

ASSESSMENT OF PROPOSED “FITNESS TO SERVE” LEGISLATION REGARDING ELECTRIC UTILITY SERVICE IN MAINE

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QUALIFICATIONS

This report was prepared under the direction of Ann E. Bulkley, Principal, The Brattle Group, and Toby Bishop, Senior Vice President, Concentric Energy Advisors, Inc. (“Concentric”).

Ms. Bulkley has more than 25 years of management and economic consulting experience in the energy industry, with extensive state and federal regulatory experience on both electric and natural gas issues including rate of return, cost of equity and capital structure issues. Ms. Bulkley has provided expert testimony on the cost of capital in nearly 100 regulatory proceedings before 32 state regulatory commissions and the Federal Energy Regulatory Commission. In addition to her regulatory experience, Ms. Bulkley is a certified general appraiser licensed in the Commonwealth of Massachusetts and the State of New Hampshire and has provided valuation and appraisal services for a variety of purposes including the sale or acquisition of utility assets, regulated ratemaking, ad valorem tax disputes, and other litigation purposes. Ms. Bulkley also has experience in the areas of contract and business unit valuation, strategic alliances, market restructuring and regulatory and litigation support. Prior to joining The Brattle Group, Ms. Bulkley held senior expertise-based consulting positions at several firms, including Concentric, Navigant Consulting, Inc., and Reed Consulting Group, where she specialized in valuation. Ms. Bulkley holds an M.A. in economics from Boston University and a B.A. in economics and finance from Simmons College.

Mr. Bishop has over 25 years of management and economic consulting experience advising energy industry clients throughout the United States and Canada. Mr. Bishop has a broad range of experience covering strategic, regulatory, financial, and transactional matters. Specifically, Mr. Bishop has extensive regulatory and civil litigation experience regarding both natural gas and electric issues, including federal and state rate proceedings, market power and competitive concerns, asset valuation, purchase and sales transactions, contractual disputes, regulatory strategy and policy formulation. In addition, Mr. Bishop has assisted numerous clients throughout North America evaluate energy markets for purposes of regulatory filings, due diligence for acquisitions and divestitures, market entry/exit and competitive assessments, and asset valuation. Mr. Bishop has testified before federal, state, and provincial regulatory commissions in the United States and Canada. Prior to the formation of Concentric, Mr. Bishop consulted for several years with Reed Consulting Group and Navigant Consulting, Inc. Mr. Bishop has a B.A. in economics and geography from Colgate University.



SECTION 1:

EXECUTIVE SUMMARY

In the summer of 2021, two different but related citizen initiatives were submitted that proposed draft legislation applicable to Maine's two largest electric utilities – Central Maine Power (“CMP”) and Versant Power (“Versant”) – and their fitness to serve. In October 2021, one of those draft initiatives was approved for signature collection and is currently being circulated by Maine voters. (the “Proposed Legislation”). The Proposed Legislation would apply only to CMP and Versant, and not to other cooperative, municipal and quasi-municipal electric transmission and distribution utilities in Maine. Both initiatives include the same language regarding the fitness to serve criteria and the requirements if either CMP or Versant are found to not meet such criteria.

The Proposed Legislation would establish 8 criteria by which CMP's and Versant's fitness to serve would be measured. If 4 or more of the criteria are found to apply to the utility, the utility would be deemed unfit to serve, and the Proposed Legislation would require the Maine Public Utilities Commission (“Maine PUC”) to “ensure the sale” of the utility within 24 months.

We have examined the Proposed Legislation, and in our view, the Proposed Legislation is not an unbiased approach to assessing an electric utility's fitness to serve, but rather it appears to seek a pre-determined outcome for the current investor-owned utilities serving Maine's electric utility customers. Specifically:

- Many of the proposed criteria that would be applied to CMP and Versant are not a reflection of either utility's fitness to serve, but rather they reflect their corporate status as investor-owned utilities subject to existing regulations. Considering that approximately 75% of the electric customers in the United States are served by investor-owned utilities, it is not reasonable or logical to suggest that a utility's status as an investor-owned utility is itself a basis for deeming a utility as “unfit to serve.” Such criteria have no determinative relationship to any objective measure of quality or cost of service, which should be paramount.
- Most of the “fitness to serve” criteria in the Proposed Legislation provide little to no discretion by the Maine PUC to assess whether CMP and Versant are actually fit to serve due to being based on specific historical experience and benchmarks or pre-existing corporate structures, and thus the criteria themselves appear to prevent a fair and impartial consideration of the utilities' fitness to serve.
- Most of the fitness to serve criteria in the Proposed Legislation fail to include reasonable or prioritized quantitative metrics, and in many cases, lack specificity and are highly subjective without proper definition. Accordingly, there would be no reasonable means for CMP or Versant to assess whether they would satisfy the proposed fitness to serve criteria, or whether the Maine PUC can reasonably apply the criteria.
- The criteria in the Proposed Legislation would ignore the unique circumstances of Maine and instead apply a “one size fits all” approach to gauge fitness to serve.
- The Proposed Legislation would be unprecedented in that the remedy for a finding of unfit to serve would be the immediate required sale of CMP and/or Versant to a pre-determined entity in the Proposed Legislation. We are unaware of any similar approach taken in the



United States. Moreover, there is no demonstration of any proportionality to the degree of fitness, nor any evidence that some other structure of utility would achieve better performance simply by virtue of being sold. If there is a problem that the criteria identify, the first approach should be to assess what remedies can be pursued short of a forced sale, which likely would be extremely complex, time consuming, disorienting for planning decisions that need to be made in the next few years, and a forced sale might well not succeed in any event. There is no evidence that a new operator would produce better performance.

- The Proposed Legislation provides no consideration of the degree of unfitness or ease of remedy through other means. Even if the criteria were precise, they are not collectively a basis for moving towards a required sale of the utilities. The criteria might diagnose some problems that could be addressed, but there is nothing about identifying any problems in any of the categories outlined that suggests a new operator would offer any better solution. For example, there is no comparative evidence of the cost to Maine customers of the existing performance relative to an alternative performance group, and none of the criteria are evaluated as to what it would cost or what kinds of capabilities would be needed to meet the proposed criteria. To the extent there are issues identified in the utilities' performance, it would be important to consider whether there were solutions that would be more cost efficient and achieve the desired outcome in less time than conducting a forced sale and bringing on board a new operator.



