

November 21, 2012

MAINE PUBLIC UTILITIES COMMISSION
Provider of Last Resort (POLR) Service
Quality Indicators and Standards
(Chapter 201)

ORDER PROVISIONALLY
ADOPTING RULE AND
STATEMENT OF FACTUAL AND
POLICY BASIS

WELCH, Chairman; LITTELL and VANNOY, Commissioners

I. SUMMARY

Through this Order, we provisionally adopt rules to establish service quality indicators and standards for Provider of Last Resort (POLR) providers pursuant to recently enacted legislation.

II. BACKGROUND

During the 2012 session, the Legislature enacted An Act to Reform Telecommunications Regulation, P.L 2011, ch. 623 (Act). The Act changed the manner by which telecommunications carriers are regulated in Maine. Section A-18 of the Act establishes a new Chapter 72, Telecommunications Regulatory Reform, in Title 35-A. Pursuant to the Act, all Incumbent Local Exchange Carriers (ILECs) will be required to offer a basic level of exchange service known as POLR service, to all customers within a carriers' service territory. New statutory language in Section A-18 of the Act (now codified at 35-A M.R.S.A. § 7201(7)) defines POLR service as:

a flat-rate service with voice grade access to the public switched telephone network; local usage within the basic service calling areas of incumbent local exchange carriers as of January 1, 2012; dual-tone multifrequency signaling or its functional equivalent; single-party service or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; toll limitation for qualifying low-income customers; and the capacity to maintain uninterrupted voice service during a power failure, either through the incorporation into the network or network interface devices of suitable battery backup or through electric current.

As of August 30, 2012, POLR service is the only telephone service regulated by the Commission. Subchapter 2 of the Act governs POLR service and newly enacted language (now codified at 35-A M.R.S.A. § 7225) addresses service quality. Section 7225(1) provides that the Commission shall by rule establish service quality indicators to which POLR service providers shall regularly report. This section specifies that the service quality indicators may relate only to:

- A. Network trouble rates;
- B. The percentage of network troubles not resolved within 24 hours;
- C. The percentage of installation appointments not met;
- D. The average delay, in days, for missed installation appointments; and
- E. Service outages.

Section 7225(2) further provides that the Commission by rule shall establish POLR service quality standards and that the Commission may impose penalties or require a service provider to provide rebates or rate reductions if the Commission finds, after investigation, that a service provider has failed to meet service quality standards. Section 7225(3) specifies that the rules may establish appropriate penalties, rebates or rate reductions that may be applied if the Commission finds, after investigation, that a service provider has failed to meet service quality standards. Finally, the Act specifies that the rules are major substantive as defined in Title 5, chapter 375, subchapter 2-A.

III. RULEMAKING PROCESS

On September 18, 2012, we issued a Notice of Rulemaking and proposed rule. Consistent with rulemaking procedures, the Commission held a public hearing on October 17, 2012 to allow interested persons to comment on the proposed rule and provided interested persons with the opportunity to submit written comments both prior to and following the public hearing. The Public Advocate, AT&T, and the Telephone Association of Maine (TAM)¹ provided comments on the proposed rule.

IV. DISCUSSION OF RULE PROVISIONS

A. General Comments

1. Rulemaking Proceeding is Premature

As an initial matter, both TAM and AT&T commented that, in their view, this rulemaking proceeding is premature. TAM argued that the service quality structure is linked with a POLR provider being eligible for universal service support to meet the obligations associated with being a POLR provider, including maintaining service quality. A separate section of the Act, Section A-25, directs the Commission to convene a stakeholder group to create an appropriate framework for establishing rates for POLR service, including the methodology, appropriate cost considerations and standards for the availability and amount of support from a universal service fund.

¹ TAM's initial comments dated October 12, 2012 stated that TAM was filing comments on behalf of all its members, including Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) as well as all of TAM's RLEC members.

These issues are being discussed in Docket No. 2011-00224 and the Commission will be submitting a report to the Legislature on these issues by January 15, 2013. TAM suggested that the Commission defer this rulemaking until the issue of support for POLR providers has been resolved. The Public Advocate commented that the connection TAM seeks to draw is not found in the statute governing this rulemaking and that if, as TAM suggests, there should be some correlation between the service quality obligation and the structure of a newly expanded Maine universal service support mechanism, that correlation can be considered after the Commission and the Legislature have finally determined the basis for that support mechanism.

