STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-196

October 4, 2002

KENNEBUNK LIGHT & POWER DISTRICT
Petition for Approval to Furnish and Extend Retail Electric Service in the Entire Town of Kennebunk

ORDER DENYING PETITION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

We conclude, based on the assertions and arguments in its petition and briefs, that the Kennebunk Light & Power District (KLPD or District) would not be able to present a case that would support the granting of authority for the District to serve the entire Town of Kennebunk. Accordingly, we deny the petition.

II. BACKGROUND

On April 8, 2002, KLPD filed a petition, pursuant to 35-A M.R.S.A. § 2110, for a Commission declaration that the public convenience and necessity require KLPD to be authorized to furnish electric service throughout the entire Town of Kennebunk. The declaration would authorize KLPD to extend its service into the southeastern area of Kennebunk. This portion of the Town is currently served by Central Maine Power Company (CMP).

KLPD's petition argues that all criteria for a declaration of public convenience and necessity are satisfied under the circumstances of this case. KLPD states that it does not seek authorization to exercise eminent domain with respect to CMP's facilities, that any transfer of service would occur by action of the affected customer, and that any transfer of facilities from CMP to KLPD would occur by a negotiated lease or purchase and sale.

KLPD also requests that the Commission make several findings to avoid "undue detriment" to CMP ratepayers. These include that any transferred customers continue to pay generation-related stranded costs as determined by the Commission pursuant to 35-A M.R.S.A. § 3208, and that no other stranded costs would be imposed as a result of the extension of service. According to KLPD, CMP would be fully compensated for other costs by payment for network transmission service and for any facilities at a fair value.

KLPD requests that the Commission determine in this proceeding a *pro forma* valuation of the electric distribution system in the southeastern area of Kennebunk.

This valuation could then be used as a benchmark for the reasonableness of the price of facilities that CMP may choose to sell to the District and for assessing the prudence of decisions by CMP not to sell facilities in the face of a reasonable offer.

The Commission convened a preliminary conference of parties on May 16, 2002 at which, the following petitions for intervention were granted: CMP, the Public Advocate, Town of Kennebunk, Citizens for Electrical Equity in Kennebunk, Maine Public Service Company (MPS), Bangor Hydro-Electric Company (BHE) and Eastern Maine Electric Cooperative (EMEC).[1] During the conference, parties agreed that the Commission should address several threshold issues, primarily to determine whether, under current law, a declaration of convenience and necessity could issue upon the circumstances presented in the District's petition.

On May 21, 2002, the Examiners issued a procedural order requesting the parties to brief several threshold issues related to the standards for a finding of public convenience and necessity for a second utility to provide service. Specifically, the parties were asked to present argument on whether the Commission may consider "local self-determination" as a ground for granting authority and whether CMP's service must be found to be inadequate to grant the District's petition. The parties were also asked whether the Commission may require CMP to sell its distribution assets or establish an "imprudence price" for distribution assets (a price at which CMP would be imprudent for refusing to sell). Finally, the procedural order asked the parties to discuss whether the Commission may, as a condition for granting authority to KL&PD, require the District to pay certain amounts designed to leave CMP (and its ratepayers) financially unharmed.

Parties filed initial and reply briefs. On August 8, 2002, the Examiners issued an Examiners' Report recommending that the Commission conclude that KLPD may be able to make a showing that its proposed service was sufficiently different from that offered by CMP to justify the requested authority, and that the proceeding should continue to allow the District to make such a showing. CMP, MPS and EMEC filed exceptions to the Examiners' Report. The briefs and exceptions are summarized below.

III. COMMENTS OF PARTIES

A. KLPD

KLPD claims that the circumstances of this case satisfy the "public need" requirement for a declaration of public convenience and necessity. KLPD argues that "public need" equates to a "public demand" for the services sought to be provided by a second utility and that "local self-determination" is a ground for granting authority to the second utility under the public need requirement.

