STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2017-00268

November 16, 2017

PUBLIC UTILITIES COMMISSION
Inquiry into Transparency and Marketing Practices in the Electricity Supply Market

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the Maine Public Utilities Commission's (the "Commission" or the "PUC") October 16, 2017 Notice of Inquiry ("Notice")[2] in the above-referenced proceeding.

BACKGROUND

On May 19, 2017, the Maine Legislature enacted Public Law, Chapter 74 (the "Statute"),[3] which imposes new conditions of licensure for competitive electricity providers ("CEPs") serving residential customers and requires that certain information be disclosed on utility bills issued to residential customers. In response, the Commission opened this proceeding and issued the Notice along with "a redline of current Chapter 305 of the Commission's rules, reflecting anticipated amendments to be proposed in a future rulemaking to conform Chapter 305 to recently enacted legislation" (the "Proposed Amendments").[4]

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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 more than 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 Inquiry (Oct. 16, 2017).

[3] The Statute has now been codified at 35-A MRSA §3203.

[4] Notice, at 2.

In the Notice, the Commissions requests comments on the Proposed Amendments as well specifically enumerated topics related to the Commission's implementation of the Statute.[5] In the Notice, the Commissions asks for comments regarding CEP marketing practices.[6] RESA hereby submits its comments in response to the 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 residential, commercial and industrial customers in Maine and are presently providing electricity service to customers in the State. As such, RESA has a vested interest in ensuring that the Commission's final rules 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. However, for the reasons discussed more fully below, RESA requests that the Commission modify some of the Proposed Amendments before issuing a notice of rulemaking. In addition, RESA urges the Commission to refrain from adopting broad, sweeping requirements to address specific areas of concern and instead adopt encourages it to adopt more targeted requirements specifically aimed at the behavior it wishes to address and to rely on its enforcement authority to ensure those requirements are followed.

[5] Notice, at 2-3.
[6] *Id.* at 3-4.

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

In the Notice, the Commission indicated that it "anticipates applying the recently enacted consumer protections to both residential and small commercial customers."[7] However, as the Commission itself recognized "the legislation ***on its face*** refers only to residential consumers."[8]

"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."[9] In this case, by its plain language, the Commission is only authorized to apply the Statute to residential customers.

According to the Notice, it has been "the Commission's historical policy of providing residential and small commercial customers the same protections under Chapter 305…"[10] However, "governmental entities cannot create authority, or erase authority, merely by establishing a practice or policy."[11] Thus, the Commission does not have the authority to expand the applicability of the statutory requirements to small commercial customers.[12]

Moreover, 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

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[7] Notice, at 2.

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

[9] *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.").

[10] Notice, at 2.

[11] *Somerset Cnty. v. Dep't of Corr.*, 2016 ME 33, 49 n.20 (2016); *see also Medellin v. Texas*, 552 U.S. 491, 532 (2008) ("[p]ast practice does not, by itself, create power.") (alteration in original; citation omitted).

[12] *Cf. Conservation Law Found. v. Dep't of Envtl. Prot.*, 823 A.2d 551, 559 (Me. 2003) ("If the rule exceeds the rule-making authority of the agency, it is invalid.").

of goods and services. Accordingly, RESA urges the Commission to refrain from expanding the parameters of the Statute to include small commercial customers.

II. CEPS SHOULD NOT BE REQUIRED TO PROVIDE PROSPECTIVE CUSTOMERS WITH ACTUAL STANDARD OFFER PRICES

The Statute requires CEPs to disclose to prospective residential customers "***where*** the residential consumer can obtain information with which to compare the service provided by the competitive electricity provider and the standard-offer service."[13] In the Notice, the Commission asks whether CEPs should "be required to provide prospective customers with the ***actual standard offer prices***, both current and, if available, for the next standard offer term."[14] RESA opposes such a requirement because it creates significant opportunities for non-compliance and will impose unnecessary costs on CEPs that will ultimately be passed onto ratepayers in the form of higher prices.

