

# MAINE STATE LEGISLATURE

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# TELECOMMUNICATIONS POLICY

## SUMMARY

Report of a Study by the  
JOINT STANDING COMMITTEE ON PUBLIC UTILITIES  
to the  
111th Maine Legislature  
January, 1984

Study Subcommittee:

Sen. John E. Baldacci (Chair &  
Committee Chair)ns  
Sen. Jerome A. Emerson  
Rep. Steven M. Bost  
Rep. Zachary E. Matthews  
Rep. Eugene J. Paradis

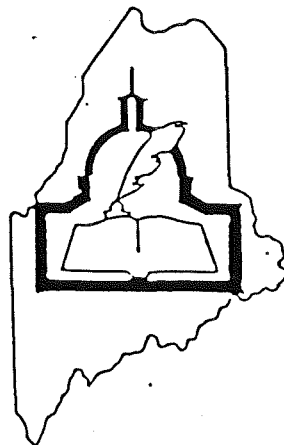
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Sen. Judy C. Kany  
Rep. Harlan Baker  
Rep. Patrick K. McGowan  
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## TELECOMMUNICATIONS POLICY STUDY

### SUMMARY

The Joint Standing Committee on Public Utilities, through a 5-member Telecommunications Subcommittee, has conducted a study to consider the possible need for a State Telecommunications Policy, and to determine whether changes are needed in the Maine Cable TV Franchising Act.

1. Cable TV. The question of introducing state regulation of Cable television had been raised by introduced bills for the previous several years. And, a 1982 U.S. Supreme Court decision (The Boulder Colorado Case) raised significant antitrust questions about municipal franchises as authorized by Maine law.

2. Telephone. The telephone industry is being restructured nationally. In 1982, the Federal Communications Commission (FCC) deregulated "Customer premises equipment". Also in 1982, after 7 years, the U.S. Department of Justice and AT&T settled an antitrust suit. The result (Judge Greene's consent decree) has split up AT&T and opened to competition all telephone functions except basic local phone service. This is expected to keep rates for long distance and for equipment down, but local rates are expected by some to double in the next 5 years. This raises the questions of universal service, and access to telephone service by persons of low-income.

3. Technological Change. New technology is available that is already beginning to revolutionize communications. This includes video display, high speed data transmission, satellites, and the marriage of computers and telephones. Some of the results are: teleconferencing, less inexpensive communications with remote areas; electronic banking; and electronic classrooms. How can Maine get the greatest benefit from these technical advances?

The study found that the State faces a real dilemma. New technology presents potentially great benefits, but at a cost. If Maine does not install new technology such as electronic switching and data-quality lines, that will produce a negative impact on certain kinds of economic growth. But, if Maine does install new technology, then who will pay? If the cost of basic service is greatly increased, some people will lose that service. But, universal service is and should continue to be a cornerstone of telecommunications policy.

Therefore, the study recommends that a State Telecommunications Policy be established, to encourage universal telephone service, to encourage installation of new technology, and to establish moderate cost basic "lifeline" telephone service, supported by appropriate tax or cost sharing mechanisms. There is also a mechanism for legislative follow-up in the future.

The study also found that Cable TV is growing and has the potential to expand in functions to far more than just an entertainment medium. On the regulatory front, some are pushing federal preemption in place of local control, and recent court cases raise the question of antitrust suits against municipalities if they award franchises without a clearly

articulated state policy.

Therefore, the study recommends a clear state policy, reaffirming the traditional preference for local control of Cable TV, with state procedural systems and franchising standards. Technical assistance would also be made available to municipalities. And, it is recommended that Cable TV policy be integrated with other aspects of telecommunications policy.

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## Introduction

The Joint Standing Committee on Public Utilities began discussing a Telecommunications study in the 110th Legislature. Many members were interested, but approval by the Legislative Council did not occur until this summer, in the 111th Legislature.

There were three things in particular that stimulated the Committee's interest:

1. Cable TV. The question of introducing state regulation of Cable television had been raised by introduced bills for the previous several years. And, a 1982 U.S. Supreme Court decision (The Boulder Colorado Case) raised significant antitrust questions about municipal franchises as authorized by Maine law.

2. Telephone. The telephone industry is being restructured nationally. In 1982, the Federal Communications Commission (FCC) deregulated "Customer premises equipment". Also in 1982, after 7 years, the U.S. Department of Justice and AT&T settled an antitrust suit. The result (Judge Greene's consent decree) has split up AT&T and opened to competition all telephone functions except basic local phone service. This is expected to keep rates for long distance and for equipment down, but local rates are expected by some to double in the next 5 years. This raises the question of universal service, and access to telephone service by persons of low-income.

3. Technological Change. New technology is available that is already beginning to revolutionize communications. This includes video display, high speed data transmission, satellites, and the marriage of computers and telephones. Some of the results are: teleconferencing, less inexpensive communications with remote areas; electronic banking; and electronic classrooms. How can Maine get the greatest benefit from these technical advances?

The purposes of the Study were:

(1) to consider the possible need for a State Telecommunications Policy to deal with issues such as cost of service, extent of service, quality of service, and technological change.

(2) to determine whether changes are needed in the Maine Cable TV Franchising Act (30 MRSA §2151(2)(H)-(J)).

The study was conducted by a 5-member subcommittee which met on three occasions in Augusta to receive testimony and prepare the findings and recommendations of this report. A list of persons testifying to the subcommittee is included as Appendix C. The full Committee on Public Utilities met once to review the report, and accepted it for transmission to and further consideration by the Legislature.

In brief, the Subcommittee recommends that:

. a State Telecommunications Policy should be established, with a

specific mechanism for legislative follow-up in the future, and that

. the Maine Cable TV Franchising Act should be modernized, preserving local franchising but adding State guidelines.

### The Telephone Industry

The telephone industry is undergoing dramatic changes which can be attributed to two forces: competition and technological change. Competition began in 1959 when the FCC for the first time allowed non-Bell equipment (a radio-telephone called the Carterfone) to be connected to the AT&T lines. More recently, MCI and GTE-Sprint have been offering competitive long distance service. And, competition has also grown in the equipment area, including both telephones and switchboards. Only local telephone service has remained a monopoly.

These changes were taken to their logical conclusion by the U.S. Supreme Court, which in 1983 let stand a settlement of a long-standing antitrust suit against AT&T. That settlement split AT&T into a national company, retaining the AT&T name, and 7 new regional companies. The new AT&T will be engaged in equipment manufacturing and research, and will be a carrier of interstate long distance and international long distance calls, while the regional companies will supply only local service and intrastate long distance service. In the more populated states, AT&T will also provide some intercity, intrastate calling. In addition, the new AT&T will be allowed to enter the computer business. The basic operating companies that exist today will be grouped as subsidiaries of the 7 regional companies. For example, New England Telephone (NET) will be part of NYNEX, which covers New York and New England.

Under the new regime, AT&T's interstate long distance business will continue to be regulated by the FCC, although its competitors' will not. All international carriers will be regulated by the FCC. The rest of AT&T's business will be deregulated. Meanwhile, intrastate phone rates will continue to be regulated by the State Public Utilities Commission, while equipment sales and rentals will be unregulated.

Appendix D is an excerpt from a report by J. M. Chaisson for the State Planning Office describing the present telephone system in Maine. Appendix E lists the companies involved in telecommunications.

Appendix F describes the effect of these changes on the individual consumer.

The restructuring of the industry is expected to have far-reaching effects on the cost of service. In the past, equipment, local calls and long distance were all sold by the same company. Over the years, new technology has brought down the cost of supplying long distance service and of terminal equipment. Although there is substantial disagreement over the extent of the subsidy, most analysts believe that some of these savings were used to keep local telephone rates down. Now, competition is forcing down the price of terminal equipment and long distance service, so heavy users of those services (typically, large businesses and institutions) will benefit by lower rates. But the price of local telephone service is likely to rise toward the full cost of supplying local service, so small users (typically

residential and small business) are likely to encounter higher rates. Meanwhile, the regulatory commission will have to weigh arguments over what that cost really is.

These anticipated rate increases lead to the concern over possible loss of universal service.

Technological change is proceeding equally fast. Satellites make possible long distance calls without expensive long lines. Electronic switching provides speed and reliability as well as new options like call forwarding and automatic redial. Digital transmission lines allow high speed data transmission sufficient for computer and video use. These fundamental changes are leading to new telecommunications applications: widespread mobile telephones, electronic funds transfer, and video teleconferencing, for example. However, the new equipment is going in first in the high volume areas of the country and the state. It may be decades before it is fully dispersed to the lower volume areas such as rural Maine.

New telecommunications technology has a significant impact on business development. Maine Information Systems provides financial computer services over the phone lines. They testified to their need for digital telephone lines to carry data economically. NET cited a Chase Econometrics study projecting that full modernization would bring 4700 new jobs to Maine by 1991, a 7% increase over the base case with no modernization. Joseph Chaisson pointed out that over 50% of U.S. employment in 1980 was in the information sector, a sector that depends on telecommunications. Rhode Island, a small state that is fortunate in being one of the first to have most of their system upgraded, is using that as a magnet to attract new businesses.

Bypass is another possible change. Only 7% of the businesses in Maine make 60% of the business toll calls. These high volume businesses are likely to consider bypass, i.e. installing a separate, private system. Nationally, many companies are already saving money using bypass and connecting to MCI, Sprint, or their own microwave trunk lines. Sprint is already available in Portland, and MCI may be coming in 1984. Intrastate competition has not yet been authorized by the PUC, but private intrastate bypass systems could be installed at any time. But Intrastate bypass could make the cost to those who remain on the system even higher, as their costs are spread among fewer users. That is one reason for keeping long distance costs on the system as competitive as possible. The implications of bypass are significant, so the situation should be watched closely.