We agree with the Public Advocate. Section 7225 of the Act directed the Commission to conduct this rulemaking and designated the rules as major substantive. Section 7225 does not anticipate that the service quality rulemaking will address questions regarding the rates and Maine universal service fund support for POLR service. Those unrelated ratemaking issues are the subject of a pending Commission stakeholder process in Docket No. 2011-00224. Pursuant to the Act, the Commission must submit its provisionally adopted rules in time for the Legislature to consider during the upcoming session and we perceive no direct connection between establishing service quality standards for POLR providers on the one hand, and setting rates or universal service support on the other.

2. Commission Should Not Have Any Service Quality Standards

AT&T also comments that the Commission should entirely eliminate its retail service quality measures for POLR service. However, as discussed above, section 7225 of the Act provides that the Commission by rule “shall establish [POLR] service quality indicators ... and [POLR] service quality standards.” Therefore, we reject AT&T’s suggestion.

B. Discussion of Individual Rule Sections

1. Purpose and Applicability (Section 1)

As described in the rule, the purpose of the rule is to establish the service quality indicators and standards for POLR providers. It also describes the requirements and procedures governing Commission investigations regarding failures to meet the service quality standards and penalties, rebates or rate reductions. The rule applies to all POLR service providers in Maine.

2. Definitions (Section 2)

Section 2 of the rule contains definitions of terms used throughout the rule. The Act does not define “service quality indicators,” but from the context of its usage in the Act and from the general definition of indicators, we find the term to be analogous with the term metrics used in the current Service Quality Index (SQI). No comments were received regarding this definition and it remains unchanged from the proposed rule.

Similarly, the Act does not define “service quality standards,” but from the context of its usage in the Act and from the general definition of “standards,” in the proposed rule, we found the term analogous to the benchmarks that are included in the current SQI. TAM commented that the Legislature had something different in mind when it used the term service quality standards. TAM’s view is that the Legislature intended that POLR service standards be calibrated based upon the quality of service that competitive, non-POLR providers supply to their customers. We do not interpret the statute in this manner, especially as this Commission has no statutory authority to obtain from competitive providers service quality information from which an “equivalency” standard, of the sort advocated by TAM, could be conducted.

Alternatively, TAM suggests that the service quality rule should eschew standards altogether in favor of a process where, should the Commission, or its staff, perceive some persistent diminishment in the quality of the service afforded to POLR customers as compared to customers of non-POLR providers, the Commission would invite the company to come to the Commission and discuss the situation. Again, without establishing some initial benchmarks, and without access to competitors’ service quality information, such a process would inject unwarranted subjectivity into the Commission’s oversight of POLR service quality with the consequence that a POLR provider would never know whether it might be subject to an investigation of its performance.

Although the Act does not provide a definition of service quality standards, the Commission recently concluded an adjudicatory proceeding pursuant to a separate section of the Act, Section A-23, which required the Commission to “establish service quality standards relating to POLR service for the period of August 1, 2012 to July 31, 2013” for any ILEC subject to an order establishing an Alternative Form of Regulation (AFOR) pursuant to Title 35-A, chapter 91. Northern New England Telephone Operations LLC d/b/a FairPoint Communications NNE (FairPoint) is the only ILEC currently subject to an AFOR. The Commission’s August 3, 2012 Order states:

The statute does not define “service standards,” but from the context of its usage in the statute and from the general definition of “standards,” we find the term to be analogous to the benchmarks that are included in the current SQI.”

Public Utilities Commission, Investigation into Service Standards Relating to Provider of Last Resort Service Pursuant to P.L. 2011, ch. 623, § A-23, Docket No. 2012-00173, Order at 7 (Aug. 3, 2012). The rule we propose would be consistent with the Order. We also have found in a prior Commission order that the terms service quality standards and service quality benchmarks are synonymous. *See Public Utilities Commission, Establishment of FairPoint Communications Rate Schedules for SQI Rebate, Docket No. 2009-388, Order Establishing Rate Schedules; Notice of Possible Penalties and Remedies at 2 (Nov. 30, 2009)* (“Under the SQI, if FairPoint’s service quality fails to meet the service quality “benchmarks” (or standards) for 14 various metrics, it must pay customers a rebate.”).

Finally, principles of good and predictable governance warrant the setting of service quality benchmarks so that they are known and clear. As of August 30, 2012, it is only POLR service to which the protections, and Commission obligations, of Title 35-A apply. Establishing actual service quality benchmarks will, in our view, afford certainty for utilities, customers and the Commission regarding what level of service quality is expected. Certainty through the establishment of fixed, known standards is especially important where, as here, the Commission is authorized to impose financial penalties or rebates for substandard performance.

