Comments to LEI, Inc. Regarding the Evaluation of LD 1646, “An Act to Restore Local Ownership and Control of Maine's Power Delivery Systems”

Pursuant to Legislative Resolve, LD 1844

Rep. Seth Berry

December 4, 2019

HOUSE OF REPRESENTATIVES
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Seth A. Berry
House Chair, Joint Standing Committee on Energy, Utilities and Technology

To: London Economics Incorporated, LLC; % Ryan Hakim
Re: Maine Public Utilities Commission Docket No. 2019-00280

December 4, 2019

Thank you for undertaking this inquiry regarding the evaluation of LD 1646, "An Act To Restore Local Ownership and Control of Maine's Power Delivery Systems," as we requested by legislative resolve, LD 1844. As the primary sponsor of both measures and as co-chair of the legislative committee that oversees energy and utility matters, I consider it crucial that a neutral, unconflicted and expert team study the proposal carefully in light of Maine's ambitious decarbonization goals, and provide us constructive feedback.

I look forward to the results of your work, and sincerely apologize that these comments come as late as they do. Please contact me anytime if I can assist.

Best regards,

Seth

Seth A. Berry

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Purpose and Terminology

Through our Public Utilities Commission, the Legislature and Governor of Maine have asked you to estimate the costs and benefits, both long term and short term, of a transition to a tax-exempt, debt-financed consumer-owned utility; to examine the legal, regulatory, technical, financial and operational issues related to the proposal and its implementation; to assess anticipated impacts, both positive and negative, of the proposal on the State, including but not limited to impacts on electricity rates, utility employees and ratepayers; and to develop alternatives or amendments to the bill to address any obstacles you may identify to successful municipalization. The foregoing comments are offered to help as you undertake this analysis.

Your work is consequential. LEI's analysis will likely impact legislative actions and if LD 1646 is passed, may be employed by the parties to negotiation and/or litigation. In this sense, your estimate of a value may help to determine an actual value.

A note on terminology: Except where specified, in these comments I use "consumer-owned utility" (COU) as it is used and understood in Maine law -- a term inclusive of both municipally organized utilities and rural electric cooperatives. Maine statute defines both COUs and investor-owned utilities (IOUs), regulating each in different ways. By "public power," I occasionally refer to municipal or municipal hybrid utilities only.

While I believe the full scope of my comments are important to your work, I want to call your attention specifically to the first seven paragraphs starting on the next page, under the subheading Capital Expenditures for Tomorrow's Grid. My concern is that we not limit any evaluation of whether a conversion of Maine's IOUs to COUs will result in immediate rate relief for Maine's ratepayers. Certainly, rate relief is always welcome. However, I believe that a more important consideration is to ensure the best financing approach possible for our transition to clean, reliable energy by 2050 and beyond. This requires a longer-term focus and the establishment of utility structures that can best achieve state goals.

Cost and Benefits

1. Capital Expenditures for Tomorrow's Grid

While I neglected to define these terms more clearly in LD 1844, I recommend that "short term" be understood for the study's purposes as the first ten years after the ownership transition, and that "long term" be defined as approximately the following fifty. During the transition period itself, the Maine Power board will necessarily incur initial managerial, consulting and/or legal expenses. These should be largely financed rather than front-loaded, such that meaningful costs and benefits commence simultaneously at the moment ownership changes.

In projecting capital expenditures in both the short and long terms, please note that Maine has recently enacted specific commitments to decarbonization that hinge almost exclusively on electrification. These include a statutory commitment to reduce carbon emissions to at least 80% below 1990 levels by the year 2050.[1] These commitments have major short term implications and extraordinary long term implications, in particular for the cost, financing, planning and design of an electrical grid capable of supporting increased electrification across all sectors of Maine's economy.

Note too that Maine's 2050 goal is seen by most as a floor, not a ceiling. Governor Janet Mills, in a speech before the United Nations in September, pledged that Maine will in fact achieve 100% decarbonization by 2045. She challenged her audience: "Maine won't wait. Will you?"

To meet or exceed these goals, the relative cost of capital for IOUs and COUs is pivotal. Both the short and long terms will involve significant new investment as we seek to electrify virtually all transportation, building heating and cooling, and industrial processes. Both the size and the sophistication[2] of the grid must change.

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[1] Title 38 MRSA §576-A. Goals include 45% emissions reductions under 1990 levels by 2030 and 80% by 2050, with a requirement to be on pace as of 2040. Additional binding requirements include new long-term contracts for solar and offshore wind, one of the most aggressive renewable portfolio standards in the nation (80% renewable by 2050), new funding for heat pumps, EVs, EV charging stations, and a significant expansion of net metering.

[2] What is measurable here is what matters. IOUs frequently claim that they are more "sophisticated," offer greater "synergies," and are less likely to "underinvest." In actual practice, the reliability of IOUs is inferior across America to the reliability of COUs, both coops and munis. This suggests that if there is excess sophistication, synergy or investment, it may not be going where it should.

By one estimate, the state's beneficial electrification goals for 2050 will require sufficient capital investment to at least triple, and possibly quintuple,[3] the capacity of Maine's grid. This estimate from a Maine energy expert, Dr. Richard Silkman, suggests a medium to long-term incremental capital cost in today's dollars of almost $60 billion is required to decarbonize Maine's electric sector and expand it to serve the state's overall energy needs – an approximate sense of which is depicted in Figure 1. Between $10 and $15 billion of this estimated total will be spent on increasing the capacity of Maine's transmission and distribution grid.

