Verrill

Second Edition

Maine Regulation of Public Utilities

Verrill

Maine Regulation of Public Utilities

Second Edition

William S. Harwood
James I. Cohen
Geoffrey G. Why
Nora R. Healy
Katie M. Gray
Brian T. Marshall
Editorial Advisor, Katie Bressler

Preface

Verrill Dana, LLP is pleased to present this second edition of *Maine Regulation of Public Utilities* to our clients, colleagues, and friends. This is the only treatise published on the subject of Maine regulation of public utilities. It attempts to capture a narrow—but vitally important—area of law that affects every Maine citizen who consumes electricity, water, natural gas, or telephone service provided by a regulated public utility.

Stephen Johnson was the principal author of the first edition of this treatise. Steve completed his legal career at Verrill Dana after successfully serving as a staff attorney to both the Maine Public Utilities Commission and the Maine Office of the Public Advocate as well as General Counsel for Maine Public Service Company. Verrill Dana remains deeply grateful to Steve for his important contribution to the law of Maine.

This second edition was the result of a group effort by all of the attorneys in Verrill Dana's Utilities and Energy Group and our capable assistants Mary Wierzbicki and Leslie Norton. Each of us played an important role in researching, drafting, and editing different chapters of this treatise. However, the individual who deserves most of the credit is Katie Bressler, a law student who assumed the role of editor and publisher for this second edition. Despite her initial unfamiliarity with Maine public utilities law, Katie was a quick study and oversaw the research, drafting, and editing of this second edition. Most importantly, she kept all the participating lawyers on task.

This treatise is intended to provide a general overview of the law of public utility regulation in Maine, as administered by the Public Utilities Commission. It does not pretend to be exhaustive. In its reach for generality, the text treats summarily many important details. These omissions are intentional. In order to broaden the book's appeal and usefulness, we chose to emphasize those aspects of regulation that apply to most utilities. In this manner, we hope to provide a firm foundation for understanding the nature and intended purpose of the State's regulatory regime.

This treatise provides a starting point for legal research and should not be relied on as legal advice. To the extent this volume contains legal opinions or interpretations of law, please note they are based on an individual attorney's reading of the relevant statutes, rules, and cases without the benefit of a particular case or controversy. Each individual's opinions and interpretations are not necessarily shared by other attorneys in Verrill Dana's Utilities and Energy Group. In addition, the research for this second edition was completed in the spring of 2018 and there may well be developments thereafter that affect the accuracy of some of the statements in this treatise. Anyone seeking specific guidance on a question of Maine utility law should seek the advice of a qualified attorney.

June 2018

William S. Harwood
James I. Cohen
Geoffrey G. Why
Nora R. Healy
Katie M. Gray
Brian T. Marshall

Utilities and Energy Group
Verrill Dana, LLP

Table of Contents

Chapter 1

What Is a Public Utility?

This chapter reviews the characteristics that define a "public utility" and make it subject to regulation by the Maine Public Utilities Commission (the "Commission" or the "PUC"). First, public utility status is conferred only upon entities that own or operate certain types of property within Maine. Awarding such entities monopoly status within a town or service territory avoids the wasteful duplication of expensive resources that would be characteristic of competitive utility service—such as several water mains or several sets of electric wires serving the same street.

However, ownership of this property will not confer public utility status on its owner or operator unless the property is also devoted to the "public use." This is a judicially imposed requirement based on the rationale that the state may not regulate property unless the public at large has acquired an interest in it. To determine whether utility property is devoted to the "public use," as opposed to that of only "particular individuals," the Commission has developed a fairly complex set of standards. The first attempt to establish these standards was the *Kimball Lake Shores Association* decision (discussed below) in which the Commission focused on the "identity of interest" between the utility enterprise and its users. This "identity of interest" standard seeks to determine whether the relationship between the enterprise and its users is so closely aligned that the property is not considered to be devoted to the "public use" and the protections afforded to users by regulation are not necessary. The Commission has

applied the *Kimball Lake Shores* standard where users have no realistic option for utility service except from the provider in question. In circumstances in which an entity offers utility service to a user who already has available to it the services (and protections) of a regulated public utility, the Commission has developed an ostensibly separate set of factors to determine whether that service is being offered to the "public" as opposed to "particular individuals." In the *Boralex* decision (discussed below), the Commission found that the relationship between the provider and the user of utility services was sufficiently particularized that the utility facilities were not devoted to the public as a whole. The complexity of these decisions emphasizes the difficulties inherent in determining whether utility property is dedicated to the "public use."

Although public utilities are defined by statute (e.g., a "gas utility" or "water utility"),[1] whether a particular entity is, in fact, a public utility and subject to regulation by the PUC is a more complex issue than the bald definition may suggest. In the overwhelming majority of cases, an entity's public utility character is self-evident; no one, for example, has second thoughts about whether a large gas company or water district is a public utility. Yet some smaller enterprises that provide gas or water service may not be deemed public utilities for the purpose of state regulation. Moreover, as discussed in Chapter 8, the understanding of which services should be subject to regulation as monopoly public utility services has profoundly changed over the past decades. Some of these alterations have been driven by developments in technology, but others have been influenced by fundamental changes in the way these services are viewed by state and federal policy makers.

A. Ownership or Control of Utility Property

A public utility is, in the first instance, whatever the Legislature declares it to be. In Maine, this roster currently includes "every gas utility, natural gas pipeline utility, transmission and distribution utility, telephone utility, water utility and ferry."[2] The classification of these enterprises as public utilities is not arbitrary as they all share at least two common elements. First, they each provide services thought to be essential to the public good and welfare in a modern society. Their second common element does not emerge until we examine the individual definitions of each utility. For example, a "transmission and distribution utility" is "a person . . . owning, controlling, operating or

[1] 35-A M.R.S.A. § 102(8), (22) (2010 & Supp. 2017).
[2] *Id.* § 102(13).

managing a transmission and distribution plant for compensation within the State"[3] and a "water utility" is "every person . . . owning, controlling, operating or managing any water works for compensation within this State."[4] Thus, the second commonality is that an entity acquires public utility status in this State simply by having control of certain types of assets—such as a "water works" or a "transmission or distribution plant"—that many believe to be particularly well-suited to monopoly service.

The essence of all public utility enterprises is their legal right to monopoly status:

> The monopoly thus afforded as among competing utilities is in effect a quid pro quo for the obligation to render public service and to submit to regulation and control.[5]

A regulated public utility is a legal monopoly; that is, it has the legal right to provide its services without any direct competition within a prescribed area or service territory. In exchange for this monopoly benefit, the utility's rates and terms of service are controlled by the PUC. Additionally, the PUC requires the utility to provide service to all customers within that territory. This state regulation is often viewed as the surrogate for the price and service discipline that would otherwise be imposed by the competitive market.

The decision to grant certain enterprises monopoly status is strongly influenced by the nature of the assets required to carry out utility functions. The designation of a particular enterprise as a "public utility" is typically based upon the perception that the enterprise's capital-intensive and location-specific nature will promote certain economic and operational efficiencies if it is the only game in town.[6] It is simply more economically efficient and operational to have a single water system, with costs spread among all users in an area, rather than to have four or five water systems, each tenuously supported by a proportionately smaller customer base.

These efficiencies explain why certain "essentials," such as water, electricity, and landline telephone, that can be delivered only by capital-intensive physical infrastructures are given monopoly status while other "essentials," such as home heating oil, are not. We readily accept that having several sets of competing water mains or telephone poles on the same street would be a wasteful duplication of resources. However, because the only asset required to deliver home heating oil is a tank truck—a far more modest and mobile

---

[3] *Id.* § 102(20-B).

[4] *Id.* § 102(22).

[5] *Dickinson v. Me. Pub. Serv. Co.*, 223 A.2d 435, 438 (Me. 1966).

[6] That utilities exist as "natural monopolies" is often given as the economic basis for regulation. *E.g.*, CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 52-54 (3d ed. 1993).

investment—the state has not subjected the local fuel dealers to regulation as public utilities.

B. Devotion of that Property to the "Public Use"

Although ownership or control of certain types of property is necessary for public utility status, it alone is not sufficient. To satisfy the legal requirements of "public utility" status, the property providing the service must not only meet the statutory description, but also be devoted to the "public use." The U.S. Supreme Court case *Munn v. Illinois* is generally asserted as the origin of the "public use" test. In that case, the Court stated:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.[7]

Shortly after the advent of formal public utility regulation by the PUC in 1913, the Law Court expressly adopted the "public use" rationale of *Munn* as the legal basis of the PUC's authority over Maine's public utilities.[8] Because utility regulation is an exercise of the state's police power to ensure the public welfare,[9] our courts have required, as a legal basis for regulation, that the owner has "impressed its property by a public use."[10]

The PUC's efforts to determine whether any particular property is in fact impressed with a "public use" reflects the difficulties of that task, especially in certain marginal circumstances. Although the large electric company's devotion of its property to the "public use" is never really in doubt, the smaller owner of a utility plant can present a more challenging problem. One of the PUC's earliest attempts to state the "public use" test as a general principle drew a less than bright line by defining a public utility as one who supplies "his product or service to the public as a class or to any limited portion of it" while classifying a private utility as one who is "serving or is ready to serve only particular individuals."[11] Application of this standard is not always straightforward.

---

[7] *Munn v. Illinois*, 94 U.S. 113, 126 (1876).
[8] *In re Searsport Water Co.*, 118 Me. 382, 387, 108 A. 452, 454-55 (1919).
[9] *Id.*, 108 A. at 455.
[10] *Gilman v. Somerset Farmers' Co-op. Tel. Co.*, 129 Me. 243, 247, 151 A. 440, 442 (1930).
[11] *Pub. Utils. Comm'n v. A.R. Wright Co.*, 36 P.U.R. (NS) 336, 341 (Me. 1940).

1. Determining Whether the Use Is "Public" with a Single Supplier—*Kimball Lake Shores*

The Commission's *Kimball Lake Shores Association* decision is a particularly comprehensive attempt by the PUC to flesh out the bare-bones public use standard.[12] This case involved a residential development in which the developer constructed a water system to supply water to every residence in the development.[13] Every property owner who paid a fee to cover the system's capital costs became a part owner of the system and, in theory at least, had voting control over its operation.[14] The system was not available to anyone outside the development and individuals in the development had the option of taking water from private wells and not from the system.[15]

To determine whether the system was devoted to the use of the "public as a class" and not merely to "particular individuals," the PUC identified seven factors, which, "taken together, provide a calculus for measuring the nature of the enterprise."[16] The seven factors identified in *Kimball Lake Shores* were:

(1) the size of the undertaking;
(2) whether the enterprise is operated for profit;
(3) whether the system is owned by the user;
(4) whether the terms of service are under the control of its users;
(5) the manner in which the services are offered to prospective users;
(6) whether the service is limited to organization members or other readily identifiable individuals; and
(7) whether the membership in the group is mandatory.[17]

Because no single factor was determinative, the PUC in *Kimball Lake Shores* placed greatest emphasis on those factors (such as 3, 4, and 6) that suggest an "identity of interest" between the enterprise and its users.[18] This "identity of interest" does not

---

[12] *Re Kimball Lake Shores Ass'n*, Issuance of Show Cause Order, No. M.221, Order (Me. P.U.C. Jan. 31, 1980).
[13] *Id.* at 3.
[14] *Id.* at 6.
[15] *Id.* at 5.
[16] *Id.* at 22-23.
[17] *Id.* at 23-26.
[18] The Commission did not intend the remaining elements to be wholly nugatory, although it did state that factor (1) was "relatively unimportant" by itself and that item (5) "cannot be accorded a great deal of weight." *Id.* at 23, 25. Item (2) was important to the extent it suggested "an identity of interest" between the utility and its users. *Id.* at 23. Among the remaining elements, only item (7) seemed to have any strong independent vitality for the Commission, which observed that "lack of freedom of choice is one of the indicia of a *bona fide* public utility." *Id.* at 26.

require that the interests of the enterprise and its users be precisely the same, only that the relationship between the enterprise and its users be sufficiently close that its users are not merely members of the "public as a class." For example, in connection with the third factor, the Commission noted:

> Clearly those who are not strangers to the enterprise do not need to be protected from that enterprise by governmental regulation. Moreover, a customer who is also an owner of the system serving him obtains a definite identity that differentiates him from the public in general. That the identity of the customer-owner is readily distinguishable from the public at large *on a basis that precludes the need for that regulation traditionally extended to utilities* appears to underlie in great part the distinction between restricted and unrestricted service. . . . The term "public" can be understood, in this context, as referring only to those who are strangers to the enterprise.[19]

In concluding that the system at issue was not devoted to the "public use," and therefore was not a public utility, the PUC placed primary emphasis on the right of the users to control the system: "[b]ecause service is extended only to persons who enjoy those rights, the need for regulation is effectively removed."[20] In *Kimball Lake Shores*, the PUC distinguished "particular individuals" from the "public as a class" on the ground that these "individuals" were those who used the system and were owners with such a degree of control over the system that they, despite its possible monopolistic nature, did not need the protection offered by regulation.[21] Under these circumstances, the PUC concluded that the users had an "identity of interest" with the system's owners that sufficiently particularized them from the "public as a class." Thus, the property in question was not deemed to be devoted to the public use.[22]

In *Kimball Lake Shores*, the Commission focused its analysis on the existence of an "identity of interest." However, subsequent decisions have moved away from this analysis and instead emphasized the "public protection" aspect of the framework. For example, in *Re Kennebec System Reach, Inc.*, the PUC stated:

> The purpose of the public use test is to determine whether a utility has undertaken by its own actions or has otherwise acquired an obligation to serve all who desire service without the right to refuse for arbitrary

[19] *Id.* at 23-24.
[20] *Id.* at 26-27.
[21] *Id.* at 22, 26-27.
[22] *Id.* at 26.

> reasons. If the utility has undertaken to provide service on this basis and if those receiving service have little or no control over terms of service, costs, prices, or profits . . . then the state will exercise its regulatory authority to ensure that service is provided on a reasonable basis . . . .[23]

Once again, in 1990, the Commission recast the *Kimball Lake Shores* analysis when it announced:

> He [the owner and operator of the water system] is going to use water for his own use at the Weld Inn to the detriment of other users of service. It is this indifference and disregard of the rights of users that requires an entity to be regulated.[24]

Thus, *Kimball Lake Shores* and subsequent cases appear to equate "public use" with the need for public protection. These cases support the reasoning that a particular utility system will be devoted to the "public use" if the users of that system are so removed from its control and operation that they can be assured of reasonable treatment only through regulatory oversight. According to this rationale, the "public as a class" are those users who can realize the benefits of fair rates and adequate service only if a regulator's intervention can extract those benefits from the utility, while "particular individuals" are those who can realize them without regulatory assistance.

2. Determining Whether the Use Is "Public" with Multiple Suppliers—*Boralex*

This reasoning remained the standard until the PUC was confronted with a set of facts that resisted resolution under the *Kimball Lake Shores* user-protection rationale. In 2001, Central Maine Power Company asked the PUC to investigate whether a power generator's plans to directly supply a retail customer would make the generator an electric utility subject to state regulation. [25] The generator was located on property adjacent to the customer and planned to install distribution facilities from its plant to the customer's facility in order to supply it with electricity. In this case, the PUC

---

[23] *Re Kennebec Sys. Reach, Inc.*, Request for Advisory Ruling on Tel. Regulatory Status, No. 84-151, Advisory Ruling at 3-4 (Me. P.U.C. June 13, 1985).

[24] *Re Rackliffe v. Weld Inn*, Request that Weld Inn Be Treated As a Public Utility Which Cannot Abandon Water Service Without Commission Approval, No. 89-312, Order at 7 (Me. P.U.C. June 11, 1990).

[25] *Cent. Me. Power Co.*, Request for Comm. Investigation Regarding the Plans of Boralex Stratton Energy, Inc. to Provide Elec. Serv. Directly from Stratton Lumber Co., No. 2000-653 Order Declining to Open Investigation (Me. P.U.C. Apr. 6, 2001) [hereinafter, *Boralex*].

essentially held that while the generator satisfied the statutory definition of a transmission and distribution utility ("a person . . . owning, controlling, operating or managing a transmission and distribution plant for compensation"), it could be deemed a "public utility" only if the distribution of electricity to the customer satisfied the "public use" test.[26] In resolving the matter, the Commission explicitly did not apply the *Kimball Lake Shores* factors, stating:

> [T]he *Kimball Lake* factors have no relevance in the context of the current proceeding, which involves a customer that has access to the services of an established utility, but would like to take service from an alternative provider.[27]

Here, the PUC concluded that the *Kimball Lake Shores* line of cases, with their emphasis on the need for user protection, did not apply in circumstances in which the user already had the requisite protections through its ability to take service from the regulated utility, but did not wish to avail itself of those protections.[28] The PUC resolved this issue by identifying the need to avoid gradual degradation of the incumbent utility's monopoly as an underlying principle of the "public use" test:

> [B]ased on the general purposes of the statutory scheme, we conclude that the Legislature did not intend the "public use" requirement to be a means to allow the gradual degradation of utility service territories through the direct sale of services to single customers or limited sets of customers that may be in the proximity of a generating facility.[29]

Additionally, the Commission introduced a new set of factors in order to determine whether a transaction was private and did not involve the sale of regulated utility services:

(1) whether the generator and customer are located on the same or physically adjacent property;

---

[26] *Id.* at 4 (citing 35-A M.R.S.A. § 102(20-B)).
[27] *Id.* at 5.
[28] *Id.*; *see also Re Me. Pub. Utils. Comm'n*, Investigation into Pine Springs Roads & Water, LLC, as to Whether It Meets the Criteria to Be Classified as a Public Utility, No. 2006-534, Order-Part II at 9 (Me. P.U.C. Mar. 9, 2007) (reaffirming the distinction when applying the *Kimball Lake Shores* criteria by stating that "the *Kimball Lake Shores* factors were developed primarily to aid us in determining whether the provision of service to relatively few customers under circumstances where the customers have little or no feasible options . . . .").
[29] *Boralex* at 5-6.

(2) whether the generator and customer have a commercial or corporate relationship that goes beyond the sale of electricity;
(3) whether the number of customers served is limited;
(4) whether all power sold comes from the generator as opposed to the utility grid; and
(5) whether there are any sham transactions to create a private character.[30]

These factors generally illuminate the relative identity of interest between the generator and the customer. Applying these factors, the Commission determined that the generator at issue had not devoted its facilities to the "public use" and, therefore, was not a public utility.[31]

3. Transmission Lines—A Public Utility?

On occasion, the Commission has been presented with the question of whether an owner of a single electric transmission line is a public utility when the transmission line passes through Maine without serving any retail customers. For example, Maine Electric Power Company, Inc. ("MEPCO") owns and operates a 345 kV electric transmission line running between the Maine-New Brunswick border near Orient, Maine, and Wiscasset, Maine, referred to as the "MEPCO Line."[32] The MEPCO Line provides high-voltage transmission service through Maine, but does not serve any retail customers in Maine.[33] In 1969, the Commission recognized MEPCO as a Maine public utility, even though MEPCO serves no retail customers in Maine and the Commission does not regulate MEPCO's transmission rates because transmission rates are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").[34]

The Commission has been faced with this question more recently as well, due to FERC's Order No. 1000 encouraging competition among transmission providers and increasing interest in the development of merchant transmission projects (e.g., transmission projects that are developed, owned, and operated by an entity other than the incumbent transmission and distribution utility). For example, in a 2015 order, the

[30] *Id.* at 6.
[31] *Id.*
[32] *Re Me. Elec. Power Co.*, Application for Authority (1) To change its purposes; (2) To construct and operate a 345 KV transmission interconnection between Wiscasset, Maine and the Maine-New Brunswick border; (3) To enter into contracts with New England participants; (4) To assume certain contracts with the New Brunswick Electric Power Commission; (5) To issue and sell Common Stock to its Maine sponsors; (6) To enter into a loan agreement; and (7) To issue and sell its long-term debt, No. U. #2846, Order at 1 (Me. P.U.C. Aug. 20, 1969) [hereinafter *MEPCO* Application].
[33] *Id.* at 3.
[34] *Id.*

Commission considered several competing proposals for transmission lines to be located in Emera Maine's service territory, including transmission proposals that would compete with Emera Maine's own proposed transmission line.[35] More than one of these third parties conceded that ownership and operation of a transmission line would cause them to become a public utility.[36]

4. "Deregulation" of Water Utilities

In 2014, consumer-owned water utilities gained the ability to become exempt from many of the requirements of Title 35-A, including several key requirements such as the requirement of Commission approval of rate changes. Pursuant to Section 6114 of Title 35-A, individual consumer-owned water utilities may petition the Commission for approval of these broad exemptions.[37]

In 2016, Portland Water District availed itself of the exemptions under Section 6114.[38] In that case, the Commission's approval was conditioned on certain reporting requirements.[39] It is important to note that these exemptions did not change the fact that Portland Water District remains a public utility subject to the Commission's jurisdiction and retains its monopoly status within its service area. However, functionally, Portland Water District and other consumer-owned water utilities availing themselves of Section 6114 exemptions are now subject to far less regulation than they had been in the past.

This brief (and non-exhaustive) review of the public utility concept demonstrates its highly fact-specific nature. Furthermore, this review provides a basis for understanding the extraordinary amount of regulation to which most of Maine's utilities, as legal monopolies, are subject. Without a competitive market or some relationship with the provider to protect them, users of utility services must rely on the

[35] *Emera Me.*, Request for Approval of Certificate of Finding of Public Convenience & Necessity for Construction of Transmission Line in Northern Maine, No. 2014-00048, Order at 31-49 (Me. P.U.C. Oct. 8, 2015).

[36] *See, e.g.*, *Emera Me.*, Approval of Certificate of Public Convenience and Necessity for Construction of Transmission Line in Northern Maine, No. 2014-00048, Reply Brief of EDP Renewables North America, LLC at 2 (Me. P.U.C. Aug. 6, 2015).

[37] 35-A M.R.S.A. § 6114 (Supp. 2017).

[38] *Portland Water Dist.*, Petition for Exemption Pursuant to 35-A M.R.S.A. Section 6114 and Chapter 615, No. 2015-00159, Decision and Order (Me. P.U.C. Nov. 13, 2015).

[39] *Id.* at 22-23.

power of the state as expressed through the PUC. The remainder of this book explores the nature and particularities of that power.

Chapter 2

The Basis and Nature of the Commission's Authority

This chapter reviews the four separate types of authority the Commission employs in its regulation of the State's public utilities. Three of these powers are expressly granted by statute; the fourth is implied.

The first type of express authority is commonly called "prescriptive" authority. Prescriptive authority refers to the Commission's ability to prescribe or establish the actual rates for utility service or the standards of conduct to which utility service and practices must conform. Although very broad, this authority is not limitless. The principal constraint on prescriptive authority is that it can be exercised to achieve only those purposes found in the public utilities statutes. In other words, the Commission may not order a utility to undertake (or cease undertaking) an activity unless the Legislature has explicitly or implicitly given the Commission authority over that activity.

The second type of express authority is the Commission's "investigative" authority. Investigative authority refers to the Commission's ability, invoked either on its own or at the request of a concerned party, to inquire into a utility's affairs. The Commission may investigate any aspect of a utility's affairs, even if it lacks the power to regulate it.

The third type of express authority is "permissive" authority, or the power to approve or consent to an activity proposed by the utility. Often, the Commission will exercise its permissive authority by approving the utility's proposed action only if that action is subject to certain conditions. The discussion of this type of authority includes an examination of the extent to which the Commission's express authority to approve a utility's proposed action may preclude its authority to unilaterally order the utility to perform that same action.

Finally, the Commission possesses "implied" authority—authority which is not expressly granted by the Legislature, but is nevertheless required to implement express authority.

A review of these four types of authority reveals that the Commission's powers are broader than those of a court.[40] The Commission may regulate not only by deciding specific cases brought before it, but also by investigating, on its own initiative, utility rates or conduct and affirmatively ordering those rates or conduct changed if it finds them to be unreasonable. However, despite the very broad nature of this authority, the Commission ultimately has only those powers the Legislature gives it. As stated by the Law Court: "[t]he Commission has no life except as life is given by the Legislature."[41]

The PUC's authority over public utilities is both comprehensive and constrained—a tension that results from public utility regulation being a purely legislative function.[42] The Commission's power over utilities is comprehensive because state control of utilities is intended to function as a surrogate for the competitive market by imposing the economic and operational efficiencies that, in theory, would otherwise result from free competition. The Commission, therefore, has authority over nearly every aspect of a utility's economic and operational life.

The Commission's authority is also constrained, however, because the PUC was created as an agent of the Legislature under the belief that a full-time agency could regulate more efficiently than the Legislature itself could.[43] Therefore, as the Legislature's

[40] The Commission also possesses rulemaking authority, as discussed in Chapter 4. Rulemaking is more a distinct method of exercising authority than it is a separate type of authority. *See infra* Chapter 4.

[41] *Auburn Water Dist. v. Pub. Utils. Comm'n*, 156 Me. 222, 226, 163 A.2d 743, 745 (1960).

[42] *Id.* at 225-29, 163 A.2d at 744-46 ("It is well understood that the regulation of public utilities is a function of the Legislature. The regulation of public utilities lies with the Legislature and not with the Executive or Judiciary.").

[43] *See In re Searsport Water Co.*, 118 Me. 382, 108 A. 452, 457 (1919) ("The general purpose of legislation of this nature, which has been enacted in many of the states, is, we think, to place the entire regulation and control of all [public utilities] in the hands of a board or commission which can investigate conditions, hear parties, and grant relief much more expeditiously and fairly than the Legislature itself.").

agent, the PUC enjoys only the powers the Legislature has delegated to it.[44] Although the PUC's regulatory powers are very broad, it has no common law authority and can exercise only statutory powers.[45] In other words, the PUC cannot exercise any authority over a utility unless that authority is either expressly granted by Maine's public utility statutes or can reasonably be implied from that express authority.[46]

As discussed in Chapter 3, the PUC conducts a certain amount of its business through the adjudicatory process. However, because of its status as an agent of the Legislature, the PUC's authority over public utilities is broader than that typically associated with a purely judicial body. For example, unlike courts, which are reactive in nature to cases that are filed, the PUC is able to initiate proceedings involving utility matters and not merely react to litigation brought by the utilities or their customers. Moreover, like the Legislature, the Commission may adopt rules of general applicability, instead of relying solely on adjudication. Finally, in order to maximize its efficacy as a surrogate for the open market, the Commission has the authority to set the rates and prescribe the conduct of the utilities subject to its jurisdiction. As a result, the PUC's powers can be described as both quasi-judicial[47] and quasi-legislative.[48]

It is important to note that the PUC's authority is limited by the fact that it regulates public utilities in their role as public utilities and not as employers or as entities that affect the physical environment. For example, the PUC does not have the authority to directly regulate other aspects of the utility's conduct, such as employee relations.[49] The PUC's sole purpose is to promote the objectives of utility regulation—"to ensure safe, reasonable and adequate service . . . [at rates that] are just and reasonable . . . ."[50] Thus, the PUC's authority is limited to utility "service" and utility "rates."[51]

To understand the precise nature of the PUC's authority and its limits, it is useful to review the powers the Legislature has given it over the state's public utilities.

---

[44] *See Poland Tel. Co. v. Pine Tree Tel. & Tel. Co.*, 218 A.2d 487, 489 (Me. 1966) ("The delegation of power, however, was not in 1913, and never has been, all inclusive but limited as the statutes have from time to time provided." (citing *Auburn Water Dist. v. Pub. Utils. Comm'n*, 156 Me. 22, 163 A.2d 743 (1960))).

[45] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 753 (Me. 1976) ("It is axiomatic that 'the powers of the Public Utilities Commission are derived wholly from statute.'" (quoting *Stoddard v. Pub. Utils. Comm'n*, 137 Me. 320, 323, 19 A.2d 427, 428 (1941))).

[46] *See id.* at 756 (explaining that, because Title 35-A does not include a statutory provision expressly stating that the Commission has all implied powers that may be necessary and proper to carry out its functions, the Maine Commission's implied powers are more limited than some other bodies').

[47] *See Dickinson v. Me. Pub. Serv. Co.*, 244 A.2d 549, 551 (Me. 1968).

[48] *See In re Guilford Water Co.'s Serv. Rates*, 118 Me. 367, 108 A. 446, 451 (1919).

[49] By way of illustrating these limits, 35-A M.R.S.A. § 115 (2010) allows the PUC to "inquire" into any violations by utilities of the state's laws, but allows it to "enforce" only those laws that relate to the utility's status as a public utility.

[50] 35-A M.R.S.A. § 101 (Supp. 2017).

[51] By way of illustrating these limits, 35-A M.R.S.A. § 115 (2010) allows the PUC to "inquire" into violations by utilities of the State's laws. That section, however, allows it to "enforce" only those laws that relate to the utility's status as a public utility.

A. Types of Authority

All of the Commission's express powers fall within one of three categories: prescriptive, investigative, or permissive. In addition to these express authorities, the Commission has implied authority to carry out any of its expressly defined powers.

1. Prescriptive Authority

Prescriptive authority is the most inclusive of the four types of authority discussed in this chapter. It consists of the PUC's ability to directly impose upon the utility the terms and conditions by which it must conduct its business as a public utility. By utilizing this power, the PUC can unilaterally establish the rates the utility may charge for its service or determine the norms to which a provider of utility service must conform.

a. Specific Prescriptive Authority

A portion of the PUC's prescriptive authority consists of small, discrete grants by the Legislature over specific aspects of utility activity. Thus, in appropriate circumstances, the Commission has the duty to prescribe a uniform system of accounting for all utilities;[52] specify the circumstances under which the utility may terminate utility service;[53] order the joint use of utility equipment and determine the compensation for such use;[54] and order the emergency interconnection and transportation of electricity between transmission and distribution utilities.[55]

b. General Prescriptive Authority

The PUC's discrete, specific powers are merely incidental to the general, plenary authority over rates and terms of service granted by 35-A M.R.S.A. §§ 310 and 1306 (2010).

Section 310 is invoked when a utility formally requests a change in its rates or terms of service. This statutory provision empowers the Commission to suspend the effectiveness of the utility's proposed rate or term for up to eight months in order to

[52] *Id.* § 501 (2010).
[53] *Id.* § 704 (Supp. 2017).
[54] *Id.* § 711.
[55] *Id.* § 3135(2) (2010).

investigate its reasonableness.[56] If the Commission believes the utility's proposed change is not reasonable, it must hold a public hearing, and may, before the suspension period expires, enter an order "as would be proper" under Section 1306.[57]

Section 1306, in turn, describes the powers of the PUC not only over changes proposed by the utility, but also over investigations initiated by the Commission's own motion or in response to certain customer complaints. This section invests the Commission with broad injunctive powers. With respect to unjust rates, Section 1306 states:

> If after a formal public hearing the commission finds that rates, tolls, charges, schedules . . . are unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of this Title, it may fix and order substituted just or reasonable rate or rates, tolls, charges, or schedules.[58]

With respect to unjust terms, conditions, practices, acts, or services, the statute provides as follows:

> If after a public hearing the commission finds that a term, condition, practice, act or service . . . is unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of this Title or if it finds that a service is inadequate, or that reasonable service cannot be obtained, the commission may by order establish or change terms, conditions, measurement, practice, service, or acts, as it finds to be just and reasonable.[59]

Therefore, under Section 1306, the PUC is given (1) the power to order into effect new rates of its own determination if it finds unreasonable any existing or proposed rates and (2) the power to examine any utility act, practice, or service and to replace unreasonable acts, practices or services with those it finds to be just and reasonable. Commenting on the breadth of this provision, the Commission itself stated that "Section 1306 is not merely a procedural provision," but one that "explicitly includes the authority to compel a utility to take actions . . . ."[60]

---

[56] *Id.* § 310(2).

[57] This notice and suspension power does not apply to municipal water utilities and consumer-owned transmission and distribution utilities, except in certain circumstances. *Id.* §§ 3502, 6104.

[58] *Id.* § 1306(1).

[59] *Id.* § 1306(2).

[60] *Me. Pub. Utils. Comm'n*, Investigation of Skowhegan OnLine Inc.'s Proposal for UNE Loops, No. 2002-704, Order on Reconsideration at 2 (Me. P.U.C. June 16, 2004), *aff'd, Verizon New England, Inc. v. Pub. Utils. Comm'n*, 2005 ME 64, 875 A.2d 118.

In some instances, the breadth and generality of the utility's obligations under Title 35-A functionally amounts to a broad grant of authority to the PUC. For example, the utility's generic obligation to "furnish safe, reasonable and adequate facilities and service"[61] allows the PUC considerable discretion to determine whether particular facilities or services are "reasonable and adequate" and then to mandate the facilities and service that it determines will satisfy this general standard.[62]

Moreover, Commission decisions in the last two decades concerning the scope of its power under Section 1306 make clear that the Commission does not view its injunctive powers as applying solely to utility acts that directly affect the utility consumer. In a series of decisions that involved the telecommunications industry, the Commission used Section 1306 to advance various state and federal telecommunications policies that favored certain types of competition or services. For example, the Commission used its Section 1306 authority to require a regulated telephone utility to make some of its network elements available to competitors[63] under the assumption that such availability would foster the growth of "broadband deployment and local competition" favored by Maine law.[64] Similarly, the Commission required a regulated telephone utility to allow its competitors to "have access to utility poles" in order to develop the telecommunications infrastructure necessary to support a competitive telecommunications industry[65] as favored by both state and federal policy.[66]

c. Limitations on Prescriptive Authority

Although the powers outlined in Section 1306 are admittedly very broad, this section does not provide a wholly unrestrained grant of authority. Instead, the PUC's authority is always subject to the terms under which the authority was delegated to it by the Legislature, as expressed in Title 35-A. Title 35-A limits the PUC's prescriptive authority in three essential ways.

First, the PUC's general authority cannot be exercised in a manner that would contravene a specific legislative directive. For example, 35-A M.R.S.A. § 313 (2010)

---

[61] 35-A M.R.S.A. § 301 (2010 & Supp. 2017).

[62] The Commission may, for example, use this general authority to order a telephone utility to provide free telephone directories for all exchanges within thirty miles of the customer's local exchange, even though it has no specific authority over directories. *See New England Tel. v. Pub. Utils. Comm'n*, 390 A.2d 8, 62 (Me. 1978).

[63] *Re Me. Pub. Utils. Comm'n*, Investigation of Skowhegan OnLine Inc.'s Proposal For UNE Loops, No. 2002-704, Order Part II at 15 (Me. P.U.C. Apr. 20, 2004).

[64] *Id.* The statute in issue in the case, 35-A M.R.S.A. § 7101 (1988 & Supp. 2003), merely acknowledged the desirability of broadband development.

[65] *Oxford Networks*, Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, No. 2005-486, Order at 1, 18, 20-21 (Me. P.U.C. Oct. 26, 2006).

[66] *See infra* Chapter 8.

permits sub-metering in campgrounds so long as the service is not provided to sub-metered users for longer than six consecutive months. Therefore, because of the interpretive adage that a "specific" statute typically trumps a "general" statute,[67] the Commission could not use its broad Section 1306 authority to determine that a reasonable facility or service requires sub-metering in campgrounds where the sub-metered user is served for nine consecutive months, thereby effectively abrogating the statute.

Second, as discussed in section 3, below, a specific permissive authority may restrict the Commission's ability to use its prescriptive authority to unilaterally require a utility to perform or undertake matters that are the subject of its permissive authority.

Finally, in order to be subject to PUC jurisdiction, the act or practice in question must relate to the provision of utility service or otherwise implicate some acknowledged policy governing the utility industry. Two Law Court decisions illustrate that the Commission's ability to regulate something as apparently unconnected to utility service as employment benefits is closely tied to the "statutory rule of reason"—that is to say, the Commission has the ability to regulate activities that have an *effect* on matters within the Commission's regulatory jurisdiction, even though those activities may not be *per se* subject to Commission regulation.

In 1980, the Commission ordered Central Maine Power Company ("CMP") to eliminate its employee discount for electricity, based on the questionable economics of the discount, which arguably increased power usage by employees. This increased power usage was viewed as inconsistent with the goals of the Public Utilities Regulatory Policies Act ("PURPA"), a federal law enacted in November 1978, which required increased conservation of electric energy.[68] The Law Court upheld the Commission's determination ("the 1981 CMP case"),[69] relying on the requirements of the Electric Rate Reform Act,[70] which, at that time, required the Commission to "order electric public utilities to submit . . . programs for implementing energy conservation."[71] Based on evidence that CMP's employees used more electricity than other residential customers because of the discount, the Law Court found the discount to be inconsistent with the conservation objectives of the Electric Rate Reform Act.

---

[67] *Butler v. Killoran*, 1998 ME 147, ¶ 11, 714 A.2d 129 ("[A] statute dealing with a subject specifically prevails over another statute dealing with the same subject generally . . . unless it appears that the Legislature intended to make the general statute controlling." (quotation marks omitted)).

[68] *Cent. Me. Power Co.*, Proposed Increase in Rates, No. 80-025, Order at 61-65 (Me. P.U.C. Oct. 31, 1980).

[69] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 433 A.2d 331, 334 (Me. 1981).

[70] 35 M.R.S.A. § 91 *et seq.* (1977) (current version at 35-A M.R.S.A. §§ 3151-3152 (2010 & Supp. 2017)).

[71] 35 M.R.S.A. § 93 (1977). This statute was later re-codified as 35-A M.R.S.A. § 3153, which itself was later repealed by P.L. 1987, c. 451, § 1. Energy conservation programs are now administered by the Efficiency Maine Trust. *See* 35-A M.R.S.A. § 10103 (2010 & Supp. 2017). See Chapter 11 for further discussion of the Efficiency Maine Trust.

In contrast, only two years earlier, the Court had overturned the PUC's disallowance in rates of the same employee discount (the "1979 CMP case").[72] The principal difference? In the 1979 CMP case, the PUC found that the discount was not a reasonable form of compensation, but did not ground the disallowance in any statutory mandate to promote conservation or any other statutory objective.[73] Thus the Law Court found that the record did not include substantial evidence to support the conclusion that the employee discount promoted electricity consumption[74] and, therefore, the PUC had not established that the discount was an "excessive, or unwarranted" form of compensation.[75] By contrast, in the 1981 CMP case, the Law Court found the record did contain substantial evidence to justify the Commission's conclusion that the discount promoted electricity consumption.[76] Because of the additional findings by the Commission, the Law Court ruled that the discount was inconsistent with the goals of the Electric Rate Reform Act, which rendered the discount both "uneconomical" and "unwarranted" and therefore subject to PUC jurisdiction.[77] These two cases demonstrate how the Legislature's addition of a specific objective, such as conservation, to the goals of utility regulation can bring an otherwise unregulated utility practice within the Commission's regulatory ambit.

2. Investigative Authority

Similar to the Commission's prescriptive authority, its investigative authority is an expression of its quasi-judicial character. Unlike a court, which cannot act until actually presented with litigation, the PUC—on its own initiative—may inquire into the affairs of the State's public utilities in as much detail as it wishes or commence litigation.

a. General Investigative Authority

The broadest grants of this authority are contained in 35-A M.R.S.A. § 112 (Supp. 2017) and § 1303 (2010). Section 112 allows the Commission to "inquire into the management of the business of all public utilities" and to require the production of

[72] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153 (Me. 1979).
[73] The Electric Rate Reform Act ("ERRA") became effective in October 1977, a few months before CMP filed the proceeding that led to the 1979 CMP case. Although the ERRA was in effect during the PUC's processing of the 1979 CMP case, the PUC did not rely upon it in its decision.
[74] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 176 n.37 (Me. 1979).
[75] *Id.* at 178 (quoting *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 153 Me. 228, 244, 136 A.2d 726, 736 (1957)).
[76] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 433 A.2d 331, 336-37 (Me. 1981).
[77] *Id.* at 337.

all documents of a public utility "in relation to its business and affairs."[78] Section 1303 allows the Commission to investigate "*any matter* relating to a public utility."[79] The Law Court has held that the Commission's investigatory authority under these sections is as broad as the language suggests and the Commission's ability to investigate is not constrained by its power to regulate.[80] In other words, the Commission may investigate any matter relating to a public utility's business even though it has no direct authority to regulate or control the particular matter. The power to inquire into all aspects of utility business may be analogous to a civil litigant's ability, under Maine Rule of Civil Procedure 26(b)(1), to discover matters that are inadmissible if the information sought is "reasonably calculated to lead to the discovery of admissible evidence." Here, even if the subject of the investigation is not within the scope of the Commission's regulatory authority, the Commission may nevertheless investigate because it may lead to the disclosure of a matter that falls within the Commission's regulatory authority.

b. Specific Investigative Authority

In addition to the broad powers granted the PUC in Sections 112 and 1303, the PUC has more specific and detailed investigatory authority. For example, Section 113 allows the Commission to conduct a management audit of the operations of any public utility to determine the adequacy and efficiency of its overall operations.[81] Because this audit need not be performed by the Commission itself, but may be done by an outside auditor,[82] this section authorizes the Commission to require the utility to pay the costs of this audit.[83]

Under 35-A M.R.S.A. § 115 the Commission may also inquire into "any neglect or violation of state laws by a public utility." Although this authority is not limited to laws that are related solely to the utility's status as a utility, the Commission has no direct

[78] 35-A M.R.S.A. § 112 (Supp. 2017).
[79] 35-A M.R.S.A. § 1303 (2010) (emphasis added).
[80] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 395 A.2d 414, 427, 430 (Me. 1978).
[81] 35-A M.R.S.A. § 113 (2010 & Supp. 2017).
[82] *Id.* § 113(2).
[83] *Id.* § 113(2)(B). Whether paid for by the Commission or by the utility, the statute was originally drafted to require audit costs to be recovered from ratepayers. *Id.* § 113(3). In 2018, the Legislature was presented with a proposal to allow such costs to be passed through to utility shareholders in certain instances where the Commission finds the utility acted "imprudently." L.D. 1729 (128th Legis. 2018). Section 113 abrogated a Law Court ruling that the Commission did not have statutory authority to order a management audit at the utility's expense. *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 58 (Me. 1978).

enforcement authority for violations of other state laws but must instead report such violations to Maine's attorney general.[84]

In addition, the PUC has access to the books and records of any utility affiliate[85] that relate, directly or indirectly, to its transactions with the utility,[86] even if that affiliate is not itself a public utility and therefore is not subject to the Commission's investigatory powers under Title 35-A.[87]

Similarly, 35-A M.R.S.A. § 713 (2010) gives the Commission the authority to examine whether an unregulated business activity undertaken by a public utility or its affiliate has "an unfair advantage in any competitive market as a result of its regulated status or its affiliation with a regulated utility." The Commission's ability to inquire into matters collateral to the actual provision of utility service is intended to ensure compliance with certain legislative policies, such as the avoidance of any unfair business advantage conferred upon a utility affiliate because of that affiliation.

3. Permissive Authority

a. Nature of Authority

The Commission's permissive authority consists of the authority to ratify or reject an action proposed by the utility. In all matters subject to the Commission's permissive authority, the authority is primarily reactive—the Commission may do only one of three things in response to an action proposed by the utility: approve, approve subject to conditions, or disapprove. The following utility-proposed actions under Title 35-A are subject to this permissive authority:

(1) agreements between a utility and any affiliate;[88]
(2) corporate reorganizations;[89]
(3) issuance of stock, bonds, or long-term debt;[90]

---

[84] The Commission has the authority to impose administrative penalties (up to $500,000 or 5% of the utility's gross intrastate revenues, whichever amount is lower) for violations of Title 35-A or the Commission's rules or orders. 35-A M.R.S.A. § 1508-A(A) (2010 & Supp. 2017). The enforcement of these penalties must be prosecuted by the state attorney general. *Id.* § 115(3)(C) (2010).

[85] In general, with the exception of providers of last resort service, a utility affiliate (an "affiliated interest," to use the verbiage of the statute) is any entity that (1) owns 10% or more of a utility's voting securities, or (2) has 10% or more of its voting securities owned by a public utility, or (3) is any entity 10% or more whose voting securities are owned by anyone who also owns 10% or more of the voting securities of a public utility. 35-A M.R.S.A. § 707(1)(A) (Supp. 2015); *see also infra* Chapter 7.

[86] 35-A M.R.S.A. § 707(2) (2010 & Supp. 2017).

[87] *See id.* § 115 (2010).

[88] *Id.* § 707(3) (2010 & Supp. 2017).

[89] *Id.* § 708(2).

(4) change of capital structure;[91]
(5) entry into a capital lease;[92]
(6) transfer or encumbrance of its utility property;[93]
(7) merger with another public utility;[94]
(8) transfer of stock to another utility;[95]
(9) abandonment of utility property or termination of utility service;[96]
(10) furnishing utility service in an area where another utility is serving or is authorized to serve;[97]
(11) construction of a transmission line;[98]
(12) construction of a transmission project;[99]
(13) purchase of a transmission line;[100]
(14) entering into an agreement with respect to a transmission line;[101]
(15) taking of property by eminent domain by a transmission and distribution utility;[102] and
(16) taking of property by eminent domain by a natural gas utility.[103]

b. Imposition of Conditions

The Commission may, in exercising its permissive authority, attach conditions to its approval of an action. In some instances, such as approval of utility corporate reorganizations under Section 708,[104] the specific conditions are set forth in the statute. In other instances, the conditions are simply the product of the Commission's inherent authority to advance the objectives of Title 35-A, as explained below. For example, when utilizing this authority, the Commission has: (1) conditioned the approval of transactions between a utility and its affiliate under Section 707 by limiting the amount

---

[90] *Id.* § 902.
[91] *Id.* § 910 (2010).
[92] *Id.* § 911.
[93] *Id.* § 1101(1)(A).
[94] *Id.* § 1101(1)(B).
[95] *Id.* § 1103 (2010 & Supp. 2017).
[96] *Id.* § 1104 (2010).
[97] *Id.* § 2102 (2010 & Supp. 2017).
[98] *Id.* § 3132.
[99] *Id.* § 3132-A (Supp. 2017).
[100] *Id.* § 3133 (2010 & Supp. 2017).
[101] *Id.* § 3133-A (2010).
[102] *Id.* § 3136 (2010 & Supp. 2017).
[103] *Id.* § 4710.
[104] *See infra* Chapter 7.B.

that the utility may pay for the services provided by the affiliate;[105] (2) conditioned its approval of an easement taken through eminent domain upon the utility's reasonable satisfaction of the land owners' concerns;[106] (3) conditioned its approval of a utility's construction of a transmission line upon the formulation of terms governing the rate recovery of the utility's investment in that line;[107] and (4) conditioned the transfer of a utility's stock upon the acquiring utility filing plans to assure the provision of quality service.[108]

Often, the Commission's approval is subject to only a very general "public interest" standard, whether explicit or implicit.[109] The conditions imposed under an explicit or implicit public interest standard are incidental to the Commission's broad authority to assure that the proposed activities for which its approval is sought will advance the general goals of utility regulation. In this context, the Law Court has defined the "public interest" as follows:

> [T]he "public interest" is shown by Title 35 [now 35-A] to encompass those facets of the Commission's regulatory functions that are directed to ensuring that the public receives adequate service, delivered in a safe and reliable manner, at a charge just and reasonable in relation to the public utility's costs of providing the service.[110]

In other words, the PUC's authority to impose conditions to its approval is not without limits: the conditions must have some basis in the Commission's overall statutory objectives. In companion decisions issued in 2014 and 2016, the Law Court addressed the question of the PUC's authority to impose conditions on a utility reorganization.[111] As background, Emera Maine had sought the Commission's approval for a reorganization arising out of Emera Inc.'s proposed acquisition of an interest in power generation companies.[112] The proposed transaction was controversial because, under the

---

[105] *See Cent. Me. Power Co.*, Request for Approval of Reorganization and of Affiliated Interest Transactions to Create Energy East Shared Services Corp., No. 2003-321, Order Approving Stipulation at 3-4 (Me. P.U.C. July 24, 2003).

[106] *Cent. Me. Power Co.*, Request for Approval of Location of Easements Taken by Eminent Domain Over Four Parcels of Land in York County, No. 2004-26, Order (Me. P.U.C. Feb. 13, 2004).

[107] *Bangor Hydro-Elec. Co.*, Petition for Finding Public Convenience and Necessity to Construct a 345 kV Transmission Line, No. 2004-771, Order Approving Stipulation (Me. P.U.C. Aug. 22, 2005).

[108] *See Cmty. Serv. Tel. Co.*, Implementation of 2002 Amendments to Chapter 204, No. 2003-491, Order Approving Increase to Local Rates for BSCA Expansions and BSCA Calculations (Subject to Tracking) (Me. P.U.C. Nov. 14, 2003).

[109] *See, e.g.*, 35-A M.R.S.A. §§ 707(3), 1101, 1103, 1104(2), 3136 (2010 & Supp. 2017).

[110] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 414 A.2d 1217, 1224 (Me. 1980).

[111] *Houlton Water Co. v. Pub. Utils. Comm'n*, 2014 ME 38, 87 A.3d 749 ("*Houlton I*"); *Houlton Water Co. v. Pub. Utils. Comm'n*, 2016 ME 168, 150 A.3d 1284 ("*Houlton II*").

[112] *See* 2014 ME 38, ¶ 7.

Restructuring Act, transmission and distribution utilities like Emera Maine may not have a financial interest in generation;[113] the intervenors in turn argued that the transaction would result in Emera Maine gaining a financial interest in generation assets located in Maine. The Commission ultimately approved the proposed transaction, and, in doing so, imposed dozens of extensive conditions on Emera Maine, Emera Inc., and the new proposed affiliates of Emera Maine, to mitigate the harmful effects of the transaction[114]

On appeal, the intervenors argued, among other things, "that the Commission did not have the authority to impose the more than fifty separate conditions, many of which appear to 're-regulate' the unregulated generation of electricity."[115] The Law Court in *Houlton I* declined to make such a finding, however, and it remanded the case on other grounds.[116]

On remand, the Commission again approved the transaction subject to numerous conditions, and the intervenors again appealed to the Law Court, pressing the issue of the conditions.[117] In this second appeal, in *Houlton II*, the Law Court reversed the Commission's decision, ruling that the Commission exceeded its statutory authority "when, in an effort to control the statutorily harmful effects of the transaction, it imposed conditions that would regulate [a generator] beyond what the Restructuring Act allows."[118] More specifically, the court found that PUC had approved a utility reorganization, subject to conditions, despite its finding that the reorganization will result in a Maine transmission and distribution utility having a prohibited "financial interest" in generation or generation-related assets. The Law Court described the Commission as having taken "the view that although Emera Maine would have a financial interest in generation that would be likely to create favoritism, that interest would be 'adequately addressed through § 708 conditions,' thus falling short of creating any unlawful incentives."[119] In other words, the court's finding makes clear that the Commission may not use its authority to impose conditions to permit a utility to engage in an activity that other statutory prohibitions are meant to prevent.

---

[113] 35-A M.R.S.A. § 3204(5) (2013) ("Ownership of generation prohibited. Except as otherwise permitted under this chapter, on or after March 1, 2000, an investor-owned transmission and distribution utility may not own, have a financial interest in or otherwise control generation or generation-related assets.").
[114] 2014 ME 38, ¶¶ 21-22.
[115] *Id.* ¶ 38.
[116] *Id.*
[117] *Houlton Water Co. v. Pub. Utils. Comm'n*, 2016 ME 168, ¶ 2, 150 A.3d 1284, 1285 ("*Houlton II*").
[118] *Id.* ¶ 2.
[119] *Id.* ¶ 12.

c. Permissive Authority as a Limit to Prescriptive Authority

Less obvious is the extent to which specific permissive authority accorded the Commission may serve to limit the Commission's broad prescriptive authority. This issue is illustrated by the Law Court's reversal of the Commission's determination in the 1980s that Maine Public Service Company ("MPS") should be acquired by Central Maine Power Company ("CMP").[120] In that case, following an investigation into the matter, the Commission concluded that the merger of MPS into CMP would be in the public interest and stated that it would "give serious consideration to possible changes in MPS's rates if management fail[ed] to pursue the merger."[121] On appeal, the Law Court construed this as an order to MPS to pursue the merger with CMP. The Court ultimately rejected the Commission's order, holding that the Commission could not use its ratemaking authority to impose conditions on an activity that it did not have the power to order directly.[122] Noting that the Commission's powers were derived wholly from statute, the Law Court found that the only explicit authority given to the Commission with respect to mergers was the permissive power to *approve* them—not the ability to *order* a utility to pursue a merger.[123] In the absence of any specific statutory authority empowering the Commission to order mergers, the court found that the Commission's order exceeded its ratemaking authority. Thus, when the Commission has been given the authority only to approve a utility action, it does not, at least through its ratemaking authority, have the more comprehensive prescriptive power to compel the utility to take that action.

It is important to note that this decision does not explicitly address the issue of whether the Commission could have obtained the same result using its more general authority to regulate utility acts, practices, and service under Section 1306.[124] However, the court's decision appears to reach this conclusion implicitly. In finding that the Commission did not have authority to order the merger and could not do so under its ratemaking authority, the court stated:

---

[120] *Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1223 (Me. 1987).

[121] *Re Me. Pub. Serv. Co.*, 75 P.U.R.4th 295, 310 (Me. 1986).

[122] *Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1226 (Me. 1987) ("[T]he Commission may not use its rate setting authority to attach conditions to the rates it sets, if it could not have attached those conditions in reliance on statutory authority distinct from its rate setting authority." (citing *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 74 (Me. 1976))).

[123] *Id.*

[124] *See* 35-A M.R.S.A. § 1306(2) (2010) ("If . . . the Commission finds that a term, condition, practice, act or service . . . is unjust, unreasonable, insufficient, unjustly discriminatory . . . the commission may by order establish or change terms, conditions, measurement, practice, service or acts, as it finds to be just and reasonable."); *see also supra* Chapter 2.A.1.b.

> 35 M.R.S.A. §§ 104 and 211 . . . [the current versions of which are codified, respectively, as 35-A M.R.S.A. §§ 708 and 1103 (2010 & Supp. 2015)], which treat reorganizations, mergers, and acquisitions[,] require that the Commission consent and authorize proposed transactions, but do not confer power to mandate such transactions.[125]

This language suggests that if the Legislature has given the Commission only permissive authority over a particular type of utility activity, that permissive authority is deemed to constitute the PUC's entire authority with respect to that activity. In such circumstances when only permissive authority is granted to the Commission, the Commission may approve of utility action, but cannot mandate utility action. Under this holding, it would appear that the Commission cannot use its very broad prescriptive authority over utility acts, practices, or service to compel a utility to engage in a transaction when the Legislature has given the Commission only permissive authority.

d. Case Study Regarding the Breadth of the Commission's Permissive Authority: Transmission Line Approval Process

Although the Commission's authority in certain instances is permissive in nature, some of these instances nonetheless confer upon the Commission substantial regulatory authority over the activities of public utilities. The Commission's authority to approve or reject an electric transmission line is a good example. Before constructing or rebuilding a transmission line with a capacity of 69 kV or more, a utility must obtain a certificate of public convenience and necessity ("CPCN") from the Commission.[126] Although this description suggests that the Commission's authority over transmission lines is limited merely to voting up or down on the proposal, the reality is more complex. In fact, the CPCN process imposes very rigorous standards that the utility must satisfy for approval, which necessarily informs the utility's decision-making process.

The authorizing statute generally states that, to issue the requested CPCN, the Commission must find that a "public need exists" for the line.[127] The Commission rule in turn equates public need with a determination that "ratepayers will benefit by the proposed transmission line."[128] The statute then goes on to add several additional factors that must be considered when determining need:

---

[125] *Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1226 (Me. 1987).
[126] 35-A M.R.S.A. § 3132 (2010 & Supp. 2017).
[127] *Id.* § 3132(6) (2010 & Supp. 2017).
[128] 65-407 C.M.R. ch. 330, § 9(B) (2012).

> In determining public need, the commission shall, at a minimum, take into account economics, reliability, public health and safety, scenic, historic and recreational values, state renewable energy generation goals, the proximity of the proposed transmission line to inhabited dwellings and alternatives to construction of the transmission line, including energy conservation, distributed generation or load management.[129]

In addition to the foregoing, a determination of need under the statute requires an evaluation of alternative routes before the Commission can approve a transmission line in a particular location. In particular, the statute requires every utility seeking approval of a new transmission line to include in its petition:

> all studies, reports, or other data relied upon in the investigation of alternate routes and shall clearly state the process by which Petitioner selected the proposed route, including comparison with alternative routes that are environmentally, technically and economically practical.[130]

This is not only a regulatory requirement; it is a statutory one. Finally, Section 3132(2-C) requires the utility to include with its petition the "results of an investigation by an independent 3rd party . . . of nontransmission alternatives to construction of the proposed transmission line."[131] If the Commission determines that a non-transmission alternative better addresses the public need, it may decide not to issue a CPCN for a proposed transmission line.

Further, the Commission's permissive authority is not limited to approval or disapproval per se. Instead, the Commission "may approve or disapprove all *or portions of* a proposed transmission line *and shall make such orders regarding its character, size, installation and maintenance as are necessary*."[132]

The effect of the particular standards for the approval of the CPCN for transmission lines is to compel the utility to study the various other methods by which the need the line is supposed to address may be satisfied—and even to consider the possibility or approval or disapproval of specific portions of the transmission line separately from others. Even though the Commission's apparent authority is permissive, it is nevertheless able to exert a substantial degree of control over the utility's planning process with these ostensibly procedural requirements.

---

[129] 35-A M.R.S.A. § 3132(6) (2010 & Supp. 2017).
[130] 65-407 C.M.R. ch. 330, § 6(I) (2012).
[131] 35-A M.R.S.A. § 3132(2-D) (Supp. 2017).
[132] *Id.* § 3132(5) (2010 & Supp. 2017) (emphases added).

From a timing standpoint, the Commission must issue its order with regard to a proposed transmission line within six months "after the petition is filed unless this period is extended either by agreement of all the parties or by the [C]ommission upon its determination that the party seeking the extension would, because of circumstances beyond that party's control, be unreasonably disadvantaged unless the extension were granted."[133] To aid the Commission in its processing of its CPCN request, the utility must pay a filing fee of up to 0.04% of the cost to construct, rebuild, or relocate the line[134] and include as part of its original petition the following information:[135]

(1) detailed maps of the corridor the proposed line will occupy;
(2) detailed one-line system diagrams of all affected transmission lines and facilities;
(3) a description of the proposed line, including height of line, the number, type and class of poles, towers, and conductors, and all associated safety features;
(4) a description of the proposed corridor specifying tree-trimming requirements, locations of high degree of slope, and those portions where the utility has already required the right of way;[136]
(5) a description of the effects of the proposed line on health and safety, scenic, historic, recreational, and environmental values, and of the proximity to inhabited dwellings;
(6) detailed cost estimates;
(7) costs incurred to date;
(8) a description of changes in system operations that will be caused by the proposed line and associated cost estimates;
(9) a description of the alternative routes that the utility investigated, including all studies, reports, or other data relied upon;
(10) a statement of what alternatives, including conservation, distributed generation, or load management, to the proposed transmission line were

[133] *Id.* § 3132(2).

[134] *Id.* § 3132(9). If the line is a "minor transmission construction project" under 35-A M.R.S.A. § 3132(3-A) (2010 & Supp. 2017) and the Commission requires the filing of a CPCN petition, the fee is 0.02% of the estimated construction cost. In addition, when a petitioner pays a filing fee under Chapter 330, the petitioner must also pay to the Office of Public Advocate 0.01% of the estimated cost to construct, rebuild, or relocate the transmission line. 65-407 C.M.R. ch. 330, § 5(B) (2012). Any portion of Commission or OPA fees not expended in processing of the CPCN petition shall be returned to the petitioner. 35-A M.R.S.A. § 3132(9) (2010 & Supp. 2017).

[135] 65-407 C.M.R. ch. 330, §§ 6-7 (2012).

[136] The utility has the right to condemn private property for transmission right of way; that authority may not, however, be exercised until after the utility has acquired the CPCN for the line. 35-A M.R.S.A. § 3136(4) (2010).

investigated, including all studies, reports, or other data relied upon in the investigation of such alternatives, together with a statement of the purposes and benefits of the proposed project and whether cost-benefit analyses have been performed; and

(11) an analysis of the effects of the proposed line on system reliability.