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[1] The MPS and BHE interventions were limited to providing argument. EMEC may participate in all aspects of the proceeding, but must request approval to file testimony to assure relevance and the lack of duplication.

In support of its local self-determination argument, KLPD states that all the residents of the entire Town (including those not served by KLPD) are potentially liable for KLPD's obligations; are subject to taxation to support KLPD's debts; may vote for, and are eligible to serve as, KLPD's trustees; and are entitled to vote on KLPD issues that are required to be decided at a town meeting. Thus, according to KLPD, electric customers who live in the Town and who are presently served by CMP justifiably desire to unite their responsibilities as part of the KLPD "body politic and corporate" with the tangible benefits of receiving service by KLPD.

KLPD's position is that the Commission is not required to find that CMP's service is inadequate or that its rates are unreasonable. Rather, KLPD argues that the Commission need only find that there is a demand for service from KLPD in the area in question. KLPD further argues that KLPD's service is a different type than that provided by CMP because of the differences in the organization of the two entities, and the far greater responsiveness and responsibility that KLPD has with respect to the area sought to be served. Additionally, KLPD claims it has the capability to provide service at a lower cost and with a higher quality of service than that presently provided in the areas of the Town served by CMP.

KLPD states that its requested authorization would satisfy the requirement that adequate service at reasonable rates be promoted for all customers including those of CMP. KLPD supports this view by explaining that it does not seek authorization for eminent domain or to require any "forced sale" of CMP assets, that transferred customers would pay generation-related stranded costs and that there would be no other stranded costs.

KLPD explains that its use of the term "prudence" in the context of the Commission establishing a valuation for CMP assets was not intended as a vehicle for compelling CMP to sell its assets. KLPD concedes that the Commission has no authority to act in such a manner. Rather, KLPD uses the term "prudence" in a more limited sense in reference to CMP claims for "stranded costs" that it failed to mitigate by declining to accept a reasonable offer for its assets. Finally, KLPD clarifies that it does not propose that the Commission act in any way to remove CMP's present authority to serve customers within the Town of Kennebunk.

KLPD did not file exceptions or other comments addressing the Examiners' Report.

B. Town of Kennebunk

Through its comments, the Town of Kennebunk presented information from its Fire Chief showing that KLPD's service is superior to that of CMP. Additionally, the Town states that CMP in the past has not delivered its regular services in a timely manner. The Town also requests the Commission to establish a valuation for CMP's assets. The Town did not file exceptions or other comments addressing the Examiners' Report.

C. Public Advocate

The Public Advocate argues that an applicant is not required to show that the service of the incumbent utility is inadequate to demonstrate that a "public need" exists for a particular service. Instead, the Public Advocate argues that a "public need" exists if the incumbent utility fails to provide a particular service needed by the public and that there is a "public need" for comparable services at lower costs.

The Public Advocate also supports the District's position that "local self-determination" is a grounds for finding "public need," but views that issue more as a matter of self-protection. The Public Advocate explains that residents of Kennebunk are at risk that their homes might be subject to foreclosure if KLPD defaults on its debts and that the addition of new customers will improve the financial viability of KLPD.

The Public Advocate states that the Commission may have the authority to establish an "imprudence price" and penalize CMP for not selling at that price. Essentially, the Public Advocate believes that the Commission has the authority to determine that it is in the public interest for KLPD to serve the entire Town of Kennebunk and to provide for the orderly transition through the determination of an "imprudence price."

Finally, the Public Advocate argues that the Commission may require, as a condition for granting KLPD authority to serve, that CMP be paid amounts designed to leave CMP ratepayers harmless. This authority, according to the Public Advocate, stems from the Commission's ability to consider the impact that entry of a second utility will have on the incumbent utility.

The Public Advocate did not file exceptions or other comments addressing the Examiners' Report.

