

ELECTRICITY MAINE, LLC)	Electricity Maine, LLC's
Application for License to Operate as a)	Exceptions to Examiners' Report and
Competitive Electricity Provider)	Request for Hearing on Sanctions

In compliance with the Commission's January 5, 2021 Order on Stipulation, Electricity Maine, LLC ("EME" or the "Company") asserts these Exceptions to the Examiners' Report that was issued in this proceeding on April 15, 2020. As discussed in greater detail below, EME respectfully requests that the Commission set aside the Examiners' Report on the bases that the show cause process used to prosecute the allegations against EME did not afford the Company adequate Due Process and failed to comply with Maine's Administrative Procedures Act ("APA"). Alternatively, EME requests that the Commission perform a comprehensive assessment of the public interest with regard to any sanctions that may be imposed in this proceeding, including supplementation of the record and rehearing to provide the Commission with sufficient evidence as to why the revocation of EME's competitive electricity provider ("CEP") license as recommended in the Examiners' Report is not in the public interest.

EME regrets that the Show Cause Order and related proceedings conducted by the Commission were necessary. Indeed, although the Company takes exception to the Examiners' Report and proposed license revocation, the Examiners' Report nevertheless portrays a door-to-door campaign that generated an unusually high number of complaints with regard to the door-to-door sales vendors who worked on behalf of EME in Maine. While the conduct described in the Examiners' Report is troubling, it is important to recognize that the violations alleged in this proceeding were limited to residential door-to-

door solicitations during approximately seven months in late 2017 and early 2018 (the “D2D Sales Campaign”), and that the Examiners’ Report does not claim any violations with regard to other consumer solicitations or relationships with EME’s existing customers. Accordingly, while the Commission should consider the circumstances of the D2D Sales Campaign when assessing the public interest, it must also consider how any sanction it may impose will affect the public interest overall. As discussed in these Exceptions, complete revocation of EME’s CEP license would be contrary to the Legislature’s recent affirmation of the importance of a competitive retail access in the residential market; would disrupt thousands of commercial and residential EME supply contracts that were never involved in a door-to-door solicitation; and would needlessly cause economically harm employees and commercial brokers who had no involvement in the D2D Sales Campaign. When considered holistically, the public interest will not be served (and, in fact, will be harmed materially) by administering the blunt instrument of license revocation.

In these Exceptions, EME suggests a penalty framework that is tailored to address the alleged violations related to the D2D Sales Campaign and ensure that similar complaints never recur. EME’s proposal is intended to preserve the public interest through tailored elements that include the following:

- EME’s lifetime ban on door-to-door sales (estimated cost to EME of \$5 million);
- EME’s one-year ban on outgoing telemarketing sales activities (estimated cost to EME of \$1 million);
- EME provides all customers that resulted from any door-to-door solicitation the opportunity to transfer their supply service to standard offer without an early termination fee (estimated cost to EME of \$600,000);
- EME pays the maximum \$500,000 administrative penalty; and

- EME enters into a comprehensive regulatory compliance plan with the Commission.

During the hearing on this proceeding, the focus of the Commission and parties was on the allegations related to the D2D Sales Campaign. Very little emphasis was placed on the development of an appropriate record for the Commission's consideration of any penalty, including the various public interest considerations that are relevant to any penalty determination. Accordingly, these Exceptions specifically address the public interest and EME respectfully requests an opportunity to supplement the record and that the Commission allow rehearing on the appropriate penalty if the Commission believes that that there is insufficient evidence in the record to make the public interest determination on the present record.

BACKGROUND

A. The Commission's Show Cause Order.

On July 24, 2018, the Commission issued an Order to Show Cause in the above-captioned proceeding (the "Show Cause Order"). The Show Cause Order alleged that the Commission and Central Maine Power Company ("CMP") received numerous complaints and inquiries regarding EME's door-to-door sales activities during the first six months of 2018. (Show Cause Order at 2.) The complaints identified by the Commission primary related to allegations that EME door-to-door marketers misrepresented themselves as representatives of or being affiliated with CMP and making false statements for the purpose of inducing them to enter into sales agreements. (*Id.*) The Show Cause Order directed EME "to show cause why its marketing practices should not be found to have violated Maine statutes and Commission rules regarding its operations as a licensed CEP in Maine" and "why its license as a CEP in Maine should not be suspended with respect to

marketing to and enrolling new customers or from re-enrolling existing customers at the end of the customer's term of service." (*Id.* at 3.)

B. The Commission's Adjudicatory Proceedings on the Show Cause Order.

On August 13, 2018, EME responded to the Show Cause Order, acknowledged the serious nature of the allegations and explained that EME was committed to operating its door-to-door sales program in a manner consistent with Maine law. (EME August 13, 2018 Response to Show Cause Order at 1.) As EME noted in its response, it had suspended door-to-door sales in Maine in early June of 2018, prior to the issuance of the Show Cause Order. (*Id.* at 2.) In addition to the information that had been previously supplied to the Commission in response to earlier requests for information (CMS Items 24, 30, 35), EME provided comprehensive background on its door-to-door marketing program, including its sales agent training program and compliance program. (*Id.* at 3-5, 8-13, Att. A-C.) Finally, EME requested a hearing if the Commission were to seek to impose any sanctions related to the Show Cause Order. (*Id.* at 15.)