SECTION 2:

OVERVIEW OF PROPOSED LEGISLATION

Maine Affordable Energy has retained Concentric Energy Advisors, Inc. to evaluate a pending citizen initiative submitted on August 13, 2021 that proposed draft legislation applicable to Maine’s two largest electric utilities – Central Maine Power (“CMP”) and Versant Power (“Versant”) – and their “fitness to serve” (the “Proposed Legislation”).¹ Specifically, the Proposed Legislation would require the Maine Public Utilities Commission (“Maine PUC”) to find electric transmission and distribution utilities with 50,000 or more customers (*i.e.*, CMP and Versant)² unfit to serve if 4 or more of 8 standards are found to be true of either of the utilities. The 8 standards outlined in the Proposed Legislation are as follows:

1. **Customer Satisfaction:** The utility has been rated for two or more of the past five years among the lowest decile of utilities of a similar size for customer satisfaction on a nationally recognized survey of U.S. utility business or residential customers.
2. **Reliability:** The utility has been found by the Maine PUC or by the U.S. Energy Information Administration (“EIA”) for two or more of the past five years to have overall reliability in terms of outage minutes per year, with or without major event days, in the lowest decile of utilities of a similar size in the country.
3. **Affordability:** The utility charged residential delivery rates for two or more of the past five years in the highest decile among utilities of a similar size in the country, based on data from the EIA and based on the Maine PUC’s analysis of average delivery rates as a proportion of the average total bill for integrated utilities.
4. **Workers:** The utility has within the previous year contracted with a business to perform work valued at more than \$100,000 that could reasonably have been performed by qualified, non-exempt employees of the utility.
5. **Security:** The utility owns critical infrastructure vital to the security and welfare of the state and is presently owned, either wholly or in a part greater than 5%, by a government that does not represent or govern the captive customers of the utility.
6. **Incentives:** The utility, due to its corporate structure, requires that customers pay for the cost of the utility’s corporate taxes, and also pay for shareholder profits exceeding 10% on

¹ There were actually two proposed citizen initiatives submitted in August, one entitled “An Act to Create Fitness-to-Serve Standards and Competition for Maine’s Electrical Monopoly Utility Companies,” and one entitled, “An Act to Create the Pine Tree Power Company, a Not-for-Profit Utility, to Deliver Lower Rates, Reliability and Local Control for Maine Energy Independence.” Both proposals seek to enact Sec. 6 35-A MRSA §1511-A regarding the “fitness to serve” of Maine’s existing, investor-owned electric utilities. Ultimately, only the second initiative has moved forward to the signature collection stage, which is the focus of this report.

² CMP and Versant are the only utilities in Maine to which these criteria would apply.



prudent capital investment in transmission infrastructure, with little to no risk for poor performance.

7. **Disaster Assistance:** The utility, due to its corporate structure, may require that customers pay directly or indirectly for 90% or more of damages to the utility's assets caused by extreme weather events and may also deny the utility access to federal emergency management assistance to reduce or eliminate these costs, which would otherwise be paid by customers.
8. **Priorities:** The utility, due to its corporate structure and fiduciary obligations, is unable to place the needs of customers, workers, or the state's climate and connectivity goals ahead of the desires of shareholders to earn a profit.

If found to be unfit by the Maine PUC, the Proposed Legislation would require the Maine PUC to "ensure the sale of the utility within 24 months to a quasi-municipal power authority." The focus of this report is the fitness to serve provisions of the Proposed Legislation. We have not reviewed nor are offering an opinion on the remainder of the Proposed Legislation other than the fitness to serve provisions – though it is safe to say that there is no evidence provided with the Proposed Legislation that the proposed solution to any identified performance concerns (*i.e.*, a required sale of the utility) would achieve improved performance. The Proposed Legislation simply would divert the responsibilities to another agent with less experience in dealing with issues unique to the existing system.



SECTION 3:

ASSESSMENT OF PROPOSED LEGISLATION

Each of the eight criteria that the Proposed Legislation would utilize to evaluate CMP's and Versant's fitness to serve are evaluated below.

3.1 CUSTOMER SATISFACTION

The Proposed Legislation would assess CMP's and Versant's fitness to serve related to customer satisfaction based on whether the utility has been rated for two or more of the past five years among the lowest decile of utilities of a similar size for customer satisfaction on a nationally recognized survey of U.S. utility business or residential customers.

The flaw with this criterion is that relying on surveys of customer perceptions of utility satisfaction cannot definitively or accurately measure the reasonableness of a utility's operations, performance, and service quality, and thus ultimately its fitness to serve the public. Imposing such a criterion is particularly problematic considering that failing to satisfy the criteria would result in the forced sale of CMP's and Versant's operations in Maine. While nationally-recognized electric utility surveys can provide useful information to be considered by utilities, regulators, and other stakeholders, the limitations of such results must also be acknowledged. For example:

- There are numerous ways to measure and compare utility customer satisfaction, and ultimately it is difficult to measure. Studies measuring utility customer satisfaction over the same period for the same firm can and do come to different conclusions.
- Utility performance reflected in customer satisfaction surveys are based on customer perceptions, which may or may not accurately reflect actual utility performance and service quality. In particular, survey results may not reflect the extent to which utility management may have had control over recent performance or what level of performance is reasonable to have expected under the severity of circumstances that prevailed (which means this criterion could lead to condemning better than average performance once a more thorough analysis were conducted of the issues.)
- Customer perceptions of utility performance and service quality can be influenced and biased by numerous factors – factors that are both within a utility's control (*e.g.*, customer service response; customer communications) and factors outside of a utility's control (*e.g.*, severe weather causing substantial damage/outages; extensive and/or negative media coverage or political advertising; fuel cost variances).
- Details regarding the ranking methodology of the most nationally-recognized survey are proprietary and not transparent, and can change from year-to-year, thus making it impossible to identify or understand issues that may be present regarding the methodology or results.



While there are various limitations associated with customer perception surveys related to utility performance, the Maine PUC already has responsibility for monitoring and addressing actual utility performance. As investor-owned utilities in Maine, both CMP and Versant are currently operating under customer service and reliability metrics with financial consequences associated with their performance that are overseen by the Maine PUC.³ These metrics provide a more detailed evaluation and better indicator of utility performance than national customer perception surveys. Maine's municipal and cooperative utilities are exempt from these customer service metrics, and as recently as 2021, these utilities actively opposed being subject to Maine PUC service quality standards.⁴

As with many of the other “fitness to serve” criteria, the Proposed Legislation would provide no discretion for the Maine PUC's assessment of utility performance or fitness to serve, but rather instead rely solely on the historical results of customer perception surveys in determining an outcome.

3.2 RELIABILITY

The Proposed Legislation would assess CMP's and Versant's fitness to serve by benchmarking outage minutes per year, with or without “major event days” (*e.g.*, storm outages), against utilities of a similar size in the country. To the extent that CMP and/or Versant are currently in the lowest decile, the company would fail this criterion. This criterion has several flaws.

First, unlike other factors that regulators like the Maine PUC apply in adjudicatory proceedings, this factor does not give the regulator any discretion in how to apply the standard. Without such discretion, the Maine PUC would be unable to consider other facts and circumstances that might bear on the relationship between outage data and “fitness to serve.”

