84-8

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 21, 1984

Honorable John E. Baldacci
Maine Senate
State House Station #3
Augusta, Maine 04333

Dear Senator Baldacci:

You have inquired whether it violates the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. § 8001, et seq, (the "APA") for the Maine Public Utilities Commission to establish, in the context of a particular rate-making proceeding, a policy with regard to the compensation of intervenors, and then to apply that policy in other rate-making proceedings not involving the same company, without following the rulemaking procedures of the APA. For the reasons which follow, it is the opinion of this Department that such actions by the Commission do not violate the APA.

The statutory provisions determinative of this question are found in the APA definition of "rule," at 5 M.R.S.A. § 8002(9). Paragraph A of that subsection provides an affirmative definition of the term "rule," as follows:

> A. "Rule" means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability . . . that is intended to be judicially enforceable and implements, interprets or makes specific the law

> administered by the agency, or describes the procedures or practices of the agency. . . . (Emphasis added.)[1/]

Furthermore, paragraph B of the same subsection describes several categories of agency actions that are expressly excluded from the definition of the term "rule." Among these are "decisions issued in adjudicatory proceedings." 5 M.R.S.A. § 8002(9)(B)(3). An "adjudicatory proceeding" is defined by the APA as

> any proceeding before an agency which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.
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> 5 M.R.S.A. § 8002(2) (emphasis added).

Thus the legal effect of any action taken by an agency in the course of an adjudicatory proceeding is limited to the parties before the agency in that proceeding. As a matter of law, no such decision can have "general applicability," which means simply a binding legal effect on the population at large. Since "general applicability" is one of the essential elements of a "rule," the statutory definition of the term "rule" correctly specifies that no decision in an adjudicatory proceeding will ever be a rule. The two actions are mutually exclusive.

Turning to the actions of the Public Utilities Commission which are the subject of your question, it is clear that that agency has not undertaken to make statements of policy which are to be generally applicable to all persons subject to its jurisdiction. Rather, the Commission has addressed the question of intervenor funding only in the context of particular quasi-judicial proceedings. By way of history, the Commission's first action with regard to intervenor funding occurred in the recently concluded Central Maine Power Company ("CMP") rate case, PUC Docket No. 82-266. At pages 208-213 of its decision, it set forth certain considerations which it felt relevant for the resolution of the requests for intervenor

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[1/] From this definition, it is clear that an agency's nomenclature is unimportant: any "agency statement" is, in law and in fact, a "rule" if it satisfies the elements of this statutory definition.

funding in that proceeding, after which it ordered CMP to compensate certain intervenors but not others. A copy of this portion of the Commission's decision is attached. Subsequent to the Commission's decision in the CMP case, it issued notice to all parties in two proceedings pending before it regarding the New England Telephone and Telegraph Company, PUC Docket Nos. 83-179, 83-213, expressing its intention to apply the same test for intervenor funding developed in the CMP case in those proceedings. Following the submission of requests for intervenor funding to it in the NET cases, the Commission further permitted any party to comment on those requests before rendering its decision.[2/] Finally, on January 27, 1984, the Commission issued an order in both cases directing the funding of the request of the Consumer Intervenor Coalition, but denying all other requests.[3/]

As should be clear from the discussion of the difference between rulemaking and adjudicatory proceedings set forth above, there is nothing illegal about this procedure. In describing its policy for intervenor funding in the CMP case, the Commission was not attempting to make a statement of general applicability; it was simply offering an explanation of the criteria by which it resolved an issue which had arisen in that proceeding. Moreover, in extending that policy into the NET case, the Commission did not violate the APA, since such an extension did not purport to make the policy of general applicability. In both cases, the agency was merely resolving issues that had come before it in an adjudicatory proceeding.

