would be provided two opt-out alternatives: 1) an electro-mechanical meter (existing meter option); or 2) a standard smart meter with the internal network interface card (NIC) operating in a receive-only mode (transmitter-off option). Customers electing either opt-out option would be assessed both an initial charge and a monthly charge intended to cover the incremental system costs CMP would incur to provide and maintain the opt-out options.

C. Foley-Ferguson Motion to Reconsider

On July 12, 2011, Suzanne Foley-Ferguson filed a Motion to Reconsider Order. *Suzanne A Foley-Ferguson, et al., Request for Commission Investigation Into Advanced Metering Infrastructure In Accordance with the Legislature*, Docket No. 2010-398, Motion to Reconsider Order (July 12, 2011). Among the grounds for reconsideration was new health information reflected in the May 2011 World Health Organization/International Agency for Research on Cancer (WHO) reclassification of radio frequency (RF) radiation as a possible carcinogen. Ms. Foley-Ferguson also cited as grounds for reconsideration the proposition that asking a person to pay to protect their health from what the WHO determines is a possible carcinogen amounts to extorting money for a perceived public benefit in violation of the Hobbs Act (18 U.S.C. § 1951). Ms. Foley-Ferguson argued that the above information and the other grounds put forth in her motion should compel the Commission to reconsider its decision to pass opt-out cost along primarily to those opting out and instead remove the opt-out fees and socialize the costs among all ratepayers.

On August 24, 2011 we issued our Order which addressed each of Ms. Foley-Ferguson's concerns and denied her Motion. *Suzanne A Foley-Ferguson, et al., Request for Commission Investigation Into Advanced Metering Infrastructure In*

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<sup>2</sup> The Part I Order described the Commission's decision in the proceeding and the Part II Order provided the background, analyses, and reasoning underlying the Commission's decision.

*Accordance with the Legislature*, Docket No. 2010-398, Order Denying Motion for Reconsideration (Aug. 24, 2011).

D. Friedman Complaint

On July 29, 2011, Ed Freidman and eighteen other persons filed a Complaint pursuant to 35-A M.R.S.A. § 1302. The Complaint was against CMP for charging its customers a fee to “opt-out” of CMP’s smart meter program and against this Commission for its Opt-Out Orders which required CMP to charge an opt-out fee. The Complaint requested that the Commission open an investigation to examine CMP’s opt-out program based on new information released subsequent to the Opt-Out Orders and examine privacy and electronic trespass issues that the complainants felt had not been satisfactorily addressed in the Opt-Out Investigation. As relief, the Complaint requested that the Commission stay the installation of smart meters or, in the alternative, that future installations be on an “opt-in” basis, provide opt-outs at no charge to customers, require CMP to present information regarding the health, interference, and privacy concerns of the complainants, and that the Commission establish a toll-free hotline within the Office of the Public Advocate where consumers can place smart meter-related complaints. The Complaint also accused CMP and the Commission of extortion in violation of the Hobbs Act and raised issues regarding the health effects of smart meters along with privacy and trespass concerns.

**III. LEGAL STANDARD**

The Complaint was filed pursuant to 35-A M.R.S.A. § 1302. Section 1302(1) provides:

When a written complaint is made against a public utility by 10 persons aggrieved that the rates, tolls, charges, schedules or joint rate or rates of a public utility are in any respect unreasonable or unjustly discriminatory; that a regulation, measurement, practice or act of a public utility is in any respect unreasonable, insufficient or unjustly discriminatory; or that a service is inadequate or cannot be obtained, the commission, being satisfied that the petitioners are responsible, shall, with or without notice, investigate the complaint.

Section 1302(2) of the statute further explains that once the Commission receives the utility’s response to the complaint, “if the commission is satisfied that the utility has taken adequate steps to remove the cause of the complaint or that the complaint is without merit, the complaint may be dismissed.”

