LD 697, An Act To Enhance Energy Security of Maine Residents

Testifying: In Opposition

Senator Lawrence, Representative Berry, Members of the Joint Standing Committee on Energy, Utilities, and Technology my name is Carlisle Tuggey. I am a resident of the Town of Cumberland and General Counsel for Central Maine Power Company, presenting testimony in opposition to LD 697, An Act to Enhance the Energy Security of Maine Residents.

First, CMP is in full support of the cyber and physical security of the Maine electric grid and has an active program to continue to assure such protection.

This bill is far from an attempt to protect grid security. In fact, the bill is vague, fails to provide clear criteria or guidelines, and is disconnected from the reality that in our global economy many developers and utilities have diverse and foreign ownership interest. Moreover, the bill is likely to be found unconstitutional for at least two reasons: it violates the commerce clause and is pre-empted by existing federal law.

I. Background

` Section 1101(1) of Title 35-A requires a public utility to secure an order of authorization from the Maine Public Utilities Commission ("MPUC") before it may:

> (A) Sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or part of its property that is necessary or useful in the performance of its duties to the public, or any part of its property under construction for the performance of its duties to the public, or its franchises, permits or rights under them;
> (B) Merge or consolidate its property, franchise or permits, or a part of them, with another public utility by any means, direct or indirect.

35-A M.R.S.A. § 1101(1). Such actions that are not made in accordance with the MPUC's order or authorization are void. *Id.* at § 1101(2). Section 1101(3) makes clear the Section 1101 does not apply to property, franchises, permits or rights of a utility owned or operated exclusively outside of the State of Maine and have no relationship to the utility's performance of its duties in Maine. *Id.* at § 1101(3). Section 1101(4) provides that "transactions involving utility property that do not materially affect the ability of a utility to perform its duties to the public do not require commission authorization under this section." *Id*. at § 1101(4). It does not appear that the MPUC has promulgated any rules related to Section 1101.

LD 697 proposes the addition of subsection 5 to 35-A M.R.S.A. § 1101, which would require that before the MPUC issues an authorization under 35-A M.R.S.A. § 1101, the MPUC shall consider "the risks to national security and the potential economic losses within the State [of Maine] that may result" from "ownership, in whole or in part, of a transmission and distribution utility located in the State by a foreign government, a foreign corporation or the subsidiary of a foreign corporation."

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II. LD 697 Would Place Unnecessary Limitations on Maine's Utilities.

LD 697 ignores the reality that Maine is part of a global economy. Most developers, financial institutions, and utilities have diverse ownership interests. Foreign investment is vital to the U.S. economy. If LD 697 were passed into law it could significantly limit the ability of Maine's utilities to secure financing, secure capital investment, or transfer assets.

More importantly, the bill is not necessary. Maine's two largest T&D utilities have connections to foreign corporations. There is no evidence that utilities with foreign ownership connections provide a risk to national security or potential economic losses within Maine. Absent such evidence the bill is without any reasonable justification. It cannot be overlooked that Maine's regulators have continued to appropriately oversee and regulate utilities in Maine with foreign ownership connections and have held those utilities accountable.

III. LD 697 Lacks Clear Criteria or Guidelines

LD 697 proposes that the MPUC be required to consider national security risks and the potential economic losses within Maine that may result in a transaction that would lead to ownership, in whole or in part, of a T&D utility in Maine by a foreign corporation or subsidiary of a foreign corporation. But LD 697 fails to provide any criteria or guidelines to the MPUC regarding what do with these "considerations." It is entirely unclear how the MPUC is to evaluate national security risks, but its notable that the MPUC lacks expertise in national security risks. Similarly, the bill provides no guidance on how potential economic losses are to be quantified and fails to consider that transactions with entities with foreign ownership connections often have economic benefits to the State.

In addition, it is not clear how LD 697 gels with the other provisions of Section 1101. For example, Section 1101(4) exempts transactions without a "material affect," but LD 697 does not provide any clarity on how ownership, in whole or in part, by a foreign corporation or a subsidiary of a foreign corporation materially affects the ability of a utility to perform its duties to the public.

