

MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Docket No. PUC-22-882

Maine Coalition to Stop Smart Meters
Appellant

v.

Maine Public Utilities Commission
Appellee

ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION
COMMISSION DOCKET NO. 2019-00044
Central Maine Power Company, Request for Approval of Revisions to
Terms and Conditions Regarding Smart Meter Opt Out Program

BRIEF OF APPELLANT MAINE COALITION TO STOP SMART METERS

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I. INTRODUCTION

This appeal concerns the Commission's approval of certain Terms and Conditions¹ ("T&C") that remove analog or electromechanical meter devices from CMP's smart meter opt out program, forcing customers to choose a non-communicating solid state smart meter if they do not want transmitting smart meters attached to their house or business. Electromechanical meters are the only metering devices that do not emit low level Radio frequency Radiation ("RFR") of any kind or record customer data beyond watt hours used. They do emit a localized magnetic field. Both communicating and non-communicating solid state smart meters emit RFR, although at different levels and frequencies. The safety of these wireless smart meters, and of any similar wireless device or structure that emits low level RFR is regulated by the Federal Communications Commission ("FCC") which, in 1996 established certain exposure guidelines the Commission and CMP have relied extensively on in their decisions to proceed with the implementation of CMP's smart meter program affecting approximately 600,000 homes. The safety of this program has been extensively litigated. There have been primarily two significant developments since the last time this Court visited the Commission's RFR safety determinations in 2016 – (1) the continued development of a growing body of scientific evidence that low level RFR exposure below FCC guidelines is

¹ 65-407 C.M.R. ch 120 § 2(K).

responsible for harm, particularly to individuals with acute sensitivities, and (2) the FCC's arbitrary and capricious decision to not review its 1996 safety standards with respect to non-thermal health risks unrelated to cancer from low level RFR.

Here the Commission has proceeded to approve the removal of a reasonable accommodation, a non RFR emitting meter, from CMP's customers instead forcing upon them, a device that still emits low level RF radiation, is the subject of recent, credible and substantial scientific evidence showing it to be harmful to human health and the environment.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This appeal is taken from the Maine Public Utilities Commission's (the "Commission") orders dated June 15, 2021, June 22, 2021 and December 23, 2021 in Commission Docket No. 2019-00044 (the "Decision Order" "Corrected Decision Order" and "Reconsideration Order" respectively) (Appendix ("A") at 38, 22, and 2). The Decision Order effectively terminated the ability of customers in the Central Maine Power's ("CMP") smart meter system "opt-out" program to choose an analog electromechanical meter rather than a solid state "non-communicating" smart meter.

The "opt-out" program and the dispute over the harm and health risks of both communicating and non-communicating smart meters began with the Commission's approval of CMP's advanced metering infrastructure system

(“AMI”) project and associated ratemaking in February of 2010.² Customer complaints followed the AMI order raising concerns about the smart meter technology associated with the AMI project, particularly the health effects of RFR emitted by the wireless smart meters.³ In response the Commission initiated an investigation in 2011 to “determine the reasonableness” of CMP’s “act or practice of not allowing individual customers to choose not to have a smart meter installed or to otherwise opt out...”.⁴ This investigation resulted in a two part order, known as the “Opt Out” orders (I and II). The Commission ordered CMP in Part I of the Opt-Out Orders (entered in May 2011) to provide two opt out alternatives for customers who choose not to have the standard communicating wireless smart meter installed on their premises: “(a) An electro-mechanical meter (likely the customer’s existing meter)” or “(b) A standard wireless ‘smart meter’ with the internal network interface card (NIC) operating in receive-only mode.”⁵

More customer complaints followed the Opt Out Orders, against both the Commission and CMP pursuant to 35-A M.R.S. § 1302 (2011). In part, the complaints raised concerns about the health and safety of wireless smart meter technology and RFR specifically. They requested a Commission investigation to consider new evidence which the complaint noted had been published since the

² Friedman 1 at 2.

³ Id. at 1-2.

⁴ Id. at 3.

⁵ Id at note 3.

Commission issued Opt-Out Order Part I.⁶ The complaint was dismissed by the Commission without a hearing on August of 2011.⁷

On July 2012, this Court vacated the Commission’s dismissal in part with respect to portions of the complaint directed at CMP addressing health and safety issues and the associated opt out fees. Specifically, this Court concluded the Commission had “... never determined whether smart-meter technology is safe...” under 35-A M.R.S. §1302(1) also noting that the FCC was “the appropriate entity to consider potential health impacts.”⁸

On remand, the Commission commenced an over two year investigation into the safety of CMP’s smart meter system opt out program. The Investigation focused in part on the safety of smart meters generally and RFR. The Commission’s investigation concluded CMP’s AMI system posed no credible threat to the health and safety of CMP’s customers and was therefore “safe”.⁹

On appeal however, this Court concluded in its January 2016 appellate review that the Commission’s findings were supported by substantial evidence in the record.¹⁰ Further, this Court stated that the “evidence supporting the *Commission’s findings includes data that smart meters comply with RF exposure*

⁶ Id. at 5.

⁷ Id.

⁸ Id at 9.

⁹ *Friedman et al. v. PUC*, 2016 ME 19, 132 A.3d 183 (*Friedman II*) at 3.

¹⁰ *Friedman II* at 7.

regulations promulgated by the FCC.”¹¹ Finally, this Court noted that the “Commission acknowledged that there had been some evidence presented of potential future risk, but nevertheless affirmed the complaint dismissal concluding “that the *current* state of the evidence was insufficient to conclude that smart meters amount to a credible threat of harm.”¹² (emphasis supplied).

At the time of this Court’s 2016 decision, approximately sixteen (16) years had elapsed since the initial CMP AMI smart meter project and associated ratemaking proceeding had commenced, and as discussed in more detail below, approximately twenty (20) years had elapsed since the FCC had issued its 1996 RFR safety guidelines.

Throughout *Friedman II*, CMP continued with implementation and installation of its AMI smart meter program subject to the utilities’ approved T&C¹³ that required, pursuant to the mandate stated in the Opt Out 1 Order, that its customers be given an opt out choice that included an analog electromechanical meter and that, as stated in Opt Out II, the Court expected CMP to take reasonable actions to maintain and support both opt out options. However, in February of 2019 CMP filed with the Commission a “Request for Approval of Revisions to Terms and Conditions Regarding the Smart Meter Opt Out Program,”¹⁴ which

¹¹ Id.

¹² Id. at 9. (emphasis supplied)

¹³ A 38-40, Decision Order A at 1-3.

¹⁴ A 64, Commission Procedural Order, A at 1.

included, among other things, that it intended to discontinue all analog dial meters and replace them with “non-communicating” solid state smart meters.

From March 9 to March 13, 2019 the Commission again received numerous public comments expressing concern over health risks and effects from smart meter RFR. In response, on March 19, 2019 the Commission issued an order requesting, among other things that CMP provide further information on “whether solid state meters emit radio-frequency (RF) energy?”¹⁵ On March 21 and 24 CMP responded.¹⁶ CMP then filed, on May 30, 2019 its third revision to its requested T&C for Commission approval *which still included an electro mechanical opt out meter option.*¹⁷ The Commission approved the T&C on May 31 of 2019 and *these approved Terms and Conditions kept the analog electromechanical meter opt out as an option for customers.*

On January 22, 2021, seven months after this Commission approval, CMP filed another requested “revision,” to its Terms and Conditions, apparently at the request of Commission Staff, to allow the Commission “to revisit the prior approval of CMP’s revised” T&C.¹⁸ The filing offered a two paragraph justification for removal of the analog meter customer option.¹⁹ In response the

¹⁵ Id.

