

# MAINE STATE LEGISLATURE

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Thomas L. Welch  
Chairman



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Commissioners

PUBLIC UTILITIES COMMISSION

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AUGUSTA, ME 04333

December 29, 1994

Honorable Jeffrey H. Butland  
President of the Senate  
117th Maine Legislature  
State House Station #3  
Augusta, ME 04333-0003

Honorable Dan A. Gwadosky  
Speaker of the House  
117th Maine Legislature  
State House Station #2  
Augusta, ME 04333-0002

Re: P.L. 1993, ch. 638, An Act to Establish an Alternative Form of Telecommunications Regulation in the State

Dear President Butland and Speaker Gwadosky:

In 1994, the Legislature enacted P.L. 1993, ch. 638, An Act to Establish an Alternative Form of Telecommunications Regulation in the State (attached). The Act amended Section 7101(3) of Title 35-A and directs the Commission to

provide to the joint standing committee of the Legislature having jurisdiction of utility matters and the joint standing committee of the Legislature having jurisdiction over housing and economic development matters a report on the status of the telecommunications industry in the State no later than December 31, 1994. The report must include the following:

A. The extent to which the dual communications policy goals of universal service and economic development are being achieved;

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- B. The actions taken by the commission to further these goals, including the status of any alternative approaches to regulation; and
- C. Recommendations for legislation.

The purpose of this letter is to provide the Commission's report to the Joint Standing Committees having jurisdiction over utility matters and over housing and economic development matters. We have provided copies to the Chairs of these committees for the 116th Legislature, but since Chairs of those committees have yet to be appointed for the 117th Legislature, we are providing our report to you directly. We are also providing copies of our report to the analysts in the Office of Policy and Legal Analysis assigned to those committees for appropriate further distribution.

#### **I. DUAL COMMUNICATIONS POLICY GOALS**

The Legislature adopted two telecommunications policy goals. As stated in Section 7101 of Title 35-A, these goals are

1. **Universal service.** The Legislature declares and finds that the 50-year effort to bring affordable, universally available telephone service to the public has served the State well; universal telephone service has contributed to the State's economic, social and political integration and development; the public benefits from universal telephone service because each telephone subscriber receives a more valuable service when virtually anyone else in the State can be called; and a significant rate increase may threaten universal service by forcing some Maine people to discontinue their telephone service. It is the policy of the State that telephone service must continue to be universally available, especially to the poor, at affordable rates.

2. **Economic development.** The Legislature further declares and finds that a modern state-of-the-art telecommunications network is essential for the economic health and vitality of the State and for improvement in the quality of life for all Maine citizens. Therefore, it is the goal of the state that all Maine's businesses and citizens should have affordable access to an integrated telecommunications

infrastructure capable of providing video, data and image-based services. The State shall consider policies that:

- A. Encourage economic development;
- B. Employ methods of regulation that encourage the development and deployment of new technologies; and
- C. Encourage acceptable service applications that support economic development initiatives or otherwise improve the well-being of Maine citizens.

**Universal service.** The primary measure of the extent of universal service is the proportion of households with telephone service. Comprehensive data on telephone penetration statistics collected by the Bureau of the Census under contract with the Federal Communications Commission (FCC) reflect an increase in telephone penetration in Maine. As of November 1993, Bureau of the Census data showed that telephone penetration in Maine had improved such that one Maine household in 33 did not have telephone service. The data reflect a strong relationship between income and penetration, with only 72.6% of households with incomes under \$5,000 nationally having telephones as of November 1993. Maine and U.S. trends are shown in the following table.

HOUSEHOLDS WITH TELEPHONE SERVICE <sup>1</sup>	NOVEMBER 1983	NOVEMBER 1992	NOVEMBER 1993
Maine	90.7 %	93.0 %	97.0 %
United States	91.4 %	93.8 %	94.2 %

Maine developed universal service assistance programs to ensure that low-income subscribers continue to have access to the telephone network ("Lifeline"), and additionally to encourage that low-income households without service connect to the network ("Link-Up"). Under the Lifeline program, eligible low-income residents receive a \$7 monthly telephone bill

<sup>1</sup> With respect to these figures, a difference of 3.8% represents a statistically significant "critical value" for Maine; a difference of 0.5% for the total United States is considered significant.

reduction, \$3.50 of which is reimbursed federally through the National Exchange Carriers Association (NECA). The Link-Up program provides a NECA-subsidized telephone line connection fee of \$10. In August 1987, the FCC certified Maine's Lifeline and Link-Up programs, that provide eligibility for recipients of SSI, AFDC, HEAP, Medicaid, or Food Stamps (with income verification by the Department of Human Services). During 1993, 70,023 Maine subscribers received Lifeline assistance, and 14,456 Maine subscribers received Link-Up assistance under these successful programs.

**Economic development.** The extent of economic development directly or indirectly influenced by Maine's advanced telecommunications infrastructure is more difficult to quantify than is universal service. The parties in a current Commission investigation into regulatory alternatives have been asked to furnish information on this issue.

## II. COMMISSION ACTION

In May 1994, the PUC began an investigation<sup>2</sup> into the appropriate method of regulating the rates of the New England Telephone and Telegraph Company (NYNEX). The Commission's goal is to determine whether changes should be made in the way NYNEX is regulated that will continue to protect consumers while recognizing and accommodating the many significant changes going on in the telecommunications markets. The Commission is also investigating whether a different regulatory approach will provide better incentives for NYNEX to operate more efficiently and, if so, how those efficiency gains should be shared with customers.

In August 1994, the Commission initiated an earnings investigation<sup>3</sup> for NYNEX in response to a complaint from some of NYNEX's customers alleging that its rates and earnings are excessive. That complaint also asked the Commission to investigate whether the costs of some or all of NYNEX's investments in fiber optic facilities, capable of providing future broadband service, should be included in current rates. The Commission determined that the

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<sup>2</sup> PUBLIC UTILITIES COMMISSION, Investigation into Regulatory Alternatives for the New England Telephone and Telegraph Company, Docket No. 94-123

<sup>3</sup> FREDERIC A. PEASE ET AL. v. NEW ENGLAND TELEPHONE COMPANY, Complaint Requesting Commission Investigation of the Level of Revenues being Earned by NET and Determination of Whether Toll and Local Rates Should be Reduced, Docket No. 94-254

earnings investigation was necessary to develop a "fair starting point" for any form of alternative regulation that may ultimately be adopted. NYNEX has filed testimony and exhibits alleging that its earnings are not excessive and that it might need a revenue increase to earn what it believes to be a fair and reasonable return on its investment.

On November 15, 1994, NYNEX filed a description of its proposed alternative regulation plan. The NYNEX plan proposes to eliminate traditional rate cases for at least five years, and would base changes in NYNEX's overall level of rates over time both on inflation and on cost changes in the telephone industry, *i.e.*, inflation less a productivity index. Within this overall limitation, NYNEX proposes that it be allowed greater flexibility to change rates for various services but that increases in "individual rate elements" would be subject to a limit of inflation (without the productivity offset). It has, however, proposed to freeze basic exchange rates for Lifeline customers. ✓

On December 13, 1994, other parties in the Commission's investigation proposed different plans and have disagreed with NYNEX's position on its earnings.

During December 1994, the Commission conducted public witness hearings in Portland, Lewiston, Bangor, Augusta, and Presque Isle, to receive testimony from the public at large. Sixty-one persons testified at these hearings, that were announced in and covered by local media. Expert witness hearings are scheduled for February, 1995.

The Commission has adopted a procedural schedule that projects that the Commission will decide these cases by May 15, 1995. The Commission plans to report its decisions to the Utilities Committee by May 16, 1995, as required in Section 9104(3) of Title 35-A, to enable the Legislature to consider those decisions during the First Session, as provided in Title 35-A, Chapter 91.

### III. RECOMMENDATIONS FOR LEGISLATION

At this time, the Commission is not making any recommendations for further legislation related to these issues. If the Commission determines that any legislation would be needed to further the Legislature's goals, we would anticipate that our recommendations would be

better informed by the Commission decisions scheduled for May 1995, and we will include any such recommendations in our report to the Legislature at that time.

Respectfully submitted,



Thomas L. Welch  
Chairman



Elizabeth Hughes  
Commissioner



William M. Nugent  
Commissioner

TLW/JDS/

attachment

cc: Sen. Harry Vose (Chair, Utilities Cmte, 116th; Co-Sponsor, 1993 L.D. 1947)  
Rep. Herbert Clark (Chair, Utilities Cmte, 116th)  
Sen. Rochelle M. Pingree (Chair, Housing & Economic Development Cmte, 116th)  
Rep. Rita Melendy (Chair, Housing & Economic Development Cmte, 116th)  
Pres. Dennis Dutremble (Sponsor, 1993 L.D. 1947)  
Sen. David Carpenter (Co-Sponsor, 1993 L.D. 1947)  
Sen. Pam Cahill (Co-Sponsor, 1993 L.D. 1947)  
Jon Clark, OPLA Analyst (15 copies)  
Roy Lenardson, OPLA Analyst (15 copies)

## STATE OF MAINE

IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND NINETY-FOUR

S.P. 726 - L.D. 1947

An Act to Establish an Alternative Form of  
Telecommunications Regulation in the State

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 35-A MRSa §7101, sub-§3, as enacted by PL 1993, c. 410, Pt. 000, §1, is amended to read:

3. Report. The commission shall provide to the joint standing committee of the Legislature with having jurisdiction over utility matters and the joint standing committee of the Legislature having jurisdiction over housing and economic development matters a report on the status of the telecommunications industry in Maine the State no later than December 31, 1994. The report must include the following:

- A. The extent to which the dual communications policy goals of universal service and economic development are being achieved;
- B. The actions taken by the commission to further these goals, including the status of any alternative approaches to regulation; and
- C. Recommendations for legislation.

Sec. 2. 35-A MRSa c. 91 is enacted to read:

## CHAPTER 91

### ALTERNATIVE FORM OF REGULATION OF TELECOMMUNICATIONS SERVICES

#### §9101. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Alternative form of regulation. "Alternative form of regulation" means a form of regulation that includes, but need not be restricted to, the use of any index, formula, rate-stability plan, range-of-freedom plan or other streamlined form of regulation or deregulation of services or entities when regulation is not required to protect the public interest or to accomplish the specific objectives set forth in this chapter.

#### §9102. Adoption of alternative form of regulation

The commission may adopt, after public hearings and other processes the commission determines appropriate, an alternative form of regulation for any telephone utility in the State. The alternative form of regulation must conform to the requirements of chapters 71, 73, 75, 87 and 89, but need not conform with chapter 3 to the extent that the provisions of chapter 3 require the use of rate-base, rate-of-return or any other specific form of regulation of the rates of a telephone utility or to the extent that the provisions of chapter 3 give any party, including the telephone utility, the right to petition to change rates for telecommunications services. This chapter may not be construed to limit the authority of the commission under section 1322.

#### §9103. Conditions of alternative form of regulation

Unless the commission specifically finds that the following objectives are not in the best interests of ratepayers, the commission shall ensure that any alternative form of regulation it adopts under section 9102 is consistent with the following objectives.

1. Alternative regulation; period. For the period of the alternative form of regulation, which may not be less than 5 years nor exceed 10 years without affirmative reauthorization by the commission, ratepayers as a whole, and residential and small business ratepayers in particular, may not be required to pay more for local telephone services as a result of the implementation of an alternative form of regulation than they would under traditional rate-base or rate-of-return regulation.

2. Costs. The costs of regulation of telephone utilities must be less under the alternative form of regulation than under rate-base or rate-of-return regulation.

3. Mandates. The alternative form of regulation preserves the ability of the commission to ensure that all legislative and commission mandates directed to the telephone utility are properly executed.

4. Safeguards. The alternative form of regulation must provide adequate safeguards to ensure that risks associated with the development, deployment and offering of telecommunications and related services offered by the telephone utility, other than local telephone services, are not borne by the local telephone service subscribers of the telephone utility and that the utility continues to offer a flat-rate, voice-only local service option.

5. Reasonable charges. The alternative form of regulation must ensure that customers pay only reasonable charges for local telephone services.

6. Reasonable return. The alternative form of regulation must ensure that the telephone utility has, over the period of the alternative form of regulation, a reasonable opportunity to earn a fair return on the investment necessary to provide local telephone services.

7. Encourage telecommunications services. The alternative form of regulation must encourage the development, deployment and offering of new telecommunications and related services in the State.

8. Nondiscriminatory charges. The alternative form of regulation must ensure that another telephone utility pays the telephone utility providing local telephone service reasonable and nondiscriminatory charges for any service used by the other telephone utility to provide its competing service.

9. General safeguards. The alternative form of regulation must include consumer and competitive safeguards.

#### §9104. Implementation

The commission may adopt an alternative form of regulation under the following conditions.

1. Completion by May 15, 1995. If the commission concludes a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the rule or order adopting the alternative form of regulation takes effect 90 days

after the adjournment of the First Regular Session of the 117th Legislature.

2. Completion by February 1, 1996. If the commission fails to complete a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the commission must conclude any proceeding it undertakes to adopt an alternative form of regulation under that section by February 1, 1996. Any rule or order providing for an alternative form of regulation adopted after May 15, 1995 takes effect 90 days after the adjournment of the Second Regular Session of the 117th Legislature.

3. Report to Legislature. The commission shall submit a report by May 16, 1995 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any proceedings it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 1. The commission shall submit a 2nd report by February 2, 1996 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any actions it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 2.

The joint standing committee of the Legislature having jurisdiction over utility matters may report out legislation regarding telecommunications regulation to the First or Second Regular Session of the 117th Legislature.

This chapter may not be construed to require the commission to adopt any alternative form of regulation.

#### §9105. Report to Legislature

The commission shall provide to the joint standing committee of the Legislature having jurisdiction over utility matters, on an annual basis beginning September 1, 1996, a report describing the activities of the commission pursuant to this chapter and the extent to which the alternative form of regulation has achieved the objectives of this chapter.

Thomas L. Welch  
Chairman



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William M. Nugent  
Heather F. Hunt  
Commissioners

## PUBLIC UTILITIES COMMISSION

February 1, 1996

Senator David L. Carpenter, Chair  
Representative Carol A. Kontos, Chair  
Joint Standing Committee on Utilities and Energy  
State House Station #115  
Augusta, ME 04333-0115

Re: P.L. 1993, ch. 638, An Act to Establish an Alternative Form of  
Telecommunications Regulation in the State

Dear Sen. Carpenter and Rep. Kontos:

In 1994, the Legislature enacted P.L. 1993, ch. 638, An Act to Establish an Alternative Form of Telecommunications Regulation in the State (attached). The Act created sections 9101-9105 of Title 35-A and required<sup>1</sup> that

[t]he commission shall submit a . . . report by February 2, 1996 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any actions it has undertaken under this chapter . . . . The joint standing committee of the Legislature having jurisdiction over utility matters may report out legislation regarding telecommunications regulation to the First or Second Regular Session of the 117th Legislature.

The purpose of this letter is to provide the Commission's report to the Joint Standing Committee on Utilities and Energy, and to recommend an amendment to 35-A M.R.S.A. § 9102.

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<sup>1</sup>35-A M.R.S.A. § 9104(3).

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## I. STATUS OF COMMISSION PROCEEDINGS

In May 1994, the PUC began an investigation<sup>2</sup> into the appropriate method of regulating the rates of the New England Telephone and Telegraph Company (NYNEX). The Commission's goal was to determine whether changes should be made in the way NYNEX is regulated that will continue to protect consumers while recognizing and accommodating the many significant changes occurring in the telecommunications markets. The Commission also investigated whether a different regulatory approach would provide better incentives for NYNEX to operate more efficiently and, if so, how those efficiency gains should be shared with customers.

In August 1994, the Commission initiated an earnings investigation<sup>3</sup> for NYNEX in response to a complaint from some of NYNEX's customers alleging that its rates and earnings were excessive. That complaint also asked the Commission to investigate whether the costs of some or all of NYNEX's investments in fiber optic facilities, capable of providing future broadband service, should be included in current rates. The Commission determined that the earnings investigation was necessary to develop a "fair starting point" for any form of alternative regulation that might ultimately be adopted.

