

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2018-00056

September 13, 2018

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

ORDER ADOPTING RULE AND
STATEMENT OF FACTUAL AND
POLICY BASIS

VANNOY, Chairman; WILLIAMSON & DAVIS Commissioners

I. SUMMARY

In this Order, the Commission adopts amendments to the Commission's Chapter 305, which governs licensing requirements, annual reporting, enforcement, and consumer protection provisions for competitive electricity providers (CEPs). The adopted Rule conforms Chapter 305 to recent legislative changes regarding CEPs and transparency in the electricity supply market. Based on the Commission's experience in implementing the Rule, the adopted Rule also provides additional customer protection standards with regard to small commercial customers and improves consumer protection standards regarding the marketing practices of CEPs.

II. BACKGROUND

Pursuant to the provisions of the Electric Industry Restructuring Act, electric supply service in Maine was deregulated in 2000 and consumers were provided with the opportunity to choose the provider of their electricity service. 35-A M.R.S. § 3201. As a result, customers receive two distinct electricity services: delivery and supply. By default, customers are placed on standard offer service, but customers may choose a CEP for their electricity supply service. This separation of electric service into two separate and distinct services, where delivery is provided by regulated utilities and supply is provided by CEPs, has required statutory and regulatory attention. In the Commission's experience, consumers have had on-going questions about the duality of delivery and supply, and increased oversight of CEPs has been necessary.

In January 2015, the Commission amended its Chapter 305 rules, responding to what had been a significant increase in competitive activity involving supply services to residential and small commercial customers. The increased competitive activity had highlighted the need for a review of the provisions of Chapter 305, and the 2015 rulemaking focused primarily on amendments to the consumer protection provisions of the rule, as well other changes based on the Commission's experience in implementing the rule. *Maine Public Utilities Commission, Amendments to Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive*

Provision of Electricity (Chapter 305), Docket No. 2014-00214, Order Adopting Rule and Statement of Factual and Policy Basis (Jan. 14, 2015).

Recently, the 128th Maine Legislature examined transparency in the competitive electricity supply market, enacting P.L. 2017, ch. 74 (Act). The Act, codified at 35-A M.R.S. § 3203(4-B) & (4-C) (eff. Nov. 1, 2017), provides consumers that elect to receive electricity supply service from CEPs with new consumer protections, namely by enacting new conditions of licensure for CEPs and new informational disclosure requirements for consumers' monthly bills. The Commission's Chapter 305 rules require amendment to conform to these statutory requirements.

Additionally, the Commission's Consumer Assistance and Safety Division (CASD) has experienced repeated and increased consumer and utility complaints regarding the door-to-door marketing practices of CEPs. CEPs are at times utilizing third-party companies to solicit sales door-to-door and this marketing practice is resulting in violations of Chapter 305. For example, CASD has received complaints that CEP salespersons fail to identify the company for whom the salespeople work, make unreasonable repetitive sales visits to the same home, make sales visits at unreasonable hours of the day, provide false or misleading information regarding electricity rates and the purported benefits of contracting with a CEP for electricity supply service, and provide false or misleading information regarding the difference between who is delivering electricity and who is supplying the electricity.

In October 2017, the Commission initiated *Public Utilities Commission, Inquiry into Transparency and Marketing Practices in the Electricity Supply Market*, Docket No. 2017-00268, Notice of Inquiry (Oct. 15, 2017) (NOI), to receive comment and collect information regarding consumer protection and the marketing practices of CEPs. The NOI indicated the information collected would be used in a subsequent rulemaking to conform Chapter 305 to the recent legislative changes in the Act cited above, and to respond to the types of consumer and utility complaints explained above. The Commission received comment from Maine's two investor-owned transmission and distribution utilities (T&Ds), Central Maine Power (CMP) and Emera Maine (Emera), as well as the Maine Office of the Public Advocate (OPA), the Retail Energy Supply Association (RESA), and Maine PowerOptions (MPO), who is a licensed aggregator/broker under Chapter 305 of the Commission's rules. Following receipt of the comments, the Commission took no further action in the inquiry docket, and closed that docket.

