

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-416

NECEC TRANSMISSION LLC, et al.,

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Defendant-Appellees

On Report from Business and Consumer Court
Docket No.: BCD-CIV-2021-00058

APPENDIX

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Continued on Inside Cover

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Business Court

Case Summary

Case No. BCD-CIV-2021-00058

NECEC Transmission, LLC, Inc., et al. V. Bureau of Parks & Lands, ME Dept of Agriculture, Conservation and Forestry, et al. §
§
§
§

Location: **Business Court**
Judicial Officer: **Duddy, Michael**
Filed on: **11/03/2021**
Other: **PORSC-CV-2021-00400**

Case Information

Case Type: Civil
Subtype: Declaratory Judgment
Case Status: **12/30/2021 Pending - Inactive**

Assignment Information

Current Case Assignment

Case Number BCD-CIV-2021-00058
Court Business Court
Date Assigned 11/03/2021
Judicial Officer Duddy, Michael

Party Information

Lead Attorneys

Plaintiff Avangrid Networks, Inc.

Aromando, John Retained

NECEC Transmission LLC

Aromando, John Retained

Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry

Bolton, Jonathan R Retained

Maine House of Representatives

Bolton, Jonathan R Retained

Maine Public Utilities Commission

Bolton, Jonathan R Retained

Maine Senate

Bolton, Jonathan R Retained

Intervenor Cianbro Corporation

Coffin, Philip M III Retained

Geisser, Christine M

Kilbreth, James Retained

H.Q. Energy Services (U.S.) Inc.

Woodcock, Timothy Retained

Huish, Wendy A



Kilbreth, James Retained

Case Summary

Case No. BCD-CIV-2021-00058

Hull, Jonathan T.	Kilbreth, James Retained
Industrial Energy Consumer Group	Schutz, Sigmund D Retained
International Brotherhood of Electrical Workers Local 104	Grant, Benjamin K Retained
Maine State Chamber of Commerce	Petrucelli, Gerald F Retained
Natural Resources Council of Maine	Kilbreth, James Retained
NextEra Energy Resources, LLC	Roach, Christopher Retained
Saviello, Thomas B.	Kilbreth, James Retained
York, Theresa E	Kilbreth, James Retained
Yorks, Robert C	Kilbreth, James Retained
Visiting Attorney	Cheverie, Robert IBEW 104

Events and Orders of the Court

11/03/2021	Filing Document - Complaint - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 9:37 AM
11/03/2021	Motion - Motion for Preliminary Injunction - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 9:52 AM
11/03/2021	 Filing Document - Affidavit - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 9:58 AM
11/03/2021	Filing Document - Affidavit - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 10:00 AM
11/03/2021	 Filing Document - Affidavit - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 10:03 AM
11/03/2021	Other Filing - Request for Hearing - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 10:06 AM
11/03/2021	Motion - Motion to Enlarge Page Limit - Filed Party: Plaintiff NECEC Transmission LLC Created: 11/10/2021 10:09 AM
11/03/2021	Motion - Motion To Intervene - Filed Party: Intervenor Industrial Energy Consumer Group Created: 11/10/2021 10:27 AM

Business Court

Case Summary

Case No. BCD-CIV-2021-00058

11/04/2021 Motion - Motion To Intervene - Filed
Party: Intervenor H.Q. Energy Services (U.S.) Inc.
Created: 11/10/2021 10:48 AM

11/08/2021 Motion - Motion To Intervene - Filed
Party: Intervenor Maine State Chamber of Commerce
Created: 11/10/2021 10:53 AM

11/08/2021 Other Filing - Entry of Appearance - Filed
Party: Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry;
Defendant Maine House of Representatives;
Defendant Maine Public Utilities Commission;
Defendant Maine Senate
Created: 11/10/2021 1:39 PM

11/09/2021 Order - Recommendation to Transfer to BCD - Entered (Judicial Officer: Warren, Thomas D.)
Created: 11/10/2021 10:59 AM

11/09/2021 Motion - Motion To Intervene - Filed
Party: Intervenor International Brotherhood of Electrical Workers Local 104
Created: 11/10/2021 11:02 AM

11/09/2021 Motion - Motion To Intervene - Filed
Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C
Created: 11/10/2021 11:20 AM

11/09/2021 Other Filing - Entry of Appearance - Filed
Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C
Created: 11/10/2021 11:39 AM

11/09/2021 Other Filing - Entry of Appearance - Filed
Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C
Created: 11/10/2021 11:43 AM

11/09/2021 Other Filing - Entry of Appearance - Filed
Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C
Created: 11/10/2021 11:44 AM

11/09/2021 Order - Court Order - Entered (Judicial Officer: Warren, Thomas D.)
Created: 11/10/2021 1:46 PM

11/09/2021 **Pretrial/Status**
Created: 01/01/0001 12:00 AM

Business Court

Case Summary

Case No. BCD-CIV-2021-00058

11/10/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/10/2021 11:46 AM

11/10/2021  Certify/Notification - Legacy Case Docket Record - Received
Created: 11/10/2021 11:48 AM

11/10/2021 **Case Management Conference** (Judicial Officer: Duddy, Michael)
Created: 01/01/0001 12:00 AM

11/12/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:28 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:29 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:49 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:50 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:50 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:51 PM

11/12/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 11/12/2021 2:52 PM

11/12/2021 Supplemental Filing - Complaint - Filed
Party: Intervenor Industrial Energy Consumer Group
Created: 11/16/2021 3:16 PM

11/12/2021 Supplemental Filing - Complaint - Filed
Party: Intervenor H.Q. Energy Services (U.S.) Inc.
Created: 11/16/2021 3:23 PM

11/12/2021 Supplemental Filing - Complaint - Filed
Party: Intervenor Maine State Chamber of Commerce
Created: 11/16/2021 3:26 PM

11/12/2021 Supplemental Filing - Complaint - Filed
Party: Intervenor International Brotherhood of Electrical Workers Local 104
Created: 11/16/2021 3:30 PM

11/15/2021  Letter - From Party - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 11/15/2021 1:59 PM

11/16/2021  Service - Acknowledgement of Service - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 11/17/2021 4:28 PM

11/16/2021  Service - Acknowledgement of Service - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 11/17/2021 4:28 PM

11/18/2021 **Proof of Service** Requested by: NECEC Transmission LLC

Case Summary

Case No. BCD-CIV-2021-00058

Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry

Issued

Anticipated Method: Proof of Service

Serving Method: Acceptance of Service

Maine Senate

Issued

Anticipated Method: Proof of Service

Serving Method: Acceptance of Service

Maine House of Representatives

Issued

Anticipated Method: Proof of Service

Serving Method: Acceptance of Service

Created: 11/18/2021 8:37 AM

11/04/2021 **Proof of Service**

Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry served

11/04/2021 **Proof of Service**

Maine Senate served

11/04/2021 **Proof of Service**

Maine House of Representatives served

11/18/2021 **Proof of Service** Requested by: NECEC Transmission LLC

Maine Public Utilities Commission

Issued

Anticipated Method: Proof of Service


Serving Method: Acceptance of Service

Service Tracking Comment: Of Mitchell Tannenbaum unsigned

Created: 11/18/2021 8:43 AM


11/04/2021 **Proof of Service**

Maine Public Utilities Commission served

11/19/2021 

Motion - Motion To Intervene - Filed


Created: 11/19/2021 3:09 PM

11/19/2021 

Other Filing - Entry of Appearance - Filed

Party: Intervenor Cianbro Corporation


Created: 11/19/2021 3:09 PM

11/19/2021 

Other Filing - Entry of Appearance - Filed

Party: Intervenor Cianbro Corporation


Created: 11/19/2021 3:09 PM

11/19/2021 

Other Filing - Entry of Appearance - Filed


Party: Intervenor Cianbro Corporation

Created: 11/19/2021 3:09 PM

11/22/2021 


Granted (Judicial Officer: Duddy, Michael)

Created: 11/22/2021 11:53 AM

11/22/2021 

Order - Court Order - Entered (Judicial Officer: Duddy, Michael)


Created: 11/22/2021 11:55 AM

11/22/2021 

Supplemental Filing - Complaint - Filed


Party: Intervenor Cianbro Corporation

Created: 11/22/2021 11:58 AM

11/22/2021 

Motion - Motion To Intervene - Filed

Created: 11/22/2021 2:55 PM

11/23/2021 














Granted (Judicial Officer: Duddy, Michael)

