State of Maine

Public Utilities Commission

Docket No. 2024-00117

Central Maine Power, Maine Natural Gas, and Avangrid, Inc.

Request for Section 708 Exemption or Approval of Reorganization

Direct Testimony of Scott Hempling

On Behalf of Our Power

August 12, 2024

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I. Background materials: Witness qualifications, transaction description, and summary of findings

A. Qualifications and experience

Q. State your name and address.

A. Scott Hempling, 29 Philadelphia Ave., Takoma Park MD 20912.

Q. On whose behalf are you testifying and what is your testimony's purpose?

A. I am testifying on behalf of Our Power. I explain that the proposed transaction has, for the Maine utilities' ratepayers, multiple detriments but no benefits. Iberdrola will give up $2.5 billion of its scarce capital to eliminate thousands of small shareholders—shareholders whose conservative investment goals act as a brake on Iberdrola's and Avangrid's risk-taking. That is a detriment. Avangrid will then go private, depriving this Commission, its staff, and the many financial analysts expert in assessing the business risks that affect Maine's utilities, of the extensive financial reporting that Avangrid makes (and that the utilities, before their takeover by Avangrid and Iberdrola, made) to the Securities and Exchange Commission. That is another detriment. My testimony discusses still other detriments.

All that Petitioners offer in return is a nonfactual, noncommittal assertion that an Iberdrola that owns 100% rather than 81.6% of Avangrid "will improve" Avangrid's and Iberdrola's access to capital. What matters to this Commission is not Avangrid's or Iberdrola's access to capital; what matters is the Maine utilities' access to capital. In the U.S. utility world, what ensures a utility's access to capital is proper rate-setting by its state commission. A state commission is bound, by statutory and constitutional law, to set rates sufficient to provide the utility a return on equity—specifically, equity invested to provide obligatory service equal to what the utility's shareholders would earn on

investment in businesses of comparable risk. For the many decades before traditional utilities, like Maine's, became minor subsidiaries in global holding companies like Iberdrola, that straightforward principle, when applied by state commissions, allowed utilities to raise the capital they needed to build and install the generation, transmission, and distribution facilities that bring us electricity today. As long as this able Commission does its statutory and constitutional job of setting rates properly, the Maine utilities will not need what Petitioners label, without factual support, Iberdrola's "improved" access to capital.

That Iberdrola's and Avangrid's access to capital is even an issue here is only because Iberdrola and Avangrid take nonutility risks with the capital that they have. If the Commission has concerns about those risks, the answer is to eliminate the risks; the answer is not to eliminate the minority shareholders whose presence helps to limit those risks.

Q. **Describe your employment background, education, and experience.**

A. Since 1984, I have worked for every sector of the electric industry, with a concentration on advising or appearing before state commissions. From 1984 to 1990, I worked for a private law firm and then a public interest organization. From 1990 to 2006, I had my own law practice, representing or advising primarily state commissions but also consumer advocacy agencies, independent power producers, and utilities. From October 2006 through August 2011, I was Executive Director of the National Regulatory Research Institute (NRRI).[1] In August 2011 I returned to my law practice,

[1] Founded by the National Association of Regulatory Utility Commissioners (NARUC), NRRI was a Section 501(c)(3) organization, funded primarily by state utility regulatory commissions to provide research to regulatory decisionmakers.

focusing on expert witness work and book-writing. From June 2021 through June 2024, I was an Administrative Law Judge at the Federal Energy Regulatory Commission. In June 2024, I returned to my private practice.

I have written three books on utility regulation: *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Amer. Bar Assoc. 2d ed. 2021); *Preside or Lead? The Attributes and Actions of Effective Regulators* (2013); and *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020). I have written several dozen articles or chapters on utility regulation for publication in law journals, trade journals, and books.

I have taught public utility law at Georgetown University Law Center since 2011. In 2025 I will add a course on justice in the regulation of infrastructural industries. I also teach a 12-week course on public utility law for NARUC's Regulatory Training Institute.

I received a B.A. cum laude from Yale University in 1978, where I majored in Economics and Political Science and in Music. I received a J.D. magna cum laude from Georgetown University Law Center in 1984. I am a member of the Bars of the District of Columbia and Maryland. My CV is attached to this testimony as Exhibit A. All writings listed in my CV for which I still have copies are available from my website, www.scotthemplinglaw.com.

Q. Before what bodies have you presented testimony?

A. I have presented testimony to the state commissions of California, Connecticut, District of Columbia, Hawai`i, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota,

Mississippi, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Vermont, and Wisconsin. I have also submitted testimony to federal district courts in Florida, Minnesota, Montana, and Wisconsin. I have testified numerous times before the U.S. Senate and the U.S. House of Representatives, and before the state legislatures of South Carolina, Arkansas, Vermont, Virginia, North Carolina, Maryland, Nevada, and California. This proceeding is the first time I have testified before the Maine Public Utilities Commission. Years ago I presented a day-long legal education seminar to this Commission.

Q. Describe your experience with mergers, acquisitions, and inter-corporate transactions.

A. Since 1985, I have been involved as a litigating attorney, a member of a negotiating team, an advisor to a state commission, or an expert witness, in merger, acquisition, or inter-corporate transaction proposals involving these companies:

- Toledo Edison and Cleveland Electric Illuminating (1985)
- PacifiCorp and Utah Power & Light (1987-88)
- Northeast Utilities and Public Service of New Hampshire (1990-91)
- Kansas Power & Light and Kansas Gas & Electric (1990-91)
- Northern States Power and Wisconsin Electric Power (1992)
- Entergy and Gulf States (1995)
- Potomac Electric Power and Baltimore Gas & Electric (1997-98)
- Carolina Power & Light and Florida Power (1999)
- Sierra Pacific Power and Nevada Power (1998-99)
- American Electric Power and Central and Southwest (2001)
- Union Electric and Central Illinois Light Company (2001)
- Exelon and Constellation (2011-12)
- Entergy and International Transmission Company (2013)
- Exelon and PHI Holdings (2014-15)
- Iberdrola and United Illuminating (2015)
- Central Louisiana Electric and Macquarie (2015)
- NextEra and Hawaiian Electric Industries (2015-16)
- Kansas City Power & Light and Westar (2016)
- AltaGas and Washington Gas Light (2017)
- Santee Cooper (2019)

- Avangrid and Public Service Company of New Mexico (2021)

B. Description of the proposed transaction

Q. Describe the proposed transaction at issue in this proceeding.

A. Today, Central Maine Power Company and Maine Natural Gas Corporation (the Maine utilities) are owned 100%, indirectly, by Avangrid, Inc., a U.S. holding company. Avangrid's 81.6% owner, indirectly, is Iberdrola S.A., a Spanish holding company that owns utilities and other companies in "dozens of countries."[2] Iberdrola used to own 100% of Avangrid, the result of its 100% acquisition in 2008 of Energy East Corporation, Avangrid's predecessor. In 2015, Iberdrola acquired UIL, the holding company for the utilities United Illuminating, Southern Connecticut Gas Company, Connecticut Natural Gas Company, and Berkshire Gas Company. That 2015 acquisition produced a corporate structure in which Iberdrola reduced its 100% stake in its U.S. holding company, making room for 18.4% ownership by minority shareholders. Those minority shareholders were, as I understand it, the former shareholders of UIL. In the 2015 transaction, those former shareholders received stock in Iberdrola's U.S. holding company, along with cash. The U.S. holding company is now called Avangrid.

Iberdrola now proposes to change its U.S. holding company's ownership again, bringing Iberdrola's control back to 100%. In this proceeding, the Commission will decide whether to approve this transaction under 35-A M.R.S. § 708.

[2] Petition at 3-4.

To acquire the 18.4%, Iberdrola would pay the minority shareholders $2.5 billion for their 70,980,000 shares, at a price of $35.75 per share.[3] The control premium—the excess of purchase price over market price—is between $260 million and $335 million, depending on the calculation method used.[4] Petitioners say that Iberdrola will pay for the acquisition using internal cash rather than external financing.[5]

Avangrid's common stock is currently traded publicly on the New York Stock Exchange (NYSE). By buying out all the minority shareholders, Iberdrola will be taking Avangrid private. Because its shares will no longer be traded publicly, the public will no longer have available the information that Avangrid currently provides via reports required by the Securities and Exchange Commission (SEC). Nor will Iberdrola have any fiduciary duty to any minority shareholders.

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[3] 35.75 x 70,980,000 = $2.537 billion. The official documents usually refer to the minority shareholders as the "unaffiliated security holders," meaning shareholders not affiliated with Iberdrola.

[4] I discuss the control premium in Part IV below.

[5] See Petitioners' Response to OURP-001-012:

> (a) The proposed transaction is not conditioned on obtaining financing. Please see Section 6.5 of the Agreement and Plan of Merger, included in Exhibit PET-1 to the Petition in this matter. Petitioners understand that Iberdrola's model is mainly based on covering financing needs of subsidiaries from the holding company. Centralized treasury allows the Iberdrola group to maintain a very strong liquidity position at the holding company that can be used to cover all financing requirements, therefore Iberdrola does not plan to conduct any specific additional financing for the proposed acquisition of the shares of Avangrid.

Q. Who are the minority shareholders?

A. When Avangrid acquired UIL in 2015, the UIL shareholders received cash, as well as publicly traded stock in Avangrid. Many of them were shareholders in the utilities that were owned by UIL. Today, the minority shareholders are those 2015 shareholders, or persons who bought shares from those shareholders. According to a confidential list provided by Petitioners, the minority shareholders number in the thousands. Most of them are individuals who formerly owned stock in the pure-play utilities owned by UIL before its acquisition by Avangrid.

C. Summary of findings

Q. Provide a summary of your findings.

A. **Part II** provides a framework for understanding and assessing corporate transactions involving public-utility monopolies. It explains that a utility's affiliated corporate-system characteristics must align with the utility's public-interest responsibilities. Iberdrola's corporate characteristics are misaligned with the Maine utilities' responsibilities, because Iberdrola has goals and practices that conflict with the utilities' public-interest mission. Increasing Iberdrola's control of the Maine utilities, from partial control to complete control, misaligns more.

Unambiguous statutory language forbids this result. First, section 708(2)(A) requires the applicant to "establish[]" that "the reorganization is consistent with the interests of the utility's ratepayers and investors." In utility regulation, the ratepayers' interests include receiving from their utility that combination of performance and price equivalent to what a competitive market would produce. Petitioners have done nothing to "establish" that result. Moreover, this transaction produces definite harm, in the form of lost access to essential financial information and the risk of future Iberdrola

transactions that are unharnessed and uninfluenced by the concerns of small, risk-averse shareholders. On benefit, Petitioners have asserted only aspiration; they have "established" nothing. Even if one interprets "consistent with the interests of the utility's ratepayers" as a no-harm test—an erroneous interpretation—this transaction fails.

Second, section 708(2)(A) says that if the reorganization "would result in the transfer of ownership and control of a public utility or the parent company of a public utility," the applicant must "establish[]" that the reorganization "provides net benefits to the utility's ratepayers." Eliminating minority shareholders is a "transfer of . . . control"—control of 18.4% of Avangrid voting stock. It is a transfer of control of the 18.4% voting right that the minority shareholders have the power to exercise when they want to put a brake on Iberdrola's risk-taking. In the status quo, Iberdrola cannot take risks without considering its fiduciary duty to the minority shareholders—many of whom are small investors who originally were investors in the pure-play utilities owned by UIL. After the transaction, Iberdrola can take those same risks, and more, free of any fiduciary duty—all because the minority shareholders have sold to Iberdrola their control of their voting shares.

In this transfer of voting-share control, section 708(1-A) requires that the Commission "ensure" that the transaction "serves the interest of the utility's ratepayers." No matter how hard the Commission and its able staff try, they cannot "ensure" any result. The term "ensure" requires certainty of benefit and certainty of harm protection. The term "serves" requires singularity of transactional purpose—the purpose of "serv[ing] ratepayers." The Proxy Statement makes clear that this

transaction has no ratepayer-interest purpose. And despite decades of experience with corporate systems that mix utility and nonutility businesses, no one has invented a means of guaranteeing protection of the former from the latter. The Commission can only do its best and hope. But the term "ensure" requires a guarantee.

Third, the "benefit" in the phrase "net benefit"—a benefit that Applicants must "establish" (more certainty)—means complete compliance with the Maine utilities' obligation to serve. That obligation is to provide the best feasible service at the lowest feasible cost. "Established" means create, with certainty. Petitioners have not "established" any benefit. They hope for better access to capital. But despite committing $2.5 billion to that hope, a hope that they obscure with the inaccurate, unenforceable phrase "will improve," they are unable to quantify any capital-access benefit. Moreover, "net benefit" requires netting detriment against benefit. Petitioners have not acknowledged, let alone quantified, any detriment. The necessary implication, that there is no risk from Iberdrola's 100% control of its acquisitive risk-taking, no possibility of any harm, is not credible. There is risk, and risk is detriment.

Part III identifies two categories of detriments, each with multiple components. First, going private means no more SEC reports from Avangrid. SEC reports make transparent, to the Commission, its professional staff, and the many objective analysts in the financial community, all information relevant to Avangrid's financial condition. Avangrid will be operating in the dark, controlled absolutely by a global corporate system. To replace the lost SEC reporting, the Commission will need to issue rules replicating all the SEC reports. To replace the lost SEC enforcement, the Commission will need to obtain from the Legislature new powers, for itself and the courts, to impose

civil and criminal consequences for any Avangrid departure from truth in financial reporting. That imposition on the Commission and Legislature is itself a transaction detriment. And even with that information, the Commission's hardworking, resource-constrained professional staff cannot possibly replicate the intense, continuous scrutiny applied today by an expert financial community informed today by the SEC reports.

Second, eliminating Avangrid's minority shareholders reduces the discipline on Iberdrola's risk-taking. In this respect, the interests of Avangrid's minority shareholders and the utilities' captive ratepayers coincide. Petitioners say, four different times, that the transaction "will not" cause any harm. But these statements are at best aspirational, at worst mere advertising. They are neither factual nor enforceable.

Part IV explains that to get 100% control of Avangrid, Iberdrola has offered the minority shareholders a premium of 11%-15% ($260-335 million) over Avangrid stock's unaffected market price as of a stated day. Because one of Avangrid's major activities is ownership of government-protected utility monopolies, some of that value is likely attributable not to minority-shareholder risk-taking in Avangrid's competitive Renewables segment but rather utility-customer captivity in Avangrid's Networks segment—a segment that produces lower-risk earnings. Part of the premium's value, therefore, is attributable to the ratepayers. The transaction's plan to divert to the minority shareholders the customer-contributed value-portion of the $2.5 billion purchase price is a detriment.

II. Assessing corporate transactions: Public-interest principles and statutory framework

A. Overview

Q. What is the purpose of this Part II?

A. This Part II provides public-interest principles and a statutory framework for assessing corporate transactions, including Iberdrola's proposal to buy out Avangrid's minority shareholders. Part II.B explains that a utility's corporate-system characteristics must align with the utility's customer-service responsibilities. Part II.C then describes how Maine's statutory language compels that very alignment. The statute's verbal precision, especially the terms "serve," "ensure," "established," and "provide," requires singularity of purpose and certainty of outcome. Applying the statute's precise terms to the transaction's undisputed facts leaves no room for approval.

B. For a reorganization to be "consistent with the interests of ratepayers," the utility's corporate-system characteristics must align with the utility's public-interest responsibilities

Q. What is a public utility's public-interest obligation to its customers?

A. In return for receiving the privilege of selling an essential service free of competition, a utility must serve all its customers using the most cost-effective practices, and at the lowest feasible cost.[6] These regulatory standards replicate the pressures of

[6] *See, e.g.*, *El Paso Natural Gas Co. v. Federal Power Commission*, 281 F.2d 567, 573 (5th Cir. 1960) (holding that a utility must operate with "all reasonable economies"*)*; *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co*., 36 FPC 61, (1966), *aff'd sub nom*. *Midwestern Gas Transmission Co. v. Federal Power Commission*, 388 F.2d 444 (7th Cir. 1968) (holding that a utility must use "all available cost savings opportunities . . . as well as general economies of management"); *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of the District of Columbia*, 661 A. 2d 131, 137 (D.C. 1995) (holding that a utility has an obligation to serve at "lowest feasible cost").

competition.[7] In competitive markets, a firm that fails to operate with all reasonable economies, fails to serve at lowest feasible cost, or fails to achieve all available savings, loses its customers to companies that perform better. If Maine's utilities don't replicate this discipline, their performance won't be consistent with the public interest.

Q. How is a utility's ability to carry out its public-interest obligation affected by the characteristics of the corporate system of which the utility is a part?

A. The public interest requires a utility to provide obligatory services using the most cost-effective practices available. That purpose must permeate the corporate system of which the utility is a part. Only that way will the motivations and incentives of the investors, executives, and workers all be aligned. In that corporate system there must be no business objectives that are in conflict with, or that have the potential to undermine or divert attention from, the utility's public-interest mission. A corporate transaction involving the utility will serve the public interest, and the interest of the customers, only if the transaction is consistent with those factors.

Q. What is the potential for conflict in a utility's holding-company system?

A. In any utility holding company system, conflict can arise from at least two sources. The first is business activities. A standalone utility, affiliated with no other business and serving a single local territory, experiences no conflict involving its business activities, because its sole business is its local utility business. That was the status of the Maine utilities for the many decades before this Commission permitted their acquisition by holding companies.

[7] *See, e.g.,* Oscar L. Pond, *A Treatise on the Law of Public Utilities* § 901 (3d ed. 1925) ("[T]he state through its [public utility] commission takes the place of competition and furnishes the regulation which competition cannot give").

As the utility's affiliated business activities expand, the potential for conflict grows. Expansion may be geographic or type-of-business. Geographic expansion (merging with or acquiring utilities serving other areas, whether nearby or remote) can benefit customers if there are economies of scale; it can hurt customers if operations are impaired by managerial remoteness or diseconomies of scale. Type-of-business expansion (merging with companies that sell services, whether utility or nonutility services, to third parties or to the utility itself) is a two-edged sword: Nonutility affiliates can support a utility (as might a subsidiary experienced in acquiring land or supplying fuel); or distract it (like affiliates operating unrelated, higher-risk businesses).

Conflict is especially direct when the unrelated businesses have financial problems. Every month, customers pay the utility for service, usually in cash. The utility's cash flow tempts the holding company to help its less successful businesses. The holding company can extract the utility's cash through dividend payments. And the holding company, to preserve its own cash for its troubled businesses, can reduce the equity it puts into the solid businesses—like its utilities. Both actions can leave the utility without the equity it needs to maintain, modernize, and expand infrastructure. And because utilities are capital-intensive, their assets are attractive collateral for third-party loans needed to help the holding company's troubled affiliates. The utility, initially strong from ratepayer support, can be weakened when its affiliates take risks that don't work out.

To reduce the potential for conflict, a utility's corporate system should have, at all levels, from the holding-company CEO to the substation repair team, a single focus: the utility's performance for its customers. When presented with a proposed merger or

acquisition, therefore, a commission should ask: Will ultimate control be exercised by individuals whose full focus and professional priority is on service to utility customers? Or will control be exercised by companies and executives whose objectives conflict with the customers' interests?

Q. How does the foregoing discussion relate to section 708(2), which requires applicants to "establish" that the reorganization is "consistent with the interests of ratepayers"?

