STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2018-00056

May 25, 2018

PUBLIC UTILITIES COMMISSION
Amendments to Chapter 305, Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] respectfully submits its comments in response to the Maine Public Utilities Commission's ("Commission") March 9, 2018 Notice of Rulemaking[2] in the above-referenced proceeding.

BACKGROUND

On May 19, 2017, the Maine Legislature enacted Public Law, Chapter 74 now codified at 35-A Maine Revised Statutes §3203 ("Statute"), which imposes new conditions of licensure on competitive electricity providers ("CEPs") serving residential customers and requires that certain information be disclosed on utility bills issued to residential customers.[3] In response, the Commission opened a proceeding (Docket No. 2017-00268) and issued a Notice of Inquiry along with "a redline of current Chapter 305 of the Commission's rules, reflecting anticipated amendments . . . ."[4] RESA submitted comments in response to the Notice of Inquiry.[5]

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[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] Notice of Rulemaking (Mar. 9, 2018) ("Rulemaking Notice").

[3] Me. Rev. Stat. 35-A, §3203.

[4] Docket No. 2017-00268, *Public Utilities Commission, Inquiry into Transparency and Marketing Practices in the Electricity Supply Market*, Notice of Inquiry (Oct. 16, 2017) ("Notice of Inquiry"), at 2.

[5] Docket No. 2017-00268, *Public Utilities Commission, Inquiry into Transparency and Marketing Practices in the Electricity Supply Market*, Comments of Retail Energy Supply Association (Nov. 16, 2017) ("RESA Comments").

On March 9, 2018, the Commission issued the Rulemaking Notice, including proposed amendments to Chapter 305 ("Proposed Amendments")[6] and requested comments on those Proposed Amendments.[7] RESA hereby submits its comments in response to the Rulemaking Notice.

COMMENTS

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Maine retail electric market. Several RESA member companies are licensed by the Commission to serve customers in Maine and are presently providing electricity service to customers in the State. Accordingly, RESA has a vested interest in ensuring that the Proposed Amendments do not have an adverse effect on RESA's members, their customers, or the continued success of the retail electric market in Maine.

RESA is generally supportive of the Commission's objective to enhance consumer protection in the competitive electricity market and appreciates the Commission's consideration of RESA's prior comments. However, for the reasons discussed more fully below, RESA requests that the Commission modify the Proposed Amendments before adopting final changes to Chapter 305.

I. THE STATUTE'S REQUIREMENTS SHOULD BE LIMITED TO RESIDENTIAL CUSTOMERS

In the Notice of Inquiry, the Commission indicated that it "anticipate[d] applying the recently enacted consumer protections to both residential and small commercial customers . . . ."[8]

[6] Rulemaking Notice at 2, 7-8.

[7] *Id.* at 7.

[8] Notice of Inquiry, at 2.

RESA opposed doing so because the Commission lacks statutory authority to apply these recently enacted consumer protections to small commercial customers.[9] The Commission disagreed and concluded that it had statutory authority to apply the Proposed Amendments to small commercial customers because of its general authorization to impose requirements to carry out the purposes of the Statute.[10] We believe this is not correct and maintain that the Commission's interpretation contravenes well-settled principles of statutory construction.

First and foremost, in enacting rules, an agency must act within its rulemaking authority.[11] If the rule exceeds the agency's statutory authority, it is invalid.[12] "The Commission being purely a creature of statute is subject to the rule universally applicable to all bodies that owe their existence to legislative act. It must look to the statute for its authority."[13] In addition, the "primary purpose of statutory interpretation is to give effect to the intent of the Legislature."[14] This is done "first by reviewing the plain language of the statute, and if the language is unambiguous, [an agency must] interpret the statute according to its plain language . . . ."[15] In this case, by its plain language, the Statute distinguishes between "residential consumers" and "small commercial consumers" and expressly limits the applicability of the new provisions to residential customers.[16] Under the Statute, all consumers are entitled to certain statutory protections,[17] and residential consumers are entitled to additional protections.[18] By

[9] RESA Comments, at 3-4.

[10] *See* Me. Rev. Stat. 35-A, § 3203(9); Rulemaking Notice, at 3.

[11] Me. Rev. Stat. 5, § 8058(1); *Conservation Law Found. v. Dep't of Envtl. Prot.*, 2003 ME 62, ¶21 (2003).

[12] Me. Rev. Stat. 5, § 8058(1); *Conservation Law Found. v. Dep't of Envtl. Prot.*, 2003 ME 62, ¶21 (2003).

[13] *Larson v. New England Tel. & Tel. Co.*, 141 Me. 326, 332 (1945); *see also New England Tel. & Tel. Co. v. Public Utilities Com.*, 148 Me. 374, 379 (1953) ("[T]he Maine Public Utilities Commission is a creature of statute and bound to act in accordance with the statute which created it.").

[14] *Arsenault v. Sec'y of State*, 2006 ME 111 (2006), ¶ 11.

[15] *Id.*

[16] *See* Me. Rev. Stat. 35-A, § 3203(4).

