

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

KATHERINE VEILLEUX,)
JENNIFER CHON, ROCKY COAST)
FAMILY ACUPUNCTURE P.A.,)
and JAMES TILTON *individually and on*)
behalf of all others similarly situated,)

Plaintiffs,)

Case No. 1:16-cv-00571-LEW

v.)

ELECTRICITY MAINE, LLC, PROVIDER)
POWER, LLC, SPARK HOLDCO, LLC,)
KEVIN DEAN, and EMILE CLAVET,)

Defendants.)
)
)
)

DECLARATION OF EMILE CLAVET

Emile Clavet, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a managing member of Provider Power, LLC (“Provider Power”). The other managing member of Provider Power is Kevin Dean.
2. In June 2010, I, along with Mr. Dean, Kirk Nadeau, and Peter Whitney founded Electricity Maine, LLC (“Electricity Maine”). Mr. Nadeau and Mr. Whitney sold their interest in the company in late 2011.
3. Electricity Maine is a Maine limited liability company and, until 2018, its principal place of business in Auburn, Maine.
4. Provider Power sold Electricity Maine to Spark Holdco, LLC (“Spark”) on August 23, 2016.
5. From January 2012 until it sold Electricity Maine to Spark, Provider Power was the sole member of Electricity Maine. Mr. Dean and I served as the Managers of Electricity Maine.

6. In addition to Electricity Maine, Provider Power served as a holding company for two other competitive electricity providers (“CEPs”)—Electricity NH and Provider Power Mass—neither of which have ever done business in Maine.
7. When we founded Electricity Maine, individuals working for the company, including Mr. Dean and myself, were employees of Electricity Maine and received paychecks from Electricity Maine. It wasn’t until sometime after Provider Power was formed to serve as a holding company for Electricity Maine, Electricity NH, and Provider Power Mass did we begin to run payroll through Provider Power.
8. After Provider Power sold Electricity Maine to Spark, Mr. Dean and I served as contractual consultants to Spark. My contract expired after one year. My role was to assist with the transition of Electricity Maine’s operations. After the sale, Spark moved much of Electricity Maine’s administration to its corporate offices in Texas, after which I had little access to Electricity Maine’s documents, property, and functions. After the sale of Electricity Maine to Spark, I no longer participated in any management decisions, such as those relating to accounting or purchasing.
9. Historically, the Maine retail electric utility industry was a vertically integrated monopoly with a single entity producing, supplying, and delivering electricity to consumers. However, that changed when, in 1997, the Maine Legislature passed the Electric Industry Restructuring Act (the “Restructuring Act”), 35-A M.R.S. §§ 3201-3217. Under the Restructuring Act, beginning March 1, 2000, Maine consumers were provided with two alternative means to procure electricity: (1) directly from CEPS; or (2) through a default electricity supply that is managed and administered by the Maine Public Utilities Commission (“MPUC” or the “Commission”), referred to as “standard offer service.”

10. The MPUC sets the price for standard offer service, which is delivered to customers by local transmission and distribution companies that include Central Maine Power Company (“CMP”) or Emera Maine (“Emera”)¹. To designate a standard offer provider, the MPUC first issues a request for proposals for retail standard offer service. Large energy producers—such as NextEra, Constellation Energy Commodities Group, and New Brunswick Power—submit bids to provide requirements service, including supply and demand resources, to those customers receiving standard offer service. From March 1, 2005 to March 1, 2014, the MPUC’s practice was to award supply contracts every year for a three-year staggered or “segmented” term for one-third of the standard offer load for customers receiving standard offer service in the CMP an Emera service territories, respectively. *See, e.g., Me. Pub. Util. Comm’n, Standard Offer Rate for Central Maine Power, https://www.maine.gov/mpuc/electricity/standard_offer_rates/current_sorates_cmp.shtml* (last visited Apr. 15, 2019); *see also Me. Pub. Utils. Comm’n, Standard Offer Bidding Process, No. 2004-00682, Order Designating Standard Offer Provider and Directing Utility to Enter Entitlement Agreements (Me. P.U.C. Dec. 14, 2004), available at https://www.maine.gov/mpuc/electricity/rfps/standard_offer/sosmall0305/2004-682ocmp.pdf.*
11. The three-year staggering of the standard offer supply contracts (also referred to as “entitlement agreements”) resulted in a standard offer electricity price that lagged the market. Thus, the standard offer price often would not reflect the actual cost of electricity during the contemporary standard offer term.

¹ In 2013, Bangor Hydro-Electric Company (“BHE”) and Maine Public Service Company (“MPSC”) merged, and in 2014 the merged entity changed its name to Emera Maine. I refer to BHE and MPSC collectively as “Emera.”