¹⁶ Record (“R”), Filings 3 and 4 (“CMP Section 12 T&C Revision” and “CMP Corrected Response to Procedural Order”). The record in this matter includes “Filings”, and submitted “Comments”.

¹⁷ R, Filings Item 10 “CMP Filing T&C Clean Version” and Item 11 “Approved Terms and Conditions”.

¹⁸ See R, Filing, Item 12 “CMP Re-Filing re Solid State Meters”.

¹⁹ R, Filing, Item 12 at 2.

Commission issued a Procedural Order on February 1, 2021 formally requesting public comment and indicating the nature of the revision and CMP's justification.²⁰

From February 3 to February 23, 2021 extensive public comments were received into the record. These comments were, in many cases comprehensive and specific in their concerns and justifications over the potential health and other safety risks associated with RFR and smart meters generally and “non-communicating” smart meters specifically, to customers and the environment. The comments included specific reference to then ongoing FCC litigation²¹, concerns by physicians, legislators, scholars, published scientific papers, health agency references, citizens injured by smart meter RF, and at least two recent peer reviewed scientific studies and one comprehensive New Hampshire legislative study on RFR health concerns (which also referenced the FCC litigation).²² The scientific evidence contained within these comments included hundreds of peer reviewed internal citations.

In response to these comments, the Commission issued two additional information requests to CMP, which CMP responded to, and commenters in turn

²⁰ R, Filing, Item 13 “Procedural Order (Opportunity for Comment”).

²¹ R, Comments, 2/18/2021 Comment of V. Farver “The CHD (Children's Health Defense) and the EHT (Environmental Health Trust) are currently suing the FCC over health effects from wireless.”

²² See e.g. R Comments, 2/19/2021 the Honorable Andrea M. Boland; 2/20/2021 B. A. Golomb, MD, PhD Professor of Medicine UC San Diego School of Medicine; 2/21/2021 Dr. Albert M. Manville II, Advanced Academic Programs, Environmental Sciences & Policy, Johns Hopkins Univ.; 2/22/2021 S.A. Foley Ferguson, referencing the state of New Hampshire “Final Report on Commission to Study the Environmental and Health Effects of Evolving 5G Technology (RSA 12-K:12-14, HB 522, Ch. 260, Laws of 2019)”

replied to.²³ The Commission in turn, on June 15, 2021 held deliberations and issued its Order Approving the revised T&C.²⁴ No further comments were requested, tendered or received into the record following this June 15 Order as the formal comment period had closed on February 22. On July 9, 2021 Appellant filed its Motion for Reconsideration.²⁵

Following the June 15 Order Approving CMP’s Terms and Conditions and Appellant’s Petition for Reconsideration, *and prior to the final deliberations of the Commission concerning the Motion for Reconsideration*, the U.S. Court of Appeals for the D.C. Circuit issued a decision on August 13, 2021²⁶ finding that the FCC²⁷ issuance of an order declining to undertake an update of its 1996 RFR safety standards was “arbitrary and capricious” for failing to “respond to record evidence that exposure to RF radiation at levels *below* the [FCC’s] current limits may cause negative health effects unrelated to cancer.”²⁸ No filings of any kind were tendered to the Commission by Commission Staff, Staff counsel, or CMP alerting or

²³ See R Filings, Items 17 2/25/2021 “Procedural Order (Requesting Comments – CMP”); Item 22 5/26/2021 “Procedural Order (Requesting Response - CMP)”.

²⁴ A 53, Supplemental Record “6/15, 2021 Deliberations” and A 38 “Order Approving Revised Terms & Conditions.”

²⁵ A 16. The motion was filed as provided for in Section 11(D) of the Commission’s Rules of Practice and Procedure (65-407 C.M.R.ch.110).

²⁶ *Environmental Health Trust et. al. v. Federal Communications Commission and United States of America*, No. 20-1025 (D.C. Cir. Aug. 13 2021) (the “FCC Decision”).

²⁷ RFR from a variety of devices is regulated by the FCC pursuant to 47 U.S.C. §§301, 302a(a).

²⁸ FCC Decision at 9. (emphasis supplied).

notifying the Commission of this decision. Appellant was not represented by legal counsel at this time.

After a tolling delay, the Commission conducted its second deliberations on Appellant's Motion for Reconsideration on December 21, 2021, over four (4) months after the FCC decision, and issued its final agency action, a December 23rd order denying the motion, concluding that there were no "errors or omissions of law and fact."²⁹ There was no mention of the FCC notice of inquiry proceeding into FCC safety standards or the ensuing litigation in the Decision Order or the Commission's Denial Order. Appellant timely appealed.

III. STATEMENT OF ISSUES ON APPEAL

- 1.** Did the Commission err in failing to accord the findings in the U.S. D.C. Circuit case the appropriate level of deference?
- 2.** Did the Commission err in not ensuring customer safety, by eliminating non RF radiation emitting electromechanical meters from its opt put program despite new evidence of a credible threat of harm from RFR?
- 3.** Is the Commission's conclusion that non-communicating smart meters are "safe" supported by substantial evidence on the record?
- 4.** Did the Commission abuse its discretion equating the "EMF" level of an analog device to that of low level RFR emitted by solid state smart meters?

²⁹ A at 2, 5. "Reconsideration Order" at 4.

5. Does the Commission's failure to address the harm from low level RF radiation to customers, sensitive populations and the environment violate the requirements of the Maine Administrative Procedures Act and the Maine Constitution?

IV. SUMMARY OF ARGUMENT

Given the extensive litigation history of the smart meter program and a Commission determination, upheld by this Court in 2016, that smart meters are "safe" because they are within FCC safety guidelines, one might conclude that any safety or human health issue has already been resolved for higher communication frequencies of RFR smart meters and that therefore lower frequency RFR could not possibly present any credible or imminent harm. However, on closer inspection, such a conclusion is fatally flawed because it ignores: (1) substantial and significant evidence continuing to accrete since 2016 showing a particular threat of harm to sensitive populations such as people with electrosensitivity or other disabilities, children, pregnant women and the environment; (2) the comprehensive reasoning and findings of the U.S. Court of Appeals for the D.C. Circuit examining and casting serious doubt on those antiquated FCC safety guidelines previously and presently relied upon by the Commission and CMP, (3) the fact that some of the low level RFR frequency harm at issue in this case is below what *current* FCC guidelines regulate; and (4) that extremely low

frequencies (1Hz-3kHz) are distinct from higher frequency RFR (3kHz-300GHz) within the EMF spectrum.