#### The State as a User

The State is the largest user in Maine, spending \$6 million per year on telecommunications. The Bureau of Public Improvements is coordinating a 3-year study of microwave, networking, and other options to upgrade the State's communications. Like any large business, they are considering bypass too. The State House in Augusta has its own equipment, an old electromechanical switch. Plans are to install electronic switching in Augusta and Portland within the next year, for a saving of \$250,000 per year. This will also allow installation of touch tone equipment.



### Universal Service & Rates

Telephone service is nearly universal now, although Maine lags behind the rest of New England. 91% of Maine households are served, while in the rest of New England a higher percentage are served.

The present cost of service varies around the State: Through December, 1983, NET charged up to \$11.50 per month including \$10.50 for a single party line, plus \$1 rental for a rotary phone. Saco River charged \$5.50 to \$9.70 per month for a single party line, but only \$3.30 for a 4-party line. But these costs could double. For example, if NET is granted its pending rate request, in July, 1984 a single party line would cost \$22 per month, \$18.50/month plus \$1.50 phone rental plus the \$2.00 interstate access charge that the FCC has scheduled for April, 1984. CONTEL also projects a doubling of local exchange rates. The Public Advocate estimates that 15-20% of the households would have trouble paying the higher rates. The Subcommittee is concerned that the result could be loss of universal service, although the degree of that loss is not known.

Some options for continuing to provide a low cost basic service are Local Measured Service or a new mechanism of subsidization. LMS would replace unlimited "free" local calling, but its installation depends on installation of additional systems which can do the necessary accounting to measure and charge for local calls. The cost of LMS is lower for electronic switching systems, so LMS proposals have often been linked to electronic switch installation. In 1983, NET proposed that service for Portland, allowing 30 calls of 5 minutes each for \$4, but the proposal was not approved. In 1984 the concept would be the same, but it seems likely that the FCC decision must make the price higher. As for subsidy, an assessment of 75 cents on all customers would allow \$5 per month support for 15% of the customers in order to keep them on the system. California has enacted legislation (Chapter 1143, Sep. 27, 1983) which places a 4% tax on gross revenues for provision of intrastate telecommunications services, which would allow subsidization of about 12% of the households.

The Subcommittee recommends assessment of a fee on long distance calls (including bypass, if feasible) and equipment to provide the necessary support for universal service, although it is noted that the details of the fee system require further analysis. The Subcommittee further recommends that PUC specify the parameters of a basic lifeline service to be provided everywhere in the state at minimum cost.

### Installation of New Technology

In Maine, new technology has been deployed more slowly than in many other states. Only 25% of the State is served by electronic switches, compared to about 50% in the NET service area. Similarly, only 33% of the State is served by digital carrier channels, compared to 80% for the NET service area. These upgraded switches and digital channels are not necessary for "Plain Old Telephone Service", but more advanced users find them essential. The following areas have electronic switches in Maine:

NET: Augusta, Bangor, Lewiston, Portland, Presque Isle, South Berwick. Waterville is scheduled for 1984.

Independents: China, Hampden, Lincolnville, Saco River, Somerset, and Unity. CCNTEL also has several.

The Subcommittee believes that the lack of installation of electronic switches in Maine is placing the State at a competitive disadvantage and causing the loss of important social and economic benefits. Therefore, it is recommended that a target date and schedule be developed to reach the goal of full deployment of this technology to the extent necessary to provide adequate service and encourage economic development.

#### Cost of System Improvements

The cost of installing electronic switches and digital lines is substantial: many millions to upgrade just the NET system in the state, compared to \$526 million book value of the system. There is a major debate proceeding on who should pay, and how. For example,

- . NET, disappointed by the results of their last rate case, announced a deferral of \$20 million of new technology, including electronic switches for Biddeford, Kennebunkport, Rockland, S. Portland, Brunswick, Yarmouth and Freeport.

- . PUC points out that rates generally follow service, and service follows demand.

- . The Public Advocate asks whether the general body of ratepayers should pay for costly improvements they do not want.

Here, since the demand depends on economic development, and the economic development may not come without the service, a new mechanism may be necessary for financing the improvements. Some have suggested that there could be a public responsibility for developing part of the telecommunications infrastructure, similar to the public responsibility for developing airports. Others suggest that users fees (i.e., rates) should continue to do the job. This question is central to the implementation of telecommunications policy, and will require further attention.

#### Cable TV

Cable television began as a means to provide basic television service to areas which, for geographic reasons, had limited or no access to broadcast television. It has since undergone an enormous transformation, providing a wide variety of entertainment services (e.g., motion picture, music and arts channels), public service activities (government, educational and public access channels) and informational services (weather and news channels, stock reports, etc.). Offerings have multiplied from a handful of broadcast channels to dozens of various channels, some broadcast, some subscription, and some on a "pay per view" basis.

New technology in this area is also bringing in services such as two-way, interactive cable systems, home banking and retail services. The future may bring further development of the telecommunications applications of cable technology, applying already developed systems to use cable hook-ups to provide home health care services, video communication and other

complex data transmission.

At the same time that these developments in the marketing and technology of cable television have been occurring, there have been substantial legal developments. An area traditionally dominated by municipal control under their authority over public ways, cable television regulation is being increasingly preempted by other governmental entities. The Federal Communications Commission has increased its involvement, and Congress is currently considering legislation which would all but eliminate state or local regulation.

State-level activity has also increased. In part, this increased involvement, such as the centralized state regulation in states like New York and New Jersey, may be a response to industry developments. Cable television is an increasingly complex area to regulate, especially if it is an objective to assure that something near "state of the art" service is maintained for subscribers.

Antitrust considerations have also emerged. The 1982 U.S. Supreme Court case, Community Communications Co., Inc. v. City of Boulder (Colorado), is part of a wave of federal court decisions which is further threatening the traditional approach of local control. In Boulder, the Court held that, absent a "clearly articulated and affirmatively expressed" state policy on cable franchising allowing local governments to displace competition, municipalities are subject to the federal antitrust laws, and potential antitrust liability, such as treble damages. Boulder and other cases also leave open the question whether the process must be actively supervised at the state level. A legal memo on this issue is included as Appendix H.

As a result of these changes, the subcommittee was faced with 3 areas of policy concern to the State: (1) federal intrusion into areas of traditionally state and local concern, (2) coordination of telecommunications policy and (3) maintenance of local control.

#### Federal intrusion

The subcommittee agreed with policies adopted by the National Conference of State Legislatures opposing federal preemption of state and local regulation of cable television. While the FCC plays a valuable role in regulating matters such as technological standards, it was felt that most details of franchising and regulation are better left to the levels of government which are better able to assess local needs and interests.

The subcommittee incorporated this recommendation as item 8 in the proposed telecommunications policy, below.

#### Coordination of telecommunications policy

The transition of cable television from a basic entertainment resource to a possibly interactive communications system may mean that cable will become a competitor with other telecommunications providers. Even before that point is reached, the fact that cable systems use utility owned poles has implications which reach beyond the municipality.

To date, the FCC has preempted regulation of two-way cable systems.

The subcommittee recommends that the State Public Utilities Commission be given authority to assure a coordinated state approach, should that be permitted by federal law.

The FCC also currently sets rates to be charged by utilities to cable systems for the use of utility poles, but States are not preempted if they wish to be the regulator. Current Maine law is unclear as to whether the PUC could assume this task. The subcommittee recommends placing jurisdiction over pole rates clearly in the state agency concerned with regulation of utility rates and finances.

#### Maintenance of local control

Cable television systems extend over limited areas, and among different areas there may exist vastly different cable needs and interests. While one municipality may be interested in securing a wide variety of entertainment services, another might place a higher priority on low-cost basic service. Again, in terms of special new services, one area might have a greater need for jobs information on a special station, while another elects a health care service.

At the same time, on a broader policy level, there are concerns of a statewide nature. Some of these include: (1) a concern that the police power of the State, exercised by municipalities, is used properly; (2) the need to assure that cable systems are operated on a technically and financially sound basis; and (3) the necessity of providing municipalities with sufficient legal authority to avoid destructive litigation.

The bill proposed by the study reaffirms Maine's support of local control, while clearly providing the level of state guidance and support, and expressing the policies, which have been the subject of so much litigation in the federal courts. This measure provides a very permissive framework for local action, and a mechanism for avoiding unnecessary legal entanglement. check".

## Recommendations.

The Subcommittee considered the factors described above, as well as the recommendations of the National Conference of State Legislatures (see Appendix G) and recommends the following State Telecommunications Policy:

### PROPOSED TELECOMMUNICATIONS POLICY FOR MAINE

It is the policy of the State of Maine to:

1. Encourage universal telephone service throughout the State;
2. Encourage installation of modern telephone switching and transmission equipment to the full extent necessary to provide modern service and encourage economic development, with a reasonable time goal for completion of the upgrade; (consistent with demand & ability to pay)
3. Establish moderate cost lifeline telephone service to provide basic service; (See NCSL telephone policy recomm. #2)  
(MECHANISM: Tax on long-distance or some alternative.)
4. Keep the cost of telephone service as low as possible, consistent with (1), (2) and (3);
5. Continue intrastate long distance telephone rates based on statewide averages so as to ensure that all communities continue to have long distance service at the same price for calls placed at the same time of day of the same distance and duration to the extent consistent with (1), (2) and (3); (See NCSL telephone policy recommendation #1)
6. Support a national policy of moderate access charges to interstate telephone lines to the extent consistent with (1), (2) and (3);
7. Oppose federal preemption of state and local regulation of rates and franchises for cable television; (See NCSL cable TV policies #1 and #2)
8. Encourage coordinated development of the State's telecommunications network by placing jurisdiction in the PUC over (a) two-way cable television to the extent permitted by federal law and (b) ratemaking for utility pole attachments;
9. Support a continued state policy of local franchising of one-way cable television service, subject to State guidelines, with appellate jurisdiction in the PUC;
10. Support the continuation of state regulatory authority over the provision and quality of local telephone service; (See NCSL telephone policy #4)
11. Continuously monitor and evaluate developments in the telecommunications field in order to continuously develop and refine the state telecommunications policy so that it will best serve the social and economic needs of the people of Maine.