Business Court

Case Summary

Case No. BCD-CIV-2021-00058

Created: 11/23/2021 8:53 AM

- 11/23/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/23/2021 8:54 AM
- 11/24/2021  Responsive Pleading - Opposing Memorandum - Filed
Party: Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry;
Defendant Maine House of Representatives;
Defendant Maine Public Utilities Commission;
Defendant Maine Senate
Created: 11/30/2021 12:59 PM
- 11/24/2021  Other Filing - Affidavit - Filed
Party: Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry;
Defendant Maine House of Representatives;
Defendant Maine Public Utilities Commission;
Defendant Maine Senate
Created: 11/30/2021 1:03 PM
- 11/24/2021  Brief - Brief - Filed
Party: Intervenor International Brotherhood of Electrical Workers Local 104
Created: 11/24/2021 10:40 AM
- 11/24/2021  Other Filing - Affidavit - Filed
Party: Intervenor International Brotherhood of Electrical Workers Local 104
Created: 11/24/2021 10:40 AM
- 11/24/2021  Brief - Brief - Filed
Party: Intervenor Maine State Chamber of Commerce
Created: 11/24/2021 12:44 PM
- 11/24/2021  Other Filing - Affidavit - Filed
Party: Intervenor Maine State Chamber of Commerce
Created: 11/24/2021 12:46 PM
- 11/24/2021  Other Filing - Memorandum of Law - Filed
Party: Intervenor Cianbro Corporation
Created: 11/24/2021 2:31 PM
- 11/24/2021  Other Filing - Affidavit - Filed
Party: Intervenor Cianbro Corporation
Created: 11/24/2021 2:31 PM
- 11/24/2021  Responsive Pleading - Opposing Memorandum - Filed
Party: Intervenor NextEra Energy Resources, LLC
Created: 11/24/2021 2:51 PM
- 11/24/2021  Brief - Brief - Filed
Party: Intervenor Industrial Energy Consumer Group
Created: 11/24/2021 3:56 PM
- 11/24/2021  Brief - Brief - Filed
Party: Intervenor H.Q. Energy Services (U.S.) Inc.
Created: 11/24/2021 5:33 PM
- 11/24/2021  Brief - Opposition Brief - Filed
Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;

Case Summary

Case No. BCD-CIV-2021-00058

Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;
Intervenor Saviello, Thomas B.;
Intervenor York, Theresa E;
Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021



Other Filing - Affidavit - Filed

Party: Intervenor Geisser, Christine M;
Intervenor Huish, Wendy A;
Intervenor Hull, Jonathan T.;
Intervenor Natural Resources Council of Maine;

Case Summary

Case No. BCD-CIV-2021-00058

Intervenor Saviello, Thomas B.;

Intervenor York, Theresa E;

Intervenor Yorks, Robert C

Created: 11/29/2021 9:51 AM

11/24/2021  Motion - Motion To Intervene - Filed
Created: 11/29/2021 10:01 AM

11/24/2021  Other Filing - Entry of Appearance - Filed
Created: 11/29/2021 10:03 AM

11/24/2021  Other Filing - Entry of Appearance - Filed
Created: 11/29/2021 10:03 AM

11/24/2021  Responsive Pleading - Opposing Memorandum - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 11/29/2021 10:24 AM

11/24/2021  Motion - Motion to Admit Pro Hac Vice - Filed
Created: 11/29/2021 1:34 PM

11/24/2021  Motion - Motion to Admit Pro Hac Vice - Filed
Created: 11/29/2021 1:34 PM

11/29/2021  Denied (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 11:45 AM

11/29/2021  Motion - Motion For Leave - Filed
Party: Intervenor NextEra Energy Resources, LLC
Created: 11/29/2021 1:18 PM

11/29/2021  Responsive Pleading - Reply Memorandum - Filed
Created: 11/29/2021 1:24 PM

11/29/2021  Other Filing - Other Document - Filed
Created: 11/29/2021 1:24 PM

11/29/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 11:54 AM

11/30/2021  Moot (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 11:56 AM

11/30/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 11:58 AM

11/30/2021  Moot (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 12:00 PM

11/30/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 12:01 PM


11/30/2021  Moot (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 12:02 PM


11/30/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 11/30/2021 12:04 PM


Business Court


Case Summary


Case No. BCD-CIV-2021-00058


12/02/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 12/02/2021 11:06 AM


12/08/2021  Brief - Opposition Brief - Filed
Party: Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry;
Defendant Maine House of Representatives;
Defendant Maine Public Utilities Commission;
Defendant Maine Senate
Created: 12/09/2021 9:18 AM


12/08/2021  Responsive Pleading - Reply Memorandum - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/09/2021 11:26 AM


12/08/2021  Other Filing - Affidavit - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/09/2021 11:26 AM


12/10/2021  Motion - Motion to Admit Pro Hac Vice - Filed
Party: Intervenor International Brotherhood of Electrical Workers Local 104
Created: 12/13/2021 1:40 PM


12/14/2021  Letter - From Party - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/14/2021 9:37 AM


12/14/2021  Letter - From Party - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/15/2021 1:30 PM


12/15/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 12/15/2021 10:05 AM


12/15/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 12/15/2021 10:06 AM

12/15/2021  **Motion for Preliminary Injunction Hearing**
Created: 01/01/0001 12:00 AM

12/16/2021  Denied (Judicial Officer: Duddy, Michael)
Created: 12/16/2021 12:29 PM

12/16/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 12/16/2021 12:32 PM


12/22/2021  Letter - From Party - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/23/2021 12:20 PM


12/22/2021  Motion - Other Motion - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 12/23/2021 12:20 PM


Business Court


Case Summary

Case No. BCD-CIV-2021-00058


12/27/2021  Responsive Pleading - Opposing Memorandum - Filed
Party: Intervenor NextEra Energy Resources, LLC
Created: 12/27/2021 4:12 PM


12/28/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 12/28/2021 2:12 PM


12/28/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 12/28/2021 2:18 PM


12/28/2021  Order - Hearing/Conference Record - Entered (Judicial Officer: Duddy, Michael)
Created: 12/28/2021 2:53 PM


12/28/2021 **Case Management Conference**
Created: 01/01/0001 12:00 AM

12/30/2021  Order - Court Order - Entered (Judicial Officer: Duddy, Michael)
Created: 12/30/2021 12:14 PM


12/30/2021  Granted (Judicial Officer: Duddy, Michael)
Created: 12/30/2021 12:17 PM

12/30/2021  Motion - Motion for Stay Of Proceedings - Filed
Party: Defendant Bureau of Parks & Lands, Maine Department of Agriculture, Conservation and Forestry;
Defendant Maine House of Representatives;
Defendant Maine Public Utilities Commission;
Defendant Maine Senate
Created: 12/30/2021 12:07 PM

12/30/2021  Order - Order For Stay of Proceedings - Entered (Judicial Officer: Duddy, Michael)
Created: 12/30/2021 12:17 PM

01/03/2022  Appeal - Mandate/Order - Filed
Created: 01/04/2022 10:00 AM

01/05/2022  Appeal - Transcript Request & Order Form - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 01/06/2022 10:03 AM

01/05/2022  Letter - From Party - Filed
Party: Plaintiff Avangrid Networks, Inc.;
Plaintiff NECEC Transmission LLC
Created: 01/06/2022 10:03 AM

01/06/2022 Sent to ER/Reporter
Created: 01/06/2022 2:27 PM

Financial Information

Intervenor International Brotherhood of Electrical Workers Local 104
Total Financial Assessment
Total Payments and Credits
Balance Due as of 1/11/2022

705.00
705.00
0.00

11/24/2021 Transaction Assessment
11/24/2021 Business Court E-File Payment
Type

5.00
(5.00)

Receipt # 2021-00050528

Business Court

Case Summary

Case No. BCD-CIV-2021-00058

12/13/2021	Transaction Assessment		700.00
12/13/2021	Business Court E-File Payment		(700.00)
	Type	Receipt # 2021-00053072	
Plaintiff NECEC Transmission LLC			
	Total Financial Assessment		175.00
	Total Payments and Credits		175.00
	Balance Due as of 1/11/2022		0.00
01/10/2022	Transaction Assessment		175.00
01/10/2022	Payment	Receipt # 2022-00001149	(175.00)

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION LLC, and)
AVANGRID NETWORKS, INC.,)
)
Plaintiffs)
)
v.)
)
BUREAU OF PARKS AND LANDS,)
et al.,)
)
Defendants)

**ORDER GRANTING MOTION TO
REPORT INTERLOCUTORY
RULING PURSUANT TO RULE 24(c)
OF THE MAINE RULES OF
APPELLATE PROCEDURE**

On November 3, 2021, Plaintiffs filed a Verified Complaint for Declaratory Judgment and Injunctive Relief seeking to prevent the retroactive application of a recently-enacted citizens’ initiated referendum (the “Initiative”) to the New England Clean Energy Connect Project (“NECEC”). The same day, Plaintiffs filed a Motion for Preliminary Injunction (the “Motion”), with supporting evidence, asserting that they had demonstrated a substantial possibility of prevailing on the merits of three claims: (1) that retroactive enforcement of the Initiative to the NECEC deprives Plaintiffs of their vested rights in violation of due process because Plaintiffs completed actual, physical construction and made substantial expenditures to construct the NECEC in good faith, in reliance on valid permits; (2) that retroactive enforcement of the Initiative to the NECEC violates the separation of powers doctrine in the Maine Constitution; and (3) that retroactive enforcement of the Initiative impairs Plaintiffs’ lease with the Bureau of Public Lands in violation of the Contract Clauses of the Maine and United States Constitutions.