On March 9, 2018, the Commission issued a Notice of Rulemaking, and provided the Notice to all CEPs licensed in the State and all T&Ds. The Notice included a redline of proposed amendments to Chapter 305, and considered the comments that had been received in the NOI proceeding cited above. The Commission convened a public hearing on April 25, 2018, and the OPA, Emera, CMP, Sprague Energy, and Genie Energy appeared. Following the hearing, CMP, Emera, the OPA, Patriot Energy Group, Inc. (Patriot), and RESA submitted written comment on the proposed Rule. The Commission addresses the comments in the rule amendments discussion below.

III. RULE AMENDMENTS

The Commission amends Chapter 305 to provide for the additional residential consumer protection required by the Act. The Commission also adopts certain other consumer protections based upon the Commission's experience regulating CEPs, and also with regard to in-person solicitation of customers in response to the T&D and consumer complaints recently received by the Commission's CASD. In addition to the amendments discussed below, the Commission adopts changes to address other non-substantive, typographical errors in Chapter 305.¹

A. Section 4(B) Small Customer Protections

The Commission sought comment on the applicability of the new statutory provisions to residential and small commercial customers. Given the Commission's historical regulatory practice of providing residential and small commercial customers the same level of consumer protection under Chapter 305, the Commission indicated in the NOI it was considering applying the recently enacted consumer protections to residential and small commercial customers, even though the new statutory provisions refer only to residential consumers.

In the NOI, Emera, CMP, the OPA, and MPO commented it made sense to provide the new protections to both customer classes, and CMP and the OPA added doing so would avoid unnecessary confusion that might result from having only some residential protections, but not all afforded under Chapter 305, apply to small commercial customers. RESA, however, stated the Commission does not have the statutory authority to extend the new statutory protections to small commercial customers, who in any event are generally more sophisticated than residential customers and thus not in need of additional consumer protection standards.

In the Notice of Rulemaking, the Commission indicated it had not been persuaded by the comments in the NOI that it lacks statutory authority to apply the new regulatory requirements to both classes. Based upon its broad statutory authority over CEPs, the Commission has a historical regulatory practice of affording residential and small commercial customers the same standard of consumer protections. The Commission, therefore, posted a draft rule, applying the new customer protections in the Act to both residential and small commercial customers. In response to the draft rule, Patriot and RESA filed comments on Section 4(B).

In RESA's comments, it maintains the Commission's interpretation of Title 35-A—that the Commission has statutory authority to apply the new provisions set forth in Section 4(B) to residential and small commercial customers—is incorrect. RESA asserts well-settled principles of statutory construction support RESA's view that the

¹ At the time the Commission issued the Notice of Rulemaking, the Commission produced a red-line of Chapter 305, which contained the non-substantive corrections, except with regard to additional required modifications to the Table of Contents and an additional punctuation correction made at Section 2(B)(3)(e)(i) of Chapter 305.

Legislature intended for the Act to prevent the Commission from promulgating the proposed new provisions to protect small commercial customers. RESA argues the plain language of the Act limits the applicability of the new provisions to residential customers by excluding other customer classes, that those words of limitation must be given meaning, and that the specific and more recently enacted provisions must be favored over more general and older provisions. Moreover, it states the additional protections for small commercial customers is unwarranted given the sophistication of the small business class in the State of Maine. The Commission disagrees with RESA's interpretation of the Act, and its assertion regarding the nature of the residential class versus the small non-residential class in the State of Maine.

The Commission is charged with overseeing the operations and practices of CEPs, and Section 3203 of Title 35-A, as a whole, is replete with the legislative directive that the Commission exercise its expertise and authority to protect consumers. CEPs are prohibited from conducting business without first obtaining a license from the Commission, placing CEPs under the jurisdiction of the Commission. 35-A M.R.S. § 3203(2). In addition to satisfying certain statutory criteria, CEPs “[m]ust comply with *any other* applicable standards or requirements established by the [C]ommission by rule.” *Id.* § 3203(4-A(H)) (emphasis added). The Commission is directed to adopt rules requiring, “through *any means considered appropriate*,” the provision of information to consumers to enhance their ability to effectively make choices in the CEP market. *Id.* § 3203(3) (emphasis added). In addition, the rules must protect, without limitation, “retail consumers of electricity from fraud and other unfair and deceptive business practices.” 35-A M.R.S. § 3203(6). Finally, the Legislature broadly delegated to the Commission authority to “impose by rule *any additional requirements* necessary to carry out the purposes” of the Electric Industry Restructuring Act. *Id.* § 3203(9) (emphasis added). The Commission interprets these statutory provisions as demonstrating a legislative intent to not impose unnecessary limitations on the Commission's discretion to fulfill the objective of effective consumer protection in the CEP market. Such oversight is important because, as explained in the Background section above, the CEP market has led to on-going consumer questions about the duality of delivery and supply and the role of CEPs in the marketplace.

