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JAMES E. TIERNEY
ATTORNEY GENERAL

86-5

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

February 5, 1986

Honorable Harry L. Vose
House Chairman, Joint Standing
Committee on Utilities
Maine Legislature
State House Station #2
Augusta, Maine 04333

Dear Representative Vose:

You have asked whether Legislative Document No. 1957, "AN ACT Concerning Local Telephone Service Rate Structure," would, if enacted, constitute a "competing measure" within the meaning of Article IV, Part 3, Section 18 of the Maine Constitution, to an initiated bill, Legislative Document No. 1831, "AN ACT to Prohibit Mandatory Local Measured Service and to Preserve Affordable Traditional Flat Rate Local Telephone Service at as Low a Cost as Possible," which has recently been presented to the Second Regular Session of the 112th Maine Legislature. Copies of both bills are attached. If L.D. 1957 is a "competing measure," and if the Legislature fails to enact the L.D. 1831, both are required by the Constitution to be submitted together to the voters at a referendum. However, for the reasons which follow, it is the Opinion of this Department that L.D. 1957 and L.D. 1831 are not "competing measures."

The Maine Supreme Judicial Court has described a "competing measure," within the meaning of the constitutional provision, as one "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. . . " Farris ex rel. Dorsky v. Goss, 143 Me. 227, 232 (1948). It is true that at least one Justice of the Supreme Judicial Court in a subsequent case indicated that if the legislative action in question simply addresses the same subject matter as the initiated bill, the two may be competing in the constitutional sense, even if

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they are not inconsistent. McGaffrey v. Gartley, 377 A.2d 1367, 1372-74 (Me. 1977) (Wernick, J., concurring). This Department, however, has for some time been of the view that the clear language of Article IV, Part 3, Section 18 of the Maine Constitution precludes this construction and requires that the legislative action must be inconsistent in order to be "competing" with the initiated bill. Op.Me.Att'y Gen. 84-19 at 3-5, a copy of which is attached.

The question, therefore, is whether there is anything in L.D. 1957 which is inconsistent with the provisions of the initiated bill. Both bills propose to enact a new section (35 M.R.S.A. § 80) into the Maine code. The initiated measure contains three subsections. The first subsection provides simply that "Mandatory local measured telephone service is prohibited in the State." L.D. 1957, in its proposed second subsection, authorizes the Public Utilities Commission to "approve an optional measured local service rate." (emphasis added.) Thus, L.D. 1957 does not allow the Commission to require measured service. It merely authorizes the Commission to establish it on an optional basis. The two bills, consequently, are not inconsistent in this respect.

The second proposed subsection of the initiated bill provides that the "Public Utilities Commission shall establish [flat] rates for telephone companies . . . at as low a cost as possible . . . " In subsection 3 of its proposed statute, L.D. 1957 requires that wherever the Commission authorizes optional local measured service, the rate structure in that area shall also include "a flat-rate option . . . to be available for residential and business customers." Thus, since a flat rate must be available to any customers for whom optional measured service is authorized by the Commission, L.D. 1957 is not inconsistent with the second subsection of the initiated bill.

It might be argued, however, that even though the Commission, pursuant to subsection 3 of L.D. 1957, preserves a flat rate in any area where it authorizes optional local measured service, it might establish such a rate at a level which is not "at as low a cost as possible," thus violating proposed subsection 2 of the initiated bill. This argument would not result in a finding of inconsistency between the two pieces of proposed legislation, since there is nothing in L.D. 1957 which prohibits the Commission from establishing the flat rate alternative at "as low a cost as possible." The initiated bill seeks to effect this mandate by providing, in its proposed subsection 3, that wherever the Commission authorizes optional local measured service, it shall be presumed that the flat rate alternative in that area is not "at as low a cost as possible" if the rate structure results in fewer than three-quarters of

the residential customers in the area in question selecting the flat rate. The bill further provides that this presumption may be overcome if the Commission finds, by clear and convincing evidence, that no reasonable alternative rate may be established which will raise the percentage of residential customers using the flat rate above 75 percent.