In saying the foregoing, this office does not wish to suggest that the Commission may not address the question of intervenor funding in a rule if it so chose. It is quite common in State Government, and, of course, permissible under the APA, for an agency to address an issue which occurs repeatedly in the context of quasi-judicial proceedings by

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[2/] Unlike the practice of the courts and some federal agencies, the Public Utilities Commission did not give "precedent" effect to its CMP decision on intervenor funding. Even if it had, a precedent differs in two respects from a rule. First, by definition, a precedent is limited to the facts of the cases in which it was developed and applied, and its applicability in the next case is always an open question. Second, a precedent is a policy made by adjudication, and it may therefore be overruled in any case where its application produces an unjust result.

[3/] Copies of all of these orders are attached.

means of a rule. Thus, should the Public Utilities Commission desire to make the policy articulated in its most recent CMP decision applicable to all cases before it, or certain classes of cases, or under certain circumstances, it would be free to do so by adopting a rule pursuant to the provisions of subchapter II of the APA.

The discretion to develop policy both by rulemaking and in the course of considering individual cases is inherent in the powers conferred upon quasi-judicial administrative agencies. Such an agency cannot perform its quasi-judicial functions without constantly interpreting the governing statutes, and indeed its own rules, in applying them to the ever-changing cases that come before it. Although administrative agencies, unlike courts, are generally both authorized and encouraged to adopt fundamental policy decisions as rules, it must be recognized that rules limit the ability of an agency to respond to the circumstances of different individual cases.

The United States Supreme Court has recognized the practical necessity of according an administrative agency the flexibility to make policy by the means it considers appropriate. The leading case explaining this conclusion is Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 202-3 (1947):

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. . . .
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or a problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite

> place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

I hope the foregoing is of assistance to you. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Rep. Harry L. Vose
House Chairman
Joint Standing Committee on Public Utilties

Peter A. Bradford, Chairman,
Public Utilities Commission

X. INTERVENOR FUNDING.

Four parties to this proceeding petitioned the Commission for an award of compensation from the Company to fund the costs of their interventions. Bruce Reeves, a residential customer of CMP, petitioned on his own behalf as a pro se intervenor and on behalf of the Maine Committee for Utility Rate Reform (MCURR), an organization of residential ratepayers. Howard Hanson, a residential customer of CMP, petitioned on his own behalf as a pro se intervenor; and, also the Maine People's Alliance, a low income consumer organization, petitioned on its own behalf. The Commission has not had previous occasion to consider whether compensation, could be awarded to intervenors in rate case proceedings,* although Chapter 84 of the Commission's Rules of Procedure does permit the award of compensation to public interest intervenors for effective presentation of conservation and cogeneration issues, so-called PURPA issues, in electric utility rate proceedings.**

Most of the issues raised by the petitioning parties in this case, however, are not PURPA issues. Therefore, Chapter 84

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* Intervenor funding has been granted in West Virginia, Colorado, California, Wisconsin and in proceedings before several federal agencies.

** Chapter 84 of the Commission's Rules was adopted to implement the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. 2601, et seq.

of our Rules is inapplicable. Nevertheless, effective participation in rate cases on non-PURPA issues can also benefit the ratemaking process and enhance the quality of rate decisions. We define effective participation as the well-focused presentation of one or more significant issues which will not be raised by other parties to the litigation.

Because the direct billings plus the utility component of other goods and services now amounts to more than $2,500 per year to a Maine family of four, effective public participation becomes increasingly important. Rate cases by their very nature are complex and it is not always possible for the PUC Staff or the Office of the Public Advocate with their limited resources to address every issue which should be examined by the Commission in a rate proceeding.* Lesser but still significant issues will remain unaddressed unless other public-interest parties are able to undertake limited interventions on issues of particular importance to them. However, the costs of participating in PUC proceedings, particularly the costs of legal assistance and expert testimony are barriers to such presentations. Awarding compensation for

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* The combined budget of the PUC and the Public Advocate is some $2.5 million, of which less than 10% is spent on any one case. Utility annual revenues in Maine exceed $700 million; rate bases are more than $2.5 billion. Recent major rate requests have exceeded $50 million, and the rate case expenditures of the utilities and large industrial intervenors approach or exceed $1 million for such cases.

important contributions to the rate case helps overcome this barrier.