On February 6, 2019, the Hearing Examiners issued a Procedural Order setting a deadline for petitions to intervene and scheduling a case conference to address pre-hearing procedures. The Office of the Public Advocate ("OPA") filed a Petition to Intervene on February 7, 2019. By a Procedural Order dated May 10, 2019, the Hearing Examiners granted the OPA's intervention and set a procedural schedule that included the filing of the complaint record, prefiled testimony of EME, discovery, a technical conference, a hearing and post-hearing briefing. On May 23, 2019, EME submitted the prefiled direct testimony of Kira Jordan. From late May 2019 through mid-July 2019 the Commission and OPA conducted discovery on EME's testimony, and pre-hearing procedures were conducted

consistent with the Hearing Examiners' Procedural Orders.

An evidentiary hearing on the Show Cause Order was held on July 17, 2019. Neither the Commission Staff nor the OPA offered any testimony from witnesses with knowledge of the allegations against EME. EME's pre-filed direct testimony was adopted by Ms. Jordan under oath, and Ms. Jordan was cross examined by the OPA, Commissioners and Commission Staff. (CMS Item No. 74 (Hearing Tr.).)

Post hearing briefs were filed by EME and the OPA on August 30, 2019 and reply briefs were filed on September 10, 2019. The OPA argued that EME should face an administrative penalty of at least \$1 million and a one-year license suspension. EME identified specific action it had taken to modify its solicitation practices, including improved hiring processes for third-party vendors and sales agents, investigating and responding promptly to customer complaints by cancelling sales and issuing refunds when customers were dissatisfied, hiring additional compliance staff, performing post-sale calls and quality assurance audits, conducting field audits of sales representatives, deactivating and terminating sales agents, clawing back revenue from vendors, and voluntarily staying its door-to-door sales campaigns in Maine. (EME Br. at 2-8; EME Reply Br. at 1-4.) EME explained that the record demonstrated it took active steps to respond to customer complaints and that, under the circumstances, the sanctions sought by the OPA would be excessive and contrary to Commission precedent. (EME Reply Br. at 5-14.)

C. The Examiners' Report.

On April 15, 2020, Commission Staff issued an Examiners' Report (the "ER"). The Examiners' Report provided a detailed description of the complaints related to EME's door-to-door sales activities from November 2017 to June 2018 and proposed findings related to

the complaints. (ER at 21-53.) Specifically, the Examiners' Report alleged 39 complaints against EME separated into two general categories: (1) false claims regarding association with CMP (18 complaints); and (2) false claims about savings and rates (21 complaints).

The Examiners' Report recommended that the Commission find EME's door-to-door sales practices violated the consumer protection standards set forth in 35-A M.R.S. § 3203(4-A) and Chapter 305, § 4(B)(12) and (13) of the Commission's administrative regulations.¹ (*Id.*) As for sanctions, the Examiners' Report recommended that EME's CEP license be revoked because revocation would be "the most effective means to deter and place a hard stop" on the door-to-door sales practices discussed in the Examiners' Report. (*Id.* at 68-69.)

D. The Settlement Discussions and Negotiations Among EME, the OPA and Commission Staff that Resulted in the Stipulation.

Beginning on or about April 2, 2020, the OPA and EME began a series of discussions and negotiations designed to address the allegations in the Show Cause Order and resolve the alleged violations of Section 3203(4-A) and Chapter 305 described in the Examiners' Report related to the D2D Sales Campaign.

The negotiations between the OPA and EME included discussion of issues relevant to the determination of appropriate sanctions in light of the public interest concerns implicated by the Examiners' Report. A draft stipulation was negotiated during April and May, 2020 and presented to Staff in late May for their review and comment.

Based on feedback from Commission Staff, the stipulation was re-negotiated among the Staff, EME and the OPA during the summer and early fall of 2020. Based on those

¹ 65-407 C.M.R. ch. 305, Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity ("Chapter 305").

negotiations, EME and the OPA filed a joint stipulation with the Commission on November 17, 2020. The stipulation was designed to promote the public interest by: (1) addressing the door-to-door compliance issues identified in the Examiners' Report in a tailored manner that would impose significant penalties and eliminate the recurrence of similar issues; and (2) avoid harm to Maine's competitive supply markets, EME customers, and EME vendors and employees who were not involved in the D2D Sales Campaign.

E. The Commission Rejects the Stipulation Because it Was Unable to Make Public Interest Determinations on the Available Record.

By an Order on Stipulation dated January 5, 2020, the Commission rejected the Stipulation on two bases. First, on the existing record, "the Commission [could not] conclude that the overall stipulated result of the proposed stipulation would be in the public interest." (Order on Stipulation at 3.) Second, the Commission determined that "the provision in the proposed Stipulation that would provide [\$150,000 in] funds to the OPA is not consistent with legislative mandate." (*Id.* (citing 35-A M.R.S. § 116(8)).) The Order on Stipulation directed the parties to file exceptions to the Examiners' Report and expressly authorized the parties to re-file a stipulation with their Exceptions. *Id.*

Two Commissioners wrote separate opinions. Commissioner Williamson wrote separately to raise additional concern as to whether "the proposed stipulated remedy is adequate as to be in the public interest." (*Id.* at 5.) Chairman Bartlett dissented on the basis that it was premature to reach the merits of the stipulation. (*Id.* at 6.) The Chairman would have preferred to receive Exceptions to the Examiners' Report to understand the parties' positions with regard to whether the public interest would be served by Examiners' Report, and then consider whether the proposed stipulation would satisfy the

Commission's standards governing approval of stipulations (including whether the stipulated result would be in the public interest). (*Id.*)

ARGUMENT

I. The Examiners' Report is Not in the Public Interest.

A. The Show Cause Proceeding Failed to Adequately Comport with Due Process and the Maine APA and the Examiners' Report Should be Set Aside.