There is nothing in L.D. 1957 which is inconsistent with this provision. As indicated above, that bill requires only that a flat rate option be provided to all customers where optional local measured service is available, but says nothing about the level at which the flat rate option should be set. Thus, if both measures were law, the Commission would exercise the authorization granted to it by L.D. 1957 in accordance with the provisions of the L.D. 1831 and will not be placed in the position of having to satisfy inconsistent requirements.

It is therefore apparent that if the Legislature were to enact L.D. 1957 and the electorate were to approve the initiated bill by referendum, the two measures could operate together, without violence to either. That being the case, they cannot be considered "competing" for purposes of Article IV, Part 3, Section 18 of the Maine Constitution. Indeed, since they are not competing, the Legislature may wish to avoid the conducting a referendum on the initiated measure by enacting it itself, as of course it is constitutionally permitted to do.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec
cc: Sen. John E. Baldacci
Senate Chairman, Joint Standing
Committee on Utilities

Rep. Polly Reeves
Speaker John L. Martin
Rep. Jean T. Dellert
Rep. Charlene B. Rydell
Co-Sponsors, Legislative Document No. 1831

JAMES E. TIERNEY
ATTORNEY GENERAL

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

May 1, 1984

The Honorable Polly Reeves
Maine House of Representatives
State House
Augusta, Maine 04333

Dear Representative Reeves:

By letter of April 2, 1984, you have requested the Opinion of this Department concerning the effect of certain legislation to be proposed by citizen initiative upon the power of the Legislature to address the same subject matter by legislation between the time the initiative legislation is proposed and the time it is submitted to the voters. The proposed initiated legislation, a draft of which is attached to your inquiry, would make subject to popular referendum any recommendation to the Legislature (1) of the Board of Environmental Protection, made pursuant to 38 M.R.S.A. § 1478, that a low-level radioactive waste disposal or storage facility be constructed in Maine, and (2) of the Governor, made pursuant to 38 M.R.S.A. § 1474, that the State enter into any compact or agreement with any other state or the federal government concerning the

disposal or storage of low-level radioactive waste.[1/]

Your inquiry assumes the presentation of suitable petitions to initiate such legislation under the Maine Constitution, Article IV, Part 3, Section 18 to the First Regular Session of the 112th Legislature, and voter approval of the initiated legislation at the general election to be held in November, 1985.

On the basis of these assumed facts, you inquire more specifically (1) whether the presentation to the 112th Legislature of an initiative requiring voter approval of low-level radioactive waste decisions would prevent that Legislature from approving either the establishment of a disposal facility in Maine, or entry into an interstate agreement on the subject, until after the voters have voted upon the initiated legislation; and (2) whether subsequent voter approval of the initiated legislation would apply to any such action of the Legislature taken during the First Regular Session of the 112th Legislature.

For the reasons which follow, it is the Opinion of this Department that the pendency of the initiated legislation would not prevent the First Regular Session of the 112th Legislature from approving a waste disposal facility in Maine, or approving an interstate agreement on the subject. With regard to your second question, the Department is able to conclude only that retrospective application of the initiated legislation could be unconstitutional if vested rights had arisen subsequent to the effective date of the action of the 112th Legislature but prior to the approval of the initiated legislation by the voters. Whether such rights will arise, however, is impossible to determine in advance.

[1/] The proposed initiated legislation expressly provides that these issues be presented to the voters at the next statewide election after a facility or compact is recommended. Although unspecified, it appears that the intention is to require voter approval in addition to legislative approval, and independent thereof, since no amendment is made to the statutes requiring legislative approval. If so, the proposal might be clarified, particularly to address the situation where the recommendation is rejected when first put to a vote, either by the people or in the Legislature.

