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M E M O R A N D U M

TO: Parties Interested in LD 1708

FROM: Jared des Rosiers, Joshua Dunlap, Jonathan Block & Kayla Grant

RE: Analysis of LD 1708 – An Act to Create the Pine Tree Power Company, a Nonprofit Utility to Deliver Lower Rates, Reliability, and Local Control for Maine Energy Independence

DATE: May 27, 2021

Analysis of LD 1708 - An Act to Create Pine Tree Power Company, a Nonprofit Utility, to Deliver Lower Rates, Reliability and Local Control for Maine Energy Independence

The following discussion provides a section by section summary and analysis of LD 1708.

Sec.1. 5 MRSA § 12004-G, sub-§ 36

A. Description

5 MRSA § 12004-G sets the compensation for members of various boards, commissions, and committees. The Bill proposes to add a subsection for the Pine Tree Power Company Board, setting its members' compensation to $110/day and expenses.

B. Key Issues/Questions

For a statewide Company that will provide service to most Mainers and have annual revenues approaching $800 million, is $110/Day ($13.75/hr for an 8 hour day) likely to attract qualified candidates to serve as elected/voting members or advisory members? This is particularly so during the multi-year phase where the Company is being formed, litigating the purchase price and terms, retaining the original third-party operator, and then executing the transfer and commencement of operations, when the demands on, and public scrutiny of, the board will be intense.

Sec.2. through Sec.4. 21-A MRSA § 354, sub § 5

A. Description

21-A MRSA § 354 describes the process and requirements for nomination petitions. Section 4 of the Bill proposes to add a subsection under the subsection governing the number of signatures required for a nomination petition to add that a nomination petition for a candidate for membership on the Pine Tree Power Company board must be signed by at least 300 and not more than 400 voters. Sections 2 and 3 of the Bill propose administrative modifications to existing subsections to accommodate the addition of the new paragraph pertaining to Pine Tree Power Company.

B. Key Issues/Questions

Are the applicable rules sufficient for candidates for this board? At the time of closing, the board will be responsible for a Company with $800 million in annual sales and contracts annually for hundreds of millions of dollars in materials (transmission and distribution poles, conductors, transformers and other equipment, vehicles, computer hardware and software, etc.) and services for, among other things, vegetation management, engineering and construction services, IT support, etc. Will there be any restrictions on vendors, suppliers, contractors and consultants being able to support the campaigns of board members? Likewise, are there concerns that the campaigns of board members will draw significant contributions from special interests with financial or other interests in the operations, investments and policy decisions of Pine Tree Power? *See* PUC Testimony at 4. For example, in the most recent elections for the board members controlling the Nebraska Public Power District, record-breaking campaign contributions have been made by out-of-state donors, environmental groups, large industrial customers, and other groups interested in influencing the agenda of the board.

Note that nomination petitions for membership on the Pine Tree Power Company board would require more voters than a candidate for the Senate or House of Representatives, but the same number of voters for a nomination petition for a candidate for county office.

Sec.5. 35-A MRSA § 1511-A

A. Description

The Bill proposes to add a new section under Title 35-A, Chapter 15 pertaining to sanctions and administrative penalties. The new 35-A MRSA § 1511-A authorizes the Commission to evaluate the "fitness" of a utility to serve and require the sale of the utility if certain criteria are met. A T&D utility with 50,000 or more customers will be considered unfit to serve and will be sold if, within the previous five years, the T&D utility has met two or more of the following criteria: 1) has repeatedly been rated in the lowest decile of utilities of a similar size for customer satisfaction on a reputable national survey of utility business or retail customers; 2) has repeatedly reported reliability, with or without major event days, in the lowest decile of utilities of a similar size in the country; and 3) has repeatedly charged customers residential delivery rates in the highest decile among utilities of a similar size in the country.

B. Key Issues/Questions

This provision is drafted to apply only to CMP and Versant Power.

It applies retrospectively to the last five years, and the occurrence of any two of the listed events over the last five years would render a utility unfit to serve and require its sale. A five-year period is a lengthy compliance period.

While facially objective, the criteria upon which the PUC is to make the fitness to serve determination appear flawed and biased in several respects.

The criteria, which relate to customer satisfaction, reliability, and cost, are suspect as unduly vague. It is entirely unclear as to what it means to have "repeatedly" reported reliability that is in the lowest decile of utilities of a similar size, or to have "repeatedly" charged rates in the highest decile among utilities of a similar size, or to "repeatedly" be

ranked in a certain decile on customer satisfaction. These vagueness issues create due process concerns. *See Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 57, 896 A.2d 271, 286.

The criterion with respect to customer satisfaction relies on the results of "reputable national surveys" with no guidance on what is necessary for a survey to be sufficiently reliable or reputable. In effect, this provision would require the PUC to defer to the findings of JD Power in deciding whether CMP and Versant Power are unfit to continue to provide service. This criterion would unlawfully delegate to private survey organizations, not subject to scrutiny under Maine law, the power to determine a utility's fitness to serve. *See Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 423 (1973).

The criterion related to reliability calls for a comparison of utilities across the country, with no allowance for differences in weather or other differences unique to a service area. This criterion also considers reliability without major event days. If major event days are not considered, this could also create an incongruent comparison of reliability issues unique to New England with utilities in other parts of the country that may have fewer event days.

And, the criterion regarding residential delivery rates is as compared with the rest of the country, and not particular to New England. This could cause an unfair comparison of rates in New England, where rates are historically higher for a variety of legitimate reasons, including labor costs, the overall cost of living, and the level and extent of applicable state regulation, with other parts of the country with lower rates.

Finally, the PUC has existing oversight of reliability and customer service concerns, and has the authority to penalize utilities for inadequate service, including rescission of a utility's authorization to provide service. *See* Testimony of Versant Power at 3; *See* PUC Testimony at 4.

Sec.6. through Sec.8. 35-A MRSA § 3501, sub § 1

A. Description

35-A MRSA § 3501 defines "consumer-owned transmission and distribution utility." Section 8 of the Bill proposes to add "Pine Tree Power Company" to the definition. Sections 6 and 7 of the Bill propose administrative modifications to existing subsections to accommodate the addition of the new paragraph pertaining to Pine Tree Power Company.

B. Key Issues/Questions

How is the Company's designation as a consumer-owned T&D reconciled with the Bill's proposal to subject the Company to certain sections of Title 35-A in the same manner as an investor-owned T&D utility, when consumer-owned and investor-owned T&Ds are sometimes subject to different requirements under that Title?

Sec.9. 35-A MRSA § 3502, first para.

A. Description

35-A MRSA § 3502 establishes the process for consumer-owned T&D utilities to change rates. The Bill proposes to add language excepting Pine Tree Power Company from the requirements of this section.

B. Key Issues/Questions

This provision gives greater leeway for other consumer-owned T&D utilities to set their rates, with limited PUC review or oversight, within certain bounds. By excepting Pine Tree Power Company from this provision, the new entity will at least on paper have to pursue changes in rates in the same way that investor-owned T&D utilities do under the existing statutes and PUC rules governing rate cases. Whether the PUC will actually apply its ratemaking and investigatory powers with respect to the new consumer-owned utility with a politically elected board is questionable, for the reasons discussed in the retired PUC Commissioners' testimony. The tendency of many government-controlled utilities is to under-invest in order to keep rates low. Should this happen with Pine Tree Power, the PUC may have no incentive to challenge or alter these decisions, as doing so likely will result in higher rates for customers and therefore be politically unpopular.