Second, the criterion is vague regarding the definition of a “similar size” utility. It is unclear whether this standard means similarity in terms of one or more of the following criteria: geographic size, customer count, total electric usage, population, miles of line, or some other criterion. Absent clarity, this ambiguity can create inappropriate comparisons among different utilities, and skew the outcome of any adjudicatory proceeding.

Third, and most importantly, there are important variables impacting utility reliability that have nothing to do with a utility's “fitness to serve,” but rather are a function of the nature of the service territory the utility serves. The Proposed Legislation's reliance on “size” as the determining factor

The “reliability” criterion in the Proposed Legislation is flawed because it fails to account for any circumstances specific to Maine generally, and fails to compare Maine or CMP and Versant specifically to other areas in the U.S.

³ CMP has exceeded the Maine PUC service quality indices since the measures were implemented in March 2020. (CMP Press Release, “CMP Offers Proof of Excellent Quality Customer Service,” September 20, 2021).

⁴ *See, e.g.*, separately filed comments of Eastern Maine Electric Cooperative, Houlton Water Company, Van Buren Light & Power District, Docket No. 2020-00334, February 18-19, 2021; also, separately filed comments of Eastern Maine Electric Cooperative, Houlton Water Company, Van Buren Light & Power District and Madison Electric Works, Docket No. 2020-00334, July 16, 2021.

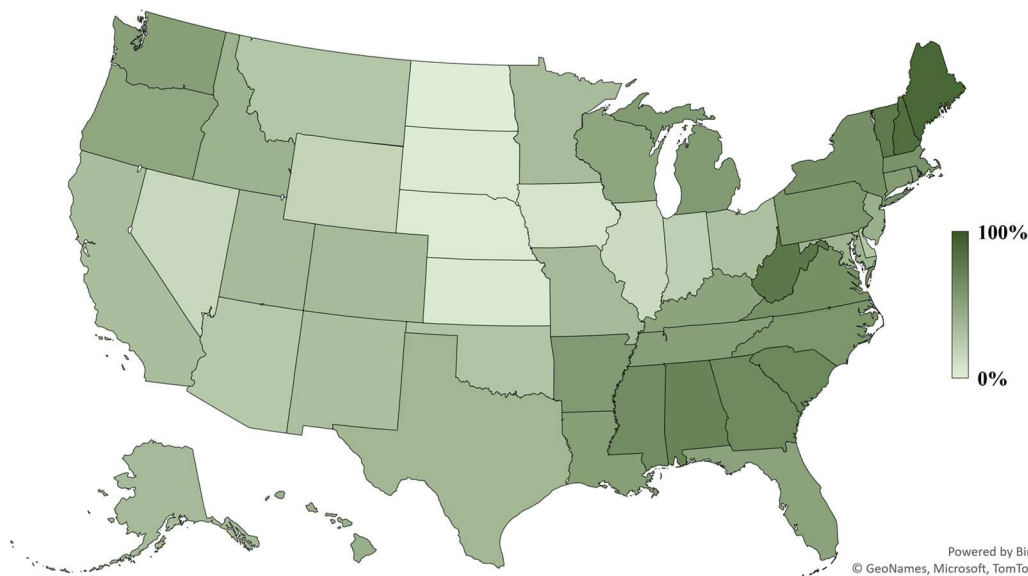


for the benchmark group on reliability fails to reasonably account for other, likely more important differences among each utility’s service territory that must be considered.

When evaluating electric reliability, it is important to recognize that power outages are a function of multiple factors outside of a utility’s control, including topography, weather, vehicle accidents, equipment failure, and wildlife on energized equipment, and these factors are unique to electric utility service territories across the country. Likewise, the time to restore electrical service after an event is also a function of multiple factors many of which are outside of a utility’s control, including the size, customer density, accessibility of the service territory, the extent of the outages and damage across the service territory, and the extent of similar outages and damage in neighboring service territories that also require restoration assistance.⁵

As shown in Figure 1, Maine is the most highly forested state in the U.S., and it is also susceptible to high winds, hurricanes, icing and storms throughout the year. These factors exist regardless of who owns or operates the electric grid.

Figure 1: Relative Forest Coverage Across the U.S.⁶



In heavily forested states like Maine, trees are responsible for customer outages throughout the year, causing significantly higher and more variable average outage durations than states with low forest

⁵ Regarding storm restoration, Eastern Maine Electric Cooperative has stated, “Safety considerations are a top priority. There are unique characteristics to every storm, which can affect the amount of time to safely restore power and the cost of the restoration. Some of these characteristics are the time of day the storm starts, weather conditions, the season, and areas affected by the storm. In many circumstances during significant storms, power can be restored to an area which will then lose power again during the storm.” Comments of Eastern Maine Electric Cooperative, Docket No. 2020-00334, July 16, 2021.

⁶ Forest Inventory and Analysis: Fiscal year 2016 Business Report; https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/publication-15817-usda-forest-service-fia-annual-report-508.pdf.

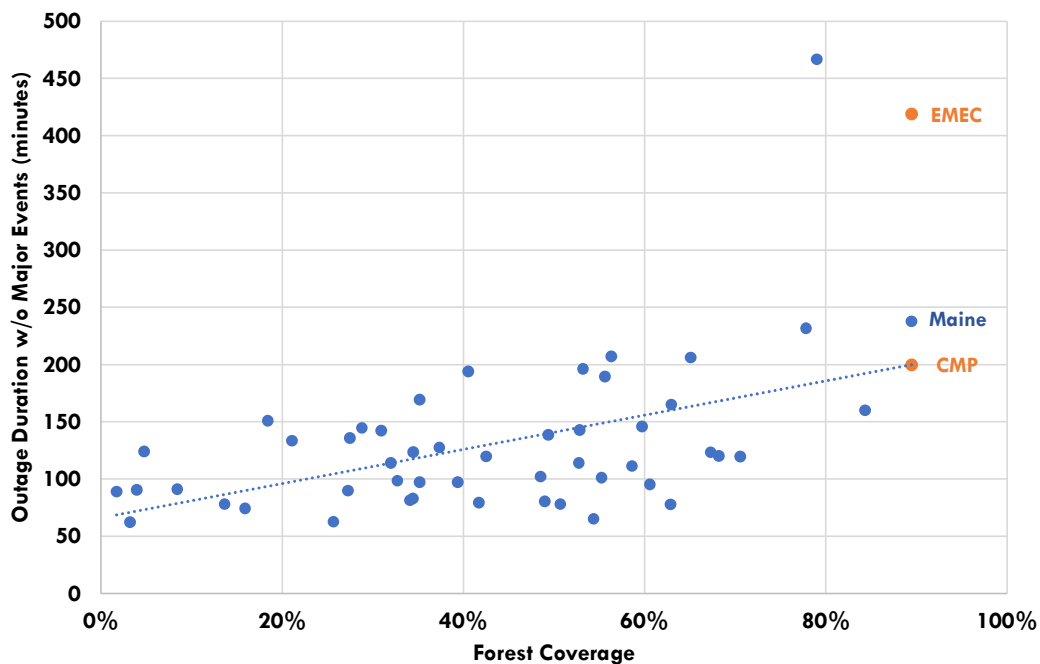


coverage. In fact, trees account for 87% of the outage time experienced by CMP's customers, and high winds and ice make tree-caused outages worse. In particular, extensive tree cover combined with high winds and ice can result in significant differences in outage durations year-to-year based on the frequency and severity of major storms that can affect large portions of a utility's service territory. Vegetation management can help to manage tree-related outages; however, over 82% of CMP's tree-related outages are caused by trees outside CMP's rights-of-way, meaning that most of these outages are caused by trees that CMP does not have the right to trim/remove – and thus are outside of CMP's control.