I. Effect of Pending Initiated Legislation.

The presentation of petitions under Art. IV, pt. 3, § 18 of the Maine Constitution is merely an alternative means to initiate legislation. "The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors. . . . If the measure initiated is enacted by the Legislature without change, it shall not go to a referendum vote. . . . " Me. Const. art. IV, pt. 3, § 18. The only effect of presentation of an initiative on the power of the Legislature to legislate is that legislation qualifying as an "amended form, [or] substitute" for the initiated legislation must be submitted to the voters together with the initiated legislation as a "competing measure," and cannot become law except by approval of the voters. Id.; Farris ex rel. Dorsky v. Goss, 143 Me. 227, 60 A.2d 908 (1948).[2/]

Thus, the more germane inquiry with respect to your first question is whether any action of the First Regular Session of the 112th Legislature, approving the establishment within the State of a low-level radioactive waste disposal or storage facility or approving an interstate compact, would constitute a "competing measure" to the initiated legislation, and thus not take effect unless approved by the voters.

In Farris, the Maine Supreme Judicial Court declared that, to determine whether a legislative action is a "competing measure" under the constitutional provision, the Court will not consider "how the Legislature may have regarded it . . . [but] only what it is in fact." The Court went on to describe a "competing measure" as 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. . . ." Farris, supra, at 232.

Applying this inconsistency test, it cannot be said that the initiated legislation attached to your inquiry would be inconsistent with a legislative enactment approving either a particular waste disposal or storage facility or a particular interstate compact dealing with that subject. There is no

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[2/] It should be noted that legislation qualifying as emergency legislation under Me. Const. art. IV, pt. 3, § 16 cannot constitute a "competing measure," by virtue of the provisions of that section and Section 17. McCaffrey v. Gartley, 377 A.2d 1367 (Me. 1977).

necessary conflict between legislative approval of a given waste facility or interstate compact and a subsequent amendment to the procedures by which further facilities or compacts are to be approved. The first action deals with a specific proposal, while the latter addresses generally the procedure for considering future proposals without regard to the merits or wisdom of any given facility or compact. Since there is no incompatibility between the two, the Legislature's approval of a particular facility or compact would not be a "competing measure" to the initiated legislation.

In reaching this conclusion, this Department was aware that the language in the Farris opinion quoted above to describe the test for a "competing measure" suggests the possibility that a legislative action that was not inconsistent with initiated legislation could still be considered a "competing measure." Such a construction was also considered possible by at least one Justice of the Law Court in a later case,[1/] who suggested that "it . . . appears manifest that the 'amended form, substitute or recommendation . . .' mandate of [Art. IV, Pt. 3] Section 18 . . . functions to save the electors effort and expense. It creates a shortcut device which avoids the need that the electors take the additional step of invoking the [Art. IV, Pt. 3, § 17] referendum to subject to the vote of the electors an enactment of the Legislature affecting the subject-matter of an initiated bill. The 'amended form, substitute or recommendation . . .' mandate incorporates directly into the initiative an equivalent of the [§ 17 "people's veto"] referendum, thereby achieving the same ultimate options for the electors as would result, if with greater effort and expense, the electors were to supplement the [§ 18] initiative with a resort to the [§ 17] referendum." 377 A.2d 1373-4 (emphasis added).

If this construction were adopted, the facts hypothesized in your inquiry might offer an example of a legislative measure which, while not inconsistent with the proposed initiative, might nonetheless be considered "competing." If, during the First Regular Session of the 112th Legislature, the Legislature receives a recommendation of the Board of Environmental Protection under 38 M.R.S.A. § 1478 or of the Governor under § 1474, and approves a bill accepting that recommendation, that action of the Legislature would normally become effective 90 days after the Legislature's adjournment. Me. Const. art. IV, pt. 3, § 16. Thus, the very actions sought to be made subject to voter approval through the initiated measure would become

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[1/] Justice Wernick, concurring in McCaffrey v. Gartley, 377 A.2d 1367, 1372 (Me. 1977).

legally effective prior to consideration by the voters of the initiated legislation. Such actions, while not strictly inconsistent with the initiated legislation as indicated above, clearly would deal with the same subject matter and therefore might be deemed to be "competing."

