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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 24, 1976

Honorable Gail H. Tarr
R.F.D. #1
Brighton, Maine

Re: The Constitutionality of Section 2, Chapter 583, Laws of 1975, An Act to Provide Lifeline Electrical Service for Older Citizens.

Dear Representative Tarr:

This opinion is in response to your telephone call to this office and your letter dated November 20, 1975, to Deputy Attorney General Martin Wilk, in which you asked whether subsection 2 of Section 2 of Chapter 585, Laws of 1975, An Act to Provide Lifeline Electrical Service for Older Citizens (L.D. 20), is constitutional.

Subsection 2 provides that:

> 2. In the event that implementation shall cause a loss of revenue to a utility, the additional revenue shall be obtained from all other classes of energy use in a just and reasonable manner.

The only question raised by that subsection is whether it satisfies the requirements of the Fourteenth Amendment of the United States Constitution and Article I, Section 6-A of the Maine Constitution that the State shall not deny any person within its jurisdiction equal protection of the laws. We think that the statute satisfies these constitutional requirements.

Pursuant to the Act, the Public Utilities Commission (PUC) has implemented a one year demonstration older citizens' lifeline electrical service program for six municipalities the PUC has selected, three with a population of over 10,000 and three with a population between 2,500 and 10,000, in each of the service areas of the Central Maine Power Company, Bangor Hydro-Electric Company and Maine Public Service Company. 35 M.R.S.A. § 84. The three larger communities that have been selected for the demonstration project are Portland, Bangor and Caribou; the three smaller ones are Rockland, Ellsworth and Fort Kent. Any citizen of 62 years of age or older who meets the income limitations provided in the statute shall not pay more than three cents per kilowatt hour (Title 35 M.R.S.A. § 84 sub-§ 2) "for each of the first

500 kilowatt hours of electricity utilized in any monthly billing period at his principle dwelling." The subsequent rates for additional usage, while varying from utility to utility, correspond to the standard residential rate for the second and third steps in the utility's declining block residential rate structure. For example, in Central Maine Power service area, the rate applicable to lifeline customers for the second five hundred kilowatt hours (KWH) is 2.16 cents per KWH; thereafter, all KWH are billed at 1.97 cents. The lifeline rate is applicable whether or not the recipient limits his residential consumption to 500 KWH per month. If he uses 25,000 KWH, he would still receive the lifeline rate for the first 500 KWH used.

The lifeline rate of 3 cents per KWH for the first 500 KWH consumed, established by the PUC under the statute, or $15.00 with no additional charges of any kind whatsoever permitted (35 M.R.S.A. §84, sub§ 2),is substantially less than the comparable standard rate for each of the three utilities involved. With the fuel adjustment charge added, the standard rate would be $18.07 for CMP, $20.32 for Bangor Hydro and $25.10 for Maine Public Service.

It is not known at this time to what extent each recipient of the lifeline rate will use the full 500 KWHs at the three cent rate. That consumption level, however, is about average for a typical residence in the CMP service area.

Under Section 2, subsection 2 of the Act, the other ratepayers in each municipality (those not qualified as lifeline ratepayers) will be required to pay for the loss of revenue their particular utility incurs as a consequence of the lower lifeline rates. Accordingly, in the Maine Public Service (MPS) area (Caribou and Fort Kent), to the extent that the lifeline recipients use the full 500 KWH, the difference between $25.10 on each bill that the MPS would have collected and the $15.00 that it does collect from the lifeline rate customer, or $9.90 per month,will be added to the bills to be paid by the other ratepayers in those particular towns. Because the statute provides that the revenue dificiency shall be collected "from all other classes of energy use in a just and reasonable manner" (underlining supplied), the PUC has decided to impose a surcharge based solely on KWH usage, regardless of the rate otherwise applicable to each ratepayer. See, e.g., PUC Order in F. C. #2165, appended hereto. 2/

2/ CMP has protested the PUC's decision to not permit the costs incurred by CMP in administering the program to be added to the surcharge as a part of its resulting loss of revenue. See CMP's Petition to Reopen Proceedings, etc. in F. C. #2165, appended hereto. See also PUC Rules and Procedures for Older Citizen Lifeline Electrical Service, November 3, 1973, p. 3, appended hereto. If CMP's protests were to be successful, the surcharge would be increased accordingly.

As of January 27, 1976, 1,966 persons in the six demonstration communities had applied for and qualified as lifeline rate customers. 3/ Inasmuch as the surcharge is based on KWH usage, it is expected that, given the number of ratepayers in the demonstration communities, the resulting economic impact of the surcharge on residential customers in these demonstration communities will be very small indeed. Industrial users could, of course, depending on their KWH usage, pay more substantial surcharges which, in turn, would be passed on to their customers in the form of higher prices for their goods or services.

