Central Maine Power Company
Testimony in Opposition to LD 1646
An Act to Restore Local Ownership and Control of Maine's Power Delivery Systems

May 14, 2019

Chairman Lawrence, Chairman Berry, and members of the Energy, Utilities and Technology Committee;

My name is Catherine Connors and I live in Kennebunk. I am an attorney at Pierce Atwood LLP and I am before you today representing Central Maine Power Company ("CMP") in opposition to LD 1646, An Act to Restore Local Ownership and Control of Maine's Power Delivery Systems. I concentrate these written comments on some of the constitutional infirmities of the proposed legislation. In a nutshell, as explained below, because the legislation is unconstitutional and in many ways unclear, it will generate lengthy and complex litigation in which the State could end up, at a minimum, paying the utilities' attorney's fees in striking down the law. Even if portions of the law were found severable and remain intact, because the compensation to the owner of the seized utility assets clearly does not meet the constitutional measure, not only would the owner of the seized assets be entitled to its fees for pursuing the proper measure of compensation, but the Maine people would have to foot the bill for paying this difference, significantly in excess of the amount contemplated in the bill.

I. LD 1646 is unconstitutional under the Takings Clauses of the U.S. and Maine Constitutions.

Because the bill refers to a "purchase" of utility facilities, it is unclear whether the proposed legislation contemplates a voluntary transaction or an involuntary seizure. (This lack of clarity itself creates constitutional problems. *See infra*, § II.) Assuming that LD 1646 does contemplate involuntary seizure, such a seizure triggers the protections of the Takings Clauses of the U.S. and Maine Constitutions.

A. LD 1646 does not meet the exigency test.

For any taking to occur, as a threshold matter, there must be a public purpose. U.S. Const., amend. V, cl. 5. Maine additionally requires a public exigency. Me. Const., art. 1, § 21; *Blanchard v. Dep't of Transp.*, 2002 ME 96, ¶ 41, 798 A.2d 1119, 1128. If this purpose and exigency requirement is not met, then the law is struck down and the State cannot take the property at all. *See Bayberry Cove Children's Land Trust v. Town of Steuben*, 2018 ME 28. If there is a public purpose and exigency, then the property can be taken, but the affected property owner must be provided just compensation for the taking.

LD 1646 contains no legislative finding of exigency. *See Brown v. Warchalowski*, 471 A.2d. 1026, 1035 (Me. 1984) (Wathen, C.J., concurring) (noting a law is unconstitutional "without a finding of any public necessity or convenience.").

Any such finding would need to be rational, applying a three-part test: (1) "the taking was necessary; (2) the property interest was taken only to the extent necessary; and (3) the property is suitable for the particular public use for which it was taken." *Bayberry*, ¶ 9; *Blanchard*, 2002 ME 96, ¶ 43 (Saufley, CJ, dissenting), citing *Ace Ambulance Serv., Inc., v. City of Augusta* 337 A.2d 661, 663 (Me. 1975).

Others have or will testify as to the lack of a rational basis for the legislation. While no exigency finding is included, presumably the goal is to obtain greater reliability and/or lower rates. Others have explained how this cannot occur, and further, how regulatory oversight could be weakened through public ownership. Indeed, it appears that 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. § 4004.

In the absence of any benefit, transfer of ownership alone reflects no exigency. *See Carey v. Bliss*, 151 Mass. 364, 379-80, 25 N.E. 92 (1890); *The Boston Water Power Co. v. The Boston and Worcester Rail Road Corp.*, 40 Mass. 360, 393 (1839).[1]. LD 1646 provides that a "nongovernmental" entity shall operate the new utility, and all its employees shall be deemed "private." § 4003 (3), (4). The bonds to fund the seizure are not to be backed by the State. The ***only*** change effected by the legislation is that of ownership. Current Maine law requires, to show public need, a finding of inadequacy of current service. *See* 35 M.R.S. §§ 2102, 2105; *Standish Telephone Co. v. P.U.C.*, 499 A.2d 458, 459 (Me. 1985). At a minimum, some rational finding and explanation as to how the ownership transfer alone would address a need and benefit the people of Maine is required.