[17] Me. Rev. Stat. 35-A, § 3203(4-A).

[18] Me. Rev. Stat. 35-A, § 3203(4-B).

expressly affording additional protections to residential consumers, the legislature excluded other consumer classes from those statutory provisions.[19] In fact, if the legislature had intended to include small commercial customers within the new provisions, it knew how to do so.[20] Since the legislature chose not to do so, the Commission does not have the authority to expand the applicability of these statutory provisions.[21]

Moreover, refusing to recognize the express limitation imposed by the legislature and expanding these newly enacted provisions to small commercial customers "runs contrary to the salutary principle of statutory construction that '[w]ords in a statute must be given meaning and not treated as meaningless and superfluous.'"[22] Additionally, the principles of statutory construction favor specific statutory provisions over general ones[23] and more recently enacted provisions over older ones.[24] Here, the protections for residential consumers are specific, newly enacted statutory provisions that modify the Statute. The general authorization relied upon by the Commission does not expand the meaning of these more recently enacted, specific provisions; rather, it is subject to them. Thus, the general authorization in the Statute permitting the Commission to impose additional requirements is not sufficient to permit the Commission to apply the newly enacted consumer protections that have been expressly limited by the legislature to small commercial consumers.[25]

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[19] *Cf. Lee v. Massie*, 447 A.2d 65, 68 (Me. 1982) (noting that the maxim of *expressio unius est exclusio alterius* is well recognized in Maine).

[20] *See Arsenault*, 2006 ME 111, at ¶17; *compare* Me. Rev. Stat. 35-A, § 3203(4) (referring to both residential and small commercial customers) *with* Me. Rev. Stat. 35-A, § 3203(4-B) (referring only to residential customers).

[21] *Larson*, 141 Me. at 332; *see also New England Tel.*, 148 Me. at 379.

[22] *Teele v. West-Harper*, 2017 ME 196 (2017), ¶12 (*quoting Wong v. Hawk*, 2012 ME 125 (2012), ¶8).

[23] *Fleet Nat'l Bank v. Liberty*, 2004 ME 36 (2004).

[24] *Cf. id.*, at ¶ 21 (Levy, J., dissenting) ("Where two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of legislative will.").

[25] *Accord Fleet Nat'l Bank*, 2004 ME 36.

Furthermore, the proposed inclusion of small commercial customers in the Commission's Proposed Amendments is unwarranted given that commercial customers are generally more sophisticated about the retail electric market and regularly contract and receive bills for a variety of goods and services. Accordingly, RESA urges the Commission to refrain from expanding the parameters of the Statute to include small commercial customers.

II. THE REQUIREMENT TO INCLUDE CERTAIN INFORMATION ON "UTILITY" BILLS SHOULD BE LIMITED TO BILLS ISSUED BY T&D UTILITIES

In a section entitled, "Residential consumer protection through ***transmission and distribution utility bill*** information,"[26] the Statute provides, in pertinent part:

> The monthly ***utility*** bill for a residential customer that elects to receive generation service from a competitive electricity provider must contain the following:
>
> A. A website address or other resource that residential consumers can access to obtain information that provides independent information as determined by the commission that allows residential consumers to compare terms, conditions and rates of electricity supply;
>
> B. A statement that directs the residential consumer to the competitive electricity provider for more information on the residential consumer's contract, including its terms, and that provides the telephone number of the competitive electricity provider.[27]

As noted above, "the primary purpose of statutory interpretation is to give effect to the intent of the Legislature."[28] This is done "first by reviewing the plain language of the statute, and if the language is unambiguous, [an agency must] interpret the statute according to its plain language . . . ."[29]

[26] Me. Rev. Stat. 35-A, § 3203(4-C) (emphasis added).

[27] *Id.* (emphasis added).

[28] *Arsenault*, 2006 ME 111, at ¶ 11

[29] *Id.*

By its title, this section specifically refers to the "transmission and distribution utility bill."[30] As RESA pointed out in its prior comments, "[t]ransmission and distribution utility" is defined as "a person . . . owning, controlling, operating or managing a transmission and distribution plant for compensation within the State . . . ."[31] "Transmission and distribution plant" is defined as: "all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the ***transmission, distribution or delivery of electricity*** for light, heat or power for public use and includes all conduits, ducts and other devices, materials, apparatus and property for containing, holding or carrying conductors used, or to be used, for the transmission or distribution of electricity for light, heat or power for public use."[32] As the Commission is aware, CEPs do not own, control, operate or manage transmission and distribution plant. Thus, CEPs are not transmission and distribution ("T&D") utilities and, as a consequence, also are not utilities. Accordingly, by its plain language, the Statute does not require CEPs to include the enumerated information on their bills.

Moreover, if the legislature had intended for the information to be presented on bills issued by CEPs, it knew how to do so.[33] Nevertheless, the Commission seeks to expand this requirement to CEP bills.[34] Since the legislature chose not to do so, the Commission cannot.[35] Once again, the Commission attempts to rely upon its "broad regulatory authority over CEPs to protect consumers" to justify the application of this Proposed Amendment to separate supply bills issued by CEPs.[36] However, refusing to recognize the express limitation imposed by the

[30] Me. Rev. Stat. 35-A, § 3203(4-C) (emphasis added).