Just as CEPs are not required to advertise or disclose the offer prices of other CEPs, they should not be required to advertise or disclose the Standard Offer rate. Consumers already have available a myriad of tools to educate themselves and make accurate price comparisons. For instance, if a consumer wishes to compare an offer to what (s)he is currently paying, (s)he only need look at his/her most recent bill. If a consumer wishes to compare an offer to the current or approved Standard Offer rate or to the offers of other CEPs, that information is available on the Maine Office of the Public Advocate ("OPA") website.[15] Thus, it is unnecessary for CEPs to provide this information to customers. Instead, the Commission should revise the Proposed Amendments to require that CEPs provide customers with a link to the OPA website.

[13] 35-A MRSA §3203, §§ 4-B(A) (emphasis added).

[14] Notice , at 2 (emphasis added).

[15] http://www.maine.gov/meopa/utilities/electric/supply.html.

By doing so, the Commission can ensure that customers are receiving the most accurate and up-to-date information to allow them to compare the offer being presented to not only the Standard Offer rates but also to offers available from other CEPs. OPA regularly updates its website to include Standard Offer rates as they change as well as new CEP product offerings. If CEPs are required to disclose the Standard Offer rates in their materials, they will have to revise their websites as well as electronic and hard copy communications every time the Standard Offer rate changes. As a consequence, CEPs will be required expend significant time and resources to modify all of their materials. In addition, because written materials cannot be modified as quickly, it will take longer for the information in those materials to be updated. Consequently, there will be a period of time during which CEPs will be providing inaccurate information to customers, resulting in frequent, unintended noncompliance and exposing CEPs to liability.

While RESA appreciates the Commission's desire to enhance transparency and increase the amount of information available to assist customers in making informed decisions about their supply options, the Statute strikes the right balance of ensuring that customers know where to find accurate and up-to-date information without imposing an undue burden on CEPs to track Standard Offer rates and update their materials every time a Standard Offer rate changes. Accordingly, RESA urges the Commission to refrain from requiring the disclosure of the actual Standard Offer rate in CEP materials.

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

In a section titled "Residential consumer protection through transmission and distribution utility bill information," 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:

> 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."[16]

A "public utility" is defined, in relevant part as "every . . . transmission and distribution utility. . . . ."[17] "Transmission and distribution utility" is defined as "a person . . . owning, controlling, operating or managing a transmission and distribution plant for compensation within the State . . . ."[18] "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."[19] 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.

[16] 35-A MRSA § 3203(4-C).
[17] 35-A MRSA § 102(12).
[18] *Id.* at § 102(20-B).
[19] *Id.* at § 102(20-A).

Nevertheless, it appears as though the Commission is seeking to expand this requirement to CEP bills.[20] RESA urges the Commission to refrain from doing so. First and foremost, by doing so, the Commission would be improperly expanding the scope of its legal authority. [21] Moreover, while RESA is supportive of the requirement to provide customers with additional information regarding contract terms, comparative prices and contact information, the legislature struck the right balance in only requiring that the T&D Utilities be required to modify their bills to do so.

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/or 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 adhere to the plain language of the Statute and only require that the information be provided on

[20] *See, e.g.*, Notice, at 2-3 ("The Commission preliminarily interprets the requirement that utility ills provide certain notices to be applicable regardless of whether customers are receiving one utility bill from the transmission and distribution (T&D) utility or a separate bill from the CEP."); *Id*. at 3 ("Pending adoption of amendments to Chapter 305 to conform to the recent legislative changes, should ***CEPs*** and T&D Utilities be required to provide notice through utility bill of the website and telephone number of the Office of Public Advocate . . . .").

[21] *Larson*, 141 ME at 332 ("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."); *New England Tel.*, 148 ME at 379 ("[T]he Maine Public Utilities Commission is a creature of statute and bound to act in accordance with the statute which created it."); *Conservation Law Found.*, 823 A.2d at 559 ("If the rule exceeds the rule-making authority of the agency, it is invalid.").

all 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.

IV. 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 (20%) or more above the price contained in the expiring contract.[22] However, for variable price arrangements, the Commission proposes to determine whether this threshold has been met by comparing the new price to the average of the variable price over the term of the contract.[23] The Proposed Amendments would also 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***."[24] These requirements suffer from two infirmities. First, they could unnecessarily deprive customers of beneficial pricing options. Second, in most instances, they would have little practical effect. Thus, RESA requests that the Commission modify these requirements to only mandate express consent when a customer is being renewed from a variable price arrangement to a fixed price agreement (a) at price that is 20% or more higher than the actual price charged to the customer in the month prior to the start of the renewal term or (b) 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

[22] *See, e.g.*, Proposed Amendments, at § 4B(8)(g).
[23] *Id.*; *see also* Notice, at 3.
[24] Proposed Amendments, at § 4B(8)(g) (emphasis added).