Accordingly, the Commission's Order must be vacated because the Commissioners ignored the documented, credible threat to human health and safety from low level RFR (inclusive of extremely low frequencies ("ELF's")) that was before them. As set forth below, their justification for this is inherently flawed and represents an abuse of discretion - failing to meet the most basic of customer safety considerations. The removal of customer choice for analog meters means customers are forced to instead have a "non-communicating" solid state smart meter. A device which emits possibly harmful low level RFR all of the time. At the very core of the Commission's and CMP's safety justification are that these devices, like their high frequency RFR transmitting counterparts, meet or are below FCC standards, standards that the FCC decision calls into question and are at best obsolete, and at worse no longer reflecting the growing body of scientific evidence demonstrating biological effects and harm can occur even at low levels. But even if the Commissioners can be excused for ignoring the FCC Decision, or not giving it the proper deference – the evidence was before them that there was a credible threat of harm to human health and safety due to exposure *below* existing FCC standards.

Here, all three Commissioners justify removal of the analog meters stating there is no applicable law to support safety concerns raised by commenters to the proceeding. One Commissioner explicitly states that in his view the fact that there is no meaningful difference in “RF” levels between analog and non-communicating smart meters is “dispositive of the issue”.³⁰ But this conclusion denies the consumer a fundamental choice – if the consumer doesn’t want the RFR device in their home for safety reasons they could have previously chosen not to have it. The basis of allowing customers an analog meter opt out was based on this premise.³¹

Further since CMP is currently installing RFR-emitting non-communicating smart meters,³² the threat of exposure to harmful low level RFR is imminent. This exposure is direct, intentional, unprotected, and unmitigated, clearly satisfying this prong of the Court’s standard of “credible and imminent threat”.

Applying the legal standards to the facts and evidence here, particularly that received by the Commission following this Court’s 2016 decision, compels the conclusion that CMP’s substitution of “non-communicating” smart meters for analog meters poses credible threat to health and safety - a conclusion that is

³⁰ A at 57, 58. Supplemental Record 6/15/2021 Deliberations.

³¹ Friedman I at 3-4.

³² See e.g. A 61 2/25, 2021 Procedural Order (Requesting Comments-CMP) at 2; R Filing, Item 17 2/25/2021; referring to the “February 22, 2021 “Addendum to Elisa Boxer Comments,” and that “Ms. Boxer requested that the Commission immediately halt CMP’s replacement of analog meters.”

heavily supported and implicated by the FCC decision - authority the Commission did not consider, acknowledge and appears to have completely ignored.

V. STANDARD OF REVIEW

This Court has a "longstanding practice of 'examining closely proceedings of the Commission to ensure that they comply with statutory and other standards.'" "

Cent. Me. Power Co. v. Pub. Utils. Comm'n, 382 A.2d 302, 313 (Me. 1978)

(quoting Bd. of County Com'rs of Washington County A Me. Cent. R. Co., 343

A.2d 877, 881 (Me. 1975)). The Court does not hesitate to act "when the

commission has 'transgressed its functions and has gone beyond the limit of what it was authorized to do' because such questions raise 'fundamental issue[s] of law.'" "

Pine Tree Tel & Tel. Co. v. Pub. Utils. Comm'n, 631 A.2d 57, 61 (Me. 1993)

(quoting New England Tel. CY' Tel. Co. v. Pub. Util. Comm'n, 148 Me. 374, 390,

94 A.2d 801, 809 (1953)). This Court "will overturn a decision if the Commission

fails to follow a statutory mandate or if it commits an unsustainable exercise of its

discretion." Office of Pub. Advocate v. Pub. Utils. Comm'n, 2005 ME 15, ¶ 18,

866 A.2d 851 (citing Office of Pub. Advocate v. Pub. Utils. Comm'n, 2003 ME 23,

¶ 19, 816 A.2d 833). Further, "when a Commission decision is 'unreasonable,

unjust or unlawful in light of the record' [the Court will] vacate a decision of the

Commission." Dunn v. Pub. Utils. Comm'n, 2006 ME 4, ¶ 5, 890 A.2d 269

(quoting Guilford Transp. Indus. v. Pub. Utils. Comm'n, 2000 ME 31, ¶ 6, 746

A.2d 910). To be sustained by the Court, Commission findings of fact must be "supported by substantial evidence in the record." *Id.* (citing *Am. Ass'n of Retired Perss. v. Pub. Utils. Comm'n*, 678 A.2d 1025, 1029 (Me. 1996)).

With respect to the procedural issues presented for review, the Court will not defer to the Commission's interpretation of the Maine Administrative Procedures Act ("MAPA"). See, e.g., *Guilford Transp. Industries*, 2000 ME 31, ¶ 11 n.4, 746 A.2d 910 ("We do not defer to an agency's interpretation of a statute or legal doctrine when that statute or doctrine is beyond that agency's expertise."). MAPA M.R.S. § 9061 (2022) ("Every agency decision shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision.) and MPUC Rules 65-407 C.M.R ch. 110 § 11(C) and ch. 120 § 1(C) (2022) (in accord with the MAPA for Commission decisions).

The applicable statutory and constitutional requirements applicable to the circumstances of this case are that the Commission must ensure "*safe,*" *reasonable,* and adequate services. 35-A M.R.S. §101 (emphasis supplied). This mandate is reinforced by every Maine citizen's constitutional right to "pursue and obtain safety" (Me. Const. Art. I, §1); and by the judicial maxim *salus populi suprema lex* -- the safety of the people is the supreme law. *Seavey v. Preble*, 64 Me. 120, 121 (Me. 1874).

The statutory mandate to ensure safety and its constitutional and judicial counterparts, are summarized as that safety will be ensured if the Commission determines there is no credible threat to health or safety and the threat is likely and probable to result in harm.³³

VI. ARGUMENT

A. THE COMMISSION COMMITTED ERRED BY FAILING TO GIVE THE FCC DECISION ANY DEFERENCE.

The FCC has undisputed primacy over the regulation of RFR safety at issue in this matter. It regulates various devices that transmit radio waves, microwaves, cell phones, 5G cell phone networks, and the establishment of health and safety guidelines for the exposure to RFR.³⁴ This primacy has been acknowledged by the Appellee and CMP, both of whom rely extensively for their conclusions that RFR from smart meters, both communicating and “non communicating” are safe because they meet applicable FCC standards.³⁵ The FCC’s regulation is in part due the fact that “biological effects resulting from the heating of human body tissue by RF radiation (“thermal” effects) are known to be harmful.”³⁶ However, there is a growing body of evidence much of which has occurred since 1996 and 2016, showing exposure to lower frequencies of RFR cause other, “non-thermal”

³³ Friedman I at 9-10 and Friedman II at p. 4-5.

³⁴ *Supra* note 30. FCC Decision at 3.

³⁵ *See e.g.* R Item 18, at 9, CMP response to question 7 and A 31-32 Order Approving Revised Terms and Conditions at 10 citing CMP response that its non-communicating smart meters meet FCC standards.

³⁶ FCC Decision at 4.

biological effects, particularly in children and other sensitive populations.³⁷ This includes the distinct low level RFR at issue in this case.