In its petition for the CPCN, the utility must supply this information in order for the Commission to process the request.[137]

The rigor with which the Commission evaluates the need for the proposed line should not be underestimated. The Commission has, for example, rejected a utility's request to construct a 138 kV transmission line to improve the reliability of its system because the Commission determined that the utility's current system resources were sufficient to meet its load.[138]

4. Implied Authority

In addition to its express authority, the Commission also has "all implied and inherent powers . . . which are necessary and proper to execute faithfully its express powers and functions."[139] This implied authority is an adjunct to the authority expressly conferred upon the Commission by statute and may not be used to contradict or substantially expand that express authority.[140] The limits on the Commission's implied power are illustrated by a comparison of a case in which the Law Court found that the Commission could not use its implied authority to order rate surcharges or refunds (the "*NET* case")[141] with a case in which the court found that it *could* use its implied authority to do so (the "*Public Advocate* case")[142].

In the *NET* case, the Commission, realizing that it could not finish a utility's rate case within the required eight months, allowed a rate change to become effective subject to a refund or surcharge if the Commission were to subsequently determine that the allowed increase was too high or too low.[143] In sustaining the utility's appeal and remanding the case, the Law Court held that the PUC could not use its implied powers to attach these types of condition to a rate increase because the conditions were

---

[137] 65-407 C.M.R. ch. 330, § 3(A) (2012).

[138] *Me. Pub. Serv. Co.*, Request to Construct Transmission Line of 100 or More Kilovolts from Limestone, Maine to Canadian Border Near Hamlin, Maine, No. 2004-538, Order-Phase I (Me. P.U.C. Oct. 21, 2005).

[139] 35-A M.R.S.A. § 104 (2010).

[140] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 756 (Me. 1976).

[141] *Id.*

[142] *Pub. Advocate v. Pub. Utils. Comm'n*, 1998 ME 218, 718 A.2d 201.

[143] *New England Tel. & Tel. Co.*, 362 A.2d at 755-56.

inconsistent with its statutory authority over such increases.[144] Reviewing the statutory authority of the Commission, the court noted that the sole power the Legislature gave the Commission in order to prevent consumers from paying unreasonable rates was the power to suspend the proposed rates for eight months, during which time the Commission could investigate the utility's rates and then order just and reasonable rates into effect.[145] With regard to the Commission's order allowing a subsequent refund for rates later found to be too high, the court found that the Legislature had specifically considered the subject of refunds, but the Count found that the Legislature chose to withhold that power from the Commission for utilities not engaged in the transportation of freight.[146] The Commission's implied powers could not, the Court held, be used to create an authority—in this case, refunds—that the Legislature had deliberately withheld.[147]

By contrast, in the *Public Advocate* case, the Law Court upheld the Commission's imposition of a surcharge or refund to offset the effects of the Commission's basic service calling area ("BSCA") rule applicable to telephone utilities.[148] Although this rule, when implemented, was certain to affect telephone company revenues, the extent of that effect could not be predicted.[149] The Commission therefore allowed affected companies to establish a deferral account in which they would record the actual costs imposed by this rule.[150] The amounts in these deferral accounts would then be placed into rates as a surcharge (if negative) or as a refund (if positive).[151] The purpose of this surcharge/refund mechanism was to keep the adoption of the BSCA rule revenue-neutral and to avoid the need for any new determination of what revenues were just and reasonable.[152] On appeal of this decision, the Law Court found that the Commission's surcharge/refund device was within the scope of its implied powers because it was intended only to preserve the utility's right to maintain revenues previously found by the Commission to be just and reasonable against a cost imposed by Commission action.[153] By preserving the effect of the Commission's prior revenue determination, the surcharge/refund mechanism simply advanced the purposes of the Commission's express statutory ratemaking authority.[154] Unlike in the *NET* case, the PUC in the *Public*

[144] *Id.* at 753-54.
[145] *Id.* at 754.
[146] *Id.* at 755-56.
[147] *Id.*
[148] *Pub. Advocate v. Pub. Utils. Comm'n*, 1998 ME 218, ¶ 2, 718 A.2d 201.
[149] *Id.* ¶ 3.
[150] *Id.*
[151] *Id.*
[152] *Id.* ¶¶ 3, 13.
[153] *Id.* ¶¶ 23, 24.
[154] *See id.* ¶¶ 14, 22.

Advocate case was not attempting to use the mechanism to revise rates retroactively,[155] and was therefore allowed.

B. The Limits of Utility Management Prerogative

The Law Court has occasionally noted that regulation should not intrude upon matters reserved for a utility's management—i.e., management prerogative.[156] If the distinction between matters left to management and matters subject to regulation is intended to suggest the existence of some area of utility activity that is immune from Commission's oversight, it is misleading. As discussed above, the Commission has broad prescriptive authority over many matters that, in an unregulated business, would be considered the prerogative of management; however, simply labeling an activity as "management prerogative" does not release it from the Commission's regulatory control. Instead, the distinction is better viewed as judicial shorthand for the requirement that, in order for the Commission to second-guess utility management, the Commission's determination must be based upon some amount of evidence and be consistent with the Commission's statutory authority.

This chapter has already described how the Commission's ability to control utility conduct must be based on the Legislature's determination, expressed in statute, of the type of activity that may be controlled—and not on the Commission's unrestricted judgment. For example, under the Commission's ratemaking authority, the Commission may approve, but not order, a utility's merger with another utility.[157] Similarly, the Commission may not disallow in rates the cost of an employee discount unless that disallowance advances some legislatively-determined objective of utility regulation.[158] Where control of certain utility activities has not been granted to the Commission, those activities may be considered the prerogatives of utility management.

In choosing and implementing a course of conduct, utility management must base its actions solely upon conclusions that, in its independent judgment, represent the best method for achieving its commercial objectives. The Commission, on the other hand, is permitted to impose a course of action on a utility only after it has (a) conducted a hearing on the matters relevant to that conduct,[159] and (b) adduced at the hearing the factual record necessary to support that decision.[160] For example, the Commission's disallowance for ratemaking purposes of some promotional expenses, but not others, was

---

[155] *Id.* ¶¶ 12-14.
[156] *See, e.g.*, *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 153 Me. 228, 136 A.2d 726 (1957).
[157] *Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1226 (Me. 1987).
[158] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 433 A.2d 331, 337 (Me. 1981).
[159] 35-A M.R.S.A. § 1306(1)-(2) (2010).
[160] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 56 (Me. 1978) (upholding Commission findings of fact because they were supported by substantial evidence).

rejected by the Law Court on appeal as an intrusion into those activities reserved to management. This decision was grounded in the Law Court's finding that the Commission did not have the record evidence to support the disallowance of expenses made by utility management.[161] Similarly, the court has suggested that salaries and executive compensation are generally reserved to the judgment of management.[162] The court has nevertheless sustained the Commission's finding that a utility president's salary was unreasonable when there was evidentiary support for that finding.[163] Thus, even if the Commission's judgment is as good as, or even better than, the judgment of management, the Commission's judgment may not usurp management's unless supported by a properly compiled evidentiary record.[164]

[161] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 153 Me. 228, 243-46, 136 A.2d 726, 736-37 (1957).

[162] *Id.* at 244, 136 A.2d at 736 ("Th[e] matter of salaries . . . calls for the exercise of judgment on the part of the management of the company. Good faith on its part is to be presumed." (quoting *Pet'n of New England Tel. & Tel. Co.*, 66 A.2d 135, 145 (Vt. 1949))); *see also Berry v. Pub. Utils. Comm'n*, 394 A.2d 790, 794 (Me. 1978) (finding that, in investigating expenses of president of five small water utilities, Commission "intru[ded] into areas largely reserved for independent business judgment, such as the establishment of salaries.").

[163] *Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 631 A.2d 57, 69-70 (Me. 1993) (upholding Commission finding of excessive total compensation for utility's president where that decision that was based upon, among other things, a study indicating that average salary of chief executives of other independent telephone companies in Maine was less than half that earned by the subject utility's president).

[164] In some limited circumstances, the adjudicatory apparatus may be used to management's disadvantage. In *Casco Bay Lines v. Public Utilities Commission*, the Court upheld the Commission's disallowance in rates of pension and life insurance expenses for the owner-officers of a small utility on the ground that the utility had not met its burden of showing that those expenses were reasonable. *See* 390 A.2d 483, 493 (Me. 1978). Although the utility in a rate proceeding has the burden of proving the reasonableness of its rates, this burden will typically come into play only when a particular expense is challenged. *See* 35-A M.R.S.A. § 1314(2) (2010). *Casco Bay Lines* is somewhat unique because it involved officers who were also owners. Because the potential for abusing employee benefits is especially great when the employees are also the owners, 390 A.2d at 493, the need for the utility to demonstrate its reasonableness is particularly important.

Chapter 3

Adjudicatory Proceedings

This chapter reviews those practices and requirements that are unique to the Commission in the conduct of its formal hearings, which are referred to by the technical term "adjudicatory proceedings." A PUC adjudicatory proceeding is defined as "any proceeding before the Commission in which the legal rights, duties, or privileges of a specific person or persons are required by Constitutional law or statute to be determined after an opportunity for hearing."[165] This chapter also summarizes the circumstances under which a hearing is required by either the Constitution or statute, and concludes that most proceedings before the Commission require an opportunity for a hearing under at least one of these standards.

This chapter then examines the procedural requirements unique to commission practice in adjudicatory proceedings, including mandatory and discretionary intervention and the prefiling requirement, as well as more complex matters such as the assignment of the burden of proof, which appears to be on the utility in all instances. This chapter also reviews the Commission's somewhat individualized *ex parte* rule, which is shown to be more inclusive than the general *ex parte* rule applicable to other state

[165] 65-407 C.M.R. ch. 110, § 2(A) (2012).

agencies. Moreover, this chapter provides a summary of the Commission's ability to issue protective orders preventing the public disclosure of certain types of information filed with it while following the general requirement that all information in the Commission's possession is available for public review. Finally, this chapter examines the role of the Commission staff in light of the Commission's decision not to use its staff in an advocacy capacity and reviews certain procedural and substantive issues to which this practice has given rise.

The chapter concludes with a brief review of the standards for judicial review of Commission decisions. Although the Law Court typically defers to the Commission on matters within the scope of its expertise, it accords the Commission no deference in matters of law.

A substantial amount of the Commission's regulation is accomplished through adjudication. The Commission's adjudicatory proceedings are quasi-judicial in nature, somewhat resembling the civil litigation conducted in state courts. As noted previously, however, the Commission's powers are more extensive than those of a civil court, which can function only when litigating parties ask it to.[166] Moreover, the Commission's proceedings often affect the rights and responsibilities of a broad segment of the public and not merely those of the litigants. Consequently, certain of the Commission's procedures for adjudication reflect those characteristics and, therefore, differ from those of the typical judicial proceeding.

This chapter does not examine all of the procedures associated with the Commission's adjudicatory proceedings, as set out in the Commission's Rules of Practice and Procedure.[167] Moreover, it is not a "how-to" manual. Instead, this chapter examines only those procedural issues unique to the PUC.

A. Office of the Public Advocate

The Office of the Public Advocate ("OPA") is a key player in most adjudicatory proceedings at the Commission. The public advocate is appointed by the governor for a four-year term, subject to confirmation by the Legislature.[168] The public advocate may hire staff, including attorneys and other professionals.[169]

---

[166] *See supra* Chapter 2.
[167] 65-407 C.M.R. ch. 110 (2012).
[168] 35-A M.R.S.A. § 1701(1-A) (2010 & Supp. 2017).
[169] *Id.* § 1701(2).

The OPA is tasked with representing ratepayer interests before the Commission.[170] When ratepayer interests differ, the OPA must give priority to ratepayer interests in the following order: low-income consumers, residential consumers, small business consumers, and other consumers whose interests the public advocate finds to be inadequately represented.[171] In furtherance of its mission, the OPA may intervene in any Commission proceeding, petition the Commission to initiate a proceeding, and investigate customer complaints.[172] Utilities are required to provide the OPA with copies of all documents filed with the Commission.[173]

B. Defining Adjudicatory Proceedings

A key distinction in Commission practice is between adjudicatory and non-adjudicatory proceedings. If a proceeding is deemed to be adjudicatory, it will be conducted in accordance with many of the procedures and processes associated with a typical judicial proceeding. Thus, the parties in an adjudicatory proceeding have (1) the right to present their evidence in an open forum[174] subject to the Maine Rules of Evidence,[175] with the right of cross-examination[176] and discovery;[177] (2) the right to issue subpoenas in the Commission's name;[178] (3) the obligation to present written (and the possibility of presenting oral) arguments after hearing;[179] and (4) the right to have the Commission set forth its findings in writing.[180] Moreover, an adjudicatory proceeding must accord the subject of the proceeding his or her procedural due process rights of notice and an opportunity to be heard.[181] Finally, all participants in an adjudicatory proceeding become subject to the requirements of the *ex parte* rule, which limits communications between those involved in the proceeding and the proceeding's decision makers.[182]

The threshold question, then, is how to distinguish an adjudicatory proceeding from a non-adjudicatory proceeding. The Commission's Rules of Practice and Procedure define an adjudicatory proceeding as "any proceeding before the Commission in which

---

[170] *Id.* § 1702.
[171] *Id.* § 1702-A(3) (2010).
[172] *Id.* § 1702 (2010 & Supp. 2017).
[173] *Id* § 1708.
[174] 65-407 C.M.R. ch. 110, § 3(A) (2012).
[175] 35-A M.R.S.A. § 1311 (2010).
[176] 65-407 C.M.R. ch. 110, § 10(A)(3) (2012).
[177] *Id.* § 9(B).
[178] *Id.* § 8(C)(1).
[179] *Id.* § 11(A)-(B).
[180] *See* 5 M.R.S.A. § 9061 (2013).
[181] *See Berry v. Pub. Utils. Comm'n*, 394 A.2d 790, 793 (Me. 1978).
[182] 65-407 C.M.R. ch. 110, § 8(G) (2012); *see also infra* Chapter 3.D.5.

the legal rights, duties or privileges of a specific person or persons are required by Constitutional law or statute to be determined after an opportunity for hearing."[183] Whether the Maine Constitution or the U.S. Constitution requires a hearing demands some analysis and is discussed below. Whether a hearing is required by statute is, in most instances, more straightforward because the relevant statute typically makes this explicit. To identify the relevant statutes, however, it is useful to briefly review how proceedings are initiated before the Commission.

1. When a Hearing Is Required by Statute

First, an adjudicatory proceeding may be initiated by a complaint against a public utility, signed by "[ten] persons aggrieved," and alleging that the utility's rates, acts, practices, or service are unjust, unreasonable, or inadequate.[184] Unless the utility removes the source of the complaint or the Commission finds the complaint to be "without merit,"[185] the matter must go to hearing pursuant to Section 1304.[186]

Second, an adjudicatory proceeding can be initiated upon the Commission's own discretion when it conducts a summary investigation concerning any matter related to a public utility.[187] If the Commission, as a result of the summary investigation, concludes the matter should be the subject of a formal investigation and gives the utility notice, the matter shall proceed to hearing, again under Section 1304.[188] Finally, a utility may make a complaint against itself "as though made by any [ten] persons."[189] If the utility's complaint is found to have merit, it is subject to the hearing requirements of Section 1304.

If a utility files a change to its rate schedules or its terms and conditions, the Commission may allow it to go into effect as filed, or, alternatively, may, "either upon complaint or upon its own motion,"[190] suspend the change for up to eight months to

---

[183] 65-407 C.M.R. ch. 110, § 2(A) (2012). The focus on the rights and obligations of *specific* persons helps distinguish an adjudicatory proceeding from certain types of non-adjudicatory proceedings, such as rulemakings. *See infra* Chapter 4.

[184] 35-A M.R.S.A. § 1302(1) (2010).

[185] The term "without merit" means either that the PUC does not have the authority to grant the relief requested or that the matter complained of is not unjust, unreasonable, or inadequate. *Agro v. Pub. Utils. Comm'n*, 611 A.2d 566, 569 (Me. 1992). Unless the Commission, after an informal investigation, determines the complaint to be "without merit," it must formally adjudicate the complaint. *Id.* Although the Commission has some discretion as to the conclusion of that informal investigation, there must be some evidence supporting that conclusion.

[186] *See* 35-A M.R.S.A. § 1302(2) (2010).

[187] *Id.* § 1303(1).

[188] *Id.* § 1303(2).

[189] *Id.* § 1309(1) (2010 & Supp. 2017).

[190] 35-A M.R.S.A. § 310(1) (2010). This "complaint" is not the ten-person complaint authorized by Section 1302 because a ten-person complaint cannot be filed against proposed rates. *See Cent. Me. Power Co. v.*

investigate the proposed change.[191] If the PUC concludes that a proposed change should not go into effect as filed and proceeds to a formal investigation, this investigation will also become subject to the hearing requirements of Section 1304.

Therefore, if the Commission determines that a formal investigation of a utility is warranted after an informal investigation initiated by its own motion or upon a ten-person complaint, the matter must proceed to hearing under Section 1304. Moreover, the utility's proposed change to its own rates or terms of service also has the potential of going to hearing under Section 1304. Thus, most—although not all—roads lead to the hearing requirements of Section 1304. These matters constitute the major proceedings before the PUC and—because they are subject to a hearing that is provided for "by statute"[192]—they are, or can become,[193] adjudicatory.

In addition, certain specific statutory provisions require a hearing before the Commission may issue an order. For example, Section 711 authorizes the Commission to order the joint use of utility equipment "after a hearing."[194] Section 2105 allows the Commission to authorize another utility to serve in any area in which another utility is serving or is authorized to provide service "after public hearing of all parties interested."[195] Section 3132(2) requires that every transmission and distribution utility's petition for authority to construct a transmission line "must be set down for public hearing."[196]

2. When a Hearing Is Required by Constitutional Law

There are, however, numerous provisions of Title 35-A that do not specifically mandate a hearing at the outset. For example, Sections 901-902 authorize the Commission to approve the utility's issuance of any securities or long-term debt, but require that a hearing be held only if the Commission so determines.[197] Additionally, Section 707, which authorizes the Commission to approve any agreements between the utilities and their affiliates, is wholly silent on whether the approval process requires a hearing.[198] As noted above, proceedings for which the statute does not require a hearing

---

Pub. Utils. Comm'n, 405 A.2d 153, 160 (Me. 1979). Thus, a complaint against proposed rates will not, by itself, compel a hearing under Section 1304.

[191] 35-A M.R.S.A. § 310(2) (2010).

[192] 65-407 C.M.R. ch. 110, § 2(A) (2012).

[193] *See infra* discussion Chapter 3.B.3., as to when a suspended utility-proposed change under Section 310 becomes adjudicatory.

[194] 35-A M.R.S.A. § 711 (2010 & Supp. 2017).

[195] *Id.* § 2105 (2010 & Supp. 2017).

[196] *Id.* § 3132(2) (2010 & Supp. 2017).

[197] *Id.* § 902(3) (2010); *see also id.* § 901 (2010).

[198] A hearing under this statute is required only before the Commission may void any contract for which approval was required but not received. *Id.* § 707(3)(B) (2010 & Supp. 2017).

are "adjudicatory" only if a hearing is required by "Constitutional law"[199]—for example, under the Due Process Clause of either the State Constitution or the U.S. Constitution.[200]

Under what circumstances does due process require a hearing? In answering this question, the Law Court uses the three-part test set forth by the U.S. Supreme Court in *Mathews v. Eldridge* to determine the requirements of due process:[201]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[202]

When it initially adopted this test in *Fichter v. Board of Environmental Protection*,[203] the Law Court applied these factors to support the Board of Environmental Protection's ("BEP") denial of the applicant's appeal from the Department of Environmental Protection's ("DEP") refusal to grant a variance. The BEP considered the appeal during its regular biweekly meeting at which the applicants were allowed to present evidence but were not permitted to cross-examine opposing witnesses. In reaching its decision, the court noted that the BEP was acting in a quasi-judicial role when it determined whether the DEP had appropriately applied the legislative standards for the variance. The Law Court again quoted from *Eldridge*:

> [M]ore is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interest of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial type procedures must be imposed upon administrative action to assure fairness . . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of [decision making] in all circumstances. *The essence of*

---

[199] 65-407 C.M.R. ch. 110, § 2(A) (2012).

[200] ME. CONST. art. I, § 6-A; U.S. CONST. amend. XIV. The due process requirements of the Maine Constitution and U.S. Constitution are the same. *Bd. of Overseers of the Bar v. Lefebvre*, 1998 ME 24, ¶ 15, 707 A.2d 69.

[201] *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[202] *Fichter v. Bd. of Envtl. Prot.*, 604 A.2d 433, 437 (Me. 1992) (quoting *Eldridge*, 424 U.S. at 335).

[203] *Id.*

> *due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.*[204]

In *Fichter*, the Law Court upheld a procedure that incorporated some, but not all, features of a typical judicial proceeding. According to the Law Court, the due process requirement that the "person in jeopardy of serious loss" have an opportunity to "meet" the case against him can be satisfied short of a full hearing. This opportunity would, under *Eldridge*, require at least that the applicant be apprised of those matters that are adverse to his or her interests and be given an opportunity to present the facts and law in support of those interests. This surely entails a "hearing" of some sort.

The Commission's Rules of Practice and Procedure, Chapter 110, invoke the entire panoply of procedures associated with a judicial proceeding, from the pre-hearing conference through briefs and oral arguments. However, Section 1 of Chapter 110 allows the Commission to "permit deviation or waiver from . . . the procedural requirements or deadlines of any other rule or order and the substantive requirements of any rule," thereby allowing a procedure that, although abbreviated, will satisfy the requirements of due process.[205] In short, the PUC rules enable the Commission to respond efficiently once the procedure implicates the due process requirements of notice and opportunity to be heard, as established by the Law Court in *Fichter*.

A proposed action that involves a regulated utility—whether as the petitioner seeking permission to undertake some transaction or as the entity whose interests are jeopardized by the complaint of some other entity—almost certainly places the utility "in jeopardy of serious loss."[206] This suggests that whenever the utility's interests are at risk, it is entitled to due process procedures that allows notice and opportunity to be heard, regardless of any statutory requirement.

3. When a Non-Adjudicatory Proceeding Becomes Adjudicatory

Many of the proceedings for which no hearing is expressly required by statute are docketed by the Commission as non-adjudicatory, which means they may be (and generally are) handled by the PUC staff without a hearing, through informal discovery from and discussions with the petitioner. Typically, these proceedings are resolved by

---

[204] *Id.* (quoting *Eldridge*, 424 U.S. at 348) (emphasis added).

[205] 65-407 C.M.R. ch. 110, § 1(C) (2012). In addition, the Maine Administrative Procedure Act provides that, with certain exceptions, every party before an administrative agency, which includes the Commission, in an adjudicatory proceeding shall have the right to "present evidence and arguments on all issues," as well as the right of full cross-examination. 5 M.R.S.A. § 9056(2) (2013).

[206] The Law Court has held that any action by the PUC that threatens to deprive a utility of its interest in any property implicates the Due Process Clause. *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1103 (Me. 1977).

granting the petitioner's request—sometimes with modifications, but only those to which the petitioner has agreed. In these circumstances, the due process rights of the petitioning utility are not typically at issue because the utility's interests are not really at risk.

A more complex set of considerations arises when the utility's request is opposed, either by a third party or by the Commission staff themselves. In these circumstances, it is likely that due process requires some procedure to be available to the petitioner to respond to its opponents.

A particular proceeding may not be adjudicatory at inception, but may evolve into an adjudicatory proceeding. Consider, for example, the typical rate case initiated by the utility. Under Section 307, the utility will attempt to implement its proposed change by filing new rate schedules, which, unless suspended by the Commission, will go into effect automatically within thirty days.[207] The Commission may examine the proposed change and allow it to go into effect at the end of that period. If it does so, the process has been entirely non-adjudicatory. The Commission may, however, suspend the effectiveness of the new rate schedule for up to eight additional months, "pending an investigation" into the reasonableness of the proposed change.[208] The Commission has concluded that simply issuing the suspension order does not automatically lead to an adjudicatory proceeding because the order's only purpose is to allow the Commission to further investigate the proposed change.[209] Only if the Commission determines the proposed rate change is not reasonable and, therefore, must go to public hearing according to Section 1304 does the matter become adjudicatory.[210] Similarly, the mere filing of a ten-person complaint would not, by itself, appear to be sufficient to initiate an adjudicatory proceeding. However, if the Commission investigates the complaint and determines that it should not be dismissed (either because it is not "without merit"[211] or because the utility has not removed the source of the complaint), then it will be set for hearing under Section 1304.

---

[207] 35-A M.R.S.A. § 307 (2010). As a practical matter, given the complexity and public interest associated with a "general rate case" (any case in which the utility proposes to increase its interstate revenues by more than 2%) such a case will, upon inception, be set for hearing and therefore treated as an adjudicatory proceeding. *See* 65-407 C.M.R. ch. 120, § 2(E) (1996).

[208] 35-A M.R.S.A. § 310(2) (2010).

[209] *Re Cent. Me. Power Co.*, Proposed Revision to Interruptible Rate, IR-S-VOL, No. 90-077, Order at 5 (Me. P.U.C. June 25, 1990).

[210] Section 310(1) states that the Commission "may . . . either upon complaint or upon its own motion" hold a public hearing on the proposed change. 35-A M.R.S.A. § 310(1) (2010).

[211] 35-A M.R.S.A. § 1302(2) (2010).

C. Intervention

The Commission's Rules of Practice and Procedure, Chapter 110, recognize two types of intervention in adjudicatory proceedings: mandatory and discretionary.

1. Mandatory Intervention

Mandatory intervention is available to "(a) any person that is or may be, or that is a member of a class which is or may be substantially and directly affected by the proceeding and (b) any agency of federal, state or local government . . . ."[212] Class (b) is self-explanatory, as is class (a), with a few qualifications.

Petitions to intervene in PUC proceedings are granted far more often than denied. This is due, in large part, to the Commission's intentional practice of "maintain[ing] a fairly liberal intervention that encourages the participation of diverse groups and interests."[213] This liberal practice notwithstanding, the person seeking mandatory intervention must be advancing or protecting an interest that is consistent with the PUC's regulatory objectives. For example, an oil dealers association's petition to intervene in an electric utility rate case to complain that the utility's electric heating rates represented unfair competition was denied because the PUC's authority over rate regulation, which was intended only to ensure that rates were just and reasonable to the utility and its customers, did not go so far as to "take into account the interests of unregulated third parties who chanced to be somewhat in competition with a regulated utility."[214] As the Law Court held, merely having a competitive interest in a proceeding is insufficient to support a request for mandatory intervention.

In addition to invoking an interest within the scope of the Commission's regulatory authority, the intervenor must also show a personal interest in the proceeding that is sufficiently particularized to confer standing to raise the issue.[215] In a proceeding involving approval of a utility's issuance of stock, a customer of prospective purchasers of that stock was deemed by the Law Court not to have any interest that distinguished it from the general public and, therefore, was not entitled to intervene. [216] Similarly, an association representing utility interests could itself obtain mandatory intervention only

---

[212] 65-407 C.M.R. ch. 110, § 8(B)(1) (2012).

[213] *See Re Cent. Me. Power Co.*, Proposed Increase in Rates, No. 89-68, Order Concerning Maine Citizens Committee for Utility Rate Reform's Petition to Intervene at 1 (Me. P.U.C. July 19, 1989).

[214] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 312 (Me. 1978).

[215] 65-407 C.M.R. ch. 110, § 4(A) (2012). The Commission "may deny intervention" of any person who fails to "show a direct and substantial interest in the proceeding." *Id.*

[216] *See E. Me. Elec. Coop., Inc. v. Me. Yankee Atomic Power Co.*, 225 A.2d 414, 416 (Me. 1967).

if it could show that at least one of its members had standing to intervene in his or her own right.[217]

The Commission has occasionally restricted mandatory intervention apparently based on notions of procedural economy. For example, a member of a utility's board of directors unsuccessfully sought to intervene in an investigation into the utility's compliance with Maine's affiliated transaction statute[218] on the grounds that his intervention would make the utility more responsive to the utility's shareholders, customers, and regulators.[219] The Commission concluded that, because a utility's director has an independent legal obligation to make the utility responsive to these interests, his intervention would not be necessary to ensure that he discharged his required duties. In denying his request, the Commission appeared to rely on the fact that, as the ultimate authority over the management of the utility's affairs, the director's interest is the same as the utility's, which was, of course, already a party to the proceeding. Thus, although the director (unlike an oil dealers association) may have an interest that is within the Commission's jurisdiction, his interest was already represented in the proceeding.

2. Discretionary Intervention

The second type of intervention is discretionary intervention, which is limited to "interested persons" who are neither governmental agencies nor "substantially and directly affected" by the proceeding.[220] Such intervenors may be allowed full or limited party status.[221] A full party has the right to fully participate in all stages of the case. A limited party has the right to participate only in certain stages of the case—for example, settlement discussions or the submission of briefs. Occasionally, an "interested person"

---

[217] *See Re Bangor Hydro Elec. Co.*, Request for Exemption (Limited Exemption) from the Reorganization Approval Requirements, No. 2006-543, Order Denying Request for Reconsideration (Part II) at 2 (Me. P.U.C. Apr. 3, 2007).

[218] *See* 35-A M.R.S.A. § 707 (2010 & Supp. 2017).

[219] *See Re Me. Pub. Utils. Comm'n*, Formal Investigation Into Hampden Telephone Company's Affiliated Transactions, Insider Transactions, Accounting and Management Practices, No. 92-295, Order Denying Request to Intervene of Lawrence A. Gamble Intervention at 2 (Me. P.U.C. Aug. 11, 1993).

[220] 65-407 C.M.R. ch. 110, § 8(B)(2) (2012).

[221] The Maine Administrative Procedure Act ("MAPA") explicitly authorizes such limited participation. 5 M.R.S.A. § 9054(2) (2013). Consistent with MAPA, the Commission's procedural rules also explicitly allow limited participation of discretionary intervenors. 65-407 C.M.R. ch. 110, § 8(B)(2) (2012) ("Any interested person . . . may in the discretion of the Commission be allowed to intervene and participate as a full or limited party to the proceeding."); *see also N. Utils., Inc. d/b/a Unitil*, Request for Approval of Precedent Agreement with Portland Natural Gas Transmission System, No. 2018-00040, Corrected Procedural Order – Revised Schedule and Intervention Rulings at 2 (Me. P.U.C. Mar. 23, 2018) (granting discretionary intervention to nongovernmental organization, with participation limited to issues regarding economics and prudence of utility's proposal).

is another utility that, although not directly affected by the outcome, may have a strong interest in an issue being developed or applied in a proceeding and may therefore wish to present argument on the point.

The Commission will usually allow a party to intervene, even where that party has sought intervention after the deadline for doing so, provided there is no prejudice to other parties.[222] In a case involving a natural gas local distribution company's request for approval of its cost of gas factor filings, the Commission allowed two gas marketers to file exceptions to an examiner's report, even though the deadline for filing exceptions had passed and even though the gas marketers had not moved to intervene in the proceeding.[223] The Commission stated its general rule that it would consider comments filed in a proceeding absent prejudice, but cautioned that the Commission would not necessarily accept late-filed comments or other documents in the future.[224]

3. Public Witnesses

Finally, independent of formal intervention, members of the public may present their views on the matter involved in the proceeding.[225] These presentations, which may be unsworn, are typically made to the Commission during so-called public witness hearings. Public witness hearings are often scheduled in the context of major rate cases, to allow members of the general public an opportunity to address the PUC's commissioners directly regarding the utility's rate change request.

D. Evidence and Procedure

Section 1311 provides that "[i]n all actions and proceedings arising under this Title . . . the practice and rules of evidence are the same as in civil actions in the Superior Court except as otherwise provided."[226] Only the exceptions concern us here.

---

[222] *But see Emera Me.*, Request for Approval of an Affiliated Interest with Tampa Electric Company and TECO Services, No. 2017-00140, Order (Me. P.U.C. Sept. 18, 2017) (denying late-filed petition to intervene).

[223] *N. Utils., Inc. d/b/a Unitil*, Proposed Cost of Gas Factor for May 2016–October 2016, No. 2016-00025, Order at 2 (Me. P.U.C. Apr. 29, 2016)

[224] *Id.*

[225] *See* 65-407 C.M.R. ch. 110, § 8(B)(6) (2012).

[226] 35-A M.R.S.A. § 1311(1) (2010).

1. Prefiling

Many of the matters addressed at hearings before the Commission are highly technical and complex and do not lend themselves to being effectively understood through an oral narrative. The PUC, therefore, has a procedure by which the parties must prefile, in writing, all of the direct testimony and exhibits they will present in support of their initial and rebuttal cases.[227] Prefiling testimony gives the Commission and other parties an opportunity to review and study the testimony and exhibits prior to the hearing, and promotes efficiency.[228] In addition, prefiled testimony may generally be corrected or supplemented only by filing corrective or supplemental testimony; oral supplemental testimony is limited only to minor corrections to prefiled testimony.[229] Supplementing prefiled testimony after the deadline will only be allowed if filed as soon as possible after the need to do so becomes apparent.

2. Burden of Proof

Title 35-A specifies the burden of proof for two separate types of proceedings—utility rate cases, and everything else. Although the overall effect of these two separate burdens of proof appears to place the burden on the utility in both instances, they achieve those results independently and should therefore be considered separately.

a. The Burden in Non-Rate Cases

Section 1314(1) addresses the burden of proof for all matters outside of rate cases:

> In all trials, actions and proceedings arising under this Title or growing out of the exercise of the authority granted to the commission, the burden of proof is on the party adverse to the commission or seeking to set aside any determination, requirement, direction or order of the commission complained of as unreasonable, unjust, or unlawful.[230]

---

[227] *See* 65-407 C.M.R. ch. 110, § 10(G) (2012).

[228] Unless otherwise ordered by the hearing examiner, testimony and exhibits should be prefiled fourteen days before the hearing date. 65-407 C.M.R. ch. 120, § 6(C) (1996). In general rate cases, any utility having jurisdictional annual revenues of $5 million or more must pre-file its case at the time it files for the change in revenues. *Id.*

[229] 65-407 C.M.R. ch. 110, § 10(G)(4) (2012).

[230] 35-A M.R.S.A. § 1314(1) (2010).

The literal reading of Subsection 1 seems to raise as many issues as it resolves. Just who is a "party adverse to the Commission"? Is a customer who complains that a utility's Commission-approved rate is unjust "seeking to set aside" a Commission order or determination?

On its surface, Section 1314(1) appears to place the burden of proof on (1) any utility requesting an order or determination from the Commission, or (2) any utility whose rates or practices have become the subject of a formal Commission investigation or a proceeding upon a ten-person complaint.

First, a utility seeking the Commission's approval of any undertaking for which approval is required has the burden of proving that it satisfies the requirements for that approval.[231] This allocation of the burden is consistent with the general practice in civil matters of placing the burden on the moving party.[232]

Similarly, if the Commission, after its own summary investigation under Section 1303, concludes that a more formal investigation and hearing is warranted, the burden of proof might be allocated to the utility, even though it is not the party who began the proceeding. As the target of the Commission's inquiry, the utility could be understood to be "the party adverse to the Commission."[233] This result would be consistent with the common law rule of placing the burden on the party who has best access to the relevant facts.[234]

However, a more complex issue arises when the proceeding is initiated not by the utility or the Commission, but by a ten-person complaint permitted in Section 1302. Although the issue has not been explicitly determined, it is likely that the utility has the burden of proof, or persuasion, as "the party adverse to the Commission," while the complainants may have some initial burden of production.[235]

---

[231] *See, e.g.*, *Biddeford & Saco Gas Co. v. Portland Gas Light Co.*, 233 A.2d 730, 735 (Me. 1967). For a summary of the approvals needed, see *supra* Chapter 2.

[232] *See, e.g.*, *Guardianship of Lander*, 1997 ME 168 ¶ 4, 697 A.2d 1298.

[233] *See, e.g.*, *Re Me. Pub. Utils. Comm'n*, Bangor Hydro-Electric Co., Investigation of Reasonableness of Rates, No. 86-242, Order (Me. P.U.C. Dec. 22, 1987).

[234] *See Jacobs v. Jacobs*, 507 A.2d 596, 603 (Me. 1986).

[235] The burden of proof is more precisely referred to (although not by the statute) as the burden of persuasion. *See Re: Camden & Rockland, Me. and Wanakah Water Cos.*, Proposed Increase in Rates, No. 93-145, Order (Part II) at 7 (Me. P.U.C. July 12, 1994). Related to the burden of persuasion is the burden of production, which requires only that the proponent of a particular position submit evidence minimally sufficient to allow a finding that supports that position. *Id.* Once this burden is satisfied by the proponent, the burden of production shifts to the opponent to produce at least the same quantum of opposing evidence. *Id.* The burden of persuasion, however, never shifts and if, for example, it is on the proponent, the proponent can win only if its evidence supports its desired finding with greater force than the opponent's evidence supports his. *See Poitras v. R.E. Glidden Body Shop,* Inc., 430 A.2d 1113, 1118-20 (Me. 1981).

Under Section 1302, the Commission must respond to any complaint against the utility brought by ten aggrieved persons. Unless the complaint is "without merit"[236] or is settled by agreement of the utility and the complainants, the Commission must take it to hearing and render a decision within nine months. Thus, if the complainants can satisfy their burden of production by alleging facts sufficient to convince the Commission of at least the possibility that the utility's rates are unreasonable or its service inadequate, and the utility's response does not defeat that allegation, the Commission must proceed to hearing. In this situation, the utility is in the same procedural posture as it would be if the PUC's summary investigation under Section 1303 gave rise to grounds for a formal investigation and, therefore, the utility bears the burden of proof as the "party adverse to the Commission."

It could be argued that where the complainants are objecting to rates or terms of service that have been approved by the Commission, they bear the burden of proof under Section 1314(1) as the parties seeking to "set aside" a Commission order. This argument has never been resolved and it may not prevail. First, if the matter complained of were expressly authorized by the PUC, the complaint is likely to be dismissed as "without merit."[237] If, however, the Commission proceeds to a formal investigation, because, for example, the complainants alleged facts unknown at the time of the PUC's initial order or the circumstances have changed, then the utility is once again the target of the Commission's investigation and should bear the burden as the party "adverse to the Commission."

It is therefore very likely that in any matter that has been elevated to a formal investigation of the utility's rates or conduct, the utility will bear the burden of proof, regardless of how the investigation was initiated.

b. The Burden in Rate Cases

With respect to utility rate cases, Subsection 1314(2) explicitly places the burden of proof (also called the burden of persuasion) on the utility: "In all original proceedings before the commission where an increase in rates, tolls, charges, schedules or joint rate is complained of, the burden of proof is on the public utility to show that the increase is just and reasonable."[238]

---

[236] That is, the Commission either has no authority to grant the relief requested or determines that the rates or services complained of are not unreasonable, discriminatory or inadequate. *See Agro v. Pub. Utils. Comm'n*, 611 A.2d 566, 569 (Me. 1992).

[237] *See, e.g.*, *Re Despres et al. v. Jay Village Water Dist.,* Request for Commission Investigation into Water Quality, Quality of Service, and Rates Charged. No. 91-001, Order at 1-2 (Me. P.U.C. Sept. 27, 1991).

[238] 35-A M.R.S.A. § 1314(2) (2010). This burden must be squarely met by the utility, without reliance upon any "presumption of management prudence." *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 281 (Me. 1982).

Here, the utility, at least theoretically, hears the burdens of both original production as well as ultimate persuasion.[239] There are, however, some broad qualifications to these burdens.

First, because any utility rate case implicates all of the utility's hundreds, if not thousands, of expense items, it is unrealistic to expect the utility to produce detailed information on each item. If no evidence is presented in opposition to an item, it is likely to be adopted, even if the supporting evidence is little more than the utility's unsupported assertion of its existence.[240] This result simply reflects the limitations in deploying finite resources during the nine months the statute allows for processing the rate case:[241]

> Decisions of this Court as well as of the Commission and other regulatory bodies make clear that merely filing for a rate increase does not automatically place a burden on the utility with respect to every item of every account. While the utility has the burden of establishing the overall justness and reasonableness of its proposed rates, absent some prior notice it cannot be called upon to account for every allocation made, property purchased, or other action taken.[242]

Second, as an administrative agency with a specialized knowledge of the areas under its jurisdiction, the Commission itself can affect the burden of persuasion. This effect can be positive—for example, using data from other utilities to supplement a particular utility's evidentiary gaps:

> [T]he Commission is not required to treat the matter as if the Company had no such expense at all. Much of the Commission's expertise would be wasted if it were not allowed to use information available to it. . . . [U]tility commissions may make reasonable assumptions or use relevant outside data to fill in the holes in either party's proof in a rate proceeding.[243]

---

[239] *Me. Water Co. v. Pub. Utils. Comm'n*, 482 A.2d 443, 451-52 (Me. 1984).
[240] *See Re Camden and Rockland, Me. and Wanakah Water Cos.*, Proposed Increase in Rates, No. 93-145, Order (Part II) at 7 (Me. P.U.C. July 12, 1994).
[241] 35-A M.R.S.A. § 310 (1)-(2) (2010).
[242] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 185 (Me. 1979).
[243] *Me. Water Co. v. Pub. Utils. Comm'n*, 482 A.2d 443, 452 (Me. 1984).

Conversely, institutional expertise may be used to defeat utility evidence unopposed by any other party to a proceeding: "Even the uncontroverted evidence of the utility may be weighed, critically examined, and rejected if deemed necessary."[244]

Consequently, although the utility technically bears the full burden in any rate case, that burden is moderated by the realities of practice before an expert administrative agency.

3. Freedom of Access Act and Protective Orders

a. Disclosure of Public Records

As an administrative agency of the State, the PUC is subject to Maine's Freedom of Access Act ("FOAA"),[245] under which all "public records" are open to public inspection.[246] For present purposes, "public records" include all data and documents in the Commission's custody or possession that have been collected or received in connection with the transaction of the Commission's business of utility regulation or that contain information relating to utility regulation.[247] Obviously, then, "public records" include all information the Commission has received from the utilities it regulates. Given the breadth of its investigatory powers, the Commission is entitled to almost any document or information in the utility's custody, possession, or control. As a result, almost any information, whether in written or electronic form, created, obtained, or compiled by a utility or its affiliates can end up in the Commission's possession and consequently placed in the public domain as a "public record."

b. Exceptions to Disclosures

There are two relevant exceptions to public disclosure of these records: (1) matters designated confidential by statute and (2) matters privileged against discovery.

The first exemption consists of all Commission records designated confidential by statute,[248] which include:

(1) Certain information in utility personnel files, such as evaluations, medical history and matters pertaining to possible misconduct.[249] This protection is not

[244] *Cent. Me. Power Co.*, 405 A.2d at 186.
[245] *See* 1 M.R.S.A. §§ 400-414 (2016 & Supp. 2017).
[246] *Id.* § 408-A (2016 & Supp. 2017). Indeed, the FOAA also applies to all quasi-municipal and consumer-owned utilities.
[247] *Id.* § 402(3).
[248] *Id.* § 402(3)(A).

absolute, however, and even this information could find its way into the evidentiary record of a proceeding under certain circumstances.[250]

(2) The payment and credit history, financial condition and medical information of a customer and family members in the possession of the Commission's Consumer Assistance and Safety Division.[251]

(3) If designated confidential by the Commission, information about the utilities' technical operations which, if made public, could compromise the security of the utility system.[252] Under this statute, the Commission has classified utility infrastructure maps confidential.[253] This material is known as Critical Energy Infrastructure Information ("CEII").[254]

(4) If designated confidential by the Commission, communications from any person concerning "the affairs of a utility that are reasonably related to a violation of state laws."[255]

(5) Information concerning customers of any competitive electricity provider.[256]

(6) Communications involving telecommunications relay services.[257]

The second exception to public disclosure consists of records "that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding."[258] These privileges include the privilege against self-incrimination,[259] attorney-client privilege[260] trade secrets,[261] and attorney work product.[262]

---

[249] 35-A M.R.S.A. § 114(1) (2010).
[250] *Id.* § 114(3).
[251] *Id.* § 704(5) (2010 & Supp. 2017).
[252] *Id.* § 1311-B(1) (2010).
[253] *Re Me. Pub. Utils. Comm'n*, Designation of Confidential Information Pursuant to 35-A M.R.S.A. § 1311-B, No. 2001-632, Order Designating Infrastructure Information Confidential at 1-2 (Me. P.U.C. May 4, 2004).
[254] *See, e.g.*, *Emera Me.*, Acadia Substation Investigation, No. 2017-00018, Protective Order No. 1 (Me. P.U.C. May 1, 2017).
[255] 35-A M.R.S.A. § 1316-A (2010).
[256] *Id.* § 3203(18) (2010 & Supp. 2017).
[257] *Id.* § 8703(5).
[258] 1 M.R.S.A. § 402(3)(B) (2016 & Supp. 2017).
[259] *See, e.g.*, *Moffett v. City of Portland*, 400 A.2d 340, 344 (Me. 1979); *State v. Vickers*, 309 A.2d 324, 326 (Me. 1973).
[260] *See* M. R. EVID. 502.
[261] *See* M. R. EVID. 507.
[262] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 283 (Me. 1982). A party seeking an opposing party's attorney work product may only obtain it upon a showing of "substantial need" for the material. M. R. CIV. P. 26(b)(3).

The most widely used privilege relates to records placed under a protective order by the Commission pursuant to Rule 26(c) of the Maine Rules of Civil Procedure. Section 1311-A provides that such records "are within the scope of a privilege against discovery" within FOAA and hence are not subject to public disclosure.[263] Therefore, once an item is placed under a protective order, it is not available to the public under FOAA.

The Commission's ability to grant protective orders and thereby limit disclosure of information about a utility's business and operations creates a tension with both the public disclosure requirements of the FOAA and the public's general interest in the affairs of utility businesses that are, after all, devoted to public use. In 1997, the Legislature tried to relieve this tension by creating clearer standards governing the PUC's issuance of protective orders (the "1997 amendments").[264]

c. Standards Governing PUC Issuance of Protective Orders

First, the 1997 amendments limited protective orders to circumstances necessary to protect "the interests of parties in confidential or proprietary information, trade secrets or similar matters as provided by . . . Rule 26(c)."[265] This appears to be an attempt to limit protective orders to matters in which the business interests of the utility or another party could be compromised by public disclosure. In fact, the overwhelming majority of protective orders issued by the Commission relate to business or commercial information, which, if disclosed, could adversely affect rates or service or have a particularized adverse effect on the commercial interests of a specific entity. Typical protective orders issued by the Commission prevent the public disclosure of such matters as: a customer's use of utility services or particular business information that would place the customer at a competitive disadvantage;[266] proprietary economic data whose disclosure would harm the commercial interest of a utility vendor;[267] the utility's internal marketing analysis, the disclosure of which would give its competitors an undue

[263] 35-A M.R.S.A. § 1311-A (2010).
[264] *See* P.L. 1997, ch. 691, § 5.
[265] *Id.*; *see also* 35-A M.R.S.A. § 1311-A(1)(A) (2010).
[266] *See Re Me. Pub. Utils. Comm'n*, Request for Approval for a Special Rate Contract (Purchase Power Agreement with Irving Forest Products-Pinkham Sawmill), No. 2004-88, Protective Order No. 1 at 1 (Me. P.U.C. Apr. 29, 2004); *see also Re Bangor Hydro-Elec. Co.*, Request for Approval of a Special Rate Contract with Lincoln Paper and Tissue LLC, No. 2004-380, Protective Order (Me. P.U.C. June 11, 2004).
[267] *See Re Me. Pub. Utils. Comm'n*, Investigation of Cent. Me. Power Co.'s Stranded Cost Revenue Requirements and Rates, No. 2004-339, Temporary Protective Order No. 2 at 1 (Me. P.U.C. July 16, 2004).

advantage;[268] bidder data, the disclosure of which would give future bidders an undue negotiating advantage against the utility;[269] a utility's plans for deploying its assets in an emergency;[270] and information concerning the separation agreements of former utility officers, disclosure of which could compromise the utility's ability to attract qualified employees.[271]

Second, the 1997 amendments attempt to provide standards for determining which parties to the proceeding should have access to the protected material by requiring the Commission to balance "the need to keep the information confidential with the policies of conducting its proceedings in an open and fair manner where all parties have the right and opportunity to participate effectively as provided under the Maine Administrative Procedure Act, the Maine Rules of Civil Procedure, the Maine Rules of Evidence and the Maine Freedom of Access laws."[272] Because this subsection does not create a new substantive right, but simply reiterates the "right and opportunity" the parties already have under existing law, its purpose appears to be the wholly rhetorical one of reminding the Commission of its obligations to both the party seeking the protective order and the other parties in the proceeding.

The 1997 amendments also allow the Commission to grant a temporary order to allow the release of protected information to only "certain parties."[273] The Commission, its staff, and any consultants or other experts retained by the Commission will almost always have access to the information, as will the public advocate, who, by statute, is entitled to any information submitted to the Commission.[274] There may, however, be valid reasons for keeping certain information from other parties. For example, a utility's analysis of its litigation exposure on a particular matter would not be disclosed to the proceeding's other participants who hold claims adverse to the utility on the same matter in order to avoid providing these parties with an undue litigation advantage.[275] Access to settlement discussion documents has also been denied to other parties in order to preserve settlement discussion confidentiality under Rule 408 of the Maine Rules of

---

[268] *See Re Me. Pub. Utils. Comm'n*, Investigation of Cent. Me. Power Co.'s Stranded Costs Revenue Requirements and Rates, No. 2004-339, Protective Order No. 5 at 1 (Me. P.U.C. July 16, 2004).

[269] *See Re Cent. Me. Power Co.*, Request for Approval of Affiliate Interest Transaction between Cent. Me. Power Co. and Union Water-Power Co., No. 2003-136, Temporary Protective Order No. 1 at 1-2 (Me. P.U.C. May 7, 2003).

[270] *See Re Me. Pub. Utils. Comm'n*, Inquiry into Status of the Reliability and Security of the Electric Grid, No. 2004-248, Temporary Protective Order No. 2 at 1-2 (Me. P.U.C. July 22, 2004).

[271] *See Re Me. Pub. Utils. Comm'n*, Investigation into Rate Design for Bangor Hydro-Electric Company's Demand Classes, No. 2005-554, BHE Protective Order No. 2 at 1-2 (Me. P.U.C. Apr. 4, 2006).

[272] 35-A M.R.S.A. § 1311-A(1)(B) (2010).

[273] 35-A M.R.S.A. § 1311-A(1)(C) (2010).

[274] *See* 35-A M.R.S.A. § 1708 (2010).

[275] *See Re Cent. Me. Power Co.*, Request for Approval of Proposed Settlement Between CMP and FPL Energy Maine, Inc. and between CMP and the Minority Joint Owners of Wyman Unit 4, No. 97-580, Temporary Protective Order at 1-2 (Me. P.U.C. Apr. 10, 2003).

Evidence.[276] Additionally, information about a specific customer will be denied to other parties who are potential competitors of the customer and could use the information to obtain an undue competitive advantage.[277] The party seeking to restrict other parties' access to the information has the burden of demonstrating the need for that restriction.

The 1997 amendments further provide that even if a party is denied access to the information, his or her attorney is entitled to the information, "subject only to the restriction that the attorney use the information solely for the purpose of the proceeding and not disclose the information to others," including the attorney's client.[278] The limited disclosure to the party's attorney is apparently predicated on the understanding that the attorney's access to the information is required to allow the attorney to represent his or her client before the Commission, thereby affording that client the "right and opportunity" to more fully participate in the proceeding. However, it is important to note that there are exceptions to an attorney's access to the information denied his client.

First, the Commission may deny the attorney access to "information relating to bids" if the attorney represents a party that is a competing bidder.[279] Although the risk of placing information of that nature in the attorney's hands is obvious, it is less clear why the direct conflict between the attorney's client and other bidders is sufficient to deny the attorney access in that situation, but not in others where the conflict is equally open and substantial (for example, where the attorney represents a party who is a direct business competitor of the party seeking the protective order). Nevertheless, in all these other conflicts, the Commission must provide the attorney with the information and rely on the Maine Bar Rules and its own authority to punish those who fail to comply with its orders.[280]

The second exception arises when the attorney has a "direct, personal and substantial financial interest that could be benefited by access to the information to the detriment of the party that provided the information."[281] This could occur if, for

---

[276] *See Emera Me.*, Acadia Substation Investigation, No. 2017-00018, Procedural Order (Me. P.U.C. April 5, 2018). *See also Bangor Hydro Elec. Co.*, Request for Approval of Special Rate Contracts with University of Maine - Orono, No. 2005-747, BHE Protective Order No. 2 at 1-2 (Me. P.U.C. Mar. 3, 2006) (prohibiting access to settlement discussion documents in order to preserve confidentiality under Maine Rule of Evidence 408). The validity of this ruling is in issue since the Law Court's determination that draft settlement documents are public records under the FOAA. *See Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, 931 A.2d 503.

[277] *See Re Cent. Me. Power Co.*, Annual Price Change Pursuant to the Alternate Rate Plan (Post Merger) "ARP 2000", No. 2001-191, Protective Order No. 1 at 1-2 (Me. P.U.C. Apr. 11, 2001).

[278] 35-A M.R.S.A. § 1311-A(1)(D) (2010).

[279] *Id.* § 1311-A(1)(D)(1) (2010).

[280] *Id.* § 1311-A(1)(D) (2010).

[281] *Id.* § 1311-A(1)(D)(2) (2010).

example, the attorney was the owner or major shareholder of a party that was also a competitor of the party from which the information is sought.

The 1997 amendments also allow the Commission to deny access to the attorney if it finds the attorney's request for the information is "not made in good faith" or the attorney would not respect the terms of the protective order.[282] Although this subsection has never been employed, its requirement of a "finding," to say nothing of the seriousness of the grounds for denial, suggests that it could be invoked only after the attorney has had, if not a full hearing, at least some opportunity to be heard.

The 1997 amendments further allow the Commission to deny or restrict the access to a party's independent consultant, only if there are "compelling reasons" for the denial or restriction, which can be imposed only "to the least extent necessary."[283] A "compelling reason" could arise if the consultant happened to be a direct competitor to the party providing the information or provided consulting services to such a competitor. Because, however, the Commission can require that the information disclosed be used only for the purposes of the proceeding and prohibit the consultant from disclosing the information to others, the consultant could argue that these restrictions are sufficient to protect the disclosing party and therefore are those restrictions "to the least extent necessary."

Finally, the 1997 amendments allow the Commission to deny access to all parties, including the Commission itself, if it finds that "the potential for harm from disclosure of the information outweighs its probative value in the proceeding."[284] With this final catchall, the restrictions on the PUC's ability to issue protective orders and shield information from public disclosure appear to lose some of their force, simply because the Commission may issue a protective order based upon a simple balancing of interests.

As this discussion suggests, the 1997 amendments may not materially restrict the Commission's ability to remove information from public scrutiny—if for no other reason than protective orders shielding confidential business information or similar matters will continue to be, as they have always been, the principal basis for preventing public disclosure of utility information. The 1997 amendments do, however, create a detailed structure for parceling out to the parties to a proceeding the information denied the general public.

[282] *Id.* § 1311-A(1)(F) (2010).
[283] *Id.* § 1311-A(1)(E) (2010).
[284] *Id.* § 1311-A(1)(F)(1) (2010).

4. Appeals of Hearing Examiner Rulings

Under Chapter 110 of the Commission's rules, the hearing examiner has the authority to conduct an adjudicatory hearing and rule on motions and the admissibility of evidence.[285] A party aggrieved by the hearing examiner's decision on a motion or any other ruling may appeal the decision to the full Commission under the same rule providing for motions for reconsideration.[286] These appeals are deemed denied unless acted upon within twenty days.[287]

5. The *Ex Parte* Rule

The basic e*x parte* rule for all State agencies conducting adjudicatory proceedings is contained in the Maine Administrative Procedure Act ("MAPA").[288] This rule prohibits all agency members "authorized to take final action" or presiding officers "designated by the agency to make findings of fact and conclusions of law" from communicating, either directly or indirectly, on any issue of fact, law, or procedure (except for inquiries concerning the status of a procedural matter) with any party or other person legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.[289] Expressly included within this *ex parte* prohibition are members of the agency's staff who have participated in the proceeding in an "advocacy capacity," as opposed to an advisory role.[290] The obvious purpose of this rule is to prevent a party to an adjudicatory proceeding from attempting to unfairly influence the decision makers.[291] Thus, although it does not absolutely prohibit communications between the agency and specific individuals, the *ex parte* rule permits those communications only if all other interested persons have an opportunity to participate.

The Commission has adopted its own *ex parte* rule[292] that is more restrictive than the MAPA requirements. The Commission's *ex parte* rule prohibits the commissioner,

---

[285] 65-407 C.M.R. ch. 110, § 8(F)(1)-(2) (2012).
[286] *Emera Me.*, Acadia Substation Investigation, No. 2017-00018, Order at 5-7 (Me. P.U.C. June 15, 2017) (denying appeal of ruling on motion in limine).
[287] *Id.* § 11(D).
[288] *See* 5 M.R.S.A. §§ 8001-11008 (2013 & Supp. 2017).
[289] *Id.* § 9055(1) (2013).
[290] *Id.* § 9055(2)(B).
[291] *See Re Me. Pub. Utils. Comm'n*, Rulemaking: Chapter 110, Rules of Practice and Procedure; Proposed Amendments to *Ex Parte* Provisions, No. 95-390, Order Adopting Rule Amendments at 11 (Me. P.U.C. Feb. 1, 1996).
[292] *See* 65-407 C.M.R. ch. 110, § 8(G) (2012).

presiding officer,[293] or advisory staff member from communicating with any party[294] or other person "legally interested in the outcome."[295] Conversely, it also prohibits parties or "legally interested" persons from communicating with the commissioner, the presiding officer, or a member of the advisory staff.[296] This explicit two-way prohibition was adopted in response to a utility's argument that the rule's prohibition on the agency member's *ex parte* communication with a party did not prohibit *ex parte* communications from the party to the agency member.[297]

Moreover, under the Commission's *ex parte* rule, the subjects of the prohibited communications include not only those that relate to "any issue of fact, law or procedure" but also those relating to any matter "in connection with any potential or proposed decision in the case."[298] This would include, for example, any comments regarding the general economic effect (such as factory closings) of a particular result. Note that, like the MAPA's *ex parte* rule, the Commission's prohibition on communications is not absolute; a party and the Commission may communicate, but only after all other parties are given notice and an opportunity to participate, thereby removing its *ex parte* character.[299]

The Commission's rule imposes additional restrictions on communications that occur after the issuance of the presiding officer's (or examiner's) report,[300] or recommended decision. Once the report is issued, the rule prohibits *any* person (not just a party or person "legally interested in the outcome") from having *any* direct or indirect communication on (1) any issue of law, fact, or procedure or (2) any issue "in connection with" any potential or proposed decision with a commissioner, presiding officer, or other

---

[293] In an adjudicatory proceeding, the presiding officer is known as the "hearing examiner" and conducts the proceeding in a role similar to that of an administrative law judge. *See* 35-A M.R.S.A. § 1305(2) (2010 & Supp. 2017); *see also* 65-407 C.M.R. ch. 110, § 8(F) (2012).

[294] For purposes of the prohibition on *ex parte* communication, a "party" includes any "proposed intervenor." 65-407 C.M.R. ch. 110, § 8(G)(1)(a)(i)-(ii) (2012).

[295] Beyond noting that the exact meaning of this phrase is not entirely clear, the Commission has declined to interpret it. *Re Me. Pub. Utils. Comm'n*, Rulemaking: Chapter 110, Proposed Amendments to *Ex Parte* Provisions, No. 95-390, Order Adopting Rule Amendments at 21 n.16 (Me. P.U.C. Feb. 1, 1996).

[296] 65-407 C.M.R. ch. 110, § 8(G)(1)(a)(ii) (2012).

[297] *See Re Me. Pub. Utils. Comm'n*, Rulemaking: Chapter 110, Rules of Practice and Procedure; Proposed Amendments to *Ex Parte* Provisions, No. 95-390, Order Adopting Rule Amendments at 9-10 n. 8 (Me. P.U.C. Feb. 1, 1996). Not surprisingly, the Commission, despite adopting the clarification, found this argument wholly unpersuasive.