The Commission consolidated the hearings for these proceedings. During late 1994, many of the 23 parties to these proceedings filed comments and testimony on these issues. During December 1994, the Commission conducted public witness hearings in Portland, Lewiston, Bangor, Augusta, and Presque Isle, to receive testimony from the public at large. Sixty-one persons testified at these hearings, that were announced in and covered by local media. Expert witness hearings were conducted during February, 1995, and the parties filed briefs and reply briefs in March. The Commission's Examiners and advisory staff issued proposed decisions in April, 1995. The Commission considered the Examiners' Reports in an open Deliberative Session held in early May 1995.

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<sup>2</sup>*Public Utilities Commission, Investigation into Regulatory Alternatives for the New England Telephone and Telegraph Company d/b/a NYNEX, Docket No. 94-123.*

<sup>3</sup>*Frederic A. Pease et al. v. New England Telephone and Telegraph Company d/b/a NYNEX, Complaint Requesting Commission Investigation of the Level of Revenues being Earned by NYNEX and Determination of Whether Toll and Local Rates Should be Reduced, Docket No. 94-254.*

During its deliberations in the regulatory alternatives and companion earnings investigation proceedings, the Commission received written and oral communications from legislators and others, apparently as a direct result of a substantial lobbying campaign by NYNEX designed to convince the Commission to adopt results other than those recommended by its advisors. To prevent similar attempts to influence decisions outside the established regulatory process in the future, we have proposed to amend our rules that govern *ex parte* and other communications designed to influence our decision-making in adjudicatory proceedings.<sup>4</sup>

In the regulatory alternatives and earnings investigation proceedings, the Commission decided that the public interest requires that an Alternative Form of Regulation (AFOR) for NYNEX be adopted for at least 5 years. Under the AFOR, NYNEX's rates for core services will be indexed to the rate of inflation minus a productivity offset of 4.5%. Core services include non-discretionary services (primarily basic exchange and toll services) and discretionary services (such as existing Custom Calling, and Phonesmart services, and special contracts on customers with competitive alternatives). The price cap does not apply to non-core services, which include new competitive broadband services. The primary pricing rule caps the annual aggregate change in prices for core services during the term of the AFOR. Other price cap rules limit the changes for certain individual core service rate elements. To ensure the continued high quality of service now provided by NYNEX, the Commission adopted a Service Quality Index (SQI) and a mechanism to provide rebates to customers if service quality does not meet the standards established by the SQI.

The AFOR meets all of the statutory requirements of 35-A M.R.S.A. § 9103. Under the AFOR, we expect that prices for both toll and basic local service will be as low as or lower than under traditional rate of return regulation (ROR), and that the cost of regulation should be less than traditional ROR. The AFOR maintains our ability to regulate NYNEX adequately, and contains sufficient safeguards to ensure NYNEX provides a high level of customer service. NYNEX will have an opportunity to earn a fair rate of return while

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<sup>4</sup>*Public Utilities Commission, Rulemaking: Chapter 110, Rules of Practice and procedure; Proposed Amendments to Ex Parte Provisions, Docket No. 95-390. A copy of the Commission's November 14, 1995 Notice of Rulemaking is attached.*

having the flexibility in pricing and in its operations to compete effectively in the Maine telecommunications market.

The Commission also decided that a "fair starting point" for that AFOR required that NYNEX reduce its current annual revenues by \$14.4 million. The Commission decided to implement the revenue reduction by eliminating charges for Touch Tone service, and by reducing rates for toll services. The Commission also ordered NYNEX to provide up to \$4.0 million per year of the \$14.4 million in the form of rate reductions and/or other benefits for libraries and schools. The Commission also required NYNEX to issue a one-time refund totalling \$2.8 million to close out a 1991 agreement with NYNEX that required the refund.

The Commission's decisions are currently on appeal to Supreme Judicial Court sitting as Law Court. The appeals were brought by AARP and Mr. Pease (the lead complainant in 94-254), on the issues that investment for stranded copper and excessive fiber capacity should be excluded from rate base, the double-leveraging method should have been used and risk was not properly considered for determining cost of equity, and that the Commission lacks authority to order benefits for libraries and schools. These issues have been briefed to the Court, and oral argument was held on January 5th. It is uncertain when the Court will decide these issues. In the interim, the Commission is proceeding to implement the Orders.

## **II. SCHOOLS AND LIBRARIES**

In response to the Commission's May order providing for up to \$4.0 million per year to benefit libraries and schools, proposals were received from NYNEX and the New England Cable Television Association (NECTA) to provide a statewide area network connecting individual school and library locations and local area networks. The Commission solicited and reviewed comments from parties and other interested persons, held a conference during September for discussion of issues raised by the proposals, and solicited and reviewed further comments offered by more than 40 entities.

In December, the Commission deliberated these matters and issued an Order on January 5, 1996 approving a plan to provide access to information networks and services

to those public libraries and public schools that presently lack adequate access. A copy of that order is attached.

Under the approved plan, all services or facilities will be provided by or with funds provided by NYNEX, which will supply funding for the plan of up to \$4.0 million per year for five years. The plan includes a NYNEX-provided Backbone Tier and two standard NYNEX-provided Access Tier packages. The plan also allows schools or libraries to opt for alternative equivalent value services that can be used as alternatives to the standard Access Tier packages. The alternatives may include access technologies and network functions furnished by NYNEX or other providers (e.g., cable television or interexchange companies).

The plan also provides funding for training and for computers and connection equipment for libraries and schools that do not presently have that equipment for connection to the NYNEX Access Tier. We are creating an Advisory Board to assist us in implementation of the plan, comprising two members of the Commission staff and representatives of the Office of the Public Advocate, NYNEX, NECTA, the Maine Department of Education, the Maine library community, and Maine internet service providers.

### **III. RECOMMENDATIONS FOR LEGISLATION**

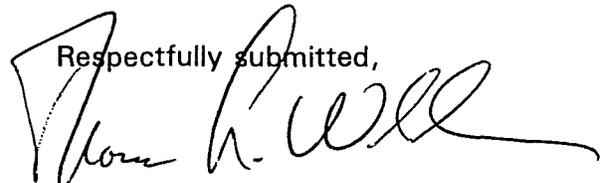
In our December 1994 Report to the Legislature, the Commission did not recommend further legislation, anticipating that our recommendations would be better informed by the decisions that we have reached. No further legislation is needed to implement the alternative form of regulation we have adopted.

The AFOR adopted by the Commission grants NYNEX substantial pricing flexibility, although at present under the AFOR, it must file rate schedules and those rate schedules must be approved by the Commission. NYNEX also has the authority to establish rates with customers by contract, but under 35-A M.R.S.A. § 703(3-A), the Commission must approve each such contract. The statute authorizing alternative forms of regulation, 35-A M.R.S.A. § 9102, allows the Commission to suspend certain requirements of "Chapter 3" (sections 301-312), i.e., the sections requiring Commission approval of rate schedules. Section 9102 states:

The alternative form of regulation . . . need not conform with chapter 3 to the extent that the provisions of chapter 3 require the use of rate-base rate-of-return or any other specific form of regulation of the rates of a telephone utility or to the extent that the provisions of chapter 3 give any party, including the telephone utility, the right to petition to change rates for telecommunications services.

We believe it may also be appropriate to provide the Commission similar flexibility with regard to the approval requirement for special contracts. We therefore suggest that the Legislature add a provision to section 9102 stating that the alternative form of regulation "need not conform with the provisions of section 703(3-A)."

Respectfully submitted,



Thomas L. Welch  
Chairman



William M. Nugent  
Commissioner



Heather F. Hunt  
Commissioner

TLW/JDS/  
Attachments

cc: Senator John J. Cleveland  
Senator Philip E. Harriman  
Rep. Herbert C. Adams  
Rep. Conrad Heeschen  
Rep. Thomas E. Poulin  
Rep. M. Ida Luther  
Rep. Gary L. O'Neal  
Rep. Joseph B. Taylor  
Rep. F. Thomas Gieringer  
Rep. Robert A. Cameron  
Rep. Richard I. Stone  
Hon. Dennis Dutremble (Sponsor, 1993 L.D. 1947)  
Hon. Harry Vose (Chair, Utilities Cmte, 116th; Co-Sponsor, 1993 L.D. 1947)  
Rep. Herbert Clark (Chair, Utilities Cmte, 116th)  
Sen. Pam Cahill (Co-Sponsor, 1993 L.D. 1947)  
Greg Nadeau, Governor's Office (3 copies)  
Stephen Ward, Public Advocate  
Paula Thomas, Clerk  
Division Directors, Public Utilities Commission  
Amy Holland, OPLA

## STATE OF MAINE

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S.P. 726 - L.D. 1947

An Act to Establish an Alternative Form of  
Telecommunications Regulation in the State

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 35-A MRSA §7101, sub-§3, as enacted by PL 1993, c. 410, Pt. 000, §1, is amended to read:

3. Report. The commission shall provide to the joint standing committee of the Legislature with having jurisdiction over utility matters and the joint standing committee of the Legislature having jurisdiction over housing and economic development matters a report on the status of the telecommunications industry in Maine the State no later than December 31, 1994. The report must include the following:

A. The extent to which the dual communications policy goals of universal service and economic development are being achieved;

B. The actions taken by the commission to further these goals, including the status of any alternative approaches to regulation; and

C. Recommendations for legislation.

Sec. 2. 35-A MRSA c. 91 is enacted to read:

## CHAPTER 91

### ALTERNATIVE FORM OF REGULATION OF TELECOMMUNICATIONS SERVICES

#### §9101. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Alternative form of regulation. "Alternative form of regulation" means a form of regulation that includes, but need not be restricted to, the use of any index, formula, rate-stability plan, range-of-freedom plan or other streamlined form of regulation or deregulation of services or entities when regulation is not required to protect the public interest or to accomplish the specific objectives set forth in this chapter.

#### §9102. Adoption of alternative form of regulation

The commission may adopt, after public hearings and other processes the commission determines appropriate, an alternative form of regulation for any telephone utility in the State. The alternative form of regulation must conform to the requirements of chapters 71, 73, 75, 87 and 89, but need not conform with chapter 3 to the extent that the provisions of chapter 3 require the use of rate-base, rate-of-return or any other specific form of regulation of the rates of a telephone utility or to the extent that the provisions of chapter 3 give any party, including the telephone utility, the right to petition to change rates for telecommunications services. This chapter may not be construed to limit the authority of the commission under section 1322.

#### §9103. Conditions of alternative form of regulation

Unless the commission specifically finds that the following objectives are not in the best interests of ratepayers, the commission shall ensure that any alternative form of regulation it adopts under section 9102 is consistent with the following objectives.

1. Alternative regulation; period. For the period of the alternative form of regulation, which may not be less than 5 years nor exceed 10 years without affirmative reauthorization by the commission, ratepayers as a whole, and residential and small business ratepayers in particular, may not be required to pay more for local telephone services as a result of the implementation of an alternative form of regulation than they would under traditional rate-base or rate-of-return regulation.

2. Costs. The costs of regulation of telephone utilities must be less under the alternative form of regulation than under rate-base or rate-of-return regulation.

3. Mandates. The alternative form of regulation preserves the ability of the commission to ensure that all legislative and commission mandates directed to the telephone utility are properly executed.

4. Safeguards. The alternative form of regulation must provide adequate safeguards to ensure that risks associated with the development, deployment and offering of telecommunications and related services offered by the telephone utility, other than local telephone services, are not borne by the local telephone service subscribers of the telephone utility and that the utility continues to offer a flat-rate, voice-only local service option.

5. Reasonable charges. The alternative form of regulation must ensure that customers pay only reasonable charges for local telephone services.

6. Reasonable return. The alternative form of regulation must ensure that the telephone utility has, over the period of the alternative form of regulation, a reasonable opportunity to earn a fair return on the investment necessary to provide local telephone services.

7. Encourage telecommunications services. The alternative form of regulation must encourage the development, deployment and offering of new telecommunications and related services in the State.

8. Nondiscriminatory charges. The alternative form of regulation must ensure that another telephone utility pays the telephone utility providing local telephone service reasonable and nondiscriminatory charges for any service used by the other telephone utility to provide its competing service.

9. General safeguards. The alternative form of regulation must include consumer and competitive safeguards.

#### §9104. Implementation

The commission may adopt an alternative form of regulation under the following conditions.

1. Completion by May 15, 1995. If the commission concludes a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the rule or order adopting the alternative form of regulation takes effect 90 days

after the adjournment of the First Regular Session of the 117th Legislature.

2. Completion by February 1, 1996. If the commission fail to complete a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the commission must conclude any proceeding it undertakes to adopt an alternative form of regulation under that section by February 1, 1996. Any rule or order providing for an alternative form of regulation adopted after May 15, 1995 takes effect 90 days after the adjournment of the Second Regular Session of the 117th Legislature.

3. Report to Legislature. The commission shall submit a report by May 16, 1995 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any proceedings it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 1. The commission shall submit a 2nd report by February 2, 1996 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any actions it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 2.

The joint standing committee of the Legislature having jurisdiction over utility matters may report out legislation regarding telecommunications regulation to the First or Second Regular Session of the 117th Legislature.

This chapter may not be construed to require the commission to adopt any alternative form of regulation.

#### §9105. Report to Legislature

The commission shall provide to the joint standing committee of the Legislature having jurisdiction over utility matters, on an annual basis beginning September 1, 1996, a report describing the activities of the commission pursuant to this chapter and the extent to which the alternative form of regulation has achieved the objectives of this chapter.

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

January 5, 1996

ORDER  
(SCHOOLS AND LIBRARIES)

PUBLIC UTILITIES COMMISSION  
Investigation Into Regulatory  
Alternatives for the New England  
Telephone and Telegraph Company  
d/b/a NYNEX

Docket No. 94-123

FREDERIC A. PEASE ET AL. V.  
NEW ENGLAND TELEPHONE AND  
TELEGRAPH COMPANY D/B/A NYNEX  
Complaint Requesting Commission  
Investigation of the Level of Revenues  
Being Earned by NYNEX and Determination  
of Whether Toll and Local Rates Should  
be Reduced

Docket No. 94-254

WELCH, Chairman; NUGENT and HUNT, Commissioners

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## **I. SUMMARY OF DECISION**

In this Order, we approve a plan to provide access to information networks and services to those public libraries and public schools that presently lack adequate access. Under the approved plan, all services or facilities will be provided by or through NYNEX, and NYNEX will supply the funding for the plan up to \$4.0 million per year for five years. The plan includes a NYNEX-provided Backbone Tier and two standard NYNEX-provided Access Tier packages. Included in these Access Tier packages are computers and connection equipment for libraries and schools that do not presently have that equipment. The plan also allows schools or libraries to opt for alternative equivalent value services that can be used as alternatives to the standard Access Tier packages. The alternatives may include access technologies and network functions furnished by NYNEX or other providers (e.g., cable television or interexchange companies).

We are requiring measurement and true-up of costs to evaluate whether this plan satisfies our intent to provide up to \$4.0 million per year for five years for school and library connections. We will require the use of intrastate marginal costs of NYNEX's incremental expenditures for this evaluation. To provide the necessary "seed money" funding, we are ordering NYNEX to continue accruals of \$333,333 monthly into a special account.

To oversee implementation of this plan, we are creating an Advisory Board to assist us by reviewing alternatives available to schools and libraries, and by recommending specific alternatives for our approval. The Advisory Board will comprise two members of the Commission staff, one of whom shall serve as the Board's chairperson, and one representative from each of the following: the Office of the Public Advocate, NYNEX, the New England Cable Television Association, the Maine Department of Education, the Maine library community and Maine internet service providers.

## **II. BACKGROUND OF PROCEEDING**

### **A. Commission Order; Procedures**

In the Order determining the proper level of revenues and earnings for the New England Telephone and Telegraph Company, d/b/a NYNEX, we found that NYNEX should reduce its Maine intrastate revenue requirements by \$14.446 million. The Commission held that up to \$4.0 million of the mandated rate reduction should "be used to reduce rates and/or provide additional services or

equipment to libraries and schools . . . in the belief that significant benefits to the public may be realized by providing limited support for additional access to information network and services." The Commission directed NYNEX, in consultation with other parties, to file a proposal describing how the \$4.0 million could be used to benefit libraries and schools.<sup>1</sup> *Frederic Pease et al. v. New England Telephone and Telegraph Company d/b/a NYNEX*, Docket No. 94-254, Order, May 15, 1995, at 58-59.

NYNEX filed that proposal on July 31, 1995. The New England Cable Television Association (NECTA), a party to this proceeding, filed its own proposal on the same day. By Procedural Order issued on August 4, 1995, parties were asked to file comments addressing certain questions we raised relating to the proposals and any other relevant issues. A Conference of Counsel was held on September 8, 1995 to allow the Commission and parties to discuss the various issues raised by the proposals. Parties and non-parties were afforded an opportunity to file further comments by September 29, 1995. More than 40 entities filed such comments.