CEP would only be required to obtain express consent if the renewal term was twelve (12) months or longer.

As a general matter, variable prices are typically charged to customers through contracts that either continue indefinitely or on a month-to-month basis until terminated by either party. As a consequence, the term of these agreements is either the entire period over which the customer chose to continue service with the CEP without terminating the arrangements, which can span years, or the term is one month.

If the term is the entire period over which the customer chose to take service from the CEP without terminating the arrangement, requiring express consent based on the average price over the length of the arrangement could significantly frustrate customers and impede their ability to take advantage of favorable pricing arrangements. As the Commission is aware, variable prices typically fluctuate when there are changes in the underlying wholesale market price, and those wholesale market prices can vary significantly from hour-to-hour, day-to-day, month-to-month, and year-to-year. As consequence, a customer could have been taking service pursuant to a variable price arrangement for years and, during that time, the customer may have experienced price changes that, on average were 20% below, the fixed renewal price being offered. However, the fixed renewal price may only be a small percentage over or could actually be less than what the customer has been paying more recently. Nevertheless, under the Commission's proposal, if the CEP was unable to obtain the customer's express consent to the renewal, it would be required to transfer the customer to Standard Offer.[25] However, the Standard Offer rate may be higher than the customer's renewal contract price. In such a case, the

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

customer would be harmed and would end up paying more than expected, resulting in customer frustration and dissatisfaction.

Likewise, 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.[26] 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.[27] 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.

In addition, in these month-to-month variable pricing arrangements, a requirement that CEPs determine whether the price will increase by twenty percent (20%) or more upon renewal based on the average price over the term of the contract would have no practical effect. Under arrangements that continue on a month-to-month basis until terminated by either party, unless the price varies more frequently than monthly (which is rare for residential customers), the average price will be identical to the actual price that was charged to the customer in the month

[26] 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).

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

immediately preceding the start of the renewal term. Thus, this requirement would have no practical effect.

Since, as written, the requirements in the Proposed Amendments for permitting renewal of a variable price arrangement to a fixed price agreement will disadvantage and frustrate customers and, in many instances, will have no practical effect, the Commission should revise these requirements before issuing a notice of rulemaking. In particular, RESA requests that the Commission modify these requirements to only mandate express consent when a customer is being renewed from a variable price arrangement to a fixed price agreement (a) at price that is 20% or more higher than the actual price charged to the customer in the month prior to the start of the renewal term or (b) 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.

V. THE COMMISSION SHOULD CREATE A CEP WORKING GROUP

In addition to the specific requirements imposed by the Statute, the Commission also requests comments on various other topics related to CEP marketing practices.[28] As an initial matter, the Commission asked if additional regulatory requirements should "be put in place with regard to third-party marketing companies to ensure compliance with Chapter 305."[29] However, before imposing any new regulatory requirements, RESA encourages the Commission to create a working group that will allow stakeholders to work collaboratively to develop appropriate measures to address specific areas of concern. While RESA appreciates the opportunity to provide comments in response to the Notice, a working group process would provide the

[28] Notice, at 3-4.

[29] *Id.* at 3.

Commission with the opportunity to garner a more complete understanding about some of the best practices that have been adopted in other jurisdictions and evaluate how those practices could be applied in Maine to effectively address the Commission's concerns. In addition, RESA recommends that, even after it concludes the inquiry in this proceeding, the Commission should maintain the working group and, as has been done in other states,[30] set-up regular meetings at which stakeholders can get together and share ideas for improving the retail electric market in Maine. The working group would provide a forum for an informal stakeholder discussion regarding the state of competitive markets. The working group would also create efficiencies by allowing the Commission and others to continue to understand the incremental regulatory challenges that exist in the market without the need to institute formal Commission inquiries to obtain such information.