[298] 65-407 C.M.R. ch. 110, § 8(G)(2)(a) (2012).

[299] If the Commission, the presiding officer, or member of the advisory staff receives an *ex parte* communication, they must, within forty-eight hours, deliver to all parties a copy or summary of the communication. 65-407 C.M.R. ch. 110, § 8(G)(1)(b); *see also Efficiency Me. Trust*, Request for Approval of Third Triennial Plan, No. 2015-00175, Notice of *Ex Parte* Communication at 1 (Me. P.U.C. Sept. 18, 2017).

[300] This report contains the presiding officer's findings of fact and conclusions of law, and is the equivalent of a proposed order. *Id.* § 8(G)(2). This report is circulated to all parties in the proceeding, who then have an opportunity to file written responses or exceptions to the report. *Id.* § 8(F)(4)(b).

advisory staff person, unless they are filing exceptions to the report or in other very limited circumstances.[301] This prohibition goes beyond the typical *ex parte* restrictions, which do not apply if the other parties have notice and opportunity to participate, by flatly prohibiting all communication except for written exceptions.[302]

Provisions that restrict all communications in the later phases of adjudicatory proceedings have long been a feature of the PUC's *ex parte* rule and are based principally on the administrative necessity of completing the proceeding, often in the face of a statutory deadline. As the Commission noted in 1984: "The submission of commentary after the final deadline for exceptions would involve significant delay and inconvenience since the Commission would be required to notify all parties of the submission and allow a further time for replies."[303] This blanket prohibition arises when the presiding officer's report is issued and remains in effect until the time for rehearing or reconsideration has expired.

The Commission further refined the prohibition against *ex parte* communication following a case in which it received numerous comments and objections from legislators and business figures concerning a presiding officer's report.[304] These comments had been strongly encouraged, if not actually authored, by the utility itself.[305] As updated, the rule now provides that any prohibited communication received at the Commission after the issuance of the report "should be disclosed" to all parties.[306] Because it may be difficult to determine whether communications by persons who are not parties to a proceeding, but that were inspired by a party, actually violate the prohibition against indirect communication, the rule prohibits any party from requesting, encouraging, suggesting, or providing any assistance to any person making any *ex parte* communication to the commission, presiding officer, or any member of the staff regarding any issue of law, fact, or procedure or in connection with a potential or proposed decision in the proceeding.[307] This prohibition is intended to prevent any party from organizing a lobbying campaign to influence the Commission's decision.[308]

---

[301] *Id.* § 8(G)(2)(a).

[302] Exceptions submitted by a non-party do not violate the prohibition on *ex parte* communications so long as the non-party moves for leave to submit the exceptions and ensures all parties receive a copy of the exceptions (and the motion) upon filing. *Bangor Hydro-Elec. Co. & Me. Pub. Serv. Co.*, Request for Exemptions and for Reorganization Approvals, No. 2011-170, Order Denying Motion to Dismiss and Reopening the Record (Me. P.U.C. Mar. 14, 2012).

[303] *Re Me. Pub. Utils. Comm'n*, Miscellaneous Amendments to Rules of Practice and Procedure (Chapter 11), No. 84-153, Order Adopting Rule at 2 (Me. P.U.C., Oct. 5, 1984).

[304] *See Me. Pub. Utils. Comm'n*, Rulemaking: Chapter 110, Proposed Amendments to *Ex Parte* Provisions, No. 95-390 Order Adopting Rule Amendments (Me. P.U.C. Feb. 1, 1996).

[305] *Id.* at 21 n.16.

[306] *See* 65-407 C.M.R. ch. 110, § 8(G)(2) (2012).

[307] *Id.* § 8(G)(2)(c).

[308] *See Re Me. Pub. Utils. Comm'n*, Rulemaking: Chapter 110, Proposed Amendments to *Ex Parte* Provisions, No. 95-390, Order Adopting Rule Amendments at 21 n.16 (Me. P.U.C. Feb. 1, 1996).

The Commission's rule also sets forth the circumstances in which communications are permitted. Following the requirements of the MAPA, the Commission's *ex parte* rule allows communications between the commissioners, the presiding officer, and the advisory staff.[309] The rule also permits inquiry by any party, the commissioners, or any member of the advisory staff concerning the status of any event in a procedural schedule, any filing, or any order.[310] The rule also permits unrestricted communication between any party and the advocacy staff in a non-adjudicatory proceeding.[311]

Although the rule itself does not expressly provide penalties for its violation, the Commission does have the general ability to impose civil penalties on any party for violations of its rules.[312] Moreover, the Commission may impose administrative penalties if a utility willfully violates Title 35-A, a Commission rule, or a Commission order.[313]

6. The Role of Staff

a. Functions of Advisory Staff and Advocacy Staff

Like many administrative agencies, the Commission employs a staff to supply the legal, financial, and technical expertise required for the performance of its regulatory responsibilities. In addition to the presiding officer or hearing examiner, members of the financial and technical staff may also collectively constitute what is referred to as the advisory staff. As its name suggests, the advisory staff is intended to provide the Commission with advice on the legal, financial, or technical aspects of the matters presented in any adjudicatory proceeding. To facilitate this advisory function, communications between the Commission and the advisory staff are not subject to the *ex parte* rule.[314]

In addition to the advisory staff, until the late 1990s it had been the Commission's practice to assign an advocacy staff to adjudicatory proceedings. The advocacy staff participated as a party in the case by conducting discovery, presenting witnesses and argument, and participating in settlement discussions. The advocacy staff was subject to the same restrictions under the *ex parte* rule as any other party to the proceeding,[315] which meant it could not communicate with the advisory staff or the

[309] *See* 65-407 C.M.R. ch. 110, § 8(G)(3)(a)-(b) (2012).
[310] *See id.* § 8(G)(3)(c).
[311] *See id.* § 8(G)(3)(d).
[312] *See* 35-A M.R.S.A. § 1502 (2010).
[313] *Id.* § 1508-A (2010 & Supp. 2017).
[314] *See* 5 M.R.S.A. § 9055(2) (2013); *see also* 65-407 C.M.R. ch. 110, § 8(G)(3)(a)-(b) (2012).
[315] *See* 5 M.R.S.A. § 9055(1) (2013); *see also Berry v. Pub. Utils. Comm'n*, 394 A.2d 790, 793 (Me. 1978).

Commission unless all other parties to the proceeding were also privy to those communications.

Since the late 1990s, however, it has become less common for the Commission to assign any advocacy staff to its numerous adjudicatory proceedings. Instead, these proceedings have been conducted with the participation of an advisory staff only, a procedure known as the "hot bench."[316] The advisory staff now plays an enhanced role, performing many of the functions previously associated with the advocacy staff.

This development has not been without its problems. One problem with the advisory staff's enhanced role is that it blurs the separation between advisory and advocacy staff envisioned by the *ex parte* rule. For example, the advisory staff will often participate in discussions, including settlement discussions, with the parties in the proceeding. Because the advisory staff is also authorized to discuss the case with the Commission itself, some have questioned whether this enhanced role could violate, or at least weaken, the restrictions on communications imposed by the *ex parte* rule.

In the late 1990s, the Legislature attempted to address these problems by adding a new Subsection 5 to Section 1305.[317] Subsection 5(A) provides that if the advisory staff or any consultant employed by the Commission relies upon facts not in the record or "presents to the commission any independent financial or technical analysis" not in the record, the advisory staff must place the information in the record, where it will become subject to discovery.[318] Moreover, the advisory staff or consultant must "answer questions" regarding the facts or analysis "in the same manner as witnesses in the proceeding."[319]

It is important to note that this provision is not intended to subject the advisory staff or the consultant to the restrictions of the *ex parte* rule; instead, the statute expressly provides that compliance with these requirements does not render the advisory staff or consultant an advocate for the purposes of the Maine Administrative Procedure Act.[320]

---

[316] The Commission has described the origin for this use of its Advisory Staff as follows:

> With the increased load caused by restructuring [of the electric utility industry], it is important for the Commission to use its resources efficiently. Accordingly, the Commission conducted the adjudicatory proceedings, including this one, with an advisory staff only and without assigning staff advocates, a procedure known as the "hot bench." By the hot bench, the Commission could assign one team rather than two teams to each proceeding, virtually cutting in half the Commission resources necessary for each proceeding. The more efficient one-team approach required advisors, not advocates, so that Commission Staff could advise and assist each Commissioner throughout the case.

Re Me. Pub. Utils. Comm'n, Investigation of Cent. Me. Power Co. Stranded Costs, Transmission and Distribution Utility Revenue Requirements, and Rate Design, No. 97-580, Order at ii (Me. P.U.C. Mar. 19, 1999).

[317] *See* P.L. 1997, ch. 691, § 3; *see also* P.L. 1999, ch. 602, § 1.

[318] 35-A M.R.S.A. § 1305(5)(A) (2010 & Supp. 2017).

[319] *Id.*

[320] *See id.*

Whether this amendment is sufficient to remove all potential legal defects from the advisory staff 's actual performance has never been judicially evaluated.[321]

In order to avoid the problems of having the advisory staff rule on objections regarding its own discovery, Subsection 5(B) requires the Commission to assign a non-advisory staff member to rule on "any objection to discovery requests made by or directed to advisors."[322]

Finally, Subsection 5(C) attempts to solve the more difficult problems associated with the advisory staff's participation in settlement discussions with the parties.[323] This problem is at least twofold. First, because the advisory staff may freely consult with the Commission on all aspects of the proceeding, there is concern that the Staff would communicate information regarding settlement discussions, in conflict with the confidentiality accorded such discussions under Rule 408 of the Maine Rules of Evidence. Second, this participation runs the risk of both indirect and direct communication between the Commission, the advisory staff, and the parties to the proceeding in violation of the *ex parte* requirements.

For these potential problems, Subsection 5(C) provides a limited remedy. If all the parties to the proceeding so request in writing, the Commission "may" assign non-advisory staff, or a settlement judge, "to facilitate" settlement negotiations in a proceeding.[324] Presumably, these facilitators would replace the advisory staff for the limited purpose of aiding settlement negotiations. If the Commission denies the request, it must issue a written order explaining the reasons for the denial.[325]

7. Stipulations

The Commission has the authority to resolve any matter, partially or completely, by approving a stipulation entered into by two or more parties to a proceeding.[326] All parties must be given an opportunity to participate in settlement discussions[327] and, if advisory staff participates in settlement discussions, all parties must either agree to that

---

[321] For example, the Commission may depend on the advisory staff's evaluation of all analyses in a proceeding, including the advisory staff's own, in rendering its decision. Although the advisory staff may be equal to the extraordinary impartiality that fair performance of this task would require, it does raise the question of whether permitting the advisory staff to make *ex parte* comments on its own product—which up to that point has been treated by the parties like the product of any other advocate—is entirely consistent with the purposes of the *ex parte* rule.

[322] 35-A M.R.S.A. § 1305(5)(B) (2010 & Supp. 2017).

[323] *Id.* § 1305(5)(C).

[324] *Id.*

[325] *Id.*

[326] 65-407 C.M.R. ch. 110, § 8(D) (2012).

[327] *Id.* § 8(D)(1).

participation or be given an opportunity to object.[328] After a stipulation has been filed with the Commission, any parties objecting to its approval must be provided an opportunity to be heard.[329]

Unlike a consent decree, which governs the relationship between private litigants, a stipulation approved by the Commission involves public interest considerations beyond the rights of the litigants in a specific case.[330] As a result, in interpreting a stipulation between parties, the Commission is not bound by the parties' intended meaning of a stipulation term but is free to use its expertise in arriving at a reasonable definition.[331]

8. Reconsideration

Consistent with its quasi-legislative authority over the utilities it regulates, the Commission has continuing jurisdiction to revisit any of its decisions on its own initiative. Section 1321 states that "[t]he commission may at any time rescind, alter or amend any order it has made" after notice and opportunity to be heard by the parties to the original proceeding.[332] Unlike judicial proceedings where the doctrines of *res judicata* and collateral estoppel prevent re-litigation of most disputes, litigants before the PUC may seek re-litigation. The authority to revisit its orders is purely discretionary[333] and may—by the terms of the statute itself—be exercised at any time after the original order has been issued, even if it has become final and unappealable.[334]

The PUC's authority to revisit its orders does not, however, completely insulate the parties affected by those orders from the general provisions of *res judicata* and collateral estoppel. Upon the expiration of the appeal period, the Commission's order becomes final and cannot be collaterally attacked in a subsequent appeal[335] unless the appellant is claiming the Commission's order is beyond its powers.[336]

In addition, any person may request the Commission to reconsider its order by filing a motion for reconsideration within twenty days after a Commission's final order.[337] The motion is automatically denied if not acted on within twenty days of

---

[328] *Id.* § 8(D)(2).
[329] *Id.* § 8(D)(6).
[330] *N. New England Tel. Operations LLC v. Pub. Utils. Comm'n*, 2013 ME 11, ¶¶ 13-14, 58 A.3d 1143.
[331] *Id.* ¶¶ 15-18.
[332] 35-A M.R.S.A. § 1321 (2010). Although this ability of the Commission to revisit its own orders typically involves orders issued in an adjudicatory proceeding, the statute applies to any orders.
[333] *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1106 (Me. 1977).
[334] *See Augusta Water Dist. v. White*, 216 A.2d 661, 664 (Me. 1966).
[335] *See Quirion v. Pub. Utils. Comm'n*, 684 A.2d 1294, 1295-96 (Me. 1996).
[336] *See Stoddard v. Pub. Utils. Comm'n*, 137 Me. 320, 19 A.2d 427, 428 (1941).
[337] 65-407 C.M.R. ch. 110, § 11(D) (2012).

filing.[338] It is unclear whether the twenty-day deadline for motions for reconsideration limits the Commission's authority under Section 1321 to modify previous decisions.

E. Judicial Review

1. Appeal to the Law Court

Except for the Superior Court's review of Commission rulemaking,[339] review of all PUC final decisions is vested exclusively in the Maine Supreme Judicial Court (sitting in its appellate capacity as the Law Court).[340] The procedures for appeals to the Law Court from Commission decisions are the same as those governing appeals from the Superior Court.[341] Thus, all appeals to the Law Court must be taken within twenty-one days after the Commission's final order[342] is issued, unless the order is subject to a timely motion to reconsider.[343] The appeal period will not begin until this motion is acted upon or is deemed denied.[344] Because reconsideration is not available as a matter of right, it is not necessary to request it before taking the appeal.[345]

As with appellate practice generally, appeals from Commission decisions are subject to considerations of ripeness[346] and mootness,[347] and, with one substantial exception, may not be taken from interlocutory, or non-final, orders.[348] This statutory exception for interlocutory orders is an attempt to codify the Law Court's continuing "equity" jurisdiction to prevent irreparable injury where there is no adequate remedy at law.[349] Specifically, the Law Court is allowed to review interlocutory orders when either

---

[338] *Id.*

[339] *See* 5 M.R.S.A. § 8058(1) (2013).

[340] *See* 35-A M.R.S.A. § 1320(6) (2010). Certain functions are assigned to the Commission by federal law, which may not be subject to the jurisdiction of state courts. For example, the federal Telecommunications Act of 1996 requires state commissions to approve certain agreements between telecommunications providers. *See infra* Chapter 9.C. The state commission's approval or rejection of these agreements can be reviewed only by federal courts. 47 U.S.C. § 252(e)(6) (2014).

[341] *See* M.R. APP. P. 22.

[342] The Law Court will undertake its own analysis of whether a Commission ruling or decision is a final order for purposes of judicial review. *See Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1225 (Me. 1987) (rejecting Commission characterization of its order as merely "a restatement of general regulatory principles" and concluding that the decision was a final order for purposes of judicial review).

[343] M.R. APP. P. 2(b)(3).

[344] Any motion to reconsider not granted within twenty days is deemed to be denied. 65-407 C.M.R. 110, § 11(D) (2012).

[345] *See Augusta Water Dist. v. White*, 216 A.2d 661, 664 (Me. 1966).

[346] *See Me. Water Co. v. Pub. Utils. Comm'n*, 388 A.2d 493, 498 (Me. 1978).

[347] *See Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 23, 818 A.2d 1039.

[348] *See Lewiston, Greene, & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895, 906 (Me. 1973).

[349] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 310 (Me. 1978); *see also Me. Pub. Serv. Co. v. Pub. Utils. Comm'n*, 524 A.2d 1222, 1224-26 (Me. 1987) (ruling that Commission's decision finding that

the justness or reasonableness of a rate, toll, or charge by a public utility or the constitutionality of any Commission order or ruling is "in issue."[350]

In fact, this procedure not only excuses the final order requirement, but may also affect the conduct of the appeal. Unlike most orders or judgments of a civil court, PUC orders are not automatically stayed by an appeal. Consequently, the Commission or the Law Court must enter a specific stay order if the status quo is to be preserved pending appeal. In the case of interlocutory appeals, any justice of the Law Court may stay a PUC order pending appeal if the order places "in issue" either the justness and reasonableness of any rate or any constitutional matter.[351] Moreover, although the Law Court may not consider extra-record evidence on appeal,[352] it may, in any case where "issues of confiscation or constitutional right are involved," order the Commission to take such additional evidence as it deems necessary for determination of the issue.[353]

Typically, to obtain standing to appeal, a person must satisfy the same standard of interest required to have standing to intervene. In other words, he or she must be directly and substantially affected by the proceeding[354] and must have been a party to that proceeding.[355] Thus, a person who has been granted intervenor status in a proceeding "either erroneously or as a mere act of grace" will not have standing to prosecute the appeal from the Commission's order in that proceeding if she cannot demonstrate to the Law Court a direct and substantial interest in the outcome.[356] Conversely—and contrary to the general rule that only parties may appeal—a person who was improperly denied intervenor status will have standing to appeal if he or she is substantially and adversely affected by the resulting decision.[357]

---

merger of two utilities would be beneficial was an "order" ripe for appeal, despite the Commission's conclusions having been couched as findings and avoiding any explicit order).

[350] 35-A M.R.S.A. § 1320(5) (2010).

[351] *Id.* § 1320(7).

[352] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 288 (Me. 1982).

[353] 35-A M.R.S.A. § 1320(8) (2010). Until the statute was changed in 1985, the Law Court was empowered to make independent judgment on the facts in an appeal from any Commission order that invoked its equity jurisdiction. *See* P.L. 1985, ch. 663, § 1. The court, however, has consistently declined to do so, believing it an improper intrusion into the legislative sphere. *See, e.g.*, *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 156 Me. 295, 163 A.2d 762 (1960); *see also Mechanics Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1090 (Me. 1977).

[354] *See E. Me. Elec. Coop. v. Me. Yankee Atomic Power Co.*, 225 A.2d 414, 416 (Me. 1967).

[355] 35-A M.R.S.A. § 1320(2) (2010).

[356] *See E. Me. Elec. Coop.*, 225 A.2d at 416.

[357] *See Brinks, Inc. v. Me. Armored Car & Courier Serv., Inc.*, 423 A.2d 536, 537 (Me. 1980).

2. Scope of Review

The Law Court's scope of review of Commission orders is constrained by the Commission's expertise and experience in utility matters[358] and by the quasi-legislative character of utility regulation.[359] This constraint is often expressed formulaically by the court's assertion that it will overturn a Commission order only if the Commission (a) abuses its discretion, (b) fails to follow its statutory mandate, or (c) acts unconstitutionally.[360]

a. Abuse of Discretion

Category (a)—abuse of discretion—typically relates to PUC decisions on questions of fact, such as ratemaking methodologies, policy, and other matters within the Commission's core competence. When the Commission is acting within its core competence, its decisions will be accorded substantial deference on appeal.[361] Thus, the court will accept as final any of the Commission's factual findings regarding utility rates, practices, or services if they are supported by "substantial" evidence from the record as a whole.[362] This deference is sometimes stated as a presumption that the Commission's factual findings are correct.[363] Judicial deference to the Commission's expertise extends to methodologies for ratemaking,[364] rate design,[365] or policy questions such as the recovery in rates of certain types of expenses.[366]

Matters involving an abuse of discretion can, however, occasionally embrace errors of law, particularly when an agency appears to be ignoring its own rules. For example, the Law Court has found an abuse of discretion when an Examiner in an administrative hearing denied a party's motion to compel discovery of material that was obviously relevant and subject to disclosure under agency rules.[367]

---

[358] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 156 Me. 295, 163 A.2d 762, 768 (1960).
[359] *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1090 (Me. 1977).
[360] *See, e.g., Office of Pub. Advocate v. Pub. Utils. Comm'n*, 2003 ME 23, ¶ 19, 816 A.2d 833. Section 11007(4)(c) of the MAPA specifies six separate grounds for judicial reversal or modifications of agency decisions. These six, however, either reiterate the three grounds set forth in the Law Court test (e.g., "characterized by abuse of discretion"), or can be logically subsumed within one of them. 5 M.R.S.A. § 11007(4)(c) (2013).
[361] *See, e.g., Millinocket Water Co. v. Me. Pub. Utils. Comm'n*, 515 A.2d 749, 752 (Me. 1986); *see also Pub. Advocate v. Pub. Utils. Comm'n*, 655 A.2d 1251, 1253 (Me. 1995).
[362] *See, e.g., New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 278 (Me. 1982).
[363] *See Mechanic Falls Water Co.*, 381 A.2d at 1091.
[364] *See City of Portland v. Pub. Utils. Comm'n*, 656 A.2d 1217, 1221 (Me. 1995).
[365] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 327 (Me. 1978).
[366] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 55 (Me. 1978).
[367] *See McAdam v. United Parcel Serv.*, 2001 ME 4, ¶ 35, 763 A.2d 1173, 1182.

The amount of evidence the court will actually require to satisfy this standard occasionally falls short of the quantum some observers might consider necessary to achieve "substantiality."[368] For example, the Law Court has found adequate evidentiary support for the Commission's finding that the salary of a full-time utility CEO was too high and should be disallowed for ratemaking even though the only evidence in the record was a staff analysis of salaries of part-time executives of other utilities.[369]

This deference, however, is not limitless. In one case, in the absence of any evidence as to the merits of its staff's, as compared to the utility's, calculation of a particular rate component, the Commission simply averaged the two, thereby "splitting the difference."[370] The Law Court upheld this result because the two methods were similar and were both "presumably" reasonable.[371] The court made clear, however, that the Commission's fact-finding authority is subject to some threshold of rationality:

> We caution the Commission that our decision in this case does not constitute approval of a practice of "splitting the difference" in general. The Commission has the duty to exercise its expertise and judgment in ratemaking proceedings. It may not abdicate that responsibility by splitting the difference whenever its Staff and a utility disagree. When a legitimate issue is appropriately raised before the Commission it must discharge its responsibility and resolve that issue.[372]

b. Failure to Follow Requirements of Law

On more traditional questions of law—(b) and (c) above—the Commission enjoys much less deference from the Law Court.[373] Indeed, the Law Court has stated that it will review questions of law *de novo*.[374] For example, the court will freely substitute its own determination for the Commission's conclusions regarding constitutional matters.[375]

---

[368] Administrative decisions that are not supported by record evidence are sometimes invalidated on the grounds they are "arbitrary or capricious." *See, e.g.*, *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, 762 A.2d 551.
[369] *See Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 631 A.2d 57, 70 (Me. 1993).
[370] *Casco Bay Lines v. Pub. Utils. Comm'n*, 390 A.2d 483, 488 (Me. 1978).
[371] *Id.*
[372] *Id.* at 488-89.
[373] *See Pine Tree Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 631 A.2d 57, 61 (Me. 1993).
[374] *See Office of Pub. Advocate v. Pub. Utils. Comm'n*, 1998 ME 218, ¶ 5, 718 A.2d 201, 203.
[375] *See Me. Yankee Atomic Power Co. v. Pub. Utils. Comm'n*, 581 A.2d 799, 803 (Me. 1990).

In determining whether the PUC is following its statutory mandate, the court will apply a two-part inquiry.[376] The court will first determine whether the statute in question is ambiguous; if it is, then the Commission's interpretation will be given substantial deference and will be overturned only if clearly erroneous.[377] If, however, the statute is unambiguous, then the court will construe it without any regard to the Commission's own interpretation.[378] This distinction is sometimes articulated in terms of the different standards of review given questions of fact and questions of law. Thus, interpretation of an ambiguous statute is viewed as a question of fact, and the court will defer to the Commission's own expertise as the fact finder, whereas the interpretation of an unambiguous statute is viewed by the court as is a matter of law in which the court's expertise is preeminent.[379]

F. Other Proceedings

1. Advisory Rulings

The Commission is empowered, both by the MAPA[380] and by its own rules,[381] to issue advisory rulings. An advisory ruling can be sought by a person who desires from the Commission, outside of any formal Commission proceeding, an opinion of its authority over an event or act that has yet to occur or over a hypothetical set of facts. An advisory ruling may be requested by any person concerning "the applicability of any statute or rule administered by the Commission to the person's property or to acts or events in which the person has a substantial interest.[382] In other words, the standing to obtain an advisory ruling is similar to that required to support intervention in an adjudicatory proceeding; that is, the applicant must have a specific interest in the matter on which the ruling is sought that is different from that of the general public.[383] The Commission may

---

[376] *See Guilford Transp. Indust. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶ 9, 746 A.2d 910, 913. This is the same two-part inquiry adopted by the Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[377] This is also the standard the Law Court will follow when reviewing the Commission's interpretation of its own rules. *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 455 A.2d 34, 44 (Me. 1983).

[378] *See Competitive Energy Servs., LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039.

[379] *See Guilford Transp. Indust. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶ 11, 746 A.2d 910.

[380] *See* 5 M.R.S.A. § 9001 (2013).

[381] *See* 65-407 C.M.R. ch. 110, § 7 (2012).

[382] *Id.* § 7(A). The request has to specify the rule or statute for which the interpretation is sought. *Id.* § 7(A)(1)(a)(ii). It is therefore unlikely that the Commission would accept a request for a ruling on whether such and such an act would be generally subject to any Commission rule or statue, without identifying the particular rule or statute.

[383] If this standard is not met, the person apparently still has the right to request an opinion of the Commission's general counsel. *Id.* § 7(B). There is little apparent difference between an advisory ruling and an Opinion of the Commission's General Counsel.

reject the request,[384] but if it does decide to issue the ruling, it must give notice to the utility involved and any other persons affected by the ruling.[385]

The advisory ruling will not constitute *res judicata* or legal precedent.[386] The Commission may, however, be subject to a diluted version of equitable estoppel,[387] because in any "subsequent enforcement action" initiated by the Commission, any person's justifiable reliance on an advisory ruling should be considered in mitigation of any penalties.[388] By its own terms, then, an advisory ruling (1) may be used as a defense only in the Commission's enforcement actions; (2) by "any person," and not merely the person who sought the ruling; and (3) may be considered in mitigation, but may not necessarily foreclose any penalty. Finally, the estoppel is limited to "justifiable" reliance. Anyone relying on an advisory ruling, then, bears the risk of not being able to convince the Commission that its reliance was justifiable or that the reliance should relieve the party of the entire penalty.

2. CASD Complaints

The Commission's Consumer Assistance and Safety Division ("CASD") is responsible for informally resolving many customer complaints regarding utility service or charges.[389] The CASD has the authority only to determine whether a utility has violated its own rate schedules, terms and conditions, Commission rules, or its general statutory obligation to provide safe, reasonable, and adequate facilities and service.[390] In addition, unlike the Commission itself, the CASD does not have the prescriptive authority to order the utility to change its rates or terms of service. The CASD complaint process is extremely informal. A customer may initiate the process by a simple phone call to the CASD.[391]

---

[384] *Id.* § 7(A)(3).

[385] *Id.* An opinion of the general counsel does not require this notice.

[386] *Id.* § 7(A)(4), (B); *see also* 5 M.R.S.A. § 9001(3) (2013).

[387] *See Me. Sch. Admin. Dist. No. 15 v. Raynolds*, 413 A.2d 523, 533 (Me. 1980).

[388] 65-407 C.M.R. ch. 110, § 7(A)(4) (2012). This is also true of reliance on an Opinion of the General Counsel. *Id.* § 7(B).

[389] A complaint is any dispute between a customer and a utility that the parties have not been able to resolve. During the 2013-2017 period, the CASD received an average of approximately 1,000 customer complaints annually. *See* ME. PUB. UTILS. COMM'N, 2017 Annual Report at 61 (Feb. 1, 2018).

[390] *See Re Appeal of Consumer Assistance Div.*, Decision by Utility #2006-21826 and #2006-231860 Regarding Verizon Maine, No. 2007-32, Order Opening Investigation at 2 (Me. P.U.C. Mar. 15, 2007).

[391] Typically, any formal utility contact with a customer that may be to the customer's disadvantage, such as a disconnection notice, must advise the customer of his right to complain to the CASD.

Either party may appeal to the full Commission from a CASD decision. These appeals are essentially *de novo* hearings conducted pursuant to the Commission's investigatory powers under Section 1303.[392]

[392] *See* 35-A M.R.S.A. § 1303 (2010); *see also* 65-407 C.M.R. ch. 110, § 12(B)(3) (2012); *Me. Pub. Utils. Comm'n*, Appeal of Consumer Assistance Division Decision of Customer #2005-18851, Regarding Kennebunk, Kennebunkport and Wells Water District, No. 2005-220, Notice of Investigation (Me. P.U.C. May 10, 2005).

Chapter 4

Rulemaking

In addition to its ability to adjudicate cases, the Commission has the authority to promulgate and adopt rules, which are legally enforceable statements of general applicability.[393] Agency rulemaking constitutes a "quasi-legislative authority"[394] that is

[393] *See* 5 M.R.S.A. § 8002(9)(A) (2013). Typically, it is clear whether a proceeding is an "adjudication" or a "rulemaking." However, in a small number of instances, it is less clear whether a proceeding is one or the other. In such instances, where a proceeding is found to be more general in scope, it is more likely to be considered a rulemaking. For example, in *Cumberland Farms Northern, Inc. v. Maine Milk Commission*, the Law Court found that the Milk Commission's minimum price setting procedure was a rulemaking rather than an adjudicatory proceeding because it "involves the agency in a wider range of independent investigation to determine facts and in a more complex balancing and reconciliation of interrelated interests, both public and private, to arrive at its conclusions." 428 A.2d 869, 874 (Me. 1981). Despite its clear effect on "specific persons," i.e., those who produce and sell milk, the setting of prices does not resolve a dispute between specific parties based on a particular set of facts. Instead, it generally adjusts the relationship between the industry and an indeterminate public. In a case the Law Court relied upon in *Cumberland Farms Northern*, the Massachusetts Supreme Judicial Court quotes that State's Administrative Procedure Act. Massachusetts' Act defines rulemaking, or regulation, as a matter of general applicability and future effect, as opposed to the resolution of specific facts concerning particular entities. *See Cambridge Elec. Light Co. v. Dep't of Pub. Utils.*, 295 N.E.2d 876, 883-84 (Mass. 1973) (citing Mass Gen. Laws ch. 30A, § 1(5)).

[394] *See In re Guilford Water Co.'s Serv. Rates*, 118 Me. 367, 108 A. 446, 451 (1919).

shared by many other state agencies in Maine. When enacted by the Legislature, a policy directive takes the form of a statute or law. However, when enacted by an administrative agency such as the Commission, a policy directive of broad applicability constitutes a rule. Once an agency adopts a rule, the rule is judicially reviewable through an appeal to the Maine courts,[395] and once final, the rule is legally enforceable by the courts. The Maine Administrative Procedure Act ("MAPA") sets forth the process by which state agencies adopt rules.

Adopting rules is a useful tool for the Commission when establishing uniform systems for utilities or utility processes, or when addressing matters that apply equally to classes of utilities. Rulemaking is often more effective than attempting to impose these requirements through adjudication on a case-by-case basis.

A. The Need for Commission Rulemaking Authority

1. Uniformity

The Commission's ability to issue rules is of obvious benefit. Unlike adjudicatory proceedings where a final order may apply only to specific parties and a specific set of facts, an agency rule allows for the establishment of comprehensive or uniform standards that are broadly applicable. For this reason, the Commission has typically issued rules to create uniform procedures, such as filing requirements for rate schedules and utility terms and conditions,[396] or uniform systems of accounts for telephone[397] or transmission and distribution[398] utilities. Moreover, the Commission's ability to perform many of its assigned functions requires a code for their uniform conduct. In this regard, the Commission's procedural rules for conducting cases and investigations are embodied in its Rules of Practice and Procedure.[399]

2. Matters of General Applicability

In addition, there are times when the Commission discovers, either upon its own initiative or upon review of a customer complaint, an issue that implicates either the

---

[395] *See* 5 M.R.S.A. § 8002(9)(A) (2013).
[396] *See* 65-407 C.M.R. ch. 120 (1996).
[397] *See* 65-407 C.M.R. ch. 210 (1996).
[398] *See* 65-407 C.M.R. ch. 310 (1996).
[399] *See* 65-407 C.M.R. ch. 110 (2012). In fact, all State agencies are required to adopt rules of practice and procedure. *See* 5 M.R.S.A. § 8051 (2013).

entire industry or a class of utilities. For example, in 2006, after reviewing two independent ten-person complaints (one against a telephone utility, and one against a transmission and distribution utility concerning their respective line extension and pole attachment practices), the PUC concluded that the complaints raised issues applicable to all telephone and transmission and distribution utilities subject to its jurisdiction. The PUC therefore determined that the matter was best resolved through rulemaking rather than through adjudication.[400]

Except in limited instances where the Legislature requires rulemaking, the Commission has discretion as to whether to resolve a matter through rulemaking as opposed to adjudication.[401] Its ability to employ rulemaking has two advantages. First, rulemaking relieves the Commission of the burden of imposing uniform requirements on each affected utility on a case-by-case basis.[402] Such a case-by-case approach would be time-consuming, and risk inconsistencies. Second, by soliciting comments from all utilities as well as from members of the general public, the rulemaking process enhances the Commission's opportunity to consider a wider array of comments and circumstances than would be the case in a single adjudicatory proceeding. Third, unlike adjudication, rulemaking also limits the need to continually refine or revise a decision in order to accommodate changed circumstances related to particular utilities. This allows rules to have greater longevity than the result of a particular adjudication.

---

[400] *Re Bemis et al.*, Request for Commission Action to Investigate Central Maine. Power Co.'s Acts and Practices Concerning its Line Extension Policies, No. 2005-412, Order at 3-7 (Me. P.U.C. Feb. 17, 2006); *Re McElwain et al.*, Request for Commission Investigation into Verizon's Implementation of Line Extension Policies, No. 2005-505, Order at 5-7 (Me. P.U.C. Feb. 17, 2006).

[401] Unless specifically directed by the Legislature to adopt a rule, the only constraint on the Commission's discretion in this area is the requirement to proceed to rulemaking if petitioned to do so by 150 or more of the State's registered voters. *See* 5 M.R.S.A. § 8055(3) (2013). This process does not mandate that a state agency adopt a rule, but it does require the agency to conduct a rulemaking process to consider a proposed rule.

[402] The MAPA provides a very detailed process for agencies to follow in adopting a rule. *See* 5 M.R.S.A. §§ 8051-8064 (2013). In one instance, the Attorney General's office concluded that the Commission could establish, in the context of a particular adjudicatory proceeding, a policy regarding the compensation of intervenors and then apply that policy in a separate adjudicatory proceeding involving another utility, without violating MAPA's requirements of rulemaking. *See* Op. Me. Att'y Gen. 84-04. The Attorney General found that this policy, as announced, applied only to the utility in the proceeding before it and therefore was not a decision of "general applicability," which is an essential element of any rule. *See id.* at *2-3*. The extension of that policy to the second utility did not make the policy one of "general applicability" as the Commission was merely resolving the issue that came before it in the second proceeding. *See id.* at *4*. This opinion suggests that the Commission could indefinitely and legally apply its policy to different parties in different adjudicatory proceedings without invoking MAPA's rulemaking requirements, provided that the application of the policy was required to resolve an issue in those additional proceedings. *See id.* at *5*.

B. Rulemaking Authority Must Be Legislatively Conferred

Like other state agencies, the Commission is not free to adopt a rule simply because it may be the most effective method of addressing a matter within its jurisdiction. To the contrary, in order for an agency like the Commission to adopt a rule, there must first be an express delegation of rulemaking authority to the agency by the Maine Legislature. For example, in the case concerning utility line extensions noted above at Chapter 4.A.2., the Legislature had already explicitly given the PUC rulemaking authority over electric utility line extensions,[403] and because of this authority, the PUC was able to resolve the issue through rulemaking.[404]

1. Rulemaking Authority Is Limited

Most commonly, the Legislature delegates rulemaking authority to state agencies because the Legislature lacks the time, resources, or expertise to establish policies through the legislative process. In the case of public utilities, the Legislature created the Commission to ensure that utility oversight and regulation would be undertaken by individuals with the necessary time and expertise to do the job effectively.[405] The Legislature therefore looks to the Commission to implement detailed policies affecting public utilities and their customers.[406]

However, the Commission's rulemaking authority is not unlimited. The ultimate authority to make law rests with the Legislature, and state agencies may not adopt rules with the force of law without legislative guidance through a particular statutory policy or purpose along with standards to guide implementation.[407] Without this legislative guidance, the delegation of rulemaking authority would be unconstitutional. In this regard, even though the Legislature has in fact conferred a general grant of rulemaking authority on the Commission ("The commission may adopt rules . . . to carry out its responsibilities under this Title."),[408] it is not clear that this general grant of authority alone is sufficient to permit the Commission to adopt rules on a given subject. However, this issue has never been tested because none of the Commission's more than seventy rules relies solely on this very general grant of rulemaking authority. Instead, each of the

---

[403] See 35-A M.R.S.A. § 314 (2010).

[404] *Re Bemis et al.*, Request for Commission Action to Investigate Central Maine. Power Co.'s Acts and Practices Concerning its Line Extension Policies, No. 2005-412, Order (Me. P.U.C. Feb. 17, 2006).

[405] *See, e.g.*, *Me. Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 42, 923 A.2d 918.

[406] That implementation has been referred to as "fill[ing] up the details" of the legislative policy. *Small v. Me. Bd. of Registration & Examination in Optometry*, 293 A.2d 786, 787 (Me. 1972).

[407] *Id.* at 787.

[408] *See* 35-A M.R.S.A. § 111 (2010).

Commission's current rules also relies on specific guidelines and direction set forth in statute.

2. Rules that Fill in the Details of a Statute

Agency rules serve a variety of different purposes. In some instances, the primary goal of a rule is to carry out a legislative purpose that is set forth in statute. Rules of this nature serve an implementation purpose by essentially filling in the details of more broadly drafted statutes that have been adopted by the Legislature. For example, the Legislature at one point enacted a law (since repealed) that prohibited disconnection of basic telephone service because of a customer's failure to pay for audiotext services, but authorized the Commission to adopt rules for blocking audiotext service if the customer "repeatedly" failed to pay for it.[409] Pursuant to this statute, the Commission later adopted a rule setting forth a simple procedure for blocking audiotext services,[410] including adding a definition of the term "repeatedly" as used in the implementing statute.[411] The process followed by the PUC in adopting this rule provides a good example of how the PUC's expertise in utility regulation enables it to fill in the details of a general legislative directive.

3. Rules that Create the Details of a Statute

Whereas some Commission rules simply fill in the details of a broad statute, many other Commission rules go much further and actually create the details that are not otherwise defined in the implementing legislation. Such rules go beyond implementing law, and are more in the nature of making law.

An example of a Commission rule that makes law is the Commission's rule setting forth the service standards that utilities must follow for credit and collection on residential customers—Chapter 815.[412] This particular rule was adopted in response to the Legislature's broad directive that the Commission adopt "reasonable" rules for the termination or disconnection of residential utility service.[413] In statute, the Legislature instructed the Commission to address six areas of general policy:

> These rules apply generally to all such utilities within the commission's jurisdiction and must provide for adequate written notice by that

[409] *See* 35-A M.R.S.A. § 802 (2010) (repealed 2011).
[410] *See* 65-407 C.M.R. ch. 202, § 3 (1996).
[411] *See id.* § 2(B).
[412] *See* 65-407 C.M.R. ch. 815 (2013).
[413] *See* 35-A M.R.S.A. § 704 (2010 & Supp. 2017).

> utility to the residential customer that the customer's utility bill has not been paid, and a notice of the prospective termination or disconnection and the right, prior to disconnection, to enter into reasonable installment payment arrangements with that utility; to settle any dispute concerning the proposed disconnection at an informal hearing with that utility and to appeal the results of that utility's decision to the commission. The rules must also provide that there may be no termination or disconnection during a limited medical emergency and for a just and reasonable procedure regarding reconnections of utility service and deposit requirements.[414]

The result of this paragraph is the Commission's Chapter 815,[415] which rule serves as a clear example of a rule that makes law. Chapter 815 is more than fifty pages in length, and it regulates, in great detail, nearly every conceivable aspect of utility billing, credit, and disconnection for residential customers. To illustrate how the rule goes beyond simply filling in details, Section 8 of the rule addresses the following very detailed billing and payment standards.

(1) That the utility must obtain an actual meter reading every month, unless certain exceptions apply.[416]
(2) The circumstances under which the utility may issue "make-up" bills. These circumstances are described in three paragraphs.[417]
(3) The minimum information required on a bill (twelve items).[418]
(4) The requirement that gas and electric utilities provide "sufficient information" on each bill "so that the ordinary customer can understand the basic components of the bill."[419]
(5) How payment due dates on weekends and holidays are treated.[420]
(6) How payment made by mail is treated.[421]
(7) How payment made at authorized offices is treated.[422]
(8) The means by which the customer can pay the bill.[423]

---

[414] *Id.* § 704(1) (2010 & Supp. 2017).
[415] *See* 65-407 C.M.R. ch. 815 (2013).
[416] *Id.* § 8(L).
[417] *Id.* § 8(E)(1).
[418] *Id.* § 8(C)
[419] *Id.* § 8(D)(1).
[420] *Id.* § 8(F)(1).
[421] *Id.* § 8(F)(2).
[422] *Id.* § 8(F)(4).
[423] *Id.* § 8(F).

(9) How non-basic service must be billed.[424]

(10) How partial payments are to be applied.[425]

As is evident from the forgoing list, the Commission is capable of adopting not only targeted rules that fill in the details of particular statutes, but also detailed and comprehensive rules of conduct based on more general grants of authority from the Legislature.

C. Major Substantive vs. Routine Technical Rules

Historically, once the Legislature delegated to a state agency the authority to develop a rule, the agency had full discretion to establish any rule that properly fell within its delegated authority. However, in 1995, the Maine Legislature decided that, in some instances, the Legislature should retain the authority to review any proposed rule before the rule could go into effect. As a result, the Legislature amended the MAPA by creating a new type of rule called a "major substantive" rule that would be adopted by the agency on a provisional basis, and then go to the Legislature for final review.[426] Rules adopted the traditional way, without legislative review, became known as "routine technical" rules.[427] Importantly, the Legislature must assign all authorized rules to one of these two categories "at the time it enacts the authorizing legislation."[428] However, for any delegation of rulemaking authority adopted by the Legislature prior to January 1, 1996, such rules are deemed to be routine technical rules not requiring legislative review.

As described in the MAPA, a major substantive rule is any rule that the Legislature determines: (1) requires "significant" agency discretion in drafting or interpreting; or (2) has the potential for substantially increasing the cost of doing business, substantially reducing property values or government benefits and services, or would impose mandates on local government.[429] Routine technical rules are all the other rules.[430] The difference between the two categories of rules is that major substantive rules are subject to legislative review before they can be finally adopted by the agency,[431] whereas routine technical rules go into effect as soon as they are promulgated by the agency and approved by the Attorney General's office. During legislative review of a major substantive rule, the Legislature has the following options: (1) pass the rule as

[424] *Id.* § 8(I).
[425] *Id.* § 8(H).
[426] *See* P.L. 1995, ch. 463, § 2.
[427] *See* 5 M.R.S.A. § 8071(2) (2013).
[428] *Id.* § 8071(1).
[429] *See id.* § 8071(2)(B).
[430] *See id.* § 8071(2)(A).
[431] *See id.* § 8072.

proposed; (2) amend the rule; or (3) do nothing, in which case the rule goes into effect as proposed.[432]

Although more than half of the Commission's current rules have been adopted after January 1, 1996, only about one quarter of those rules have been designated by the Legislature as major substantive rules, and a majority of such rules relate to electric utility restructuring.[433] It should also be noted that not every routine technical rule adopted by the Commission is actually "routine" or "technical." In fact, many rules labeled "routine technical" are very substantive and detailed in nature. For example, rules establishing the conditions and procedures for the divestiture of generation assets[434] or rules governing conservation programs by gas utilities[435] are labeled "routine technical" rules, but these rules are complex in nature.

Ultimately, despite the language of the MAPA, what practically separates a routine technical rule from a major substantive rule is the Legislature's desire to review a rule for political purposes before it goes into effect. When the Legislature believes the public interest is best served through such political oversight, the Legislature will commonly classify the rule as major substantive so that the rule will come back to the Legislature for consideration.

D. Commission's Ability to Waive Its Rules

Nearly all of the Commission's rules contain a provision allowing the Commission to waive application of the rule, typically under a good cause standard. However, the Commission's ability to grant these waivers is limited to those requirements set forth in the rule, and the waiver may not go so far as to permit violation of the implementing statutes on which the rule is based. More specifically, where a regulatory requirement has been established by the Commission by rule and is not expressly set forth in statute, the Commission has the discretion to consider whether application of the rule can be waived in a particular instance. This authority is grounded in the Commission's status as both author and enforcer of particular rights and obligations. In this regard, a properly issued waiver should not be viewed as a discriminatory enforcement of a rule, but rather an informed determination that strict application of the rule would be contrary to the Commission's broader regulatory objectives, if not the actual purpose of the rule itself. However, the Commission's ability to waive the application of its own rule in any particular instance is not unlimited; the Commission still needs to show that there is good cause to issue the waiver. Absent such

[432] *Id.* § 8072(5).
[433] *See infra* Chapter 8.
[434] *See* 35-A M.R.S.A. § 3204 (2010).
[435] *See id.* § 4711(4) (repealed 2009).

a showing, administration agencies such as the Commission are obligated to follow their own rules.[436]

A good example of the waiver process is the Commission's treatment of Chapter 650, which governs water main extensions. This rule establishes a complicated formula allocating the cost of installing and operating a water main, but over the years, the Commission has issued numerous waivers, for example, in instances where the water main was installed in conjunction with a Maine Department of Transportation construction project[437] in instances where the water main was installed as part of a Superfund project,[438] or in circumstances where strict application of the rule would be inconsistent with the rule's overall purpose.[439] The Commission may also issue waivers when compliance with the rule is physically impossible.[440] In each of these cases, the Commission found that there was good cause to allow the applicant to engage in conduct outside the express terms of the rule, but within the broader requirements of the statute.

E. Petitions for Reconsideration

It is an open question whether a petition for reconsideration may be filed after the Commission has issued an order adopting a rule. First, there is no procedure in the MAPA for the filing of petitions for reconsideration of agency rules. Likewise, the Commission's rules of procedure include no explicit provision for reconsideration of a rulemaking order. Nevertheless, the Commission has on occasion entertained petitions for reconsideration of final orders adopting rules.[441] In such instances, due to the absence of a reconsideration process, the Commission has commonly decided to issue a new rulemaking proceeding in conformity with MAPA requirements rather than simply "reconsider" the rule and issue a modified order under the original rulemaking

---

[436] *State v. Norton*, 257 F. Supp. 2d 357 (D. Me. 2003).

[437] *See Re Portland Water Dist.*, Request for Exemption of Chapter 65, No. 2004-216, Order Approving Exemption at 1-2 (Me. P.U.C. Apr. 29, 2004); *see also* 65-407 C.M.R. ch. 65 (2011).

[438] *Re S. Berwick Water Dist.*, Request for Waivers for Extension of Service to Hooper Sands Road, No. 93-022, Order (Me. P.U.C. Mar. 18, 1993).

[439] *See Re Biddeford & Saco Water Co.,* Appeal of Consumer Assistance Division Decision #2004-17563 Regarding Biddeford Saco Water Company, No. 2004-566, Revised Order at 3-5 (Me. P.U.C. Dec. 8, 2004).

[440] *See Re Bangor Hydro Elec. Co.,* Request for Waiver of Requirements of Chapters 305, 322 and 323, No. 2000-99, Order Granting Waivers at 1 and 2 (Me. P.U.C. Mar. 1, 2000).

[441] *Me. Pub. Utils. Comm'n*, Efficiency Maine Trust Procurement Funding Cap (Chapter 396), No. 2015-00007, Order (Me. P.U.C. June 24, 2015). In this case, the Commission relied on Section 11(D) of Chapter 110, which pertains to petitions for reconsideration in adjudicatory proceedings. *See id.* at 20.

proceeding.[442] In determining whether to entertain a petition for reconsideration, the Commission considers whether it has sufficient time to consider the request given the MAPA's time limits,[443] and where there is insufficient time, the Commission has been willing to deny a petition for reconsideration.

There is also a question as to who would have standing to submit a petition for reconsideration, assuming such a petition may be submitted at all. In considering such a request, the Commission has referenced the procedural rules governing adjudicatory proceedings, which contemplate that such a petition would need to be filed by a "participant" in the original rulemaking. However, given the absence of procedural rules governing petitions for reconsideration related to rulemaking, it is not clear that such a petition must be filed by a participant, or whether any interested person could make such a filing.

Finally, there is an unresolved question as to whether a petition for reconsideration submitted following a provisionally adopted major substantive rule, if allowed at all, can be filed prior to such time as the Legislature has reviewed the rule. By way of example, in a 2018 rulemaking involving a rule governing affiliate ownership of electric generation, the Commission declined to entertain a petition for reconsideration since the rule remained subject to legislative review.[444] Instead, the Commission determined that it would defer all motions until after the Legislature had completed its review and the rule was finally adopted.[445] However, until a court rules on the type of process that must be followed in order to reconsider a major substantive rule, this issue will remain unresolved.

---

[442] *Pub. Utils. Comm'n*, Amendments to Construction Standards, Ownership and Cost Allocation, and Customer Charges Rules for Electric Distribution Line Extensions (Chapter 395), No. 2012-00583, Order Adopting Amended Rule and Statement of Factual and Policy Basis (Me. P.U.C. Feb. 27, 2013) (agreeing with petitions for reconsideration and initiating a new rulemaking proceeding with notice and opportunity for comment).

[443] *Me. Pub. Utils. Comm'n*, Amendments to Net Energy Billing Rule (Chapter 313), Petitions for Reconsideration/Clarification, No. 2016-00222, Commission Letter Concerning Petitions for Reconsideration (Me. P.U.C. Apr. 18, 2017).

[444] *Pub. Utils. Comm'n*, Standards of Conduct for Transmission and Distribution Utilities and Affiliated Generators (Chapter 308), No. 2017-00262, Procedural Order at 1 (Me. P.U.C. Jan 31, 2018) ("Because the matter is now before the Legislature, the Commission will not act to consider Emera Maine's motion.").

[445] *Id.*

Chapter 5

Service Territory

This chapter reviews the concept of the utility's monopoly service territory, and the so-called regulatory bargain. The principal justification for granting monopoly status to a public utility is that the substantial infrastructure required to provide the utility service is most efficiently provided through one entity; duplicative infrastructure would constitute a waste of resources. In theory, the utility's monopoly status protects the utility from competition within its service territory from other entities seeking to provide the same service, although utilities may still face competition from different but related services. The trade-off to receiving a monopoly service territory is the accompanying obligation to provide adequate service at a reasonable rate to every user and service applicant within that service territory, as determined by a regulator. In short, with monopoly comes regulation.

No public utility may provide service within any territory in which another public utility is furnishing or is authorized to furnish such service without the approval of the PUC. Paramount among the standards used in evaluating the service proposed by a second utility is the determination of the "public need" for that service. Public need requires a finding that either the existing service is provided inadequately, unreliably, or

not at all, or, although the basic service is adequately provided, it does not include a particular additional or enhanced service that is proposed by the second utility.

In recent years, the concept of the monopoly service territory has seen noteworthy erosion and Commission decisions have taken different approaches to assessing the "public need" element depending on the type of utility involved. For an electric transmission and distribution utility, which is not subject to any policy promoting competition, the standard of "public need" requires a fairly strict showing that the type or quality of service proposed is different from that provided by the incumbent utility. For industries such as natural gas or telecommunications, in which competition is openly promoted by regulators, the "need" standard is much more relaxed.

Finally, this chapter briefly reviews the type of activity that constitutes an extension of service. Notably, there is Commission precedent supporting the notion that simply locating utility facilities within another utility's service territory, without providing any service therein, is not an extension of service requiring PUC approval.

A. The Utility Service Territory

The distinguishing feature of public utility status is the right to serve a designated service territory without competition from any other entity providing the same type of service.[446] A utility's designated service territory can be a portion of a municipality, a whole municipality, several municipalities, or even entire counties.[447]

However, the grant of monopoly service comes with significant obligations. When a utility is accorded a monopoly service territory, the utility receives a corresponding obligation to provide safe, adequate, and reliable utility service at just and reasonable rates to every person within the territory who wishes to receive it.[448] As the regulator, the Commission has the authority to enforce this obligation and to determine the level of service it deems adequate.[449] For example, a Maine telephone utility, in response to earnings it believed were unsatisfactory, attempted to cut back its level of

[446] *See Dickinson v. Me. Pub. Serv. Co.*, 223 A.2d 435, 438 (Me. 1966) ("The monopoly thus afforded as among competing public utilities is in effect a quid pro quo for the obligation to render public service and to submit to regulation and control.").

[447] *See* 35-A M.R.S.A. § 2102 (2010 & Supp. 2017); *see also Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service Pursuant to 35-A MRSA Sections 2012, 2104 and 2105, No. 2012-00258, Order Approving Stipulation at 2 (Me. P.U.C. Jan. 29, 2013).

[448] *See* 35-A M.R.S.A. § 301 (2010); *see also id.*

[449] *See Dickinson v. Me. Pub. Serv. Co.*, 223 A.2d 435, 438 (Me. 1966).

service by providing only multi-party local service to new subscribers.[450] In response, the Commission found that poor earnings did not relieve the utility of its obligation to provide reasonable and adequate service, as determined by the Commission, and it ordered the utility to provide full single-party service to all subscribers who wanted it.[451] Additionally, no utility may terminate or abandon service to its service territory without the Commission's approval.[452] If the Commission finds there is a need for the utility to continue the service, it may require the utility to do so—even over the utility's objection.[453] The utility's service territory is therefore the bedrock of its rights and obligations.

B. Determination of Service Territory Limits—"Charter" and "General Law" Utilities

Until 1895, a utility's service territory was determined by the Legislature when it chartered the utility by enacting a private and special law. Each of these so-called charter utilities was granted a service territory in which it was the sole provider of its particular utility service. In 1895, Maine law was amended to allow companies incorporated under the general laws of the State to provide utility services. These so-called general law utilities could provide utility service in any municipality, provided that no other utility was serving or authorized to serve that municipality. If another utility was serving, or was authorized to serve, a particular municipality, the general law utility could not provide service in that municipality without the Legislature's special consent.[454]

When the Maine Legislature created the Public Utilities Commission in 1913 and delegated to it the regulation of Maine's public utilities, it also delegated to the Commission power over general law utilities. Thus, no general law utility could extend its services into a municipality where another utility was actually providing, or was authorized to provide, the same type of utility service without first obtaining the Commission's consent. As the Law Court ruled in 1966, this control did not apply to charter utilities, which were able to extend their service to any municipality within their authorized territory without the PUC's consent even if another utility was already providing that service.[455] Agreeing with the Law Court's observation that this particular lack of control over charter utilities was inconsistent with "a neat and orderly system of

---

[450] *See Pollis v. New England Tel. Co.*, 25 P.U.R.4th 529, 537-39 (Me. 1978).
[451] *See id.*
[452] *See* 35-A M.R.S.A. § 1104 (2010).
[453] *See Application of Casco Castle Co.*, 141 Me. 222, 224-25, 42 A.2d 43, 44-45 (1945).
[454] This general history is recounted by the Law Court in *Town of Madison, Department of Electric Works v. Public Utilities Commission*, 682 A.2d 231, 234 (Me. 1996).
[455] *See Poland Tel. Co. v. Pine Tree Tel. & Tel. Co.*, 218 A.2d 487, 490 (Me. 1966).

public utility regulation,"[456] the Legislature promptly amended the law to extend the Commission's consent requirement to charter utilities, excepting only those utilities that were already providing service in a municipality prior to September 1, 1967.[457]

C. The "Second Utility" Statute—No Utility Can Serve in Another Utility's Territory Without PUC Approval

The product of this brief history is 35-A M.R.S.A. § 2102, which, with certain exceptions discussed below, prevents any utility from extending its service, without Commission approval, in or to any municipality in which "another public utility is furnishing or is authorized to furnish a similar service."[458] Section 2105(1) further provides that the Commission shall not grant approval until it has determined "that public convenience and necessity require a 2nd public utility."[459] These statutes are generally referred to as the "second utility" statutes.[460] The Commission and the Law Court have interpreted the second utility statutes to require any second utility, whether general law or charter, to obtain Commission approval to extend its service in a municipality if another utility is furnishing or is authorized to furnish a similar service in the same municipality—even if that second utility is already serving other portions of the same municipality.[461]

The standards the Commission applies in determining whether the public convenience and necessity require the services of the second utility are whether (1) there is a public need for the second utility service, (2) the second utility has the technical capability to provide the service, and (3) the second utility has the financial capability to

---

[456] *Id.*

[457] *See* P.L. 1967, ch. 382.

[458] 35-A M.R.S.A. § 2102(1) (2010 & Supp. 2017).

[459] *Id.* § 2105(1).

[460] Section 2110(1) provides that the Commission may authorize any charter utility to extend its service into any municipality regardless of any territorial limitations contained in the private and special law that created it. 35-A M.R.S.A. § 2110(1) (2010). Section 2110(2) makes it clear that the standards governing the Commission's authority under Section 2110 are those set forth in Sections 2102 and 2105. *Id.* § 2110(2). The Commission, however, has questioned whether Section 2110 may be intended solely as a mechanism for removing charter limitations on the utility service territory, which is a different concern than that addressed by the second utility statutes. *See Kennebunk Light & Power Dist.*, Petition for Approval to Furnish and Extend Elec. Serv., No. 2002-196, Order Denying Petition at 8 (Me. P.U.C. Oct. 4, 2002). As a result, the Commission has directed charter utilities seeking to provide service where another utility is serving or is authorized to serve to file its petition under Section 2102, reserving Section 2110 solely for extensions of its chartered territory. *Id.*

[461] *See Town of Madison, Dep't of Elec. Works v. Pub. Utils. Comm'n*, 682 A.2d 231, 234 (Me. 1996); *see also Pub. Utils. Comm'n*, Investigation of Authority of Kennebunk Light & Power District to Provide Service in Certain Portions of Kennebunk, No. 95-148, Order at 10 (Me. P.U.C. July 16, 1997).

provide the service.[462] Of these three standards, the most controversial has been the "public need" requirement.

Establishing a "public need" for the particular service to be offered by the second utility typically requires a finding that the service offered by the incumbent utility is inadequate or that the service proposed by the second utility is not being offered by the incumbent.[463] [464] The determination of a public need for the second utility's service can, however, be influenced by the technological and economic characteristics of the industry in question, which includes determining the degree of permitted competition. In certain industries, the desire to promote competition has lowered the bar for the circumstances constituting "public need."

1. Public Need and the Natural Gas Local Distribution Utility—Gas-on-Gas Competition[465]

The Commission has faced the question of "public need" for new natural gas utilities several times since the late 1990s. In a line of cases that began in 1997, the Commission has developed a pro-competitive standard of public need[466] that has led to authorizing multiple natural gas utilities to provide the same service within the same municipalities[467] and even on the same street.[468] To some degree, this regime has set up a

---

[462] *Standish Tel. Co. v. Pub. Utils. Comm'n*, 499 A.2d 458, 459 (Me. 1985). These standards typically apply when the incumbent utility protests the actions of the second utility. When both the utilities and the customers affected agree to the extension, the Commission generally will grant the request without further review. *See, e.g.*, *Auburn Water Dist., Mechanic Falls Water Dep't*, Request for Approval of Extension of Service Area, No. 2006-344, Order at 1 (Me. P.U.C. June 22, 2006).