[31] *Id*. at § 102(20-B).

[32] *Id*. at § 102(20-A) (emphasis added).

[33] *See Arsenault*, 2006 ME 111, at ¶17; *compare* Me. Rev. Stat. 35-A, § 3203(4-C) (referring to "utility bill") *with* Me. Rev. Stat. 35-A, § 3203(15) (referring to "bills for electric power service").

[34] *See* Rulemaking Notice, at 3-5; *see also* RESA Comments, at 5-8.

[35] *Larson*, 141 Me. at 332; *see also New England Tel.*, 148 Me. at 379.

[36] Rulemaking Notice, at 4-5.

legislature and expanding this provision to include bills issued by CEPS "runs contrary to the salutary principle of statutory construction that '[w]ords in a statute must be given meaning and not treated as meaningless and superfluous.'"[37]

Furthermore, by expanding the requirement to include CEP bills, the Commission would force both the T&D Utilities and CEPs to expend significant time and resources to modify their billing systems to ensure this information is presented on bills. The costs associated with these modifications would then be passed onto ratepayers through increased T&D Utility delivery charges ***and*** higher CEP prices. Because the T&D Utilities would likely be permitted to recover the costs of any further billing system changes in the non-bypassable portion of their rates, all customers would pay for the costs of the T&D Utilities billing system modifications. As a consequence, customers served by CEPs would pay for the costs of the T&D Utilities' billing system modifications in increased delivery charges ***and*** would also pay for the costs CEPs incur for modifications to their billing systems in higher supply prices. Thus, the Commission should recognize the balance struck by the legislature by adhering to the plain language of the Statute and only require that the enumerated information be provided on T&D Utility bills issued to residential customers. Since even customers who receive a separate bills from their CEPs for supply charges, still receive a bill from their T&D Utility, such a requirement will ensure that all residential customers are provided with the required information without imposing undue costs upon them.

III. THE COMMISSION SHOULD MODIFY THE EXPRESS CONSENT REQUIREMENTS FOR RENEWAL OF VARIABLE PRICE ARRANGEMENTS TO FIXED PRICE CONTRACTS

Consistent with the Statute, the Commission proposes to require that CEPs obtain express consent prior to renewing customers to a fixed price contract at a price that is twenty percent

[37] *Teele v. West-Harper*, 2017 ME 196 (2017), ¶13 (*quoting Wong v. Hawk*, 2012 ME 125 (2012), ¶8).

(20%) or more above the price contained in the expiring contract.[38] However, for variable price arrangements, the Commission proposes to require CEPs to obtain express consent if the term of the fixed price renewal exceeds "the duration term of the currently existing Terms of Service or 12 months, whichever is shorter."[39]

As RESA pointed out in its prior comments, this requirement suffers from two infirmities. First, it could unnecessarily deprive customers of beneficial pricing options. Second, in most instances, it would have little practical effect.[40] Specifically, if the term of the expiring contract is one month, an express consent requirement could significantly frustrate customers and impede their ability to take advantage of favorable pricing arrangements. Under the Proposed Amendments, a CEP would be unable to renew a customer on more than a month-to-month basis without express consent.[41] In fact, if they were to offer to do so and the customer did not provide express consent, the CEP would not be able to retain the customer on the customer's existing arrangement because it would be required to return the customer to Standard Offer service.[42] Rather than risk losing these customers, CEP will simply retain the customers on their existing pricing arrangements. As a consequence, no customers currently accepting service pursuant to a month-to-month variable pricing arrangement would ever be offered a fixed price agreement on renewal, thereby depriving customers of the ability to take advantage of otherwise beneficial pricing offers and resulting in customer frustration and dissatisfaction.[43] Thus, RESA requested that the Commission modify this requirement to only mandate express consent when a

[38] *See, e.g.*, Proposed Amendments, at § 4B(8)(g).

[39] Proposed Amendments, at § 4B(8)(g) (emphasis added).

[40] RESA Comments, at 8.

[41] Proposed Amendments, at § 4B(8)(g) (requiring require CEPs to obtain express consent if the term of the fixed price renewal exceeds "the duration term of the currently existing Terms of Service or 12 months, ***whichever is shorter***.") (emphasis added).

[42] *See id.* at § 4B(8) ("If a customer does not provide the express consent required by this section, the customer must be transferred to the standard-offer service.").