D. CMP

CMP views this proceeding as an attempt by KLPD to obtain authority to displace CMP from serving its existing customers in Kennebunk. CMP argues that sections 2102 and 2105 reflect a legislative policy in favor of protecting a utility's actual service territory and that "public need" can only be found if CMP voluntarily relinquishes its service territory, the service KLPD seeks to provide is a new service that is not provided by CMP, or the service currently provided by CMP is not adequate. CMP argues that none of the necessary findings can be made in this case.

CMP disputes the District's claim that the service it seeks to provide is a new service that is not currently available. CMP states that the distribution service KLPD seeks to offer is the same service that CMP already provides, and that it is the type of entity providing the service (i.e., a municipal utility), not the type of service, that

is the basis for KLPD's argument that a "public need" exists under the circumstances of this case. CMP argues that service by a municipal utility (as opposed to an investor-owned utility), which underlies the "local self-determination" argument, is not an appropriate factor in considering public convenience and necessity.

CMP also dismisses KLPD's argument concerning resident liability of the District's debt, stating that KLPD's rates are set to recover all its debt costs, and that all municipalities incur debts and obligations that are secured by resident property regardless of whether the property owner receives a direct benefit from the municipality's expenditure. CMP also notes that, under Maine law, a resident may recover the full value of sold property; so it is the Town, not the individual property owner, that ultimately backs KLPD's debts.

Because CMP does not view KLPD's service to be a new service, it argues that the Commission must find CMP's service to be inadequate before it can conclude that a "public need" exists. CMP states that lower price and better service, even if true, are not relevant to the "public need" test and allowing such considerations would eviscerate service territories and introduce competition into the distribution sector. Because CMP is providing adequate service in Kennebunk, it argues that a "public need" does not exist for a second utility.

Finally, CMP argues that the Commission does not have the authority to require CMP to sell its distribution facilities to KLPD. Similarly, CMP argues that the Commission may not establish an "imprudence price," in that such action would be an impermissible attempt to coerce CMP to sell its assets.

In it's exceptions to the Examiners' Report, CMP argues that the "local control" and "self-determination" characteristics of the service proposed by KLPD do not make it a different service within the meaning of *Standish Telephone Co. v. Public Utilities Comm'n,* 499 A.2d 458, 459 (Me. 1985). CMP also argues that the statute does not support a system where customers could choose one or the other utility on a customer-by-customer basis. CMP asserts that, unlike the circumstances in *Standish Telephone,* competition between two electric distribution utilities is not feasible.

E. MPS

MPS commented that, based on prior precedent, a consideration of public convenience and necessity implicates the general public interest and requires examination of a variety of issues, including the potential impact on the orderly development of a stable electric industry in Maine. Thus, according to MPS, the interests of particular customers that wish to be served by a second utility must be subordinated to broader public policy issues. MPS also takes the position that "local self-determination" as discussed by KLPD cannot be considered a basis for granting KLPD's request for authority.

MPS argues that KLPD must show either that CMP is not offering a particular type of service or that an offered service is inadequate. It argues further that a demonstration that KLPD has lower rates or more reliable service than CMP is irrelevant to the determination of "need" for a second utility. MPS also agrees with CMP that the Commission does not have the authority to require CMP to sell its distribution assets or to accomplish the same purpose through setting an "imprudence price."

MPS's exceptions to the Examiners' Report argue that electric distribution service with minimal differences is not the kind of "fundamentally different" service offered by the competitor in *Standish Telephone*. MPS also argues that the "local control" attributes of KLPD have nothing to do with the nature of the service itself. Rather, they are "political issues," and that the Legislature has resolved those issues in 1903 and 1951 by designating different service areas within the Town of Kennebunk. MPS suggests that if the Commission granted authority to KLPD to provide service in the area presently served by CMP, it would be essentially second-guessing the Legislature's political judgment.

F. EMEC

EMEC comments that there is no single or universal set of standards that applies for purposes of a finding that the public convenience and necessity require a second utility. EMEC believes that the weight given to various considerations depends on the nature of the industry and the policy objectives of the State with regard to that industry. Accordingly, EMEC argues that precedents regarding second utilities in the telecommunications industry should not control the standards to be used in this case in that the technology and economic characteristics of telecommunications are amendable to competition, while the electric distribution industry has not been affected by analogous changes.