Following an expedited schedule for briefing and argument, this Court denied the Motion by Order dated December 16, 2021. The Court determined that Plaintiffs had not shown a

substantial possibility of prevailing on any of their legal arguments. As this Court noted in its Order, however, “[t]he applicable law . . . is uncertain on many disputed points” and “this case presents many difficult questions.” Order at 2. It was and remains the Court’s view that “Plaintiffs have legitimate counter arguments on all disputed points of law,” *id.*, and that “the questions of law presented by this case are important and ought to be determined by the Law Court,” *id.* at 3 (internal quotation marks omitted). To that end, Plaintiffs have now moved this Court to report its Order to the Law Court for determination of the legal questions pursuant to M.R. App. P. 24(c). For the reasons discussed below, the Court grants the Motion.

Rule 24(c) of the Maine Rules of Appellate Procedure provides as follows: “If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose.” In making this determination, this Court has considered the following factors:

(1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions; and (3) whether a decision on the issue would, in at least one alternative, dispose of the action.

Littlebrook Airpark Condo. Ass’n v. Sweet Peas, LLC, 2013 ME 89, ¶ 8, 81 A.3d 348 (quotation marks omitted). Although Rule 24 operates as an exception to the final judgment rule and should not be lightly invoked, *see Payne v. Sec’y of State*, 2020 ME 110, ¶ 12, 237 A.3d 870, these factors all support a report of this case to the Law Court.

First, this case presents questions of law of “sufficient importance and doubt to justify the report.” *Despres v. Moyer*, 2003 ME 41, ¶ 14, 827 A.2d 61 (internal quotation marks omitted). For instance, this case presents questions regarding (1) whether the vested rights doctrine applies to state laws, and (2) whether and to what extent knowledge of pending changes in law prevents

the vesting of property rights during the pendency of permit appeals. The answers to these and the other legal questions addressed in the Court’s Order will determine whether construction can continue on a billion-dollar infrastructure project, or whether the Initiative will prevail. As expressed in this Court’s Order, Plaintiffs present legitimate arguments on numerous areas of unsettled law – issues that must ultimately be addressed by the Law Court to resolve this case. *See Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 7, 957 A.2d 94. Although discreet aspects of the NECEC are currently the subject of separate pending legal proceedings in the Superior Court, the Law Court, the Board of Environmental Protection, and the U.S. District Court for the District of Maine, all these cases are interrelated with this proceeding, counseling for departure from the normal strictures of the final judgment rule. *See generally Roque Island Gardner Homestead Corp. v. Town of Jonesport*, 2021 ME 21, ¶ 6, 248 A.3d 953. In this Court’s view, the legal questions are of sufficient importance to outweigh the policy against piecemeal litigation. Finally, the issues presented in this case are capable of repetition. *See Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 9, 61 A.3d 1242. Vested rights cases recur before the Law Court with some regularity, and it is entirely likely, if not certain, that future projects will be affected by the scope and applicability of retroactive legislation.

Second, while the possibility that “factfinding or determination of a preliminary issue . . . may render” a reported question moot weighs against a report, *Littlebrook Airpark Condo. Ass’n*, 2013 ME 89, ¶ 12, 81 A.3d 348, no such threshold issues exist here. No fact finding will render the issues addressed in the Order irrelevant; and no other legal issues, such as statute of limitations issues, will moot the primary merits questions presented. This Court has created the factual record on which to decide the legal issues, and Plaintiffs do not dispute this Court’s findings of fact.

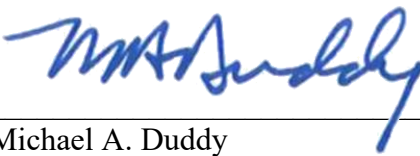
Third, a decision by the Law Court on report would in at least one alternative dispose of the action. *Id.* ¶ 13. There is no plausible basis on which Plaintiffs can prevail on the pending claims assuming that the legal conclusions set forth in the Order are correct as a matter of Maine law. Thus, a decision affirming the legal conclusions contained in Court’s Order will dispose of the matter. It is only if Plaintiffs prevail on report, in whole or in part, that the case as currently pleaded will proceed. But even in that latter scenario, the Law Court’s determination of the legal issues would likely bring the litigation to a swift conclusion.

Accordingly, this Court determines that it is appropriate to “report the case to the Law Court,” M.R. App. P. 24(c), in its entirety, *see State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981), for the Law Court to determine the questions of law presented in the Order before any further proceedings are taken.¹ The Motion to Report Interlocutory Ruling filed by Plaintiffs NECEC Transmission LLC and Avangrid Networks, Inc. in the above-captioned matter is hereby GRANTED.

SO ORDERED.

The clerk is directed to make the following entry in the civil docket pursuant to M.R. Civ. P. 79(a): “This Order is incorporated into the docket by reference at the specific direction of the Court.”

Dated: 12/28/2021



Michael A. Duddy
Judge, Business and Consumer Court

¹ The legal questions are embodied in this Court’s Order, and thus the Court does not separately specify the questions of law as it would for a report pursuant to M.R. App. P. 24(a).

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al.,)
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Plaintiffs & Intervenor,)
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BUREAU OF PARKS AND)
LANDS, et al.,)
)
Defendants & Intervenor.)

ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

On November 3, 2021, Plaintiffs filed a three count Verified Complaint for Declaratory Judgment. The Verified Complaint seeks to permanently block retroactive application of the recently enacted ballot initiative which imposes a geographic ban on the construction of High Impact Transmission Lines in Maine and imposes new requirements on parties seeking to lease Public Lands. On the same date, Plaintiffs also filed a Motion for Preliminary Injunction (the “Motion”), seeking to enjoin the Initiative while this litigation is pending. The Motion has been fully briefed by Plaintiffs, Defendants, and the many Intervenor. Oral argument on the Motion was held on December 15, 2021, and the Motion is now ready for resolution.

SUMMARY

The question before the Court is whether, during the pendency of this litigation, to enjoin (in other words, stay or block) the Initiative approved by the voters of Maine on November 2, 2021, and scheduled to become law on or about

December 19, 2021. The answer to the question requires a careful weighing of four factors.

As to the legal question at the heart of the dispute, the Court determines that allowing the Initiative to become law will not violate Plaintiffs' constitutional rights or constitutional principles. The vested rights doctrine does not apply, and to the extent it does, Plaintiffs' rights to continue building the corridor did not vest. The Court also concludes the Initiative does not violate Separation of Powers principles or the Contracts Clause. Plaintiffs have not demonstrated a substantial possibility of prevailing on the merits. The applicable law, however, is uncertain on many disputed points. Thus, while the Court is unpersuaded by Plaintiffs' legal arguments, this case presents many difficult questions. Plaintiffs have legitimate counter arguments on all disputed points of law.

But the existence of such counter arguments, even if they were to constitute a substantial possibility of prevailing on the legal merits, are not enough to stay the Initiative, because the other factors are determinative. The Court finds that allowing the Initiative to become law during the litigation will not cause Plaintiffs irreparable injury. The litigation is moving rapidly, and the Court anticipates it will continue to do so. The public interest in participatory democracy is paramount and would be adversely affected by blocking the Initiative. And while the economic harm to Plaintiffs brought about by delaying construction of the corridor during the litigation will be substantial, that harm does not outweigh the harm to voter confidence and participatory democracy that would result from preventing the Initiative from

becoming law while this legal challenge is pending. Hence, the Court declines to prevent the Initiative from going into effect.

This is not a decision the Court reaches lightly given the countervailing considerations at issue. On the one hand, a major commercial enterprise attempting to build a large linear project in Maine, and multiple other interested parties, seek to avoid significant financial losses and protect their investment. On the other hand, the Initiative's architects and the people of Maine seek to prevent the disturbance of Maine lands and impose additional requirements for approval of projects like the one at issue here. The Court understands and respects the substantial interests and stakes on each side of the dispute. Resolution of the dispute carries regional and national implications.

Of course, the Court's decision on Plaintiffs' Motion is by no means the last word. Plaintiffs and supporting Intervenors can file an interlocutory appeal or move to have the questions of law reported to the Law Court pursuant to M.R. App. P. 24(c). If the latter, this Court will expeditiously grant the motion to report. Either way, the questions of law presented by this case are important and "ought to be determined by the Law Court." *Id.* The Law Court may interpret its precedents differently than does this Court. As but one example, it may be a better reading of the precedent to apply the vested rights doctrine to consideration of state-wide laws, and to conclude that the vesting factors are satisfied. If the Law Court determines that allowing the Initiative to become law works a constitutional violation on any basis, that determination would likely change the trajectory of the case. On remand (or directly

by the Law Court), the finding of a constitutional violation would likely satisfy the requirement for irreparable harm, supersede the will of the voters, and change the balance of harms in favor of Plaintiffs. Under those circumstances, staying the Initiative would be appropriate.