However, the FCC last updated its standards for RFR exposure in 1996³⁸ and recently terminated its Notice of Inquiry regarding the adequacy of its RFR safety guidelines. That agency action was the subject of remand in the FCC decision which found the agency “arbitrary and capricious” in part for “its failure to respond to record evidence that exposure to RF radiation at levels below the [FCC]’s current limits may cause negative health effects unrelated to cancer.”³⁹ As set forth below, the “record evidence” the D.C. Circuit is referring to contains many of the same recent studies cited to by Appellant and other commenters.⁴⁰ Further, these are exactly the same RFR safety guidelines CMP, the Commission, and to some extent this Court have historically relied on as the basis to conclude that smart meters are safe. More specifically to this case and RFR safety, the exposure to low level RFR at frequencies below the FCC’s current limits from non-communicating smart meters, and the same potential for negative environmental and non-thermal health effects unrelated to cancer, are what CMP’s customers articulated as

³⁷ Id. at 23, and 25-26.

³⁸ Id. at 5.

³⁹ Id. at 9.

⁴⁰ These include the Int’l Agency for Rsch. on Cancer, *Non-Ionizing Radiation, Part 2: Radiofrequency Electromagnetic Fields*, 102 IARC Monographs on the Evaluation of Carcinogenic Risks to Humans 419 (2013). The Int’l Comm’n on Non-ionizing Radiation Prot., ICNIRP Note on Recent Animal Carcinogenesis Studies 6 (2018), analyzing the [National Toxicology Program] and Ramazzini studies for cancer risks to humans, both studies cited by Appellants. See note 49 infra.

concerns and documented here. In response CMP and the Commission continue to assert that non-communicating smart meters are “safe” primarily because they emit low levels of RFR below the FCC limits and now assert this is so because the “EMF levels” are similar to analog devices. As discussed below, these conclusions, even if not false, are at odds with the substantial record evidence and D.C. Circuit’s findings, and casts significant doubt as to the efficacy, applicability and obsolescence of the FCC safety guidelines and CMP’s safety determinations which rely on them. It also improperly equates EMF with RFR as the basis for those conclusions.

The record before this Court is completely bereft of any analysis by the Commission of whether and to what degree it, as a state agency, should give deference⁴¹ to the D.C. Circuit analysis, determinations and findings, or as here, act contrary to the judicial precedent and find, interpreting the same federal guidelines and law, and much of the same or similar evidence, that non-communicating smart meters emitting low level RF are safe.

The importance of the United States Court of Appeals for the D. C. Circuit cannot be overstated. As has been previously noted: "As a practical matter, the

⁴¹ This Court noted in its 2012 vacatur that “... As an administrative body authorized to conduct hearings and engage in fact-finding, the Commission is not precluded from considering the findings and conclusions of other state and federal agencies.” *Friedman II* at 7 (emphasis supplied). This Court also noted in *Friedman II* that “in assessing this evidence, the Commission noted that compliance with FCC was not conclusive, but considered it to be of value in making its safety determination. *Id.* at 8. Neither observation involved an appellate court review of the FCC itself.

D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord."⁴² By statute, judicial review of FCC regulations resides in only one federal circuit - the D.C. Circuit.⁴³ If Congress specifically directs appellate review to a single court of appeals, it follows that the single reviewing court's decision and findings should have a binding effect nationwide.

To be clear, the controlling federal precedent here is the D.C. Circuit's findings regarding low level RFR and remand with respect to the FCC's failure to respond to record evidence (noted as a "fundamental change in the factual premises previously considered"⁴⁴) and not to engage in rulemaking regarding its 1996 RF safety standards. The D.C. Circuit made no finding about whether the low level RFR was in fact harmful (relating to cancer, environmental or non-cancer issues). That was not its role and that determination (for all but cancer) is to be made when the FCC reconsiders the evidence on remand, the same or similar RFR evidence that was before the Commission and CMP. Here also, both the Commission and CMP have failed to respond to much the same RFR evidence before the DC Circuit.

⁴² Antonin Scalia, *Vermont Yankee: The APA, the D. C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 371.

⁴³ 47 U.S.C. § 402(j) (2022) (limiting certain decisions by the FCC to the D.C. Circuit, whose judgment "shall be final, subject, however, to review by the Supreme Court of the United States.").

⁴⁴ FCC at 9.

Further, the Commission still has a state statutory duty to insure that the devices it allows CMP to install in customer homes are “safe” (35-A M.R.S. §101) and had the Commission at least considered the evidence, analysis, and findings of the D.C. Circuit, along with the same evidence that was before it, at a minimum, it would have been prudent to at least stay the implementation of smart meters until the FCC resolved its RFR safety guidelines, and surely not allow removal of the only non-RFR emitting analog meters from CMP’s opt out program when the question of RFR safety for even “non-communicating” smart meters has been credibly brought into question.

Further, it is unreasonable to conclude that the Commission and CMP were ignorant of the FCC proceeding as it was raised in the comment period and was also referred to elsewhere in the evidentiary record. (See note 21 *supra*). However, absent even a mention of the FCC decision in any of the orders it issued or deliberations it undertook, or any indication the Commission and CMP made any inquiry whatsoever into the FCC proceeding, it *is* reasonable to conclude the Commission and CMP simply ignored it and the D.C. Circuit decision that followed during its deliberations.

However, the Commission is not free to disregard precedent that strikes at the very core of its safety determinations. Although as this Court has previously stated, a state agency need not follow federal appellate court precedent when

interpreting federal law, the question of how state agencies should treat federal appellate court precedent is not so clear. For example, two federal courts of appeals have declared that their decisions are binding on state courts.⁴⁵ Extending this doctrine to the agencies state courts oversee, provides some legal basis to conclude that it is fundamental error of law for the Commission not to have explicitly considered and incorporated the D.C. Circuit's reasoning and evidentiary findings regarding RFR, or even the implications of those findings, which included much of the same evidence that commenters here had introduced, when it concluded that exposure to RF radiation at low levels below the 1996 FCC guidelines were safe.

Assuming *arguendo*, the Commission and CMP were not bound in any way by the D.C. Circuit's ruling and its decision was only persuasive precedent, the same result occurs. The persuasive value of court precedent, and the considerations governing persuasiveness, echo the standards for determining the "degree of respect" due to nonbinding agency interpretations of law.⁴⁶ Here, under any

⁴⁵ The U.S. Courts of Appeals for the Eighth and Ninth Circuits have claimed that state courts must follow their lead on federal questions. *Fretwell v. Lockhart*, 946 F.2d 571, 577 (8th Cir. 1991), *rev'd on other grounds*, 506 U.S. 364 (1993); *Yniguez v. Arizona*, 939 F.2d 727, 736 (9th Cir. 1991) ("Despite the authorities that take the view that state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view."). The solicitor general has also suggested that decisions made by the D.C. Circuit pursuant to exclusive judicial review provisions are binding nationwide. *Environmental Defense v. Duke Power Co.*, 549 U.S. 561 (2007).

⁴⁶ *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (internal citations omitted))).

standard the D.C Circuit would appear entitled to great deference in its findings regarding low level RF evidence and the implications from those findings. Its opinion is thorough, comprehensive and persuasive and it holds the sole appellate review over FCC decisions regarding its safety standards.

There are also strong policy considerations for affording the D.C. Circuit persuasive deference – unlike the Commission, its focus is often on the risks to human health, particularly sensitive populations, and the environment from the oversight of multiple federal agencies that regulate those concerns. This is in addition to another policy concern arising if deference is not given to the D.C. Circuit. These concerns are premised on the idea an agency or court will treat as binding a federal appellate court's interpretation of a law not because it has to, but because of the benefits that accrue from such an approach, such as uniform interpretation of RFR safety and FCC guidelines so that safety to human health and the environment is ensured, particularly when the efficacy and obsolescence of these guidelines are at issue.

