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January 27, 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 the Motion of Appellant/Cross-Appellee NECEC Transmission LLC to Defer Oral Argument Date. A copy of the same has been forwarded to counsel of record.

Thank you for your attention to this matter.

Sincerely,



Nolan L. Reichl

Enclosures

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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RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

**MOTION OF APPELLANT/CROSS-
APPELLEE NECEC
TRANSMISSION LLC TO DEFER
ORAL ARGUMENT DATE**

Pursuant to Maine Rule of Appellate Procedure 10, Appellants/Cross-Appellees Central Maine Power Company and NECEC Transmission LLC (together “NECEC LLC”) hereby move the Court to defer oral argument in this matter until on or close to the date of the argument in the related litigation *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands*, BCD-21-416 (the “Referendum Challenge”), currently proceeding before the Court on an expedited basis.

In support of this motion, NECEC LLC shows as follows:

1. After NECEC LLC and Appellants/Cross-Appellees Bureau of Parks and Lands and Andy Cutko (together “BPL”) commenced this appeal and filed their opening briefs, a citizens initiative entitled “An Act to Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the

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Construction of Certain Transmission Lines in the Upper Kennebec Region,” L.D. 1295 (“I.B. 1”), took effect. Section 1 of I.B. 1 contains provisions that purport to retroactively amend BPL’s statutory authority under 12 M.R.S. § 1852(4) to grant the leases at issue in the instant appeal.

2. NECEC LLC and its corporate parent Avangrid Networks, Inc. have challenged the constitutionality of I.B. 1 as applied to them retroactively in the Business and Consumer Court through the Referendum Challenge, seeking a preliminary injunction barring enforcement of I.B. 1. Numerous parties supporting NECEC LLC and Avangrid Networks have intervened in the Referendum Challenge and presented their own arguments challenging the constitutionality of I.B. 1. As the Business and Consumer Court previously observed, the issues presented by the preliminary injunction motion filed in the Referendum challenge are “uncertain on many disputed points,” “carry[y] regional and national implications,” and “ought to be determined by the Law Court.” *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). Accordingly, the Business and Consumer Court invited the parties in the Referendum Challenge to seek a report of the matter to this Court pursuant to M.R. App. P. 24(c), a request for which report the Business and Consumer Court subsequently granted.

3. The Court since has approved of an expedited briefing schedule in the Referendum Challenge and has stated its intention to hold oral argument in that case on May 9th or 10th.

4. During the course of briefing in this matter, Appellees/Cross-Appellants Russell Black et al. (“Plaintiffs”) filed a motion to dismiss NECEC LLC and BPL’s respective appeals, as well as Plaintiffs’ own cross appeal, as moot. Plaintiffs’ motion contends that I.B. 1 applies to the leases at issue in the instant appeal and that there are no barriers to I.B. 1’s enforceability. On the latter point, Plaintiffs’ motion sets forth a lengthy argument addressing some, but not all, of the grounds upon which NECEC LLC and supporting intervenors have challenged the constitutionality of I.B. 1, and asks the Court to rule that such challenges must fail. As a result of the foregoing, according to Plaintiffs, I.B. 1 must be applied to the leases at issue in this case in such a way as to void them and, in turn, moot this appeal.

5. As BPL and NECEC LLC argued in their respective oppositions to Plaintiffs’ motion to dismiss, dated January 12th and 14th respectively, Plaintiffs’ motion to dismiss is an inappropriate attempted end run around the Referendum Challenge, as it asks the Court to preemptively rule on the significant issues in that litigation notwithstanding the absence of the relevant factual record present in the Referendum Challenge and the similar absence from this litigation of many of the parties who have appeared in the Referendum Challenge. Ultimately, Plaintiffs premise their motion to dismiss on the constitutionality of I.B. 1, which is the very

question pending before the Court in the Referendum Challenge. As BPL succinctly and rightly put it in their opposition to Plaintiffs' motion: "It would be contrary to the interests of justice if the Court were to dismiss this appeal as moot now based on I.B. 1 and then, in a few months, rule that I.B. 1 is unconstitutional." Director Cutko's and The Bureau of Parks and Lands' Opposition to Senator Black's Motion to Dismiss All Appeals as Moot at 3 (January 12, 2022). NECEC LLC need not restate here all of the arguments against Plaintiffs' motion to dismiss, and refers the Court to NECEC LLC's and BPL's respective briefs on that motion.