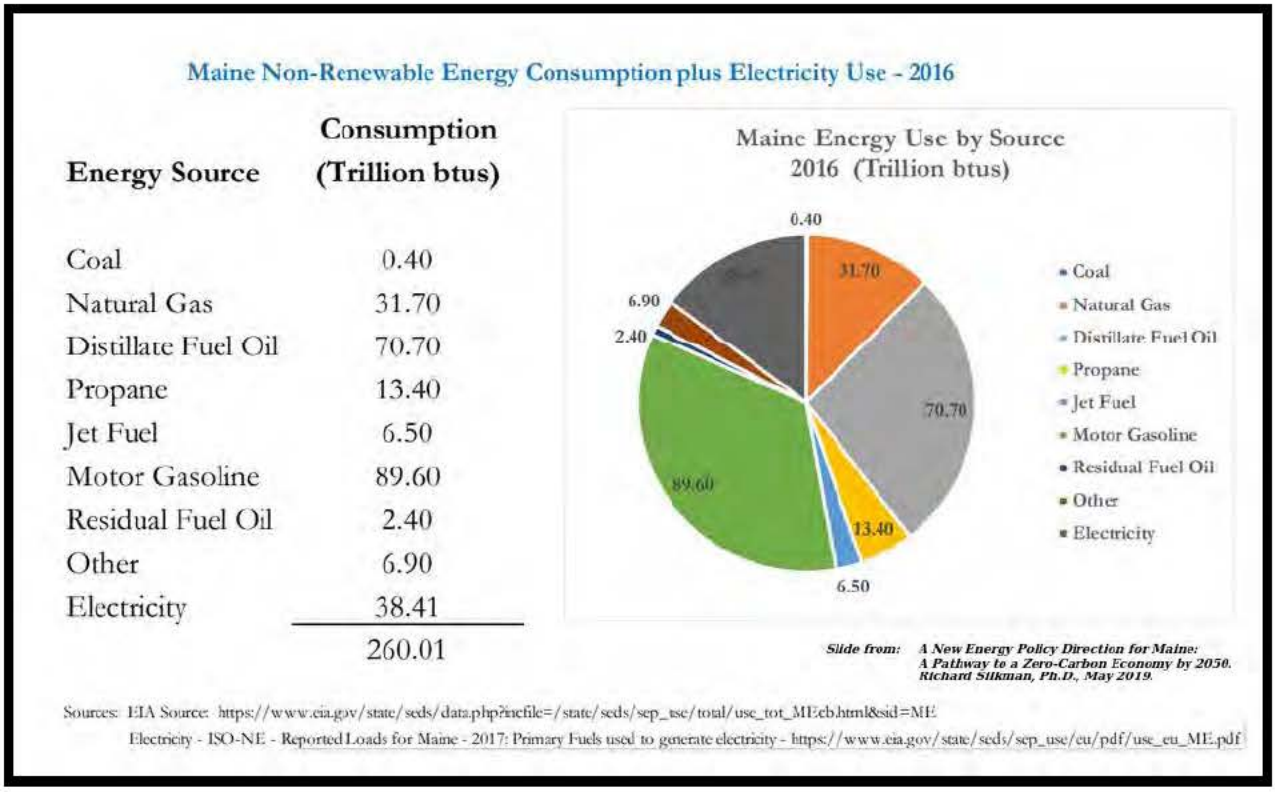

Figure 1: Maine Non-Renewable Energy Consumption, 2016 (does not include wood heat)

Silkman does not negate savings from efficiency and demand response, but assumes based on historic trends that these savings are offset by growth of population, businesses, and consumptive technology.[4]

Additionally and during the same period, Maine must dramatically improve system reliability in the face of severe weather, rocky coasts buffeted by some of the best offshore wind resources in the world, and the heaviest forest cover in the nation. As of 2017, Maine's IOUs together had the worst reliability in the nation.[5] To the extent that almost the entire economy is to be electrified, the importance of reliability is also

[3] A New Energy Policy Direction for Maine: A Pathway to a Zero-Carbon Economy by 2050. Richard Silkman, Ph.D., May 2019.
[4] Email from Dr. Silkman to Seth Berry, November 2019
[5] https://www.eia.gov/todayinenergy/detail.php?id=37652

magnified. To boost reliability in the face of increasingly severe weather as well as lower tolerance of outages, significant additional capital expenditure must be assumed as part of any valid short and long term spending outlook.

CMP's parent, Avangrid, Inc., already sees major near-term capital expenditures for reliability. In July of 2018, they announced spending of $2.5 billion for reliability upgrades in Maine and New York, $2.0 billion of which is capital expenditures. Investment has commenced, with costs filed in pending rate increase requests.

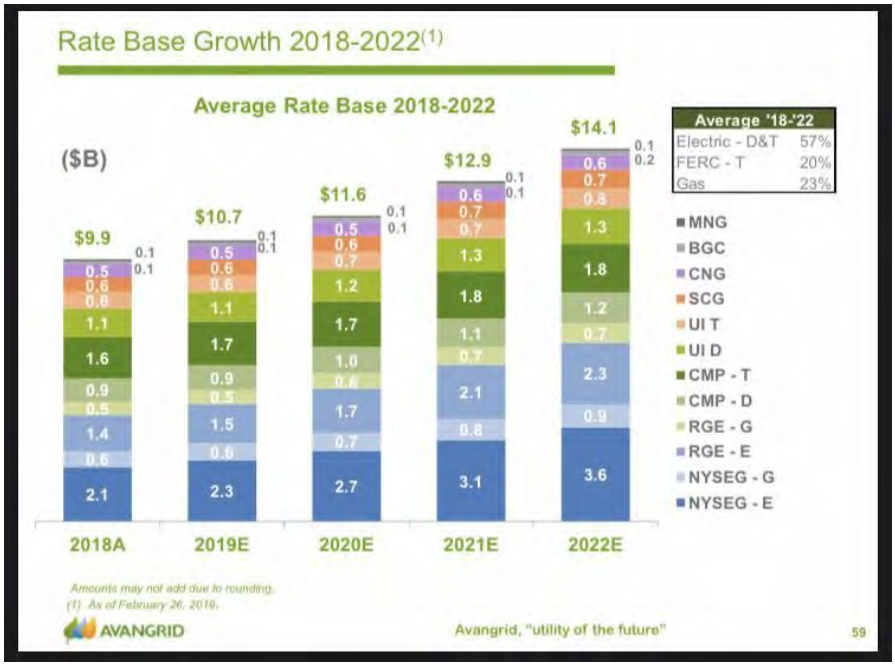

Figure 2: Avangrid Networks rate base projections to 2022

In their November 2019 Factbook for investors, Avangrid projects rate base growth across its New England networks of 57% in the period from 2018 to 2022 (Figure 2). For Maine, growth is slightly lower but increasing in the out years.