Further, the broad applicability of the law, and its lack of precision as to what property is being taken is inconsistent with the targeted requirement of the second criterion of the three-part exigency test. LD 1646 provides within a one-year period, which can be extended to two years, "all utility facilities in the State owned or operated or held for future use by any investor-owner transmission and distribution utility" must be "purchase[d]" at net book value by the newly created authority, along with any "other utility property [the authority] should determine such an acquisition to be in the interest of its customer-owners." § 4003(5). After that two-year period, the authority can take other "any utility facilities and any utility property" using the eminent domain procedure in Title 35-A, ch. 65. Setting aside the problem with the measure of compensation and other issues raised by this approach (*see infra*), it is unclear how there can be an exigency to take some but not all of vaguely defined assets, and only those not owned by existing consumer-owned utilities created either before or after the date of the chapter, with a different process and measure for compensation based solely on the timing of the seizure. § 4003(8).

[1] Massachusetts has a similar exigency requirement. (Part I, Art. X).

Finally, the Chapter 65 procedure referenced for the condemnation of utility facilities and property after one year (extendable to two years) only provides for review of damages, and not the propriety of the taking. *See* 35-A M.R.S. § 6505(2). An entity whose property is being taken must have an opportunity to challenge the taking on the basis that constitutional public use and exigency requirements have not been met.

B. LD 1646 does not meet the requirement for just compensation.

Even more clearly, the measure provided in the bill for compensating the owners of the seized assets does not meet constitutional requirements.

Under the Taking Clause, a condemning statute must designate the procedural means to obtain the necessary just compensation. *See Jordan v. Town of Canton,* 265 A.2d 96, 100 (Me. 1970). LD 1646 designates such a procedure for assets taken after the first year, extendable to two – chapter 65. But for the first-year seizures, the bill itself sets a measure for compensation: net book value.

As a threshold matter, it is irrational, and thus violates the exigency requirement and Due Process and Equal Protection Clauses of the U.S. and Maine Constitutions, to have the measure of compensation change based purely on timing. But the initial measure provided – net book value – is constitutionally deficient.

The compensation required under the Constitution must be the "exact equivalent" money worth of the value of the property taken. *Orono-Veazie Water District v. Penobscot County Water Co.*, 348 A.2d 249 (Me. 1975) (striking down act condemning utility property for failure to provide equivalent money worth).

The touchstone for just compensation is fair market value. *See Curtis v. Maine State Highway Commission,* 260 Me. 262, 266, 203 A.2d 451, 453 (1966). The test of fair market value is "the value of the [property] for its best and highest use at the time of the taking or in the foreseeable future." *Id.* The owner whose property is subject to a taking is "to be made whole insofar as money can compensate." *Id.* Three valuation methodologies commonly used alone or in combination are similar sales analysis, income or capitalization, and reproduction cost less compliance. *See Rangeley Water Co. v. Rangeley Water Dist.*, 1997 ME 32, ¶ 9, 691 A.2d 171, 175.

In contrast, net book value is a ratemaking concept, untethered to the constitutionally required fair market value touchstone:

> "The complete dissimilarity between rate-making concepts and the just or full compensation standards which govern eminent domain have resulted in rejection of attempts to equate rate-making with eminent domain as a basis for determining fair market value." *Dade County v. General Waterworks Corp.,* 267

> So.2d 633, 640 (Fla.1972) (citation omitted). The Water Company owned the line and used it in the provision of water service, thus entitling the company to compensation for the line when it was condemned.

Rangeley, 1997 ME 32, ¶ 19, 691 A.2d at 178. *Cf. CMP v. Town of Moscow*, 649 A.2d 320 (Me. 1994) (municipal assessors were not required, in valuing hydroelectric project for purposes of assessing property taxes, to accept "net book cost" assigned to project by Public Utility Commission (PUC) as property value for ratemaking purposes, but rather, could base assessment on combination of project's replacement value and value as a "going concern.").