[43] RESA Comments, at 10.

customer is being renewed from a variable price arrangement to a fixed price agreement for a renewal term that exceeds the term stated in the expiring contract or twelve (12) months, whichever is shorter, unless the expiring contract term was only one month, in which case, the CEP would only be required to obtain express consent if the renewal term was twelve (12) months or longer.[44]

Despite this, the Commission determined that, because it does not have discretion to modify the statutory requirement, "the renewal provisions of the [P]roposed [Amendments] incorporate the language of the statute, requiring express notice prior to renewal of contract for a term that is longer than the term of the expiring contract or 12 months, whichever is shorter."[45] However, the Commission determined that another subdivision of this statutory section only applied to fixed price contracts.[46] RESA urges the Commission to make this same determination with respect to Section 3203(4-B)(D) of the Statute. In this way, the Commission can provide customers with opportunities to take advantage of beneficial pricing offers and reduce customer frustration and dissatisfaction. If the Commission declines to the limit applicability of Section 3203(4-B)(D) of the Statute to the renewal of fixed price contracts, RESA urges the Commission to adhere to the plain language of the Statute and limit the applicability of this provision solely to residential customers.

[44] RESA Comments, at 11.

[45] Rulemaking Notice, at 5.

[46] *Id.* at 5-6 (interpreting section 3203(4-B)(C) as only applying to fixed price contracts).

IV. THE COMMISSION SHOULD NOT ADOPT OR SHOULD MODIFY CERTAIN PROPOSED AMENDMENTS REGARDING IN-PERSON SOLICITATION OF CUSTOMERS.

The Proposed Amendments include new consumer protection standards applicable to "in-person solicitations" of customers.[47] RESA urges the Commission to make several modifications to these new regulatory provisions prior adopting the final amendments to Chapter 305.

A. Applicability

As currently written, any in-person solicitation at a residential or small non-residential customer's premises would be subject to Section 4(B)(14) of the Proposed Amendments, including solicitations via network marketing or pre-arranged appointments. In the Notice of Inquiry, the Commission expressed concern that CEP marketing representatives fail to identify the company for whom the salespeople work, make unreasonable repetitive sales visits to the same home, and make sales visits at unreasonable hours of the day.[48] However, these activities are unlikely to arise in the context of solicitations via network marketing or pre-arranged appointments because the prospective customer has already had prior contact with the representative and has agreed to meet with him or her. Thus, RESA requests that the Commission clarify that Section 4(B)(14) of the Proposed Amendments only apply to in-person solicitations do not apply to solicitations via network marketing, pre-arranged appointments, or other in-person solicitations in which the customer has already been in contact with the CEP and is aware of the purpose of the in-person contact prior to the solicitation.

B. Notice Requirement

The Commission "proposes requiring CEPs to provide notice in advance of marketing door-to-door, indicating the dates and times when the in-person solicitation will occur and

[47] *See, generally*, Proposed Amendments, § 4(B)(14).

[48] *See* Notice of Inquiry, at 2.

identifying who will be going door-to-door."[49] However, such a notice requirement could run afoul of the constitutional requirements of free speech and equal protection. Thus, RESA requests that the Commission remove this requirement before adopting the final amendments to Chapter 305.

The proposed notice requirement may violate CEPs' right to freedom of speech under Article 1, Section 4 of the Maine Constitution[50] and the First Amendment of the United States Constitution.[51] The First Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that "Congress shall make no law… abridging the freedom of speech, or of the press…."[52] The Maine Constitution likewise reads: "Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty …."[53] With respect to free speech rights, "the Maine Constitution is no less restrictive than the Federal Constitution."[54]

"Core speech" is entitled to strict constitutional protection.[55] Core speech involves "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes[,]"[56] speech directed at educating the public,[57] or more generally, speech addressing "matters of public concern."[58] Commercial speech is entitled to intermediate constitutional

[49] Rulemaking Notice, at 6; *see also* Proposed Amendments, § 4(B)(14)(a).
[50] Me. Const. art. 1, § 4.
[51] U.S. Const. Amend. I.
[52] U.S. Const. Amend. XIV.
[53] Me. Const. art. I, § 4.
[54] *State v. Janisczak*, 579 A.2d 736, 740 (Me. 1990).
[55] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).
[56] *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).
[57] *See Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940).
[58] *Id.* at 101-02.

protection.[59] Commercial speech has been defined as "expression related ***solely*** to the economic interests of the speaker and its audience,"[60] speech that relates to a particular product or service,[61] or speech that "propose[s] a commercial transaction."[62]

CEPs that are marketing in-person may be marketing specific products and/or distributing consumer education materials. Although a commercial activity may be constitutionally regulated more restrictively than noncommercial activity, since in-person marketing materials and sales activity may provide information beyond the economic interests of CEPs (e.g., general educational materials about the retail electric supply market), it could presumably be defined as core speech. If such activity is found to be core speech, the Commission's proposed notice requirements may violate the prior restraint doctrine. The concept of prior restraint refers to "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur."[63] There is a heavy presumption against the constitutional validity of prior restraint.[64]

For example, in *Central Maine Power Co. v. Public Utilities Comm'n,* the court evaluated the Commission rule requiring T&D Utilities to file with the Commission any materials (for informational purposes only) that were part of or related to utility-sponsored educational activities at least three weeks before the commencement of the activity.[65] In that proceeding, the court established that a rule requiring electric utilities to submit consumer education materials three weeks in advance of dissemination constituted a prior restraint on core

[59] *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-65 (1980).