This Department concludes, however, that the clear language of Section 18 precludes the possible construction of the Constitution suggested by the Farris opinion and Justice Wernick. A requirement that legislative action must be inconsistent with the initiated legislation in order to be a "competing measure" would seem to follow directly from the language of Section 18. That section requires that "any amended form, substitute, or recommendation of the Legislature" be presented to the voters together with the initiated measure "in such manner that the people can choose between the competing measures or reject both." The referendum ballot must thus be structured to allow the voters to approve one or the other of the competing measures, or to reject both, but not to allow approval of both measures. Legislative approval of a recommended facility or compact would not establish the situation where the voters could logically only choose either to ratify the approval or amend the approval process, or reject both. Since it would not be illogical for both a particular facility or compact and the suggested procedural change to be approved, the two questions therefore cannot be presented to the voters as "competing measures," which, in the sense contemplated by the Constitution, must clearly be alternatives to one another.

II. Effect of the Approval of the Initiated Legislation on Prior Legislative Acts.

The foregoing analysis also provides the answer to your second inquiry. Since it has been concluded that legislative approval of a compact or waste facility would not be a "competing measure" to the initiated legislation, it would therefore take legal effect if the normal ninety day waiting period[4/] were to expire prior to voter approval of legislation amending the approval process. Such a legislative act would ordinarily not be subject to the later-enacted procedural amendment, unless the initiated legislation were

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4/ By virtue of Me. Const. art. IV, pt. 3, § 16, non-emergency legislation takes effect 90 days after the adjournment of the session of the Legislature in which it was passed, unless, of course, the legislation itself provides for a later effective date.

given retrospective application. The draft legislation attached to your opinion request contains a provision clearly intended to make it apply to previously approved compacts or agreements. Proposed 35 M.R.S.A. § 3397. It contains no such provision with respect to previously approved waste storage or disposal facilities. The question thus becomes whether retrospective application of the initiated legislation to prior legislative approval of a compact or agreement would be constitutional.

Laws enacted through the initiative process are subject to the same constitutional restrictions on retrospective laws as are those adopted by the Legislature. Generally a statute may be constitutionally applied retrospectively unless its effect is to impair vested rights. Proprietors of the Kennebec Purchase v. Laboree, 2 Me. (2 Greenl.) 275, 295 (1823). The proposed initiated legislation could not constitutionally be applied to a recommendation previously approved by the Legislature if to do so would impair or divest others of rights upon which they had justifiably relied. In this case, were the Legislature to approve entry into an interstate compact or agreement, it is apparent that rights could vest in third parties upon the effective date of the legislative action and before the submission of the initiative to the voters. However, until such legislative action actually occurs it is not possible to reach any conclusion as to whether such vested rights will in fact arise. Thus, the most this Department can say now is that it is possible that the retrospective application of the initiated legislation would be unconstitutional.

Consequently, it would appear that the only certain constitutional means for the voters at large to obtain a popular referendum to approve or disapprove an action by the Legislature at the First Regular Session of the 112th Legislature approving a waste facility or entering into an interstate compact would be by the referendum procedure set forth in Article IV, Pt. 3, § 17 of the Maine Constitution.[5/] Such a "people's veto" referendum would be separate and distinct from the initiated legislation attached to your inquiry.

[5/] In approving a waste facility or interstate compact, the Legislature could, of course, make that action subject to referendum unconditionally, by so providing in the bill, Me. Const. art. IV, pt. 3, § 19, or conditionally, if the initiated legislation is approved, by delaying the effective date of their approval of the compact beyond the date of the next statewide election.