The recently enacted Act is intended to promote transparency in the CEP marketplace, and applying the new provisions to residential and small commercial customers does not detract from this consumer protection policy. When it enacted the Act, it is presumed the Legislature acted with knowledge of the broad, existing consumer protection standards cited above, including the Commission's rules, which extend protections to the residential and small commercial classes alike. While RESA asserts the Legislature has chosen words of limitation to exclude the small commercial class from retail consumer protection standards, there is nothing express in the Act to suggest the Legislature intended to repeal the broad oversight authority delegated to the Commission, or to curtail the Commission's interpretation of Section 3203 as embodied in its rules. Indeed, because the character of use of the residential and small business classes are so similar that they are treated as one class with regard to procuring the standard offer service, see, e.g., *Commission Initiated Standard Offer Bidding Procedure for CMP and Emera Maine-BHD Small, Medium and Large Non-*

Residential Pertaining to Central Maine Power Company and Emera Maine, Docket No. 2017-00184, Order Approving Request for Standard Offer Bids, Request for Proposals to Provide Standard Offer Service to CMP Customers at 4, Request for Proposals to Provide Standard Offer Service to Emera Maine Customers at 3-4 (Sept. 6, 2017), it is a reasonable exercise of the Commission's discretion under Section 3203 to continue to apply the retail consumer protection standards afforded under Chapter 305 to residential and small commercial customers. Accordingly, The Commission does not exclude the small commercial class from the protections afforded under Section 4(B).

In Patriot's comments, it explains that, while it is a licensed CEP in the State of Maine, it is an aggregator/broker and is not a supplier of generation. It serves as a buyer's agent to its commercial and industrial clients, assisting them—based upon its analysis of their needs and risk profiles—in the decision-making process regarding the purchase of energy. Patriot states it is concerned that the proposed rule does not sufficiently distinguish between the nature of the business of CEPs such as itself, and the nature of the business of CEPs engaged in the solicitation of customers for the supply of electricity. Patriot questions whether subsections 4(B)(8) (renewal notifications), 4(B)(11) (termination fees), and 4(B)(14) (in-person solicitation) are appropriately applied to CEPs who are not engaged in the sale of electricity. Patriot explains that, as an aggregator/broker, it does not control a generation supplier's terms of service, that restrictions on termination fees do not make sense where its contracts are not for supply, and that the proposed provisions regarding in-person sales are misplaced.

Regarding in-person sales, Patriot further explained its concerns, which RESA shares. Patriot explains that (a) it does not arrive unannounced but rather pre-arranges face-to-face meetings with its clients who invite Patriot to their places of business, (b) there is no rationale to require audio recordings of such brokered business-to-business transactions, and (c) prohibiting compensation based upon successful sales fails to recognize the business-savvy nature of its brokering interactions with its business clients. Similarly, RESA states the concerns regarding in-person sales are unlikely to arise in the context of solicitations via network marketing or pre-arranged appointments. RESA requests the rule be clarified such that Section 4(B)(14) does not apply to solicitations via network marketing, per-arranged appointments, or other in-person solicitations in which the customer has already been in contact with the CEP and is aware of the purpose of the in-person contract prior to the solicitation.