Animal contact is also responsible for nearly 20% of all of CMP's outages annually. Again, these are causes of outages that are outside the control of the utility.⁷

Electric reliability data from the U.S. Energy Information Administration shows that states with a higher proportion of forest coverage have higher outage times. As shown in Figure 2, CMP's average outage duration over the past five years is consistent with the extent of Maine's forest coverage relative to other states and is significantly lower than the outage duration of the largest consumer-owned electric utility in Maine, Eastern Maine Electric Cooperative ("EMEC").

Figure 2: Relationship Between Outage Duration and Forest Coverage, By State, 2015-2019⁸



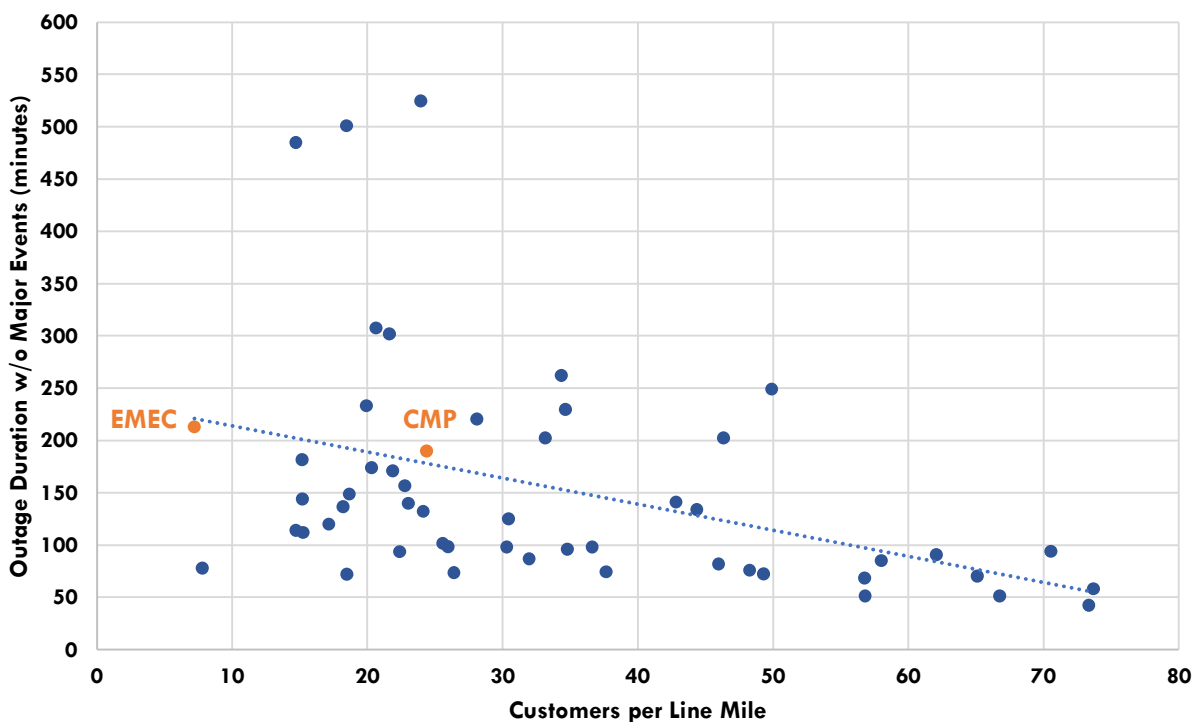
⁷ 2020 Avangrid Sustainability Report, p. 20.

⁸ EIA Form-861 and authors' analysis. At the time of preparation of this report, data reported for 2020 was preliminary and not yet final. Figure 2 assumes that CMP and EMEC have the same average forest coverage as Maine overall.



While the Proposed Legislation would not only fail to consider that Maine is the most heavily forested state in the U.S., such legislation would also fail to consider that Maine has relatively low customer density, meaning customers are more dispersed and thus it takes longer to address outages relative to more densely populated service territories. CMP serves a broad, largely rural geographic region across southern and central Maine that includes over 26,000 miles of transmission and distribution lines providing service to over 646,000 customers spread over 11,000 square miles. This reflects an average of approximately 25 customers per line mile. As shown in Figure 3, longer distribution lines serving fewer customers per line mile can experience higher outage durations than shorter lines serving more densely populated areas.

Figure 3: Relationship Between Customer Density and Outage Duration, By Company, 2019⁹



Since lines of greater distances are required to reach rural areas, each line can have more exposure to variable weather and associated tree contacts. In areas that are more densely populated, utilities can build connections between distribution feeders to provide temporary backup in the event of an outage. However, in sparsely populated service areas, long distances between adjacent feeders can make backup connections prohibitively expensive.

⁹ EIA Form-861 and authors' analysis. Utilities analyzed have greater than 100,000 customers.



Therefore, while the Proposed Legislation would assess CMP's and Versant's fitness to serve on the basis of outage duration relative to similarly-sized electric utilities, it is clear that this criterion does not reflect the primary attributes of a utility system that result in outage duration. Outage durations experienced by CMP or Versant are not reasonably compared to other utilities throughout the U.S. simply based on size of the system without consideration of other, likely more important circumstances related to the transmission and distribution system. As an example, it is illogical to suggest that the reliability of CMP, a utility with over 600,000 customers in Maine with a heavily forested, largely rural service territory is reasonably compared to another utility of that same scale that is located in a significantly less forested and/or largely urban or suburban environment with much higher customer density. There is simply no comparison of the reliability between such utilities, even if they have the same geographic size or the same customer count, yet this criterion would likely penalize CMP and Versant simply for being rural or having heavy tree cover – which they cannot control nor can another owner of these electric assets.

CMP's and Versant's outage duration times are consistent with the high degree of forest coverage and low customer density of their service territories relative to other electric utilities in the U.S.