VI. THE COMMISSION SHOULD NOT IMPOSE OVERLY PRESCRIPTIVE TRAINING REQUIREMENTS

In the Notice, the Commission requested comment on whether express training requirements should be put in place and, if so, whether formal verification of the training of each person should be required.[31] While RESA generally supports a requirement that CEPs be required to train those marketing on their behalf, it requests that the Commission not impose overly prescriptive training requirements. Instead, the Commission should adopt a requirement that representatives be trained about the products that they are selling, applicable federal, state and local laws, regulations and ordinances, and ethical and responsible sales practices, and cautioned against misleading representations, and that CEPs keep a record of such training. However, RESA requests that the Commission refrain from prescribing the precise nature of

[30] *See, e.g.*, PURA Docket No. 17-01-03, *2017 PURA Supplier Working Group*.
[31] Notice, at 3.

training materials, the manner in which the training is conducted, or the process by which such training is tracked and verified. In this way, the Commission can ensure that CEPs are aware of the core elements that should be included in any training program but CEPs can develop and implement training materials and programs that reflect their individual business models.

VII. A BAN ON DOOR-TO-DOOR MARKETING MAY VIOLATE THE U.S AND MAINE CONSTITUTIONS

In the Notice, the Commission also seeks comment on whether it has the authority to prohibit CEPs from engaging in door-to-door ("D2D") marketing and, if so, whether it should do so.[32] A rule outright prohibiting D2D marketing may violate the right to freedom of speech under Article 1, Section 4 of the Maine Constitution[33] and the First Amendment of the United States Constitution.[34]

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…."[35] 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 …."[36] With respect to free speech rights, "the Maine Constitution is no less restrictive than the Federal Constitution."[37]

"Core speech" is entitled to strict constitutional protection.[38] 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

[32] *Notice*, at 3.
[33] Me. Const. art. 1, § 4.
[34] U.S. Const. Amend. I.
[35] U.S. Const. Amend. XIV.
[36] Me. Const. art. I, § 4.
[37] *State v. Janisczak*, 579 A.2d 736, 740 (Me. 1990).
[38] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

processes[,]"[39] speech directed at educating the public,[40] or more generally, speech addressing "matters of public concern."[41] Commercial speech is entitled to intermediate constitutional protection.[42] Commercial speech has been defined as "expression related solely to the economic interests of the speaker and its audience,"[43] speech that relates to a particular product or service,[44] or speech that "propose[s] a commercial transaction."[45]

CEPs that are marketing D2D 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 D2D 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, a ban on such activities 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."[46] There is a heavy presumption against the constitutional validity of prior restraint.[47]

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

[39] *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).
[40] *See Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940).
[41] *Id.* at 101-02.
[42] *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-65 (1980).
[43] *Id.* at 561
[44] *See Friedman v. Rogers*, 440 U.S. 1, 10 (1979)
[45] *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 473-74 (1989) (*quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).
[46] *Alexander v. United States*, 509 U.S. 544, 550 (1993).
[47] *Central Maine Power Co. v. Pub. Utilities Comm'n*, 734 A.2d 1120, 1127 (Me. 1999).

educational activities at least three weeks before the commencement of the activity.[48] 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 speech[49] 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.[50]

Commercial speech is protected even though it may involve a solicitation to purchase or otherwise pay or contribute money.[51] 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."[52] 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").[53] 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

[48] *Central Maine Power*, 734 A.2d at 1127.
[49] *Id*. at 1128-29.
[50] *Id.* at 1129.
[51] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 762 (1976) (internal citations omitted).
[52] *Id.* at 770.
[53] *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.[54]

Even if the Commission were to assume that it could satisfy the first two prongs of the Central Hudson test, based on the Notice, it appears the Commission's main objective in considering a ban on D2D solicitations by CEPs is to prevent violations of Chapter 305.[55] 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.[56]

Each of these issues can be addressed in significantly less prescriptive ways than an outright ban on D2D marketing, which would deprive CEPs, even those who have not engaged in the identified behavior, of an entire marketing channel as a means of selling their products. For instance, the Commission could affirmatively require that D2D marketing representatives identify the company for whom they work as it currently does for telemarketing representatives.[57] Thus, a complete prohibition on D2D sales would impose a broad limitation on speech that 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 protect right to free speech.[58]

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

[55] Notice, at 2.

[56] *Id.*

[57] *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.").