The Commission generally agrees with RESA's and Patriot's concerns with regard to distinguishing between CEPs' provision of aggregator/broker services and CEPs' provision of supply service, and notes that it does not, in many instances, read existing subsections of section 4(B) as applicable to aggregatory/broker service providers. The purpose of the new renewal and termination fee provisions is to inform customers of changes in supply contracts and to protect customers from exorbitant fees at vulnerable points in time with regard to their continued supply of electricity. Therefore, there is no policy reason to apply these provisions to CEPs like Patriot who engage in aggregator/broker relationships with consumers and do not engage in the sale of supply. Accordingly, the Commission has clarified the Rule to indicate Section

4(B), except for specified sections, applies only to entities licensed to provide generation service to residential and small non-residential customers. Specifically, Sections 4(B)(12), (13), (14), and (18) apply to all CEPs, including aggregator/brokers, subject to the exceptions noted in this Order and reflected in the rule.

With regard to the in-person solicitation of customers, Section 4(B)(14), the Commission agrees with Patriot and RESA that the rule should be clarified such that this provision—while it generally applies to all CEPs, including aggregators and brokers—does not apply in situations where a customer and a CEP have an existing relationship and the CEP is invited in advance to the place of business of the customer at a specified time for a meeting. The Rule has been clarified in this regard.

B. Section 4(B)(1). Disclosure Regarding Standard Offer

The Commission proposed adding a new section 4(B)(1), Disclosure Regarding Standard Offer. This new section, in accordance with the Act (35-A M.R.S. § 3203(4-B)(A)), requires CEPs to provide prospective customers with information that compares the service rate provided by the CEP with the standard offer service rate. This section of the proposed Rule requires CEPs to provide a link to the page on the Commission's website where the Commission lists standard offer rates. The Commission received no comment on this proposal and adopts this section as proposed.

C. Section 4(B)(2). Bill Information

In accordance with the requirements of the Act (35-A M.R.S. § 3203(4-C)), the Commission proposed in section 4(B)(2)—Bill Information—to require customers' monthly utility bills to include information enabling customers to compare terms, conditions, and rates of electricity supply, and directing customers to the telephone number of the CEP for additional information.

In the NOI, the Commission requested comment on directing customers to the website and telephone number of the OPA to allow the comparison envisioned by section 3203(4-C)(A). The OPA acknowledged that its website is not comprehensive in this regard, but that it was not aware of another resource allowing customers to make the specified comparisons between CEPs. The OPA supported inclusion of its website and telephone number to allow customers to compare terms, conditions, and rates. CMP did not object to including the required information, and while Emera did not object, it did express concern as to the finite amount of space in its billing system to provide a full website address and telephone number for the OPA. Based on the comments, the Commission concluded that providing reference to the OPA website and telephone number on customer bills would be a reasonable approach to complying with the Act's directives, and should reasonably enable customers to make useful comparisons among CEP product offerings. Accordingly, the proposed Rule reflected that approach.

In response to the proposed Rule, CMP and the OPA provided additional comment on this issue. CMP indicated it would include the specified information in

accordance with an adopted rule. The OPA suggested directing consumers to the OPA homepage, which would address the T&D concern about having sufficient space on the utility bill to provide a more detailed web address as well as a phone number. The OPA explained that its homepage would provide access to standard offer rates as well as rates offered by CEPs, and the OPA stated it would keep the website up to date. While the Commission does not see a need to modify the proposed Rule which simply requires reference to the OPA's "website address"—the Commission agrees that inclusion of the OPA's homepage would satisfy the new statutory requirement, enabling a comparison of terms, conditions, and rates. The Commission, therefore, adopts this provision of section 4(B)(2) as proposed.

In the NOI, the Commission further indicated it had preliminarily interpreted the bill information requirements of section 3203(4-C) to be applicable regardless of whether customers received one, consolidated utility bill from a T&D, or a separate bill from the CEP. The Act does not address the issue of consolidated billing—where CEPs arrange with the T&Ds to provide the supply portion of the bill with the T&Ds' delivery portion of the bill, and thus the Commission requested comment on whether the T&Ds and/or the CEPs must provide the required bill information. In the NOI, CMP, Emera, the OPA, and RESA responded.