[60] *Id.* at 561 (emphasis added).

[61] *See Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

[62] *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 473 (1989) (*quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

[63] *Alexander v. United States*, 509 U.S. 544, 550 (1993).

[64] *Central Maine Power Co. v. Pub. Utilities Comm'n*, 734 A.2d 1120, 1127 (Me. 1999).

[65] *Central Maine Power*, 734 A.2d at 1127.

speech[66] because of the ongoing nature of the regulatory relationship between the utilities and the Commission, the rule, in conjunction with the Commission's power to investigate a utility, was essentially the same as Commission approval.[67] The Commission's proposed in-person notice requirement would have a chilling effect on CEPs, and could result in CEPs delaying marketing and sales activity and discouraging in-person marketing. Consequently, such a requirement could be found to be an unconstitutional prior restraint.

Commercial speech is protected even though it may involve a solicitation to purchase or otherwise pay or contribute money.[68] For instance, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, the Court concluded that, while a State had the power to regulate the professional standards applicable to pharmacists, "it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[69] In evaluating the constitutionality of restrictions on commercial speech, courts implement the four-part analysis set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.* ("Central Hudson Test").[70] For commercial speech to constitute an expression that is protected by the First Amendment, it must concern lawful activity. Next, the court asks whether the asserted governmental interest is substantial. If both inquiries yield positive answers, then the court must determine whether the regulation directly advances the governmental interest asserted, and whether it is no more extensive than is necessary to serve that interest. Together, these final two

[66] *Id*. at 1127-29.

[67] *Id.* at 1129.

[68] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 762 (1976) (internal citations omitted).

[69] *Id.* at 770.

[70] *Central Hudson*, 447 U.S. at 566.

factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends.[71]

Even if the Commission were to assume that it could satisfy the first two prongs of the Central Hudson test, based on the Notice of Inquiry, it appears the Commission's main objective in imposing the notice requirement is to prevent violations of Chapter 305.[72] In particular, the Commission is concerned that CEP marketing representatives

> fail to identify the company for whom the salespeople work, make unreasonable repetitive sales visits to the same home, make sales visits at unreasonable hours of the day, provide false or misleading information regarding electricity rates and the purported benefits of contracting with a CEP for electricity supply service, and provide false or misleading information regarding the difference between who is delivering electricity and who is supplying the electricity.[73]

Each of these issues can be addressed in significantly less prescriptive ways. For instance, the Commission could affirmatively require that in-person marketing representatives identify the company for whom they work as it currently does for telemarketing representatives.[74] Thus, the Commission's notice requirement could be deemed to be more extensive than is necessary to achieve the Commission's objectives. As a consequence, it could be deemed to violate the CEPs' constitutionally protected right to free speech.[75]

The proposed notice requirement may also violate the Equal Protection clauses of the United States and Maine constitutions. For instance, the federal Equal Protection clause provides that no State shall deny any person within its jurisdiction "the equal protection of the laws."[76]

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[71] *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993).

[72] Notice of Inquiry, at 2.

[73] *Id.*

[74] *See* 65-407 CMR c. 305, § 4B(10)(c) ("Upon contacting a customer by telephone, a competitive electricity provider must state the name of its company and the purpose of the call.").

[75] *See Edge Broad*, 509 U.S. at 427-28.

[76] U.S. Constitution, Amend. 14.

The Maine Constitution includes similar requirements.[77] However, RESA is not aware of any other industry that is required to provide the Commission with notice prior to engaging in in-person marketing in Maine.

While the matter at hand does not involve a suspect classification, it could be construed to involve a fundamental right - freedom of speech. If the proposed notice requirement is found to deprive, infringe or interfere with the exercise of a fundamental right, it would trigger a strict scrutiny analysis.[78] Pursuant to such an analysis, the Commission must show that the requirement is necessary to promote a compelling governmental interest.[79] If the Commission can establish it has a compelling interest, it must also prove that the requirement is narrowly tailored to furthering that interest.[80] Otherwise, the prohibition cannot satisfy strict scrutiny.[81]

However, there is no precise connection between a notice requirement and preventing the activities of concern to the Commission. In the Rulemaking Notice, the Commission also proposes to adopt standards of conduct that would further protect against unscrupulous activities.[82] Thus, there seems to be little justification for the Commission's proposed in-person notice requirement. Consequently, RESA urges the Commission to remove this requirement before adopting its final proposal.