Capital investment on an increasing scale will come at significant cost. For CMP transmission-related equity, typical base allowed ROEs are currently above 11%, while distribution investments are allowed a return of 9.45% (Figure 3). Meanwhile, Maine's quasi-independent entities such as the Maine Turnpike Authority (MTA) or existing COUs are able to access tax-exempt debt at rates between 2% and 5%.[6] Costs and benefits for a new COU will diverge accordingly.

[6] Since 2012, The Maine Turnpike Authority has issued ~$500 MM in revenue bonds. All of these bonds earn rates between 2 and 5%. Maine Turnpike Authority Annual Report, 2018, p. 24.

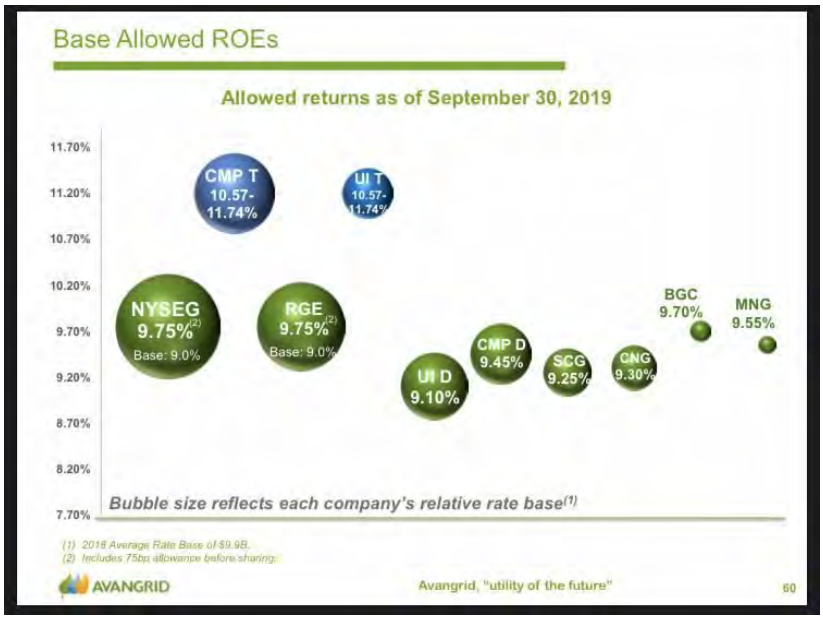

Figure 3: Avangrid Networks Base Allowed ROEs

Assuming the typical IOU debt-to-equity capex ratio of 50%, half of new capital spending during the crucial, thirty-year window for economywide electrification, decarbonization and grid adaptation will be taxable equity investment, typically earning actual returns in the double digits. *The key question for LEI, then, is the short- and long-term cost of capital under the status quo, as opposed to the short and long term cost of capital under the COU proposed by LD 1646.*

To be relevant to Maine's realities, the cost/benefit analyses used in this study must follow the benchmarks and timeframes of Maine's statutory and scientific imperatives when it comes to the needs of our grid in the coming decades.

2. The Value of Aligned Interests and Consumer Trust

Maine is at an energy crossroads, both with respect to its present policy environment and with respect to its geographic location. Policywise, there is great interest in hardening the grid to adapt to climate change, and in creating a smarter grid that is more friendly to efficiencies, renewables, savings and/or resilience through measures such as more distributed energy resources, nonwires alternatives, efficiency procurement, peak shaving, microgrids, storage, and generator interconnects to meet renewable procurement targets both in Maine and in the rest of New England. In some of these areas, significant progress has been made over the past 12 years, but generally despite the opposition of utilities, rather than with their collaboration.

Some of these investments in Maine's future grid will benefit both the utility and the consumer. Other investments, however, will tend to benefit one more than the other. Wherever regulatory and ratemaking incentives for a Maine IOU are not aligned with each new need or opportunity for improved service and reduced rates, Maine consumers will likely miss opportunities, pay more than necessary, receive inferior service, or a combination of the three. Customer-utility trust and meaningful alignment of interests will be essential.

Alternatives to better align utility and ratepayer interests for our IOUs have been tried and tried again, and have failed. Maine was a leader among states in the use of performance-based ratemaking (PBR), starting in 1994. For 19 years, CMP operated under a series of alternative rate plans (ARPs). These are described briefly and enthusiastically by CMP here. For the most part, however, these have not been successful and have benefited shareholders at the expense of ratepayers. A summary of the objections to PBR in Maine was provided to my committee earlier this year by Maine's Industrial Energy Consumer Group (IECG), an association of the state's highest-volume transmission- and subtransmission-level ratepayers.

My committee and I share the concerns of IECG. So too does the Maine PUC, which discontinued CMP's ARPs after three attempts. Even under the best regulators, in such proceedings, the complexities hurt ratepayers and favored the regulated utilities, who enjoy access to intimate knowledge of their systems and financial realities, as well as access to sophisticated in-house and outside experts. While Maine's PUC is sophisticated and well resourced for a relatively low-income state of only 1.3 million residents, the commission does not have equivalent access.

