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Honorable Laurence E. Connolly, Jr.
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Connolly:

This will respond to your questions regarding L.D. 1652 and L.D. 1673.

By way of background, L.D. 522 (AN ACT to Create the Maine Energy Commission), which would replace the Public Utilities Commission with an elected Maine Energy Commission, has been proposed to the Legislature pursuant to the direct initiative process. Since the Legislature has declined to enact the initiated bill, it will be the subject of a referendum vote in November of this year. Presently pending before the Legislature are two other bills relating to the Public Utilities Commission [hereinafter "PUC"]. The first, L.D. 1652 (AN ACT to Restructure the Public Utilities Commission), as amended by H-533, would reduce the terms of the Commissioners to six years and would stagger those terms so that a vacancy occurred every two years. The second, L.D. 1673 (AN ACT to Create the Public Advocate to Represent the Interests of Utility Customers), would establish an office to represent the interests of the "using and consuming public" in matters within the jurisdiction of the PUC. In their present form, L.D. 1652 and L.D. 1673 are emergency bills.

You have raised the following questions with respect to both L.D. 1652 and L.D. 1673:

1. Would the bill, if enacted as nonemergency legislation, constitute a "competing measure" with the initiated bill,[1] thereby requiring that it be included on the referendum ballot as an alternative to the initiated bill?

2. Does the bill in its present form satisfy the constitutional requirements for emergency legislation?

Competing Measures

Art. IV, pt. 3, § 18(2) of the Maine Constitution requires that unless an initiated bill is enacted without change by the Legislature, it shall be "submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both." In our view, a competing measure may result from two different types of legislative action.[2] The first, expressly recognized by Maine precedent, occurs when the Legislature enacts "[a] bill which deals broadly with the same general subject matter [as the initiated measure], particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together. . . . " (Emphasis supplied.) Farris ex rel. Dorsky v. Goss, 143 Me. 227, 232 (1948). When such inconsistent legislation is enacted, it would appear irrelevant whether the Legislature intended it to be, or regarded

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1/ In McCaffrey v. Gartley, Me., 377 A.2d 1367 (1977), the Law Court held that an emergency enactment is not subject to the "competing measure" requirement in art. IV, pt. 3, § 18 of the Maine Constitution.

2/ We should note that the Justices of the Law Court have not demonstrated complete agreement on the operation of the competing measure requirement. In Farris ex rel. Dorsky v. Goss, 147 Me. 227 (1948), one Justice strenuously dissented from the majority opinion, while in McCaffrey v. Gartley, supra, two Justices saw the need to add concurring opinions. Thus, our advice to you is based on our understanding of what is a somewhat unsettled area of the law. For a more thorough discussion of these cases, see Op. Att'y. Gen. #79-87.

it as, a competing measure. The second type of legislative action which may give rise to a competing measure occurs when the Legislature passes a bill with the intent that it be an "amended form, substitute, or recommendation of the Legislature." While the Maine cases do not specifically address this point, we believe that such a bill would be a competing measure even if it were not inconsistent with the initiated bill and thus could stand together with the initiated bill.

L.D. 1652

By virtue of the "inconsistent legislation" test, it seems clear that, if enacted as nonemergency legislation, L.D. 1652 would be a competing measure with L.D. 522. The former legislation establishes six-year terms for the PUC Commissioners, whereas the latter bill sets those terms at four years. In addition, L.D. 1652 is designed to maintain the PUC as an appointed body, while L.D. 522 would create a commission whose members are popularly elected. Finally, from a purely mechanical perspective, the two bills would change 35 M.R.S.A. § 1 in wholly inconsistent fashions. Thus, if both were enacted, it would be impossible for them to stand together.

L.D. 1673

Applying the "inconsistent legislation" test to L.D. 1673, we conclude the bill would not be a competing measure. When the language of L.D. 1673 is compared with that of the initiated measure, we see no reason why the proposed Public Advocate cannot coexist with the proposed Maine Energy Commission. Similarly, from a technical perspective, the enactment of both bills would not result in conflicting statutes.

There is one provision in L.D. 1673 which might be invoked to support a contrary conclusion. That provision, found in the proposed 35 M.R.S.A. § 1-A(12), states in relevant part that "[i]n the event that the selection of the Public Utilities Commission is required by law to be accomplished by any other method than appointment by the Governor, with confirmation by the Legislature, the Public Advocate shall be repealed. . . . " In light of this "repeal provision," it may be argued that L.D. 1673 and L.D. 522 cannot stand together. While such an argument would be literally correct, we do not believe it brings L.D. 1673 within the competing measure test set forth in Dorsky. Analogizing to a repeal or amendment by implication, the Court in Dorsky was referring to a situation in which the two bills could not possibly coexist. That is not the case with which we are confronted. Here the two measures can stand together, but the Legislature has made a judgment that the Public Advocate should not continue in existence if the method of selecting the PUC is changed. In other words, the two measures are not inherently

inconsistent. Rather, the Legislature has simply made the policy judgment that it does not want a Public Advocate if the PUC Commissioners are not to be appointed by the Governor.