12. In the mid-to-late 2000s, the electricity market experienced tremendous volatility. The price of oil and natural gas fluctuated quickly and dramatically, which in turn led to large swings and increases in the price of electricity. Electricity prices hit historically high levels in the summer of 2008. *See* Fed. Energy Reg. Comm’n, *State of the Markets 2008, Item No. A-3* (Apr. 16, 2009), *available at* <https://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/som-rpt-2008.pdf>.
13. In an effort to offer Maine residential and small and medium business customers an electric supply option other than standard offer service, Mr. Dean, Mr. Nadeau, Mr. Whitney, and I decided to found Electricity Maine. And in September 2010, Electricity Maine obtained a license from the MPUC to operate as a CEP. A CEP is not a public utility, nor does it provide a utility-provided service. Rather, a CEP sells electric supply service to the public at retail.
14. Electricity Maine began enrolling residential and small and medium-sized business customers in July 2011. True and accurate copies of Electricity Maine’s supply service enrollment forms from are attached as **Exhibits 1-5**. [DEFENDANTS-0000404 (2015 form), 407 (2014 form), 409 (2013), 1723 (2012 form), and 1748 (2011 form)]. Customers could enroll by submitting a paper form, enrolling through Electricity Maine’s website, or calling Electricity Maine’s toll-free number.
15. Local transmission and distribution utilities (e.g., CMP and Emera) charged customers a delivery charge, which is separate from the supply charge charged by the CEP. A customer enrolled with Electricity Maine received monthly bills from CMP or Emera that included the supply charge from Electricity Maine. The bills came with a separate insert entitled “Electricity Supply Account Detail,” that made clear that if the customer was enrolled with

Electricity Maine, that customer was receiving their electricity supply from Electricity Maine and included the rate the customer was charged for that supply. A true and accurate copy of a bill issued by CMP, including the “Electricity Supply” insert, with customer identifying information redacted, is attached as **Exhibit 6** [DEFENDANTS-0001877].

16. We started Electricity Maine because we believed that we could offer customers a competitive product in several respects. We believed that we could beat the standard offer price; provide customers price stability and budget certainty by guaranteeing a fixed rate for up to twenty-four (24) months (twice that of the standard offer term applicable at the time); and allow customers to renew their service by utilizing an automated reenrollment process that complied with MPUC consumer protection rules.
17. Initially, much of Electricity Maine’s marketing was done over Facebook. Electricity Maine began using Facebook on or around July 22, 2011. In the summer of 2011, most of the company’s paid advertising was via the newspaper.
18. In late 2011, Electricity Maine began advertising over the radio. Radio ads contained disclaimers, which played at the end of the commercial. A true and accurate recording of (1) a radio advertisement that aired on WJBQ in or around April and May of 2013 is attached as **Exhibit 7** [DEFENDANTS-00002856]; and (2) a radio ad disclaimer that played after the promotional ad, which is attached as **Exhibit 8** [DEFENDANTS-000040].
19. Electricity Maine also purchased radio disc jockey endorsements. Electricity Maine provided the disc jockeys with talking points, but were otherwise unscripted and had discretion as to how to execute the endorsement. A true and accurate copy of (1) talking points issued by Electricity Maine to paid radio disc jockey endorsers on in or around April 6, 2013 is attached as **Exhibit 9** [DEFENDANTS-0023846]; and (2) a recording of a radio

endorsement aired on WJBQ on or around April 23, 2013 is attached as **Exhibit 10** [DEFENDANTS-0002875].

20. In early 2012, Electricity Maine began running commercials on television. Attached are true and accurate copies of a television advertisement that ran on local network television stations: **Exhibit 11** [DEFENDANTS-0002692 (May 16, 2012)]; **Exhibit 12** [DEFENDANTS-0002694 (May 16, 2012)]; **Exhibit 13** [DEFENDANTS-0002690 (August 27, 2012)]; **Exhibit 14** [DEFENDANTS-0002674 (January 12, 2013)]; **Exhibit 15** [DEFENDANTS-0002672 (January 10, 2013)]; and **Exhibit 16** [DEFENDANTS-0019897 (Oct. 7, 2013)].
21. In early February 2012, News Center WCSH-6 aired a segment featuring Electricity Maine in which Mr. Dean, then-Public Advocate Dick Davies, and I were interviewed. A true and accurate copy of the segment that aired on WSCH-6 is attached as **Exhibit 17** [DEFENDANTS-002650].
22. We also marketed our electricity supply products through direct mail campaigns, event sponsorships, and testimonials from customers, which we shared on our website and social media pages.
23. From the beginning, Electricity Maine advertised itself as a locally-owned company that provided customers a competitive option other than standard offer service (or that provided by other CEPs). These advertisements were completely accurate: Electricity Maine was based in Auburn, Maine; it was locally owned; we employed Maine residents; the company was offering fixed-rates for terms ranging from six (6) to twenty-four (24) months at competitive prices.