Also impacting trust, capital spending proposed by CMP and approved by regulators in recent years has not lived up to its promises. In the past decade, a buildout of transmission across the New England grid has more than tripled regional transmission rates, while assumptions regarding increased transmission demand have not proven out. Spending on new AMI infrastructure in 2009 was accompanied by great fanfare as well but has not resulted in any of the promised savings or environmental benefits.

In one instance widely noted in the policy community, CMP sought in 2009 to upgrade transmission lines to serve peak demand on the Boothbay peninsula. A competitive nonwires alternative was put forward at the PUC, and won approval. The nonwires project used solar, efficiency and storage, and was able to meet needs at a third of the cost projected by CMP. Partly with this experience in mind, Maine passed LD 1181 earlier this year, requiring that nonwires alternatives no longer be entrusted to the utility, but that NWAs instead be formally established as an external, competitive process.

Should LD 1646 pass, Maine Power would have no shareholder pressure to overbuild in areas where it was not necessary. That said, there would still be a healthy competition at the PUC for approval of Maine Power projects, and a dynamic and productive tension between the Public Advocate, Maine Power, the Efficiency Maine Trust and other stakeholders in cases at the PUC.

With a utility that is a partner rather than an adversary in fostering a competitive environment to support the grid of the future, Maine is well positioned to advance. The ingredients are in place. Smart grid legislation was enacted in 2009 history. A quasi-governmental Efficiency Maine Trust deploys efficiency solutions, based not on arbitrary funding limits but rather on a standard of maximum achievable cost-effectiveness, or MACE. The new LD 1181 process for nonwires alternatives will further assist. Generation and storage are already unregulated and competitive. In short, Maine is seeking to maximize competition, and requires a grid owner and operator that can act as an affordable, dependable and neutral partner -- and as a foundation for the competitive technologies best suited to a rapid transition.

For customers, it has become clear that CMP in particular is not a good partner, and that its focus has been on building the rate base inefficiently, rather than serving customers efficiently. In summer of 2018, CMP's CEO acknowledged that his was "probably the most mistrusted" company in Maine.

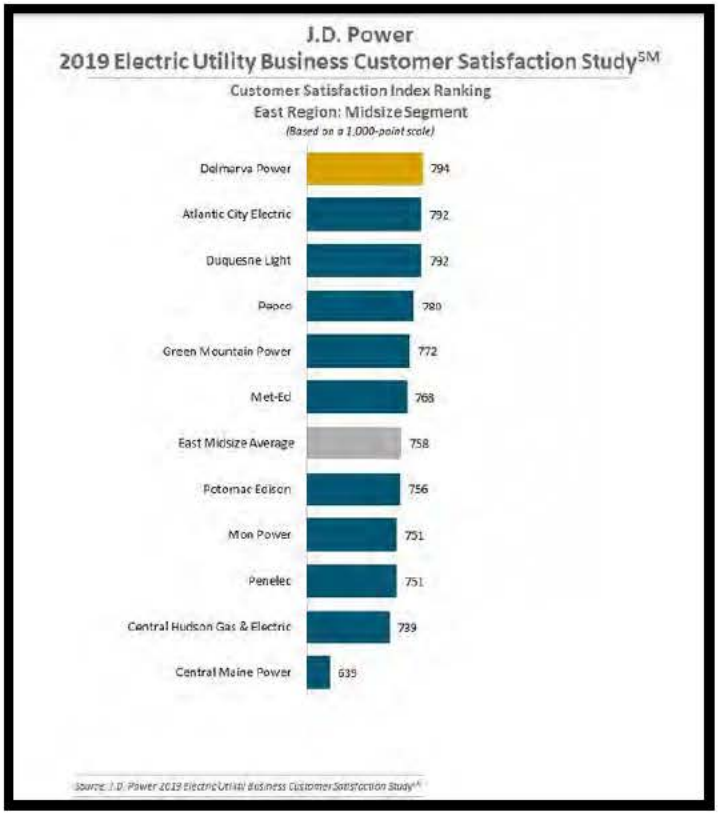

Figure 4: Eastern midsize utilities from among the 87 ranked by JD Power

In November 2019, based on a survey conducted in early 2019, CMP was pronounced by JD Power and Associates to be the least popular among business customers of the 87 large utilities it surveys each year around the U.S. The 192-point spread between most popular and least popular had not been so great in 13 years. On a scale of 1,000, CMP was almost 100 points lower than the next worst (Figure 4).

The second least popular large utility in the U.S. was California's PG&E, which has gone bankrupt twice in the last two decades, has been convicted of multiple felonies, and has been confirmed by state fire officials as the cause of the Camp Fire, which killed 85 residents of Paradise, CA. Third least popular in the U.S. was NYSEG, an Avangrid-owned "sister" of CMP serving parts of New York.

Emera Maine was not surveyed due to its smaller size. That said, it is worth noting that CMP and Emera Maine together serve about 97% of Maine load, and that Emera Maine rates are slightly higher and reliability slightly worse than CMP's.

Together, the two utilities are ranked as having some of the highest rates in the nation, and as of 2017, the worst reliability of all 50 states (Figure 5).