6. The Court has ruled that it will not decide the merits of Plaintiffs' motion to dismiss until it considers the full merits of this appeal. *See* Order Enlarging Time to Respond to Motion to Dismiss (December 29, 2021).

7. Through the Clerk's Office, the Court contacted the parties to this appeal on January 25, 2022, requesting the parties state their availability for oral argument in this matter on March 8th, 9th, or 10th, approximately two months before the Court's proposed dates for oral argument in the Referendum Challenge and over one month before the briefing in the Referendum Challenge is even completed.

8. For the reasons set forth above and in NECEC LLC's and BPL's prior submissions, the instant appeal and the Referendum Challenge are inextricably linked as a result of Plaintiffs' pending motion to dismiss. This Court and the parties in each litigation would be ill served by consideration of the constitutional issues raised in Plaintiffs' motion to dismiss without the relevant record created in the Referendum

Challenge. Moreover, the parties to the Referendum Challenge would be deprived of the opportunity to fully brief and present argument on the constitutional issues Plaintiffs now seek to address. Accordingly, while NECEC LLC does not request the Court consolidate the two matters and the Court should not do so, NECEC LLC respectfully requests the Court defer oral argument in this appeal until on or close to the date of the argument in the Referendum Challenge, so the Court can consider this case alongside a full and fair presentation of the issues relating to the constitutionality of I.B. 1 in the Referendum Challenge.

9. Plaintiffs' previous arguments that deferring oral argument in this case will prejudice them are unavailing.

10. For instance, Plaintiffs' argument that the "question of the Bureau's leasing authority is distinct from NECEC Transmission's overall challenge to the constitutionality of I.B. 1" defies belief: Plaintiffs' own motion to dismiss relies solely and entirely on I.B. 1's purported impact on BPL's leasing authority as the basis for Plaintiffs' requested relief. *See* Request for Leave to File a Response to Appellant's Motion to Defer or Consolidate at 2 (January 18, 2022). There can be no dispute that, if the Court enjoins the effectiveness of I.B. 1, Plaintiffs' motion to dismiss must be denied. Nor can Plaintiffs argue that delaying any decision in this case would imperil the rights they claim with respect to the leased land at issue, as NECEC LLC already has agreed to refrain from engaging in any construction activities on such land while this appeal remains pending, and the Court has ordered NECEC LLC to so refrain.

11. Plaintiffs point to the possibility the Court may decline to accept the Superior Court's report in the Referendum Challenge as an additional basis for the Court refraining from deferring argument in this matter. *See id.* at 3. What the Court may do in the Referendum Challenge is speculative at best and, as with all of the substantive arguments in that case, should be addressed in that litigation only. Plaintiffs' arguments are otherwise a red herring, as NECEC LLC asks here only that the Court defer argument in this matter until on or close to the date of the argument in the Referendum Challenge, so that the two cases can be considered and decided on the same timeline. Doing so will not prejudice any party's arguments presented in the Referendum Challenge or affect the Court's consideration of any issues in that litigation.

12. The Court should see the nature of Plaintiffs' position clearly: Plaintiffs hope for a favorable decision in this litigation in advance of the Court's consideration of the Referendum Challenge so that Plaintiffs may use the effect of such a ruling to their advantage in the Referendum Challenge. Plaintiffs thus seek to create a no-win situation for NECEC LLC whereby NECEC LLC first must lose this case, including on mootness grounds because of the enactment of I.B. 1, and then must lose its challenge to I.B. 1 because of the Court's ruling in this case. The unfairness of such a dynamic is evident.

13. NECEC LLC understands BPL takes no position on this motion.

WHEREFORE, the Court should defer argument in this appeal until on or close to the date of the argument in *NECEC Transmission LLC et al. v. Bureau of Parks and Lands et al.*, BCD-CIV-2021-00058, such that both appeals may be considered and decided on the same timeline.

DATED: January 27, 2022



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CERTIFICATE OF SERVICE

I, Nolan L. Reichl, Esq., hereby certify that a copy of this Motion of Appellant/Cross-Appellee NECEC Transmission LLC to Defer Oral Argument Date was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on January 27, 2022:

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DATED: January 27, 2022



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