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

Pursuant to Rule 10(c) of the Maine Rules of Appellate Procedure, Plaintiffs-Appellees/Cross-Appellants Russell Black, *et al*. ("Plaintiffs") hereby oppose Appellant/Cross-Appellee's NECEC Transmission LLC's Motion to Defer Oral Argument. NECEC Transmission LLC ("NECEC") seeks to delay argument in this case, currently scheduled for March, 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-21-416" (the "Avangrid Case"), currently scheduled for May. NECEC's motion is really a stay request by another name. But that request fails to meet any of the applicable prerequisites for a stay and utterly fails to justify favoring the Avangrid Case, with different parties and issues, over this case which long predates it and has a far more developed record relating to the Bureau of Parks and Lands' (the "Bureau") management of Maine's public reserved lands, the

application of Article IX, Section 23 of the Constitution, and the two specific leases that are affected by the recently-enacted statutory amendments.

I. NECEC is Not Entitled to a Stay or Deferral.

Although NECEC characterizes its motion as a motion to defer (a characterization NECEC denied when Plaintiffs suggested it in requesting leave to file a response to NECEC's *sub silentio* motion made in its opposition to Plaintiffs' motion to dismiss), functionally it is a stay request seeking a stay of the currently scheduled argument until the argument in the Avangrid Case. "A stay of proceedings . . . is not a matter of right but a matter of grace." *Cutler Assocs., Inc. v. Merrill Trust Co.*, 395 A.2d 453, 456 (Me. 1978). A stay of an entire proceeding may only be granted "when the court is satisfied that justice will be thereby promoted." *Id.* Maine's Rules of Civil Procedure codify a longstanding policy to "to secure the just, speedy and inexpensive determination of every action." M.R. Civ. P. 1. In seeking a stay, it is the movant's burden to "demonstrate on the record a hardship or inequity so great as to override" this type of longstanding policy. *Cutler Assocs., Inc.*, 395 A.2d at 457.

NECEC makes no attempt to demonstrate any hardship because a just, speedy resolution of this appeal will cause it none. It seeks a stay solely for delay, urging this Court to defer until it hears a case that has not yet been fully briefed and argued. The Court properly denies a stay request where, as here, the movant has "not

demonstrated how a stay would serve any purpose other than delay." *Soc'y of Lloyd's v. Baker*, 673 A.2d 1336, 1340–41 (Me. 1996). Such a request violates the policy of the Maine Rules of Civil Procedure for a just and speedy determination. As a general rule, the proponent of a stay "bears the burden of establishing its need," *Clinton v. Jones*, 520 U.S. 681, 708 (1997), and "[i]t will be only be granted when the court is satisfied that justice is thereby promoted," *Cutler Associates, Inc.*, 395 A.2d at 456-57 (affirming trial court's refusal to stay the proceedings where the proponent failed to demonstrate a hardship or inequity).

NECEC's principal argument to justify its request in fact demonstrates its weakness—it claims that the "interests of justice" require that the Court defer this case so as to avoid the possibility of inconsistent outcomes in this case and the Avangrid Case, specifically that the Court might dismiss the appeals here as moot because of the passage of I.B.1[1], the citizen's initiative that the people of Maine overwhelmingly passed to enact L.D. 1295 (Dec. 19, 2021), and then in the Avangrid Case declare I.B.1 unconstitutional. More of a nonsense point cannot be imagined. The issue here involves the meaning of Article IX, Section 23 of the Constitution, as implemented now by I.B.1. If this Court decides, as Plaintiffs believe it must, that I.B.1 renders the appeals here moot, which necessarily

[1] "An Act to Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region".

requires a determination that I.B.1 does not unconstitutionally impair NECEC's lease, for example, how plausible is it that the same Court a few months later will decide the opposite? Like its other arguments, NECEC's argument relies entirely on rhetoric rather than logic.

In any case, as we now show, none of the equitable arguments advanced by NECEC justify delaying argument here either.

II. Plaintiffs Are Entitled to Have this Case Heard and Resolved Without Delay And the Lack of Alignment of the Parties Counsels against Delay.

Plaintiffs first filed their complaint challenging the validity of CMP's lease with the Bureau in June 2020, and after litigating the case in full, are entitled to have it heard and resolved on appeal without further delay. This case has already been delayed in the trial court where, among other things, the Bureau and CMP filed appeals in May 2021 that this Court denied as interlocutory. Order Dismissing Appeals, *Russell Black et al. v. Bureau of Parks and Lands et al.*, BCD-21-143 (June 8, 2021). Thereafter, the Bureau and CMP appealed the trial court's final decision in August 2021, but refused to expedite the appeal. This appeal was thus briefed on a standard schedule under M.R. App. P. 7(b), and is properly in order for oral argument on March 8th, 9th, or 10th in accordance with M.R. App. P. 7(e).