A. In a competitive market context, the interest of the customer is to receive service at the level of quality and cost that reflects the pressures on the seller of competitive market forces. In the monopoly utility context, the standard is the same. The interest of ratepayers is in receiving service that has the quality and cost that it would have if the utility were subject to competitive market forces. As in a competitive market, the legitimate interests of shareholders and ratepayers should be aligned. The customer should be the focus of the enterprise, and the result should be economically efficient. That outcome makes for satisfied customers and satisfied shareholders. As well, the customers should be bearing none of the seller's unrelated business risks. The customer is buying services; she is not taking business risks.

In this transaction, those features are absent. The minority shareholders' interest was in getting from Iberdrola the highest possible price.[8] That interest is not aligned with the ratepayers' interest, because the higher the price that Iberdrola pays, the less able it is to supply the utilities' capital needs. (Which is why it is odd that a transaction that claims to "improve" Iberdrola's access to capital has as its first step a $2.5 billion

[8] *See* Schedule 14A, *Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934* (Proxy Statement) at 43-61 (detailing the steps taken by both sides to initiate and carry out negotiations, culminating in the Merger Agreement).

outflow of capital.) And Iberdrola's risk-taking, which is unrelated to serving Maine's utility customers, can cause costs to the utilities' ratepayers. At best, the hardworking professionals at the Commission can try to prevent those costs, but there are no guarantees. And the staff time required for prevention—a cost paid for by the ratepayers rather than shareholders—is itself a cost.

Moreover, a transaction cannot be "consistent with the interest of ratepayers" if in design and purpose it is indifferent to the interest of ratepayers. Using common sense, one cannot view an event as "consistent with the public interest" if that result occurs only by happenstance rather than intent. Imagine this eulogy: "Her career was consistent with the public interest; she did no harm." Similarly, a doctor serves the patient's interests not merely by doing no harm but by envisioning a healthy patient, then taking all actions necessary to make that patient healthy. If a transaction is to be "consistent with" and "serve" the ratepayer interest, it cannot be activated by an intent to serve interests that conflict with the ratepayer interest.

Defining the ratepayers' statutory interest as merely suffering "no harm" would allow a government-protected monopoly—a company that is not accountable to competitors—to persist in a level of performance that would cause it to fail if it were accountable to competitors. Such a policy would conflict with the very purposes of regulation. On this point, therefore, I respectfully disagree with prior Commission decisions.[9] The current transaction presents a necessary opportunity to align Commission policy with the statutory requirement.

[9] *See* William S. Harwood, James I. Cohen, Geoffrey G. Why, Nora R. Healy, Katie M. Gray, and Brian T. Marshall, *Maine Regulation of Public Utilities* 147-48 (Verrill 2018) (stating that the Commission applies to most reorganizations a "no net

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Part II.C.5 of this testimony will explain how the conflicts within Iberdrola's corporate system are detrimental to Maine's utilities, such that this transaction does not deserve deference by the Commission. But that explanation is not necessary, because as discussed next the relevant statutory provisions leave no room for approval of this transaction.

C. The statute requires certainties that the Application fails to provide

Q. Explain the purpose and organization of this Part II.C.

A. This Part II.C has five subparts:

- Part II.C.1 sets out the relevant statutory language. I use italics to emphasize the language of mandate and certainty—terms like "ensure," "serve," and "established."

- Part II.C.2 explains that the language applies to this transaction because eliminating minority shareholders—the entire reason for the transaction—is a "transfer of ownership and control."

- Part II.C.3 explains that the transaction's facts provide no way for the Commission to "ensure" that the transaction "serves the interest of the utility's ratepayers."

- Part II.C.4 defines "net benefit" to align with conventional regulatory principles. The phrase cannot mean $1, as in "net benefit equals no harm plus $1." Rather, we must measure benefits in terms of the utility's franchise obligation to provide the best feasible service at the lowest feasible cost.

- Part II.C.5 concludes this discussion of regulatory framework by emphasizing that even if the Commission had discretion to apply the precise statutory terms loosely, there is no basis for deferring to the Applicants' goals because their goals do not align with the ratepayers' interest.

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harm" standard, under which the Commission will approve a transaction if "the rates and service of the utility will not be adversely affected or if the benefits of the merger are at least equal to its risks").

1. In connecting ownership and control to ratepayer interests and net benefits, the statute uses the language of mandate and certainty

Q. Provide the relevant statutory provisions, italicizing the key phrases.

A. 35-A M.R.S. § 708(1)(A) provides:

> The Legislature finds it is in the public interest to *ensure* that a reorganization of a public utility that would result in the transfer of ownership and control of a public utility or the parent company of a public utility *serves the interest* of the utility's ratepayers.

35-A M.R.S. § 708(2)(A) states, in relevant part:

> If a reorganization would result in the *transfer of ownership and control* of a public utility or the parent company of a public utility, a reorganization may not be approved by the commission unless it is *established* by the applicant for approval that the reorganization provides *net benefits* to the utility's ratepayers.

35-A M.R.S. § 708(2)(A)(1)-(9) requires the Commission to find that

- it "has reasonable access to books, records, documents and other information relating to the utility or any of its affiliates" (with a separate provision for trade secrets);
- it "has all reasonable powers to detect, identify, review and approve or disapprove all transactions between affiliated interests";
- "the utility's ability to attract capital on reasonable terms, including the maintenance of a reasonable capital structure, is not impaired";
- "the ability of the utility to provide safe, reasonable and adequate service is not impaired";
- "the utility continues to be subject to applicable laws, principles and rules governing the regulation of public utilities";
- "the utility's credit is not impaired or adversely affected";
- "[the commission has imposed] reasonable limitations . . . upon the total level of investment in nonutility business, except that the commission may not approve or disapprove of the nature of the nonutility business";
- "the commission has reasonable remedial power including, but not limited to, the power, after notice to the utility and all affiliated entities of the issues to be determined and the opportunity for an adjudicatory proceeding, to

order divestiture of or by the utility in the event that divestiture is necessary to protect the interest of the utility, ratepayers or investors"; and

- "neither ratepayers nor investors are adversely affected by the reorganization, and if the reorganization would result in the transfer of ownership and control of a public utility or the parent company of a public utility, that the reorganization provides net benefits to the utility's ratepayers."

These items are not mere possibilities for the Commission to consider; they are outcomes that the Commission must find to be true. And as I will explain shortly, each of the key phrases signals a legislative requirement of certainty.

2. Eliminating minority shareholders is a "transfer of . . . control"

Q. Describe the debate over the statutory phrase "transfer of ownership and control"

A. Petitioners state: "The Transaction will not result in a change in control of Petitioners. . . ."[10] From this statement, they argue that this transaction needs no Commission approval.

Petitioners' statement is factually incorrect. Consider two propositions:

- 81% ownership is not full control because the 81% owner owes a duty to, and is subject to the influence of, the minority shareholders.
- 100% is full control because the 100% owes no duty to, and is not subject to the influence of, any minority shareholders.

The second proposition differs from the first. It differs because there has been a "change"; namely, a "change in control." That change in control occurred because there was a "transfer of ownership and control."

This reading of the language—the only possible reading, so it is not even an interpretation of language needing interpretation—is supported by Avangrid's own language. Its 2023 Form 10-K states (at 35, emphasis added):

[10] Petition at 1.

> Iberdrola owns approximately 81.6% of outstanding shares of our common stock and has the ability to *exercise significant influence* over Avangrid's policies and affairs, including the composition of our board of directors and any action requiring the approval of our shareholders, including the adoption of amendments to the certificate of incorporation and bylaws and the approval of a merger or sale of substantially all of our assets, subject to applicable law and the limitations set forth in the shareholder agreement to which we and Iberdrola are parties.

Note the phrase "exercise significant influence." "Significant" influence means less-than-complete influence. Influence contributes to control. An 81.6% share—the share in 2023—was less-than-complete influence, short of complete control, because the minority owners also had influence—partial control. A 100% share is not significant influence; it is unimpeded control. The change from significant influence to unimpeded control results from a transfer of control.

Q. Straightforward text aside, is there a practical basis for finding that Iberdrola's elimination of the minority shareholders is a change in control?

A. Yes. If there is no change in control, or if there is only a "modest[] increase" in ownership,[11] the Commission can reasonably wonder why a rational holding company would pay $2.5 billion to make this transaction happen. Iberdrola surely is not paying $2.5 billion to reduce the cost of making SEC filings—a cost that literally thousands of much smaller companies routinely incur for the privilege of issuing stock in public markets. And Iberdrola is not paying $2.5 billion to produce benefits for electricity customers, because the Proxy Statement's discussion of reasons for the acquisition state no customer benefits (as discussed in Part II.C.5 below). Iberdrola is paying $2.5 billion to eliminate the minority shareholders. Iberdrola is eliminating the minority shareholder to increase its control. Ownership, where the ownership is of voting stock,

[11] Petition at 1.

is a form of control. Increasing ownership of voting stock increases control. Complete ownership is complete control.[12]

Here's another way to think about it: In any corporation, legal control rests with the shareholders. For status quo Avangrid, that legal control rests with the sum of all shareholders—Iberdrola with its 81.6%, *plus* the minority shareholders with their 18.4%. After the transaction, legal control will still rest with the shareholders—except that instead of the combination of shareholders in the status quo, there will be only Iberdrola. That change—from control exercised by the combination to control exercised by Iberdrola alone, is a change in control resulting from a transfer of control.

The Petitioners seem to argue that the ownership change from 81.6% to 100% is not a change in control because at 81.6%, Iberdrola already has control. That is, the change in control from supermajority status to sole-owner status is not a change in control.[13] I respectfully disagree. Iberdrola has more control at 100% than at 81.6% because at 81.6% it has to take into account the interests of the minority shareholders, to whom Iberdrola as majority shareholder has in state corporation law a fiduciary duty. That duty means that Iberdrola cannot use its supermajority status to take actions that advance its own interests to the detriment of the minority shareholders' interests.

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[12] To put $2.5 billion in context: In 2011, Dr. Anthony Fauci viewed $2.5 billion as sufficient to reach "the goal of putting eight million people globally on HIV treatment by 2013 and ten million by 2015." Anthony Fauci, M.D., *On Call: A Doctor's Journey in Public Service* 279 (2024).

[13] Petition at 12-13.

3. The Commission has no way to "ensure" that the transaction "serves the interest of the utility's ratepayers"

Q. How does section 708(1)(A) fit with the regulatory principles that you have discussed?

A. Section 708(1)(A) requires the Commission to "ensure" that the transaction "serves the interest of the utility's ratepayers."

The Legislature's use of the term "serves" warrants close attention. To "serve" is to "be a servant to," "give the service and respect due to (a superior)," "comply with the commands or demands of," and "perform the duties of (an office or post)."[14] Each of these common definitions of "serve" describes well a utility's state-law obligation to provide service to its customers. The term "serve" does not suggest some incidental outcome—some vague, unsupported benefit—of a transaction that "serves" a completely unrelated purpose. The phrase "serves the interest of the utility's ratepayers" therefore aligns fully with the framework described in Part II.B above. That framework recognizes that in return for receiving the privilege of government protection from competition, the utility must put its customers first. A Maine utility cannot put its customers first if it is controlled by a global entity whose share-price-enhancement mission conflicts with the utility's customer-service mission.

Applied to this transaction, this phrase's natural meaning is that "serv[ing] the interest of the utility's ratepayers" must be the transaction's purpose—its sole purpose, or at least its dominant purpose. It is not the language's natural meaning to say that by some happenstance, a transaction having a nonratepayer purpose will, just maybe, leak out some possible benefit to the ratepayers. If that unnatural meaning were the

[14] https://www.merriam-webster.com/dictionary/serve.

Legislature's intent, the statutory language would have created a right in merging entities to merge, provided that the transaction produces some incidental benefit to ratepayers. That is not what the statute says. Serving the customers' interest necessarily means having the purpose of serving the customer's interest.

The language cites the ratepayers' interest but no other interest. That is no accident. There is a time when a commission must take into account the interests of not only ratepayers but also investors. That time is when the Commission sets rates. In that rate-setting context, the Commission's obligation to consider the investors' interest is rooted in the statutory just-and-reasonable standard, the Constitution's requirement of just compensation, and the real-world fact that shareholders are volunteers; they will invest in the utility only if their profit opportunity matches or exceeds their opportunity cost of capital—i.e., the profit they could earn elsewhere. In contrast, the language in section 708(1)(A) mentions no investor interest; the interest to "serve" is the ratepayers' interest only.

Q. Do the official transaction documents say that the transaction's purpose is to "serve[] the interest of the utility's ratepayers"?

A. No. As I will describe in Parts II.C.5 and III below, the Proxy Statement and Merger Agreement make clear that this transaction's sole purpose is to serve the minority shareholders and Iberdrola. The Merger Agreement has no "whereas" clause saying, for example, "whereas the Maine utilities have a duty to serve customers," or "whereas the parties have entered into this agreement to help the Maine utilities serve their customers." This transaction fails based on section 708(1)(A) alone.

Q. What is the importance of the separate statutory term "ensure"?

A. As already stated, section 708(1)(A) requires the Commission to "ensure" that the transaction "serves the interest of the utility's ratepayers." The term "ensure" requires certainty of result. Ensure doesn't mean "do the best one can do under the circumstances." It doesn't mean "increase the probability." It doesn't mean "tend to improve." Ensure means ensure. Ensure means no risks and no uncertainty, because risks and uncertainty reduce the probability below 100%, whereas "ensure" means that the probability equals 100%. Nothing in the Application anywhere promises this result. Perhaps Petitioners are assuming that there are no risks. That implicit assumption is not credible. That affiliating a utility with a nonutility business involves risk is confirmed by a century of regulatory history,[15] as well as bond-rating agency reality.[16] And eliminating conservative minority shareholders that prefer lower risk—thousands of them here—increases risk.

The certainty required by the term "ensure" cannot exist if the post-transaction family has motivations, opportunities, and powers that create tension or conflict with the

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[15] *See* Leonard S. Hyman, "Investing in the 'Plain Vanilla' Utility," 24 ENERGY L.J. l, 10 (2003) ("In the past, utility managers failed their investors when they bet the company on a technology they did not understand (nuclear power), when they entered businesses far afield from their experience (diversification), and when they plunged into seemingly related businesses without adjusting their finances to the new risk levels (merchant generation, power marketing, and foreign investment").

See also Exelon-PHI Merger, 2015 D.C. PUC LEXIS 203, at *174 ¶ 142 (finding that Pepco "will be exposed to additional financial risks from the Proposed Merger due to Exelon's unregulated businesses"); *id.* ¶ 259 (finding that that "ratepayers could be impacted if the cost of capital available to Pepco . . . is higher because of Exelon's ownership of non-jurisdictional business operations in general and nuclear operations in particular"); *Southern California Edison-San Diego Gas & Electric Merger*, 1991 Cal. PUC Lexis 253 (expressing concern about proposed merger's mixing of utility and nonutility businesses); *Oncor Electric Delivery-NextEra Energy Merger*,

customer interest. If that tension or conflict exists, then the Commission must decide whether it is feasible to design conditions that will, with certainty, prevent the company decisionmakers from using their powers to act on those motivations and opportunities. If such conditions are feasible, then the Commission must also find that it has the authority to impose those conditions, along with the authority and resources to enforce the conditions. Any gap in this set of findings is inconsistent with the certainty required by the term "ensure." The Application and testimony include no facts that allow the Commission to design the necessary conditions.

Finally, what the statute requires the Commission to "ensure" is that the transaction serves the ratepayers' interests throughout the entire period in which the post-transaction corporate structure exists. That is not possible here, because as discussed in Part II.C.5 below, the transaction involves subjecting the customers to the risks of Avangrid's and Iberdrola's strategic acquisitions without the moderating influence of the departed minority shareholders.

2017 Tex. PUC LEXIS 807, at text accompanying nn.8 & 14 (finding that "the expansive and diversified structure of NextEra Energy and its affiliates would subject Oncor to new and potentially substantial risks," including, but not limited to, "potential changes in renewable demand resulting from changes in climate or tax policy, commodity risks, retail electric provider risks, as well as power and nuclear generation risks, . . . [which] in conjunction with the high amount of leverage at NextEra Energy, increase the likelihood that unforeseen events could jeopardize Oncor's financial stability").

[16] *See, e.g.,* Moody's concerns about the Texas utility Oncor: Freeing Oncor from its parent, Moody's said, would "[resolve] . . . family contagion risk and [reduce] . . . parent holding company debt, both credit positives." Direct Testimony of John Reed at 35, *Oncor Electric Delivery-NextEra Energy Merger*, PUC Docket No. 46238 (Tex. Pub. Util. Comm'n filed October 31, 2016) (quoting MOODY'S INVESTORS SERVICE, ONCOR ELECTRIC DELIVERY COMPANY LLC: EXPLORING THE LIMITS OF PARENT COMPANY LEVERAGE, AGAIN 1, 4 (2015)).

4. The benefit in "net benefit"—a benefit that Applicants must "establish"—means complete compliance with the utility's obligation to provide best feasible service at lowest feasible cost

Q. Explain the importance of the statutory term "establish."

A. Section 708(2)(A) states in relevant part:

> 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. If a reorganization would result in the transfer of ownership and control of a public utility or the parent company of a public utility, a reorganization may not be approved by the commission unless it is established by the applicant for approval that the reorganization provides net benefits to the utility's ratepayers.

The first key term is the verb "established." "Establish" means to "put beyond doubt," "make firm or stable," to "bring into existence," to "put on a firm basis."[17] Petitioners' witnesses have done none of these things. The statute does not say that the applicant may "suggest," "hope for," "project," or "hint at" net benefits. That is all that the witnesses have done. (Actually they haven't even "projected" benefits, not with any professional sophistication or even effort.) They have said that eliminating minority shareholders will improve Iberdrola's access to capital. But they offer no factual support. They have made no enforceable commitment. They have not even projected improvement methodologically, based on factual experience—which still would leave nothing "established." No matter how Applicant-friendly one interprets the witnesses' testimony, the witnesses have "established" nothing. The statute's explicit language leaves the Commission no choice but to reject the transaction.

As for a technical response to the access-to-capital point, I address that topic at Part III.E below.

[17] https://www.merriam-webster.com/dictionary/establish.

Q. Explain the importance of the statutory term "net benefit."

A. I understand the Petitioners to view "net benefit" as meaning "no harm plus $1," or maybe "no harm plus some undefined benefits that Iberdrola in its discretion feels comfortable providing and the Commission chooses to accept." Neither view is reasonable, for at least three reasons.

First, the $1 effectively means "no harm," because $1 spread among Maine's many citizens is a meaningless amount. A legislative body, with power as vast as its constitutional scope, would not go through the trouble of drafting and debating language that will address billion-dollar transactions in a billion-dollar industry—an industry on which its constituents' lives depend, all to produce so meaningless a definition of "benefit." Elephants don't give birth to mice.

The Petitioners' interpretation might make sense if the statute's purpose was to encourage corporate transactions. Then one might, if one stretched, read the language as telling merger promoters "Have at it, just don't hurt us." But this statute, read accurately, has the purpose not of encouraging corporate transactions but of limiting them—limiting them to the ones whose very purpose is to "serve" ratepayers.

Second, in a transaction like this one, where each side's sole purpose is to maximize wealth (as discussed in Part III.C.5.b below), defining benefit as $1 would mean a benefit differential, between the shareholder side and the customer side, of a nearly infinite amount (think ratio of 2,500,000,000 to 1). Inferring a legislature's satisfaction with that ratio, from a statute whose language limits corporate transactions, is unreasonable.

