MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. PUC-17-185

CONSERVATION LAW FOUNDATION ET AL.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION,
Appellee.

ON APPEAL FROM THE MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF THE APPELLANTS

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INTRODUCTION

Maine homeowners and businesses who generate some of their own electricity through what are known as "distributed generation" ("DG") resources[1] are subject to a different rate or billing mechanism than those who have all of their electricity delivered by a utility. This billing mechanism, known generally as net metering in most of the forty-one states, Washington D.C., and four territories that offer it,[2] is regulated in Maine by the Public Utilities Commission ("Commission") as net energy billing ("NEB") pursuant to 06-407 C.M.R. ch. 313 ("Chapter 313").[3] For two decades, Chapter 313 has provided an elegantly simple billing and compensation method for NEB customers – the electricity generated by the customer is used to offset the

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[1] DG contrasts with the traditional model of electricity generation whereby centralized facilities produce all of the electricity for a region and require extensive, and expensive, transmission and distribution infrastructure to deliver it. Whereas, DG lives up to its name – electricity generation systems using industrial process byproducts (woodchips, heat and steam), wood boilers, solar panels, wind turbines or other systems are distributed throughout a utility's service area. These DG resources are located "behind the meter" that measures electricity that is delivered to the home or business. Individually, DG resources tend to generate relatively small amounts of electricity, but collectively can represent a significant amount of electricity that benefits utilities' transmission and distribution infrastructure (the grid) by reducing demand on the system, particularly at peak times of use. *See, e.g.,* Record (hereafter, "R.") 26 C, *Public Utilities Commission,* Commission Inquiry into the Determination of the Value of Distributed Solar Energy Generation in the State of Maine, No. 2014-171, Final Value of Solar Study (Revised Apr. 2015) (Me. P.U.C. Apr. 15, 2015) at 25-26.

[2] National Conference of State Legislatures, State Net Metering Policies (Nov. 3, 2016) http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx.

[3] The NEB crediting mechanism was introduced in Maine after the legislative restructuring of the electricity industry in the late 1990s. *See, e.g., Public Utilities Commission,* Commission Initiated Inquiry into Market-Based Solar Policy Design Stakeholder Process, No. 2015-218, Report to the Legislature Regarding Market-Based Solar Policy Design Stakeholder Process Pursuant to Resolves 2015, ch, 37 (Me. P.U.C. Jan. 30, 2016) ("Solar Stakeholder Report") at 5. Net metering became part of federal law with the passage of the Energy Policy Act of 2005 which required state utility regulators to offer net metering services as a standard for setting electricity customer rates. *See* 16 U.S.C. § 2621(a), (d)(11). The Act defines net metering as "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." *Id.*

electricity provided by the utility.[4] By all accounts, the NEB rate has been successful in encouraging investment in various forms of DG and spurred a burgeoning DG business sector in Maine.

Although the NEB rate applies to less than 1% of Maine homeowners and businesses, it has generated a great deal of interest and debate over the last several years, both in the State and nationally. With general agreement that the NEB system should ultimately be updated to reflect improved metering and billing capabilities, changed market circumstances and increasing demand for DG, in particular solar,[5] Maine's Legislature overwhelmingly passed bills in its last two sessions – L.D. 1649 (127th Legis. 2016); L.D. 1504 (128th Legis. 2017) – that preserved NEB in the short term while entailing comprehensive processes and analyses to develop thoughtful new approaches for the long term. But Governor LePage vetoed both bills, and efforts to override those vetoes failed by less than a handful of votes in both instances.

In between those two legislative sessions, the Commission took it upon itself to initiate a process to amend Chapter 313 in 2016, which it completed in March 2017.

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[4] Under the NEB system in effect until Jan. 1, 2018, electricity distributed into the grid by NEB customers is credited at the same rate as electricity purchased, which includes charges for the electricity itself (supply cost) and the cost of delivery (transmission and distribution cost). Chapter 313, § 3 (2016); *see* Solar Stakeholder Report at 4 ("Through this process, a NEB customer, in essence, receives the value of the full retail rate . . . for any excess of generation above the customer's usage.").

[5] While Maine's NEB approach is not specific to solar, solar comprises the vast majority of DG resources utilizing NEB in Maine. *See, e.g.,* R. 29, *Public Utilities Commission*, Amendments to Net Energy Billing Rule (Chapter 313), No. 2016-222, Order Adopting Rule and Statement of Factual and Policy Basis, (Me. P.U.C. Mar. 1, 2017) ("Order Adopting Rule") at 10-11. In light of its prevalence, solar, and the costs of solar technologies, were major focuses in the rulemaking to amend Chapter 313. *See id.* at 4 ("the proposed reduction in nettable energy tracked the continuing declining costs of renewable technologies, *in particular solar photovoltaic (PV) technology.*") (emphasis supplied).

Unlike the vetoed bills, the Commission's amendments to Chapter 313 ("Chapter 313 Amendments"), which will begin affecting rates on January 1, 2018, drastically alter NEB, establishing a complex system that penalizes NEB customers, severely complicates implementation, and as a result, will discourage development of DG, including solar. Not only do the Chapter 313 Amendments phase out NEB on the transmission and distribution portion of a customer's electricity bill over 10 years (with 15-year grandfathering terms), but they also assess a charge on NEB customers for the electricity that the customers generate and use behind the meter at their home or business that never enters the utility's infrastructure or is otherwise serviced by the utility. To add insult to injury, because electricity generated and consumed behind the meter is, by definition, not monitored by existing meters, implementation of these new charges will require changes in how DG projects are designed and installed, and will require all ratepayers (not just NEB customers) to pay for additional metering, data collection, reporting, management systems, and complex new billing software.[6] For existing NEB customers, the Chapter 313 Amendments will require, in 15 years, retrofitting their systems to splice in the additional metering and data reporting equipment – which may not even be technically possible in certain cases.[7]

The Commission did not base these revisions upon the costs of servicing NEB customers, but rather on its unsubstantiated and untested presumption that NEB

[6] *See* Supplemental Record 13/315 Preliminary Comments of ReVision (Oct. 12, 2016) at 9.
[7] *See* R. 20, Supplemental Comments of ReVision (Nov. 2, 2016) at 1-2.

customers do not adequately compensate the utility for the service they receive, resulting in lost revenue to utilities and a "cost shift" to non-NEB customers. As such, the Chapter 313 Amendments violate relevant law concerning the development and application of rates and exit fees, unjustly discriminate against customers who invest in DG energy systems, and exceed the Commission's statutory authority. Beyond these substantive flaws, the Commission failed to follow critical procedural requirements and either ignored or failed to ascertain basic facts throughout the rulemaking proceeding to amend Chapter 313.

This challenge requests that the Court vacate the Chapter 313 Amendments and reinstate Chapter 313 as it existed prior to the rulemaking. Conservation Law Foundation ("CLF"), Industrial Energy Consumer Group ("IECG"), ReVision Energy LLC ("ReVision") and Natural Resources Council of Maine ("NRCM") (collectively, "Appellants") also request that the Court find that changes to the structure of NEB amount to rate changes, and that the Commission must follow the provisions of law applicable to rate changes should it choose to revise NEB in the future.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Rulemaking Process

In 2016, the Commission initiated an inquiry into whether the NEB rule should be modified pursuant to Chapter 313 § 3(J) (2016).[8] *Public Utilities Commission*, Commission Initiated Inquiry into Net Energy Billing Rules (Chapter 313), No. 2016-120, Notice of Inquiry (Me. P.U.C. June 14, 2016) ("Notice of Inquiry"). The Commission's inquiry was prompted by a letter from Central Maine Power Company ("CMP"), Maine's largest utility, claiming that at the end of 2015, the cumulative capacity of CMP's NEB customers surpassed 1% of its peak demand (a claim accepted at face value by the Commission but which subsequently proved to be false).[9] *Id.* at 1.

In response to the Notice of Inquiry, the Commission received more than 330 written comments from interested parties. As acknowledged by the Commission, "a ***vast majority*** of public comments urged the Commission not to initiate a rulemaking proceeding or make any changes to NEB." R. 2, *Public Utilities Commission*,

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[8] Chapter 313 § 3(J) provided that a "transmission and distribution utility shall notify the Commission if the cumulative capacity of generating facilities subject to the provisions of this Chapter reaches 1.0 percent of its peak demand. Upon notification, the Commission will review this Chapter to determine whether net energy billing pursuant to this Chapter should continue or be modified."

[9] For the calculation underlying CMP's letter, CMP used direct current ("DC") facility ratings for certain installations rather than alternating current ("AC") ratings as required by the Commission. *See* R. 14, Supplemental Comments of CMP (Nov. 1, 2016) at 3. After other commenters identified the error, CMP recalculated the cumulative capacity using the appropriate AC ratings, and determined that at the time of its notification letter, the cumulative capacity level of its NEB customers was below 1%. *Id.* Thus, no cause existed under Chapter 313 § 3(J) at the end of 2015 for the Commission to conduct a review of the NEB system.