NECEC makes much of the fact that "[n]umerous parties supporting NECEC LLC and Avangrid have intervened in the" Avangrid Case but are absent

from this case. Yet NECEC's argument completely disregards the rights and interests of the twenty Plaintiffs here, only two of whom are also intervenors in the Avangrid Case, and elevates the interests of the intervenors in the Avangrid case over the Plaintiffs here.[2] The individuals and current and former legislators here are just as entitled to have their case heard and decided as the parties in the Avangrid Case. Their interest in protecting the public lands is separate and distinct from the NECEC project and the decision here has implications far beyond that single project. Although NECEC wants the Court to focus on "the Project," Plaintiffs here want the Court to consider and decide the validity of the lease and the issues relating to the Bureau's management of the public lands, which have long-term critical significance. They are entitled to have their case decided now, not wait for Avangrid's.

Moreover, although NECEC Transmission LLC is a party to the Avangrid Case, CMP is not. NECEC is a single-purpose entity that took assignment of the 2020 Lease from CMP. NECEC never sought nor negotiated any lease over public lands, and is unlikely ever to do so in the future. In contrast, CMP negotiated the terms of both of the leases at issue in this case and is likely to negotiate other

[2] It would be particularly unfair to the Plaintiffs in this case where CMP and NECEC have done everything in their power to slow walk this litigation, while their parent company Avangrid has tried to expedite its challenge to I.B.1 at every turn. For example, Avangrid filed its complaint and motion for preliminary injunction on November 3, 2021, the day after the referendum passed; its motion for preliminary injunction was briefed and decided on an expedited basis; and the trial court reported its denial of NECEC's motion for preliminary injunction on December 28, 2021.

leases of public lands in the future given its broad operations in the state. The Plaintiffs are entitled to have CMP bound by the judgment of whether and how I.B.1 applies to state leasing of lands for high-impact transmission lines generally, and to the two specific leases CMP contracted for here.

Plaintiffs and the public are entitled to a final decision on this important question of the management of public lands without regard to the progress of the other case. Delay particularly prejudices the legislator plaintiffs who have been deprived of their constitutional right to vote on the lease and oversee management of the State's public lands. This case deals specifically with the Bureau's leasing authority and the Legislature's right to approve uses of the public lands; it need not wait for resolution of the Avangrid Case.

III. NECEC's Statements About the Record are Inaccurate.

NECEC asserts that somehow Plaintiffs here are trying to "end run" the Avangrid Case. But their apparent conclusion that their arguments will fare better in that case than here is totally irrelevant. Contrary to their claim, in the Avangrid Case there is no record relating to the public lands lease at issue here. In contrast, the record here is fully developed with regard to all aspects of the lease negotiation and terms, which would be central to any Contract Clause challenge. Furthermore, unlike this case reviewing a final judgment of the Superior Court, the Avangrid Case comes to this Court on review of a ruling denying a preliminary injunction

where no discovery and little to no factual development occurred. Indeed, the only record evidence in the Avangrid Case is the lease itself, as opposed to the more than 2000 pages of lease negotiations and the legislative history here.

The issues in this case are ripe and fully briefed. The complete constitutional and statutory history has been developed, as well as the creation and terms of the leases at issue. Both the parties and the record created in this case are better suited than in the Avangrid Case to address the contract clause challenge regarding application of I.B.1 to the two CMP leases. Under the well-established legal principle that a change in law applies to pending litigation, it is entirely appropriate, indeed necessary, for this Court to address the effect of I.B.1 on the lease in this case now, not after the Avangrid Case.

IV. This Case is the Only Appropriate Case for a Decision on the Effect of I.B. 1 on the Public Lands Lease.

Under this Court's precedent, there is a strong presumption that I.B.1 is constitutional. *See, e.g.*, *Somerset Tel. Co. v. State Tax Assessor*, 2021 ME 26, ¶ 30, 259 A.3d 97 ("A person challenging the constitutionality of a statute bears a heavy burden of proving unconstitutionality, since all acts of the Legislature are presumed constitutional.") (internal citations omitted); *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) (stating that a citizen's initiative "carries a heavy presumption of constitutionality, and the burden of overcoming that presumption rests on the challenger") (internal citations omitted). NECEC

tried but failed in the Avangrid Case to carry its burden of overcoming the presumption of constitutionality in its attempt to obtain a preliminary injunction to enjoin the effectiveness of I.B.1. *See also Waldron v. George Weston Bakeries Inc.*, 570 F.3d 5, 8 (1st Cir. 2009) ("When a party appeals from the grant or denial of a preliminary injunction, review is for abuse of discretion.").

The Avangrid Case, in contrast to this case, is thus at a very early procedural stage. It does not, moreover, actually seek specific relief against specific defendants, but rather seeks an injunction "to allow the project" to proceed. That is not relief that it can obtain. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 550, n.4 (2021) (observing "no court may lawfully enjoin the world at large") (internal citations and quotations omitted). And because that case comes to this Court on a Rule 24 report, it is entirely possible that the Court may not even reach the constitutional issues at this stage. *See, e.g.*, *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 1, 183 A.3d 749, 751 (accepting the report, answering one of seven questions on the merits, and concluding that the other questions raise nonjusticiable issues). Such an outcome is particularly likely where none of the named defendants—the Bureau, the Public Utilities Commission ("PUC"), or the Maine Legislature—has taken any concrete or threatened action against Avangrid.