The show cause process that was implemented by the Commission in this proceeding to investigate, prosecute and adjudicate the complaints received by the Commission and CMP failed to afford EME Due Process under the United States² and Maine³ Constitutions⁴ and must be set aside. Not only was EME not given notice that its CEP license could be revoked as a result of the proceeding, but the show cause process improperly placed the burden of production and persuasion on EME, was conducted by the Commission Staff acting as investigators, prosecutors and advisors to the Commission, and was the result of multiple witness credibility determinations where no witnesses were called by the prosecution. Where, as here, the proposed penalty is the most severe option available to the Commission, Due Process protections commensurate with the proposed penalty should have been afforded to EME. *See Fichter v. Bd. of Env'tl. Protection*, 604 A.2d

² U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

³ Me. Const. art. I, § 6-A (“No person shall be deprived of life, liberty or property without due process of the law, nor be denied the equal protection of the laws . . .”). The protections afforded under the United States and Maine Due Process Clauses are coextensive. *In re D.P.*, 2013 ME 40, ¶ 10 n.4, 65 A.3d 1216.

⁴ “The Due Process Clauses of the Maine and Federal Constitutions guarantee due process before the state deprives a citizen of a property right.” *Board of Overseers of the Bar v. Lefebvre*, 1998 ME 24, ¶ 15, 707 A.2d 69. It is well-settled that professional and other licenses granted by a state are property entitled to due process protections. *E.g., Balian v. Board of Licensure in Med.*, 1999 ME 8, ¶ 10, 722 A.2d 364; *Mackey v. Montrym*, 443 U.S. 1, 10 (1979) (driver’s license is a protectable property interest).

433, 437 (Me. 1992) (“What process is due will vary from case to case . . . to assure the basic fairness of each particular action according to its circumstances.”) (quoting *Secure Env’ts, Inc. v. Town of Norridgewock*, 544 A.2d 319, 324-25 (Me. 1988)). They were not. For the reasons stated below, the Examiners’ Report should be set aside.

1. The Show Cause Order Failed to Give EME Notice of Potential License Revocation.

Although the Examiners’ Report recommends that EME’s CEP license be revoked, the Show Cause Order identified only license suspension as a penalty, not complete revocation. (Show Cause Order at 3: “the Commission directs Electricity Maine to show cause why its license as a CEP in Maine should not be suspended”). Sufficient notice is a fundamental Due Process requirement, *Senty v. Bd. of Osteopathic Examination & Registration*, 594 A.2d 1068 1072 (Me. 1991) (“It is essential to a party’s right to procedural due process that he be given notice of and an opportunity to be heard at any proceeding in which such property rights are at stake.”), and it is all the more critical given the severity of the revocation penalty recommended in the Examiners’ Report, *N. Atl. Sec., LLC v. Me. Office of Sec.*, 2014 ME 67, ¶ 51, 92 A.3d 335 (“Revocation is a substantial penalty, especially when corporate entities’ fates may determine the livelihoods of all who are employed in their offices. The penalty of revocation must be reserved for some of the most serious circumstances, taking into account all relevant factors.”).

2. No Witnesses Were Presented Against EME and the Allegations Presented Were Comprised of Unsworn Written Statements.

Maine’s APA governs the evidentiary requirements for adjudicatory proceedings and requires witnesses to be sworn,⁵ prevents sworn written evidence from being admitted unless the author is available for cross examination or by subpoena,⁶ and allows pre-filed witness testimony only when the witness is available for cross

⁵ 35-A M.R.S. § 9057(3) (“All witnesses shall be sworn.”).

⁶ *Id.* § 9057(5) (“No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.”).

examination.⁷ These requirements are rooted in Due Process and fairness in administrative proceedings. Here, the Examiners' Report recommends the extreme penalty of license revocation despite the fact that no witnesses were called to prosecute the complaints against EME. Instead, the record is comprised of written statements, none of which was sworn, and none from witnesses who were called to testify under oath or available for cross examination. The lack of confrontation and cross examination are particularly important here, where the Examiners' Report recommends that the Commission make witness credibility determinations from a paper record. (ER at 61: "The Commission finds the detailed customer complaints documented by CASD and CMP to be more credible than the bald statements made by Electricity Maine in response to discovery."). The Examiners' Report is replete with similar credibility assessments.⁸

3. The Commission Should Have Assigned Separate Advocacy Staff to Investigate and Prosecute the Complaint Allegations and Advisory Staff to Assist the Commissioners.

The Commission has the authority to assign Staff to serve in separate advocacy and advisory roles, and the separation of these roles is necessary when the Commission is acting as the investigator, prosecutor and adjudicator in an enforcement proceeding. The Commission recognizes the importance of this separation in its current proposal to amend its Chapter 420 rules to assign "prosecutorial staff" in the Commission's gas safety enforcement proceedings.⁹ As the Commission noted, assigning separate prosecutorial staff and advisory staff "will establish a clear delineation between the Gas Safety Staff who typically act as advocates before the Commission, and other Commission Staff who serve as advisors to the Commission."¹⁰ Combining the roles of investigator, prosecutor and adjudicator in

⁷ *Id.* § 9057(4) ("[A]n agency may . . . require procedures for the prefiling of all or part of the testimony of any witness in written form. Every such witness shall be subject to oral cross-examination.").