Amendments to Net Energy Billing Rule (Chapter 313), No. 2016-222, Notice of Rulemaking (Me. P.U.C. Sept. 14, 2016) ("Notice of Rulemaking") at 3 (emphasis supplied). As the Commission also recognized, many commenters argued "that no changes should be made to the rules at this time, in light of potential future review of NEB and solar power incentives in Maine by the legislature." *Id.*

Nevertheless, the Commission decided to initiate a rulemaking proceeding to amend Chapter 313, emphasizing its position that revisions were necessary to address a supposed shift of lost utility revenue from NEB customers to non-NEB customers. Notice of Rulemaking at 1. The Commission conducted no analysis or investigation to bolster that presumption, and referenced no supportive evidence.

In its Notice of Rulemaking, the Commission highlighted the changes it proposed making to Chapter 313:

1. NEB for transmission and distribution charges would phase out over ten years such that new NEB customers would receive a lower rate than NEB customers who joined the previous year;
2. NEB customers would maintain their rate, based upon the year they initiated NEB service, for 15 years;
3. while the NEB system remained in place, NEB customers' full output would offset their electricity consumption with respect to the supply cost charged by the utility, but only a percentage of their output would offset charges for transmission and distribution costs;
4. the maximum capacity of an eligible generating facility would increase from 660 kilowatts to one megawatt; and
5. the proposed rule would provide for different types of NEB arrangements including community NEB, allowing more customers to participate in and benefit from DG.

Id. at 6-7. The Notice of Rulemaking did not include an estimate of the Chapter 313 Amendments' impact on small business (nor indicate where one might be found, as required by statute), 5 M.R.S. §§ 8052(5-A), 8053(3)(F), nor did it provide an estimate of the fiscal impact of the rule, also required. *Id.* § 8057-A(1)(C). Further, the fundamental structural change that the Commission ultimately made – assessing service charges for electricity generated and consumed behind the meter on NEB customers and requiring installation of a second meter to gauge that consumption – was entirely absent from the Notice of Rulemaking.

The response to the Commission's solicitation for public comment was overwhelmingly in support of preserving net metering. *See generally* Supplemental Record (hereafter "Supp. R."); *see* R. 29, *Public Utilities Commission*, Amendments to Net Energy Billing Rule (Chapter 313), No. 2016-222, Order Adopting Rule and Statement of Factual and Policy Basis, (Me. P.U.C. Mar. 1, 2017) ("Order Adopting Rule") at 4 ("The Commission also received a large number of public comments . . . which primarily supported solar incentives to address climate change and promote jobs in the solar industry. These comments were in opposition to changes to the NEB rules."). As with its Notice of Inquiry, the Commission received over 300 comments from concerned citizens, small businesses, solar industry representatives, utilities, and renewable energy advocates, among others. More than 35 persons testified at the public hearing on the proposal. *See* R. 11, Transcript of Public Hearing (Oct. 17,

2016).[10] Appellants, in their comments, urged the Commission *inter alia* to conduct a "full and transparent adjudicatory investigation" into the costs and benefits of NEB rather than basing the rulemaking on unverified presumptions that NEB results in shifting transmission and distribution costs from NEB customers to non-NEB customers. Supp. R. 13/315, Preliminary Comments of ReVision (Oct. 12, 2016) at 2; *see also* R. 10, Comments of IECG (Oct. 17, 2016) at 3.

II. The Chapter 313 Amendments

The Commission's final product, issued in March 2017, went even further than the proposed changes it gave notice to six months previously.

First, the Commission declined to conduct or provide any analysis, studies, or expert opinion to support its presumptive conclusion that "the NEB mechanism results in a shift of T&D utility revenue responsibility from NEB customers to non-NEB customers with corresponding impacts on the rates of non-NEB customers." Order Adopting Rule at 2. This, despite the Commission's acknowledgment that numerous commenters had called attention to the glaring absence of any "analysis of

[10] Fewer than ten persons expressed support for phasing out NEB, but even they significantly criticized the proposed amendments. *See, e.g.,* R. 8, Emera Maine Comments (Oct. 13, 2016); R. 9, Comments of CMP (Oct. 14, 2016); R. 12, Comment of Ahmad Faruqui, Principal with the Brattle Group (Oct. 24, 2016); R. 13, Comments of Ashley C. Brown, Executive Director of Harvard Electricity Policy Group (Oct. 31, 2016); and, *see* Supp. R. 14/315, Comments of Barbara Alexander, Consumer Affairs Consultant (Oct. 26, 2016). Indeed, even some commenters who were generally in favor of phasing out NEB opposed the Commission's proposal. *See, e.g.,* R. 23, Comments of the Office of the Public Advocate (Nov. 2, 2016); R. 7, Comments of Governor's Energy Office (Oct. 12, 2016).

the benefits and costs of solar installations."[11] *Id.* at 6. As such, the Order Adopting Rule is bereft of any record evidence for its finding that NEB customers do not pay just and reasonable rates to the utility for the service they receive, resulting in a shift of costs to non-NEB customers. *See id.* at 5-11.

Second, operating in this fact free zone, it is not surprising that the Commission came up with a concept of its own invention, "gross metering", to fundamentally alter the NEB mechanism. As explained by the Commission, "[n]ettable energy is now the entire amount of energy generated by the facility, including the amount consumed by a customer behind the meter. Hence, the amended rule nets on a gross basis rather than a net basis."[12] Order Adopting Rule at 16. Under the concept of gross metering, NEB customers will be charged transmission and distribution costs for their full amount of consumption, including that which the utility did not service in any way, while the amount of output that offsets those charges decreases over time. After an initial fifteen-year participation term, the Chapter 313 Amendments provide that NEB customers can use "zero percent of the gross output for determining net energy for the customer's T&D bill." Chapter 313 at § 3(G). In other words, NEB customers' transmission and distribution

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[11] For instance, the Commission noted that Appellant IECG "suggested that the Commission conduct an investigation to consider whether the benefits outweigh costs and to determine if a cost shift occurs." Order Adopting Rule at 6.

[12] Despite this clarification, the Commission, inexplicably, also maintained its claim that "[n]etting regarding the supply portion of the customer bill remains unchanged." *Id.* at 1.

charge will be calculated as 100% of their gross electric energy consumption multiplied by the applicable rate for transmission and distribution service, with no percentage reduction. Thus, this system will impose transmission and distribution charges upon electricity that NEB customers produce and consume themselves behind the meter.

Third, the final rule maintained widely criticized provisions from its initial proposal, including the ten-year phase-out of NEB and fifteen-year grandfathering provisions. Order Adopting Rule at 15-19.

Finally, the provisions in the proposed rule that were widely supported, the expansion on the size of eligible facilities and the number of customers who could participate in a community solar project, were withdrawn. *Id.* at 20-22.

III. Petition for Reconsideration

Appellants filed a Petition for Reconsideration on March 21, 2017, on the basis that the Order Adopting Rule failed to advance the public interest, unjustly discriminated against and violated the rights of customers to generate electricity behind the meter, and was not based on sufficient evidence. R. 33, *Public Utilities Commission*, Amendments to Net Energy Billing Rule (Chapter 313), No. 2016-222, Petition for Reconsideration of NRCM, CLF, ReVision, Insource Renewables, and

IECG (Mar. 21, 2017). The Commission did not respond within 20 days, rendering the Petition denied pursuant to 65-407 C.M.R. ch. 110, § 11(D).[13]

IV. Motion to Dismiss

Appellants filed this appeal on May 1, 2017. The Commission filed a Motion to Dismiss the appeal for lack of jurisdiction on June 16, 2017. After the issue was briefed by the parties, the Court directed the parties that it would consider the Motion to Dismiss at the time it considered the merits of the appeal, and that the parties should address the issue in their brief. (Order on Mot. Dismiss (June 27, 2017))

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does 35-A M.R.S. § 1320 authorize the Law Court to hear this appeal?
2. Does the Chapter 313 Amendments' imposition of transmission and distribution charges on distributed generation energy consumed behind the meter constitute unjust discrimination and an exit fee in violation of statute, and violate law requiring rates and charges to be based upon utilities' cost of serving customers?
3. Did the Commission exceed its statutory authority by promulgating the Chapter 313 Amendments?
4. As adopted by the Commission, are the Chapter 313 Amendments unsupported by substantial evidence in the record?

[13] "Any petition for rehearing, reopening or reconsideration not granted within 20 days from the date of filing is denied." 65-407 C.M.R. ch. 110, § 11(D).

5. Are the Chapter 313 Amendments void and of no legal effect because the Commission failed to adhere to the Maine Administrative Procedure Act in promulgating them?

SUMMARY OF THE ARGUMENT

I. Jurisdiction

The Court has jurisdiction over this appeal pursuant to 35-A M.R.S. § 1320, which provides the Law Court with jurisdiction over all final decisions of the Public Utilities Commission. The Chapter 313 Amendments constitute a final decision, because the rule became effective on March 29, 2017.

