Testimony in Support of L.D. 1963, Sponsor Amendment,
"An Act to Protect and Compensate Public Utility Whistleblowers"
Joint Standing Committee on Energy, Utilities and Technology

May 15, 2025

Senator Lawrence, Representative Sachs, and Committee Members:

My name is Seth Berry, I am Executive Director of Our Power, and I live in Bowdoinham. Our Power is a Maine nonprofit advocating for energy democracy.

Our Power enthusiastically supports this proposal. First, it is modeled on proven federal programs and answers a demonstrated need. Second, by providing for a degree of anonymity and potential payment if a report leads to a financial sanction, it partially compensates for a key loophole in existing Maine whistleblower law. Third, it will serve both to detect and to deter -- helping the commission better protect Maine utility customers and to maximize utility efficiency and performance. Fourth and finally -- at a time when consumer, environmental and safety protections are under siege nationally -- it would make Maine a leader once again in a matter of state jurisdiction.

1. The utility whistleblower program proposed here is modeled on proven federal programs enacted under Lincoln, Obama and Biden.

The amendment before you is based on three federal programs. One, the *qui tam* process under the False Claims Act,[1] has been law since the days of Lincoln.[2] The other two --

[1] http://phillipsandcohen.com/what-is-a-qui-tam-case

[2] FCA was improved under President Reagan in 1986, as championed by U.S. Senator Chuck Grassley (R-Iowa). See https://www.judiciary.senate.gov/press/rep/releases/grassley-longtime-champion-of-the-false-claims-act-urges-us-court-of-appeals-to-uphold-provision-to-fight-fraud-empower-whistleblowers

programs of the Securities and Exchange Commission (SEC)[3] and of the National Highway Traffic Safety Administration[4] -- were created in 2010 and 2024, respectively.

These programs use the same three-part formula: *anonymity* + *award* + *awareness*. Specifically, *anonymity* in reporting, to reduce retribution; a possible *award (*10-30% of any penalty resulting from their report); and basic publicity to raise *awareness* of the program. This is the formula put before you today by Senator Tipping and explained at length in his testimony.

The SEC program, implemented under Sec. 922 of the Dodd-Frank reforms of 2010, most closely resembles the sponsor's amendment to LD 1963. For this reason we strongly encourage you to visit the SEC whistleblower website directly, to see for yourself its track record and the awards given to corporate whistleblowers.[5] At the same website, you will also find a graphic explaining the process used by the SEC, upon which Senator Tipping has modeled his proposal. Clearly, Dodd-Frank is protecting investors with its formula of *anonymity* + *award* + *awareness*, making at-least-monthly, multimillion-dollar awards to courageous federal whistleblowers who are deterring and detecting serious misconduct like insider trading.

Where an award is earned under the SEC program, it is because the payee's information was the primary reason for penalties 3 to 10 times the amount of the award -- effectively preventing non-insider, smaller investors from being robbed. The False Claims and NHTSA programs also work this way to protect us as federal taxpayers and as vehicle occupants. The program proposed today would work this way to protect us as utility customers.

Unfortunately, consumer protections are today being abandoned at breakneck speed in Washington, D.C. Now more than ever, it is important to consider parallel protections for matters of state jurisdiction.

2. Maine utility whistleblowers want to come forward but cannot.

As the House Chair of your committee from 2016 to 2022, I was contacted several times by frightened, would-be whistleblowers seeking guidance. A past Public Advocate, Bill Harwood, was also contacted several times. I encourage you to ask Mr. Harwood or his deputy advocate about these experiences. We were both unable to help them.

Two of those calling me wanted to report violations of law or rule. Five said they had evidence of utility imprudence. Imprudence is not a violation of law, and for this reason

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[3] http://sec.gov/enforcement-litigation/whistleblower-program
[4] http://nhtsa.gov/laws-regulations/whistleblower-program
[5] Click "View All" next to Whistleblower News at http://sec.gov/enforcement-litigation/whistleblower-program

Maine's Whistleblower Protection Act does not apply.[6] Imprudence does, however, raise rates and boost utility profits. For this reason, imprudence is a key standard used in utility ratemaking.

Today you will also hear from actual utility whistleblowers. These include Tyler Fehrman, who exposed a $61 million utility bribery scheme in Ohio, costing ratepayers over $1.2 billion. You will also hear from Paulo Silva, who has been working for many years to pursue concerns of Avangrid imprudence and bid-rigging -- which he charges led to over $500 million in avoidable charges to Maine and other ratepayers – all while defending himself against severe and extraordinary retaliation, potentially funded in part by Maine ratepayers, for speaking out.

We thank you for hearing from these selfless and courageous individuals with open heart and open ears.

3. Existing law fails to protect whistleblowers.

Contrary to the claims of corporate opponents to this bill, Maine utility whistleblowers lack protection under Maine law. This includes both Title 26, chapter 7, subchapter 5-B, the Whistleblowers' Protection Act, and Title 35-A, section 1316. Were existing laws adequate, Mr. Harwood and I could have helped those who contacted us.