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

A ban on D2D marketing 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."[59] The Maine Constitution includes similar requirements.[60] RESA is not aware of any other industry that has been banned from selling via D2D 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 a Commission ban on D2D marketing activities is found to deprive, infringe or interfere with the exercise of a fundamental right, it would trigger a strict scrutiny analysis.[61] Pursuant to such an analysis, the Commission must show that the requirement is necessary to promote a compelling governmental interest.[62] If the government can establish it has a compelling interest, it must also prove that the requirement is narrowly tailored to furthering that interest.[63] Otherwise, there is no compelling justification for the requirement, and the prohibition cannot satisfy strict scrutiny.[64]

Even if the Commission had the authority to ban D2D marketing (which RESA disputes), all marketing channels should continue to be available to CEPs. Because CEPs require customer account numbers to effectuate enrollments and customers do not typically have that information readily available to them, CEPs must necessarily interact with customers in their homes. While RESA recognizes that there are other means to do so (e.g., telemarketing), a prohibition on D2D marketing would deprive all CEPs of the ability to interact with customers through an entire marketing channel; thereby, fostering the competitive advantage of Standard Offer created by the

[59] U.S. Constitution, Amend. 14.
[60] Me. Const. art. I, § 6-A ("No person shall be . . . denied the equal protection of the laws . . . .").
[61] *In re Dustin C.*, 952 A.2d 993, 997 (Me. 2008).
[62] *Id.*
[63] *Id.*
[64] *Cf. id.*

automatic placement customers on the Standard Offer at time of service initiation and further hindering the ability of CEPs to obtain such customers. Thus, rather than adopting an overly broad restriction that will ultimately diminish CEPs ability to be compete in the State's retail electricity markets, RESA recommends that the Commission adopt more targeted requirements specifically addressed to the particular areas of concern.

VIII. THE COMMISSION SHOULD ADOPT MORE TARGETED REQUIREMENTS

As an alternative to a complete ban, the Commission requests comments on several potential D2D requirements.[65] Before imposing any additional requirements, the Commission should recognize that there are a variety of in-person marketing avenues available to CEPs and ensure that it defines the type of activities to which any new D2D marketing requirements would apply narrowly so as to avoid capturing marketing outlets that do not face the same challenges as unscheduled, "cold" calls. For instance, network marketing, marketing conducted at malls, fairs, trade shows, and expositions, and sales conducted in response to a specific invitation from the customer to visit their home or pursuant to a pre-arranged appointment should not be considered D2D sales. The Commission should also ensure that any requirements it imposes are narrowly tailored to address specifically identified areas. To that end, RESA offers the following in response to the particular requirements on which the Commission is seeking comment:

First, the Commission asks whether the practice of third-party entities working on commission-based compensation impacts compliance with Chapter 305 and whether it should be prohibited.[66] 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 widely accepted business practice. However, RESA does not believe that these

[65] *See* Notice, at 3-4.

[66] *Id.* at 3.

compensation structures impact compliance. Thus, RESA recommends that the Commission refrain from imposing restrictions on these structures.

Second, the Commission seeks comment on whether additional financial security should be required as a prerequisite to CEPs engaging in D2D marketing. Such a requirement could be a beneficial tool to ensure compliance, but only if it is structured correctly to reasonably coincide with the applicable risks involved. The most appropriate forum to evaluate any such Commission proposal is within a collaborative working group process where stakeholders can evaluate the terms upon which such security would be necessary and for what it could be used as well as the amount of and manner for posting such additional security.

Third, the Commission requests comment on whether CEPs who engage in D2D marketing should be required to submit advance notice of the targeted locations for D2D sales and/or quarterly reports detailing D2D marketing activities. It is unclear what purpose advanced notice of D2D marketing plans or reports of completed D2D marketing activities would serve. Thus, rather than imposing an ongoing notice or reporting obligation, the Commission should require CEPs to maintain information on the municipalities in which their products are being marketed, including the sales agents marketing in each municipality, and produce that information within a reasonable time frame if requested by the Commission. This approach correctly places the obligation of monitoring D2D sales activities on CEPs without imposing unreasonable, unnecessary and costly ongoing notice or reporting requirements. If, despite the foregoing, the Commission decides to move forward with this proposal, it should review the notice requirements currently being considered by the Massachusetts Department of Public