II. Summary of Argument

The Law Court has jurisdiction to hear and decide this appeal pursuant to 35-A M.R.S. § 1320(1), which grants the Law Court jurisdiction over all final decisions of the Commission. The Court should adhere to its precedent exercising that jurisdiction over a Commission rulemaking. The exception contained in 35-A M.R.S. § 1320(6) is to the Law Court's *exclusive* jurisdiction, and cannot be interpreted as a limitation on the Law Court's jurisdiction without creating inconsistencies within the statute or otherwise construing the statute to contain qualifications that are not present.

The Chapter 313 Amendments were promulgated in violation of ratemaking law and violate statutory prohibitions against exit fees and unjust discrimination because they impose utility charges on service that customers supply to themselves.

The Chapter 313 Amendments also exceed the Commission's statutory authorization by fundamentally altering the structure of NEB so that it is no longer net metering as defined by Maine law, and because NEB is now a system that will hamper solar development rather than encourage it, contrary to state statutory policy. Further, the Commission's basic presumptions and findings underlying the Chapter 313 Amendments are unsupported by analysis or substantial evidence in the record.

Finally, in adopting the Amendments, the Commission did not comply with the Maine Administrative Procedure Act ("Maine APA"). The Commission failed to issue a small business impact statement, 5 M.R.S. § 8052(5-A), and failed to disclose estimated fiscal impacts to the DG industry, *id.* § 8057-A(1)(C) & (2). The Commission also failed to provide adequate notice and opportunity for comment because the final rule was a substantial departure from what the Commission outlined in its Notice of Rulemaking. *Id.* §§ 8052, 8053.

STANDARD OF REVIEW

This Court has a "longstanding practice of 'examin[ing] 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 v. 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. & Tel. Co. v. Pub. Util. Comm'n,* 148 Me. 374, 390, 94 A.2d 801, 809 (1953)).

The first issue presented regards this Court's jurisdiction, and as such it does not entail a review of the Commission's decision.

With respect to the second issue presented for review, 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). The Court will interpret a statute according to its plain language and will not defer to an agency's construction if the statute is unambiguous. *Cobb v. Bd. of Counselling Professionals Licensure,* 2006 ME 48, ¶ 13, 896 A.2d 271.

With respect to the third issue presented for review, "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 fourth issue presented for review, "[i]t is axiomatic that 'the powers of the Public Utilities Commission are derived wholly from statute.'" *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 753 (Me. 1976) (quoting *Stoddard v. Pub. Utils. Comm'n*, 137 Me. 320, 323, 19 A.2d 427, 428 (1941)). A decision that goes beyond that authority exceeds the Commission's jurisdiction and is of no effect. *Stoddard*, 137 Me. at 323, 19 A.2d at 428. To determine whether the Commission has exceeded its authority, the Court "must look to the statutes creating the Commission and endowing it with the power to regulate the public utilities of this State." *New England Tel. & Tel. Co.*, 362 A.2d at 753.

With respect to the procedural issues presented for review, the Court will not defer to the Commission's interpretation of the Maine APA. *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.").

ARGUMENT

I. The Court has Jurisdiction Over this Appeal Pursuant to 35-A M.R.S. § 1320

The Commission has moved to dismiss this appeal, arguing that the Superior Court has jurisdiction over final rules of the Commission and not this Court. The Commission's reading of 35-A M.R.S. § 1320(6) is overly broad and inconsistent with

the decisions of this Court. This Court should deny the Motion to Dismiss and exercise its jurisdiction over this appeal.

A. The Plain Language of 35-A M.R.S. § 1320(1) Confers Jurisdiction Over this Appeal on this Court

35-A M.R.S. § 1320(1) expressly provides the Law Court with jurisdiction to review final decisions[14] of the Commission, with no exceptions or qualifications:

> **Final decisions.** An appeal from a final decision of the commission may be taken to the Law Court on questions of law in the same manner as an appeal taken from a judgment of the Superior Court in a civil action.

Where, as here, "the meaning of the statute is clear on its face, then [the court] need not look beyond the words themselves." *Villas by the Sea Owners Ass'n v. Garrity*, 2001 ME 93, ¶ 4, 774 A.2d 1115 (quoting *Stage Neck Owners Ass'n v. Poboisk*, 1999 ME 52, ¶ 9, 726 A.2d 1261).

The Commission bases its motion to dismiss on the language of § 1320(6), which addresses this Court's exclusive jurisdiction:

> **Law Court jurisdiction is exclusive.** The Law Court has exclusive jurisdiction over appeals and requests for judicial review of final decisions and of rulings and orders subject to subsections 1 and 5, with the exception of the Superior Court's jurisdiction to review rules under Title 5, section 8058.

While § 1320(6) does introduce an exception to this Court's *exclusive* jurisdiction, that only provides the Superior Court with concurrent jurisdiction – it does not deprive this Court of any jurisdiction. Reading § 1320(6) to preclude the Law Court's jurisdiction over rules creates a direct inconsistency with the unqualified grant of

[14] A final agency rule constitutes a final agency decision. *See, e.g., Cumberland Farms Northern, Inc. v. Me. Milk Comm'n*, 428 A.2d 869, 873 (Me. 1981).

jurisdiction over final decisions found in § 1320(1). Long-standing principles require courts to interpret statutes to facilitate internal consistency and harmony. *See, e.g., Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 15, 957 A.2d 94 (construing "statutory language to avoid absurd, illogical, or inconsistent results," (quoting *Nasberg v. City of Augusta,* 662 A.2d 227, 229 (Me. 1995)), "so that a harmonious result, presumably the intent of the Legislature, may be achieved." (quoting *York Mut. Ins. Co. v. Bowman,* 2000 ME 27, ¶ 5, 746 A.2d 906)).

A plain reading of 35-A M.R.S. §§ 1320(1) and 1320(6) undermines the Commission's contention that the Law Court's jurisdiction is limited to final decisions resulting from adjudicatory proceedings. (*See* Mot. Dismiss (June 16, 2017) at 3.) Words imposing the significant limitation advanced by the Commission are simply not present. It is beyond argument that absent such language, no limitation can be inferred. *See, e.g., Andrews v. Sheepscot Island Co.*, 2016 ME 68, ¶ 12, 138 A.3d 1197, as corrected (Sept. 27, 2016) ("[W]e do not read exceptions, limitations, or conditions into an otherwise clear and unambiguous statute."(quoting *Adoption of M.A.*, 2007 ME 123, ¶ 9, 930 A.2d 1088)).

B. This Court's Precedent Supports its Exercise of Jurisdiction Over this Appeal

There is clear precedent to support this Court's jurisdiction over a direct appeal from a rulemaking decision of the Commission. In *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 1999 ME 119, 734 A.2d 1120 ("*CMP v. PUC*"), the appeal, like this one, was

from the Commission's "promulgation of a rule," *id.* at ¶ 1, and filed pursuant to 35-A M.R.S.A. § 1320. *Id.* at ¶ 6. Although in that case the Commission did not raise the jurisdictional issue it asserts here, and the *CMP v PUC* court accordingly did not expressly consider the issue, it is well established that even where "neither party has raised the question of jurisdiction, it is [the Court's] duty to assure [itself] of, and examine, [its] own jurisdiction before deciding the merits of an appeal." *Olsen v. French*, 456 A.2d 869, 871 (Me. 1983). "The Law Court on its own initiative must take note of matters raising questions as to its own jurisdiction." *Id.* (citing *Coates v. Me. Employment Security Comm'n*, 428 A.2d 423, 425 n. 3 (Me. 1981); *Brann v. State*, 424 A.2d 699, 702 (Me. 1981); *Look v. State*, 267 A.2d 907, 908–09 (Me. 1970)). Thus, the fact that the *CMP v PUC* court accepted and decided the case indicates that it was "assure[d]" of its own jurisdiction, even if it did not make an express determination. *Id.*

It is immaterial that *CMP v. PUC* was filed pursuant to 35-A M.R.S. § 1320(5) as well as § 1320(1).[15] Section 1320(5) expands the Law Court's jurisdiction over *nonfinal* decisions of the Commission raising constitutional issues. *See, e.g., Quirion v. Pub. Utils. Comm'n*, 1997 ME 47, ¶¶ 1, 4, 691 A.2d 205 (explaining that § 1320(5) provides for interlocutory appeal of constitutional issues); *see also* Review of rulings and orders of the Public Utilities Commission, 3A Maine Prac., Maine Civil Practice §

[15] 35-A M.R.S. § 1320(5) provides: "**Additional Court review.** An appeal may also be taken in the same manner as an appeal under subsection 1, when the justness or reasonableness of a rate, toll or charge by any public utility or the constitutionality of any ruling or order of the commission is in issue, *notwithstanding that the ruling or order is not final.*" (Emphasis supplied).