B. Description of NYNEX Proposal

NYNEX's July 31 proposal (NYNEX Proposal) resulted from a collaborative effort among NYNEX, the Maine Department of Education, the Maine Library Commission, the Maine Library Association (MLA) and the Maine Educational Media Association with comments from other interested entities. Under the NYNEX proposal, NYNEX would provide a statewide area network connecting individual school and library locations and local area networks. Schools and libraries would directly connect into this backbone via the NYNEX Frame Relay Service (FRS) network. Each school or library would be provided 56 Kbps FRS circuits to connect into the network. Libraries could choose either a 56 Kbps FRS access line or a business line with a modem. For those choosing a business line, there would be a credit of 22 hours per month of intrastate toll usage. Under either option, libraries could also order up to two additional voice-grade access lines at a reduced rate of \$12 per line per month.

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<sup>1</sup>According to NYNEX's July 31, 1995 filing, its proposal was "the product of extensive collaborative efforts among NYNEX, the Department of Education, the Maine Library Commission, the Maine Library Association and the Maine Educational Media Association." According to this filing, NYNEX was also assisted by comments of PUC Staff, OPA, NECTA, Maine Science & Technology Foundation, and members of the Maine Legislature. NECTA did not join the endorsement but, as explained below, presented its own variation.

The NYNEX proposal also envisions an Oversight Board to oversee implementation and ongoing management of this project, training, certain network hardware, and modems for locations choosing the business line option. In describing the proposal, NYNEX stated that over the 7-year period it expects this project to be in place, it would spend at least \$4.0 million annually to benefit Maine schools and libraries. NYNEX recommended an annual reconciliation process to allow parties to monitor and adjust expenditures so as to utilize fully the annual allowance of up to \$4.0 million. In its September 29 comments, NYNEX stated that it is willing to measure the cost of the proposal under an incremental cost method, and that NYNEX was working with the parties to develop a so-called Total Service Long Run Incremental Cost (TSLRIC) methodology, anticipated to be completed shortly.

C. Description of NECTA Proposal

NECTA proposes a variant on the NYNEX proposal. It proposes a 2-tier system that includes a so-called Backbone Tier and an Access Tier. The Backbone Tier would consist of the same elements proposed in NYNEX's backbone and any necessary training. NECTA proposes that local communities of interest be allowed to select the most appropriate Access Tier technologies to address their specific information requirements. Communities could choose access items offered by NYNEX (such as Frame Relay Service, modems and business lines, or other tariffed network services offered by NYNEX or independent telephone companies), or services offered by cable television-based data networks, or private or community-owned networks. NECTA proposes that "Equivalent Value Funding" be made available for these services. That amount would equal the value of the proposed FRS option. For example, if a 56 Kbps access line and associated hardware represent \$1,000 in recurring costs and \$500 in one-time costs, the school or library could use those amounts to purchase an alternative service that its needs.

D. Summary of Other Comments

Several internet service providers (ISPs) objected to the use of ratepayer funds to fund NYNEX's Frame Relay Services. They contend that NYNEX is using ratepayer funds to allow it to develop an infrastructure that it will use for commercial purposes. The ISPs believe that the NYNEX Frame Relay Service will compete with their services. One ISP suggests that we exclude any expenditures that NYNEX would have made *anyway* for the provisions of Frame Relay Services.

Several commenters, including NECTA, several schools and school districts, and several internet service providers, have also commented that the 56 Kbps access service proposed by NYNEX is too technically limited. Those commenters have proposed allowing users to receive equivalent funding to configure their own access networks in a manner which better suits their needs.

A proposal "to fund the acquisition and installation of computers/printers in smallest libraries" was made by an individual from Parsonsfield, Phil Degnon. Mr. Degnon commented that the NYNEX proposal "falls short of meeting the needs of the very small communities with their equally small libraries" that cannot afford computer equipment to access the network. A number of other commenters endorsed Mr. Degnon's proposal.

### **III. THE APPROVED PLAN**

We approve a plan for public libraries and public schools ("users") throughout NYNEX's service territory that includes a Backbone Tier available to all users and an Access Tier that includes alternatives that can be selected by the users. In approving this plan, our intent is to provide schools and libraries basic but adequate connections to advanced information services. Despite claims by other potential providers that they may be able to provide higher-quality facilities, very few schools and libraries are now connected to advanced information services. Nevertheless, we do not wish to discourage other initiatives intended to advance the availability of any particular group of services or technologies. We do not intend that our action favor or disfavor any entity's future participation in Maine's information services market, or cause construction of needlessly duplicative facilities. Indeed, the provision below for alternative equivalent value services is intended to encourage other initiatives.

As noted above, it is our intent that the funding we have made available shall be used, at least initially, to provide 56 kbps connection for each school and library.<sup>2</sup> A school or library desiring access capability above 56 kbps may use equivalent value funding to help pay for such a connection. However, it is not our intent to allow any school or library to use equivalent funds to pay for any existing connection that is already capable of delivering the service (56 kbps).

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<sup>2</sup>Depending on ultimate funding availability, in the future we may consider increasing the minimum standards.

A. Eligible Public Schools and Libraries

1. Public Libraries

We adopt a definition of public libraries that we believe is consistent with that proposed by the NYNEX plan and the parties supporting that plan. MLA's August 25, 1995, comments propose that the category include "public libraries as defined by statute, libraries in publicly funded institutions of higher education, the county law libraries, the Maine State Library, and the Maine Law and Legislative Reference Library." We adopt this proposed definition. However, one portion of that definition, "public libraries as defined by statute," is not entirely clear. The statutes that define "free public libraries" are located at 27 M.R.S.A. §§ 101 and 102. In addition, section 106 states that "libraries owned or controlled by corporations, associations or trustees" that receive municipal funding so that its inhabitants may have the "free use of its books" shall be considered a "free public library."

Another, somewhat more expansive, definition of "public library" is contained in 27 M.R.S.A. § 110(10):

**10. Public Library.** "Public library" means a library freely open to all persons and receives its financial support from a municipality, private association, corporation or group. The above serves the informational, educational and recreational needs of all the residents of the area for which its governing body is responsible.

That definition is only intended to be used in Chapter 4 of Title 27, Regional Library Systems. The primary difference between the section 110(10) definition and those in sections 101, 102 and 106 is that the more generally applicable provisions require municipal funding. Section 110(10) does not.

The MLA comments further state, however: Many of the Maine libraries which are contributors to the statewide integrated library resource sharing system are presumed to be outside the scope of the Order. These include libraries in medical centers, libraries in museums and historical societies, libraries in private research laboratories, and libraries in privately funded institutions of higher education.

We are generally disposed to adopt the restrictions "presumed" by MLA, at least for the present. We are concerned that the definition in 27 M.R.S.A. § 110(10) would automatically include many entities that should not be included at this time.<sup>3</sup> On the other hand, there may be libraries that are generally thought to be "public" in that they have general collections available to the public, but receive no municipal funding. We therefore will adopt a definition of "public libraries" that effectively includes all municipally-funded libraries and those that are part of a regional library system, as well as the others specifically listed in the MLA's proposed definition:

1. The Maine State Library, the Maine Law Library and Legislative Reference Library, county law libraries and libraries in publicly funded institutions of higher learning.
2. All libraries described in 27 M.R.S.A. §§ 101, 102 and 106;
3. All libraries that are defined in 27 M.R.S.A. § 110(10) and that are members of a "library district" as defined and described in 27 M.R.S.A. §§ 110(7) and 114; and
4. All "area reference and resource centers" and "research centers," as defined in 27 M.R.S.A. §§ 110(2) and (12), provided that they are also "public libraries" as described in 27 M.R.S.A. § 110(10).

In their exceptions, the libraries proposed "standards" for inclusion that appear to be similar, but may or may not be identical to the statutory definitions adopted above. Unless problems develop using the statutory definitions, we will rely on the set of definitions we describe above.

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<sup>3</sup>In comments filed in response to the Examiner's Report, the Maine Department of Labor requested inclusion of its "libraries," i.e., the job training information resources available at seven of its regional offices. For the present, the Department's facilities should be included only if they fall within the definition set forth below. In doubtful cases, the Board may recommend whether a particular library is within or outside of the definition we have adopted.

Depending on the availability of funding within the overall limit of \$20.0 million, the Advisory Board may, at some future time, wish to propose a somewhat more expansive definition.

## 2. Schools

The proposal was limited to "public" schools although no reason was given for that limitation. We were unable to find in the record any proposed definition for "public" schools, despite NYNEX's reference to a definition provided by the "DOE and Library Group." 20-A M.R.S.A. § 1(24) provides a reasonable and clear definition of public schools.<sup>4</sup> Under that definition, public schools are limited to the grades kindergarten through 12.<sup>5</sup> For our purpose, we will include within the definition of public schools those private secondary schools that are "private schools approved for tuition purposes." See 20-A M.R.S.A. §§ 1(23) and 2951.

The Office of Maine Catholic Schools filed a comment in response to the Examiners' Report requesting that parochial schools be included in the program. We will not at this time expand the program beyond public schools. We intend to re-examine this issue at the conference described below in Part VIII.

### B. Backbone Tier

NYNEX is hereby directed to provide throughout its territory in Maine what has been characterized by NECTA as a Backbone Tier. The Backbone Tier will be the portion of the switched packet network that interconnects individual "access tier" networks and that provides a shared access and gateway to higher level network services. We accept NYNEX's proposal for the following elements to constitute the Backbone Tier:

1. The regional network routers and dial hubs with modems;
2. Six 1.544 Mbps circuits between the regional routers;
3. Thirty-two business lines at the dial hubs; and
4. Shared services including:

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<sup>4</sup>Title 20-A M.R.S.A. § 1(24) defines public schools as:

**24. Public school.** "Public school" means a school that is governed by a school board of a school administrative unit and funded primarily with public funds.

<sup>5</sup>A "school board" is the governing body of a "school administrative unit." 20-A M.R.S.A. § 1(28). Its function is to operate "programs in kindergarten and grades 1 to 12 . . . ." 20-A M.R.S.A. § 1001(8).

- a. Internet and other gateway access,
- b. Training,
- c. Network monitoring,
- d. Help desk, and
- e. University Resources Serving Users State-wide (URSUS) equipment.

C. Access Tier

Individual schools or libraries ("users") shall have an option of the following as the Access Tier:

1. NYNEX 56 Kbps Standard Package

The first Access Tier option consists of a standard package of services and equipment that will be provided entirely by NYNEX and that will include a Frame Relay Service connection with an individual DDS-II 56 Kbps access circuit from the specific school or library to the closest FRS access point, including a local distribution channel, a 56 Kbps port and a 56 Kbps internal Frame Relay Access Device (FRAD). The FRAD will connect a computer to the frame relay transport channels.

Users will also be provided training necessary to use the services. The Advisory Board described in Part VII below shall make recommendations to ensure the training costs and content are appropriate to user needs.<sup>6</sup>

2. NYNEX Business Line and Modem Standard Package

The second Access Tier option consists of one voice-grade business line with 22 hours of intrastate toll usage per month and a V.34 modem that will be used to connect the business line to a computer. Training, although presumably simpler, will be provided pursuant to the same procedures as for the first NYNEX standard package.

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<sup>6</sup>NYNEX proposed a specific training program. Comments and exceptions filed by other parties have suggested alternatives, including the provision of training by the University of Maine Computing and Processing Services (CAPS).

### 3. Alternative Equivalent Value Services

To address concerns such as those stated in Part II.D above, any user, subject to the limitations described below, may choose to receive alternative Access Tier "equivalent value services" in lieu of the NYNEX standard packages. Those services must provide network functions that are equivalent to or better than those provided under the NYNEX standard packages. Funding will be equal to the unseparated (total company) incremental cost to NYNEX of providing a 56 Kbps FRS connection along with a 56 Kbps FRAD, as described in Part III.C.1 above.<sup>7</sup> Any additional costs must be borne by the customer. A customer choosing the "equivalent value" alternative will be permitted to "pool" or combine its individual alternative equivalent value services with other users to purchase or construct access services for more than one user.

We agree with several commenters who have suggested that NYNEX standard packages might be too technically limited and may not suit users' needs or current equipment configurations. We believe that the alternative described here will allow customers and others to propose innovative alternatives that may provide higher quality and/or cost savings.

The Access Tier services that will be available as an alternative equivalent value services will be provided by or delivered through NYNEX. They may include access technologies and network functions from NYNEX or other providers as approved by the Commission following a recommendation by the Advisory Board as described in Part VII below. To provide reasonable equivalent services to a customer, NYNEX will be required to contract with other suppliers, including other telephone companies, interexchange carriers, cable television

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<sup>7</sup>NYNEX should calculate this amount on a location-specific basis, but must do so only if a customer indicates an interest in obtaining an alternative system. The cost calculation shall not include the common transport costs of the FRS network, which are shared among other users of the service. NYNEX shall use total *unseparated* costs for the purpose of determining the benchmark maximum funding level, as well as for any actual cost comparison that must be made (discussed below), because it would be impossible to calculate or even estimate the separations effects prior to knowing actual usage. As explained below, however, we will require NYNEX to use post-separations intrastate incremental costs to determine the total amount of funds expended to provide service to schools and libraries. Any money paid to other providers will be treated as NYNEX expenses and will also be subject to separations.

companies, private or community owned networks, internet service providers (ISPs), or combinations thereof.<sup>8</sup>

As explained in greater detail in Part VII below, requests by users to approve alternative equivalent value Access Tier packages shall be made to the Advisory Board, which shall make a recommendation to the Commission. The Advisory Board shall determine whether alternative equivalent value service proposals are reasonable and whether they provide functions at least equivalent to those of the first NYNEX standard package described in Part III.C.1 above. The Board may also recommend approval of necessary training subject to the overall \$500,000 limit stated in Part VII.B.2 below. Once a proposal has been approved for one user, other users shall be able to choose that alternative without further action by the Board or Commission. The Board shall maintain a list of all approved standard alternatives.

#### 4. Computers

As suggested by commentors, we agree that connectivity to information services requires computers. Representations have been made that many institutions, particularly smaller libraries, presently do not have computers. Therefore, an institution that represents to the Board that it presently does not have a computer that is capable of connecting to either of the NYNEX standard Access Tier Packages, or to an approved alternative package, may receive funding for one computer up to \$3,000 per institution. At the conference described below in Part VIII, we will discuss whether schools with larger student populations should receive funding to buy more than one computer. The customer will select the computer and may obtain it from a source of its choosing. Requests for computers, as well as the software that is necessary for access to information services, shall be reviewed by the Advisory Board. We delegate to the chairperson of the Advisory Board (who will be a Commission Staff member) the authority to approve these requests. The total amount that may be expended for computers during the first year, without further Commission approval, shall be \$500,000.

#### 5. Additional Discounted Access Lines for Libraries

We accept the proposal that public libraries be permitted to obtain one or two business voice-grade access lines at a discounted rate of \$12 per line per month. The stated purpose of this provision is to reduce "existing

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<sup>8</sup>Nothing shall preclude NYNEX, on its own initiative or on the request of a customer, from proposing additional alternatives.

costs for telephone services." Some libraries have no telephone service at present. The line or lines included in this provision are in addition to the access line that may be provided pursuant to the second Access Tier standard package described above in Part III.C.2.

6. Free Public Access

We agree with the suggestion of the Education/Libraries and the OPA that the services provided by the approved plan shall be made available to the relevant public on a no-charge basis.<sup>9</sup>

IV. **LEGAL AUTHORITY**

At the Conference of Counsel held on September 8, 1995, and in the procedural order issued on September 15, we requested the parties to provide comments on the following legal question:

Whether the Commission has legal authority to require payments by NYNEX to customers (specifically, schools and libraries) that those customers could use for any purpose, including the purchase of non-NYNEX telecommunications or training services.

Several parties filed comments on this question. Some parties provided arguments that went beyond the question that we raised. As discussed below, we believe that the broader issue argued by those parties is not presently before us. Nevertheless, we discuss those arguments because it is virtually impossible to separate them from the narrower question we asked.

The Commission Advocacy Staff (Staff)<sup>10</sup> argues that we cannot provide funding for customers to spend with alternative suppliers or order NYNEX to make such expenditures. Its argument, however, is based entirely on a more fundamental argument that we cannot order NYNEX to spend money to provide

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<sup>9</sup>The "relevant" public for a public library is the patrons it serves for other purposes. The "relevant" public for a school includes its students.