For these reasons, we provisionally adopt the definition of service quality standards unchanged from the proposed rule.

3. Information For Quarterly Reports (Section 3)

Section 3 of the proposed rule would have required POLR providers to identify the number of POLR access lines they serve in Maine and service quality reports required pursuant to Section 5 of the rule would be based only on service to POLR customers. We sought comments on this and alternative approaches.

Both the Public Advocate and TAM commented that the Act does not provide a definition of POLR customer or POLR access line. The Public Advocate argued that the Commission should presume that the Legislature did not intend to limit the Commission assisting customers with bundle packages who are experiencing service quality problems attributable to the components of POLR service. The Public Advocate argues that the Commission should avoid creating new terms and establishing new concepts that the Legislature did not define or authorize, such as POLR customer. Both the Public Advocate and TAM recommended that the Commission should require POLR providers to continue to track their service quality results for all voice customers that they serve in their service territory. They both asserted, although for slightly different reasons, that the service quality standards should apply to all the service provided over the POLR's network, and not just to a subset of customers identified as "POLR customers."

We agree and have reflected that change in the provisionally adopted rule. The Legislature instructed the Commission to establish POLR service quality standards for POLR providers. The statute contains no definition of "POLR customer" and we find that there is no need for us to do so by rule. The amended rule therefore maintains the current mechanism under which the ILECs track their service quality performance to all customers in the areas they serve. In the unlikely situation of an ILEC being relieved of its obligations as the POLR provider for a discrete portion of its service territory (such as a specific exchange), the carrier would no longer have to include in its POLR SQI reports any of the service quality results for those customers.

4. Service Quality Indicators (Metrics) and Service Quality Standards (Benchmarks) (Section 4)

a. Description of Rule

Section 4 of the rule establishes the five metrics on which service providers will be required to report to the Commission. These metrics will quantitatively measure the performance of each POLR service provider in providing safe, reasonable and adequate service to voice customers in the service areas where the provider is designated as the POLR provider. The five metrics in the rule correspond to the service quality areas identified in the Act and are the same five metrics that the ILECs have been reporting on to the Commission for approximately ten years.

Section 4 also establishes the initial baseline, or benchmark, for each metric, which will establish the standard for acceptable POLR service quality. The rule establishes a definition for each metric and describes the calculation used in determining whether each benchmark has been met. Performance equal to or better than the benchmark for each metric will represent reasonable and adequate service. Performance that is worse than the benchmark will represent inadequate service. The benchmarks are established in such a way that an actual result that exceeds the benchmark percentage or cumulative number is considered to be worse than the benchmark and, thus, a failure for that metric. Failure to meet the benchmarks may result in a Commission investigation and penalty, rebate or rate reduction pursuant to Sections 6 and 7 of the rule. The metrics and benchmarks apply to all POLR service providers.

The benchmarks have been established by using the actual quarterly results reported by the 23 ILECs that operate in Maine because, pursuant to the Act, ILECs will initially be the POLR providers.² We used data from the last 4 quarters available at the time we proposed the Rule, which encompasses the reported results for the second quarter (ending June) of 2012. For the four metrics dealing with installation appointments not met, average delay days for missed appointments, the network trouble report rate and network troubles not resolved in 24 hours, we calculated the average of the 4-quarter result (designated as the "Rolling Average" on the Summary Page on the PUC web site) reported by the 23 companies, and then added one standard deviation to the average.

We adopted this approach in recognition of the fact that, inherent in the concept of a mathematical average is the reality that any one of the inputs used to calculate the average will either exceed or be less than the calculated average. However, in this context, deviation from the average does not necessarily mean that a particular result is tantamount to inadequate service. The addition of the

² The Act provides that "[a]n entity that was an [ILEC] as of January 1, 2012 shall provide [POLR] service within its service area" (now codified at 35-A M.R.S.A. § 7221(1)).

one standard deviation to the actual average will account for this statistical issue. In addition, some companies may have been historically worse than the average due to reasons and circumstances inherent in their operations or service territory topology. Setting the benchmark by increasing the actual average result by one standard deviation is reasonable and accounts for most of the variation that occurs among the various ILECs. We recognize that there are differences in the operating characteristics and structures of the various companies that likely have contributed to differences in reported historic performance. Nevertheless, in the context of the overall structure of the rule, we believe that establishing a single benchmark that applies to all POLR providers for each metric provides a fair and equitable standard for all carriers.