CMP and Emera did not object to including the required bill information on the supply page of any consolidated utility and supply bill issued by the T&Ds. Further, they did not object to a requirement that CEPs add the required bill information to any separate supply bills issued by CEPs. They did, however, object to any requirement that T&D utilities include the required bill information on a utility bill in the situation of dual billing, where CEPs issue their own bills for generation service. Similarly, the OPA stated it did not seem necessary to include the bill information on a monthly T&D bill when a separate bill is being issued by the CEP. CMP, Emera, and the OPA indicated there is no place to include the information on a utility bill when the T&D is not issuing a consolidated bill that includes the supply portion of the bill. RESA, however, stated section 3203(4-C) requires that a "utility bill" provide the required bill information, that CEPs are not utilities, and that therefore the statute does not require CEPs to include the information on their supply bills. RESA asserted the Commission does not have the authority to require CEPs to include the information, and that such a requirement would force both the T&Ds and the CEPs to expend significant time and resources to modify their billing systems.

Because section 3203(4-C) does not expressly specify which entity is required to ensure the required information reaches consumers who elect to receive generation service from a CEP, when posting the proposed Rule, the Commission proposed specifying that if a utility bill is consolidated with the supply portion of the bill, the obligation would be that of the T&D. If, however, a CEP issued a separate supply bill, the Rule would specify that the obligation is that of the CEP. As discussed above, the Commission has been delegated broad regulatory authority over CEPs to protect consumers, and therefore the Commission noted at the time of issuing the proposed Rule that it was not persuaded that it lacks statutory authority under Title 35-A to require

either the utility or the CEP—in the case of dual billing—to issue the required bill information. 35-A M.R.S. § 3203(4-A)(H), (4-C), (6), & (9).

CMP and Emera filed comments in support of the Commission's approach, and RESA filed comments in opposition. The T&Ds reiterated they would have no place to include the bill information on utility bills in instances where the CEP issued its own supply bill, and that it makes sense to include the information—which regards supply—with the supply portion of the bill. RESA reiterated its prior assertion that the Act only authorizes requiring billing information on utility bills, not supply bills, and further stated requiring T&Ds and CEPs to modify their billing systems would result in consumers paying twice for the costs associated with modifying billing systems.

The Act does not specify how to address the situation of dual billing, and thus the Legislature left the resolution of that issue to the discretion of the Commission. 35-A M.R.S. § 3203(3) (directing the Commission to make information available to consumers to enhance informed decision making through any means considered appropriate). As noted by the T&Ds, it would be absurd to require the T&Ds to issue notices regarding supply in instances where the T&Ds are not billing for supply. Further, in view of the T&Ds' comments that including the billing information on the utility portion of the bill—under the circumstances of dual billing—is currently not possible, there would be expense associated with resolving this issue as requested by RESA. Accordingly, the Commission does not modify the proposed Rule in response to RESA's comments. The Commission does, however, modify the rule with regard to bill information, as explained below.

CMP and Emera each noted the proposed Rule lacked the clarity on this issue that had been articulated in the Notice of Rulemaking. CMP and Emera suggested clarifying the rule to conform to the Notice of Rulemaking. The Commission agrees, and section 4(B)(2) has been clarified to provide that, should a CEP elect to provide its own bill, the CEP shall be responsible for providing the required bill information.

D. Section 4(B)(8). Renewals

The Commission proposed a series of amendments to section 4(B)(8) to conform the Rule to recently enacted statutory section 3203(4-B). First, the proposed Rule provides that, if a customer does not provide express consent when required under the Rule for renewal of service, then the customer must be transferred to standard offer service. Second, the proposed Rule provides that one of the two notices a customer must receive in advance of renewal of service must be made by U.S. Postal Service. Third, the proposed Rule prohibits a CEP from renewing a contract for service at a fixed rate that is 20% or more above the rate in the expiring contract, without the express consent of the customer. Fourth, the proposed Rule provides a CEP may not renew a contract for service for longer than the current term of the contract or 12 months, whichever is shorter, without the express consent of the customer.