<sup>10</sup>In this Order, the Commission's Advocacy Staff is referred to as "Staff." Other Commission staff members, including the Examiners, are assigned to these cases as advisors. The Advocacy Staff functions as a party to the case by presenting evidence and argument, without specific direction from the Commission.

services to the libraries and schools at all, because our power is limited to that stated in 35-A M.R.S.A. § 1306 and the approval of special discounted rates for schools and libraries that are permitted by 35-A M.R.S.A. § 703(1).

We do not believe that that broader question is presently before us, and it may even be finally settled. We issued our final order in the *Pease* case on May 15, 1995. That Order directed NYNEX to propose discounts and/or expenditures on behalf of schools of up to \$4.0 million per year. The deadline for filing motions for reconsideration expired on June 5, 1995. On that date, the American Association of Retired Persons (AARP) filed a Motion for Reconsideration which specifically raised the issue of whether there was sufficient *record support* to justify the Commission's conclusion that up to \$4.0 million of the revenue reduction should be used for the benefit of schools and libraries. No party, including AARP, raised the issue of the Commission's legal authority to order such expenditures on behalf of schools or libraries prior to the expiration of the time to file a motion for reconsideration.<sup>11</sup> The May 15 Order is now on appeal to the Maine Supreme Judicial Court sitting as the Law Court. One appellant has attempted to raise the issue, but the Law Court may lack jurisdiction.<sup>12</sup> In any event, we do not consider the issue to be presently before us.<sup>13</sup>

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<sup>11</sup>AARP's motion was denied by operation of Chapter 110, § 1004, which states that if the Commission takes no action on a motion for reconsideration within 20 days, it is denied.

<sup>12</sup>The Commission's authority to order expenditures by NYNEX was not raised by AARP or by Mr. Pease in their respective Notices of Appeal. 35-A M.R.S.A. § 1320 plainly requires an appellant from the Public Utilities Commission to state in its Notice of Appeal the "grounds upon which the order or ruling is claimed to be unlawful." Mr. Pease's Notice of Appeal was filed on August 4, 1995. Subsequently, on October 6, 1995, Mr. Pease filed a purported amendment to his Notice of Appeal. The Commission and NYNEX moved to limit the grounds of appeal by Mr. Pease to those listed in his original August 4 Notice on the ground that the Court lacks jurisdiction because the appellant failed to comply with the statutory requirement.

<sup>13</sup>In its September 27 memorandum at 2 and 7, the Public Advocate appears to argue that the order was lawful because no one had appealed the issue. (The Public Advocate's memorandum was filed prior to Mr. Pease's attempted amendment of his Notice of Appeal.) We find the Public Advocate's proposition rather different from the possibility that the order may be final and therefore not attackable.

Applied to its narrower focus of whether NYNEX can be ordered to make expenditures on non-NYNEX services, we reject Staff's argument. Staff argues that the Commission's powers generally are limited to those provided by statute. *New England Telephone and Telegraph Company v. Public Utilities Commission*, 362 A.2d 741 (1976). Staff believes that in an investigation pursuant to 35-A M.R.S.A. §§ 1302 or 1303, our power is limited to those enumerated in section 1306, e.g., to find that a rate, service, act or practice is unreasonable and to order reasonable rates or reasonable service be substituted or to order a utility to cease an unreasonable act or practice. The Staff overlooks two recent legislative policy directives. The Public Advocate argues that 35-A M.R.S.A. § 7101(2) provides a basis for our order. That subsection states:

**2. Economic development.** The Legislature further declares and finds that a modern state-of-the-art telecommunications network is essential for the economic health and vitality for the State and for improvement in the quality of life for all Maine citizens. Therefore, it is the goal of the State that all Maine's businesses and citizens should have affordable access to an integrated telecommunication infrastructure capable of providing voice, data and image-based services. The State shall consider policies that:

- A. Encourage economic development;
- B. Employ methods of regulation that encourage the development and deployment of new technologies; and
- C. Encourage acceptable service applications that support economic development initiatives or otherwise improve the well-being of Maine citizens.

We see no reason why the phrase "the State" does not include its agencies, particularly the Public Utilities Commission. The placement of this statute in 35-A lends weight to those conclusions.<sup>14</sup>

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<sup>14</sup>It would make little sense for the Legislature to aim the directive solely at itself. The Legislature should not be presumed to enact laws that in effect direct it to enact other laws.

The Staff's argument also overlooks one of the "conditions" or "objectives" that we must ensure in approving any alternative form of regulation (AFOR). 35-A M.R.S.A. § 9103(7) states:

**7. Encourage telecommunications services.** The alternative form of regulation must encourage the development, deployment and offering of new telecommunications and related services in the State.

We ordered the libraries' and schools' funding in the *Pease* rate case, rather than in the alternative form of regulation (AFOR) case. Nevertheless, the two proceedings were consolidated and conceptually linked by virtue of the fact that the rate case established the starting point for rates under the AFOR. The parties themselves, in their joint briefing outline approved by the Examiners, proposed to address the issue of funding for schools and libraries in the AFOR case. Moreover, the Order clearly contemplated that the funding be provided for the duration of the AFOR, i.e., up to \$4.0 million during each of the five years of the AFOR. We therefore consider that our Order requiring the funding for schools and libraries is as much a condition of the AFOR as it is part of the rate reduction order and is justified pursuant to the statutory condition of the AFOR statute quoted above.

In addition, 35-A M.R.S.A. § 104 grants the Commission "implied" powers to carry out its "express powers and functions:"

The provisions of this Title shall be interpreted and construed liberally to accomplish the purpose of this Title. The commission has all implied inherent powers under this Title, which are necessary and proper to execute faithfully its express powers and functions specified in this Title.

Sections 7101(2) and 9103(7) state express functions or powers (or even obligations) that the Legislature has granted (or imposed) on this Commission. Under section 104, we have the authority to implement those powers and functions through our ratemaking powers and other regulatory authority over telephone utilities.<sup>15</sup>

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<sup>15</sup> The Public Advocate also points to our recent Order in *Public Utilities Commission, Re Investigation of Modification of Central Maine Power Company's Electric Lifeline Program For the 1993-1994 Program Year*, Docket No. 93-156, Order (March 10, 1994). In that case, over the objection of CMP, the Commission

For all of these reasons, we conclude that we have the authority to order NYNEX to provide internet and information connection services that in some respects may be provided under contract through or by other entities. We reject the Staff's argument that our statutory powers are limited to those enumerated in section 1306 and in other related ratesetting sections such as 310 and 703(2)(A).

NYNEX purports to address the narrow question of providing funding for customers to use for alternative suppliers of internet and information services. However, its argument is essentially the same as Staff's that the Commission's powers are limited to finding that rates or practices are unreasonable and ordering reasonable rates or practices substituted. Staff and the Public Advocate point out that if NYNEX's argument were accepted, its own proposal might also be illegal, inasmuch as it includes providing equipment itself and provides for certain portions of the service to be supplied by other providers. For reasons similar to our rejection of Staff's argument, we also reject NYNEX's argument.<sup>16</sup>

We decide that we have sufficient authority to order NYNEX to implement the plan we have described in Part III above, at least in light of the particular features of that plan. Under the plan, NYNEX must provide schools and libraries with a service, i.e., connecting them to information services. The service will be provided pursuant to two standard plans or by an alternative "equivalent value" plan. Under both the standard plans (as proposed by NYNEX) and under an alternative plan, NYNEX may be required to provide part of the service through an outside supplier. For an alternative plan, NYNEX must contract with an outside supplier to provide part of the service only following: (1) a request by a customer for an alternative method of providing an information connection, (2) an

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ordered that recipients of funds under the Electric Lifeline Program (ELP) could use those funds for the purpose of fuel conversions, i.e., for the purchase of a non-electric heating system provided by entities other than CMP. In that Order, we ruled that an ELP recipient may use some or all of its benefit to fund electric reduction measures, including fuel conversions.

<sup>16</sup>NECTA also presented arguments in support of its proposal that "equivalent" funding be provided for alternative plans that utilize the services of outside (non-NYNEX) providers. NECTA argues that the Commission can and "in effect" did find that NYNEX's service to schools and libraries was "unreasonable" and, under 35-A M.R.S.A. § 1306(6), can order a reasonable service or practice substituted. NECTA also relies on the "charitable or benevolent rate" provision of 35-A M.R.S.A. § 703(2)(A).

opportunity for NYNEX to propose a less-expensive alternative plan of its own, (3) a recommendation by the Advisory Board that an alternative plan should be approved, and (4) approval by this Commission upon a finding that the alternative plan is reasonable. It is not uncommon for utilities to contract with outside suppliers to provide services that allow the utilities to provide services to their customers in the most efficient manner. Indeed, NYNEX itself has proposed to contract with outside suppliers for certain portions of the standard packages.<sup>17</sup> Moreover, it is our obligation to assure that utilities are "operating as efficiently as possible" in order that they provide their service at rates that are as low as reasonably possible. 35-A M.R.S.A. § 301.

Because of the policy directives in 35-A M.R.S.A. §§ 7101(2) and 9103(7), which we construe to be broad grants of authority, our authority pursuant to 35-A M.R.S.A. § 104, and our ratemaking powers under 35-A M.R.S.A. §§ 101 and 301, to implement express policies, we rule that we have the authority to order NYNEX to provide information connection services in the most reasonable manner possible, including, where necessary and appropriate, through services provided by outside providers.

#### **V. AVAILABILITY IN AREAS SERVED BY INDEPENDENT TELEPHONE COMPANIES**

The Telephone Association of Maine (TAM) and NYNEX have requested that all public schools and libraries in the State of Maine, including those served by Independent Telephone Companies (ITCs), should qualify for participation. NYNEX and TAM point out that ITCs participated in the discussion leading to the proposed plan. TAM points out that ITCs serve approximately 40% of the schools and libraries in the State.

Our decision that NYNEX should implement a program for the connection of schools and libraries to information services was made in a NYNEX rate case in which we ordered NYNEX's rates reduced by approximately \$14.4 million annually and that up to \$4 million of that amount (per year) be used for the program. The case did not address the revenue requirements of the independent telephone companies, although it automatically altered their toll rates because ITCs concur in NYNEX's toll rates.

We believe that the potential benefits of this program should be extended to all public libraries and schools in the State, provided that the same plan we have

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<sup>17</sup>See NYNEX Proposal at 32.

approved for NYNEX shall also apply to the independent telephone companies, and that NYNEX and the ITCs are able to reach agreement about any operational or interconnection issues. We reserve the issue of any ratemaking treatment of any capital costs of expenses incurred by the ITCs. However, in order that those costs may be ascertained, ITCs shall separately account for all capital costs, expenses and revenue effects that are incurred in connecting libraries and schools. NYNEX has agreed that lost revenue (which may be very difficult to ascertain) will not be considered in determining how much of the \$4 million per year (\$20 million over five years) has been spent. We consider this condition also to be applicable to the ITCs.<sup>18</sup>

## VI. MEASUREMENT AND TRUE-UP

### A. Measurement of Costs

To determine what portion of the up to \$4.0 million per year reduction from intrastate revenues has been spent, we will adopt the Staff proposal that NYNEX's incremental costs (investment and expenses) be used for that purpose. In its September 29 comments, NYNEX agreed with the Staff's proposal. NYNEX shall use jurisdictionally intrastate (post-separations) incremental costs. Jurisdictional incremental costs for each category of type of investment will be determined by using the same cost allocation factors from 47 CFR Part 36 that are used to allocate each category of NYNEX's book investments and expenses between the interstate and intrastate jurisdictions. By "incremental," we mean only those reasonable costs that NYNEX has spent on behalf of the schools and libraries.<sup>19</sup> It shall not include amounts that NYNEX has spent or will have spent anyway for network functions needed to provide Frame Relay Services.

NYNEX filed a rate schedule for Frame Relay Services (FRS) on June 28, 1995. The schedules were approved on August 29, 1995 (Docket No. 95-232), and we understand that the equipment, including software, necessary, to provide FRS was in place and functioning at about that time. NYNEX has also implemented FRS in the other states it serves. It therefore appears that

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<sup>18</sup>In its comments on the Examiners' Report, TAM did not raise any objection to the plan proposed by the Examiners.

<sup>19</sup>Under the circumstances explained in Part III.C.3 above, some of the incremental spending may be spent on alternative services for customers that do not want to participate in NYNEX's standard packages. Portions of those alternative services may be provided by cable companies, ISPs and others.

the network functions necessary to provide FRS would have been in place and provisioned in any event, and that expenditures should not be considered for that system as incremental expenditures for schools and libraries. Within 30 days following the issuance of this Order, NYNEX shall file a detailed accounting of the costs it has (or will) incur for the construction of the facilities necessary to provide Frame Relay Services pursuant to the rate schedules approved on August 29, 1995.

NYNEX, in consultation with the Commission Staff, shall make an initial report using the described methodology for the measurement of its cost and/or expenditure by January 1, 1997. NYNEX shall provide its report simultaneously to the Commission and to our Advisory Board for review. The Commission may adjust, revise, modify, or expand the Approved Plan on the basis of that report.

**B. Accrual**

In our May 15, 1995 Order in Docket No. 94-254, we ordered NYNEX "to establish an account in which it will accrue \$333,333 per month" beginning on June 1, 1995 and continuing "until such time as the Commission approves its proposal to use these amounts." Our objective with respect to these funds is to provide "seed money" to enable users to be connected to advanced information services. Since the need for these funds has not yet been fully resolved, NYNEX will continue to accrue \$333,333 per month into the special account until May 31, 2000 or until recommended otherwise by the Advisory Board and approved by the Commission. We do not presently anticipate that this source of funding will be renewed after the 5-year term.<sup>20</sup> Accordingly, schools and libraries should plan for their own funding of these services and equipment after that time.

For planning purposes, although \$333,333 is being accrued monthly into the special account, and although we have stated that "no more than \$4.0 million per year" will be used for this limited support, the Advisory Board should consider that the result of our decision is the allocation of not more than \$20.0 million during the 5-year period ending May 31, 2000 for these purposes. The disbursement of funds need not be limited to \$333,333 monthly or \$4.0 million annually, provided that the five-year \$20.0 million ceiling is not exceeded. It is reasonable to expect that initial up-front costs may exceed those in later years.

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<sup>20</sup>To the extent that the NYNEX plan called for a 7-year period, we decline to adopt it.

We will evaluate the amounts being collected and expended, the appropriateness of the funding mechanisms we are adopting, the overall effectiveness of this process, and the benefit to the general body of ratepayers, during our reviews of the Alternative Form of Regulation we have adopted in Docket No. 94-123.

## VII. OVERSIGHT

### A. Commission Responsibility

NYNEX in its proposal recommended the creation of an Oversight Board consisting of representatives from the education and library communities, NYNEX, and other parties "that might be identified . . . to oversee the implementation and ongoing management of this project." NYNEX Proposal at 20. The Advocacy Staff, relying primarily on cases decided by the federal courts, argues that the Commission cannot lawfully delegate its regulatory powers to an outside agency or board. The Public Advocate suggests that the Commission has the legal authority to delegate "certain functions" to an outside board. OPA Memorandum and Additional Comments at 18-24.

We do not need to decide this issue. For policy reasons, we believe we should exercise firm control over the expenditure of ratepayer money by a public utility to insure that the public interest is served. Thus, at all times we will retain ultimate responsibility and authority with respect to matters pending before us. We will order the creation of an Advisory Board to assist us with limited, clearly-defined functions necessary for the administration of this plan.

### B. Advisory Board

The Advisory Board will have limited functions and shall engage in a collaborative effort to assist us by ensuring that our decisions will be made upon the best information and basis possible. The primary role for our Advisory Board will be to ensure that the needs of all interested parties are considered and represented in the information presented to the Commission for any decision we are asked to reach regarding this plan. We will appoint to the Advisory Board a member representing the Commission's Staff who will act as the Chairperson of the Advisory Board and who shall be responsible to the Commission for the activities of the Advisory Board.

#### 1. Membership

The Commission will appoint a member of its staff as Chairperson of the Advisory Board. Other members of the Advisory Board will be:

- a. a second member of the Commission's Staff;
- b. a representative of the Office of the Public Advocate;
- c. a representative of NYNEX;
- d. a representative from a Maine member of NECTA;
- e. a representative of the Maine Department of Education, appointed by its Commissioner;
- f. a representative of the Maine library community, selected jointly by the Maine Library Commission, the Maine Library Association, and the Maine Educational Media Association; and
- g. a representative of Maine Internet Service Providers (ISPs), selected by the ISPs that have filed comments in Docket No. 94-254.