In addition, the Subcommittee recommends the following proposals for Cable TV regulation:

#### PROPOSALS FOR CABLE TELEVISION REGULATION

1. Restatement in statute of current policy of local control.
2. Minimum system standards for cable systems (currently, require compliance with FCC regulations only).
3. Procedural standards for municipal officer conduct in granting franchises (e.g., requirement of local needs analysis before issuance of an RFP; degree of exclusivity of franchises; etc.).
4. Refranchising procedures. (NOTE: A major issue in areas which have had cable for some time. To what extent does the initial holder of a franchise have an entitlement to renewal? On the other hand, to what extent does a municipality have the right to reopen bidding for the franchise in an attempt to secure "state of the art" service? There are significant ramifications in terms of litigation, incentives/disincentives to upgrade, and competition for franchises.)
5. Technical assistance to municipalities in the franchising or refranchising processes.
6. Administrative appeal to state agency of franchising and regulatory decisions of municipalities.
7. PUC authority over two-way cable TV operations.
8. Enactment of privacy standards for 2-way communications over public access channels (See NCSL Cable TV recommendation #3).
9. Clarification of PUC authority over rates charged for access to utility poles.

#### ADDITIONAL VIEWS OF SENATOR EMERSON

I agree with the recommendations of the Proposed Telecommunications Policy for Maine with the exception of #3. While I do support the need to provide moderate cost lifeline telephone service to provide basic service, I believe this is a social program which should be funded from the General Fund.

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## APPENDIX A

### Telecommunications Study, Public Utilities Committee, Study Bill

AN ACT to Establish a Telecommunications Policy for the State of Maine

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

35 MRSA Part 9 is enacted as follows:

#### PART 9 TELECOMMUNICATIONS

##### CHAPTER 351 TELECOMMUNICATIONS POLICY

#### §5001. Findings

It is found that:

1. Essential to people Telecommunications is essential to the social welfare and quality of life of the people of the State of Maine;
2. Essential to Economic Development. Adequate telecommunications is essential to the economic development of the state, and an essential tool of business and commerce;
3. Universal service. The existing telecommunications system evolved on the basis that all individuals should have access to telephone service at a reasonable price and that principle should be maintained;
4. Changes in the Industry. Introduction of competition and development of new technology are causing a major restructuring of the telephone system;
5. New Communication Modes. New telecommunication modes including data transmission, video transmission, electronic funds transfer and cable television (both 1-way and 2-way) are being rapidly developed and are becoming increasingly important;
6. State Telecommunications Policy. A coordinated, integrated overall State Telecommunications Policy is an appropriate vehicle to provide guidance and integration to the efforts of State and municipal agencies, both regulatory and otherwise, as well as to the private sector in the area of telecommunications.

#### §5003. Definitions

As used in this Part, unless the context indicates otherwise, the following terms have the following meanings:

1. Electronic switching system. "Electronic switching system" means a telephone switching system primarily dependent upon solid-state electronic components rather than electromechanical switches.



2. Lifeline telephone service. "Lifeline telephone service" means a basic minimum telephone service sufficient to satisfy the essential needs of a household, including incoming calls, a reasonable number of local outgoing calls, and access to long-distance lines, at any time of day.

3. Target date. "Target date" means a date established by the Commission when, except in areas specifically exempted by the Commission, all network access lines in the State are to be served by electronic switching systems.

4. Telecommunications. "Telecommunications" means any transmission, emission or reception of signals, images, sounds, data, or intelligence of any nature by wire, radio, or other electromagnetic systems, including any intervening processing and storage.

5. Telecommunications services. "Telecommunications services" means the end services provided by telecommunications, such as telephone, other voice communication, data transmission, teletext, video transmission, and telegraph.

#### §5005. State Telecommunication Policy

It is the policy of the State of Maine to:

1. Encourage universal telephone service throughout the State;
2. Encourage installation of modern telephone switching and transmission equipment by the target date to the full extent necessary to provide adequate service and encourage economic development;
3. Establish moderate cost lifeline telephone service to provide basic service and to subsidize that service as needed by a fee assessed against long distance services and equipment;
4. Keep the cost of telephone service as low as possible, consistent with the previous goals;
5. Continue intrastate long distance telephone rates based on statewide averages so as to ensure that all communities continue to have long distance service at the same price for calls placed at the same time of day, of the same distance and duration;
6. Support a national policy of moderate access charges to interstate telephone lines;
7. Support the continuation of state regulatory authority over the provision and quality of local telephone service;
8. Oppose federal preemption of state and local regulation of rates and franchises for cable television;
9. Support a continued state policy of local franchising of one-way cable television service, subject to State guidelines, with appellate jurisdiction in the Commission;

10. Encourage coordinated development of the State's telecommunications network by placing or clarifying jurisdiction in the Public Utilities Commission over

A. two-way cable television, to the extent permitted by federal law, and

B. ratemaking for utility pole attachments;

11. Continuously monitor and evaluate developments in the telecommunications field in order to continuously develop and refine the state telecommunications policy so that it will best serve the social and economic needs of the people of Maine.

#### §5007. Review and Update of the Policy

1. The committee of the Legislature with jurisdiction over public utilities through a Telecommunications subcommittee shall review the State Telecommunications Policy and report to the Legislature its findings and recommendations by January 1, 1985 and biennially thereafter until 1989.

2. The Commission, the Public Advocate, the Bureau of Public Improvements and the State Planning Office and the Office of Legislative Assistants shall provide assistance to the Subcommittee in preparation of the report specified in subsection 1.

§5009. Implementation. All decisions of the Commission affecting telecommunications shall be based upon reasonable consideration of an application of the State Telecommunications Policy.

#### STATEMENT OF FACT

Because telecommunications is essential to the social and economic welfare of the State, and because of the rapid technical and regulatory changes in the industry, a State Telecommunications Policy is needed. That policy will serve as guidance for state agencies, including regulatory agencies, as well as for the private sector.

Under the bill, it is the policy of the State of Maine to:

- encourage universal telephone service;
- encourage installation of electronic switching equipment by a target date;
- establish moderate cost lifeline telephone service;
- minimize the cost of telephone service, consistent with other goals;
- base intrastate long distance rates on statewide averages;
- support moderate access charges to interstate lines;
- support continued state regulation over local telephone service;

- oppose federal preemption of state and local regulation of Cable TV;
- support local franchising of Cable TV, with guidelines by and appeal to the State;
- authorize the PUC to regulate 2-way Cable TV, and pole attachments.

The policy is to be reviewed biennially by a Telecommunications Subcommittee of the Joint Standing Committee with jurisdiction over public utilities, with a biennial report to the Legislature.

The bill also modifies the statute on Cable TV regulation containing local franchising, but adding State technical and procedural standards, including procedural standards and adding an opportunity for appeal to the Commission of municipal franchising and regulatory decisions.

Finally, the bill provides for privacy standards for 2-way communications over public access channels.

telecom

PUB. UTIL. COMMITTEE  
TELECOMMUNICATIONS STUDY  
STUDY BILL

AN ACT Regarding Franchising and Regulation  
of Cable Television Systems

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

Sec. 1. 30 MRSA §2151, sub-§2, paragraphs H, I and J, as amended by PL 1981, c. 308, are repealed.

Sec. 2. 30 MRSA §2151, sub-§2, paragraph K is enacted to read:

K. Governing cable television, as provided in section 2158.

Sec. 3. 30 MRSA §2158 is enacted to read:

§2158. Cable television

1. State policy. It is the policy of this State, with respect to cable television:

A. To affirm the importance of municipal control of franchising and regulation, in order to assure that the needs and interests of local citizens are adequately met;

B. To provide minimum state guidelines and supervision to guard against arbitrary or unsound decisions by municipalities while seeking to avoid time-consuming and expensive litigation;

C. To encourage widespread development of cable television systems which are technically and financially sound, and which address local needs and interests; and

D. To provide adequate statutory authority to municipalities to make franchising and regulatory decisions to implement this policy, and to avoid the costs and uncertainty of lawsuits challenging that authority.

2. Ordinances. A municipality may enact any ordinances not contrary to the provisions of this chapter, governing franchising and regulation of cable television systems using public ways. Systems located in accordance

with those ordinances, franchises and regulation are not defects in public ways.

The municipal officers of towns shall have exclusive power to enact all ordinances authorized by this section. Seven days' notice of the meeting at which those ordinances are to be proposed shall be given in the manner provided for town meetings, and those ordinances shall be effective immediately.

3. General requirements. The following requirements apply generally to cable television systems governed by this section.

A. Any cable television system shall be constructed and operated in accordance with Federal Communications Commission regulations.

B. No cable television company, notwithstanding any provision in a franchise, may abandon service or portion thereof without having given 6 months' prior written notice to the franchising municipality, if any, and to the municipalities affected by such abandonment. When abandonment of any service is prohibited by a municipal franchise, no cable television company may abandon that service without written consent of the municipal officers. Any cable television company which violates this paragraph shall be subject to a fine of \$50 a day for each day that the violation continues.