In the NOI, the Commission indicated it preliminarily interpreted the third and fourth requirements referenced above as applying to the renewal of fixed rate contracts

and variable rate contracts. Under this interpretation, the 20% requirement would require a calculation of an average rate of the term of the expiring contract that contained a variable rate and a variable rate month-to-month contract could renew for no more than a one-month term without the express consent of the customer. CMP, the OPA, and RESA filed comments on this issue. CMP stated it had no objection to calculating an average rate, and the OPA stated the Commission's interpretation would provide clear direction to CEPs and likely afford consumers adequate protection from significant rate increases. RESA, however, objected. RESA commented that requiring express consent before allowing the renewal of a contract at a rate that is 20% or more above the average of the existing rate and requiring express consent before allowing the renewal of contract for a term longer than an existing variable rate term or 12 months, whichever is shorter, would deprive customers of beneficial pricing options and otherwise have little practical effect. Averaging the rate of a month-to-month contract would have no practical effect, it explains, because the term of such contracts is one month, and thus the average price of the month would also be the actual price for the month.

In the Notice of Rulemaking, the Commission indicated it agreed with RESA with regard to the 20% requirement. The Commission interpreted section 3203(4-B)(C) as applying to only fixed rate contracts and thus intending to prevent CEPs from raising the rate at the time of renewing a fixed rate contract at 20% or more from the prior fixed rate without the express consent of the customer. This makes sense as section 3203(4-B)(C) refers to the renewal of contracts for generation service at a fixed rate, thus indicating a legislative intent to apply this restriction in the context of fixed rate contracts. The Commission, therefore, agreed with RESA that express consent would not be triggered based upon an average rate, but rather based upon the fixed rate of the expiring contract, and the renewal provisions of the proposed Rule did not require averaging. The Commission, however, indicated it interpreted section 3203(4-B)(D) as applying to fixed rate and variable rate renewals, and thus proposed a rule that would not allow CEPs to renew variable month-to-month contracts for a term greater than 1 month without the express consent of the customer. Section 3203(4-B)(D), unlike section 3203(4-B)(C), does not reference fixed rate contracts.

In response to the Notice of Rulemaking, RESA filed comments on the Commission's intent to apply section 3203(4-B)(D) to variable rate contracts. RESA states it would be inconsistent to apply section 3203(4-B)(C) to only fixed rate renewals and section 3203(4-B)(D) to fixed rate and variable rate renewals. RESA asserts applying Section 3203(4-B)(D) to only fixed-rate contracts would provide customers with opportunities to take advantage of beneficial pricing offers and reduce customer frustration and dissatisfaction. The Commission, however, disagrees. Section 3203, throughout its subsections, refers to "contract[s] for generation service," and except for subsection 3203(4-B)(C), does not narrow its application to fixed rate contracts. For example, the legislative policy directive of transparency and the protection of consumers would not be served by excluding variable rate contracts from the requirement that consumers receive required notices by mail, 35-A M.R.S. § 3203(4-B)(B), and the requirement that termination fees not apply in instances where contracts are renewed

without express consent, *id.* § 3203(4-B)(E). Accordingly, the Commission does not change the proposed Rule in response to RESA's comments.

E. Section 4(B)(11). Termination Fees

In accordance with 35-A M.R.S. § 3203(4-B)(E), section 11 of the proposed Rule prohibits CEPs from imposing an early termination fee for any contract for generation service that was renewed without express consent from the customer. Patriot provided comment on this section, and, as explained above, in response the Commission has clarified that only certain sections apply to aggregators and brokers, and section 4(B)(11) does not apply to aggregators and brokers.

F. Section 4(B)(14). In-Person Solicitation of Customers

In this section, the Commission adopts new consumer protection standards for in-person solicitation of customers in response to the T&D and consumer complaints received by the Commission's CASD. The new provisions are intended to improve consumer protection standards in the context of CEP employees and agents marketing door-to-door, and are intended to assist consumers in avoiding certain circumstances that may arise in the context of door-to-door sales that consumers may not experience in other sales settings.

Section 4(B)(14) of the proposed Rule contained provisions intended to assist consumers, upon a salesperson arriving at the door, in their understanding of what CEPs are authorized to market given that consumers in Maine receive two distinct electricity services: delivery and supply. Thus, section 4(B)(14)(b) requires CEPs to produce and display, upon arriving at a potential customer's home and for the duration of the meeting with the potential customer, identification, which includes the salesperson's name and the name of the CEP. RESA filed comments on this subsection.