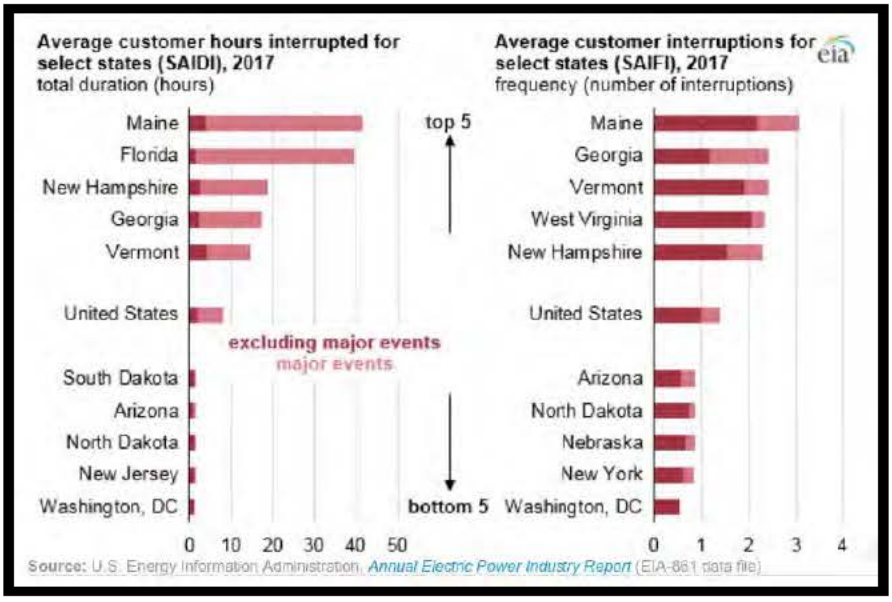

Figure 5: EIA SAIDI and SAIFI reliability data for selected states

As discussed previously, the transition to an electrified, clean energy future hinges to an extraordinary degree on customer-utility trust and meaningful alignment of interests. While no alternative is without risk, it is difficult to imagine an option less likely to yield positive outcomes than to continue with the status quo.

Background on LD 1646

LD 1646 proposes that the state create a new, consumer-owned, municipally organized utility to deliver electricity to those parts of Maine not already served by a COU. The new utility is called the Maine Power Delivery Authority, or Maine Power for short.

For more general advocacy and public consumption, I have prepared an outline of the bill as well as a summary of its potential benefits and frequently asked questions. Please review these. They are necessarily oversimplifications, but may help to convey some background and intent.

Individual board members of Maine Power would be nominated, publicly vetted, and confirmed (or not confirmed) by legislative vote, using the same process used in Maine for other quasi-independent or independent boards and commissions. Terms are staggered and no more than half may be of any one political party.

The geographic distribution of board members reflects the unique needs of highly rural northern and eastern Maine, parts of which are not directly tied to the New England grid or controlled by the New England Independent System Operator (ISO-NE). Emera Maine, the smaller of the two utilities by load and customer count, operates across the two separate system operators.

As a municipally organized utility, Maine Power is quasi-governmental, and is expected to establish its own bylaws and strategic plan. Strategic matters such as initiating and conducting negotiations with the incumbent IOUs, preparing for a potential legal proceeding, hiring a contracted operations team, and preparing or reviewing cybersecurity plans, are intentionally not spelled out in law. These decisions are to be made by the board in public meetings or, as practiced commonly where needed and as allowed by Maine law, in closed executive session.

As defined in § 4006, the authority is a “public instrumentality” and does perform a “governmental function,” but “no debt or liability of the authority may be considered a debt or liability of the State.”

As with other quasi-governmental entities such as the Maine Turnpike Authority, the Maine State Housing Authority, the Maine Technology Institute, or the Board of Trustees of the University of Maine System, it is subject to state transparency requirements. Unlike these, Maine Power is also subject to additional scrutiny and regulation by the Maine Public Utilities Commission.

In other words: Maine Power is proposed as a consumer-owned utility. This is a term already defined in Maine law and well understood. At present, eight smaller COUs serve part or all of 97 of Maine's 488 communities. With the exception of offshore islands, their rates and reliability are generally better than those of their nearest investor-owned neighbor.

Nationally, public power serves one in seven Americans in 49 states. On average, according to the American Public Power Association, the rates of these munis and public power districts are 13% lower than that of investor-owned utilities, and reliability is approximately twice as good.[7] Co-ops, serving another one in six Americans in the most rural of areas, have slightly higher rates but better reliability.

Key advantages of COUs as defined under Maine law include local control, fiduciary responsibility to ratepayers rather than shareholders, transparency and public notice requirements, access to tax-free, lower-interest financing, and access to federal disaster assistance funding.

As severe weather increases, this last point should not be underestimated. In the short term and especially in the long term, cost/benefit analysis of municipalization will need to take this into account as well.

As one example: following Superstorm Sandy in 2012, the consumer-owned Long Island Power Authority received $878 million in federal disaster assistance.[8] IOUs are ineligible for such assistance and recover these costs in rates. As a rural, lower-income state with unique reliability challenges, federal assistance following severe weather events could have an outsized positive net impact on rates.

[7] https://www.publicpower.org/public-power/stats-and-facts
[8]https://www.newsday.com/long-island/nassau/fema-delivers-1-6-billion-to-nassau-county-and-lipa-for-sandy-repairs-1.9363179

Transition from IOU to COU

1. Initial Acquisition Costs

As you have noted, LD 1646 uses the self-reported net book value of each IOU's assets as a starting point for the cost of acquisition. Predictably, both IOUs have objected to this figure. This is to be expected. In practice, I anticipate that a final value will be determined through negotiation and if necessary, through litigation. Any taking under the state's right of eminent domain must meet constitutional tests of just value.

The utilities and their representatives argue that the expenses of LD 1646 will be great, because they will litigate the proposal. However, apart from the acquisition price and related terms, there is little to litigate. State and federal law clearly allow the legislature to 1) revoke a utility's authority to operate, 2) require a divestiture, 3) prohibit investor-owned transmission and distribution utilities altogether, and 4) to take IOU property by eminent domain.

The transaction is simpler than past or pending municipalizations elsewhere. Because Maine has already deregulated, the proposition is to require the sale of a discrete set of T&D assets. There is no need for complex separations of existing delivery and/or supply systems such as we have seen in the successful conversion in 1998 in Long Island, or more recently in the ongoing attempt by Boulder, CO to create its own municipal utility.