C. Neither the cable television company whose facilities are used to transmit a program produced by a person other than the cable television company pursuant to Federal Communications Commission regulations or municipal ordinance, nor the officers, directors or employees of any such cable television company, shall be liable for damages arising from any obscene or defamatory statements or actions or invasion of privacy occurring during any program when that company

does not originate or produce the program.

D. Notwithstanding any other provisions of this chapter, any permit to provide a cable television system issued prior to July 1, 1965 without a fixed termination date shall be deemed to expire on September 18, 1996, unless an earlier expiration date is mutually agreed upon by the municipality and the permit holder. These cable television systems, as a condition of franchise, shall be operated in such a manner as to provide a safe, adequate and reliable service to subscribers.

E. A party aggrieved by a decision of a municipality to enact an ordinance or grant a franchise under this section may, within 20 days of the effective date of the decision, request review of the decision by the Public Utilities Commission as provided in Title 35, section 5051. In the absence of such a request or if the review results in a finding in favor of the municipal decision, the action of the municipality shall be deemed to be pursuant to and in implementation of the state policy expressed in subsection 1.

F. A municipality shall be entitled to injunctive relief in addition to any other remedies available by law to protect any rights conferred upon the municipality by this section or any ordinances enacted under the authority of this section.

4. Franchise procedures. Pursuant to subsection 2, a municipality may enact ordinances governing the procedures for granting cable television franchises. These ordinances must be enacted prior to granting any such franchise or franchises, and shall be reasonably designed to assure that the terms and conditions of a franchise will adequately protect the needs and interests of the municipality. The ordinances shall include, but are not limited to, provisions for the following:

A. A mechanism for determining special local needs or interests before issuance of a request for proposals, whether by actively seeking to determine those needs or interests or by allowing a period for public comment on a proposed request for proposals;

B. The filing of franchise applications and related documents as public records, with reasonable notice to the public that the records are open to inspection during reasonable hours;

C. A reasonable opportunity for public input prior to granting franchises; and

D. The assessment of reasonable fees, not to exceed \$25 per applicant, to defray the costs of public notice, advertising and other expenses incurred by the municipality in acting upon applications.

5. Information from applicants. The municipal officers may require from applicants any information they consider necessary or helpful to making a franchising decision, and shall allow a reasonable period of time for an applicant to provide that information.

6. Franchise agreements or contracts. Pursuant to ordinances, the municipal officers may contract on such terms and conditions and impose such fees, as are in the best interests of the municipality, including the grant of an exclusive franchise for a period not to exceed 15 years, for the placing and maintenance of cable television systems and appurtenances or parts thereof, along public ways and including contracts with cable television companies which receive the services of television signal transmission offered by any public utilities using public ways for such transmission.

In addition to other terms and conditions determined by the municipal officers to be in the best interest of the municipality, the agreement or

contract may include, in the discretion of the municipal officers, provisions for the following:

A. Review of franchisee performance during the term of the franchise, with the possibility of extension of the term, not to exceed 15 years from the time of the review, in return for upgrades in service or area of coverage;

B. Rights of the municipality and franchisee at expiration or termination, including standards for municipal buy-outs or procedures for refranchising and for cancellation or non-renewal of franchise; or

C. Distribution of locking program control devices enabling subscribers to limit the reception in the subscriber's residence of any channel which displays public access programs or for which a specific, optional premium charge is imposed.

7. Interlocal agreements. Pursuant to chapter 203, municipalities may enter into cooperative arrangements with other public agencies to implement the policy of this section.

8. Local authority; construction. In view of the policies enumerated in subsection 1, this section shall not be construed to authorize municipalities to make franchising or regulatory decisions not specifically enumerated in this section, unless those decisions are prohibited, or they are manifestly contradictory to these policies.

9. Current ordinances and agreements. This section shall not be construed to invalidate any ordinance, franchise or agreement in effect on the effective date of this section.



Sec. 4. 35 MRS chapter 351 is enacted to read:

PART 9

TELECOMMUNICATIONS

CHAPTER 351

CABLE TELEVISION

§5051. Review of municipal decisions

1. Jurisdiction. The commission shall review municipal decisions to enact ordinances or grant franchises for cable television systems upon request of an aggrieved party as provided in Title 30, section 2158, subsection 3, paragraph E.

2. Scope of review. The review of the municipal decision shall be limited to alleged violations of the requirements of Title 30, section 2158.

3. Disposition. If the commission finds in favor of the municipality, it shall issue a decision stating that. If the commission finds that the alleged violation did occur, it may order the modification or revocation of any agreement, or invalidate any ordinance, only to the extent the commission deems it necessary and appropriate to bring the municipal decision into accordance with the state policies expressed in Title 30, section 2158.

4. Rulemaking. The commission is authorized to adopt rules to effectuate the purposes of this section.

§5053. Regulation

1. Two-way cable television. In order to assure coordinated state policy in telecommunications, the commission is authorized, to the full extent permitted under federal law, to adopt rules concerning the construction, maintenance and operation of two-way cable television services in this State, including standards to protect personal privacy.

The authority granted by this subsection is in addition to the authority granted to municipalities to generally regulate cable television systems.

2. Pole attachments. The commission may regulate the rates charged to cable television systems for access to poles owned by utilities whose rates are subject to approval by the commission.

§5055. Technical Assistance. The Commission shall establish a program of technical assistance on cable tv and make it available to any municipality upon request.

§5057. Technical system standards. The Commission shall review the need for State technical system standards and report their recommendations to the 2nd Regular Session of the 112th Legislature. Such standards may address services offered, area covered, quality of service and related matters, but shall not address entertainment program content.

#### STATEMENT OF FACT

This legislation is a product of the telecommunications study conducted by a subcommittee of the Joint Standing Committee on Public Utilities.

The subcommittee found that recent litigation in the federal courts, including the 1982 U.S. Supreme Court case of Community Communications Company, Inc. v. City of Boulder, has brought into question the validity of Maine's cable television franchising process. One disturbing aspect of these cases is that, unless a municipality can demonstrate that its cable television regulation is in furtherance of a "clearly articulated and affirmatively expressed state policy: municipalities may be subject to enormous civil penalties to aggrieved parties. Even an eventually successful municipality may suffer under the weight of time-consuming, costly litigation through the federal court system, meanwhile precluding

development of the cable television system in the community.

The approach taken by this legislation is to provide a clear state policy and carefully limited state involvement to avoid the threat of such vexations litigation, while reaffirming the traditional preference for local control.

(cabletv)

TELECOMMUNICATIONS STUDY

PERSONS TESTIFYING

Joseph M. Chaisson, Consultant to State Planning Office

Joseph G. Donahue, Chief Counsel, Public Utilities Commission

Charles F. Dingman, Attorney Examiner, PUC

Richard A. Jalkut, VP/Maine, New England Telephone Co.

Huc Hauser, Sales & Marketing Mgr., Summit Communication

Robert Carroll, General Mgr., Saco River Telephone Co.

Dale Higgins, State Mgr., Continental Telephone Co.

David Brenerman, Member, Maine Committee on Aging

Paul Fritzsche, Public Advocate

Kay Rand, Dir., State & Federal Relations, Maine Municipal Assn.

Paul Cianelli, Executive Director, New England Cable TV Assn.

Leighton Cooney, Director, Bureau of Public Improvements

Excerpts from: Business Activity and Telecommunications Services in Maine: Public Policy Considerations  
A Discussion Paper for the Maine State Planning Office by Joseph M. Chaisson, August, 1983.

#### IV. TELECOMMUNICATIONS IN MAINE

Maine's existing telecommunications system (not including broadcasting services) consists of the following:

1. The telephone system and other services/facilities that can be accessed through it;
2. Cable TV systems; and
3. Such other miscellaneous services as: mobile telephone service, paging systems, marine satellite service and internal business systems operated outside of the common telephone system.

##### A. Maine's Telephone System

Basic telephone service in Maine is provided by New England Telephone Co. (a Bell operating company) and 17 independent companies. NET serves about 85% of all Maine customers, but has a geographic service area about equal to that of the independents. About 91.1% of Maine households have telephone service, up slightly from 88.5% five years ago. NET's capital investment in both interstate and intrastate facilities within Maine is about \$735 million, and its annual capital facility construction budget is about \$100 million. As part of the pending breakup of the Bell system, NET will be merged with another Bell operating company, New York Telephone to form NYNEX as of January 1, 1984.

Table 3 shows the distribution of NET's current capital investments in Maine.

Table 3

Capital Investment Distribution  
New England Telephone Company  
Facilities in Maine (1983)

Land and buildings	\$40.5 million
Central office equipment (switching and some radio trunk equipment)	264.0 million
Station equipment (subscriber telephones & terminals)	130.0 million
Outside plant (subscriber loops, trunk lines)	280.0 million
General equipment (vehicles, office equipment, etc.)	20.0 million
Total	<hr/> \$734.5 million

1. Switching

Switching within the Maine NET system is about 25% electronic, while it is 47% electronic in the other portions of NET's service area. Independent telephone companies in Maine have transitioned about 50% to electronic switching. They have progressed faster than NET in part due to their access in some cases to low-interest federal financing (Rural Electrification Administration). About 45% of NET's trunk lines in Maine are digital channels, with the remainder being older, analog channels.

2. Advanced Services

A number of Bell system services that are available elsewhere in New England are not yet available in Maine. These include:

- Picture-phone Service;
- Dataphone Digital Service (direct digital data links at high rates of transmission) and;
- Picturephone Meeting Service (a video conferencing service).