⁸ *E.g.*, ER at 22 n.15, 25 n.18, 28 n.23, 31 n.28, 35-36 n.30, 37 n.32, 44 n.37, 46-47 n.38.

⁹ *Maine Public Utilities Commission, Amendments to Chapter 420 of the Commission's Rules – Safety Standards for Natural Gas and Liquefied Natural Gas Facility Operators*, Docket No. 2020-00282, Notice of Rulemaking at 6 (Dec. 1, 2020) ("Chapter 420 NOR").

¹⁰ *Id.*

adjudicatory type proceedings has been squarely rejected in Maine. *See Gashgai v. Bd. of Registration of Medicine*, 390 A.2d 1080 (Me. 1978) (noting that although the issue had been waived, “the combination of investigator, prosecutor and sitting member of the adjudicatory panel, even if ostensibly a nonparticipating member, creates an intolerably high risk of unfairness” and stating that the Court “shall not approve that practice in our review of future proceedings of this Board or those of other administrative agencies.”); *see also Sevigny v. City of Biddeford*, 344 A.2d 34 (1975) (tax assessor removal proceeding before city council where mayor acted as prosecutor and presiding officer); *Flewelling v. School Admin. Dist. No. 49*, No. CV-79-759, 1986 Me. Super. LEXIS 208 (Sept. 19, 1986) (relying on *Gashgai* and *Sevigny* to hold that Board member who participated with Superintendent, acting as prosecutor, in investigation of teacher could not and should not have participated in adjudicatory proceeding against that teacher).

4. The Burden of Production and Persuasion Were Improperly Placed on EME.

From the start of the proceeding, the burdens of production and persuasion were at all times placed upon EME improperly. The Show Cause Order “direct[ed] Electricity Maine to show cause why its marketing practices should not be found to have” been in violation and “why its license as a CEP in Maine should not be suspended.” (Show Cause Order at 3.) The Examiners’ Report asserts that the burden of proof need not be reached here because the Commission is reviewed by the Law Court under a “substantial evidence” standard and “the record contains substantial evidence from CASD, CMP and Electricity Maine” to support the recommended findings in the Examiners’ Report. (ER at 59.) As noted above, however, the “substantial evidence” relied upon in the Examiners’ Report fails to comport with Maine’s APA. Moreover, as a proceeding that implicates a substantial property right of EME, the Commission as prosecutor should bear the burden of production and persuasion. *See, e.g., Vining v. Fl. Real Estate Comm’n*, 281 So. 2d 487, 491-92 (Fla. 1974) (applying Fifth Amendment principles to administrative license revocation proceeding: “The basic constitutional infirmity of the statute lies

in requirement of a response under threat of license revocation or suspension, which amounts to compelling the defendant to be a witness against himself.”). *Estrin v. Moss*, 430 S.W.2d 345, 354 (Tenn. 1968) (to comport with Due Process in license revocation proceedings “the burden of proof is generally on the state or administrative agency which asserts in favor of revocation”). Tellingly, even in the prosecution of routine traffic violations, which are civil infractions under Maine law, the burden of production and persuasion rest with the State.¹¹ Using a “show cause” mechanism¹² to shift the burden upon the EME under these circumstances was constitutionally impermissible.¹³

For all of these reasons, as well as those stated in EME’s pre-hearing briefs, the Examiners’ Report should be rejected on the basis that the proceeding failed to comport with Due Process and the Maine APA, particularly given the severity of the recommended penalty. *Fichter*, 604 A.2d at 437 (the process that is due is commensurate with the circumstances); *N. Atl. Sec., LLC*, 2014 ME 67, ¶ 51 (emphasizing that revocation is a substantial penalty).

Subject to and without waiving any of these arguments, EME addresses the merits of the CEP license revocation recommended in the Examiners’ Report.

¹¹ The Maine Courts provide a comprehensive explanation of traffic court procedures, including the fact that the burden of proof remains with the State as prosecutor.
<https://www.courts.maine.gov/courts/traffic/index.html>

¹² It is noteworthy that the Commission’s proposed amendments to Chapter 420 would strike the issuance of show cause orders from its enforcement options available in Section 8(D) of the rule. Chapter 420 NOR at 8.

¹³ EME is mindful that 35-A M.R.S. § 1314 addresses the burden of proof in certain Commission proceedings. Nothing in Section 1314 authorizes the Commission to issue a show cause order in the context of an enforcement proceeding implicating a substantial property right as a mechanism to shift the burdens of production and persuasion upon the accused. Moreover, to the extent that the Commission interprets Section 1314 as imposing the burden of production or persuasion upon EME in the circumstances of this enforcement proceeding, such an interpretation of that provision is contrary to the Due Process clauses of the United States and Maine Constitutions.

B. The License Revocation Sanction Recommended in the Examiners' Report is Not in the Public Interest.

As discussed above, the Examiners' Report is limited to alleged violations related to the D2D Sales Campaign, yet it recommends that EME's CEP license be revoked without any assessment of the public interest implications of that recommendation. For example, the Examiners' Report fails to consider the negative effects of license revocation on Maine's competitive supply market, which is particularly important given EME's prominence in the competitive market and the Legislature's confirmation in 2020 that it is in the public interest to retain residential consumers' access to competitive retail supply options. Nor does the Examiners' Report consider the effects of license revocation upon: (a) EME's existing customers—both commercial and residential—who had no involvement in the D2D Sales Campaign, and (b) EME's employees or the brokers with whom EME has ongoing brokerage agreements. These public interest considerations were not addressed in the Examiners' Report and should be given significant attention by the Commission when assessing any penalty in this proceeding.

