

Central Maine Power Company
Testimony in Opposition to LD 1611
An Act to Create the Pine Tree Power Company

May 4, 2023

Chairman Lawrence, Chairman Zeigler, and members of the Energy, Utilities and Technology Committee:

My name is Scott Mahoney. I am Senior Vice President – General Counsel & Corporate Secretary at Avangrid, Inc. I attended Maine Law School and raised our family in Manchester and now live in Freeport. I am before you today to oppose LD 1611, “An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility.” These written comments address at a high level some of the legal infirmities of the proposed legislation. I have attached a memorandum from Pierce Atwood LLP addressing LD 1708 (130th Legis.) that analyzes these issues in more detail, because LD 1611 presents similar legal concerns as were implicated in LD 1708 (130th Legis.). I do not describe all of the legal issues in this testimony, because they are adequately described in the memorandum. The major issues with LD 1611 are as follows.

LD 1611 creates substantial potential liability for the State of Maine. Because the legislation is unconstitutional, it will generate lengthy and complex litigation in which the State could end up, at a minimum, paying the attorneys’ fees incurred by the utility companies in striking down the law. LD 1611 is unconstitutional for several reasons.

LD 1611 creates an unlawful taking of private property. Both the U.S. and Maine Constitutions prohibit the taking of private property without just compensation. U.S. Const. amend. V; Me. Const. art. I, § 21. LD 1611 neither meets the exigency test necessary for a taking, nor provides for just compensation.

- For a taking to occur lawfully under the Maine Constitution, there must be both a public purpose and public exigency. *Blanchard v. Dep’t of Transp.*, 2002 ME 96, ¶ 27, 798 A.2d 1119. There is no public purpose or exigency for the taking; LD 1611 would not guarantee greater reliability or lower rates. To the contrary, the bill would require ratepayers to pay the complete cost of service, including debt service, no matter how high the interest rate, and with no regulatory constraint for the rates to be just and reasonable. In addition, it would require the government to hire a private grid operator, at a profit, to manage and operate the grid. Transfer of ownership is all that LD 1611 would accomplish—but that reflects no public purpose or exigency.
- Further, any taking must be accompanied by just compensation for the owner. The touchstone for just compensation is fair market value. *See Curtis v. Maine State Highway Comm’n*, 160 Me. 262, 266, 203 A.2d 451, 453 (1966). The distinction in LD 1611 between “facilities” and “property” – requiring purchase of utility “facilities” but

merely permitting the purchase of utility “property” – runs afoul of the requirement to provide just compensation because it is a transparent effort to avoid paying compensation for the value of the seized utility as a whole. The property taken by LD 1611 includes the utilities’ right to operate as a going concern. As such, the proper measure of a taking includes more than just physical assets and property rights; it includes the value of the going concern as well. *East Boothbay Water Dist. v. Inhabitants of the Town of Boothbay Harbor*, 158 Me. 32, 177 A.2d 659 (1962). We have the recent examples of the fair market value of a utility business and the range for Maine is between \$12 billion and \$15, billion. Compare this massive increase in debt to the current debt of the Maine Turnpike and the University of Maine combined -- \$1.5 billion. The legislature should compare the debt to seize these utility businesses with the debt of the State of Maine.

LD 1611 is inconsistent with the Due Process Clause, Commerce Clause, Equal Protection Clause, and Contracts Clause.

- LD 1611 violates due process for various reasons. For example, the “fitness to serve” criteria in the bill include customer satisfaction rankings by unspecified private survey organizations. This would unlawfully delegate powers to private companies. *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 423 (1973). Further, not all the assets needed for CMP’s T&D delivery system to function properly are located within the State of Maine. An attempt to seize property outside the borders of the State violates due process. *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1943).
- The Commerce Clause prevents states from burdening interstate commerce through the exercise of the takings power. Given the interrelated nature of the interstate power T&D system, the condemnation proposed in the bill runs afoul of the Commerce Clause. *Burlington N. v. Fort Bend County*, 2009 WL 1172704, at * 2-3 (S.D. Tex. Apr. 29, 2009).
- L.D. 1611 violates equal protection principles. The bill discriminates between privately owned and “consumer-owned” T&D utilities based on no articulated or apparent rational basis. Such discrimination is suspect under Maine law. *Dickinson v. Maine Pub. Serv. Co.*, 233 A.2d 435 (Me. 1966).
- L.D. 1611 also implicates the Contracts Clause because it unlawfully destroys public utilities’ franchise right to serve exclusively absent a necessity finding under 35-A M.R.S. § 2102 by seizing T&D utility assets. *Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶¶ 36-47, 288 A.3d 346.

LD 1611 creates other substantial issues. Even if the law were not struck down in its entirety as unconstitutional, the State would still be at substantial risk. Because the bill does not

provide for paying just compensation to the owner of the seized utilities for the value of the utility as a going concern, the people of Maine would have to pay for the attorneys' fees incurred by the utilities in pursuing the proper measure of compensation and would also have to foot the bill for paying the difference between the amount of compensation contemplated in the bill and the utilities' value as a going enterprise.

These costs would be substantial, and, because there would be no non-State-backed bonding mechanism to pay for those attorneys' fees and compensation, the State (and thus Maine taxpayers) would have to pay these sums. Typically, the compensation that must be paid far exceeds what was originally contemplated by the condemnor, even with an original understanding of the fair market value measure. For example, the City of Nashua calculated \$85 million to acquire Pennichuck Water Company, and the New Hampshire Public Utilities Commission ordered payment of \$203 million. The costs of the state-wide T&D seizure contemplated in LD 1611 would far exceed these amounts given the size of the taking.

Nor will LD 1611 provide any offsetting financial benefit to Maine. A professional study and resulting whitepaper published by Concentric Energy Advisors, issued in May 2021, "there is a reasonable potential for a \$4.7 billion net cost to Maine electric customers." Whitepaper: Analysis of Government-Controlled Power in Maine, May 2021, at 2, *available at* <https://maineaffordableenergy.org/wp-content/uploads/2021/12/Whitepaper-Analysis-of-Government-Controlled-Power-in-Maine.pdf>.

The bill is constitutionally flawed and will therefore put the State of Maine, and its taxpayers and ratepayers, in an untenable position. Accordingly, I respectfully encourage the Committee to vote LD 1611 ought not to pass.