A22:1 (3d ed.) ("Appeals from the [Commission] may also be taken in the same manner on an interlocutory basis when the justness of a rate or the constitutionality of an order is in issue even if the ruling or order is not final."). Beyond the expansion of jurisdiction for nonfinal rulings, however, § 1320(5) does not create a separate right to review for constitutional issues. Indeed, such a special right would be superfluous where § 1320(1) already grants the Law Court jurisdiction over all Commission appeals presenting questions of law, including those containing constitutional issues. *See, e.g., City of Bangor v. Diva's, Inc.*, 2003 ME 51, ¶ 10, 830 A.2d 898 (noting that the application of constitutional concepts is a question of law); *Morris v. Goss*, 147 Me. 89, 98, 83 A.2d 556, 561 (1951) (explaining that the constitutional issue of whether certain facts can constitute an emergency within the meaning of the Constitution is a question of law). In any case, the Court in *CMP v. PUC* gave no indication that its jurisdiction turned upon the constitutional nature of appellant's claims, or that it heard the appeal pursuant to § 1320(5) instead of § 1320(1). Thus, there is no reasonable basis for distinguishing *CMP v. PUC* from the case at hand, and the Court should adhere to that precedent.

Finally, judicial review of Commission decisions is different than appeals from agency actions generally. Unlike most agency actions, which are appealable to the Superior Court pursuant to the Maine APA, the Legislature deemed appeals from Commission final decisions sufficiently pressing to warrant appeal directly to the Law

Court. *Compare* 35-A M.R.S. § 1320 *with* 5 M.R.S. § 11001. Similarly, other legislatures throughout New England consider appeals of utility regulators' decisions significant enough to warrant expediency.[16] The underlying rationales, for instance the far-reaching applicability of Commission decisions to all ratepayers and immediate implications, apply as strongly to final rules of the Commission as they do to its other final decisions.

II. The Imposition of Transmission and Distribution Charges on NEB Customers for Energy Generated and Consumed Behind the Meter Results in Unlawful Exit Fees and Constitutes Unjust Discrimination

As discussed *supra*, one of the key features of the Chapter 313 Amendments is their imposition of charges for transmission and distribution service on NEB customers based upon all electricity consumed, including energy generated and consumed behind the meter which never uses the utility grid. This aspect of the Chapter 313 Amendments violates the statutory prohibition against the imposition of exit fees, 35-A M.R.S. § 3209(3), as well as the statutory prohibition against unjust discrimination in setting rates, *id.* § 702.

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[16] *See, e.g.*, Mass. Gen. Laws ch. 25, § 5 ("An appeal as to matters of law from any final decision, order or ruling of the commission may be taken to the supreme judicial court . . . ."); Vt. Stat. Ann. tit. 30, § 12 ("A party to a cause who feels aggrieved by the final order, judgment, or decree of the Board may appeal to the Supreme Court."); 39 R.I. Gen. Laws Ann. § 39-5-1 ("Any person aggrieved by a decision or order of the commission may . . . petition the supreme court for a writ of certiorari to review the legality and reasonableness of the decision or order."); *see also* Venue, Generally, 2 State Environmental L. § 14:35 (Dec. 2016) ("These [public utilities] commissions often have specific judicial review sections which are exclusive and which may authorize review only in the state supreme court.").

The violations result from the fundamental flaw in the Order Adopting Rule – the failure to recognize that the development of rates for NEB is a retail ratemaking exercise. This is demonstrated definitively by the fact that Congress specifically classifies "net metering" as a ratemaking standard that it directs state utility regulators to consider in setting rates for electric utilities. 16 U.S.C. § 1241(a), (d)(11).[17] The Commission has authority to develop retail rates for NEB customers, but it must do so in the way it sets rates for all other customers – based on cost of service, and without undue discrimination. The Chapter 313 Amendments fail to even attempt this, instead focusing on the costs of solar generation technology, which it has no authority to consider in setting retail rates, and on an unsubstantiated assertion of a utility lost revenue "cost shift."

The overarching principle of utility ratemaking is that any "rate, toll or charge" for utility service must be "just and reasonable." 35-A M.R.S. § 301. Courts have consistently interpreted "just and reasonable" to mean rates based on the utility's cost of providing service. *See, e.g., New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A. 2d 8, 14 (Me. 1978) ("Ratemaking in theory is a relatively simple process. To the cost of producing the service furnished is added a reasonable return to the investor."); *see also Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). 35-A M.R.S. § 303

[17] To the extent the Commission deviates from the federal definition of net metering in establishing rules regulating consumer owned generation, it risks violating the exclusive jurisdiction of the Federal Energy Regulatory Commission over the wholesale sale of generation under Federal Power Act. 16 U.S.C. § 791 *et seq.*

codifies the principles established by a century of utility regulation, litigation and judicial review that limit utilities to recovering only their prudent costs and a reasonable rate of return on their investment – in authorizing rates, "the commission shall give due consideration to evidence of the cost of the property when first devoted to public use," less depreciation and other factors.

Further, the Maine Electric Rate Reform Act requires "the commission to relate transmission and distribution service rates more closely to the costs of providing transmission and distribution service," 35-A M.R.S. § 3152(1)(A), and to "set rates to the extent practicable to achieve economic efficiency." *Id.* § 3152(1)(D). These duties include, *inter alia*, setting "[r]ates that reflect marginal costs of services . . . ." *Id.* § 3153-A(1)(B). The Chapter 313 Amendments deviate from the clear principles established by this Court's precedent and mandated by statute.

Rates, of course, are neither set at a single level for all customers nor separately for individual customers. Rather, customers are grouped into classes based on common usage characteristics, such as the level of voltage at which customers take service. Individual rate elements, such as charges calculated on volume of energy consumed, maximum demand at a given moment, and a basic "customer" charge for the minimum unavoidable costs imposed by virtue of signing up for service are also reviewed and authorized as part of the rate design process. In establishing rates for individual classes and rate elements, the Commission carefully analyzes the specific

cost imposed on the utility system by the service in question as well as other relevant factors, such as rate design stability. *Id.* § 310(1). The exercise of this regulatory discretion, popularly described by the late Professor James Bonbright in *Principles of Public Utility Rates* (1969), has long been recognized by this Court and the Commission in undertaking the difficult task of electric utility rate design. *See, e.g., Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A. 2d 153, 186-194 (Me. 1979).

If this discussion of the cost based determination of rates and charges seems out of place, there is good reason: in amending Chapter 313, the Commission did none of it. Indeed, the Commission conducted no analysis of the cost of serving NEB customers, let alone in comparison to the cost of serving other similarly situated residential and commercial customers. No party, including the utilities themselves, which hold all the information on their cost of service, was invited to submit cost of service studies or submitted such studies.[18]

The only "data" filed was CMP's assertion that is had suffered "lost revenues" in 2016 of $1.8 million.[19] The Order Adopting Rule specifically measures the value of the supposed "cost shift" as lost revenues. Order Adopting Rule at 7 ("the actual amount of this cost shift can be determined with reasonable accuracy and Maine utilities track this lost revenue"). However, neither the term "cost shift" nor "lost

[18] Appellants pointed out that the Commission failed to conduct a cost analysis of NEB in their written comments submitted during the rulemaking proceeding. *See, e.g.,* Supp. R. 13/315, Preliminary Comments of ReVision (Oct. 12, 2016) at 2; *see also* R. 10, Comments of IECG (Oct. 17, 2016) at 3.
[19] *See* Order Adopting Rule at n. 14

revenues" are statutorily defined, rate design terms of art or terms used previously in a Maine rate design proceeding. Put simply, the untested number represents a guess by CMP of what it *would have* received in additional revenues *if* its NEB customers had not generated some of the electricity they consumed.

More importantly, "lost revenues" and "cost shift" are not measures of cost of service. Factors legitimately affecting the cost of serving NEB customers would include the cost of providing the utility service that NEB customers consumed despite their DG, the contribution of NEB customers to the avoidance of utility system costs such as the reduced need for investment in transmission and distribution lines to meet higher local peak loads that would occur without the NEB self-generation, the grid reliability benefits provided by NEB customers' DG, and similar factors. Indeed, several commenters cited the Commission's own Value of Solar Study as supporting the existence of substantial system savings derived from the presence of local generation owned by NEB customers. *See* R. 26, *Public Utilities Commission,* Commission Inquiry into the Determination of the Value of Distributed Solar Energy Generation in the State of Maine, No. 2014-171, Final Value of Solar Study (Revised Apr. 2015) (Me. P.U.C. Apr. 15, 2015) ("Value of Solar Study.").

Rather than engaging in a reasoned exercise in determining costs of service and ratemaking, these sections of the Chapter 313 Amendments are the equivalent of allowing a grocer to charge for the vegetables grown by customers in their own

gardens, or allowing an oil dealer to charge customers for burning firewood cut off their own land. While the customer's decision to grow vegetables or cut firewood may disappoint a vendor and result in less revenue, it does not increase the vendor's costs. Similarly, CMP's bald assertion of lost revenues is not proof that NEB customers provide revenues inadequate to cover the cost of serving them. For the reasons described herein, imposing utility charges based on this theory is contrary to Maine law.