CMP customers, who have documented their concerns for their personal safety for over twenty years, and this Court, are however without the benefit of *any* analysis on the part of the Commission on the validity of the 2021 D.C. Circuit's evidentiary determinations and findings or why it afforded them no deference – just the Commission's conclusory conclusions made based on 1996 FCC standards,

and perhaps this Court’s 2016 reasoning and decision regarding the PUC’s now outdated 2011 investigation. Thus, even if the Commission and CMP can be excused for ignoring the decision as non-binding persuasive precedent, the *only* analysis the Commission has conducted and relies on occurred in the vacuum of 1996 – as if scientific evidence of credible harm froze at that time, the FCC decision never happened in 2021, and those 1996 standards and its 2011 investigation and conclusions relying on those standards are undisturbed. In doing so, the Commission has failed the Maine APA and Commission Rules requiring a reasoned and “sufficient statement of facts” to justify its decision.⁴⁷ As discussed below this also fails because the health and environmental risks of low-level RF radiation at issue with non-communicating smart meters, the same health risks addressed in the FCC Decision, occur *below* the FCC 1996 safety guidelines rendering these guidelines an ineffective safety benchmark. It also involves a distinct type of low level, low frequency harm not previously considered or investigated by CMP.

B. THE REMOVAL OF ANALOG METERS AS AN OPT OUT OPTION POSES A CREDIBLE AND IMMINENT THREAT TO THE HEALTH AND SAFETY OF CMP’S CUSTOMERS.

1. The removal of non-RF emitting analog meters as a customer choice is clear error - there is a growing body of substantial evidence, developed after this Court’s 2016 decision, demonstrating a credible threat of harm from low level RF radiation.

⁴⁷ 5 M.R.S. § 9061 (2022) and MPUC Rules 65-407 C.M.R ch. 110 § 11(C) and ch. 120 § 1(C) (2022).

a. The record here showed substantial evidence of low level RFR harm.

The quantum of evidence needed to be “substantial” has been found by the Court to be a fairly low threshold.⁴⁸ The record here contained substantial information before the Commission demonstrating the credible and imminent threat of human health and the environment from low level RFR, including that at low levels below the FCC safety guidelines.⁴⁹ The overwhelming majority of this evidence was developed after the Commission’s 2011 investigation and in most instances after this Court’s 2016 ruling in connection with that investigation and easily exceeds the threshold needed for “substantial”. Nevertheless, this evidence was summarily dismissed by the Commission for various conclusory reasons [record cites].

⁴⁸ See *Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 631 A.2d 57, 70 (Me. 1993). (finding adequate evidentiary support for the Commission’s finding that the salary of a full-time utility CEO was too high and should be disallowed for ratemaking even though the only evidence in the record was a staff analysis of salaries of part-time executives of other utilities).

⁴⁹ See e.g. R, Comments 2/17/21 Ed Friedman citing to WHO/IARC monograph evaluating RFR and studies (cited in note 55 infra); 2/18/2021 Comment of V. Farver NTP Study (cited infra note 55, evidence of carcinogenic harm from RF radiation); 2/22/2021 Comment of Appellant, citing Lamech, Self-Reporting of Symptom Development From Exposure to Radiofrequency Fields of Wireless Smart Meters in Victoria, Australia: A Case Series (2014); Comment of S.A. Foley Ferguson citing to NTP Report, New Hampshire Study (reproduced, cited infra 3/29/2021 Comment of Appellant citing Johansson, “Electrohypersensitivity: a functional impairment due to an inaccessible environment”(2015) and American Academy of Environmental Medicine “Recommendations Regarding Electromagnetic and Radiofrequency Exposure” and Belyav et al., “EUROPAEM EMF Guideline 2015 for the prevention, diagnosis and treatment of EMF-related health problems and illnesses” (2015); 3/30/2021 Comment by FOMB citing to 2020 State of New Hampshire Final Report of the Commission to Study The Environmental and Health Effects of Evolving 5G Technology (HB 522, Chapter 260, Laws of 2019, RSA 12-K:12–14) (the “New Hampshire Study” a comprehensive analysis of FCC role, and RF radiation health and environmental concerns, extensive bibliography of scientific studies, reports and findings concerning RF exposure) (reproduced).

b. The record evidence in the FCC decision also showed substantial evidence of low level RFR harm. Had the Commission or CMP considered the FCC decision it would have also been informed by evidence of record in that proceeding the D.C. Circuit found persuasive, such as the following:

Bioinitiative Working Group, Bioinitiative Report (Cindy Sage & David O. Carpenter eds., 2012) (describing evidence that human sperm and their DNA are damaged by low levels of RF radiation)); (Igor Yakymenko et al., *Oxidative Mechanisms of Biological Activity of Low-Intensity Radiofrequency Radiation*, *Electromagnetic Biology & Med.*, Early Online, 1–16 (2015)); (Henrietta Nittby et al., *Increased Blood-Brain Barrier Permeability in Mammalian Brain 7 Days After Exposure to the Radiation from a GSM-900 Mobile Phone*, *16 Pathophysiology* 103 (2009)); (Henry Lai, *A Summary of Recent Literature on Neurobiological Effects of Radiofrequency Radiation*, in *Mobile Communications and Public Health* 187–222 (M. Markov ed., 2018)); (Milena Foerster et al., *A Prospective Cohort Study of Adolescents' Memory Performance and Individual Brain Dose of Microwave Radiation from Wireless Communication*, *126 Env't Health Persps.* 077007 (July 2018)); a 2018 study by the National Toxicology Program that found that exposure to RF radiation emitted by cell phones may cause cancer in rodents.⁵⁰

The FCC Decision record also contained substantial information and material from, for example:

the American Academy of Pediatrics; the Council of Europe; the Cities of Boston and Philadelphia; medical associations, [including] (California Medical Association); thousands of physicians and scientists from around the world, [including] (letter to United Nations); (letter to European Union); (Frieburger Appeal by over one thousand German physicians); and hundreds of people who were themselves or who had loved ones suffering from the alleged effects of RF radiation, [including] (collecting statements from

⁵⁰ FCC Decision at 10-12. (capital emphasis in original removed).

physicians and health organizations expressing concern about health effects of RF radiation).⁵¹

In addition, the FCC Decision also refers to the studies that indicate RFR is possibly carcinogenic to humans, which the [FCC's] notice of inquiry specifically sought comment, and two 2018 studies—the National Toxicology Program (“NTP”) study and the Ramazzini Institute study that also found increases in the incidences of certain types of cancer in rodents exposed to RF radiation.⁵² These studies are the same studies cited by commenters here.

Moreover, even cursory review of the FCC proceeding and decision would have revealed that, similar to the commenter's concerns expressed in this matter, approximately 200 comments had been “submitted by individuals who advised the [FCC] either they or their family members suffer from radiation sickness, a constellation of mainly neurological symptoms that manifest as a result of RF exposure.” (FCC Decision at 11). Here the Commission received approximately 90 comments from individuals the majority of whom described the same or very similar personal harms.⁵³

⁵¹ FCC Decision at 25.