Third, to interpret "net benefit" as "no harm plus $1" is to ignore regulation's central public-interest purpose. The purpose of a regulated utility, like the purpose of any business, is to serve the customer. There is no place in that purpose for mere harm-avoidance. In an effectively competitive market, no seller seeks merely to avoid harming its customers. The purpose of utility regulation is not to avoid harm. The purpose is to produce the performance that effective competition would produce. Ignoring regulation's purpose is not a persuasive way to interpret a regulatory statute.

To interpret "net benefit," therefore, one must view "benefit" as the benefit that the public utility is obligated to provide, the benefit that the commission is obligated to induce the utility to provide. That benefit is the benefit of performance; specifically, performance at a level comparable to what the utility would reach if it were subject to effective competition. Any lesser standard would mean that a utility gets to sit back, enjoy its government-granted franchise privilege, and not do its best, even though some other potential franchise holder, selected competitively, could do better.[18]

To the correct understanding of "benefit," what is added by the term "net"? "Net" implies the presence of detriment, because if there were no detriment there would be nothing to net against the benefit. Given the definition of benefit—performance comparable to what competitive pressure would produce—"net" must mean that each detriment must be matched by an additional benefit; that is, a benefit exceeding what competitive pressures would result. Otherwise, the netting of detriment against a competitive level of benefit would, as a matter of simple arithmetic, produce a level of

[18] As the eminent economist Sir John Hicks said, "the best of all monopoly profits is a quiet life." "Survey of Economic Theory: The Theory of Monopoly," 3 *Econometrica* 1, 8 (1955).

benefit below what competition would produce. Remember that if a competitive supplier fails to perform at a competitive level, its customers will shift to another supplier. But in a utility-monopoly context the customers cannot shift to another supplier. They would be stuck with the detriment. So any detriment must be matched by a benefit above the competition-level benefit. That is the only possible meaning of "net benefit."

As discussed in Part III below, even if the Commission interprets net benefit as no harm plus $1, the transaction fails because it has detriments without benefit.

Returning to detriment: Since the statute requires net benefit, and because net benefit implies some detriment, and because each feature of detriment must be matched by an equivalent amount of extra benefit (again, benefit above the normal benefit), it is necessary to define detriment, otherwise called harm.

Harm includes the risk of harm. Risk of harm means an above-zero probability of harm. Multiplying that above-zero probability by the amount of harm produces above-zero harm. It is therefore illogical to equate a risk of harm with "no harm," such as when merger promoters seek to zero-out harm by calling it "speculative." One cannot treat a risk of harm as no harm unless one ignores the mathematical logic just explained. Harm, even if "speculative," is still harm. And the harms discussed below are not speculative; they have occurred before. That we can't be sure that they'll occur does not make them speculative, any more than uncertainty about tomorrow's weather makes one's concern about rain "speculative."

As I have discussed, the purpose of public-utility regulation is to produce the performance that effective competition would produce. Since effective competition

produces cost-effectiveness, "harm" is any factor, brought on by the transaction, that reduces, or creates the risk of reducing, the utility's ability to provide quality service cost-effectively. I discuss those factors, as relevant to this transaction, in Part III below.

5. The transaction doesn't deserve Commission deference, because the transacting entities' interests don't align with the public interest

a. Overview

Q. Introduce the concept of Commission deference.

A. Commissions sometimes defer to utility proposals. That is, they sometimes assume that the proposal deserves approval unless someone suggests a negative. Deference, assuming its consistency with the statutory burden of proof, can be appropriate when two factors are in place. The first factor is utility expertise—as applied to the customers' needs. I defer to my cardiologist's judgments because he knows more about my heart than I do. The second factor is alignment of the utility's goals with the customer's well-being. Though my cardiologist makes money from me when he orders tests, I defer to his decisions on testing because he is subject to competition (within 10 miles of my home there are many cardiologists), and because over-testing can subject him to insurance company penalties, fraud prosecution, and delicensing.

Those bases for deference don't apply to this transaction. The parties—Iberdrola, Avangrid, and Avangrid's minority shareholders—did not use customer-service expertise to design this transaction. Expertise aside, their purpose had nothing to do with serving utility customers. And if the transactions cause customers harm, the customers can't shop for competing distribution service. In short, the parties' expertise and interests don't align with the customers' interests.

With the possibility of deference eliminated, the Commission should focus, intensively and analytically, not deferentially, on the misalignments between the transacting parties' interests and the ratepayers' interest. I discuss those misalignments next.

Q. How have you organized this subpart?

A. This subpart has four more subparts:

- Part II.C.5.b explains that the parties entered into and designed this transaction not to benefit customers but to monetize market positions—including a government-granted privilege.
- Part II.C.5.c explains that the parties' interests, and their transaction, actually conflict with the customers' interests.
- Based on the prior two points, Part II.C.5.d shows that Avangrid's and Iberdrola's interests are not aligned with Maine's customers' interests or the public interest.
- Similarly, Part II.C.5.e shows that the minority shareholders' interests are not fully aligned with Maine's customers' interests or the public interest.

In short, not only are there are no bases for Commission deference; there are multiple bases for Commission rejection.

b. The transaction's essence: Monetizing market positions, including a government-granted privilege

Q. What is this transaction's essence?

A. For decades, the Maine utilities have been the beneficiary of a government-granted privilege. That privilege has two main components. First, it contains the exclusive right to provide electric and gas distribution service to captive customers within a state-assigned territory that no competitor can enter. Second, it allows the utility to charge rates established under statutory and constitutional principles that provide the utility a reasonable opportunity to recover its prudently incurred operating costs, and to earn a

fair return on its prudent, used-and-useful investments. The privilege is valuable because it is exclusive, or nearly exclusive. That exclusivity makes the utilities' customers captive. As a result, the utility's business risks are lower than are the risks for competitive companies.

Mechanically, the minority shareholders are selling their Avangrid stock; but practically they are selling their right to receive the earnings from this privilege (along with the earnings potential of Avangrid's nonutility investments in Renewables). Iberdrola, in turn, is gaining total control of Avangrid, free of the minority shareholders' interests. Understood for what it is—the sale of a public privilege for the two private parties' private gain—this transaction conflicts with the public interest because, as discussed next, neither party's goals are consistent with the public interest.

c. In this transaction, which includes a sale of public franchises for private gain, the transaction promoters' goals conflict with the utility customers' interests

Q. What does the Proxy Statement tell us about the customer benefits from this transaction?

A. The Proxy Statement tells us that the transaction's purpose has nothing to do with the customer interest. This transaction is solely about wealth maximization on both sides; each side seeking to monetize its interest to the maximum level consistent with consummating the transaction. The parties have produced no evidence that anyone on either side gathered or presented serious information, conducted serious analyses, or made any serious plans, about improving the utilities' performance. Customer interests were irrelevant. This is a purely private transaction having no positive purpose relating to the utilities' obligation to serve. That is the only inference one can draw from the official documents.

Moreover, when asked to produce all documents relating to the transaction, a request made specifically to learn if there was any intent to produce customer benefits, the Petitioners declined to respond, other than to reference official documents—documents which nowhere referenced customer benefits. From that refusal, one must infer that there was no intent to benefit the customer; because to provide evidence of that intent would have been to the parties' strategic benefit.

Q. What if Petitioners argue that the Proxy Statement doesn't mention customer benefits because its legal purpose is to discuss shareholder benefits?

A. That argument fails. Had the parties actually focused on, and intended to provide, customer benefits, the Proxy Statement would need to say so if those benefits could have reduced the minority shareholders' gain, added to Iberdrola's costs, or both.

Q. Is it relevant to the Commission's public-interest duties that this transaction is a cash buyout?

A. Yes. A cash buyout is different from a stock-for-stock exchange. In a stock-for-stock exchange, which is typical of what merger practitioners call a "merger of equals," the target's shareholders join the acquirer's pre-existing shareholders to become shareholders in the combined post-merger entity. So the target's shareholders will have a stake in the post-acquisition company's financial health, including its ability to serve customers well. A cash buyout is fundamentally different. The bought-out shareholders take their money and leave. The financial health and managerial ability of the company they leave behind are no longer their concern.

d. Avangrid's and Iberdrola's interests are not aligned with Maine's customers' interests or the public interest

Q. In this proposed transaction, are the interests of Avangrid and Iberdrola aligned with the interests of Maine's utility customers?

A. No. Here are most of Iberdrola's and Avangrid's official reasons for this transaction, where "Company" refers to Avangrid and "Parent" refers to Iberdrola:[19]

- "[T]he operating agreement has changed in a significant manner since the Company became a publicly traded company as a result of the merger with UIL in 2015."
- "[T]he competitive landscape has shifted, adversely impacting the Company's relationships with customers, vendors, and suppliers.
- "[T]he energy industry as a whole has experienced meaningful cyclicality due to volatility in underlying commodity prices."
- "[I]ncreased regulatory oversight has enhanced the uncertainty being experienced by the Company and the energy industry as a whole."
- "[T]he amount of capital needed to sustain growth in the Company's business continues to increase."
- "These changes have increased the uncertainty and volatility inherent in the business models of companies similar to the Company. A response to current market challenges will require tolerance for volatility in the Company's business, commitment, ability to make capital expenditures and willingness to make business decisions focused on improving the Company's long-term performance."
- "As a privately held company, the Company will have greater operational flexibility and be relieved of the public reporting requirements under the U.S. federal securities laws, including the Exchange Act and the Sarbanes-Oxley Act."
- Iberdrola wants to "bear the risks and rewards of the sole ownership of the Company, . . . including any increase in value of [Avangrid] as a result of improvements in the Company's operations or acquisitions of other businesses, or any decrease in value due to negative performance of the Company."

[19] Proxy Statement at 91-93.

- Iberdrola "wants to take advantage of the benefits of the Company being a privately held company as described above."

Petitioners also have stated that "Parent believes that the Company's new status as a privately held company will enable Parent to facilitate its future investment plans to be deployed in the energy market of the United States."

These concerns appear to be related to the risks and benefits associated with Avangrid's competitive businesses, not its public-utility businesses. On the public-utility side, none of these concerns differs from the normal concerns about cost-based ratemaking for monopoly-franchise utilities—concerns that are routinely addressed when commissions set rates that satisfy statutory and constitutional provisions. So Iberdrola's desire to buy out Avangrid's minority shareholders was unconnected utility-service purpose. It is true that the more successful the competitive side of the business, the less risk to the utility-monopoly side of the business. But saying that is to admit that the fate of Maine's customers is tied to the success or failure of Avangrid's competitive businesses.

In short, Iberdrola is spending $2.5 billion not to help its U.S. public-utility business but to help its higher-risk global business, specifically by eliminating risk-averse minority shareholders. Given the minority shareholders' large number, the fact that most own very small amounts, and the fact that most likely originated as shareholders in small, local, pure-play utilities owned by UIL, I assume that the minority shareholders are less comfortable than Iberdrola with Avangrid's competitive business risks. I assume that the minority shareholders are mostly of the buy-and-hold category—individuals that want a conservative, just-the-basics utility company; whereas Iberdrola wants to take risks and expand. As Petitioners' counsel said, "it's pretty

common for index funds to have utility stocks that are viewed as defensive stocks that pay good dividends. . . . In our top 20 investors, minority investors, most are passive funds or infrastructure funds."[20] All will be replaced by global, acquisitive, Iberdrola. That is a change in control—in degree and in kind.

If my assumption is correct—and Petitioners offer no contrary facts—the Commission should have concern, because it means that without the minority shareholders there will be less constraint on the risks that Avangrid takes. Equally important to the Commission is this: We do not know the real reason why Iberdrola is buying out the minority shareholders, because the Petitioners never connect the above list of concerns causally to the buyout decision—and because, again, the Petitioners have declined to provide any internal documents relating to the transaction. This information gap means that the Commission has no way to know if the arguments Petitioners are making now for the transaction are post-hoc rationalizations created for purposes of persuasion, rather than accurate representations of the real reasons for the transaction.

For example, Petitioners say that eliminating the minority shareholders will improve access to capital. But in 2015, they said the opposite—that having minority shareholders will increase access to capital.[21] Mr. Estella attributed the change in view to a difference in macroeconomic factors. He may be right. Or not. Having no internal

[20] July 15 transcript at 28:23-29:8 (Mahoney).

[21] July 15 Transcript at 68:17-70:8 (Estella).

documents—for a transaction costing $2.5 billion—leaves the Commission unable to assess his credibility.

What we do know is that Iberdrola wants the minority shareholders out of its way. Iberdrola says as much, as clearly as one can: "The need for the management of the Company to be responsive to the concerns of, and to engage in an ongoing dialogue with Unaffiliated Shareholders can at times distract management's time and attention from the effective operation and improvement of the business."[22] The minority shareholders are a distraction.

Q. Should the Commission be concerned about Iberdrola's multiple changes of position about Avangrid's having minority shareholders?

A. Yes. This transaction represents the third version of Iberdrola's relationship to minority shareholders in Avangrid. Initially, Iberdrola owned 100% of Avangrid (or its predecessor). Then when Iberdrola acquired UIL Holdings, the holding company for United Illuminating, that transaction resulted in—with Iberdrola's consent—Avangrid's having minority shareholders. The current proceeding brings us the third version—Iberdrola eliminating those minority shareholders.

Nothing prevents Iberdrola from returning to this busy Commission with a fourth version—an Avangrid proposal to sell shares to the public (or to a private acquirer), perhaps to raise cash that Iberdrola or Avangrid needs to expand or to address losses somewhere in the corporate system. Iberdrola has preserved that possibility. Given how unexplained and unsupported is the Petitioners' presentation in this proceeding, and given what I understand is the Commission's history of approving each utility acquisition proposal regardless of whether the transaction's real purpose was to

[22] Proxy Statement at 91-92.

improve utility service or lower utility cost, it is possible that they view the Commission as indifferent to who owns Avangrid and therefore who owns Maine's utilities. Such expectation of indifference, which expectation I hope is mistaken, is inconsistent with the statutory language that I have discussed—especially the requirement that a transaction "serve[]" the interest of ratepayers.

e. The minority shareholders' interests are not fully aligned with the ratepayers' interests or the public interest

Q. How well are the minority shareholders' interests aligned with the Maine ratepayers' interests?

A. As for whether the minority shareholders' interests are aligned with the Maine ratepayers' interests, the situation is mixed. If we ignore the transaction—meaning that the minority shareholders continue as Avangrid shareholders—their interests are likely aligned with utility customers' interests in several respects. Both groups benefit from access to public information about Avangrid's financial condition—its risks, its plans, its insider trading, its changes in leadership—all topics discussed in Part III.B below. Both groups also benefit from having influence over Iberdrola's and Avangrid's business plans—influence that can promote responsible risk-taking and leadership accountability.

But in this transaction, as opposed to the status quo without the transaction, the minority shareholders' interests conflict with the utility customers' interests. The minority shareholders want the highest possible price. The Proxy Statement (at 62) lists their reasons for supporting the transaction:

- It provides "immediacy and certainty of the cash value . . . as compared to the recent historical trading prices."
- It avoids the "potential long-term business and execution risk" of remaining as shareholders.

- "[T]he liquidity provided by cash consideration may not otherwise be available" via "alternative forms of consideration."
- The minority shareholders can liquidate their stock without incurring the transaction costs that normally attach to market trades.
- The $35.75 was the highest price "reasonably attainable."

The higher the price, the greater the financial burden on Iberdrola. The greater the financial burden on Iberdrola, the less likely that Iberdrola can support Avangrid and its utilities; the more likely that Iberdrola will look to Avangrid, and Avangrid to the utilities, to pay dividends necessary to restore Iberdrola's financial strength. The minority shareholders' interest in getting highest price does not align with the utility customers' interest in the best feasible service at the lowest feasible cost.

Q. Isn't seeking the highest price what profit-maximizing targets are supposed to do?

A. In competitive markets, yes; but in that context competition imposes a constraint: The target's desire for a high price is disciplined by the acquirer's need for the post-transaction company to keep its customers. Consider the sale of an apartment building, in a city with plenty of apartment vacancies—and therefore effective competition among building owners for tenants. The interests of the building seller, building buyer, and renters are all aligned. The building seller will demand the highest possible price, but the building buyer will resist paying a price above what she predicts she can recover when, post-acquisition, she competes for tenants. So the building buyer will pay a premium no greater than the new economic value she believes she can create as the new owner. That new economic value is a public-interest benefit. Competitive pressure disciplines the acquisition price; everyone wins.

Monopoly-utility service is different because the customers are captive—they can't shop for service elsewhere. So the interests of utility, acquirer, and customers are

not aligned. Instead there is conflict—here, between Avangrid's minority shareholders and its utilities' customers. Insisting on the highest price for the selling shareholders produces an outcome different from insisting on the best performance for customers.

Moreover, as I pointed out earlier, Avangrid's shareholders are departing, so they have no interest in or concern for the financial health of the utilities that they leave behind. The utilities' customers see things differently.

III. The proposed transaction produces net detriment, not net benefit

A. Overview

Q. Explain the purpose and organization of this Part III.

A. Restating the relevant provision of Section 708(2)(A):

> If a reorganization would result in the transfer of ownership and control of a public utility or the parent company of a public utility, a reorganization may not be approved by the commission unless it is established by the applicant for approval that the reorganization provides net benefits to the utility's ratepayers.

Petitioners acknowledge that this net-benefits standard is a "heightened" standard—presumably, heightened compared to the standard applied by the Commission in its 2008 CMP Reorganization Order. There the Commission, referring to a requirement that the transaction be consistent with the interests of shareholders and ratepayers, stated that "this test is satisfied if the total benefits flowing from the merger are equal to or greater than the determents or risks for both ratepayers and shareholders."[23]

This transaction does not satisfy the net-benefit test; nor is it "consistent with the interests of… ratepayers." This Part III provides six reasons:

- Going private means no more SEC reports from Avangrid (Part III.B).
- Eliminating Avangrid's minority shareholders reduces the discipline on Iberdrola's risk-taking (Part III.C).
- Petitioners' assertions of no harm are nonfactual and unenforceable (Part III.D).
- Petitioners' claim of improved access to capital has no supporting facts, and is unenforceable (Part III.E).

[23] Petition at 11 (citing, at n.23, "2008 Reorganization Order at 4 (citing *CMP Group* Order at 4).").

- Benefits that arise not from the transactional design but from settlement strategy don't count toward statutory net benefits (Part III.F).

- The facts leave the Commission unable to make the required statutory findings (Part III.G).

B. Going private means no more SEC reports from Avangrid

Q. What effect will eliminating the minority shareholders have on Avangrid's public reporting?

A. With no publicly traded stock, Avangrid will no longer be filing public reports with the Securities and Exchange Commission. Maine's Public Utilities Commission, the rating agencies, and the public will no longer have access to the SEC-required materials that I describe next.

Form 10-K is the annual report. It describes all aspects of Avangrid's structure and operations. It gives investors and the general public an accurate, audited picture of the company's financial condition. The report describes the company's various business divisions and subsidiaries, as well as the markets from which it buys inputs and into which it sells outputs. The report also describes the company's research and development activities, its competitive pressures and other risks (both current and future), and its regulatory relationships. It includes a discussion by management, which allows readers to assess how well management understands and responds to all the facts that affect the company's health. It includes the standard financial statements—balance sheet, income statement, and cash flow statement—all reviewed by auditors (who certify the financial statements) and footnoted to explain any unusual features, such as deviations from customary accounting treatment. It has additional sections that describe any legal proceedings affecting the company. The company's chief executive officer and chief financial officer have to swear to the financial statements' accuracy.

Form 10-Q is the quarterly version of Form 10-K. The company files it in each of the first three quarters of the company's fiscal year.