Because a net book measure does not meet the "exact equivalent" compensation requirement, LD 1646 is clearly unconstitutional. The Law Court's decision in *Orono-Veazie Water District* is squarely on point.

Further, LD 1646's division between "facilities" and "property," included in an apparent effort to avoid paying compensation for the value of the seized utility as a whole, also runs afoul of the Taking Clause. *See Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc.*, 617 A.2d 291, 293 (N. J. Super. Ct. App. Div. 1992) ("It is settled that a franchise granted by the State in return for the performance of a public service, such as a public utility franchise, constitutes a property right." (citing *Frost v. Corporation Comm. of Oklahoma*, 278 U.S. 515 (1929); *New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U.S. 179 (1914); *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893).)

In *Brunswick & T. Water Dist. V. Maine Water Co.*, 99 Me. 371, 377, 59 A. 537, 539 (1904), the Court noted that for condemnation purposes, the property being taken consists of more that the physical assets and property rights, but value as a going concern as well. The State cannot simply cherry pick, without compensating for the loss of value of the property from which those assets have been severed. As the Law Court has stated in examining eminent domain rights given to a water district to condemn town utility property:

> The language of section 10 as painstakingly corelated [*sic*] with that of section 9 preponderates very appreciably to the conclusion that in section 10 the Legislature purposed to designate 'the entire plant, properties, rights,' etc. of the defendant rather than to denote 'all or part of the entire plant,' etc. Such is the abiding and persistent impression engendered. And were that objective reality not so, the contrary would be regrettable and grievous. An election accorded to the plaintiff to condemn selectively a portion of the defendants' franchises or assets in plaintiff's domain and to prescind at will from the remainder of such properties could be obviously productive of resultants very partial to the plaintiff and sacrificial or even crippling for the defendant whose license to function in plaintiff's territory has not been repealed.

East Boothbay Water Dist. v. Inhabitants of the Town of Boothbay Harbor, 158 Me. 32, 40, 177 A.2d 659, 663 (1962). *See id.*, 158 Me. at 41, 177 A.2d at 664 ("If the plaintiff elects to condemn it must appropriate and pay the fair and equitable worth of all the franchises and assets of defendant in plaintiff's territory with the single exception of defendant's corporate franchise."). *See also Merrill Trust Co. v. State,* 417 A.2d 435, 440 (Me. 1980) (just compensation includes not only the value of the part taken but the damages accruing to the residue, *i.e.*, severance damages).

In sum, the State cannot avoid paying for the entire value of the T&D utilities by attempting to distinguish between "facilities" and "property," and must pay just compensation, *i.e.* fair market value, for the whole.

Relatedly, to be constitutional, the taking and the amount paid must be reviewable by an impartial tribunal. *Kennebec*, 52 A. at 779. Under the process contemplated by LD 1646, the Law Court would not be setting the amount; nor would any impartial body. While the Bill references some sort of review by the Law Court, problematic in itself (*see infra*, § II), what is clear is that LD 1646 itself sets the amount of compensation to be paid – net book value – a level lower than constitutionally required.

II. LD 1646 violates the Due Process Clause of the U.S. and Maine Constitutions as well as the excess delegation provisions of the Maine Constitution.

L.D. 1646 suffers from a host of problems from a clarity perspective. As just a few illustrations:

- By use of the word "purchase" for the acquisition of the utility assets and property at net book value, does the bill only contemplate a voluntary transaction? Condemnation rights are also to be strictly construed. *In re Bangor-Hydro Co.,* 314 A.2d 800, 806 (Me. 1974) ("Statutes authorizing the taking of private property against the will of the owner must be construed strictly against the donee of the right. The power so granted is not to be extended beyond the plain, unmistakable meaning of the language used."). In *Mullens v. Union Power Co.* 122 W. Va. 179, 7 SE.2d 870 (1940), it was held that the authority given the city "to acquire" a utility system did not amount to either express or implied authority to take by eminent domain the properties of operating companies engaged in serving the public.