A. Imposing Transmission and Distribution Charges on Energy Produced and Consumed Behind the Meter Constitutes an Illegal Exit Fee

Maine statute explicitly prohibits the imposition of "exit fees . . . in any form" on customers who reduce or eliminate consumption of electricity by utilizing DG, converting to an alternative fuel, or conserving energy. 35-A M.R.S. § 3209(3). The Chapter 313 Amendments' provisions for imposing transmission and distribution charges on gross energy consumed rather than energy actually delivered from the utility grid constitutes an unambiguous example of an exit fee by charging customers based upon the volume of service that they would have purchased from the grid had they not installed DG equipment.

There is no factual dispute regarding the nature of the charges imposed by the Chapter 313 Amendments. The Chapter 313 Amendments impose delivery charges

applying the gross metering concept. Therefore, the question of whether that constitutes an exit fee is one of statutory interpretation.[20]

In this instance, the statute is unambiguous. 35-A M.R.S. § 3209(3) provides:

> 3. Exit fees. A customer who significantly *reduces or eliminates consumption of electricity due to self-generation*, conversion to an alternative fuel or demand-side management may not be assessed an exit or reentry *fee in any form for the reduction or elimination of consumption* or reestablishment of service with a transmission and distribution utility.

(Emphasis supplied). The Chapter 313 Amendments directly violate this provision. Specifically, NEB customers that 1) reduce their consumption of electricity from the grid, 2) due to self-generation,[21] 3) are subjected to a charge "in any form" as a result of this reduction. Indeed, the Commission's definition of "cost shift" mirrors the concept of an exit fee. Specifically, the Commission states that the appropriate measure of this cost shift is lost revenues to the utility. *See, e.g.,* Order Adopting Rule at 7 ("the actual amount of this cost shift can be determined with reasonable accuracy and Maine utilities track this lost revenue"). The statutory prohibition on exit fees explicitly recognizes that this can never be the legitimate basis of a charge imposed on a customer. The Commission's imposition of an exit fee in the Chapter 313 Amendments is based on the fallacy that these customers have some obligation to purchase a volume of service that exceeds their actual consumption from the grid.

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[20] Unless it is ambiguous, the statute must be interpreted according to its plain language. *Cobb*, 2006 ME 48, ¶ 13, 896 A. 2d 271.

[21] Self-generation is defined in 35-A M.R.S. § 102(16-A): "the generation of electricity for the use of an entity that owns, leases, operates, controls or manages, in whole or in part, generation assets, as defined in section 3201, subsection 10, provided that the electricity is not transmitted over transmission and distribution plant, as defined in subsection 20-A."

However, as discussed *supra*, Maine law requires that rates be set based upon the cost of the service that a customer is actually taking.

Prior to the Legislature's enactment of § 3209(3), the Commission addressed the policy reasons for not allowing exit fees:

> The Commission does not believe exit fees are either practical or appropriate. Proponents of exit fees claimed that the demand for electricity of particular customers has caused utilities to incur certain costs on their behalf, and that these same customers should pay these costs. This claim is doubtful. Power purchases are rarely customer-specific. Moreover, if the idea is to match cost-recovery with cost-causation, some daunting questions emerge. Should customers have to be on the system any particular length of time before any exit fee would apply? Should customers who entered the system last year be required to pay an exit fee if they leave the system next year? If so, should the amount of the exit fee be the same as for a customer that has been on the system for 30 years? Should exit fees apply to customers that enter the system in the future? None of these questions has a felicitous answer.
>
> Exit fees could also adversely affect Maine's business climate. If exit fees applied to businesses who were utility customers on a specific date, only newer businesses could switch power suppliers without paying an exit fee. If exit fees applied to new customers, it could dissuade businesses from entering the State. What business would move to Maine if its flexibility to move in the future were so constrained?
>
> Exit fees are an extraordinary remedy. That approach might be justified where its absence would result in either extreme financial stress on the utility or unacceptable rate increases for utility ratepayers. An exit fee or similar rate design should not be adopted without a substantial demonstration of ratepayer harm.

Re Electric Utility Industry Restructuring, Docket No. 1995-462, Report and Recommended Plan (December 31, 1996) ("Restructuring Plan") at 111-12. In addition to the Chapter 313 Amendments' plain violation of statute with respect to exit fees, the same policy considerations exist here.

The Order Adopting Rule attempts to evade the exit fee restriction by asserting that its imposition of transmission and distribution charges on NEB customers is lawful because the program is "voluntary." Order Adopting Rule at 18. This is a false premise. First, buying power from the grid could likewise be called "voluntary," but

that does not give utilities or the Commission free license to charge any fee whatsoever or excise burdensome or arbitrary regulatory requirements. Rather, the Commission must follow statutory criteria in setting rates and applying charges. Second, there is no "voluntary" escape hatch under § 3209(3). Indeed, the bar applies to exit fees "in any form," which would include a fee for a voluntary program. Third, as a practical matter, the Chapter 313 Amendments' charges are not voluntary. There is no other reasonable way to interconnect behind the meter DG with the utility grid. Fourth, all existing NEB customers who have previously made investments in DG will be subject to the gross metering approach after their grandfathering time period expires. For these customers, the new NEB program is not "voluntary" at all.

This Court should vacate the Chapter 313 Amendments' provisions that impose transmission and distribution charges on gross energy because they fail to follow statutory mandates pertaining to ratemakings and constitute illegal exit fees under Maine law. *See, e.g., Office of Pub. Advocate*, 2005 ME 15, ¶ 18, 866 A.2d 851.

B. Imposing Delivery Charges on Energy Produced and Consumed Behind the Meter Constitutes Unlawful, Unjust Discrimination

Rates for utility service subject to the jurisdiction of the Commission may not unjustly discriminate against any individual customer or group of customers and may not "prejudice or disadvantage … a particular person." 35-A M.R.S. § 702(1). Unjust discrimination includes charging one customer or group of customers an amount that is "higher than that charged by the same utility for the same service or service of

similar value and cost rendered to other users or consumers." *Id.* § 1309(4); *see also Am. Tel. & Tel. Co. v. Cent. Office Tel.*, 524 U.S. 214, 223 (1998) ("the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services"). In addition, Maine's statutory prohibition against unjust discrimination explicitly identifies customers using solar energy as a class of customers that may not be discriminated against:

> 2. Solar energy. No public utility providing electric or gas service may consider the use of solar energy by a customer as a basis for establishing higher rates *or charges* for energy or service sold to the customer.

35-A M.R.S. § 702(2). As discussed previously, the Commission has explicitly stated that in adopting the Chapter 313 Amendments, it was responding directly to developments regarding the cost of solar technology.[22]

As discussed *supra*, the Commission performed no analysis of the utilities' costs of providing service to NEB customers in comparison to others, relying instead on assertions of cost shifting and utility lost revenue. The Commission's facile analysis ignores the fact that other similarly situated customers may equally reduce their consumption by installing energy efficiency equipment, by fuel switching (e.g., switching from electricity to gas or oil for space or water heating), due to changing household circumstances (e.g., a child going off to college), or by simply declining to use electricity when they otherwise might (e.g., not running an air conditioner on a hot

[22] *See supra* n.5.

day). Under the Commission's overly broad definition, when these customers reduce their usage, they are also "shifting" costs onto other customers and should be subject to additional charges to reflect the lost revenue resulting from their decisions, yet the Commission utilizes the "cost shifting" analysis for NEB customers *only*. The fallacy of this logic, of course, is that utility customers are under absolutely no obligation to purchase any particular volume of service. This truth applies to all utility customers, including NEB customers.

To the extent that existing rates are inadequate to cover minimum utility cost levels related to providing service, utilities are permitted to propose rates that implement customer related charges or minimum charges to ensure that necessary costs are recovered from every customer. However, the Commission asserts that minimum bills and customer charges are not adequate to recover the utility's full cost of service for the utility's fixed costs. Order Adopting Rule at 7. If that is the case, those rates should be changed. The Commission has authorized rates for customers using minimum levels of service that every customer is eligible to take. The answer is not singling out NEB customers for special charges by calculating their transmission and distribution bills in an entirely different manner from all other customers, resulting in charges "higher than that charged by the same utility for the same service or service of similar value and cost rendered to other users or consumers," 35-A M.R.S. § 1309(4), therefore constituting unjust and unlawful discrimination. *Id.* § 702.

The solution is to properly answer the question the Order Adopting Rule seeks to avoid: How much does it cost to provide T&D service to NEB customers?

Further, the Commission's finding with respect to cost shifting is inconsistent with its prior determinations. Maine has a long history of DG, both in practice and in regulation, and multiple statutes protect the ability of customers to produce and consume their own power without penalty or interference. In its 1996 order on industry restructuring, the Commission explicitly found that the loss of revenue due to customer DG is a risk borne by utilities for which they are compensated in their rates of return.

> Not all costs that become unrecoverable are "stranded" by retail competition. Customers may reduce or even eliminate electricity usage by self-generating, fuel switching, production cutbacks, energy conservation, and bypassing the utility's system entirely. All these activities result in fewer revenues available to the utility to pay the fixed costs of operations. These customer options, however, exist under current regulation as much as they would after retail competition begins.