With respect to CMP, Emera Maine or both, the board may determine that a purchase of the entire company is most efficient, and proceed accordingly. However, to provide the board greater latitude, LD 1646 also does not require that the entire company be purchased. Rather, it must assume ownership of the assets of the utility necessary for its operation. Should the Maine Power board choose to purchase other assets and/or liabilities of the company, such as outstanding pension obligations or merchant transmission lines, it may opt to negotiate and/or litigate to do so.

2. Degraded Value of Network Systems

Some have suggested that the incumbent utilities may neglect the grid during any transition period. I do not share this concern, but rather anticipate the good faith maintenance of the system as well as ongoing necessary capital expenditures, which

would be properly compensated. PUC regulation of the IOU would continue for as long as necessary.

Were there actual neglect, this would reduce the value of the transaction or else be litigated later on.

Given the significant issues experienced with CMP's new billing system and advanced metering systems, as well as poor reliability in both Emera Maine and CMP service territories, the board may also argue that the that the cost of necessary overhauls, repairs, retrainings, clearing of vegetation management backlogs, etc. should be deducted from any final acquisition payment. I trust that LEI will factor these concerns into valuation estimates for the purposes of its cost/benefit analysis.

3. Synergies of IOUS and of COUs

CMP has also argued that any acquisition that split CMP from Avangrid would lose the operating synergies that have been put in place over the past decade under a variety of shared services agreements. This may be a fair point. To test the assertion, the specifics of each such agreement should be examined and evaluated in light of recent PUC measures of utility performance and return on equity, to determine the extent to which specific synergies have been realized and the extent to which they have benefited ratepayers.

As you unravel these agreements, I urge LEI to consider three things – first, consolidating operations can result in inefficiencies or service quality degradations as attempts are made to standardize functions; second, consolidations can lead to higher management expenses as salaries are often tied to the scope of responsibilities being assumed; and third, a stand-alone Maine COU could draw upon a wide variety of contract services should such services offer value. For example, contracted billing services with a third party handling an order of magnitude more invoices than Avangrid currently handles could be explored, in addition to services offered by other public power organizations and municipal utilities. These strategies are common to COUs in the U.S. and help them to achieve better rates and reliability.

4. Discussions with Experienced Utility Investors

In the near term, the LEI cost/benefit analysis will depend significantly on the cost of capital, related terms or financial engineering, and the value of the payment for the assets of Central Maine Power (CMP) and Emera Maine or its potential successor,

ENMAX. To understand better the financing of public power transitions, legislators on my committee, in leadership positions, the State Treasurer, the Public Advocate, and senior executive branch staff met in February 2019 with senior executives at Goldman Sachs, LLC (GS).

GS lends to both investor-owned and consumer-owned utilities. Notably, they financed the municipalization of Long Island Lighting Company (LILCO) in 1998, which created the consumer-owned Long Island Power Authority. This transaction was particularly complex and expensive because it involved the Shoreham plant, a newly constructed but never utilized nuclear power plant.

A link to the slide deck put together by GS for Maine policymakers is here.

While providing the usual caveats and disclaimers, the GS executives verbally expressed optimism that Maine Power would receive a strong bond rating (low A range), and if well designed, could realize short-term, medium-term and long-term savings for Maine ratepayers.

5. Tax Considerations

Under the federal Rostenkowski Rule, the debt issued to fund the initial acquisition would not be tax-exempt, despite a public utility's otherwise tax-exempt status. This reduces the near-term savings of the transition, unless financing is structured to favor near term rate reductions. Importantly however, future capital expenditures are tax exempt.

From the perspective of the utilities whose assets are being purchased, there may be some U.S. tax advantage in selling involuntarily. Under Section 1033 of the federal tax code, property owners are eligible for nonrecognition of gains for tax purposes if:

1. Their property is condemned, or there is a "threat of imminence" of condemnation;
2. They replace the condemned property within a specified time period (typically two to three years); and,
3. The replacement property is "eligible property" (similar to the like-kind provision in Section 1031) under Section 1033.

In this respect, retaining the provision in LD 1646 invoking the state's powers of eminent domain may be of some use to the incumbent utilities.

6. Competitive Management Team

As written, LD 1646 provides for a degree of competition in hiring the top management team. While most details are left to the Board, I envision a process more or less as follows. Initially, and likely with the technical assistance of another state office such as the PUC, Public Advocate, and/or Governor's Energy Office, the Maine Power board would hire a highly qualified, well compensated director. Among other tasks, this individual would then directly oversee the competitive procurement of a highly skilled and well compensated management team who would manage the utility. In this respect, the suggestion by bill opponents that this provision might obviate any operational management savings has a grain of truth.

However, as discussed previously, the bulk of savings is expected to come not from management efficiencies but from capital expenditures, particularly in the longer term as we rapidly electrify our economy to meet our statutory decarbonization goals by 2050, as well as to harden the grid in the face of more severe weather. The point is certainly not to skimp on personnel.

7. Federal Tariffs vs. Cost of Service

Maine Power would be required to operate its transmission grid and assets under the Open Access Transmission Tariff (OATT) required by the Federal Energy Regulatory Commission (FERC). My understanding is that, to the extent that Maine Power receives revenues under the OATT that exceed its actual cost of service, Maine Power could return the difference to customers based on their usage, invest the difference in improved service, or some combination of the two. I strongly urge LEI to focus on this matter and develop reasonable estimates of how much revenues will flow back to ratepayers. I have heard from other public power entities that own and operate significant transmission assets that this value is quite large.

8. Constitutionality and Value of Assets

Two decades ago, Maine required its electrical utilities to divest of all generation assets. LD 1646 would require that they divest of delivery assets. Legally speaking, the bill this follows established legislative precedent, except insofar as it requires a sale to a specific entity. To effect this transition, the correct value for the sale is either negotiated

between the newly established board and the incumbent utilities, or is established by the court.