Sec.10. 35-A MRSA c. 40

The Bill proposes to add a new Chapter 40 under Title 35-A, "Pine Tree Power Company."

a. §4001. Definitions.

A. Description

Section 4001 defines various terms used throughout the remainder of Chapter 40.

"Acquired utility" means an investor-owned T&D utility whose facilities or property are purchased or intended for purchase pursuant to this chapter.

"Cost of Service" means the total amount that must be collected by the Company to recover its costs but does not include any return on capital investment unless a return is required as security for debt service.

"Customer-owner" means a person to whom the Company delivers electricity.

"Utility Facility" means an item of plant used and useful in providing T&D utility service and includes, but is not limited to, transmission and distribution lines, office buildings, networks, vehicles and equipment.

"Utility Property" means any tangible or intangible asset, liability, obligation, plan, proposal, share, agreement or interest of a utility; any facility, asset or enterprise in development or planning by the utility as of January 1, 2020; and, without limitation, the entire utility and any part or portion of the utility.

B. Key Issues/Questions

"Cost of Service"

- If no return on capital investment can be included in rates, the suggestion made by some supporters of the Bill that the Company could set transmission rates for Pool Transmission Facilities recovered through Regional Network Service rates from across New England based on an imputed level of equity and therefore at a level that is greater than the cost of service determined by the applicable cost of

debt would seem to go beyond the Company's statutory authority. The Company could not charge customer-owners a rate that exceeds its cost of service.

"Utility Facility"

- Under § 4003(5), the Company must buy these assets.
- "Utility Facility" is also defined under 35-A MRSA § 3131(6). The definition varies only slightly. Is the variation from the existing definition appropriate?

"Utility Property"

- This includes assets, proposals, agreements and projects in development as of January 1, 2020, such as NECEC Transmission LLC's New England Clean Energy Connect (NECEC) transmission project. Under § 4003(5), the Company "may," but is not required, to buy these assets. The different treatment of utility facilities and utility property raises constitutional issues discussed below and in Joshua Dunlap's Testimony in Opposition to LD 1708.

b. § 4002. Pine Tree Power Company established; board members.

A. Description

Section 4002 sets forth the goals and purpose of the Pine Tree Power Company and establishes the composition of the board, the nomination process, board member terms, what constitutes a quorum, designation of chair and vice-chair, and the votes needed for the Company to act.

B. Key Issues/Questions

1. Company purposes

The Bill sets forth several purposes for the Company to accomplish using its "access to low-cost capital and its ability to manage the electric transmission and distribution system in a manner that is not focused on ensuring shareholder profits." Some of the listed purposes include, among others: 1) safe, affordable and reliable delivery of electricity; 2) timely and accurate billing, metering, and customer service; 3) an open and competitive platform for development and deployment of renewable generation, storage, and other technologies; and 4) to assist the State in achieving its climate action plan goals; 5) to improve the State's internet connectivity.

2. Governance; board

The Bill proposes that the board be comprised of 11 members, seven of whom are elected voting members and four of whom are expert advisory members. The elected members must be legal citizens of the United States for at least five years, be at least 21 years of age, be a legal Maine resident for at least one year, and have lived in the area the member represents as provided in this provision for at least three months. The Bill assigns each voting member of the board five senate districts.

- Are the qualification requirements sufficient for participation on the Company's board given the size and complexity of its operations and governance? *See* PUC

Testimony at 4 ("boards with more expertise have the advantage of enabling detailed oversight and accountability on specific aspects of the utility's work.").

The Bill states that candidates for election to the board are eligible for funding through the Maine Clean Election Act, in amounts and under terms commensurate with those for candidates for the State Senate. The Bill directs the Commission on Governmental Ethics and Election Practices, established under Title 5, section 12004-G, subsection 33, to adopt rules implementing this requirement. The rules must include, at a minimum, procedures for qualifying and certification and for allocation of distributions from the fund and other provisions necessary to ensure consistency with the provisions of the Maine Clean Election Act.

- By when does the Commission on Governmental Ethics and Election Practices need to promulgate these rules?

- Will the rules be subject to notice and comment procedures?

The Bill proposes that the nomination and election of the elected and voting members of the board are governed by the provisions of Title 21-A governing nonpartisan elections for county office other than county commissioner or county charter commission member, except that the determination of the elections is governed by Title 21-A, section 723-A. Title 21-A, section 723-A establishes the process for determining a winner in an election for an office elected by ranked-choice voting.

- How does the process under Title 21-A, section 723-A align with the nomination by petition process and the requisite number of voters?

The Bill proposes that the Secretary of State adopt rules governing the election of members of the board and shall consult with the commission in developing the rules. The rules are considered "routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A."

- Routine technical rules are "procedural rules that establish standards of practice or procedure for the conduct of business before an agency and any other rules that are not major substantive rules . . . . Routine technical rules include, but are not limited to, forms prescribed by an agency; they do not include fees established by an agency except fees established or amended by agency rule that are below a cap or within a range established by statute." Routine technical rules are subject to the rule-making requirements of subchapter II only.

- What is the purpose and expected contribution that the PUC can provide the Secretary of State in establishing election rules for the board positions?

- Is it appropriate for the Commission to be involved in any way in the election process to determine the leaders of the Company, which will be subject to the Commission's regulatory oversight?

The Bill proposes to select four expert advisory members to serve on the board. The advisory members must "collectively possess expertise and experience across the following 4 areas: 1) utility law, management, regulation or finance; 2) clean energy and the environment; 3) the concerns of utility employees; and 4) the concerns of electricity consumers."

- The expertise and experience requirements do not consider years of experience or degree requirements.

- Expertise requirements for advisory members do not reference expertise regarding other issues of importance to the operation of Maine's T&D systems, including reliability, generation, FERC and NERC compliance, cybersecurity and ISO/RTO participation and markets.

- What criteria does an expert advisory member need to satisfy to be considered an expert in "concerns of utility employees" or "concerns of electricity consumers"?

- Is the intent of this provision that each one of the four advisory members will have expertise and experience in one of the four identified areas, such that there will effectively be an advisory member "seat" on the board for each of the identified areas, and no others?

3. Term of office

The Bill proposes to elect voting members of the board for six-year terms and expert advisory members of the board for four-year terms. Voting members will serve from December 1 to November 30, and expert advisory members will serve from February 1 to January 31.

- Are these term-lengths appropriate? Are they sufficiently long to ensure that the board's decision-making is not focused on short-term results and that the board members are not regularly concerned with re-election as they direct and lead the Company. Section 8 of the Bill, discussed below, states that these terms will be staggered.

The Bill proposes that a majority of elected, voting members will declare a vacancy on the board upon a member's resignation, death, or incapacitation, in the event a member is absent without leave of the chair for at least half of all board meetings held in a 180-day period or in the event of a member's gross and continual neglect of duty.

- What is considered a gross and continual neglect of duty?

If there is a vacancy on the board of an expert advisory member, it must be filled within 180 days in the same manner as "subsection 1" and the person selected to fill the vacancy must serve for the remainder of the unexpired term of the member whose vacancy the person is filling.