3.3 AFFORDABILITY

The Proposed Legislation includes an “affordability” test in which the affordability of CMP and Versant would be based on a comparison of residential delivery rates over the past five years among utilities of a similar size in the U.S. based on data aggregated by the EIA, and data developed by the Maine PUC of average delivery rates as a proportion of the average total bill for integrated utilities. There are a number of issues with the Proposed Legislation’s affordability criterion.

First, the proposed “affordability” test does not include any ability of the Maine PUC to consider other relevant factors affecting CMP’s or Versant’s rates.

There are numerous factors that affect a utility’s rates, and it is important to understand the degree of comparability among utilities when evaluating differences in their rates. For example, utilities have differences in how and when customers use electricity, customer densities, relative age of assets used to provide service, and the weather and other events to which their systems are subject. None of these factors will be different for a new owner, so many of the conditions that affect a utility’s rates are intrinsic to the location of the system, the system itself, and how the customers use the system, not the management of the utility.

Electric delivery rates cannot be readily and easily compared across the U.S. because of a lack of comparability as to the manner in how costs are allocated to the utilities' specific functions and recovered in rates.

Second, as with the prior criterion related to reliability, the Proposed Legislation fails to define “similar size” for purposes of a delivery rate comparison.

In addition to the foregoing points, there are two additional and significant challenges with using this criterion for evaluating a utility’s fitness to serve: (i) the comparability of the services provided by



the utility (*i.e.*, a bundled *v.* unbundled service); and (ii) the comparability of the rates derived for such a comparison – each of which are described in more detail below. These challenges make it extremely difficult to undertake a reasonable comparison among utilities and could lead to the inaccurate conclusion that CMP and Versant fail this criterion.

First, the rate comparisons published by the EIA for electric utilities across the U.S. do not disaggregate rates into sufficient detail to be comparable, and this fact alone makes precise rate comparisons extraordinarily complicated. The rates presented by the EIA includes rates for utilities that provide “bundled” service (*i.e.*, power supply and wires service)¹⁰ and those utilities like Maine that provide “unbundled” service (*i.e.*, wires service only). The cost components that are included in bundled versus unbundled rates differ which makes it unreasonable to compare bundled and unbundled rates to assess affordability. Specifically, electric utility rates are comprised of four main components:

1. **Distribution Service:** The cost of delivering electricity across local power lines to customers. Distribution rates include the cost of operating and maintaining a utility’s low voltage, local electric grid.
2. **Transmission Service:** The cost of transporting high-voltage electricity from the generating source, which may be in or out of state, to the various distribution system receipt points (substations) where the power can be delivered and consumed locally.
3. **Power Supply:** The cost of generating electricity by power plants.
4. **Policy Initiatives:** The costs associated with various societal and state policy initiatives such as energy efficiency programs, distributed solar/net metering, and electric vehicle pilot programs.

“Bundled” delivery rates reflect the costs for all four components, while “unbundled” delivery rates exclude power supply costs since the utility does not own generation. The majority of the utilities in the Northeast and Mid-Atlantic states do not own generation, including the utilities in Maine, and therefore utilities like CMP and Versant Power have unbundled delivery rates. However, most of the utilities across the remainder of the U.S. own both electric generation facilities and provide electric delivery service to customers, meaning the rates for these utilities are “bundled” as they include both wires and power supply service. As a result, EIA only publishes “bundled” delivery rates for most utilities, thus significantly limiting the universe of utilities for which a comparison to CMP and Versant can be made using the EIA data.

¹⁰ We use the term “wires” service to include both Maine regulated “distribution” service, which are the smaller power lines that run along many streets that interconnect with homes and businesses, and federally-regulated “transmission” service, which is provided over the higher voltage backbone electric lines that interconnect Maine’s smaller geographic distribution systems with other parts of the State and with the rest of New England.



The second problem with this criterion is that an analysis of delivery rates for integrated, “bundled” utilities is likely to be imprecise; moreover, the degree of such imprecision is difficult to determine.¹¹ There is no database of delivery-only rates for vertically-integrated electric utilities in the U.S. by which a comparison can easily be made to CMP’s and Versant’s separately stated rates for transmission and distribution service. Vertically-integrated utilities are not required to have separate generation, transmission, and distribution rates. Rather, the recovery of the costs of these functions can be bundled together (*e.g.*, a combined transmission and distribution rate v. separately stated rates) and/or the treatment of the costs associated with these functions can be different (*e.g.*, allocating overhead costs between functions differently), and this makes an apples-to-apples comparison with CMP’s and Versant’s separate transmission and distribution rates imprecise. Moreover, residential electric rates provided by utilities across the U.S. are not standardized and reflect a number of differences between the utilities, including differences in average residential usage (*e.g.*, usage in hot climates versus colder climates), rate design (*e.g.*, amount of fixed monthly charge versus usage charge; seasonally differentiated rates; tiered rates), and rate plans (*e.g.*, general use, time of use, residential space heating).

Therefore, a statutory standard of affordability based solely on size (which is undefined in the Proposed Legislation), without any further discretion by the Maine PUC to consider other important differences among utilities, is likely to produce an inaccurate measurement of affordability.

3.4 WORKERS

The Proposed Legislation would deem a utility “unfit to serve” if it has, within the previous year, contracted with a business to perform work valued at more than \$100,000 that could reasonably have been performed by qualified, non-exempt employees of the utility. This criterion does not appear to reflect “fitness to serve” since outside contracting is a common and prudent step for utilities to address specific service needs.

We are not aware of any utility precedent in the U.S. that relying on outside contractors to undertake services could contribute to the immediate forced sale of the utility to a third-party simply because utility employees could have done the task. Further, there is no basis to suggest that a utility is unfit to serve simply because it has relied on outside services valued at more than \$100,000 when such work could have reasonably been performed by its own employees. In fact, there are numerous instances where a utility’s reliance on outside, contracted services can contribute to lower costs or better service, or both.

In addition, applying this criterion in a regulatory context would be extremely difficult to apply in a fair manner. The criterion is both subjective and contingent on the specific facts present at the time

It is unreasonable and unprecedented that, if work valued at more than \$100,000 is performed by outside contractors but is determined that it could have been performed by utility personnel, such action could contribute to the forced sale of the utility to a third-party.