Since the establishing of just and reasonable rates is in the long-term interest of the utility as well as the consumer, PUC proceedings that fully evaluate meritorious contentions are in the best interests of the Company and the public. The Commission has broad authority, pursuant to 35 M.R.S.A. §§3, 4, and 313, to assure that its hearing process is effective. To that end, we have invariably allowed utilities to charge their consumers for the reasonable costs of presenting their own cases for rate increases. All that we order today is that those costs include the reasonable costs of others who make a significant and unique contribution to the setting of just and reasonable rates and whose contribution is unlikely to take place without such support.

In order to assure that intervenor funding is awarded only in cases in which it is both truly necessary and in which it will make a substantial contribution to the proceeding, such funding must, in future, meet the following criteria:

1. A request must be made at least four weeks before the first hearing. The request must state the issue(s) to be raised, the estimated costs of the presentation, the manner of the presentation and the reasons why funding cannot reasonably be obtained elsewhere. Petitions filed later than four weeks before the first hearing must also contain a clear and convincing showing as to why they could not have been presented earlier.

2. Within ten days of the presentation of such a request, the Staff and the Public Advocate (if participating)

must explain why the issue(s) cannot be pursued by them in the context of their cases.

3. The Commission must find that the issue(s) will potentially have a significant impact on the outcome of the proceedings in question and will be responsibly presented.

4. The Commission must also find that the issue(s) cannot resonably be developed in the absence of intervenor funding.

5. The Commission will rule on such petitions before the commencement of hearings in the case in question.

The financial test is not designed to achieve a showing that the issue cannot be raised without compensation. No useful purpose would be served by requiring an individual to sell their home to raise a significant issue before the PUC or by requiring a charitable organization to cease most of its other works. If the other tests are met, the financial test requires only a showing of an effort so significant in relation to available resources as to impair the functioning of the petitioning agency or to constitute a real hardship to the petitioning individual.

For purposes of this case, the preceding criteria must be loosely applied. It will suffice if a party has made a unique and significant contribution and if it can now show a substantial financial burden incurred in the making of that contribution. Aspects of the presentations of MCURR and Mr. Reeves appear to meet these criteria.

We find that the presentation of MCURR on the several tax issues discussed in this opinion was a significant contribution to this rate proceeding. The total value of these issues was several million dollars of deferred tax monies, all of which will be flowed back from the Company to ratepayers on a more

timely basis than would otherwise have been the case. These tax issues were not raised by any other party to the proceeding.

The presentation of Mr. Reeves on the issue of executive salaries was also of significant aid to the Commission.* In particular, Mr. Reeves' request for the appearance and testimony of Mr. George Ellis, Chairman of the Board of CMP, permitted a thorough examination of both the size of recent increases in executive salaries and the reasons the Board felt these large increases were justified. Had Mr. Reeves not requested Mr. Ellis' appearance, no other party would have done so, and the record regarding the setting of executive salaries would have been substantially diminished. Because salary setting policies are a fundamental indicator of company priorities, such a diminution would have reduced our basic understanding of the functioning of CMP during the test period and other relevant years.

Accordingly, our Decision and Order of December 6, 1983, ordered Company compensation of the reasonable costs of these two interventions on the issues mentioned above. Mr. Reeves and MCURR must prepare itemized statements of their costs and submit them no later than 30 days following the date of this Order. These statements must also demonstrate significant reallocation of other resources to meet the demands of participating in this case. The Commission will issue any further necessary orders at that time.

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* See discussion in Section II(B).

We further find that the petitions of the Maine People's Alliance and Howard Hanson must be denied. While Mr. Hanson participated substantially in this proceeding and made considerable personal effort, we cannot find his contribution to be so unique and so determinative on any issue as to merit intervenor funding. The Maine People's Alliance assisted in the presentation of public witness testimony in a manner helpful both to us and to the public, but this contribution was not so unique as to justify intervenor funding.