- This provision references subsection 1. Subsection 2 contains the procedure for selecting expert advisory members of the board. It is presumed that is the intended cross reference.

- What happens if the vacancy is not filled within 180 days?

If there is a vacancy on the board of an elected, voting member, the board must notify the Governor and the vacancy must be filled within 180 days in the same manner as for a State Senator under Title 21-A, sections 366 and 381.

- Title 21-A, section 366 provides for "special elections." Will the State be responsible for the costs of any necessary special election to fill a vacancy? If not, what entity will pay for any such special election?

- Title 21-A, section 381 provides the procedure for when there is a vacancy in the office of State Senator. In such a case, the Governor issues a proclamation declaring the vacancy and ordering a special election. The Governor will order the appropriate political committees to meet and set the deadline for choosing nominees, in compliance with the procedure outlined in section 363 (which contains the process for choosing candidates and nominees).

    - How should the applicable committees choose a "qualified person" to fill the vacancy, given the complexity of the Company's operations? Are the criteria the same as set forth in § 4002(2)?

- What happens if the vacancy is not filled within 180 days?

4. Quorum and chair

Four elected, voting members of the board constitute a majority and a quorum. The board will elect from its voting members a chair and vice-chair. The vice-chair serves as acting chair in the absence of the chair.

5. Voting

All decisions of the board, unless otherwise provided, must be made by a majority of the elected, voting members.

6. Bylaws; due diligence

The board must adopt bylaws, conduct due diligence, and develop a transition plan and business plan prior to making a purchase price offer for any utility facility or utility property.

- What will the transition and business plan entail?

- Is there a time by which these plans must be in place?

- Will the transition plan business plan be subject to review and approval by the PUC?

7. Board review

Four years after the first meeting of the board, the board must review the effectiveness of the Company's governance structure and report to the joint standing committee of the Legislature with jurisdiction over energy and utilities matters the outcome of this review. The report may suggest necessary changes to the governance structure of the Company. The committee may report out legislation pertaining to the recommendations in the report.

c. § 4003. Powers and duties; acquisition of utility facilities and utility property.

1. Powers; generally.

This provision states that the Company is a consumer-owned T&D and has all the powers and duties of a T&D utility within the service territories of the investor-owned T&D utilities whose utility facilities it acquires.

2. Limits on company; generating property.

This provision states that the Company may not own or operate a generating source or purchase electric capacity or energy from a generating source, except as the Commission may approve in order to allow the Company to maintain or improve system reliability.

- The prohibition on purchasing electric capacity or energy must be reconciled with the Company's obligation to participation in PUC procurements of renewable energy or capacity as required in Section 4003(10)(B) as discussed below.

3. Operations.

This provision requires the Company to contract by means of a competitive public solicitation the services of a third-party operator to run the Company. The contracted for services are to include "cost-effective, private sector operations, maintenance, customer accounts management and customer service and information" and to assist in "regulatory affairs, capital planning and administrative services."

- The Bill provides little guidance on the qualifications of the operator or the expectations and terms of an operator agreement, which is likely to be a contract worth hundreds of millions of dollars, instead granting the board broad discretion to select the operator. This provision is not clear as to whether the operator may provide other services, such as engineering and legal, not enumerated in the provision, or whether those services must be provided directly by the Company. The provision also includes no reference to incentive structures or benchmarks or standards for performance.

- As explained by Versant in its testimony, the operator will likely be a private company with shareholders, which will require a profit. This will presumably defeat the purpose of LD 1708, by hiring the same employees of the utilities and simply paying a different company a profit for operating the system. It is also possible the Company (and thus, customers) will have to pay a premium to attract a qualified operator. *See* Versant Testimony at 3-4.

- The Bill also provides little guidance on the timing and process for the solicitation of the operator and necessity of, duration or expectations for a transitional period where the operator works with the investor-owned T&D utilities to ensure a seamless transfer of operational control.

- The Bill also does not specify the minimum term of the operator agreement, whether the agreement would be subject to PUC review and approval, or the frequency with which the board must solicit for operational services in the future.

4. Operator employees.

The operator must hire any person who was an employee of the investor-owned T&D at the time the Company acquired the T&D and who was a qualified, nonexempt employee subject to collective bargaining agreements of the T&D. The persons hired by the operator are considered private employees with all the rights and responsibilities of private employees. The operator is required to honor and maintain the terms of any collective bargaining agreements in place at the time of the acquisition. When two or more such agreements exist, the operator must maintain the higher of the wages, salaries, and benefits. The operator shall also assume all retirement benefit obligations to the workers and retirees of the acquired utility, unless these obligations have remained with the acquired utility, its corporate parent or a pension plan trust.

- There is no reference to the "exempt" non-union employees of the T&D utilities or any protection for them, which includes management and support staff, presumable meaning that some or all of these employees, who number in the hundreds, are not expected to be retained by the opreator. There is a retention bonus of up to 10% provided to non-exempt union employees over two years. The operator is only obligated to maintain existing collective bargaining agreements at the time of the transfer. After that, the Company only needs to give preference to operators that propose to maintain or improve collective bargaining agreement terms.

- The explicit reference to the retained non-exempt employees being "private employees" rather than public employees is undoubtedly a response to the point that public employees are prohibited from striking and taking other labor related actions under Maine law. However, this provision is likely legally ineffective and the employees of the operator hired to operate the T&D systems for Pine Tree Power would be found to be "public employees" under federal and state law. The operator would not be an employer subject to the National Labor Relations Act (NLRA), as it will be responsible to elected officials on the Company's board. 29 U.S.C. § 152(2); *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600, 605 (1971). As such, the employees of the operator would not have rights under the NLRA and instead would be subject to Maine law governing labor relations for public employees. *See* 26 M.R.S. § 962(7)(b)(2); *Baker Bus Serv., Inc. v. Keith*, 416 A.2d 727, 730-31 (Me. 1980). Maine law precludes public employees from striking. *See* 26 M.R.*S* § 964(2). This issue is described at greater length in Joshua Dunlap's Testimony in Opposition to LD 1708.

- Even if the union employees are found to be private employees subject to the NRLA, the provisions of the Bill mandating the terms of the collective bargaining agreement that the operator must comply with will likely be pre-empted under federal law, as discussed in Joshua Dunlap's Testimony in Opposition to LD 1708.

- The obligation that the operator assume all of the retirement benefit obligations of at least all of the workers (and related retirees) of the acquired utility that must be hired by the operator would place a significant, long term liability on the operator, which may limit the interest of third-party operators from seeking this engagement and/or result in significantly higher charges for

the operations services. *See* Versant Testimony at 3-4 (explaining the lack of qualified candidates to serve in technical roles and potential premium to pay an operator).

- Similarly, requiring the operator to hire specific employees at specific salaries may be viewed as overly restrictive and deter entities from bidding to serve as operator. *See* PUC Testimony at 3.

- Given that the minimum term of the operations agreement is not established and given the likelihood that the Company will periodically conduct future solicitations for the operator, it is quite possible that the operator will periodically change. In that case, this responsibility will have to pass between operators, which could create significant complexity and uncertainty in the selection of the operator and the provision of retirement benefits to the employees and retirees of the acquired utility. *See* IBEW Testimony at 2 (explaining the uncertainty of delegating responsibility for retirement benefits to a selected operator). The (potentially repeated) transfer of these retirement obligations also creates the risk that the benefit plans will be underfunded over time, exposing the covered workers and retirees to the risk that their promised retirement benefits will not be paid when due. Concerns with the underfunding of retirement benefit obligations due the employees and retirees of the Long Island Power Authority have arisen after the transfer of operational authority between National Grid and PSEG.