Even if there were a compelling state interest in further monitoring CEP sales activities (which RESA disputes), then there is a much less burdensome approach that will be equally effective. Since, under the Proposed Amendments, all in-person marketers will be required to wear identification badges that clearly state the name of the CEP on whose behalf they are

[77] Me. Const. art. I, § 6-A ("No person shall be . . . denied the equal protection of the laws . . . .").
[78] *In re Dustin C.*, 952 A.2d 993, 997 (Me. 2008).
[79] *Id.*
[80] *Id.*
[81] *Cf. id.*
[82] *See* Proposed Amendments, § 4(B)(14).

marketing,[83] customers raising concerns about a particular in-person encounter will have sufficient information to allow the Commission to identify the CEP involved. Moreover, since many municipalities require those undertaking door-to-door marketing activities to register and/or obtain a permit,[84] municipalities raising concerns about in-person activities will also have sufficient information to identify the CEP involved. Thus, CEPs should simply be required to maintain information on the municipalities in which their products are being marketed, including the marketing representatives marketing in each municipality, so that they can respond to Commission, municipal or customer inquiries about their activities. This approach rightly places the obligation of monitoring sales activities on the CEPs without imposing unreasonable, unnecessary and costly obligations.

If, despite the foregoing, the Commission requires CEPs to file a notice of in-person activities, it should modify the notice requirements because, as a practical matter, the proposed notice requirement is unworkable. For instance, stating the exact dates and times of solicitations with a precision is not possible. Successful solicitations may take more time than anticipated; unsuccessful ones could end quickly. Weather or traffic conditions could impact arrivals and departure times in certain areas or lead marketing representatives to avoid, or seek out, particular areas. Similarly, identifying specific employees or representatives is also unworkable. Individuals may have to alter planned solicitations because of unexpected events, such as illness.

Moreover, vital to any CEP's success in the Maine retail electric market are its proprietary marketing and sales strategies. A CEP's decisions as to where and when to conduct

[83] *See* Proposed Amendments, § 4(B)(14)(b).

[84] *See, e.g.*, Portland, Me., Code § 19-56 ("No person shall engage in the transient sales of consumer merchandise or services within the city without a license from the city."); Auburn, Me., Code § 14-316(b) ("A permit is required for all persons selling or with the intent of selling at a future date any merchandise or services by means of personal contact and who does not have, for that purpose, any permanent place of business within the city."); Bath, Me., Code § 5-90 (requiring itinerant vendors to receive licenses from the Collector of Taxes, which licenses may not be granted except upon the certification of the police chief and the fire chief).

marketing and sales campaigns are at the core of its business plan and, as such, are highly confidential and proprietary. The methods and techniques each CEP uses to develop its marketing and sales campaigns are the result of that CEP expending considerable resources, time and expenses over many years to develop the talent and information to effectively undertake such efforts. For instance, CEPs have expended resources to hire marketing and sales personnel with knowledge of the industry and to obtain and track market research information to assist in marketing and sales activities, including where and when such activities may be most effective. Knowing where and when a particular CEP markets to customers is valuable information, which competitors could use to target their marketing efforts. For instance, current and future CEPs could use this information to guide them in marketing and selling their products in Maine to consumers in areas where other CEPs have not yet marketed without having to expend time and resources to independently determine these locations;[85] thereby, providing a competitive advantage to some CEPs to the competitive disadvantage of others.

If, despite the foregoing, the Commission continues to require CEPs to file a notice of in-person activities, it should revise the notice requirements to simply require that the CEP provide notice only to the Commission that it intends to begin in-person marketing activities without reference to specific municipalities along with contact information for the person overseeing those activities. In this way, the Commission can be aware of which CEPs are actively engaging in in-person marketing at any given time and whom to contact with any inquiries about such activities without requiring unnecessary and unjustified notices or the disclosure of competitively sensitive information.

[85] For instance, in order to independently determine these locations, a competitor would need to contact each and every municipality in the State to determine if any other CEPs had already conducted in-person marketing activities there and, if so, when.

C. Identification Requirements

The Commission also proposes adopting a requirement that the CEP, or its representative, "produce identification . . . which prominently displays in reasonable size type the full name of the CEP and the employee or representative, as well as the CEP's telephone number for inquiries, verification, and complaints . . . ."[86] The proposed identification would be required to be "visible at all times" after it is produced, and the representative would be required to leave such identification with the potential customer upon request.[87] While RESA does not oppose a requirement that marketing representatives wear and prominently display identification, it requests that the Commission modify the required information to be presented on the identification and not require that it be left with the customer.

First, in order to protect marketing representatives, RESA requests that the Commission require that the identification not include the full name of the representative. In other markets, the listing of a representative's full name on the identification badge has resulted in some representatives being stalked and harassed through social media channels by persons with whom they have engaged in in-person marketing activities. In order to mitigate against such incidents, RESA requests that, similar to other retail merchants, the identification badge only include the representative's first name along with a unique identification number as this will provide CEPs with sufficient information to confirm who was involved in a particular transaction should that become necessary while also protecting the representative's privacy.

Second, RESA requests that the Commission eliminate the requirement that representatives leave the identification badge with the potential customer upon request. First, this requirement would unnecessarily increase the cost of production of such identification badges, as

[86] Proposed Amendments, at § 4(B)(14)(b).
[87] *Id.*

multiple copies of each badge would be required to be printed for each individual representative in case requested by a customer.[88] This increased cost would ultimately be passed onto customers in the form of higher CEP supply prices. Further, this requirement could unnecessarily impede a CEP's ability to engage in in-person solicitations because, as a practical matter, a situation could arise in which a CEP representative runs out of identification badges and is unable to continue customer interactions; thereby, unreasonably interfering with a CEP's ability to conduct marketing and potentially resulting in a loss of business.