XI. CONCLUSION.

For the reasons stated above, the Commission entered its Decision and Order of December 6, 1983, which included a finding that an increase in rates of $11,064,000 is just and reasonable.

Dated at Augusta, Maine this 15th day of December, 1983.

BY ORDER OF THE COMMISSION

Charles G. Roundy
Charles G. Roundy
Secretary

A true copy.
Attest: Charles G. Roundy, Secretary

COMMISSIONERS VOTING FOR: Bradford
Gelder
Harrington

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

December 23, 1983

PROCEDURAL ORDER ON
INTERVENOR FUNDING

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY
Re: Consideration of Local
Measured Service and Alternative
Exchange Service Options

Docket No. 83-179

We have recently outlined a test for determining whether intervenors will be able to recover their costs and legal fees. Central Maine Power Company, Proposed Increase in Rates, No. 82-266, slip op. at 208-213 (Me. P.U.C. December 15, 1983). The Commission intends to apply this test to this proceeding. Since there are fewer than four weeks remaining before the hearings in this docket, the rule on filing times will be slightly modified. The information required by this test must be filed with the Commission by no later than January 6, 1984.

Dated at Augusta, Maine this 23rd day of December, 1983.

BY ORDER OF THE COMMISSION

Charles G. Roundy
Charles G. Roundy
Secretary

A true copy.
Attest: Charles G. Roundy
Charles G. Roundy, Secretary

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STATE OF MAINE
PUBLIC UTILITIES COMMISSION

December 23, 1983

PROCEDURAL ORDER ON
INTERVENOR FUNDING

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY
Re: Proposed Increase in Rates

Docket No. 83-213

We have recently outlined a test for determining whether intervenors will be able to recover their costs and legal fees. Central Maine Power Company, Proposed Increase in Rates, No. 82-266, slip op. at 208-213 (Me. P.U.C. December 15, 1983). The Commission intends to apply this test to this proceeding. Since there are fewer than four weeks remaining before the hearings in this docket, the rule on filing times will be slightly modified. The information required by this test must be filed with the Commission by no later than January 4, 1984.

Dated at Augusta, Maine this 23rd day of December, 1983.

BY ORDER OF THE COMMISSION

Charles G. Roundy
Secretary

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 83-179

January 6, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY
Re: Consideration of Local Measured Service on Alternative Exchange Service Options

PROCEDURAL ORDER ON INTERVENOR FUNDING COMMENTS

Any party wishing to comment on the requests for intervenor funding submitted in this case may do so in writing by no later than Monday, January 16, 1984.

Dated at Augusta, Maine, this 6th day of January, 1984.

BY ORDER OF THE HEARING EXAMINER

Nancy Brockway

Nancy Brockway

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 83-213

January 6, 1984

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY
Re: Proposed Increase in Rates

PROCEDURAL ORDER ON
INTERVENOR FUNDING
COMMENTS

Any party wishing to comment on the requests for intervenor funding submitted in this case may do so in writing by no later than Monday, January 16, 1984.

Dated at Augusta, Maine, this 6th day of January, 1984.

BY ORDER OF THE HEARING EXAMINER

Nancy Brockway

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket Nos. 83-179
and 83-213

January 27, 1984

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY
Re: Consideration of Local Measured Service and Alternative Exchange Service Options, and
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY
Re: Proposed Increase in Rates

ORDER ON INTERVENOR FUNDING

BRADFORD, Chairman; GELDER and HARRINGTON, Commissioners

We have motions before us for funding of a variety of witnesses and presentations by intervenors in these two dockets. With one exception, the presentation of the testimony of Dr. William Melody, the motions for funding do not meet the test we set out in in our order in Re: Central Maine Power Company, No. 82-266, slip op. at 208-213 (Me. P.U.C. December 15, 1983).