[463] *See Standish Tel. Co.*, 499 A.2d at 461-62; *see also In re Powell*, 358 A.2d 522, 527-30 (Me. 1976); *In re Lefebvre*, 343 A.2d 204, 210 (Me. 1975).

[464] In addition to the relatively narrow issue of "public need," the Commission will give very strong consideration to the general public interest, which can involve such issues as avoiding the duplication of services, or the impact of the approval on the incumbent utility and its customers. *See Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 8 (Me. P.U.C. Mar. 7, 1997); *see also Bangor Gas Co.*, Petition for Approval to Provide Gas Service in the Greater Bangor Area, No. 97-795, Order Granting Unconditional Service Authority (Me. P.U.C. June 30, 1998); *Kennebunk Light & Power Dist.*, Petition for Approval to Furnish and Extend Retail Elec. Serv., No. 2002-196, Order Denying Petition at 10 (Me. P.U.C. Oct. 4, 2002).

[465] For additional discussion of Maine's promotion of competition among LDCs, see *infra* Chapter 8.C.

[466] *See Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 8 (Me. P.U.C. Mar. 7, 1997); *see also Bangor Gas Co., LLC*, Petition for Approval to Provide Gas Service in the Greater Bangor Area, No. 97-795, Order Granting Unconditional Service Authority (Me. P.U.C. June 30, 1998), 186 P.U.R.4th 244 (Me. P.U.C. 1998); *Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service Pursuant to 35-A MRSA Sections 2012, 2104 and 2105, No. 2012-00258, Order Granting Conditional Authority and Denying Motion to Dismiss at 3-4 (Me. P.U.C. Oct. 17, 2012).

[467] *See Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service Pursuant to 35-A MRSA Sections 2012, 2104 and 2105, No. 2012-00258, Order Granting Conditional Authority and Denying Motion to Dismiss at 4 (Me. P.U.C. Oct. 17, 2012); *see also Kennebec Valley Gas*

"race to the trench" among natural gas utilities authorized to serve within a particular municipality.

In considering its first request from a natural gas utility to furnish service as a second utility, the PUC analyzed Sections 2104 and 2105 of Title 35-A. At the time, Section 2104 provided simply that "[n]o gas utility may furnish it service in . . . any municipality . . . without the approval of the commission, even if no other gas utility is furnishing or is authorized to furnish a similar service."[469] In its order ruling on this first of several "second utility" requests from natural gas companies, the PUC determined that the "statutory scheme provides a right to 'second utilities' to petition the Commission under § 2105 despite previous grants of authority to another utility under § 2104."[470] The Commission interpreted Sections 2104 and 2105 together to mean that a public need for natural gas distribution service exists if the applicant is seeking to serve an area that is not presently being served, regardless of whether any other natural gas utility may be authorized to provide that same service to that area. The Commission held that the "applicant seeking to serve an area which is unserved or to provide a type of service which is not being provided need make no further evidentiary showing to demonstrate . . . need . . . ."[471] The Commission justified this relaxed and simplified standard of need in part by recognizing the purported benefits to consumers from competition in the natural gas distribution industry:[472]

> There is a potential risk that permitting two or more utilities to compete for load in the same area may delay the development of infrastructure by making it more difficult to recruit a critical mass of load. However, this

---

Co., LLC, Petition for Authority to Furnish Natural Gas Service, No. 2011-161, Order Approving Stipulation at 7 (Me. P.U.C. Aug. 18, 2011); *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas, No. 96-786, Order at (Me. P.U.C. Aug. 17, 1998).

[468] *See Summit Natural Gas of Me., Inc., and Me. Natural Gas Corp.*, Request for Approval of Joint Procedure for Duplicate Facilities in Close Proximity, No. 2013-00496, Order Approving Joint Procedure for Duplicate Facilities in Close Proximity at 1 (Me. P.U.C. Nov. 12, 2013).

[469] 35-A M.R.S.A. § 2104 (1997) (*quoted in Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 3-4 (Me. P.U.C. Mar. 7, 1997)).

[470] *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 4 (Me. P.U.C. Mar. 7, 1997). Further, although Section 2104 did not specifically refer to public necessity, "requiring a showing of 'necessity' would be superfluous," because on *initial* requests to serve, finding that there is a public need for the service implies that the service is not being provided. *Id.* at 8 (quoting *Standish Tel. Co. v. Pub. Utils. Comm'n*, 499 A.2d 458, 462 (Me. 1985).

[471] *See Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 10 (Me. P.U.C. Mar. 7, 1997).

[472] If the proposed second utility is a natural gas company, it must also seek Commission approval under Section 2104, which does not expressly require a finding of public need and convenience. The Commission has determined, however, that the standards for approval under Section 2104 are the same as under Section 2105. *Id.* at 6.

> risk must be balanced against the potential benefits to consumers of having two or more entrepreneurs competing on the bases of price and service quality to serve their needs. Moreover, it is possible that the threat of competition may accelerate the development of gas infrastructure as each party strives to foreclose others by being the first to provide service in a given area . . . . [W]e conclude that the public interest would best be served by encouraging competition in the provision of this service . . . .[473]

The Commission formulated this policy of promoting competition in the natural gas distribution industry without any express legislative directive. The Legislature subsequently adopted the pro-competitive policy by amending Section 2104 to provide that a natural gas utility already authorized to serve within the state may provide service—without Commission approval—in areas where no other natural gas utility is actually serving.[474] Further, an amendment to Section 2105(2) made it possible for the Commission to approve, by "declaration without public hearing," a second utility to serve a municipality that is already receiving natural gas service provided that the incumbent utility, the second utility, and "any customer or customers to receive service agree that the [second utility] . . . should provide the service."[475]

In the years since the *Mid Maine Gas* case, the Commission has used the relaxed public need standard developed under Sections 2104 and 2105 to grant multiple natural gas utilities the authority to serve. Despite the Commission's longstanding policy encouraging so-called gas-on-gas competition and overlapping service territories for gas utilities, incumbent natural gas utilities have often opposed the petitions of new utilities to provide natural gas service, to no avail.[476] The Commission has authorized new natural gas utilities to serve municipalities that other natural gas companies are not serving despite having authority to do so,[477] as well as municipalities that other natural gas companies are in fact serving.[478]

---

[473] *Id.* at 19.

[474] *See* P.L. 2001, ch. 124, § 1 (codified as 35-A M.R.S.A. § 2104 (2010)); *see also Summit Natural Gas of Me., Inc.*, Request for Approval to Provide Natural Gas Service in the Towns of Cumberland and Falmouth (35-A M.R.S. 2105), No. 2014-00004, Order at 3 (Me. P.U.C. Mar. 5, 2014) (noting utility's ability to serve the Town of Yarmouth under Section 2104 without Commission approval because no other natural gas company served the town).

[475] 35-A M.R.S.A. § 2105(2) (2010 & Supp. 2017); *see also Summit Natural Gas of Me., Inc.*, Request for Approval to Provide Natural Gas Service in the Towns of Cumberland and Falmouth (35-A M.R.S. 2105), No. 2014-00004, Order at 3 (Me. P.U.C. Mar. 5, 2014).

[476] *See generally infra* Chapter 8.C.

[477] *See Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service Pursuant to 35-A MRSA Sections 2012, 2104 and 2105, No. 2012-00258, Order Approving Stipulation at 10, 15 (Me. P.U.C. Jan. 29, 2013) (authorizing utility to serve towns in which two existing utilities had unconditional authority, and one had conditional authority, to serve but which were not receiving service); *see also Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not

Although the "public need" standard appears to be clear, the question of natural gas distribution service territories may not be as simple as "public need" jurisprudence would suggest. It remains noteworthy that in 1998, the Commission expressed that, from a practical viewpoint, two natural gas utilities competing for customers within the same municipality would be unlikely:

> While local distribution service has some of the hallmark characteristics of a natural monopoly— for example, installation of natural gas infrastructure is capital intensive and one distribution system investment in an area is generally less costly than more than one—we believe the potential benefits of competition outweigh the potential harms. The economic facts are that it may not be possible in many areas to obtain sufficient load, due to the typically low population density in Maine, to support two utilities and that the total cost of service will likely be higher where two utilities exist. We expect the competing utilities will take these factors into account, with the result that uneconomic duplication of infrastructure and detrimental 'races to the trench' are not likely given the economic incentives of the entities.[479]

Thus, the Commission justified the relaxed public need standard on the basis that it was unlikely that two utilities would in fact seek to serve the same municipality.

In 2012, however, the Commission's expectation that competing utilities would not seek to serve the same area was put to the test when the City of Augusta experienced intense competition between two natural gas companies authorized to serve the same territory and competing for additional customers. Notwithstanding the risk that competition would bring to the two utilities, Summit Natural Gas of Maine and Maine Natural Gas competed intensely, on a street-by-street basis at times, to serve residential and commercial customers in Augusta. At times, the two companies found themselves

---

Currently Receiving Natural Gas, No. 96-786, Order (Me. P.U.C. Aug. 17, 1998) (authorizing second utility to serve towns in which one existing utility had unconditional authority to serve but which were not receiving service).

[478] *See Summit Natural Gas of Me., Inc.*, Request for Approval to Provide Natural Gas Service in the Towns of Cumberland and Falmouth (35-A M.R.S. 2105), No. 2014-00004, Order at 3-4 (Me. P.U.C. Mar. 5, 2014) (based on agreement between incumbent utility, customers, and second utility, declaring without hearing that second utility may serve two towns already receiving natural gas service); *see also CMP Natural Gas, LLC*, Petition for Approval to Furnish Gas Service in the Municipalities of Westbrook and Gorham, No. 99-477, Order at 17 (Me. P.U.C. Dec. 13, 1999) (over incumbent utility's objection, authorizing second utility to provide natural gas service to customers in the City of Gorham, where incumbent utility served approximately eighteen customers).

[479] *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service In and To Areas Not Currently Receiving Natural Gas, No. 96-786, Order at 5 (Me. P.U.C. Aug. 17, 1998).

installing their different pipes on the same street. Beginning in 2015, the Commission heard the first rate case that addressed the years-long competition between the two gas companies.[480] The utility seeking the rate increase had argued that it should be allowed to recover in rates costs it incurred with its expansion into the City of Augusta. The Commission staff, however, had found that these expenditures, incurred in the throes of competition, may have been imprudent.[481] In 2016, the Commission approved a stipulation providing that the utility be prohibited, effectively, from recovering in rates $15 million out of the approximately $40 million it spent pursuing customers in the City of Augusta.[482] Further, the stipulation provided that the utility establish separate rates for its customers in the City of Augusta and for its non-Augusta customers, to ensure non-Augusta customers were not subsidizing the costs the utility incurred to serve the Augusta customers.[483]

2. Public Need and the Telecommunications Utility

The telecommunications industry is one area in which the Commission has received a clear pro-competition directive from the both the state and federal authorities.[484] In the 1980s, the standard for telecommunications competition was stricter, and required a baseline showing that a competitive carrier was offering a service different from or better than the incumbent. For example, in 1985, the Commission found a public need for a particular type of long distance telecommunications service offered by a second telephone utility even though the incumbent telephone utility offered a comparable long distance telecommunications service.[485] The distinguishing feature of the second utility's service was that it was a less reliable and therefore cheaper service than that offered by the incumbent.[486] The Commission's finding of need was influenced by an emerging public policy of promoting competition in telecommunications services and the fact that the second utility's service did not involve the wasteful duplication of physical resources.[487] Even in the face of this budding

---

[480] *See Me. Natural Gas Corp.*, Request for Approval of an Alternative Rate Plan and Establishment of Starting Point Rates, No. 2015-00005, Order Approving Stipulation at 1 (Me. P.U.C. June 1, 2016).

[481] *See Me. Natural Gas Corp.*, Request for Approval of an Alternative Rate Plan and Establishment of Starting Point Rates, No. 2015-00005, Bench Analysis (Redacted) at 4, 9-11 (Me. P.U.C. June 19, 2015).

[482] *Me. Natural Gas Corp.*, Request for Approval of an Alternative Rate Plan and Establishment of Starting Point Rates, No. 2015-00005, Order Approving Stipulation at 1, 5 (Me. P.U.C. June 1, 2016).

[483] *Id.* at 1.

[484] *See infra* Chapter 8.C.

[485] *Standish Tel. Co. v. Me. Pub. Utils. Comm'n*, 499 A.2d 458, 462 (Me. 1985).

[486] *Id.*

[487] *Kennebunk Light & Power Dist.*, Petition for Approval for Furnish and Extend Retail Elec. Serv., No. 2002-196, Order Denying Petition at 11 (Me. P.U.C. Oct. 4, 2002) (interpreting *Standish Tel. Co. v. Me. Pub. Utils. Comm'n*, 499 A.2d 458 (Me. 1985)).

competitive market for telecommunications services, however, the second telephone utility was still required to show some difference between its proposed services and those offered by the incumbent.[488]

In 1997, the Legislature amended the second utility statutes to allow the Commission to exempt by rule any telephone utility or group of telephone utilities from the approval otherwise required of second utilities if the Commission "finds the exemption will not result in unjust or unreasonable rates or inadequate service . . . ." [489] The resulting rule allows any telecommunication carrier to provide competitive local exchange or interexchange telecommunication service in an area in which another telephone carrier is furnishing the same telephone service or is authorized to do so, subject to the requirement that the second utility demonstrate that it has the technical and financial capability to do so and is willing to comply with applicable state law.[490] There is no need to show that the incumbent utility is failing to provide adequate service, and no limitation on the number of competitive carriers who may serve a particular area. Indeed, in the telecommunications industry, where competition is heavily promoted on both the state and federal levels, the "public need" standard scarcely consists of anything more than the second utility's ability and willingness to provide service according to Maine law.[491]

3. Public Need and the Electric Transmission and Distribution Utility

In contrast to telecommunication and natural gas distribution utilities, electric transmission and distribution utilities are currently immune from competition and are subject to the more traditional, stringent standard of public need. A PUC decision from 2002 demonstrates the challenge facing the second utility in trying to satisfy that restrictive standard in the context of transmission and distribution service.

In its petition, the Kennebunk Light & Power District, a consumer-owned electric utility serving most of the Town of Kennebunk, sought a finding of public convenience and necessity to serve the portion of Kennebunk that was being served by

---

[488] *Standish Tel. Co.*, 499 A.2d at 462 n.7.

[489] P.L. 1997, ch. 118, § 1 (codified at 35-A M.R.S.A. § 2102(3) (Supp. 2017)).

[490] 65-407 C.M.R. ch. 280, § (4)(A) (2003).

[491] The Legislature's adoption of the Telecommunications Reform Act of 2013 ("Act") reduced the level of regulation on incumbent local exchange carriers with regard to telephone services provided within their service territories, but the Act did not formally eliminate the service territories of such carriers. That said, the Act does permit incumbent carriers to obtain relief from providing provider of last resort ("POLR") service within a given municipality if authorized by statute or by the Commission following a prescribed procedure. 35-A M.R.S.A. § 7221 (Supp. 2017).

Central Maine Power Company ("CMP").[492] The District claimed that the public need for the extension of service consisted of a general demand for that extension based upon (1) the benefits of local control, such as increased responsiveness, and (2) lower costs and higher quality service.[493] The Commission disagreed, finding instead that this public demand did not equate to the public need required to support the finding of public convenience and necessity under the second utility statutes.[494]

The Commission determined that the service proposed by Kennebunk Light & Power was the same distribution service being provided by CMP and, moreover, the differences advanced by the District did not relate to the type or quality[495] of distribution service necessary to support a finding of public need.[496] The Commission noted that price differences always exist between utilities, and elevating those differences to a component of public need would simply weaken the stability of the State's public utility system by unnecessarily eroding the service territory concept.[497] Moreover, the Commission noted that public demand for a different utility, as opposed to the need for a different *service*, is insufficient to show a public need for the service being provided by the second utility.[498]

Finally, the Commission stated that the issue of local control was essentially an issue of the legal nature of the entity providing the service, which did not, in the Commission's view, have any direct bearing on the type or quality of service being provided.[499] The Commission also noted that, even if it had found a public need for the proposed service, it would still have to consider the broader public interest implications of the proposed extension, including the following: the impact on CMP and its customers; the desirability of competition for distribution services; and the wasteful duplication of resources.[500] From this discussion, it is apparent that no second transmission and distribution utility will obtain the Commission's authority unless it can meet the relatively high bar of showing that the incumbent utility's services are

---

[492] *See Kennebunk Light & Power Dist.*, Petition for Approval for Furnish and Extend Retail Electric Service, No. 2002-196, Order Denying Petition at 1 (Me. P.U.C. Oct. 4, 2002).

[493] *Id.* at 3.

[494] *Id.* at 11-12.

[495] The inadequacy of existing service sufficient to support a "public need" can be of two types. The existing service can be provided inadequately or unreliably, creating a "public need" for replacement service. *See In re Lefebvre*, 343 A.2d 204, 210 (Me. 1975). Or the existing service may be adequately provided but nevertheless fail to provide a particular additional service. *See In re Powell*, 358 A.2d 522, 528 (Me. 1976). The incumbent utility need not be given an opportunity to remedy these deficiencies. *See Lefebvre*, 343 A.2d at 210.

[496] *See Kennebunk Light & Power Dist.*, Petition for Approval to Furnish and Extend Retail Electric Service, No. 2002-196, Order Denying Petition at 11 (Me. P.U.C. Oct. 4, 2002).

[497] *See id.*

[498] *Id.* at 12.

[499] *Id.*

[500] *Id.* at 13.

inadequate, which may include a demonstration that the service proposed by the second utility is of a different type or quality from the service provided by the incumbent.

This discussion of state regulation of service territories is being affected by developments at the federal level. As discussed in Chapter 8, Federal Energy Regulatory Commission ("FERC") Order No. 1000 has begun to erode the principle of single-utility monopoly service territories.

D. What Constitutes "Service" within a Territory?

Finally, the question occasionally arises as to the type of activity that constitutes utility "service" within a defined geography for purposes of the second utility statutes. In this regard, there appears to be a bright line between actually serving customers within a territory, and simply owing utility facilities within a territory. In a case dealing with this precise issue, the Commission found that a telephone utility's installation of fiber optic cable through the service territory of another telephone utility did not require PUC approval under the second utility statutes.[501] The Commission reasoned that merely installing cable through an incumbent utility's territory in which no service was to be provided did not constitute furnishing service within the scope of the second utility statutes.[502] In an earlier decision, however, the Commission analyzed as a second utility the construction of the high-voltage Maine Electric Power Company ("MEPCO") transmission line through other incumbent utilities' service territories, even though no retail customers were allowed to connect directly to the MEPCO line.[503]

---

[501] *Re China Tel. Co.*, Complaint Requesting Order that New England Tel. Co. Comply with Request for Installation and Interconnection of Fiber Optic Line, No. 88-113, Order Denying New England Tel. Co.'s Motion for Summary Judgment at 3 (Me. P.U.C. Mar. 31, 1989); *see also Re Hamden Tel. Co.*, Request for Approval of Proposed Contract with Express Tel. Systems, Inc. Regarding Etna Switch and Approval of Construction Line, No. 88-255, Order Closing Docket at 2 (Me. P.U.C. Apr. 17, 1990) (declining to revisit decision in *China Tel. Co.*).

[502] *Re China Tel. Co.*, Complaint Requesting Order that New England Tel. Co. Comply with Request for Installation and Interconnection of Fiber Optic Line, No. 88-113, Order Denying New England Tel. Co.'s Motion for Summary Judgment at 2 (Me. P.U.C. Mar. 31, 1989).

[503] *See Bangor Hydro-Elec. Co.*, Request for Approval of Affiliated Interest Transaction with Maine Electric Power Company (MEPCO), No. 2004-774, Order at 2 (Me. P.U.C. Dec. 30, 2004) (noting that MEPCO serves no retail customers).

Chapter 6

Ratemaking

This chapter reviews the process used by the Commission to set utility rates. In essence, utility rates are set to reflect the cost of providing service to customers. Once set, the rates are assumed to meet the statutory requirement that rates must be "just and reasonable"[504] Although this principle may appear a simple one, the ratemaking process can be complicated. This chapter also describes the process under which the Commission reviews a proposed rate change and then puts revised rates into effect within nine months from the date the utility filed the proposed rate change. The chapter briefly examines some general principles of ratemaking, including: (1) the constitutional requirements the Commission must follow in setting rates; (2) the prohibition against retroactive ratemaking, and (3) the Commission's ban against "single issue" rate cases.

This chapter then reviews the overall methods of traditional rate of return ("ROR") regulation, including the Commission's ability to adjust the utility's rate of return to reflect management "efficiency." In addition, the chapter covers the Commission's concerns that traditional ROR regulation did not provide the utility with adequate incentives for efficient operation and imposed too much risk upon customers,

[504] 35-A M.R.S.A. § 301(2) (2010).

which led to the Commission supplanting ROR regulation with so-called long-term rate plan regulation, which may better mirror the conditions of the competitive market.

Under rate plan regulation, utilities are subject to fixed annual increases over several years that reflect inflation offset by imputed productivity gains. The utility's earnings are frequently subject to a numerical bandwidth, beyond which the utility is required to pass on to its customers a share of its excess profits or any shortfalls. Finally, to prevent the utility from increasing its earnings by neglecting operations, the plan typically imposes various service quality standards based on historic performance. Failure to meet these standards subjects the utility to financial penalties.

The establishment of utility rates and charges is the function with which the PUC is most clearly identified. Pursuant to statutory requirements, every charge for utility service must be set forth in a rate schedule, or 'tariff,' filed with the PUC[505] and this rate schedule must be approved by the PUC as "just and reasonable."[506] The Commission's authority applies not only to charges for core utility service (for which the customer is billed for regular usage on a monthly or quarterly basis), but also to all special or one-time utility-related services provided to the customer. These special or one-time services can include such matters as fire protection service,[507] line or main extensions required to provide service to a customer,[508] or charges for reconnecting a meter.[509]

All utility rates, whether charges for routine or core utility service or charges for customer specific services, are intended to reflect the utility's cost of providing that service.[510] Maine is therefore a "cost of service" jurisdiction: rates for regulated utility service are typically based on the utility's costs, as established by the Commission, and not, for example, upon the value of that service to the consumer.

Although the concept of a cost-based rate may appear uncomplicated (and, in cases involving rates for customer specific services, often is), the entire ratemaking process has become a highly specialized undertaking. Moreover, this process has become even more complex as a result of both the introduction of varying degrees of competition into certain utility functions and the regulators' desire to implement incentive-based ratemaking. This chapter briefly reviews the traditional form of utility ratemaking as well

---

[505] *See* 35-A M.R.S.A. § 304 (2010).
[506] *See id.* § 301(2).
[507] *See* 65-407 C.M.R. ch. 640, § 2 (1998).
[508] *See* 65-407 C.M.R. ch. 395 (2013).
[509] *See* 65-407 C.M.R. ch. 815, § 12(D) (2013).
[510] *See, e.g.*, *Me. Water Co. v. Pub. Utils. Comm'n*, 482 A.2d 443, 447 (Me. 1984).

as its evolution into incentive-based ratemaking in a more competitive environment. Before doing so, however, it is useful to review the mechanics by which new rates are proposed by the utility and reviewed by the PUC.

A. The Rate Filing Process

Although the Commission has the ability to investigate any utility rate or charge at any time,[511] the majority of rate cases are initiated by the utility when it files for approval of a proposed increase in its rates.[512] If the proposed change would increase the utility's overall revenues by more than 2%, it is considered a "general rate case" in accordance with the Commission's Rules and the initial filing must be accompanied by the substantial financial and operating information set forth in Chapter 120, Section 5 of the PUC's rules.[513] In addition, certain large utilities must provide the Commission with two months advance notice of a proposed increase in rates.[514] Finally, if the proposed change would increase the utility's overall revenues by more than 1% (a "general increase in rates") the filing may not be made within one year of the utility's most recent filing for a "general increase in rates."

1. PUC's Authority to Suspend and Investigate Proposed Rate Changes

In the early years of utility regulation, the utility simply set its own rates by filing new schedules, which became automatically effective. The PUC could then investigate the new rates and order a refund if it determined the new charges to be unreasonably high.[515] When this method proved unsatisfactory, the Legislature changed the Commission's powers of review from after the fact to before the fact. The PUC now has the power to investigate proposed rates and suspend their effectiveness until it determines that the proposed rates are just and reasonable and should become effective as filed, or that the filed rates are not just and reasonable. In the latter case, the Commission will, after a hearing, substitute new rates that it has determined to be just and reasonable.[516]

---

[511] *See supra* Chapter 2.A.1.
[512] 35-A M.R.S.A. § 307 (2010).
[513] 65-407 C.M.R. ch. 120, § 5 (1996).
[514] 35-A M.R.S.A. § 307 (2010). This provision applies to utilities "whose gross revenues exceed $5,000,000 annually." *Id.*
[515] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 354 A.2d 753, 756-64 (Me. 1976).
[516] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 323 (Me. 1978)

To initiate this procedure, the utility files a revised rate schedule setting forth the proposed rate changes to become effective no later than thirty days from the date of filing.[517] If the Commission does nothing, this proposed change will, in accordance with its terms, automatically become effective thirty days after filing by operation of law.[518] If the Commission wishes to investigate the proposed change, it has the authority to suspend the effective date of the change for an initial period of three months and for an additional five-month period in order to complete its review.[519] The initial thirty-day lag in the rate's effectiveness in addition to the cumulative eight-month suspension period comprise the nine-month review period traditionally associated with utility rate cases in Maine.

The Law Court has determined that, under this scheme, the Commission's primary obligation following suspension of a proposed increase is to adjudicate whether the proposed rates are "just and reasonable" and, if they are not, to issue an order setting substitute rates.[520] The Commission must complete this process within the nine months set forth by statute, which the Commission has no authority to extend. This standard is strictly enforced. For example, the Law Court ruled that the PUC violated the nine-month rule when it allowed the proposed rates to go into effect at the end of the nine month period subject to a future refund or surcharge should they subsequently be determined to be too high or too low.[521] If the Commission does not complete its investigation by the end of nine months, the rates originally proposed by the utility automatically go into effect by operation of law, unless the utility voluntarily forgoes that advantage and withdraws its rate filing.[522] Once the Commission establishes new or substitute rates, they are effective only prospectively. With certain exceptions,[523] the Commission has no authority to order a refund or surcharge to reimburse either customers or the utility should it determine that the prior rates were either too high or too low.[524]

---

[517] 35-A M.R.S.A. § 307 (1988 & Supp. 2006).

[518] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 376 A.2d 448, 455 (Me. 1977).

[519] 35-A M.R.S.A. § 310 (2010).

[520] *Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080 (Me. 1977).

[521] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 745 (Me. 1976).

[522] Virtually all rate cases are completed within the nine months permitted by statute. Occasionally, however, the Commission will fail to suspend the proposed rate prior to the expiration of the thirty-day period. This creates a procedural dilemma because the proposed rate will have become effective by operation of law, and the Commission has no ability to retroactively suspend an effective rate under Section 310. Although the Commission has employed various strategies to circumvent this dilemma—such as back-dating a late suspension order or temporarily suspending the new rates—there is simply no legal method for resolving this problem without the utility's acquiescence.

[523] Certain temporary increases may be allowed during a rate proceeding, but are subject to refund if the amount finally allowed is less than the amount of the temporary increase. 35-A M.R.S.A. § 312 (2010).

[524] *See New England Tel. & Tel. Co.*, 362 A.2d at 754.

Once the Commission sets an overall total revenue requirement for the utility, the Commission must then set the actual rates to be charged for specific services to specific classes of ratepayers that collectively are designed to produce the total required revenues.[525] Typically, this occurs by increasing or decreasing all rates and rate elements by an equal percentage "across the board." This second step in the process of setting specific rates need not occur before the nine-month suspension period has expired, but should happen as soon thereafter as is reasonably practical.[526] The Commission may not, for example, delay the effectiveness of new rates pending an investigation of the proper design of these new rates.[527]

The result of this procedure is to permit the utility's current rates to continue in effect during the suspension period. Because these current rates will be replaced by new rates that may be either higher or lower, the suspension and review method has the effect of allowing a technically "unjust and unreasonable" rate to continue in effect for the suspension period:

> The Legislature, however, did not mandate that the rate legally in effect shall at each moment of its effectiveness be a just and reasonable rate. Our statute tolerates regulatory lag, the Legislature having chosen to limit it in time rather than to attempt to cure it by after the fact adjustments through refund or surcharge.[528]

The Law Court has characterized this "regulatory lag" as "[o]ne of the philosophical difficulties within [the] system."[529]

B. General Principles of Ratemaking

1. Constitutional Requirements

As the U.S. Supreme Court has observed, "[t]he traditional regulatory notion of the "just and reasonable" rate was aimed at navigating the straits between gouging utility customers and confiscating utility property."[530]

The constitutional requirement under the Takings Clause of the U.S. Constitution to avoid confiscation is based upon the premise that any entity that devotes

---

[525] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 382 A.2d 302, 323 (Me. 1978).
[526] *See id.*
[527] *See id.*
[528] *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 757-58 (Me. 1976).
[529] *Pub. Advocate v. Pub. Utils. Comm'n*, 1998 ME 218, ¶ 28, 718 A.2d 201 (Saufley, J., dissenting).
[530] *Verizon Commc'ns v. FCC*, 535 U.S. 467, 481 (2002).

its property to the public use is entitled to receive adequate compensation for its investment in that property.[531] Investors in utility enterprises therefore expect to earn a reasonable profit on their investment in property that is used to provide utility services and is regulated in the public's name. Any action by a governmental agency that unreasonably interferes with that expectation would constitute a regulatory taking,[532] and, in the ratemaking context, is typically referred to as setting rates that are "confiscatory." [533] In short, rates are "just and reasonable" when they allow a fair return on the utility's investment in regulated property. The amount invested is sometimes referred to as "rate base." This simple principle helps create a floor below which rates may not be established merely to benefit utility customers.

The very basic constitutional tenets regarding the compensation or return to which investors of property devoted to public use are entitled have been set forth by the U.S. Supreme Court in three well-known cases. The first of these cases establishes the principle that the allowed rate of return should meet investor requirements:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments and other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. [534]

This decision establishes the general range for the returns on utility investment. Its focus on comparable investments, although not providing any specific guidance, at least helps establish a floor below which allowed returns will be considered "confiscatory." This decision also makes it clear that such returns may not be the product of the Commission's unfettered judgment.

---

[531] *See* U.S. CONST. amend. V.

[532] *See. York Hosp. v. Me. Healthcare Fin. Comm'n*, 719 F. Supp. 1111, 1124 (D. Me. 1989).

[533] *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 19 (Me. 1978); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–08 (1989) ("The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

[534] *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923) (*cited in New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 390 A.2d at 31).

In a later decision, the Court tempered its strict reliance upon the investors' needs with the acknowledgement that regulators should consider the "broad public interests" when establishing the utility's rate of return.[535] This finding has been echoed by the Law Court, which has determined that ratepayers' interests must be given substantial weight when establishing the utility's allowed rate of return.[536]

In the third case, the Supreme Court stated:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.[537]

This holding is somewhat problematic, as illustrated in *Duquesne Light & Power Co. v. Barasch*,[538] *Duquesne* upheld the constitutionality of a state statute that prohibited the recovery in rates of any investment not "used and useful." The *Barasch* opinion noted that the denial of the recovery of the non-used and useful property in that instance reduced the annual revenues of the two utilities involved by only 0.4% and 0.5%. The Court then concluded:

> Given these numbers, it appears that the PUC would have acted within the constitutional range of reasonableness if it had allowed amortization of the . . . costs but set a lower rate of return on equity with the result that Duquesne and Penn Power received the same revenue they will under the instant orders on remand. The overall impact of the rate orders, then, is not constitutionally objectionable.[539]

---

[535] *See In re Permian Basin Area Rate* Case, 390 U.S. 747, 791 (1968).

[536] *New England Tel. & Tel. Co.*, 390 A.2d at 30-31.

[537] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (internal citations omitted). Subsequently, this standard has been echoed by the Court in multiple cases. *See, e.g.*, *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 423 (1999) (commenting that terms such as 'just and reasonable' "give ratesetting commissions broad methodological leeway; they say little about the 'method employed' to determine a particular rate."); *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 388 (1974) (confirming that "it is the result reached not the method employed which is controlling."); *Wisconsin v. Fed. Power Comm'n*, 373 U.S. 294, 309 (1963).

[538] 488 U.S. 299 (1989).

[539] *Id.* at 312.

Putting aside any state statutory requirements for ratemaking, this constitutionally satisfactory "end result" analysis allows the Commission greater latitude in the method it uses for determining the individual components of utility rates, provided that the result falls within the range of reasonableness required by the Constitution. This analysis, however, could be interpreted as allowing the regulator to use infirm methods to reach an overall result that would be within that acceptable range and, therefore, not considered confiscatory. Only if the disallowances described in *Barasch* were substantial enough to push the "end result" below the range of reasonableness, would the Court have had to examine whether the disallowance has satisfied a constitutionally proper ratemaking objective.[540]

The purely constitutional analysis therefore begs the question as to the degree to which the reviewing court may overlook the Commission's specific errors of law. In a case in which the Law Court found it unnecessary to review the imposition of a management efficiency "penalty" because of the reasonableness of the overall result, a dissenting opinion articulated the court's obligation to review Commission decisions for all errors of law:

> If this Court will not correct a demonstrable error of law in the fixing of rates, there will be only a narrowly constricted purpose served by the continuance of this Court's appellate function in public utility ratemaking cases. Contrary to express statutory mandate [that the Court decides all issues of law], today's decision allows this Court to identify and correct error only in cases in which chance fails to rescue rates, based on legal error, from the constitutional anathema of "confiscation."[541]

The dissent's position falls well within the scope of the court's appellate jurisdiction. As noted at Chapter 3.E., the court is fully empowered to review and correct Commission decisions involving questions of law or arbitrary findings of fact. Given that the Commission has only the powers conferred on it by statute, the Law Court has repeatedly recognized that the Commission does not have the authority to establish rates that contravene any of the statutory requirements under which it operates.[542] Therefore, the U.S. Supreme Court's endorsement of the "end result" should not be understood to shield the Commission's decisions from appellate oversight when those decisions conflict with State laws controlling the Commission's authority.

---

[540] For example, the Commission, to protect the public from unjust rates, can disallow costs that are excessive or imprudently incurred. *See Gay v. Damariscotta-Newcastle Water Co.*, 131 Me. 304, 162 A. 264 (1932).

[541] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 455 A.2d 34, 49 (Me. 1983) (citation omitted).

[542] *See, e.g.*, *Office of the Pub. Advocate v. Pub. Utils. Comm'n*, 2005 ME 15, ¶ 35, 866 A.2d 851.

2. The Prohibition Against Retroactive Ratemaking

As described in section A of this chapter, the PUC has the authority to adjust rates only prospectively.[543] If the Commission today determines that a utility's rates are too high or too low, it can order the utility to lower or raise those rates so that, beginning tomorrow, all subsequent charges will be just and reasonable. It does not, however, have the authority to require the utility to lower its rates in an effort to flow back to customers the excess profits previously collected by rates that were too high or, in the alternative, raise rates to compensate the utility for past earnings that were deficient.[544] The Commission's lack of authority to adjust current or future rates for past under- or over-collections[545] is often referred to as "the general prohibition against retroactive ratemaking."[546]

Strict application of the prohibition against retroactive ratemaking denies utilities the ability to recover in rates the costs of an extraordinary expense incurred prior to the date new rates are established.[547] For example, if a utility's rates became deficient in January because of a sudden unexpected increase in a particular expense and the PUC did not implement new rates until June, the utility could collect in rates only those increased costs paid by it from June forward. Any loss from January to June would be borne by the utility and its investors. The utility's rates may therefore recover only its "real time" cost of service. Thus, the general rule is that an expense should be recoverable through rates only if it occurs during the effective period of those rates.

Although there is universal agreement on this principle, its application has been blurred by the use of accounting deferrals. Continuing with the situation described in the previous example, under the deferred accounting mechanism, the utility could recover the loss incurred from January through June by obtaining an accounting order from the PUC that would allow it to deviate from generally accepted accounting principles ("GAAP") and accumulate its extraordinary expenses in a special account called a deferred account. Those deferred expenses would then be flowed through to, or

---

[543] *First Hartford Corp. v. Cent. Me. Power Co.*, 425 A.2d 174, 176-81 (Me. 1981).

[544] *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 753-54 (Me. 1976).

[545] There is one narrow exception to this general rule: the Commission may, under certain circumstances, authorize "reparation" for rates that the utility admits were "excessive or unreasonable or collected through error." 35-A M.R.S.A. § 1309(2) (2010 & Supp. 2017). This authority has rarely been used.

[546] *Me. Pub. Advocate v. Pub. Utils. Comm'n*, 476 A.2d 178, 180 (Me. 1984).

[547] A possible exception to this restriction may be the recovery of costs imposed by governmental mandate. If the utility is required to incur a cost by direct state mandate in performing its utility functions, the Fifth Amendment's prohibition against uncompensated takings may require the state to allow the utility to collect all of those costs from the customers on whose behalf they were incurred. *See Kansas City Power & Light Co. v. State Corp. Comm'n*, 715 P.2d 19, 25 (Kan. 1986) (holding that the Fifth Amendment requirement for just compensation is satisfied if the utility is allowed to recover from its customers all the costs of a state mandated power purchase contract).

recovered from, customers when the new rates go into effect in June, just as if they were a current, or coincident, expense.

Typically, the Commission has allowed expense deferrals only in limited circumstances: "Deferral mechanisms should be used only in truly extraordinary cases or in specific situations where the amount of spending cannot be reasonably estimated with any certainty or where the existence of incentives or disincentives supports deferral."[548] Deferrals have therefore been allowed for the expense associated with catastrophic events such as the 1998 ice storm,[549] but not for routine storms, which, although "relatively infrequent," are not deemed by the Commission to be truly out of the ordinary.[550] The Commission has also allowed deferred expenses when it wished to provide an incentive for utilities to incur the expense of terminating certain contracts, when that termination was to their customers' long-term benefit,[551] or when the utility could not estimate the future costs of a cost-effective early retirement program.[552] The Commission limits deferrals to sums so "extraordinary"[553] or large that it is assumed the utility cannot absorb them without an undue impact in earnings.[554] Furthermore, in cases where a deferral may be justified, the Commission has required the utility to request an

---

[548] *Re Cent. Me. Power Co.*, Deferral of Ice Storm of 1998 Service Restoration Costs, No. 1998-020, Order at 1 (Me. P.U.C. Jan. 15, 1998).

[549] *See id.*

[550] *Re Cent. Me. Power Co.*, Proposal for Accounting Order in Hurricane Bob Services Restoration Costs, No. 92-019, Order at 2 (Me. P.U.C. Nov. 10, 1992); *see also Re Emera Me.,* Request for Approval of Accounting Order, No. 2015-00093, Order Approving Stipulation (Me. P.U.C. Aug. 5, 2015)*, Re Cent. Me. Power Co.*, Request for Deferral of Ice Storm Restoration Costs, No. 2009-18, Accounting Order (Me. P.U.C. July 13, 2010), *Re Bangor Hydro-Electric Company*, Deferral of Ice Storm of 1998 Service Restoration Costs, No. 98-019, Order (Me. P.U.C. Jan. 15, 1998). *See also*, *Cent. Me. Power Co.*, Proposal for Accounting Order on Hurricane Bob Service Restoration Costs, No. 92-019, Order at 2 (Me. P.U.C. Nov. 10, 1992) (Commission denied deferral of Hurricane Bob costs (0.5% of total operating expenses) finding it not to be a truly extraordinary event, but indicated that the cost may be considered in establishing a normalized amount for storm damage in future rate proceedings.); *Cent. Me. Power Co.*, Request for Accounting Order Concerning O'Connor Site Clean-Up, No. 91-216, Order (Me. P.U.C. Aug. 26, 1992); *Consumers Me. Water Co.*, Request to Defer Costs of Millinocket Engineering Audit, No 94-478, Order (Me. P.U.C. Feb. 15, 1995).

[551] *Re Bangor Hydro Elec. Co.*, Request for Accounting Order in NORESCO Contract Termination Costs, No. 96-445, Order at 1 (Me. P.U.C. Dec. 18, 1996).

[552] *Re Cent. Me. Power Co.*, Request for Commission Account Treatment on Proposed Early Retirement Program, No. 91-063, Order at 1 (Me. P.U.C. Apr. 5, 1991).

[553] Requests for deferral are appropriate when the underlying "costs are extraordinary, i.e., unusual and sufficiently large that the utility cannot be expected to absorb them without undue financial impact." *Fox Islands Elec. Coop.*, Request for an Accounting Order for Incurring Extraordinary Costs in Dealing with Storm Damage, No. 2008-00048, Accounting Order at 2 (Me. P.U.C. Mar. 27, 2008); *N. Utils., Inc.*, Proposed Environmental Remediation Cost Recovery, No. 96-678, Order Approving Stipulation (Me. P.U.C. Apr. 28, 1997) (noting Commission precedent that incremental costs are extraordinary when they amount to approximately 2.5-3.0% of a utility's total operating expenses; finding that environmental remediation costs were extraordinary in amount as well as unusual in their nature).

[554] *Re N. Utils., Inc.*, Proposed Environmental Response Cost Recovery, No. 96-678, Order (Me. P.U.C. Apr. 28, 1997) (extraordinary expenses are those that exceed 2.5% of total costs).

accounting order within a reasonably short time after the utility becomes aware of the extraordinary expense.

The Law Court's 3-2 decision in *Public Advocate v. Public Utilities Commission* illustrates the problematic nature of the deferred accounting mechanism.[555] That case arose when the Commission implemented a rule that would change the basic calling areas of the State's telephone utilities. Although these changes would necessarily affect each utility's revenues, that effect could not be determined in advance. The Commission therefore allowed each affected utility to establish an account to record the revenue changes caused by the new rule during its first twelve months. If the rule increased the utility's revenues, the utility would be required to lower its rates to flow the excess revenues back to customers; if its revenues decreased, the utility would be authorized to raise its rates to recover the shortfall. A majority of the court found that this program did not violate the prohibition against retroactive ratemaking. The majority based its holding on a narrow interpretation of the types of adjustments that were subject to the prohibition against retroactive ratemaking. Finding that the ruling did "not constitute a correction of past rates on the basis that such rates were unjust or unreasonable" [556] because it did not "adjust rates to reflect prior errant cost or revenue projections formally included in the utility's rates,"[557] the majority interpreted the retroactive ratemaking prohibition to apply only to the correction of errors in the calculation of rates previously determined to be just and reasonable. In other words, if the Commission's cost estimate turns out to be wrong, the utility's only remedy is prospective correction. If, however, events unrelated to the Commission's cost estimate occur subsequent to the effective date of those rates and renders the rates excessive or deficient, the prohibition against retroactivity does not prevent recognition of the revenue effect of these past events in new rates through the deferred accounting mechanism.

The dissent took a broader view of the prohibition, applying it to *all* events that occurred between rate cases. Noting that a consequence of Maine's after-the-fact system of rate regulation is the existence of rates that at any given moment may be either too high or too low prior to the Commission's declaring them unjust and unreasonable and correcting them prospectively,[558] the dissent concluded:

> the Commission has attempted prospectively to ameliorate the expected "regulatory lag," during which either the consumer or the company would have suffered some loss, thereby attempting to solve the philosophical dilemma inherent in our statutory scheme. Such an

[555] *Pub. Advocate v. Pub. Utils. Comm'n*, 1998 ME 218, 718 A.2d 201.
[556] *Id.* ¶ 16.
[557] *Id.* ¶ 20.
[558] *Id.* ¶ 28.

> approach, while a seemingly logical method of assuring just and reasonable rates, is nonetheless merely an indirect route to retroactive ratemaking. Indeed, there is no substantive difference between this regulation and the refund/surcharge provision we declared illegal in [*New England Telephone Co. v. Public Utilities Commission*, 362 A.2d 746 (Me. 1976).] . . . like that refund/surcharge provision. [The] regulation is an after-the-fact remedy for rates that have now been determined to be unjust or unreasonable – the only difference is that the . . . regulation is carefully couched in terms designed to portray it as an accounting device rather than a mechanism to equalize revenue.[559]

Despite the logic of the dissent's position, the law in Maine currently permits the correction of future rates based on certain events wholly in the past through the use of deferred accounting.

3. Single-Issue Rate Case

A logical consequence of the requirement that utility rates be based on the utility's overall cost of providing service is the Commission's prohibition against single-issue rate cases.[560] The Commission announced this doctrine in rejecting a telephone company's request for a rate increase to compensate it for increases in three specific expense items.[561] The Commission ruled that a utility cannot change rates simply to address a cost change of a single expense category because it is not possible to determine whether rates are "just and reasonable" without reviewing all of the utility's costs, investments, and revenues. The prohibition against increasing or decreasing rates to reflect isolated changes is therefore a corollary of the just and reasonable requirement discussed above.

It is important to note that this corollary has not been uniformly applied. As discussed above, for example, the Commission has permitted telephone utilities to set up a "tracking" system to adjust their rates to reflect under- or over-recoveries based solely on the implementation of the Commission's local calling area rule. In addition, in the past, local exchange carriers were permitted to adjust local rates to offset legislatively-

---

[559] *Id.* ¶ 29 (citations omitted).

[560] *See, e.g.*, *Re N. Utils. Inc.*, Petition for Authority to Implement Therm Billing, No. 2001-398, Order at 4 (Me. P.U.C. July 25, 2001).

[561] *Re New England Tel. & Tel. Co.*, Proposed Increase in Rates, No. 82-6, Order of Dismissal at 3 (Me. P.U.C. May 11, 1982).

mandated reductions in access rates.[562] Both of these changes were approved either by the Commission or the Legislature and were responsive to the constitutional requirement that the State should make the utility whole for the losses it directly imposes.[563]

C. "Traditional" Rate of Return Rate Regulation

For many years, the Commission has established rates for Maine utilities using the rate of return ("ROR") method set forth in 35-A M.R.S.A. §§ 301-312. Rates established under this method remain in effect for a limited but indeterminate period and can be changed as often as annually.[564] Although pure ROR regulation is no longer the only regulatory tool used to set rates for Maine's utilities, it is still employed for most utilities. Its various weaknesses have resulted in its being supplanted by the incentive-based ratemaking discussed in this section D of this chapter. However, as ROR regulation is the starting point for incentive-based ratemaking, it is useful to briefly review this method.

ROR regulation begins with a financial portrait of the utility during a recent twelve-month operating period, referred to as the test year.[565] From this test-year portrait, the Commission determines the utility's actual annual revenues, investment in operating plant (rate base), and expenses, which are then adjusted to reflect known and measurable changes from the test year experience.[566] The utility's adjusted test-year expenses and rate-based investment multiplied by its rate of return yields its overall revenue requirement or amount of revenue needed to pay the costs of providing service to the utility's ratepayers in the twelve months following the date the new rates take effect. This figure can then be compared to actual test year revenues to determine the amount of the increase (or decrease) in annual revenues that will produce the utility's calculated revenue requirement. This can be illustrated by the following simple formula:

The utility's calculated annual revenue requirement = E + (RB x ROR), where E is the utility's adjusted test year expenses, RB is its adjusted test year rate base, and ROR is the rate of return (or cost of capital) that is required to fairly compensate its investors during the first year the new rates will be in effect. Assuming a utility's adjusted test year

---

[562] 35-A M.R.S.A. § 7101-B (Supp. 2017). Although it did not expressly direct the Commission to increase local rates to offset reductions in access charges, this statute clearly contemplated those changes. *See infra* Chapter 8.B.

[563] *See supra* note 533.

[564] 35-A M.R.S.A. § 307 (2010) prohibits utilities from filing rate changes that, with certain limited exceptions, would increase overall operating revenues by more than 1% within one year of any prior filing for a more than 1% increase.

[565] *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 470 A.2d 772, 775 (Me. 1984).

[566] *Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080 (Me. 1977).

expenses are $100, its rate base is $500, and its ROR is 10%, then the utility's revenue requirement will be:

$100 + ($500 x 10%) = $150

If the utility's actual test year revenues are $140, then it is entitled to an overall annual increase in rates of $10, or approximately 7%.

This description suggests that standard ROR regulation consists simply of mechanically supplying the values of a few variables in a simple algebraic formula. In reality, the ROR ratemaking process is a complicated, technical exercise involving substantial judgment on the part of the regulator. To perceive this complexity we can briefly review each of the formula's components.

1. Expenses

As a general matter, test year expenses are subject to two types of adjustment: known and measurable changes and unreasonable or imprudent expenses.

a. Known and Measurable Changes

First, because ratemaking is prospective, historic or test year expenses should be adjusted to reflect anticipated changes, if these changes are subject to a reasonable degree of certainty and can be confidently quantified—i.e., they are known and measurable.[567] For example, if a utility has $100,000 in labor expenses during the test year, but has signed a contract with its union to increase wages by 5% immediately after the test year, then its adjusted test year labor expenses (assuming an exclusively union workforce) would be $105,000. This is a reasonably certain and measurable change, even though the precise number of post-test-year employees cannot be predicted with complete certainty.

b. Unreasonable or Imprudent Expenses

The other type of adjustment to operating expenses is to eliminate those that are deemed unreasonable or "imprudent" or that benefit only the utility's shareholders. Expenses can be deemed "imprudent" because they are excessive or because they do not effectively contribute to the service provided the utility's customers. The utility has the right to make imprudent expenditures; it may not, however, recover them from its

[567] *See Mars Hill & Blaine Water Co. v. Pub. Utils. Comm'n*, 397 A.2d 570, 583-84 (Me. 1979).

customers. In fact, disallowances for "imprudence" apply equally to all other elements of the ratemaking formula.

By disallowing recovery of actual expenses or investment, the utility is effectively denied the opportunity to fully earn its authorized rate of return. In the simple example above in which the utility's calculated revenue requirement was $150, the disallowance of $5 in "imprudent" expenses would produce a revenue requirement of $145, effectively depriving the utility of its authorized 10% return on investment. Accordingly, if utility management incurs unreasonable or imprudent expenses or makes such investments, they remain the responsibility of the utility and its investors.

It bears emphasis that the concept of imprudence is jurisprudential, not economic. The Commission has defined "prudence" as "a course of conduct that a capably managed utility would have followed in light of existing and reasonably knowable circumstances."[568] Because of its reliance on what reasonable managers knew or should have known, this standard strongly suggests the "prudence" standard is designed to protect customers only from management errors and not from unforeseeable vicissitudes. If utility management could not reasonably have foreseen that sales would suddenly decrease, its overinvestment in capacity is not per se "imprudent."

2. Attrition

Another element in the rate case calculation may be an allowance for attrition. An attrition analysis adjusts the utility's revenue requirement to ensure that the various pieces of the ratemaking equation (revenues, expenses, and rate base) remain accurate as the analysis moves from the historic test year to the future rate-effective period (generally the first twelve months the new rates are in effect).[569] The attrition analysis is entirely forward-looking and attempts to extrapolate, based on recent historic trends, changes in revenues and expenses due to inflation and other factors that will occur between the test year and the rate-effective period. The utility is then provided with sufficient additional revenues to ensure that it will have a reasonable opportunity to earn its allowed return. This necessarily involves a lesser degree of precision than the Commission applies in making specific adjustment to the utility's test year experience:

---

[568] *Pub. Utils. Comm'n*, Investigation of Seabrook Involvements by Maine Utilities, Docket No. 84-113, Order (Phase II) at 12 (Me. P.U.C. May 28, 1985). *See also Emera Me.*, Request for Approval of a Proposed Rate Increase, No. 2015-00360, Order (Part II) at 21-22 (Me. P.U.C. Dec. 22, 2016); *Pub. Utils. Comm'n*, Investigation of Central Maine Power Company's Credit and Collection Policies and Standard Offer Uncollectible Balances, No. 2010-00327, Order on Reconsideration (Me. P.U.C. May 14 2013).

[569] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 455 A.2d 34, 40 (Me. 1983).

> The standards that we apply to adjustments in the attrition analysis are slightly different than those applied to test year adjustment, where a strict known and measurable standard is observed. In an attrition analysis, the degree of precision by which proposed adjustments are evaluated and measured must, by their nature, take into account the lesser degree of certainty that surrounds projections of the items involved. An attrition analysis looks at a future period, the first rate effective year, and tries to project, using educated estimates and forecasting mechanisms, how that future will affect the operations of the utility. In other words, it tries to determine if there will be a change from the test year level of operations that would reduce or enhance the utility's ability to earn its authorized return.[570]

Consequently, there is no bright line between "known and measurable" changes on the one hand, and attrition adjustments on the other. Instead, the differences are merely a matter of degree.

3. Rate Base

Utility rate base is "all the property of a public utility . . . used or required to be used in its service to the public within the State,"[571] and is the value of property investment on which the utility it is allowed to earn a return.[572] The most obvious, as well as the largest, component of rate base is the physical plant used to provide utility service. Rate base can also include such non-plant items as working capital, which are the funds that must be supplied by investors to meet the utility's day-to-day cash flow needs during the interim between the rendition of service to customers and payment for that service.[573] Because investors supply this capital, they are entitled to a return on it, which can be achieved most effectively through its inclusion in rate base. Like expense items, test year rate base can also be adjusted to reflect known changes (e.g., plant being placed in service) that occur after the test year.[574] Note that rate base properly consists of property "used or required to be used." This disjunctive has supported the inclusion in

---

[570] *Re Bangor Hydro-Elec. Co.*, Proposed Increase in Rates, No. 97-116, Order at 22 (Me. P.U.C. Feb. 9, 1998).
[571] 35-A M.R.S.A. § 303 (2010 & Supp. 2017).
[572] *See Camden & Rockland Water Co. v. Pub. Utils. Comm'n*, 432 A.2d 1284, 1286 (Me. 1981).
[573] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 455 A.2d 34, 41 (Me. 1983).
[574] *See Maine Water Co. v. Pub. Utils. Comm'n*, 482 A.2d 443, 454 (Me. 1984).

rate base of plant that has not yet been used, such as land held for future use[575] or plant that has become partially obsolete.[576]

To illustrate the potential concerns that arise when calculating utility rate base, consider *Central Maine Power Co. v. Public Utilities Commission*, in which the PUC addressed the issue of whether the ongoing investment in constructing new facilities should be included in rate base.[577] In this case, electric utilities were engaged in the lengthy construction of large, expensive generating plants and their ability to include their investment in these projects (during construction) in their rate base was a matter of lively controversy. The Commission's typical practice in these circumstances was to include in rate base the partially constructed plant (Construction Work in Progress ("CWIP")), but then to impute to the test year revenues the allowed return on CWIP, called Allowance for Funds Used During Construction ("AFUDC").[578] The effect of imputing this "phantom" income to the utility's test year income (and thereby crediting it to the utility's ratepayers) was to prevent ratepayers from paying a return on the CWIP investment during construction, but also give the investors the assurance that the plant under construction is included in rate base.

The "used or useful" principle was also tested when a utility acquired a parcel of land that had been available on the market and for which the utility may have had a future use. When a utility attempted to include such a parcel in rate base, the Commission ruled that it could not be included in rate base unless the utility had a "definite" plan to use the parcel.[579]

Finally, in valuing property included in rate base, Maine is an "original cost" jurisdiction.[580] Essentially, property never appreciates in value for ratemaking purposes, even if true market value has increased. By statute, the Commission is charged with fixing a "reasonable value" for property included in rate base[581] and in doing so, is required to "give due consideration to evidence of the cost of the property when first devoted to public use and the prudent acquisition cost to the utility, less depreciation on each, and other material and relevant factors."[582] These "other" factors expressly exclude "current" or market value.[583] Although the statute makes neither original cost nor prudent acquisition synonymous with "reasonable value," the PUC has traditionally

---

[575] Land held for future use will be included in rate base if it is subject to a definite plan. *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 158, 184 (Me. 1979).
[576] *See Am. Ass'n of Retired Persons v. Pub. Utils. Comm'n*, 678 A.2d 1025, 1029 (Me. 1996).
[577] 405 A.2d 153 (Me. 1979).
[578] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 433 A.2d 331, 334, 344 (Me. 1981).
[579] *Cent. Me. Power Co.*, 405 A.2d at 184.
[580] *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1104 (Me. 1977).
[581] *See* 35 M.R.S.A. § 303 (2010 & Supp. 2017).
[582] *Id.*
[583] *Id.*

used as rate base the utility's book value, which is the cost of property when first devoted to public use, less depreciation, as expressed in the utility's books of account.[584]

This principle was tested when a Maine gas utility was acquired for substantially less than its book value. The public advocate argued that the new owners should earn a return on only the newly depressed value of the utility. The Commission and Law Court sided with the utility and retained the utility's inflated book value as the proper amount of rate base upon which its investors should earn a return.[585]

a. Gain on Sale of Property

One consequence of this method of valuation is the return to customers of any gain on the sale of depreciated utility property. Because depreciation is treated like any other operating expense,[586] the investor is able to recover its investment in utility property from customers over its useful life.[587] Because customers, through depreciation expense, have reimbursed the utility for its investment in this property, they are entitled to receive any gain realized on a sale of that property.[588] The Law Court has held:

> It is only equitable that the ratepayers who bear the cost of depreciation and maintenance on the property and the burden of a sale at loss, should be entitled to benefit from the sale of such property at a gain.[589]

More recently, the Commission expanded this ruling to apply to non-depreciable property, including land, as well as depreciable property. Despite the fact that ratepayers have not been required to compensate the utility for the cost of land purchased by the utility (ratepayers pay a return *on* such investments but not a return *of* such investments), the PUC has applied the same policy to both types of assets.

In one case, the Commission extended the policy to gains Central Maine Power Company ("CMP") realized by selling easements within a CMP right of way to an

---

[584] *See, e.g.*, *Kittery Elec. Co. v. Successors of Kittery*, 219 A.2d 728, 738 (Me. 1966).

[585] *Office of Pub. Advocate v. Pub. Utils. Comm'n,* 2015 ME 113, ¶ 22, 122 A.3d 959.

[586] Because utilities may use one method of depreciation in keeping their regulated books of account and another for tax purposes, the precise depreciation expense to be used for ratemaking purposes has been controversial. *See, e.g.*, *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 164 (Me. 1979). These matters have now been resolved and presently it is sufficient to note only that once the PUC has prescribed the manner in which a utility must account for depreciation on its books of account, it may not disregard that matter for ratemaking purposes. *See New England Tel. & Tel.. Co. v. Pub. Utils. Comm'n*, 390 A.2d 8, 19, 23 (Me. 1978).

[587] *See Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1100 (Me. 1977).

[588] *See, e.g.*, *Me. Water Co. v. Pub. Utils. Comm'n*, 482 A.2d 443, 448 (Me. 1984).

[589] *See Casco Bay Lines v. Pub. Utils. Comm'n*, 390 A.2d 483, 490 (Me. 1978) (citations omitted).

interstate natural gas pipeline.[590] The Commission affirmed this approach in a 2018 decision in which the Commission ordered Northern Utilities, Inc. to return to ratepayers the gain on the sale of its former Maine headquarters in Portland.[591]

However, this principle has been somewhat softened by a decision of the Commission that shareholders be allowed to retain 10% of any gain on the sale of utility property. In *Casco Bay Lines v. Public Utilities Commission*, the Law Court affirmed the PUC's 90% allocation to ratepayers and 10% allocation to shareholders of the gain on the sale of three vessels.[592] Although the Commission acknowledged that ratepayers should be the primary beneficiaries of any sale of assets, the PUC concluded that shareholders should retain 10% of the gain in order to provide an incentive for the utility management to achieve the best possible purchase price.[593]

4. Rate of Return

Broadly, the rate of return is the amount, expressed as a percentage, that the utility is entitled to earn on its investment (rate base).[594] Just as it must pay for every other resource it uses to provide service, the utility must also pay for the money that is invested in its business. Because its two principal sources of money are debt and equity, the utility's cost of capital consists, respectively, of interest payments on its debt (and, in some cases, preferred stock) and the return required (both dividends and appreciation of the value of the utility's shares) needed to attract and compensate purchasers of common stock.[595] Although the cost of capital provides the basis for calculating the utility's rate of return, it is not, however, necessarily the same thing as the rate of return. As noted below, the allowed rate of return may include adjustments to reflect management efficiency or other considerations reflecting the balancing of ratepayer and utility interests.

The cost of debt is relatively easy to determine, as the interest on borrowing is expressly set forth in the debt instrument itself. This is also true of the cost of preferred stock.