In the meantime, as more fully explained below, the Court denies Plaintiffs' Motion for Preliminary Injunction. The Court determines that, at this stage of the proceeding, there is no basis to block the Initiative from going into effect as scheduled.

STATEMENT OF FACTS

Plaintiffs in this action are NECEC Transmission LLC and Avangrid Networks, Inc. (collectively "Plaintiffs" or "NECEC").¹ Intervenors in support of Plaintiffs are Cianbro Corporation, H.Q. Energy Services (U.S.) Inc. ("HQUS"), Industrial Energy Consumer Group ("IECG"), International Brotherhood of Electrical Workers Local 104 ("IBEW"), and Maine State Chamber of Commerce. Defendants are Bureau of Parks and Lands, Maine Department of Agriculture, Conservation and Forestry, Maine Public Utilities Commission, Maine Senate, and Maine House of Representatives (collectively "Defendants"). Intervenors in support of Defendants are NextEra Energy Resources, LLC, Natural Resources Council of Maine, Christine M. Geisser, Wendy A. Huish, Jonathan T. Hull, Thomas B. Saviello, Theresa E. York, and Robert C. Yorks.

No party requested an evidentiary hearing. All parties opted to proceed based upon the pleadings, well supported briefs, and oral argument. Accordingly, based

¹ Avangrid Networks, LLC, owns NECEC, and is the indirect parent company of Central Maine Power Company ("CMP").

upon the Verified Complaint, briefs, affidavits, exhibits, and stipulations made during oral argument, the Court finds the following facts based upon a preponderance of the evidence. Because of the many overlapping chronologies, the presentation of facts is organized topically to assist the reader. However, the overall sequence of events is important to the analysis.

Introduction to the Project

In response to requests for proposals for a clean energy supply by Massachusetts electric distribution companies (“EDCs”), Central Maine Power Company (“CMP”) and Hydro-Québec proposed the project at the heart of this action (the “Project”). The Project would transmit power from Québec through Maine and into Massachusetts. The Project consists of a 145.3-mile-long High Voltage Direct Current (“HVDC”) transmission line running from the U.S./Canadian border in Beattie Township, Maine to a new converter station in Lewiston, Maine, which will connect to an existing substation by a new 1.2-mile High Voltage Alternating Current transmission line, as well as other network upgrades.

The Project is divided into five segments: (1) 53.1 miles of HVDC line running along a new corridor from Beattie Township to the Forks Plantation; (2-3) approximately 92 miles of transmission line along an existing corridor which will be widened; and (4-5) network upgrades, including a 26.5-mile AC transmission line from Lewiston to Wiscasset. Segment 1 is the most controversial, as a new corridor must be cut through commercial timberland. The segment will cross hundreds of wetlands and waterways as well as bird habitats and vernal pools. Additionally, a

300-foot-wide, 0.9-mile-long stretch of Segment 1 of the Project corridor is planned to cross over public reserved lands, administered by the Maine Bureau of Parks and Lands (“BPL”), in Johnson Mountain Township and West Forks Plantation.

CMP ultimately transferred its rights and responsibilities in the Project to Plaintiff New England Clean Energy Connect LLC (“NECEC”), which will construct and operate the Project. Both CMP and NECEC are subsidiaries of Plaintiff Avangrid Networks, Inc. (“Avangrid Networks”). Avangrid Networks is a wholly owned subsidiary of Avangrid, Inc., a publicly traded, sustainable energy company with approximately \$38 billion in assets that operates in twenty-four U.S. States. Its two primary lines of business are Avangrid Networks, which owns eight electric and natural gas utilities, including CMP, and serves 3.3 million customers across New England and New York, as well as Avangrid Renewables, which owns and operates 8.5 gigawatts of electricity capacity in twenty two states.

Permitting

By July 2017, CMP had obtained sufficient control of the proposed Project corridor to begin seeking the requisite permits for the Project. On September 27, 2017 CMP filed a petition for a Certificate of Public Convenience and Necessity (“CPCN”) from the Public Utilities Commission (“PUC”), as required for this level of voltage in a transmission line pursuant to 35-A M.R.S. § 3132. The PUC reviewed the petition over nineteen months, held six days of evidentiary hearings and three public witness hearings, and thirty-one parties participated in the proceedings. The PUC granted the CPCN on May 3, 2019, based on the Commission’s finding that the Project is in

the public interest, considering the anticipated reduction in electricity prices, increased system reliability, and displacement of fossil-fuel energy generation.² NextEra Energy Resources, LLC (“NextEra”), an owner of an oil-fired electric generation facility in Yarmouth, Maine appealed the issuance of the CPCN. On March 17, 2020 the Law Court denied NextEra’s appeal, thereby affirming the grant of the CPCN for the Project.³

In September 2017, NECEC also applied for permits from the Department of Environmental Protection (“DEP”) under the Site Location of Development Act (“SLODA”) and Natural Resources Protection Act (“NRPA”), as well as a Land Use Planning Commission (“LUPC”) Site law Certification of Compliance. 38 M.R.S. §§ 480-C, 483-A. In May 2019, the DEP and LUPC began joint hearings on CMP’s permit applications. Thirty-nine parties participated in the review of the Project, six days of evidentiary hearings were held, and two days of public testimony were heard. On May 11, 2020 the DEP approved NECEC’s permits, incorporating LUPC’s certification, with thirty-eight conditions.

NextEra, the Natural Resources Council of Maine (“NRCM”), and petitioners residing in the West Forks area appealed the grant of the DEP permits to the Superior Court and the Maine Board of Environmental Protection (“BEP”). In November 2020, NRCM and the West Forks petitioners moved the Superior Court for a stay of the DEP order, and in January 2021, the Superior Court denied the motion,

² The PUC’s approval of the CPCN spurred the first initiative effort, as will be discussed in a later section.

³ *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, 227 A.3d 1117.

finding the movants had not established a substantial likelihood of success on the merits.⁴ The appeal of the DEP order to the BEP is still pending. On November 23, 2021 the DEP Commissioner suspended the DEP permits pending the outcome of the instant motion for preliminary injunction—the suspension will be lifted if NECEC obtains the injunction or, if the injunction is denied, NECEC prevails on the merits. *See Central Maine Power Co. & NECEC Transmission, LLC*, License Suspension Proceeding, Decision and Order 12 (Me. D.E.P. Nov. 23, 2021).

On September 29, 2017 NECEC applied for a permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act and then sought further approval under Section 10 of the Rivers & Harbors Act (together, the “ACE Permit”). The Corps attended the DEP hearings, considered the evidence before the DEP, accepted written public comments, held its own public hearing, and considered relevant evidence under the National Environmental Policy Act. The Corps also completed an Environmental Assessment (“EA”) for the Project on July 7, 2020 which included a Finding of No Significant Impact (“FONSI”). The Corps completed an addendum to the EA on November 4, 2020 and issued the ACE Permit on November 6, 2020. Prior to its issuance, on October 27, 2020, the Sierra Club, NRCM, and Appalachian Mountain Club (together, “Sierra Club”) sued the Corps, alleging the EA was insufficient and that the Corps should complete a full Environmental Impact Statement in its place. On November 11, 2020 the Sierra Club moved for a preliminary injunction to halt construction of the Project; the motion was denied on

⁴ *NextEra Energy Res., LLC v. Dep’t of Env’t. Prot.*, Dkt. Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Sup. Ct. Jan. 11, 2021).

December 16, 2020.⁵ The Sierra Club filed an emergency appeal, and on January 15, 2021 the First Circuit granted a partial injunction pending appeal, enjoining construction in Segment 1 of the Project. This temporary injunction was vacated on May 13, 2021.⁶ The Sierra Club lawsuit is still pending in the District Court for the District of Maine.

On July 17, 2017 CMP applied for a Presidential Permit from the U.S. Department of Energy as required under Executive Order 10,485, as amended by Executive Order 12,038 due to the Project's Beattie Township segment at the U.S./Canada border. The DOE developed its own administrative record and prepared its own EA and FONSI. The DOE issued the Presidential Permit on January 14, 2021.⁷ Sierra Club then amended its complaint in the pending *Sierra Club v. U.S. Army Corps of Eng'rs* to include claims relating to the Presidential Permit.

NECEC has obtained various municipal permits and approvals in accordance with local requirements, including *inter alia* shoreland zoning permits, building permits, rezoning/conditional use approvals, site plan approvals, demolition permits, and utility location permits. Due to the Project's construction schedule, permits and approvals have not yet been acquired from four remaining municipalities which the Project will need to cross.