5. Acquisition of utility facilities and utility property.

This is the key provision which requires the Company to purchase (or acquire by eminent domain) all utility facilities from all Maine investor-owned T&D utilities. The provision authorizes but does not require Company to purchase (or acquire by eminent domain) some or all other "utility property."

- The definition of utility facilities would include the operating assets of CMP, Versant Power as well as Maine Electric Power Company (MEPCO) and Chester SVC, which are all Maine investor-owned T&D utilities.

- The requirement that the Company purchase all utility facilities would also include the operating assets of NECEC Transmission LLC, if the NECEC transmission project is in service. The option for the Company to purchase other "utility property" would include assets related to the NECEC project before it commences service and other projects in development or assets held for future development by the T&D utilities.

- As the PUC pointed out in its testimony, the Bill does not require the Company to acquire the utilities' net energy billing agreements and long-term contracts.

This Section requires the board to finance purchases through issuance of debt under Title 35-A Chapter 9.

- The board's financing of purchases through issuance of debt would be subject to PUC approval.

- What oversight the PUC will practically provide is questionable for the reasons discussed in the retired PUC commissioners' testimony. If the politically-elected board decides to issue additional debt to cover expenses, will the PUC actually push back? Conversely, if the board refuses to incur additional debt to cover investments needed for reliability purposes or to achieve Maine's energy policy objectives, such as decarbonization or electrification, will the Commission have the political will to force such expenditures and in turn higher rates on the Company's customer-owners?

This Section specifies the timeline for the Company to make an offer to existing investor-owned T&Ds and for the T&Ds to dispute or counter the offer.

- Disputes concerning the offer price are to be litigated before the Maine Superior Court, Kennebec County, which is authorized to appoint one or more referees with relevant experience to determine a recommended purchase price for the utility facilities and property. Any decision of the Superior Court is appealable to the Maine Law Court.

- This subsection puts the onus on the investor-owned T&Ds to start the litigation concerning the purchase price. If the T&Ds do not file a petition in the Superior Court challenging the price, then the Company may use eminent domain to take the utility facilities and property using the existing eminent domain provisions in Title 35-A, chapter 65.

- The eminent domain provisions in Title 35-A, chapter 65 would require the Company to make filings identifying the property to be seized with the county commissioners in every Maine county in which property is to be seized. The threat of litigating the purchase price in every county before the county commissioners appears intended to force the T&Ds to start an action in Superior Court.

- This provision also seeks to compel the investor-owned T&Ds to timely seek all necessary approvals, including FERC approvals, to transfer the utility facilities and property to the Company and gives authority to the PUC to oversee and compel the T&Ds to seek such approvals.

- Whether state law can compel actions under federal law raises pre-emption issues under the Federal Power Act.

- This provision also authorizes the PUC to (1) impose conditions on the acquisition of all utility facilities and property in Maine owned or operated or held for future use by any investor-owned T&D utility to protect the public interest during the period between the effective date of the Bill and the date on which ownership and control are assumed by the Company and (2) take all necessary steps to ensure the investor-owned T&D utilities fully and cost-effectively cooperate with the Company during the transition.

- It is reasonable to expect that the investor-owned T&Ds would slow their investments in the T&D systems during this transition period. This slowdown could delay or imperil achievement of Maine's clean energy and climate change objectives.

This section of LD 1708 triggers the protections of the Takings Clauses of the U.S. and Maine Constitutions, both of which prohibit the taking of private property without just compensation. This issue is discussed in detail in Joshua Dunlap's Testimony in Opposition to LD 1708. In brief, the Takings Clause issues raised by this section are as follows:

- For any taking to lawfully occur, there must be both a public purpose and public exigency. *Blanchard v. Dep't of Transp*., 2002 ME 96, ¶ 27, 798 A.2d 1119. Absent public purpose and exigency, then the law must be struck down. If there is a public purpose and exigency, then the property can be taken, but the affected property owner must be provided just compensation.

- The Bill includes no finding of a public exigency. Such a finding requires a showing that the taking was necessary and that the property interest was taken only to the extent necessary.

  - Under Maine law, a finding of inadequacy of service is necessary to show public need. *See* 35 M.R.S. §§ 2102, 2105; *Standish Telephone Co. v. P.U.C.*, 499 A.2d 458, 462 (Me. 1985). A taking will not result in greater reliability and/or lower rates, and regulatory oversight could be weakened through public ownership. In the absence of any benefit to the public, transferring ownership alone reflects no public exigency.

  - Even if there were a public need for the taking, the Bill is not adequately targeted. It is unclear how there can be an exigency to take some but not all utility assets – *i.e.*, take all "utility facilities" but not all "utility property" - and only those not owned by consumer-owned utilities.

- Even if the taking is permissible, LD 1708 does not allow for just compensation. For the measure of compensation to be "just" under the Constitution, the property owner must be provided the "exact equivalent" of the monetary worth of the value of the property taken. *Orono-Veazie Water District v. Penobscot County Water Co.*, 348 A.2d 249 (Me. 1975)

  - 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. *Brunswick & T. Water Dist. v. Maine Water Co.,* 99 Me. 371, 59 A. 537 (1904). Thus, compensation must be made for the going concern as a whole. *East Boothbay Water Dist. v. Inhabitants of the Town of Boothbay Harbor,* 158 Me. 32, 177 A.2d 659 (1962).

  - The distinction in LD 1708 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 State cannot avoid paying for the entire value of the T&D utilities, and must pay just compensation for the whole.

  - The potential treatment of investor-owned T&D's retirement benefit plans applicable to its exempt, non-union employees and other

existing obligations and liabilities highlight this legal flaw. Should the Pine Tree Power Board decline to acquire these obligations, which constitute "utility property" under the Bill, the investor-owned T&D utilities would be left with these liabilities, and related costs, which were incurred in order to provide service to customers and which are now being recovered in the utilities' distribution and transmission rates, but be provided no compensation for them, nor have a mechanism to be able to recover them through rates in the future. The denial of recovery of these costs would be "confiscatory" and constitute a taking, requiring just compensation. *Bluefield Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) ("If the rate does not afford sufficient compensation, "the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.")

- If a court found that the distinction between "utility facilities" and "utility property" was infirm and just compensation must be made for the utility as a whole, 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. The Bill requires a complete pass-through of all of the public municipal corporation's borrowing costs.

This section of LD 1708 also raises other constitutional concerns, as described in Joshua Dunlap's Testimony in Opposition to LD 1708.

- It creates due process concerns because of its vagueness. *See Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 57, 896 A.2d 271, 286. The Bill provides both that the Superior Court shall render a decision as to the purchase price for T&D utilities' facilities and properties, while also providing eminent domain powers shall be exercised as under chapter 65 of Title 35-A. A chapter 65 procedure involves proceedings before county commissioners relating to the assets within the borders of that county. How are those proceedings to work given that they contemplate damages being set by county commissioners, not the Superior Court? And how could appeal from a chapter 65 proceeding be taken if the only issue that can be appealed is the amount of damages – an issue that the county commissioners may or may not be able to address?