For the metric dealing with outages, we set the initial benchmark at FairPoint's latest actual annual reported SQI result (cumulative) for Outages, as reported for the twelve months ending July 31, 2012, under the Company's AFOR. The outage metric was originally developed for Verizon in association with Federal Communications Commission (FCC) requirements. Because of the considerable difference in size between Verizon (and its successor, FairPoint) and the other ILECs, it is difficult to create a metric and benchmark suitable for both FairPoint and the other ILECs. As a result, we use FairPoint's most current reported result for this metric's benchmark, which will apply to FairPoint and all other ILECs. We recognize that the non-FairPoint ILECs may never miss the benchmark, but note that outages have not been a problem for those companies in the past and using the benchmark that reflects FairPoint's most recent actual reported performance, which has been significantly below its SQI benchmark, will help ensure that all POLR providers continue to provide safe, reasonable and adequate service quality to their customers.

In setting the initial benchmarks for the metrics, we have relied on the most recent reported results of the 23 Maine ILECs which include all of each POLR providers' customers. The Commission may adjust the benchmarks in a future rulemaking proceeding, but it will not do so until there is sufficient data pertaining to service quality provided by the ILECs in their role as providers of POLR service.

b. Discussion of Comments

The Public Advocate filed comments regarding two aspects of this section of the rule. First, the Public Advocate recommended that the Commission establish one set of benchmarks for FairPoint and another set for the rest of the ILECs, because these two entities have significantly different operational characteristics. The Public Advocate also asserts that FairPoint has exhibited much poorer service quality performance than the other ILECs, and use of a common averaged benchmark would "bake in" that poor performance into the standard. In addition, the Public Advocate recommends that the eleven metrics proposed by the Public Advocate for FairPoint in Docket Number 2012-00173 be established as the permanent metrics for FairPoint in this proceeding. The Public Advocate asserts that the Commission should demand a higher level of performance from FairPoint than was proposed by the Commission.

We reject both of the Public Advocate's proposals for the metrics and benchmarks to be applied to FairPoint. The legislation is explicit that "[t]he service quality indicators may relate only to..." the five metrics that we adopt in this rule. Because the five named indicators or metrics are the same as those which the rural ILECs have been reporting to us for many years, we believe the Legislature intended that we use only those metrics. As discussed above, section A-23 of the Act requires the Commission to establish a SQI mechanism for the final year of the AFOR that applies to FairPoint, and it requires use of the same five metrics. Our rule is consistent with the metrics identified in the statute.

In addition, we find that a single set of service quality benchmarks is sufficient for the intended purposes of the rule. While FairPoint may have exhibited significantly different results in the past for its SQI metrics, the benchmarks we establish in this rule do not materially differ from the SQI benchmarks that are currently in place for the last year of the FairPoint AFOR. Moreover, contrary to the Public Advocate's assertion, FairPoint has not reported significantly worse results for these metrics during the past year. We will monitor the service outage metrics results, as our decision to use FairPoint's latest reported result may result in too high a benchmark. Because service outages have generally not been a problem for the ILECs, we find this to be a reasonable approach.

TAM commented that the Commission's rule has more of the characteristics of the "AFOR Model" (the one applied to Verizon and now to FairPoint) rather than the "RLEC Model," which is the service quality mechanism that TAM asserts has been in place for the RLECs for many years and is the mechanism that the Legislature had in mind. TAM further asserts that the RLEC Model, which TAM also refers to as an "oversight" model, has been quite successful in perpetuating a high level of service among the RLECs, but that the Commission's rule is very much like the AFOR SQI model in that it applies automatic penalties for failure to meet the established benchmarks. In addition, TAM asserts the rule presupposes an adversarial relationship between the Commission and the companies, whereby a structure of hard and fast penalties is established. TAM would prefer a system where the Commission and the companies work as partners to identify service quality issues and work collaboratively to resolve the problems. In TAM's view, an adversarial approach, as is embodied in the AFOR SQI, is no longer appropriate, and penalties should only be a last resort, which should be enforced only when a company has failed to meet the standard of comparable service when compared to services offered by the market as a whole. TAM asserts that specific benchmarks attached to the ability to commence an investigation or penalties are neither necessary nor helpful.