Additionally, EMEC urges the Commission to determine standards in the context that it might really be deciding whether one utility should replace another. EMEC does not believe a simple showing by a second utility that it might have better service or lower rates justifies its authorization to serve in another utility's territory. EMEC also believes that "local self-determination" cannot be a sole ground for granting authority, but may be taken into account (with other issues, such as the impact on the existing utility's customers). Finally, EMEC argues that any authority the Commission grants to KLPD to serve should be conditioned on compensation to CMP for any harm that results.

EMEC'S exceptions to the Examiners' Report argue that by focusing on the issue of a "difference" between the existing and proposed services, the Examiners' Report tends to overlook the question of "public interest," which EMEC argues is another important aspect of the overall question of "public need." EMEC requests that the Commission clarify that the establishment of a "different" service does not, by itself, constitute a finding of public need.

IV. DISCUSSION

We decide that KLPD is not able make a case that would support the granting of authority for the District to serve the portions of the Town of Kennebunk that are presently served by CMP. We decide that there are no circumstances or facts stated in KLPD's petition that would permit us to find that there is a "public need" for KLPD to provide such service. We therefore terminate this proceeding. [2]

A. Standards for Authority to Provide Service

KLPD filed its petition for authority to serve the entire Town of Kennebunk pursuant to 35-A M.R.S.A. § 2110. The parties have effectively agreed that section 2110 incorporates the standard contained in 35-A M.R.S.A. §§ 2102 and 2105 (whether "the public convenience and necessity require a second utility") [3] and that we should

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[2] In making these rulings, we apply the standard of Me.R.Civ.P. 12(b)(6) ("failure to state a claim upon which relief may be granted"). Under that standard, a party does not state a claim if, even assuming it could prove all of the facts stated in the complaint (petition), it is not legally entitled to the "relief" (or decision) that it seeks in the complaint. We recognize that no party filed a motion to dismiss or formally raised KLPD's "failure to state a claim" as a defense in an "answer," the two methods described in Civil Rule 12(b). Nevertheless, the substance of CMP's arguments (in its brief and its exceptions) is that KLPD has failed to present a legal basis for allowing it to provide service in the portion of Kennebunk served by CMP. We of course have the discretion to terminate any proceeding when it becomes clear that we cannot legally do what a party has requested. Doing so when that circumstance becomes apparent, even when there is no formal motion, saves the resources of the parties and the Commission.

[3] Section 2110 applies to utilities, such as KLPD, that are organized by Private and Special Act of the Legislature. Section 2110 states in relevant part:

> A public utility organized by Private and Special Act of the Legislature may extend its services as follows:
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> **1. Commission authorization**. The commission may authorize a public utility organized by private and special act of Legislature to furnish or extend its service in, to or through a city or town notwithstanding any territorial limitations, express or implied, in the private and special act of the Legislature by which it was organized or under which it is enfranchised . . . .
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> **2. The commission's powers and limitations**. The commission's powers and limitations, made applicable under this section, are those applicable by law in like cases

apply that standard to the question of whether the Commission should permit the District to extend its service throughout the Town of Kennebunk.

Section 2102(1) states that no public utility may furnish service in a municipality in which another utility is furnishing or authorized to furnish similar service without approval of the Commission.[4] Section 2105 provides that approval to provide

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> concerning public utilities organized under Title 13-A or any prior general corporation law.