The existence of the repeal provision does, however, raise the question of whether L.D. 1673 falls within what we have called the second type of competing measure, namely, a bill which is specifically intended as a substitute for the initiated legislation. Here we need only note that a provision which automatically eliminates the Public Advocate in the event of an elected commission could be read as reflecting such an intent. Since L.D. 1673 is still pending before the Legislature, we believe that the best resolution of this matter is for the Legislature to clearly indicate, either in the bill or in the record, whether L.D. 1673 is intended as a substitute for L.D. 522 and thus is to be placed on the ballot as an alternative to that measure.

Emergency Legislation

Your other concern with L.D. 1652 and L.D. 1673 is whether the bills may be validly enacted as emergency legislation. This question arises as a result of art. IV, pt. 3, § 16 of the Maine Constitution which provides that no act may take effect until 90 days after the adjournment of the Legislature unless the measure is "immediately necessary for the preservation of the public peace, health or safety." Furthermore, section 16 requires that the facts constituting the emergency be expressed in the preamble of the act.3/

As explained by the Law Court in Morris v. Goss, 147 Me. 89 (1951), judicial review of the sufficiency of an emergency preamble is limited to two areas of inquiry. The first is whether the Legislature has expressed a fact or facts. The second is whether such fact or facts can constitute an emergency within the meaning of the Constitution. On the other hand, it is within the exclusive power of the Legislature to decide whether the expressed facts do constitute an emergency. Put more simply, judicial review focuses on the question of whether the facts recited in the preamble could be deemed to demonstrate an emergency and not on the question of whether an emergency actually exists.

3/ If an emergency clause is held invalid, it does not invalidate the underlying law. It merely changes the date on which it takes effect. Lamoine v. Crockett, 116 Me. 263 (1917). In this instance, however, a holding that the emergency clause is invalid could also subject the legislation to the competing measure requirement.

Before analyzing L.D. 1652 and L.D. 1673 in the context of the constitutional prerequisites for emergency legislation, certain caveats are in order. First, there is very little Maine case law in this area. Second, the infinite variety of pressing problems which the Legislature may be called upon to address makes it virtually impossible to develop legal principles of general applicability on this subject. Thus, the question of whether a particular set of facts is legally sufficient to describe an emergency will inevitably involve a large measure of subjective judgment.

L.D. 1652

With respect to this bill, there appears to be a problem which eliminates the need to consider the sufficiency of the emergency preamble. The principal thrust of L.D. 1652, as amended by H-533, is to change the terms of the PUC Commissioners in order to insure that those terms are systematically staggered in the future. If our understanding of the facts is correct, the problem is that the first vacancy which will be affected by the bill will not occur until July 8, 1982.[4/] Assuming the Legislature adjourns sometime in June, 1981, it would be very difficult to argue that an act, which will have no effect until a year after adjournment, had to be passed as emergency legislation. Although the Law Court has never specifically addressed this type of problem, we doubt it would sanction emergency legislation under these circumstances.[5/]

L.D. 1673

As to L.D. 1673, we are of the opinion that the emergency preamble is sufficient for purposes of art. IV, pt. 3, § 16. Our reasons may be stated very succinctly. First, the preamble recites facts with regard to both the status and nature of matters

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4/ Under the bill as amended, incumbent commissioners are to continue to serve the remainder of their terms. We are informed that the term of Commissioner Smith will be the first to expire and that this will not occur until July 8, 1982. Furthermore, the possibility that a vacancy might occur at any time does not justify an immediate effective date since the bill does not alter the terms of those appointed to fill such vacancies.

5/ Section 4 of this bill deals with a different subject and does not encounter the problem described in the text. We express no view on whether that section could be validly enacted as emergency legislation in a separate bill.

pending before the PUC and the inadequacy of public representation.[6] In light of those facts, as well as the significant effect of PUC decisions on the public, we believe the Legislature could reasonably conclude that immediate steps are necessary to insure adequate public representation before the Commission.

Conclusions

Our conclusions on the issues you have raised may be summarized as follows:

1. If enacted as nonemergency legislation, L.D. 1652, as amended by H-533, would be a "competing measure" with L.D. 522.

2. If enacted as nonemergency legislation, L.D. 1673 would not be a "competing measure" with L.D. 522.[7]

3. It is our opinion that L.D. 1652, as amended by H-533, is vulnerable to attack as emergency legislation because the bill does not have any practical effect until July, 1982. Thus, it would be very difficult to justify an immediate effective date.

4. It is our opinion that L.D. 1673 may be validly enacted as emergency legislation.

I hope this responds to your concerns. Please feel free to contact us if we can be of further service.

Sincerely,

James E. Tierney

JAMES E. TIERNEY
Attorney General

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6/ Although these facts are very general in nature, the Law Court has held that the "constitutional requirement is satisfied by the expression in the preamble of an ultimate fact or facts which constitute an emergency without a recital of all of the separate facts evidencing the existence of such ultimate fact." Morris v. Goss, supra, at 102.

7/ This conclusion is subject to our recommendation, found on page 4 of this Opinion, that the Legislature make it clear that it does not intend L.D. 1673 to be a competing measure.