- Because all utility facilities are supposed to be acquired, what facilities could there be left to be acquired after the first one-year period (extendable to two)? Does this language mean that if the Law Court has not ruled on the propriety of the seizure within two years, the entire acquisition shifts to a ch. 65-type acquisition, with a different measure for compensation, with PUC oversight and rules preventing intrusion into existing service territories? Such a dichotomy, based solely on timing, as noted above, seems wholly irrational.

- The bill refers to Law Court review "in the same manner as an appeal taken from a judgment of the Superior Court in a civil action." § 4003(5)(B). But an appeal taken from a Superior Court judgment reviews fact finding and decision-making in an impartial lower tribunal. There is no such fact-finding mechanism included in the proposed legislation.

- A ch. 65 procedure involves proceedings before county commissioners relating to the assets within the borders of that county. Does this bill truly contemplate dozens of county-wide proceedings?

A law that is too vague violates principles of Due Process under both the U.S. and Maine Constitutions. *See Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 57, 896 A.2d 271, 286. When an unconstitutionally vague law bestows powers on a regulatory body, it also violates the Maine Constitution's Separation of Powers Clause. The Maine Constitution (unlike the U.S. Constitution) contains specific provisions regarding delegation of powers. Me. Const., art. III, Sections 1 and 2. The Law Court has held that, given this explicit inclusion of a Separation of Powers Clause, "the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government." *State v. Hunter*, 447 A.2d 797, 799.

Here, at some point, the reference in the bill to "eminent domain" suggests the delegation of a general power to condemn some utility assets. But the questions posed above, along with the opacity between the definition of what is "property" and what is a "facility" violates Due Process. The powers apparently bestowed upon the newly-created Authority, unconstrained by regulatory oversight by the Public Utilities Commission and infected with vague delegation of powers in the Bill, violates excessive delegation principles.

Finally, as a practical matter, at least as to CMP, not all the assets needed for its T&D delivery system to function properly are located within the State of Maine. But the State has no jurisdiction over and cannot condemn assets outside its borders. An attempt to seize property outside the borders of the State violates both the Due Process and Commerce Clauses. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1943) (under Due Process Clause, state may not extend the effect of its laws beyond its borders to as to destroy or impair rights elsewhere); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918).

III. LD 1646 violates the Equal Protection clauses of the Maine and U.S. Constitutions.

Because this is economic legislation, a rationality test applies. Some of the irrational aspects of the bill have already been noted. With respect to irrational disparate impact, the concern under the Equal Protection Clauses of the U.S. and Maine Constitutions, L.D. 1646 treats privately owned utilities disparately from "consumer-owned" transmission and distribution utilities based on no articulated or apparent rational basis.

In *Dickinson v. Maine Pub. Serv. Co.*, 233 A.2d 435 (Me. 1966), the Law Court considered the constitutionality of 1965 amendments to the Public Utility Code that purported to vest cooperatives with an exclusive franchise territory and other rights traditionally reserved to public utilities, but at the same time did not subject the cooperatives to any regulation and control over their rates and borrowings. The Law Court held that this violated the Equal Protection Clause:

> [W]hen the effect of legislation [is] to confer upon the cooperative territorial immunity without at the same time imposing upon it the same requirements with respect to non-discriminatory public service, regulation and control as are imposed upon all competing public utilities offering the identical service, the competitors were thereby deprived of equal protection of the laws.

Dickinson, 223 A.2d at 440.

IV. LD 1646 violates the Commerce Clause and Supremacy Clause of the U.S. Constitution.

Transmission lines in particular run across State borders. As such, they implicate interstate commerce, as well as the Federal Power Act ("FPA"). Under FPA, any transfer of assets subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") requires FERC approval. 16 U.S.C. § 824b.

Hence, to the extent LD 1646 contemplates automatic transfer of FERC-jurisdictional T&D assets upon Authority "purchase" or condemnation in a ch. 65 proceeding, the proposed legislation is preempted, violating the Supremacy Clause. Given the interrelated nature of the interstate power delivery system, the condemnation runs afoul of the Commerce Clause as well. *See City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 158 (Ct. App. 1985 (striking down a municipal condemnation under the Commerce Clause).