### 3. Data Transmission

Due to switching system and line limitations, data transmission rates in Maine are limited to a maximum of 9600 bits per second, with a maximum guaranteed rate of 4800 bits/second. Even these rates can not be provided in most parts of NET's service area, which is limited to 1200 bits/second by local switching types. Thus, no "advanced" telecommunications services (high speed data and video) are available in Maine at the current time. Eastern Massachusetts and parts of southern New Hampshire currently have Dataphone Digital Service at maximum rates of at least 56,000 bits per second. Many customers in these areas are now using this rate, with smaller but growing numbers using even higher rates (1.5 and 3.0 million bits per second). NET has estimated that a total investment of about \$170 million (1983 \$) would be necessary to upgrade its entire service area in Maine to be able to provide Dataphone Digital Service at 56,000 bits per second (56 KBS) rates. \$120 million of this amount would be to complete the transition to electronic switching and \$50 million to replace analog "trunk lines" with digital lines. Providing data transmission services at 56,000 bits per second would have the following near-term benefits:

- o This rate is sufficient for most businesses today; and
- o It is sufficient to support interactive information retrieval systems as a typical 8 1/2 by 11 typed page can be transmitted in 4 seconds.

### 4. Systems Planning

A very important point to note about telephone company system planning is that such companies build to meet demand as it grows and do not invest ahead of actual demand to facilitate or generate increased system use.

## 5. Special Networks

### a. Long distance telephone service

At the present time, one non-Bell long distance common carrier (Sprint) provides service in the Portland exchange. No other areas in Maine are served.

### b. Packet-switched data networks

Packet-switched data network ports are currently available in Maine as follows:

<u>Exchange</u>	<u>Network</u>
Portland	Tymnet
Augusta	Telenet; Uninet
Bangor	Uninet
Auburn	Tymnet

Costs for use of these networks varies from about \$6-\$8 per inter-connect hour.

## B. Telecommunications and Business Development in Maine

Maine's telecommunications system today is clearly less capable than is the case in many other areas of New England and it does not seem likely, given the levels of current system modernization plans, that Maine's system will "catch-up" with more advanced systems for the foreseeable future. In the course of the public debate over NET's recent rate request, it was strongly suggested that some Maine businesses are being constrained by the lack of modern telecommunications facilities (as exemplified by testimony by the L.L. Bean Co.). As a result of opening interstate telecommunications services to competition, the breakup of AT&T, and the technical capability for many large telecommunications service users to bypass the public telephone system



to obtain services not available through the system, a serious revenue erosion may occur that further constrains modernization of Maine's telephone network.

A recent overview and forecast of Maine's economy conducted by the State Planning Office organized the state's economy into seven distinct "sectors." Table 4 summarizes selected employment characteristics of these sectors and their projected dependence upon advanced telecommunications services over the coming 10-20 years.

Table 4

<u>Sector</u>	<u>1980 % Employment</u>	<u>1980 % Earnings</u>	<u>% Employment Growth 1980-1990</u>	<u>Estimated Future Dependence Upon Telecommunications</u>
Natural Resources	14	15.5	-3 to +1	Low-Moderate
Clothing	7	6.1	+6 to +13	Low-Moderate
Metals/Electronics	5	6.9	+33 to +42	Moderate-High
Other Manufacturing	2	2.1	+17	Moderate-High
Construction	4	6.6	-3 to +7	Low
Trade/Services	42	43.7	+18 to +25	High
Government	19	19.1	-1 to +2	High

Economic trends discussed in the previous section suggest that Maine, largely because of the high quality of life offered here, could attract a substantial amount of business activity if advanced, "wideband" communications services are provided at affordable rates for such businesses. The prior-provision of such services is likely to be most important to the formation of new, small businesses, as large information-handling businesses can in many cases today already afford to bypass the existing public communications systems, primarily through use of satellite communications.

SOURCE: PUC

UPDATED - 8/22/83

## Maine

TELEPHONE COMPANIES

	# of main telephones
Aroostook Paging, Inc. Michael D. MacPherson, President P.O. Box 1086 Presque Isle, Maine 04769 Telephone: 764-5491	
Bryant Pond Telephone Company F. Robert Jamison, Manager Buckfield, Maine 04220 Telephone: 336-9911	447
* China Telephone Company George C. Twombly, Manager South China, Maine 04358 Telephone: 445-9911	1868
Coastal Communications, Inc. (Camden) William E. Abbott, President P.O. Box 508 Camden, Maine 04843 Telephone: 236-3605	
Cobbosseecontee Tel. & Tel. Company Roger E. Goodwin, Manager RFD #2 Litchfield, Maine 04350 Telephone: 724-9911	522
Comex, Inc. Gary P. Wallin, President 720 Union Street Manchester, New Hampshire 03104 Telephone: 603-668-3000	
Community Service Telephone Company Norman Savard, Manager Winthrop, Maine 04364 Telephone: 377-9911	9521
Com-Nav Inc. Arthur R. Tilley, Jr., Manager 12 Acme Road Brewer, Maine 04412 Telephone: 989-5526	

several *	Continental Telephone Co. of Maine W.D. Locke, State Manager Main Street Damariscotta, Maine 04543 Telephone: 563-9911	30,666
* Hampden Telephone Company	Lawrence E. Gamble, Manager Hampden, Maine 04444 Telephone: 862-9911 or 862-3000	1599
	Hartland & St. Albans Telephone Co. Carl H. Palmer, Manager Hartland, Maine 04943 Telephone: 938-9911	2087
	Island Telephone Company Jeffrey V. Webber, Manager Frenchboro, Maine 04635 Home Phone: (Bangor) 942-2626	Home address: Hudson Street Bangor, Maine 04401
* Lincolnville Telephone Company	Shirley Manning, Manager R.F.D. #1, Box 263 Lincolnville, Maine 04849 Telephone: 763-9911	945
several *	New England Tel. & Tel. Company Richard A. Jalkut, Vice President - Maine 1 Davis Farm Road Portland, Maine 04103 Telephone: 797-1247	396,726
	Oxford County Tel. & Tel. Company Robert Jamison, Gen. Manager Buckfield, Maine 04220 Telephone: 336-9911	3534
	Pine Tree Tel. & Tel. Company Timothy D. Hutchison, Manager Gray, Maine 04039 Telephone: 657-9911	3291
	Portland Marine Radio, Inc. Jeffrey Weinstein, President 4 Fundy Road Falmouth, Maine 04105 Telephone: 781-2121	

* Saco River Telegraph & Tel. Company Robert C. Carroll, Manager Bar Mills, Maine 04004 Telephone: 929-9911	4279
* Somerset Telephone Company Lynwood P. Hill, General Manager North Anson, Maine 04958 Telephone: 635-9911	6203
Summit Mobile Radio Company Bruce S. Hamlin, President P.O. Box 55 - 32 Cook Street Auburn, Maine 04210 Telephone: 784-3566	
Standish Telephone Company George C. Twombly, Manager Standish, Maine 04084 Telephone: 642-9911	3929
Union River Telephone Company William S. Silsby, Jr., Manager Aurora, Maine 04401 Telephone: 584-9911	591
* Unity Telephone Company Bert G. Clifford, President Unity, Maine 04988 Telephone: 948-9911	2526
Warren Telephone Company Lawrence H. Woodcock, Manager Warren, Maine 04864 Telephone: 273-9911	865
West Penobscot Tel. & Tel. Company Carl H. Palmer, Manager P.O. Box 0 Corinna, Maine 04928 Telephone: 278-9911	1324

\* Digital Switches

Joseph E. Brennan  
Governor



APPENDIX F

Paul A. Fritzsche  
Public Advocate

State of Maine  
Executive Department  
PUBLIC ADVOCATE

State House Station 112  
Augusta, Maine 04333  
(207) 289-2445

Many Maine people have expressed their concerns regarding the breakup of the Bell System on January 1, 1984. We hope that the following information will be helpful in answering some of the questions that have been asked. We encourage consumers to carefully read the detailed information that New England Telephone has been providing and will continue to provide over the next few months.

- 
1. DO I NEED TO DO ANYTHING NOW OR IN JANUARY IN ORDER TO CONTINUE MY PRESENT PHONE SERVICE?

Absolutely not.

New England Telephone will continue to provide local and in state toll service. Other Bell System companies will provide, without any request from you, out-of-state long-distance service and, for those people who have not bought their own phones, rental telephones.

2. I AM A NEW ENGLAND TELEPHONE CUSTOMER. CAN I BUY A TELEPHONE RATHER THAN RENT IT FROM THE PHONE COMPANY?

Yes.

You can buy the telephone in your home from New England Telephone through January 1, or from a new ATT company called ATT Information Systems after January 1. In addition, you can buy a phone outside of the Bell system from the many stores that sell them.

3. SHOULD I BUY A PHONE?

Probably yes.

Your monthly bill presently includes a charge for the rental price of your telephone. On January 1, this charge will increase between 20% to 70% (50 cents to \$1.00) per month, based on the model you have. It may be wise to buy a phone and avoid paying increased monthly rental costs. Buying a phone should quickly pay for itself.

4. IF I BUY, IS THERE ANY ADVANTAGE TO BUYING BEFORE JANUARY 1, 1984?

Yes.

Because of Federal actions, the rental phones that are now in your home will become the property of ATT, rather than New England Telephone, on January 1. At that time, the existing sale prices for those phones will generally rise. As both the rental and sale prices will generally increase in January, you may wish to buy before then.

5. WHAT HAPPENS IF I NEED REPAIRS AFTER JANUARY 1?

Repairs will be more complicated after January 1, as one company will no longer have responsibility for all aspects of phone service from the phone itself all the way through the outside lines and the telephone office. However, you need not worry and you should start by calling your local phone company as you always have.