---

[590] *Cent. Me. Power Co.*, Annual Price Change Pursuant to the Alternative Rate Plan, No. 99-155, Order on Issue of Proceeds from Sales of CMP Easements to Gas Pipeline Companies (Me. P.U.C. Aug. 2, 1999).

[591] *N. Utils., Inc.*, Request for Approval of Rate Change Pursuant to Section 307, No. 2017-00065, Order (Corrected) at 17-21 (Me. P.U.C. Feb. 28, 2018).

[592] 390 A.2d 483 (Me. 1978)

[593] *See N. Utils., Inc.*, Request for Approval of Rate Change Pursuant to Section 307, No. 2017-00065, Order (Corrected) at 18 (Me. P.U.C. Feb. 28, 2018).

[594] *See, e.g.*, *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 284 (Me. 1982).

[595] *See Millinocket Water Co. Inc. v. Me. Pub. Utils. Comm'n*, 515 A.2d 749, 752 (Me. 1986). The constitutional basis for calculating the return to equity investors is discussed in Section A, *supra*.

The return on common equity,[596] however, is not fixed by any formal instrument. Because the equity shareholder is not guaranteed any particular rate of return and is paid only after the debt and preferred stock investors have received their payments, the return on equity is both riskier and more speculative and, therefore, more difficult to calculate. The Commission typically calculates the return on equity using a discounted cash flow method, which attempts to estimate the equity investor's required yield and expected growth in dividends per share.[597] Other methods include: (1) the capital asset pricing model, which is a combination of risk-free premiums based on Treasury bond yields and an equity market risk premium based on historic equity yields; and (2) the comparable earnings analysis which is based on the returns of "comparable" companies. The only general observation that may be safely made about any particular utility's cost of equity is that it is typically more expensive than its cost of debt and preferred stock.

Once the cost of debt and equity has been computed, it must be weighted according to the components of the utility's capital structure, which is simply the relative amount of debt and equity that comprise the utility's overall capital.[598] For example, assuming that the utility's capital structure is 60% equity and 40% debt; the cost of equity is 10%; and the cost of debt is 5%, the utility's overall rate of return will be 8.0%, calculated as follows:

Equity	60% x 10% = 6.0%
Debt	40% x 5% = 2.0%
Total:	8.0%

This calculation can become more complex if the utility is the subsidiary of a larger corporation. In that case, the equity of the subsidiary utility may be funded by a combination of the parent's debt and equity. To avoid setting the subsidiary's cost of equity too high, the Commission has in the past "double leveraged" that cost; that is, it set the subsidiary's cost of equity equal to its parent's total weighted cost of capital.[599]

---

[596] This applies only to investor-owned utilities; consumer-owned utilities, such as municipal water districts, do not have equity investors and their cost of capital is limited to the expenses—interest and sinking fund payments—associated with their debt.

[597] *See New England Tel. & Tel. Co.*, 448 A.2d at 289.

[598] The debt component consists typically of short- and long-term debt as well as preferred stock, whereas the equity component is limited to common stock.

[599] *See New England Tel. & Tel. Co.*, 448 A.2d at 287, 304. Recently, the Commission has moderated its use of "double leveraging," as the holding company structure has proliferated, on the grounds that "double leveraging" ignores the competition among subsidiaries for the parent's capital. Instead, the Commission often uses the subsidiary's own capital structure, unless it is unreasonable, in which case it

The Commission may also use a "hypothetical" capital structure if it believes that the utility's actual capital structure is unreasonably expensive or "imprudent" (e.g., its actual equity component is too high).[600]

The Commission has also reduced the cost of equity for utility subsidiaries when the Commission determined that the parent company/shareholder was deriving a substantial profit from buying and selling operating utility subsidiaries.[601]

5. Management Practices as Affecting Rates of Return

In determining just and reasonable rates, the Commission shall "to a level within the commission's discretion, consider whether the utility is operating as efficiently as possible and is utilizing sound management practices."[602] The Commission has interpreted this provision as authorizing it to reward or penalize the utility for its management behavior by setting the utility's allowed return on equity at the high end (for efficient management) or low end (for inefficient management) of the range of reasonableness. In its application to date, which has inclined toward penalties, this management efficiency adjustment has been limited to utility failures to conform to certain Commission policies and requirements, such as a utility's lack of diligence in promoting conservation and co-generation;[603] failure to conform to the Commission's demand-side management and credit and collection policies; or uncooperative and evasive behavior towards the Commission.[604] More recently, a utility has been punished for poor customer service and maintenance practices.[605] The Commission has succinctly described the sort of intransigence that can invite these penalties:

> The Company's message has been consistent, loud and clear: the Company disagrees with the Commission's policy concerning conservation and least cost planning, has been intent on simultaneously

---

will use a hypothetical capital structure. *See Pease v. New England Tel. & Tel. Co.*, 162 P.U.R.4th 110 (Me. 1995).

[600] *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 182 (Me. 1979).

[601] *Re Millinocket Water Co.*, 70 P.U.R.4th 387 (Me. 1985).

[602] 35-A M.R.S.A. § 301(4)(B) (2010),

[603] *In Re Cent. Me. Power Co.*, Proposed Increase in Rates, No. 81-127, Order (Me. P.U.C. Mar. 27, 1982); *In Re Cent. Me. Power Co.*, Investigation of Justness and Reasonableness of Rates, No. 81-206, Decision and Order at 62-63 (Me. P.U.C. Mar. 27, 1982).

[604] *In Re Bangor Hydro Elec. Co.*, Investigation of Reasonableness of Rates, No. 86-242, Order at 30-43 (Me. P.U.C. Dec. 22, 1987).

[605] *Emera Me.*, Request for Approval of a Proposed Rate Increase, No. 2015-360, Order-Part II (Me. P.U.C. Dec. 22, 2016).

> arguing that that policy is ambiguous and ill-conceived . . . and on avoiding compliance because the Commission is wrong . . . .[606]

In the Commission's view, these management efficiency adjustments are warranted when standard ratemaking adjustments cannot be employed, either because the costs of the utility's failure are difficult to measure or because the unrealized benefits of lost opportunities cannot be determined.[607] One consequence of this remedy is that it encourages the company towards self-correction, without providing a detailed blueprint of how that correction should be structured:

> As we have stated before, we are not in the business of *micromanaging* public utilities. We do not have the resources to operate [the utility], and it is not our responsibility to do so. Rather, the proper function for the Commission is to direct utilities toward the desired result, and to establish the policies and regulations which facilitate and guide public utilities.[608]

Interestingly, the Law Court has never expressly upheld the Commission's authority to make these efficiency adjustments. In the one instance in which the issue was presented to it, the court found that the adjustment was lawful if its "end result" remained within the range of reasonableness:

> It is not necessary to determine . . . whether the Commission upon an adequate record may properly "penalize" a utility . . . for such reasons as the failure to effectuate the public policy expressed in independent state and federal energy legislation. The Commission's determination of [the utility's] cost of equity in this case is independently supported by the record and falls within a range we find to be reasonable.[609]

---

[606] *Re Pub. Utils. Comm'n*, Investigation into Bangor Hydro Electric Co.'s Performance in the Areas of Demand Side Management and Integrated Least Cost Planning, No. 90-286, Decision and Order-Part III at 27 (Me. P.U.C. May 31, 1990).

[607] *See Bangor Hydro-Elec. Co.*, Investigation of Reasonableness of Rates, No. 86-242, Order at 18 (Me. P.U.C. Dec. 22, 1987).

[608] *Re Me. Pub. Utils. Comm'n*, Investigation into Bangor Hydro Company's Performance Policies and Management Practices in the Areas of Demand Side Management and Lease Cost Planning, No. 90-286, Decision and Order-Part III at 35 (Me. P.U.C. May 31, 1991).

[609] *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 455 A.2d 34, 39 (Me. 1983). The dissent makes the interesting point that the relevant statutes give the Commission no authority to adjust the utility's return for non-compliance with the Commission's policies and that the Commission may not, as a matter of law, consider matters outside the scope of its statutorily conferred ratemaking authority.

Although the Commission has authority to foster "the broad public interest" through its rate of return calculations,[610] it is not clear whether the Law Court would find lawful this specific instance of promoting that interest, should it examine the adjustment in isolation.

D. Pass-Through Rates

From time to time, the Commission or the Legislature has recognized that the extreme price volatility in certain supplies needed by utilities to provide customer service requires traditional ratemaking principles to be modified. This usually takes the form of a special category of ratemaking where rates are periodically (often annually) adjusted to make sure utility investors receive no more than and no less than the actual cost incurred by the utility purchasing the particular supply. This results in an exception to both the prohibition against retroactive ratemaking and the prohibition against single-issue ratemaking.

These rates were sometimes historically referred to as "automatic adjustment clauses," though it would be wrong to call them "automatic," for the Commission retains authority to review and approve, in an adjudicatory proceeding, the rates upon the utility's petition.[611] A more apt descriptor for these types of rates might be "pass-through rates." Two principal characteristics define pass-through rates. First, they are trued-up, or reconciled, at regular or semi-regular intervals. Second, they are essentially retroactive, allowing for recovery of actually incurred past costs, rather than providing recovery for estimates of known and measurable anticipated future costs.

Three common types of pass-through rates are (a) cost of gas adjustment rates for natural gas local distribution companies ("LDCs"), (b) stranded cost rates for transmission and distribution utilities, and (c) the pre-Restructuring Act fuel adjustment clauses, which no longer exist for electric utilities.

Because the overriding purpose of the Commission's ratemaking authority is the economic one of ensuring that rates are just and reasonable, the dissent would limit the Commission's consideration of management efficiency to those practices that directly affect the utility's financial needs. *Id.* at 54.

[610] *See supra* note 535; *see also supra* Chapter 6.B.1.

[611] It is important to note that the Commission has "moved away from automatic adjustment clauses under normal circumstances . . . ." *Fox Island Elec. Coop.*, Proposed Tariff Revisions to Modify the Transmission Adjustment Tariff, No. 2004-641, Order at 2 (Me. P.U.C. Oct. 13, 2004). Despite this statement, there are still a number of these mechanisms in use, such as stranded costs, cost of gas adjustments, and targeted infrastructure recovery adjustments, as this section explains.

1. Cost of Gas Adjustment

An LDC's cost of gas refers to the utility's cost of procuring natural gas supply for delivery to customers. These are actual costs the LDC incurs through arrangements with natural gas marketers. Maine's LDCs recover gas supply costs through rate proceedings that are governed by the Commission's Chapter 430 and the utility's Commission-approved terms and conditions, which often provide specific rate adjustment and reconciliation formulae.[612]

2. Stranded Cost Rates

Stranded costs are those power procurement costs of electric utilities that were left "stranded" as a result of electric restructuring. Title 35-A defines these costs as "a utility's legitimate, verifiable and unmitigable costs made unrecoverable as a result of the restructuring of the electric industry . . . ."[613] Stranded costs include the difference between net plant investment associated with a utility's generation assets and the market price received by the utility when those assets were sold[614] as well as the difference between future contract payments by utilities to third-party suppliers of electricity and the price received by the utility when it re-sold the power into the wholesale market.[615] The transmission and distribution utilities' initial stranded cost rates were established in 2003. Stranded cost rates are reset in a rate case every three years[616] and reconciled annually.[617] Stranded costs were originally envisioned to allow for recovery of below-market sales of generation assets and long-term power purchase agreements that predated the Restructuring Act. In practice, however, the Commission has also used the stranded cost rate mechanism to enable recovery of utilities' costs of long-term renewable energy contracts.[618]

---

[612] *See* 65-407 C.M.R. ch. 430 (1997).
[613] 35-A M.R.S.A. § 3208(1) (2010).
[614] *Id.* § 3208(2)(A), (B).
[615] *Id.* § 3208(2)(C).
[616] *Id.* § 3208(6).
[617] *Id.* (noting that the "[C]ommission may correct adjustable stranded costs estimates and adjust the stranded costs charges at any other time," though in practice stranded costs have been reconciled annually); *see also Me. Pub. Utils. Comm'n*, Annual Reconciliation of Cent. Me. Power Co.'s Stranded Cost Revenue Requirement and Rates, No. 2011-486, Order Approving Stipulation at 1 (Me. P.U.C. Feb. 21, 2012).
[618] *See, e.g.*, *Emera Me.*, Request for Approval of Rate Change (Stranded Costs), No. 2016-00270, Order Approving Stipulation (Me. P.U.C. June 15, 2017); *Me. Pub. Utils. Comm'n*, Annual Reconciliation of Cent. Me. Power Co.'s Stranded Cost Revenue Requirement and Rates, No. 2011-486, Order Approving Stipulation, Stipulation ¶ 1 (Me. P.U.C. Feb. 21, 2012) (noting recovery of long-term contracts that Commission directed utility to enter into with wind power facility) *Pub. Utils. Comm'n*, Investigation into Recovery of Expenses and Disposition of Resources from Long-Term Contracts by

3. Fuel Adjustment Clauses

Prior to the 2000 restructuring of the electric industry, Maine's transmission and distribution utilities procured fuel used to generate electricity. The utility recovered the costs of its fuel procurement through Commission-approved fuel adjustment clauses. Commission rules governed the establishment of the fuel adjustment clause. In 2001, the Commission repealed the rules pertaining to fuel adjustment clauses because the rules became superfluous upon restructuring.[619]

As previously described, the Commission has created unique "tracker" systems for certain unusual expenses.[620] For example, a gas LDC was authorized to create a Targeted Infrastructure Rate Adjustment ("TIRA") mechanism designed to recover the costs of replacing all its old cast iron and unprotected steal pipe with new state of the art pipes. The cost of this infrastructure replacement far exceeded the normal level of operation and maintenance costs for the utility. As a result, the PUC authorized the "tracker" system.[621]

E. Long-Term Rate Plans

1. Dissatisfaction with ROR Regulation

The formulaic nature of traditional ROR regulation, which is driven by the utility's cost of providing service, can result in a method of economic regulation in which ratemaking becomes merely a passive conduit for passing on to customers the utility's "prudent" investment and expense decisions. Moreover, under this "cost of service" model, arguably the utility may come to regard the recovery of its actual costs as a right, regardless of the level of such costs. During the early 1990s, the Commission began to voice its dissatisfaction with traditional ROR regulation, which it referred to as "essentially 'cost plus' regulation."[622]

Maine's T&D Utilities, No. 2011-00222, Order (Me. P.U.C. Oct. 26, 2011) ("Although it is clear that costs under these contracts are not 'stranded costs' as defined by statute, for cost recovery purposes we see no reason to treat them differently than stranded costs associated with existing purchased power contracts." (internal footnotes omitted)).

[619] *Pub. Utils. Comm'n*, Repeal of Chapters 340, Fuel Adjustment for Electric Utilities, and 341 Fuel Cost Adjustment for Small Electric Utilities, No. 2001-375, Order Repealing Rules at 1 (Me. P.U.C. Aug. 9, 2001).

[620] *See supra* Chapter 6.B.3.

[621] *N. Utils. Inc. d/b/a Unitil*, Proposed Base Rate Increase and Rate Design Modification, No. 2013-00133, Order Approving Stipulation (Me. P.U.C. Dec. 27, 2013).

[622] *Cent. Me. Power Co.*, Re: Proposed Increase in Rates, No. 92-345, Order at 126 (Me. P.U.C. Dec. 14, 1993).

The Commission's statement reflects a frustration with the ability of traditional ROR regulation to mimic the rigor that the competitive market theoretically imposes on unregulated suppliers, who cannot simply raise prices to compensate for investments that turn out to be unproductive. Unlike free market suppliers, utilities traditionally responded to adverse changes, such as a decline in sales or unexpected cost increases, by seeking a rate increase—at least a portion of which was typically allowed by the Commission. At the same time, utilities that did increase their efficiency, thereby reducing their expenses, saw the fruits of those efficiencies passed on to their customers through lower rates. In response, the Commission announced its intention to "implement a system whereby [the utility] will benefit if it is efficient and will suffer if it is not."[623] This "system" is intended to introduce a type of economic regulation that will impose the discipline economic theory assigns as the product of the competitive marketplace.

2. ARPs for T&D Utilities

The "system" the Commission created for transmission and distribution ("T&D") utilities was essentially a multiyear rate plan that created stable, predictable rates, and, more importantly, shifted risk to shareholders in a financially manageable way.[624] The rate plan, first adopted for CMP and referred to as an alternative rate plan, or ARP, was instituted in 1994 for a seven-year term and had four principal elements: price caps, profit sharing bandwidth, mandated costs, and service quality indices. The initial CMP rate plan has served as the model for rate plans adopted by various other Maine utilities.[625]

a. Price Caps

First, the ARP establishes fixed, multiyear rate increases, typically over a five- to seven-year period with predetermined annual adjustments. Referred to as a price cap, this mechanism begins with a rate level established by ROR regulation, but then adjusts that rate annually by an amount equal to inflation. These annual inflation adjustments are then reduced by an imputed productivity offset, which automatically flows imputed efficiency gains through to ratepayers. Under this plan, the utility may not file for a new rate increase during the term of the ARP (sometimes referred to as a "stay out"

[623] *Id.* at 131.
[624] *See id.* at 124.
[625] The Commission's authority for electric utility rate plan regulation is Section 3195, which authorizes rate mechanisms that promote electric utility efficiency. *See* 35-A M.R.S.A. § 3195 (2010).

provision). The annual rate increases are intended to be self-implementing and provide predictable, stable, multiyear revenue increases.[626]

Despite these adjustments, the price cap method of regulation cannot perfectly capture whatever efficiencies may exist in competitive markets. First, it depends to a great extent on the traditional method of setting rates; that is, it calculates a rate base and then employs the ROR method to establish an initial rate for the ARP that is "just and reasonable" to both customers and investors under traditional rate regulation. Moreover, predetermined "productivity" offsets and annual increases limited to general rates of inflation are, at best, an inexact proxy of the prices to which customers would be subject under competition. This multiyear rate plan nevertheless avoids the pass-through effect of cost of service ROR regulation and is therefore believed by some to be superior to it.

b. Profit-Sharing Bandwidth

Secondly, the ARP includes a profit-sharing mechanism in the form of a bandwidth around the utility's allowed return on equity, within which all profits flow to and all deficiencies are imposed on the utility's equity investors. Given a typical bandwidth of 350 basis points, and assuming an allowed 10% return on equity, the utility would be allowed to keep all profit up to a 13.5% earned return on equity without having its rates lowered for "over-earning." However, it would be required to absorb all losses until its earned return on equity fell to 6.5% before it could request a rate increase. Outside this bandwidth, profits and losses are allocated equally between shareholders and ratepayers.[627] This profit-sharing mechanism shifts the risk of low profitability away from ratepayers, provides the utility with a direct monetary incentive to improve its operating efficiencies, and protects both the utility and its ratepayers from extreme earning fluctuations.[628]

c. Mandated Costs

Third, the ARP allows special increases for certain so-called mandated costs in excess of a specified amount. These "mandated costs" must be costs beyond the utility's

---

[626] *Cent. Me. Power Co.*, Proposed Increase in Rates, No. 92-345(II), Detailed Opinion and Subsidiary Findings at 1 (Me. P.U.C. Jan. 10, 1995).

[627] A subsequent ARP approved for Central Maine Power Company did not include this top-end sharing provision. The Law Court upheld this, noting that because of the high productivity offset built into the price cap and increased service quality index penalties the utility's probability of excessive earnings was very small. *See Indust. Energy Consumers Group v. Pub. Utils. Comm'n*, 2001 ME 94, ¶ 19, 773 A.2d 1038.

[628] *See id.*

control and must have a disproportionate effect on the utility or the electric industry, as opposed to the economy in general. Mandated costs include costs associated with tax or regulatory changes and natural disasters. Mandated costs are sometimes referred to as exogenous costs. The purpose of the mandated cost exception is to provide a limited safety net[629] for unforeseen and substantial contingencies to which the utility is uniquely susceptible, but for which it is not to blame.[630] This safety net concept departs somewhat from the model of the competitive marketplace, which does not protect its participants from such contingencies. It should be noted, however, that the competitive market is, at best, an imperfect analogue for regulation because the regulated utility, unlike the unregulated competitor, cannot manage its risks by selecting only the most desirable customers. Instead, it must provide service to all customers within its service territory.

d. Service Quality Indices

Finally, the ARP establishes a service quality index ("SQI"), which is intended to prevent the utility from increasing its profits during the term of the ARP by reducing spending on service. The SQI quantifies a baseline, based on recent historic performance, for various service categories, such as new service installations completed on time, or the frequency of service interruptions. The utility's performance in these service categories is evaluated each year during the ARP. If its performance in any area falls below the baseline amount, it must pay a scheduled penalty.[631] This feature also departs from a purely competitive marketplace, in which entrepreneurs that provide inadequate service are punished through the loss of business. Customers of a monopoly utility typically do not, however, have the option of taking their business elsewhere.

e. Commission Evaluation of ARPs

In 1998, the Commission established an ARP framework for Emera Maine (then known as Bangor Hydro Electric Company ("Bangor Hydro")), the State's second largest

---

[629] That the safety net is limited is illustrated by the Commission's refusal to allow CMP to recover unanticipated costs outside of its ARP. When CMP, through no fault of its own, incurred a substantial loss performing certain billing duties that were imposed on it by statute but that were not specified as a mandated cost under the ARP, the Commission concluded that this loss was the type of risk allocated to CMP under the ARP and that CMP had accepted in exchange for the ARP's benefits. *Re Cent. Me. Power Co.*, Request for Accounting Order, No. 2004-709, Order Denying Request for Accounting Order at 2-3 (Me. P.U.C. Feb. 22, 2005).

[630] *See id.*

[631] *See id.*; *see also Cent. Me. Power Co.*, Re: Proposed Increase in Rates, No. 92-345 (II), Order at 3 (Me. P.U.C. Dec. 14, 1993).

electric utility.[632] This ARP was not, however, implemented until 2002.[633] The Bangor Hydro ARP incorporated most of the features set forth in the first CMP ARP.[634]

In 2013, the Commission reviewed CMP's ARP.[635] Due to the specifics of CMP's revised plan, the Commission staff believed it was "appropriate to ask whether the ARP ha[d] worked as intended and whether an ARP . . . [was] the correct ratemaking methodology, at least at [that] point in time."[636] In its analysis, staff first reiterated the objectives and benefits of an ARP.[637] Then, after evaluating the effectiveness of CMP's 2008 ARP, the staff concluded that due to "issues/concerns with CMP's performance under prior ARPs, as well as the concern that a new ARP cannot adequately address CMP's projected capital plans in a way that meaningfully protects ratepayers,"[638] the Commission should take "an ARP 'hiatus' for CMP and allow CMP to operate under cost of service ratemaking for a period of time."[639] In making this decision, the Commission noted that a return to cost of service regulation "does not necessarily mean increased regulatory burdens, continuous rate filings and a lack of incentive to control cost."[640] Instead, the Commission explained, a hiatus would allow CMP to "address its system and spending needs" in a manner that would suit the interests of both the shareholders and the ratepayers.[641] Furthermore, Commission staff observed that "the normal regulatory lag between rates was sufficient to promote the Commission's objectives of management efficiency, cost containment and rate stability."[642]

3. AFORs for Telephone Utilities

In 1993, the Legislature enacted legislation to permit the PUC to adopt rate plans for the State's telecommunications utilities.[643] The precise form of these utilities' rate plans, called the Alternative Form of Regulation, or AFOR, was not specified by

---

[632] *See Bangor Hydro Elec. Co.*, Proposed Increase in Rates, No. 97-116, Order (Me. P.U.C. Feb. 9, 1998).
[633] *Bangor Hydro Elec. Co.*, Request for Approval of Alternative Rate Plan, No. 2001-410, Order Approving Stipulation (Me. P.U.C. June 11, 2002).
[634] *Cent. Me. Power Co.*, Proposed Increase in Rates, No. 92-345(II), Detailed Opinion and Subsidiary Findings at 1 (Me. P.U.C. Jan. 10, 1995).
[635] *Cent. Me. Power Co.*, Request for New Alternative Rate Plan ("ARP 2014"), No. 2013-00168, Bench Analysis (Me. P.U.C. Dec. 12, 2013).
[636] *Id.* at 5.
[637] *Id.* at 10 (focusing on benefits such as rate stability and predictability, regulatory administration, reliability, risk-shifting and incentives for cost control, and ability of ARPs to handle projected changes in cost.).
[638] *Id.* at 20.
[639] *Id.*
[640] *Id.*
[641] *Id.*
[642] *Id.* at 21.
[643] *See* 35-A M.R.S.A. § 9101 *et seq.* (Supp. 2005) (repealed 2013).

statute. However, these rate plans were subject to a number of general statutory conditions, such as the requirement that they could not last less than five or more than ten years[644] and that they could not be more costly than traditional ROR regulation.[645] The AFOR adopted for the State's telecommunications utilities closely paralleled the ARP adopted for the State's electric utilities.[646]

Due to the enhanced competition in the telecommunications industry, the AFOR applied only to "core" services, such as basic exchange and toll services, and not to competitive non-core services, such as broadband.[647] This AFOR consisted of a price regulation index ("PRI"), adjusted annually by an amount equal to the rate of inflation and then offset by productivity growth and a very limited number of exogenous costs (similar to "mandated costs" for the electric utilities). The utility could change the price of any particular core service (but not price it below cost) provided the overall revenues from core services did not exceed the PRI.[648]

In adopting the AFOR, the PUC again noted the superiority of rate plans over ROR methodology, under which the utility relied upon frequent rate cases to overcome declining sales or management inefficiencies. Under the AFOR, the utility bore "the entrepreneurial risks that sufficient sales will not occur, that costs will be higher than expected, and that it will not earn a fair return on its investment."[649] In addition, the AFOR employed a SQI to ensure that service does not deteriorate. The principal difference between the AFOR and the ARP for transmission and distribution utilities was the AFOR's lack of any earnings sharing above or below a bandwidth. The Commission concluded that the AFOR's very substantial productivity offset provided ratepayers with a sufficient benefit.[650]

4. Rate Plans for Gas Utilities

In 1997, the Commission was given authority to establish rate plans for natural gas distribution utilities.[651] Pursuant to this authority, the Commission established an ARP for Bangor Gas for a period of ten years.[652] The ARP included price caps, annual

[644] *See* 35-A M.R.S.A. § 9103(1) (Supp. 2006) (repealed 2013).
[645] *See id.* § 9103(2).
[646] *See, e.g.*, *Me. Pub. Utils. Comm'n*, Re: Investigation Into Regulatory Alternatives for the New England Telephone & Telegraph Company d/b/a NYNEX, No. 94-123, Order (Me. P.U.C. May 15, 1995).
[647] *See id.* at 37.
[648] *See id.* at 38.
[649] *See id.* at 15.
[650] *Id.* at 2.
[651] *See* 35-A M.R.S.A. § 4706. (2010).
[652] *Bangor Gas Co., L.L.C.*, Request for Approval to Furnish Gas Service in the Greater Bangor Area, No. 1997-795, Order Approving Rate Plan (Me. P.U.C. June 26, 1998); *see also Office of Pub. Advocate v. Pub. Utils. Comm'n*, 2015 ME 113, ¶ 3, 122 A.3d 959.

inflation adjustments, rate flexibility, and annual reporting requirements,[653] as well as "a provision that required the Company to share 50/50 with ratepayers any earnings that exceeded a cumulative return on equity net of total historic losses in excess of 15% per year."[654]

In 2015, after the sale of Bangor Gas to Energy West, the result of which prompted the utility to record an "impairment loss of approximately $38 million,"[655] Bangor Gas filed a petition to renew its ARP. This ARP based its valuation on the initial investment (which was written off as an "impairment loss" after the sale) and not Energy West's significantly lower acquisition costs.[656] After review, the Commission authorized a seven-year ARP for Bangor Gas, determining that the original pre-sale rate base was still "just and reasonable."[657]

Upon appeal, the Law Court held that, "[c]onsistent with its statutory authority, the Commission rejected using the acquisition cost and accepted the original cost as the more reasonable value on which to base Bangor Gas's rates and resulting return on equity."[658] In its decision, the Law Court once again emphasized the statutorily-defined purposes of an ARP: "to promote efficiency in operations, create appropriate financial incentives, promote rate stability and promote equitable cost recovery for the utility."[659]

5. Do Rate Plans Work?

Do these rate plans provide more economically efficient rates than those established by traditional ROR methods? Because the comparison involves a high degree of speculation, no one really knows. Despite this inability, the AFOR statute nevertheless required the Commission to adopt a rate plan only if it determined that it would not produce rates higher than those established by ROR regulation.[660] In two trips to the Law Court on this issue, the Commission unsuccessfully defended its failure to make the statutorily required determination by claiming its inability to make a reliable estimate about ROR rates for the full term of any AFOR.[661] That the Commission doubts its own

---

[653] *Bangor Gas Co., L.L.C.*, Request for Approval to Furnish Gas Service in the Greater Bangor Area, No. 1997-795, Order Approving Rate Plan at 12-25 (Me. P.U.C. June 26, 1998).
[654] *Bangor Gas Co., L.L.C.*, Request for Approval of Renewal of Multi-Year Rate Plan (35-A M.R.S. § 4706), No. 2012-00598, Order (Me. P.U.C. Sept. 8, 2014).
[655] *Office of Pub. Advocate*, 2015 ME 113, ¶ 3, 122 A.3d 959.
[656] *Id.* ¶ 14.
[657] *Id.*
[658] *Id.* ¶ 21.
[659] *Id.* ¶ 16 (citations removed); *see also* 35–A M.R.S.A. § 4706(1) (2010).
[660] 35-A M.R.S.A. § 9103(2) (2010) (repealed 2013).
[661] *See Office of the Pub. Advocate v. Pub. Utils. Comm'n*, 2003 ME 23, ¶26-29, 816 A.2d 833; *see also Office of the Pub. Advocate v. Pub. Utils. Comm'n*, 2005 ME 15, ¶ 26-38, 866 A.2d 851.

ability to compare the two different approaches to ratemaking is good evidence that an objective comparison cannot be made with any reliable degree of confidence.

That the hypothesis of the rate plans' superiority to traditional ROR regulation cannot be empirically demonstrated should not by itself, however, defeat the assumption that it is superior. The Commission's theoretical justifications for abandoning traditional ROR regulation for rate plans may still have merit. Inability to prove the hypothesis by empirical evidence may be a striking illustration of the old saying that ratemaking is more of an art than a science.

It should be noted that the portion of utility rates established by either the ROR or rate plan method has diminished considerably in recent years. Due to the electric industry restructuring discussed in Chapter 8.A., electric rates are now divided into four distinct classes: transmission, distribution, stranded costs, and standard offer.[662] Transmission rates are established by the Federal Energy Regulatory Commission ("FERC").[663] Stranded cost rates and standard offer charges are accounted for separately, and only the utility's distribution rates are subject to rate plan method.

Similarly, rates for the State's natural gas utilities are divided into distribution and commodity categories, with commodity rates being essentially a pass-through of costs[664] while only distribution rates are established by rate plans.

Finally, as noted above, only the telephone utility's "core" services are subject to AFOR regulation; rates for competitive "non-core" services are still subject to market determination.

F. Special Rate Contracts

Despite the fact that utilities generally group large numbers of customers into a few distinct rate classes, the Commission permits the State's utilities to offer special discounted rates to individual customers under so-called special rate contracts. These special rate contracts are also sometimes referred to as targeted rate contracts. The purpose of these contracts is to prevent the loss of revenue due to lower rates in other states, a customer's financial distress, or the customer's ability to self-serve.[665] The utility's

---

[662] *Re Me. Pub. Utils. Comm'n*, Investigation Into Bangor Hydro-Electric Company's Stranded Cost Revenue Requirements and Rates, No. 2004-112, Ruling on BHE's Motion In Limine at 6 (Me. P.U.C. Nov. 5, 2004).

[663] Occasionally disputes arise as to whether certain expenses or revenues should be allocated to one or the other of these different classes. *See Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, 90 A.3d 451. In this case, CMP improperly allocated approximately $2.6 million to T&D receivables instead of standard offer receivables. *Id.* ¶ 1.

[664] 35-A M.R.S.A. § 4703 (2010).

[665] *See, e.g.*, *Re Me. Pub. Utils. Comm'n*, Investigation of Airco Industrial Gases, Request for Interruptible Load Retention Service Rate with CMP, No. 92-331, Order-Part II at 12 (Me. P.U.C. Mar. 25, 1994).

discretion to offer those non-core rates is subject to certain parameters, such as floors to prevent the utility from pricing the contracts below long-term marginal cost. In addition, the utility has the burden of demonstrating (1) that but for the discount, the customer would reduce its consumption and (2) that the amount of the discount is the minimum necessary to cause the customer to maximize its consumption of utility services. Essentially the utility must demonstrate that the customer's contribution toward payment of the utility's fixed costs is maximized by the discounted rate. In establishing the utility's revenue requirement in a traditional rate case, the revenues from those special contracts are subtracted from the utility's overall revenue requirement, resulting in the amount of the discount being collected from all other ratepayers.[666]

G. Rate Design

Rate design is the manner in which the utility's overall revenue requirement is translated into the specific prices or rates charged to individual customers. It is characterized primarily by uniform average rates for broad classes of customers (e.g., residential, commercial, and industrial customers) or subclasses of customers (e.g., residential space heat customers) or by the type of service the customer is receiving (e.g., demand charges). Unlike determining the utility's revenue requirement—which typically pits the utility's shareholders against the utility's ratepayers—rate design pits one group of ratepayers against another group of ratepayers. Essentially, rate design allocates responsibility for the "revenue requirement pie" between all of the various ratepayers.

Rate design in the electric utility industry became a compelling item beginning in the early 1980s when the Public Utility Regulatory Policies Act of 1978 ("PURPA")[667] and corresponding state laws[668] prompted the Commission to use rate design to promote the broad policy goals of energy conservation and efficiency.[669] The purpose of these rate design efforts was to attempt to base each rate for each type of electric service upon the utility's actual cost of providing that type of service. In the language of the State's Electric Rate Reform Act, the Commission was obligated "to relate transmission and distribution rates more closely to the cost of providing transmission and distribution service."[670] The theory behind the alignment of rates to costs was that when customers receive the "right price signal," they would make economically rational choices about how much utility

---

[666] *Re Me. Pub. Utils. Comm'n*, Investigation into Cent. Me. Power Co.'s Stranded Costs, Transmission and Distribution Utility Revenue Requirements and Rate Design, No. 97-580, Order at 37 (Me. P.U.C. Mar. 19, 1999).

[667] 16 U.S.C. § 2601 *et seq*. (2010).

[668] The Electric Rate Reform Act, 35-A M.R.S.A. §§ 3151-56 (2010 & Supp. 2017).

[669] *Cent. Me. Power Co.*, Re: Investigation into Cost of Service of Customer Classes of Rate Design of CMP, No. 80-066 Order at 3 (Me. P.U.C. Sept. 11, 1985).

[670] *See* 35-A M.R.S.A. § 3152(A) (2010 & Supp. 2017).

service to purchase, leading to greater efficiency through the informed use of the true cost of providing each specific type of electric service.[671]

The Commission has stated that cost-based rates will:

> [I]nsure that those who buy electricity pay what it costs to generate and deliver that electricity to them, and that no one group of customers is subsidized at the expense of another. By doing this, we believe that all customers will be treated as fairly as possible; that they will be more able to choose wisely among competing energy technologies; that the use of electricity will be neither promoted nor discouraged artificially . . . .[672]

To further these ends, the Public Utilities Regulatory Policies Act ("PURPA") listed various standards that must be considered by the state commissions:

(1) rates must reflect the cost of providing service on a class by class basis;
(2) declining block rates are prohibited (rates in which the unit price decreases as consumption increases);
(3) rates that vary based on the time of day reflect the varying cost of providing service at different times of day; and
(4) rates that vary on a seasonable basis reflect the cost of providing service at different times of the year.[673]

These standards were implemented by the State's electric utilities.

Although fundamental to its success, cost calculation has been a difficult issue in the design of rates. In large part, the controversy has focused on whether the embedded or the marginal cost is the appropriate basis for establishing the cost of service. Embedded costs are the historical costs of plant and service as reflected on the utility's books of account and are the same costs used to determine the utility's revenue requirement.[674] Marginal costs, on the other hand, are the current costs that will be incurred by producing an additional unit of output.[675] In theory, when prices reflect marginal costs, resources are more efficiently allocated because the customer will make choices based not upon the investment the utility made well in the past, but upon the additional investment it will be required to make at the current time to expand service to

---

[671] *Re Me. Pub. Utils. Comm'n*, Investigation of MPS's Cost of Service and Rate Design, No. 87-009, Order Approving Stipulation and Lifting Suspension (Me. P.U.C. Feb. 9, 1989).
[672] *Re Cent. Me. Power Co.*, 26 P.U.R.4th 388, 429 (Me. 1978).
[673] 16 U.S.C. § 2621 (2010).
[674] *See Re Cent. Me. Power Co.*, Investigation into Cost of Service of Customer Classes of Rate Design of CMP, No. 80-066, Order at 9 (Me. P.U.C. Sept. 11, 1985).
[675] *See id.*

that customer. Although PURPA is neutral as to the two classes of cost, state law favors the marginal cost approach.[676] The Commission has used both types of costs in setting rates.[677]

Initially, embedded costs were used to allocate the utility's revenue requirement to customer classes (e.g., residential, commercial, or industrial). As studies became more refined, however, the Commission used marginal cost to guide the allocation of cost to the various customer classes.[678]

Cost allocation involves a three-step process in which the first step is to functionalize cost by assigning all of the utility's cost to such major functions as generation, transmission, or distribution. This is primarily an engineering activity. These costs are then classified as demand, energy, or customer depending upon the type of cost.[679] Finally, the Commission allocates the costs associated with each of the three functions and each type of cost to each of the utility's classes.[680]

Traditionally, the allocation of the utility's revenue requirement among customer classes (inter-class rate design) enjoyed most of the emphasis in Commission's rate design efforts. With this matter accomplished, however, the Commission has more recently been able to focus on another major component of rate design—the design of individual rate elements within a particular customer class (intra-class rate design). For example, in 2007, the Commission authorized Bangor Hydro to gradually transfer all its distribution related costs from energy charges to demand charges for its large demand customers.[681] However, this decision was subsequently reversed for CMP.[682]

It should be noted that cost-of-service rate design principles are not confined to the electric industry. For example, Maine law expressly recognizes that water rates may vary between divisions of a water utility's service territory based upon differences in the cost of serving different portions of that territory.[683] Moreover, the Law Court has upheld a PUC rate order allowing water rates to be designed based on the cost

---

[676] *See* 35-A M.R.S.A. § 3153-A (2010 & Supp. 2017).

[677] *See Re Me. Pub. Utils. Comm'n*, Investigation of MPS Cost of Service and Rate Design, No. 87-009, Order Approving Stipulation and Lifting Suspension (Me. P.U.C. Feb. 9, 1989).

[678] *See Re Cent. Me. Power Co.*, Proposed Increase in Rates and Rate Design, No. 89-068, Order at 22 (Me. P.U.C. Mar. 29, 1991).

[679] Demand costs (expressed in kW) are essentially the fixed cost of the plant the utility must maintain in order to meet its load. Energy costs (expressed in kWh) are essentially the variable costs of providing service—principally fuel and certain operational maintenance costs. Customer costs are costs that vary with the number of customers.

[680] *See Re Cent. Me. Power Co.*, Investigation into the Cost of Service of Customer Classes of Rate Design of CMP, No. 80-66, Order at 14-20 (Me. P.U.C. Sept. 11, 1985).

[681] *See Re Bangor Hydro-Elec. Co.*, Request for Commission Investigation into the Rate Design for Demand Classes, No. 2005-554, Order Approving Stipulation at 3 (Me. P.U.C. Mar. 12, 2007).

[682] *See Cent. Maine Power Co.*, Request for New Alternative Rate Plan ("ARP 2014"), No. 2013-00168, Order (Me. P.U.C. Oct. 14, 2014).

[683] *See* 35-A M.R.S.A. § 6105(3) (2010 & Supp. 2017).

differences of serving the utility's urban and rural customers.[684] This issue was revisited recently when the PUC authorized Emera to impose a surcharge on ratepayers on Swan's Island to reflect the added cost of serving the remote island.[685]

H. Ratemaking for Consumer-Owned Utilities

Traditional ratemaking has been relaxed for Maine's consumer-owned water or electric utilities, such as municipal water or electric districts. Under 35-A M.R.S.A. § 6104 (2010), any consumer-owned water utility has the option to increase rates under a procedure in which the utility, rather than the PUC, will hold a public hearing on the proposed rate increase, pursuant to public notice, including notice of the customer's right to request a Commission investigation. If, within thirty days after the public hearing, the lesser of 15% of the utility's customers or 1,000 customers file an objection with the Commission, then the Commission has the right to suspend and investigate the proposed rate change which otherwise will become effective as filed, without being subject to suspension and prior investigation. 35-A M.R.S.A. § 3502 (2010) establishes a very similar procedure for consumer-owned electric utilities. Moreover, as discussed in Chapter 8.D., under 35-A M.R.S.A. § 6114 (Supp. 2017), the Commission may broadly exempt consumer-owned water utilities from many of the regulatory requirements of Title 35-A.[686]

[684] *See City of Portland v. Pub. Utils. Comm'n*, 656 A.2d 1222 (Me. 1995).

[685] *See Swan's Island Elec. Coop.*, Proposed Sale of Assets & Abandonment of Serv. Territory (35-A M.R.S. §§ 1101 & 1104) Emera Maine Proposed Expansion of Serv. Territory (35-A M.R.S. § 2102), No. 2016-00209, Order Approving Stipulation (Me. P.U.C. Mar. 13, 2017).

[686] *Portland Water Dist.*, Petition for Exemption Pursuant to 35-A M.R.S.A. Section 6114 and Chapter 615, Decision and Order (Me. P.U.C. Nov. 13, 2015).

Chapter 7

Mergers, Reorganizations, and Affiliate Transactions

This chapter reviews the Commission's authority over utility reorganizations and transactions between the utility and its affiliates. The purpose of this authority is to address two separate types of risk—the risk that the utility's customers will subsidize the affiliates' operations and the risk that poor business decisions by the affiliate could impair the finances or operations of the utility. These risks have assumed a greater prominence with the rise of the holding company structure in Maine's utility industry.

The statute governing the Commission's approval of reorganizations applies not only to corporate reorganizations (such as a merger) of the utility itself, but also to the creation, dissolution, or transfer of any utility subsidiary or affiliate, even when that affiliate has no substantive connection with the utility. For example, if the parent company of a Maine utility acquires another entity, that is a reorganization subject to Commission approval regardless of whether the new affiliate has no other connection to the Maine utility, and regardless of where in the world the new affiliate is located.

The fundamental standard that the Commission uses in approving reorganizations is that reorganization creates "no net harm" to the utility or to its customers. To ensure this standard is satisfied, the Commission will frequently attach

conditions, such as limits on the amount of investment in non-utility businesses, to the reorganization.

A frequent issue in mergers is the treatment of the "acquisition premium," or the amount paid above book value for the capital stock of the acquired utility. The Commission may allow the recovery in rates of a portion of the acquisition premium if the merger can be shown to produce net savings for Maine utility customers.

Transactions, such as sales of property or the provision of services, between the utility and its affiliate are also subject to Commission review and approval under the "no harm" standard.

Transactions between the utility and its unregulated affiliate pose not only business and self-dealing risk, but may also present the risk of harm to competitors of the affiliate. The Commission has attempted to deal with these risks through conditions associated with specific reorganizations and more generally by adopting Chapter 820, which regulates relations between the utilities and their non-utility affiliates. Under Chapter 820, all non-utility businesses (other than *de minimis* non-utility businesses) must be placed in a corporate subsidiary separate from the utility. Moreover, the rule establishes detailed methods for valuing goods and services that are transferred between the utility and its affiliate. Of particular interest is the rule's valuation of "good will" or the benefit to the affiliate of the utility's reputation and customer relationships. The affiliate must pay the utility for the use of its "good will" and those payments will typically be flowed through to the utility's customers. Chapter 820 also provides fixed limits on utility investment in non-utility affiliates and establishes standards of conduct for relations between the utility and its affiliate.

A. Risks of Corporate Interrelationships

This chapter focuses on the Commission's efforts to protect utility ratepayers from the risks presented by various corporate interrelationships and reorganizations. These risks generally fall into two general categories: self-dealing and business risk.

1. Self-Dealing

First, utility ratepayers may be exposed to the harms of self-dealing among the utility and those entities, such as subsidiaries, in which it has a direct interest or those with which it is affiliated through, for example, ownership by a common parent. One potential harm from self-dealing is that the utility might provide its affiliate or subsidiary

with facilities, services, or personnel at an inadequate price. As a result, the utility's ratepayers would effectively subsidize the costs of the non-utility affiliate, which is often a competitive enterprise and one from which ratepayers receive no service. Running in the opposite direction is the risk that the affiliate might, because of a lack of arms-length bargaining, overcharge the utility for the services it provides to the utility. This overcharging allows the unregulated affiliate to unfairly shift costs away from itself and onto the utility and its captive customers. These types of risks are addressed by the Commission's review and regulation of all transactions between the utility and its affiliates.

2. Business Risk

The second type of risk is the business risk that occurs when a utility or its parent, through corporate affiliates or subsidiaries, engages in an unregulated business. This business risk could be realized when the utility or its parent company over-invests in an unregulated business, with the result that the utility's financial ability to maintain an acceptable level of utility service is compromised. Moreover, should a non-regulated affiliate suffer business problems, the utility's credit could be impaired to the point where it would no longer be able to raise capital, or could do so only on less favorable terms. Although this type of risk may be reduced by monitoring a utility's transactions with and among its affiliates, the Commission nevertheless has the authority to eliminate these harms before they occur by imposing conditions on, or even disapproving of, various corporate restructurings involving the utility.

Finally, the Commission has also considered the potential harm that may arise when a utility's parent company engages in or invests in unregulated businesses. For example, the Commission considered the potential risk to the unregulated, competitive electricity-generation market serving Maine customers when the parent company of a Maine utility invests in generators that participate in the energy markets serving Maine customers.[687]

3. Other Risks

Note that in certain reorganizations, the Maine utility that is the subject of the reorganization may have very few contacts with the State of Maine. For example, even though Public Service Company of New Hampshire ("PSNH") does not provide service to any retail customers in Maine, the Commission deemed PSNH to be a regulated

[687] *Bangor Hydro-Elec. Co., Me. Pub. Serv. Co.*, Request for Exemptions and for Reorganization Approvals, No. 2011-170, Order at 20-23, 25-30 (Me. P.U.C. Apr. 30, 2012).

Maine public utility because PSNH owns and operates certain transmission and distribution plant in Maine near the Maine-New Hampshire border.[688] Consequently, when PSNH sought to create an affiliate, the creation of which was required in connection with the securitization of stranded costs and the issuance of rate reduction bonds, Commission approval was required. In that case, given PSNH's limited contacts with Maine, the Commission focused its inquiry on whether the reorganization would affect PSNH's ability to maintain its transmission and distribution plant in Maine in a safe and reasonable manner.[689] The Commission found that the reorganization would not affect PSNH's ability to do so and approved the reorganization.

4. Holding Company Structure

The two general risks of self-dealing and business failure have arisen by the acquisition of many of Maine's utilities by larger out-of-state entities. For example, Central Maine Power Company was acquired by Energy East Corporation, which was later acquired by Iberdrola, S.A. (later renamed AVANGRID). Additionally, Bangor Hydro Electric Company and Maine Public Service Company were both acquired by Emera, Inc. Similarly, Northern Utilities was acquired by NiSource, Inc. and, later, Unitil Service Corporation, and New England Telephone & Telegraph Company was first acquired by Bell Atlantic Corporation and later by NYNEX, which changed its name to Verizon Communications. Many of these acquiring companies are holding companies that own and operate other utilities and unregulated businesses in several states (including Maine) and throughout the world. Depending on the circumstances of acquisition, this diversification may either mitigate or exacerbate business risk.

Additionally, in the view of some, the holding company structure itself may heighten the risk of cross-subsidization or self-dealing. The Commission has noted: "the natural incentive of the holding company [is] to have as much of its costs as possible recovered through the regulated rates of the [utility] for its monopoly services."[690] This inclination is the product of a business manager's desire to maximize the allocation of costs away from the parent's unregulated subsidiaries and into the rates paid by the utility's captive customers. This provides the utility's competitive affiliates an undue market advantage because the captive customers must pay for services that provide them with little or no benefit. Moreover, the utility subsidiary typically has very little

[688] *Pub. Serv. Co. of N.H.*, Request for Waiver of 35-A M.R.S. § 708 or Approval of Reorganization, No. 2018-00013, Order at 1 (Me. P.U.C. Feb. 8, 2018).
[689] *Id.* at 2.
[690] *Re Pub. Utils. Comm'n*, Investigation Into Cent. Me. Power Co.'s Stranded Costs, Transmission and Distribution Revenues Requirement and Rate Design, No. 97-580, Order at 2 (Me. P.U.C. Mar. 19, 1999).

bargaining power with its parent, which often dictates which costs must be borne by its subsidiaries.

The proliferation of the holding company structure and the emergence of non-utility affiliates and subsidiaries has undoubtedly complicated the regulatory environment. However, these complications do not exceed the Commission's apparent authority to manage the regulatory environment. Although the activities in this area are often transactionally similar for the purpose of regulation, they may be logically separated into two general areas: (1) corporate reorganizations, which involve the creation, termination or transfer of corporate relationships with the utility; and (2) affiliate transactions, which involve the dealings among the utility and its various legally related entities.

B. Reorganizations

1. What Is a Section 708 Reorganization?

The Commission's authority over "reorganizations" is found in 35-A M.R.S.A. § 708 (2010 & Supp. 2017). A Section 708 reorganization occurs if any sale, issuance, or other transfer of "voting securities" or property creates, organizes, extends, merges, transfers ownership or control, liquidates, dissolves, or terminates an entity referred to as an "affiliated interest."[691]

Under this section, a "voting security" is defined to include "any security presently entitling the owner or holder of any security to vote in the direction or management of the affairs of a company," which includes not only any share of common stock, but also "any proprietary or other interest serving the same purposes," such as a membership interest in an LLC or a general partnership interest in a partnership.[692] In short, the transfer, termination, or issuance of any right to control the management of an entity as part of a transaction affecting the legal status of an "affiliated interest" constitutes a reorganization that must be approved by the Commission (unless otherwise exempted by Commission order or rule as discussed below).[693] Note that the Commission must complete its review of the reorganization within 180 days.[694]

The definition of an "affiliated interest" is complicated, but essentially includes any entity that has a more than marginal relationship with a Maine public utility. Thus, an "affiliated interest" (more commonly referred to simply as an "affiliate") is defined to include (for utilities other than providers of provider of last resort ("POLR") service):

---

[691] 35-A M.R.S.A. § 708(1)(A) (2010 & Supp. 2017).
[692] *Id.* § 708(1)(B).
[693] *Id.* § 708(2)(A).
[694] *Id.*

(a) Any entity that, directly or indirectly, owns 10%[695] or more of the voting securities of a Maine public utility.[696] When, for example, any entity directly or through a subsidiary purchases 10% or more of a Maine utility's voting securities, it has created (or, in the case of the direct acquisition, has itself become) an "affiliated interest," which is subject to prior approval under Section 708 as a "reorganization." The acquisition of any Maine public utility by another entity in the typical merger[697] is therefore a Section 708 reorganization.

(b) Any entity, 10% or more of whose voting securities are owned, directly or indirectly, by a Maine public utility.[698] This makes the creation, termination, or transfer of any utility subsidiary a Section 708 reorganization, no matter how many corporate layers exist between the utility and the subsidiary.

(c) Any entity, 10% or more of whose voting securities are owned, directly or indirectly, by any entity that also owns, directly or indirectly, 10% or more of the voting securities of a Maine public utility.[699] Of all the definitions of an "affiliated interest," this one has the broadest reach. Under the holding company structure, the utility parent may, directly or indirectly, control or own scores of other entities, many of which have no relation to or impact on the Maine public utility that happens to be in the parent's portfolio. Nevertheless, by this definition, all of these enterprises are "affiliated interests" of the utility due to their ultimate ownership by a common parent. Thus, if a holding company creates an indirect subsidiary to operate a dry cleaning business in Montana, that creation will constitute a "reorganization" of a Maine public utility and will require Commission approval if the holding company also directly or indirectly owns 10% or more of the Maine utility's voting securities.

---

[695] For telecommunications POLR service providers, the 10% thresholds of Section 707 are 25% rather than 10%. *Id.* § 707(A)(2).

[696] *Id.* § 707(1)(A)(1)(a).

[697] Under 35-A M.R.S.A. § 1101(1)(B) (2010), a Maine public utility must obtain the Commission's approval before it can merge with any other Maine public utility. This Section has traditionally applied when one established public utility absorbs another and no new entity is created. *See, e.g.*, *Re Bangor Hydro-Elect. Co. and Stonington and Deer Isle Power Co.,* Joint Application to Merge Property, Franchises and Permits and for Authority to Discontinue Service, No. 87-109, Order Approving Stipulation and Merger (Me. P.U.C. Nov. 10, 1987). This type of merger nevertheless would constitute a "reorganization" under Section 708. In these circumstances, the utility must seek approval under both Section 708 and 1101.

[698] 35-A M.R.S.A. § 707(1)(A)(1)(c) (2010 & Supp. 2017).

[699] *Id.* § 707(1)(A)(1)(b).

(d) Finally, as a catchall, any entity or group of entities acting in concert, who (1) owns more than 3% of a Maine public utility's voting securities, and (2) exercises "substantial" influence over the public utility, if the Commission so finds after investigation and hearing.[700]

The Commission has interpreted these statutory definitions to include even reorganizations that occur simply through stock trades in the open market, of which the utility is not even aware until after the fact.[701] When a group of investors, Mario J. Gabelli and entities related to Mr. Gabelli, acquired 12.08% of the shares of Maine & Maritimes Corporation (the parent company of Maine Public Service Company) in the open market, and MPS learned of the transaction after the fact, MPS sought a retroactive exemption from the reorganization approval requirements for that reorganization. The Commission, however, disagreed that the reorganization should be exempt. The Commission found that its approval was required, and did grant such approval.

In 2011, the statutory definition of affiliated interest was amended to include a definition that applies only to providers of POLR service.[702] While the general definition requires a 10% or greater interest relationship, providers of POLR service are covered by the affiliated interest definition only in cases of a 25% or greater interest. The reorganization statute itself was also amended to limit the instances in which a telephone utility reorganization requires prior Commission approval. Specifically, the reorganization statute does not apply to any telephone utility other than a provider of POLR service, and it applies to a provider of POLR service "only if the reorganization results in a merger, sale or transfer of a controlling interest of the provider of [POLR] service."[703] The phrase "controlling interest" is specifically defined and includes transfers of at least 25% of votes or shares,[704] and the phrase appears nowhere in Section 708 other than in this POLR-related provision.[705]

2. Section 708 Exemptions

Section 708 defines "reorganization" very broadly. Virtually any alteration of the legal status or ownership of any entity under a holding company umbrella that also includes a Maine public utility will constitute a "reorganization" for which PUC approval

[700] *Id.* § 707(1)(A)(1)(d).
[701] *Me. Pub. Serv. Co.*, Request for Approval of Reorganization or Waiver of Section 708(2), No. 2008-390, Order Approving Reorganization and Granting Partial Waiver for Designated Future Reorganizations (Me. P.U.C. Dec. 2, 2008).
[702] 35-A M.R.S.A. § 707(1)(A)(2) (2010 & Supp. 2017).
[703] *Id.* § 708(5) (2010 & Supp. 2017).
[704] *Id.* § 708(1)(C) (2010 & Supp. 2017).
[705] *Id.* § 708(5) (2010 & Supp. 2017).

must be obtained—even though many of these "reorganizations" will have little or no financial or operational effect on the Maine public utility. However, because the manifest purpose of Section 708 is to prevent a "reorganization" that will adversely affect a Maine public utility and its customers and because Section 708 subjects activities within the holding company structure that have nothing to do with Section 708's purpose to Commission jurisdiction, many holding companies have successfully sought partial Section 708 exemptions from the Commission.[706]

For example, these exemptions may limit the requirement of Section 708 approval to the reorganization of the utility itself, or of the utility's subsidiary or parent, or to the creation of any affiliate that will enter into a contract to furnish goods to the utility or perform activities formerly or simultaneously performed by the utility.[707] The result of these exemptions is to remove from the Commission's approval any "reorganization" of a particular utility affiliate that does not own or control the Maine public utility or that has no effect on the conduct of the utility's businesses or its financial integrity.[708]

3. Standards and Conditions for Reorganizations

Regardless of whether reorganization approvals are limited by exemption or include everything within the statutory language, the applicant for Commission approval under Section 708 must demonstrate that the reorganization is "consistent with the interests of the utility's ratepayers and investors."[709]

In addition, the Commission is given the authority to impose on the reorganization such conditions that "in its judgment, are necessary to protect the interests of ratepayers."[710] These conditions may include provisions that ensure access to the books and records of the utility's affiliate; ensure that the utility's credit is not

---

[706] *E.g.*, *Re Cmty. Servs. Tel. Co.*, Request for Exemption from Required Approvals of Certain Reorganizations Under 35-A M.R.S.A. § 708, No. 98-973, Order Granting Exemption (Me. P.U.C. May 11, 1999); *Re Cent. Me. Power Co.*, Request for Waiver from the Reorganization Approval Requirements in 35-A M.R.S.A. § 708, No. 2001-447, Order (Me. P.U.C. Dec. 20, 2001); *Re Me. Pub. Serv. Co.*, Request for Approval of Reorganization of the Company into a Holding Company Structure, No. 2002-676, Order Approving Stipulation (Me. P.U.C. Mar. 26, 2003).

[707] *See e.g.*, *Bangor Hydro-Elec. Co.*, Request for Exemption (Limited Exemption) from the Reorganization Approval Requirements, No. 2006-543, Order Approving Stipulation at 2-4 (Me. P.U.C. Jan. 5, 2007).

[708] In addition, the Commission's Rule, 65-407 C.M.R. ch. 280, § 12 (2003) exempts from both Section 708 and the affiliate transaction regulation discussed in Part B all telecommunication carriers that provide only competitive inter-charge service, on the grounds that this type of regulation is not required in a purely competitive environment. *See Re Me. Pub. Utils. Comm'n*, Amendment of Chapter 280, Provisions of Competitive Telecommunication Services, No. 96-526, Order Adopting Rule at 24 (Me. P.U.C. June 10, 1997).

[709] 35-A M.R.S.A. § 708(2)(A) (2010 & Supp. 2017).

[710] *Id.*

impaired; protect the utility's ability to attract capital on reasonable terms; assure that the utility's ability to provide safe, reasonable, and adequate service is not impaired by the reorganization; or limit the level of investment in a non-utility business.[711] Any of these additional conditions are intended to limit—if not eliminate—the potential self-dealing and business risks to which the creation of new corporate relationships could expose the utility.[712]

a. No Harm to Utility

The standard the Commission applies to most "reorganizations" such as mergers is a "no net harm" standard.[713] Under this standard, the Commission will approve a utility merger if the rates and service of the utility will not be adversely affected or if the benefits of the merger are at least equal to its risks.[714] In applying this standard to the merger of Central Maine Power Company into Energy East Corporation,[715] the Commission was faced with an application that had failed to quantify the risks and benefits of a proposed merger.[716] Although, in this case, both the benefits (such as the savings created by economies of scale and better access to capital markets) and the risks (such as deterioration of customer service due to a decreased work force, loss of autonomy, and the utility's submergence into a more complex corporate structure) of CMP's acquisition could be easily predicted, Section 708 nevertheless placed on the utility the burden of demonstrating that the benefits outweigh the risks.[717] CMP's failure to do so could have provided the Commission with a procedural ground for simply rejecting the proposed merger. However, the Commission, believing that benefits were reasonably likely to result from the merger and aware that requiring strict quantification could frustrate potentially beneficial mergers, did not resolve the matter on burden of

---

[711] *Id.* § 708(2)(A)(1)-(9).