RESA states it does not object to identification requirements, but seeks certain clarifications to the proposed Rule. RESA asks that the full name of salespersons not be required, but rather only the first name and an identification number, to protect privacy and avoid situations where salespersons, once identified by name, may be harassed on social media. Further, RESA explains it does not object to salespersons being required to display identification, but asks that salespersons not be required to leave identification badges behind as such practice would be costly, cumbersome, and lead to possible impersonation of a CEP employee. RESA asks that this subsection be clarified to require the wearing and prominent display of first-name identification and an identification number, but refrain from specifying the form in which the materials, upon request, must be provided. Thus, CEPs would generally be required, upon request, to give customers materials that provide the CEP's name and telephone number, and the

first name and an identification number for the salesperson. The Commission did not intend this subsection to require salespersons to leave behind identification badges, and otherwise concludes the consumer protection goal of conveying helpful information to consumers will continue to be achieved by accommodating RESA's requested clarifications. Accordingly, the rule has been modified to provide CEPs with the option of having salespersons display first and last names, or first name and an assigned identification number, and clarifies any worn identification need not be left behind upon request. The Commission has modified this subsection accordingly.

Under proposed sections 4(B)(14)(c) & (d), CEPs employees and agents must inform potential customers that they do not work for and are independent of the potential customer's transmission and distribution utility, and that the customer's transmission and distribution utility will continue to deliver the electricity and will respond to any outages or emergencies. With regard to the requirement that CEPs state their independence from the customer's utility, RESA seeks clarification that subsection 4(B)(14)(c) does not require CEP's to use the actual name of the T&D because customers may misinterpret the statement and incorrectly assume the salesperson is an agent of the specifically identified T&D. The Commission disagrees, as it concludes name recognition by customers of their specific T&D utility will assist consumers in their understanding of what product CEPs are offering, and what service they are not. The consumer protection goal of conveying helpful information to consumers will be better achieved by the rule as proposed, and therefore the Commission makes no change to this subsection in response to RESA's comments.

The proposed Rule provides at section 4(B)(14)(e) that if, due to a limitation in language skills, it becomes apparent that a potential customer is unable to understand the information being conveyed by the CEP, the in-person marketing must be terminated. RESA provided comment on this provision, seeking a modification to require the salesperson to either find a representative in the area who is fluent in the language in which the customer has sufficient language skills to translate the sales transaction, or terminate the in-person contact with the customer. The Commission does not interpret the draft provision to prevent a CEP from re-initiating in-person contact upon securing an interpreter to ensure a potential customer understands and is able to respond to information conveyed during the in-person solicitation, and therefore does not make any modification to this draft provision.

The proposed Rule also contains a notice provision and a recording provision, both of which were intended to assist the Commission in responding to situations where it appears CEP salespersons are failing to identify the company for whom the salespeople work, providing false or misleading information regarding electricity rates and the purported benefits of contracting with a CEP for electricity supply service, and providing false or misleading information regarding the difference between who is

delivering electricity and who is supplying the electricity. In response to comments regarding these two proposed provisions, the Commission makes certain modifications to the proposed Rule, all of which is explained below.

First, Section 4(B)(14)(a) proposed requiring CEPs to provide notice to the Commission and local police department in advance of marketing door-to-door, indicating the dates and times when the in-person solicitation would occur and identifying who would be going door-to-door. RESA and Emera filed comments on this subsection. Emera requests the rule be modified to provide advance notice to the T&Ds because in the past Emera has been unable to advise customers who to call with concerns about possible scam marketers coming door to door. RESA, however, asserts notice requirements would be contrary to the constitutional requirements of free speech and equal protection. RESA states if its marketing activity is found to be core speech, then the proposed notice provisions may violate the prior restraint doctrine. If its marketing activity is protected as commercial speech, RESA asserts there are less prescriptive ways than the notice provisions to address the Commission's concerns, and thus the notice provisions violate CEPs' constitutionally protected right to free speech. As to equal protection, RESA argues no other industry is required to provide prior advance notice to the Commission of in-person marketing, and there is no justification for the proposed notice requirement given the identification requirements in the rule. Finally, RESA states the marketing information to be filed is confidential and proprietary and if required should only be filed with the Commission.