If you buy your telephone, the telephone company will no longer repair or replace your phone free of charge. However, the basic telephone itself rarely needs repairs. The telephone company will continue to be responsible for repairs on equipment outside your home even if you buy your phone.

6. I'VE HEARD ABOUT VARIOUS COMPANIES THAT PROVIDE LONG DISTANCE CALLING. WHAT IS THIS ALL ABOUT?

Part of the reason for the breakup of ATT was the promotion of competition in various services, including long distance calling. Right now, one other company provides long distance calling to customers living in the Portland area. If you make enough calls out of the State of Maine, you may find that other long distance service, rather than from ATT, may be cheaper. We encourage you to call any companies that may come to Maine and ask them what services they provide at what cost. You may find that, when you examine your own calling habits, you can save money by having your long distance calls made through a company other than ATT.

7. ARE THERE WAYS OF SAVING MONEY ON MY TOLL CALLS WITHIN MAINE?

Yes.

New England Telephone, and several other phone companies, offer three voluntary services called Selective Calling, Circle Calling and Pine Tree Calling.

Selective Calling gives you a cheaper rate for calls to one or more towns in your general area that would normally be billed at a higher toll rate.

Circle Calling gives you discounted calling to towns that are within thirty miles of your own.

Pine Tree Calling gives you a reduced rate for calling anywhere in Maine.

If you think any of these might be of interest, you should call your telephone company and ask for the details as to price and what hours of the day these discounted services are available. If you make frequent toll calls to one town, a group of towns within 30 miles, or make a lot of statewide calls, you may find that these options can save you money.

8. I HAVE ALSO READ ABOUT WHAT IS CALLED AN "ACCESS CHARGE". WHAT IS THIS AND WHEN WILL IT SHOW UP ON MY BILL?

A Federal agency in Washington has determined that, beginning in April, there will be a separate \$2-per-month charge for residential customers and approximately a \$6-per-month charge for business customers. The "access charge" is a term which describes a new method of dividing costs between local and long-distance service, such that local rates will rise and long distance rates fall. It is too early to say when an access charge will first appear in your bill. Congress is working on a law that would either prohibit or delay access charges for residential and small business customers.

9. ARE MY RATES LIKELY TO GO UP BECAUSE OF THE BREAKUP OF THE BELL SYSTEM?

The breakup of the Bell System itself should have little effect on your monthly bill. There is, however, a rate increase request pending before the Maine Public Utilities Commission, the body that sets rates in Maine, which will be decided next July. Our office is participating in that case on behalf of consumers.

Other federal actions and normal increases in the cost of doing business will, however, affect the amount of your bill.

10. WHAT WILL MY PHONE BILL LOOK LIKE AFTER THE BREAKUP IS IN EFFECT?

Your bill will include a page where your total bill is listed and separate sheets listing your charges for:

- (a) local service and toll calls in Maine, if any; (provided by New England Telephone)
- (b) phone rental fees, if any; (provided by ATT Information Systems)
- (c) toll calls out of Maine, if any, (provided by ATT Communications). (This assumes you have long distance service from ATT. If you have service from another company, billing arrangements may be different.)

You will have a separate number to call for each part of the bill if you have questions. NET will accept payment for the entire bill.



Dialing for Dollars: State Telecommunications Policy in the 1980's. Panel Discussion at the Annual Meeting, National Conference of State Legislatures, August 8-12, 1983, San Antonio, Texas.

## SUMMARY

Ms. (Moderator): First I'd like to point out to the delegates that there are two resolutions in the consent package. One is on Cable Television and one on the Telecommunications issue that you might want to read.

COMMUNICATIONS

## CABLE TELEVISION

The National Conference of State Legislatures believes the current system of shared regulatory powers over cable television involving the federal government, state governments, and local governments works well. The cable television industry is expanding rapidly, adding about 250,000 new homes a month. By 1990, a Senate committee report estimates that over half the homes in the United States will be wired for cable technology. As technology improves, the capabilities of cable systems increase. Cable operators are rapidly adding more channels and a wider variety of services to the public. Local input and local accountability are the best guarantees of quality service, fair access and low rates.

Therefore, NCSL

1. opposes preemption by the federal government of state and local regulation of rates charged for cable television service;
2. urges Congress to reject any efforts to preempt or curtail the role of state or local governments in regulating the cable television industry; and;
3. urges the states to enact legislation to protect subscribers' rights of privacy from intrusion by cable television.

## TELEPHONE POLICY

The National Conference of State Legislatures recommends to the Congress that in its review of National Telephone Policy it take action which would provide for:

1. the continuation of long distance telephone rates based on nationwide averages so as to ensure that all communities and regions of the country continue to have long distance telephone service at the same price for calls placed at the same time of day of the same distance and duration; and
2. the provision of subsidies for local telephone service to ensure that such service will continue to be available to metropolitan, urban, small town and rural subscribers alike at reasonable cost, especially for the economically disadvantaged;
3. free and equal competition between the telephone companies and others in the provision of terminal equipment to be connected directly to the local telephone service and other intercity specialized services; and
4. the continuation of state regulatory authority over the provision and quality of local telephone service.

Mr. Wise and his comments made very clear that the ATT break-up is a minor component of the increase in the cost of services: we also have to consider the impact of competition, deregulation and replacement of old equipment. He also brought out the interesting parallel of the airline deregulation and the impact that the revolution in telecommunications is going to have on rural services. With regard to legislation, he made several proposals. One was to regulate the pricing of equipment. The second was that State Legislatures might consider monitoring competition. A third was that they would like to mandate some sort of life line rates for the poor. And a fourth was that we might set up some system of subsidy for rural service by taxing telephone equipment.

Mr. Todd explained the proposal for Southwest Bell's rate increase. He broke that down into some detail and said very importantly that rates must rise to costs and that we must be competitive. His suggestions for legislation that we would not over-regulate and that there be no artificial ceilings. In

sum, he asked us to be fair to the industry.

Mr. Goff picked up that theme and called for a federal telecommunications policy. That was repeated throughout the morning. He then talked about some of the bills in Congress and asked us to leave the access charge decision alone.

Mr. Prement said that the telecommunications industry is growing so fast that competition is good. There are so many new services and so much new equipment coming on that competition will take care of whatever changes are taking place in the industry right now. Legislatively, he asked if we would do what we can to maintain some form of universal service to establish a fund for special groups by the use of some form of special taxes. He also urged us to relax ---- probably the best advice I've heard all morning!

Assembly-woman Moore outlined legislation that is being worked on in California at this time. She did not go into some of the things that California has already taken the leadership in. But I know there have been a number of bills dealing with access by the handicapped to the telecommunications system and the accessibility of TTY equipment to the deaf that has been guaranteed in the State of California. They have a number of bills proposing a 4% tax on long distance calls by the long distance carriers, which should be able to raise \$75 million dollars and subsidize between 10 and 12% of the households. She also talked about a bill to inform the consumer about the equipment that is available on the market.

These are quite a few ideas to take home with us, and there are a number of issues that we did not discuss this morning that are still pending. This is not a subject that is going to go away. I think that we will be back next year discussing new aspects of the telecommunications revolution. In fact, I suspect that this is something that is going to be with us for a long time in the future.

## M E M O R A N D U M

December 5, 1983

To: Senator John Baldacci, Chair      Telecommunications Study  
From: William E. Saufley, Esq.      Legislative Assistant  
Subj: Maine Cable TV Franchise Act after the Boulder case

In response to your request, I have examined the issue of whether Maine's Cable Television Franchise Act (30 MRSA §2151(2), paragraphs H-J) provides sufficient protection to municipalities from attack under the Federal antitrust laws in light of the Boulder case<sup>1</sup> and other developments.

My conclusion is that, while there is authority to the contrary, it is by no means certain that Maine's current law is sufficient to protect municipalities from possible antitrust liability, or at least from costly and vexatious lawsuits seeking to establish that liability.

The reasons which form the basis for this conclusion are:

- (1) In a line of recent cases, the U. S. Supreme Court has repeatedly reduced the degree of immunity which political subdivisions of the State were thought to enjoy from application of the Federal antitrust laws;
- (2) The language and holding of the Boulder case cast serious doubt on the sufficiency of Maine's law; and
- (3) Lower court decisions since Boulder do not resolve the doubts raised by the U. S. Supreme Court.

What follows is a discussion of each of these points, as well as some concluding remarks.

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<sup>1</sup> Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40 (1982). (Hereinafter cited as Boulder.)

## I. THE TREND OF THE SUPREME COURT

The Federal Sherman Act<sup>2</sup> is designed to promote competition by banning anticompetitive activity. As early as 1943, in the Parker case<sup>3</sup>, the U. S. Supreme Court recognized that, in the exercise of their legitimate police powers, the states might engage in activities which, although their effects would be clearly anticompetitive, should nonetheless withstand scrutiny under the Sherman Act, in lieu of clear congressional intent to encompass them in the Act.

In subsequent years, the question has been to what extent the Parker doctrine of immunity extends to other persons and institutions: to private organizations operating under authority of a state statute<sup>4</sup>, and more relevant to this discussion, to instrumentalities and subdivisions of the state.

The development of the Parker doctrine has accelerated rapidly in the past few years. In 1978, in the case of City of Lafayette v. Louisiana Power & Light Co.<sup>5</sup>, the U. S. Supreme Court opened the door to potential antitrust liability by state government instrumentalities and subdivisions. In Lafayette, the Court was faced with counterclaims against two municipalities which operated proprietary electric companies. The Court rejected the argument that municipalities are per se exempt from antitrust liability<sup>6</sup>, stating that:

the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.<sup>7</sup>

Thus, the Court in Lafayette presented the possibility that a municipality could be found liable, not merely that a law would be preempted under the Sherman Act. Given the possibility of a criminal sanction or treble damages for violation of the Act,

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<sup>2</sup> 15 USC §§1-2.