24. When advertising projected savings to customers who switched from the standard offer to Electricity Maine, our television and radio ads included disclaimers, such as “[s]avings are calculated based on the current standard offer rates” applicable at the time of the commercials were scheduled to air or “[s]avings are calculated based on MPUC residential standard offer rates in CMP territory as of 03/01/12.” *See, e.g.*, Exhibits 8, 12-13.
25. When a new customer enrolled with Electricity Maine, the customer was provided with Electricity Maine’s terms of service. These terms of service, which were always vetted to ensure compliance with MPUC consumer protection regulations, changed from time to time. After the customer enrolled, a copy of the terms of service were sent to the customer by email or mail.
26. All of the terms of service utilized by Electricity Maine during my association with the company clearly explained to the prospective customer that they would be reenrolled automatically at the end of their term until terminated by the customer or Electricity Maine pursuant to the termination provisions included in the contract. Attached as **Exhibits 18-34²** are true and accurate copies of terms of service in effect for Electricity Maine from its inception until Provider Power sold Electricity Maine to Spark.
27. When a new customer enrolled with Electricity Maine, we asked where that individual heard about Electricity by asking them to enter a “promotional code” on the paper or electronic form they used to sign-up for service.

² DEFENDANTS-3764 (V. 1, 7/1/11-12/27/11), 3768 (V.2, 12/28/11-1/24/12), 31934 (V. 3, 1/25/12-5/10/12), 3778 (V. 4, 5/11/12-10/4/12), 3781 (V. 5, 10/15/12-11/6/12), 3786 (V. 6, 11/7/12-11/27/12), 03791 (V. 7, 11/28/12-12/18/12), 3795 (V. 8, 12/19/12-12/30/12), 3799 (V. 9, 12/31/12-4/1), 3803 (V. 10, 4/18/13-5/9/13), 3806 (V.11, 5/10/13-5/20/13), 3810 (V. 12, 5/21/13-6/16/13), 3821 (V. 13, 6/17/13-7/8/14), 5458 (V. 14, 7/9/14-12/9/14), 3831 (V. 15, 12/9/14-6/16-15), 3835 (V. 16, 6/17/15-7/22/15), and 3839 (V. 17, 7/23/15-10/23/16).

28. The majority of Electricity Maine's enrolled customers were individuals and businesses that had been receiving standard offer service from either CMP or BHE.
29. In or around May 2015, Electricity Maine purchased 314 residential accounts from Union Atlantic Electricity, another CEP operating in Maine.
30. Electricity Maine has marketed at least a dozen different fixed-rate electricity supply products to Maine residential and small and medium-sized business customers since its inception. Attached as **Exhibit 35** is a matrix containing a list of the different products marketed and sold by Electricity Maine to residential and small business customers from 2011 to 2016.
31. Electricity Maine never marketed or sold variable-supply plans. Supply plans ranged from six (6) to twenty-four (24) month terms.
32. Electricity Maine also offered and sold a number of special and partner supply plans to local businesses and area nonprofits.
33. Electricity Maine used other promotions, including contests in which individuals could enter to win free electricity for a year. We advertised these offers on the radio, television, online, and in print. *See, e.g.*, Exhibit 11.
34. In addition to supply services, Electricity Maine provided its customers with information and materials not otherwise available to customers receiving standard offer service. This included educational resources pertaining to electric usage, anticipated electric price and rate changes, projected weather patterns affecting electric and natural gas prices, and other materials intended to keep its customers aware of changes in the market and ways to conserve their use of electricity. Attached as **Exhibits 36-38** [DEFENDANTS-0000390,

391, 401] are true and accurate copies of materials distributed to Electricity Maine customers and prospective customers.