As discussed previously, utility lawyers have argued that the sale price established by the court will be higher than the self-reported, net book value of the assets. It is correct that in a condemnation, payment would be necessary for the just value of the assets.

Just value would be a matter for the court to determine. Weighing against utility arguments will be the considerable and ever-mounting evidence that their poor maintenance, worst-in-nation reliability record, and failed adoption of AMI systems and new billing infrastructure have diminished the true value of these assets, perhaps even below net book value.

A recently agreed-to sale of Maine's smaller IOU, Emera Maine, is being reviewed by the PUC. The PUC may or may not require that the sale value be reduced to ensure profitability of the new utility, ENMAX. Due to concerns about the structure of the deal, PUC staff have expressed interest in an escrow account, as well as interim dividend limitations to stabilize the new entity. ENMAX presumably offered more than any other suitor, but has no experience in such acquisitions, no experience in owning or managing distant utilities, no experience in owning or managing U.S. utilities, and no experience in owning or managing wires-only utilities.

In their bid, ENMAX may well have overvalued the assets considerably. The incumbent, Emera Maine, has been denied rate increase requests multiple times in recent years. The proposed acquisition is a considerable risk ENMAX took on itself, which regulators are considering but may or may not agree to as proposed. The agreed-to price represents approximately 12 times the EBITDA of Emera Maine, which is on the high side of recent market transactions.

At present, Maine law allows the three-member PUC, in an adjudicatory proceeding, to revoke a utility's authority to provide service. In fact, two pending dockets at the PUC seek to pursue this remedy at this time. There is no use of the word "franchise" in Maine law. By the same power with which it delegates this power to revoke or suspend a utility, the legislature and Governor may also do so directly.

9. Contracts Clause Objection

In testimony from lawyers or lobbyists representing CMP and Emera Maine during the public hearing on LD 1646, the allegation was made that LD 1646 would violate the Contracts Clauses of the State and Federal constitutions.

A legal memo rebutting this argument, authored *pro bono* by Michael Kebede, Esq., of Maine Equal Justice Partners, is linked here. Kebede's analysis suggests the objection has little merit.

In addition to Kebede's points: it should be noted that Emera and ENMAX may argue that passage of the bill interferes with their rights under the Contracts Clause for the reason that they have recently agreed to the sale of Emera Maine to ENMAX. This specific objection is without merit, because the proposal was known to both parties before they agreed to the transaction. The transcripts of Emera Maine executives and their investors will reflect their awareness of the proposal.

LD 1646 was publicly announced and widely reported in media accounts on January 28, 2019. Both CMP and Emera Maine responded to media inquiries on the proposal at that time. Nine days later, the sale of Emera Maine was reported in Power Finance & Risk, a trade publication, as an ongoing matter, just then embarking on its final round.

Given the timeline and evidence, there can be no violation of the State or Federal Contracts Clauses specific to the sale of Emera Maine, because there was no contract to impede when the bill announced. Both ENMAX and Emera fully assumed the regulatory risks associated with the Maine regulatory and legislative landscape.

10. § 1983 Claims

Testimony on LD 1646 submitted by Emera Maine's lobbyist, Jim Cohen, and Central Maine Power's lobbyist, Catherine Connors, suggested that the State could be liable for plaintiffs' attorneys' fees based on a § 1983 claim. As stated by Attorney Connors:

> Aside from the substantive constitutional deficiencies in L.D. 1646, procedurally, a constitutional challenge to LD 1646 would be pursued under 42 U.S.C. § 1983, exposing the State to paying the plaintiff's attorneys fees when the plaintiff utility prevails.

A response debunking this claim and authored *pro bono* by Robert H. Levin, Esq. was submitted to my committee after the hearing, and is linked here. According to Attorney Levin:

> Federal and state courts are highly unlikely to award attorneys' fees to Emera or CMP based on a §1983 action, as demonstrated by the above jurisprudence.
>
> In fact, it is even possible that the State could be awarded reimbursement of its own attorneys' fees, as §1988 (the statute accompanying §1983 that governs the award of attorneys' fees) applies to the prevailing party whether the plaintiff or the defendant. A prevailing

> defendant can win attorney's fees under § 1988 if it can prove that a plaintiff's claim is frivolous, unreasonable, and without foundation. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978); *Hughes v. Rowe,* 449 U.S. 5 (1980). Given the weakness of CMP's and Emera's legal arguments, it is entirely plausible that such a standard would be met in this case.

11. Requirements Beyond Those for Existing Consumer-Owned Utilities

Maine presently has eight consumer-owned utilities. These COUs serve part or all of 97 municipalities, and range from the extreme north to the extreme east to the coast and islands. Some are rural, others more suburban. One, the Eastern Maine Electric Cooperative, is twice the size of Rhode Island. With the exception of offshore islands, typically dependent on expensive diesel baseload, Maine's COUs are both less expensive and more reliable than their closest for-profit neighbors.

COUs in Maine are exempted from some requirements not because of their ownership structure, but their smaller size. For example, they are exempt from 3210-C, which pertains to long-term contracting. At the public hearing on the LD 1646, Avangrid's counsel misread the bill and did not understand this provision. In fact, LD 1646 is careful to extend to the proposed MDPA most requirements that are imposed solely on IOUs like CMP and Emera Maine, such as administration of an arrearage management program. The new utility would be larger than existing COUs, and should be subjected to the same expectations Maine law already imposes on its large T&Ds in light of their size, as opposed to their ownership.

Potential Amendments

Based on public testimony and discussion since the public hearing on the bill, a few potential amendments may be worthwhile or necessary. LEI comments and specific suggestions on these would be helpful.

1. An Expanded Role for the Commission and Public Advocate?

It would be helpful if LEI could consider the ideal balance of powers between Maine Power, the Maine Public Utilities Commission (PUC) and the Public Advocate (OPA).