⁵² See note 40 supra.

⁵³ See e.g. R Comments 2/22/2021 Comment of A. Lorah “diagnosed with electromagnetic hypersensitivity. “ Comment of S.K. Hamilton “opted out since the start of CMP's change to smart meters because of health reasons and the safety of my family. I have Leukemia and smart meters are unprecedented in their triggering of electrosensitivity” Comment of Y. Gallo “ In the presence of CMP's proposed "solid state" smart meters, I develop extreme headaches, nausea, lightheadedness, concentration difficulty. These are immediate symptoms. If I stay in a house/yard with a smart meter for more than an hour, I develop chest pain, and difficulty understanding and responding to questions as well. Out of a family of 8, three of us currently suffer from electrosensitivity.”; 3/17/2021 Comment of N. Polito “I have

There is no indication anywhere in the Commission’s deliberations that any of this evidence, substantial by any quantum measure, was reviewed or considered in the present case or in any previous iteration of this litigation since the majority of the studies were done post 2011 and in many cases after 2016.

c. The FCC Admits Adverse Effects from low level RFR. Even the FCC itself admitted in 2019 that at least some level of radio frequencies can cause non-thermal adverse health effects with low level RFR frequencies ranging between 3 kHz and 10 MHz.⁵⁴ RFR created by the AC/DC conversion performed by non-communicating smart meters’ Switch Mode Power Supply (“SMPS”) (discussed more fully below), generates frequencies between 2-50 kHz, which fall squarely in the frequency range identified by the FCC as problematic. The FCC noted that “[a]dverse neural stimulation effects...include acute effects such as perception of tingling, shock, pain, or altered behavior due to excitation of tissue in the body’s peripheral nervous system.”⁵⁵ This the same low level RF radiation at issue here and these are the same symptoms suffered by CMP customers and others who report adverse health effects from smart meters. (see note 56 *supra*).

an analog meter because of several autoimmune diseases. I can not tolerate the Smart Meter in or around my home.” M.Hertz “I was injured by the modulated [RFR] from both transmitting and "non-transmitting" digital utility meters.” (letter, affidavit and study); 3/18/2021 Comment of N. Sossman “I had the smart meter removed because it was causing headaches and heart problems.”

⁵⁴ See *Proposed Changes in the Commission’s Rule Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 34 FCC Rcd 11687, 11743-11745, ¶¶122-124 & nn. 322-335 (2019). (SuppAuth)

⁵⁵ 34 FCC Rcd at 11742-11744, ¶119-122 & n.328.

This means that (1) the FCC is currently making findings on RFR safety not considered by the Commission or CMP and (2) there are at present no FCC environmental/health standards or limits for the exposures related to noncommunicating digital meters that occur below 3 kHz, even though FCC has expressly recognized potentially harmful effects. This is in accord with the FCC decision, applies to the non-communicating (and communicating) meters CMP is using, and underscores the misconception that just because a low level frequency is below FCC standards it must be considered safe.

All of this evidence, the vast majority of which has been developed and refined since the Commission's 2011 investigation, is relevant to the issue here – the mandated imposition of a non-communicating smart meter that emits low level RF radiation and can collect personal data beyond that merely necessary for billing.⁵⁶ This is because CMP's own studies show that such non-communicating smart meters emit low level RFR⁵⁷ of the type found harmful in the evidence cited above. So it may be reasonable to conclude, as this Court did in 2016, that the Commission performed the necessary investigation and considered the evidence as it existed in 2011 in concluding that transmitting smart meters were "safe" but

⁵⁶ CMP Response to RUC Questions 3/11/21 Q1.2.5 at 4-5: "Solid state meters are capable of recording both register readings and load profile data. This information is stored in electronic memory."

⁵⁷ R Item 18 3/11/2021 "CMP Response to Procedural Order" indicating the purpose of the filing is to "Attachment 4", at 2. The bar graph depicts the RFR a non-transmitting smart meter emits (the left bar) and that emitted by a transmitting smart meter (the right bar).

given the evidentiary developments that have occurred since 2011 it does not follow that such a similar conclusion can be reached in 2022 for low frequency RFR constantly emitted by non-communicating smart meters.

C. THE COMMISSION ERRED IN EQUATING EMF TO LOW LEVEL RFR AND RELYING ON UNDOCUMENTED EVIDENCE.

Instead of analyzing the growing body of substantial evidence indicating harm to human health and the environment from distinct low level RFR, the Commission reached a determination that it could eliminate non-RFR emitting analog electromechanical meters from CMP's customer opt out choice, forcing customers to be irradiated from low level RFR no matter whether they chose to opt out or not. It apparently came to this determination by: (1) ignoring record evidence that it is a scientific impossibility for analog meters to emit RFR since they have no radio; (2) CMP's own demonstration in the record that non-communicating smart meters emit low level RFR; and (3) by relying primarily on a 2013 Office of Public Advocate financed study of limited duration, high frequency airborne RFR from smart meters, and (4) an unsubstantiated statement from a utility website that equated EMF levels of non-communicating smart meter RFR to magnetic fields emitted from analog meters. This last point particularly is a false comparison. First, generalized *EMF exposure is not the issue in this case and never has been. Exposure and harm from low level RF radiation, a distinct frequency*

range in and subset of the EMF spectrum, is at issue and has been at issue throughout the course of this and prior smart meter litigation.

1. It was error for the Commission to compare EMF with RFR.

The conflation of low level RFR frequencies to electro mechanical magnetic fields is an “apples to oranges” comparison and therefore non-sensical when determining the safety of non-communicating smart meters. RFR is a distinct wave form or part of the electromagnetic frequency (EMF) spectrum. Magnetic fields are force fields around an object associated with changing electric fields. Magnetic and electrical fields and RFR are some of the very different forms present within the EMF spectrum but magnetic and electrical fields are not manifest in wave forms as RFR, infrared radiation, visible waves and gamma rays for example.⁵⁸ At issue in this case are RFR emissions from smart meters and more specifically non-communicating smart meters – *not analog meters that emit only a localized magnetic field (MF) through magnetic induction and not EMF’s - a broad and non-specific term inclusive of MF, RF ELF, and others.* Here CMP’s smart meters emit RF in two ways – when they intermittently transmit at high frequencies, and *for both communicating and non-communicating meters when they interact with the household power supply, which is all of the time.* Digital solid state meters run

⁵⁸ Basic Physics of Radiofrequency, BC Centre for Disease Control, <http://www.bccdc.ca/resource-gallery/Documents/GuidelinesandForms/GuidelinesandManuals/EH/EH/Section2Final06062013.pdf>

on direct current (DC) whereas the electrical grid is alternating current (AC). The meters (and some other household electronic items like wireless routers, computers, and battery chargers) use switch mode power supplies (“SMPS”) for lowering and converting high voltage AC current to lower voltage DC current necessary to run the device. Analog electromechanical meters do not use SMPS and only emit a local magnetic field dissipated within about 18 inches. This is why eliminating an analog meter from the opt out program forces customers to be exposed to RF radiation continuously at low levels and low frequencies when the smart meter is a “non-communicating” meter. It is the low level RFR frequencies that are the subject of health and safety concerns in this case, *not the higher frequency intermittent RFR from smart meters, or the magnetic fields analog meters emit.*⁵⁹

For non-communicating smart meters, the RF radiation that comes with household current 24 hours a day, seven days a week affects the power quality of the household current, a widely recognized technical phenomenon including such problems as impulsive and oscillatory transients, voltage sags and swells, harmonic distortion and noise⁶⁰ colloquially known as “dirty power” or “dirty electricity.” The Commission and CMP wholly failed to acknowledge this effect, dismissing it

⁵⁹ See e.g. the New Hampshire Study. Smart meter RF radiation is indistinguishable from the RF radiation that occurs in 5G technologies, cell phones and other devices. The evidence from studies conducted in these other technologies of harm from low level RFR is relevant to “non-communicating smart meters”.