1. The Examiners' Report Fails to Consider the Effect of the Proposed License Revocation on the Competitive Market.

There can be no dispute that the Maine Legislature has determined that access to competitive supply by both residential and commercial consumers is in the public interest. Retail access to all consumers is a right that was initially conferred when Maine restructured its electric industry decades ago. 35-A M.R.S. § 3202(1) ("all consumers of electricity have the right to purchase generation services directly from competitive electricity providers . . ."); ER at 17 (discussing deregulation of supply market); ER at 68 (discussing CEP licensure under the public interest standard.)

The Legislature recently reaffirmed its ongoing commitment to competitive supply in the residential market. In early 2020, Maine’s 129th Legislature considered L.D. 1917, “An Act To Eliminate Direct Retail Competition for the Supply of Electricity to Residential Consumers.”¹⁴ L.D. 1917 proposed to amend 35-A M.R.S. § 3202 to limit retail access to non-residential consumers and would require all residential consumers on competitive supply to be transitioned to standard offer service no later than January 1, 2022. L.D. 1917, §§ 1, 2.

The Legislature’s Energy, Utilities and Technology (“EUT”) Committee considered L.D. 1917, conducted hearings, and heard testimony from stakeholders who supported¹⁵ and opposed the bill. A Committee Amendment was drafted that proposed to convert the bill into a resolve, which would have directed this Commission to study competition in the residential market and report the findings of the study to the Legislature in 2021. L.D. 1917, Comm. Amend. A.¹⁶ The bill was voted out of the EUT Committee in a divided report: 11 members voting that the original bill ought not to pass, and one member voting that it ought to pass as amended by the Committee.¹⁷ The majority report (ought not to pass) was accepted on March 3, 2020.

¹⁴ L.D. 1917 is available at:

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0664&item=1&snum=129>.

¹⁵ In fact, the Committee received testimony that referred specifically to the Commission’s investigation of EME to support the argument that the “retail marketing of electric supply to residential customers” is a “failed experiment of retail competition in this market segment” and should be eliminated. Testimony of the OPA in Support of L.D. 1917 at 1, available at:

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0664&item=2&snum=129>.

¹⁶ The Committee Amendment is available at:

<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0664&item=2&snum=129>.

¹⁷ The Committee vote and disposition of the bill is available at:

http://www.mainelegislature.org/legis/bills/display_ps.asp?id=1917&PID=1456&snum=129.

The Legislature's rejection of L.D. 1917—less than a year ago—confirms that the Legislature views direct access to competitive retail energy markets to be in the public interest. The Commission should consider this Legislative affirmation when making any decisions that would have significant impacts on the competitive residential supply market. EME has had a long-standing presence in Maine and was one of the first competitive suppliers to focus on the residential market. Today, EME is the largest competitive supplier to Maine's residential market and the Company estimates, based on most recently available Commission published data, that it serves more than 31% of the residential customers who are served by CEPs.

The Examiners' Report fails to consider the effect of its recommended license revocation on Maine's competitive market. Imposing sanctions upon EME that would have the effect of putting the Company out of business, directly or indirectly, would eliminate a significant retail supply option for residential and other consumers and would be contrary to the Legislature's intent that residential customers continue to have meaningful competitive supply options available.

To be clear: EME is not arguing that the Legislature's recent rejection of L.D. 1917 nullifies this Commission's ability to take enforcement action against residential market suppliers. EME does contend, however, that the Commission is obligated to follow the Legislature's clear intent that residential consumers continue to have meaningful competitive supply options available when the Commission does exercise its enforcement powers.

2. Revocation of EME's CEP License Would Negatively Affect (a) EME's Residential and Commercial Customers, Brokers and Employees Who Were Never Involved in the D2D Sales Campaign.

The focus of the Commission's enforcement proceeding was the D2D Sales Campaign. There are no allegations in the Examiners' Report of non-compliance by EME other than the third-party sales vendors who were engaged in that campaign (and who no longer work for EME or any of its affiliates). Door-to-door sales, however, is only one discrete portion of the Company's book of business and EME has had many sales interactions with other consumers, as well as interactions with existing customers, that did not result in any complaints. When assessing the public interest, the Examiners' Report fails to consider what effect license revocation would have on EME's existing customers, EME's employees, and the brokers with whom EME works in the competitive commercial markets. *See N. Atl. Sec.*, 2014 ME 67, ¶ 51 ("Revocation is a substantial penalty, especially when corporate entities' fates may determine the livelihoods of all who are employed in their offices. The penalty of revocation must be reserved for some of the most serious circumstances, taking into account all relevant factors.").

EME has sales contracts with many customers that resulted from a variety of sales channels. The table below shows EME's current customer mix at a high level:

Residential D2D	Residential Other Channels	Residential Total	D2D as % of All Residential	Res & Comm Non-D2D	D2D as % All Customers
442	22,050	22,492	1.97%	30,149	1.47%

Currently, EME has approximately 442 residential customers acquired through door-to-door solicitation, and the remaining 22,050 residential customers were acquired through other sales channels. As such, door-to-door customers account for about 1.97% of

EME's total residential customer base. When commercial customers are added, door-to-door drops to about 1.47% of all EME customers. It is noteworthy that this analysis accords equal weight to residential and commercial customers and, therefore, door-to-door would account for an even lower percentage if the residential and commercial customers were considered on a residential load equivalent basis.