¹¹ It is assumed that “integrated utilities” as used in the Proposed Legislation means vertically-integrated utilities, or those utilities that continue to own generation, as well as transmission and distribution.



each decision by a utility is made to hire a third-party to conduct work. Information is not publicly-available to determine the number of projects conducted by other U.S. utilities over \$100,000 or the specific circumstances that apply to those projects. However, utilities throughout the U.S., whether investor-owned utilities, cooperatives, or municipal utilities, frequently rely on outside contractors to perform a variety of tasks because doing so is the most effective means of getting the necessary work completed on the basis of time and/or cost. It is important to recognize the difference between the value of the service provided and the cost of the service provided, and this proposed criterion is insufficient to acknowledge this distinction. In addition, utilities undertake a number of projects that are infrequent, or one-time (including capital investments) for which it would not be financially prudent to employ utility staff all year when their services would only be needed periodically, or even just once. Just like a homeowner might reasonably elect to hire someone to repair or maintain their home, so do utilities determine that hiring outside contractors for specialized tasks makes sense, both financially and with regard to quality of service. This includes tasks like tree trimming, where professional arborists are best-suited to do the job, or the coordination of underground facility marking requests through the DigSafe program where hiring an outside service is common-practice because it is more cost-effective. Thus, it is standard utility practice to utilize outside contractors to assist with a variety of tasks.

Moreover, whenever utilities like CMP and Versant seek cost recovery of any expenditure associated with hiring an outside contractor, the reasonableness and prudence of such expenditure is reported to the Maine PUC and subject to challenge by interested parties before the expenditure can be included in customers' rates.¹² Importantly, the existing regulatory construct provides the necessary oversight into the management decisions of the utilities, including the use of outside services, and it creates appropriate incentives for utilities to exercise care when hiring outside contractors. For example, CMP incurred approximately \$16 million in costs associated with two different storms in 2010, a portion of which involved the hiring of outside contractors, and these costs were later identified by the Maine PUC Staff as potentially being imprudent. After a hearing regarding the details of the matter, such costs were ultimately found to be prudently incurred by the Maine PUC.¹³ This illustration demonstrates the authority of the Maine PUC to review any costs associated with outside contractors, and to the extent that it finds a utility's decisions to be imprudent, the Maine PUC has authority to limit cost recovery by the utility.

There may be instances in which work valued at more than \$100,000 could be reasonably performed by qualified, non-exempt employees of the utility, which is the criterion established in the Proposed Legislation; however, for the reasons noted above, utilizing such employees rather than contractors may be neither prudent nor in the best interest of customers. Given the Maine PUC's existing responsibility to evaluate the prudence of utility decisions to hire outside contractors, it is unreasonable to establish a criterion whereby a utility would be found "unfit to serve" for simply

¹² The standard of prudence has been defined by the Maine PUC as: "whether the utility followed a course of conduct that a capably managed utility would have followed in light of existing and reasonably knowable circumstances." *See, e.g.*, Maine Public Utilities Commission, Docket No. 2011-77.

¹³ *Id.*



hiring an outside contractor to conduct work that utility personnel could reasonably conduct, particularly if such decision is deemed by the Maine PUC to be prudent. However, the Proposed Legislation appears to do just that, without providing the Maine PUC any discretion when considering whether such retention of an outside contractor was prudent. Considering the regular practice of utilities like CMP and Versant to hire outside contractors, it is likely that if this criterion in the Proposed Legislation was applied, CMP and Versant would fail such criterion, regardless of the actual prudence of such outside contracting decisions. Even if the Maine PUC were to find the decision to retain an outside contractor to provide work valued at more than \$100,000 was imprudent, we are not aware of any jurisdiction that uses such criterion as a factor in determining that the utility would have to relinquish its provision of utility service to another provider.

3.5 SECURITY/UTILITY OWNERSHIP STATUS

The Proposed Legislation also would deem a utility unfit to serve if 5% or more of the utility is owned by a government “that does not represent or govern the captive customers of the utility.” This “security” criterion related to ownership status suggests that, if CMP or Versant is owned in whole or in part by a government outside of their service territory, even by another municipal utility in Maine, that such utility would automatically be considered “unfit to serve.” The apparent implication is that outside government ownership is inherently not “secure,” regardless of the actual facts and circumstances. Further, this is another self-executing criterion that eliminates the Maine PUC’s reasonable discretion to consider the facts and circumstances of a utility’s ownership to determine whether or how such government ownership in fact may bear on the ability of a Maine utility to serve its customers.

Neither the type of entity that owns and operates critical electric utility infrastructure, nor the extent of that ownership stake, are in and of themselves determinative of a utility’s fitness to serve.

While the ownership and ownership stake in a utility may be an important consideration in certain limited circumstances, we are not aware of any similar standard in the U.S. that would deem a utility as unfit to serve simply because it is directly or indirectly owned 5% or more by a governmental entity from outside a particular electric service territory. Additionally, we are not aware of any studies or circumstances that demonstrate that that, in general, a government owner of any percentage ownership interest would be any more or less “secure” than any other owner. Further, minority ownership interest of a publicly-traded company, regardless of government ownership or individual investor, does not provide the owner the ability to dictate the daily or long-term management of the company. Likewise, a minority interest cannot dictate dividend or investment policy. Therefore, this criterion is not a meaningful test of the company’s fitness to provide service to customers, nor is there any evidence of a bias that is injected into utility decision-making when the criterion is met.

More generally, simply because a government-owned entity from outside of the service territory of CMP or Versant owns and operates electric utility infrastructure in Maine, this fact alone does not provide a sound basis for finding that the utility is “unfit to serve” its customers. Likewise, it is also illogical to assume that a specific level of ownership stake in CMP or Versant by a government is a



basis for determining that the utility is unfit to serve. Nonetheless, the Proposed Legislation would effectively deem any entity owned by a government as unfit to serve if it had a 5% or more ownership stake in CMP or Versant.

The arbitrary and illogical nature of this criterion is highlighted when one considers Kennebunk Light & Power (“KL&P”) as an example. KL&P is a municipal utility in southern Maine owned and operated by the Town of Kennebunk. However, if KL&P were to own some or all of the assets of CMP or Versant, KL&P would not “represent or govern the captive customers” outside of Kennebunk, and thus would technically cause CMP or Versant to be deemed unfit to serve. Similarly, if this criterion were applied to Madison Electric Works (“MEW”), which is actually a department of the Town of Madison, MEW would be considered unfit to serve considering it also provides electric service in communities outside of Madison, including Norridgewock, Starks and Anson.

Regardless of the type of ownership interest or the amount of ownership stake, the Maine PUC is currently responsible for overseeing CMP’s and Versant’s utility operations, investments and rates to ensure they are in the public interest. This responsibility includes approving, modifying, or denying a merger or acquisition of any utility under its regulation, regardless of the organizational form of the potential acquirer. In fact, in March 2020, the Maine PUC expressly considered and approved the acquisition of Emera Maine (now Versant) by ENMAX,¹⁴ specifically concluding that the acquisition, as set forth in the Revised Stipulation agreement, would “provide meaningful and long-term net benefits” to customers, and was reasonable and in the public interest.¹⁵ The Maine PUC made similar determinations regarding CMP and its ownership structure.¹⁶ Notwithstanding these prior determinations by Maine’s utility regulator, after many months of active adjudication, that it was in the public interest to allow the acquisition of Maine’s investor-owned electric utilities by entities affiliated with other governments, the Proposed Legislation would nonetheless impose a contrary finding that Versant and CMP are unfit to serve solely because of their ownership status.