Further, leaving identity badges with potential customers would create a risk that the potential customer (or a third party) could use the identity badge to impersonate a CEP employee or marketing representative, possibly with criminal intent. While this risk may be low, CEPs should be allowed to ensure the security of identification that they issue to their employees and marketing representatives to ensure that only actual CEP employees and marketing representatives are able to represent themselves as such. Thus, RESA requests that, upon customer request, CEPs give customers materials that provide the CEP's name and telephone number and include the first name and identification number of the marketing representative but that the Commission refrain from requiring that these materials be provided in any particular form (e.g., marketing representative identification).

D. Statement of Independence from Utility

The Commission proposes that a CEP's representatives state that they are not working for, and are independent from, the potential customer's electric utility.[89] Conceptually, RESA has no objection to this proposed requirement. Potential customers should be aware of the distinct roles of CEPs and T&D Utilities. However, as a practical matter, it is important to ensure that

[88] *See* Proposed Amendments, at § 4(B)(14)(b).
[89] *Id.* § 4(B)(14)(c).

efforts to comply with any regulatory requirement do not create an undue risk of customer confusion. For instance, using the T&D Utility's name, even to state that the representative is *not* from the particular T&D Utility, often leads customers to believe erroneously that they have spoken with a representative from that very T&D Utility. Thus, RESA is concerned that, if marketing representatives were required to state "I represent [Name of CEP]; I do not represent [Name of Utility]," some customers may misinterpret the statement and assume, incorrectly, that the representative is an agent of the utility. Stating that the representative is not from *a* T&D Utility, as opposed to referencing the name of the particular T&D Utility, is preferable and will avoid any undesirable confusion among consumers. To that end, RESA recommends that the Commission revise the requirement to read: "Clearly state that the employee or representative is working for a CEP and clearly identify the CEP (by full legal name or registered trade name)."

E. Language Skills

The Proposed Amendments would require that a representative "terminate the in-person contact with the potential customer when it is apparent that the potential customer's language skills are insufficient to allow the potential customer to understand and respond to the information conveyed, or where the potential customer or another third party informs the CEP, or its representative, of this circumstance."[90] RESA generally supports requirements that ensure that customers understand the sales transaction. However, RESA requests that the Commission revise this provision to require that the representative *either* find a representative in the area who is fluent in a language in which the customer has sufficient language skills to translate the sales transaction or terminate the in-person contact with the customer. In this way, the Commission can ensure that customers understand the sales transaction without unnecessarily depriving customers of the opportunity to participate in the retail electric market.

[90] Proposed Amendments, at § 4(B)(14)(e).

F. Recording Audio Communications

The Proposed Amendments would require CEPs to audio record all in-person solicitations with potential customers, commencing when the initial contact is made with the potential customer and ending when the representative leaves the potential customer's premises.[91] As part of this recording, CEPs would be required to capture the potential customer's name and address.[92] CEPs would also be required to maintain the recordings for at least twelve months after the date of the solicitation[93] and make the recording available in a format amenable to electronic conveyance to the Commission upon request.[94] These requirements will invade customer privacy, have perverse results, and be unnecessarily costly. Thus, RESA requests that the Commission remove these requirements before adopting the final amendments to Chapter 305.

First, if this Proposed Amendment is adopted, to ensure that the prospective customer is fully informed, at the beginning of an in-person solicitation, a marketing representative would need to inform a prospective customer that the conversation was being recorded and that the recording might be provided to the government.[95] Beginning a solicitation in this way could have a chilling effect on the transaction. As a consequence, customers concerned about their

[91] Proposed Amendments, at § 4(B)(14)(f).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Pursuant to the Interception of Wire and Oral Communications Act, Me. Rev. Stat. 15, §§ 709-713, it is permissible for a conversation to be recorded if either the sender or the receiver of the communication has given prior authority for it to be recorded. Me. Rev. Stat. 15, § 709(4)(C); *see also Griffin v. Griffin*, 92 A.3d 1144, 1149-50 (Me. 2014). However, the recording of interactions with customers without informing them of such a requirement, or informing them that such recording could be required to be given to a governmental agency, could conceivably be interpreted by customers as being deceptive.

constitutional privacy rights[96] may refuse to continue with the solicitation even if they are interested in CEP offers.

Furthermore, requiring that the recording capture the customer's name and address could have perverse results. Specifically, in many marketing efforts, the customer concludes the transaction before the representative can provide more than his/her name and the reason for the visit. However, if the marketing representative is affirmatively required to capture the customer's name and address, (s)he would be forced to disturb the customer again in order to do so – an absurd result because the customer already has expressed his or her disinterest in engaging with the representative. This would be a perverse outcome that neither the CEP nor the consumer would desire.