If this Office may be of further assistance, please do not hesitate to contact me.

Sincerely,

JAMES E. TIERNEY
Attorney General

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SECOND REGULAR SESSION

ONE HUNDRED AND TWELFTH LEGISLATURE

Legislative Document No. 1831

H.P. 1315 House of Representatives, January 13, 1986

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on Utilities suggested and ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative Reeves of Pittston.

Cosponsored by Speaker Martin of Eagle Lake, Representative Dellert of Gardiner and Representative Rydell of Brunswick.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SIX

AN ACT to Prohibit Mandatory Local Measured Service and to Preserve Traditional Flat-rate Telephone Service at as Low a Cost as Possible.

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

35 MRSA §74-A is enacted to read:

§74-A. Mandatory local measured telephone service prohibited

1. Mandatory measured service. Mandatory residential local measured telephone service is prohibited in the State.

2. Low-cost traditional telephone service. The Public Utilities Commission shall establish rates for telephone companies which will preserve traditional local telephone service as provided prior to January 1, 1986, as the standard service for residential customers, at as low a cost as possible.

3. Standard. In determining whether a telephone rate preserves the standard residential service at as low a cost as possible, it shall be presumed that any rate which results in less than 3/4 of the residential customers maintaining the traditional standard service in preference to measured or otherwise limited calling options is in violation of subsection 2. The commission may approve a rate structure which does not result in 3/4 of the residential customers maintaining traditional local service, only if the commission finds by clear and convincing evidence that no alternative rate structure could be implemented which will maintain 3/4 of the residential customers on traditional local service.

STATEMENT OF FACT

This bill prohibits mandatory local measured telephone service, preserves traditional local telephone service at as low a cost as possible and limits the percent of customers who will be provided optional local measurred service.

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SECOND REGULAR SESSION

ONE HUNDRED AND TWELFTH LEGISLATURE

Legislative Document No. 1957

H.P. 1388 House of Representatives, January 31, 1986

Reported by Representative Vose from the Committee on Utilities. Sent up for concurrence and ordered printed. Approved by the Legislative Council on May 22, 1985.

Reported from the Joint Standing Committee on Utilities under Joint Rule 19.

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SIX

AN ACT Concerning Local Telephone Service Rate Structure.

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

Sec. 1. 35 MRSA §80 is enacted to read:

§80. Local telephone service rates

1. Policy. It is the policy of the State that the rates for local telephone service to both business and residential customers shall be just and reasonable and take into account people's ability to pay.

2. Local optional measured service. The commission may approve an optional measured local service rate where it finds that such a rate is not inconsistent with other provisions of law, that it is fair and equitable, that it is consistent with the univer-

sal service policy of section 74 and that the net economic benefits to the telephone system will exceed the net economic cost of implementing that usage charge.

This subsection is repealed on May 1, 1988.

3. Rate structure. In any service area where local measured service is offered as an alternative to traditional flat-rate pricing, the rate structure for local telephone service shall include:

A. A fixed monthly charge, as determined by the commission, to make an appropriate contribution to the fixed costs of the telephone system. This contribution shall be set in a way that recognizes the cost savings resulting from joint use of common telecommunications facilities by local, toll and other services and that equitably shares the benefits of those cost savings among all services;

B. Except as provided in paragraphs C and D for residential and business customers, maximum monthly charges for calling to a customer's present local calling area, not to exceed 35% above the amounts the monthly charges would be if calculated on a flat-rate basis to supply the revenue requirement of the telephone company as determined by the commission;

C. For residential customers, any measured service rate structure shall include an option with no usage charge during off-peak periods as determined by the commission, when additional calls do not result in significant additional costs to the telephone system. The maximum monthly charge for this option may be $1 higher than the maximum permitted under paragraph B;

D. If ordered by the commission, the maximum monthly charge imposed by paragraph B may be exceeded for customers who use the local telephone network to complete interexchange calls, that is, calls beyond the local calling area for flat-rate customers, to provide shared tenant service or to provide coin service;

E. Except as provided in paragraph D, a flat-rate option shall continue to be available for residential and business customers; and

F. Any local measured service rate structure established in accordance with this section shall be revenue neutral when compared with the traditional flat-rate structure, as calculated by the commission.