- It creates other due process and Commerce Clause concerns because the State has no jurisdiction over and cannot condemn assets outside its borders. As to CMP, not all the assets needed for its T&D delivery system to function properly are located within the State of Maine. An attempt to seize out-of-state assets would be unconstitutional. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996).

- It also creates Commerce Clause issues because, given the interrelated nature of the interstate power delivery system, a taking would burden interstate commerce. *Burlington N. v. Fort Bend County*, 2009 WL 1172704, at * 2-3 (S.D. Tex. Apr. 29, 2009); *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 158 (Ct. App. 1985).

- It also creates Equal Protection Clause issues because it 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).

- A taking would also violate the Contracts Clause. L.D. 1708 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. Third-party contracts would also be impaired by such seizures. This substantial impairment of contracts is unlawful, given the lack of a rational legislative finding of necessity. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410 (1983).

- If the taking were found unconstitutional for any of these reasons, the State would be liable for attorneys' fees. 42 U.S.C. § 1988. There would be no non-State-backed bonding mechanism to pay for these attorney's fees and compensation – the State itself, and thus Maine taxpayers, would be liable and have to pay these sums.

- Given these legal complexities and the necessary process to address them, it must be expected that the transfer contemplated by LD 1708 will take many years to complete. In fact, as demonstrated on Attachment A to this memorandum, the timeline for implementation of LD 1708 to establish the Company's elected board, complete the forced acquisition of the investor-owned T&D utility facilities and property, the retention of the third-party operator, and the transition of operational control to the operator could well take **10** to **14 years.** This duration would be in line with the experience that other jurisdictions have had when seizing investor-owned utilities to form a government-controlled utility.

6. Regional Transmission

This provision requires that the service areas of the Company (*i.e.,* CMP, Versant – BH and Versant – MPD) initially remain in the transmission system to which they belonged on the effective date of the transfer **until** changed by majority vote of the board.

- This means that a majority of the board could decide, seemingly without PUC oversight or approval, to withdraw the Company from ISO-New England (ISO-NE) (CMP and Versant – BH) and/or the Northern Maine Independent System Administrator (NMISA) (Versant – MPD). Because the withdrawal of the majority of Maine from ISO-NE is a complex issue subject to FERC jurisdiction and involves significant financial exposure to Maine's retail customers, T&D utilities and generators, the PUC has in the past conducted extensive and detailed public proceedings to consider whether Maine's continued participation in ISO-NE was in the best interest of customers and the State.

- Given the complexity and potential cost significance of a decision to withdraw from ISO-NE, is it appropriate to cede this authority to the politically-elected board of the Company and dictate no process or PUC participation or oversight of these decisions?

7. Names

The Company may adopt one or more alternative or regional names.

8. Rules

The Company may adopt rules for establishing and administering the Company and carrying out its duties. The rules will be major substantive rules requiring Legislative approval.

9. Bylaws

The Company must adopt bylaws through the board.

10. Consumer-owned transmission and distribution utilities; application.

This Section subjects the Company to the following provisions "in the same manner as an investor-owned transmission and distribution utility":

a. Section 310 – This provision authorizes the Commission to conduct an investigation of any proposed changes in rates, either upon complaint or upon its own motion. The burden of proof to show that the rate change is just and reasonable is upon the public utility. After the investigation and hearing, the Commission may issue an order setting the new rate. Pending the investigation and order, the Commission may suspend the rate schedule.

b. Section 3104 – This provision requires an investor-owned T&D to adopt and follow a schedule of reading customer meters on a monthly basis. If a utility wants to adopt a different policy, such as bimonthly readings, it must receive prior Commission approval.

c. Section 3132, subsection 2-D – Section 3132 generally requires prior Commission approval before construction of transmission lines operating at 69 kV and above (i.e., grant a certificate of public convenience and necessity (CPCN) authorizing construction and operation of the transmission line). Subsection 2-D states that in considering whether to approve or disapprove all or portions of a proposed transmission line and associated infrastructure, the Commission shall consider nontransmission alternatives in accordance with section 3132-C.

- Why is the Company only subject to subsection 2-D specifically and not the rest of Section 3132?

- Is the Company not required to submit a petition for approval of proposed transmission or receive a CPCN for transmission facilities that will operate at 69 kV or above in the same manner as an investor-owned T&D, in accordance with the remainder of this section?

- Is the Company not required to provide an annual schedule of transmission line rebuilding or relocation projects, or an annual schedule for minor transmission line construction projects for the next five years in the same manner as an investor-owned T&D?

- Is the Company exempt from the remaining requirements of this section, such as the requisite filing fees?

d. Section 3132-A – Section 3132-A prohibits construction of a transmission project operating at less than 69 kV without prior approval from the Commission. A person that proposes to undertake a transmission project must provide the Commission with a description of the need for the project. The Commission must consider and give preference to nontransmission alternatives.

e. Section 3132-B – This provision requires T&D utilities to submit annually a planning study for small transmission and distribution projects, and sets forth the dispute resolution process in the event the T&D utility and the nonwires alternative coordinator disagree.

f. Section 3132-C – This provision sets forth the nonwires alternative investigation process.

g. Section 3132-D – This provision sets forth the process for procuring a nonwires alternative when the Commission determines a nonwires alternative is appropriate under 3132, 3132-A, or 3132-B, or the investor-owned utility voluntarily agrees to a nonwires alternative.

h. Section 3144 – This provision requires investor-owned T&Ds to establish an emergency response plan for recovery and restoration in response to an emergency.

i. Section 3210-C, subsections 3, 7, and 11 – Section 3210-C governs the PUC's capacity procurement program.

    - Note the concern raised by the retired PUC Commissioners that energy suppliers may well incorporate increased risk premiums in their bids to reflect the changing risk profiles and balance sheets of the existing investor-owned utilities as compared to the Company.

j. Section 3212 – This Section governs the standard-offer service competitive solicitation process.

    - Note the concern raised by the retired PUC Commissioners that energy suppliers may well incorporate increased risk premiums in their bids to reflect the changing risk profiles and balance sheets of the existing investor-owned utilities as compared to the Company.

k. Section 3212-B – There is no section 3212-B.

l. Section 3214, subsection 2-A – Subsection 2-A requires each investor-owned T&D to implement an arrearage management program to assist eligible low-income residential customers who are in arrears on their electricity bill. This subsection gives consumer-owned T&D utilities the option to implement an arrearage management program. If it does, it must do so in accordance with this Section.

    - If the Company is subject to this provision in the same manner as an investor-owned T&D utility, is it ineligible for the "optional" arrearage

management program afforded to consumer-owned T&Ds under this Section?

- The Bill identifies Subsection 2-A specifically. Is the Company still required to pay funds for purposes of this program (under Subsection 2.A.)?

The Bill states that this chapter may not be construed to affect the powers, authorities or responsibilities of other consumer-owned T&D utilities. It also states that the Company may not oppose the extension of the service territory of a consumer-owned T&D utility existing prior to the effective date of this chapter to include the entirety of a municipality in which the consumer-owned T&D provides service, as long as the Company is reasonably compensated for the assets and appurtenances required.

- Does this provision undermine the oversight of the PUC to assess the extension of a consumer-owned T&D's service territory and to determine any appropriate compensation?