35. To meet customer demand, Electricity Maine would enter into energy supply contracts with power producers—namely Noble Energy—to secure pricing that would allow Electricity Maine to offer supply plans competitive with standard offer service and other CEPs.
36. When purchasing electricity, Electricity Maine would estimate projected usage in future months on the number of enrolled customers; the prior usage by those customers; anticipated weather patterns; and other risks impacting costs, including line losses and bad debt.
37. Electricity Maine’s fixed-rate contracts served as the underlying collateral for its supply contracts with Noble Energy, allowing the company to hedge those agreements and procure electricity in bulk at competitive prices.
38. From July 2011 to March 9, 2013, Electricity Maine offered customers products that were with rates that were below the contemporaneous standard offer price.
39. Toward the end of 2012, Electricity Maine began its Power to Help campaign and the Power to Help Fund (collectively, the “Power to Help initiative”), in which Electricity Maine partnered with and donated to local charities and nonprofits. Through its Power to Help initiative, Electricity Maine provided thousands of dollars as well as many volunteer man hours to local nonprofits. *See, e.g.*, Exhibits 14-16. Also attached as **Exhibit 39** [DEFENDANTS-0001055] are radio “blinks” developed by Electricity Maine and provided to Cumulus Media radio stations in or around November 2012 addressing Electricity Maine’s support of local charities.
40. From in or around March 2013 to February 2015, in conjunction with the Power to Help initiative, Electricity Maine offered customers in good standing with Electricity Maine

supply plans that provided the option of directing 2% of their monthly supply charge for donation to a Power to Help charity partner, or receiving it as cash back at the end of their contract term. With other products, Electricity Maine pledged to donate 2% of the customer's monthly supply to a Power to Help charity partner, as well as donate \$5 to the local community. Attached as **Exhibit 40** [DEFENDANTS-0002008] is a true and accurate of a document providing an overview of the Power to Help initiative that Electricity Maine used to educate the community on the initiative. *See also* Exhibits 14-16.

41. In early 2013, Electricity Maine stopped actively marketing and advertising comparison of its rates to the standard offer price. Rather, advertisements and promotions focused on Electricity Maine's status as a locally-owned company; supply service options that were competitive with the terms of standard offer service and other CEPs; and the Power to Help initiative. The statements made in these advertisements were completely accurate: Electricity Maine was locally owned; provided fixed-rate supply service for up to 24-months; and made the donations it represented that it would to area nonprofits.
42. In and around January 2014, the northeastern United States experienced a "polar vortex," during which the region saw unusually frigid temperatures. This led to higher demand for natural gas to heat homes, fuel gas-fired electric generators, and supply fuel to industrial users. This resulted in dramatically increased wholesale electricity prices. *See, e.g.,* Institute for Energy Research, *Electricity Rate Increases Begin in New England*, available at <https://www.instituteforenergyresearch.org/electricity-rate-increases-begin-new-england> (last visited Apr. 17, 2019).
43. Prior to the polar vortex, the Commission's practice had been to solicit bids to supply standard offer service in the winter with a spring start because New England had been a

summer peaking region. However, when market conditions shifted due, in large part, to the weather and shortfalls due to closure of coal-powered generators, New England electricity price began peaking in January and February. *See Me. Pub. Utils. Comm'n*, Standard Offer Bidding Procedure for all CMP and EMERA-BHE Customer Classes and CMP Time of Use Service, No. 2014-00306, Order Designating Standard Offer Providers and Directing Utility to Enter Entitlement Agreements at 3 (Me. P.U.C. Jan. 13, 2015), *available at* https://www.maine.gov/mpuc/electricity/standard_offer_rates/documents/CMPODR_1_27_15_released.pdf.

44. Beginning in March 2014, the MPUC moved from a three-year procurement to a one-year procurement of the electric supply service provided to standard offer customers. *See Me. Pub. Utils. Comm'n*, Inquiry Into Residential and Small Commercial Customer Standard Offer Service and Customer Protections, Docket No.2013-00200, Inquiry Conclusions at 3 (Me. P.U.C. Nov. 13, 2013).
45. In or around the fall of 2014, regulators and other state energy officials began warning Maine businesses of projected electric price spikes, spikes that were anticipated to be the highest since 2008. *See Me. Pub. Utils. Comm'n*, Press Release: *State Energy Officials Encourage Businesses to Prepare for Winter and High Prices* (Oct. 6, 2014), *available at* <https://www.maine.gov/tools/whatsnew/index.php?topic=puc-pressreleases&id=629128&v=article08>.
46. These price spikes had an unanticipated and significant impact on Electricity Maine's ability to procure supply service at rates competitive with the standard offer in 2015.
47. In January 2015, the MPUC announced that it would accept bids for standard offer service for a period of ten months—March 1, 2015-December 31, 2015—rather than a twelve-

month commitment from March to February, as had been their regular practice. As a result, the Commission procured supply during the peak months of January and February at rates that differed from the two ten-month periods prior to and following the two-month period.

48. The new, unanticipated procurement process made it difficult for CEPs to compete with the standard offer rate, largely because they were now competing for favorable bids from the same suppliers bidding to provide standard offer service for durations that were previously a competitive advantage to CEPs.

PURSUANT TO 28 U.S.C. § 1746, I DECLARE UNDER THE PAINS AND PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Dated: May 10, 2019

/s/ Emile Clavet
Emile Clavet