⁵ *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 2:20-cv-00396-LEW, 2020 WL 7389744 (D. Me. Dec. 16, 2020).

⁶ *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021).

⁷ *NECEC Transmission LLC*, DOE Docket No. PP-438, Presidential Permit (DOE Jan. 14, 2021); *New England Clean Energy Connect*, DOE/EA-2155, Environmental Assessment (DOE Jan. 14, 2021); *New England Clean Energy Connect*, Finding of No Significant Impact (DOE Jan. 14, 2021).

Public Lands Lease

In 2014, CMP obtained a lease from BPL to construct electric transmission facilities across public reserved lands in Johnson Mountain Township and West Forks Plantation. Neither BPL nor CMP had sought approval from the Maine Legislature. In December 2019, prompted by his concerns about this lease, Senator Russell Black introduced a bill, LD 1893, which would have reinforced the requirement of legislative approval and fair market value for leases of public lands by the State. The bill was subsequently referred to the Agriculture, Conservation and Forestry Committee (“ACF”), which has oversight authority of BPL.

The ACF held a public hearing on the bill in January 2020 at which Director Cutko of BPL testified that the Bureau had not sought legislative approval for the 2014 lease to CMP because (i) BPL believed it was authorized to grant the lease under 12 M.R.S. § 1852, and (ii) BPL was not aware of the requirement for PUC to issue a CPCN prior to the execution of a lease over public land under 35-A M.R.S. § 3132(13). Then-House Chair Hickman, believing the 2014 BPL lease was a violation of Art. IX, Sec. 23 of the Maine Constitution, which requires any action that reduces or substantially alters the use of public lands held for conservation or recreation purposes to be approved by a two-thirds majority of both houses of the Legislature, drafted Committee Amendment A to LD 1893. This amendment clarified that the Project constitutes a substantial alteration of public lands and is thus subject to the two-thirds vote requirement. In February 2020, the ACF unanimously voted to recommend that LD 1893, as amended, should pass. However, no vote was taken in

either chamber due to the adjournment resulting from the COVID-19 pandemic and the bill died at the conclusion of the 129th Legislature.

On June 23, 2020 BPL and CMP entered an amended and restated transmission line lease agreement (“BPL Lease”), assigned to NECEC on January 4, 2021, for a 0.9-mile transmission line corridor through public reserved lands in Johnson Mountain Township and West Forks Plantation under 12 M.R.S. § 1852(4), explicitly superseding the 2014 lease for the same. The BPL Lease provides that the Project “shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to [the Project] in connection to its use of [the public reserved land].” The BPL Lease also provides that BPL has the right to request its amendment “if any Lease term is found not to comply with Maine state law regarding public reserved lands.”

At the end of June 2020, Senator Black filed a complaint in the Superior Court, seeking judicial review of the Lease and the potential application of Art. IX, Sec. 23 of the Maine Constitution. The Court issued a preliminary ruling on March 17, 2021, holding that leases executed under 12 M.R.S. § 1852(4) are not necessarily exempt from legislative approval. The Court on August 10, 2021 issued its final Decision and Order, reversing the grant of the BPL Lease.⁸ BPL and NECEC’s appeal of that decision is currently pending at the Law Court, during which time the decision’s effect is stayed under M.R. Civ. P. 62(e).⁹ The automatic stay notwithstanding, the Law

⁸ *Black v. Cutko*, BCD-CV-2020-29, 2021 WL 3700685, at *5 (Me. B.C.D. Aug. 10, 2021).

⁹ There appears to be some disagreement among the parties as to the effect of an appeal of a final order of this Court. Pursuant to rule M.R. Civ. P. 62(e), “the taking of an appeal from a judgment shall operate as a *stay of execution* upon the judgment during the pendency of the appeal.” (Emphasis

Court issued an agreed-upon order prohibiting NECEC from building on the leased property until the legal questions have been resolved.

Voter Initiatives

On August 29, 2019, a group of voters filed an application for a citizens' initiative targeting the May 3, 2019 CPCN order, seeking to force the PUC to make new findings of fact and reverse its decision. On May 12, 2020, after the Law Court affirmed the Secretary of State's verification of the petition signatures, thereby certifying the initiative for public vote in November 2020, Avangrid Networks challenged the initiative as unconstitutional and sought to bar it from the ballot. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 236 A.3d 882. The Law Court agreed and on August 13, 2020, just one month after opening briefs were filed on July 14, 2020, held that the initiative was "not legislation" because it required the PUC to "reverse its findings and reach a different outcome in an already-adjudicated matter." *Id.* ¶ 36.

On or about September 15, 2020, voters filed an application for a second citizens' initiative—the one at issue here (the "Initiative"), and the Secretary of State issued the petition on October 30, 2020. Comporting with the statutory requirements of 21 M.R.S. §§ 901-907, a group of Maine voters circulated the Petition and obtained enough signatures to achieve submission of the petition to the electors for

supplied). The text of this rule is clear; what is stayed by the decision to appeal is the *enforcement* of the Court's order vacating the BPL lease. As of now, however, the BPL Lease stands as void in the eyes of the law.

consideration in accordance with art. IV, section 18(2) of the Maine Constitution.¹⁰

On February 22, 2021, the Secretary of State certified that the proponents of the Initiative had gathered enough signatures for submission of the Initiative to the Legislature. The certified petition was printed by the Legislature’s Revisors Office as LD 1295.¹¹ A copy of LD 1295 is attached as Exhibit D to Plaintiffs’ Verified Complaint.

LD 1295 (a copy of which is also attached for convenience to this Order) proposed a bill with twofold effect, retroactively amending Titles 12 and 35-A of the Maine Revised Statutes. First, in Section 1, LD 1295 amends BPL’s authority to lease public reserved lands for certain linear projects by providing that “poles, transmission lines and facilities, landing strips, pipelines and railroad tracks under this subsection are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23, and [such a lease] may not be granted without first obtaining the vote of 2/3 of all the members elected to each House of the Legislature.” It also states that “this provision applies retroactively to September 16, 2014.”

Second, in Sections 4 and 5, LD 1295 adds three new provisions relating to electric transmission lines in particular, specifying that (i) “a high-impact electric

¹⁰ At least 10% of the total number of votes cast in the gubernatorial election preceding the filing of the petition. Me. Const. art. IV, § 18.

¹¹ When a finalized petition for direct initiative is submitted to the Maine Secretary of State’s Office and certified, the change in law that the petition purports to make is printed by the Maine Legislature Revisors Office as a Legislative Document (“LD”). That LD serves as the initial draft which may be amended, enacted, or rejected by the Legislature in a final vote. Here, the Initiative was printed as LD 1295 for consideration by the Legislature and this is the document from which the ballot question was subsequently drafted.

transmission line may not be constructed anywhere in the State without first obtaining the approval of the Legislature,” with a supermajority needed if the line uses or crosses public lands; (ii) notwithstanding the prior subsection, construction of high-impact electric transmission lines in a defined region of Franklin and Somerset Counties is banned altogether; and (iii) these new restrictions “apply retroactively to September 16, 2020 and apply to any high-impact electric transmission line the construction of which had not commenced as of that date.” LD 1295 does not explicitly mention the Project, but its cumulative effect would be to block completion of the Project, potentially indefinitely.

Prior to adjournment *sine die* on March 30th, 2021, the Legislature failed to act on LD 1295. *See* Me. Const. art. IV, § 18(2). Accordingly, on April 8, 2021, pursuant to her Constitutional obligation in the absence of Legislative action on a direct initiative, the Governor referred the Initiative “to the people at an election to be held in November” of 2021. Me. Const. art. IV, § 18(3). Pursuant to 21 M.R.S. § 906, the Secretary of State received the Governor’s proclamation and prepared a combined ballot that sufficiently posed a question to the Maine people regarding the enactment of LD 1295. The wording of the question reducing LD 1295 to a concise “yes or no” statement was as follows:

Do you want to ban the construction of high-impact electric transmission lines in the Upper Kennebec Region and to require the Legislature to approve all other such projects anywhere in Maine, both retroactively to 2020, and to require the Legislature, retroactively to 2014, to approve by a two-thirds vote such projects using public land?¹²

¹² The decision to reduce LD 1295’s language into a single ballot question was affirmed by the Law Court in *Caiazzo v. Sec’y of State*, 2021 ME 42, 256 A.3d 260.

As with LD 1295, the ballot question does not expressly mention the Project, but because of the retroactivity provisions, the ballot question applies to the Project.

Avangrid Networks' parent company Avangrid, Inc. disclosed the Initiative, as well as the various pending lawsuits related to the Project, in its October 30, 2020 10-Q report to the Securities and Exchange Commission ("SEC"). Avangrid, Inc. stated that it "[could] not predict the outcome of this citizen initiative." The Initiative was certified for submission to the Legislature on February 22, 2021. In its 10-K report to the SEC of March 1, 2021, Avangrid, Inc. noted that among "strategic risk factors" potentially causing delays, budget overruns, or cancellations regarding the Project were "regulatory approval processes, permitting, new legislation, citizen referendums or ballot initiatives" which could "have an adverse effect on the success of the [Project] and our financial condition and prospects."