We decline to adopt TAM's suggested model. In our view, the Legislature has directed the Commission to adopt specific standards (the benchmarks) for service quality performance as a means of ensuring a minimal level of quality for basic local service. In a system of defined standards, as contemplated by the rule, POLR providers know what targets they are expected to meet. Objective

standards, once set (or subsequently revised) remove disputes regarding what reasonable performance means.

As discussed above, without even the authority to obtain data from competitive providers, it would be impossible to develop a relativistic approach to service quality of the sort advocated by TAM. Nor do we believe that such an approach, even if possible, would be predictable or capable of easy and fair administration. Rather than inject into the Commission's oversight role significant opportunities for subjectivity at the point of determining whether a POLR provider's performance has not met some fluid standard, we believe that it is better that a standard be established in the first instance. Further, as is set forth in the rule, substandard performance will not lead to the automatic imposition of penalties. Instead, the failure by a POLR provider to meet a benchmark triggers only an explanatory initial report from the company. Informal discussions among the company and Commission could occur during the initial phase of this process. After reviewing the report and any other relevant information and circumstances, the Commission will decide whether to open a formal investigation of the service quality failure. Only after the conclusion of the adjudicatory investigative proceeding could penalties be imposed. In addition, as discussed in Section B(7) below, the Commission will consider all relevant factors in determining the amount of any penalty to be imposed.

This is a very different process than what currently occurs under the FairPoint AFOR process by which the company is assessed an automatic penalty for failure to meet a benchmark. The Commission believes this process strikes the appropriate balance for having the Commission and POLR providers work together on service quality issues and ensuring that customers have access to safe, adequate and reasonable service quality.

As a result, this section of the rule is provisionally adopted unchanged from the proposed rule.

5. Quarterly Report Filings to the Commission (Section 5)

Sections 5(A) and (B) of the rule require service providers to track the performance metrics monthly and file reports on a quarterly basis with the Commission as they have been doing for many years. The service providers will report the numbers necessary to calculate the metric result, and the Commission will calculate the result and post it on its web site, which continues the current well-established process. The rule requires that the quarterly results be filed within 28 days of the end of each quarter. Section 5(C) further provides that service providers that fail to meet one or more of the service quality benchmarks established in Section 4(D) must provide, within ten days of the filing of their quarterly report, an explanation of why they did not meet the benchmark(s), and the carriers may provide any reasons for why the Commission should not open an investigation into the failure to meet the benchmarks pursuant to Section 6 of the rule.

TAM proposed that Section 5(C) be eliminated because as described earlier, TAM sees no need for the Commission to establish actual benchmarks for each metric. Rather, TAM proposed that if the Commission observes a decline in service quality, as measured by comparing the POLR provider's results with "comparable levels of service" provided by other competitive carriers, the Commission would work cooperatively with the company to discover the cause of the problem and initiate corrective action. Thus, under TAM's proposal, there would be no need for the filing of explanatory reports after a service quality failure was observed. Because we have declined to adopt TAM's model, we also decline to eliminate Section 5(C) of the rule and it is provisionally adopted as proposed. We also view this as an important step in aiding the Commission in deciding whether or not to open an investigation pursuant to Section 6 of the rule.

6. Commission Investigations (Section 6)

Under Section 6, upon reviewing the reports and any other information filed pursuant to Section 5 of the rule, the Commission may open an adjudicatory investigation into the failure to meet any of the service quality benchmarks established in Section 4(D).³

TAM also recommended changes to Section 6 of the proposed rule consistent with its view that service quality standards based on the quality of service that competitive providers supply be established. In addition, TAM recommended that a customer directly affected by a company's performance could petition the Commission to open an investigation into the POLR provider's service quality. Because we provisionally adopt a structure containing explicit benchmarks and requiring the POLR provider to explain any service quality failures, and because customers may file a ten person complaint with the Commission pursuant to 35-A M.R.S.A. § 1302, we decline to adopt TAM's proposed modifications to Section 6 and it is provisionally adopted unchanged from the proposed rule.