Form 8-K discloses major developments that occur between the times that the company files the Forms 10-Q and 10-K. A major development could be a change in financial condition, a new stock issuance, a change in accounting firms, changes in the company's code of ethics, a major lawsuit, a bankruptcy of the company or one of its affiliates, a major acquisition or disposition of companies or assets, the entry or exit of executives or board members, and any impairments of assets.

Form 4 is the Statement of Changes in Beneficial Ownership. It tells us when company insiders—officers, directors, major shareholders—buy and sell company stock or exercise stock options. Since Avangrid stock will be owned wholly by Iberdrola, any insider stock ownership will be ownership in Iberdrola, not Avangrid. The Commission will have no ready way to learn anything about the company that controls the Maine utilities.

Form S-4 is used for registration of securities issued in conjunction with certain transactions, such as mergers and exchanges. It includes the proxy statement and the prospectus. These documents explain the proposed transaction, summarize the financial condition of the companies involved, and describe the risk factors and any other material information that would affect a shareholder's view of the value of the transaction. Avangrid is a holding company. It makes acquisitions. Each acquisition changes the risks that Avangrid bears. Those risks affect the Maine utilities. The Commission will know nothing about these actions.

By law, all these documents must be truthful. Failure to be complete and accurate subjects the company and some of its officials to serious penalties. A company cannot object to disclosure requirements, including disclosure of its risks, by doing what Petitioner did during discovery in this proceeding—repeating rote, undocumented, unexplained claims about "burden" and "irrelevance."

Q. What are the consequences for this Commission?

A. Without the information provided by these forms, the Commission will have no ready way to know how Avangrid's actions are changing the risks and costs that affect the Maine utilities. Consider two examples.

First, the Maine utilities depend on Avangrid for equity. Equity is a utility's blood supply. Because they are wholly owned by Avangrid, the Maine utilities cannot, independently of Avangrid, issue stock to raise their own equity. Without continuous information about Avangrid's financial health, and about Avangrid's actions (such as incurring debt to make more acquisitions) that can affect its health, the Commission will have no information about the strengths and weakness of the company that is the only source of the utilities' equity (other than the utilities' internally generated equity). And the utilities' internally generated equity remains with the utilities only to the extent that Avangrid does not require the utilities to transfer that equity to Avangrid via dividends—an Avangrid action that Avangrid won't be reporting to the SEC.

Q. Don't the conditions on the 2008 transaction address the concern about excess dividends paid by the utilities to Avangrid?

A. The conditions on the 2008 acquisition by Iberdrola of Energy East Corporation do not eliminate the concern. The 2008 conditions include, among others, these two provisions:

> CMP and MNG will maintain their respective dividend policies with due regard for the financial performance and needs of CMP and MNG, irrespective of the financial performance and needs of Iberdrola. Iberdrola will report to the Commission in the event that the dividend payout for any year is more than 100% of income available for dividends calculated on a two-year rolling (eight calendar quarter) average basis.[24]
>
> CMP and MNG will at all times maintain common equity capital at levels equal to or greater than 40% of total adjusted capital (including common equity, preferred equity, long-term debt, short-term debt, capitalized leases, Current Maturities of Long-Term Debt (CMLTD), and Current Maturities of Capitalized Long-Term Leases (CMLTL)). No equity distributions, whether by dividend or other form, will be allowed that would result in equity capital falling below the minimum level, without prior approval of the Commission. Notwithstanding the foregoing, CMP and MNG shall maintain the right to petition the Commission for an exception to this condition. One-time events, such as mandated changes in accounting, that temporarily affect equity will be reported to the Commission and excluded from the common equity ratio calculation.[25]

These provisions do not eliminate the above-stated concerns, because there is room for slippage. On whether the utilities' dividend practices will be "irrespective of the financial performance and needs of Iberdrola," the language implies that the judgment will be made by the utilities. That is not how 100% control works. How 100% control works is that the holding company has 100% control. It controls who are the utilities' chief executive officers, chief financial officers, and board members. So even if those individuals are the ones to determine the relationship of the utilities' dividend practices to Iberdrola's financial performance and needs, they will have received their leadership positions because their perspectives are compatible with Iberdrola's. Moreover,

[24] For purposes of this proceeding, this language appears in ODR-001-002 Attachment 1 at p. 2. In that Attachment, the Petitioners state that their adherence to this condition is "[o]ngoing."

[25] *Id.* at p.3.

this provision has no clear enforcement mechanism. Yes the Commission retains its authority to order divestiture of the utilities from the holding companies—but only after a process that will involve many steps, much tension, and months of litigation and appellate review. There is no provision for fines linked to specific types of violations. There is no provision stating career consequences for executives or board members who violate the provision. For all these reasons, the 2008 language leaves us with a situation that is net detrimental rather than net beneficial.

As for the equity ratio condition, nothing prevents Iberdrola or Avangrid from taking the types business risks that lead to the types of business failures that cause them to seek from the Commission permission to lower the Maine utilities' equity levels below the 40% threshold. Once those business failures occur, the Commission might feel great pressure to approve the equity reductions so as to avoid worse damage to the utilities. The very fact that the petitioners in the 2008 case insisted on preserving this option shows that they think they might need it. That's a detriment.

Second, to the extent that the Maine utilities issue their own debt, the lenders and the credit rating agencies will assess the risk of the debt based in part on Avangrid's ability to provide the utilities with financial support. With the Commission unable to review SEC-mandated information on Avangrid's financial strength, the Commission will be unable to assess independently whether the interest cost that the Maine utilities are incurring, which interest costs the utilities will seek to recover in rates, are excessive as a result of Avangrid's and Iberdrola's activities.

Third, proxy statements tell the shareholders and public about compensation received by executives. The size and type of compensation affect the costs and operations of the utilities. Grants of stock can place a utility executive in conflict with customers, because one way to increase stock value is to get rate increases. Three ways to get rate increases are, in rate cases, to over-project operating costs, under-project sales, and over-project capital expenditures (including proposing capital expenditures for goals that could be achieved without capital expenditures, such as buying wholesale power from nonaffiliates rather than building new generation directly). Those actions are executive temptations enhanced by executive stock ownership. According to Petitioners' counsel, some portion of Mr. Azagra's $10,689,792 compensation in 2023 consists of stock options.[26] That's a lot of personal incentive—incentive to send a message throughout Avangrid urging the rate teams to win rate cases. I am not saying, in any way, that Mr. Azagra would ever intentionally act inconsistently with the public interest. But no one is reliably effective at unilaterally controlling their personal preferences. That is why we have regulation. As to Mr. Azagra's temptations and actions, the Commission will have no information.

The Hearing Examiner stated: "I don't think there's been any allegations that the compensation will change as a result of the incremental investment which is the subject of this proceeding."[27] The issue, respectfully, is not whether compensation "will" change, but whether there is a possibility that it will change, in ways that harm customers. The Petitioners have made no commitment to avoid compensation plans that

[26] July 15 transcript at 18:13-19:6 (Mahoney).

[27] July 15 transcript at 16:23-17:1 (Hearing Examiner).

conflict with ratepayers' interests. That means that they want that option. In the status quo, the minority shareholders can act as a brake on excess or misdirected compensation. If shareholders played no role in disciplining executive compensation, there would be no need for SEC requirements to disclose and explain compensation; nor would there be a need for the efforts that boards of directors make to study and justify compensation. The Petitioners have the burden of proof, so they have to prove the absence of risk. On the question whether elimination of the minority shareholders creates no risk, the Petitioners have done nothing.

Fourth, cash compensation increases operating costs. Yes, "this proceeding doesn't address ratemaking."[28] But counsel's statement of the obvious diverts attention from the point. The less that the Commission and the public know about the costs and risks that Avangrid is incurring, the less they can do to prevent cost increases that occur. Those cost increases then become rate disputes. The utility will argue that it was prudent, some intervenor will argue otherwise, and this busy Commission will have to deal with the dispute rather than allocate its limited resources to improving the future. That is a detriment of this transaction.

Petitioners' counsel says that the Commission can learn about costs when the utilities file rate cases.[29] This predictable retort is, again, besides the point. Rate increases can result from company actions, like capital expenditure commitments, that occur before the rate case is filed. If the expenditure is large enough, seeking to remove

[28] July 15 transcript at 16-12:13 (Des Rosiers).

[29] July 15 transcript 20:12-21:10 (Mahoney).

it from rates can prompt company arguments that the disallowance will damage the company.

C. Eliminating Avangrid's minority shareholders reduces the discipline on Iberdrola's risk-taking

Q. Will eliminating Avangrid's minority shareholders reduce the discipline on Iberdrola's risk-taking?

A. Yes. In this Part III.C I explain three things:

- Iberdrola will be free to take risks that the minority shareholders might have questioned, limited, or blocked (Part III.C.1).
- If the minority shareholders remain, their interests align in part with those of the utility customers; if the minority shareholders depart, this mutual support disappears (Part III.C.2).
- Freed from the minority shareholders, Iberdrola can increase its efforts to limit the Maine utilities' discretion, in violation of their obligation to serve (Part III.C.3).

1. Iberdrola will be free to take risks that the minority shareholders might have questioned, limited, or blocked

Q. Explain how Iberdrola's risk-taking can be detrimental to Avangrid and the utilities that it owns.

A. Iberdrola has many different companies in many different parts of the world. Within its global holdings, the two utilities on which Maine residents and its many businesses depend are but minor subsidiaries.

With 100% control, Iberdrola can pursue its holding company business—buying and controlling other companies—free of the caution that minority shareholders apply. These acquisitions will add complexity while reducing accountability—accountability to minority shareholders and to outside, objective analysts of Avangrid's financial health. The risks and complexity will grow as Iberdrola continues to buy companies, making the Maine utilities a smaller and smaller part of the whole. The attention paid to

each utility by the holding company's top leadership—the CEO, executive team, and board—necessarily diminishes. As those individuals become responsible for more businesses and more assets, each utility's specific needs fall in their priorities.

This Commission's prior decisions have not limited Avangrid's and Iberdrola's acquisitions—which I understand occur with no notice to the Commission. If the Commission allows Iberdrola to eliminate Avangrid's minority shareholders—which elimination also means no more SEC reporting—the Commission will not even know about future acquisitions before they occur, and possibly not afterwards. It thus will have no way to prevent, or even monitor, the risks associated with these future acquisitions. That result is not reconcilable with a statute that requires the Commission to "ensure" that the transaction "serves" utility ratepayers.

Q. What concerns should the Commission have about the Maine utilities' access to equity financing?

A. As Part III.B explained, equity is a business's financial lifeblood. I assume that at some point, the Commission will order its utilities to construct and own, or modernize and continue to own, various elements of electric and gas infrastructure. Examples are new distribution facilities necessary to accommodate what is loosely called "electrification": the charging of electric cars and trucks, the residential heat pumps that will replace gas supply, new data centers, and the new transmission facilities to import renewable power. (It's possible to appoint other companies—competitive companies—to make these investments, but that's an important subject for another day.) Faced with a Commission order to creates these new facilities, the Maine utilities will likely need to raise millions of dollars in equity and debt. Their sole source of equity is Avangrid. Today, Avangrid's source of equity is not only Iberdrola; it includes the non-Iberdrola investors

willing to finance Avangrid's utilities and other businesses. If the Commission approves this transaction, it will be removing that independent source of equity, making the Maine utilities completely dependent on Avangrid and ultimately Iberdrola. Limiting the utilities' sources of equity at a time when they will need more equity is not consistent with logic, or with the public interest. It is counterintuitive to "improve" access to capital by eliminating a source of capital. And it hardly helps the utilities' access to equity that Iberdrola will be parting with $2.5 billion in equity just to complete this transaction—and will part with more as it, and Avangrid, make the future acquisitions that the Commission will neither have stop nor condition.

Indeed, Iberdrola has not promised that the alleged increase in capital will be devoted to the utilities. For all we know, Iberdrola will be using the newly accessed capital to make more acquisitions—which is negative for Maine's utilities, not positive. If Iberdrola were spending the $2.5 billion so that it can increase capital flow to the utilities, Iberdrola would have said so—and would be willing in this proceeding to commit to that result. Iberdrola has done neither. That fact alone makes clear the absence of benefit and presence of detriment.

Another constraint facing the Commission, one not mentioned by the Petitioners, is this: What if, for these future capital expenditures, the Legislature or the Commission, frustrated with the Maine utilities' performance, wants to use competitive bidding to find the most cost-effective company ready and willing to make those capital expenditures? If Iberdrola and Avangrid face financial difficulties because of their past and future acquisitions, they will pressure the Commission and Legislature to drop the idea of competitive bidding, so that the utilities can do the work and earn the associated

profit. Consider what that pressure will mean: Avangrid, a company that purports to welcome competition, will be asking government to protect it from competition, so that it can earn protected profits that compensate for the losses that it incurred because of competition. I question whether the Commission and the Legislature will want to get tangled up in such twisted logic. But that is a real possibility given the risks that Iberdrola and Avangrid take—risks that no minority shareholders will be able to limit. Better for Iberdrola and Avangrid to commit, in writing with top executives' signatures, that that will never happen. But they have made no such commitment—or any commitment. The Petitioners are asking without giving.

As the holder of many other companies, Iberdrola is a portfolio manager. Its portfolio is its many subsidiaries. A portfolio manager aims to maximize the portfolio's total return. To maximize that return, a portfolio manager shifts investment dollars from one part of the portfolio to the other. To be able to do so, Iberdrola and Avangrid control and limit the Maine utilities' spending. Controls and limits can benefit customers by reducing waste—when that is the sole purpose of the controls and limits. But Iberdrola and Avangrid have a larger purpose—maximizing the portfolio's total return. That purpose—attributable not to the utilities' needs but to the two holding companies' needs—conflicts with the utilities' purpose and the utilities' needs.

Q. In prior acquisition cases, applicants have labeled concerns about affiliate business risk "speculative." Are they?

A. No, concerns about affiliate business risk are not "speculative." Adjectives don't change facts. Here are five facts:

- The geographic reach and type-of-business scope of Iberdrola and Avangrid's future acquisitions have no legal limit, because this Commission has set no limit. That is a fact.

- If Avangrid and Iberdrola continue to make acquisitions without Commission limit, the Maine utilities will become smaller relative to Iberdrola's and Avangrid's other holdings. How small, the Commission is unable to say. That is a fact.

- The Commission will not know how small is too small, or how many unrelated affiliates are too many unrelated affiliates, before the Maine utilities' welfare becomes too insignificant to engage the attention of Iberdrola's and Avangrid's leadership. That is a fact, because the Commission has established no criteria addressing that concern.

- Iberdrola's and Avangrid's acquisition aspirations are in tension with the Maine utilities' public service obligations. The reason is that if equity becomes scarce for the two holding companies, the Commission has neither required nor received an enforceable guarantee that Iberdrola and Avangrid will put the Maine utilities' welfare in front of their other ventures. That is a fact.

- Iberdrola and Avangrid cannot, at least not under oath, tell each utility subsidiary's state regulatory commission that its utility will be the top priority, any more than a teacher can tell every parent that their child is above average. That is a fact.

None of these facts should be new to this Commission, which has recognized that merger transactions involve risks:

> [A]ny merger carries with it a certain amount of risk. We find that Iberdrola's proposed acquisition of Energy East carries with it the additional risks associated with associated with the Maine utilities we regulate not only becoming a very small part of a very large corporate entity but also becoming part of a very large foreign corporate entity with significant generation holdings whose operations may not always be obvious to U.S. regulators.[30]

Those who call these concerns speculative are the ones who speculate. They speculate that (a) shrinking the Maine utilities' position in a global holding company

[30] *Central Maine Power Co., Request for Approval of Reorganization Acquisition of Energy East Corp. and Iberdrola, S.A.,* 2008 Me. PUC LEXIS 45 *9, 263 P.U.R.4th 271 (Feb. 7, 2008). The Commission approved this transaction subject to 59 conditions. The approval occurred under a statute that lacked the 2019 amendment's requirements of certainty discussed in Part II.C above.

system will never affect the utilities' well-being; (b) Iberdrola's and Avangrid's numerous unregulated business activities will never conflict with the Maine utilities' service obligations; (c) business failures within the Iberdrola corporate family will never occur, and if they do, they will never have any adverse effect on Maine's utilities; and (d) magnifying the complexity of the regulatory task will not stress the Commission's limited regulatory resources. Applicants, who have the burden of proof, have neither acknowledged nor disproven these negatives.

Petitioners are practicing the classic strategy of "What you see is all there is."[31] By saying little (four double-spaced pages to support a $2.5 billion decision), they hope the Commission will see little. They are practicing strategic "framing": framing the transaction as simplifying the Iberdrola corporate system, returning it to its pre-2015 status, reducing paperwork. They want this artificial picture to fill the Commission's eye-space, to be copied into the Commission's opinion approving the transaction.

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[31] Daniel Kahneman, *Thinking, Fast and Slow* 85-87 (2011). In this passage, Professor Kahneman discusses the "remarkable asymmetry between the ways our mind treats information that is currently available and information we do not have." He explains that one of our systems of mental processing (what he calls System 1) "excels at constructing the best possible story that incorporates ideas currently activated [by available information], but it does not (cannot) allow for information it does not have." He adds that "[*w]hen information is scarce, which is a common occurrence, System 1 operates as a machine for jumping to conclusions*." *Id.* at 85 (emphasis added).

A psychologist and emeritus professor at Princeton University, Professor Kahneman received the 2002 Nobel Prize in Economic Sciences for his work with Amos Tversky on decisionmaking. This book is his effort to explain to the layperson his decades of inquiry into methods of nonfactual persuasion and their effects on decisionmakers. I view this book as essential reading for anyone required to make decisions in contexts where a participant has a self-interest in telling less than the full story. I apply Professor Kahneman's principles to the 40 years of regulators' merger decisionmaking in Part III of my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities.*

But Iberdrola and Avangrid are not simple companies. They are not static companies. They are conduits and trajectories—conduits that move their utility-service earnings into Avangrid's and Iberdrola's acquisition trajectories. This transaction is not only what the Application says it is; this transaction is the path by which Iberdrola and Avangrid will give effect to all the internal motivations, plans, strategies, and tactics that exist within any acquisition-oriented enterprise unconstrained by minority shareholders and unconstrained by this Commission—plans, strategies, and tactics that the Commission doesn't know about because the Petitioners have declined to respond to routine discovery questions. Post-transaction Iberdrola and Avangrid will be the classic black box. To approve this black box without addressing the facts and risks does not "serve," and is not "consistent with," the ratepayers' interests.

2. If the minority shareholders remain, their interests align in part with those of the utility customers; if the minority shareholders depart, this mutual support disappears

Q. What is the connection between the risks you have described, and the Petitioners' proposal to eliminate the minority shareholders?

A. The minority shareholders are represented by something called the Unaffiliated Committee. (The Merger Agreement refers to the Unaffiliated Committee as the Special Committee.) The Committee consists solely of independent and disinterested directors. They are responsible for, among other things, "reviewing and approving all transactions entered into between the Company, on the one hand, and Iberdrola or its affiliates, on the other hand, and requiring that any such transaction is entered into on an arm's length basis."[32]

[32] Proxy Statement at 43.

The equity capital marketplace—the universe of all shareholders of all companies—is diverse. Some shareholders buy and hold, some want growth through acquisitions, some want stability in their pension funds, some are large, some are medium, some are small. Avangrid's minority shareholders reflect some of that diversity.