The reference in section 2110(2) (formerly 35 M.R.S.A. § 294) to the law that is applicable to "public utilities organized under Title 13-A or any prior general corporation law" (so-called "general law" utilities) is a reference to 35-A M.R.S.A. §§ 2102 and 2105 (formerly 35 M.R.S.A. §§ 2301 and 2302). See *Biddeford & Saco Gas Co. v. Portland Gas Light Co.*, 233 A. 2d 730, 734-36 (Me. 1967). Prior to 1967, 35 M.R.S.A. §§ 2301-02 on their faces applied only to "general law" utilities. Amendments effective in 1967 applied them for the first time to so-called "charter" utilities (those organized pursuant to Private and Special Law), such as KLPD. Thus, after the 1967 amendments, the requirements of 35 M/R.S.A. §§ 2301-02 / 35-A M.R.S.A. §§ 2102 and 2015 applied directly to all utilities. It appears, therefore, that the incorporation of those sections by 35 M.R.S.A. § 294 (now 35-A M.R.S.A. § 2110) is no longer necessary. Nevertheless, section 2110 continues to apply on it's face only to charter utilities and continues to cross-refer to and incorporate the provisions formerly applicable only to "general law" utilities (i.e., sections 2102 and 2105) for the substantive powers of the Commission with regard to a request to expand a service area. Section 2110 is effectively nullified by the fact that section 2102 and 2105 themselves now apply directly to charter utilities. We prefer (if only to prevent the need for explanations such as the foregoing) for all utilities that wish to expand their service areas to file their requests under section 2102(1).

[4] The Commission and the Law Court interpreted section 2102 (including the "grandfather clause" of 35-A M.R.S.A. § 2102(2) that was enacted as part of the 1967 amendments) in *Public Utilities Commission, Investigation of Authority of Madison Electric Works Pursuant to Section 1303 to Provide Service to Certain Portions of Madison, Anson, Starks and Norridgewock Without Approval Pursuant to Sections 2102 and 2105*, Docket No. 94-379 (Aug. 4, 1995), *aff'd. sub nom. Town of Madison, Dept. of Electric Works v. Public Utilities Comm'n*, 682 A.2d 231 (Me. 1996). The Commission further interpreted these provisions in *Investigation Pursuant to 35-A M.R.S.A. § 1303 of Authority of Kennebunk Light & Power District to Provide Service in Certain Portions of Kennebunk*, Docket No. 95-148, Order (July 16, 1997). Under these interpretations, section 2102 requires both charter and general law utilities to obtain approval to provide service to any area that the utility was not serving as of October 8, 1967 (the effective date of the 1967 amendments), even though that utility was serving in other portions of the same municipality, if any other utility is providing or has authority to provide a similar service in the same municipality. As noted in the 1997 KLPD order, KLPD's charter (P.&S.L. 1951, c. 53) may be even more restrictive than sections 2102 and 2105.

utility service in a municipality where a public utility is engaged in or authorized to provide similar service shall not be granted until the Commission makes "a declaration that the public convenience and necessity require a second public utility."

The parties also generally agree that in determining public convenience and necessity in "second utility" cases, the Commission generally employs a three-prong test:

- Public need exists for the proposed service
- Applicant has the technical ability to provide the proposed service
- Applicant has the financial capability to provide the service

Standish Telephone, 499 A.2d at 459. KLPD states that among the criteria that the Commission considers in these cases is whether the requested approval will promote safe, reasonable and adequate service at rates which are just and reasonable to customers and to public utilities.

CMP states that the three-prong test is considered in light of the overall general public interest. MPS and EMEC take similar positions, stating that second utility cases require the consideration of numerous issues, including the impact of granting the requested authority on the existing utility and its ratepayers.

We agree that the general public interest is the overriding consideration in determining second utility cases and thus all issues relevant to the public interest may

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Section 3 of the charter states that the "territorial limits" of the District are those established in the 1903 Act (under which the Town of Kennebunk was authorized to provide service):

> except that the territorial limits of the … District … may include areas contiguous to areas served by the Kennebunk Light Department in the towns of Kennebunk … *in which at the time no other public utility is furnishing electric service,* if and when the … District shall have received the consent of the public utilities commission in accordance with the provisions of sections 3 and 4 of chapter 46 of the revised statutes of 1944 [now 35-A M.R.S.A. § 2102 and 2105] and all acts amendatory thereof or additional thereto. (emphasis added)