The retroactive nature of this criteria is also concerning. If this criterion from the Proposed Legislation were in place, the effect would be a retroactive repeal of prior regulatory decisions approving the ownership of CMP and Versant. Such a retroactive standard would also have significant effects on the overall risk profile of Maine as perceived by debt or equity investors and would likely increase borrowing costs to customers.

¹⁴ Maine Public Utilities Commission, Order Approving Stipulation (Part I), Docket No. 2019-00097, March 19, 2020.

¹⁵ Maine Public Utilities Commission, Order Approving Stipulation (Part II), Docket No. 2019-00097, April 21, 2021, at 15.

¹⁶ *Central Maine Power Company, Reorganization/Acquisition of Energy East Corporation and Iberdrola, S.A.*, Docket No. 2007-355, Order Approving Stipulation (Me. P.U.C. February 7, 2008).



3.6 INCENTIVES – PRIVATE V. PUBLIC UTILITY OWNERSHIP

The Proposed Legislation would establish a criterion that would find a utility unfit to serve if the utility requires its electric customers pay for corporate taxes and also pay for a return on equity exceeding 10% on prudently invested capital in transmission infrastructure, with little to no risk to the utility for poor performance. This “incentives” criterion (as named in the Proposed Legislation) is a three-prong test addressing (i) whether corporate taxes are reflected in customer rates; (ii) the level of return on transmission investments reflected in rates; and (iii)

whether and the extent to which the utility is subject to risk for poor performance. In practice, two of the three factors considered under this criterion are definitional in nature, such that if a utility is investor-owned, it would be considered unfit to serve. The ownership structure of the electric utility is not a measure of fitness to serve.

For example, in terms of the first prong, whether an electric utility is required to pay taxes, does not reflect on a utility’s fitness to serve its customers. Rather, the requirement to pay taxes is a function of law and corporate structure, and investor-owned utilities are generally required to pay taxes as a matter of law. As such, it is simply one of the operating costs that the utility must incur in order to provide service. Moreover, pursuant to traditional cost-based regulation, all investor-owned utilities throughout the U.S. are provided a reasonable opportunity to recover their costs, and that includes recovering the cost of paying federal and state income taxes. The income and other taxes paid by CMP and Versant are actual expenses of the utilities that are required by law to be paid, and thus these costs are appropriately recovered from customers consistent with traditional utility regulation. This is similar to the manner in which other businesses recover the money they pay in taxes – through the cost of the goods and services they sell. Accordingly, there is no basis to evaluate CMP’s or Versant’s fitness to serve based on whether the corporate taxes that they are required to pay are recovered through customers’ rates.

Similarly, regarding the second prong, the return on equity that is established by the regulator on a utility’s transmission investment is intended to represent the return on equity that is necessary for the utility to attract capital from the market based on the return on equity that investors expect to receive on investments of comparable risk elsewhere in the market. The return on equity is also heavily litigated in utility rate cases before being finally determined by the regulator, including for Versant and CMP. Since the utility’s authorized return on equity is market-based and established by the regulator, it is outside of the utility’s control, regardless of whether it is above or below 10%. In this regard, it is arbitrary to decide that a utility is unfit to serve simply because it is authorized by state and federal regulators to incorporate a return on equity in excess of 10% in order to attract private capital to invest in and operate the utility.

Application of this criterion is further challenged to the extent that the Maine PUC would have the responsibility of determining whether the utilities are subject to “little or no risk for poor performance;” however, the level of risk to which CMP and Versant would be subject is established

None of the prongs of the “incentives” criterion are within CMP’s or Versant’s control, and thus this criterion fails as a reasonable measure of fitness to serve.



not only by the Maine PUC and its regulatory policies (for distribution assets), but also by the Federal Energy Regulatory Commission and its regulatory policies (for transmission investments). Thus, the Proposed Legislation would seek to have the Maine PUC determine whether CMP and/or Versant were subject to “little or no risk for poor performance” even though the Maine PUC does not regulate a significant portion of the utilities’ business.

Regardless of the flaws of the “incentives” criterion in the Proposed Legislation, CMP and Versant are at risk for the recovery of their return on their investments – whether due to poor performance and/or other factors within or outside of their control. The return on equity associated with the invested capital that a utility is allowed to recover in rates is established by the regulator with jurisdiction over those facilities. The criteria used by regulators across the U.S. for establishing the return on equity of a regulated utility are based on the principles established by the United States Supreme Court in the *Hope* and *Bluefield* decisions.¹⁷ In these decisions, the Supreme Court established the standards for determining a fair and reasonable return on equity for ratemaking, including consistency of the allowed return with the returns of other businesses having similar risk, adequacy of the return to provide access to capital and support credit quality, and the requirement that the result lead to just and reasonable rates. Pursuant to the fundamental principles of utility ratemaking, utilities are provided a reasonable *opportunity* to earn their authorized return on investment, but utilities have *no guarantee* of earning their authorized return on investment. There are various factors can cause a utility to earn less than its allowed rate of return, or even lose money (*e.g.*, failure of a utility to sell as many kWh as expected; unforeseen increases in costs).

As discussed previously, two of the three factors considered in this criterion are a function of the ownership structure of the assets, which is not a reasonable measure of fitness to serve. Combined with the ambiguity of the third factor, it is not possible to determine whether any investor-owned utilities would be able to satisfy this criterion.

3.7 DISASTER ASSISTANCE

The Proposed Legislation would find CMP and/or Versant unfit to serve if, as a result of their corporate structure, 90% or more of the damages that may be caused by severe weather to their respective systems are required to be paid by customers, and they may be ineligible for federal emergency management assistance to mitigate such costs. Although framed as a standard measuring “fitness to serve,” this criterion appears directed at a private utility’s legal ability to access certain government funds, and whether a private utility should be allowed a reasonable opportunity to recover its costs, including disaster-related costs, and a return on and return of its invested capital.

Maine's investor-owned utilities mitigate disaster-related costs and have access to federal relief funds with appropriate support from state and local government.

¹⁷ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923).



It is important to recognize that a utility's corporate structure, and its ability to mitigate disaster-related costs associated with its infrastructure, does not in and of itself reflect or determine its fitness to serve. While there are different avenues for mitigating disaster-related costs for investor-owned utilities versus municipal utilities, electric cooperatives, and public power agencies, regardless of corporate structure, all electric utilities have means to mitigate disaster-related costs on behalf of their customers, and all utilities must ultimately have vehicles for either pre-funding and insuring against such costs or of recovering such costs after the fact from customers. Disasters are not controllable or preventable by utilities, regardless of the utility's organizational form. There would be no reduction in exposure to this problem by requiring the sale of a utility. Disasters are simply an irregular cost of doing business. Unless the preparedness for such risks is found to be lax and imprudent, there is no basis for denying cost recovery from customers; moreover, denying such recovery places at risk the long-term viability of the utility. There are many possible arrangements for addressing the recovery of disaster costs and addressing those directly makes more sense than using it as a basis for ordering a forced sale of the utility.