The Bill does not include several other requirements of T&D utilities. (Note, the below provisions contain "affirmative" obligations of T&D utilities. Requirements contingent on utility action, *i.e.*, a rate increase, disposition of property, etc. have not been included):

- Section 3104-A – This provision requires a T&D utility to test its metering and billing systems in accordance with Commission rules.

- Section 3106 – This Section requires a T&D utility to provide comparative usage data on billing statements.

- Section 3134 – This Section requires every T&D to submit a long-range plan for a 15-year period. Subsection 4 states that the Commission "may" require the filing of a long-range plan by a consumer-owned T&D. If the Company is subject to this provision in the same manner as an investor-owned T&D utility, is the long-range plan required or optional for the Company?

- Section 3210-G – This Section governs the Renewable Portfolio Standard procurement process, which allows the Commission to direct T&Ds to enter into one or more contracts for energy or renewable energy credits from Class IA resources.

- Section 3482 – This Section governs the Commission's distributed generation procurement process and requires T&D utilities to take commercially reasonable steps to promote the participation of distributed generation resources in serving the State's energy needs.

- Section 3483 – This Section requires the designated standard buyer, which is the investor-owned T&D in its service territory unless otherwise designated by the Commission, to aggregate the output of the procured distributed generation resources and sell or use the output of the resources in a manner that maximizes the value of the portfolio of the resources to all ratepayers. The T&D must track all costs and benefits incurred by procuring distributed generation, which are reviewed and then allocated to and recovered from the T&D's customers.

Is it the intention of the Bill to make these provisions inapplicable to the Company?

11. Board staff; transition.

This provision authorizes the board to hire a director or manager and support staff and counsel. This provision also states that assistance and counsel may be provided to the board by the Office of the Treasurer of State, the Office of the Attorney General, the Maine Municipal Bond Bank, the Finance Authority of Maine, the Commission, the Office of the Public Advocate and others. All initial activities and expenditures of the board must be funded by short-term debt, to be retired in the initial financing of the acquisition of the IOUs utility facilities and property. The short-term debt is guaranteed by the IOU T&Ds and the PUC must find these costs just and reasonable for ratemaking purposes.

- This means that the Company board and employees can spend whatever they want during the transition phase and those costs will ultimately be included in the rates of the Company or, if the transaction ultimately fails, in the rates of the investor-owned T&Ds. Given the likely several year delay until the effective date of the transfer, these transition costs could be significant and their recovery could be delayed for many years, resulting in even greater amounts included in rates by the application of carrying charges.

- Does the requirement that the Commission provide assistance and counsel to the board undermine its oversight of the Company?

d. § 4004. Cost-of-service rates; no use of state funds or tax dollars.

A. Description

This provision requires that the Company's rates and other charges be sufficient to pay the full cost of service of the Company, including the cost of debt and the payments in lieu of taxes. It also makes clear that the debts and liabilities of the Company are not debts and liabilities of the State or any agency or instrumentality thereof and that the State does not guarantee the debts and liabilities of the Company.

B. Key Issues/Questions

This means that the Company's debt are not secured by the full faith and credit of the State and instead will only be secured by the Company's revenue streams. As such, the Company's cost of debt will not necessarily be as low as the State's. This also undercuts the notion that the consumer-owned utility will be able to borrow at lower rates that the investor-owned T&D utilities.

e. § 4005. Tax-exempt; payments in lieu of taxes.

A. Description

Subsection 1 declares that the Company is a public municipal corporation pursuant to Title 36, section 651, and its property and income are exempt from taxation.

- Title 36, section 651 defines what constitutes "public property" which is exempt from taxation. This means that the new consumer-owned utility will not be liable for State income tax and therefore that the State will realize less income tax revenues after the company begins operation.

This provision also declares that the Company is a quasi-municipal corporation within the meaning and for purposes of Title 30-A, section 5701.

- Title 30-A, section 5701 provides that a quasi-municipal corporation may take the personal property of residents and real estate within its territory to pay the municipal corporation's debt and then the owner of the property taken by the municipal corporation may seek recovery through a civil action.

This Subsection also states that all bonds, notes, and other evidences of indebtedness are legal investments for savings banks in the State and are exempt from state income tax.

- This means that the State of Maine will suffer a further reduction in tax income by the formation of the consumer-owned T&D utility, as the interest paid by the investor-owned T&D utilities is currently subject to state income tax.

Subsection 2 obligates the Company to make payments in lieu of taxes (PILOTs) with respect to its facilities and property to any municipality, county or public subdivision where the facilities and property are located in the same amount as the property taxes that the applicable investor-owned T&D utility would have paid with respect to such facilities and property.

B. Key Issues/Questions

While the Bill calls for tax-exempt financing of the Company, the State Treasurer has pointed out that the initial financing of the Company would likely be taxable, with refinancing occurring later. Furthermore, according to the Treasurer, determination of tax status of debt is a fact-specific inquiry and the issuer must meet certain requirements. *See* Testimony of State Treasurer Henry Beck at 1.

The concept of PILOTs are permitted under Maine law. However, the Bill does not spell out the details of how the PILOTs would be assessed, disputed, paid and collected in the same way that existing law specifies how property taxes are. The Bill says that the Company shall make PILOT payments in "the same amount as those taxes would be if an investor-owned transmission and distribution utility owned the property." However, this provision is overly simplistic as it does not import all of the other provisions of Title 36, Chapter 105 (governing property tax law) that would apply, such as the procedures for assessment, collection, liens, abatements, appeals, exemptions, etc. For example, how are the PILOTS committed and assessed by the municipality? Can the Company challenge a municipal assessment if it believes the PILOTs are over-assessed? What are the deadlines for doing so? If the Company doesn't pay, how can the PILOTs be enforced? Can tax liens be issued? If the PILOTs are not paid, can the property be foreclosed on? Can the Company apply for pollution control exemptions? Also, will the Company continue to pay property taxes when urged to reduce rates? *See* Versant Testimony at 4 ("The PILOT payments described in the bill could well be at risk in times of economic uncertainty.").

As far as having the taxes be in the "same amount" as if the property still belonged to an investor-owned utility, does that mean that the value should take into account the profitability of the assets, even though the Company is a non-profit that will not have profits? (For example, the income approach to valuation incorporates a cap rate or rate of return on investment. Will that still be applied even though the Company will not have a profit motive?)

Article 9, Section 8 of the Maine Constitution provides that all property taxes must be assessed equally according to just value. This basically means that all property taxpayers must be taxed in the same manner, equitably and according to the fair market value of the property. The Legislature is allowed to create exemptions, but since this PILOT provision sounds like it is in substance a property tax, even though it has been given a different name, it could arguably fall within Article 9, Section 8 since it is in essence a property tax. If so, other taxpayers could perhaps argue that the Company is being taxed differently than everyone else because it has been removed from Title 36 and pays PILOTs using different rules for assessment and collection than apply to all other property taxpayers.

Also, and importantly, this provision in LD 1708 would create a potential "tax shift" from utility rich towns onto towns that have less valuable utility property in them. This is because the state aid to education, revenue sharing, and county tax formulas are all based in part on the amount of taxable property value that each town has. LD 1708 will make currently taxable electric utility property into exempt property, and therefore excluded from these formulas, even though the towns will be compensated dollar for dollar through PILOTs.