Restructuring Plan at 99. The Commission's finding in the Order Adopting Rule with respect to cost shifting effectively reverses this fundamental premise.

Finally, the Commission improperly relied on projections of the cost of solar equipment in establishing retail transmission and distribution rates. For instance, it states, "the proposed reduction in nettable energy tracked the continuing declining costs of renewable technologies, in particular solar photovoltaic (PV) technology." Order Adopting Rule at 4. The cost of solar technology, however, is an external factor that is not related to the utility's cost of providing service. Using this cost as a basis for establishing delivery charges for this group of customers therefore violates the

requirement to set rates based on the utility's cost. Because no other customers have their rates set on this basis, it constitutes unjust discrimination.

The imposition of transmission and distribution charges on energy that is generated and consumed by NEB customers behind the meter, and therefore that never enters the utility grid, is unjustly discriminatory and should be rejected as being in violation of 35-A M.R.S. §§ 702, 1309(4). *See, e.g., Office of Pub. Advocate*, 2005 ME 15, ¶ 18, 866 A.2d 851.

III. The Chapter 313 Amendment's Gross Metering Approach and Imposition of Transmission and Distribution Costs on NEB Customers Exceed the Commission's Authority

The Commission derives its authority to implement NEB from the specific language found in 35-A M.R.S. § 3209-A:

> The commission may adopt or amend rules governing net energy billing . . . "Net energy billing" means a billing and metering practice under which a customer is billed on the basis of net energy over the billing period taking into account accumulated unused kilowatt-hour credits from the previous billing period.

The Chapter 313 Amendments so fundamentally alter the structure of the NEB system and its compensation method that it no longer constitutes NEB as intended by the Legislature, and as such, is not statutorily authorized.

The Legislature intended Maine's NEB statute to implement net metering. As explained *supra,* net metering is a commonly utilized compensation mechanism for DG, whereby electricity exported to the grid is netted against that imported. *See, e.g.,* Value of Solar Study at 139. Although net metering practices vary to some extent, the

general concepts are held in common and net metering is often described by reference to a figurative or literal electricity meter that runs backward when the customer's production exceeds consumption. *See, e.g.,* 1 Law of Independent Power § 4:28 (2017) ("Under [net metering], excess energy sold by a residential user with a small home energy system essentially runs the utility meter backwards . . . .").

Prior to the Chapter 313 Amendments, Maine's NEB regulation exemplified a net metering approach. *See, e.g.*, Solar Stakeholder Report at 4 ("Net energy billing is a common mechanism with several variations used by many states . . ."). The Commission explained that, under Maine's NEB rule, "excess generation from a customer's generating facility may be used as a kWh credit to offset that customer's electricity usage in a future billing period." Notice of Rulemaking at 1; *see also* Solar Stakeholder Report at 4. Consistent with the fundamentals of net metering, the Commission historically characterized NEB as "allowing the meter to run in both directions." Solar Stakeholder Report at 4.

In enacting the NEB statute, the Legislature intended to codify the Commission's approach to NEB as it then existed.[23] The statutory definition of NEB was crafted to "closely reflect" the method in use by the Commission at the time of the law's passage and enactment. Comm. Amend. A to L.D. 795, No. S-216, Summary

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[23] *See An Act to Expand Net Energy Billing: Hearing on LD 795 Before the J. Standing Committee on Energy, Utilities and Technology*, 125th Legis. (2011) (Testimony of Paulina McCarter Collins, Esq., Legislative Liaison, Public Utilities Commission) ("It appears to the Commission that the language in the bill is consistent with language in our current rule and that the bill would simply codify what currently exists by rule.").

(125th Legis. 2011). In 2011, Chapter 313 unquestionably offered DG owners the option of net metering. Thus, the Legislature intended for 35-A M.R.S. § 3209-A to offer net metering.

The Chapter 313 Amendments vastly diverge from net metering. Customer billing is no longer based upon the difference between energy imported into and exported out of the grid, but rather, under the concept of gross metering explained *supra*, upon the difference between the total amount of energy *generated* and the total amount of energy *consumed*. This is not merely a shift in semantics but will in fact lead to significant and grave differences in application, including the imposition of transmission and distribution charges on behind the meter consumption. *See supra* at 9-10.

The new system – necessitating installation of costly additional meters and complex wiring to facilitate the monitoring of behind the meter consumption by NEB customers;[24] charging NEB customers for services they are not utilizing; and requiring utilities to implement at least ten different levels of reimbursement simultaneously[25] –

[24] *See, e.g.*, R. 20, Supplemental Comments of ReVision (Nov. 2, 2016) at 1-2 ("As CMP commented, currently the utilities do not measure NEB generator output, nor do they measure behind the meter consumption of self-generated energy. CMP and others are concerned that it may not be technically possible, and many think it would be cost-prohibitive, to retrofit the thousands of existing NEB projects in Maine to meet this new requirement.").

[25] *See, e.g.*, R. 9, Comments of CMP (Oct. 14, 2016) at 8 ("Under [the ten-year phase out] methodology, each utility would have its existing number of grandfathered NEB agreements, as well as an array of new arrangements with varying percentages of T&D usage to be netted. This would represent a significant challenge in terms of programming a billing system to accurately track and administer this wide variety of arrangements.").

is a far cry from the simple and straightforward approach the Legislature adopted back in 2011 for the purposes of encouraging investment in, and development of, DG and in particular solar power. Indeed, the new methodology is antithetical to legislative intent underlying the statute and will undoubtedly make potential NEB customers reconsider their investment.[26] The Commission is empowered to implement NEB as net metering, but the provisions of the Chapter 313 Amendments that establish the gross metering approach and impose transmission and distribution charges for behind the meter consumption exceed that statutory authority. And it is indisputable that a Commission decision that goes beyond its authority is of no effect. *Stoddard*, 137 Me. at 323, 19 A.2d at 428.

Finally, the Commission exceeded its authority because the Chapter 313 Amendments directly conflict with statutory policy encouraging the development of renewable energy resources, including solar. Specifically, the Legislature has found that "it is in the public interest to develop renewable energy resources, including solar energy," and that solar "constitute[s] a valuable indigenous and renewable energy resource and that solar energy development, which is unique in its benefits to and impacts on the climate and the natural environment, can make a contribution to the

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[26] *See, e.g.*, Supp. R. 222/315, Public Comment of Nancy L. Gilbert (Oct. 31, 2016) ("My husband and I looked into solar and have only rejected it because of the state's lack of support and our fear of rules against it that loom in the future."); Supp. R. 291/315, Public Comment of Peter Barber (Nov. 2, 2016) ("After spending many hours and days researching solar PV array systems for my home, it is most dismaying to now be stopped in my tracks due to the PUC recent actions.").

general welfare of the citizens of the State . . . ." 35-A M.R.S. § 3472(1) & (2). Further, the Legislature has provided that it is state policy "to encourage the attraction of appropriately sited development related to solar energy generation," *Id.* § 3474(1), and that, in "encouraging the development of solar energy generation," the State will advance the following goals:

> A. Ensuring that solar electricity generation, along with electricity generation from other renewable energy technologies, meaningfully contributes to the generation capacity of the State through increasing private investment in solar capacity in the State;
> B. Ensuring that the production of thermal energy from solar technologies meaningfully contributes to reducing the State's dependence on imported energy sources;
> C. Ensuring that the production of electricity from solar energy meaningfully contributes to mitigating more costly transmission and distribution investments otherwise needed for system reliability;
> D. Ensuring that solar energy provides energy that benefits all ratepayers regardless of income level;
> E. Increasing the number of businesses and residences using solar technology as an energy resource; and
> F. Increasing the State's workforce engaged in the manufacturing and installation of solar technology.

Id. § 3474(2). Moreover, Maine law states that "it is the policy of this State to encourage the generation of electricity from renewable and efficient sources" including "solar arrays and installation," in order "to diversify electricity production," and sets forth specific targets to that end. *Id.* § 3210(1), (2)(C), (3-A).

The Chapter 313 Amendments proclaim with little sense of irony that "[t]he purpose of this Chapter is to implement the State's policy to encourage electricity generation from renewable resources through the adoption of requirements and standards for customer net energy billing." Chapter 313 § 1. The amended rule not only fails to advance these statutory goals, it moves Maine in precisely the opposite

direction, directly undermining these legislative policies by dispensing with NEB over ten years and levying unfair, unfounded, and unlawful charges upon NEB customers. The Commission proposes no substitute mechanism for achieving the state's goals. Accordingly, the new rule directly renders investment in DG less attractive, thereby destabilizing the solar marketplace and threatening to upend solar energy development in the state. These regulations are inconsistent with the goals and policies espoused by the state Legislature.