This subsection is repealed on May 1, 1988.

4. Rate structure; local measured service prohibited. Unless authorized by statute, no utility may offer local measured service on either an optional or mandatory basis later than 90 days after adjournment of the Second Regular Session of the 113th Legislature. Unless continuation is authorized by law, any local measured service rate structure previously approved by the commission shall expire 90 days after adjournment of the Second Regular Session of the 113th Legislature and be replaced by a flat-rate structure.

Sec. 2. Effective date. The Maine Revised Statutes, Title 35, section 80, subsection 4, shall take effect on May 1, 1988.

Sec. 3. Report. The Public Utilities Commission shall report to the Legislature on July 1, 1987, on the impact of any local measured service rate structure in effect prior to that date. The report shall address the effect of local measured service on the various categories of users; residential, large and small businesses, with attention to special groups such as low-income, elderly, shut-in, deaf, speech-impaired and blind persons, as well as volunteers and volunteer organizations. The report shall address the effects of measured service on rural, suburban and urban customers, and its effects on local, county and state governmental agencies. The report shall evaluate the traffic sensitive and nontraffic sensitive costs of supplying local service. The report shall also analyze and compare the economic savings and the costs to the telephone system related to implementation of local measured service. The report shall include any other information

the commission believes will be useful in assisting the Legislature in determining whether or not to authorize continuation of local measured service.

Sec. 4. Users informal vote. Any telephone company offering local measured service as of July 1, 1987, shall poll its customers to determine whether they believe the local measured service program should continue. The poll shall be included as an insert in telephone bills issued in November 1987, in only those service areas where local measured service has been in effect at least since July 1, 1987. The form of the bill insert and the questions asked shall be approved by the Public Utilities Commission, after receiving public comment. The results of the poll shall be submitted to the Second Regular Session of the 113th Legislature and to the commission on or before January 6, 1988.

Sec. 5. Noncompeting measure. It is the intent of the Legislature that this Act not be interpreted as a competing measure, within the meaning of the Constitution of Maine, Article IV, Part Third, Section 18, with "AN ACT to Prohibit Mandatory Local Measured Service and to Preserve Affordable Traditional Flat-rate Local Telephone Service at as Low a Cost as Possible," an initiated bill which will be submitted to the voters in November, 1986. It is the further intent of the Legislature that this measure not be subject to referendum as a competing measure with that bill.

STATEMENT OF FACT

This bill is report X of the study of local telephone service conducted by the Joint Standing Committee on Utilities. The bill permits a 2-year trial of optional local measured service pricing of telephone service for business and residential customers, provided that the Public Utilities Commission finds that it is not inconsistent with other provisions of law and that it is fair and equitable and helps maintain universal service. Additional requirements for residential customers include a mandatory cap and mandatory availability of calling with no time-based usage charge during off-peak hours.

A sunset provision is included: Local measured service is prohibited 90 days after adjournment of the Second Regular Session of the 113th Legislature in 1988, unless authorized by a future legislative Act. A Public Utilities Commission study is required with a report on July 1, 1987, to assist the Legislature in making that determination.

An informal vote of telephone users will be taken in November 1987, in the areas where local measured service is available. The results of that vote will be made available by January 6, 1988, to the 113th Legislature in order to inform the members in their decision whether or not to authorize continuation of the program.

It is the intent of the Legislature that this bill not be a competing measure with the proposed referendum: "AN ACT to Prohibit Mandatory Local Measured Service and to Preserve Affordable Traditional Flat-rate Local Telephone Service at as Low a Cost as Possible."

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