<sup>3</sup> Parker v. Brown, 317 U.S. 341 (1943).

<sup>4</sup> E.g., Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (Minimum attorney fee schedule established by county bar association denied immunity because state did not specifically authorize price fixing).

<sup>5</sup> 435 U.S. 389 (1978).

<sup>6</sup> Id., at 411.

<sup>7</sup> Id., at 413.

this was significant.<sup>8</sup>

After Lafayette, some lower courts were still able to find bases for extending Parker "state action" immunity to municipalities without too rigorous a test for a specific state policy. At least two Federal Courts of Appeal interpreted Lafayette to apply only to proprietary activities, or those where the municipality is essentially engaged in an otherwise competitive private business.<sup>9</sup>

However, any hopes municipalities may have had that Lafayette would be the "high water mark" of the Supreme Court's broadening of antitrust liability toward them were negated by the Boulder decision.

## II. THE BOULDER CASE

As discussed earlier, the Boulder case<sup>10</sup> continued to increase the specter of municipal antitrust liability. Significantly, the majority in Boulder held that a municipality, acting not in a proprietary capacity but in a regulatory capacity, and lawfully under the state's constitutional "home rule" provision, could find itself liable (and not merely preempted) under the Sherman Act.<sup>11</sup>

An alternative statement of the holding of the U. S. Supreme Court in Boulder is that municipalities are immune from Sherman Act liability only where their actions are taken "in furtherance or implementation of clearly articulated and affirmatively expressed state policy."<sup>12</sup> The challenge thus presented to Maine's law is whether municipalities would be acting in such a manner. (There may also be a question after Boulder whether the state must "actively supervise" the activity. This issue, taken from the Midcal case<sup>13</sup>, is mentioned, but not decided, in Boulder<sup>14</sup>.)

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In this case, treble damages sought from the municipalities were \$540 million from an area with a population of 75,000 Id., at 440.

<sup>9</sup> Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir., 1981) (waste disposal plant); and the Court of Appeals in the Boulder case itself, prior to the Supreme Court decision, Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir., 1980).

<sup>10</sup> Boulder, 455 U.S. 40 (1982).

<sup>11</sup> Id., at 60 (Rehnquist, J., dissenting).

<sup>12</sup> Id., at 52.

<sup>13</sup> California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

<sup>14</sup> Boulder, 455 U.S. 40, note 14 at 51f.

First, it should be noted that Maine's law clearly contemplates the possibility of municipalities engaging in at least one form of anticompetitive activity, i.e., the granting of exclusive franchises.<sup>15</sup> And the very existence of Maine's Cable TV franchise law stands in contrast to the respondent Boulder, which acted under authority solely of a provision of the Colorado state constitution reserving legislative authority on local matters to the municipalities.<sup>16</sup>

Still, the questions remain whether (1) Maine has at the state level a "clearly articulated and affirmatively expressed" policy in this area, and (2) municipalities acting under the Maine statute do so "in furtherance or implementation" of that policy.

Without at this point looking at interpretations of these issues by the lower courts,<sup>17</sup> the plain language of Boulder indicates problems in Maine's statute. Maine's statute appears infirm under the Court's reasoning because (a) no statewide objective or policy is expressed; and (b) there is mere authorization for municipalities to engage in anticompetitive conduct, without any state policy considerations or state involvement.

(a) Lack of state policy. According to the Court, the state policy must be "clearly articulated and affirmatively expressed."<sup>18</sup> The only policy statement apparent in Maine's law is that the municipal officers shall act "in the best interests of the municipality."<sup>19</sup> While this is more than the Colorado legislature provided their cities, it is not a statewide objective or policy. Two excerpts from the majority opinion seem relevant.

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive.<sup>20</sup>

Thus in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while

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<sup>15</sup> 30 M.R.S.A. §2151(2)(H)

<sup>16</sup> Boulder, 455 U.S. 40, 43f. (1982).

<sup>17</sup> This is part of the discussion in part III of this memo, starting at page 6, infra.

<sup>18</sup> Boulder, 455 U.S. 40, 52.

<sup>19</sup> 30 M.R.S.A. §2151(2)(4).

<sup>20</sup> Boulder, 455 U.S. 40, 55.

still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition--that the general grant of power to enact ordinances necessarily implies state authority to enact specific anticompetitive ordinances--would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.<sup>21</sup>

Under this analysis, it appears that Maine's law expresses only the state's neutrality on the issue. To its credit, the statute does specifically authorize municipalities to engage in exclusive franchises, but it does so in the absence of any state involvement or state policy. This "blank check" approach, while legitimate for some tasks of local government, has been rejected by the Court in the area of antitrust law.<sup>22</sup>

(b) Implementation or furtherance of state policy. Without that clearly stated policy, it's impossible to say whether a given municipality's decision is in "implementation or furtherance" of that policy. The question that needs to be asked is, by what yardstick contained in the franchise law may we gauge local franchise decisions? Basically, we're left with only the municipal interests, and that determination appears to be makeable only by the officers without recourse.<sup>23</sup>

A thin reed of hope for municipalities in the decision is the Court's reference to whether the state legislature "contemplated" the kind of action complained of.<sup>24</sup> The reference which forms the basis of this notion is contained in Lafayette:

(W)e agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of

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<sup>21</sup> Id., at 56.

<sup>22</sup> See, e.g., the statement in Parker: "(A) state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. 341, 351 (1943).

<sup>23</sup> This might be distinguished from other programs which are locally administered, with some policy alternatives, but where the state may be involved to assist, coordinate or act as an appellate mechanism.

<sup>24</sup> Boulder, 455 U.S. 40, 55.



action complained of."<sup>25</sup>

The reed is thin because the Court, even in Lafayette<sup>26</sup>, rejected the "blank check" interpretation that mere lawfulness under state law creates immunity under the Sherman Act. The language in a number of Supreme Court cases indicates that blanket authorization is insufficient; rather, the state must be involved, whether by creating the policy (Boulder, Lafayette), by being the regulator (Parker, Bates<sup>27</sup>), or by "actively supervising" the activity (Midcal).

Nonetheless, the reference to legislative "contemplation" of anticompetitive activity has been seized upon by some lower courts, while others have emphasized the "evisceration" language of the opinion, which tends to require more consistent statewide policies and actions. The actions of the lower courts are the subject of the third part of this discussion.

### III. LOWER COURT DECISIONS

U.S. Supreme Court decisions in particular cases are relied upon to establish the broad standards for specific lower court cases. Unfortunately, the Court's decisions in this area have not yet established a clear direction for the courts of appeal and district courts. This is due in part to the fact that it's not always possible to discern which facts in the particular case before the Supreme Court are necessary to support the holding and which are incidental (e.g., does it make a difference that the offending party in Midcal was a private party, or would the result be the same for any entity other than a state agency?). The direction is also complicated by the fact that many of these cases have involved plurality decisions, i.e., a majority of the Justices concurred in the result, but they differed in their rationales for reaching that result.

The lower courts have therefore been faced with the responsibility of determining which Supreme Court "yardsticks" to apply in these cases. There are several available, including:

- the requirement of state "compulsion" of anticompeti-

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<sup>25</sup> Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978).

<sup>26</sup> Id., note 45 at 415.

<sup>27</sup> Bates v. State Bar of Arizona, 433 U.S. 350 (1977). (Compare to Goldfarb, n4 on page 2, *supra*; in Bates, immunity applied to ban on attorney advertising, despite anticompetitive effects, because imposed by a state agency, the Arizona Supreme Court.)

tive activity (Goldfarb, Cantor<sup>28</sup>);

- the requirement of "active state supervision" (Midcal);
- the requirement of a "clearly articulated and affirmatively expressed" state policy (Midcal, Lafayette, Boulder);
- the requirement that the state have evidenced an intent to "displace competition with regulation or monopoly public service" (Lafayette, Orrin W. Fox<sup>29</sup>, Midcal); and
- the requirement of an "important state interest" in the regulated area (Bates).

Not surprisingly, the lower courts have varied in determining which factors are relevant. In addition, courts using the same yardsticks have varied widely in interpreting and applying them.

Following is a very cursory overview of some of the lower courts' activities in this area.

A. Generally. A number of lower federal courts have considered cases in this area, with no definite result. At one end of the spectrum are cases like Hopkinsville<sup>30</sup>, where a federal district court, even in light of Boulder, found sufficient basis for a municipal claim of immunity from only the delegation by the legislature to municipalities over streets, rights of way and public utility hook-ups.

On the other side, the federal Court of Appeals for the First Circuit, which includes Maine, decided even before Boulder that a municipality might be liable where an anticompetitive activity is not in furtherance of clear state policy and not supervised by the state.<sup>31</sup>

Again, even before Boulder, a California federal district court refused to grant immunity to a municipal utility district, despite an authorizing statute allowing all of the allegedly

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<sup>28</sup> Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

<sup>29</sup> New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1973).

<sup>30</sup> Hopkinsville Cable TV v. Pennroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982).