Iberdrola, in contrast, is a monolith. Its holdings may be diverse, but its strategy is not. Its strategy is to maximize its return for itself. By eliminating the minority shareholders, this transaction eliminates diversity—a factor that psychologists say is essential to effective decisionmaking.[33] Shareholder diversity brings discipline, skepticism, and transparency—more factors that improve decisionmaking. Independent shareholders can prevent the type of executive compensation that distorts decisionmaking by treating executive risk-taking asymmetrically—compensation in

[33] Discussing the benefits of diversity among decisionmakers, three accomplished academics (one being Professor Kahneman, a psychologist who received the Nobel Prize in Economic Science for his work on decisional biases) write:

> Variability in judgments is . . . expected and welcome in a competitive situation in which the best judgments will be rewarded. When several companies (or teams in the same organization) compete to generate innovative solutions to the same customer problem, we don't want them to focus on the same approach. The same is true when multiple teams of researchers attack a scientific problem, such as the development of a vaccine: we very much want them to look at it from different angles. . . . In such settings, variability in ideas and judgments is again welcome, because variation is only the first step. In a second phase, the results of these judgments will be pitted against one another, and the best will triumph. In a market as in nature, selection cannot work without variation.

Daniel Kahneman, Olivier Sibony, and Cass R. Sunstein, *Noise: A Flaw in Human Judgment* 28 (2021).

which the executives gets a bonus if the risk works out, but shareholders bear the cost if it doesn't.

Given its benefits, eliminating diversity among the owners of the company that controls Maine's utilities is not a positive step.

3. Freed from the minority shareholders, Iberdrola can increase its efforts to limit the Maine utilities' discretion, causing them to violate their obligation to serve

Q. What concerns should the Commission have about Iberdrola's 100% control of Avangrid?

A. Standard regulatory law prohibits a franchised utility from contracting away its obligation to serve. As I explained in my textbook on public utility law, "[a] utility that contracts away either its managerial powers or control of its essential assets violates its franchise."[34]

If Iberdrola or Avangrid has placed any limits on the Maine utilities' actions—limits such as spending on operations or infrastructure—the Maine utilities will have

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[34] Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* at Chapter 2.B.5, p.48. (Amer. Bar Assoc. 2d ed. 2021). The book cites these examples:

- *Pa. Water & Power Co. v. Consol. Gas, Elec. Light & Power Co. of Baltimore*, 184 F.2d 552, 567 (4th Cir. 1950) (utility contracted to its affiliate "the power to control (1) the prices at which [Penn Water] may sell its product; (2) the extent to which [Penn Water] may extend its plant; (3) the territory in which [Penn Water] may sell its product; and (4) the amount of back feed energy which [Penn Water] must purchase from Consolidated").

- *Gibbs v. Baltimore Gas Co.,* 130 U.S. 396, 410 (1889) (utility agreed with its competitor to forgo installing more gas pipe; court held that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests").

- *Thomas v. R.R. Co.,* 101 U.S. 71, 83 (1879) (franchised railroad company leased to another entity "its roads, buildings and rolling stock," giving that

acted inconsistently with their franchise duty. I assume that in the Maine utilities' situation, those limits exist. The discovery question OURP-001-024 asked:

> Please identify, and provide all documents relating to, every restriction that Iberdrola, Avangrid or any of its affiliates puts on the management of the Maine utilities. A nonexhaustive list of possible restrictions includes restrictions on operational spending, capital expenditures, bond issuances, compensation to be paid to employees and management.

Petitioners' counsel objected to this question as "unduly burdensome." If identifying the holding companies' restrictions on the utilities is unduly burdensome, there must be a lot of restrictions—good reason for the Commission to find out what they are, and to take the necessary corrective and penal actions.

These restrictions, which I assume exist today, are grounds for an independent investigation by the Commission. The relevance to this case is that eliminating the minority shareholders—some of whom likely invested in Avangrid because they wanted to invest conservatively in state-franchised utilities—will remove a voice that would

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company control of all the assets necessary to provide the railroad company's franchised service).

- *Application of Liberty Utilities (CalPeco Electric) LLC (U933E) for Exemption from the Affiliate Transaction Rules for Its Transactions with Liberty Utilities Service Corp., or, in the Alternative, for a Waiver from Affiliate Transaction Rules V.C, V.G.1, and V.G.2.c* (Cal. Pub. Utils. Comm'n, 2017 Cal. PUC LEXIS 432 (Sept. 28, 2017) (utility transferred all its employees to an unregulated affiliate).

The book acknowledges that in response to my testimony on this point in a case involving Exelon's acquisition of the holding company that owned Baltimore Gas & Electric, the Maryland Commission did not reject Exelon's limits on BG&E's spending. The Commission did limit dividend payments from the utility to the holding company, and reserved its authority to order divestiture of the utility from the holding company or revoke the utility's franchise. The Commission did not address whether the Exelon-imposed spending limits caused BG&E to violate its franchise. *Regulating Public Utility Performance* at 49-50.

have, or should have, objected to such constraint. An independent reason is straightforward: Just as an adolescent who hasn't done his chores doesn't get the car on Saturday night, a holding company that used its partial control over the utility to cause a violation of franchise duty doesn't deserve Commission approval to have even more control over the utility.

D. Petitioners' assertions of no harm are nonfactual and unenforceable

Q. Address Petitioners' insistence that the transaction will have no ill effects.

A. Petitioners argue that the transaction "will not affect CMP and MNG's Rates or Terms of Service"; "will not change CMP and MNG's management or any parent company control of Avangrid's subsidiaries"; "will not affect CMP and MNG's current level of service and operations"; "will not affect the CMP or MNG executive and management teams nor any parent company control of Avangrid's subsidiaries"; and "will not adversely affect . . . Petitioners' access to capital. . . ."[35]

On the technical surface, and only on the technical surface, Petitioners are correct that the formal "transaction"—the mere paper-shuffling and contract-signing—won't affect rates, terms of service, management, operations, quality of service, or access to capital. That qualification established, counsel's statements—which are not evidence—are not factual. If they are anything more than advertising, they are only aspirational. They pose as repeated factual certainties ("will not," "will not," "will not," "will not"), but their truth value is zero. No one would make such statements under oath—which for regulatory commissions is all that matters. Nothing in the Petition and nothing in the testimony provides any guarantee that the statements "will" be true

[35] Petition at 15-16.

during the unlimited years (Petitioners set no limit) of the post-transaction corporate system.

I have described the multiple ways in which making Iberdrola the 100% owner leaves it more able than before to make decisions that can affect each of the areas that the letter-signing counsel claims "will not" be unaffected. Without an enforceable condition limiting Iberdrola's discretion, there is no way to "establish," to use a statutory term, no way to "ensure," to use another statutory term, that counsel's signed-but-not-certified statements are true statements. If the Transmittal signatories' misuse of the term "will not," offered to a body with this Commission's profound responsibilities, is reflective of Iberdrola's culture, that fact alone makes this proposal detrimental.

Utility management decisions affect Iberdrola's earnings. It is neither realistic nor truthful to say that Iberdrola will never seek to influence a utility management decision, or to replace a utility executive whose decisions Iberdrola dislikes. And it is not possible to say that, had the minority shareholders remained, they could not have prevented such an Iberdrola action.

E. Petitioners' claim of improved access to capital has no factual backing

Q. Address Petitioners' claim that the transaction will improve access to capital.

A. To support its sole claimed "benefit," "improved" access to capital, Petitioners make four statements. For each one I provide a quote, then I explain why the statement fails.

Q. Address this first quote: "This change will improve Avangrid's access to capital needed for investments. Iberdrola's previous capital investment in Avangrid was limited by its proportionate ownership interest. Increasing Iberdrola's interest in Avangrid would remove that limitation and would therefore increase Avangrid's access to capital directly through Iberdrola."[36]

A. This statement does not add up. The 81.6% ownership share does not limit the *amount* of investment that Iberdrola makes in Avangrid; the 81.6% limits only the share. Whenever Avangrid needs increased equity, it can issue more shares for the necessary amount. That is what every utility does. That the source of that equity is divided between Iberdrola and the minority shareholders does not affect the amount that Avangrid can raise. What will limit the amount is what should limit the amount: the wisdom of the stock issuance, and the issuer's expectations about reactions from regulators and the financial markets. Petitioners presented no evidence that the presence of minority shareholders has in the past, or will or might in the future, limit Avangrid's decisions to raise equity capital. Indeed Avangrid's Chief Financial Officer and Controller, Mr. Lagasse, said that "there has not been an issue" from "the capital market side and the debt side."[37] On the equity side, he said, "it's been more challenging," but he seemed to attribute the challenge to high interest rates, not to Iberdrola's less-than-100% share.[38]

Petitioners' counsel then asserted that during the 2009 financial crisis, Rochester Gas & Electric could not access capital markets; but Iberdrola, then a 100% owner,

[36] Petition at 15.

[37] July 15 Transcript at 47:10-24 (LaGasse).

[38] July 15 Transcript at 47:24-48:13 (LaGasse).

injected capital.[39] Counsel's statement diverts attention from what matters, because it says nothing about whether Iberdrola's ability to support RG&E was specifically because of its 100% ownership, such that it would not have taken the same action with 81.6% ownership. Absent that clarification, which was not injected by Mr. Lagasse despite his presence, counsel's statement was unhelpful.

In short, Petitioners have provided no history of the Maine utilities having trouble raising capital because of Iberdrola's less-than-100% ownership. What raises capital is a trustworthy and trusting regulatory environment, along with the type of utility performance makes such an environment possible.

Q. Address this second quote: "Avangrid would no longer be subject to the same share price volatility that currently exists as a publicly traded company of reduced scale."[40]

A. This passage creates worry without any factual basis for worry. "Volatility" sounds like a bad thing—a constant source of unpredictability, a jagged share-price graph with dizzying, stomach-turning leaps and drops. All publicly traded companies, many of them successful, face daily, even hourly, changes in the stock price. Unless that "volatility" is big and unusual, these price changes are normal, not harmful. They merely reflect the realities of capitalism—the continuous questioning of a company's value because of the continuous changes in economic context. And when the changes are big and unusual, it can be an important sign, a transparent sign, that the company has a problem—with management decisions, or with reactions from regulators or from the competitive market.

[39] July 15 Transcript at 48:19-49:4 (Mahoney).

[40] Petition at 15.

What makes public markets so useful is that very transparency. The composite reactions of the many people and businesses whose welfare depends on the quality of management decision and regulatory decisions—those reactions tell us a lot. And transparency causes accountability. So Petitioners have it backwards. If Avangrid goes private, we lose the transparency that Petitioners mislabel "volatility."

Q. Address this third quote: "Because it will be underwritten by parent company financials at arms' length, Avangrid will be able to continue to access U.S. private debt markets but with the scale and strength of Iberdrola as the 100% parent company. As a wholly owned subsidiary of Iberdrola, some credit rating agencies [sic] (such as Moody's) can now be expected to look through to Iberdrola's stronger credit rating in evaluating Avangrid's own credit metrics, and Avangrid will benefit from those enhanced credit metrics, which would then be expected to benefit Avangrid's access to capital at the best possible scale, terms, and conditions."[41]

A. This passage implies that Avangrid doesn't see Iberdrola, at 81.6% ownership, as able and willing to back Avangrid's lending; or that Iberdrola has been, up to now, somehow less than fully ready and able to back that borrowing. That implication has no basis in logic or facts. Nor is there evidence that when in 2015 Iberdrola reduced its ownership of Avangrid from 100% to 81.6%, either company revealed to the Maine and Connecticut utility regulators, or to anyone else, a concern that this reduction would somehow reduce Avangrid's access to capital. Nor is there evidence that Iberdrola's "stronger credit rating" is viewed by the rating agencies as insufficient because Iberdrola owns 81.6% rather than 100%.

The reference to "arm's length" is confusing. The Petition signatories can't mean that Iberdrola will view Avangrid as merely one possible investment opportunity to compare with dozens of other investment opportunities. They can't mean that if

[41] Petition at 16.

Iberdrola wants to loan money to Avangrid, Iberdrola will have to compete for that opportunity with other lenders. At 81.6% ownership and at 100% ownership, Iberdrola has the power to order Avangrid to choose as lender its parent Iberdrola over other unaffiliated companies. Between Iberdrola and Avangrid, there is no arm's-length relationship.

Q. Address this fourth quote: "As a result of Iberdrola's scale and scope of market participation, Avangrid also will be able to access more diverse sources of capital."[42]

A. There is no evidence that the diversity and availability of capital sources is any greater with 100% ownership as compared to 81.6% ownership. And there is no evidence of anyone's "scale and scope." Those two terms are technical terms that professional economists use when referring to cost functions; specifically, average variable costs that decline as size or product diversity increases. They are technical terms that Petitioners' counsel, nontechnically and nonfactually, have converted into advertising jingles, on the mistaken assumption that busy Commissioners and staff will accept them noncritically. The one-sidedness of this argument—and it is only an argument because it is not factual—should be obvious. Iberdrola's "scale and scope" involve investments in nations beyond this Commission's ability to monitor, with no limits on amount, location, or type. The notion that this "scale and scope" is all benefit and no risk conflicts with elementary investment theory, because all investments have risk. That Petitioners' top advisors would make such a nontechnical, untrustworthy argument reflects an Iberdrola culture inconsistent with ratepayers' interest—another independent reason to reject this application.

[42] Petition at 16.

Q. Can you reconcile Iberdrola's asserted goal of increasing access to capital with its decision to part with $2.5 billion of its capital?

A. Not without any internal documents explaining how Iberdrola will recover and earn a return on its $2.5 billion investment. Asked to explain how this expenditure will improve Iberdrola's finances—specifically, "What is Iberdrola's expected return on its purchase price for the minority shares?"—Petitioners declined to answer. From this nonresponse, one must infer that there is no financial benefit to Iberdrola; or if there is a financial benefit, Petitioners have no idea how much—or don't want the Commission and the public to know. Financial benefit was Petitioners' only claim of benefit. It was in their interest—and it was counsels' duty to their client—to provide every feasibly available piece of supporting evidence. None appeared. This silence, this unwillingness or inability to explain the value of a $2.5 billion investment, signals how Iberdrola will behave without the minority shareholders.

I assume that Iberdrola is rational. If the $2.5 billion investment provides no known, quantifiable financial benefit, there still must be some benefit. That benefit is gaining control—100% control. And so we are back to "transfer of control." There is the Commission's undisputed, indisputable evidence—$2.5 billion of evidence—that this transaction effects a "transfer of control." Why else would Iberdrola part with that kind of cash?

Finally, Iberdrola is saying in 2024 that customers will be better off without Avangrid's having the minority shareholders that Iberdrola in 2015 said it wanted Avangrid to have. This conflict in positions, lacking explanation and even acknowledgement, renders noncredible the Petitioners' assertion that without the minority shareholders, the customers will realize a benefit.

F. The transaction is detrimental because it allows Qatar to benefit from a statutory violation undetected by the Commission

Q. Explain the Qatar acquisition and its significance to this proceeding.

A. Since at least 2011, the Qatar Investment Authority has been Iberdrola's largest shareholder.[43] It currently owns, indirectly, 8.71% of Iberdrola's outstanding shares.[44]

In 2021 the Qatar Investment Authority, through its wholly owned subsidiary Hyde Member LLC, bought 3.7% of Avangrid Common Stock.[45] This purchase made the Qatar Investment Authority a more-than-10%-owner, therefore an "affiliated interest" of, the Maine utilities. The math is straightforward. By owning 8.71% of Iberdrola's 81.6% of Avangrid, the Qatar Investment Authority had owned, indirectly, 7.1% of Avangrid.[46] Adding to that 7.1% stake the 3.7% purchase, the Qatar Investment Authority became the owner (combining direct and indirect ownership) of 10.8% of Avangrid. Avangrid owns 100% of the Maine utilities. That means that the Qatar

[43] "Iberdrola and Qatar sign agreement to strengthen their strategic alliance in innovation" (May 18, 2022) ("The collaboration between Iberdrola and Qatar was consolidated in 2011, when the Qatar Investment Authority (QIA) became Iberdrola's main shareholder."), available at https://www.iberdrola.com/press-room/news/detail/iberdrola-qatar-sign-agreement-to-strengthen-strategic-alliance-innovation (last visited Aug. 8, 2022).

[44] "Holdings of significant shareholders," available at https://www.iberdrola.com/shareholders-investors/share/share-capital/shares (last visited Aug. 8, 2022).

[45] Proxy Statement at 178 (referring to Hyde's purchase of $740 million of Avangrid stock at $51.40 per share). *See also* "Avangrid, Iberdrola's controlled subsidiary in the U.S., has issued a capital increase of $4,000 million" (May 13, 2021) (describing the $740 million purchase as representing 3.7% of Avangrid common stock), available at https://www.iberdrola.com/press-room/news/detail/avangrid-iberdrola-s-controlled-subsidiary-u-s—issued-capital-increase-4-000-million (last visited Aug. 9, 2024).

[46] 8.71% x 81.6% = 7.1%.

Investment Authority owns, indirectly, 10.8% of the Maine utilities. Under section 707(1)(A)(1), the Qatar Investment Authority thus became an "affiliated interest" of the Maine utilities.

Under section 708(1)(A), the 3.7% stock purchase that made the Qatar Investment Authority an affiliated interest of the Maine utilities was a "reorganization." The stock purchase was a "creation . . . of an affiliated interest . . . accomplished by the . . . acquisition . . . or transfer of voting securities." Section 708(2) says that absent exemption, "a reorganization may not take place without the approval of the commission." There has been no Commission approval of the 3.7% purchase because none of the three involved entities—Qatar Investment Authority, Avangrid, and Iberdrola—sought approval. All three are violators of state law.

These three violators, still silent on their violation, now ask permission for a transaction that will allow the Qatar Investment Authority to benefit from its violation. It will benefit because what it will receive as an Avangrid minority shareholder is $293.5 million more than its share of Iberdrola's $2.5 billion purchase cost. Specifically:

- What it receives as an Avangrid minority shareholder: 3.7% x 387,010,149 Avangrid's outstanding shares x $35.75 = $511 million.
- Its cost as an Iberdrola shareholder: 8.7% of $2.5 billion, or 217.5 million.
- The difference between $511 million and $217.5 million is $293.5 million.[47]

From the facts, three conclusions are unavoidable.

[47] Petitioners might argue that Qatar had a loss, not a gain, because it bought Avangrid stock at $51 but sold it at $35.75. That argument would divert attention from what matters. The loss arose from Qatar's 2021 purchase—a sunk decision logically and legally irrelevant to Qatar's 2024 sale. It is the 2024 transaction—the transaction that will give Qatar its 2024 gain—whose lawfulness Petitioners must prove.

First, a transaction that enables a company to benefit from violating a Maine statute is inherently detrimental to the public interest. It does not "serve," and is not "consistent with," the ratepayers' interests. To "fix" the problem by retroactively approving the Qatar Investment Authority's 3.7% acquisition, then allowing the current proposed transaction to occur, is an insult to the ratepayers, to the legislative body that enacted the violated statute, and to the many regulated entities and regulatory professionals in this state that play by the rules.

Second, the Commission's lack of knowledge about the Qatar Investment Authority's two ownership positions is a direct result of two things: the complexity of the Iberdrola corporate system, and the mismatch between that complexity and the Commission's limited resources. That the Commission missed this information is no one person's fault; but it is a direct result of the series of Commission approvals for corporate transactions—none designed for the ratepayers' benefit—that complicated the regulatory task without commensurately increasing regulatory resources. The currently proposed transaction worsens that mismatch, because the absence of minority-shareholder constraint, and the loss of SEC reporting, invite more complicated transactions with fewer available facts.