IV. The Commission's Findings with Respect to Shifting Costs and the Decision to Impose Transmission and Distribution Charges for Behind the Meter Consumption are Unsupported by the Record

The Chapter 313 Amendments are unsupported by substantial evidence in the record.[27] The Commission acknowledged that a threshold matter in the rulemaking was the costs and benefits of NEB, and recognized that a "central component of the debate [was] . . . the question as to whether the costs to the general ratepayers through the cost shift is outweighed by the societal benefits or value of small solar installations." Order Adopting Rule at 5, 7. Yet, the Commission declined to assess those costs and benefits, offered no explanation as to why lost revenue is an appropriate measure of costs associated with NEB,[28] and conducted no analysis of

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[27] *See, e.g., New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 32 (Me. 1978) ("We will not overturn the Commission's determination of a fair rate of return if the result is reasonable and the findings on which it is based are supported by substantial evidence.").

[28] The Commission offers the following explanation: "Moreover, the actual amount of this cost shift can be determined with reasonable accuracy and Maine utilities track this lost revenue as part of their annual NEB reports." Order Adopting Rule at 7.

whether costs, if they outweigh benefits, are shifted to other customers. Instead, the Commission stated throughout the Order Adopting Rule that

> Because the costs of the T&D system to serve NEB customers are still incurred by the utility, these costs are ultimately paid for by other customers. This is what is referred to as a "cost shift" and there can be no doubt that it exists.

Order Amending Rule at 7; *see also id.* at 2.

The Commission recognizes, as it must, given the results of its own Value of Solar Study, that "distributed generation, such as solar facilities, may have a value to ratepayers and the public in general over the longer term through reduced system costs, as well as environmental and economic development benefits." Notice of Rulemaking at 4. However, the Commission explicitly declined to consider such factors in adopting Chapter 313, finding that such value is location specific, and ignoring the Value of Solar Study. Order Adopting Rule at 7-9. The Commission provided no substitute assessment and conducted no further investigation into the benefits of solar or DG.

The Commission further ignores comments in the record that directly undermine its conclusion that there "can be no doubt" of cost shifting:

> In a recent Massachusetts rate case, Eversource recently made exactly the same allegations of a NEB cost-shift, with just as little evidentiary support as filed in Maine. In an Order issued Sept. 30, 2016, the Massachusetts Department of Public Utilities, after a full adjudicatory proceeding, held that the utility had failed to meet its burden to demonstrate that a cost-shift in fact exists:
>
> The Company purports that—DG customers may contribute significantly less to support the distribution system as a result of their reduced kWh usage, thereby shifting the recovery of distribution system costs to all non-DG customers . . . The Company has not quantified the amount of costs attributable specifically to DG customers and has not quantified the distribution system benefits associated with DG customers in its service territory . . . Other

> than quantifying net metering credits and citing to current rate design, the Company did not substantiate its cost-shift assumption with reasonable analysis and quantitative record evidence . . . As such, the Department is not persuaded that a cost-shift from DG customers to non-DG customers, in fact, exists. Therefore, we find that the basis of the Company's tiered customer charge proposal is not sufficiently supported. (Order, D.P.U. 15-155 at 458) (emphasis added).

Supp. R. 13/315, Preliminary Comments of Revision (Oct. 12, 2016) at 3-4; *see also* R. 10, Comments of IECG at 3 & n4.

The Commission erred as a matter of law by failing to consider all relevant information available to it. 5 M.R.S. § 8052(4). Its findings are clearly erroneous and not supported by the totality of evidence in the record. *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 414 A.2d 1217, 1232 (Me. 1980)).

V. Procedural Errors in the Rulemaking Render the Chapter 313 Amendments Void and of No Legal Effect

A. The Commission Failed to Issue an Economic Impact Statement as Required by the Maine APA

The Commission conceded that the small business impact statement required by the Maine APA, 5 M.R.S. § 8052(5-A), is required when a rule directly regulates a small business, but held that it was inapplicable in the rulemaking to amended Chapter 313, because, "[i]n this case, the rule at issue *only regulates the metering and billing activities of Maine's T&D utilities, and does not regulate the solar industry.*"[29] Order Adopting Rule at 13 (emphasis supplied). The Commission's premise is patently false. The plain

[29] The Commission's interpretation of the Maine APA is entitled to no deference. *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.").

language and regulatory scheme of Chapter 313 directly regulate DG industries including the solar industry and, more broadly, any small business in Maine that seeks to develop a DG facility.

First, the express purpose of the rule is "to implement the State's policy to encourage electricity generation from renewable resources through the adoption of requirements and standards for customer net energy billing." Chapter 313 § 1. It is plainly intended to regulate the solar industry, which, as the Commission noted, is the largest renewable resource sector participating in NEB. Order Adopting Rule at 10-11. And that is exactly how the rule is structured. The Chapter 313 Amendments directly regulate system eligibility, § 2(F) and § 3(C)-(F), compensation, § 3(I), interconnection requirements, § 3(M), the form of contract, § 3(N), and the duration of contracts, § 3(G), for all solar and other DG resources that seek to use NEB. Solar and other DG installers, acting as agent for their customers, are directly regulated by and must comply with each of these requirements. The majority of Maine's solar energy installers are qualified small businesses with 20 or fewer employees. 5 M.R.S. § 8052(5-A); *see, e.g.,* R. 3, Maine Association of Building Energy Professionals (Oct. 12, 2016) at 7 ("Of the roughly forty Maine-based solar installation firms, only one has more than 20 employees."). Accordingly, because these small businesses are directly regulated by and must comply with the Chapter 313 Amendments for each and every project they build, the Commission violated the Maine APA and acted arbitrarily and

capriciously by failing to conduct a small business impact analysis. *See* 5 M.R.S. § 8057(1) (rule adopted in violation of § 8052(5-A) is void and of no legal effect).

Second, the Commission is also wrong to say that the rule amendments only regulate utilities. Rather, the Chapter 313 Amendments directly regulate utility "customers" – defined as a person or an entity that takes electricity service through a utility. Chapter 313 § 2(C). *See, e.g., id.* at § 3(A) ("Any eligible customer may elect net energy billing for the customer's accounts or meters within the transmission and distribution utility's service territory"), § 3(B) ("Shared ownership customers may elect net energy billing pursuant to the requirements of this subsection"). As noted above, the Chapter 313 Amendments go on to specify all of the terms and conditions each *customer* must meet to participate in NEB. Further, the rule imposes annual reporting requirements on shared ownership customers. *Id.* at § 3(B)(2) & (4). Thus, because the rule "directly regulates" customers, which in Maine include many, many small businesses, the Commission erred by failing to produce the impact analysis required by statute and requested by Appellants. Order Adopting Rule at 12-13; 5 M.R.S. § 8057(1).

B. The Commission Failed to Adhere to the Maine APA's Requirements Relating to the Fiscal Impacts of a Proposed Rule

In its Order Adopting Rule, the Commission also refused to address impacts to DG industries on grounds that the disclosure of estimated fiscal impact required by the Maine APA, 5 M.R.S. § 8057-A(1)(C) & (2), applies only to impacts to local and

municipal government, and not to impacts to regulated industries. Order Adopting Rule at 12 (citing 5 M.R.S. § 8063). The Commission's interpretation cannot withstand a reading of the plain language of § 8057-A.[30]

Section 8057-A(1) requires that at the time an agency is preparing a rule, it must consider, *inter alia*, the estimated impact of the rule which "must be based on the information available to the agency." As the Commission acknowledged, in comments to the initial Notice of Inquiry, Appellants and other commenters provided extensive information about potential impacts to the solar industry, including loss of sales, jobs, etc. *See, e.g.,* Order Adopting Rule at 3; *see also* R. 4 C, Comments of Sunrun, Inc., Exhibit A (Oct. 12, 2016). By ignoring and failing to consider, analyze and disclose those impacts in its draft rule and fact sheet, the Commission directly violated the Maine APA. 5 M.R.S. § 8057-A(1).

The Commission's determination that only fiscal impacts to local government need be considered and disclosed in the fact sheet accompanying a proposed rule is wrong on two counts. First, the reference to "fiscal impacts" in § 8057-A(1)(C) is additive to the broader requirement to consider the "estimated impact of the rule" based on the information available to the agency at the time it prepares the rule. *Id.* § 8057-A(1). Second, in terms of fiscal impacts, the notion that the agency need consider only impacts to governments is contradicted by the plain language of the

[30] The Commission's interpretation of the Maine APA is entitled to no deference. *See, e.g., Guilford Transp. Industries*, 746 A.2d 910, ¶ 11 n.4, 746 A.2d 910.

very next subsection, which requires that, when an amendment to an existing rule has a fiscal impact greater than $1 million, as Appellants contend is the case here,[31] the fact sheet "shall also include . . . A description and examples of individuals, major interest groups, and types of businesses that will be affected by the rule and how they will be affected," *id.* § 8057-A(2)(B), including "effects that cannot be quantified in monetary terms." *Id.* § 8057-A(2)(A).