The more currently taxable utility property that a town has relative to other towns, which becomes exempt under LD 1708, the more that other towns with less utility property value would have to pick up the tab for county taxes, and receive relatively less in education aid and revenue sharing. The following simplified example demonstrates this point:

- Assume there are just two towns in the state, Town A and Town B. Town A has $110 million of total property, consisting of $100 million of non-utility taxable property and $10 million of utility property. Town B also has $110 million of total property, consisting of $108 million of non-utility taxable property and $2 million of utility property. Currently, each Town has $110 million of taxable value for purposes of the three formulas. Thus, each town would be equally "wealthy" and would have the same (50/50 if there are only two towns) contribution for purposes of the three formulas.

- Under LD 1708, Town A's taxable value would be reduced to $100 million, because the $10 million of utility property has now become exempt. Town B would have $108 million of taxable value, because $2 million of its utility property has become exempt. Town A's share of the total taxable value has dropped to 48% (100/208) and Town B's share of the total taxable value has increased to 52% (108/208). Thus, in this case, about 4% of the burden of these formulas has been shifted from Town A onto Town B, even though the towns are getting fully compensated for the lost property tax revenue through the PILOT payments.

f. § 4006. No debt or liability of the State.

A. Description

This provision states that the debt or liability of the Company is not considered a debt or liability of the State.

B. Key Issues/Questions

This means that the Company's debt are not secured by the full faith and credit of the State and instead will only be secured by the Company's revenue streams. As such, the Company's cost of debt will not necessarily be as low as the State's. This also undercuts the notion that the consumer-owned utility will be able to borrow at lower rates that the investor-owned T&D utilities.

g. § 4007. Termination of the company.

A. Description

This provision states that the Company may not be dissolved or cease operations unless authorized by law and only if all debt and liabilities have been paid or a sufficient amount for payment of all debt and liabilities has been placed in an irrevocable trust for the benefit of the holders of the debt.

B. Key Issues/Questions

This provision purports to restrict the dissolution or cessation of Company operations, but does not specify what governmental body can authorize such dissolution or cessation and provides no guidance for setting up the referenced irrevocable trust.

h. § 4008. Freedom of access; confidentiality.

A. Description

This provision states that the proceedings and records of the Company are subject to the Freedom of Access ("FOA") laws, Title 1, chapter 13. Specifically, the following are designated confidential:

- A record obtained or developed by the Company that a person, including the Company, to whom the record belongs or pertains has requested be designated confidential and that the Company has determined contains information that gives the owner or user an opportunity to obtain a business or competitive advantage over another person who does not have access to the information, except through company's records, or access to which by others would result in a business or competitive disadvantage, loss of business or other significant detriment to any person to whom the record belongs or pertains; and

- A record that contains usage or other nonpublic information regarding a customer of a T&D utility in the State.

This Section requires the Company to provide any information or records to the legislative committee upon request, including confidential information. The

information may only be used for lawful purposes and in any action arising out of any investigation conducted by the committee, subject to protective order.

The following are considered not confidential, public records:

- Any otherwise confidential information the confidentiality of which the Company determines to have been satisfactorily and effectively waived;
- Any otherwise confidential information that has already lawfully been made available to the public; and
- Impersonal, statistical or general information.

Board members, employees, agents, or other representatives of the Company are prohibited from disclosing information designated as confidential. However, the Company may make or authorize disclosure in certain circumstances:

- If necessary for processing an application for, obtaining or maintaining financial assistance for any person.
- To a financing institution or credit reporting service.
- Compliance with federal or state law, regulation, rule, or agreement pertaining to financial assistance.
- To ensure collection of any obligation in which the Company has an interest.
- In any litigation or proceeding in which the Company has appeared, introduction for the record of any information obtained from records designated confidential.
- Pursuant to a subpoena, request for production, warrant, or other order.

B. Key Issues/Questions

In addition to the Bill's proposed exceptions to documents that are considered public record, FOA sets forth exceptions to what documents are considered public record. Some of the relevant categories of documents and records that are exempt under FOA include:

- Records that have been designated confidential by statute (§ 402(3)(A));
- Material prepared for and used specifically and exclusively in preparation for negotiations, including the development of bargaining proposals to be made and the analysis of proposals received, by a public employer in collective bargaining with its employees and their designated representatives (§ 402(3)(D));
- Records that would be confidential if they were in the possession or custody of an agency or public official of the State or any of its political or administrative subdivisions are confidential if those records are in possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of these entities (§ 402(3)(F));

- Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure, systems and software, including records or information maintained to ensure government operations and technology continuity and to facilitate disaster recovery (§ 402(3)(M));

- Social security numbers (§ 402(3)(N)); and

- Personal contact information concerning public employees, except when that information is public pursuant to other law (§ 402(3)(O)).

Taken together, it is not clear that the exceptions set forth in the Bill and the existing exceptions set forth in FOA are sufficient to protect certain other categories of confidential information, which we would expect the Company would want to protect from public disclosure. Some of the types of information we expect the Company would want to protect, but may not qualify under either set of exceptions, include:

- Confidential/proprietary information and data of the Company as the operating T&D utility for most of Maine;

- Confidential/proprietary information and data of vendors/contractors/suppliers and consultants providing services to the Company;

- Confidential information developed or obtained as part of regulatory proceedings in which the Company is a party before the PUC, FERC or other regulators or administrative agencies;

- Confidential or private employee information, such as health related information;

- Negotiations and information related to collective bargaining agreements;

- Confidential and private customer related information;

- Critical energy infrastructure information (CEII);

- Cybersecurity protected information; and

- Any other categories of protected information under FERC, NERC or other federal requirements.

The Bill requires the Company to provide any information or records to the legislative committee upon request, including confidential information. The information may only be used for lawful purposes and in any action arising out of any investigation conducted by the committee, subject to protective order. The language as drafted does not limit the requesting committee to the committee with jurisdiction over utilities and does not indicate what constitutes a lawful purpose. Presumably, this means any legislative committee could request access to the Company's confidential records. While the legislature has the authority to create investigative committees, it is not clear the Bill intends to investigate pursuant to this authority or if another investigative process is contemplated. To our knowledge, there is no authority under Maine law for the Legislature to issue protective orders. If there is such authority,

and this procedure is implemented, it is not clear who would enforce the protective order or what process exists to address issues that arise from or are related to the protective order.

i. § 4009. Annual report.

A. Description

The Company must submit an annual report to the joint standing committee of the Legislature summarizing the performance of the Company in meetings its obligations to its customer-owners and its responsibilities under section 4002 and 4003 during the preceding calendar year, its plans for the current year, and plans for the subsequent five years.

B. Key Issues/Questions

Are there any objective performance metrics to measure the Company's performance?

Are there any specific metrics that must be reported regarding the Company's support of the State's progress toward climate goals, job creation, and gross state product?

Who in the Company is responsible for monitoring these metrics? Is there an internal process in place?

Is the annual report subject to public review and comment?

What are the repercussions if the Company does not perform to the joint standing committee's satisfaction?

Will the report be submitted to the PUC?

j. § 4010. Initial 5-year plan.

A. Description

Within 18 months of when the Company and operations team take full ownership and control of all utility facilities in the State, the Company must submit to the Commission for approval a five-year plan to meet "initial affordability, reliability, decarbonization and connectivity goals." At a minimum, the plan must include a program to: 1) establish lower rates for low-income residential customers; 2) build across the State accessible, rapid charging infrastructure for electric vehicles; 3) reduce make-ready and pole attachment costs for open-access fiber-optic cable in unserved and underserved areas of the State; and 4) make rapid investments in the distribution network to upgrade reliability and to improve capacity for interconnections of new renewable generation and storage facilities.