Third, that Avangrid and Iberdrola, and their counsel and witnesses, knew about the Qatar ownership positions but never shared it with the Commission, or didn't have this information when it was their legal duty to have it, signals a lack of preparedness for, and a lack of respect for, the regulatory process and this Commission's immense

responsibility for that process. Granting such entities more opportunity to miss, or withhold, this type of information creates detriment.[48]

G. Benefits that arise from settlement strategy rather than transactional design don't count toward statutory net benefits

Q. Explain the potential for confusion over "benefits."

A. In other merger transactions, applicants have offered to intervenors things that the applicants label "benefits." They do so to win the intervenors' support, or their nonopposition. I offer here principles by which the Commission can assess any such actions by the Petitioners in this proceeding. I reserve the opportunity to address in surrebuttal any specific asserted benefits that Petitioners offer in their rebuttal.

As a reminder, 35-A M.R.S. sec. 708(2)(A) provides in relevant part (emphasis added):

> If a reorganization would result in the transfer of ownership and control of a public utility or the parent company of a public utility, a reorganization may not be approved by the commission unless it is established by the applicant for approval that the *reorganization* provides net benefits to the utility's ratepayers.

This language makes clear that the "provide[r]" the net benefits must be the "reorganization." Here, the reorganization is the buyout of minority shareholders. To count toward the net-benefit calculation, therefore, the asserted benefit must be a benefit

[48] To the extent Petitioners' counsel and witnesses did not have the information—hard to believe since one would expect Mr. Mahoney, who is Avangrid's Senior Vice President, General Counsel, and Corporate Secretary, to know the identity of and shares owned by each of Avangrid's "affiliated interests"—they have it now because Our Power gave them a sufficient hint. Our Power data request OURP-001-028 specifically asked whether the Qatar Investment Authority owned more than 10% of Avangrid. Any ignorance thus ended, but counsel's failure to inform this Commission continues.

attributable to, meaning available only because of, that buyout and Iberdrola's resulting 100% control. Any other benefit comes from settlement strategy, not the "reorganization." A benefit that comes from Iberdrola's or Avangrid' corporate treasury, or from the generosity of its executives, is not a benefit provided by the "reorganization."

And for good reason. No student gets an A for giving the teacher an apple. No utility wins a rate increase by promising to support the commissioners' favorite causes. In education as in regulation, reward depends on merit. In this proceeding, what matters is the merits of this transaction, not the savvy of the regulatory strategists or the unrelated needs of intervenor organizations.

Based on the above principles, I respectfully disagree with the Commission's decision, in its 2008 merger order, to count as benefits applicant commitments that did not arise from the transaction itself. In finding that "the total benefits flowing from the merger are equal to or greater than the detriments or risks for both ratepayers and shareholders," the Commission treated as "benefits flowing from the merger" the 59 conditions stated in the Stipulation. [49] Those items included, among others, these Applicant commitments: levelizing the Advanced Metering Infrastructure (AMI) investment and forgoing the associated carrying charges; developing voluntary price-based customer demand response programs and proposing associated rate design changes; providing detailed quarterly service quality reports; evaluating the Maine utilities' continued participation ISO-NE; participating in a Commission proceeding on

[49] Central Maine Power Co., *Request for Approval of Reorganization Acquisition of Energy East Corp. and Iberdrola, S.A.*, 2008 Me. PUC LEXIS 45 *8, 263 P.U.R.4th 271 (Feb. 7, 2008).

the future of the Transmission Owners Agreement; committing to "take no action with regard to CMP's position in any RTO . . . without explicit Commission approval"; not asserting federal preemption; agreeing not to undertake any major new transmission investments without Commission approval; and committing to "make key decision makers responsible for policy, management and operations . . . available to meet with the Commission upon request."[50] Respectfully, the Commission disregarded the statutory language and its own standard. None of the conditions "flow[ed] from the merger. Each was one of the following: an effort to protect against the merger's harms, a commitment not to violate the law, a correction to some preexisting problem, a commitment not to oppose the Commission's lawful actions, or something utterly unconnected to the transaction (such as matters relating to ISO NE policies). These items were all strategic quid pro quos, not benefits flowing from or provided by the "reorganization." They are all things that the Commission could have ordered without the transaction—which causes one to wonder, if they are truly benefits, why the Commission hadn't ordered them before.

It is understandable that intervening organizations might hope to get from Petitioners benefits that the political processes have failed to provide—whether it be support for low-income consumers, commitments to renewable energy and environmental protection, or proper compensation for and treatment of utility workers. These are all causes of immense importance to us all. No law prevents Iberdrola and Avangrid from exploiting the unresponsiveness of the legislative process to achieve success in the regulatory process. No law prevents Iberdrola and Avangrid from using

[50] *Id.* at *10-13.

the earnings they get from customers to buy support from intervenors. What the law prevents is the Commission's counting those quid pro quos as benefits "provide[d]" by the "reorganization."

H. The facts leave the Commission unable to make the required statutory findings

Q. Discuss the criteria that transaction must satisfy under section 708(2)(A)(1)-(9).

A. Section 708(2)(A)(1)-(9) requires satisfaction of a series of criteria. Based on the facts provided by the Petitioners—who are obligated to supply facts—I see no evidentiary support for any of these criteria. Here is a restated list of eight of the required findings, each with my comment.

"[R]easonable access to books, records, documents and other information relating to the utility or any of its affiliates" (with a separate provision for trade secrets): I interpret "reasonable access" to mean access to the facts that the Commission needs to ensure that the Maine utilities are able to provide adequate service at reasonable rates, for current and future customers. The Commission of course has the power to order the Maine utilities to provide any information that the Commission needs, if that information is in the Maine utilities' possession. But some information affecting the Maine utilities' ability to serve will be in Avangrid's and Iberdrola's possession—such as the type and size of business activities whose failure could affect the Maine utilities. That information includes the two holding companies' financial condition, including the funds available for equity investment in the Maine utilities as well as their need for dividends from the utilities; the two holding companies' plans for issuing new equity and debt, which will affect their ability to put equity into, and their need to take equity from, the Maine utilities; and the holding companies' other

acquisition and investment plans. All these things will affect the availability of capital for the Maine utilities. Absent a condition on this transaction that the two holding companies are willing to accept, I am aware of no statutory authority in the Commission to compel this information from Avangrid and Iberdrola.

"[A]ll reasonable powers to detect, identify, review and approve or disapprove all transactions between affiliated interests": The Commission has some authority over affiliate transactions to which the Maine utilities are a party. But it has no authority over any other affiliate transactions within the Iberdrola corporate system. If Iberdrola encounters financial difficulties, such as from debt-financed acquisitions that don't work out, and if Iberdrola then extracts dividends from Avangrid or overcharges Avangrid for loans or other goods and services, the Commission will have no way to learn of those affiliate transactions and no way to prevent them.

"[T]he utility's ability to attract capital on reasonable terms, including the maintenance of a reasonable capital structure, is not impaired": The Commission is not able to find that the Maine utilities' ability to attract capital on reasonable terms is not impaired. That inability stems from this fact: The Commission will have no advance information about, and is exercising no control over, among other things, what acquisitions Avangrid and Iberdrola will make and how much debt they will take on to make those acquisitions. As already discussed, their acquisitions create business risk and distract management, while the acquisition debt (or use of internal cash instead of external debt) reduces their ability to support the Maine utilities financially.

"[T]he ability of the utility to provide safe, reasonable and adequate service is not impaired": The statute does not permit this finding for the same reasons that it cannot make the finding on the immediately preceding factor.

"[T]he utility continues to be subject to applicable laws, principles and rules governing the regulation of public utilities": The Commission can make this finding because the transaction makes no changes in the governing laws, principles, and rules. But the problem here, as already discussed, is not the Commission's authority over the Maine utilities; the problem is the absence of Commission authority over Avangrid and Iberdrola.

"[T]he utility's credit is not impaired or adversely affected": The Commission has no way to make this finding because it has no way to know today, no way to control in the future, and no way to learn in advance, the future debt issuances, acquisitions, dispositions, and competitive market successes or failures that will affect Avangrid and Iberdrola, and therefore the Maine utilities.

"[R]easonable limitations . . . upon the total level of investment in nonutility business, except that the commission may not approve or disapprove of the nature of the nonutility business": The statute does not permit this determination because the Application and testimony include no limitations, let alone reasonable limitations, on the current and future nonutility investments made by Avangrid and Iberdrola. A limitation is reasonable only if it eliminates all risk to the utility customers of any adverse effect. Otherwise there is detriment—which, given the absence of "established" benefits, creates net harm. With net harm, this transaction fails under either of the two statutory tests.

I expect the Petitioners to respond that "eliminating risk is impossible." Correct. But to say that is to admit that subjecting the Maine utilities to an affiliation with and control by Avangrid and Iberdrola is inevitably a detriment—one that worsens when we eliminate the potentially restraining influence of the minority shareholders. Eliminating risks directly associated with utility service is also impossible. But because those risks are tied to the customers' purchase of electric service, they are acceptable within reason. In contrast, risks associated with nonutility businesses are not part of electric service; they are not risks that customers sign up for when they buy electric service. Customers are not investors in the nonutility businesses, accepting the risks of the downside so that they can profit from the upside. As mere electricity customers they must bear only the risks associated with electric service. Therefore, the only "reasonable" limitation here is a limitation that eliminates all risk associated with removing the restraining influence of the minority shareholders. That is an impossibility.

"[R]easonable remedial power including, but not limited to, the power, after notice to the utility and all affiliated entities of the issues to be determined and the opportunity for an adjudicatory proceeding, to order divestiture of or by the utility in the event that divestiture is necessary to protect the interest of the utility, ratepayers or investors": This language does not create remedial power; it requires the Commission to find that it has remedial power. Whether that remedial power exists explicitly and independently in Maine law is outside my direct expertise. But I assume that the Maine utilities' right to continue as franchised companies, protected from competition, is impliedly conditioned on their acting in all ways consistent with their obligation to serve. What Maine's government has granted, Maine's government can remove—with

proper notice, proper procedures, and factual findings based on substantial evidence. I am aware of no permanent, irrevocable right to be a state-law utility franchisee.

So if the Commission finds that the Maine utilities' continued affiliation with Avangrid and Iberdrola is inconsistent with the utilities' obligation to serve, the Commission can give the utilities a choice: disaffiliate from Avangrid and Iberdrola, or forfeit their right to serve. This Commission action would not be a direct order to divest; it would present the utilities with a choice. Of course, disaffiliation itself would be accomplished not by any action by the utilities but by the action of Avangrid, which would sell its stock in the utilities to others. That process would be subject to the Commission's authority over transfers of ownership and control.

Q. Do you have any additional comments about these eight items?

A. Yes. The problems I have described exist in the status quo. But the move from 81.6% to 100% ownership and control makes them worse, because eliminating the minority shareholders removes a constraint on Avangrid's and Iberdrola's risk-taking, and because the loss of SEC reporting leaves the Commission without the full information necessary to make decisions.

Consider the statutory phrase "is not impaired." The "is" requires certainty. The statute doesn't say "might not be impaired" or "probably won't be impaired." The statute says "is not impaired." One might say that literally speaking, at the moment of the transaction there "is" no impairment. But that would not be a reasonable reading of the language or a reasonable inference of legislative intent. What can't be impaired, what the Commission must find "is not impaired," is the Commission's continuing ability to protect the customers from the unavoidable risks that arise from their utility

being 100% controlled by two holding companies whose business purpose is partly in conflict with the business purpose of the Maine utilities.

Many of these problems arise from the Commission's years-ago decisions to allow its local utilities to be acquired by holding companies: companies that have no public-utility obligation, companies that make other acquisitions a priority, companies that have no statutory responsibility for the quality and cost of Maine's utility service. Those decisions are not before the Commission here. But they are relevant, because they alert the Commission to the long-term consequences of allowing the control of their utilities to be consolidated in hands that are insufficiently accountable to either competitive forces or regulatory rules. That very consolidation is what Petitioners propose here.

IV. The proposed transaction diverts from customers their share of the $260-335 million control premium

A. Overview

Q. Provide the context for your finding that the transaction diverts from customers their lawful share of the $260-335 million control premium paid by Iberdrola to the minority shareholders.

A. The $35.75 per share purchase price for the minority shares in Avangrid represents a 11.4% premium over the closing price of $32.08 on March 6, 2024. That day was the last trading day preceding Avangrid's announcement of Iberdrola's unsolicited offer. Because that day preceded the announcement, the closing price was theoretically unaffected by the prospect of the transaction.[51] That 11.4% premium amounts to $260 million.[52] The $35.75 purchase price is also a 15.2% premium over $31.03, the volume-weighted average price of Avangrid's common stock over the 30 trading days immediately preceding that last unaffected trading day.[53] That 15.2% premium amounts to $335 million.[54]

In this Part IV, I first explain that this premium represents the value that Iberdrola sees in not merely owning Avangrid stock, but in owning it 100%, thus not having to contend with minority shareholders. It is the value—$2.5 billion—of obtaining complete control. I then explain that this value is created, in part, by the Avangrid utilities' captive customers. Conventional regulatory principles require that shareholders and customers share gains in proportion to each group's contribution to

[51] Proxy Statement, Letter to Shareholders at 2.

[52] (35.75-32.08) x 70,980,000 shares = 260,496,600.

[53] Proxy Statement, Letter to Shareholders at 2.

[54] (35.75 - 31.03) x 70,980,000 shares = 335,025,600.

those gains. Here, the transaction's negotiators are transferring all that value to the minority shareholders, leaving nothing for the customers. That feature of this transaction is a detriment.

B. The $2.5 billion control premium is the amount paid for complete control

Q. What is a control premium?

A. A control premium arises when an acquirer seeks to buy 100% of a target company's stock. The control premium is the excess of the per-share purchase price over the target stock's unaffected market price. The unaffected market price is the market price for the target's stock before that price was affected by (meaning, driven up by) news of a possible acquisition.

This transaction's purchase price, $35.75 per share, is undisputed. The question is what was the unaffected market price. If one uses the market price on the day preceding the official announcement, $32.08, the control premium is $11.4%. But a company's stock price, as published on any single day, can reflect random factors. Also, rumors of the acquisition can circulate well before a deal's formal announcement. Analysts therefore sometimes determine the unaffected market price by choosing a longer period, like the 30, 60, 90 or 180 days preceding the announcement, then calculating the volume-weighted average stock price for that period. Here, the control premium measured by the 30-day weighted average is 15.2%. Given the number of minority shares, 70,980,000, the control premium is therefore somewhere between $246 million and $335 million.

Q. Why might an acquirer pay a purchase price exceeding a stock's market trading price?

A. To understand why an acquirer of 100% of a target's stock might pay a purchase price exceeding the market trading price, compare a corporate acquirer to an ordinary stock purchaser. The ordinary stock purchaser tells her broker, "Buy me some shares at the market price." She has no reason to pay more than the market price because she is buying only a sliver of the company. The acquirer of 100% of the stock pays more than the market price because it is buying more than stock; it is also buying complete control. With that control, the acquirer can determine the future direction of the acquired company. It can install its own board of directors and its own executives. It can use its control to advance its overall business objectives. It can control dividend payouts, future acquisitions, and capital expenditures. An ordinary stock buyer has no such influence. Acquirers pay a control premium because they value control. Control brings the potential for higher earnings.

In a competitive market, the corporate acquirer will pay a control premium if it thinks that with its control it can increase the target's earnings. It can increase the target's earnings if it can increase the target products' quality or lower their cost, thus generating more sales or more profit per sale. Iberdrola has stated no such purpose, certainly not in terms of the Maine utilities' quality of service or cost of production. As explained next, Iberdrola has different reasons for paying a control premium. Understanding those reasons is key to understanding the asymmetry in transferring the entire control premium automatically to Avangrid's minority shareholders and none to Avangrid's utilities' customers.

C. Iberdrola is paying the control premium because it expects higher earnings from 100% ownership than from 81.6% ownership

Q. Explain the connection between Iberdrola's decision to pay a control premium and its expectation of higher earnings from Avangrid.

A. A rational Iberdrola would pay a control premium for Avangrid's minority shares only if it thought that with 100% control it could increase Avangrid's earnings above their current level. Avangrid has two major segments: a competitive segment, referred to as Renewables; and monopoly utilities' segment, referred to as Networks. I assume that Iberdrola expects that its 100% control will increase earnings from both segments. (I make this assumption because Iberdrola has said nothing about how it expects to recover, and earn a return on, any of its total $2.5 billion payment, let alone the control premium portion of that payment. I also make this assumption because acquirers have paid control premia in situations where the acquisition was of pure-play, or mostly pure-play, utilities.)[55]

One reason why Iberdrola would pay a premium is its expectation that its Renewables segment will increase its earnings in competitive markets. That expectation, and a desire to have 100% of those earnings rather than 81.6%, is a valid reason for paying a premium to Avangrid's minority shareholders (and none to customers), because those shareholders have historically taken the competitive risks and fronted the investments that produce earnings for Renewables.

[55] I recognize that within Networks are some companies that face competition. See July 15 Transcript at 39:4-7 (referring to "the NECEC line"). And even retail monopoly distribution utilities compete to sell and buy wholesale power. For purposes of this discussion, I am referring to the portion of Networks consisting of traditional utilities—i.e., companies that are protected from competition.

But that reasoning does not apply to Avangrid's Networks segment. That segment consists of utilities protected by state law from competition. Iberdrola's earnings expectation from that part of the business is not based on shareholder risk-taking or competitive skill. Though utility shareholders do take risks, the utility's customers already compensate them for those risks, through the return-on-equity component of the revenue requirement used to set utility rates. To the extent that Iberdrola's control premium is attributable to Avangrid's Networks segment, some portion of it is therefore the result of the government-granted franchise. What makes that franchise profitable is not uncompensated minority-shareholder risk-taking but rather the utility customers' captive position.

Recall that in competitive markets, an acquirer would pay a control premium if it thinks that with control it can increase product quality or lower product cost, thus increasing the target's competitive success. We know that Iberdrola is not paying the control premium to improve the utilities' service or lower their costs, because those reasons were absent from Iberdrola's stated reasons for the acquisition. So if Iberdrola is paying a premium to get control of the utilities' franchises, Iberdrola is paying a premium for value created by those franchises—for value created by the utility customers' captivity.

Q. Elaborate on your conclusion that Iberdrola is paying a premium to get 100% control of utility franchises whose value is attributable in part to the utilities' captive customers rather than to Avangrid's minority shareholders.

A. In buying 100 percent control of Avangrid's utilities, Iberdrola is actually buying two things: control of the utilities' capital assets and business practices, and control of the government-granted franchise. Today, the utilities' assets sit on their rate-setting books at book value. After the transaction, those same assets will still sit on the same books at

the same book value. (That fact is a necessary result of not putting the control premium into utility rate base—which Iberdrola has not proposed to do and which it cannot lawfully do, because a control premium is not an asset that is used and useful in providing utility service.) Because the utilities' retail rates are based on book value, we can assume that the value to Iberdrola of the utilities' capital assets (i.e., as distinct from the franchise) is book value. That book value is the net present value of the discounted future stream of earnings made possible by charging rates that are based on book value.

But Iberdrola is offering a price above that level. So Iberdrola must be paying for more than just the control of the assets. What Iberdrola is also paying for is control of the government-granted franchise—the franchise that, by prohibiting competition for the distribution service that the Maine utilities' provide, makes the utilities' customers captive customers. The value of that franchise comes from the customers, not the shareholders.