Under both current laws cited above, a whistleblower is not protected unless they first report internally and then provide management a "reasonable" time to respond.[7] [8] Unfortunately, this "reasonable" time is also an open window for preemptive firing and retaliation, with zero protections, in an at-will state.

In other words, it is "heads the company wins, tails the employee loses." Retaliation is legal if it comes after an internal report yet before an external report. And it is also legal if it comes after an external report that was not preceded by an internal report. [9]

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[6] Title 26, chapter 7, subchapter 5-B, styled as the Whistleblowers' Protection Act, provides limited protection for reporting violations of law. It is most often utilized for violations of human rights law or labor law. Utility imprudence is different. It hurts customers but is not a violation of law or rule. For this reason, the Act fails those seeking to report imprudence.

[7] Title 26 MRSA §833, the Maine Whistleblower Protection Act, sub-2 (emphasis added): "(The protections of) Subsection 1 does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to a public body, *unless the employee has first brought the alleged violation, condition or practice to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practice*."

[8] Title 35-A, §1316, paragraph 3 (emphasis added): "This subsection does not apply… *unless the employee has first brought the subject matter of the testimony or information in writing to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable time to address the subject matter of the testimony or information*."

[9] *Ibid*.

4. The stakes are high – both for whistleblowers and for all utility customers.

What sort of legal retaliation might a Maine utility whistleblower experience? You will hear real-life examples today. Common industry tactics include the following:

1) blacklisting in the industry and being referred to in media statements as a "disgruntled former employee" to scare off potential future employers and clients;
2) expensive libel lawsuits, the utility's side of which may be funded by ratepayers; and
3) the loss of all severance and/or retirement benefits, due to non-disparagement and/or non-disclosure agreements in the employee contract.

Contrary to the claims of corporate opponents and as previously mentioned, the Maine Whistleblowers' Protection Act also fails to protect whistleblowers reporting utility imprudence. This is because imprudence is not a violation of law or rule.

Imprudence is incredibly serious. It is also at the heart of most allegations Mr. Harwood and I received. To provide an example: if a utility is found in an adjudicatory proceeding at the commission to have spent $500 million imprudently, its rates may be reduced by that amount, plus any associated profit. *Indeed, imprudence is the principal act of omission or commission by a utility that if detected, can reduce rates and protect utility customers.*

5. Sunshine is the best disinfectant – and the best medicine.

The reports of whistleblowers -- if substantiated by the commission in an adjudicatory case that lets the utility respond -- may lead to significant savings for utility customers. This is true even after the commission decides to issue an award, since the award may be only a percentage of the penalty or negative rate adjustment to the utility. The commission also anticipates no cost to implement this proposed program.

Better yet, based on the impressive SEC program track record cited above, the program proposed by L.D. 1963 will likely *deter and prevent* imprudence and violations to begin with. This path too will lead to lower rates and improved utility performance. As the saying goes: an ounce of prevention is worth a pound of cure.

6. Additional observations:

"Self-policing" is not working. The status quo scheme described as "self-policing" by opponents to the bill is failing us and is not a viable way to protect consumers or the environment. Too much is at stake in our gas, water and electricity utility sectors to depend on self-discipline by distant corporate managers.

COUs and ILECS could be exempted. Our Power would defer to the committee on removing ILECs and consumer-owned utilities from the proposed program. That said, these entities are unique and are not our focus of concern.

Concerns about "frivolous reports" are without merit. Like each federal program it is modeled on, this proposal provides for an investigation only under the evidentiary and due process standards of the law. Under the sponsor's amendment before you today, if a tip is made to the commission, staff will investigate only if they find the tip credible. Moreover, no penalty or negative rate adjustment will occur, except as it would under the law today. Utilities are experts at defending their prudence and compliance. They may also appeal a commission decision to the courts. Importantly, a whistleblower may receive a report only if, *but for* their report, the commission would have been unable to detect the imprudence or violation -- and even then, may receive only a small portion of what they have given to the rest of us.

The Executive Branch should have proactive input. Maine is fortunate to have a Governor who cares deeply about both consumer protection and utility accountability, and who deeply understands the law. This proposal can likely be made even better with her input. At a minimum, Our Power encourages this committee to seek the guidance of the Governor's Energy Office on the sponsor's amendment and alternative approaches, prior to crafting its final report.

Outside resources may also help. Should you have questions on the utility regulatory aspects of this proposal, the committee may want to invite Zoom comment at work session by Mark Lebel or another expert at the Regulatory Assistance Project. RAP is a nonpartisan consultant to policymakers, who you have invited in before to your work sessions. They do not advocate for or against legislation, but their expertise is generally available to consult on your request. Should the committee wish for expert opinions on the shortcomings of existing Maine whistleblower laws, Our Power recommends outreach to the National Whistleblower Center.

Concluding thoughts:

Our Power urges this committee to support the sponsor's amendment to LD 1963. It is a well-crafted step toward more robust regulation, and toward more cost-effective performance and compliance by Maine utilities.

Sincerely,

Seth Berry, Executive Director