B. Key Issues/Questions

At what point is the Company and operations team considered to be in full ownership and control of all utility facilities?

Is it appropriate for the five-year plan to be developed after the takeover takes place? Time and resources should be allocated at the outset to develop, with a spectrum of stakeholders, and implement a five-year plan prior to any takeover.

Is the Company going to develop or participate in a low-income assistance program? Outside of a low-income assistance program, is the Company permitted to differentiate its rates for low-income residential customers?

Would the building of electric vehicle charging infrastructure be subject to a PUC-administered procurement?

How does the Company intend to improve capacity for interconnections of new renewable generation and storage facilities when it is prohibited from purchasing electric capacity or energy from a generating source?

Sec.11. Review of Laws and Report

A. Description

The PUC must review the laws and rules amended as a result of this Act and propose any modifications necessary or appropriate to effectuate the purposes of the Act.

B. Key Issues/Questions

None.

Sec.12. Staggered Terms of Initial Members of Pine Tree Power Company Board

A. Description

The terms of the initial members of the Board must be staggered. The initial appointed members of the board serve as follows: Two members serve four-year terms and two members serve two-year terms. The initial elected and voting members of the board serve as follows: three members serve six-year terms, two members serve four-year terms, and two members serve two-year terms.

B. Key Issues/Questions

Staggered terms of the board members should ensure continuity in leadership and operations, and minimize the possibility for significant political swings in the direction of the Company. Does the proposed staggering of the terms in this provision satisfy these objectives?

Sec.13. Statutory referendum procedure; submission at statewide election; form of question; effective date

A. Description

This provision requires that the Act be submitted to voters at the November election following passage of the Act. Specifically, voters must vote to accept or reject the Act by voting on the following question:

"Do you favor the creation of the Pine Tree Power Company, a nonprofit, privately operated utility governed by a board elected by Maine voters, to replace Central Maine Power and Versant Power, without using tax dollars or state bonds, and to focus on delivering reliable, affordable electricity and meeting the State's energy independence and Internet connectivity goals?"

If a majority of the legal votes are cast in favor, the Act becomes effective 30 days after the Governor's proclamation.

B. Key Issues/Questions

The Legislature has the authority to promulgate a referendum to be decided by the voters. A bill seeking to promulgate such a referendum must be presented to the Governor and the Governor may veto it, as with other bills. Should the Governor veto the bill, it will not take effect, such that the referendum question will not be presented to the voters, unless the Legislature overrides the veto. When the Legislature promulgates a referendum, it is authorized to formulate the question that Secretary of State must include on the ballot. *See Lockman v. Sec'y of State*, 684 A.2d 415, 418–19 (Me. 1996).

Whether it is a wise use of the Legislative authority to present to the voters such a momentous policy question as the creation of a state-wide consumer-owned utility to seize the assets of all investor-owned T&D utilities and take over operation of the State's transmission and distribution systems is a different question. Such a takeover would involve highly complex issues of Constitutional, administrative and energy law and policy likely beyond the comprehension of the average voter. The political process for referenda also does not lend itself to the detailed and complex debate that would be appropriate for such an important policy decision. Instead, the campaigns for or against such a referendum will necessarily overly simplify the debate and will likely turn the issue into a populist debate about Maine's existing investor-owned T&D utilities' performance and the fact that they are ultimately owned by foreign companies.

Also, LD 1708's referendum provision creates constitutional concerns when viewed in conjunction with LD 194, which prohibits participation by foreign government-owned entities in referendum campaigns. Because some T&D utilities in Maine (such as Versant Power) might qualify as a foreign government-owned entity under LD 194, it is possible that adoption of both LD 194 and LD 1708 would leave such utilities without recourse to participate in the referendum campaign. Prohibiting an entity from participating in a campaign that could deprive it of its property raises due process and free speech concerns. *See VAMOS, Concertacion Ciudadana, Inc. v. Puerto Rico*, 494 F. Supp. 3d 104 (D.P.R. 2020); *Opinion of the Justices*, 461 A.2d 701 (Me. 1983).

Attachment A

LD 1708: Act to Direct a Quasi-Governmental Takeover of CMP and Versant Power

Implementation Timeline Shows No Takeover until 2032, if at all

Action	Time Frame	Date Estimate
Passage of LD 1708	90 days after adjournment	Sept. 2021
Voter Referendum	November after bill passed	Nov. 2021
Election of Authority Board	November general election	Nov. 2022
PUC Fitness to Serve Process		
PUC must decide IOU "fitness to serve"	No later than Jan. 1. 2024	Jan. 2024
Appeal of PUC decision to Law Court	Not specified in bill; typically 1 year	Jan. 2025
Forced Sale of IOU Property		
Board required to submit purchase offer	12 months after first meeting of Board	Dec. 2023
• *Board may delay offer*	*Delay time frame not specified*	*Unspecified*
IOU may counter-offer	30 days after receiving offer	Jan. 2024
Board accepts/rejects counter-offer	No time frame specified (2 months	Mar. 2024
If Board rejects, IOU may file suit	Within 30 days of receipt of rejection	April. 2024
• Referral to court referee	No time frame in bill (6 months)	Oct. 2024
• Stay pending appeal of PUC "fitness to serve" case	Time frame outlined above	Jan. 2025
• Adjudication before referee	No time frame in bill (3-4 years likely)	Jan. 2028 – Jan. 2029
• Briefing/argument before Superior Court – June. 2029	No time frame in bill (6 months)	June. 2028
• Superior Court decision	No time frame in bill (3-6 months)	Dec. 2028 – Dec. 2029
• File appeal to Law Court	30 days	Jan. 2028 – Jan. 2029
• Law Court review	No time frame in bill (12-24 months)	Jan. 2029 – Jan. 2031
➢ ***Maine Climate Action Plan greenhouse gas reduction milestone***		***2030***
Transfer of Property, if required		
IOUs must make regulatory filings	45 days after sale agreed or mandated	Mar. 2029-31
If IOUs fail to file, PUC may investigate	Must be completed in "timely" manner	July 2029-31
Completion of regulatory process	No time frame in bill	July 2030-32
Financing Acquisition Bonds	No time frame in bill (6-8 months)	July 2029-Sept. 2031
Hiring of Third Party Grid Operator	No time frame in bill; assume commence when transfer approved	
Issuance of RFP	4-8 months	May 2029 – Sep. 2031
Issuance of award	4-6 months	Sep. 2029 – Mar. 2032
Disposition of any appeals	6-12 months	Feb. 2030 – Mar. 2033
Steps to Implement Third Party Operator	No time frame in bill; assume commence after grid operator selected	
Development of operating systems	6-18 months	June 2030 – June 2034
Hiring and staffing	6-18 months	Dec. 2031 – Dec. 2035
Actual Cutover to New Grid Operator	**No time frame (assume 2 months)**	***Feb. 2032 – Feb. 2035***

NOTES:

1. *Time frames above would extend further if "Pine Tree Power" Board delays issuance of purchase offer to IOUs*
2. *Further delay or schedule changes possible as Board members are elected every two years*