D. Iberdrola's proposal—to deprive utility customers of any portion of the control premium—conflicts with the conventional regulatory principle that gains go to the benefit-creators and burden-bearers

Q. In determining how to share the control premium between shareholders and customers, what principles should apply?

A. The necessary standard is the statutory public-interest standard. For utility regulation, I view the public interest as having at least these components: alignment of the interests of shareholder and customers, economic efficiency, outcomes consistent with effective competition, and respect for legitimate investor expectations. Consistent with all those components are these principles: Costs go to the cost-causers, while benefits go to the benefit-creators and burden-bearers. Allocating the control premium to shareholders and customers in proportion to their contributions satisfies all these elements.

Commissions follow this principle when they allocate the gain from a utility's sale of an asset previously used for utility service. If that asset had been in the utility's rate base (which means that the cost was borne by the customers), and if the utility then sells that asset for a price exceeding the asset's net book value (net book value equaling original cost less accumulated depreciation), the gain typically goes to the customers. The customers bore the cost, so they get the gain. If the asset had not been in rate base, the gain normally goes to shareholders because they bore the economic burden. Benefit goes to the burden-bearer.

On this topic, the frequently cited precedent is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*. The court there stated:

> It is well settled that utility investors are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service. This entitlement extends, not only to reductions in investment attributable to physical wear and tear (ordinary depreciation) but also to those occasioned by functional deterioration (obsolescence) and by exhaustion (depletion). . . .[Since customers] have shouldered these burdens, . . . it is eminently just that consumers, whose payments for service reimburse investors for the ravages of wear and waste occurring in service, should benefit in instances where gain eventuates—to the full extent of the gain.[56]

[56] 485 F.2d 786, 808-11, 822 (D.C. Cir. 1973) (footnotes omitted); *id.* at 808 ([I]f the land no longer useful in utility operations is sold at a profit, those who shouldered the risk of loss are entitled to benefit from the gain.). *See also Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd. 6283, 6295 66 113-14 (Sept. 17, 1987) (order on reconsideration) (observing that "[t]he equitable principles identified in [*Democratic Central Committee*] have direct application to a transfer of assets out of regulation that produces gains to be distributed," and requiring that customers receive the gains on assets when the market value of the assets exceeds net book cost); *N.Y. Water Serv. Corp. v. Pub. Serv. Comm'n of N.Y.*, 12 A.D.2d 122, 129 (N.Y. App. Div. 1960) (allocating gain on sale to customers when customers bore the risk of a loss in value of the assets); *N.Y. State Elec. & Gas*, Case No. 96-M-0375, 1996 N.Y. PUC LEXIS 671, at *8 (N.Y. Pub. Serv. Comm'n Nov. 19, 1996) (memorandum opinion) (holding that reserving the net gains on the sale of land

E. A public-utility franchise is not a shareholder-owned asset whose control the shareholders are entitled to sell for gain

Q. In past cases, utility-merger promoters have argued that allocating any of the control premium to customers deprives the target-company shareholders of their rightful gain. How do you respond?

A. My response covers the following three points:

- A state-granted franchise is not the shareholders' private asset; it is a public privilege granted to the utility for the public's benefit (Part IV.E.1).
- Since commission-set rates have provided minority shareholders their legally required compensation, they have no automatic right to more compensation (Part IV.E.2).
- Mere legal ownership of Avangrid stock does not entitle minority owners automatically to the entire control premium (Part IV.E.3).

1. A state-granted franchise is not the shareholders' private asset; it is a public privilege granted to the utility for the public's benefit

Q. Explain the concept of a utility franchise.

A. A utility's franchise is a government-granted, usually exclusive privilege to serve captive customers. It consists of rights and responsibilities: rights granted by government to the utility, and responsibilities imposed by the government on the utility. The utility's rights include the right to provide legally-defined services to a largely captive customer base, and to receive in return compensation that satisfies statutory and constitutional standards. The utility's responsibilities include the obligation to provide service that satisfies commission-set standards, to provide that service without undue discrimination, and to charge for that service only the rates authorized by the commission.

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for customers is equitable and reasonable); *N.Y. Tel. Co. v. N.Y. Pub. Serv. Comm'n*, 530 N.E.2d 843 (N.Y. 1988) (holding that customers are entitled to benefits on sale of yellow pages advertisements).

The franchise is thus a conditional privilege. It is not an asset that can be sold and resold, like a McDonald's franchise or a New York City taxi medallion. It is not like corporate stock, or buildings or trucks or power plants. The franchise privilege is not a commodity, available for sale to the highest bidder. The franchise is not bought and sold by anyone. It remains with the government, to be granted to whichever company the government chooses.[57]

Because the franchise is a privilege created by government, it was not created by the shareholders; nor was it purchased by shareholders. The franchise does have value, because the right to provide exclusive electric service has value. But as I have explained, that specific value does not derive from actions of shareholders; it derives from actions of government and customers—actions by government to limit competition for the defined product and compel customers to pay government-set rates if they want that product; and actions by captive customers to pay those government-set rates. The franchise never loses its public character.

[57] *See New Orleans Gas Co. v. La. Light Co*., 115 U.S. 650, 669 (1885) (describing a franchise as "belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases"); *see also Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 595 (1839) (describing franchises as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right"); *McPhee & McGinnity Co. v. Union Pacific R.R. Co*., 158 F. 5, 10 (8th Cir. 1907) (describing a franchise as a "right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gasworks, and to collect tolls therefor").

2. Since commission-set rates have provided minority shareholders their legally required compensation, they have no automatic right to more compensation

Q. Explain the connection between (a) the compensation that the minority shareholders receive through the utilities' rates, and (b) the gain they would receive from the control premium.

A. Before beginning my explanation, I wish to reiterate that I am addressing here the portion of the premium attributable to Avangrid's Networks segment; and ultimately, the portion of that amount that is properly attributable to the Maine utilities. What Iberdrola pays to gain control of Avangrid's Renewables segment is a competitive market issue outside this Commission's jurisdiction.

A utility has a legal right to fair compensation for carrying out its obligation to serve. That right comes from two sources: he statutory just-and-reasonable standard; and the Constitutional standard, inscribed in the Fifth Amendment's Takings Clause (as applied to the states through the Fourteenth Amendment's Due Process Clause), stating: "nor shall private property be taken without just compensation."

In conventional cost-based ratemaking, the utility's annual revenue requirement reflects reasonable operating and maintenance expenses, depreciation, debt (both interest and principal), and capital expenditures, as well as an authorized return on equity. From that revenue requirement, regulators derive rate levels that will produce that authorized return on equity—if actual sales equal the reasonably projected sales and if actual costs equal the reasonably projected costs. The authorized return on equity is applied to a rate base consisting of assets used and useful in providing utility service. As Justice Brandeis famously explained:

> The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the

> capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return.[58]

Justice Brandeis's analysis is the basis for our modern understanding of how the Constitution applies to ratemaking. The phrase "capital embarked in the enterprise," Justice Brandeis explained, is the money invested in assets that serve the public, i.e., book value, otherwise known as rate base:

> The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money."[59]

When this Commission sets cost-based rates lawfully, utility shareholders receive their legally required compensation.

Q. You have explained how Commission-set rates provide shareholders their legally required compensation. What is the relationship between that compensation and the control premium?

A. If a lawfully set rate gives shareholders sufficient compensation, they have no automatic right to additional compensation—such as the gain from selling control of the franchise. Applying Justice Brandeis's wording, neither the franchise nor the control premium (to the extent attributable to the franchise) represents "capital embarked in the [public utility] enterprise."

Because the control premium doesn't represent investment in utility service assets, the target's shareholders have no legally protected expectation of receiving it.

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[58] *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 290 (1923) (Brandeis, J., concurring).

[59] *Id.*, 262 U.S. at 307-08.

Any expectation of receiving a premium arises from shareholders investing in the stock market, not from utilities investing in public-service assets. Rate base is where government honors its constitutional obligations; stock is where shareholders invest their money. The dollars shareholders spend to buy stock are therefore constitutionally distinct from the dollars a utility spends to acquire or construct assets used for utility service. Only the latter dollars—dollars associated with utility service rather than an investor's stock-buying—receive constitutional protection.

Q. Companies in competitive markets routinely sell their businesses at a premium, with their shareholders keeping the gain. What's the difference?

A. In a competitive market the acquirer's willingness to pay the premium, and the target's expectation of receiving a premium, are both disciplined by competition in the market for the target's products. In that product market, the target company receives neither government protection from competition nor government assurance of reasonable prices. So if the acquirer pays a control premium for the target, we can logically attribute the premium to real economic value created by the acquisition—value that competitive pressures will force the acquirer to share with customers. The discipline imposed by competition in the product market will discipline the size of the premium, leaving no logical reason to question either its appropriateness or the target shareholders' expectation of keeping the gain. And in the competitive market there is not government-created franchise included in the thing being purchased.

In a regulated utility market, those two key facts—competition in the ultimate product market to discipline the premium, and the noninvolvement of a government franchise—are absent.

3. Mere legal ownership of Avangrid stock does not entitle the minority shareholders to the entire control premium

Q. Aren't target shareholders entitled to the entire control premium because they're the legal owners of the target's stock?

A. No. In the utility regulatory context, the value of utility stock is always affected by regulatory decisions. A utility's stock value can vary depending on how regulatory decisions affect investors' projections of the utilities' earnings. When utility shareholders volunteer to invest in a government-regulated market, they impliedly accept that regulation can reduce the value of their holdings. As explained in the landmark case of *Munn v. Illinois*:

> [When someone] devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.[60]

Recall also that with its purchase price, Iberdrola is buying two things: ownership of stock (which is what ordinary stock purchasers buy), and control of the government privilege. The portion of the purchase price equal to the market price of the stock pays for that stock. So that amount of course must go to the shareholders, because payment for stock goes to the owner of the stock. The control premium, in contrast, pays in part for control of the franchise. Because that franchise is a conditional privilege granted by government to the utility, not an asset owned by the utility's shareholders, the portion of the purchase price associated with the franchise must flow to the drivers of that value. The drivers are the shareholders and the customers, in proportion to their contribution. I address this concept of contribution below.

[60] 94 U.S. 113, 126 (1876).

Q. Aren't acquisition premia typically paid in acquisitions of companies in competitive markets?

A. Yes, but that fact supports my reasoning. In a competitive market as in a utility monopoly market, the acquirer pays a control premium to get control of the target's market position. But in an effectively competitive market, the target company has earned its market position through merit—by taking investment risks and displaying managerial skill. In the regulated monopoly context, the utility gets its market position not from merit but from the state government's decision to grant franchise control of a captive customer base. When Iberdrola is buying 100% of Avangrid's Networks segment, that is what it is buying 100% of: market positions granted and protected by government. The value of that control comes from the utilities' customers, not from the shareholders.

Q. Didn't the shareholders provide the investment and hire the executive team that created the utility's value that Iberdrola is paying a premium to control?

A. One must take care with the term "value." Looking only at the market value before the acquisition, including any excess of market price over book value, one could argue that this value is attributable to shareholders' actions. This value has two components. An excess of market price over book value reflects the market's expectation that future earnings will exceed the Commission-authorized earnings. That value ordinarily belongs to shareholders, because they risked their dollars hoping to get earnings exceeding the those associated with book value.

But the second component, the control premium—the excess of the acquirer's purchase price over market price—is different, for the reasons I have already discussed. In the context of utilities protected by the state from competition, the control premium is not necessarily attributable to target shareholder risk-taking or target management skill.

Customers already compensate shareholders for their risk, through the return on equity element in the utility's revenue requirement. And customers already compensate the shareholders for management effectiveness by paying rates that reflect management costs. Good utility performance is the quid pro quo for the regulatory commitment to set rates based on reasonable operating costs, prudent investment, used-and-useful assets, and a fair rate of return on equity investment. There is no logical basis for extra compensation—especially for shareholders alone—in the form of a control premium.

Q. Is there any case law addressing your position?

A. To a partial extent. I have taken the position described here in several merger or acquisition proposals before state commissions. As far as I know, the only time that my arguments were addressed occurred when Maryland's courts reviewed the Maryland Public Service Commission's order approving Exelon's acquisition of the holding company Pepco Holdings, Inc. (PHI—the holding company for Potomac Electric Power, Atlantic City Electric, and Delmarva Power & Light).[61] The Commission's Order did not directly address my arguments. The Maryland Office of People's Counsel petitioned for judicial review.

The Maryland Court of Appeals (the state's highest court, now called the Maryland Supreme Court) affirmed the Commission. It is not clear to me that the Court fully grasped the issue—which the Commission had not addressed. The Court held that the Maryland Commission was not "required to regard [the] acquisition premium . . . as a harm to consumers or as inconsistent with the public interest." (The question was not whether the premium caused harm; the question was whether denying the customers any

[61] *In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, Order No. 86990 (May 15, 2015).

portion of the premium was unlawful.) As I explained in my book on electric utility mergers, the Court applied to the Maryland Commission's decision a deferential standard of review, holding as follows:

- Because the statute made no explicit mention of the control premium, the Commission had discretion over whether and how to address it.
- In not finding the premium harmful, the Commission had not deviated from its prior treatment of mergers—treatment which included both comparing the premium to that paid in prior mergers and prohibiting rate recovery.
- Given that the Commission had no statutory obligation to consider the issue, its decision to disregard concerns about the premium was not an abuse of discretion. It was "difficult to see how consumers are necessarily worse off as a result of the payment of a premium, or would necessarily be better off if an acquiring company paid a smaller premium."
- The gain-on-sale precedent did not apply, because unlike utility property, the control premium had not been placed in rate base and therefore was not a cost borne by ratepayers.

The Court also did not address my constitutional arguments. And its opinion cautioned that nothing in its reasoning "suggest[s] that an acquisition premium can never be considered by the Commission, either as a potential harm or as contrary to the public interest." The Commission could find, for example, that the premium could harm consumers if it was so large as to cause the layoff of essential employees, or if it was based on "unrealistic expectations about future profits that risk consumer harm."[62]

As this summary shows, the Maryland Supreme Court did not address the question presented here: the transfer of 100% of the control premium to the target's shareholders and none to the customers.

[62] *Md. Office of People's Counsel v. Md. Pub. Serv. Comm'n*, 192 A.3d 744, 754, 758 (Md. 2018). The text accompanying this footnote comes from my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate* 131-32 (Edward Elgar Publishing 2020).

F. Because the customers do not receive their appropriate share of the control premium, the transaction does not "serve," and is not "consistent with," the ratepayers' interests

Q. What steps are necessary to ensure that this transaction, if approved, results in customers receiving their appropriate share of the control premium?

A. Iberdrola's decision to pay the full premium to Avangrid's minority shareholders and none to the utility customers, including the Maine utilities' customers, produces an asymmetry that makes this transaction detrimental. To correct the problem, Iberdrola would need to explain what it is about owning 100% of Renewables and Networks that makes it rational to pay $35.75 per share. That explanation needs to specify the control-related earnings potential that Iberdrola attributes separately to Renewables and Networks. From that information, the Commission can allocate the premium between those two segments, then determine the Maine utilities' share of the Networks segment. That ultimate fraction of a fraction, multiplied by the total premium (somewhere between $260 million and $335 million) is the amount that the Petitioners are diverting from utility customers.

Iberdrola has not specified how it will produce the new earnings for which it is paying $2.5 billion purchase price, including the control premium. Nor has Iberdrola identified how the new earnings, if they occur, will be attributable to Avangrid's Renewables segment as compared to its Networks segment. To fill this gap, we asked Petitioners for all internal documents that described Iberdrola's reasons for paying the total $2.5 billion purchase price. Petitioners have declined to provide any document. The absence of this information leaves the Commission unable to decide a question essential to determining detriment; specifically, the portion of the control premium that the transacting parties have diverted from the Maine utilities' customers. The

Commission cannot approve a transaction that, through no fault of its own, it cannot fully understand.

Parts II and III of this testimony have explained that Iberdrola's elimination of Avantgrid's minority shareholders fails the statutory tests. That failure exists even without considering Iberdrola's denying Maine's utility customers their share of the control premium. If the Commission chooses to approve the transaction, it still needs to determine what share of the premium is attributable to the utility customers. The Commission then needs to condition the transaction not only on eliminating the detriments that I have described (an elimination that, I have explained, is not practically possible), but also on Iberdrola's paying the Maine utilities' customers their appropriate share of the premium. If this requirement means that Iberdrola must lower the purchase price, and if then the minority shareholders choose not to sell, that result is the correct result because it flows from proper economics and proper policy. Any suggestion that the Commission somehow would have caused the transaction to "fail" would be incorrect.

Conclusion

Q. Do you have a comment on the sufficiency of the Petitioners' submissions?

A. Yes. The Application's thinness, the witnesses' reliance on unquantified aspirations, and the Petitioners' insistence on providing no internal documents that explain the intentions behind this transaction, make it impossible for the Commission to find that the transaction complies with the statute's mandates. Those features are also impossible to reconcile with the $2.5 billion cost, the unimpeded control that Iberdrola is buying, and the loss of SEC and financial community scrutiny.

This mismatch between transaction magnitude and evidentiary support is, in my experience, unprecedented. In the many state commission proceedings in which I participated as an advisor or a witness, I have never seen such applicant casualness. In my three years as an administrative law judge at the Federal Energy Regulatory Commission, I had responsibility for around two dozen cases—three litigated cases for which I acted as the presiding judge, and the rest settlement cases for which I acted as a mediator. In none of these cases did the petitioning utilities rely on such generic, nonfactual, hope-substituting-for-commitment presentations. The professionalism of counsel and witnesses, and the respect for FERC and its professional staff, were too high for any petitioners' counsel and witnesses to speak so nonrigorously, so nonfactually. An application so unhelpful, so self-interested, so disrespectful toward the principles of regulation and toward the government body charged with applying those principles, would have been rejected by the Commission's gateway staff summarily.

That Petitioners view such a submission as acceptable—worse, persuasive—is itself a transaction detriment. It means that after this transaction, the Commission risks

receiving more of the same—lack of rigor, lack of professional respect, and expectation of easy approval of transactions that raise serious issues of ratepayer detriment.

Q. Your testimony discusses statutory language and case law. Do those discussions make your testimony legal testimony as distinct from expert testimony?

A. No. In regulatory adjudication, a witness must testify within the boundaries of applicable statutes, as the case law has interpreted those statutes. So the witness must set out the necessary legal language, then demonstrate both familiarity and compliance with it. Witnesses addressing operating expenses routinely discuss the statutory just-and-reasonable requirement, along its case-law applications under the standards of prudence and used-and-usefulness. Cost-of-equity witnesses routinely discuss the Supreme Court's *Bluefield* and *Hope*[63] decisions to show their adherence to the Constitution's requirement of just compensation. I have shown here the same respect for statutory and constitutional boundaries.

Every decision in utility regulation is a combination of law and policy. All policy derives from law. To discuss policy without discussing law is to substitute mere policy preference for what a witness should do: Recommend to the Commissioners what actions they should take—or in this situation have no choice but to take—under the legal authority that they have.

Q. Should the Commission defer to a settlement of this matter?

A. I recommend against the Commission's deferring to a settlement in this proceeding. In prior proceedings the Commission has found settlements appropriate if they satisfied three criteria:

[63] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923); *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944).

> The parties joining the stipulation represent a sufficiently broad spectrum of interests that the Commission can be sure that there is no appearance or reality of disenfranchisement[.]
>
> [T]he process that led to the stipulation was fair to all parties.
>
> [T]he stipulated result is reasonable and is not contrary to legislative mandates.[64]

Not having participated in prior Maine proceedings, I can't comment on whether the criteria were met there. But in this proceeding, none of the three will be met.