Under current law, both entities have a role in regulating COUs. However, their role is more limited than what may be ideal. As Maine Power would be a much larger utility than any of Maine's existing COUs, its good governance may benefit from additional scrutiny and regulatory checks and balances.

In testimony from the Public Advocate, the idea of serving on the board of the new utility was floated. With Maine's existing COUs, however, the OPA has the power to bring a complaint about the COU to the PUC for review. One of these may be appropriate, but perhaps not both.

The Public Advocate could also be given special standing before the board, or be seated as a non voting member.

I welcome LEI's opinion on the optimal regulatory balance, as a possible amendment to the bill. At a minimum, the existing powers of the PUC and OPA over Maine COUs should be preserved, as well as the existing ability of customers to initiate a complaint at the PUC.

2. One COU, or more than one?

While Maine Power is established as a single entity, its role will be to own and manage the grids in three historically discrete service territories. Before 2000, these were controlled by Central Maine Power, Bangor Hydro, and Maine Public Service. The last of these is operated by a different system administrator, and the latter two are owned and operated as Emera Maine.

In testimony on LD 1646 by the Public Advocate, the suggestion was made that multiple COUs might be worth considering, rather than a single Maine Power utility. Certainly as part of the transition, and for many years, the systems would necessarily be operated differently. Differences in employee contracts, AMI systems, and other areas will remain.

LEI recommendations would be useful here. At present, the bill leaves the organizational differences of the different service territories up to the Maine Power board to address.

3. Eminent domain proceeding to Superior Court

The Maine Judiciary System recommended in its testimony that a case of this kind should begin in Superior Court. I welcome that feedback and am confident that an amendment along these lines can be agreed upon.

4. Clarifications to protect municipal budgets

Particularly for transmission, it is important to the future buildout of the grid that those communities willing to host such lines be compensated and see the lines as a net benefit. For this reason there is a need to amend the bill based on the helpful input of the Maine Municipal Association in their testimony.

It is important to note first that on balance, local communities do better with public power. For details, please refer to the 2018 Public Power Pays Back report of the American Public Power Association (APPA). The APPA summarizes its findings as follows (emphasis added):

> When all 2016 taxes, tax equivalents, and other contributions to state and local government are considered, the contribution of public power utilities — as a percentage of electric operating revenues — is 27 percent higher than that of investor-owned utilities. In 2016, public power utilities contributed a median of 5.6 percent of electric operating revenues back to the communities they serve. In comparison, investor-owned utilities paid a median of 4.4 percent of electric operating revenues in taxes and fees to state and local governments in 2016.

That said, an important concern was raised at the bill's public hearing by the municipal community. First, the lines indicated below by strikethrough formatting were a drafting error and should be deleted from the final bill.

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

2.Payments in lieu of taxes. Rates charged by the authority must include sufficient amounts to allow the authority to make payments in lieu of taxes in accordance with this subsection. The authority~~, to the extent its revenues exceed current expenditures and any necessary reserves in any fiscal year,~~ shall make payments in lieu of taxes… (etc.)

Additionally, the bill requires an amendment to ensure that the value of future network improvements be measured by local assessors just as it would be under an IOU, and that payments in lieu of taxes be made to reflect this value as well.

Finally, the following language from the same paragraph is overly complex and unnecessary, and should be deleted.

If the authority owns and manages a service territory formerly franchised to an investor-owned transmission and distribution utility for at least one month during fiscal year 2019-20 or fiscal year 2020-21, for each such month, the authority also shall make timely payment in lieu of taxes to the State in the amount of 1/12 of the most recent, full-year taxes paid to the State by the investor-owned transmission and distribution utility. Such payment to the State must be reduced by any amount paid in lieu of taxes pursuant to this subsection.

5. Competitive Management Team

Under § 4003 sub-3, the Maine Power authority contracts by means of a competitive public solicitation the services of a qualified nongovernmental entity, referred to as "the contractor," to provide operations and administrative services. This provision has been the subject of some discussion.

As mentioned earlier, the idea is to introduce an element of competition and to provide greater flexibility for performance-based compensation, while still preserving Maine Power's access to lower interest, tax exempt financing. That said, LEI's observations and any recommendations are appreciated.

6. Referendum provision

In previous municipalizations elsewhere, a referendum provision has been involved. This could be added to the bill. For example, the legislature could place the bill itself on a statewide ballot for a yes or no vote in November 2020.

A version of this approach is advanced in the amendment suggested by Dr. Gordon Weil, Maine's first Public Advocate and a key *pro bono* architect of LD 1646. An

advantage of a prior vote to authorize municipalization is knowing the will of the people before proceeding.

7. Go/No Go Provision

Alternatively or in addition, a final go/no go vote on the two transactions could be added, to take place once the value and related details have been negotiated and/or adjudicated. This vote could be by the Legislature, by referendum, or both.

Conclusion

The authority for any Maine utility to serve captive customers in a specific territory and to use public rights of way exists in Maine law. As such it may be revoked at anytime by the legislature or, in an adjudicatory proceeding, by the PUC. Both Maine IOUs object to the idea, but such a step is entirely legal and within the rights of the people of Maine.

Additionally, CMP and Emera Maine have warned of the potential for higher rates or reduced reliability if LD 1646 passes. Based on national statistics and on customer satisfaction, it is hard to imagine that adopting a model proven in 49 states for over a century is more risky than the status quo. This is especially true as the pace of capital investment accelerates over the coming decades to face the moral, statutory and science-based imperatives that stem from climate change.

Maine is a unique state: rural, ambitious in its climate goals, and harboring unique potential to provide solutions for other parts of the region as well as its own. LD 1646 seeks to capitalize on this opportunity for Maine. It is our shared goal to put our grid more fully under local control, while also ensuring that the basic costs of tomorrow's energy economy are minimized and the benefits maximized. LEI's thoughtful and expert input can help us to achieve that goal.