IV. LD 697 Violates the Commerce Clause

The Constitution's Commerce Clause provides that "Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States …." U.S. Const. art. I § 8, cls. 1, 3. Notably, the power to regulate commerce among the States is provided in the same clause, and by the same words, as the power to regulate commerce with foreign nations. The primary purpose of the Commerce Clause is to bar state protectionism and economic isolation, and to limit the barriers against movement of interstate trade and commerce.

"[T]he Commerce Clause was not merely an authorization to Congress to enact laws … but by its own force created an area of trade free from interference by the States …. [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). The Commerce Clause broadly limits the exercise of state power. Even when Congress has not acted and its commerce power lies dormant, the Supreme Court has held that state and local laws are unconstitutional if they place an undue burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

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When a state law facially discriminates against out-of-state actors in favor of in-state economic interests, such economic protectionist laws are virtually per se invalid unless the state can show that there is no other means to advancing a legitimate local or state purpose. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When a state law's purpose is achieved by "illegitimate means of isolating the state from the national economy" the law is constitutionally invalid. *Id*. 437 U.S. at 627.

State laws that place restrictions on foreign commerce are subject to more rigorous scrutiny, *Reeves, Inc. v. Stake*, 447 U.S. 419, 438 n.9 (1980), in part because the federal government has exclusive authority to regulate commerce with foreign nations. *Japan Line, Ltd. V. Los Angeles County*, 441 U.S. 434, 453-54 (1979) (holding that a California state property tax on foreign cargo containers used exclusively in foreign commerce was unconstitutional under the Commerce Clause and is inconsistent with Congress' power to regulate commerce with foreign nations).

LD 697 is a facially discriminatory bill that places restrictions on foreign investment and interferes with the flow of interstate commerce. It is thus per se invalid, subject to the most rigorous scrutiny, and constitutionally invalid. The concerns over national security and potential economic losses in Maine due to foreign investment and ownership are discriminatory and the bill is not rationally related to a legitimate state interest that outweighs the burden the bill would impose on commerce. Moreover, it cannot be overlooked that the constitutional issues with LD 697 cannot be reconciled with Section 1101(3) of Title 35-A, the purpose of which, in part, is to limit the MPUC's review to property, franchises, permits or rights related to a utilities duties in the State, so that Section 1101 does not run afoul of the commerce clause.

V. LD 697 is Likely Pre-Empted by Federal Law

Due to the Supremacy Clause in Article VI of the U.S. Constitution, if there is a conflict between federal law and state law, then the state law is pre-empted. U.S.Const. art. VI; *see also Gade v. Nat'l Sold Waste Mgmt. Assoc.*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

LD 697 is an effort to limit whole or partial ownership of T&D utility assets (including critical infrastructure) in Maine by foreign corporations and subsidiaries of foreign corporations based on considerations of national security risks. Existing federal law likely pre-empts LD 697. For example, the Committee on Foreign Investment in the United States (CFIUS) was created by President Ford by executive order. The CFIUS is an inter-agency committee responsible for reviewing foreign investment in the United States for national security concerns and implementing foreign investment policies.[1] In 2007 President Bush signed into Law the Foreign Investment and National Security Act of 2007, which expressly reaffirmed the CFIUS's role in reviewing foreign investments and tasks the CFIUS to evaluate transactions with involving homeland security and critical infrastructure. The fact that the Executive Branch operates the CFIUS pursuant to express

[1] Available at The Committee on Foreign Investment in the United States (CFIUS) | U.S. Department of the Treasury

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authorization from Congress suggests that the preemptive scope of the CFIUS should be broadly construed. Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT'L SECURITY J. 1, 18 (2022) (arguing that a recently passed Texas law that prohibits companies and state governmental entities from entering into agreements relating to critical infrastructure with companies that have ties to China, Iran, North Korea, or Russia is likely pre-empted from federal law).[2]

The federal government and the intelligence community is far better positioned than state governments to assess whether foreign investments and real estate transactions involving corporations with foreign ownership connections pose a risk to national security.

[2] Available at HNSJ-Vol-13-Eichensehr-CFIUSPreemption.pdf (harvardnsj.org)

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