Members of the Advisory Board shall be selected within 30 days from the date of this Order. The Commission's Administrative Director shall be notified of those selections, any alternate members that may be selected, and of subsequent changes in membership.

## 2. Duties, Responsibilities, and Authority

The Advisory Board shall develop and recommend for the Commission's approval procedures and timelines for implementing the Approved Plan (Part III above). Those recommendations shall be reported to the Commission within 90 days after the date of this Order.

The Advisory Board shall review any request by school or library users for proposed Access Tier Alternative Equivalent Value Services pursuant to Part III.C.2 above, to ensure those proposals are reasonable and that they provide functions that overall are at least equivalent to those of the first NYNEX standard package described in Part III.C.1.a above. If an alternative supplier is selected, NYNEX should pay (and book as an expense) only the amount of that supplier's proposal up to a maximum of the level of costs for the NYNEX 56 Kbps package, as determined by the Board.

The Chairperson, in consultation with other members of the Commission's Advisory Staff as appropriate, shall examine NYNEX proposals for the proposed Backbone Tier and optional Access Tier Standard Packages described in Parts III.B, III.C.1 and 2 above, to ascertain that the costs of those proposed elements are calculated correctly for the purpose of ultimate measurement pursuant to Part VI.A above. To the extent that NYNEX files as confidential competitively-sensitive information, the chairperson shall order appropriate protection.

It shall not be necessary for a user choosing one of the NYNEX standard packages, or a previously approved alternative equivalent value package, to consult with the Advisory Board about that selection. There is no need for an Advisory Board recommendation or Commission approval of the use of standard packages as described in Parts III.C.1 or 2 above. A qualified user need only request the service from NYNEX.

The Advisory Board shall review requests and proposals for training and make recommendations for approval to ensure the proposed training meets user needs and that the costs of training are reasonable. The Board may also consider whether to recommend standard training packages. For the first year we will approve up to \$500,000 in training expense unless there is good cause to increase that limit.

The Advisory Board shall review NYNEX's initial measurement and true-up report submitted pursuant to Part V.A above, and shall provide its evaluation of that report to the Commission. The Advisory Board's report may include recommendations for further action by the Commission.

The Advisory Board shall review and report on any other aspect of administration of the plan as requested by the Commission.

### 3. Procedure

The Chairperson shall schedule regular meetings of the Advisory Board, at which members of the Advisory Board shall address matters that are assigned to them by this Order. Meetings will be open to the public. The Chairperson will determine the extent of public participation at Advisory Board meetings. To the extent that proprietary or competitively sensitive information that requires trade secret protection must be brought before the Advisory Board, the Chairperson may issue such protective orders as may be necessary, pursuant to the Maine Rules of Civil Procedure.

Proceedings by and before the Board shall be informal. They shall not be considered adjudicatory proceedings. The voting members of the Board shall attempt to reach consensus on its recommendations and other issues brought before it. "Consensus" shall mean agreement by four of the five "public" members of the Advisory Board. The voting members will not include entities that have or that represent industries that have financial interests in the outcome of the Board's recommendations. Thus, the voting members shall be the Commission Staff members, the representative of the OPA and the representatives of the libraries and schools. For a particular decision, the Board may decide that it will make a recommendation by majority vote, provided that those voting the minority have some reasonable opportunity to present their views to the Commission. Decisions to recommend approval or disapproval of request for alternative equipment value services shall be made within 30 days.<sup>21</sup>

If it should appear that consensus of the Advisory Board may not be reached on a matter, the Chairperson shall refer the issue to the Commission for decision. Generally, the Chairperson shall issue a Report to the Commission that summarizes the issues and may include proposed findings. When appropriate, the Chairperson may devise other procedures that will enable the Commission to make an informed decision. As noted above, the Advisory Board proceedings are not adjudicatory. However, when the Chairperson issues a report, the provisions of Chapter 110, § 752, which govern a presiding officer's (examiner's) reports, shall provide guidance. Thus, an opportunity shall be provided for board members and persons with a direct stake in the outcome to comment on the report or other appropriate opportunity to make their views known to the Commission. We expect that those persons will contact the Commission only through the procedures established by the Board Chairperson.

### C. Reporting

The Chairperson of the Advisory Board shall initially, at least quarterly, advise the Commission on the status of the Advisory Board's administration of the plan, including all activities of the Advisory Board, issues brought to the Advisory Board, consensus recommendations reached, and schedules established for further plan administration.

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<sup>21</sup>If the Board initially receives a substantial number of such requests, such that they cannot all be processed within 30 days, the Chairperson of the Advisory Board, in consultation with the Chairman of the Commission, may temporarily enlarge the 30-day deadline for processing requests.

### VIII. RELATIONSHIP TO OTHER INFORMATION SERVICE INITIATIVES

Concerns have been raised about possible duplication with the asynchronous transfer mode (ATM) network that the State is planning to implement, or the possibility that the ATM network may be able to provide information services connectivity to high schools and to the seven libraries that the State proposes shall be served by that network. We understand that a primary purpose of the ATM network is to provide interactive classroom capability. It is possible that high schools and the seven libraries would be able to obtain information services through the ATM network.<sup>22</sup> To clarify the relationship between the frame relay system and ATM, to avoid duplication of facilities, to make the best use of ratepayer dollars, and to ensure coordination of various activities relating to providing telecommunication service to schools and libraries, we will hold a further conference of the parties and other interested persons in the near future.<sup>23</sup> As noted above, at the conference we will also discuss the issue relating to number of computers per school and whether certain private schools should be eligible.

Accordingly, it is

### O R D E R E D,

That:

1. A plan to reduce rates and/or provide additional services or equipment to libraries and schools is approved as outlined in Part III of this Order;
2. Docket No. 94-254 is closed;<sup>24</sup>
3. A new non-adjudicatory proceeding will be opened to implement the decisions contained in this Order;

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<sup>22</sup>To the extent that funding for connecting to the ATM network is not already provided by proceeds of the bond issue recently approved by voters, alternative equivalent value funding may be available for the purpose of connecting to the ATM network. Obviously, a high school or library may choose not to participate in the NYNEX plan.

<sup>23</sup>Notwithstanding that conference, we consider all of the decisions set forth in this Order to be final decisions.

<sup>24</sup>Docket No. 94-123 shall remain open until our approval of a methodology for calculating total service long-run marginal costs and service quality and reporting issues.

4. An Advisory Board is created as described in Part VII of this Order;
5. The entities selecting members of the Advisory Board pursuant to Part VII.B.1 above shall notify the Commission's Administrative Director of these selections within 30 days from the date of this Order;
6. The Chairperson shall convene the Advisory Board within 45 days of the date of this Order;
7. The Advisory Board shall develop and make recommendations concerning implementation of the Approved Plan as described in Part VII.B.2 above within 90 days of the date of this Order;
8. NYNEX shall report its accounting of costs for FRS facilities as described in Part VI.A above within 30 days of the date of this Order; and
9. NYNEX shall continue to accrue \$333,333 per month into a special account as described in Part VI.B above.
10. A conference of parties and interested persons will be held in the near future to address the following issues:
  - a. The relationship between the frame relay system approved in this Order and the asynchronous transfer mode (ATM) system being implemented by the State of Maine,
  - b. The definition of eligible schools, and
  - c. The number of computers per school.

Dated at Augusta, Maine, this 5th day of January, 1996.

BY ORDER OF THE COMMISSION



Christopher P. Simpson  
Administrative Director



COMMISSIONERS VOTING FOR:	Welch
	Nugent
COMMISSIONER CONCURRING:	Hunt

### CONCURRING OPINION OF COMMISSIONER HUNT

I support the Order's goal to provide advanced telecommunications services to our public schools and libraries. The Order is sufficiently flexible to afford user choice and it achieves that end with relatively few bureaucratic hurdles. I find these features of the Order particularly important.

I write separately because I regret that the record in this case does not indicate that there has been integrated planning of the State's various initiatives to advance telecommunications technology at our public institutions with ratepayer and taxpayer bond dollars.

Specifically, this Order adopts voice grade or Frame Relay Service as the "standard service" for all public schools and libraries using ratepayer dollars. The choice of any other service at least initially requires additional approval by the PUC and more effort on behalf of the school or library. The Order also ensures the availability of computers. Although Frame Relay Service is capable of providing internet access, so are other more sophisticated technologies such as Asynchronous Transfer Mode.

The State issued a Request for Proposal for Asynchronous Transfer Mode technology for 136 high schools, seven libraries and 27 vocational schools. And in November, voters approved a \$15 million bond to make it possible for schools to purchase equipment necessary for ATM. ATM can provide distance learning capability as well as internet access.

While the two efforts do not conflict, this Commission was neither part of, nor formally made aware of, any attempt to move the projects in concert. I believe the common pursuit to bring the information age to the public schools calls for a unified effort by all players to make the best possible use of public dollars.

As a result, I believe there remain questions unanswered. For example, does the fact that the State, with input from the Department of Education, issued an RFP for ATM for the high schools mean that the high schools want ATM's capacity for distance learning and internet access rather than Frame Relay Service's internet access alone? If so, why did the Department of Education, in our proceeding, endorse Frame Relay Service as the technology of choice for the high schools? Given the State's goal to equip the high schools with ATM, is it likely that those schools may seek the alternative funding for ATM? Should we not have considered tailoring this Order to automatically accommodate the State's ATM project?

I appreciate the Commission's willingness to hold a conference to discuss the interplay of the various technologies and telecommunication infrastructure initiatives. However, it is unfortunate that the record in this case does not reflect a coordinated effort to make the best, most efficient use of public dollars.

November 14, 1995

PUBLIC UTILITIES COMMISSION  
Rulemaking: Chapter 110, Rules of  
Practice and Procedure; Proposed  
Amendments to *Ex Parte* Provisions

NOTICE OF RULEMAKING

WELCH, Chairman; NUGENT and HUNT, Commissioners

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## I. INTRODUCTION

We commence this rulemaking for the purpose of amending provisions in our Rules of Practice and Procedure (Chapter 110) that govern *ex parte* and other communications designed to influence our decision-making in adjudicatory proceedings. We undertake this rulemaking because of activities by or on behalf of NYNEX (New England Telephone and Telegraph Company d/b/a NYNEX), a regulated telephone utility, in recent proceedings before the Commission, and because of arguments NYNEX made subsequently that its activities were not unlawful under our rules. NYNEX argues that the *ex parte* rule contained in the Maine Administrative Procedure Act (APA) and our rules does not prohibit communications to commissioners by parties and other persons interested in the outcome of a case.

As explained below, we do not agree with NYNEX's interpretation. Nevertheless, because our primary objective in addressing this issue is to prevent similar behavior by parties to our proceedings in the future, we believe that the best way to accomplish this end is to identify the conduct we believe should be regulated or prohibited (if it is not already) and to institute this rulemaking. In the recent NYNEX proceedings, we did not give any weight to the inappropriate and arguably illegal activities by NYNEX and they did not affect our decision.

One purpose of the rulemaking is to make the *ex parte* prohibition abundantly clear, so that there will be no question about the extent of its reach and to resolve any possible lack of clarity upon which NYNEX or any other party could base arguments such as those NYNEX has made to us following the recent proceedings. More importantly, a rulemaking also allows us to address issues beyond the relatively narrow issues requiring legal interpretation raised by NYNEX. Thus, in addition to clarifying the basic *ex parte* rule, we will propose provisions designed to address other problems we perceive as a result of the recent conduct of NYNEX. If, instead of conducting a rulemaking, we were to investigate NYNEX's conduct further, our focus would be largely limited to determining whether the current rule applies to NYNEX's conduct.

## II. BACKGROUND

As mentioned above, the impetus for this rulemaking is a result of activities by NYNEX in two recent consolidated cases: *Public Utilities Commission, Investigation Into Regulatory Alternatives for the New England Telephone and Telegraph Company d/b/a NYNEX*, Docket No. 94-123 (the *AFOR* case) and

*Frederic A. Pease et al. v. New England Telephone and Telegraph Company d/b/a NYNEX, Complaint Requesting Commission Investigation of the Level of Revenues Being Earned by NYNEX and Determination of Whether Toll and Local Rates Should be Reduced*, Docket No. 94-254 (the *Pease* case) (hereinafter also, the *NYNEX* cases). Both cases were adjudicatory proceedings. The parties conducted extensive discovery. Hearings took place over a two-week period. Parties filed lengthy briefs addressing all issues. On April 11, 1995, the hearing examiners issued an Examiners' Report in the *Pease* case that made recommendations about many issues, including a recommended overall revenue reduction for NYNEX of \$23.9 million. On April 19, 1995, the examiners issued an Examiners' Report in the *AFOR* case that made certain recommendations about the structure of the alternative form of regulation (AFOR). The revenue reduction ordered in the *Pease* case would also serve as the starting point for the AFOR. The *AFOR* case included a recommended overall price index (the PRI), based primarily on inflation and productivity, that would set the annual maximum overall price levels that NYNEX could establish during the course of the AFOR.

Under section 752(b) of Chapter 110<sup>1</sup>, a party has the right to file a response or exceptions to an examiner's report. Several parties, including NYNEX, filed exceptions to both of the Examiners' Reports in the NYNEX cases. In addition, however, NYNEX contacted numerous members of the public, including business customers, legislators and the Governor, to explain NYNEX's views about the recommendations contained in the Examiners' Reports. NYNEX suggested to many of those persons that they might wish to contact the Commission with their views.

The Vice President for NYNEX in Maine provided the following narrative of NYNEX's activities subsequent to the issuance of the Examiners' Reports:

In the weeks between the release of the Examiners' decisions and the Commission's formal deliberations on this matter, several NYNEX representatives, including myself, contacted and advised numerous interested stakeholders of the implications of the Commission's pending decision . . . .

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<sup>1</sup>Section 752(b) is identical to 5 M.R.S.A. § 9062(4), a provision in the Maine Administrative Procedures Act (APA).

Individuals contacted by me or my direct reports included the Governor, the Speaker of the House, the Senate President, the Co-chairs of the Joint Utilities Committee of the Legislature, large business subscribers of NYNEX services, local Chambers of Commerce, various councils of state government, associations for economic development, labor leaders and newspaper editors. The message NYNEX delivered with each stakeholder communication was essentially the same: a poor policy choice by the Commission in this case could be expected to affect adversely both the Company and the state for many years to come. Specifically, NYNEX cautioned that a Commission outcome which crippled the Company financially would, in our opinion:

- a) cost NYNEX jobs;
- b) discourage future job growth in information-intensive industries;
- c) likely curtail the Company's access to needed capital in the state;
- d) hinder or delay future investment by NYNEX in Maine, including the replacement of analog switches in Bangor and Lewiston;
- e) curtail the rapid deployment of advanced telecommunications products and services in Maine; and
- f) affect Maine's ability to attract and grow new businesses . . . .

Additionally, NYNEX advised stakeholders concerned with the Examiners' recommended findings that they may also write or copy the Commission with an expression of their views on the matter. Some NYNEX representatives provided interested stakeholders with names and addresses of the Commissioners. In several instances, NYNEX provided editorial assistance to individuals who had elected to communicate with the Commission. As

long as the individuals were not parties to the case (or otherwise "legally interested" in the outcome), and wrote to express their own views, NYNEX freely provided such assistance.<sup>2</sup>

Subsequently, counsel for NYNEX provided a memorandum that included the following statements:

The facts indicate NYNEX representatives actively encouraged various stakeholders to write letters communicating their views on matters affecting state regulatory policy towards NYNEX. Some NYNEX representatives mentioned the Commission as a potential recipient of such communications . . . .

In all the presentations made by NYNEX, NYNEX urged the recipient to actively support public policy which would leave the Company with a financially viable business. NYNEX asked interested stakeholders to direct their comments in writing to the Governor, the Senate President and House Speaker, and the heads of the Joint Utilities Committee. Although the Commission was not the primary target of the communications activity, the Company provided interested stakeholders with the names and address of the Public Utilities Commission and included the Commission in the list of people for stakeholders to contact. While NYNEX never viewed its actions as an attempt to influence through extra-record evidence the outcome on specific factual issues pending before the Commission, NYNEX managers certainly wished to alert the Commission that the Examiners' overall recommendations were, in the view of key stakeholders, ill-considered.<sup>3</sup>

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<sup>2</sup>Letter of Edward Dinan to Christopher Simpson, Administrative Director, dated September 14, 1995.

