

NOLAN L. REICHL

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

P 207.791.1304
F 207.791.1350
nreichl@pierceatwood.com
pierceatwood.com

Admitted in: ME, MA, NY

January 14, 2022

VIA HAND DELIVERY AND EMAIL

Matthew Pollack, Esq.
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101

Re: *Russell Black, et al. v. Bureau of Parks and Lands, et al.*
Docket No. BCD-21-257

Dear Mr. Pollack:

Enclosed for filing in the above-referenced action, please find the original and one copy of Opposition of NECEC Transmission LLC to Appellees/Cross-Appellants' Motion to Dismiss Appeal as Moot. A copy of the same has been forwarded to counsel of record.

Thank you for your attention to this matter.

Sincerely,



Nolan L. Reichl

Enclosure

cc: Via email and U.S. Mail
James T. Kilbreth, Esq.
David M. Kallin, Esq.
Adam R. Cote, Esq.
Jeana M. McCormick, Esq.
Lauren E. Parker, AAG
Scott W. Boak, AAG

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
DOCKET NO. BCD-21-257

RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et
al.

Appellants/Cross-Appellees

**OPPOSITION OF NECEC
TRANSMISSION LLC TO
APPELLEES/CROSS-APPELLANTS'
MOTION TO DISMISS APPEAL AS
MOOT**

Pursuant to Maine Rule of Appellate Procedure 10(c), Appellants/Cross-Appellees Central Maine Power Company (“CMP”) and NECEC Transmission LLC (together “NECEC LLC”) hereby oppose Appellees/Cross-Appellants’ (“Plaintiffs”) motion to dismiss NECEC LLC’s appeal (the “Motion”) as moot.¹

Plaintiffs’ Motion consists of an inappropriate attempt to preempt this Court’s consideration of matters of significant public importance currently pending in *NECEC Transmission LLC v. Bureau of Parks and Lands*, under Law Court docket number BCD-21-416 (the “Referendum Challenge”). The Court accordingly should deny the Motion for the reasons set forth below.

¹ The Motion contains two requests: (a) that the Court dismiss the appeals brought by NECEC LLC and the Bureau of Parks and Lands, and (b) that the Court dismiss Plaintiffs’ own cross-appeal. NECEC LLC opposes the former request, but does not object to the Court dismissing Plaintiffs’ cross-appeal.

First, in a footnote appearing on page 5 of the Motion, Plaintiffs acknowledge that the significant constitutional questions discussed in the Motion “are also being litigated” in the related Referendum Challenge, which concerns the constitutionality of legislation, known as I.B. 1, recently enacted by referendum. Motion at 5 n.4. In fact, those constitutional issues form the core of the Referendum Challenge, which, before the Business Court, gave rise to hundreds of pages of briefing between more than a dozen parties and intervenors, ultimately yielding a 52-page decision from the Business Court on the motion for preliminary injunction presented in that case.² *See NECEC Transmission LLC et al v. Bureau of Parks and Lands et al.*, BCD-CIV-2021-00058, Order Denying Plaintiffs’ Motion for Preliminary Injunction (Me. B.C.D. Dec. 16, 2021). As the Business Court rightly observed, the issues presented in the Referendum Challenge—raised collaterally in the Motion—are “uncertain on many disputed points,” “carr[y] regional and national implications,” and “ought to be determined by the Law Court” on their own independent merits. *Id.* at 2-3 (quoting M.R. Civ. P. 24(c)). Before Plaintiffs filed the Motion, the Business Court accordingly invited the Plaintiffs in the Referendum Challenge to seek a report of the Business

² Plaintiffs take significant liberties where they assert that the vested rights and Contracts Clause theories discussed in the Motion are the “only arguments likely to be raised against the retroactive application of I.B. 1.” Motion at 5. As Plaintiffs well know, the Referendum Challenge also includes multiple claims that the retroactive application of I.B. 1 violates the separation of powers under the Maine Constitution. In short, the Motion seeks not only to preempt consideration of the issues presented in the Referendum Challenge, but to do so by presenting an incomplete picture of that litigation.

Court's decision to this Court, which it would grant "expeditiously," and has since granted. *Id.*

Numerous of the parties in the Referendum Challenge are not parties in the instant case and thus not before the Court on the Motion, including significant public and private institutions such as the Maine State Chamber of Commerce, H.Q. Energy Services (U.S.) Inc., the International Brotherhood of Electrical Workers, the Maine Public Utilities Commission, and the Maine Legislature, among others.

Notwithstanding clear guidance from the Business Court that the issues in the Referendum Challenge would be reported to the Law Court, Plaintiffs nevertheless rushed forward with the Motion in a transparent effort to obtain a preemptive and premature decision on those serious constitutional issues on truncated motion practice, without oral argument, without reference to the factual record created in the Referendum Challenge (notwithstanding that the Motion discusses factual issues presented there), without the benefit to the Court of the regular briefing process provided by the Maine Rules of Appellate Procedure, and, most remarkably, without the opportunity of numerous of the parties in the Referendum Challenge to present their views. All of the foregoing should cause the Court to see the Motion for what it is: an inappropriate effort not only to work an injustice on the parties in the Referendum Challenge, the parties in this litigation, the development of Maine law, and the people of Maine, but also to deprive the Court of important arguments and

information, including a proper factual record, presented in the Referendum Challenge. The Court should deny the Motion for these reasons alone.