[712] This chapter does not discuss the types of parties that may intervene in reorganization proceedings. However, it is worth noting that even though the Commission's own focus is on the protection of ratepayers in these proceedings, the Commission has allowed stockholders to intervene in reorganization proceedings to represent their own individual stockholder interests, but not those of stockholders more generally. *Oxford Tel. Co. & Oxford West Tel. Co.*, Request for Approval of Reorganization, No. 2013-00459, Order Granting Intervention (Me. P.U.C. Dec. 18, 2013).

[713] *See Bangor Natural Gas Co., Inc.*, Request for Approval of Merger Between Gas Natural Inc. and First Reserve Merger Sub, Inc. a Wholly Owned Subsidiary of First Reserve Energy Infrastructure Fund GP II LP 35-A M.R.S. § 708, No. 2016-00282, Order Approving Stipulation at 9 (Me. P.U.C. June 23, 2017). This standard applies under both Section 708 and Section 1101.

[714] *E.g.*, *Consumers Me. Water Co.*, Request for Approval of Reorganization Due to Merger, No. 98-648, Order Approving Stipulation (Me. P.U.C. Jan. 12, 1999).

[715] *CMP Group, Inc., et al.*, Request for Approval of Reorganization and of Affiliated Interest Transactions, No. 99-411, Order (Me. P.U.C. Jan. 4, 2000).

[716] *Id.* at 11.

[717] *Id.* at 13.

proof grounds.[718] Instead, the Commission noted that, should the anticipated benefits of the merger not materialize of their own accord, Section 708 gave it the regulatory tools to protect CMP's ratepayers by authorizing it to impose conditions on the merger to ensure that rates will not increase, nor service decline, solely as the result of the merger.[719] The Commission, therefore, approved the merger but imposed conditions to ensure that the merger would at least satisfy the "no net harm" standard.[720] For example, the Commission conditioned the merger on CMP's continuing compliance with the customer service standards established in its most recent alternative rate plan ("ARP"), submitting periodic reports to prove compliance, and prohibiting rate recovery of any net incremental costs of the merger—i.e., any merger costs in excess of any merger savings.[721]

The Commission's imposition of prophylactic conditions is very common in major reorganizations. For example, when Maine Public Service Company first reorganized into a holding company structure, that reorganization was conditioned upon ratepayer protection restrictions such as limitations on the amount the holding company could invest in non-utility ventures and requirements ensuring that Maine Public Service's equity component did not go below 48% of its total capital structure. [722]

In other instances, the Commission has used its authority under Section 708 to protect ratepayers from the business risks associated with the utility's participation in subsidiaries engaged in unregulated businesses.[723] In addition, the Commission can protect utility ratepayers by specifying the utility's maximum allowed investment in a non-utility enterprise.[724] In fact, the Commission has the authority to order divestiture "of or by the utility in the event that divestiture is necessary to protect the interest of the utility, ratepayers or investors."[725] The Commission has noted that divestiture should be

[718] *Id.* at 22.
[719] *Id.*
[720] *Id.*
[721] *Id.* at 24-29.
[722] *Re Me. Pub. Serv. Co.*, Request for Approval of Reorganization of the Company into a Holding Company Structure, No. 2002-676, Order Approving Stipulation (Me. P.U.C. Mar. 26, 2003).
[723] For example, the Commission has imposed on a utility a "rebuttable presumption" that any increase in its cost of capital beyond a specified bandwidth would be deemed to be the result of the utility's participation in the non-utility subsidiary and would be disallowed for ratemaking purposes. *Re Me. Pub. Serv. Co.*, Request for Approval of Reorganization Approvals and Exemptions and for Affiliated Interest Transaction Approvals, No. 98-138, Order at 5-11 (Me. P.U.C. Sept. 2, 1998).
[724] *Re Bangor Hydro-Elec. Co.*, Affiliated Interest Transaction and Reorganization to Transfer its CareTaker Home Security Monitoring Business into a Separate Subsidiary, No. 98-555, Order Approving Stipulation at 1, 3 (Me. P.U.C. Jan. 14, 1999).
[725] 35-A M.R.S.A. § 708(2)(A)(8) (2010 & Supp. 2017).

a remedy only in the most extreme cases and should be used when no other remedy is available to address the harm.[726]

b. Protection Against Anti-Competitive Effects

In some instances, such as mergers involving telecommunication utilities, the Commission has used its ability to impose conditions to obviate the merger's possible anti-competitive effects. When New England Telephone & Telegraph Company's parent (NYNEX) merged with Bell Atlantic, the Commission noted that the merger would produce demonstrable cost reductions, but could disadvantage NET's customers by eliminating Bell Atlantic as a potential NYNEX competitor, thereby rendering the marketplace less robust. [727] In order to offset this possible detriment, the Commission ordered that a portion of the cost savings be flowed through to ratepayers and imposed several service-related standards to further ameliorate any competitive risks created by the merger.[728] Indeed, in a telecommunications merger where the *only* demonstrable effect was the diminution of customer choice, the Commission nevertheless allowed the merger subject to conditions designed to protect consumers from that anti-competitive result.[729]

c. The Breadth of the Commission's Authority

Given that the Commission imposes conditions on its reorganization approval that are in the Commission's judgement broadly "necessary to protect the interests of ratepayers,"[730] the Commission's use of its condition authority is a significant instance of regulatory interference with those functions generally associated with management. The Commission's willingness to dictate the substance of fundamental business decisions, such as how much to invest in a subsidiary venture, is perhaps the result of its regulatory priorities. The Commission may allow utilities to be bought and sold, or permit them to participate in unregulated enterprises, but never at the expense of the basic regulatory objective of ensuring safe, adequate, and reasonable utility service at rates that are just and reasonable.[731] The Commission will permit activities that are perhaps unrelated to

---

[726] *Re CMP Group, Inc. et al.*, Request for Approval of Reorganization and of Affiliated Interest Transactions, No. 99-411, Order at 27 (Me. P.U.C. Jan. 4, 2000).
[727] *Re New England Tel. & Tel. Co. and NYNEX Corp.*, Proposed Joint Petition for Reorganization Intended to Effect the Merger with Bell Atlantic Corp., No. 96-388 Order (Part II) (Me. P.U.C. Feb. 6, 1997).
[728] *Id.* at 13-22.
[729] *Re Verizon Commc'ns Inc. and MCI, Inc.*, Request for Approval of Reorganization, No. 2005-154, Order (Part II) at 5-7 (Me. P.U.C. Dec. 22, 2005).
[730] 35-A M.R.S.A. § 708(2)(A) (Supp. 2017).
[731] 35-A M.R.S.A. § 101 (2010 & Supp. 2017).

that basic objective, but only under conditions that will ensure the integrity of the core utility service.

Although the Commission has broad authority to impose conditions on reorganizations needed to protect ratepayers or competitive markets, that authority is not boundless. For example, the Commission approved reorganizations that involved Emera Inc.'s acquisition of voting securities in First Wind Holdings, LLC and Algonquin Power & Utilities Corp. ("APUC").[732] In approving those reorganizations, the Commission imposed a number of conditions—some of which applied to the unregulated generators that would become affiliated with the Maine utilities.[733] On the case's second appeal, the Law Court found that Commission had exceeded its jurisdiction "when it imposed conditions on an electricity generator such as APUC, where those conditions contravene the legislative framework allowing generators to operate with very little regulatory governance."[734]

4. Acquisition Premiums

One of the most vexing problems in mergers occurs when the acquiring entity purchases the utility's stock at a price greater than its book value, which, as discussed in Chapter 7, is the basis for valuing utility investment (or rate base) when setting rates. In accounting terms, this excess over book value is classified as "goodwill"; in regulatory jargon, it is the "acquisition premium."[735] Without the payment of at least some acquisition premium, it is unlikely that utility shareholders would have any incentive to consent to mergers that might otherwise benefit ratepayers. Thus, discouraging the payment of premiums by flatly disallowing their recovery through rates may not be to the ratepayer's ultimate benefit.[736] On the other hand, as succinctly stated by the Commission, harm may result from automatically allowing purchase price to replace book value in the ratemaking formula:

---

[732] *Bangor Hydro-Elec. Co. & Me. Pub. Serv. Co.*, Request for Exemptions and for Reorganization Approvals, No. 2011-170, Order (Me. P.U.C. April 30, 2012).

[733] *Id.* at 40-54.

[734] *Houlton Water Co. v. Pub. Utils. Comm'n*, 2016 ME 168, ¶ 34, 150 A.3d 1284.

[735] It should be noted that the gain on the sale of stock is not gain that must necessarily be shared with ratepayers in the same manner as the gain on sale of utility property. *See Casco Bay Lines v. Pub. Utils. Comm'n*, 390 A.2d 483, 490 (Me. 1978). Utility stock is not an asset that has been used to provide service whose value has been recovered in rates. Moreover, ratepayers do not bear the risk of the sale of stock below book, although they do bear the risk of the sale of utility assets below book. *New England Tel. & Tel. Co. and NYNEX*, Proposed Joint Petition For Reorganization Intended to Effect the Merger with Bell Atlantic, No. 96-388, Order (Part II) at 20 (Me. P.U.C. Feb. 6, 1997).

[736] *Re Bangor Hydro-Elec. Co. and Stonington & Deer Isle Power Co.*, Joint Application to Merge Property Franchise and Permits and for Authority to Discontinue Service, No. 87-109, Order Approving Stipulation and Merger at 2 (Me. P.U.C. Nov. 10, 1987).

> The premium is the amount over book value that the acquirer offers to existing shareholders to induce them to sell their shares. The value of a utility to a potential acquirer is the present value of the revenue stream which the buyer anticipates receiving. But if rates are set based upon the buyer's cost of acquiring the firm, then by making a high offer, the buyer simultaneously raises the rates that will be charged to the monopoly customers. The logical result of automatically including the acquisition premium in rates is that the offering price will rise to the point where rates are set at the same level that an unregulated monopoly firm would charge its customers. Such an outcome is clearly undesirable as a matter of both law and economics.[737]

Balancing these competing interests, the Commission has, at times, allowed the recovery in rates of a portion of the acquisition premium "upon a clear and persuasive showing that the savings resulting from the merger *itself* (and not from some other cause) exceed the costs imposed by the merger."[738] Any recovery is then further subject to the limitation that this recovery cannot raise rates above what they would have been absent the merger.[739] Finally, the ratepayers must receive in rates a "reasonable portion of the net savings from the merger." [740] Thus, to satisfy these conditions, the demonstrable benefits of the merger available to ratepayers must not only be sufficient to offset *all* merger-related costs, they must actually exceed them. Although the Commission may apply the "no net harm" standard when approving the merger, the merger must produce a net benefit in order to support recovery of any acquisition premium.

Note that the utility may never be able to make the requisite showing. It is very difficult to demonstrate savings after the merger has occurred because the utility would have to compare the actual cost of the merged entity with the estimate of what rates would have been had the merger not occurred.[741] Although merely difficult in early years, the possibility of making this showing becomes increasingly remote as time passes.

Conversely, the sale of Bangor Gas to Energy West caused the utility to record an "impairment loss of approximately $38 million" based on the difference between the book value and Energy West's acquisition price. In the context of the Commission's 2014 approval of an alternative rate plan for Bangor Gas, the Commission, however, found the original book value to be the appropriate measure of Bangor Gas's value and

---

[737] *Re CMP Group Inc., et al.*, Request for Approval of Reorganization and of Affiliated Interest Transactions, No. 99-411, Order at 17 (Me. P.U.C. Jan. 4, 2000).
[738] *Id.* at 19.
[739] *Id.*
[740] *Id.* at 20.
[741] *See, e.g., id.* at 22 ("The record in this case brings us close to a finding that the evidence of both potential gain and potential harm is so amorphous that we cannot satisfy section 708.").

on appeal, the Law Court affirmed the Commission's use of "the original cost as the more reasonable value on which to base Bangor Gas's rates and resulting return on equity."[742]

C. Affiliate Transactions

1. What Is a Section 707 Affiliate Transaction?

The Commission's ability to protect ratepayers from the potentially negative consequences of utility reorganizations is not limited to its authority to approve utility reorganizations in the first instance. The Commission also has the power to regulate relations and transactions between the utility and any of its "affiliated interests."[743] In the case of unregulated affiliates that are engaged in a competitive market, the Commission may (1) seek to ensure that the affiliate does not gain an unfair competitive advantage because of its relationship to the utility and (2) may also seek to protect the utility's own customers. In the case of an affiliate that is regulated by another State regulatory commission, the Maine Commission is likely to focus its inquiry on whether the Maine utility's customer may be harmed.

Central to the Commission's authority to regulate these intra-corporate transactions is the requirement that, without the Commission's consent, no Maine utility may extend or receive credit, make or receive a loan to or from an "affiliated interest," or enter into any contract with an "affiliated interest" for the furnishing of any service or real or personal property.[744] [745] As described in Part A, an "affiliated interest" is essentially (1) any entity that owns 10% or more of the voting securities of a utility (a parent); (2) any entity, 10% or more of whose voting securities are owned by a utility (a subsidiary); or (3) or any entity whose voting securities are owned 10% or more by another entity that also owns 10% or more of the utility (sometimes referred to as a "sister" company).[746]

As also noted in Part A, because certain "reorganizations" that take place within a holding company structure have no effect on the finances or operations of the Maine utility, many Maine utilities under a holding company umbrella have obtained limited exemptions from Section 708 approval.[747] Such blanket exemptions, however, have rarely been sought or granted from the requirement that affiliate transactions must be

---

[742] *Office of Pub. Advocate*, 2015 ME 113, ¶ 21, 122 A.3d 959, 964-65.
[743] 35-A M.R.S.A. § 707 (2010 & Supp. 2017).
[744] *Id.* § 707(3) (2010 & Supp. 2017).
[745] Any of these arrangements hereafter will be referred to as an "affiliate transaction."
[746] *See* 35-A M.R.S.A. § 707(1)(A)(1) (2010 & Supp. 2017).
[747] *See supra* Chapter 7.A.-B.

approved by the Commission because the risk of harm to Maine ratepayers in this situation may be greater.[748] For example, although the creation of an affiliated dry cleaning business in Montana will not affect a Maine utility, the Maine utility's entering into a contract with that dry cleaner could. Finally, note that the Commission must complete its review of the transaction within 120 days.[749]

2. "No Harm" Standard

The standard for approval of affiliate transactions is that the transaction "is not adverse to the public interest."[750] This "no harm" standard subjects affiliate transactions to a lower standard of approval than would apply if the Commission were examining the costs of the transaction to determine whether they were "just and reasonable" or "prudently incurred."[751] Additionally, this standard does not guarantee the ratemaking treatment to be applied to the transaction. However, it does not follow that because the Commission will apply a more limited standard of review in approving an affiliate transaction, that it will casually approve it and then disallow the resulting costs in a subsequent rate case.[752]

a. Self-Dealing As a Principal Concern

A principal concern with affiliate transactions is, of course, the risk of self-dealing. As a result, the Commission has frequently determined a transaction to be "not adverse to the public interest" if the exchange of value[753] appears to be "both equivalent

---

[748] *E.g.*, *Re Cent. Me. Power Co., et al.*, Request for Waiver from the Reorganization Approval Requirements in 35-A M.R.S.A. § 708, No. 2001-447, Order at 8 (Me. P.U.C. Dec. 20, 2001). This order expressly states that the exemption does not apply to the affiliate transaction approval required under Section 707. *Id.*

[749] 35-A M.R.S.A. § 707(3)(A) (2010 & Supp. 2017).

[750] *Id.* § 707(3) (2010 & Supp. 2017).

[751] *Re N. Utils. Inc.*, Proposed Precedent Agreement with Granite State Gas Transmission Inc. for LNG Storage Service, No. 95-480, Order at 30-31 (Me. P.U.C. Feb. 21, 1996).

[752] *Re Consumers Me. Water Co.*, Application for Approval of Affiliated Interest Contracts with Ohio Water Service Company, No. 94-352, Final Order at 4-6 (Me. P.U.C. July 6, 1995).

[753] The Commission has acknowledged a somewhat limited exception to the affiliate transaction approval requirement in circumstances in which an affiliate makes a gratuitous contribution to the utility. *See Re Bangor Gas Co., LLC*, Petition for Advisory Ruling on Applicability of 35-A M.R.S.A. §§ 902 and 707 to Capital Contribution by Affiliate, Penobscot Natural Gas, Or for Exemption (§ 707), No. 2003-687, Advisory Ruling at 3-4 (Me. P.U.C. Nov. 12, 2003). Here, the Commission found that a voluntary contribution of $8 million in capital to a utility LLC by its sole member (also its parent) for no consideration by the utility, without any provision of security by the utility and with no effect on the utility's ownership, was not an affiliate transaction subject to its approval. Although this transaction is not adverse to the public interest because it has no adverse effect on the utility and should be approved, it is not apparent why the Commission simply did not do so, instead of exempting the transaction

to an arms-length negotiated price and also a fair market price."[754] In this manner, the utility, as the purchaser, will not pay an excessive price or, as the seller, receive a deficient price and thereby subsidize the affiliate at ratepayer expense. Although the existence of rate plans diminishes the utility's incentive to overpay its affiliate for services received,[755] this result should not be conclusively assumed when the affiliate is the utility's parent.[756]

When reviewing affiliate transactions, the Commission will not approve a transaction that exposes the utility and its ratepayers to the risk of undue expense. This risk can often arise in the holding company context, where the parent entity seeks to impose a contract or other transaction on its utility subsidiary. For example, the Commission refused to approve a service contract between a utility and its parent when that contract stipulated that the utility could not refuse the services or seek alternate service from competitors, thereby exposing the captive utility to the risk of non-competitive fees.[757] On the other hand, the Commission will approve service contracts between a utility and its parent when the contract (1) allows the utility to determine which services it will purchase from the parent and which it will obtain from the competitive market and (2) fairly allocates the cost of providing these services to the utility so that the utility is not indirectly subsidizing the operating cost of the parent's other subsidiaries.[758]

b. The Particular Risks of Affiliates Engaged in Competitive Businesses

The Commission and the Legislature have given particular attention to a utility's participation in unregulated business activities. This attention has focused both on the risk that such unregulated activities pose to the utility, as well as the affiliate's potential for obtaining an unfair competitive advantage over its competitors in the unregulated

---

outright. The lack of consideration cannot be *per se* determinative, because if the utility transferred $8 million to its parent for no consideration, the Commission might be very hard pressed not to disapprove such a transaction as "adverse to the public interest." As a result, this exemption must be viewed as limited to the precise circumstances of the case, when the utility is providing no consideration to the affiliate. *Id.*

[754] *Re N. Utils. Inc.*, Request for Approval of Affiliated Interest Transaction with Granite State Gas, No. 2003-663, Order at 2 (Me. P.U.C. Nov. 13, 2003).

[755] *Re Cent. Me. Power Co.*, Request for Approval of Affiliated Interest Transaction for Facility Use Agreements, No. 2003-384, Order at 2 (Me. P.U.C. July 22, 2003).

[756] *Re Verizon Me.*, Request for Exemption of Affiliated Interest Filing Requirements for Long-term Debt Securities (§ 707), No. 2005-116, Order Approving Limited Exemption of Affiliated Interest Transaction at 3 (Me. P.U.C. Sept. 19, 2006).

[757] *Re Consumers Me. Water Co.*, Application for Approval of Affiliated Interest Contracts with Ohio Water Service Company, No. 94-352, Final Order at 9, 11 (Me. P.U.C. July 6, 1995).

[758] *See, e.g.*, *Re N. Utils. Inc.*, Request for Approval of Affiliated Interest Transaction with NiSource Corporate Services, Inc., No. 2004-537, Order at 5 (Me. P.U.C. Nov. 8, 2004).

market. The risk to the utility's customers of engaging in unregulated businesses is typically perceived to be either (1) the financial harm to which poor performance or unsatisfied liabilities would expose the utility, or (2) the possibility that the utility will devote so many of its resources to the unregulated business that its ability to provide adequate service would be compromised. The risk to competitors is typically perceived to be threefold: (1) the possibility that the utility's monopoly status will provide its unregulated business affiliate with an undue advantage in the market through its exclusive access to the utility's customers, (2) the potential access to customer information the unregulated business may have obtained because of its utility status, or (3) the competitive advantage of affiliates that comes simply because of the trust or familiarity the utility's many years of service have engendered in its customers.

The Commission initially addressed these concerns when, in an adjudicatory proceeding, it determined that the utility's non-core activities[759] would have to be contained in a separate corporate subsidiary in order to protect the utility[760] from liability and to reduce the financial impact of the unregulated business's poor performance (the "Cochrane Order").[761] The Commission also attempted to eliminate the utility's ability to use its monopoly status to obtain a market advantage by placing limits on the use the affiliate could make of customer information.[762]

---

[759] A non-core activity is perhaps easier to identify than to define. As a general matter, a non-core service is any service that is part of the utility's regulated utility service—e.g., the transmission and distribution of electricity and the services, such as metering and billing, that are required to perform that basic utility service. The Commission's Chapter 820 rule defines a non-core service as any service that is not a core service. *See* 65-407 C.M.R. ch. 820, § 2(K) (1998). A core service, in the case of an electric utility, for example, is defined as the transmission and distribution of electricity, service necessary to perform those functions, and the service for which the utility is the provider of last resort or is required to provide by the Commission; however, no service performed outside the utility's service territory is a core service. *Id.* § 2(C). This definition notwithstanding, the Commission has ruled that sales of utility service outside the utility's service territory *are* core activities, if they are "integrally related" to the utility's core activity. *Re Me. Pub. Serv. Co.*, Request for Approval of Reorganization Approvals and Exemptions and for Affiliated Interest Transaction Approvals, No. 98-138, Order at 15 (Me. P.U.C. Sept. 2, 1998). Whether the Commission was technically correct about the nature of the off-system sales is not as interesting as its apparent conclusion that, despite the clear language of the rule, there may be instances in which the definition fails to adequately capture the essence of a core activity.

[760] Although having the non-regulated business in a separate corporation will provide the utility with some immunity, Maine does recognize the legal principle of "piercing the corporate veil." *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84 ¶ 10, 901 A.2d 189. Courts will pierce the veil if the entity or person sought abused the privilege of a separate corporate identity and an unjust or unreasonable result would occur if the Court recognized the separate corporate existence. *State v. Weinschenk*, 2005 ME 28 ¶ 19, 868 A.2d 200. Piercing the veil is not, however, easily accomplished in Maine. For example, the Law Court has found that the parent's exclusive ownership of a subsidiary's stock and the intertwining of management to be insufficient. *State v. L.V.I. Group*, 1997 ME 25 ¶ 4, 690 A.2d 960.

[761] *Re Cochrane et al. v. Bangor Hydro-Elec. Co.*, Request for Commission Investigation into Bangor Hydro-Electric's Practice of Installing of Monitoring Security Alarms Systems, No. 96-053, Order at 9 (Me. P.U.C. Jan. 28, 1997).

[762] *Id.* at 16-19.

Subsequently, the Legislature enacted laws expressly prohibiting the utility from passing on to ratepayers the costs associated with an unregulated business.[763] In addition, these laws require the Commission to allocate between the utility's shareholders and ratepayers the cost of all facilities and services, including the use of a brand name or "good will," that are shared between the utility and its unregulated activities.[764] The laws also required the Commission to "attempt" to ensure that an unregulated business would not enjoy any competitive advantage because of its relationship with the utility.[765] Finally, the Legislature directed the Commission to value utility facilities and services, including use of a brand name or "good will," used by the utility affiliate and to allocate the cost between them based on that value.[766]

3. Chapter 820 Rules

In response to the legislation, the Commission adopted Chapter 820,[767] which applies to relationships between Maine utilities and their non-core affiliates.[768] However, this rule does not apply to consumer-owned water utilities.[769] Additionally, only certain provisions of the rule apply to telephone utilities and investor-owned water utilities.[770] Essentially, the rule follows—but substantially amplifies—the course established by the Cochrane Order.[771]

---

[763] 35-A M.R.S.A. § 713 (2010).
[764] *Id.*
[765] *Id.*
[766] 35-A M.R.S.A. § 707(3)(G) (2010 & Supp. 2017).
[767] 65-407 C.M.R. ch. 820 (1998).
[768] On its face, the rule applies to all utility affiliates. Certain of its provisions make sense, however, only if the rule's application is limited to non-core utilities because many core activities would continue to be regulated as public utility functions. For example, the transfer of utility property to a core affiliate would require the Commission's prior approval and should be transferred at book value, which is the traditional basis for valuing utility property. This would, however, be inconsistent with the requirements of Section 4 of the rule that requires transfers at market price.
[769] Consumer-owned water utilities were exempted because they have doubtful authority to establish non-regulated affiliates and still maintain their quasi-municipal status, have charter limitations on their activities and have no shareholders to shift costs away from. *Re Me. Pub. Utils. Comm'n,* Requirements for Non-Core Utility Activities and Transactions Between Affiliates (Chapter 820), No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 3 (Me. P.U.C. Feb. 18, 1998).
[770] Telephone utilities are partially exempt because many areas addressed by the rule are covered by Federal Communications Commission ("FCC") rules. Investor-owned water utilities are partially exempt because full application of the Chapter 820 would interfere with a long history of mutual aid and support. *Id.* at 4-8.
[771] *Re Cochrane et al. v. Bangor Hydro-Elec. Co.*, Request for Commission Investigation into Bangor Hydro-Electric's Practice of Installing of Monitoring Security Alarms Systems, No. 96-053, Order (Me. P.U.C. Jan. 28, 1997).

a. Separate Subsidiaries for Non-Core Business

First, except for de minimis activities, the rule requires the utility to place its non-core businesses in a separate affiliate.[772] This requirement not only helps insulate the utility from the business risk inherent in its unregulated business activities, but also extends the additional protections that come when every contract or arrangement between the utility and its subsidiary is subjected to regulation and prior approval as an affiliated transaction. It should be noted that no expenses or other costs associated with the unregulated business are recoverable through the utility's rates.[773]

b. Valuation and Allocation of Goods and Services

Second, Chapter 820 establishes the method for valuing the utility's goods and services that are used by the unregulated business, including the use of brand name or "good will."[774] The rule establishes a preference for the market price[775] based on the rationale that allowing the utility to provide its affiliate with any goods or services for less than it could get in the market not only creates a ratepayer subsidy for the affiliate, but also encourages an unfair competitive advantage over other businesses that must buy in the market.[776] Thus, any utility equipment, facilities, service, or personnel used by the affiliate must be charged to the affiliate at market price unless the service or equipment is subject to a tariff rate, which is the rate at which the utility is permitted to market that item.[777] If neither a market nor a tariff rate is available, the item should be charged at fully distributed cost.[778] Under this rule, utility assets transferred to an affiliate must be charged at market price.[779] Additionally, the affiliate's goods or services used by the utility should be charged at the same price charged to non-affiliates, if available, or

---

[772] 65-407 C.M.R. ch. 820, § 3 (1998). More than one unregulated business may be located in a single affiliate. *Id.*

[773] *Id.* § 6(A).

[774] *Id.* § 4(C).

[775] In the holding company context, the Commission has waived market price in favor of fully distributed cost because that is the method imposed by the SEC under the Public Utility Company Holding Act. *See, e.g.*, *N. Utils., Inc.*, Request for Approval of Affiliated Interest Transaction with NiSource Corporate Services, Inc., No. 2004-537, Order at 8 (Me. P.U.C. Nov. 8, 2004). Under fully distributed cost allocation, the actual costs of providing the service are directly assigned to the recipient or they are allocated using formulaic allocation ratios—e.g., human resource costs are allocated based on the proportionate ratio of the recipient's number of employees to the number of all affiliate employees.

[776] *Re Pub. Utils. Comm'n.*, Requirements for Non-Core Utility Activities and Transactions Between Affiliates (Chapter 820), No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 20 (Me. P.U.C. Feb. 18, 1998).

[777] 65-407 C.M.R. ch. 820, § 4(A) (1998).

[778] *Id.*

[779] *Id.* § 4(B).

otherwise at market price.[780] Finally, affiliate assets transferred to the utility will be charged at market price.[781] Although these requirements may place the utility affiliate at a disadvantage with its competitors who are able to obtain goods and services from their affiliates at a less than market price, the rule's ratepayer and competitive protection purposes are deemed to outweigh this potential disadvantage.

c. Valuation and Allocation of "Good Will"

Third, the rule establishes a formula method for valuing the utility's "good will" used by the affiliate.[782] This "good will" has nothing to do with the accounting concept of "good will" (price paid over book value), but instead is defined as the benefit to the affiliate of the utility's positive reputation and customer relationships.[783] Because it is nearly impossible to place a market value on this "good will,"[784] the rule establishes as the value of "good will" the lesser of 1% of the affiliate's capitalization or 2% or its gross revenue.[785] Good will is paid annually to the utility by the affiliate.[786] By focusing on the value of the affiliate as the measure of "good will," this formula is intended to reflect the value that the shareholders expect to receive from the affiliate.[787] All "good will" payments received by the utility will be allocated to its ratepayers unless the utility can provide evidence that the "good will" is unrelated to the provision of utility services.[788] Because it is unlikely that the utility can ever provide this evidence, the value of the "good will" may always go to ratepayers. This result is consistent with the assumption that "good will" has been created by the utility's opportunity to provide service in a non-competitive service territory, which service has been financially supported by its ratepayers, who therefore should be entitled to any payments for the value of that "good will."[789]

---

[780] *Id.* § 4(E).
[781] *Id.* § 4(F).
[782] 65-407 C.M.R. ch. 820, § 4(C) (1998).
[783] *Id.* § 2(F).
[784] *Re Pub. Utils. Comm'n.*, Requirements for Non-Core Utility Activities and Transactions Between Affiliates (Chapter 820), No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 28 (Me. P.U.C. Feb. 18, 1998).
[785] 65-407 C.M.R. ch. 820, § 4(C)(3) (1998).
[786] *Id.* § 4(C)(1).
[787] *Re Pub. Utils. Comm'n.*, Requirements for Non-Core Utility Activities and Transactions Between Affiliates (Chapter 820), No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 29 (Me. P.U.C. Feb. 18, 1998).
[788] 65-407 C.M.R. ch. 820, § 6(B) (1998).
[789] *Re Pub. Utils. Comm'n.*, Requirements for Non-Core Utility Activities and Transactions Between Affiliates (Chapter 820), No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 15 (Me. P.U.C. Feb. 18, 1998).

d. Limits on Non-Utility Investment

Next, the Rule places limits on the investment the utility can make in the affiliate.[790] If the utility has an investment-grade bond rating and has not filed for, or been granted, any temporary rate increase, the utility may invest in an affiliate up to 5% of the utility's total capitalization without prior Commission approval.[791] Any larger investments require approval.[792] Furthermore, a utility that fails either of these criteria may not make any investment in an *unregulated* affiliate.[793] It may, however, invest in a regulated affiliate, subject to Commission review.[794]

e. Standards of Conduct

Chapter 820 also outlines standards of conduct for the utility and its affiliates.[795] If the affiliate wishes to use customer information—either in the aggregate or about a specific customer—that has become available to the utility solely because of its utility status, it must purchase that information from the utility at market price.[796] The utility must then make that same information available to any other entity on the same terms.[797] Moreover, the utility must provide any other information it shares with its affiliate and that it has obtained because of its utility status to any party that makes a request for such information.[798] The rule also prohibits the utility from showing any preference to the affiliate in providing access to its facilities or service or from influencing customers to use that affiliate's services.[799] For example, a utility that provides the name of an affiliate to a customer must also provide the names of non-affiliates providing the same service. However, as a practical matter, the Commission routinely waives the "market price" rule when a utility shares the actual cost of services provided by an affiliated services company that is providing services to a group of affiliated operating utilities.[800]

---

[790] 65-407 C.M.R. ch. 820, § 5 (1998).
[791] *Id.* § 5(A).
[792] *Id.*
[793] *Id.* § 5(B).
[794] *Id.* § 5(C).
[795] *Id.* § 8.
[796] *Id.* § 8(A)(1).
[797] *Id.* § 8(A)(2).
[798] *Id.*
[799] *Id.* § 8(C).
[800] *See e.g.*, *Emera Me.*, Request for Approval of Affiliated Interest Transaction, No. 2017-00297, Order at 2 (Me. P.U.C. Nov. 7, 2017).

D. Insider Transactions

Finally, the Commission has some limited authority over insider transactions, which are essentially dealings between the utility and so-called insiders.[801] These "insiders" include any utility director; utility trustee; utility employee or officer who has authority to participate in major policy-making functions of the utility or its affiliate; or the spouse, parent, or child of any such insider.[802] All insider transactions must be specifically approved by the utility's board of directors or trustees and reported to the Commission.[803] Insider transactions are not, however, subject to the Commission's prior approval.

The abuses to which the insider transactions can be subject is illustrated by a rather extreme case involving a small, closely-held utility in which a majority of the company's officers and directors were all members of the same family.[804] The Commission's investigation into this utility's insider activities found the following:

(1) a residence owned by the utility was leased to a company director at a rent well below market value. Moreover, the residence was substantially renovated at company expense, and the contract for the renovation was given to the son of another director;
(2) the utility paid for gas and repairs to the family's personal vehicles;
(3) the utility paid for the family's travel, meals, and entertainment even though these items were not incident to any business purpose;
(4) many family members (including a U.S. Marine stationed in North Carolina) were on the utility's weekly payroll even though they did no work for the utility;
(5) the utility reimbursed one family member "employee" for her flying and Tai Chi lessons and maintained, at company expense, her dental hygienist license;
(6) the utility paid for boarding family dogs during various trips;
(7) the utility created academic scholarships and then awarded them to the directors' grandchildren; and

---

[801] 35-A M.R.S.A. § 709 (2010).
[802] *Id.* § 709(1).
[803] *Id.* § 709(2)-(3).
[804] *Re Me. Pub. Utils. Comm'n*, Investigation into Hampden Telephone Company's Affiliate and Insider Transactions, Findings of Summary Investigation, No. 91-286, Order and Notice of Formal Investigation (Me. P.U.C. Oct. 20, 1992). In this instance, many of these insiders also each owned 10% or more of the utility's stock and therefore, many of the arrangements described in the text were also affiliate transactions, subject to PUC approval (which was never obtained). *Id.*

(8) the utility paid a family member $50 for playing the guitar at a company Christmas party.

Accordingly, the Commission reduced the utility's rates by $5,000 annually to reflect the costs of these obviously non-service-related expenses and required the utility to have its books and records annually audited by an independent firm.[805] Although there is an *opera buffa* aspect to these particular escapades, they do exemplify the ease with which insiders and affiliates can exploit their relationship to the monopoly utility, which, lacking a competitive market place to discipline its practices, must rely on regulatory oversight.

[805] *Re Me. Pub. Utils. Comm'n*, Formal Investigation Into Hampden Telephone Company's Affiliated Transactions, Insider Transactions, Accounting and Management Practices, No. 92-295, Order Approving Settlement Agreement at 1 (Me. P.U.C. Jan. 19, 1994).

Chapter 8

Less Regulation and More Competition

This Chapter reviews the "deregulation" of, or the introduction of competition into, each of the State's utility industries. The deregulations of each industry have not all reached the same point and have been achieved through separate and distinct regulatory models.

For much of the twentieth century, utilities enjoyed full monopoly status within their respective service territories and were able to provide regulated utility services within those territories without competition. In the late 1970s and early 1980s, however, this monopoly status began to erode after events such as the court-ordered breakup of the Bell System[806] and the enactment of the Public Utilities Regulatory Policies Act

[806] As a result of antitrust litigation begun by the U.S. Department of Justice in 1974, AT&T agreed to split its local operations into seven independent regional Bell operating companies, effective January 1,

("PURPA")—the federal legislation requiring electric utilities to purchase energy from unregulated, independent generators.[807] As important as these developments were, they were later dwarfed by the two primary developments of the 1990s: (1) when Congress opened substantial portions of the telecommunications industry to competition under the Telecommunications Act of 1996 ("TelAct")[808] and (2) when the Federal Energy Regulatory Commission ("FERC") issued Order No. 888, which promoted wholesale generation competition by requiring all transmission utilities to provide non-discriminatory open access transmission service to all requesting it.[809]

In the case of the electric industry, deregulation was the product of efforts at both the state and federal levels. Beginning in 2000, Maine limited the functions of its electric utilities—which traditionally both produced and delivered electricity—to delivery only. As such, electric utilities were required to divest themselves of all their marketable generation facilities. Consumers were thereafter able to purchase their electricity from competitive suppliers. Additionally, customers who were unable or unwilling to participate in the competitive market were to be supplied by standard offer service, the providers of which were selected by the Commission from participants in the competitive wholesale market. The result of this effort was a partial deregulation that separated the traditional electric utility functions into delivery, which remained regulated, and generation, which is now supplied from competitive markets.

Competition in the telecommunications industry, on the other hand, was initiated under the federal TelAct. Unlike the laws deregulating the electric industry, this federal law does not advance its competitive goals by disaggregating the telephone utility's traditional functions into regulated and unregulated components. Instead, it advances these goals by requiring the regulated telephone utility to make available portions of its infrastructure to its competitors and subjecting telecommunication utilities to a complex regulatory regime involving both state and federal authorities.

With respect to the natural gas industry, Maine's regulatory policy has promoted competition by allowing natural gas local distribution companies to compete for customers, even within the same municipalities, and to have overlapping service territories. Further, as with the electric industry, the natural gas industry has been unbundled both in Maine and at the federal level, with the supply of natural gas not

---

1984. *United States v. W. Elec. Inc. and Am. Tel. & Tel. Co.*, 569 F. Supp. 990 (D.D.C. 1983). This result effectively introduced competition into the long distance toll market.

[807] The Public Utilities Regulatory Policy Act of 1978 ("PURPA") required electric utilities to purchase power from small generators using biomass or renewable energy ("Qualifying Facilities") at the utilities' avoided costs and to interconnect those generators with their electric system. *See* 16 U.S.C. § 824a-3 (2012).

[808] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-621).

[809] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. ¶ 61,080 (1996).

subject to rate regulation but the delivery of it remaining subject to rate and other significant regulations.

Finally, although water utilities remain regulated monopolies, the PUC has taken an increasingly smaller role in regulating them. As explained in Chapter 6, which focuses on ratemaking, consumer-owned water utilities routinely adjust their rates with minimal oversight from the PUC. For example, the state's largest water utility, Portland Water District, has recently been granted a waiver or exemption from most PUC rules.[810]

These changes over the past few decades at both the state and federal level reflect a fundamental belief that free market competition will produce greater efficiencies than regulation. None of these laws, however, completely replace regulation with full competition. Instead, these laws use regulation to further competitive goals.

A. Electric Industry

1. Federal Restructuring

FERC's Order No. 888 effectively eased the wholesale generation electricity markets away from regulation and into competition by opening up the transportation link between buyers and sellers.[811] Order No. 888 was, in part, a response to technological advances that promoted the development of generation by making it possible to generate power from smaller plants. At the time it issued Order No. 888, the FERC noted a shift from larger, 500 MW plants with an average lead time of twelve years to fifty to 150 MW plants with a one-year lead time.[812] More recently, FERC's Order No. 1000 opened up the electric transmission system to limited competition.[813]

2. State Restructuring

Prior to March 1, 2000, the Maine retail electric utility industry was a vertically integrated monopoly—that is, a single regulated entity both produced and delivered all electrical energy and capacity its customers consumed. In 1997, the Maine Legislature enacted 35-A M.R.S.A. Chapter 32, which opened the retail market to competition,

---

[810] *Portland Water Dist.*, Request for Waiver of Section 6(b) Subsections 1, 2, 3, and 4 of Chapter 895, No. 2010-158, Order (Me. P.U.C. July 6, 2010).

[811] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. ¶ 61,080 (1996).

[812] *Id.* at 19-20.

[813] Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 F.E.R.C. ¶ 61,051 (2011).

beginning on March 1, 2000.[814] Thus, after March 1, 2000, the regulated monopoly merely delivered the electricity, which was now produced by unregulated suppliers. In order to achieve this comprehensive restructuring, the Legislature and the Commission disaggregated the vertically integrated electric utilities into their delivery and generation components.

a. Divestiture of Marketable Generation

As a large first step, the State's investor-owned utilities[815] were required, by March 1, 2000, to divest themselves of all generation or generation-related assets, with certain limited exceptions.[816] After this sale, the electric utilities were recast as "transmission and distribution" ("T&D") utilities, as befit their new and limited role as the deliverers of electricity. Pursuant to Commission rules, the sale of the utility's generation and generation-related assets was conducted by auction,[817] with the proceeds retained by the utilities and used to lower or stabilize retail rates, as described below. The typical purchaser was an entity that planned to enter the competitive market as an unregulated supplier. Moreover, the T&D utilities could not thereafter "own, have a financial interest in or otherwise control" any generation-related assets except for those few they were permitted to retain.[818]

As a result, the delivery and generation of electric energy in Maine was "unbundled"; that is, these services were now provided by two separate corporate entities and marketed separately. The T&D utility, which delivered the electricity to the customer, remained subject to regulation as a public utility. Generation, on the other hand, was now purchased by the State's retail electricity consumers from suppliers in the competitive market, which would not be not subject to price regulation.[819]

---

[814] P.L. 1997, ch. 316, § 3.

[815] Consumer-owned utilities, such as municipal electric companies, typically did not own generation assets but purchased power on a wholesale basis, either from the adjacent investor-owned utility or, following Order No. 888, from competitive wholesale suppliers.

[816] 35-A M.R.S.A. § 3204 (2010 & Supp. 2017). For example, the utilities could retain ownership in nuclear facilities, principally because the federal government, and not the State, has authority over these facilities. The utilities could also retain ownership of generation facilities that supported its role as the transmission and distribution utility.

[817] 65-407 C.M.R. ch. 307 (1999).

[818] 35-A M.R.S.A. § 3204(5) (2010 & Supp. 2017). It remains an open question as to whether a utility affiliate could own generation under circumstances in which the utility itself did not own, control, or have an economic interest in the affiliate.

[819] 35-A M.R.S.A. § 3202 (2010 & Supp. 2017).

b. Unmarketable Generation Not Divested

Not all of the T&D utilities' generation-related assets would or even could be sold. For example, as of March 1, 2000, the State's T&D utilities still carried investments in closed or abandoned nuclear plants, such as Maine Yankee or Seabrook. However, the continuing recovery through rates of these generation investments, which, if "prudently" incurred, would have been recovered from ratepayers in the vertically integrated utility's unbundled rates, became problematic when the utility was no longer providing generation service and, therefore, could not pass these costs on to customers as part of its overall cost of service.

Similarly, the vertically integrated utilities had been required by federal and state law[820] to enter into numerous long-term contracts with Qualifying Facilities ("QF") to purchase energy and capacity as part of their overall obligation to provide generation service to their customers.[821] With that obligation transferred to the competitive market, these contracts were now irrelevant to the T&D utilities. Because the outright abandonment of the contracts would have been, at least, economically troublesome, the T&D utilities were not allowed to divest themselves of those contracts, but were instead required to continue to pay the producer for its power in accordance with the contract, while periodically auctioning off the utility's entitlement to that power to unregulated suppliers.[822] Because so many of these QF contracts were priced substantially above the market,[823] the utilities were unable to recover the total amount of their contractual obligations from the entitlement purchasers and therefore would be required to absorb the difference. While the vertically integrated utility had been able to pass the costs of the QF contracts through to its customers as part of its generation service following restructuring, the T&D utility could no longer use its distribution rates to recover the portion of the contract not recouped through an entitlement sale because the costs of the QF contracts did not represent a cost incurred to provide T&D service.

c. Stranded Costs

The solution to these problems was to establish a new category of T&D utility cost called "stranded costs" and permit the T&D utility the opportunity to recover these

---

[820] 16 U.S.C. § 824a (2012); 35-A M.R.S.A. § 3301, *repealed by* P.L. 1999, ch. 398, § A76 (effective Mar. 1, 2000).

[821] 35-A M.R.S.A. Chapter 33

[822] 35-A M.R.S.A. § 3204(4) (2010 & Supp. 2017); 65-407 C.M.R. ch. 307 (1999).

[823] These contracts had price terms that the PUC established based on its projections of what future generation would cost the utility in the absence of these contracts. These projections, in many cases, turned out to be well above the actual cost of generation.

stranded costs from its customers through a new separate rate.[824] Stranded costs are defined as those costs "made unrecoverable as a result of the restructuring of the electric industry."[825] Because, following restructuring, the T&D utility was no longer providing generation service and because the utility could only recover through T&D rates the costs it reasonably incurs in providing utility service, costs associated with unsold generation became unrecoverable or "stranded."

Stranded cost calculation has three principle components.[826] The first component is the utility's generation-related "regulatory assets" that existed prior to restructuring.[827] A regulatory asset is simply any asset established on the utility's book of accounts by an order of the PUC. These assets typically result from the Commission's use of the deferred accounting mechanism discussed in Chapter 6. Regulatory assets usually represent costs the utility has incurred in the past, but is no longer incurring when providing current service. By approving the creation of a regulatory asset, the Commission assures the utility that these costs will be recovered from ratepayers in the future. The T&D utility's unrecovered investment in a canceled or abandoned plant is a classic example of a regulatory asset. By definition, these assets have no market value and, because they are generation-related, are not recoverable from customers as part of the current cost of providing T&D service.

The second element of stranded cost calculation is the difference between the contract price of power under power purchase contracts (principally QF contracts) paid by the utility and the market price of that power received by the utility.[828] This, as noted above, is typically a negative amount.

Finally, there is the difference between the book value of the utility's divested generation assets and the market price received by the utility upon divestiture of those assets. Because the State's investor-owned utilities were able to sell their generation assets for more than their book value, this positive difference has been used to offset the T&D utilities' stranded cost of above-market power contracts and regulatory assets.[829]

Once calculated, these stranded cost charges are collected by the T&D utilities through a separate charge that is part of their PUC-approved distribution rates. The charges for stranded costs were initially established as of March 1, 2000, and are adjusted at least every three years to coincide with the auction of the utility's QF contract

[824] 35-A M.R.S.A. § 3208 (2010).
[825] *Id.* § 3208(1).
[826] *Id.* § 3208.
[827] *Id.* § 3208(2)(A).
[828] *Id.* § 3208(2)(C).
[829] *Re Me. Pub. Utils. Comm'n*, Investigation of Central Maine Power Company's Stranded Costs, Transmission and Distribution Utility Revenue Requirements and Rate Design, No. 97-580, Order at 91 (Me. P.U.C. Mar. 19, 1999).

entitlements.[830] Stranded cost rates are based on the Commission's estimate of forecasted sales, stranded costs, and the calculated rate of return on the utility's regulatory assets.[831]

When stranded cost ratemaking was first envisioned, it was viewed as a temporary exercise that would end naturally when all of the costs, both direct and indirect, of restructuring were fully paid off by ratepayers. Although the levels of stranded cost rates have declined substantially for T&D utilities over the past fifteen years, it is no longer certain that this category of ratemaking will disappear in the near future. For example, the stranded cost rates are a vehicle for utilities to purchase the output of, and thereby provide financial support for, renewable energy projects that could not be financed or developed without the utility's guaranteed purchase of the projects' output at rates favorable to the developer.[832]

d. Affiliate Ownership of Generation

Today, Maine's two major T&D utilities are owned by large, out-of-state holding companies that also own many other energy-related businesses throughout the world. Some of these affiliated businesses also own electric generating facilities. This apparent conflict has raised the question of whether affiliate ownership of generation facilities violates the spirit, if not the letter, of Maine's prohibition on a T&D utility's ownership of generation. In 2012, the issue came to a head when Emera Maine's parent company entered into joint venture with a local wind developer, First Wind.[833] The PUC initially approved the transaction finding that the Restructuring Act did not apply where the regulated utility itself did not have an equity ownership interest in the generation facility.[834]

On appeal, the Law Court remanded the case back to the PUC, finding that the PUC had misconstrued the Restructuring Act and an equity interest was not the only

---

[830] 35 M.R.S.A. § 3208(6) (2010).

[831] *Id.* § 3208(2).

[832] *See, e.g.*, *Emera Me.*, Request for Approval of Rate Change (Stranded Costs), No. 2016-00270, Order Approving Stipulation (Me. P.U.C. June 15, 2017); *Me. Pub. Utils. Comm'n*, Annual Reconciliation of Cent. Me. Power Co.'s Stranded Cost Revenue Requirement and Rates, No. 2011-486, Order Approving Stipulation, Stipulation ¶ 1 (Me. P.U.C. Feb. 21, 2012) (noting recovery of long-term contracts that Commission directed utility to enter into with wind power facility); *Pub. Utils. Comm'n*, Investigation into Recovery of Expenses and Disposition of Resources from Long-Term Contracts by Maine's T&D Utilities, No. 2011-00222, Order (Me. P.U.C. Oct. 26, 2011) ("Although it is clear that costs under these contracts are not 'stranded costs' as defined by statute, for cost recovery purposes we see no reason to treat them differently than stranded costs associated with existing purchased power contracts." (internal footnotes omitted)).

[833] *Bangor Hydro-Elec. Co. & Me. Pub. Serv. Co.*, Request for Exemptions & for Reorganization Approvals, No. 2011-170, Order at 4-5 (Me. P.U.C. Apr. 30, 2012).

[834] *Id.* at 19.

form of interest in generation that was prohibited under the Act.[835] On remand, the PUC reviewed the Law Court's new interpretation of the Act but still affirmed its original conclusion—finding that, even under the court's new interpretation of the Act, the transaction did not violate the prohibition on utility ownership of generating facilities.[836] Once again, on appeal, the Law Court reversed the PUC and ruled that the PUC exceeded its jurisdiction by imposing conditions on the affiliated generators' ownership of generation.[837] In response, the Legislature amended the Restructuring Act to allow affiliate ownership of generation, except where the generation was within the T&D utility's service area.[838]

Consistent with the Legislature's amendment, the Commission adopted Standards of Conduct for Transmission and Distribution Utilities and Affiliated Generators, Chapter 308. Chapter 308 prohibits the affiliation of a transmission and distribution utility with an entity that owns generation or generation-related assets that are directly interconnected with facilities owned or operated by the utility or if the point of interconnection is within the utility's service area. Chapter 308 also prohibits the transmission and distribution utility from wholly or partially owning a direct or indirect subsidiary that owns generation or generation-related assets. Further, through standards of conduct, Chapter 308 governs the conduct between the transmission and distribution utility and affiliated generators located outside of the utility's service territory. For example, Chapter 308 requires that the utility provide no preference to its affiliated generators.

[835] *Houlton Water Co. v. Pub. Utils. Comm'n*, 2014 ME 38, ¶ 35, 87 A.3d 749.
[836] *Bangor Hydro-Elec. Co. & Me. Pub. Serv. Co.*, Request for Exemptions & for Reorganization Approvals, No. 2011-00170, Order (Me. P.U.C. Oct. 9, 2014).
[837] *Houlton Water Co. v. Pub. Utils. Comm'n*, 2016 ME 168, ¶ 2, 150 A.3d 1284.
[838] 35-A M.R.S.A. § 3204(6) (2010 & Supp. 2017).

3. Generation Supplied by Competitive Energy Providers

The customers' total price for electricity has a fourth component: the supply price, as determined by the competitive retail market or through standard offer service. Although retail suppliers—called competitive energy providers ("CEP")—are not subject to price regulation by the PUC, they must be licensed by the PUC,[839] which requires proof of financial and technical capability.[840] In 2018, approximately nine retail electric suppliers were licensed as CEPs in Maine.[841]

Even though the CEP's price is unregulated, the Commission retains some control over other terms of service.[842] For example, the CEP must give every new customer written notice of a five-day right of rescission.[843] In addition, the CEP must: (1) obtain and retain verification that the customer has "affirmatively chosen" the CEP;[844] (2) provide service for a thirty-day minimum period;[845] (3) provide thirty-day written notice of cancellation, including the specific information prescribed by the PUC;[846] and (4) have written procedures to guide its evaluations of applications for service, which can be denied only in a writing that sets forth the reason for denial.[847] The Commission also specifies the bill format the CEP may issue.[848] Furthermore, the Commission has the authority to enforce these provisions through financial penalties or license revocation.[849] Finally, as a condition of licensing, every CEP must demonstrate that no less than 30% of its portfolio of supply sources for in-state retail sales consists of renewable resources.[850] In short, although the PUC does not regulate the CEP's prices, its other terms of service remain subject to substantial oversight.

It should be noted that a T&D utility may have a CEP affiliate.[851] The affiliated CEP may not provide more than 33% of total sales within the affiliated T&D utility's service territory.[852] Relations between the T&D utility and its affiliated CEP are subject

---

[839] *Id.* § 3203(2).
[840] 65-407 C.M.R. ch. 305, § 2(B)(1), (2) (2015).
[841] *Electricity Supply*, ME. OFFICE OF PUB. ADVOCATE, http://www.maine.gov/meopa/utilities/electric/supply.html (last visited Apr. 25, 2018).
[842] 65-407 C.M.R. ch. 305, § 4 (2015).
[843] *Id.* § 4(B)(2)(a).
[844] *Id.* § 4(B)(3)(a).
[845] *Id.* § 4(B)(4).
[846] *Id.* § 4(B)(6), (6)(a).
[847] *Id.* § 4(B)(8)(a), (8)(b).
[848] *Id.* § 4(H)(B)(7)(c).
[849] *Id.* § 3.
[850] 35-A M.R.S.A. § 3210(3) (2010 & Supp. 2017).
[851] *Id.* § 3205(1)(A).
[852] *Id.* § 3205(2)(B)(1).

to a very comprehensive code of conduct, designed to avoid allowing a CEP any competitive advantage because of its affiliation with a utility.[853]

4. Standard Offer Service

The Legislature anticipated that not all customers would obtain their generation supply through an independent contract with a CEP. For those customers unable or unwilling to participate directly in the competitive retail generation market, the Legislature set up a class of service called standard offer service.[854] Standard offer service allows customers to purchase generation from the market without having to affirmatively opt for standard offer service; instead, any customer that does not select a CEP will automatically receive standard offer service. The customers of each T&D utility are divided into standard offer service classes, such as residential and small commercial or large industrial. From competitive bids submitted by various CEPs in a formal bidding process, the Commission selects (based on price) one or more CEPs to serve as standard offer providers for a specified period for each standard offer service class. These bids are often joined to the purchase of the utility's QF entitlements; that is, the CEP will supply all or part of the standard offer service for a particular T&D utility using the output of the QF entitlements that the CEP has purchased from the utility. The duration of the standard offer service from a particular bid may vary from six months to three years.

Service is provided directly to the customer by the standard offer service provider. The T&D utility itself does not purchase any standard offer service power, but acts solely as a metering, billing, and delivery agent for the standard offer provider.[855] Due to the T&D utility's removal from the generation process, the standard offer provider does not enter into a contract with a utility to provide service; instead, its obligation rests entirely on the fact that it has been awarded the service by Commission order. The standard offer provider is also required to secure its obligation through a provision of financial

---

[853] *Id.* § 3205(3); 65-407 C.M.R. ch. 304 (1999); *see also Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 14, 818 A.2d 1039 ("The Restructuring Act does not have an outright prohibition against T & D utility marketing affiliates; rather, the Act specifically allows T & D utilities to have marketing affiliates in some circumstances subject to strict oversight by the Commission.").

[854] 35-A M.R.S.A. § 3212 (2010).

[855] The Commission does have the authority to order the T&D utility to provide for "default service" if the standard offer provider defaults or the Commission receives no bids or unacceptable bids for standard offer service. 35-A M.R.S.A. § 3212(2) (2010). In fact, the Commission did order Emera Maine's predecessor in name, Bangor Hydro Electric Company ("Bangor Hydro"), to obtain the power for standard offer service when the standard offer service bids that reached Bangor Hydro's territory were not acceptable. Bangor Hydro obtained this power through a *combination* of wholesale power contracts and spot market purchases. The Commission then set the price for the standard offer service power administratively. When the spot market became more expensive than anticipated, the Commission allowed Bangor Hydro a mid-term increase in the price of the standard offer. *Me. Pub. Utils. Comm'n*, Standard Offer Bidding Procedure, No. 99-11, Orders (Me. P.U.C. Feb. 21, 2002 and July 20, 2000).

security, such as a letter of credit or corporate guarantee, to cover the cost of replacement power should it default.[856]

Customers whose contracts with CEPs expire may then elect standard offer service. To stabilize standard offer service load, and avoid "gaming" the process (that is, frequent, repeated switching between standard offer service and the competitive market to obtain the best price), large and medium customers that return to standard offer service after participating in the competitive market must remain on the standard offer for one year or pay a substantial opt-out fee.[857] The Commission has waived the opt-out fee in circumstances where the customer can demonstrate it is leaving standard offer service for reasons other than price.[858]

5. Transmission

a. FERC Assumes Jurisdiction over Transmission Rates and Opens Transmission Up to Competition

The unbundling of generation from delivery led to the somewhat unexpected assertion by the FERC of jurisdiction over the utilities' transmission service and rates, as explained in the following FERC order:

> [W]hen transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the [Federal Power Act ("FPA"], the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe that jurisdictional lines change. In this situation, the State clearly retains jurisdiction over the sale of power sales. However, the unbundled transmission service involves only the provision of "transmission and interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled and becomes separate

[856] 65-407 C.M.R. ch. 301, § 3(B)(3) (2009).
[857] 65-407 C.M.R. ch. 301, § 2(C)(2) (2009).
[858] *See, e.g.*, *Re: Me. Energy Aggregation Co.*, Request for Waiver of Opt-Out Fee Requirement of Chap. 301 Regarding Maine Energy Aggregation Company, No. 2002-468, Order Granting Waiver (Me. P.U.C. Dec. 11, 2002).

> transmission and power sale transactions, the resulting transmission transaction falls within the federal's sphere of regulation.[859]

As a result, the PUC was obligated to further unbundle transmission expenses and investment from distribution expenses and investment.[860] This was accomplished by implementation of FERC's seven-factor test for distinguishing between high-voltage transmission lines and equipment and lower voltage distribution lines and equipment.[861] Transmission investment and expenses are now recovered by rates set by the FERC.

Thus, the T&D utilities' rates now consist of three components: (1) distribution rates, established by the PUC; (2) stranded cost rates, established by the PUC; and (3) transmission rates, established by the FERC.

Having asserted jurisdiction over transmission, FERC then moved forward in opening transmission up to competition. In FERC's Order No. 1000, FERC allowed non-utilities the opportunity to propose new transmission projects when the New England Regional Transmission Organization ("RTO"), ISO New England, Inc. ("ISO-NE") identifies need.[862]

b. PUC Looks to Alternatives to Transmission

Like many other regulatory bodies across the country, the Commission has considered non-wires alternatives to transmission (or distribution) infrastructure. Although a variety of definitions of non-transmission alternatives ("NTAs") exist, a commonly used definition is "programs and technologies that complement and improve operation of existing transmission systems that individually or in combination defer or eliminate the need for upgrades to the transmission system."[863] End use efficiency, conservation, demand response, microgrids, improved transmission line performance

---

[859] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. ¶ 61,080 at 430-31(1996).

[860] *Re Me. Pub. Utils. Comm'n*, Investigation of Retail Electric Transmission Services and Jurisdictional Issue, No. 99-185, Order Approving Stipulation (Central Maine Power Company) (Me. P.U.C. Aug. 28, 2000).

[861] *See* Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. ¶ 61,080 at 230 (1996). The seven factors indicating local distribution are (1) close proximity to retail customers; (2) primarily radial in character; (3) power flows into local distribution systems—it rarely, if ever, flows out; (4) power is not recognized or transported on to some other market; (5) power is consumed in a comparatively restricted geographical area; (6) meters are based at the transmission/local distribution interface to measure flows; and (7) systems are of reduced voltage. *See* 65-407 C.M.R. ch. 140, § 1 (2001).

[862] Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 F.E.R.C. ¶ 61,051 (2011).

[863] https://www.energy.gov/oe/downloads/updating-electric-grid-introduction-non-transmission-alternatives-policymakers

and energy storage devices are some examples of NTAs. Maine's preference for NTAs that deliver the same or greater benefits at a lower cost than a wires solution is reflected in Sections 3132 and 3143 of Title 35-A as well as Chapter 330 of the Commission's rules.