Thus, in addition to existing EME residential customers who were not acquired through door-to-door sales, the proposed license revocation would negatively affect every EME commercial customer. Nearly all of EME's commercial customers were secured competitively through a third-party broker licensed by the Commission. There is no guarantee that each of those commercial customers would be able to secure similar or better supply terms from standard offer or a different competitive supplier during the remainder of their contract term. In addition, the brokers who placed those contracts are due commissions on the supply agreements (for 2020, broker commissions averaged about \$20,000/month). Finally, EME would have no choice but to lay off employees due to the CEP license revocation, notwithstanding that they did not commit any of the alleged violations (which were limited to third-party sales vendors). Thus, license revocation would harm EME's current commercial customers, lead to the breach of the agreements with the licensed brokers who worked hard to place those supply agreements through competitive solicitations, and harm employees who had no involvement in the D2D Sales Campaign.

3. The Examiners' Report Fails to Consider that Complaints in Maine Have Stopped Since EME Abandoned Door-to-Door Sales and a New Management Team Has Assumed Control of EME.

The Examiners' Report also fails to consider whether revocation of EME's license is necessary to avoid recurrence of the conduct alleged in this proceeding. EME's parent company, Spark Energy, has made significant changes in its senior executive team to address regulatory compliance issues that arose within its operating companies during 2018.¹⁸ These changes include new personnel in the roles of Chief Executive Officer, Chief Financial Officer, Chief Operating Officer and Interim General Counsel. The Chief Operating Officer position, which was newly created in March 2020, includes responsibility for all retail sales channels for Spark Energy's subsidiaries. All sales responsibilities were placed with a "C-Level" executive to emphasize the Company's commitment to improving its operational and compliance processes. The current management team is seasoned,¹⁹ well credentialed, and focused on ensuring that appropriate regulatory compliance mechanisms are in place.

Since the new management team has taken over, complaints against EME alleging regulatory non-compliance are down significantly. This is attributable to, among other things, management's renewed focus on regulatory compliance, EME's voluntary withdrawal from the door-to-door market since June of 2018, and the retention of key

¹⁸ The management personnel who were responsible for the D2D Sales Campaign are no longer with the company. Due to employee confidentiality, EME is not able to provide details publicly as to their departure. To the extent additional details would be helpful to the Commission's determinations in this proceeding, it would be necessary to provide them on a confidential record.

¹⁹ Biographical summaries for these personnel are provided in Attachment A to these Exceptions.

vendors that are recognized for excellence in the industry.²⁰ The new management team views Maine as a long-term market for EME and has significant incentive to properly manage personnel and ensure regulatory compliance.

Although the overhaul of senior management does not excuse prior conduct, it reflects commitment to moving EME forward in a positive, responsive and responsible direction. The consumer complaints concerning door-to-door have stopped, and the objective of the Examiners' Report (*i.e.*, putting a "hard stop" on complaints) has been achieved. As discussed above, revoking EME's CEP license will cause significant harm to the competitive retail supply market, existing EME customers, and EME's employees and brokers. Revocation will not, however, result in fewer door-to-door complaints than EME is currently generating. For all of the reasons discussed above, revocation is not in the public interest.

II. Any Sanction Imposed in this Proceeding Should Be Appropriately Tailored to Address the Focus of this Proceeding: Door-to-Door Solicitations.

EME acknowledges that the Examiners' Report portrays a door-to-door campaign that experienced compliance deficiencies and lacked appropriate oversight of the vendors who worked on behalf of EME. Although the Examiners' Report recommends revocation of EME's CEP license due to the D2D Sales Campaign, as discussed in Part I above, that remedy is not in the public interest. The Commission does, however, have the ability to impose appropriately tailored sanctions that would provide the "hard stop" on door-to-door

²⁰ For example, Spark has recently contracted with a new third party verification vendor (Emerios) that offers the ability to perform third party verification more efficiently, improve the customer's sales experience and quickly identify sales agents that may be out of compliance.

complaints desired by the Examiners' Report, while promoting the overall public interest. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 371 U.S. 168 (1962))).

Such a tailored approach would include the following elements:²¹

- EME's lifetime ban on door-to-door sales;
- EME's one-year ban on outgoing sales activities;
- EME provides written notification to existing customers that resulted from a door-to-door solicitation of this proceeding and provides those customers with an opportunity to transfer their supply service to standard offer without an early termination fee;
- EME pays the maximum \$500,000 administrative penalty imposed pursuant to 35-A M.R.S. § 1508-A; and
- EME enters into a comprehensive sales compliance plan with the Commission to be negotiated and submitted as a compliance filing.

EME believes that these sanctions would have the effect of imposing significant penalties in recognition of the conduct alleged in the Examiners' Report, and ensure that such conduct would not be repeated. This structure is also tailored to address the conduct at issue in this proceeding (door-to-door sales), while avoiding the undesirable consequences discussed in Part I, above. As such, this penalty framework would be in the public interest for the reasons discussed below.

²¹ These elements are substantively similar to those which were included in the Joint Stipulation that was filed in this proceeding on November 17, 2020.