V. LD 1646 violates the Contract Clause

To the extent L.D. 1646 is deemed a contract with the State, including the right to serve exclusively absent a necessity finding under 35-A M.R.S. § 2102, those franchise rights are destroyed by the seizure of utility assets. Third-party contracts would also be impaired by such seizures. As such, the Contract Clause of the U.S. and Maine Constitutions are implicated. U.S. Const., Art. I, § 10; Me. Const., Art. I, § 11.

The federal courts apply a three-part test for violation of the Clause:

> First, the court will assess the degree of substantiality of the impairment of the contract. Second, if a substantial impairment has occurred, the court will inquire whether there is a significant and legitimate public purpose behind the legislation. Third, if such a purpose has been identified, the court will then determine whether or not the particular impairment is appropriate to the

> accomplishment of public purpose, in which regard the court will generally defer to the legislative judgment.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).

Seizing the assets needed to provide service obviously impairs the contracts substantially. The remaining two parts of the test raise the same issues as discussed with respect to the Takings Clause in terms of a rational legislative finding of necessity.

The Law Court, however, has applied a stricter test under Maine's counterpart to the Contract Clause: any legislation that lessens the value of a contract to the parties, or lessens the efficacy of the means by which a party can enforce the contract, impairs the obligation, and is therefore unconstitutional. *Portland Savings Bank. v. Landry*, 372 A.2d 573, 576 (Me. 1977). *See, e.g., Canal National Bank v. SAD No. 3*, 160 Me. 309, 203 A.2d 734 (1964). While Maine law has converged in some respects with federal law as to the Contract Clause analysis, the decision in *Landry* has never been overruled. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, n. 7, 856 A.2d 1183.

VI. Other legal considerations

Aside from the substantive constitutional deficiencies in L.D. 1646, procedurally, a constitutional challenge to LD 1646 would be pursued under 42 U.S.C. § 1983, exposing the State to paying the plaintiff's attorneys fees when the plaintiff utility prevails. 42 U.S.C. § 1988. Typically, utility condemnations take many years of litigation, not only creating fees potentially in the millions for both sides of the dispute, but easily exceeding the one-year, extendable to one more year, initial period for asset seizure contemplated in the bill.[2] As noted above, it is entirely unclear what would happen once that two-year period has expired, creating further confusion, delay and concomitant mounting fees.

Notably, if the utility whose assets are seized ultimately prevails in court in arguing that the taking was illegal or the compensation mandated by the bill on its face is too small, aside from paying attorney's fees, if after seeing the actual cost of the seizure, the State wanted to change its mind about the taking, even assuming that were statutorily possible – the bill does not so provide – it could have to pay compensation and fees for the temporary taking. There would be no non-State-backed bonding mechanism to pay for those attorney's fees and compensation – the State itself, and thus Maine taxpayers, would be liable and have to pay these sums.[3]

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[2] *E.g.* Sacramento Municipal Utility District (23 years); Long Island Lighting Company (13 years); Las Cruces (NM) / El Paso Electric (12 years); City of Nashua (NH) / Pennichuck Water Company (10 years); City of Boulder (CO) / Xcel Energy (9 years and counting).

[3] 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. *E.g.*, in the City of Missoula's acquisition of Mountain Water, the City acquired the water utility at almost twice the price originally projected and was separately ordered to pay certain litigation costs. The City of Nashua calculated $85 million to acquire Pennichuck

Indeed, if LD 1646 survived legal scrutiny with only the infirmity found by the court the legislation's measure for just compensation, which a court found severable and thus struck, once property has been taken, there is no going back. Under such circumstances, the people of Maine would have to pay whatever an impartial tribunal found to be the actual fair market value of the seized utilities as going concerns, far above net book value – no matter how much the purchase and how high the debt service to pay for these multi-billion dollar seizures would raise their rates, given that the bill requires a complete pass-through of all of the Authority's borrowing costs.

In sum, I respectfully encourage the Committee to vote LD 1646 ought not to pass.

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 1646 would far exceed these amounts, not only in quantitative terms, given the size of the taking, but in multiples of the originally contemplated below market net book value cost.