However, the statute does not define the term “without merit.” In interpreting section 1302, the Law Court has stated:

The phrase ‘without merit’ must be understood to mean that there is no statutory basis for the complaint, i.e., that the PUC 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. Util. Comm’n*, 611 A.2d 566, 569 (Me. 1992). Therefore, we consider whether we have the statutory basis to initiate an investigation for the purpose of granting the relief requested in the Complaint.

#### IV. DISCUSSION

##### 1. World Health Organization Reclassification

The information presented in the Complaint regarding the WHO reclassification of RF is the same information presented by Ms. Foley-Ferguson in her recent Motion for Reconsideration and considered by the Commission in our August 24, 2011 Order Denying Motion for Reconsideration in Docket No. 2010-398. We see no new information in the current Complaint that would warrant the opening of an investigation to reconsider our conclusion.

##### 2. Privacy and Trespass Issues

Issues of trespass were addressed by the Commission in previous decisions, including our February 18, 2011 Notice of Investigation in Docket No. 2010-400, April 15, 2011 Order Denying Motion for Reconsideration in Docket No. 2010-400, and August 24, 2011 Order Denying Motion for Reconsideration in Docket No. 2010-398. Privacy issues raised by previous complainants were dismissed as without merit in the earliest stages of the Opt-Out Investigation in the January 7, 2011 Notice of Investigation in Docket Nos. 2010-345 and 2010-389 where the Commission limited the scope of the Opt-Out Investigation and expressly excluded privacy issues from that investigation. We see no new information in the current Complaint that would warrant the opening of an investigation to reconsider our conclusion.

##### 3. Customer Costs to Opt-Out

The Complaint argues that there should be no cost to customers who choose to opt-out and that charging customers to opt-out amounts to extortion. The Commission addressed the issue of charging customers that opt-out for the incremental costs that CMP will incur in our June 22, 2011 Part II Order in Docket No. 2010-345 and the issue of extortion in our August 24, 2011 Order Denying Reconsideration in Docket No. 2010-398. We see no new information in the current Complaint that would warrant the opening of an investigation to reconsider our conclusions.

4. Fourth Amendment Issues

The Complaint alleges that CMP's smart meter program violates protections guaranteed under the Fourth Amendment to the United States Constitution. We previously addressed this issue in our April 15, 2011 Order Denying Motion for Reconsideration in Docket No. 2010-400 and we see no new information in the current Complaint that would warrant the opening of an investigation to reconsider our conclusion.

**V. DECISION**

The Opt-Out Investigation resulted in the Opt-Out Orders whereby the Commission ordered CMP to institute an opt-out option for consumers. The opt-out option addresses in a comprehensive way the issues raised by the Opt-Out Investigation complainants. All of the issues raised by the complainants in this matter were raised by one or more of the complainants in the Opt-Out Investigation and were considered by the Commission and resolved during that investigation or in subsequent orders on motions for reconsideration. CMP is currently implementing the directives contained in the Opt-Out Orders and the orders on reconsideration; thus, CMP has taken and is taking adequate steps to remove the cause of the Complaint filed by Ed Friedman, et al. Accordingly, the Complaint is dismissed as to CMP. As to the portions of the Complaint directed at the Commission, there is no statutory basis for a complaint of this type. Title 35-A M.R.S.A. § 1302 allows ten or more persons aggrieved by a public utility to make a written complaint *against that utility*. There is no mechanism in Section 1302 for such a complaint against the Commission itself. Accordingly, because there is no statutory basis for the Complaint insofar as the Complaint is directed at the Commission, the portions of the Complaint directed at the Commission are dismissed as without merit.

Dated at Hallowell, Maine, this 31st day of August, 2011.

BY ORDER OF THE COMMISSION

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Karen Geraghty  
Administrative Director

COMMISSIONERS VOTING FOR: Vafiades  
Littell

**NOTICE OF RIGHTS TO REVIEW OR APPEAL**

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 21 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.