<sup>3</sup>Letter of Donald Boecke, Esq. to Christopher Simpson, Administrative Director, dated September 28, 1995.

Several letters that NYNEX sent to legislators stated:

Attached are a few of many letters that have been directed to the Commission urging their rejection of the examiner's decision.

Thank you for any assistance you can provide towards stopping what would be a major setback for telecommunications and economic development in Maine.

Letters to other legislators stated:

Legislators in attendance at Saturday's meeting asked that we provide additional background for them to use in making contacts with the PUC and urging reconsideration of the staff position. I have provided them with a letter summarizing the issue and with copies of letters that have already been sent to the Commission by individuals and organizations.<sup>4</sup>

The Commission received 22 written communications and about a half dozen oral communications between the issuance of the Examiners' Reports and the date we deliberated the NYNEX cases. Eleven of those communications were received at the Commission after the May 1 deadline for the filing of exceptions by parties in the *AFOR* case (extended from April 25; the deadline in the *Pease* case was April 19) and prior to Commission deliberations on the two cases held on May 3, 1995. An additional 19 letters were received after the deliberations.

While there was some variation among the communications, all of the letters stressed one or more of the themes that NYNEX itself (as quoted above) described as the themes it had emphasized to the persons it contacted.

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<sup>4</sup>These letters were provided with and attached to the September 14 letter from Mr. Dinan.

### III. EXISTING STATUTORY AND RULE PROVISIONS

The basic *ex parte* rule for state agencies that conduct adjudicatory proceedings is contained in the Maine Administrative Procedures Act (APA) at 5 M.R.S.A. § 9055(1), entitled "Ex parte communications:"

1. **Communication prohibited.** In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.

The Public Utilities Commission's Rules of Practice and Procedure, Chapter 110, is based directly on that statutory provision and restates it without substantive change as the first sentence of section 760(a):

(a) No Commissioner, presiding officer, or advisory staff member in a proceeding shall communicate, directly or indirectly, in connection with any issue of fact, law or procedure, with any party, including a proposed intervenor, or any other person legally interested in the outcome of the proceeding except upon notice and opportunity for all parties to participate as provided in these rules or pursuant to order of the presiding officer.<sup>5</sup>

In addition, we have adopted a subsection (b) of section 760. It states:

(b) No party or other person legally interested in the outcome of the proceeding shall communicate with the Commission in connection with any issue of fact, law or procedure after the deadline for exceptions to the presiding officer's report, or other final deadline for

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<sup>5</sup>Because of longstanding practice, and the continued reference in 35-A M.R.S.A. § 1305 to hearing examiners, the "presiding officer" in Commission proceedings is usually called the hearing examiner.

submission of comment, without the prior approval of the Commission or presiding officer.

There are two major differences between the prohibitions contained in subsection (a) and subsection (b). First, while subsection (a) applies throughout the whole case, subsection (b) applies only to communications made subsequent to the deadline for filing of exceptions. Second, subsection (b) prohibits any communications about issues in a case, including those made in a non-*ex parte* manner, i.e., with notice to other parties and an opportunity to respond.

Other existing sections of the APA and of Chapter 110 are discussed below in connection with NYNEX's arguments about the applicability of the provisions quoted above.

#### **IV. NYNEX'S ARGUMENTS; DISCUSSION OF ISSUES**

##### **A. Applicability of the Ex Parte Rule to Communications by Parties**

NYNEX's correspondence to the Commission assumes that Chapter 110, section 760 (a) and 5 M.R.S.A. § 9055(1) operate in only one direction, i.e., they prohibit communications *by* the commissioners or presiding officers *to* parties and persons legally interested in the outcome of a proceeding, but do not prohibit communications in the opposite direction. NYNEX's September 28 memorandum states:

. . . the prohibition against *ex parte* communications in Maine's Administrative Procedures Act, by its terms, applies only to agency members. There is no statutory prohibition directed specifically against a party communicating, or attempting to communicate, with an agency's decision-making personnel.

In the earlier (September 14) letter, NYNEX states:

The "directly or indirectly" language in the statute applies to state agency employees, not to parties. Similarly, the phrase appears in the portion of the Commission's rule that applies to the Commission and its staff (§ 760(a))

and does not appear in the section of the rule applicable to parties (§ 760(b)).<sup>6</sup>

NYNEX offers no semantic, logical or precedent-based arguments in support of its assumption about the meaning of these provisions. We assume its argument is semantic. The subject of the sentence (in Chapter 110, § 760(a)) prohibiting *ex parte* communications is "no commissioner, presiding officer, or advisory staff member." Those persons shall not "communicate . . . with" other named persons, i.e., "parties or persons legally interested in the outcome of the proceeding." One possible reading of this language (NYNEX's, at least) is that it prohibits the subjects of the sentence (commissioners, et al.) from directing a communication to others (indirect objects, i.e., parties, et al.), but that it does not prohibit communications from the others to the subjects of the sentence.

We decline to accept NYNEX's argument. The word "communicate" is conjoined with the preposition "with" rather than "to." "Communicate" has more than one meaning. One person can communicate an idea (send it) *to* another. However, "communicate" may also refer to the process in which two persons communicate *with* each other, even if one person talks (or writes) and the other person listens (or reads). The very use of the word "with" ("communicate . . . with a party or other person legally interested") in the statute and rule suggests the second meaning. If the Legislature had intended to prohibit only one-way communications, the obvious preposition to use is "to," not "with."<sup>7</sup>

NYNEX's argument also conveniently ignores the long-standing and traditional interpretation and assumptions about the language of section 760(a) and 5 M.R.S.A. § 9055(1). This Commission, in both its adjudicatory and rulemaking capacities, has consistently interpreted the rule to prohibit communications in both directions, i.e., *by* parties and other persons legally interested in the outcome of a proceeding *to* agency members and *by* agency members *to* parties or to legally interested persons. *See, e.g., AT&T Communications of New England, Inc., Request for Authority to Provide Intrastate Federal Telecommunications System 2000 Network Service*, Docket No. 89-017, Order Approving Stipulation

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<sup>6</sup>The last part of this argument assumes that only section 760(b) prohibits a communication from a party or other legally interested person to a commissioner. As discussed above, section 760 (b) applies only after the deadline for the filing of exceptions.

<sup>7</sup>The *American Heritage Dictionary (AHD)* confirms that there are two meanings of "communicate." The first is: "1.a. to make known; impart: *communicate information*; b. To display; manifest." *AHD* states that this first meaning is a transitive verb, i.e., it requires a direct object, e.g., communicate information. "Communicate" is also an intransitive verb, i.e., one not requiring a direct object to complete its meaning. One of the *AHD* intransitive meanings is: "1. To have an interchange, as of ideas."

(October 4, 1989), in which the Commission admonished AT&T for a communication to Chairman Gordon.

Other provisions in the APA and Chapter 110 reflect the assumption that the prohibition applies to communications in both directions. The APA itself contains a provision (also stated in Chapter 110) that allows agency members to receive advice from staff members who are not participating in an advocacy role. 5 M.R.S.A. § 9055(2)(B); P.U.C. Rules, Ch. 110, § 761(b). That provision expressly excludes "aid or advice" by non-advocacy staff members to agency members from the purview of the *ex parte* prohibition. That exception would not be necessary if NYNEX were correct that the basic rule prohibited only communications *by* agency members.

In addition, the second (last) sentence of Chapter 110, § 760(a) imposes a reporting requirement (not contained in the APA) upon "Any Commissioner, presiding officer, advisory staff member, party or representative of a party *making or receiving an ex parte* communication prohibited by this section . . . ." (emphasis added).<sup>8</sup>

We are not aware of any *ex parte* rule that prohibits communications between adjudicators/fact finders and parties to a proceeding in only one direction. The traditional view of the *ex parte* rule as prohibiting communications in both directions is reflected in Maine's rules governing attorney and judicial behavior. Maine Bar Rule section 3.7(b)(2) prohibits attorney-to-court communications and the Code of Judicial Responsibility Canon 3.B(7) prohibits judges from "initiating" or receiving *ex parte* communications. Common sense suggests that the greater harm (unfair influence on the decisionmakers) is likely to occur as a result of communications from parties to agency members than in the other direction, and that the Legislature most likely did not intend to prohibit communications only in the direction that is less likely to result in harm. NYNEX's argument that the APA/PUC *ex parte* rule operates in only one direction defies the obvious substantive purpose of an *ex parte* rule to prevent a party of interest from

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<sup>8</sup>It is true that subsection (b) of Chapter 110, § 760 rather more clearly applies to communications by parties to agency members than does the language of subsection (a). However, the contrast between the language of subsection (a) and subsection (b) does not provide a convincing argument in support of construing subsection (a) as not prohibiting communications to agency members. For one thing, subsection (b) was drafted by the Commission and subsection (a) restates language enacted by the Legislature. Subsection (b) states a special rule that applies only during a limited time span -- after the deadline for exceptions to the Examiner's Report -- and not throughout the proceeding. *See Public Utilities Commission Rulemaking, Amendments to the Rules of Practice and Procedure (Chapter 110)*, Docket No. 89-321, Order Adopting Rule and Statement of Factual Basis and Policy Statement (March 19, 1990) at 23. It applies to communications of any kind, "even if a made in non-*ex parte* manner."

exercising undue influence over the factfinders and decision makers in a proceeding.

It is not even clear that NYNEX believes its own argument. The September 14 letter from its Vice President states:

The Company was aware and fully cognizant of the restrictions placed on parties to an administrative action prohibiting *ex parte* communications with the Commission and its decisionmaking personnel. NYNEX and its representatives took every effort to ensure that no one directly under the Company's control contacted anyone at the Commission, except through formal pleadings filed in the case.

If NYNEX's view of the *ex parte* rule were correct, the precaution it described would not be necessary. Indeed, under its interpretation of the rule, representatives of NYNEX could have communicated directly with the commissioners and advisors, without notice to other parties, during other stages of the case. This, at least, NYNEX did not do.

Although we believe that NYNEX's interpretation of the *ex parte* rule is incorrect, we believe that conducting a rulemaking is preferable to litigation over the interpretation of the statute and rule or investigating further the particular conduct that prompted this proceeding. As indicated above, NYNEX's effort here, whatever its intent or legality, had no effect on the Commission's decision. Indeed, NYNEX itself has suggested a rulemaking. The rulemaking will propose to correct any possible problem in the wording of the rule. The rulemaking allows us to strengthen other existing provisions and to add new safeguards. Finally, this Notice provides us an opportunity to describe to parties who practice before the Commission the kind of conduct that we believe should not be tolerated under our rules.<sup>9</sup>

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<sup>9</sup>As discussed in this section, we do not find valid NYNEX's argument that present section 760(a) does not prohibit *ex parte* communications by parties and other legally interested persons to the Commission. We have proposed an amendment to section 760(a) to make explicit what we believe is the proper interpretation of the current rule and to prevent future arguments such as those NYNEX has made. By proposing the amendment (or ultimately, adopting it), we do not intend that parties in proceedings before other agencies should be provided with an argument that the clearer language of our version of this rule establishes that the APA provision, 5 M.R.S.A. § 9055(1), means something different.

B. Other Issues

1. Whether the Letters Were Indirect Communications by NYNEX

NYNEX also argues that any communications received by the Commission from the "stakeholders" it had contacted did not constitute "indirect" communications by NYNEX. (Section 760 (a) prohibits direct or indirect communications.) NYNEX claims that the views expressed were those of the writers and therefore could not constitute an indirect communication by NYNEX. For the purpose of this rulemaking it is not necessary to decide this issue. We also do not believe it necessary to amend the rule to provide a more detailed definition of the word "indirect." The word is easily understood and applied. Nevertheless, for the future benefit of parties that might attempt to influence a Commission decision in the way that NYNEX did in this case, we provide two observations. First, NYNEX may be correct that the views expressed were the writers' views. However, they were also NYNEX's views. The letters received by the Commission invariably repeated the same concerns that NYNEX conveyed to the persons it contacted. Second, NYNEX admits that it "actively encouraged" those persons to write letters, including to the Commission.<sup>10</sup> In short, NYNEX presented its views to "stakeholders" whom NYNEX hoped would influence the Commission's decisions, suggesting that they should write to the Commission. As a result, many of them did, expressing views markedly similar to NYNEX's. Short of coercion or an express agreement by a non-party to convey the ideas of a party, there would appear to be few fact patterns that would better describe an indirect communication by party.

2. Whether the Communications Were by "Persons Legally Interested in the Outcome of the Proceeding"

NYNEX also argues that the persons who wrote letters to the Commission (at NYNEX's suggestion or with NYNEX's assistance) were not "persons legally interested in the outcome of the proceeding." NYNEX concludes that the persons writing letters did not violate the *ex parte* rule contained in Chapter 110, § 760(a) and 5 M.R.S.A. § 9055(1), or the separate prohibition contained in Chapter 110, § 760(b). (All three provisions apply to "persons legally interested in the outcome of a proceeding.")

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<sup>10</sup>NYNEX makes much of the fact that it had the right to contact legislators for the purpose of convincing them that they should override the Commission's decision if the Commission were to adopt decisions similar to those recommended by the Examiners' Reports. The fact that NYNEX chose to undertake this activity just prior to the time we were to decide the cases suggests that the primary purpose was to influence our decision, particularly since there was no Commission decision (unfavorable or favorable to NYNEX) at the time for the Legislature to review.

NYNEX bases its argument on federal cases interpreting the Federal Administrative Procedures Act *ex parte* provision, 5 U.S.C. § 557(d)(1), which applies to "interested persons." Those cases, based on the House Report discussing the legislation, interpret the federal provision as describing an interest greater than that of the public at large. *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982) (*PATCO v. FLRA II*); *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993). The *Portland Audubon* case describes three ways in which a person might be "interested:"

First, an interested person can be someone who has a curiosity or concern about a matter, although he may be neutral with respect to the outcome. Second, an interested person can have a preference or a bias regarding a matter's outcome but no direct stake in the proceedings. Finally, a person can be "interested" in a matter in the sense of having a legal interest that will be determined or affected by the decision.

984 F.2d at 1544.

From the description of the three categories in the *Portland Audubon* case, which did not play a clear role in the Court's decision,<sup>11</sup> NYNEX concludes that the modifier "legally" in the Maine Statute means that a person must have a legal interest that would be determined or affected by the decision.

The correct interpretation of the phrase in Maine law is not certain. NYNEX's argument is not implausible. On the other hand, the language describing the persons to whom the *ex parte* provision applies ("persons legally interested in the outcome of the proceeding") is similar to the standard governing intervention as of right under 5 M.R.S.A. § 9054 ("any person . . . directly affected by the proceeding"). The Legislature may well have been concerned about communications by persons having interests similar to those of parties. Thus, it is possible that the phrase applies to any person who would be able to intervene as of right. In most cases before the Commission, the right to intervene broadly applies to all ratepayers. See *Central Maine Power Company v. Public Utilities Commission*, 405 A.2d 153 (Me. 1979) (right of ratepayer to intervene in rate proceedings); *Central Maine Power Company, Petition for Certificate of Public*

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<sup>11</sup>Based in part on the House Report, which specifically mentioned public officials as persons with "special interest" greater than that of the general public, the Court held that the President and White House staff were "interested persons" with a special interest within the meaning of the federal APA. The Court did not expressly characterize the President and White House staff as being within the second or third categories. Indeed, a "special interest greater than the public as a whole" description would appear to fall somewhere between the second and third types of interest described by the Court.

*Convenience and Necessity for Purchases of Generating Capacity and Energy from Hydro-Quebec*, Docket No. 87-268, Order Concerning Intervention (Dec. 10, 1987) (right of ratepayer to intervene in power purchase certificate proceedings).

The approach of the *Portland Audubon* Court to determining the question of the persons to whom the federal *ex parte* rule applies was as follows:

Ultimately, the *ex parte* communication provision must be interpreted in a common sense fashion. *PATCO v. FLRA II*, 685 F.2d at 563. Its purposes are to insure open decision-making and the appearance thereof, to preserve the opportunity for effective response, and to prevent improper influences upon agency decision-makers. *Id.* at 563, 568. To achieve these ends we must give the provision a broad scope rather than a constricted interpretation. The essential purposes of the APA require that all communications that might improperly influence an agency be encompassed within the *ex parte* contacts prohibition or else the public and the parties will be denied indirectly their guaranteed right to meaningful participation in agency decisional processes.