The obvious purpose of the fact sheet and disclosures required by § 8057-A is to provide the public and decision makers with a full and complete picture of the consequences of a proposed rule prior to final adoption. It is not a requirement to do a full-scale impacts analysis – rather, the legislative directive is to "strive to the greatest possible extent to follow the procedure defined in this section." *Id.* § 8057-A. In this case, the Commission had a detailed record from the pre-rulemaking docket, 2016-00120 (*see* Order Adopting Rule at 3), that it could have used to generate an estimate of the impact of the proposed rule on the DG sector pursuant to § 8057-A(1) & (2). Yet, rather than strive to the "greatest possible extent" to follow those procedures, the Commission actively ignored those concerns.

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[31] *See, e.g.,* Supp. R. 13/315, Preliminary Comments of ReVision (Oct. 12, 2016) at 5 "[a]dditionally, assuming the NOR estimated installation rate of $3/watt for solar DG, if the Amendments resulted in 335 kW of lost sales of DG solar over the life of the rule – i.e. 50-60 residential scale solar projects, or just a couple of commercial-scale projects – the fiscal impact would exceed $1 million in lost economic activity in the state, and thus trigger the much more detailed fiscal impact analysis required by 5 M.R.S.A. § 8057-A(2)." Further, "[i]f lost income and property taxes, lost wages and jobs for Maine workers, and loss of equity and investments for small business owners, plus a multiplier for affects to related businesses, were factored in, the $1 million threshold for the § 8057-A(2) analysis would be met far sooner." *Id* at n.5.

The Commission's willful rejection of the Maine APA requirements is further compounded in the final order. Instead of subsequently considering the solar industry's business, jobs, and other financial concerns in its Order Adopting Rule, the Commission brushed off the entire analysis as inapplicable, Order Adopting Rule at 12, again violating the Maine APA. 5 M.R.S.A. §§ 8052(4) ("The agency shall consider all relevant information available to it, including but not limited to economic, environmental, fiscal and social impact analyses and statements and arguments filed, before adopting any rule"). Nowhere in the Order Adopting Rule does the Commission consider, disclose, discuss or analyze these issues – despite extensive commentary by concerned business owners and employees and others at every step in the rulemaking process. Rather, the Commission held that it need not make any such consideration. The Commission's steadfast refusal to consider these impacts distinguishes this case from *Conservation Law Found. v. Pub. Utils. Comm'n*, 2017 ME 109. In that case, appellants challenged the level of consideration given to determination of a specific statutory criterion. *Id.* ¶ 30. Here the Commission contends it need make no "consideration" at all of the potential economic impacts to affected businesses. Failure to consider relevant information available to the agency, including "fiscal and social impact analyses and statements filed," 35-A M.R.S. § 8052(4), is arbitrary and capricious, and fatal to this rulemaking. *Id.* § 8057(1) (rule adopted in violation of § 8052(4) is void and of no legal effect.)

C. The Commission Failed to Provide Adequate Notice and Opportunity to Comment Regarding the Structural Change to NEB in the Chapter 313 Amendments

The Maine APA requires that agencies give "notice and an opportunity for public comment" prior to adopting any rule. 5 M.R.S. §§ 8052, 8053. If a final regulation is "substantially different from a proposed rule," § 8052(5)(B) requires agencies to provide additional notice and opportunity for public comment. Failure to provide notice in accordance with § 8052 or § 8053 will render a rule invalid pursuant to § 8057(1). *See Ms. S. v. Reg'l Sch. Unit 72*, 829 F.3d 95, 108 (1st Cir. 2016).

While the meaning of "substantially different" appears to be an issue of first impression before this Court, the First Circuit Court of Appeals has considered when principles of public participation require additional opportunity for comment. Fundamentally, an agency must provide "adequate notice of the *substance* of the rules it is formulating." *U.S. v. Whitlow*, 714 F.3d 41, 47 (1st Cir. 2013) (emphasis supplied). In assessing whether an agency has done so, "[t]he essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan." *Id.* (quoting *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258, 1283 (1st Cir.1987)).

To answer that question, many state and federal courts have adopted the "logical outgrowth test." *See* Revised Model State Admin. Procedure Act § 308 cmt. (Unif. Law Comm'n 2010) at 40 ("The variance test adopted by state and federal

courts is the logical outgrowth test."); *see also*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 160 (2007) ("[T]he final rule must be a logical outgrowth of the rule proposed."). This common standard provides that a final rule must be "in character with the original scheme" *and* "'a logical outgrowth' of the notice and comment already given." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979) (quoting *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974)). Courts generally find that a final rule is a "logical outgrowth" of a proposed rule when stakeholders "should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 549 (D.C. Cir. 1983).

Here, the proposed rule failed to put reasonable stakeholders on notice of the new gross metering approach or that NEB customers would be charged transmission and distribution costs for behind the meter consumption. These fundamental changes to NEB were buried in the technical text of the proposed rule, such that even industry experts were unsure of whether the Commission intended to structurally alter the rule.[32,33] Further, the Notice of Rulemaking repeatedly and falsely asserted that the rule

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[32] *See, e.g.* R. 23, Comments of the Office of the Public Advocate (Nov. 2, 2016) at 3 ("'Nettable Energy' in section 2(Q) of the draft revised rule is defined as the energy "generated by an eligible facility" which does not appear to account for the energy that is produced by the facility but consumed on-site by an eligible customer. It is unclear whether this is the Commission's intent, as the language is ambiguous . . ."); R. 10, Comments of IECG (Oct. 17, 2016) at 5 ("It is not clear that this is the Commission's intent, but IECG urges the Commission to revise the draft rule to clarify that customers would not be subject to such charges.").

would only affect the transmission and distribution portion of the bill and that "netting of the supply portion of the bill will remain unchanged." Notice of Rulemaking at 1; *see id.* at 5. In its description of the proposed amendments, the Commission omitted any mention of the new gross metering approach. *See* Notice of Rulemaking at 6-8.[34]

Only in its Order Adopting Rule did the Commission clarify that "the inputs to nettable energy have changed from the existing rule" and the "amended rule nets on a gross basis rather than a net basis."[35] Order Adopting Rule at 16; *see also* 17, 23. The text of the final rule also clarifies that "nettable energy" is based on the "*gross* output of an eligible facility," and defines "gross output," a term not included at all in the proposal, as "all of the energy generated by an eligible facility during an applicable period."

Based on the text of the proposed rule and the Notice of Rulemaking, stakeholders had no reasonable basis for "anticipat[ing] that [changes to the structure of NEB, as well as transmission and distribution charges for behind the meter consumption] might be imposed." *Small Refiner Lead Phase-Down Task Force,* 705 F.2d

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[33] The fact that certain industry expert attorneys, including some Appellants, did detect and comment on the change based on the text of the proposed rule has no bearing on the fact that the Commission did not properly put stakeholders on notice.

[34] *See also* R. 23, Comments of the Office of the Public Advocate (Nov. 2, 2016) at 3 ("the Notice of Proposed Rulemaking accompanying the draft rule is silent on" whether the proposal has "the effect of forcing new net energy billing customers into a buy-all, sell-all arrangement").

[35] Despite these clarifications, the Commission, inexplicably, simultaneously maintains its erroneous claims that NEB with respect to the supply portion of the bill remains unchanged. *See, e.g.,* Order Adopting Rule at 1 ("Netting regarding the supply portion of the customer bill remains unchanged.").

at 549. Thus, the final rule was not a "logical outgrowth," but, instead, "substantially different" from the proposed rule. The Commission was therefore required to request additional public comments. *See* 5 M.R.S. § 8052(5)(B).

CONCLUSION

For the reasons stated above, this Court should vacate the Chapter 313 Amendments in their entirety, and reinstate Chapter 313 as it existed prior to the rulemaking. The Court ought to find that changes to the structure of NEB amount to rate changes, and that the Commission must follow the provisions of law applicable to rate changes should it choose to revise NEB in the future. In addition the Court should order such other relief as it deems necessary and appropriate.

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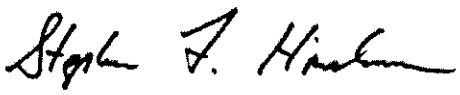

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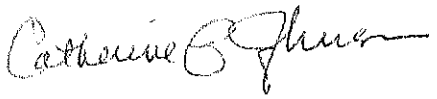

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CERTIFICATE OF SERVICE

I, Emily K. Green, Esq., hereby certify that two copies of this Reply Brief for Appellant were served upon counsel at the address set forth below by first class mail on August 15, 2017, and were also provided electronically:

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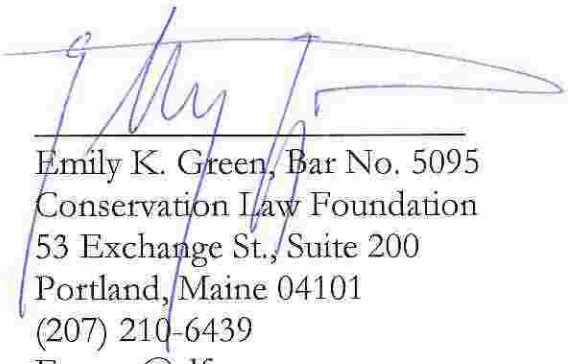

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