STATE OF MAINE
PUBLIC UTILITIES COMMISSION

CENTRAL MAINE POWER COMPANY ET AL.	**BRIEF OF THE OFFICE OF THE PUBLIC ADVOCATE**
Request for Section 708 Exemption or Approval of Reorganization	**August 12, 2024**
Docket No. 2024-00117	

The Office of the Public Advocate (OPA) files this brief pursuant to the Hearing Examiners' July 23 Procedural Order. The Procedural Order requests that the parties file briefs on two issues: (1) whether the Commission should exempt the proposed transaction from approval under Section 708 and (2) if not exempted, whether the "no net harm" or the "net benefits" legal standard under Section 708 applies to the proposed transaction. As explained below, the OPA recommends the Commission decline to exempt the transaction from Section 708 approval and reserve the question of the applicable legal standard until the end of the case so it can decide the issue on a complete record. In the event the Commission chooses to decide both questions now, the OPA recommends the Commission find that the net benefits test applies to the proposed transaction.

I. The Commission should decline to exempt the transaction from Section 708 approval because it has the potential to adversely impact CMP and MNG customers.

Section 708 itself does not include any legal standard for whether a proposed reorganization should be exempt. However, the Commission has exercised its exemption authority carefully, as it explained in a 2001 decision involving CMP's former parent Energy East: "We have previously granted exemptions to Section 708 in a manner that maintains our jurisdiction over reorganizations that may financially or operationally impact affiliated

Maine public utilities."[1] As explained in that order, due to the nature of holding companies, there are certain types of reorganizations that might affect a company that is technically an affiliate of a public utility "even though it may be in a different line of business or its operations may have no direct impact on the public utility."[2] The Commission has exempted reorganizations involving these distant affiliates because there are no potential consequences for Maine ratepayers. But other Commission decisions demonstrate that in reorganization cases involving a parent of a Maine utility, exemption is almost never appropriate.[3]

In a clear example of how reluctant the Commission has been to exempt parent company reorganizations from Section 708 approval, the Commission declined to exempt a reorganization involving the parent of Public Service Company of New Hampshire (PSNH) even though the utility owned just four transmission lines in the state and one substation and served no retail customers in Maine.[4] The proposed transaction was also subject to approval by the Federal Energy Regulatory Commission (FERC) and the Massachusetts Department of Public Utilities (MA DPU).[5] Despite the limited nature of PSNH's contacts with Maine and the fact that at least two other regulatory bodies needed to approve the transaction, the

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[1] *Central Maine Power Co., et al.*, Request for Waiver From the Reorganization Approval Requirements in 35-A § 708, No. 2001-00447 Order at 6 (Me. P.U.C. Dec. 20, 2001).

[2] *Id.* at 4.

[3] *See e.g.*, *Bangor Gas Company, LLC*, Request for Exemption from Reorganization Approval Requirements of 35-A M.R.S. § 708, No. 2008-00271 Order at 1 (Me. P.U.C. July 14, 2009) (denying request for exemption of parent company reorganization); *Maine Public Service Company*, Request for Approval of Organization or Waiver of Section 708(2), No. 2008-00390 Order at 5 (Me. P.U.C. Dec. 17, 2008) (same).

[4] *Public Service Company of New Hampshire*, No. 2010-00395 Order at 1, 6-7 (Me. P.U.C. May 11, 2011).

[5] *Id.* at 6.

Commission nevertheless evaluated on the merits whether the transaction would "impair [PSNH's] ability to maintain its infrastructure in Maine."[6]

In this case there is clearly the potential for harm to Maine utility ratepayers. The proposed transaction involves a restructuring of CMP and MNG's parent company Avangrid, which will no longer be a publicly traded company. While Petitioners claim the proposed transaction will have no impact on Maine utility customers, that is a factual question that should be resolved after carefully weighing the evidence to be gathered in the case, it should not be assumed at the outset by way of exemption. At a minimum, the transaction has the potential to reduce transparency as Avangrid will no longer be required to make SEC filings required of publicly traded companies. This is at least a potential harm that could impact customers of the Maine utilities.

II. Whether the net benefits or no net harm test applies is a mixed question of law and fact and therefore the decision should be based on a complete record at the end of the proceeding.

Under 35-A M.R.S. § 708, "[a] reorganization may not be approved by the commission unless it is established by the applicant for approval that the reorganization is consistent with the interests of the utility's ratepayers and investors." This language has been interpreted by the Commission as a "no net harm" standard.[7] In 2019, the Legislature amended Section 708 to include the following: "If a reorganization would result in the transfer of ownership and control of a public utility or the parent company of a public utility,

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[6] *Id.* at 7.