⁶⁰ R Comments 2/17/21 Comment by Appellant at 5. (citing Kennedy, B. Power Quality Primer. (2000)).

as a “non-technical term” stating that the RF radiation here is no different and in fact emits less EMF than analog devices. (see A 47). The Commission also ignored a key difference cited by Appellant that: consumers can carefully research and *choose* which RFR emitting appliances to install in their home - a condition that is no longer true for a meter installed by CMP and a choice impossible once analog meters are eliminated from the opt out program.

Finally, the comparison of EMF levels between magnetic fields and low level RFR is a false choice because low dose exposures of a toxic substance or radiation over time (or sometimes immediately depending on the individual, whether disabled or not can have a harmful effect).⁶¹ Even if non-communicating smart meters emit only low level RFR there was no Commission analysis on the relative harms of different SMPS devices, the different degrees of power quality disturbance affecting RF radiation emissions (or RFR affecting power quality) or the cumulative harm that will result by adding more RF radiation over a constant period of time to the ambient RF radiation fields CMP customers are already exposed to. There is no basis in fact, and the Commission and CMP have not provided any, to conclude that just because the RFR was low, it is not harmful and

⁶¹ See R Comment 2/17/2021 Comment by Appellant citing Conrad Smart Meter Health Effects Survey from MPUC 2011-262 (Q. 16 where symptom response time varied from a few minutes after smart meter installation (11.4%) to greater than 3 months (6.7%).

here the Decision Order forces customers be irradiated by low level RFR despite credible evidence of harm.

2. The Commission CMP erred in largely basing its determination on one outdated Office of Public Advocate funded study and a completely undocumented or verified statement.

The evidence the Commission and CMP used to justify their conclusions consisted primarily of one utility funded study and a website statement summarized as “testing performed by Central Hudson.” The “testing” performed by Central Hudson, which the Commission seized on in its Order and deliberations was a statement contained in Central Hudson’s website “Q and A” that:

Testing performed by Central Hudson on the digital opt out meter and the mechanical/mechanical analog meters found that readings were nearly identical in all cases, *except for slightly higher EMF levels by the analog meter with a thirty amp load at 1 foot away*⁶²

This “testing” or study by Central Hudson was never produced by CMP, only a hyperlink reference to the Central Hudson website where the bald assertion is found in a general website “Q and A” section. *There was never a Central Hudson “study” or test ever entered into the record.* In any event, the language emphasized by CMP and the Commission underscores the central flaw – “EMF” is not the same as “RF” radiation. EMF is a broader term to describe a frequency spectrum of

⁶² The hyperlink to the Central Hudson webpage is: <https://www.cenhud.com/my-energy/meters/ert-meters/metering-qa/>. Appellant was unable to locate specific studies in the record supporting the statements on this webpage.

which RFR from digital meters and magnetic fields created by analog meters are entirely different components. The level of EMF exposure is irrelevant to the central issue presented in the case. To state there is little difference between analog electromechanical meters and solid state digital opt out non communicating smart meters, or to somehow imply that analog meters even emit RF radiation, much less at levels higher than solid state smart meters is misinformed and misleading at best and dishonest and disingenuous at worst. For the Commission to accept such a conclusory and unfounded statement, unauthenticated on the record, and without even a cursory inquiry to what is even being measured and compared, or any inquiry whatsoever into the validity of the statement as a primary factual basis for a ruling - is an egregious abuse of discretion on the part of the Commission.

The Commission and CMP attempt to bolster their “safety” conclusion by referring to a study conducted on the January of 2013.⁶³ The True North study did study certain RFR from smart meters for the benefit of the Maine Public Advocate in connection with the 2011 litigation. The study was conducted “to measure the maximum and average power output of a small sample of smart meters and other system components using the mesh network, and compare these readings to existing [FCC] safety standards.” It concluded that its “results obtained through the

⁶³ See R Filing Item 18 3/11/2021 “CMP Response to Procedural Order” Attachment 5 at 8.

effort indicate that the measured exposure levels are well below the current FCC exposure limits.” Study at 2-3. Specifically the findings were summarized as:

The RF exposure measurement survey detailed in the report found that the included Smart Meters and associated AMI infrastructure devices produced emissions significantly below the maximum power density exposure levels as outlined by the FCC ... for the general public.

The True North Study also relied on FCC guidelines and limits for maximum permissible exposure for the “general population” Study at 15. The RFR frequencies and levels of emissions referred to are those airborne emissions generated from transmitting or communicating smart meters, *not* the distinct low level RFR frequency (mostly conducted) emissions occurring well below the FCC guidelines that are presently of concern.

The essential flaws in this study with respect to its applicability in this case are numerous: (1) non-communicating smart meters were not studied; (2) low level RF radiation frequencies were not studied; (3) analog electro mechanical meters were not studied; (4) the exposure of low level RF to sensitive populations such as those with electro-sensitivities, children and pregnant women and potential environmental harms were not studied; (5) the duration of exposure was limited to times of transmission; (6) and there was no study of the low level RF emissions that occur as a result of SMPS power quality perturbations when the smart meter is not transmitting, and (7) the study is simply out of date.

It is unclear why CMP and the Commission appear to rely on this study in this matter. While their reliance may have had some justification in 2011 or 2013, it is no longer in accord with either (1) recent and substantial evidence, postdating the study that is accreting to those indicating potential for harm from low level RFR or (2) the FCC Decision findings regarding those same FCC guidelines the study relies on. It is therefore not only out of date but wholly inapplicable here and the Commission's reliance on it to determine the safety of non-communicating smart meters is at best misplaced and at worse an abuse of discretion demonstrating a complete lack of understanding of the issue they were confronted with. The Commission however concluded without any basis that "electro mechanical meters emit similar RF to non-communicating smart meters" This conclusion underscores the confusion created by the false EMF to RFR comparison. It is incomprehensible that the Commission found this comparison to be dispositive and could not find the evidence or the law. (See A-57, 58; A-13).

D. THE COMMISSION COMPOUNDED ITS ERRORS BY FAILING TO INVESTIGATE OR ADDRESS THE HARM TO SENSITIVE POPULATIONS AND THE ENVIRONMENT FROM LOW LEVEL RF RADIATION

1. The credible and imminent threat of harm from low level RFR is particularly acute for those individuals disabled or not, who are vulnerable and particularly sensitive to RFR.