Second, in subsequent briefing submitted to this Court, Plaintiffs argue the issues in the Referendum Challenge “should in no way ... become intermingled with this case.” *See* Appellees/Cross-Appellants’ Opposition to HQUS’ Motion for Leave to File Response at 4 (dated January 4, 2022). Not only are the issues in this litigation and the Referendum Challenge linked factually and legally—e.g., NECEC LLC argues in the Referendum Challenge that I.B. 1 violates the Contracts Clause by impairing the very BPL lease at issue here—but Plaintiffs themselves bind the two cases together through the Motion. The premise of the Motion is that I.B. 1 comports with the United States and Maine Constitutions (the precise issue contested in the Referendum Challenge) and, thus, that it moots these proceedings when applied to the BPL lease at issue. But the premise of NECEC LLC’s claims in the Referendum Challenge is that I.B. 1 *violates* the United States and Maine Constitutions and, therefore, can have no force or effect with regard to the NECEC transmission project generally and the BPL lease in particular. In short, if the plaintiffs in the Referendum Challenge prevail, then the Motion necessarily must fail. With the Court’s recent approval of expedited briefing and consideration of the Referendum Challenge, the Court’s intention to hold oral argument on the Referendum Challenge on either May 9th or 10th, and its previous decision to refrain from deciding the Motion until it considers the full merits of this appeal, the two cases will be ripe for decision on a

similar timeline.³ Accordingly, the Court should decide the Motion and the substantive issues in this litigation contemporaneous with its decision in the Referendum Challenge. Plaintiffs would suffer no prejudice from such an approach whatsoever, as NECEC LLC already has agreed not to engage in construction activities on the leased land at issue until the Court decides this case.⁴ *See* Order on Appellees/Cross-Appellants' Motion to Lift Automatic Stay Pending Appeal (dated September 15, 2021).

Third, the instant appeal is not moot even if I.B. 1 survives challenge. Alternatively, the exceptions to the mootness doctrine apply to permit consideration of the instant appeal notwithstanding mootness. In the event the Court determines otherwise, however, the appropriate remedy would be not only to dismiss this appeal, but to vacate the judgment of the Business Court. In this regard, NECEC LLC joins in and adopts the arguments presented in BPL's opposition to the Motion. Additionally, despite Plaintiffs' claim that I.B. 1 "conclusively answers" the issues in this case, *see* Motion at 18, NECEC LLC must underscore that the instant appeal includes questions of first impression concerning the interpretation of the Maine

³ NECEC LLC respectfully suggests it would be the appropriate for the Court to schedule oral argument in this case on the same day as the oral argument in the Referendum Challenge or otherwise near in time to the day of that argument.

⁴ In fact, construction of the entire project cannot proceed as a result of a suspension order issued by the Maine Department of Environmental Protection following the enactment of I.B. 1. Accordingly, construction of the project, including on the leased land at issue here, will remain stayed at least until such time as the Court addresses the merits of the Referendum Challenge.

Constitution, including the definition of the term “uses substantially altered” set forth in Article IX, section 23. It goes without saying that this Court has the power and the duty to interpret the Maine Constitution and that no legislative enactment, including I.B. 1, can deprive the Court of the authority to do so as the Motion impliedly suggests.

Fourth, and finally, to the extent the Court intends to address the constitutional claims presented in the Referendum Challenge in the course of this litigation, NECEC LLC adopts the arguments against the constitutionality of I.B. 1 to be presented in its forthcoming briefing in the Referendum Challenge.

DATED: January 14, 2022



Nolan L. Reichl, Bar No. 4874
Jared S. des Rosiers, Bar No. 7548
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100
nreichl@pierceatwood.com
jdesrosiers@pierceatwood.com

*Attorneys for Appellants/ Cross-Appellees
Central Maine Power Company and
NECEC Transmission LLC*

CERTIFICATE OF SERVICE

I, Nolan L. Reichl, Esq., hereby certify that a copy of this Opposition of NECEC Transmission LLC to Appellees'/Cross-Appellants Motion to Dismiss Appeal as Moot was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on January 14, 2022:

James T. Kilbreth, Esq.	jkilbreth@dwmlaw.com
David M. Kallin, Esq.	dkallin@dwmlaw.com
Adam R. Cote, Esq.	acote@dwmlaw.com
Jeana M. McCormick, Esq.	jmccormick@dwmlaw.com

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

Lauren E. Parker, AAG	lauren.parker@maine.gov
Scott W. Boak, AAG	scott.boak@maine.gov

Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

DATED: January 14, 2022



Nolan L. Reichl, Bar No. 4874
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100
nreichl@pierceatwood.com

*Attorney for Appellants/ Cross-Appellees Central
Maine Power Company and
NECEC Transmission LLC*