984 F.2d at 1544.

One difficulty with an interpretation that the prohibition applies to all persons who would have the right to intervene is that the numerous letters we receive from customers throughout a proceeding expressing views on the outcome of the proceeding would be *ex parte* communications. The right to intervene before the Public Utilities Commission may be considerably broader than the right to intervene before other agencies, where some specialized interest may be necessary in order to establish standing.

At this time, we will not propose to define more precisely those persons other than parties who are subject to the basic *ex parte* rule, even though we are not presently certain of the meaning of the phrase "persons legally interested in the outcome of the proceeding." However, pursuant to our authority to enact rules governing procedure in our own cases (5 M.R.S.A. § 805(1); 35-A M.R.S.A. § 111), we will propose additional provisions restricting communications that interfere with the adjudicatory process. Present section 760(b) of Chapter 110 is such a provision as described in greater detail below, we propose to amend that section to provide that no person may communicate with the Commission after the issuance of an examiner's report and that if any communications are received, they will not be distributed to or read by the Commission, the presiding officer or other advisors.

3. Whether Section 760(b) Prohibits Indirect Communications

NYNEX also presented arguments that its activities did not violate section 760(b) of Chapter 110. As discussed above, section 760(b) prohibits any communication by a party or by a legally interested person, even if made in a non-*ex parte* manner, at any time after the deadline for the filing of exceptions. Among NYNEX's claims is the argument that section 760(b), unlike 760(a), does not prohibit *indirect* communications by a party or a legally interested person. We do not need to decide that issue, although it is arguable that the absence of the word "indirect" in section 760(b) does not necessarily mean that indirect communications are not prohibited. Section 760 (b) is not expressly limited to direct communications. The word "communications" is simply unmodified. It therefore might apply to all communications initiated by a party or other legally interested person.

As discussed further in Part IV below, we will address this issue by proposing a new section 760-A (based on present section 760(b)) that will make it clear that both direct and indirect communications after the issuance of an examiner's report are prohibited and will further make it clear that parties are likewise prohibited from encouraging others to make prohibited communications during that time period.

4. Whether the Communications Were About Issues of Fact, Law or Procedure

NYNEX raises one other issue in connection with its claim that it did not violate the existing rule. NYNEX argues that the various communications did not discuss "matters of fact, law or procedure" at issue in the *NYNEX* cases. It claims that the communications were "expressions . . . meant only to underscore the importance of the . . . decision rather than an attempt to influence the resolution of any specific issue." NYNEX and the persons who wrote letters at NYNEX's suggestion plainly desired to influence the ultimate decisions in the two cases. Those decisions would determine NYNEX's rate levels for at least the next five years and would have a major impact on its revenues and earnings. Plainly, the amount of NYNEX's reasonable revenue requirement, upon which rates are based directly, and the overall amount that rates could change during the next five years (based primarily on an index incorporating inflation and a controversial productivity factor) were the overriding factual issues in the two cases. We find the argument that issues of fact do not include the ultimate decisions in a case to be extremely doubtful. The fact that the *ex parte* rule applies to "person[s] legally interested in the *outcome of the proceeding*" (emphasis added) strongly indicates that the outcome or decision in a case is an issue of fact about which communications are restricted. Similarly, the statutory provision (5 M.R.S.A. § 9055(1)) describes agency members to whom the restriction applies as "agency members authorized to take *final action* . . . ." (emphasis added)

Nevertheless, once again, in order to make the existing rule clearer, and to preclude arguments such as NYNEX has made, we will propose to amend both of the present subsections of section 760 (with subsection (b) to be

moved to section 760-A) to prohibit communications concerning potential or proposed decisions in the proceeding, as well as issues of fact, law or procedure.

## V. PROPOSED AMENDMENTS TO CHAPTER 110

We have proposed two sets of amendments to Chapter 110: one set is to make clear that the basic *ex parte* rule in section 760(a) applies to direct and indirect communications in both directions: from parties and legally interested persons to the Commission as well as from the Commission to parties and legally interested persons. The other set proposes more extensive restrictions on communications to the Commission during the period following the issuance of an examiners' report.

### A. Amendment to Section 760(a)

We propose to amend section 760(a) to make clear that it prohibits *ex parte* communications in both directions: *to* "commissioners, presiding officers and advisors" *from* "parties and persons legally interested in the outcome of a proceeding," as well as in the other direction. The proposed amendment is set forth in Appendix A.

As discussed above, in all likelihood we are proposing no substantive change to section 760(a) and are proposing only to clarify the present meaning of the rule. We find that the activities of NYNEX in the *NYNEX* cases, of soliciting or encouraging its selected "stakeholders" to send communications to the commissioners expressing opinions about the Examiners' Reports, were wholly inappropriate. NYNEX ran a very substantial risk of being found to have violated the *ex parte* rule of 5 M.R.S.A. § 9055(1) and Chapter 110, § 760(a) by communicating indirectly with this Commission on issues of fact.<sup>12</sup> NYNEX's post-case arguments are not credible in light of the long-standing common understanding of those statutory and rule provisions, and NYNEX's compliance with that common understanding in the other stages of the cases.

### B. Proposed Amendments to Section 760(b); New Section 760(c)

We also propose other amendments that are designed more precisely to address communications by both parties and also non-parties during the period following the issuance of an examiner's report in an adjudicatory proceeding.

Viewing NYNEX's conduct in this case more broadly than whether it constituted a violation of the existing *ex parte* rule (*see* Part IV.A above), it is clear that NYNEX attempted to conduct a substantial lobbying campaign, designed to convince the Commission to adopt results other than those recommended by the Examiners' Reports. Whether NYNEX's conduct violates any current rule or not,

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<sup>12</sup>A violation of a Commission rule is punishable as a contempt under 35-A M.R.S.A. § 1502. Other penalties are also available under other provisions in other sections of Chapter 15 of Title 35-A.

we find that such conduct by a party is not an appropriate practice before the Commission. The APA, Title 35-A and Chapter 110 of our rules have established ample procedures for a party to attempt to convince us to adopt its position in a case. The opportunities include: testimony by witnesses for a party; cross-examination of other parties' witnesses in hearings; rebuttal and surrebuttal testimony and cross-examination of that testimony; briefs and reply briefs; and responses or exceptions to recommended decisions presented by the hearing examiners. A heavy-handed lobbying campaign, involving people whom the party apparently believes to have more influence than the party itself or than the merits of its positions, is unreasonable and inappropriate and will not be tolerated. We find it particularly reprehensible that NYNEX would involve legislators in its campaign to influence the Commission, given the Legislature's potential review function of at least the *AFOR* decision. See 35-A M.R.S.A. § 9104. In addition to running the risk that its actions would violate the *ex parte* rule of section 760(a), NYNEX ran other substantial risks: that its actions could be found to violate section 760(b) (at least if that provision were construed to apply to indirect communications); that its activities could be found to be an unreasonable act or practice by a utility under 35-A M.R.S.A. § 1306;<sup>13</sup> and that its activities could create a perception of unfairness such that the integrity of the Commission's processes would be subject to question.

We intend that amendments proposed in this section will, in future proceedings, prevent the kind of activity that occurred in the *NYNEX* cases.

Present section 760(b) prohibits a party or a person legally interested in the outcome of a proceeding from directing *any* communication to the Commission following the deadline for the filing of exceptions to an examiner's report. The 1990 Order amending Chapter 110<sup>14</sup> notes that the prohibition applies to communications "even if made in a non-*ex parte* manner," i.e., even if the communications are sent to all parties and they have an opportunity to respond. The 1990 Order (quoting the 1984 Chapter 110 Order<sup>15</sup>; that originally adopted this provision) stated:

The submission of commentary after the final deadline for exceptions would involve significant delay and

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<sup>13</sup>Unreasonable activities by utilities in the past have led the Commission to reduce a utility's rate of return. See *Central Maine Power Company, Proposed Increase in Rates*, Docket No. 81-127, Order (March 27, 1982), *aff'd* 455 A.2d 34 (Me. 1983); *Bangor Hydro-Electric Company, Investigation Into Bangor Hydro-Electric Company's Performance, Policies and Management Practices in the Areas of Demand-Side Management and Integrated Least Cost Planning*, Docket No. 90-286, Order (May 31, 1991).

<sup>14</sup>Docket No. 89-031 (March 19, 1990), Order at 23.

<sup>15</sup>Docket No. 84-153 (October 5, 1984).

inconvenience since the Commission would be required to notify all parties of the submission and allow a further period of time for replies to be submitted.

The reasons stated in 1984 and 1990 have continuing validity today. In addition, however, we intend that this provision should prevent an organized campaign by a party to influence our decisionmaking following the ample opportunities that are provided under the Administrative Procedures Act, Title 35-A and our Rules of Practice and Procedure. Accordingly, we propose the following changes:

1. Move section 760(b) to a new section (section 760-A(a)). The purpose of this change is to make clearer the distinctions between this provision and that contained in present section 760(a), i.e., the limited time during which the provision is in effect and the fact that it prohibits communications made in a non-*ex parte* manner.
2. Move the time that the prohibition in new section 760-A(a) begins back to the date on which the presiding officer's (hearing examiner's) report is issued. (At present the prohibition only applies from the date that exceptions are due.) Further, we propose to continue the prohibition through the date of final Commission actions on any motion for reconsideration or the date for taking such action expires. (The present rule contains no stated termination point.)
3. Apply the prohibition in new section 760-A(a) to both direct and indirect communications.
4. Apply the revised prohibition in section 760-A(a) to all persons. We anticipate that some commenters may argue that such a prohibition infringes on First Amendment rights. We disagree. During the period following the issuance of an examiners' report, we believe our attention should be focused entirely on the record, the briefs of the parties and the parties' exceptions. We do not believe that it is appropriate for us to consider extra-record comments or other attempts to influence our decision during that time period, or for any person, whether a party or not, to have a further opportunity to make such comments. Any person has the right to influence Commission decisions through extensive established procedures. A person with standing to intervene (under a liberal intervention standard) may participate as a party in

a case. Other persons may participate as a party in the discretion of the Commission. All persons may attend and testify or speak at public witness hearings that are held in important cases. Moreover, at all stages during the case prior to the issuance of the examiner's report, persons who are neither parties nor persons legally interested in the outcome of the proceeding, may be able to state their views verbally or in letters to the Commission. By these latter two methods, we have heard the views of broad segments of the public, including both business and residential customers, legislators and other governmental leaders: we do not wish to foreclose those opportunities.<sup>16</sup> Although we are restricting the timing of persons' rights to speak, our primary purpose in enacting this provision is to clarify when we will listen.

5. Enact a provision (§ 760-A(b)) stating that any communications received at the Commission that would violate section 760-A(a) will not be distributed to commissioners, presiding officers or advisors. In addition, the Administrative Director shall provide notice to the person making the communication that it will not be read by the commissioners, presiding officers or advisors, that the sending of such communications is in violation of our rules, and that other timely procedures for expressing opinions exist.
6. Enact a provision (§ 760-A(d)) prohibiting any party (but not other persons) from soliciting, encouraging or providing any assistance to any other person to make any communication to the Commission that would violate proposed section 760-A(a). Some of that conduct may be included in the proposed prohibition against indirect communications by a party. However, in a particular case, it may be factually difficult to determine whether the communication is an

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<sup>16</sup>As discussed at Part IV.B.2 above, however, it is possible that the phrase "person legally interested in the outcome of the proceeding" could be interpreted to apply to any person having the right to intervene and, therefore, to any customer of the utility that is a party to a Commission proceeding. We make no ruling on the correct interpretation of that phrase in this Notice.

indirect communication by a party. The proposed provision would therefore create a direct prohibition against the kind of conduct that is highly likely to result in an indirect communication by a party. It also provides a somewhat more precise standard of conduct for parties.

C. Other Amendments

In order to make the organization of this portion of Chapter 110 clearer, we propose three organizational changes. First, we propose to rename the subpart containing sections 760-762 (now named "*Ex Parte* Communications"), "*Ex Parte* and Other Communications." Second, we propose to move the notice requirement that is now the second sentence of section 760(a) to a new subsection (b) of section 760. Third, we propose to move present subsections (c) and (d) to section 761. That section will become the repository for all provisions describing communications that are permitted.

**VI. PROCEDURE**

The rule may or may not be adopted, and if adopted it may be adopted as proposed or in a revised or modified form. A hearing will not be scheduled unless requested by five interested persons pursuant to 5 M.R.S.A. § 8052. Any request for a hearing shall be in writing and shall contain the name and full mailing address of each person making or joining in the request and shall be filed with the Commission by December 20, 1995. Any written comments must be filed on or before January 5, 1996. Requests for a hearing and comments shall be filed with Christopher P. Simpson, Administrative Director, Public Utilities Commission, 242 State Street, State House Station 18, Augusta, Maine 04333-0018. If a hearing is held pursuant to the request of five interested persons, comments shall be due 10 days after the hearing.

The rule is expected to have no fiscal impact. However, the Commission invites all interested persons to comment on whether there may be a fiscal impact and all other implications of this proposed rule.

The following persons are being sent copies of this Order and the attached rule:

1. All utilities in the State;
2. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;
3. The parties who participated in Docket Nos. 94-123 and 94-254.
4. The Secretary of State for publication of notice in accordance with 5 M.R.S.A. § 8053(5); and

5. Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

The Commission plans to conclude this rulemaking proceeding by January 31, 1996.

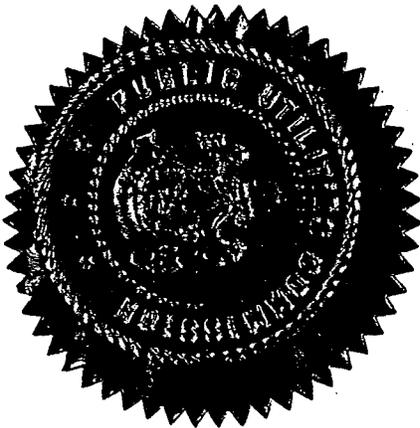
Accordingly, it is

**ORDERED**

1. That the Administrative Director send copies of this Order and the attached proposed rule to all the persons listed above and compile a service list of all such persons and any persons submitting written comments on the proposed Rule.

2. That the Administrative Director send a copy of the Order Commencing Rulemaking Proceeding to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053.

Dated at Augusta, Maine, this 14th day of November, 1995.



BY ORDER OF THE COMMISSION

*Christopher P. Simpson*  
Christopher P. Simpson  
Administrative Director

COMMISSIONERS VOTING FOR:

Welch  
Nugent  
Hunt

65 - INDEPENDENT AGENCIES - REGULATORY

407 - PUBLIC UTILITIES COMMISSION

CHAPTER 110 - RULES OF PRACTICE AND PROCEDURE

SUMMARY: This Rule establishes rules of practice and procedure before the  
Maine Public Utilities Commission

PART 7 ADJUDICATORY PROCEEDINGS; GENERAL PROVISIONS

Subpart 6 EX PARTE COMMUNICATIONS

760 Ex Parte Communications Prohibited

~~Throughout any adjudicatory proceeding:~~

(a) ~~Throughout any adjudicatory proceeding:~~

(1) ~~No~~ Commissioner, presiding officer, or ~~other~~ advisory staff member in a proceeding shall communicate, directly or indirectly, ~~in~~ connection with any issue of fact, law or procedure, with any party, including a proposed intervenor, or any other person legally interested in the outcome of the proceeding, ~~and~~

(2) ~~no party, including a proposed intervenor or person legally interested in the outcome of a proceeding shall communicate, directly or indirectly, with any commissioner, presiding officer, or other advisory staff member,~~

~~in connection with any potential decision in the case or any issue of fact, law or procedure,~~ except upon notice and opportunity for all parties to participate as provided in these rules or pursuant to order of the presiding officer.

(b) Any commissioner, presiding officer, other advisory staff member, party, or representative of a party making or receiving an ex parte communication prohibited by this section shall, within 48 hours after first having reason to believe the communication was prohibited, prepare and deliver to the Administrative Director and all parties a written statement setting forth the substance of the communication if it was in oral form, or the actual communication if it was in written form.