P. & S. L. 1951, c. 53, § 3.

In contrast to the charter language, sections 2102 and 2105 allow the Commission (upon the necessary finding of public need) to order service by another utility *even if* a first utility is serving in an area. We have ruled against the District under those sections, and it is therefore not necessary to decide whether the possible limitation in KLPD's charter persists in light of the 1967 amendments to sections 2102 and 2105 that made those sections applicable to charter utilities. If we were to decide that KLPD might be able to show public need, it might be necessary to address that question.

be considered. *Mid Maine Gas Utilities Inc., Request to Furnish Gas Service,* Docket No. 96-465 at 6-10 (Mar. 7 1997) (broad public interest standard must be considered when determining public convenience and necessity). This includes whether the requested approval will promote safe and adequate utility service at just and reasonable rates, and the potential impact of the proposed service on the existing utility and its ratepayers. *Standish Telephone,* 499 A2d at 464 (Commission considered impact on existing utilities); *Mid Maine, Docket* No. 96-465 at 8 (public interest requires consideration of a spectrum of interests).

We also agree with EMEC that consideration of the public convenience and necessity should take into account the particular technological and economic characteristics of the industry in question. Accordingly, a request by a second utility to provide service in an area already served necessarily raises questions of whether competition among utilities would lead to efficiencies or to higher costs. In the alternative, it raises questions of the possible displacement of one utility by another, and the costs associated with such displacement.[5] The resolution of such questions would depend on the nature of the proposed utility service. *Standish Telephone*, for instance, involved the resale of certain telephone services. The Court in that case noted the developing public policy in favor of promoting competition in telecommunication services and that no issues of wasteful duplication of facilities were presented. *Standish Telephone,* at 461 n.6, 464 n.8.

In contrast, this case presents the question of whether a second electric distribution utility should be authorized to serve in an area where distribution service is already being provided. At the current time, there is no national or State policy favoring the promotion of competition for electric distribution service. In the Electric Restructuring Act, 35-A M.R.S.A. §§ 3201-17, the Legislature made the conscious policy choice to allow competition only for generation services. *See Investigation of KLPD* at 2*, supra,* n.4. There is no reason to believe that electric distribution service is not still a natural monopoly. As discussed below, the KLPD petition raises questions regarding the potential for duplication of distribution facilities or the possible displacement of CMP by KLPD. The propriety of competition for electric distribution customers in Kennebunk, the potential for duplication of facilities, and the consequences of potential displacement are valid considerations in this case.

B. Public Need

The threshold issue currently before us is whether the KLPD petition can satisfy the "public need" criteria, the first of the three criteria described above. To find public need, we must at least conclude either that the service provided by the current utility is inadequate or that the proposed service by the new utility is not currently provided. *Standish Telephone,* 499 A2d at 461-462; *In Re Powell,* 358 A.2d 522, 527-

[5] As discussed below, the Commission does not have the legal authority to order the displacement of CMP by KLPD, but, if dual utility service is not workable economically, it is possible that only one utility would end up serving.

529 (Me. 1976). KLPD has stated that it is not arguing in this proceeding that CMP's service is inadequate or that its rates are unjust and unreasonable. Rather, KLPD's "local self-determination" argument is that KLPD, by virtue of being a municipal utility, can provide a service that is different from that currently provided by CMP. Specifically, KLPD argues that the service it can provide is subject to local control and responsive to local needs and desires as to quality of retail service and performance of distribution system operations. Additionally, if KLPD obtained authority to serve, customers could receive service from a utility for whose general obligations they share potential liability.

Based on the holding in *Standish Telephone,* we conclude that KLPD cannot make a case that service from a locally-controlled municipal utility is sufficiently different from that of a large investor-owned utility to satisfy the public need criteria. In *Standish Telephone,* the Court affirmed the Commission's finding that there was a public need for the resale of tariffed services (WATS and FX) by an entity other then the currently serving telephone utility. Although the resale of WATS and FX is a long-distance telephone service, the Court found that it was a different service from the long-distance service offered by the existing utility. Specifically, the Court noted that, although the proposed service was "comparable" to the existing service, it differed in that the resold product would cost less to low-volume customers, and would provide inferior access because a caller would have to dial more numbers and might need to wait until the reseller's circuits became available. *Standish Telephone,* 499 A.2d at 462 n.7.