A. EME Would Be Forever Banned from Door-to-Door Sales in Maine.

This proceeding focused on door-to-door sales. A lifetime ban on that sales channel is narrowly tailored and serves as both a significant penalty for past conduct, and would ensure that violations related to door-to-door sales will never recur for EME. Rather than a complete revocation of EME's CEP license, this is essentially a limitation on the scope of EME's license. The Company estimates that the cost of a lifetime ban on door-to-door sales is \$ 5 million.

B. EME Would Be Banned from Outbound Telemarketing of Maine Consumers for One Year.

Although this proceeding focused on the D2D Sales Campaign, as an additional penalty EME proposes to accept a one-year ban on all outbound telemarketing of Maine consumers. This one-year ban is in addition to the self-imposed ban that the Company has operated under since June 2018. The Company estimates that the cost of this one-year ban will be \$1 million, and the total cost of one year ban and the self-imposed ban to be approximately \$2.7million.

C. EME Would Allow Existing Door-to-Door Customers to Transition to Standard Offer Service without Penalty.

EME proposes to allow customers with a contract that resulted from a door-to-door solicitation (regardless of whether it was the D2D Sales Campaign) to transfer to standard offer without an early termination penalty. The structure for such a process could involve a written notification to such customers that:

- (1) the Commission commenced an enforcement proceeding against EME that resulted in enforcement action being taken against the Company;
- (2) provides the customer with their then-current EME contract rate and the then-current standard offer rate available through the customer's transmission and distribution utility;

- (3) offers to transfer the customer's supply service from EME to the transmission and distribution utility's standard offer service without an early termination penalty; and
- (4) provides the customer a toll-free number to contact EME for the purpose of transferring their EME supply service to the utility's standard offer service in accordance with the notification.

Upon the customer directing EME to transfer their supply service to standard offer, EME would communicate by the end of the next business day with the customer's transmission and distribution utility to process the transfer in accordance with the utility's account transfer procedures. EME estimates that the cost of this customer notification and transfer process will be approximately \$600,000.

D. EME Would Enter Into a Comprehensive Sales Compliance Plan Designed to Promote Regulatory Compliance.

To further ensure that EME's future sales activities comply with Maine law, the Company proposed to enter into a comprehensive Sales Compliance Plan. Using the draft plan provided in Attachment B of these Exceptions as a starting point, EME proposes to negotiate a comprehensive plan with the OPA designed to ensure that EME's restructured management team continues to place a high priority on sales compliance in Maine. The negotiated plan would be filed with the Commission as a compliance filing and be subject to Commission approval.

E. EME Would Pay the Maximum Administrative Penalty of \$500,000, and the Total Cost Impact of EME's Proposed Sanctions Would Exceed \$7.1 million.

In its post-hearing briefs, the OPA argued that the Commission should impose an administrative penalty of \$1 million and a one-year suspension of EME's CEP license. (OPA Br. and OPA Reply Br., CMS Item Nos. 86, 87.) As discussed below, the administrative penalty in this proceeding is capped by statute at \$500,000, but the financial impact that

EME would experience from the sanctions discussed above in subsections A - C would be significantly greater than \$1 million. Accordingly, the maximum administrative penalty is in the public interest, particularly when considered in the context of the overall impact of the sanctions proposed by EME.

1. The Administrative Penalty is Capped by Statute at \$500,000.

The administrative penalty that is available in this proceeding is governed by 35-A M.R.S. § 1508-A. The Commission has recently explained that:

a utility that willfully violates Commission rules may be subject to an administrative penalty of up to \$5,000 per violation, up to a maximum of \$500,000 for any related series of violations. 35-A M.R.S. § 1508-A(1)(A). A utility that violates Commission rules and received notice of the violation may be subject to an administrative penalty of up to \$500,000 for any related series of violations. *Id.* § 1508-A(1)(B).

Public Utilities Commission, Investigation of Improper Notices by Central Maine Power Company (35-A M.R.S. § 1303), Docket No. 2020-00017, Order at 9 (Aug. 5, 2020) (the “CMP Winter Disconnection Investigation”).

In its *CMP Winter Disconnection Investigation*, the Commission considered CMP’s alleged violation of the Commission’s Chapter 815 Rules governing Consumer Protection Standards for Electric and Gas Transmission and Distribution Utilities (“Chapter 815”). In that proceeding, the Commission investigated three distinct types of disconnection notice that CMP issued to customers²² during three separate winters, as summarized below:

²² Specifically, the three separate notices were: (a) a premises visit package that CMP hand delivers to a customer’s premises “in an attempt to make personal contact with customers who are in arrears during the winter period;” (b) a “Letter 180” that CMP sends when it is unable to make personal contact with the customer when delivering the premises visit package; and (c) a “Letter 310” that CMP hand delivers to a location when a landlord has asked that service be turned off or taken out of the landlord’s name and CMP has no new responsible party for billing purposes. *Id.* at 3.

Disconnection Notice Type	Period Issued	Number Issued
Premises Visit Package	January 2020	102
Letter 180	Winter 2018-19	14,892
	Winter 2019-20	986
Letter 310	Winter 2018-19	995
	Winter 2019-20	470
Total		17,445

CMP Winter Disconnection Investigation, Order at 3-4.

Thus, *the CMP Winter Disconnection Investigation* considered the issuance of 17,445 notices issued by CMP over three separate winter periods that failed to comply with the Commission’s Chapter 815 Rules. Moreover, CMP issued the notices *after* the Commission notified CMP on March 6, 2018 and again on December 21, 2018 that certain of its notices were non-compliant.