7. Penalties, Rebates or Rate Reductions (Section 7)

Consistent with the Act, Section 7 of the rule provides that the Commission may impose penalties or require a service provider to provide rebates or rate reductions if the Commission finds, after an investigation pursuant to Section 6, that a service provider has failed to meet any one or more of the service quality benchmarks established in Section 4(D). The Act provides that Commission rules may establish appropriate penalties, rebates or rate reductions that may be applied if the Commission finds, after investigation, that a service provider has failed to meet any service quality benchmarks. Section 7(A) of the proposed rule provided that any penalty, rebate or rate reduction assessed after any individual investigation shall not exceed \$500,000. In setting this amount, the Commission looked to its existing statutory authority regarding

³ This does not alter the Commission's authority to open an investigation of any matter relating to a public utility at any time. See 35-A M.R.S.A. § 1303.

assessing administrative penalties for violations of Title 35-A, Commission rules and Commission Orders. See 35-A M.R.S.A. § 1508-A. We sought comments on whether the size of the penalty should explicitly be related to the size of the company, such as the amount of the ILEC's annual revenues.

In the Public Advocate's view the capped penalty amount of \$500,000 is too low to effectively deter management decisions that would lead to substandard service quality. The Public Advocate recommended that the cap for FairPoint be \$2,000,000 and the cap for other POLR providers be set proportionally, based on total revenues. In recommending \$2,000,000, the Public Advocate points to Section A-23 of the Act in which the Legislature allowed the Commission to impose penalties for the last year of FairPoint's AFOR not to exceed an annual amount of \$2,000,000 for service quality violations.

TAM commented in its initial comments that it believes the penalty structure in the proposed rule is unnecessary and that the proposed rule omits a critical limiting factor in the law which caps the penalty at the lesser of \$500,000 or 5% of the company's annual gross revenues. TAM, however, only quoted a portion of the statute. Section 1508-A(1) provides:

1. Penalty. Unless otherwise specified in law, the commission may, in an adjudicatory proceeding, impose an administrative penalty as specified in this section.

A. For willful violations of this Title, a commission rule or a commission order by a public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or a competitive electricity provider, the commission may impose an administrative penalty for each violation in an amount that does not exceed \$5,000 or .25% of the annual gross revenue that the public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or the competitive electricity provider received from sales in the State, whichever amount is lower. Each day a violation continues constitutes a separate offense. The maximum administrative penalty for any related series of violations may not exceed \$500,000 or 5% of the annual gross revenue that the public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or the competitive electricity provider received from sales in the State, whichever amount is lower.

B. For a violation in which a public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or a competitive electricity provider was explicitly notified by the commission that it was not in compliance with the requirements of this Title, a commission rule or a commission order and that failure

to comply could result in the imposition of administrative penalties, the commission may impose an administrative penalty that does not exceed \$500,000.

C. The commission may impose an administrative penalty in an amount that does not exceed \$1,000 on any person that is not a public utility, voice service provider, dark fiber provider, wholesale competitive local exchange carrier or a competitive electricity provider and that violates this Title, a commission rule or a commission order. Each day a violation continues constitutes a separate offense. The administrative penalty may not exceed \$25,000 for any related series of violations.

D. In addition to the administrative penalties authorized by this subsection, the commission may require disgorgement of profits or revenues realized as a result of a violation of this Title, a commission rule or a commission order.

The portion cited by TAM refers to the penalty amount for a series of violations following an initial willful violation of Title 35-A, a Commission Order or Commission rule. See 35-A MRSA § 1508-A(1)(A). Section 1508-A(1)(B) provides that for a violation in which a public utility was explicitly notified by the Commission that it was not in compliance with the requirements of this Title, a Commission rule or a Commission order and that failure to comply could result in the imposition of administrative penalties, the Commission may impose an administrative penalty that does not exceed \$500,000.

Pursuant to the rule, a POLR provider will report the numbers necessary to calculate the metric result to the Commission quarterly, the Commission will calculate the result and post the numbers on our website as we do now. Within 10 days of the filing of the quarterly report, a POLR provider that fails to meet one or more of the benchmarks is required to file an explanation of why it failed to do so and may include any reasons and/or mitigating circumstances for why the Commission should not open an investigation into the failure to meet the benchmark(s) pursuant to section 6 of the rule. At that point, the Commission may decide based on the information filed and any discussions with the provider that it is not going to open an investigation and nothing else happens. If however, the Commission does decide to open an investigation, the Order opening the investigation will serve as the explicit notice to the POLR provider, required in section 1508-A(1)(B), that the POLR provider is in violation of a Commission rule and that failure to comply could result in the imposition of administrative penalties not to exceed \$500,000. Again, the Commission after any investigation may determine that no penalty shall be assessed.

