



Kathleen Newman, Director of Government Affairs

LD 1223, An Act to Clarify Cost Allocations and Insurance in the Joint Use of Public Utility Equipment

May 10, 2023

Testifying: Ought not to Pass

Senator Lawrence, Representative Zeigler, Members of the Joint Standing Committee on Energy, Utilities and Technology, my name is Kathleen Newman, presenting testimony in opposition to LD 1223 – An Act to Clarify Cost Allocations and Insurance in the Joint Use of Public Utility Equipment.

This seeks to give municipalities seeking to attach municipal broadband, telecommunications lines, and other facilities to utility poles a competitive advantage over all other entities attaching to utility poles by capping the insurance requirements for municipalities and shifting the risk of loss associated with their facilities to CMP's ratepaying customers and other attaching entities.

Recently, the Town of Somerville filed a Rapid Response Complaint with the Public Utilities Commission seeking to force Central Maine Power and other pole owners to accept the same insurance provisions proposed by LD 1223. The Commission rejected the Town's Complaint, concluding that the Town's proposal violated both statute (35-A M.R.S. § 711) and regulation (Maine Public Utilities Commission Rule Chapter 880, § 2) requiring utility pole owners to provide non-discriminatory access to all entities seeking to attach their facilities to utility poles¹. Just like the Commission, this committee should also conclude that the insurance provisions proposed by LD 1223 would give municipalities an unfair advantage over other competitors in the marketplace.

As an owner of utility poles, and consistent with the requirement of non-discriminatory access, CMP, like other pole owners, uses a standard pole attachment agreement with all entities attaching facilities to CMP's poles, which requires, among other things, that all entities attaching facilities to the utility poles obtain and carry at least \$5,000,000 in general liability insurance to cover the significant risks of personal injury, death, and property damage associated with attaching facilities to utility poles. Those risks include, but are not limited to, the risks associated with installing facilities in close proximity to electric lines and the risk that facilities could fail and fall to the ground.

Rather than agree to procure the same insurance that all other attaching entities obtain, the bill seeks to cap the potential liability of municipalities attaching facilities to utility poles at \$400,000

¹ MPUC Docket No. 2023-00063, RRPT Decision, March 17, 2023

based on section 8105 of the Maine Tort Claims Act ("MTCA), even though the MTCA expressly allows municipalities to purchase insurance above the \$400,000 limit (14 M.R.S. § 8116). Allowing municipal attachers to utility poles to cap their liability at \$400,000 will shift the burden and risk associated with personal injury, death, and property damage claims onto pole owners and other entities attaching to poles, particularly in high value claims where \$400,000 may be insufficient to cover an injured party's injuries. It is common practice for claimants and litigants to assert claims against other parties when the responsible party's liability is capped. If this risk is shifted, then it is likely that the insurance costs for pole owners and other entities attaching to poles will increase.

While proponents of LD 1223 will claim that this risk is minimized by the requirement that a municipality's contractor working on utility poles carry the minimum coverage required by the pole owner and names the municipality as an additional insured, that claim is misleading. First, it would be highly unusual for the contractor's insurance to provide insurance coverage for claims that do not arise from the contractor's actions; this means that if a claim does not arise from the contractor's actions, or if the contractor's insurer takes the position that there is no coverage, then the municipality would only have \$400,000 available to compensate an injured party in a high value claim. Second, if the municipality's contractor terminated their agreement with the municipality and the municipality could not find a new contractor, then there is a risk that the Town would only have \$400,000 available to compensate an injured party. Finally, it appears the proponents of this bill are conflating "additional insured" status with a party's status as an insurance "certificate holder." A certificate holder is simply provided with proof of insurance, while a named additional insured is entitled to coverage under an insurance policy. Notably, in the aforementioned Rapid Response Complaint before the Commission, when the Town of Somerville proposed the requirement that its contractor's insurance grant additional insured status to the town and CMP, the contractor's insurer offered to make the Town and CMP "certificate holders" under the policy.

It is simply good public policy to require those who own facilities attached to utility poles to be responsible for the risks associated with their facilities. LD 1223 would allow municipalities to avoid that responsibility, shift their risk onto other pole owners and attachers, and give municipalities an unfair competitive advantage.

Thank you for your consideration.