<sup>31</sup> Corey v. Look, 641 F.2d 32 (1st Cir. 1981).

anticompetitive activities.<sup>32</sup> It is interesting to note that the judge in that case found that the defendant failed all of several tests: the "state policy to displace competition with regulation or monopoly public service" (Lafayette), the "clearly articulated and affirmatively expressed state policy" (Midcal, Orrin W. Fox and later, Boulder), and the presence of "active state supervision" (Midcal). The court also specifically refused to rule that the defendant could not be assessed treble damages.<sup>33</sup>

B. State compulsion. While the "compulsion" language has its origins in cases which dealt with non-governmental entities (Goldfarb, Cantor), it lives on in this area as well. As pointed out by the court in Grason, a form of this test is found applicable to governmental activities even in Lafayette; the Grason court noted that:

This statute does not by its terms create a policy of preferring monopoly to competition; it is merely permissive.<sup>34</sup>

It appears from the terms of Cal. Pub. Util. Code §12801 that each municipal utility district is permitted to make whatever policy decisions it chooses with respect to the construction of electrical distribution systems. As such, the state does not enjoy a sufficient degree of involvement in that decisionmaking process to insulate the district from the consequences of making an anti-competitive choice.<sup>35</sup>

Aside from the approach taken in these and similar cases, injecting an element of "compulsion" into the decision whether the requisite state policy or intent is present, courts have not generally adopted the Goldfarb requirement for municipalities.<sup>36</sup>

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<sup>32</sup> Grason Elec. Co. v. Sacramento Municipal Utility District, 526 F. Supp. 276 (1981).

<sup>33</sup> Id., at 281f.

<sup>34</sup> Id., at 278 (Emphasis added).

<sup>35</sup> Id., at 279. Accord, Jairo Cash & Carry Enterprises, Inc. v. Food Distribution Center, 569 F. Supp. 1404 (D.C.Pa. 1983).

<sup>36</sup> See, e.g., Town of Hollie v. City of Eau Claire, 700 F.2d 376, 381 f. (7th Cir. 1983), U.S. v. Southern Motor Carriers Rate Conference, 702 F.2d 532, 537f. (5th Cir. 1983) (dicta). But cf. Ronwin v. State Bar of Arizona, 686 F.2d 692 (1981) (amended decision after Boulder on September 8, 1982).

C. Active state supervision. As stated above, the Boulder court specifically declined to rule whether the "active state supervision" requirement of Midcal applies to municipalities. In the same session, the Court vacated and remanded a 6th Circuit case which had held, among other things, that Midcal doesn't apply.<sup>37</sup> Again, the result is uncertainty.

Some courts have specifically stated that the "active state supervision" requirement does not apply to governmental entities, but only to private parties.<sup>38</sup> Other cases have stated that Midcal does apply.<sup>39</sup> Still other cases have, like the Supreme Court, declined to rule on the issue, either because they determined that the facts indicated there was active state supervision<sup>40</sup>, or because the lack of other requisite factors disposed of the immunity claim without the need to proceed further.<sup>41</sup>

D. Requisite state policy. At least since Boulder, most lower court decisions in this area have sought to determine whether the requisite state policy was present to validate the claim of immunity. The two elements of state policy which have been stated by the Supreme Court are: (1) a "clearly articulated and affirmatively expressed state policy" (Lafayette, Boulder); and (2) state intent to displace competition with regulation or monopoly public service" (Lafayette, Orrin W. Fox, Midcal).

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<sup>37</sup> Hybud Equip. Corp. v. City of Akron, 654 F.2d 1137 (6th Cir. 1981), vacated and remanded in light of Boulder, mem., 455 U.S. 931 (1982).

<sup>38</sup> See, e.g., Gold Cross Ambulance and Transfer v. City of Kansas City, 705 F.2d 1005, 1014 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376, 383 f. (7th Cir. 1983); Golden State Transit Corp. v. City of Los Angeles, 563 F. Supp. 169, 172 (C.D. Calif. 1983); Pueblo Aircraft Service, Inc. v. City of Pueblo, Colo., 679 F.2d 805 (10th Cir. 1982).

<sup>39</sup> See, e.g., Corey v. Look, 641 F.2d 32 (1st Cir. 1981); Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 562 F. Supp. 712, 717 (D.C. Hawaii 1983); Jetro Cash & Carry Enterprises, Inc. v. Food Distribution Center, 569 F. Supp. 1404 (D.C. Pa. 1983); Guthrie v. Genesee County, 494 F. Supp. 950, 956 (W.D. N.Y. 1980); Euster v. Eagle Downs Racing Assn., 677 F.2d 992 (3rd Cir. 1982).

<sup>40</sup> Brantel, Ltd. v. City of New York, 571 F. Supp. 1065 (D.C. N.Y. 1983); Capital Telephone Co., Inc. v. City of Schenectady, N.Y., 560 F. Supp. 207 (D.C.N.Y. 1983).

<sup>41</sup> Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati, 556 F. Supp. 976 (D.C. Ohio 1983).

Some courts have been generous in finding the requisite policy. The Hopkinsville<sup>42</sup> court found sufficient state policy to regulate cable TV in the grant to municipalities of authority over rights of way, streets and public utility hook-ups. In Gold Cross<sup>43</sup>, it was sufficient that there was statutory authority to provide for an ambulance system, using "one or more" private services, and as a "necessary or reasonable consequence" of the authorized activity.<sup>44</sup> Pueblo Aircraft<sup>45</sup> and similar cases dealing with taxi franchises at municipality-operated airports found sufficient state policy in that the legislature granted the general operating authority of airports to municipalities not just for their own good, but for that of the general public.

In City of Eau Claire<sup>46</sup>, sufficient state policy was found, but two important factors were that the state legislative authorization quite specifically authorized the particular form of restraint, and the subject area - sewerage and sanitation - was a traditional area of municipal control designed to protect the public health and safety. The court specifically limited the scope of its opinion in this latter regard.<sup>47</sup>

Other cases have more rigorously applied the test of requisite state policy. Some courts have ruled, even in the face of clear legislative authorization in an area, that the lack of a stated legislative preference for the monopoly or restraint may defeat a claim of immunity.<sup>48</sup> Absent explicit language, it has

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<sup>42</sup> Hopkinsville Cable TV v. Pennroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982).

<sup>43</sup> Gold Cross Ambulance and Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983).

<sup>44</sup> Id., at 1013.

<sup>45</sup> Pueblo Aircraft Service, Inc. v. City of Pueblo, Colo., 679 F.2d 805 (10th Cir. 1982); All American Cab. Co. v. Metropolitan Knoxville Airport Authority, 547 F. Supp. 509 (D.C. Tenn. 1982).

<sup>46</sup> Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

<sup>47</sup> Id., at n. 18, page 384f. Similar factors were cited in Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), esp. at 427f. (distinguish from a project for a municipal recreational swimming pool).

<sup>48</sup> E.g., Jetco Cash & Carry Enterprises, Inc. v. Food Distribution Center, 569 F. Supp. 1404 (D.C. Pa. 1983); Catalina Cablevision Associates v. City of Tucson, Civ. No. 82-459 (D. Ariz. Order filed July 21, 1983); Grason Elect. Co. v. Sacramento

been held that the municipality must show that the restraint is necessary to the successful operation of the legislative scheme.<sup>49</sup>

One of the most ominous problems may arise where, even though all other municipal acts might be protected under Parker, the allegation of a conspiracy will defeat a claim of immunity.<sup>50</sup>

#### IV. CONCLUSION

From a legal standpoint, a review of the case law demonstrates genuine cause for concern. At least some of the cases indicate that municipalities may run the risk of antitrust liability -- but that is not the whole story. Even if a particular municipality can survive an antitrust claim, a protracted struggle through the federal court system<sup>51</sup> can be very expensive.

Given the specter of treble damages on the one hand and an expensive attempt at vindication on the other, municipal officials may be hard-pressed to set sound policies and reach the best agreements. Litigation or its threat could, in a given case, delay the implementation of any cable system pending resolution, or force a compromise that would be otherwise unacceptable.

Of course, there are a number of variables currently at work. For one, antitrust liability is only threatened where someone wants to bring an action, and this might not occur in Maine. Also, this area of law is currently in a period of transition - cases brought against municipalities in light of Boulder may just now be reaching trial courts, and the appellate courts may not resolve the issues for a couple of years.

The Maine Legislature may not be able to resolve all of these problems, even if it chooses to try. For example, an

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Mun. Utility Dist., 526 F. Supp. 276 (1981); Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati, 536 F. Supp. 664 (D.C. Ohio 1983).

<sup>49</sup> Corey v. Look, 641 F.2d 32 (1st Cir. 1981).

<sup>50</sup> Westborough Mall, Inc. v. City of Cape Girardeau, Missouri, 693 F.2d 733 (8th Cir. 1982); Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 566 F. Supp. 1444 (D.C.S.C. 1983). See also, Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983) (Mayor may be liable in cable TV franchise case).

<sup>51</sup> Federal courts have exclusive jurisdiction to hear cases under the federal antitrust laws. Maine does, however, have its own parallel antitrust laws. 10 M.R.S.A. chapter 201, §§1101 et seq.

allegation of conspiracy by municipal officers may be enough to keep an otherwise futile claim in litigation.<sup>52</sup>

Nonetheless, the Legislature might attempt to address this area in a manner which, insofar as possible, would resolve most antitrust claims at the pretrial stage through a motion for summary judgement.

While this is not the subject of the current discussion, there may also be good policy reasons for a fresh state policy in this area. If what the Supreme Court is requiring as a prerequisite to invoking the Parker doctrine is a clear state policy perhaps the state policymaking body should affirmatively address what is or should be that policy.

My reading of the cases does not indicate that state government must preempt the field of cable television regulation, nor that the state must make the decisions on fine details that are of greatest import to the served areas. It does support the argument, however, that in order to assure municipal immunity from antitrust liability, the state should clearly and explicitly establish the broad policies in this area.

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<sup>52</sup> See note 50 and accompanying text, supra.