Proponents of the Initiative included a political action committee, "No CMP Corridor," which repeatedly stated that the purpose of the Initiative was to stop the Project. After the final wording of the question for the ballot was issued, No CMP Corridor issued a statement praising the drafting and stated that the people of Maine will "have the opportunity to vote on the fate of the destructive CMP Corridor." Proponents of the Initiative sought public support by emphasizing that a "yes" vote would block the Project.

On November 2, 2021, the Initiative was approved by a 59% majority of voters. It is scheduled to take effect on or about December 19, 2021.

Project Expenditures, Operations, and Impacts

In 2018, the EDCs selected CMP and Hydro-Québec's proposal, i.e., the Project, for delivering clean energy to Massachusetts. Subsequently, CMP and Hydro-Québec, through its U.S. affiliate H.Q. Energy Services (U.S.) Inc. ("HQUS"), entered contracts obligating CMP to provide 1,200 MW of transmission services to HQUS and the EDCs for a period of forty years. HQUS also agreed to sell 1,090 MW of energy to the EDCs for the first 20 years of the Project. HQUS can use its remaining transmission capacity, i.e., 110 MW per year for the first twenty years and 1200 MW for the second twenty years, to sell additional energy into the New England markets, including Maine.

NECEC anticipated beginning construction of the Project on December 4, 2019. However, the final permit required for construction, the Presidential Permit, was not received until January 14, 2021. Consequently, NECEC did not commence clearing and construction activities in Segments 2-5 of the Corridor until January 18, 2021, and in Segment 1, apart from public reserved lands, until May 15, 2021. Such delays in large-scale transmission line projects are common, if not inevitable.

As of the filing of the instant complaint, NECEC has spent nearly \$450 million on the Project, representing 43% of the total cost estimate, and has undertaken substantial physical construction, including cutting approximately 124 miles of right-of-way for direct current line, clearing the entire alternating current line corridor, erecting transmission structures along the Project corridor, and preparing the converter station site. NECEC anticipates that approximately 97% of the corridor

would have been cut by the end of 2021.¹³ Continued construction will create approximately 300 new direct jobs in addition to the roughly 600 direct jobs currently related to the Project. NECEC believes that the completion of the Project will provide Maine with lowered electricity costs, improved transmission supply and reliability, reduced greenhouse gas emissions, \$18 million in annual property taxes, and \$250 million of value in rate relief, economic development, and education-related benefits. The current estimate for the total cost of the Project is approximately \$1.04 billion.

As for Segment 1, which includes the portion of the Upper Kennebec Region in which the Initiative seeks to prohibit all high-impact transmission lines and the public lands subject to the BPL Lease, cutting commenced on May 15, 2021 following the First Circuit's vacating of its January 15, 2021 partial injunction of construction activities in this segment. No cutting, clearing, or associated construction has been undertaken yet on the public reserved lands. Presently, all work on the Project corridor is suspended due to the DEP's suspension of its permits pending the outcome of the instant motion. Central Maine Power Co. & NECEC Transmission LLC, License Suspension Proceeding, Decision and Order 11 (Me. D.E.P. Nov. 23, 2021). Because this Court is not granting a preliminary injunction to stay the Initiative, the DEP permits will remain suspended until a final disposition of NECEC's legal challenge to the Initiative. *Id.* at 12. The DEP, as part of its order, requires NECEC to stabilize disturbed soils, spread all piles of wood chips and grindings, and stabilize

¹³ This estimate was provided before NECEC suspended operations to extend the corridor.

off-corridor access roads, as well as backfill or cover uncompleted structure foundations or bore holes. *Id.* No new vegetation may be cut. *Id.*

Plaintiffs originally contractually agreed that the commercial operation date for the Project would be December 13, 2022. At present, the schedule envisions a December 13, 2023 commercial operation date, assuming no further delays, with a contractual deadline of August 23, 2024. NECEC may extend this deadline to August 23, 2025 by posting up to \$10.9 million of additional security. Suspending operations comes at a cost. Without sufficient work, contractors hired for construction activities on the Project would have to either standby or demobilize and later remobilize. The approximate cost to standby is \$742,000 per week and the approximate cost to demobilize is \$1,542,000. NECEC estimates that an 18-month delay would incur \$113 million in additional costs and a 24-month delay would incur \$137 million, representing approximately 11% to 13% of the total project budget.

STANDARD OF REVIEW

A party seeking a preliminary or permanent injunction generally has the burden of demonstrating that the following four criteria are met:

1. That plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility);
2. That plaintiff will suffer irreparable injury if the injunction is not granted;
3. That such injury outweighs any harm which granting the injunctive relief would inflict on the defendant; and

4. That the public interest will not be adversely affected by granting the injunction.

Department of Environmental Protection v. Emerson, 563 A.2d 762, 768 (Me. 1989). These criteria “are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together in determining whether injunctive relief is proper in the specific circumstances of each case.” *Id.* The emphasis a court places on any single criterion can vary depending upon the relative strength of the other criteria. *Id.* However, “[f]ailure to demonstrate that any one of these criteria are met requires that injunctive relief be denied.” *Bangor Historic Track, Inc. v. Dep’t of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 10, 837 A.2d 129. Where the public interest is involved, “the court’s equitable powers assume an especially broad and flexible character.” *State v. DeCoster*, 653 A.2d 891, 895 (Me. 1995).

Because injunctive relief is an equitable remedy, and thus discretionary, a court’s denial of the requested relief “must stand unless plainly wrong or based on an error of law.” *Emerson*, 563 A.2d at 768 (quoting *Crafts v. Quinn*, 482 A.2d 825, 830 (Me. 1984)). “[F]act-finding that is a prerequisite for judicial action, such as a finding of irreparable injury, or lack thereof, is reviewed for clear error.” *Bangor Historic Track*, 2003 ME 140, ¶ 11, 837 A.2d 129.

DISCUSSION

The Court’s analysis is organized around the four preliminary injunction factors and explains why none of the factors are met under the circumstances of this case.

I. Success on the Merits

NECEC raises several legal theories which, it argues, create a substantial possibility of success on the merits. NECEC posits that the Initiative should be invalidated because it is unconstitutional as (i) an unlawful deprivation of its vested rights in the Project; (ii) a violation of separation of powers principles enshrined in the U.S. and Maine Constitutions; and (iii) an impairment of the Contracts Clause of the U.S. and Maine Constitutions.¹⁴ The fact that the law at issue was enacted by a public referendum rather than the Legislature does not alter the requirement that the law comport with the Constitution. *Citizens Against Rent Control/Coal. For Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981). However, “the constitutional validity of a citizens’ initiative is evaluated under the ordinary rules of statutory construction” and thus the Initiative carries a “heavy presumption of constitutionality” which NECEC must overcome. *Portland Reg’l Chamber of Commerce v. City of Portland*, 2021 ME 34, ¶ 7, 253 A.3d 586 (quoting *League of*

¹⁴ Intervenor HQUS also raises an additional, independent argument that the Initiative violates the Articles of Separation (“Articles”) which preceded Maine’s statehood and solidified Maine’s separation from the Commonwealth of Massachusetts in 1820. Specifically, they assert that the Articles reserved certain public lots—including the ones subject to the BPL Lease—for certain “beneficial uses” and that the Law Court, in *Opinion of the Justices*, 308 A.2d 253 (Me. 1973), defined that term broadly to mean “public uses.” *Id.* According to HQUS—as has been asserted many times by NECEC—the Project is a public use, and thus the Initiative violates the Articles’ provisions. The Court however is unconvinced by this argument and doubts whether HQUS, a non-sovereign party or intended beneficiary, has standing to assert a claim for violation of the Articles. Additionally, HQUS was not an intended third-party beneficiary of the Articles, *see, e.g., Davis v. R C & Sons Paving, Inc.*, 2011 ME 88, ¶ 12, 26 A.3d 787, nor is it likely that an interstate compact such as the Articles creates a cause of action under which private citizens may bring suit. *See, e.g., Doe v. Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 107 (3d Cir. 2008).

Women Voters v. Sec’y of State, 683 A.2d 769, 771 (Me. 1996)). With this guidance in mind, the Court addresses NECEC’s arguments in turn.¹⁵

A. Vested Rights

NECEC contends that the Initiative deprives it of vested rights in the Project. Defendants respond first that “vested rights” is not the proper analysis for retroactive State legislation. Even if it is, argue Defendants, NECEC’s rights did not vest on the facts of this case. The Court agrees with both propositions, while at the same time acknowledging that Plaintiffs have legitimate arguments to the contrary, since until recently the vested rights jurisprudence has been unclear.