Breadth of interests represented: No one claims to represent the future decades of ratepayers affected by this transaction. This proceeding is not a routine rate case, one whose consequences will last for only a few years. This proceeding is about a corporate structure that will last into an indefinite future. Living in that indefinite future will be the many customers who depend on distribution service. The rates and quality of that distribution service will be at risk because of future decades of reorganizations that the holding companies Avangrid and Iberdrola will undertake. Those future reorganizations will include acquisitions of other companies—acquisitions that this Commission has no habit of reviewing. They will undertake those reorganizations guided only by their self-interest, because as holding companies they have no statutory obligation to honor the public interest.

Fairness of the process: In this matter, the process leading to a settlement will not have been "fair," for multiple reasons. On resources, the Petitioners had all the time

[64] Central Maine Power Co., *Request for Approval of Reorganization Acquisition of Energy East Corp. and Iberdrola, S.A.*, 2008 Me. PUC LEXIS 45 at *6 (citing Central Maine Power Company, Proposed Increase in Rates, Docket No.92-345(II) Detailed Opinion and Subsidiary Findings (Me. P.U.C. Jan. 10, 1995), and Maine Public Service Company, Proposed Increase in Rates (Rate Design), Docket No.95-052, Order (Me. P.U.C. June 26, 1996).

and personnel they deemed necessary. OPA has only the resources currently allocated—an allocation which does not clearly anticipate transactions as complex as this one. Meanwhile, Our Power has only volunteer resources. Petitioners opposed intervenor compensation for Our Power (an act that now precludes Petitioners from asserting fairness—which means that the Commission cannot make an essential finding). And the Commission made a final decision on the amount of intervenor compensation without seeing the complexity of the issues which the intervenor testimony would explain, and because a change in the procedural schedule—a change announced the day before intervenor testimony was due—made uncertain what amount of compensation, if any, would be awarded.

Time is also a resource. The Petitioners had all the time they needed because they didn't need to present their application until they were ready. In contrast, intervenors initially faced a testimony schedule determined by a statutory deadline created without knowledge about this transaction's complexity. While the Commission's schedule suspension in this proceeding eased that problem, the situation is repeatable.

Also affecting fairness is the asymmetry of information. Petitioners control all the information about the transaction, but refused to provide responses to nearly all of Our Power's questions.

Legislative mandate: In Part II above, I explained that on its face, based on the Petitioners' own facts, this transaction fails multiple statutory tests. No "stipulated result" can fix a facial defect. Settling an unlawful transaction is a legal oxymoron.

Q. Besides recommending against approving a settlement in this proceeding, do you have a more general recommendation about the Commission's policy on settlements?

A. Yes. The Commission appears to have a practice of accepting settlements without having held an adjudicative hearing. That practice appears to have led parties to begin settlement discussions after the applicant has filed its testimony but before the intervenors have filed their testimony—which is what is occurring in this proceeding. The Commission thus is hearing from only one side—a suboptimal foundation for an objective decision.

I recommend that the Commission reconsider its practice. Not having an adjudicative hearing means that the Commissioners do not hear from the witnesses. The witnesses are the ones who know the facts and know the principles of utility regulation. They are the ones who bring to the Commissioners decades of professional experience and wisdom—all disciplined by taking an oath and facing the pressures of cross-examination. By inviting parties to avoid the rigor of adjudication, the Commission deprives itself of its many benefits. Worse, the Commission risks transferring its statutory role of making policy for the public—a role that legislators, courts, and the public expect the Commission to play—to a group of advocates who, despite their own professionalism, do not have the Commissioners' legal responsibilities. Repeated too many times, the practice of transferring the Commission's responsibilities to advocates can create an impression, among the practicing professionals and the public, that the Commissioners are uninvolved, or uninterested, in the performance of an industry that affects so many lives and businesses. Such an impression, if it holds, can lead to a loss of respect that the Commission deserves and needs.

Q. Does this conclude your Direct Testimony?

A. Yes.

Exhibit A: Scott Hempling's CV

Scott Hempling, Attorney at Law

Scott Hempling has assisted clients from all sectors of the electric industry, including regulators, utilities, consumer organizations, independent competitors, environmental organizations, and labor unions. As an expert witness, he has testified numerous times before state commissions ; also before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Belgium, Canada, Central America, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru, and Vanuatu.

Hempling's legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Amer. Bar Assn. 2d ed. 2021), has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." It is used in law school and public policy courses at Stanford, University of California–Berkeley, Vermont Law School, Georgetown, George Washington and Washburn Law, among other graduate schools. His book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020) was described by an *Energy Law Journal* reviewer as "powerful and persuasive . . . a terrific book." His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has circulated throughout Latin America through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía (an association of telecommunications regulators from Europe and Latin America) and the World Energy Forum.

His articles have appeared in the *Energy Law Journal*, the *Electricity Journal*, *Energy Regulation Quarterly, Public Utilities Fortnightly*, *ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy and state–federal jurisdictional issues. From 2006 to 2011, he was Executive Director of the National Regulatory Research Institute. From 2021 to 2024, he was an Administrative Law Judge at the U.S. Federal Energy Regulatory Commission.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches a Fall course on public utility law and a Spring course on justice in the regulation of infrastructural industries. At Georgetown Law he has also taught regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. He is a member of the District of Columbia and Maryland Bars. A cellist, Hempling performs at the Jewish High Holy Day services held at the Riderwood Retirement Community.

Hempling' s contact info: shempling@scotthemplinglaw.com, 301-754-3869.

Education

B.A. *cum laude*, Yale University (1978). Two majors: Economics and Political Science, Music. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

J.D. *magna cum laude*, Georgetown University Law Center (1984). Recipient of *American Jurisprudence* award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

Professional Experience

President, Scott Hempling, Attorney at Law LLC (2024–present).

Administrative Law Judge, Federal Energy Regulatory Commission (2021–2024).

President, Scott Hempling, Attorney at Law LLC (2011–2021).

Adjunct Professor, Georgetown University Law Center (2011–present).

Executive Director, National Regulatory Research Institute (2006–2011).

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006).

Attorney, Environmental Action Foundation (1987–1990).

Associate, Spiegel and McDiarmid (1984–1987).

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, Enitan Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies and Executive Departments

South Carolina Department of Administration, South Carolina Senate, Vermont Legislature.

Municipalities and Counties

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; Texas Cities; City of Winter Park, Florida.

Public Interest Organizations

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, D.C. Consumer Utility Board, Energy Foundation, Environmental Action Foundation, Environmental Defense Fund, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, Wisconsin Citizens Utility Board.

Unions

Laborers' International Union of North America.

Regulatory Commissions and Consumer Agencies

Arkansas Attorney General, Arkansas Public Service Commission, Arizona Corporation Commission, Australia Energy Regulator, British Columbia Office of the Auditor General, British Columbia Utility Commission, California Public Advocates Office, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawai`i Public Utilities Commission, Hawai'i Office of Planning, Indiana Utility Regulatory Commission, Indiana Office of Utility Consumer Counsel, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Commissions Regulators de Anergia, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, New Mexico Attorney General, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, Rhode Island Public Utilities Commission, Rhode Island Division of Public Utilities, South Carolina Department of Administration, South Carolina Department of Consumer Affairs, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

Testimony Before Legislative Bodies

United States Senate

Committee on Energy and Natural Resources, May 2008 (addressing the adequacy of state and federal regulation of electric utility holding company structures).

Committee on Energy and Natural Resources, Feb. 2002 (analyzing bill to amend the Public Utility Holding Company Act) (PUHCA).

Committee on Energy and Natural Resources, May 1993 (analyzing bill to transfer PUHCA functions from SEC to FERC).

Committee on Banking and Urban Affairs, Sept. 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, March 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, Nov. 1989 (analyzing proposed amendment to PUHCA).

United States House of Representatives

Subcommittees on Energy and Power and Telecommunications and Finance, Commerce Committee, Oct. 1995 (regulation of public utility holding companies).

Subcommittee on Energy and Power, Energy and Commerce Committee, July 1994 (analyzing future of the electric industry).

Subcommittee on Energy and Power, Energy and Commerce Committee, May 1991 (analyzing proposed amendment to PUHCA).

Subcommittee on Environment, Energy and Natural Resources, Government Operations Committee, Oct. 1990 (assessing electric utility policies of FERC).

Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing "independent power producers" and PUHCA).

State Legislatures

Judiciary Committee, South Carolina Senate (2000) (discussing options for introducing retail electricity competition).

Commerce Committee, Arkansas General Assembly (1999) (discussing legislation to introduce retail electricity competition).

Health Access Oversight Committee, Vermont General Assembly (1999) (discussing options for state regulation of prescription drug pricing).

Electricity Restructuring Task Force, Virginia General Assembly (1999) (discussing options for introducing retail electricity competition).

Study Committee, North Carolina Legislature (1999) (discussing legislation to introduce retail electricity competition).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997) (discussing options for introducing retail electricity competition).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

Testimony before Commissions, Courts and Arbitration Panels

New Mexico Public Regulatory Commission: Spanish holding company's acquisition of state-franchised electric company (2021).

South Carolina Public Service Commission: Principles relating to prudence and to executives' incentive competition (2020).

District of Columbia Public Service Commission: Sufficiency of utility's oversight of its contractors' treatment of workers (2020).

Wisconsin Public Service Commission: Principles relating to prudence and used-and-usefulness in the context of possible coal plant closures (2019).

Oklahoma Corporation Commission: Principles relating to prudence and used-and-usefulness in the context of a scrubber investment (2019).

Louisiana Public Service Commission: Utility holding company's acquisition of merchant generation company (2018).

District of Columbia Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Maryland Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Kansas Corporation Commission: Utility holding company acquisition of utility holding company (2016-2017).

U.S. District Court for Middle District of Florida: Effect of disaffiliation, mandated by Public Utility Holding Company Act, on corporation's liability under the Comprehensive Environmental Response, Compensation, and Liability Act (2016).

New Jersey Board of Public Utilities: Transfer of utility transmission assets to holding company affiliate (2015-2016) (application withdrawn).

Hawaii Public Utilities Commission: Holding company acquisition of utility holding company (2015-2016).

Louisiana Public Service Commission: Holding company acquisition of utility holding company (2015).

Connecticut Public Utilities Regulatory Authority: Holding company acquisition of utility holding company (2015).

District of Columbia Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Mississippi Public Service Commission: Utility holding company's divestiture of its utility subsidiaries' transmission assets to an independent transmission company (2013).

U.S. District Court for Minnesota: Effects of Minnesota statute limiting reliance on fossil fuels (2013).

Tobacco Arbitration Panel: Principles for regulating cigarette manufacturers (on behalf of State of Maryland) (2012).

Illinois Commerce Commission: Performance-based ratemaking (2012).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2011).

California Public Utilities Commission: Performance-based ratemaking (2011).

Superior Court of Justice, Ontario, Canada: Renewable energy contractual relations under the Public Utility Regulatory Policies Act (2007).

Florida arbitration panel: Financial responsibility for stranded investment arising from municipalization (2003).

Minnesota Public Utilities Commission: Transmission expansion for renewable power producers (2002).

U.S. District Court for Wisconsin: State corporate structure regulation in relation to the Commerce Clause of the U.S. Constitution (2002).

New Jersey Board of Public Utilities: Conditions for provider of last resort service (2001).

Indiana Utility Regulatory Commission: Risks of overcharging ratepayers using "fair value" rate base (2001).

North Carolina Utilities Commission: Effect of merger on state regulatory powers (2000).

Wisconsin Public Service Commission: Effect of merger on state regulatory powers (2000).

New Jersey Board of Public Utilities: Affiliate relations in telecommunications sector (1999).

Illinois Commerce Commission: Affiliate relations and mixing of utility and non-utility businesses (1998).

Texas Public Utilities Commission: "Incentive" ratemaking, introduction of competition (1996).

Rhode Island Attorney General: Market structure changes in the electric industry (1996).

Vermont Public Service Board: Cost allocation and interaffiliate pricing between service company and utility affiliates (1990).

Publications

Books

Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication (Edward Elgar Publishing 2020).

Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction (2d edition American Bar Association 2021).

Preside or Lead? The Attributes and Actions of Effective Regulators (2d edition 2013).

Articles, Papers and Book Chapters

"Electricity Formula Rate Plans and Multi-year Rate Plans: Can They Serve the Public Interest, and How?" in Hunter, Herrera Anchustegui, Crossley, and Álvarez, *Routledge Handbook of Energy Law* (2020).

"Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation," *Energy Law Journal* (Fall 2018), available at https://www.eba-net.org/assets/1/6/15-233-312-Hempling_[FINAL]1.pdf.

"Maryland's Supreme Court Loss: A Win for Consumers, Competition and States," *ElectricityPolicy.com* (June 2016).

"Certifying Regulatory Professionals: Why Not?", *ElectricityPolicy.com* (June 2015).

"Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers," *Energy Law Journal* (Spring 2015), available at https://www.eba-net.org/assets/1/6/14-1-Hempling-Final-4.27.pdf

"Pricing in Organized Wholesale Electricity Markets: Can We Make the Bright Line any Brighter?", *Infrastructure* (American Bar Association, Spring 2015).

"From Streetcars to Solar Panels: Stranded Investment Law and Policy in the United States," *Energy Regulation Quarterly* (Vol. 3, Issue 3 2015).

"Regulatory Capture: Sources and Solutions," *Emory Corporate Governance and Accountability Review* Vol. 1, Issue 1 (August 2014), available at http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html.

"When Technology Gives Customers Choices, What Happens to Traditional Monopolies?" *Trends* (American Bar Association, Section of Environment, Energy and Resources July/August 2014).

"Democratizing Demand and Diversifying Supply: Legal and Economic Principles for the Microgrid Era," *ElectricityPolicy.com* (March 2014).

"Non-Transmission Alternatives: FERC's 'Comparable Consideration' Needs Correction," *ElectricityPolicy.com* (June 2013).

"Broadband's Role in Smart Grid's Success," in Noam, Pupillo, and Kranz, *Broadband Networks, Smart Grids and Climate Change* (Springer 2013).

"How Order 1000's Regional Transmission Planning Can Accommodate State Policies and Planning," *ElectricityPolicy.com* (September 2012).

"Renewable Energy: Can States Influence Federal Power Act Prices Without Being Preempted?" *Energy and Natural Resources Market Regulation Committee Newsletter* (American Bar Association, June 2012).

"Can We Make Order 1000's Transmission Providers' Obligations Effective and Enforceable?" *ElectricityPolicy.com* (May 2012).

"Riders, Trackers, Surcharges, Pre-Approvals, and Decoupling: How Do They Affect the Cost of Equity?" *ElectricityPolicy.com* (March 2012).

"Regulatory Support for Renewable Energy and Carbon Reduction: Can We Resolve the Tensions Among Our Overlapping Policies and Roles?" (National Regulatory Research Institute 2011).

"Infrastructure, Market Structure, and Utility Performance: Is the Law of Regulation Ready?" (National Regulatory Research Institute 2011).

"Cost-Effective Demand Response Requires Coordinated State-Federal Actions" (National Regulatory Research Institute 2011).

"Effective Regulation: Do Today's Regulators Have What It Takes?" in Kaiser and Heggie, *Energy Law and Policy* (Carswell 2011).

Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions (lead author, with C. Elefant, K. Cory, and K. Porter), Technical Report NREL//TP-6A2-47408 (January 2010).

Pre-Approval Commitments: When and Under What Conditions Should Regulators Commit Ratepayer Dollars to Utility-Proposed Capital Projects? (National Regulatory Research Institute 2008) (with Scott Strauss).

"Joint Demonstration Projects: Options for Regulatory Treatment," *The Electricity Journal* (June 2008).

"Corporate Structure Events Involving Regulated Utilities: The Need for a Multidisciplinary, Multijurisdictional Approach," *The Electricity Journal* (Aug./Sept. 2006).

"Reassessing Retail Competition: A Chance to Modify the Mix" *The Electricity Journal* (Jan./Feb. 2002).

The Renewables Portfolio Standard: A Practical Guide (National Association of Regulatory Utility Commissioners, Feb. 2001 (with N. Rader).

Promoting Competitive Electricity Markets Through Community Purchasing: The Role of Municipal Aggregation (American Public Power Association, Jan. 2000 (with N. Rader).

"Electric Utility Holding Companies: The New Regulatory Challenges," *Land Economics*, Vol. 71, No. 3 (Aug. 1995).

Is Competition Here? An Evaluation of Defects in the Market for Generation (National Independent Energy Producers 1995) (co-author).

The Regulatory Treatment of Embedded Costs Exceeding Market Prices: Transition to a Competitive Electric Generation Market (1994) (with Ken Rose and Robert Burns).

"Depolarizing the Debate: Can Retail Wheeling Coexist with Integrated Resource Planning?" *The Electricity Journal* (Apr. 1994).

Reducing Ratepayer Risk: State Regulation of Electric Utility Expansion. (American Association of Retired Persons 1993).

"'Incentives' for Purchased Power: Compensation for Risk or Reward for Inefficiency?" *The Electricity Journal* (Sept. 1993).

"Making Competition Work," *The Electricity Journal* (June 1993).

"Confusing 'Competitors' With 'Competition.'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

"Opportunity Cost Pricing." *Wheeling and Transmission Monthly* (Oct. 1989).

"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

Selected FERC Administrative Law Judge Issuances

Basin Electric Power Cooperative, Initial Decision, 187 FERC ¶ 63,021 (2024).

Basin Electric Power Cooperative, "Order Denying Motion and Amending Procedural Schedule," 180 FERC ¶ 63,035 (2024).

Fern Solar LLC, Initial Decision, 183 FERC ¶ 63,004 (2023).

Fern Solar LLC, "Order Denying Motion for Partial Summary Disposition and Motion to Strike," 180 FERC ¶ 63,024 (2022).

Tri-State Generation and Transmission Association, Inc., Initial Decision, 179 FERC ¶ 63,019 (2022).

Speaker and Lecturer

United States: American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association;

American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week;* Electricity Consumers Resource Council; Energy Bureau; *Energy Daily;* Executive Enterprises; Ent; Federal Energy Bar Association; Harvard Electricity Policy Group; Indiana State Bar Association; Endocast; King Abdullah Petroleum Studies and Research Center; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Michigan State University Public Utilities Institute; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New Mexico State University Regulatory Studies Program; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Center; Puerto Rico Institute of Public Policy; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; Universidad del Turnbo (Puerto Rico); United Nations Association at Georgetown Law; U.S. Department of Energy Forum on Electricity Issues; U.S. Department of Energy Solar Energies Technology Office; U.S. Environmental Protection Agency; Western Interstate Energy Board; Wisconsin Public Utilities Institute; Wisconsin Bar—Public Utilities Section; Yale Alumni in Energy; Yale School of Forestry and Environmental Studies.

International: Australian Competition and Consumer Commission; Australian Energy Regulator; Bergen Center for Competition Law & Economics, University of Bergen (Norway); British Columbia Utilities Commission; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); commission regulator de Energeia (Mexico); The Energy and Resources Institute (India); Government & Policy Think Tank, Sharif University Institute of Technology (Iran); Independent Power Producers Association of India; India Institute of Technology at Kanpur; Ludwig-Maximilians-Universitas (Munich, Germany); Management Development Institute (Gurgaon, India); National Association of Water Utility Regulators (Rome, Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigeria Electric Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India); Regulated (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); Utilities Regulatory Authority of Vanuatu; World Regulatory Forum.

Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello): Riderwood Village Retirement Community (2003-present); St. Paul Episcopal Church (Centreville, MD).