In some cases the issues proposed for funding are not significant or unique, and in other cases they will be raised by the Staff or the Public Advocate. It is not the function of intervenor funding to support narrow sectarian positions, but rather to insure that the record is complete on issues of importance to ratepayers in general. Nor can we award intervenor funding to finance public education, as meritorious as that goal may be. We therefore deny all motions for intervenor funding in these two dockets with the exception of funding necessary to give the Commission the benefit of testimony by Dr. Melody. We approve the motions of the Consumer Intervenor Coalition in these dockets for the funding of Dr. Melody's participation, subject to the conditions set forth in this Order.

Dr. Melody's testimony bears on an issue which is extremely important in this case, the proper allocation of revenue requirements among the various types of service. In particular, Dr. Melody's approach contradicts the broad consensus that toll service has historically subsidized basic exchange service. There is general agreement among the parties to this case that new technology and the divestiture of AT&T bring new pressures to bear on basic exchange service. Since we have generally held that rates for services should reflect costs, the question of how costs should be allocated between basic exchange and other services is very important. Dr. Melody also presents a view on local measured service that contrasts with the widely held opinion that LMS improves the relationship between use and cost.

Both the Public Advocate and the Staff have certified that they cannot effectively sponsor Dr. Melody's testimony. The experts of the other parties will not provide the Commission

with the "stand-alone" cost-allocation view Dr. Melody proposes. Indeed, their positions are inconsistent with that view. We do expect to hear expert testimony challenging the LMS proposal of the Company, but the comments of the parties show that Dr. Melody's views on LMS and cost-allocation will not come before us without funding for Dr. Melody's presentation. Ordering the Staff to present Dr. Melody would burden its presentation of its own conflicting expert, and likely result in a less than optimal presentation of either view. Bringing Dr. Melody on as a bench witness would leave him without support by counsel on the stand, and require the Commission to forego the development of his view through his consultation with a party cross-examining other experts and briefing the "stand-alone" position.

Because the effective presentation of such an expert is key, the request for funding of counsel goes hand in hand with the funding of Dr. Melody's testimony. The out-of-pocket costs reasonably associated with the preparation and presentation of this testimony are also a necessary expense of effective presentation. No party has disputed the claims of the National Consumer Law Center and Pine Tree Legal Assistance that their loss of basic funding in the last three years effectively prevents them from hiring Dr. Melody, assigning counsel to present his testimony and paying the associated out of pocket costs of that presentation. (A further opportunity will be provided to object specifically to the finding of financial hardship on the part of the Consumer Intervenor Coalition.)

The Commission in ordering this funding does not endorse Dr. Melody's position. There may be sound reasons to reject Dr. Melody's cost allocation approach, or that of any other witness. However, the ratesetting process can only be improved by having this unique approach laid out by a responsible expert for examination and consideration side by side with the other allocation methods. We find that Dr. Melody's testimony and consultation with counsel for the Consumer Intervenor Coalition is likely to "make a significant and unique contribution to the setting of just and reasonable rates and [this] contribution is unlikely to take place without such support." Re: Central Maine Power Company, No. 82-266, slip op. at 210 (Me. P.U.C. December 15, 1984) 82-266).

Accordingly,

IT IS ORDERED that

1. If the presentation of Dr. Melody's testimony is accomplished as set forth in the motions for intervenor funding, we will order N.E.T. to pay the reasonable costs of that presentation, upon submission to and approval by the Commission of an itemized account. Any

party may object to payment if they can prove that the actual presentation was made irresponsibly or in bad faith.

2. Any party wishing to rebut the claim of hardship on the part of the Consumer Intervenor Coalition must so indicate no later than February 16, 1984.

Dated at Augusta, Maine, this 27th day of January, 1984.

BY ORDER OF THE COMMISSION

Charles G. Roundy,
Secretary

Commissioners Voting For:
(x) Peter Bradford, Chairman
(x) Ralph Gelder, Commissioner
(x) Cheryl Harrington, Commissioner