Utilities (the "DPU").[67] While these requirements have not yet been adopted in final and will likely be further refined, they have been developed based on several rounds of extensive stakeholder input and attempt to strike an appropriate balance of providing the DPU with advance notice of D2D marketing activities without imposing overly burdensome and costly compliance obligations. For instance, the DPU's Second Revised Proposal would require a supplier to file a notice, no later than 5:00 pm the day before its D2D marketing activities commence, that it intends to begin such activities in the Commonwealth along with contact information for the person overseeing those activities. However, the inclusion of geographic-based data of marketing activities within the notice is optional.[68]

Fourth, the Commission seeks input on whether it should modify the third-party verification requirements "where customers have been contacted through door-to-door marketing."[69] As the Commission is aware, "the customer's affirmative choice may be evidenced by a customer-signed letter of authorization, third-party verification, or through electronic authorization."[70] Each of these options should continue to be available to CEPs. For instance, although the third-party verification ("TPV") process can be beneficial in certain instances, it should not be required for all D2D sales. However, RESA would support a requirement that marketing representatives be prohibited from providing guidance or directives to customers during the TPV process.

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[67] *See* Docket No. D.P.U. 14-140, *Investigation by the Department of Public Utilities on its own Motion into Initiatives to Improve the Retail Electric Competitive Supply Market*, Hearing Officer Memorandum, along with Second Revised Proposal and Notice Template (Jun. 27, 2017) (available at: http://web1.env.state.ma.us/DPU/Fileroom/dockets/bynumber).

[68] *See id.*

[69] Notice, at 4.

[70] 65-407 CMR c. 305, § 4B(3)(b).

Lastly, the Commission asks if there are other marketing activities that might require additional regulatory/reporting requirements. The Commission should avoid imposing solutions for regulatory problems that do not exist and recognize that any additional requirements will cause CEPs to incur more costs to serve Maine customers and those costs will ultimately borne by ratepayers in the form of higher CEP prices. Thus, before adopting any new requirement, the Commission should identify the issues it is trying to resolve and seek stakeholder input on the best overall approach for addressing those issues as a whole and in a manner that adequately protects consumers and allows for the continued development of the retail electric market in Maine. In the end, if a CEP is purposefully operating in a non-compliant mode, ***no*** level of prescriptive rulemaking will drive that entity to adjust its behavior short of unique enforcement attention and oversight. Thus, RESA urges the Commission to engage in appropriate enforcement activity to address non-compliance.

IX. THE COMMISSION SHOULD NOT INCORPORATE REQUIREMENTS FROM THE TRANSIENT SALES AND CONSUMER SOLICITATION STATUTES

The Commission requests comment on whether provisions similar to those contained in the transient sales and consumer solicitation sales statutes should be incorporated in the Commission's regulations.[71] The incorporation of any of the provisions of these statutory schemes into the Commission's regulations would necessarily subject CEPs to duplicative regulation for the same sales activity. If CEPs engage in the activities to which either of these two statutory provisions apply, they are already subject to the requirements of those statutes.

Moreover, the Commission regulations already include requirements that are similar to those that are included in in the transient sales and consumer solicitation sales statutes. For

[71] Notice, at 4.

instance, the transient sales statute requires licensing;[72] the Commission already licenses CEPs.[73] The consumer solicitation sales statute requires a contract and that the customer be provided a right to rescind;[74] the Commission rules already include requirements for a Terms of Service and a rescission period.[75] Thus, it is unnecessary for the Commission to incorporate the requirements of the transient sales and consumer solicitation sales statutes in its regulations.

X. THE COMMISSION SHOULD CONSIDER OTHER ENHANCEMENTS TO THE RETAIL MARKET TO BENEFIT CONSUMERS

In the Notice, the Commission also offers an opportunity for stakeholders to provide input on other standards that could benefit consumers.[76] RESA encourages the Commission to consider opportunities to further engage and empower customers by providing enhanced opportunities for customers to access the competitive market by making it easier to enroll with CEPs.