Heavy users of electricity, such as those residential ratepayers having large families with heavy washing, drying and/or electric heating loads as well as the larger industrial firms, would, of course, pay more of the subsidy for the lifeline rate customers than would more modest users of electricity. 4/ Landlords with single meter apartment houses will presumably choose to pass their subsidy costs on to their tenants, unless prevented from doing so by the terms of a lease.

Lifeline rate customers do not pay any part of the subsidy, even on their electrical usage that exceeds 500 KWH per month. 5/

3/ As the PUC recognizes in its Rules and Procedures for Older Citizens' Lifeline Electrical Service, Rules 2 and 3, not all those eligible may qualify as lifeline customers. Potential lifeline rate customers living in a multiple unit dwelling with a single meter will be eligible for the preferred rate only if all households within the dwelling so qualify. (Even if they do, the lifeline customers apparently receive the resulting benefits in fact only if the landlord chooses to follow the PUC recommendation that he reduce rents accordingly. See Rule 2).

4/ The statute can, and inevitably will, result in persons living on welfare and on marginal incomes, but not satisfying the age requirements of the lifeline rate customer, subsidizing the latter. In some instances, if such marginal income families have heavy electrical load requirements, their subsidy of the lifeline rate customer may be more substantial than that of more affluent persons in the same community having lesser needs for electricity. In that connection, we are aware that much of the cheaper housing in Maine is heated with electricity, often with relatively inefficient radiant electrical heat, because of the low initial capital costs.

5/ The utilities, with the approval of the PUC, have interpreted "classes of energy use" in subsection 2 of Section 2 of the Act as essentially synonymous with classes of service. Lifeline service customers are treated as a class of use and, therefore, are exempt from the surcharge imposed by subsection 2 for their KWH usage beyond the first 500 KWH monthly. See, e.g., CMP's Rate LL appended to the PUC Order in F. C. 2165.

As a consequence of subsection 2 of Section 2 of the Act, taken in conjunction with the other provisions of the Act and under the plan that has been developed by the PUC for the implementation of the lifeline service program (which plan, it should be noted, follows the requirements of the statute reasonably), the following differences in rate treatment result:

1. Lifeline customers receive preferable rate treatment over others in the community who do not qualify as lifeline recipients.

2. Ratepayers other than lifeline customers living in demonstration communities will pay for the subsidized rate for the lifeline customers in their communities while similarly situated ratepayers outside the demonstration communities will not pay any of the subsidy, regardless of their KWH usage.

3. Ratepayers, other than lifeline customers, living in the same demonstration communities will pay different amounts of surcharge according to their respective KWH usage.

This statute is presumed constitutional at the outset. As stated by the Supreme Judicial Court of the State of Maine in State v. Norton, 335 A. 2d 607, 614 (1975):

> "In passing upon the constitutionality of any act of the legislature the Court assumes that the legislature acted with knowledge of constitutional restrictions, and that the legislature honestly believed that it was acting within its rights, duties and powers. All acts of the legislature are presumed to be constitutional and this is a 'presumption of great strength.' . . . The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality . . . Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the legislature and not for the Court." (Citations omitted.) State v. Fantastic Fair & Karmil, 158 Me. 450, 466, 467, 186 A.2d 352, 262,263 (1961).

Turning to the first category of difference, we have no difficulty whatsoever with preferential treatment being given to persons 62 years of age or older with limited incomes as specified in the statute. Public assistance to such groups of persons would undoubtedly be sustained as a legitimate exercise of the Legislature's powers to protect the public welfare. 6/ The only question remaining, then, is whether the manner of imposing the resulting economic burden of the subsidy to that group is so arbitrary or unfair as to deprive any of the other ratepayers paying the subsidy equal protection of the laws.

6/ In New York, it has been held that a county government's Department of Social Services was required to meet the immediate needs of a welfare recipient by paying the sum that would make the recipient current in his obligation to the utility that provides power for heating and lighting his home. Ingram v. Fahuy, 358 N.Y.S. 2d 604.

The relevant criteria here regarding the resulting disparity in the burden of this social welfare program carried by various persons is well stated in the recent decision of the United States Supreme Court in Weinberger v. Salfi, 422 U.S. _____ (June 26, 1975), at 45 L.Ed 2d 522, 541, quoting from one of its prior opinions,

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61, 78, 55 L Ed 369, 31 S Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations - illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 US 61, 69-70, 57 L Ed 730 S Ct 441 . . . ."