Second, Section 4(B)(14)(f) also proposes requiring CEPs to record all on-site communications with a potential customer, such audio recording to be made available upon request by the Commission. CMP, the OPA, and RESA filed comment on this request. CMP states recording the sales activity would be consistent with state law, so long as one party to the conversation consents to the recording. The OPA adds that while not required by law, as a policy matter the rule should require disclosure of the recording to potential customers. RESA agrees that CEPS must notify customers of the recording to avoid being deceptive, and that the recording would have a chilling effect on the transaction. RESA further contends the recording and retention of the record would be costly and borne by ratepayers, and impracticable in the long term.

In response to the comments filed on proposed Sections 4(B)(14)(a) and 4(B)(14)(f), the Commission modifies the notice and recording provisions to, instead, expressly require CEPs to maintain certain records regarding their in-person marketing activities. A new subsection (a) provides that each CEP employee or agent engaged in in-person marketing must create a written log, associated with his or her name and identification number (where applicable), identifying the street address of each sales visit. CEPs must retain the logs for at least 12 months and make them available upon request by the Commission. As with the previously contemplated notice and recording

provisions, the purpose of the record keeping provision is to assist the Commission in responding to customer and utility complaints that in-person marketing practices are leading to customer confusion regarding who and what is being marketed to customers. The Commission concludes these consumer protection goals can be achieved with a record-keeping requirement, and the rule has been modified accordingly.

Proposed section 4(B)(14)(g) requires CEPs to leave the potential customer's premises prior to any third-party verification (TPV) call during which customer enrollment is confirmed. RESA filed comment on this subsection, stating it may result in abandonment of transactions where a TPV is ended prematurely and the salesperson is no longer available to move the transaction forward. Further, RESA states some TPV calls require the salesperson to advance the calls to the next prompt. RESA supports a requirement that salesperson not be permitted to speak to the customer during the TPV process, but objects to the salesperson having to leave the premises. The purpose of the proposed provision is to address the Commission's concern that the TPV process provide consumers with an opportunity to independently confirm a CEP selection, but the Commission is persuaded that it is possible to maintain the TPV process as independent from the sale despite the salesperson being on site. The Commission has modified this section, which is now section 4(B)(14)(f), to require CEPs to ensure the verification process is not influenced by the salesperson, including but not necessarily limited to, remaining silent during the TPV process.

Proposed subsection 4(B)(14)(h) provided that CEPs may not pay or otherwise compensate their employees or agents based on whether a potential customer accepts the CEP's service. RESA and Patriot filed comments on this proposed provision. RESA states such a requirement is unworkable because CEPs rely on third-party vendors to market in-person sales and therefore CEPs do not have control over how the salespersons are compensated. Further, RESA states compensation based upon commission is a widely-accepted business practice and there is no basis to conclude this compensation structure impacts compliance. Similarly, Patriot states restricting compensating employees based upon whether salespersons are successful in gaining new clients would be unprecedented in nearly any industry. The Commission notes that it remains concerned that this business model provides an incentive for in-person marketers to violate Commission rules, particularly in instances where a CEP may be offering rates that are above current standard offer rates. Nonetheless, based upon the comments received, the Commission has deleted this subsection and will, alternatively, focus its attention on enforcement actions when—regardless of the means by which CEP employees and agents are compensated—it appears CEPs are engaged in unfair or deceptive act or practice that creates a likelihood of confusion or misunderstanding in connection with the offer for sale of the sale of electricity.

IV. ORDER

Accordingly, we

ORDER

1. That the attached amended Chapter 305, Licensing Requirements, Annual Reporting, Enforcement and Consumer Protection Provisions for Competitive Provision of Electricity, is hereby approved;
2. That the Administrative Director shall file the amended rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following of this rulemaking proceeding:
 - a. All utilities operating in the State;
 - b. All persons who have filed with the Commission within the past year a written request for notice of rulemakings;
 - c. All persons that have commented in this rulemaking proceeding;
4. That the Administrative Director shall send copies of this Order and the attached amended rule to the Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0115 (20 copies).

Dated at Hallowell, Maine, this 13th day of September, 2018.

BY ORDER OF THE COMMISSION

/s/ Harry Lanphear

Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Vannoy
Williamson
Davis