The Commission has considered the question of whether NTAs should be owned and operated by the electric utilities or by third parties. The Commission first authorized an NTA pilot project located in Boothbay, Maine that was jointly conducted by CMP and GridSolar, LLC.[864] The Commission later considered and rejected a petition by GridSolar to serve as the Smart Grid Coordinator for the State of Maine.[865] However, in rejecting GridSolar's petition, the Commission ruled that it may be in the public interest for a coordinator with a more limited role, a NTA Coordinator, to serve the State of Maine.[866] The Commission opened a series of investigations to explore that possibility, but ultimately determined that it was not in the public interest to designate a third party as an NTA Coordinator:

> The Commission finds that it is not in the public interest to designate a NTA Coordinator. In particular, the Commission finds that the NTA-related policy goals set forth in the Smart Grid Policy Act are more likely to be realized in an efficient and effective manner by removing the incentives in existing rate-setting paradigms that cause T&D utilities to favor wires solutions over non-wires ones, thus, allowing the utilities to consider all of the options on a comparable basis and pursue the solution that meets reliability needs in a manner that is least cost to ratepayers.[867]

Consequently, electric utilities will continue to supply NTAs where appropriate. However, that does not necessarily preclude third parties from competing with utilities with respect to, for example, the design and procurement of NTAs on a case-by-case basis.

---

[864] *Cent. Me. Power Co.*, Request for Approval of Non-Transmission Alternative (NTA) Pilot Projects for the Mid-Coast and Portland Areas, No. 2011-00138, Decision Assessing the Boothbay Non-Transmission Alternative Pilot Project (Me. P.U.C. Jan. 16, 2018).

[865] *GridSolar, LLC*, Petition for Designation as the Smart Grid Coordinator for the State of Maine and for Approval of GridSolar's Initial Five-Year Smart Grid Implementation Plan, No. 2013-00519, Order at 15-27 (Me. P.U.C. May 11, 2015).

[866] *Id.* at 27-28.

[867] *Pub. Utils. Comm'n*, Investigation into the Designation of Non-Transmission Alternative (NTA) Coordinator, No. 2016-00049, Order at 15 (Me. P.U.C. Dec. 15, 2017).

6. Has Restructuring Been Successful?

It cannot easily be determined whether electric utility restructuring has worked. The Commission itself has noted that "many factors affect electricity rates, and it is not possible to determine what rates would have been if the State had not pursued electric restructuring."[868] Unquestionably, the provision of generation service by the vertically integrated utility saddled consumers with costs of expensive centralized generating plants (such as the Seabrook nuclear power plant) or with very expensive QF power contracts, which were often the product of government mandate and not utility choice. Restructuring has shifted the direct risk of poor generation investment decisions (whether by the utility or the regulators) away from consumers and onto market participants. On the other hand, regulators now have very little control over the resources and fuel types used to provide electricity.[869] As a result, almost all new major generation facilities in the region that have been developed since restructuring have relied on natural gas as a fuel. Natural gas prices, however, are extremely volatile. Moreover, because of ISO-NE market rules, wholesale suppliers are paid the price bid by the most expensive marginal unit. As such, marginal fuel prices have a substantial impact of the total cost of electricity, thus increasing price volatility.[870] To add to these issues, regulators and lawmakers have in recent years expressed concern that natural gas pipelines may not be expanding capacity fast enough to accommodate both LDC heating load and electric generation load on the coldest days of the winter, leading to extraordinarily high energy prices on those days.[871]

In addition, the shifting of risk to market participants may have had the unintended consequence of inhibiting the development of adequate generation

---

[868] ME. PUB. UTILS. COMM'N, 2002 Annual Report on Electric Restructuring at 20 (Dec. 31, 2002).

[869] Initially, Maine's electric utilities were required, under the Commission's oversight, to engage in long-term generation planning and to develop least cost energy plans. 35-A M.R.S.A. §§ 3134, 3191 (repealed 2000). These integrated resource planning requirements were repealed when Maine's electric industry was "restructured." *See Me. Pub. Utils. Comm'n,* Standard Offer Bidding Procedure, No. 99-111, Order Regarding Standard Offer Prices for Customers in Bangor Hydro-Electric Company's Service Territory (Me. P.U.C. July 20, 2000); *Me. Pub. Utils. Comm'n*, Standard Offer Bidding Procedure, No. 99-111, Order Raising Standard Offer Prices In Bangor Hydro-Electric Company's Service Territory (Me. P.U.C. Sept. 21, 2000).

[870] The Commission has concluded that the northern Maine competitive market (essentially Washington and Aroostook counties), because of its small size and lack of interconnection with New England, is an "obvious failure" and has begun an investigation of solutions to this failure. *Re Me. Pub. Utils. Comm'n*, Standard Offer Bidding Procedure for Customers of Maine Public Service Company, No. 2006–513, Order Rejecting Standard Offer Bids and Directing MPS to Provide Standard Offer Service and Notice of Inquiry (Me. P.U.C. Nov. 16, 2006).

[871] *See generally Me. Pub. Utils. Comm'n*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-00071, Order Phase I (Me. P.U.C. Nov. 13, 2014) and Order Phase II (Me. P.U.C. Sept. 14, 2016); *see also* 35-A M.R.S.A. §§ 1901-1912 (2010 & Supp. 2017).

resources, creating an entirely new set of consumer risks in the form of undiversified or even inadequate sources of supply. In 2005, the Legislature attempted to partially address this circumstance when it authorized the Commission to order large T&D utilities (Emera Maine and Central Maine Power Company) to enter into long-term contracts for to purchase capacity and energy from certain favored generators.[872] The stated purpose of this legislation is to increase the share of new renewable energy resources as a percent of the State's total capacity and to reduce total prices and price volatility.[873] In its rulemaking implementing the statute, the Commission noted that long-term contracts with a credit-worthy counterparty, such as a utility, may not be available in a competitive market, but are nevertheless valuable to the developer of generation resources by enhancing its ability to obtain financing.[874]

Although this legislation does not explicitly seek to disturb the competitive paradigm introduced by electric "restructuring," it does conscript the regulated T&D utility into a campaign to address some apparent defects of the paradigm. To that extent, at least, the legislation appears to acknowledge that regulation can achieve some goals that might elude the free market. Today, the majority of the State's electricity consumers have limited experience with the competitive market; instead they receive power under the standard offer, which, from the customer's perspective, is no different than the bundled service it received from the vertically integrated utility. The difference, however, between traditional bundled service and unbundled standard offer service is that the Commission, standing in for the utility, is intervening in the competitive wholesale market and is making supply choices on behalf of the customer.

Finally, in 2013 the Legislature enacted legislation authorizing the Commission to impose a surcharge on T&D or natural gas utility ratepayers to help finance needed expansion of natural gas pipelines.[875] Titled the Maine Energy Cost Reduction Act, the legislation was in response to extraordinary spikes in natural gas and (as a result) electricity prices due to insufficient interstate natural gas pipeline capacity on the coldest days of winter.[876] Legislators determined that additional capacity was necessary to ensure an adequate supply of competitively priced natural gas would be available for generation of electricity during the middle of the winter.[877] Existing mechanisms for funding the expansion of interstate natural gas pipeline capacity, such as precedent agreements between pipeline companies and natural gas local distribution companies to serve LDC heating load, were insufficient, as they were designed to create enough firm pipeline

[872] P.L. 2005, ch. 677, Part C; *see also* 35-A M.R.S.A. § 3210-C (2010 & Supp. 2017).
[873] 35-A M.R.S.A. § 3210-C(2) (2010 & Supp. 2017).
[874] *Re Me. Pub. Utils. Comm'n*, Long-Term Contracting and Resource Adequacy (Chapter 316), No. 2006-557, Notice of Ratemaking at 3, 8 (Me. P.U.C. Oct. 3, 2006).
[875] 35-A M.R.S.A. § 1905 (Supp. 2017).
[876] *Id.* §§ 1901-1912.
[877] *Id.* § 1903.

capacity for natural gas utility customers only. The Maine Energy Cost Reduction Act created a new funding mechanism by allowing the Commission to direct Maine's electric (or gas) utilities to enter into one or more precedent agreements (called energy cost reduction contracts ("ECRC")) for firm pipeline capacity, and deeming the ECRC's costs to be prudent for ratemaking purposes, thereby requiring electric (or gas) utility ratepayers to fund the pipeline expansion.

Beginning in March 2014, the PUC conducted a two-phase investigation implementing the ECRC facet of the Maine Energy Cost Reduction Act. The first phase of the investigation concluded with the Commission voting 2-1 to issue a request for proposals for ECRCs.[878] Natural gas pipeline companies were invited to submit their proposals for expanding natural gas pipelines to enhance power generators' access to natural gas in the New England market, in accordance with specified submission requirements and evaluation criteria.[879] The second phase of the investigation involved an analysis of the pipeline companies' proposals. Following this review, the Commission voted 3-0 to approve an ECRC conditioned on approval of comparable agreements in Massachusetts, Connecticut, Rhode Island, and New Hampshire.[880] Pending developments in other New England states, in late 2016 the Commission postponed further action in the docket.[881]

In 2016, the Legislature then adopted the Liquefied Natural Gas Storage Act, which amended the Maine Energy Cost Reduction Act to give the Commission the authority to enter into a physical energy storage contract ("PESC").[882] A PESC would fund the development of liquefied natural gas ("LNG") storage facility that would make natural gas available during peak periods, which coincide with times of regional natural gas supply constraint.[883] The funding mechanism for a PESC was essentially the same as that of an ECRC: Maine's electric (or gas) ratepayers would fund the LNG storage facility.[884] Following a relatively brief proceeding, the Commission concluded 3-0 that no PESC proposal would satisfy the statutory requirements that the contract be commercially reasonable, be in the public interest, materially enhance LNG storage in

---

[878] *Me. Pub. Utils. Comm'n*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-00071, Order Phase I at 1 (Me. P.U.C. Nov. 13, 2014).

[879] *See id.* at 38-41.

[880] *Me. Pub. Utils. Comm'n*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-00071, Order Phase II (Me. P.U.C. Sept. 14, 2016).

[881] *Me. Pub. Utils. Comm'n*, Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act, 35-A M.R.S. § 1901, No. 2014-00071, Order on Petitions for Clarification and Reconsideration at 1 (Me. P.U.C. Nov. 21, 2016).

[882] 35-A M.R.S.A. § 1904 (Supp. 2017).

[883] *Id.* § 1904(2-A).

[884] *Id.* § 1905(1).

the region, significantly affect peak pricing, or be reasonably likely to be cost-beneficial to utility ratepayers.[885]

The Maine Energy Cost Reduction Act gives the Commission until December 31, 2020, to execute, or direct execution of, an energy cost reduction contract.[886] The Commission's authority to execute, or direct execution of, a PESC expired June 1, 2017.[887]

B. Telecommunications Industry

1. Early Efforts by PUC

The PUC began introducing competition into the State's telecommunications industry as early as 1985.[888] The Commission's efforts to promote some degree of competition were influenced by the emergence of mobile wireless or cellular telephone service, as well as competitive services such as resold toll-free long distance services ("WATS") or local phone service ("MTS").[889] The product of this early foray into telephone competition was Chapter 280, Provision of Competitive Telecommunication Service, adopted by the Commission in 1988.[890] Chapter 280 provided for two types of competitive telephone service: (i) intrastate toll, or interexchange, service, and (ii) certain enhanced services that depended on direct access to the local exchange carrier's network. These developments reflect the PUC's belief in the efficacy of competition over regulation:

> [F]airly based competition, however, is advantageous because it produces total cost savings which ultimately benefit all ratepayers. In other words, competition should replace or supplement regulation when there is reason to believe that competition can encourage the provision of needed and useful telecommunications functions at lower costs.[891]

---

[885] *Me. Pub. Utils. Comm'n*, Request for Proposals for Physical Energy Contracts for Liquefied Natural Gas Storage Capacity, No. 2016-00253, Order at 4 (Me. P.U.C. May 17, 2017).
[886] 35-A M.R.S.A. § 1912 (Supp. 2017).
[887] *Id.*
[888] *Re Me. Pub. Utils. Comm'n*, Notice of Investigation of Competition in Telecommunications Industry in Maine, No. 85-197, Notice of Investigation (Me. P.U.C. Oct. 18, 1985).
[889] *Id.* at 3.
[890] *Re Me. Pub. Utils. Comm'n*, Proposed Rulemaking on the Provision of Competitive Telecommunications Services (Chapter 280), No. 87-31, Order Adopting Rule (Me. P.U.C. Nov. 17, 1988).
[891] *Id.* at 4.

In addition, both the PUC and the Federal Communications Commission ("FCC") had deregulated customer premises equipment and wiring by the mid-1980s.[892] This allowed telephone customers to purchase not only their own telephones, but also their own inside telecommunications wiring, both of which had previously been available only through monopoly telephone service.

2. Telecommunication Act of 1996

Deregulation in the telecommunications industry, however, is primarily the result of the federal Telecommunications Act of 1996 ("TelAct"), which opened the local exchange market to competition by imposing various obligations on incumbent local exchange carriers, or "ILECs."[893] ILECs are the traditional incumbent landline phone companies that provide local phone service to specific geographic areas.[894] Principal among these obligations is the obligation of the local provider to share its phone network with its competitors.[895]

a. Unbundling of Network Components

The TelAct requires ILECs to disaggregate or "unbundle" their network components, or elements ("unbundled network elements" or "UNE"), and provide competitive local exchange carriers ("CLECs") with access to those elements at nondiscriminatory rates.[896] For example, CLECs are entitled to access basic portions of the local telephone line, such as copper loops and subloops (the wire running from the terminal to end-users' premises), and transport facilities (the facilities that move traffic between the ILEC's central office and tandem switches, and allow the CLEC's to aggregate end-user traffic and carry it to the CLEC's switch).[897] As a result of their access to UNE, CLECs competed within the local exchange on a component-by-component basis, as well as on a service-by-service basis. This allowed CLECs to compete in the

---

[892] *Re Me. Pub. Utils. Comm'n*, Installation, Maintenance and Ownership of Customer Premise Wire, No. 84-135, Order Adopting Rule and Statement of Policy and Factual Basis (Me. P.U.C. Jan. 22, 1985).

[893] *See* H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (the House-Senate Conference Committee called the TelAct a "procompetitive, de-regulatory national policy framework designated to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

[894] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[895] 47 U.S.C. § 251(c) (2012).

[896] *Id.* § 251(c).

[897] *Re Verizon-Maine*, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (P.U.C. 20) and Resold Services (P.U.C. 21), No. 2002-862, Order (Me. P.U.C. Order Sept. 13, 2005).

residential and enterprise telephone market. State commissions have the authority to arbitrate and oversee agreements under which the ILECs provide the UNE to the CLECs.[898]

In the early years of the TelAct, many state commissions established rate structures for UNE. However, this structure changed significantly on March 2, 2004. On this date, the U.S. Circuit Court for District of Columbia ruled that the FCC lacked the authority to delegate to the states the responsibility for setting UNE rates.[899] The Court further ruled that the FCC had failed to prove that competitors in the local telephone market were impaired without government-regulated access to critical parts of the phone network controlled by the ILECs.[900] The ruling stated that the FCC had erred by not providing unified federal guidelines, but rather had improperly pushed FCC decisions onto the states.[901] Largely related to this ruling, which had the effect of making UNE more expensive to obtain from ILECs, many CLECs elected to leave the residential market. Currently, the primary market for UNE involves purchasing UNE from ILECs in order to offer enterprise services.

b. Requirement to Interconnect

The TelAct also requires every ILEC to permit CLECs to interconnect with its network.[902] Thus, even if a CLEC wishes to replace or supplement the ILEC's network with one of its own, the ILEC remains obligated to interconnect those new facilities to its own network to whatever extent is required to allow the operation of the CLEC's competing facilities. The interconnection agreements are to be approved by state regulators,[903] who also have the authority to arbitrate disagreements over their terms.[904]

c. Miscellaneous Requirements

Finally, to further ensure the removal of regulatory barriers to free entry, the TelAct requires ILECs to allow CLECs to co-locate their equipment on the incumbent's facilities[905] and provides for the portability of telephone numbers,[906] thereby reducing the inconvenience of changing local service providers.

---

[898] 47 U.S.C. § 252(e), (f) (2012).
[899] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).
[900] *Id.*
[901] *Id.*; *see also infra* Chapter 9.C.2.
[902] 47 U.S.C. § 251(c)(2) (2012).
[903] *Id.* § 252(e)(1).
[904] *Id.* § 252(b).
[905] *Id.* § 251(c)(6).
[906] *Id.* § 251(b)(2).

3. PUC Regulation of Competitive Providers

Although many CLECs and all competitive interexchange carriers are relieved from many aspects of regulation,[907] CLECs and other providers of other telecommunication services remain subject to some regulation as a "public utility." For example, any competitive carrier wishing to sell local exchange service in a location where another utility provides, or is authorized to provide, the same or similar service, must obtain the Commission's approval that the public convenience and necessity require an additional public utility.[908] As noted in Chapter 5.C.2, the Commission's approval for competitive providers is subject to the relaxed standards set forth in Chapter 280. Indeed, in its efforts to remove regulatory barriers to competition, the Commission has attempted to substitute disclosure for regulation where competition exists.[909]

4. Mobile Wireless Telecommunications

Over the past several decades, telecommunications services have increasingly migrated to the wireless spectrum and away from traditional landline service. In Maine, as in every other state, the number of mobile wireless customer accounts now exceeds the number of landline customer accounts, and many Mainers have "cut the cord" and only use their mobile phones.[910]

---

[907] Chapter 212 exempts CLECs that do not receive State Universal Funding and all competitive interexchange carriers from the need to receive PUC approval for (i) the issuance of stocks, bonds, or other evidence of long-term indebtedness, (ii) the sale, mortgage, or transfer of any utility property, and (iii) merger with any other public utility. In addition, the Commission routinely exempts competitive telecommunication providers from reorganization and affiliate transaction approvals. *E.g.*, *Re Telecom Mgmt., Inc. d/b/a Pioneer Tel.*, Petition for Filing of Public Convenience and Necessity to Provide Service as a Local Exchange Carrier, No. 2006-587, Order Granting Authority to Provide Local Exchange Service as a Reseller and Approving Schedule of Rates and Terms and Conditions (Me. P.U.C. Nov. 7, 2006).

[908] *See, e.g.*, *Re IDT Am., Corp.*, Petition for Finding of Public Convenience and Necessity to Provide Facilities-Based and Resold Local Exchange Service, No. 2003-11, Order Granting Authority to Provide Facilities Based and Resold Local Exchange Service Granting Authority to Provide Facilities Based and Resold Local Exchange Service (Me. P.U.C. Feb. 4, 2003).

[909] *E.g.*, *Re Me. Pub. Utils. Comm'n*, Standards for Billing, Credit and Collection, Termination of Service, and Customer Information for Eligible, Non-Eligible and Inter-exchange Telecommunications Carriers (Chapter 290), No. 2001-852, Order Adopting Rules at 2 (Me. P.U.C. June 20, 2002).

[910] ME. PUB. UTILS. COMM'N, *Plan to Reform Telecommunications Regulation, Presentation to Joint Standing Committee on Energy, Utilities and Technology* at 15 (Dec. 30, 2011).

a. Competitive Model of Regulation

One of the key regulatory features of mobile wireless service is that it is considered a competitive market. Thus, under federal law, there is limited regulation of mobile wireless service. Federal law further preempts state regulation of rates for mobile wireless service, and it prohibits states from establishing barriers to entry for such service.[911] The federal prohibition on rate regulation has also been extended to prohibit state regulation of "terms of service" to the extent terms of service are closely intertwined with rates—in other words, requiring that mobile providers offer certain services indirectly impacts the rates that providers must charge, which triggers the federal prohibition on rate regulation.[912]

In recognition of the largely deregulated nature of mobile wireless service, Maine's definition of "public utility" was amended in the 1980s to carve out "mobile telecommunications services" except in circumstances where one provider "exclusively controls" the radio spectrum assigned by the FCC for mobile service within a particular geography.[913] In practice, this provision has not led—nor is it likely to lead—to the classification of mobile wireless service as a utility service in Maine. That is because, over time, the FCC has made larger and larger amounts of public radio spectrum available to mobile wireless carriers, and there are few if any places in Maine where only one carrier owns or operates the radio spectrum. Going back several decades, mobile wireless service was established as a duopoly where the radio spectrum was allocated to only two providers within any given geography, such as the Portland or Lewiston-Auburn metro areas. Originally, one of the spectrum licenses was made available to the regional Bell Operating Company—in Maine's case, New England Telephone—and the other license was made available by public auction. Over time, as more radio spectrum was made available for mobile wireless service, the number of spectrum licenses available within a geography increased from two, and now there are many areas of the country where there are seven or more providers owning spectrum within a given geography. As a result, the mobile wireless industry remains competitive, and therefore not subject to utility regulation.

b. Antenna Siting

Another key feature of mobile wireless service is the evolution from traditional voice service, to data and information service. Early cell phones were typically installed in

[911] 47 U.S.C. § 332(c)(3)(A) (2012).
[912] *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C. Rcd. 19898, 19907 (1999).
[913] 35-A M.R.S.A. § 102(13) (2010 & Supp. 2017).

cars with large antennas and repeaters. By the mid-1990s, car phones became "bag phones" with integrated antennas to allow use outside of cars. By the end of the 1990s, cell phones evolved into small handsets without the need for a backup antenna or car installation. With the increase in phone mobility came an increase in the speed and quality of service. Early cell phone service was analog-based, and as distance from the tower increased, service degraded. By the early 2000s, cell phone service migrated to digital platforms with higher speeds and quality, but with a shorter range from the tower. By the latter part of the 2000s, digital service had increased to the point where cell phones not only carried voice calls, but also carried data allowing access to the Internet. Cell phones were now more than just phones—they had become like portable computers enabling Internet access.

As cell phones offered more and higher quality services, the need for cell phone towers also grew. Towers were needed to expand the geography of coverage, and to meet the growing capacity demand of consumers using more and more data. As cell phones offered more and higher quality services, the need for cell phone towers also grew. Towers were needed to expand the geography of coverage, and to meet the growing capacity demand of consumers using more and more data. Importantly, cell phone towers are not regulated by the PUC, and are permitted under a mixture of federal and local regulation. Under the TelAct, the traditional authority of municipalities to regulate land use and zoning was expressly reserved to cities and towns.[914] While largely preserving these rights, however, the TelAct also imposed several restrictions on municipal regulation of wireless towers. Specifically, federal law allows cities and towns to determine where towers may be sited, but local governments may not completely prohibit towers from locating within their borders, nor may they discriminate against providers of functionally equivalent services.[915] Moreover, cities and towns are further prohibited from denying a permit for a cell tower based on concerns about the health effects of radio frequency exposure.[916]

More recently, new technology offers the opportunity for mobile wireless providers to provide much faster connection speeds using arrays of "small cell" antennas located on utility or municipal poles. However, because such facilities would be located within the public right of way, mobile providers must work not only with pole owners, but also with transportation authorities charged with overseeing the location of utility facilities in the public right of way.[917] For local roads, this requires approval from the municipality. [918] On State roads, this requires approval from the Maine Department of

[914] *See APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cty. of Pa.*, 196 F.3d 469, 473 (3d Cir. 1999).
[915] *See* 47 U.S.C. § 332(c)(7)(B)(i).
[916] *See N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 729-30 (S.D. N.Y. 2009).
[917] 35-A M.R.S.A. § 2503 (2010 & Supp. 2017).
[918] *Id.* § 2502 (2010).

Transportation.[919] Additionally, the terms and conditions by which pole owners charge for small cell attachments is governed by the Commission, which establishes the broad contours by which pole owners allow third parties to attach to their facilities.[920]

c. Wholesale Access for Backhaul Service

Mobile wireless providers are also "customers" of telephone utilities, and to this limited degree, are beneficiaries of PUC regulation of the terms of access to telephone wires. More specifically, to the extent cell phone towers and antennas require wireline "backhaul" to allow mobile traffic to access the public switched landline network, cell phone providers are essentially wholesale customers of landline phone providers, and the PUC has jurisdiction over the terms and conditions by which telephone utilities charge for access to their network.[921] Telephone utilities benefit from the revenues they receive from mobile wireless providers for backhaul services; however, like other wholesale customers, mobile wireless providers benefit from Commission oversight of access charges by telephone utilities.

d. Numbering

One limited area where mobile wireless service is subject to PUC regulation relates to phone number allocation. Under federal law, states retain the authority to allocate phone numbers for both landline and mobile wireless services, and Maine exercises this authority.

e. Contributions to State-Supported Telecommunications Programs

Another area where mobile wireless service is subject to state utility oversight relates to contributions to certain state programs. In particular, the Maine Legislature has determined that customers of mobile wireless service should contribute to state programs such as Enhanced 9-1-1 services, the Maine Universal Service Fund, and the Maine Telecommunications Education Assess Fund.[922] For traditional billed phone service, these fees are collected through an assessment on the carrier, which is generally passed on by way of a surcharge on the customer's monthly phone bill.[923] For prepaid

[919] *Id.*
[920] *Id.* § 711 (2010 & Supp. 2017); 65-407 C.M.R. ch. 880 (2018).
[921] *See supra* Chapter 5.B.2.b.
[922] 35-A M.R.S.A. § 7104 (2010 & Supp. 2017).
[923] *Id.*; 65-407 C.M.R. ch. 290, § 12 (2002).

wireless services, where there is no billing relationship with the customer, retailers collect from consumers the prepaid wireless fee, which is a flat transaction fee applied at the point of sale, and remit this fee to Maine Revenue Services for eventual allocation to the three identified state programs.[924]

5. Interconnected Voice over Internet Protocol (VoIP)

Historically, voice telephone service was provided over copper wire as a standalone service. More recently, however, voice telephone service has increasingly been provided as an Internet-based application by wire or wireless means, also known as Voice over Internet Protocol or "VoIP." When VoIP service is provided by entities such as cable television companies through a wire to a fixed location, the service is known as "fixed-base VoIP." When the service is provided through an Internet application on either a smart phone or computer, such that the service can be accessed in any location, the service is known as "nomadic VoIP."

Because VoIP service has aspects of telephone service, which is regulated, and components of an "information service," which has traditionally been subject to limited regulation, there has been a debate across the states regarding the extent to which VoIP service should be regulated as a utility service.[925] With respect to nomadic VoIP service, it is generally agreed that the service is purely an information service not subject to traditional telephone regulation. Such services are similar to most other Internet-based applications, which are also not subject to telephone or utility regulation. With respect to fixed-base VoIP service, there has been more of a debate as the service more closely aligns with traditional landline telephone service.

In Maine, the PUC initially determined that fixed-base VoIP service should be regulated as a public utility service.[926] Maine was one of only a small number of states to pursue this direction. However, in 2012, when the Maine Legislature passed legislation

---

[924] 35-A M.R.S.A. § 7104-C (Supp. 2017); 65-407 C.M.R. ch. 284, § 5 (2018).

[925] For example, in *New Hampshire Telephone Association,* 96 N.H.P.U.C. 449 (Aug. 11, 2011), the New Hampshire Public Utilities Commission found that "the cable voice service offered by Comcast and Time Warner constitutes" telephone service. The case was not appealed. However, the New Hampshire General Court limited the New Hampshire Public Utilities Commission's authority on VoIP by amending the statute. *See* N.H. Rev. Stat. § 362:7 (2016). *See also PAETEC Commc'ns, Inc. v. CommPartners, LLC,* Civ. A. No. 08-0397(JR), 2010 WL 1767193, *2 (D.D.C. Feb. 18, 2010) ("PAETEC"); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), aff'd, 394 F.3d 568 (8th Cir. 2004); *Vonage Holdings Corp. v. FCC,* 489 F.3d 1232, 1241 (D.C. Cir. 2007) (finding that "'[i]nformation service' and 'telecommunications service' are mutually exclusive categories" under federal law).

[926] *Pub. Utils. Comm'n*, Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Voice" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service, No. 2008-00421, Order (Me. P.U.C. Oct. 27, 2010).

reforming Maine's telecommunications regulations, the Legislature determined that fixed-base VoIP should not be regulated as a local exchange telephone service.[927] The Legislature determined that such services should continue to collect fees to support state telecommunications programs such as Enhanced 9-1-1 services, the Maine Universal Service Fund, and the Maine Telecommunications Education Assess Fund.

6. Maine Telecommunications Reform Act of 2012

In the last ten years, as more and more of the telecommunications market in Maine and elsewhere has gravitated to a competitive model of regulation, Maine's incumbent local exchange carriers argued that their services should also be deregulated. In 2011, Maine's ILECs advocated for new legislation to create "parity" in telephone regulation, and the end result of this effort was adoption of a legislative resolve directing the Commission to convene a stakeholder group to explore opportunities to reduce regulation on ILECs.[928] After extensive study over the summer and fall of 2011, the Commission returned to the Legislature with draft legislation proposing to reduce regulation of ILECs.[929] This bill in turn triggered several more months of facilitated stakeholder negotiations at the Commission, the end result of which was a completely new legislative proposal that pared down PUC regulation to a portion of the ILEC business known as provider of last resort, or "POLR," service. Under this new construct, which was ultimately passed into law as "An Act to Reform Telecommunications Regulation,"[930] many aspects of ILEC service were expressly exempted from numerous areas of PUC regulation. However, the bill called for continued regulation of POLR service, namely, telephone service offering flat-rate, voice-grade access to the public switched telephone network within the service territories of the ILECs, which service would include local usage, dual-tone multi-frequency signaling, single party service, interexchange service, directory assistance, and several other attributes.[931]

Also included in the new reform act was legislation that expressly deregulated VoIP service, and provisions ensuring that mobile wireless providers and dark fiber providers would continue to have the legal ability to attach to utility poles in the public right of way.[932] The Act is extensive, and a key reason for its length was an effort to preserve existing and historic definitions of "public utility" and "telephone utility" as they existed in Title 35-A at the time of the legislation. Given the decades of "meaning"

[927] P.L. 2011, ch. 623, § A-2.
[928] Resolves 2011, ch. 69.
[929] L.D. 1784 (125th Legis. 2012).
[930] P.L. 2011, ch. 623.
[931] 35-A M.R.S.A. § 7201(7) (Supp. 2017).
[932] P.L. 2011, ch. 623, Part B.

built up over time with regard to these historic definitions, the final legislation sought to retain the definitions, but where appropriate, clarify the scope of PUC regulation over particular types of entities for particular purposes. As a result, Title 35-A contains numerous exceptions for various types of telecommunications entities, depending on the nature of the regulation.[933] Otherwise, providers worried that they might lose some of the positive aspects of regulation, including access to poles in the public right of way.

Following adoption of the Telecommunications Reform Act, ILECs transitioned their businesses in order to segregate the portion of their business providing POLR service. However, ILECs remained concerned that even this more limited business was becoming uneconomic to operate. ILECs questioned why it was necessary to offer a regulated phone service in communities like Portland or Bangor where customers had numerous competitive options, such as VoIP or mobile wireless service, which options were not subject to traditional utility regulation. The solution came in the form of 2016 legislation entitled "An Act to Increase Competition and Ensure a Robust Information and Telecommunications Market."[934] Under this legislation, "price cap ILECs" (ILECs who agreed to accept federal Connect America Fund Phase II support, also known as CAF II) were relieved of the obligation to offer POLR service in Portland, Lewiston, Bangor, South Portland, Auburn, Biddeford, and Sanford.[935] Such ILECs further received the right to petition the PUC for "POLR relief" in 15 other larger Maine municipalities, and if relief was eventually granted in these other communities, the ILEC would have the ability to submit petitions for POLR relief in other Maine communities.[936] Under the new POLR-relief guidelines, the ILEC has the burden of demonstrating that there is sufficient competition in the municipality to "ensure access to affordable telephone service."[937] This showing includes demonstrating at least one wireline-facilities network serving 95% of the households in the municipality, and one or more mobile wireless provider collectively serving 97% of the community.[938] The Commission has approved petitions relieving ILECs of their POLR obligations in all fifteen of the Maine communities listed in the statute.[939]

---

[933] P.L. 2011, ch. 623.
[934] P.L. 2015, ch. 462, §§ 3, 6 (2016).
[935] 35-A M.R.S.A. § 7221(4)(A) (Supp. 2017).
[936] *Id.* § 7221(4), (5).
[937] *Id.* § 7221(5)(A)(1).
[938] *Id.*
[939] *N. New England Tel. Operations, LLC d/b/a Fairpoint Commc'ns-NNE*, Request for POLR Relief Certificate, No. 2017-00016, Order (Me. P.U.C. Apr. 27, 2017); *N. New England Tel. Operations, LLC d/b/a Fairpoint Commc'ns-NNE*, Request for POLR Relief Certificate, No. 2017-00185, Order (Me. P.U.C. Nov. 2, 2017); *N. New England Tel. Operations, LLC d/b/a Fairpoint Commc'ns-NNE*, Request for POLR Relief Certificate, No. 2018-00027, Order (Me. P.U.C. May 3, 2018).

C. Natural Gas Industry

Maine's experience introducing deregulation and competition into the natural gas industry was distinct from its experience with deregulation of the electric industry. Whereas deregulation of the electric industry was based primarily on the restructuring of that industry—i.e., forcing electric utilities to sell off their generation assets, and introducing competition into power generation—competition in the natural gas industry revolved around natural gas unbundling; permitting overlapping, non-exclusive service territories, or what is sometimes called gas-on-gas competition;[940] and the related relaxation of the regulation of marketing activities of gas utilities. In contrast to the electric industry, the introduction of competition in the natural gas industry made particular sense due to its status as a competitor with other heating fuels. As the Commission once stated:

> The nature of competition in the gas and electric industries is distinctly different. Unlike for electricity, other fuels can be substituted for natural gas for virtually all natural gas end uses. The major uses of gas—cooking, clothes drying, water heating, space heat[ing], and manufacturing processes—can easily be provided by a number of other fuels, such as propane, kerosene, wood, oil, coal and even electricity. By comparison, the electric industry does not need to fear a widespread resurgence of gas lighting, to say nothing of oil-fired computers.[941]

1. Maritimes & Northeast Pipeline as a Catalyst to Changes in Law

Prior to the late 1990s, only one natural gas LDC operated in Maine: Northern Utilities, Inc. ("Northern"). The PUC in 1969 authorized Northern to operate as a gas utility in any unserved areas in the entire State of Maine.[942] During Northern's early years of existence, Maine law did not provide for any alternative form of regulating an LDC. Instead, the law provided that Northern's regulatory treatment would be similar to that of any other utility with an exclusive franchise service territory, under traditional

---

[940] *See Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 24 (Me. P.U.C. Aug. 17, 1998).

[941] *Pub. Utils. Comm'n*, Investigation of Request to Order Natural Gas Companies to Make Available Commercial Customer Lists, No. 2006-83, Order at 6 (Me. P.U.C. June 29, 2006).

[942] *N. Utils., Inc.*, Re Petition for Consent to Furnish Natural Gas Service in and to any City or Town in the State of Maine, U. #2782 (Me. P.U.C. June 27, 1969). The PUC did not authorize Northern to serve the Greater Bangor area—specifically, the municipalities of Bangor, Brewer, Old Town, Orono, and Veazie. *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 2 (Me. P.U.C. Mar. 7, 1997).

cost of service ratemaking principles, without the sort of relaxed regulatory treatment that would have recognized its status as a competitor with other home heating providers.

The late 1990s brought the introduction of competition into the natural gas industry in Maine. This change in regulatory treatment was prompted by the development of significant new interstate natural gas pipeline capacity in the state. In the late 1990s, the 684-mile Maritimes & Northeast Pipeline was under development. The pipeline, which runs from the Sable Offshore Energy Project in Goldboro, Nova Scotia, Canada, to Dracut, Massachusetts, went into service in December 1999. (Maritimes & Northeast Pipeline and Portland Natural Gas Transmission System jointly own another portion of the pipeline, which runs 101 miles from Westbrook, Maine, to Dracut, Massachusetts. This portion is referred to as the Joint Facilities.)[943] The introduction of the Maritimes pipeline presented new opportunities. In particular, open access on interstate pipelines allowed for interconnections to newly created natural gas utilities (and other direct connections to industrial users) along the pipeline's corridor in Maine.

The Maine Legislature responded to the Maritimes & Northeast Pipeline development by adopting new laws meant to open up the state's natural gas market and make it easier for new LDCs to operate and new natural gas suppliers to form. In 1997, the Legislature adopted an alternative form of regulation for natural gas utilities. In recognition of the unique competitive circumstances of the natural gas LDC—specifically, its status as a competitor with other home heating fuels, which are not regulated as utilities—the Legislature explicitly granted the Commission the authority to approve alternative ratemaking mechanisms that may include, but are not limited to, multiyear rate plans, rate reconciliation mechanisms, automatic indexed rate adjustments, earnings-sharing, financial incentives, and "[s]treamlined regulation or deregulation of services or entities when regulation is not required to protect the public interest."[944] The statute gives the PUC the discretion to consider a number of factors in adopting an alternative ratemaking mechanism, including, for example, the "impact on economic development" and the "development of a competitive market for gas services that are not natural monopolies . . . ."[945] The law also provides for rate flexibility by allowing a utility to "change its schedule of rates with limited notice" and to "enter into contracts for the sale of gas, transmission and distribution services and related management services with limited or no prior approval by the commission."[946]

In 1999, the Legislature continued to open up the natural gas market by mandating the unbundling of natural gas and giving the Commission the ability to

---

[943] *See generally* Portland Natural Gas Transmission Sys. and Maritimes & Northeast Pipeline, L.L.C., FERC Docket No. CP97-238-000, Letter Order (Nov. 10, 1999) (referring to the Joint Facilities).
[944] 35-A M.R.S.A. § 4706(1) (2010).
[945] 35-A M.R.S.A. § 4706(1) (2010).
[946] 35-A M.R.S.A. § 4706(5) (2010).

determine the necessary level of oversight of natural gas marketers.[947] Ultimately, the Commission simply required natural gas marketers to register with the Commission by completing a simple form.[948] The unbundling of natural gas meant that LDC customers could purchase the natural gas commodity separate from natural gas delivery service. This enabled commercial LDC customers[949] to enter into natural gas supply contracts to suit their individual needs. It also meant that natural gas supply was sold in a competitive market, both to consumers and to the gas utilities themselves. Also in 1999, the Legislature granted specific eminent domain authority to natural gas utilities.[950]

2. 1996-1998: The PUC's *Mid Maine* Line of Cases

Around this same time, the market responded enthusiastically to the development of the Maritimes pipeline, with three new LDCs proposed within a short period of its being developed (1996-1998): Mid Maine Gas Utilities, Inc. ("Mid Maine"), CMP Natural Gas LLC ("CMP Natural Gas"),[951] and Bangor Gas Co., LLC ("Bangor Gas"). In response to these new entrants petitioning the Commission for approval to operate as utilities, the Commission issued a series of orders that further supported competition among natural gas LDCs.

Mid Maine gave the PUC its first opportunity to address a new entrant to the LDC field. In 1996—prior to the Legislature's adoption of new laws opening up the natural gas market—Mid Maine requested approval of a "non-exclusive" franchise to operate as a utility in the Greater Bangor area, the only area in the state where Northern was not authorized to serve.[952] Mid Maine's petition raised a number of questions for the Commission, including whether the Commission had statutory authority to condition a franchise as "non-exclusive"; whether the Commission had authority to condition its approval order on a subsequent review of financing, gas supply, and construction plans; what legal standards and findings the Commission must make to grant approval of a new gas utility service territory; and what evidentiary showing Mid Maine would have to make to support the Commission's findings.[953] In confronting these novel issues, the Commission determined, first, that it did not have the authority to grant a "non-exclusive" utility franchise for Mid Maine, but that nonetheless, under 35-A M.R.S.A.

---

[947] 35-A M.R.S.A. §§ 4708-4709 (2010).
[948] *See* 35-A M.R.S.A. § 4708 (2010).
[949] Although residential customers are permitted to purchase natural gas supply separately from delivery, this happens rarely if ever.
[950] 35-A M.R.S.A. § 4710 (2010 & Supp. 2017).
[951] CMP Natural Gas was later incorporated as Maine Natural Gas Corporation.
[952] *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 2 (Me. P.U.C. Mar. 7, 1997).
[953] *Id.* at 2-3.

§ 2105, the Commission had the authority to authorize a second utility to operate in a municipality even if another utility was previously granted the right to operate in the same municipality.[954] The Commission stated: "The grant of authority to Mid Maine is indistinguishable from grants made to any other utility under section 2014 or 2105 with respect to the degree of 'exclusivity' it confers."[955]

Second, the Commission in *Mid Maine* determined that it could impose, as a condition to its order, that Mid Maine provide for Commission review its plans for financing, gas supply, and construction prior to its commencing service.[956] The PUC ruled that it had "ample authority to impose . . . conditions" on a grant of authority under Section 2104 of Title 35-A.[957] The PUC rested its decision on its implied powers;[958] its authority to review and approve stocks, bonds, and other long-term debt issuances;[959] and its general investigate authority.[960] This particular finding resulted in the creation of a two-phase process for gas utility authorization that multiple future gas utility petitioners would emulate.[961] This two-phase process was attractive to new entrants because it enabled the prospective utility to demonstrate its general financial and technical capability and the public necessity for the service in the first phase,[962] and to use the conditional order to market to prospective investors and obtain the significant

[954] *Id.* at 3-4.
[955] *Id.* at 4.
[956] *Id.* at 5.
[957] *Id.* at 5.
[958] 35-A M.R.S.A. § 104 (2010).
[959] 35-A M.R.S.A. § 902 (2010).
[960] 35-A M.R.S.A. § 1303 (2010).
[961] In particular, the petitions of CMP Natural Gas, LLC (later known as Maine Natural Gas Corporation), Kennebec Valley Gas Co., LLC, and Summit Natural Gas of Maine, Inc. were planned to be processed in two phases, with a conditional order followed by an order authorizing commencement of service upon a showing of financing, gas supply procurement, and construction plans. *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order (Me. P.U.C. Mar. 11, 1998) and Order (Me. P.U.C. Aug. 17, 1998); *Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service, No. 2012-00258, Order Granting Conditional Authority and Denying Motion to Dismiss (Me. P.U.C. Oct. 17, 2012) and Order Approving Stipulation (Me. P.U.C. Jan. 29, 2013); *Kennebec Valley Gas Co., LLC*, Petition of Kennebec Valley Gas Co., LLC for Authority to Furnish Natural Gas Service, No. 2011-161, Order Approving Stipulation at 1 (Me. P.U.C. Aug. 18, 2011) (granting conditional authority only). Because KVGC sold its rights to Summit, KVGC never sought or obtained an order authorizing the commencement of service. *See Kennebec Valley Gas Co., LLC*, Conditional Application for Approvals to Extent Required for Agreement with Summit Natural Gas of Maine, Inc. for Sale of Assets, No. 2012-00257, Order Granting Approval of Sale of Utility Assets at 1 (Me. P.U.C. Feb. 26, 2013).
[962] *See Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 9 (Me. P.U.C. Mar. 7, 1997) (quoting 35-A M.R.S.A. § 101). This is the same three-part analysis (public necessity, technical ability, financial ability) the Law Court established in *Standish Telephone Co. v. Public Utilities Commission*, 499 A.2d 458, 459 (1985).

financing needed prior to establishing construction and marketing plans and making more specific showings of financial and technical capability in the second phase.[963]

Third, the Commission in *Mid Maine* determined that the standard for approval under either Section 2104 or Section 2105 of Title 35-A is whether the grant of authority "will promote 'safe, reasonable and adequate service at rates which are just and reasonable to customers and public utilities.'"[964]

And finally, as to the evidentiary showing required to meet this test, the Commission found that: (1) public need is established by a demonstrating that the area proposed to be served is not currently being served;[965] (2) relevant evidence of technical capability includes educational and engineering qualifications, past experience, demonstrated competence and knowledge, general credibility of answers, and knowledge of industry, and company standards of safety and reliability;[966] and (3) relevant evidence of financial capability included past experience, propose level of equity investment, current assets and liabilities, existing commitments, and relevant credit history.[967] Notably, the Commission did not require Mid Maine to show it had already obtained financing and investment, or that it had already prepared a detailed system diagram and engineering plans.[968] Again, these conclusions limiting what Mid Maine would need to submit to begin taking steps toward formal operations made the Maine natural gas market easier to enter, creating the possibility for true competition.

Ultimately, though, Mid Maine never commenced operating service in Maine. The Commission nevertheless used multiple opportunities following the *Mid Maine* order to demonstrate its commitment to gas-on-gas competition. Close in time to the Commission's order in *Mid Maine*, CMP Natural Gas (later known as Maine Natural Gas) and Bangor Gas sought PUC approval to operate as gas utilities; both of these utilities did commence operation. The Commission's orders authorizing these and other gas utilities to operate continued the pro-competitive theme.[969] The Commission

---

[963] *See, e.g.*, *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 16-17 (Me. P.U.C. Mar. 7, 1997) (not issuing a conditional order could "impede the development of needed infrastructure by increasing investor risks to unreasonable levels").

[964] *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 6 (Me. P.U.C. Mar. 7, 1997).

[965] *Id.* at 10 (citing *Standish*, 499 A.2d at 462); *see also supra* Chapter 5.C.1.

[966] *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 11 (Me. P.U.C. Mar. 7, 1997).

[967] *Id.* at 12.

[968] *Id.* at 11-12.

[969] *See, e.g.*, *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 4 (Me. P.U.C. Aug. 17, 1998) ("[W]e endorse the *Mid-Maine* policy of allowing competition for customers among local distribution companies in Maine unless there is evidence of harm to the public interest.").

approved Bangor Gas's petition in a single-phase proceeding in June 1998.[970] It granted CMP Natural Gas a conditional order in March 1998 and then an order authorizing commencement of service in August 1998.[971] Subsequently, the Commission approved, on a conditional basis, the petition of Kennebec Valley Gas Company, LLC ("KVGC") to become a gas utility.[972] KVGC was later sold to Summit Natural Gas of Maine, Inc. ("Summit"), [973] which itself obtained first a conditional and then a final, unconditional order to operate as a gas utility.[974] When given an opportunity in 2012 to walk back its pro-competitive policy and choose a single gas utility who should be solely authorized serve the City of Augusta, the PUC declined to do so.[975]

3. 2011-2015: Unexpected Levels of Competition, Particularly in Augusta

In *Mid Maine*, the Commission made some key predictions regarding competition in the natural gas market in Maine. Among them, the Commission predicted that competition for heating fuels would create a natural limit on Mid Maine's ability to recover future uneconomic costs from ratepayers:

> Given the inter-fuel competition for the end use[r]s Mid Maine seeks to serve, we believe it is reasonable to assume that there is and will be a market-imposed limit on Mid Maine's ability to recover uneconomic costs from future ratepayers. That limit will be the comparative costs of current or potential alternatives.[976]

---

[970] *Bangor Gas Co., L.L.C.*, Petition for Approval to Provide Gas Service in the Greater Bangor Area, No. 97-795, Order (Me. P.U.C. June 30, 1998).

[971] *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order (Me. P.U.C. Mar. 11, 1998) and Order (Me. P.U.C. Aug. 17, 1998).

[972] *Kennebec Valley Gas Co., LLC*, Petition of Kennebec Valley Gas Co., LLC for Authority to Furnish Natural Gas Service, No. 2011-161, Order Approving Stipulation at 1 (Me. P.U.C. Aug. 18, 2011).

[973] *Kennebec Valley Gas Co., LLC*, Conditional Application for Approvals to Extent Required for Agreement with Summit Natural Gas of Maine, Inc. for Sale of Assets, No. 2012-00257, Order Granting Approval of Sale of Utility Assets at 1 (Me. P.U.C. Feb. 26, 2013).

[974] *Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service, No. 2012-00258, Order Granting Conditional Authority and Denying Motion to Dismiss (Me. P.U.C. Oct. 17, 2012) and Order Approving Stipulation (Me. P.U.C. Jan. 29, 2013).

[975] *Kennebec Valley Gas Co., LLC*, Complaint Regarding Authority of Maine Natural Gas Corporation to Furnish Natural Gas Service in Augusta, No. 2012-95, Order Denying Request for Investigation (Me. P.U.C. Apr. 24, 2012).

[976] *Id.* at 14.

In fact, the PUC has many times made explicit that, in exchange for the right to compete for customers with limited oversight of the Commission, shareholders of new gas utilities bear the risk of uneconomic expansion.[977]

A more remarkable prediction the Commission made in *Mid Maine* was that "the risk of uneconomic duplication" of natural gas infrastructure "is slight, and . . . any attempt by the Commission to establish preordained economies of scale would be unreasonable."[978] Further, because "the market for other energy alternatives will effectively cap the rates charged by any new LDC, this indicates that it is very unlikely that two separate systems would ever be built."[979] And, in the case of gas-on-gas competition, "it is possible that the threat of competition may accelerate the development of gas infrastructure as each party strives to foreclose others by being the first to provide service in a given area."[980] Similarly, in its 1998 order authorizing CMP Natural Gas to commence service, the Commission stated:

> While local distribution service has some of the hallmark characteristics of a natural monopoly—for example, installation of natural gas infrastructure is capital intensive and one distribution system investment in an area is generally less costly than more than one—we believe the potential benefits of competition outweigh the potential harms. The economic facts are that it may not be possible in many areas to obtain sufficient load, due to the typically low population density in Maine, to support two utilities and that the total cost of service will likely be higher where two utilities exist. We expect the competing utilities will take these factors into account, with the result that uneconomic duplication of infrastructure and detrimental "races to the trench" are not likely given the economic incentives of the entities.[981]

The Commission's statements regarding duplicative facilities and competition were prescient, if not accurate. Beginning in 2012, intense competition between Maine Natural Gas and Summit for customers in the City of Augusta strained the

---

[977] *See, e.g.*, *Kennebec Valley Gas Co., LLC*, Petition of Kennebec Valley Gas Co., LLC for Authority to Furnish Natural Gas Service, No. 2011-161, Order Approving Stipulation at 10 (Me. P.U.C. Aug. 18, 2011); *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 14, 20, 23, 25, 39-40 (Me. P.U.C. Aug. 17, 1998).

[978] *Mid Me. Gas Utils., Inc.*, Request for Approval to Furnish Gas Service, No. 96-465, Order at 18 (Me. P.U.C. Mar. 7, 1997).

[979] *Id.* at 17-18.

[980] *Id.* at 19.

[981] *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 5 (Me. P.U.C. Aug. 17, 1998).

Commission's pro-competition policy. Maine Natural Gas and Summit did indeed construct natural gas facilities not only within the same town, but, in at least one case, on the same street.[982] A few years later, in 2016, the Commission approved a stipulation that effectively disallowed millions of dollars Maine Natural Gas incurred in competing with Summit for customers in pursuit of an expansion into Augusta, and ordered Maine Natural Gas to adopt separate rates for the City of Augusta in recognition of the incrementally greater costs of serving that expansion area relative to the cost of serving Maine Natural Gas's existing customer base.[983]

4. 2015-2018: Recent Enhancements to Competition in the Natural Gas Industry

Recent years have brought additional enhancements to the state's pro-competition policy for natural gas LDCs. In the context of marketing, for instance, Bangor Gas, Maine Natural Gas, and Summit may enter into special rate contacts with customers without prior PUC approval.[984] In addition, both Bangor Gas and Maine Natural Gas had previously obtained Commission approval to offer promotional allowances.[985] In 2017 the Legislature adopted a law providing that any natural gas LDC may offer promotional allowances without prior Commission approval.[986]

In 2015, the Commission approved Northern's proposal to adopt a targeted area buildout, or "TAB," surcharge.[987] The TAB surcharge enabled Northern to expand its service territory to previously unserved towns yet (a) recover incremental costs without a full rate case, (b) limit the recovery of costs to customers in the geographic area receiving service for the first time, and (c) spread the recovery of costs of the localized expansion

---

[982] *See Summit Natural Gas of Me., Inc., and Me. Natural Gas Corp.*, Request for Approval of Joint Procedure for Duplicate Facilities in Close Proximity, No. 2013-00496, Order Approving Joint Procedure for Duplicate Facilities in Close Proximity (Me. P.U.C. Nov. 12, 2013).

[983] *Me. Natural Gas Corp.*, Request for Approval of an Alternative Rate Plan (ARP) and Establishment of Starting Point Rates, No. 2015-00005, Order Approving Stipulation at 1, 5 (Me. P.U.C. June 1, 2016). See additional discussion of this matter at Chapter 5.C.1.

[984] *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 7-8 (Me. P.U.C. Dec. 17, 1998); *Bangor Gas Co., LLC*, Petition for Approval to Provide Gas Service in the Greater Bangor Area, No. 97-795, Supplemental Order at 1 (Me. P.U.C. Feb. 17, 1999); *see also Summit Natural Gas of Me., Inc.*, Petition for Authority to Provide Natural Gas Utility Service, No. 2012-00258, Order Approving Stipulation at 7 (Me. P.U.C. Jan. 29, 2013).

[985] *Cent. Me. Power Co.*, Petition for Approval to Furnish Gas Service in and to Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 5-7 (Me. P.U.C. Dec. 17, 1998); *Bangor Gas Co., LLC*, Request for Waiver of the Requirements of Chapter 830, No. 2001-287, Order at 1 (Me. P.U.C. May 14, 2001).

[986] 35-A M.R.S.A. § 4706-C(2) (Supp. 2017).

[987] *N. Utils., Inc. d/b/a Unitil*, Request for Approval of Targeted Area Build-Out Program, No. 2015-00146, Order Approving Stipulation at 1 (Me. P.U.C. Dec. 22, 2015).

over a limited period of years. Northern subsequently obtained approval of a TAB surcharge for a second expansion area.[988]

In addition, by 2015, the Commission had adopted a new policy of granting prior approval of the prudency of natural gas pipeline capacity agreements—commonly referred to as precedent agreements—for ratemaking purposes.[989] Prior to this time, the only precedent agreements the commission had reviewed were those that constituted affiliate agreements and for that reason required prior Commission review and approval under 35-A M.R.S.A. § 707.[990] Title 35-A does not explicitly provide the Commission the authority to grant prior approval of the prudency of a precedent agreement that is not an affiliate agreement. In approving precedent agreements with non-affiliates, however, the Commission has stated that its power to do so resides in Section 301, which authorizes the Commission to make determinations as to costs that may be included in setting just and reasonable rates, and Section 4703, which establishes those costs that may be approved for recovery in a utility's cost of gas rates.[991] The Commission has since approved additional precedent agreements.[992] The Commission's decision to begin providing prior prudency approval of precedent agreements promotes competition by giving natural gas LDCs greater flexibility in obtaining natural gas pipeline capacity when that capacity becomes available through the development of new interstate pipeline expansions.

D. Water Industry

Of all public utilities, water utilities have been the least affected by the movement away from regulation and toward more competition. For the handful of investor-owned water companies still operating in Maine, PUC regulation looks quite similar to the way

---

[988] *N. Utils., Inc. d/b/a Unitil*, Request for Approval of Targeted Area Build-Out Program in Sanford Retail Choice Program, No. 2017-00037, Order at 1 (Me. P.U.C. June 26, 2017).

[989] *Me. Natural Gas Corp.*, Request for Approval of Precedent Agreement on Atlantic Bridge Project, Service Agreements and Negotiated Rate Agreements with Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C., No. 2015-00063, Order (Part II) at 10 (Me. P.U.C. Sept. 24, 2015).

[990] *See, e.g.*, *Re N. Utils., Inc.*, No. 95-480 and No. 95-481 Order (Me. P.U.C. Aug. 9, 2016) approving two precedent agreements, one between Northern and its affiliate Granite State Gas Transmission, Inc., and the other between Northern and its then-affiliate Portland Natural Gas Transmission System).

[991] *Me. Natural Gas Corp.*, Request for Approval of Precedent Agreement on Atlantic Bridge Project, Service Agreements and Negotiated Rate Agreements with Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C., No. 2015-00063, Order (Part II) at 3-4 (Me. P.U.C. Sept. 24, 2015).

[992] *See, e.g.*, *N. Utils., Inc. d/b/a Unitil*, Request for Approval of Atlantic Bridge Precedent Agreement, No. 2016-00229, Order Part 2 (Me. P.U.C. Mar. 2, 2017); *N. Utils., Inc. d/b/a Unitil*, Request for Approval of Precedent Agreement with Portland Natural Gas Transmission System, No. 2018-00040, Order (Me. P.U.C. June 14, 2018).

it did thirty years ago. However, for the more than one hundred consumer-owned water districts or municipal water departments, regulation has relaxed over time as the Legislature and PUC have gradually granted them more control over setting water rates.[993] For example, since 1987, consumer-owned water utilities have had the option of more streamlined rate setting pursuant to Sections 6104 and 6104-A. Moreover, since 2013, pursuant to Section 6114, consumer-owned water utilities have had the ability to request that the Commission exempt them from many of the requirements of Title 35-A, Portland Water District has availed itself of these exemptions.[994]

E. Non-Core Services

Associated with this movement away from regulation and towards more competition is the Commission's efforts to restrict utilities from expanding their services into related services that are subject to competition from non-utility sellers.

This issue has been present since the early years of electricity when electric utilities—including those in Maine—routinely sold electric appliances to ratepayers.[995] In Maine, the issue came to a head when an electric utility began offering its customers a home security alarm service.[996] In this case, the utility saw an opportunity to use its electric wires and related infrastructure to participate in a cost-effective manner in the growing home security alarm market. The incumbent providers of this service objected to what they perceived as unfair competition from a utility that had the advantage of a steady and substantial cash flow from its regulated electricity business.

In response, the Legislature amended the law and the PUC adopted Chapter 820 of its rules.[997] In essence, the new regulations strongly discouraged utilities from providing what are referred to as "non-core" or competitive services, such as home security. If a utility wishes to provide more than a *de minimis* amount of non-core services, it is required to create a separate legal entity to do so and must do so under a different name that will not cause customers to believe the service is provided by the utility itself.

This same issue has arisen in a number of contexts where utilities, on the one hand, have argued that customers want the option to purchase related or ancillary services from the utility while non-utility competitors, on the other hand, have objected

---

[993] For an extended discussion, *see supra* Chapter 4.

[994] *Portland Water Dist.*, Petition for Exemption Pursuant to 35-A M.R.S.A. Section 6114 and Chapter 615, Decision and Order (Me. P.U.C. Nov. 13, 2015).

[995] *See Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

[996] *Robert Cochrane v. Bangor Hydro-Elec. Co.*, Request for Commission Investigation into Bangor Hydro-Electric Company's Practice of Installing or Monitoring Security Alarm Systems, No. 96-053, Order (Me. P.U.C. Jan. 28, 1997).

[997] 65-407 C.M.R. ch. 820 (1998).

to unfair competition. In the electric industry, a T&D utility attempted, with limited success, to convince the PUC to authorize the utility to sell and install heat pumps, thereby making more efficient use of the utility's T&D system.[998] In the natural gas industry, a local distribution company attempted, also with limited success, to convince the PUC to authorize the utility to install home heating furnaces that used natural gas, rather than heating oil.[999] In both cases, the Commission expressed concern that the utilities were expanding into competitive markets where they were not welcome by other competitors.

In contrast, water utilities have a long tradition of providing "jobbing" services to their customers where much of the work involves installing and repairing water pipes on the customers' premises, in competition with local plumbers.[1000] Similarly, the PUC has long allowed telephone utilities to install and repair telephone wire inside a customer's home or business, in competition with local contractors.[1001]

Undoubtedly, as technology advances, the PUC will continue to be confronted with the challenge of drawing clear lines between regulated utility services on the one hand, and related, but competitive, services on the other.

---

[998] *Emera Me.*, Request for Approval of Heat Pump Program, No. 2015-00090, Order (Me. P.U.C. Sept. 29, 2015).

[999] *Summit Natural Gas of Me., Inc.*, Request for Approval of Terms and Conditions for Conversion Services, No. 2014-00190, Order Approving Stipulation (Me. P.U.C. Sept. 15, 2014).

[1000] *See, e.g.*, 65-407 C.M.R. ch. 640, § 3(B) (1998) ("These additional services [such as any services beyond those included in the private fire protection charge] shall be treated as jobbing and shall be billed directly to the customer requesting the service."); *Me. Pub. Utils. Comm'n*, Appeal of Consumer Assistance Division Decision #2006-20626 (By Customer) Regarding Biddeford Saco Water Co., No. 2006-00322, Order at 3 (Me. P.U.C. June 22, 2006) ("The owner can hire [Biddeford Saco Water Co.] to maintain or repair a hydrant, but the costs are not included in the annual rate for private fire protection."); *Greater Augusta Util. Dist.*, Approved Tariffs, No. 2011-00506, Operating Terms and Conditions at 21 (Me. P.U.C. Feb. 6, 2012) ("Jobbing is the provision of unregulated utility services, such as construction services. Jobbing services are offered at the discretion of the Utility. Customers who, at their expense, wish to have the Utility perform work outside the scope of regulated Utility service must complete a written Utility jobbing request form provided by the Utility. . . . At the completion of the work, a bill will be rendered.").