It is our understanding that investor-owned utilities are permitted income tax deductions associated with disaster losses to their systems to mitigate the cost of disaster recovery, but since municipal utilities, electric cooperatives and public power agencies do not pay federal income taxes, such relief is not be applicable or available to these utilities.¹⁸ At the same time, although there are some disaster assistance programs which are not ordinarily available to investor-owned utilities, investor-owned utilities are eligible for other forms of relief. For example, an investor-owned utility can access federal disaster relief funds with assistance from state and local agencies who are in turn able to apply for such assistance on behalf of investor-owned utilities.¹⁹ An example of how partnerships with state and local government provided disaster relief for customers of investor-owned utilities is the 1998 ice storm that did considerable damage to the electrical system in Maine. In that case, the Governor and Maine's Office of Community Development submitted a request for funds to the Federal Emergency Management Agency and U.S. Department of Housing and Urban Development associated with unmet costs incurred by the investor-owned utilities, with FEMA ultimately reimbursing \$20 million of CMP's \$56 million in storm-related costs.²⁰

Similar to the "incentives" criterion discussed in Section 3.6, this "disaster assistance" criterion would assess fitness to serve based on the ownership structure of the assets. A utility's fitness to serve should not be evaluated based on its corporate structure and the means by which it is legally entitled to access disaster assistance. Further, it is not reasonable to assess CMP and Versant's fitness to serve

¹⁸ National Rural Electric Cooperative Association, Fact Sheet, April 2021; <https://www.cooperative.com/programs-services/government-relations/Documents/Legislative%20Issues/FEMA%20fact%20sheet.pdf>

¹⁹ U.S. Department of Energy, Office of Policy, "Enhancing Resilience of the Nation's Electricity System: Leveraging Federal Assistance," Craig Zamuda, Ph.D., November 17, 2019, at 7.

²⁰ *See, e.g.*, Maine Public Utilities Commission, Docket No. 98-026, Re Response by Public Utilities in Maine, December 29, 1998 (1998 WL 971290 (Me.P.U.C.)); Edison Electric Institute, "After the Disaster: Utility Restoration Cost Recovery," February 2005, prepared by Bradley W. Johnson of ACN Energy Ventures LLC.



based on the willingness or ability of state and local governments to partner with the utilities to secure federal funds on behalf of the utilities' customers.

3.8 CORPORATE PRIORITIES

The eighth and final criterion of the Proposed Legislation would assess whether, due to its corporate structure and fiduciary obligations, either CMP and/or Versant are “unable to place the needs of customers, workers, or the state’s climate and connectivity goals ahead of the desires of shareholders to earn a profit.” This “priorities” criterion is vaguely worded, entirely subjective, and offers no metrics by which the Maine PUC is to measure the utility’s performance.

The proposed “priorities” criterion is subjective and ambiguous, failing to provide a reasonable means by which the Maine PUC can base a decision or for the utilities to measure their own performance.

For example, there is no reasonable or objective way to determine how the desires of shareholders may impede the desires of customers or workers. Nearly a century of regulatory law and economics have repeatedly concluded that the goals of customers can be, should be, and are harmonized against the risks taken by shareholders via cost of service ratemaking and appropriate allowances for the cost of capital. In fact, the customer goals should not be ahead of or behind the shareholder goals. This criterion reflects an invalid assumption that one side of the regulatory bargain can only gain at the expense of the other. There are many examples of this not being the case (*e.g.*, incentivized energy efficiency programs). The basis of this criterion is incorrect and counterproductive to finding outcomes that are mutually beneficial to shareholders and customers.

Further, the Proposed Legislation does not define the state’s “connectivity goals” and therefore cannot be used to determine if the presence of shareholders may be an impediment to achieving such goals. For example, the ability of a utility to earn a reasonable profit is not antithetical to climate change goals, as renewable energy developers are typically private businesses that seek to earn a profit, and there is no basis to conclude such businesses are unfit to serve simply because they earn a profit. Likewise, most broadband developers are private companies such as CMP and Versant that also earn a profit, and there is no suggestion that these service providers would be unfit to serve.

The ultimate implication of this criterion is that the status of CMP or Versant as private companies that are provided a reasonable opportunity to recover their costs including a reasonable rate of return on their capital investments are, by definition, acting in a manner contrary to the desires of their customers, workers, and other important goals such as climate change and connectivity. However, because this criterion is ill-defined and arbitrary, it is impossible for a utility to gauge its own performance relative to the criterion and reasonably understand the outcome of an assessment by the Maine PUC. As a result, if enacted, this criterion would undoubtedly cause extensive and costly litigation, which is counter to the goals the criterion appears to be targeting.



3.9 CONCLUSION

Based on our review, there are a number of significant concerns with the “fitness to serve” criteria in the Proposed Legislation. In our view, the Proposed Legislation does not provide an impartial evaluation of an electric utility’s fitness to serve. Specifically:

- Many of the criteria that would be applied to CMP and Versant are not a reflection of either utility’s fitness to serve, but rather are a function of their corporate structure and long-standing utility regulation that has evolved over more than one hundred years. Considering that approximately 75% of the electric customers in the United States are served by investor-owned utilities, it is not reasonable or logical to suggest that a utility’s status as an investor-owned utility is itself a basis for deeming a utility unfit to serve.
- Most of the fitness to serve criteria in the Proposed Legislation fail to include reasonable quantitative metrics, and in many cases, lack specificity and are highly subjective without proper definition. Accordingly, there would be no reasonable means for CMP or Versant to assess whether they would satisfy the proposed fitness to serve criteria, or whether the Maine PUC can reasonably apply the criteria. As a result, these criteria will likely spur prolonged litigation without any clear benefit to customers.
- The criteria in the Proposed Legislation would ignore the unique circumstances of Maine and instead apply a “one size fits all” approach to gauge fitness to serve.
- Both CMP and Versant are regulated by the Maine PUC, which has responsibility to ensure that the services provided to customers are in the public interest and that the rates charged are just and reasonable. However, most of the fitness to serve criteria in the Proposed Legislation provide little to no discretion by the Maine PUC to assess whether CMP and Versant are fit to serve, and thus these criteria are likely to prevent a fair consideration of their fitness to serve.
- The Proposed Legislation would be unprecedented in that the remedy for a finding of being unfit to serve would be the immediate required sale of CMP and/or Versant to a pre-determined entity in the Proposed Legislation. We are unaware of any similar approach taken in the United States.



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