1. Vested Rights Analysis Does Not Apply to Retroactive Statutes.

In *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1061 n.5 (Me. 1986), *abrogated on other grounds by DeMello v. Dep’t of Envtl. Prot.*, 611 A.2d 985 (Me. 1992), the Law Court “clarified the proper analysis concerning the retroactive application of statutes.” *State v. L.V.I. Group*, 1997 ME 25, ¶ 9, 960 A.2d 690. If the Legislature

¹⁵ The Court acknowledges that Defendants have raised a sovereign immunity defense to this suit. Because the Court denies Plaintiffs’ Motion, the Court only briefly addresses the defense. As the Law Court noted in *Waterville Indus. v. Finance Auth. of Maine*, “a claim against the State will be dismissed unless the State, acting through the Legislature, has given its consent that the present action be brought against it.” 2000 ME 138, ¶ 21, 758 A.2d 986. To date, Maine courts have failed to recognize an exception to sovereign immunity that allows for suit against constitutionally derived branches of government. And, under the multifactor test for determining sovereign immunity recited by the First Circuit in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, the Maine House and Senate seemingly qualify. 991 F.2d 935, 939 (1st Cir. 1993); *see also Reed v. Bd. of Trs.*, No. CV-08-155, 2008 Me. Super. LEXIS 214 (Dec. 4, 2008). However, the context in which this suit arises—an action seeking declaratory judgment regarding constitutionality—muddies the availability of the sovereign immunity defense. Several courts in other states have held that in such cases, sovereign immunity is unavailable as a defense. *See Jones v. Bd. of Trs. of Ky. Retirement Sys.*, 910 S.W.2d 710, 713 (Ky. 1995) (holding legislature immune to constitutional claim “would undermine and destroy the principle of judicial review” and leave “no redress for the unconstitutional exercise of legislative power”); *see also Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 391 (N.H. 1999); *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 75–76 (Tex. 2015). The Court is inclined to agree with this line of cases, because the availability of judicial review here appears to be integral to the constitutional framework, and not subject to a sovereign immunity defense.

intends for the provisions of a statute to apply retroactively,¹⁶ the statute must be so applied “unless a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature.” *Norton*, 511 A.2d at 1061 n.5. Here, both the wording of the Initiative and LD 1295 clearly and explicitly intend for changes in the law to apply retroactively. There is thus no question of Legislative intent. The question is whether the doctrine of vested rights necessarily invokes a constitutional provision such that the retroactivity analysis applies.

The etymology of the vested rights doctrine is confusing. *See id.* Prior to *Norton*, the Law Court appears to have used the phrase “vested rights” as a heuristic when determining that a retroactive statute is unconstitutional, “without identifying the source of the constitutional prohibition.” *Norton*, 511 A.2d at 1061 n.5. Indeed, the parties have not brought to the Court’s attention any case that expressly grounds the doctrine on a specific constitutional provision.¹⁷ Rather, the doctrine of vested rights appears to be an equitable concept, derived by implication from the state and federal constitutions (but without attribution to any specific provisions), and developed (especially in the municipal context) through a process of judge-made constitutional common law. *See, e.g., Coffin v. Rich*, 45 Me. 507, 514-15 (1858); *Baxter v. Waterville Sewage Dist.*, 79 A.2d 585, 588 (Me. 1951); *Thomas v. Zoning Bd. Of*

¹⁶ If some provisions of LD 1295 can be characterized as procedural, such as possibly the Initiative’s requirement for two thirds approval by the Legislature, then those provisions might not be considered retroactive. *Norton, Inc.*, 511 A.2d at 1061 n.5. It is unclear, however, whether the procedural-substantive distinction retains any vitality after *DeMello*. *See DeMello*, 611 A.2d at 987. No party has addressed the procedural-substantive argument, and the Court does not address it further.

¹⁷ At oral argument, Plaintiffs asserted that the doctrine of vested rights, in and of itself, is a fundamental right. Plaintiffs have not brought to the Court’s attention any case expressly holding that vested rights are a fundamental constitutional right, and the Court is not aware of any such case.

Appeals, 381 A.2d 643, 647 (Me. 1978); *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981); *cf.* Henry Paul Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1, 10 (1975). As such, the vested rights doctrine cannot be invoked to defeat the retroactivity provisions of the Initiative.

As clarified in *L.V.I. Group*, a party seeking to demonstrate the unconstitutionality of a retroactive state statute must ground its challenge on a specific provision of the Maine or U.S. Constitutions. 1997 ME 25, ¶¶ 9-16. In *Norton*, for instance, the employer argued that retroactively applying a change in the Maine Workers' Compensation Act, 39 M.R.S. § 194-B, would "impermissibly impair contractual rights in violation of *Me. Const. art. I, § 11*." *Norton*, 511 A.2d at 1061 (emphasis added). In *L.V.I. Group*, the employer mounted attacks on a retroactive change to Maine's severance pay statute, 26 M.R.S. § 625-B, based on the Due Process Clauses of the Maine and United States Constitutions, *Me. Const. art. I, § 6-A*; *U.S. Const. amend. XIV, § 1*; the Takings Clauses of both constitutions, *Me. Const. art. I, § 21*; *U.S. Const. amend. V*; the Equal Protection Clauses of both constitutions, *Me. Const. art. I, § 6-A*; *U.S. Const. amend XIV*; and several other specific constitutional provisions. The vested rights doctrine is not similarly based on any specific provision of the Maine or U.S. Constitutions, and therefore does not apply to the retroactivity analysis. Plaintiffs have not been divested of constitutionally protected vested rights.¹⁸

¹⁸ Plaintiffs' and Intervenor's separate arguments based on Separation of Powers and the Contracts Clause are addressed later in this Order.

Even if the vested rights doctrine is of sufficient constitutional specificity to apply, it would still not be enough to defeat the clear legislative intent for the Initiative to apply retroactively. The Initiative is an exercise of state “police power” to protect the environment.¹⁹ “The exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts.” *Baxter*, 79 A.2d at 589. The Law Court has declared that this rule “is not only reasonable, but necessary, as a contrary rule would enable individuals by their contracts, or contractual relations, to deprive the State of its sovereign power to enact laws for the public health and public welfare.” *Id.* Even in the municipal context, which is discussed later, the Law Court recognizes that “all property is held in subordination to the police power.” *Thomas*, 381 A.2d at 647.

In reliance on *L.V.I. Group*, 1997 ME 25, ¶ 15, 690 A.2d 960, Plaintiffs counter that the Maine Constitution forbids interference with vested rights, and the gravamen of vested rights challenges is in “due process.” However, the language Plaintiffs rely on in *L.V.I. Group* is a passing reference to the employer’s losing argument under the Declaration of Rights provision of the Maine Constitution, *Me. Const. art I, § 1*, not the Court’s analysis of vested rights or the Due Process Clause.

¹⁹ The police power of the State to make laws within its territory is “older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved to the states respectively or to the people.” *York Harbor Vill. Corp. v. Libby*, 126 Me. 537, 540, 140 A. 382, 385 (1928). The frontiers of the police power are those “expressed or necessarily implied in the Federal Constitution.” *Id.* When a fundamental right has not been implicated, the Court reviews the validity of a given statute as an exercise of this police power only for a rational basis, requiring no more than that “(1) the police powers be exercised for the public welfare; (2) the legislative means employed be appropriate to achieve the ends sought; and (3) the manner of exercising the power not be unduly arbitrary or capricious.” *State v. Haskell*, 2008 ME 82, ¶¶ 5-6, 955 A.2d 737 (quotation marks omitted). The Initiative satisfies these criteria.

L.V.I. Group does not say that the doctrine of vested rights is synonymous with or specifically based on the Due Process Clause of either the state or federal constitutions. Indeed, in *L.V.I. Group*, unlike here, the employer actually made an argument based on the Due Process Clause. Even if NECEC had brought a Due Process Clause challenge, in addition to or as the explicit basis for its vested rights argument, it would be unavailing. “The retroactive aspects of economic legislation meet the requirements of the due process clause if enacted to further a legitimate legislative purpose by rational means.” *L.V.I. Group*, 1997 ME 25, ¶ 9, 690 A.2d 960. This is the lowest level of constitutional scrutiny, and easily met by the Initiative.²⁰ The Initiative seeks to impose additional environmental protections, and enacting those protections through supplemental requirements contained in the Initiative is not unduly arbitrary or capricious.