[1001] *See, e.g.*, *Pub. Utils. Comm'n*, To Amend Ch. 23, Installation, Maintenance and Ownership of Customer Premises Wire, No. 1996-00329, Order Adopting Amendments to Rule and Statement of Factual and Policy Basis at 8 (Me. P.U.C. June 9, 1997) (ordering that a telephone customer may hire its local exchange carrier ("LEC") to repair or install customer premises wire, and that the LEC may charge for the repair); *Continental Tel. Co. of Me.*, Proposed Increase in Rates, No. 1984-00105, Supplemental Order No. I (Me. P.U.C. Apr. 30, 1985) ("For the installation and maintenance of customer premises inside wire, the company will charge on a time and material basis, in quarter-hour increments.").

Chapter 9

The Relationship Between State and Federal Utility Regulation

This chapter summarizes the relationship between state and federal jurisdiction over utility operations and transactions. As a general rule, federal law regulates interstate operations, while the states have authority over intrastate matters. This apparent bright line between the two jurisdictions is sometimes difficult to draw, however, because decisions seemingly intrastate in nature can affect interstate operations and vice versa. Thus, whenever a matter implicates both intra- and interstate concerns, federal authority typically prevails whenever: (i) Congress has given the matter to the federal authority; (ii) the state authority conflicts with federal authority; or (iii) Congress has given the federal authority so much control over the area in question that it will be deemed to "occupy the field."

In the interstate electricity area, a two-part inquiry is used to determine whether federal regulation is proper: (1) federal regulation must be directed at "wholesale" sales and (2) federal regulation may not regulate retail sales. As noted, however, this deceptively limited federal authority can oust state authority over matters that may have only an indirect effect on wholesale rates. Moreover, federal authorities have successfully

asserted jurisdiction over even intrastate transmission in circumstances where the states have not previously regulated that transmission.

In the telecommunications field, the most interesting development in recent years is the creation of a state/federal partnership in which the states are authorized to implement competition using federal guidelines and procedures.

In the natural gas area, the distinction between inter- and intrastate operations appears to work more evenly, in part because of the nature of the industry. This is so, despite State law that appears to retain limited PUC jurisdiction over natural gas pipelines.[1002]

A. Federal Regulation of Interstate Matters

As suggested in Chapter 8, there is a substantial body of federal public utility law. Under the Commerce Clause of the U.S. Constitution, Congress has the sole authority to "regulate commerce . . . among the several states."[1003] As a result, utility operations or transactions that are interstate in nature are regulated under federal, and not state, authority.[1004] To perform this role, Congress created the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")) to regulate electric and natural gas utilities by enacting the Federal Power Act[1005] and the Natural Gas Act.[1006] Similarly, Congress created the Federal Communications Commission ("FCC") to regulate telecommunications by enacting the Communications Act of 1934.[1007] Of the major utility groups, only water utilities remain primarily subject to state regulation.[1008]

Unfortunately, the clean distinction in which interstate utility operations and rates are regulated by the FERC or the FCC while interstate matters are reserved for the

---

[1002] 35-A M.R.S.A. §§ 4508-4517 (Supp. 2017).

[1003] U.S. Const. art. I, § 8, cl. 3.

[1004] *See Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927). Here, the U.S. Supreme Court held that the Rhode Island PUC could not regulate the rates charged by a Rhode Island generator for sales to a Massachusetts customer because only Congress could regulate interstate transactions. At the time, there was no federal law addressing interstate electricity sales or any agency to enforce them. The constitutional inability of states to regulate interstate electricity sales and the absence of any federal agency to oversee them created a regulatory vacuum, which became known as the "Attleboro Gap." To plug this gap, Congress enacted the Federal Power Act, which, in part, gave a federal agency regulatory authority over interstate sales.

[1005] 16 U.S.C. §§ 791a–828c (2012).

[1006] 15 U.S.C. §§ 717–717z (2012).

[1007] 47 U.S.C. §§ 151-621 (2012).

[1008] Although the rates and service of water utilities are regulated exclusively by the state, However, Congress has enacted legislation dealing with drinking water safety, such as the Federal Safe Drinking Water Act. 42 U.S.C. §§ 300f-300j-26 (2012).

state PUCs is not as simple as it sounds. Justice Brennan's observations regarding telephone regulation apply with equal force to electric and natural gas regulation:

> However, while the [Communications] Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC has plenary authority, and the other made up of intrastate service over which the states would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility.[1009]

The complicating "realities" of which Justice Brennan spoke are twofold. First, the same utility plant can provide both interstate and intrastate service—implicating both state and federal regulation. Second, actions taken by a regulator acting within its proper area of concern can affect the utility's ability to provide service that is the subject of the other regulator's proper area of concern—once again converging state and federal interests.

The regulation of public utilities has traditionally been a function of the state's police power,[1010] but this traditional state interest is not inviolate and, in some instances, can be displaced by federal regulation. Even more remarkably, this traditional state police power may, in other instances, be used to implement federal programs and policies. This chapter will briefly outline the legal principles that control the determination of how the state or federal interests are balanced in such circumstances.

Congressional ability to oust state regulation of public utility operations that have an interstate dimension is found in the Supremacy Clause of the U.S. Constitution,[1011] which provides Congress with the power to preempt, or invalidate, state law:

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, or where

[1009] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).
[1010] *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).
[1011] U.S. CONST. art. VI, cl. 2 ("the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

> state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[1012]

In other words, when state and federal interests converge on a particular aspect of utility regulation, the federal interest will prevail in situations where (1) Congress states its intent to preempt state law, (2) when there is an actual conflict between state and federal law, or (3) when federal regulation is so pervasive that it is deemed to "occupy the field." When Congress preempts state authority, state agencies such as the PUC have no authority to act.

Any comprehensive analysis of the federal law of public utility regulation is beyond the scope of this chapter, but a brief review will help demonstrate the "realities" of the dual character of electric, natural gas, and telecommunication utilities.

B. Electric Utility Regulation

The two principal electric utility activities subject to federal regulation as set forth in the Federal Power Act are (1) "the transmission of electric energy in interstate commerce" and (2) "the sale of such energy at wholesale in interstate commerce."[1013] 'Sales at wholesale' are sales for resale,[1014] as opposed to sales directly to the customer.

1. Federal Regulation of Wholesale Service

Wholesale sales of electricity and the transmission of wholesale electricity, including the rates and terms of transmission service,[1015] are under the exclusive jurisdiction of the FERC. In contrast, retail sales of electricity, which are direct sales to the ultimate consumer, are regulated by the states through their public utilities commissions.

That the federal government, through the FERC, sets rates for *wholesale* sales of electricity, while state commissions set rates for *retail* sales, seems to establish a fairly clear

---

[1012] *Cent. Me. Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1191 (Me. 1990) (quoting *La. Pub. Serv. Co. v. FCC*, 476 U.S. 355, 368-369 (1986) (citations omitted)).

[1013] 16 U.S.C. § 824(b) (2012).

[1014] *Id.* § 824(d).

[1015] Certain transmission matters, however, do remain under state control. For example, the PUC retains the authority to approve or disapprove a utility's decision to construct the transmission line in the first place. 35-A M.R.S.A. § 3132 (2010 & Supp. 2017). In enacting The Federal Power Act, Congress initially did not grant the FERC any authority over the construction of transmission facilities. *See, e.g.*, *Dunk v. Pa. Pub. Utils. Comm'n*, 252 A.2d 589, 591 (Pa. 1969), *cert. denied*, 396 U.S. 839 (1969). However, Congress amended the Federal Power Act to enable the FERC to preempt state approval authority when the states have been unable or unwilling to approve the construction of transmission facilities that would eliminate certain interstate transmission constraints. 16 U.S.C. § 824p (2012).

demarcation of authority. However, a review of the Commission's unsuccessful attempts to establish Maine Yankee's decommissioning costs illustrates how state regulation can infringe upon, and therefore be preempted by, FERC's regulation of wholesale utility rates.[1016]

In the *Maine Yankee* case, the Commission, acting pursuant to state law, established the level of decommissioning costs that Maine Yankee, a Maine nuclear power plant, had to contribute to a state decommissioning trust fund. However, because Maine Yankee sold power in the wholesale, and not retail, markets, its rates were regulated exclusively by the FERC, which had authorized the collection through wholesale rates of amounts to fund Maine Yankee's decommissioning obligations. Because the decommissioning expenses that the PUC ordered Maine Yankee to contribute to the Maine fund exceeded the amount authorized in rates by the FERC, Maine Yankee could supply the difference only from its own assets. In other words, the PUC created a new expense for Maine Yankee but had no means of permitting Maine Yankee to collect that expense through rates because only FERC could establish those rates. As a result, this new expense could be funded only from Maine Yankee's earnings, the level of which was established by the FERC when it set Maine Yankee's rate of return. In effect, then, the Commission's decision reduced Maine Yankee's FERC-authorized rate of return. This action by the PUC intruded on FERC's exclusive jurisdiction over Maine Yankee's rates and, therefore, was preempted by federal law. As a result, the Law Court invalidated both the PUC's action and the State law that authorized it and held that decommissioning expenses would be established by federal authority alone.[1017]

This case illustrates an aspect of federal preemption under which state commissions must pass through to retail customers, as a retail operating expense, all payments by the utility pursuant to a FERC-approved tariff,[1018] even if the matter over which the state is attempting to assert jurisdiction appears to be intrastate in character. This doctrine not only prevents the states from issuing rate orders that conflict with rates established by the FERC, but also from exercising control over utilities in a manner that frustrates the effect of <u>any</u> FERC decision that indirectly affects those rates. Thus, the U.S. Supreme Court invalidated a state commission's action when the commission, through its ability to establish retail rates, prevented an electric utility "from recovering

---

[1016] *Me. Yankee Power Co. v. Pub. Utils. Comm'n*, 581 A.2d 799 (Me. 1990).

[1017] This case also illustrates how a comprehensive scheme of federal legislation will so pervasively occupy the field that it can oust State jurisdiction, even without an actual conflict. The court found that the federal government, through the Atomic Energy Act, maintained complete control over health and safety aspects of nuclear power. *Id.* at 805. This preempts any state efforts to regulate any aspect of nuclear safety, such as decommissioning.

[1018] *Nanthala Power & Light Co. v. Thornberg*, 476 U.S. 953, 970 (1986).

the full costs of acquiring power under a FERC-approved scheme."[1019] The Court reasoned that under the impermissible state regulation:

> [the utility] must . . . calculate its retail rates as if it received more entitlement power than it does under FERC's order, and as if it needed to procure less of the more expensive purchase power than under FERC's order. A portion of the costs incurred by [the utility] in procuring its power is therefore "trapped."[1020]

This "trapping" of costs occurs when a portion of the costs incurred pursuant to a FERC order are excluded from retail rates, thereby preventing the utility from fully recovering from its customers the costs of purchasing the power. The effect of this "trapping" frustrates the purpose of the FERC-approved power allocations and is preempted by federal law, even though the state order merely influenced an element of the utility's costs but did not directly interfere with the FERC rates authorized to recover these costs. Indeed, even the states' traditional authority to review the prudence of utility practices is limited by the preemptive effect of FERC orders. The U.S. Supreme Court has held that state commissions cannot subject certain purchase power costs to a prudency review when those costs result from the allocation to the utility of the output of a particular generator in accordance with a FERC-approved tariff or contract. This is true even where FERC itself has not made any express finding that the allocation was prudent. The Court concluded that the preemptive effect of FERC jurisdiction does not depend on whether a particular matter was actually determined by the FERC:

> Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.[1021]

Although in this case, FERC made no ruling that the purchase was prudent, the cost allocation approved by the FERC nevertheless preempted any state review because "if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for [the utility] to procure the particular quantity of . . . power that FERC

[1019] *Id.* at 971.
[1020] *Id.*
[1021] *Miss. Power & Light Co. v. Miss. ex rel Moore*, 487 U.S. 354, 374 (1988).

has ordered it to pay for."[1022] Allowing state commissions to undertake a prudency review could result in an order "trapping" the costs that the utility was obligated to pay for the power. [1023]

States are also prohibited from directly interfering with wholesale power markets. For example, in *Hughes v. Talen Energy Marketing, LLC*, the U.S. Supreme Court struck down a Maryland generator subsidy program under which a generator was guaranteed a price by the state regardless of the market clearing price under the federal wholesale power market.[1024] The Court's narrow holding is limited to a situation in which a state program requires the generator to participate in the wholesale power auction, thereby distorting the auction clearing price.[1025] The decision would not impact general subsidies such as renewable energy portfolio standards, which may indirectly impact the wholesale price of power.[1026]

2. Federal Regulation of Transmission

Although the FERC's jurisdiction over sales of power is confined to wholesale markets, its jurisdiction over transmission is limited only by the requirement that the transmission be interstate. The courts have recognized that, because of the interconnectedness of the nation's transmission grid, even a minor change in local transmission load can influence the available capacity in a transmission line located in an adjacent state.[1027] Thus, all transmission is, in effect, interstate.[1028]

[1022] *Id.* at 374.

[1023] One exception is the so-called Pike County Doctrine, set forth in *Pike County Light & Power Co. v. Pennsylvania Public Utilities Commission*, 465 A.2d 735 (Pa. 1983), which upheld the authority of a state commission to review the prudence of the utility entering into a wholesale transaction in the first instance Therefore, although a state commission can generally investigate the prudence of a utility's unilateral decision to enter into a wholesale purchase agreement, a state commission may not "trap" costs that have been *imposed* upon the utility pursuant to a FERC-approved tariff. The situation in *Pike County* concerned the prudence of a utility's voluntary decision to buy a particular quantity of wholesale power at a FERC-approved price. The purchase of that quantity was deemed imprudent because cheaper power was available; the price of that quantity, however, was not reviewed by the state commission. The cases discussed in the text, on the other hand, involve purchase quantities if these purchases result from FERC-approved tariffs or contracts.

Therefore, if the retail utility has a choice as to whether it can incur the particular cost, the state commission may have authority to review that decision. If, however, the utility is compelled to incur the cost as a consequence of a FERC-approved tariff, its action cannot be deemed unreasonable or imprudent by state commissions, even if FERC did not directly mandate the cost. *See, e.g.*, *AEP Generating Co., Ky. Power Co.*, 39 F.E.R.C. ¶ 61,158 at ¶ 61,630 (1987) ("Because the essence of the *Pike County* inquiry is whether a particular choice is wise, the lack of choice here makes such an inquiry an empty one.").

[1024] *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

[1025] *Id.* at 1299.

[1026] *Id.*

[1027] *E.g., Fed. Power Comm'n v. Fla. Power & Light*, 404 U.S. 453, 461 (1972).

The U.S. Supreme Court has held that FERC can regulate even retail transmission, when the sale of that transmission is unbundled and sold separately from retail sales of power.[1029] The Court reasoned that because the states had not traditionally regulated unbundled retail transmission service, it would permit a federal agency to preempt state law when that federal agency was merely acting within the scope of its congressionally delegated authority (even though it was given no *express* authority over retail transmission) and was not displacing established state authority.[1030] Under this interpretation, federal authority will oust the local authority, even without a conflict or federal occupation of the field, if the local authority has never actually regulated the transmission in issue. On the other hand, courts apply a presumption against preemption when the traditional state police powers conflict with federal authority. In those circumstances, the state's historic utility regulation will not be superseded unless it is the clear intent of Congress to do so.[1031]

Finally, those who would take comfort from the Federal Power Act's statement that federal regulation of sales or transmission of energy will "extend only to those matters which are not subject to regulation by the States,"[1032] should note that this has been interpreted simply as a policy declaration that cannot nullify an explicit Congressional grant of jurisdiction to the FERC.[1033] Thus, the U.S. Supreme Court upheld FERC's demand response rule, which generators argued impacted retail rates, a domain reserved to the states.[1034] Even where federal regulation significantly affects retail rates, that rule is nevertheless a valid exercise of federal regulation provided it does so only indirectly.[1035]

[1028] FERC has adopted a seven-factor test to determine whether a given facility is a local distribution facility (state jurisdiction) or a transmission facility (FERC jurisdiction). Under the test, there are seven characteristics of local distribution facilities: (1) local distribution facilities are normally in close proximity to retail customers; (2) local distribution facilities are primarily radial in character; (3) power flows into local distribution systems, it rarely if ever, flows out; (4) when power enters a local distribution system it is not reconsigned or transported on to some other market; (5) power entering a local distribution system is consumed in a comparatively restricted geographic area; (6) meters are based at the transmission local distribution interface to measure flows into the local distribution system; and (7) local distribution systems will be of reduced voltage. *Detroit Edison Co. v. F.E.R.C.*, 334 F.3d 48, 50-51 (D.C. Cir. 2003) (citing F.E.R.C. Order No. 888 at ¶ 31,981).

[1029] *New York v. F.E.R.C.*, 535 U.S. 1, 17 (2002).

[1030] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[1031] *Hillsborough Cty., Fla. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 712 (1985).

[1032] 16 U.S.C. § 824(a) (2012).

[1033] *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964).

[1034] *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016).

[1035] *Id.* at 776.

3. Federal Authorities Imposing Duties on State Commissions

The relationship between state and federal utility regulation can, however, be more dynamic than a simple contest for the field. In 1978, Congress amended the Federal Power Act by enacting the Public Utilities Regulatory Policy Act of 1978 ("PURPA"), which, among other things, required electric utilities to enter into long-term contracts with certain types of generators referred to as qualifying facilities or "QF."[1036] Responsibility for this program fell upon the FERC, which enacted regulations to implement the new law. Accordingly, FERC established a standard for the pricing of power under these contracts that became known as "avoided cost,"[1037] which is essentially the cost at which the utility would have obtained the power but for its purchase from the QF. Although FERC could have determined the avoided cost itself and then simply imposed it upon the utilities, instead, it left to each state commission the responsibility of determining the avoided costs of the utilities under its jurisdiction on the grounds that the state commissions, being closer to the transactions, were better able to judge the actual avoided costs involved.[1038] Thus, PURPA created a state-federal collaboration in which the actual calculation of avoided costs was deemed to be a matter particularly within the competence and interest of the individual state commissions, who were nevertheless required to follow FERC's general guidelines in doing so.

PURPA's delegation to the states of the actual implementation of federal guidelines was challenged under the Tenth Amendment ("the powers not delegated to the United States by the Constitution . . . are reserved to the states").[1039] In that case, the U.S. Supreme Court noted that the federal government's attempts to use state regulatory machinery to advance federal goals presented a question of "first impression" that was somewhat "troublesome."[1040] The Court found, however, that obligations imposed on the state by PURPA were no different in kind from the authority they already enjoyed:

> FERC has declared that state commissions may implement this by, among other things, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA]. In essence, then, the statute and the implementing regulation simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission. . . .

[1036] 16 U.S.C. § 824a-3 (2012).
[1037] 18 C.F.R. § 292.304 (2017).
[1038] 84 F.E.R.C. ¶ 61,265, at pp. 62,300-02 (1998).
[1039] *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982).
[1040] *Id.* at 759.

> The Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy [PURPA] § 210's requirements simply by opening its doors to claimants.[1041]

In upholding PURPA against Mississippi's challenge, the Supreme Court relied on an earlier decision, in which it rejected a Rhode Island state court holding that the Tenth Amendment prohibited the federal government from requiring Rhode Island state courts to enforce a certain federal penal law.[1042] The Supreme Court noted that the same type of claim under state law could be enforced in the Rhode Island courts and concluded "[t]hus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action."[1043]Therefore, under PURPA, state commissions are empowered to enforce the requirements of federal law, including the ability to establish QF contracts and prescribe the prices for those contracts, under guidelines promulgated by the FERC, but only because that authority would be consistent with the authority state commissions already possess as a matter of state law.

As discussed below, this type of hybrid state/federal jurisdiction, under which states are obligated to carry out some federal programs, but are given a measure of latitude in choosing the means to do so, took a substantial leap forward with the Telecommunications Act of 1996 (the "TelAct"). Because the state commissions' authority to implement this federal program apparently depends upon the commissions' independent preexisting authority, it is interesting to observe how the Commission attempted to use its authority over telecommunications not only to implement the TelAct's requirements, but to actually exceed them.

C. Telecommunications Regulations

The Federal Communications Act of 1934 (the "Act"), which establishes the FCC, also ostensibly parcels out jurisdiction over telecommunications utilities between state and federal authorities, depending on whether the service is intra- or interstate.[1044] Thus, the Act requires the FCC to regulate all interstate and foreign communications services,[1045] leaving intrastate service to the state authorities.[1046] As noted above, however, the demarcation between inter- and intrastate service is not always clearly drawn. As a result, the FCC, if acting within the scope of congressionally delegated authority, can

---

[1041] *Id.* at 760 (quotations and citations omitted).
[1042] *Testa v. Katt*, 330 U.S. 386 (1947).
[1043] *Id.* at 394.
[1044] 47 U.S.C. §§ 151-621 (2012).
[1045] *Id.* § 151.
[1046] *Id.* § 152(b).

preempt state authority—even over intrastate matters—if that state authority interferes with the accomplishment of the purposes of federal law.[1047]

1. TelAct Creates Hybrid Federal/State Jurisdiction

Any complications in this area were greatly enhanced when the Federal Communications Act was fundamentally amended by the TelAct. As discussed in Chapter 8, the TelAct requires state authorities to participate in a federal program of competition for telecommunications services. The state commissions are therefore required to approve and arbitrate interconnection agreements between competitive local exchange carriers ("CLEC") and incumbent local exchange carriers ("ILEC")[1048] and establish the rates at which the ILEC should sell services to the CLEC,[1049] all in accordance with federal guidelines. Like PURPA before it, the TelAct creates a hybrid state/federal jurisdiction, in which the states' independent regulatory authority over local facilities is conscripted into a program advancing federal law and policy.[1050] The FCC's ultimate authority over the unbundling and joint use of what is essentially an intrastate utility plant rests on the FCC's use of that plant to promote competition in telecommunications services, which, in turn, has a direct effect on interstate commerce.[1051]

[1047] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd on other grounds sub. nom.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[1048] *Id.* § 252.

[1049] *Id.* § 251(c).

[1050] The relative roles of the federal and state regulators are spelled out in the TelAct itself. This hybrid jurisdiction does not, however, allow the FCC, on its own initiative, to delegate to the states any of the tasks assigned it by Congress. For example, the TelAct requires unbundling of and access to 251 UNE, if failure to provide that access would impair the CLEC's ability to provide the services it seeks to offer. The FCC initially determined that the individual state commissions, given their familiarity with local markets, were better able to make determinations of what unbundling was required to prevent that impairment, and therefore attempted to delegate to state commissions the authority to make those determinations. This is similar to the delegation to the states performed by the FERC under PURPA. The FCC claimed that so long as the delegation was not expressly denied by statute, it retained the presumptive power to do so, particularly where the states had independent authority over the subject matter.

In *U.S. Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), the court found that Congress, in enacting the TelAct, intended that the FCC alone would have the power to determine which UNEs would be available to CLECs. The court further noted that an agency that delegates to a subordinate agency retains responsibility and accountability for that subordinate's actions, but if it delegates to an outside party, such as a state commission, "lines of accountability may blur, undermining an important democratic check on government decision-making." *Id.* at 565. In addition, the FCC would have no ability to prevent the state agency from pursuing goals that are inconsistent with the underlying federal statutory scheme. Although these observations are equally true of avoided cost determination under PURPA, Congress did not expressly assign that determination to the FERC.

[1051] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

2. PUC's Use of State Authority to Expand TelAct's Effect

In Maine, however, the tension between federal and state telecommunications regulation has focused as much on the degree to which federal law restrains state regulatory authority, as upon the extent to which it augments that authority. For example, the TelAct permits state authorities to establish ILEC access and interconnection obligations, provided those obligations are "consistent with" and do not "substantially prevent" implementation of the TelAct's provisions.[1052] The Commission initially interpreted this requirement as permitting it to order access to certain unbundled network elements ("UNEs") that the FCC had not designated.[1053] When subsequent court decisions determined that the FCC has exclusive authority to determine which UNEs are required by the TelAct,[1054] the Commission concluded it had the authority under State law to order additional unbundling, provided unbundling did not conflict with the TelAct's requirements.[1055] In ordering additional unbundling, the PUC relied on 35-A M.R.S.A. § 1306 (2010), which prohibits utilities from engaging in unreasonable acts or practices.[1056] The Commission found the ILECs' failure to unbundle and allow access to certain network elements was unreasonable in light of "public policy, and the potential impact of the unbundling on the availability of telecommunications services to Maine customers."[1057] The Commission further noted that 35-A M.R.S.A. § 7101 (2010 & Supp. 2017), which endorses broadband deployment,[1058] established a State policy that would be advanced by the unbundling of

---

[1052] 47 U.S.C. 251(d)(3) (2012).

[1053] *Re Mid-Me. Telplus*, Request for Arbitration of an Interconnection Agreement with Bell Atlantic, No. 98-593, Link Issues (E3 and E7) Part 2 at 3 (Me. P.U.C. Apr. 9, 1999).

[1054] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[1055] *Re Pub Utils. Comm'n*, Investigation of Skowhegan OnLine Inc.'s Proposal for UNE Loops, No. 2002-704, Order Part II (Me. P.U.C. Apr. 20, 2004) [hereinafter, *Skowhegan Online*].

[1056] For a discussion on this section, *see supra* Chapter 2.A.1. *Skowhegan Online* applies to the Commission's injunctive powers under Section 1306, relating to acts or practices directed against another service provider and not directly against the consumer of utility services, but only if it advances policies designed to benefit that consumer. *See also Re Oxford Networks f/k/a Oxford County Tel.*, Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, No. 2005-486, Order (Me. P.U.C. Oct. 26, 2006) (finding that Verizon's pole attachment practices were unreasonable because they impeded the development of the communications infrastructure necessary to support a competitive telecommunications industry). Read broadly, these decisions appear to empower the Commission to order Maine's utilities to undertake any action that advances any policy found in Title 35-A.

[1057] *See Skowhegan Online* at 13.

[1058] This broad policy statement reads as follows:

> The Legislature further declares and finds that computer-based information services and information networks are important economic and educational resources that should be available to all Maine citizens at affordable rates. It is the policy of the State that affordable access to those information services that require a computer and rely on the use of the

the particular network element that was the subject of the Commission's order, even though the FCC, under the TelAct, did not require that particular element to be unbundled. Relying on 47 U.S.C. § 252(d)(3), the Commission found its order to be (1) "consistent with" the TelAct, which it interpreted broadly to mean "not in contradiction of" and (2) did not "substantially prevent" implementation of the federal regime.[1059]

The Commission's efforts to use State law to exceed the TelAct's express requirements did not survive appeal.[1060] The Court found that because local facilities were used for both inter- and intrastate service, they were a proper subject for federal regulation and the Commission's authority in this matter was preempted by federal law.[1061] The Court found that the FCC's failure to require the unbundling of certain network elements was not a blank canvas that could be filled by the PUC using State law. Instead, the Court found the scheme of federal regulations to be so pervasive that even the exclusion of certain elements from the unbundling requirement was intended to advance the overall federal objective of promoting a competitive telecommunications market.[1062]

D. Natural Gas Regulation

One area in which the intrastate/interstate dividing line between state and federal authority has worked fairly smoothly, at least in Maine, is the regulation of natural gas utilities. In Maine, the FERC regulates interstate transportation of natural gas,[1063] while the PUC regulates the retail sale and local distribution of natural gas.[1064] Typically, then, PUC regulation has been confined to the rates and service of local natural gas distribution companies, which is unlikely to infringe on the FERC's regulation of interstate transmission or wholesale sales.

In part, the PUC's ability to regulate local distribution companies without intruding on FERC's authority results from the physical separation of intrastate and interstate delivery systems.[1065] Natural gas is delivered to the retail customer from small local distribution systems located just beneath the street adjacent to the customer's property, while interstate transmission occurs from large pipelines that literally cross several states and from which direct sales are rarely, if ever, made. Moreover, because

---

telecommunications network should be made available in all communities of the State without regard to geographic location.

[1059] *Skowhegan Online* at 17-19.

[1060] *Verizon N.E., Inc. v. Me. Pub. Utils. Comm'n*, 509 F.3d 1 (1st Cir. 2007).

[1061] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[1062] *Verizon N.E., Inc.*, 509 F.3d at 7-9.

[1063] 15 U.S.C. § 717(b) (2012).

[1064] *E.g.*, 35-A M.R.S.A. §§ 4701-4712 (2010 & Supp. 2017).

[1065] *See Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507 (1947).

Maine does not produce any natural gas, it is unlikely to take any actions that could interfere with the wholesale price of gas.[1066]

This unruffled relationship exists despite Title 35-A's insistence that interstate gas pipelines are public utilities subject to the Commission's regulation.[1067] Although rates and terms of service of interstate transmission and wholesale sales of natural gas are subject to FERC's exclusive jurisdiction,[1068] Chapter 45 of Title 35-A requires natural gas pipeline utilities to comply with "any proper" PUC order[1069] and provides penalties for any failure to do so.[1070] Unfortunately, the statute provides very little guidance as to what constitutes a "proper" order. Chapter 45 may be limited solely to safety issues of intrastate gas transportation. Under the federal Natural Gas Pipeline Safety Act of 1968,[1071] any state is allowed to assume intrastate regulation of pipeline safety so long as it adopts either the federal safety regulations adopted under the federal act[1072] or more stringent regulations that do not conflict with federal regulations. The Commission has in fact adopted regulations governing gas transmission pipeline safety, which expressly include the federal standards.[1073] It is therefore possible that Chapter 45 relates solely to the enforcement of the safety standards for intrastate gas transmission.

More recently, the Legislature created a category of pipelines called private natural gas pipelines.[1074] Private natural gas pipelines are directly or indirectly owned by one or more industrial end-users or their affiliates.[1075] Private natural gas pipelines are subject to the PUC's regulation for safety purposes only.[1076]

[1066] *See N. Natural Gas Co. v. Kan. State Corp. Comm'n*, 372 U.S. 84 (1963).

[1067] Under 35-A M.R.S.A. § 102(13) (2010 & Supp. 2017), the definition of a "public utility" includes any "natural gas pipeline utility," which is defined as "every person . . . owning or operating . . . any pipeline . . . for the transportation, distribution or sale of natural gas, or any person . . . which has applied to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity . . . to operate a natural gas pipeline within the State." *Id.* § 102(10).

[1068] *E.g.*, *F.P.C. v. La. Power & Light Co.*, 406 U.S. 621 (1972). The PUC has expressly acknowledged FERC's jurisdiction over wholesale service. *E.g.*, *N. New England Energy Corp.*, Request for Approval of Reorganization or Exemption (§ 708), No. 2006-479, Order Exempting Reorganization at 2 (Me. P.U.C. Oct. 13, 2006).

[1069] 35-A M.R.S.A. § 4512 (2010).

[1070] *Id.* § 4516-A (2010 & Supp. 2017).

[1071] 49 U.S.C. §§ 60101-60503 (2012).

[1072] 49 C.F.R. §§ 190-199 (2016).

[1073] 65-407 C.M.R. ch. 420 (2015).

[1074] 35-A M.R.S.A. § 4517.

[1075] *Id.*

[1076] *Id.*

Chapter 10

Safe, Reasonable, and Adequate Service

Much of the regulation of public utilities over the past 100 years has focused on utility rates and service territories. More specifically, regulators focus on whether the rates are just and reasonable, and whether the regulated monopoly should be free of competition within its prescribed service territory. However, there is an important third aspect of utility regulation—adequacy of service. This is sometimes referred to as the third leg of the three-legged stool (rates, service territories, and adequacy of service) that makes up the regulatory bargain between the government and utilities. It is this third leg that is sometimes overlooked in summarizing the regulation of public utilities.

This third leg is often referred to as the utility's duty to serve, stemming from the statutory provision that utilities are required to "furnish safe, reasonable and adequate facilities and service."[1077] Unlike most competitive businesses, utilities do not have the luxury of closing their business on weekends and holidays; refusing to sell to customers with poor credit ratings; or refusing to serve in high-cost or remote, sparsely populated areas. Utilities have a duty to serve all customers within the utility's service area, anytime utility service is requested by the customer. Whether turning on the light switch, picking

[1077] 35-A M.R.S.A. § 301(1) (2010).

up the phone, or turning on the water faucet, customers have come to expect that the utility will be there to serve 24/7.

Issues relating to this duty to serve arise in a wide variety of circumstances. This chapter will not attempt to identify all of those circumstances. Instead, it will highlight some of the more frequent situations where the issue has arisen.

A. Service Quality Standards

For transmission and distribution ("T&D") electric service, the PUC has adopted several standards by which the service provided by utilities is measured, including: the percentage of customer telephone calls answered within thirty seconds, the timeliness of utility service technicians meeting with customers, and the percentage of bills issued with errors.[1078] Two specific measures of electricity service quality used by the PUC are System Average Interruption Frequency Index ("SAIFI") and Customer Average Interruption Duration Index ("CAIDI").[1079] These two standards measure the number, duration, and frequency of outages.

For natural gas utilities and other companies operating natural gas facilities, there are a number of standards by which service is measured—many of which relate to safety. The Commission regulates safety at intrastate facilities through Rule Chapter 430.[1080] Further, the U.S. Department of Transportation's ("USDOT") Pipeline and Hazardous Materials Administration ("PHMSA") has delegated to the PUC[1081] jurisdiction and authority over the enforcement of USDOT's safety rules for natural gas. In this role, the PUC is a certified agent of PHMSA.[1082] The PUC has broad oversight over natural gas distribution and transmission safety and has the authority to impose fines on safety-regulated entities for violations of the PUC's and PHMSA's gas safety rules.[1083] Although much of the PUC's natural gas oversight occurs outside of docketed cases (by way of document requests, recurring meetings with gas company personnel, on-the-ground supervision of gas facility installation, and review of annual updates to safety manuals),

---

[1078] *See, e.g.*, *In Re Bangor Hydro Elec. Co.*, Request for Approval of Alternative Rate Plan, No. 2001-410, Order Approving Stipulation at 10-11 (Me. P.U.C. May 12, 2002).

[1079] *See, e.g.*, *Me. Pub. Utils. Comm'n,* Investigation Mid Period Review of CMP's ARP 2000 Service Quality Indices, No. 2002-445, Order Approving Stipulation (Me. P.U.C. Dec. 4, 2003).

[1080] 65-407 C.M.R. ch. 420 (2015).

[1081] 49 U.S.C. § 60105 (2012).

[1082] *Id.*; *see also Natural Gas and Propane* Safety, ME. PUB. UTILS. COMM'N, http://www.maine.gov/mpuc/natural_gas/natural_gas_safety/index.html (last visited May 2, 2018).

[1083] *See* 35-A M.R.S.A. §§ 4506, 4516-A, 4517, 4702-A, 4705-A, 4712 (2010 & Supp. 2017).

the Commission does open dockets in cases of probable violations of gas safety rules.[1084] In addition, the PUC also monitors the safety of liquefied petroleum gas ("LPG") systems.[1085]

For water utilities, Chapter 620 of the Commission's rules includes regulations pertaining to the minimum and maximum amount of water pressure that is acceptable when supplying water service to a residential customer.[1086]

B. Meters

One of the most critical components of providing utility service is the meter used by utilities to measure the amount of electricity, natural gas, or water used by the customer. Accurately recording customer usage is necessary in order to provide the customer with accurate billing. Accordingly, meter testing and replacement is an important aspect of utility service and PUC regulation.[1087]

For water utilities, residential meters must be tested every eight years.[1088] While other utilities do not have hard and fast rules for testing and replacing meters, the Commission is not hesitant to investigate customer complaints that the meter reading on a bill is incorrect.[1089]

One common meter issue is whether a multi-unit complex (such as an apartment building, condominium project, or shopping mall with numerous tenants or occupants) should be served by one single "master" meter or, alternatively, numerous individual meters measuring each tenant's or occupant's usage. On the one hand, it can be argued that dozens or even hundreds of small, expensive meters are not cost-effective when one larger meter will suffice. On the other hand, if the goal is to provide each consumer with

---

[1084] *See, e.g.*, *Me. Pub. Utils. Comm'n*, Notice of Probable Violation Pertaining to Summit Natural Gas of Maine, Inc. Regarding Horizontal Direct Drilling Practices, No. 2014-00382, Order Approving Consent Agreement (Me. P.U.C. Jan. 13, 2015) (imposing $100,000 penalty, reduced from proposed $150,000); *Pub. Utils. Comm'n*, Notice of Probable Violation Pertaining to Maine Natural Gas, LLC–Dec. 22, 2012 Freeport Gas Leak, No. 2013-00178, Order Approving Consent Agreement (Me. P.U.C. July 25, 2013) (imposing penalty of $50,000 in relation to gas leak resulting from failure to locate underground natural gas facility); *Pub. Utils. Comm'n*, Notice of Probable Violation Pertaining to Northern Utilities, Inc. d/b/a Unitil–Feb. 17, 2013 Maine Mall Meter Strike, No. 2013-00181, Order Approving Consent Agreement (Me. P.U.C. July 19, 2013) (reducing proposed penalty from $10,000 to $2,500 in light of meter protection efforts since incident); *Me. Pub. Utils. Comm'n*, Notice of Probable Violation Concerning Bangor Natural Gas, No. 2011-434, Order Approving Consent Agreement (Me. P.U.C. May 7, 2012) (imposing $2,000 penalty for failure to follow written procedures with regard to timely response to reported emergency conditions).

[1085] 65-407 C.M.R. ch. 421 (2012).

[1086] 65-407 C.M.R. ch. 62 (1996).

[1087] 35-A M.R.S.A. § 2701 (2010).

[1088] 65-407 C.M.R. ch. 62, § 3(G) (1996).

[1089] *See, e.g.*, *Pub. Utils. Comm'n*, Investigation of Central Maine Power Company Metering, Billing and Customer Communication Issues, No. 2018-00052, Order (Me. P.U.C. Apr. 11, 2018).

an accurate price signal as to how much it costs the utility to provide the service, thereby allowing customers to make informed decisions regarding how much utility service to consume, then each tenant or occupant must have a separate meter. This issue was addressed in *Quiland, Inc. v. Public Utilities Commission*—a case involving two different multiunit vacation projects.[1090] In this case, the developer won the first appeal,[1091] but the utility won the second.[1092] Under these rulings, if the utility correctly creates a policy requiring individual metering of each tenant or occupant, the Commission will enforce it. Otherwise, the developer will be spared the cost of installing individual meters and be allowed to take service through a single master meter.[1093]

C. Safety

Under Maine statute, utilities are required to provide "safe, reasonable and adequate" service.[1094] Focusing on safety, the Legislature and PUC have adopted a number of provisions to protect the safety of utility employees and the public at large. For example, T&D utilities must design, construct, and operate their lines and equipment in conformance with the National Electric Safety Code ("NESC").[1095] In addition, the Legislature passed the Overhead High-Voltage Line Safety Act[1096] and, in response, the Commission adopted Chapter 910 of its rules.[1097] Under these rules, T&D utilities must take precautions to minimize the risk that mechanical equipment such as an antennae, sailboat masts, or rigging will come in contact with overhead high-voltage power lines. The Law Court has interpreted these provisions to apply to a sailboat in storage that being moved on land near high-voltage lines.[1098]

For underground facilities, utilities are required to participate in a program known as Dig Safe, which is enforced by the PUC. Under Dig Safe, every utility with underground facilities is required to mark the exact location of those facilities with stakes, paint, or other identifiable markings whenever an excavator gives notice to the Dig Safe operator that the excavator is planning to dig in an area where the utility has underground facilities.[1099]

[1090] 2007 ME 45, 917 A.2d 697.
[1091] *Id.*
[1092] *Quiland, Inc. v. Pub. Utils. Comm'n*, 2008 ME 135, 956 A.2d 127.
[1093] *Id.* ¶¶ 14-15.
[1094] 35-A M.R.S.A. § 301(1) (2010).
[1095] *Id.* § 2305-A (2010 & Supp. 2017).
[1096] *Id.* §§ 751-761 (2010 & Supp. 2017).
[1097] 65-407 C.M.R. ch. 910 (2001).
[1098] *Smith v. Cent. Me. Power Co.*, 2010 ME 9, ¶¶ 22-23, 988 A.2d 968.
[1099] 23 M.R.S.A. § 3360-A (1992 & Supp. 2017).

Furthermore, utilities are required to report any accident involving loss of life, personal injury, or damage to property to the PUC.[1100] In the case of an accident involving personal injury or property damage, the PUC may initiate a formal investigation to determine the cause of the accident.[1101] For accidents involving loss of life, the utility report must be filed "immediately" either by telephone or electronic means, and the PUC is required to initiate a formal investigation.[1102]

D. Consumer Assistance and Safety Division

The duty to serve frequently arises in cases where a specific customer has complained about poor service or bad treatment by a utility and, as such, these cases tend to focus on the specific circumstances surrounding service to an individual customer. Due to the demands of resolving these issues on a formal case-by-case basis, the PUC has created a separate division within the Commission known as the Consumer Assistance and Safety Division ("CASD") to address individual disputes between customers and utilities.[1103]

CASD complaints often involve issues regarding utilities requiring deposits from customers requesting service or utilities disconnecting service for nonpayment.[1104] From the utility's perspective, it is their responsibility to make sure each customer receiving service pays for that service at the approved rates. When payment is not received, the unpaid amount is considered "bad debt" and, in turn, rates to all customers must be increased in order to recover the utility's lost revenue. To prevent this cycle, utilities occasionally seek advance deposits from potential customers with poor credit history before providing service or may even disconnect service if timely payment is not received. However, because customers have no choice from whom to purchase these essential utility services, customers must be protected from aggressive collection efforts by public utilities, including situations in which the utility unfairly requires large deposits or unreasonably disconnects service for nonpayment.

To help referee these disputes, the PUC has adopted Chapter 815 of its Rules.[1105] This Chapter provides detailed requirements the utilities must follow when collecting payments from customers,[1106] resolving billing disputes,[1107] or ultimately disconnecting

---

[1100] 35-A M.R.S.A. § 710 (2010); 65-407 C.M.R. ch. 130, § 3 (1997).
[1101] 35-A M.R.S.A. § 710(2) (2010); 65-407 C.M.R. ch. 130, § 4(2) (1997).
[1102] 35-A M.R.S.A. § 710(1), (4) (2010); 65-407 C.M.R. ch. 130, § 4(1) (1997).
[1103] 65-407 C.M.R. ch. 815, § 2(I) (2013).
[1104] *Id.* § 2(L)(1), (5) (2013); *see, e.g.*, *Me. Pub. Utils. Comm'n*, Appeal of Consumer Assistance Decision #2011-30999 (by Customer) Regarding Bangor Hydro Elec. Co., No. 2011-151, Order on Appeal (Me. P.U.C. June 29, 2011).
[1105] 65-407 C.M.R. ch. 815 (2013).
[1106] *Id.* § 8(K).

customers for non-payment.[1108] These rules even include provisions that take into consideration the unique climate in Maine. For example, because of Maine's harsh winters and the need for electricity to operate most indoor heating systems, Maine's T&D utilities are subject to a "winter moratorium" preventing most disconnections for non-payment during the winter months.[1109]

E. Penalties

The Legislature has authorized the Commission to penalize utilities who fail to provide "safe, reasonable and adequate" service.[1110] As discussed in Chapter 6, the PUC has adjusted a utility's allowed rate of return due to management inefficiency.[1111] A determination of management inefficiency could rely on poor service or frequent mistakes in billing and collection activities.[1112]

The Legislature has also provided the PUC with other regulatory tools to punish utilities for poor service. Specifically, under 35-A M.R.S.A. § 1508-A (2010 & Supp. 2017), the PUC may impose administrative penalties on utilities for willful violations of Title 35-A, PUC Rules, or a PUC Order. For each day the violation continues, the PUC may impose a penalty in the amount of $5,000 or 0.25% of the utility's annual gross revenue.[1113] The maximum penalty for any related series of violations may not exceed $500,000 or 5% of the utility's annual gross revenue.[1114] In determining the amount of the penalty, the PUC must consider the severity of the violation, the intent of the utility, and the utility's history of previous violations.[1115]

In addition, the Legislature has given the PUC the authority to hold utilities in contempt for failure to comply with a PUC Order.[1116]

[1107] *Id.* § 13.
[1108] *Id.* § 10.
[1109] *Id.* § 10(M).
[1110] 35-A M.R.S.A. § 3503 (2010).
[1111] *See supra* Chapter 6.
[1112] *See, e.g.*, *Emera Me.*, Request for Approval of a Proposed Rate Increase, No. 2015-00360, Order Part II (Me. P.U.C. Dec. 22, 2016).
[1113] 35-A M.R.S.A. § 1508-A(1)(A) (2010 & Supp. 2017).
[1114] *Id.*
[1115] *Id.* § 1508-A(2).
[1116] 35-A M.R.S.A. §§ 1305(1)(G), 1502 (2010); *see also Me. Pub. Utils. Comm'n*, Contempt Proceeding Pursuant to 35-A M.R.S.A. Section 1502 Against Portland Marine Radio for Failure to File Annual Reports, No. 88-186, Order of Dismissal (Me. P.U.C. May 16, 1994); *Cent. Me. Power Co.*, Investigation of Testimony of Robert F. Scott on March 1982 Telephone Survey and Related Company Actions, No. 82-208, Decision and Order (Me. P.U.C. Sept. 21, 1983).

F. Utility Liability for Inadequate Service

The PUC has addressed the issue of whether it has authority to order a utility to pay civil damages to an aggrieved customer for failure to provide "safe, reasonable and adequate" service. If, for example, a paper mill loses power and is forced to shut down, can the PUC order the offending utility to compensate the paper company for its lost profits? If a homeowner loses power and is forced to throw out expensive steaks that had been stored in the freezer, can the PUC order the offending utility to compensate the homeowner for the cost of the steaks? Despite language in Section 1501 suggesting otherwise,[1117] the PUC has ruled that claims for civil damages against utilities that failed to provide adequate service must be brought in Superior Court, not the PUC.[1118]

G. Adequate Service vs. Reasonable Rates

Occasionally, the issue arises of whether a utility can use lack of sufficient resources as an excuse or defense to claims of poor service. In *Pollis v. New England Telephone Co.*, a phone company argued that it could no longer assure there would be adequate service if the PUC did not grant the utility the requested rate increase needed to provide sufficient revenue to maintain adequate service.[1119] The Commission responded by making it clear that "just and reasonable" rates and "adequacy of service" are two independent provisions of Title 35-A, and having reasonable rates is not a precondition for providing adequate service. Accordingly, under this ruling, low rates are no excuse for poor service.

[1117] 35-A M.R.S.A. § 1501 (2010).
[1118] *Ames (Joanne L.) v. Bangor Hydro-Elec. Co.*, No. 85-167, Order (Me. P.U.C. Nov. 7, 1985).
[1119] *Pollis v. New England Tel. Co.*, 25 P.U.R.4th 529 (Me. 1978).

Chapter 11

Utility Regulation by Other State Agencies

The PUC is the primary regulator for utilities in Maine, but it is by no means the only state entity involved in the regulation of Maine utilities. Other state agencies, along with municipalities, also play an important role in the delivery of public utility services to consumers in Maine.

A. Permitting Utility Facilities in the Public Way: MaineDOT and Local Municipalities

A key feature of public utility service is that it relies on extensive facilities in order to deliver service to consumers. These facilities are capital-intensive and rely on access to roads and streets so that services can be delivered directly to residential and commercial customers throughout the State. Utility facilities fall into two basic

categories: (1) aboveground facilities such as poles and wires, which allow for the delivery of electric and telephone service to consumers; and (2) below-ground facilities such as water and gas mains, or in some cases, underground electric and telecommunications lines.[1120] Aboveground facilities are typically located on the edge of the roadway, with sufficient offset to allow for safe vehicular and pedestrian travel. Belowground facilities are commonly located under the roadway, necessitating disruption of the pavement in order to install and maintain the facilities.

To ensure that public utility services are able to be delivered to consumers, Maine law expressly allows public utilities to locate their facilities within the public right of way, subject to the need for a "location permit" governing where the facility may be installed,[1121] and a "road opening" permit in instances where installation or maintenance of an underground facility requires disturbing the pavement or shoulder of a street or highway.[1122] This right to locate facilities in the public way extends to certain non-utility entities such as electric generators installing generator leads, cable television companies, municipalities, the University of Maine System, dark fiber and "unlit" fiber providers, sewer districts, and mobile wireless providers.[1123] Other types of facility owners may seek access to the public way for their facilities on state highways, and if approved, are typically allowed by the Maine Department of Transportation ("MaineDOT") on a limited basis through a private facility exception license.[1124] Such licenses are not permanent in nature, and are valid only as long as they do not interfere with the highway, its maintenance, or any of its uses.[1125]

Location permits and road opening permits are issued by what is referred to as the "applicable licensing authority."[1126] Which authority is "applicable" depends on who has jurisdiction over the particular highway. In the case of state or federal highways, the licensing authority is MaineDOT.[1127] MaineDOT has a formal process for issuing permits set forth in its Accommodation Policy.[1128] In the case of municipal roads, the local municipality is the applicable licensing authority and, as such, may establish its own permitting standards.[1129] Practically speaking, some cities and towns have adopted their

[1120] *See* 35-A M.R.S.A. § 2502(3) (2010).
[1121] *See id.* § 2501 (requiring all persons constructing facilities "upon and along highways and public roads" to apply for and obtain a "written location permit from the applicable licensing authority"); *id.* § 2503 (outlining the application procedure for location permits).
[1122] *See* 35-A M.R.S.A. § 2307 (2010 & Supp. 2017); *see also id.* § 2503(14) (requiring an "opening permit[]" prior to an applicant "making any underground installation").
[1123] *See* 35-A M.R.S.A. § 2501 (2010 & Supp. 2017).
[1124] 17-229 C.M.R. ch. 210, § 5(6) (2014).
[1125] *Id.*
[1126] *See* 35-A M.R.S.A. § 2502(1) (2010).
[1127] *Id.* § 2502(1)(A).
[1128] 17-229 C.M.R. ch. 210, §§ 5-6 (2014).
[1129] 35-A M.R.S.A. § 2502(1)(B) (2010).

own policies governing facility location, but many municipalities have no policy. For communities without permitting standards, the MaineDOT standards serve as the default in the case of underground facilities.[1130] For facilities in state highways within the "urban compact zone" of a community (i.e., the portion of town that meets certain density standards), the municipality serves as the local licensing authority,[1131] but the MaineDOT accommodation policy serves as the minimum standard.[1132] Finally, for facilities within the unorganized territories not otherwise on state highways, the county serves as the licensing authority in the same manner as a local municipality.[1133]

As a final note, even though MaineDOT and local communities are the licensing authority with respect to issues of utility facility location within the public right of way, the Commission retains jurisdiction over two aspects of underground facility installation and maintenance: (1) gas pipeline safety under the federal Pipeline and Hazardous Materials Safety Act, which is administered by the PUC as agent for the U.S. Department of Transportation,[1134] (2) the so-called Dig Safe program,[1135] which requires excavators to precede most excavations on public or private property by a notification to area utilities, and in turn, such utilities are required to mark the location of their facilities within the designated area of the excavation. These two programs are discussed in greater detail above in Chapter 10.

B. Maine Drinking Water Program

Unlike other public utility services, water utilities provide a service that is actually ingested by the public. As a result, Maine not only regulates the financial and business operations of water utilities, but it also oversees the health and safety aspects of supplying potable water—including public water systems that are not "water utilities" (e.g., small homeowners associations, schools that provide well water, or roadside "springs").[1136] Under federal law, the safety of public water service is governed by the Safe Drinking Water Act ("SDWA"), which sets forth detailed requirements regarding the chemical composition of water and how it is treated.[1137] In Maine, responsibility for administering the SDWA has been delegated to the Drinking Water Program within the Center for

[1130] *Id.* § 2503(21)(C) (2010 & Supp. 2017).
[1131] *Id.* § 2502(1)(B) (2010).
[1132] *Id.* § 2503(21)(B) (2010 & Supp. 2017).
[1133] *Id.* § 2502(1)(C) (2010).
[1134] 15 U.S.C. § 717 (2012); *see also* 35-A M.R.S.A. § 4508 (2010 & Supp. 2017); 65-407 C.M.R. ch. 420 (2015).
[1135] Initially, the Dig Safe Program was administered by the MaineDOT. However, in 2004, the Legislature determined that the PUC was better situated to operate the program. The program has been with the Commission ever since. *See* 23 M.R.S.A. § 3360-A (1992 & Supp. 2017); 65-407 C.M.R. ch. 895 (2016).
[1136] 22 M.R.S.A. § 2601(8) (2004).
[1137] 42 U.S.C. §§ 300f to 300j-27 (2012).

Disease Control and Prevention division of Maine's Department of Health and Human Services. The Drinking Water Program requires all public water systems to meet the safety standards set forth in the SDWA, including the National Primary Drinking Water Regulations.[1138] It also requires such systems to notify customers annually through "customer confidence reports" regarding the composition of their water,[1139] and to let them know whenever there are health concerns about their water[1140]—including the issuance of a "boil water order," which is a notification to consumers that they should boil their water prior to consumption for a specified period.[1141]

C. Efficiency Maine Trust: Natural Gas and Electricity Conservation

For many years, electric utilities in Maine were responsible for implementing conservation programs, which are sometimes known as demand-side management, or DSM, programs. In the 1990s, the Legislature determined that such programs were best implemented by the State, and the responsibility for energy conservation shifted to the State Planning Office[1142]—an agency that was terminated in the early 2010s. Later, the Legislature became frustrated with the pace of action of the State Planning Office, and shifted the program to the PUC.[1143] Finally, after several instances in the 2000s where energy conservation funds were raided by the Legislature to close a General Fund budget gap, the Legislature determined that energy conservation should be overseen by a trust with the goal of protecting the funds from being used for General Fund purposes. So, in 2009, the Legislature established the Efficiency Maine Trust ("Trust"), which is governed by a seven-member board appointed by the governor.[1144] The Trust is charged with administering energy conservation programs, which are financed in part by a surcharge on gas and electric rates and in part from external revenues such as through the Regional Greenhouse Gas Initiative ("RGGI").[1145] The Trust's budget is set by the PUC,[1146] which also determines the amount of the surcharges that can be passed through to gas and electric customers in Maine.[1147] Following passage of the Maine Energy Cost Reduction Act in 2013 (sometimes referred to as the "Omnibus Energy Bill"), the Trust received authority to substantially increase its programs and surcharges.[1148]

[1138] 22 M.R.S.A. § 2611 (2004).
[1139] *Id.* § 2615-A.
[1140] *Id.* § 2615 (2004 & Supp. 2017).
[1141] *Id.* §§ 2614(3), 2615(4)(A).
[1142] 35-A M.R.S.A. § 3211, *repealed by* P.L 1999, ch. 336, § 3 (effective Sept. 18, 1999).
[1143] 35-A M.R.S.A. § 3211-A(2), *repealed by* P.L. 2009, c. 372, § A-6 (effective July 1, 2010).
[1144] *Id.* §§ 10101-10123 (2010 & Supp. 2017).
[1145] *Id.* § 10109.
[1146] *Id.* § 10104(4).
[1147] *See supra* Chapter 2.
[1148] 35-A M.R.S.A. §§ 1901-1912 (Supp. 2017).

D. Emergency Services Communications Bureau

In the 1990s, Maine established an Enhanced 9-1-1 system ("E-9-1-1") that allowed dispatchers to match a 9-1-1 call with a physical address.[1149] The program was developed to conform to federal requirements adopted by the Federal Communications Commission ("FCC"). Initially, Phase I of the program was limited to landline phones, and it required Maine to develop a system that paired every landline phone number with a physical address. Additionally, since not every physical location had an official street address, the State had to assign an official street name to every road in the State.[1150] Later, when technology was developed to allow mobile phones to be physically located based on global positioning system ("GPS") technology, the system was expanded through Phase II to require all 9-1-1 calls from mobile phones to be associated with a specific set of GPS coordinates.[1151]

Under the new system where phone numbers were paired with physical locations, local public safety agencies set up public safety answering points, or PSAPs, to receive the 9-1-1 call and location information and then to pass this information and the call over to a dispatcher to respond to the 9-1-1 call.[1152] In states like New Hampshire, there was a single PSAP for the entire state.[1153] In Maine, there were initially more than eighty PSAPs around the State. In the 2000s, the Legislature grew frustrated with the large number of PSAPs and the inefficiency of such a system and, therefore, directed the Commission to take steps to reduce and consolidate the number of PSAPs in Maine.[1154] Over time, these efforts resulted in a substantial reduction in the number of PSAPs in the State.

To pay for this new E-9-1-1 program, the State imposed a flat fee surcharge on every telephone line in the state, and these fees were collected by telephone providers and remitted to the State.[1155] In 2007, the fee was expanded to include prepaid wireless services where there was not a billing relationship between the provider and the customer.[1156]

Administration of the E-9-1-1 program rests with the Emergency Services Communications Bureau ("ESCB" or the "Bureau")—a Bureau initially housed within

---

[1149] *See* 25 M.R.S.A. §§ 2921-2935 (2007 & Supp. 2017); 65-625 C.M.R. ch. 1 (2007).
[1150] 25 M.R.S.A. § 2926(4) (2007 & Supp. 2017).
[1151] 47 C.F.R. § 20.18(e) (2016).
[1152] 25 M.R.S.A. § 2921(7) (2007 & Supp. 2017).
[1153] *Bureau of Emergency Communications (9-1-1) Public Safety Answering Point and Operations*, N.H. DEP'T OF SAFETY, https://www.nh.gov/safety/divisions/emergservices/nh911/911psap.html (last visited May 8, 2018).
[1154] 25 M.R.S.A. § 2926(2-A) (2007 & Supp. 2017).
[1155] *Id.* § 2927.
[1156] P.L. 2007, ch. 68 §§ 5-9.

the Department of Public Safety.[1157] However, after several years, the Legislature determined that the Bureau should be housed within the PUC.[1158] As a result, the ESCB is now physically located within the offices of the PUC, although its day-to-day operations remain independent of the Commission.

E. ConnectME Authority

In the mid-2000s, then-Governor John Baldacci became concerned about the availability of broadband and mobile wireless service to Maine people, particularly in more rural areas of the state. After convening stakeholders and studying the issue for many months, the governor proposed legislation that established a new state agency whose assigned mission was to study broadband availability and access, and to award grants on a competitive basis to broadband providers to allow broadband access to unserved and underserved portions of the State.[1159] This agency is known as the ConnectME Authority. From the outset, although it is an independent agency, the ConnectME Authority has been housed within the PUC. To administer the agency, the Legislature established a fund paid for by a fee on landline telephone and retail broadband services in Maine.[1160] Mobile wireless services were not included within the ConnectME Authority, but the law permits mobile providers to participate in the program if they voluntarily collect fees from their customers and remit them to the Authority.[1161]

[1157] P.L. 1994, ch. 566 § 2-A.
[1158] 25 M.R.S.A. § 2926(1) (2007 & Supp. 2017).
[1159] 35-A M.R.S.A. § 9203 (2010 & Supp. 2017).
[1160] *Id.* § 9211 (2010).
[1161] *Id.* § 9209(4)(B) (2010) (only "communications service providers" must pay into the ConnectME Fund, and mobile wireless providers are defined as "communications service providers only" if they voluntarily pay into the fund); *see also* 99-639 C.M.R. ch. 101, § 7(A)(2) (2007).

Verrill

One Portland Square
Portland, ME 04101-4054
(207) 774-4000
Fax (207) 774-7499

45 Memorial Circle
Augusta, ME 04332
(207) 623-3889
Fax (207) 622-3117

One Federal Street, 20th Floor
Boston, MA 02110
(617) 309-2600
Fax (617) 309-2601

355 Riverside Avenue
Westport, CT 06880
(203) 222-0885
Fax (203) 226-8025

www.verrill-law.com/energy
www.verrill-law.com/water-and-wastewater-systems
www.verrill-law.com/telecommunications