Applying that criteria here, the difference in treatment between those in demonstration communities and those outside of those communities (category (2)) is not serious, in our view, from a constitutional standpoint. One purpose of the demonstration or pilot program was to try to determine, by examples in communities of different sizes, what the economic impact would be on other ratepayers in such communities if the program were to be adopted statewide. Assuming no other constitutional problems with the plan, then, the discrimination that results between equal consumers of electricity in different communities could be justified on the ground that it is an inevitable result of a legislative determination to treat this aspect of the economic welfare problems of the elderly poor as a local responsibility solely for the purposes of the demonstration project. The difference in treatment results from that determination, not from any arbitrary or invidious classification. We think the Legislature has the lawful authority to make that determination. It follows that the resulting discrimination between comparable energy users in different communities is not constitutionally impermissible.

The remaining (third) category of difference in treatment is that between big and little users of electricity. The inquiry here is whether the discrimination based on KWH usage is reasonably related to the promotion of some legitimate legislative purpose of this statute.

The underlying policy or purpose of the statute, as originally introduced, was to provide aid to Maine's elderly through lifeline preferential electric rates. See 35 M.R.S.A. § 82. It was pointed out during debate that three-quarters of Maine's 114,000 elderly citizens support themselves solely with social security payments and this means

that most of them live on $40 a week. See Senator Cummings' comments, Senate Record, June 4, 1975, p. B1622.

A secondary policy of the statute is (35 M.R.S.A. § 82) "to encourage the reduction of electrical power consumption for all other uses beyond" the basic necessities of modern life, such as lighting and refrigeration, needed by Maine's older citizens. The sponsors of the legislation were of the view that the bill would encourage such energy conservation. See the comments of Senator Reeves, Senate Record, June 4, 1975, at B1622, and on June 9, 1975, at B1753, and the comments of Representative Goodwin, House Record, June 9, 1975, at B1740 and June 20, 1975, at B2202. Whether or not the proponents of the bill were factually correct in their statements that the bill would encourage the recipients of the lifeline rate to conserve electricity, it is reasonably clear from the legislative history that the proponents of the bill did profess a concern that the bill help achieve energy conservation. Subsection 2 of Section 2 of the statute should encourage other ratepayers in the demonstration communities to conserve electricity because the surcharge is based solely on KWH usage. The more electricity used the more the ratepayer must pay in the way of a surcharge.

It may also be pointed out in defense of this statute that today, in an inflationary period, the increased usage of electricity, especially during peak demand periods, increases the cost of electricity, as it requires the construction of expensive new generating and transmitting facilities, all to the detriment of the elderly poor when they attempt to pay their electric utility bills. It can be argued, then, that there is an element of fairness in imposing a surcharge based on KWH usage to help subsidize the electric bills of the elderly poor.

The statute is not without precedent in offering a preferential rate with discrimination resulting against other ratepayers. While utilities are prohibited from giving (35 M.R.S.A. § 102) "any undue or unreasonable preference or advantage to any particular person, firm or corporation," they are free to provide (35 M.R.S.A. § 103) "service at free or reduced rates for charitable or benevolent purposes * * *." While section 103 fails to specify upon whom the resulting burden of the subsidized service to the charity shall fall, it seems clear that the other ratepayers would have to pay the subsidy so that the utilities would still receive a reasonable rate of return as required by law. See 35 M.R.S.A. § 51.

The legislative debate on this bill (L.D. 20) reflects the concern of a number of legislators, including yourself, that if enacted, it would impose an economic burden on poor people who are large users

of electricity, and several legislators recommended, instead, that the lifeline rate be subsidized directly out of the tax base.8/ As we have pointed out, however, the resulting differences in treatment between small and large users of electricity does bear some relationship to an objective of the statute. The legislature has broad discretion to enact laws which affect some groups of citizens differently than others and the equal protection clause will be offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective in enacting the statute. In making that determination, the statute will be sustained if any state of facts may reasonably be conceived that would justify it. E.g. McGowan v. the State of Maryland, 366 U.S. 420 (1961); see Weinberger v. Salfi, 45 L.Ed.2d at 549, n.15.

For the reasons stated above, we believe the statute would be sustained if challenged on the ground that it denies equal protection of the laws.

If we could be of any further assistance to you with regard to this inquiry, please do not hesitate to call on us.

Sincerely yours,

EDWARD LEE ROGERS
Assistant Attorney General

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8/ See, e.g. the comments of Representative Berry from Buxton and your own comments, House Record, June 9, 1975, at B1740 and the comments of Senator Cyr of Aroostook, Senate Record, June 4, 1975, at B1622 and those of Senator Katz, June 9, 1975, at B1754. Senator Katz stated the issue as follows:

> "Now if your * * * answer to the needs of the elderly is to give them some kind of preferential rate * * * and say that everybody else who uses electricity is going to have to * * * [pay more], including all the low income people in this state, all the marginal people with large families, who are large users of electricity, this is not my idea of compassionate social welfare legislation at all."