Compounding its errors of law and fact, is the complete omission anywhere in the Commission's contribution to the record of any analysis of the risk to human

health and the environment from low level RF radiation. This omission replicates the omission by the FCC and includes the risk of harm particularly as it relates to those individuals with sensitivities to RFR such as children,⁶⁴ pregnant women, and those with electrosensitivity or other disabilities.⁶⁵

This Court has previously remanded a Commission order when the Commission failed to perform the Legislature’s mandate to ensure safety when it issued the Opt-Out Orders. “Safety” is defined in part as “...a place that is free from harm or danger; a safe place.” Merriam Webster Online Dictionary. Thus, both human health and the environment or “place” are well within the Commission’s statutory mandate to ensure safety.

The Legislature’s mandate to ensure safety, and the Law Court’s mandate to determine no credible threat, apply to *all* CMP customers and Maine residents, especially including the most vulnerable, not just healthy customers who may have some resistance to low level RFR or the general public who may be unaware of the danger. The Commission’s fundamental duty as guardian of the public trust is not limited to only some of the public, some of the time. Given the chronic nature of

⁶⁴ FCC Decision at 6 and 10. Stating the “failure undermines the [FCC’s] conclusions... particularly as they relate to children... and the implications of technological developments that have occurred since 1996” leading to conclusions found arbitrary and capricious. Unlike the Commission here the FCC sought comment on exposure limits for RF radiation effects on children.

⁶⁵ FCC Decision at 20. Noting observations by the cities of Boston and Philadelphia regarding whether “electrosensitivity” [is] a cognizable disability under the Americans with Disabilities Act,” and urging the FCC to “lead in advice to electrosensitive persons about prudent avoidance,” (internal citations omitted).

low level RFR risk, everyone is potentially susceptible and entitled to protection, particularly those showing immediate and acute sensitivities.

A conclusion that CMP's smart meter system is safe for only some CMP customers, i.e. the general population, does not, as a matter of law, satisfy the statutory mandate to ensure safety for all. Yet, that is what the Commission has done here. It has not taken into consideration continuous and cumulative exposures and their effects on those most susceptible and vulnerable to RF radiation occurring *below* FCC guidelines.

The fact that RFR exposure is becoming more and more ubiquitous from a variety of sources in public places,⁶⁶ does not justify imposing more RF exposure on vulnerable individuals in their home environment. Those who are vulnerable struggle every day to avoid exposures in public places, and take extraordinary measures to make their homes as free of exposure as possible.⁶⁷ The forced addition of additional low level RF radiation pollution, increasingly shown to be harmful, cannot under any legal standard be considered just and reasonable.

2. The Commission here also erred in failing to look at harms to the environment from low level RF.

⁶⁶ See April 11, 2022 Emergency Cease and Desist Order based on RFR emission from cell phone tower issued by Pittsfield, Mass. Board of Health, (<https://ehtrust.org/wp-content/uploads/Pittsfield-Health-Board-Cell-Tower-Order-to-Verizon-April-11-2022-FINAL-REDACTED.pdf>) requiring that Pittsfield cellular telephone company show cause why the Pittsfield Board of Health should not issue a cease and desist order abating a nuisance ...) (citing to many common evidentiary sources and the FCC Decision).

⁶⁷ See note 53 supra.

The D.C. Circuit was also clear in its findings that the FCC was wrong in failing to examine the possible harms to the environment as part of its inquiry into its 1996 standards.⁶⁸ The Commission here again mirrored this omission despite its statutory safety mandate and Maine APA requirements to consider the evidence and find a reasonable “basis in fact.”⁶⁹

Appellants introduced comments with extensive evidence, almost identical to that submitted to the FCC relevant to the environmental harms⁷⁰ which the Commission also summarily ignored. This omission cannot under any definition of reasoned finding “of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision”. under the Maine APA or the Commission’s own rules.

IV. CONCLUSION

The Commission conclusion that non-communicating smart meters are safe, and therefore can replace analog meters, is fundamentally flawed. The credible harm at issue here are effects from low frequency RFR, well below FCC standards

⁶⁸ FCC Decision at 10, and 22. Finding the FCC’s order arbitrary and capricious in its complete failure to respond to comments concerning environmental harm caused by RF radiation and noting the obsolescence of the FCC’s RFR criteria and that the “lack of any reasoned explanation as to environmental harms does not satisfy the requirements of the APA.” (record citations omitted).

⁶⁹ Supra note 47.

⁷⁰ R Comments 2/17/2021 Comment by Appellant citing <https://www.mainecoalitionstopsmartmeters.org/wp-content/uploads/2019/09/EHT-Teton-Cell-Tower-Testimony-4-10-19-Dr.-Devra-Davis-Comment-Submission-to-the-NPS.pdf> a 2019 Environmental Health Trust correspondence to the National Park Service, Grand Teton National Park discussing RFR environmental harms. (internal citations omitted due to number and length).

and demonstrated by the growing and vast body of evidence accreted since 1996, 2011 and even 2016. The removal of an analog meter, which does not emit RF, as an opt out CMP customer choice is a denial of a reasonable accommodation on the basis of documented health and environmental harm considerations. Customer safety is not only a Commission priority but a constitutional right and as such cannot be ignored by the Commission and CMP. The conclusory dismissal or ignoring of substantial record evidence showing the potential harm to human health and the environment from low level RF exposure, while at the same time refusing to even acknowledge a significant D.C. Circuit decision concerning the FCC safety standards that are at the very core of CMP and the Commission's justification is clearly unjust, unreasonable, arbitrary and must be vacated.

As the FCC Decision is prospective, the Commission, CMP, and this Court do not have any way of knowing what determination the FCC will make on remand. What is known is that the FCC was found to be arbitrary and capricious in not considering new record evidence (approximately 11,000 pages) regarding health and environmental threats from low level RFR, just as the Commission and CMP have done here. This uncertainty, fundamentally involving credible and imminent human health and environmental risks, underscores why the Commission's reasoning, actions and conclusions in this matter are flawed and should be stayed pending: (1) the final determination by the FCC of its RF safety

standards now subject to D.C. Circuit remand; (2) a subsequent investigation by the Commission with a reasoned health and safety explanation for its decision to eliminate the non-RF emitting analog meters from the opt out program; (3) specifically addressing the short and long term, cumulative impacts of low level RF radiation exposure on children, pregnant women, and individuals with electrosensitivity or other disabilities, (4) addressing the impacts on the environment from the installation of both types of smart meters.

For the reasons stated above, this Court should vacate the Commission's Order Approving the Terms and Condition and denial of the Motion for Reconsideration in their entirety. The Court ought to find removal of optional non RF radiation emitting analog meters, a necessity for those with acute disabilities, is not in accordance with its directives regarding an imminent, credible threat of harm, the APA, and the Maine Constitution. In addition, the Court should order such other relief as it deems necessary and appropriate.

Dated at Portland, Maine this 20th day of April, 2022.

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CERTIFICATE OF SERVICE

I, Scott L. Sells, hereby certify that I have on this day caused the foregoing *Brief of Appellant, Maine Coalition to Stop Smart Meters, and Appellant's Appendix thereto* to be served ELECTRONICALL and hard copy BY REGULAR MAIL, upon each person designated on the official service list compiled by the Law Court in this proceeding (including the Maine Public Utilities Commission).

Dated this 20th day of April, 2022.

By: 

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