~~(b) — No party or other person legally interested in the outcome of the proceeding shall communicate with the Commission in connection with any issue of fact, law or procedure after the deadline for exceptions to the presiding officer's report, or other final deadline for submission of comment, without the prior approval of the Commission or presiding officer.~~

~~(c) — Nothing in this section prevents inquiry by a party, a commissioner, a presiding officer or an advisory staff member concerning the status of any event contained in the procedural schedule, any filing or any order.~~

~~(d) — Nothing in this section prevents individual communications between any party and members of the Commission's advocacy staff or between any party and any staff members in a nonadjudicatory proceeding.~~

760-A Prohibited Communications After Issuance of Presiding Officer's Report

(a) In an adjudicatory proceeding, after the issuance of the presiding officer's report or proposed findings, no person shall make any direct or indirect communication to any commissioner, presiding officer, or other advisory staff member in connection with any potential or proposed decision in the proceeding or any issue of fact, law or procedure, except for the filing by a party of a response or exceptions to the report or proposed findings as permitted by section 752(b), or except as permitted by order or prior approval of the Commission or presiding officer, or except as by motion pursuant to section 1004. The prohibition stated in this subsection shall continue until the deadline for filing of a motion for rehearing, reopening, reconsideration, or clarification pursuant to section 1004, and, if such a motion is filed, until after final action by the Commission on the motion.

(b) In the event that the Commission receives a communication that, if delivered to a commissioner, presiding officer, or other advisory staff member, would violate the prohibition contained in subsection (a), the communication shall not be provided to or received or read by any commissioner, the presiding officer, and other advisory staff members. Any such communications shall be made available for inspection by parties and members of the public. The Administrative Director shall notify a person providing such communication

prohibited by this section that the communication is not permitted by our rules, that it will not be delivered to the commissioners, the presiding officer, or other members of the advisory staff, and that there are established procedures for timely public participation in adjudicatory proceedings.

(c) Notwithstanding the provisions of subsection (b), if a commissioner, presiding officer, or other advisory staff member receives a communication that is prohibited by subsection (a), the recipient shall deliver a copy of any written communication, or a brief summary of any oral communication, to the Administrative Director for action as required under subsection (b). If the communication was made directly or indirectly by a party or by a person legally interested in the outcome of the proceeding, the recipient of the communication, or the Administrative Director, within 48 hours after first having reason to believe the communication was prohibited, shall send to the parties a written statement setting forth the substance of the communication, if it was in oral form, or a copy of the actual communication if it was in written form.

(d) No party in a proceeding shall request, encourage, suggest, or provide any assistance to any other person to make a communication that would violate subsection (a) of this section.

(e) The actions that this section requires shall be taken by commissioners, presiding officers, other advisory staff members and the Administrative Director are not exclusive and shall not preclude any other action or sanction against a party or person legally interested in the outcome of a proceeding who violates subsections (a) or (b) any provision of this section.

### 761 Communications Permitted

This subpart shall not prohibit any Commissioner or presiding officer from:

(a) Any commissioner or presiding officer from communicating in any respect with Commissioners or presiding officers; or

(b) Any commissioner or presiding officer from having the aid or advice of those members of the Commission staff, counsel, or consultants retained by the Commission who have not participated and will not participate in the Commission proceeding in an advocate capacity; or

(c) Inquiry by a party, a commissioner, a presiding officer, or other advisory staff member concerning the status of any event contained in the procedural schedule, any filing, or any order.

NOTE: The above subsection is transferred from section 760(c), without substantive change.

(d) Individual communications between any party and members of the Commission's advocacy staff or between any party and any staff members in a nonadjudicatory proceeding.

NOTE: The above subsection is transferred from section 760(d), without substantive change.

**BASIS STATEMENT:** The factual and policy basis for this rule is set forth in the Commission's Statement of Factual and Policy Basis and Order Adopting Rule, Commission Docket No. 95-390, issued on \_\_\_\_\_ . Copies of this Statement and Order have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, State House Station 18, Augusta, Maine 04333-0018.

**AUTHORITY:** 5 M.R.S.A. § 8051 and 35-A M.R.S.A. §§ 111, 112 and Chapter 13.

**Effective date:** This rule was approved by the Secretary of State on \_\_\_\_\_ and will be effective on \_\_\_\_\_ .

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THOMAS L. WELCH  
CHAIRMAN

WILLIAM M. NUGENT  
HEATHER F. HUNT  
COMMISSIONERS

August 29, 1996

Senator David L. Carpenter, Chair  
Representative Carol A. Kontos, Chair  
Joint Standing Committee on Utilities and Energy  
115 State House Station  
Augusta, ME 04333-0115

Re: P.L. 1993, c. 638, An Act to Establish an Alternative Form of  
Telecommunications Regulation in the State;  
Telecommunications Activities Generally

Dear Sen. Carpenter and Rep. Kontos:

In 1994, the Legislature enacted P.L. 1993, c. 638, An Act to Establish an Alternative Form of Telecommunications Regulation in the State (attached). The Act created Sections 9101-9105 of Title 31-A and required that

[t]he commission shall provide to the joint standing committee of the Legislature having jurisdiction over utility matters, on an annual basis beginning September 1, 1996, a report describing the activities of the commission pursuant to this chapter and the extent to which the alternative form of regulation has achieved the objectives of this chapter.

This letter provides the Commission's report to the Joint Standing Committee on Utilities and Energy, and an update more generally on other recent telecommunications activities at the Commission.

#### Alternative Form of Regulation

In May 1995, as authorized by P.L. 1993, c. 638, the PUC decided that the public interest required that an Alternative Form of Regulation (AFOR) be adopted for NYNEX for at least 5 years. Under the AFOR, NYNEX's rates for core services are indexed to the rate of inflation minus a productivity offset of 4.5%. Core services include non-discretionary services (primarily basic exchange and toll services) and discretionary services (such as existing Custom Calling and Phonesmart services, and special contracts with customers that have competitive alternatives). The price cap does not apply to non-core services, which include new competitive broadband services. The primary pricing rule caps the annual aggregate change in prices for core services during the term of the AFOR. Other price cap rules limit the changes for certain individual core service rate elements. To ensure continued high quality service



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provided by NYNEX, the Commission adopted a Service Quality Index (SQI) and a mechanism to rebate customers if service quality does not meet the SQI standards.

The AFOR preserves the Commission's ability to regulate NYNEX adequately, and contains sufficient safeguards to ensure NYNEX provides a high level of customer service. NYNEX has an opportunity to earn a fair rate of return and has flexibility in pricing and operations to compete effectively in the Maine telecommunications market. The AFOR became effective on December 1, 1995. Two remaining issues, development of a marginal costing methodology and a service quality index for outages, are still being finalized. NYNEX's first annual filing under the AFOR is due on September 1, 1996. The Commission will review any rate changes proposed by NYNEX and will resolve outstanding issues. Any resulting rate changes will be effective on December 1, 1996.

#### Schools and Libraries

The Commission's May 1995 decision provided benefits to Maine's libraries and schools. In January 1996, the Commission approved a plan to provide access to information networks and services for Maine's public libraries and schools. NYNEX is providing services or equivalent value funds up to \$4.0 million per year for five years. An Advisory Board assists the Commission in implementing the plan, comprising representatives of the Commission Staff, the Office of the Public Advocate, Department of Education, NYNEX, the New England Cable Television Association, Maine independent telephone companies, the Maine library community, and Maine internet service providers. Implementation is ongoing and will be more fully discussed in a comprehensive report to the Legislature by February 1, 1997.

#### Ex Parte Contacts

Following completion of the AFOR and companion rate investigation proceedings, some parties raised questions about possible improper ex parte contacts by NYNEX near the time the Commission deliberated the matters but after the close of the record. The Commission received 22 written communications and about a half dozen oral communications between the issuance of the Examiners' Reports and the Commission's public deliberation of the two cases on May 3, 1995. The Commission received an additional 19 letters shortly after deliberations. In August, 1995, the Commission asked NYNEX to explain its possible involvement in the letter writing campaign. NYNEX responded that it had contacted numerous members of the public, Legislators, and the Governor, to explain its views about the effect of the Hearing Examiners' Report and suggest that these persons might wish to contact the Commission. In some instances, NYNEX provided addresses and editorial assistance. NYNEX claimed it had not violated either the Maine Administrative Procedure Act or Commission rules because the Commission's rules prohibit communication in only one direction: by the Commissioners, but not to the Commissioners.

Although the Commission found NYNEX's actions to be wholly inappropriate and arguably in violation of ex parte rules, it determined the best course of action was to clarify its Rules of Practice and Procedure to ensure that such actions do not occur again. This rule-making was completed in February, 1996. Shortly thereafter, the Law Court, acting on an appeal of the Commission's decisions in these cases, stated:<sup>1</sup>

While we find no merit in [the] contention that ex parte communications by NYNEX and others with the Commission on this matter taints the decisions. In August, 1995, the Commission began a separate investigation into the allegation of improper ex parte communications by NYNEX. Although it did not find that the utility had violated any of its rules, the Commission did issue a notice of rulemaking proposing certain changes and clarifications regarding such communications.

#### Telecommunications Act of 1996

On February 8, 1996, the landmark Telecommunications Act of 1996 (TelAct96) became law.<sup>2</sup> This legislation makes sweeping changes affecting all consumers and telecommunications service providers. The intent of this legislation is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>3</sup> The Federal Communications Commission (FCC) is required by TelAct96 to adopt a number of implementation rules. The PUC is closely following the FCC's implementation process, and provides comments on proposed FCC rules that may have particular effect on Maine residents.

TelAct96 opens local telephone service to competition. To date, about 20 providers have taken the first step toward competing in Maine's local telephone market by requesting NYNEX to negotiate interconnection or resale agreements. Issues not successfully negotiated by the parties are being brought to the Commission for arbitration under TelAct96, which provides very short time frames for Commission resolution of outstanding issues. TelAct96 also requires the Commission to approve agreements resulting from arbitration or negotiation. One arbitration request has

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<sup>1</sup>*American Association of Retired Persons v. Maine Public Utilities Commission*, \_\_\_ A.2d \_\_\_, No. 7585 (Me. Mar. 15, 1996) at 5 n.5, 13.

<sup>2</sup>The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>3</sup>S. REP. NO. 230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

already been filed with the Commission, and one negotiated agreement has also been submitted for approval. TelAct96 requires the Commission to resolve outstanding issues in these filings by December, 1996.

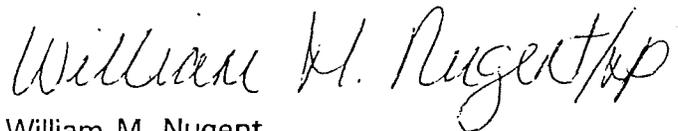
Interexchange Access Charges

Before the end of September 1996, the Commission will issue proposed revisions to the "Competition Rule" (Chapter 280 of the Commission's Rules) to restructure charges paid by competitive interexchange carriers to handle intrastate telephone calls. The revisions result from a lengthy process in which various stakeholders were consulted for their recommendations. In addition to interexchange access issues, we are revising the Competition Rule to accommodate changes in the telecommunications environment resulting from TelAct96. We anticipate that further comments will be provided during the rule-making proceeding, which will conclude by January 1997.

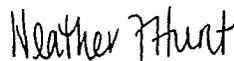
Respectfully submitted,



Thomas L. Welch  
Chairman



William M. Nugent  
Commissioner



Heather F. Hunt  
Commissioner

TLW/JDS/  
Attachment

cc: Hon. Dennis Dutremble  
Hon. Pam Cahill  
Hon. Harry Vose  
Jon Clark, OPLA

## STATE OF MAINE

IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND NINETY-FOUR

S.P. 726 - L.D. 1947

An Act to Establish an Alternative Form of  
Telecommunications Regulation in the State

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 35-A MRSA §7101, sub-§3, as enacted by PL 1993, c. 410, Pt. 000, §1, is amended to read:

3. Report. The commission shall provide to the joint standing committee of the Legislature with having jurisdiction over utility matters and the joint standing committee of the Legislature having jurisdiction over housing and economic development matters a report on the status of the telecommunications industry in Maine the State no later than December 31, 1994. The report must include the following:

A. The extent to which the dual communications policy goals of universal service and economic development are being achieved;

B. The actions taken by the commission to further these goals, including the status of any alternative approaches to regulation; and

C. Recommendations for legislation.

Sec. 2. 35-A MRSA c. 91 is enacted to read:

## CHAPTER 91

### ALTERNATIVE FORM OF REGULATION OF TELECOMMUNICATIONS SERVICES

#### §9101. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Alternative form of regulation. "Alternative form of regulation" means a form of regulation that includes, but need not be restricted to, the use of any index, formula, rate-stability plan, range-of-freedom plan or other streamlined form of regulation or deregulation of services or entities when regulation is not required to protect the public interest or to accomplish the specific objectives set forth in this chapter.

#### §9102. Adoption of alternative form of regulation

The commission may adopt, after public hearings and other processes the commission determines appropriate, an alternative form of regulation for any telephone utility in the State. The alternative form of regulation must conform to the requirements of chapters 71, 73, 75, 87 and 89, but need not conform with chapter 3 to the extent that the provisions of chapter 3 require the use of rate-base, rate-of-return or any other specific form of regulation of the rates of a telephone utility or to the extent that the provisions of chapter 3 give any party, including the telephone utility, the right to petition to change rates for telecommunications services. This chapter may not be construed to limit the authority of the commission under section 1322.

#### §9103. Conditions of alternative form of regulation

Unless the commission specifically finds that the following objectives are not in the best interests of ratepayers, the commission shall ensure that any alternative form of regulation it adopts under section 9102 is consistent with the following objectives.

1. Alternative regulation; period. For the period of the alternative form of regulation, which may not be less than 5 years nor exceed 10 years without affirmative reauthorization by the commission, ratepayers as a whole, and residential and small business ratepayers in particular, may not be required to pay more for local telephone services as a result of the implementation of an alternative form of regulation than they would under traditional rate-base or rate-of-return regulation.

2. Costs. The costs of regulation of telephone utilities must be less under the alternative form of regulation than under rate-base or rate-of-return regulation.

3. Mandates. The alternative form of regulation preserves the ability of the commission to ensure that all legislative and commission mandates directed to the telephone utility are properly executed.

4. Safeguards. The alternative form of regulation must provide adequate safeguards to ensure that risks associated with the development, deployment and offering of telecommunications and related services offered by the telephone utility, other than local telephone services, are not borne by the local telephone service subscribers of the telephone utility and that the utility continues to offer a flat-rate, voice-only local service option.

5. Reasonable charges. The alternative form of regulation must ensure that customers pay only reasonable charges for local telephone services.

6. Reasonable return. The alternative form of regulation must ensure that the telephone utility has, over the period of the alternative form of regulation, a reasonable opportunity to earn a fair return on the investment necessary to provide local telephone services.

7. Encourage telecommunications services. The alternative form of regulation must encourage the development, deployment and offering of new telecommunications and related services in the State.

8. Nondiscriminatory charges. The alternative form of regulation must ensure that another telephone utility pays the telephone utility providing local telephone service reasonable and nondiscriminatory charges for any service used by the other telephone utility to provide its competing service.

9. General safeguards. The alternative form of regulation must include consumer and competitive safeguards.

#### §9104. Implementation

The commission may adopt an alternative form of regulation under the following conditions.

1. Completion by May 15, 1995. If the commission concludes a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the rule or order adopting the alternative form of regulation takes effect 90 days

after the adjournment of the First Regular Session of the 117th Legislature.

2. Completion by February 1, 1996. If the commission fail to complete a proceeding adopting an alternative form of regulation pursuant to section 9102 on or before May 15, 1995, the commission must conclude any proceeding it undertakes to adopt an alternative form of regulation under that section by February 1, 1996. Any rule or order providing for an alternative form of regulation adopted after May 15, 1995 takes effect 90 days after the adjournment of the Second Regular Session of the 117th Legislature.

3. Report to Legislature. The commission shall submit a report by May 16, 1995 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any proceedings it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 1. The commission shall submit a 2nd report by February 2, 1996 to the joint standing committee of the Legislature having jurisdiction over utility matters on the status of any actions it has undertaken under this chapter and must submit any rule or order the commission has adopted in accordance with subsection 2.

The joint standing committee of the Legislature having jurisdiction over utility matters may report out legislation regarding telecommunications regulation to the First or Second Regular Session of the 117th Legislature.

This chapter may not be construed to require the commission to adopt any alternative form of regulation.

#### §9105. Report to Legislature

The commission shall provide to the joint standing committee of the Legislature having jurisdiction over utility matters, on an annual basis beginning September 1, 1996, a report describing the activities of the commission pursuant to this chapter and the extent to which the alternative form of regulation has achieved the objectives of this chapter.