When a customer initiates service, unless the T&D Utility has received notice to enroll the customer with a CEP, the customer is placed on Standard Offer.[77] In addition, when a customer moves within a T&D Utility's service territory, unless the customer moves without interrupting its T&D Utility service (i.e., initiates service at its new location before stopping service at its previous location), the customer is placed on Standard Offer at the new location.[78] Because the current rules automatically place new and, in some circumstances, moving customers on Standard Offer, at a time when they may be most open to considering the range of available energy supply options, and CEPs then must incur marketing expenses to win those

[72] 32 M.R.S. § 14702(1).
[73] 65-407 CMR c. 305, §2.
[74] 32 M.R.S. §§ 4661, 4664.
[75] 65-407 CMR c. 305, §§ 4B(1), 4B(2)(a).
[76] Notice, at 4.
[77] 65-407 CMR c. 322, § 7(D).
[78] *Id.*

customers away from Standard Offer, CEPs are at a competitive disadvantage. In addition, when moving customers wish to retain their existing CEPs but are not able to do so, it causes customer dissatisfaction and confusion, requires CEPs to spend additional funds to reacquire the customers, and increases the administrative burden and expense for both CEPs and the T&D Utilities who must process the service terminations and re-enrollments. Thus, rather than simply defaulting customers to Standard Offer, upon service initiations, moves or reinstatements, CEPs should be given an equal opportunity to win those customers as their own. The Commission is expressly permitted to "establish standards for making available, through any means considered appropriate, information that enhances customers' ability to effectively make choices in a competitive electricity market."[79] Pursuant to this authority, RESA encourages the Commission to consider implementing a program that would allow customers to actually choose a CEP at the time of service initiation or reinstatement, rather than simply placing customers on Standard Offer.

The Commission should also consider "Enroll with Your Wallet" options, which are being implemented in other state jurisdictions and deemphasize the importance of account numbers. Under the current paradigm, customers must know their account number to switch to a new CEP.[80] However, a picture ID or social security number that links to the service or billing address should be sufficient. While all legal forms of marketing should continue to be permitted, including D2D sales, enroll with your wallet will allow the industry to rely less on "in-home" customer interactions (where the customer may be able to access its utility account number) and engage in more traditional types of retail customer engagements, such as retail stores and kiosks.

[79] 35-A MRSA § 3203(3).

[80] A requirement to know the account number is one of the primary drivers of door-to-door marketing, as the account number is generally included in the utility invoice.

This model works very well within the cellular industry and is beginning to be deployed in the retail electric and gas industries in more evolved markets.[81]

RESA also urges the Commission to consider adopting CEP complete billing service, sometimes referred to as supplier consolidated billing. Many utility billing systems were developed during a time when the utility provided all services to customers – generation, transmission and distribution. As a result, the functionality and adaptability of those systems are limited. Thus, CEPs are limited in the types of pricing and product offerings that they can make available to customers who prefer to receive a single bill for their electric service. In this third billing model, the CEP would be responsible for billing the customer, including the customers' costs for transmission and distribution services as well as any regulatory fees, surcharges or other assessments approved by the Commission. Suppliers are required to offer consolidated billing in Texas, Georgia and in the Alberta, Canada markets. Supplier consolidated billing is also being evaluated by public utility commissions in other jurisdictions.[82] By permitting CEPs to offer consolidated billing, customers become better informed about the retail market for electricity and are provided with more choices – not only with respect to who issues their bills, but also the opportunity to take advantage of pricing and product offerings, including offers that promote energy efficiency and demand reduction, that are not accessible under the current available billing options offered by the T&D Utilities and that better suit customer needs.

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[81] *See* http://www.energychoicematters.com/stories/20170214a.html.

[82] The Public Utilities Commission of Ohio ("PUCO") has recently ruled on two different utilities' Purchase of Receivables plans and, in both, has advanced the market with respect to Supplier Consolidated Billing. In Case No. 15-1507-EL-EDI, the PUCO ruled that their "desired course for competitive suppliers is to ultimately partake in supplier consolidated and dual billing." Case No. 15-1507-EL-EDI, *In the Matter of the Commission's Review of the Purchase of Receivables Implementation Plan for Ohio Power Company*, PUCO Finding and Order (Sep. 27, 2017), at 7-8. More recently, in the Dayton Power and Light Electric Security Plan, the PUCO established a two-year pilot plan for Supplier Consolidated Billing. Case No. 16-395-EL-SSO, *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, PUCO Opinion and Order (Oct. 20, 2017), at 36-37.

CONCLUSION

RESA appreciates the opportunity to submit these comments and looks forward to discussing these issues in more detail during the course of this proceeding.[83]

Respectfully Submitted,
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[83] Notice, at 4 ("Commission Staff anticipates scheduling a workshop on the issues identified in this Notice and comments received following the comment deadline.").