Thus, the *Standish Telephone* Court concluded that a service could be found to be "different" for purposes of the public need test, even if it is "comparable" to the existing service in that both services are long distance telephone services. The Court's decision was premised on the fact that the proposed service had certain features that differed from traditional long distance service (i.e. lower costs and inferior access to the network). In this case, however, there is nothing that differentiates the actual service KLPD proposes to provide from CMP's service to justify a finding that the proposed service is a different service for purposes of the public need test.

We emphasize three points. First, we reject any suggestion that lower price alone makes a service "different" for the purpose of satisfying the "public need" test for approval of a second utility. *Standish Telephone* does not hold that the public need test is satisfied simply because one utility can provide the same service at a cheaper price at a given point in time. If that were the case, there would be nothing to prevent BHE customers living near the service area border with CMP from petitioning to be served by CMP, on the grounds that CMP currently has lower prices. If lower prices alone sufficed to allow entry by a second utility, the concepts of utility franchises, service areas and a coherent, stable public utility system would be meaningless, and utility boundaries would be in a constant state of flux.

Second, we also reject the suggestion that "public demand" alone is sufficient to satisfy the public need test. We do not read *Standish Telephone* as holding that a public demand for a different *utility* is sufficient to show a public *need*. The

demand must be for a different *service*. *Standish Telephone* indicates that public demand for a type of utility service that does not currently exist can suffice to justify allowing a second utility to serve. Applying that proposition to the current case, we may accept for the purpose of argument that there is a significant level of demand by CMP customers in Kennebunk to be served by KLPD. KLPD, however, has provided no indication that it could satisfy the second part of the *Standish Telephone* test, namely, that the demand must be for a different service. KLPD proposes to do what CMP presently does: deliver electricity to customers. As described by the *Standish Telephone* Court in some detail at footnote 7, the proposed telephone service at issue in that case differed from the existing service both in terms of quality and price.

KLPD essentially argues that T&D service by a municipal utility is different from T&D service provided by an investor-owned utility. We disagree. The proposed service is the same service provided by a different type of legal entity. If KLPD's rationale were to prevail, it is likely that T&D utility customers could argue with equal persuasiveness that service provided by a small utility is different from service provided by a large utility (or the converse, if economies of scale were more important to the proponents than the personal touch of smallness) or that service provided by a standalone utility headquartered in Maine is different from service provided by a utility owned by a holding company headquartered in a different state or even a different country. As in the case of current price differentials, allowing these kinds of differences to satisfy the public need test would simply abolish the concept of the franchise entirely.

In arguing that its petition "involves a profound issue of self-determination," KLPD is attempting to make the simple delivery of electricity into a different type of service depending upon who owns the entity doing the delivery. A public desire to be served by a particular utility is not a sufficient reason, standing alone, to make the legal determinations that the utility is delivering a different service or that there is public need for the service. We agree with MPS that the question of communal desires (or "self-determination") is essentially a political question that, in the case of Kennebunk, has been addressed twice by the Legislature with the present situation as the result. In our view, the issue must continue to be addressed by the Legislature rather than as a legal question, under 35-A M.R.S.A. § 2102 and 2105, of "public need." The fact that CMP customers residing in Kennebunk potentially could be liable for the unpaid debts of KLPD presents a similar political issue. That happenstance does not go to the nature of the utility service, but instead presents an issue of fairness for the Legislature, which established the arrangement almost 100 years ago.