Nonetheless, we do understand TAM's concerns about the possibility of a \$500,000 penalty for one of the small RLECs. Section 7(B) of the rule describes the factors that the Commission will consider in determining the amount of

any penalty, rebate or rate reduction. In response to TAM and the Public Advocate's comments, we amend Section 7(B)(3) of the rule to read: "the amount necessary to deter future failures to meet the benchmark, taking into consideration the size of the service provider as measured by its revenues, assets or number of customers."

With respect to the Public Advocate's comment that the cap should be \$2,000,000, we note that Section 7225 does not specify what the penalty amounts should be or set a cap and leaves this to the Commission's discretion. We believe the administrative penalty provisions contained in Section 1508-A(1) provide sufficient incentive for POLR providers to maintain or improve service quality levels for customers. Finally, we strike the maximum penalty amount of \$500,000 per investigation in the rule and refer more generally to section 1508-A(1) so as not to limit the Commission's penalty authority.

TAM also proposed that a penalty could only be assessed if the Commission had proposed an alternative approach to allow the service provider to utilize resources in a manner that would improve performance in the service quality metric or metrics that the Commission has found to be below service quality standards – such as hiring additional technicians or customer service representatives - and the service provider had declined to utilize the Commission's proposed approach. The Commission does not typically determine how specific problems should be resolved as these are, appropriately, utility management decisions. The Commission establishes standards for performance and allows utilities to determine how best to comply with those standards. Because our provisionally adopted rule establishes a benchmark, reporting and potential penalty structure that is different from TAM's proposal in many respects, we decline to adopt TAM's proposed change. If, after an adjudicatory investigation, the Commission determines that a service quality penalty is appropriate, that penalty will be imposed in accordance with Section 7 of the rule.

Finally, we sought comments on whether we should include a provision to allow for consideration of exogenous events, both in the Commission's decision to open an investigation (Section 6) and in any Commission determination of a penalty amount pursuant to Section 7 of the proposed Rule, and how exogenous events should be defined. We note that allowance for consideration of "exogenous" events, also referred to as Force Majeure, was included in the original AFOR implemented for Verizon in Docket No. 1994-123 and in the recently implemented SQI for the final year of the FairPoint AFOR, in Docket 2012-00173.

The Public Advocate recommended not including a specific provision inviting service quality penalty waivers based on exogenous events arguing that such events that are truly beyond management's control and that cannot be reasonably anticipated are rare. The Public Advocate commented that the general waiver provision in the rule, Section 8, was sufficient but recommended that the rule provide that no such waiver would be considered unless the POLR provider could demonstrate that the cause of poor service quality was entirely beyond its control and beyond its ability to anticipate and mitigate such harm. The Public Advocate also noted

that unlike the historical automatic penalties that applied to FairPoint, future penalties will be imposed only after the Commission has decided to open an investigation relating to poor service quality, in other words the Commission has the discretion not to open such an investigation if it is apparent that the poor quality was a result of exogenous events.

We find that Section 7(B)(7) of the rule allows the Commission to consider any and all circumstances related to a POLR provider's failure to meet one or more service quality benchmarks. This includes consideration of exogenous events. POLR providers will have the opportunity to provide information regarding possible exogenous events when they file their explanations of why they failed to meet a benchmark pursuant to Section 5 of the rule. They will have another opportunity if the Commission opens an investigation to introduce evidence and argument about the nature of events that might be considered "exogenous" during that proceeding. As we did in Docket No 2012-00173, the case regarding the service quality requirements for the final year of FairPoint's AFOR, we require that an exogenous event is one that a company had no control over, or that a company could not have reasonably anticipated. The event must also have had a significant negative effect on service quality. There might be events that result in extreme negative effects on service quality and for which a company could not reasonably be expected to foresee or have plans in place to address. In these instances, a company should not be penalized for failure to meet its service quality benchmarks.

The other provisions in Section 7 of the rule are provisionally adopted as unchanged from the proposed rule.

8. Waiver or Exemption (Section 8)

Section 8 of the proposed rule contains the Commission's standard waiver provision as is adopted as proposed.

Accordingly, we

O R D E R

1. That Chapter 201, Provider of Last Resort Service Quality Indicators and Standards, is hereby provisionally adopted;
2. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State;
3. That the Administrative Director shall notify the following of this rulemaking proceeding:
 - a. All incumbent local exchange carriers operating in the State;
 - b. All competitive local exchange carriers operating in the State;

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within 20 days from the date of filing is denied.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.