[7] *See Bangor Gas Co.*, Request for Approval Relating to Long-Financing, Affiliated Interest Transactions and Reorganization, No. 2016-00030 Order at 12 (Me. P.U.C. Aug. 19, 2016) ("[U]nder section 708, the Commission must find that a proposed reorganization is consistent with the interests of the utility's investors and ratepayers, which means there is likely to be no net harm from the proposed reorganization.").

a reorganization may not be approved by the commission unless it is established by the applicant for approval that the reorganization provided net benefits to the utility's ratepayers."[8] Thus, the question is whether the proposed transaction would result in the transfer of ownership and control of Avangrid, the parent company of CMP and MNG.

Petitioners acknowledge that the proposed transaction involves a transfer of ownership, but they argue that there is no transfer of control because Iberdrola already has supermajority control of Avangrid through its ownership of 81.6% of Avangrid stock.[9] They reason that acquiring the minority shares does not transfer control of Avangrid because Iberdrola already controls the company.[10]

The problem with Petitioners' argument is that there are gradations of control, just as there are gradations of ownership. It is not sufficient to ask simply whether an entity "controls" the parent company of a utility. Under Petitioners' logic, there would be no change in control, even if an owner of a public utility increased its ownership of voting shares from 25%—the amount that constitutes a "controlling interest" under Section 708—to 100% ownership. Clearly there is a difference in control between owning 25% and owning 100% of a company. This case is a closer call that requires analyzing the facts to determine whether the proposed transaction would result in the transfer of some degree of control.

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[8] P.L. 2019 c. 353 § 2 (emphasis added).

[9] Petition at 12-13.

[10] *Id.* at 13.

At this stage, only Petitioners have filed their direct case. It is therefore premature to make findings about the degree of control Iberdrola currently has over Avangrid and how that might change following the proposed transaction. There are multiple factual issues to explore such as the current role played by minority shareholders, shareholder rights under the 2015 shareholder agreement, the value to the public and the PUC in having access to financial information included in SEC filings, and Iberdrola's ability to make equity investment into Avangrid now and following the proposed transaction, among others. Given these factual questions, the Commission should defer making a final determination until the end of the case.

III. If the Commission chooses to address the question now, the Commission should find that the net benefits test applies because the proposed transaction will likely result in the transfer of both ownership and control of an affiliate of a Maine public utility.

If the Commission chooses to decide the legal question now, based on the available evidence the Commission should conclude that the proposed transaction would result in the transfer of both ownership and control of Avangrid and therefore should apply the net benefits test. There are two key factors that weigh in favor of finding transfer of control: (1) the motivation behind the transaction and (2) the key differences between a privately held company and a publicly traded company.

First, the driving motivation behind the proposed transaction is to increase Iberdrola's control over Avangrid. Iberdrola does not seek to increase its ownership interest in Avangrid merely as a passive investment but to consolidate its control over the company so that it has unfettered ability to pursue investment opportunities. The very proxy statement issued by Avangrid states that the purpose of the acquisition "is to enable [Iberdrola] to

acquire 100% ownership and control of the Company . . . ."[11] This statement necessarily implies that Iberdrola does not have 100% control of Avangrid and therefore the proposed transaction will result in the transfer of control. The proxy statement further states that after the proposed transaction that "the Company will have greater operational flexibility" and that the transaction "will enable [Iberdrola] to facilitate its future investment plans to be deployed in the energy market of the United States."[12] These statements imply that there are currently operational constraints on Iberdrola's control over Avangrid that will disappear following the proposed transaction. Again, this means the proposed transaction will result in a transfer of control.

Second, it is a mistake to focus solely on the percentage change in Iberdrola's ownership of Avangrid under the proposed transaction. There is a difference in kind, not just degree, in 100% ownership of a privately held company versus majority, or even supermajority, ownership of a publicly traded corporation with minority shareholders. There is inherently a greater degree of control held by the single owner of a private corporation because there are no constraints over that control. By contrast, minority shareholders have rights and the rights of Avangrid's minority shareholders are protected in part by a 2015 shareholder agreement.[13] These minority shareholders are a check on Iberdrola's unfettered control of the company. Following the proposed transaction there will be no check on

[11] EXM-001-003 Attachment 1 at 12 (emphasis added).

[12] EXM-001-003 Attachment 1 at 91-92.

[13] OPA-001-013 Attachment 1.

Iberdrola's control of Avangrid and therefore the transaction involves a transfer of control for which Petitioners must satisfy the net benefits standard.

Respectfully submitted,

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