We are aware that during the past session of the Legislature, the Commission, through its Legislative Liaison, presented the view that KLPD should first seek approval from the Commission pursuant to existing law established by the Legislature in 35-A M.R.S.A. § 2102 and 2105. Although we do not rule in KLPD's favor, we continue to believe that a proceeding before the Commission was the correct approach. The statutory arrangement reflected in KLPD's charter between KLPD (and its predecessor) and CMP (and its predecessors) has existed for nearly 100 years. The charter itself requires Commission approval. The requirement in the public laws (35-A

M.R.S.A. §§ 2102 and 2105 and their predecessors) that utilities obtain the approval of the Commission for expansion into areas served by other utilities has existed since 1913. It is appropriate that KLPD's request be fully considered under existing law before the Legislature is asked to change or make exceptions to those long-standing legal arrangements.

Our conclusion that KLPD could show only a public desire and could not make a showing under the existing legal standard that there is a "public need" for its service in the portion of Kennebunk served by CMPdoes not mean that this proceeding should not have taken place. The proceeding helped focus the issues, and should provide guidance to the Legislature concerning what issues are properly within the purview of the Commission (under current law) and those that must be considered (or reconsidered) by the Legislature.[6] KLPD's participation in this case, and the extensive and well-argued briefs and exceptions that have been filed demonstrates that there were substantial issues under current law that the Commission needed to address.

The third and final point we wish to emphasize concerns comments made by CMP, MPS and EMEC in their exceptions. We agree with those comments that, in considering whether to authorize service by a second public utility, we must determine the overall public interest, which may include many issues other than whether there is a "public need" for the service. These issues could, as noted above, include the effect on existing utilities and their customers. Because we decide in this case that KLPD cannot show a public need for its service, we do not need to decide other public interest issues or address them in great detail.

We believe, however, that if KLPD could show public need, we almost certainly would have to consider additional issues prior to granting approval. As noted above, these would include issues such as the impact on CMP and its ratepayers as well as whether the service by KLPD would be on a competitive basis, which in turn raises the questions about the desirability of distribution service competition and about the potential for, wasteful duplication of facilities, or on a sole-provider basis, which raises questions of whether the Commission could even order such a result and whether KLPD would be able to obtain facilities from CMP that the latter is unwilling to

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[6] Should the Legislature revisit this issue, it must consider not only community sentiment ("self-determination"), but issues, as discussed briefly herein, of whether to allow competition or require displacement, and issues of stranded cost and other compensation to CMP.

sell.[7] The need to discuss questions concerning both the competitive and displacement models is in sharp contrast to the situation in *Standish Telephone*, where interexchange telephone competition was generally thought to be in the public interest and there was no possibility that the competition in question would result in the duplication of facilities. For these reasons, even if it were possible that a "public need" could be found for KLPD to provide service, other public interest concerns might lead to the conclusion that KLPD should not obtain its requested authority to serve.

V. ORDERING PARAGRAPH

For the reasons stated in this Order, we DENY the petition of Kennebunk Light and Power District to provide retail electric distribution service to those portions of the Town of Kennebunk now served by Central Maine Power Company.

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[7] Throughout this proceeding KLPD has agreed that the Commission has no power to order CMP to cease providing service or to sell its facilities. KLPD's proposed model, therefore, is one of competition. Competition suggests duplicate facilities, which could lead to higher overall cost of service to the competitive area. It is undoubtedly more efficient to have only one set of facilities, which suggests that only one utility would provide service, even though there could be no legal compulsion for either utility to cease providing service. Under the single-server model, it is possible that CMP alone would continue to provide service using its present facilities. (Clearly that is not the goal of KLPD's petition.) If KLPD were to become the sole provider, it would either have to build its own facilities (and CMP would remove its facilities, presumably at some cost to the District's customers) or the District would have to purchase CMP's facilities. The Examiners' Report proposed to establish a reasonable sale price for CMP's assets should CMP be willing to sell. However, as the Examiners and KLPD recognized, the District has no eminent domain powers (specifically, under its charter, it cannot take the property of another utility), and CMP has indicated that it is unwilling to sell.

By Order of the Commission

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Dennis Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

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.

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.