CMP consented to a finding that it had violated Chapter 815, and agreed to pay a \$500,000 administrative penalty pursuant to Section 1508-A, which the Commission’s Order characterized as “the maximum administrative penalty for this related series of violations:”

This case opened with an order requiring CMP to show cause why it should not be subject to administrative penalties for delivering notices containing language contrary to the Commission’s consumer-protection rules—**in three separate winters and despite multiple communications from the Commission’s CASD that doing so was not consistent with the Commission’s rules.** Though in its response to the show-cause order CMP initially denied that its actions violated a Commission rule, CMP now agrees that it did violate the rule **and thus consents to payment of the maximum administrative penalty for this related series of violations.**

CMP Winter Disconnection Proceeding, Order at 10-11 (emphasis added).

2. EME Would Pay the Maximum Administrative Penalty of \$500,000.

Given the circumstances in the *CMP Winter Disconnection Investigation*, the maximum administrative penalty under Section 1508-A imposable against EME in this proceeding is \$500,000. The CMP investigation involved 17,445 separate customer communications that were issued over three different winters “despite multiple communications from the Commission’s CASD that doing so was not consistent with the Commission’s rules.” *Id.* The D2D Sales Campaign at issue in this proceeding involved 39 complaints listed in the Examiners’ Report during the D2D Sales Campaign that lasted about seven months. Although the administrative penalty properly calculated pursuant to Section 1508-A is closer to \$200,000 (\$5,000 per complaint * 39 complaints = \$195,000), like CMP, EME is nevertheless willing to consent to the imposition of the statutory maximum penalty of \$500,000.

Finally, as summarized below, the financial impact of the sanctions discussed above in subparts A – C in addition to the \$500,000 administrative penalty are estimated to exceed \$7.1 million in value, as summarized below:

Sanction	Value
Permanent ban on D2D Sales	\$5 million
One year ban on outbound telemarketing	\$1 million
D2D customer transition to standard offer	\$600,000
Administrative penalty	\$500,000
Total	\$7.1 million²³

Thus, this penalty structure would impose significant business and financial penalties upon EME that send a strong message both to EME and other CEPs regarding the

²³ The estimated total would be nearly \$9 million if the lost opportunity cost of EME’s self-imposed ban on outgoing telemarketing from June 2018 to present were included.

importance of regulatory compliance, particularly with regard to door-to-door sales activities.

III. The Commission Should Conduct Rehearing on Sanctions to Ensure that a Public Interest Determination is Made on a Properly Developed Record.

As discussed above, while the Commission's Show Cause Order may have put EME on notice of a potential suspension of its CEP license, the Show Cause Order did not identify revocation as a penalty that the Commission might impose in this proceeding. As such, and as the Commission appears to have concluded when considering the Joint Stipulation, the record has not been adequately developed to allow the Commission to consider what sanctions against EME are in the public interest.

If, after consideration of these Exceptions, the Commission believes that revocation of EME's CEP license is a sanction that would be in the public interest, then EME respectfully requests rehearing on sanctions such that the record may be more fully developed. *See N. Atl. Sec., LLC*, 2014 ME 67, ¶ 58-64 (Saufley, C.J. and Mead, J. concurring in part and dissenting in part; Justices would have remanded the matter to the for further consideration of the sanction to be imposed given the severity of the license revocation sanction to allow the accused "a meaningful opportunity to be heard on the proposed sanctions after entry of the findings of violations.").

Among other things, the purpose of the rehearing would be for EME to present evidence, including testimony of the Company's Chief Operating Officer and Interim General Counsel, and for the Commission and the OPA to examine the Company's witnesses as to how revocation would negatively affect the public interest and how other sanctions would meet the objectives of the Examiners' Report while not causing harm to the

competitive markets, customers, employees and vendors that were not involved in the D2D Sales Campaign investigated in this proceeding. The Commission has recently adopted similar procedures in other investigations. *See, e.g., Public Utilities Commission, Investigation Regarding 2018 SQI Results Pertaining to Consolidated Communications*, Docket No. 2018-00319, Order (Sept. 20, 2020) (rejecting Examiners' Report on service quality penalties related to provider of last resort service and remanding to Hearing Examiner for further process) & Procedural Order (Oct. 21, 2020) (scheduling hearing on remand for Commission and OPA to examine senior utility executives regarding SQI issues and compliance plan).

CONCLUSION

The Show Cause process that was used to prosecute the complaints against EME in this proceeding violated the Maine APA and failed to afford EME adequate Due Process under the United States and Maine Constitutions. In recommending that EME's CEP license be revoked, the Examiners' Report fails to consider the overall public interest, and EME has outlined a proposed penalty structure that would meaningfully address the past alleged door-to-door sales conduct, while also ensuring that the Examiners' Report's goal of placing a "hard stop" on similar conduct is met. Accordingly, EME respectfully requests that the Commission:

- (a) Set aside the Examiners' Report;
- (b) Alternatively, perform a comprehensive assessment of the public interest with regard to an appropriate penalty in these circumstances, consider EME's proposed penalty structure, and allow EME an opportunity to supplement the record and hold a hearing on the appropriate penalty if the Commission believes

that that there is insufficient evidence in the record to make the public interest termination; and

(c) grant such other relief as may be just and equitable in the circumstances.

Dated: January 26, 2021



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