The absence of any enforcement action is one reason the Court may decide to discharge the report in the Avangrid Case as not justiciable. This Court has

explained that ripeness "involves a two-part inquiry: (1) whether the issues are fit for judicial review, and (2) whether hardship to the parties will result if the court withholds review." *Pilot Point, LLC v. Town of Cape Elizabeth*, 2020 ME 100, ¶ 30, 237 A.3d 200, 209. The Court further explained that "[a] declaratory judgment concerning the permissible scope of any hypothetical, future development of the Pilot Point Section would be only an advisory opinion *because the Town has taken no formal, concrete steps toward accepting or developing the Pilot Section and may never do so*." *Id.* ¶ 31 (emphasis added).

In the Avangrid Case, none of the named defendants has taken steps to enforce the provisions of the statute and may never do so—the statute does not affect the PUC decision which predates its effective date and requires no action by the PUC; its requirements with respect to the Bureau are ripe in this case and hypothetical in the Avangrid Case since the Bureau has threatened no action there; and NECEC has not made any effort to obtain legislative approval, much less explain how a court can enjoin the Maine House and Senate. Thus, any decision would be merely advisory. *Accord Nat'l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 459 (Me. 1977).

Nor can NECEC legitimately argue that it will suffer a hardship absent review of its unripe claims. In this context, it is important to consider what I.B.1 enacted and how it affects NECEC. I.B.1 consists of three parts: Section 1 "deems"

a transmission line like NECEC to "substantially alter the uses of the land within the meaning of…Article IX, Section 23" and a lease for such a use "may not be granted without first obtaining the vote of 2/3 of the members of each House… ." Section 2 amends the definition of a "high-impact transmission line" and section 4 requires legislative approval for any such transmission line in addition to PUC approval, except 2/3 approval is required for a line crossing public lands. Finally section 5 prohibits high-impact transmission lines in the Upper Kennebec Region.

Section 1 applies directly in this case.[3] At the time it filed its principal brief NECEC knew that the referendum had passed overwhelmingly and that section 1 applied directly to its lease. To now suggest that somehow it would be more appropriate to decide this issue in the Avangrid Case boggles the mind, particularly since that section of I.B.1 is the only issue here, while it is one of several in the Avangrid Case. And to the extent NECEC is now in a hurry to obtain a resolution, a case argued in March allows for much quicker resolution than a case argued in May. It can suffer no hardship from a discharge of the report on ripeness grounds

[3] The Bureau is a defendant in the Avangrid Case and there argued among other things that unlike on other portions of the permitted transmission line where construction had occurred, there had been no construction on the public reserved land subject to § 1 of I.B.1, and consequently NECEC could not have acquired any "vested rights" against application of § 1 (which is the provision Plaintiffs argue moots this appeal). Similarly, the Bureau there argued that I.B.1 does not impair the contractual relationship between the Bureau and NECEC and even if it did, I.B.1 satisfies the legal standard for statutes impairing contracts. There is no reason for the Bureau to defer making these arguments here.

where this case provides a faster and at least equally if not more fair forum for resolution.

Moreover, none of the defendants in the Avangrid Case are currently engaged in any issue relating to the Upper Kennebec prohibition. The Maine Department of Environmental Protection ("DEP"), however, has taken action against NECEC by suspending its permit on the ground that the permitted route was barred by the statute. DEP is not even a party to the Avangrid Case. More perplexing is the fact that CMP could have appealed the Maine DEP's suspension of its permit dated November 23, 2021, and had another venue for its constitutional challenge that was fully ripe, but opted not to do so.

The question of the Bureau's leasing authority, moreover, is distinct from Avangrid's overall challenge to the constitutionality of I.B.1, which involves a challenge primarily on the basis of "vested rights"; resolution of the Bureau's leasing authority here and the issue of a possible impairment of contract based on I.B.1's requirement of 2/3 legislative approval for transmission lines crossing public lands does not need to and should not wait for resolution of the Avangrid Case. Whatever the merits of its vested rights arguments on private lands where it has constructed, which it is trying to raise in the Avangrid Case, NECEC can have no "vested rights" to lease public lands, especially since there has been no construction commenced on those lands.

CONCLUSION

The Plaintiffs in this case, including the individuals who use the public lands and the legislators who have been deprived of their constitutional right to vote, should not be held hostage just because NECEC would prefer to litigate its legal challenges in a forum where it can talk about economic harms in its challenge to I.B.1. The underlying reason for NECEC's preference is obvious—it wants to assert there that because of Rule 62's automatic stay of the judgment vacating the lease here, the lease is still in effect and thereby provides a basis for its argument that I.B.1 impairs its contract. That argument has no merit there, but cannot even be made here. The Court should deny NECEC's gamesmanship and proceed with argument as scheduled.

Dated at Portland, Maine this 2d day of February, 2022.

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CERTIFICATE OF SERVICE

I, James T. Kilbreth, attorney for Appellees/Cross-Appellants certify that I have this day caused the foregoing Opposition to Appellant/Cross-Appellee's NECEC Transmission LLC's Motion to Defer Oral Argument to be served on the individuals below via electronic mail and U.S. mail, first class postage prepaid, addressed as follows:

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