In addition, the cost of the proposed recording and retention requirements, which would ultimately be borne by ratepayers, would be substantial and disproportionate when compared to the limited value produced from the availability of such records. The potential costs of this requirement would include the costs of system development, implementation and testing, data storage, and database management. These costs could be exorbitant for a CEP that has a robust in-person sales channel.

Moreover, since recordings for any given sales transaction may need to be provided to the Commission on short notice, CEPs cannot simply warehouse digital recordings of the sales calls. Instead, the sales calls must be catalogued and tagged by several different factors (customer name, address, account number, or other information), and be placed somewhere where they are quickly retrievable. Decisions as to how to set this system up to delete the recordings no earlier than twelve months after they are collected in a manner consistent with

[96] *See e.g., Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (reiterating the right to privacy and protection against all governmental invasions of the sanctity of one's home).

internal document retention polices will require significant time and attention from multiple resources. All of these functions cost money, whether from internal information technology upgrades or human time transcribing and tagging to hiring various outside vendors. Ultimately, CEPs would pass these costs along to consumers in the form of higher prices.

Additionally, given the numerous available formats in which recordings can be stored, CEPs have no way of knowing if their chosen storage format will be "amenable to electronic conveyance to the Commission." In addition, given the likelihood of developments in digital storage technology in the future, RESA cannot predict what formats might be (or become) available or whether the Commission will be able to receive recordings in these formats. Thus, RESA requests that the Commission remove the requirement that all in-person solicitations be audio recorded before adopting the final amendments to Chapter 305.

G. Leaving Premises Prior to Third-Party Verification

Pursuant to the Proposed Amendments, the marketing representative would be required to leave the customer's premises prior to any third-party verification ("TPV") call confirming the customer enrollment.[97] Such a requirement will increase premature transaction abandonment for otherwise mutually-beneficial sales calls. If a marketing representative must leave the premises, the customer whose TPV has concluded prematurely but still wishes to pursue the transaction will be required to find and contact the marketing representative again in order to move forward. Conversely, if marketing representatives are permitted to remain on the premises, if the TPV concludes prematurely but the customer still wishes to proceed with the transaction, (s)he can easily re-engage with the marketing representative. Moreover, on some TPV systems, the agent is supposed to be silent but remain on the call to advance the call to the next prompt. Thus, in order to make the process as simple as possible for consumers, marketing representatives should

[97] Proposed Amendments, at § 4(B)(14)(g).

be permitted to remain on the premises. However, RESA would support a requirement that marketing representatives not be permitted to speak to the customer during the TPV process. In addition, should the marketing representative speak or attempt to intervene in the TPV, the process would be immediately halted and designated as an Incomplete or Invalid TPV.

H. Compensation

The Commission proposes to prohibit a CEP from paying or otherwise compensating its marketing representatives for in-person solicitations based on whether the potential customer accepts the CEP's service.[98] However, the Commission's role is limited to the oversight of CEPs.[99] It is not the role of the Commission to manage CEPs' business affairs.[100] Deciding how a CEP's employees or third-party vendors are to be compensated is a managerial function; it is not a function of regulatory oversight.

Moreover, the Commission has not put forth any basis for such a requirement. In the Notice of Inquiry, the Commission asked whether the practice of third-party entities working on commission-based compensation impacts compliance with Chapter 305 and whether it should be prohibited.[101] In response, the Office of the Public Advocate noted that

> commissioned sales that follow the rules can spur healthy competition and be good for the market. We do not, at this point, believe that commissioned sales should be banned. However, in the event that abuses are seen in the marketplace in connection with commissioned sales, we would support swift enforcement actions, and a change to the rule so that the practice is banned.[102]

Just like many other industries, CEPs utilize a variety of compensation structures. In fact, the use of commission-based compensation for sales and marketing agents of private enterprises is a

[98] Proposed Amendments, at § 4(B)(14)(h).

[99] Me. Rev. Stat. 35-A, § 103(2)(C).

[100] *See In re Stratton Water Co. Proposed Increase in Rates*, 383 A.2d 1373, 1377 (Me. 1978) (noting that "the function of a public utilities commission is one of control and not management.").

[101] Notice of Inquiry, at 3.

[102] Docket No. 2017-00268, *Public Utilities Commission, Inquiry into Transparency and Marketing Practices in the Electricity Supply Market*, Comments of the Office of the Public Advocate (Nov. 17, 2017), at 4-5.

widely accepted business practice. However, RESA does not believe that these compensation structures impact compliance. Moreover, no other stakeholder submitted comments to the contrary. Thus, the Commission has no factual basis to conclude otherwise. Accordingly, any ban on commission based compensation structures would be arbitrary.[103]

Furthermore, imposing such a requirement would be unworkable. CEPs frequently rely on third-party vendors to perform marketing on their behalf. These third-party vendors are generally independent contractors. As such, CEPs do not generally have the right to dictate how those vendors compensate their employees.

CONCLUSION

For all the foregoing reasons, the Commission should modify the Proposed Amendments before adopting final changes to Chapter 305.

[103] *See Central Maine Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971) ("Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence.").

Respectfully Submitted,
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