Plaintiffs also rely on the body of vested rights jurisprudence developed in the context of municipal land use and zoning. *See, e.g., Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266; *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 25, 856 A.2d 1183. Unlike the Legislature (or the people of Maine acting through a public Initiative), municipalities enact zoning laws and local ordinances under their limited home-rule powers, which are intended to address issues “which are local and municipal in character.” Me. Const. art. IX, § 1; *see also* 30-A M.R.S. § 3001. Local rules and ordinances are not equivalent in authority to state legislation, as the latter

²⁰ It is clear that Plaintiffs have not brought a Due Process Clause challenge, because at oral argument Plaintiffs insisted the vested rights analysis does not require any legitimate purpose/rational means analysis, which are indispensable components of a Due Process challenge.

can preempt local regulations either expressly or implicitly. *State v. Brown*, 2014 ME 79, ¶ 23, 95 A.3d 82. Cases decided in the municipal context, where the enforceability of a local ordinance is at stake, therefore, have little if any relevance to the analysis of whether a statute enacted by the Legislature can be applied retroactively. However, even if the municipal-level vested rights analysis applies, as discussed below it does not change the outcome.

2. There is No Violation Under a Vested Rights Analysis.

As the vested rights doctrine has been developed in the municipal context, NECEC posits that the right to build a project vests under two scenarios. First, a right to build and complete a project vests, even if the law changes, when there has been (1) actual, physical commencement of significant and visible construction (2) undertaken in good faith with the intention to continue through and carry it to completion (3) pursuant to a valid permit. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. Second, according to NECEC, the right to construct a project vests if the lawmakers seek to prohibit construction in “bad faith” or through “discriminatory enactment.”²¹ *See Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231, 1233 (Me. 1982); *cf. Kittery Retail Ventures LLC*, 2004 ME 65, ¶ 25, 856 A.2d 1183. NECEC asserts that its right to complete the Project vested under both scenarios. The Court, however, finds to the contrary. Even if the vested rights analysis can be lifted from the municipal context and applied to a state-wide Initiative, NECEC’s rights did not vest under either scenario.

²¹ At oral argument, Plaintiffs clarified that in their view the bad faith prong works in conjunction with the *Sahl* factors, not independently. Either way, the outcome here is no different.

The Court addresses NECEC’s “bad faith” argument first. NECEC claims that it has vested rights to complete the Project because of the bad faith or discriminatory intent reflected in the Initiative. The Court is unwilling to credit the argument. Even when a small, municipal body enacts an ordinance, it is difficult to demonstrate bad faith on the part of the governmental body. *See Kittery Retail Ventures, LLC*, 2004 ME 65, ¶ 25, 856 A.2d 1183. NECEC has not demonstrated bad faith here. When the voters of Maine cast ballots in a state-wide Initiative, the Court is unwilling to ascribe bad faith or discriminatory intent on the part of the electorate (or the Legislature for its role in enacting the Initiative).²² This is an illustration of why unmooring the vested rights analysis from its local, municipal application can lead to problems. Indeed, the Court questions whether as a matter of law it is possible for the citizens of a democracy to cast votes in a state-wide, public referendum other than in good faith. Perhaps there are such occasions, but this is not one of them. With regard to the Project, there is a stark—but legitimate—good faith difference of opinion and vision between Plaintiffs and Defendants (and the Intervenor aligned on each side of the dispute). The Court declines to find NECEC’s rights to complete the Project vested because of bad faith or discriminatory intent on the part of the Maine electorate.

The Court next turns to consideration of the *Sahl* factors, but here too the Court begins its analysis with a discussion of good faith, this time on the part of

²² The Court is also unwilling to accept Plaintiffs’ invitation to find that the five individuals who sought to certify the Initiative were acting in bad faith. These individuals were merely exercising their rights under the direct initiative procedures found in the Maine Constitution, however objectionable their goals were to Plaintiffs.

NECEC. One of the *Sahl* factors requires that construction was commenced in good faith, by which the *Sahl* Court means construction was undertaken with the genuine intention to carry construction through to completion. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. There can be no doubt that in this sense, NECEC has proceeded in good faith. NECEC has spent nearly \$450 million on the Project, and the Project is substantially complete. That is no head fake. Just as the voters of Maine have acted in good faith, so too has NECEC. Having addressed the element of good faith, the Court next addresses the remaining *Sahl* factors.

Circumstances Attending Commencement of Significant Construction

Sahl requires “actual physical commencement of some significant and visible construction” for rights to vest. *Id.* The question is when during the timeline to apply that measure. In some circumstances, it is appropriate to make the determination “when a municipality applies a new ordinance to an existing permit.” *Id.* (quoting *Peterson v. Town of Rangeley*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930). Plaintiffs argue that by whichever Initiative date in their view should be reasonably selected (February 22, 2021, April 8, 2021, November 2, 2021, or December 19, 2021), they had commenced substantial physical construction. According to Plaintiffs, this should settle the matter.

However, the doctrine of vested rights, even in the municipal setting, is an equitable concept.²³ *Kittery Retail Ventures*, 2004 ME 65, ¶¶ 24-27. In this sense, *Sahl* does not provide inflexible requirements that must be mechanically applied, but

²³ At oral argument, the Maine Chamber of Commerce referred to the vested rights doctrine as “constitutional in origin but equitable in nature,” and acknowledged that this is an equity proceeding.

rather an example of certain factors that should be considered as the starting point of the analysis. More broadly, when considering a matter in equity, the totality of the circumstances must be considered. *See Tarason v. Town of S. Berwick*, 2005 ME 30, ¶ 14, 868 A.2d 230. Even the *Sahl* court recognizes that there are circumstances which limit or otherwise prevent rights from vesting. *See Sahl*, 2000 ME 180, ¶ 13. Indeed, the Law Court has held that whether a developer has notice of opposition to its projects may complicate a “vested rights” argument. In *Portland v. Fisherman’s Wharf Assocs. II*, the Court considered the developer’s “knowledge of the contents of the proposed ordinance and its retroactive provisions” in its determination that the petitioner “failed to establish any vested rights based on equitable grounds.” 541 A.2d 160, 164 (Me. 1988). Later, in *Kittery Retail Ventures*, the Law Court again factored in the developer’s “knowledge of the pending ordinance changes” and again held that it was “not the case in which equity demands that [the developer] acquire vested rights.” 2004 ME 65 ¶ 31, 856 A.2d 1183. NECEC’s argument that these cases are irrelevant because the developers in them had not begun construction at the time that the changes in the law became pending misses the point. Both *Kittery Retail* and *Fisherman’s Wharf II* stand for the proposition that a developer’s awareness of a likely change in the law is relevant to the analysis of whether rights will vest upon the commencement of construction.

At the time NECEC commenced construction of the Project in Segments 2-5 on January 18, 2021, NECEC was well aware of the staunch opposition the Project faced from many citizens in Maine. An attempt to launch an initiative to stop the Project

in 2020 did not make it onto the ballot due to constitutional violations in the proposed bill, but the fact that the 2020 initiative collected enough signatures to qualify for a statewide referendum put NECEC on notice of the public's desire to effectuate a change in the law. On October 30, 2020, the Secretary of State issued the petition for the Initiative relevant to this case, reinforcing the likelihood that the Project would face legislative roadblocks, especially given the popularity of the 2020 initiative. NECEC was aware of the second Initiative and admitted in its October 30, 2020 10-Q report to the SEC that it could not predict the outcome of the referendum. NECEC commenced construction on January 18, 2021 despite this knowledge (and knowledge of all the other adverse actions to that date described in the Statement of Facts). NECEC's decision to forge ahead with construction in the face of a substantial possibility that retroactive change negatively impacting the Project could be passed in the near future was a calculated risk.

On February 22, 2021, the Initiative was certified for submission to the Legislature. Sometime between October 2020 and March 2021, the text of LD 1295 was released. On March 1, 2021, Avangrid, Inc. disclosed in its 10-K report to the SEC that "new legislation" and "citizen referendums and ballot initiatives" were strategic risk factors potentially causing delays, budget overruns, and cancellation of the Project. On March 17, 2021, this Court issued its preliminary ruling that the public land leases were not necessarily exempt from legislative approval. On April 8, 2021, the Governor referred the Initiative to the voters for the November election. Thus, by the time NECEC started construction in Segment 1 on May 15, 2021, its

knowledge about a potential change in the law applying retroactively to the Project was further heightened. NECEC started construction in Segment 1 under intense risk that a change in the law would have an adverse impact on the success of the Project. Under the totality of the circumstances, NECEC's rights to complete the Project did not vest upon commencement of substantial construction.²⁴

Valid Permit

Under *Sahl*, construction must be commenced “pursuant to a validly issued building permit.” 2000 ME 180, ¶ 12, 760 A.2d 266. Defendants argue that in order to vest rights, however, the permit in question must be final, meaning that the appeal period must have run.²⁵ The *Sahl* Court was not faced with this question, and the Law Court appears not to have addressed it.

NECEC argues that the requirement for a valid permit means only that a developer cannot vest rights to a permit which is illegal at the time of issuance, but cannot cite a Maine case to support this contention. NECEC points to the West Virginia case of *Harding v. Board of Zoning Appeals*, 219 S.E.2d 324, 332 (W.V. 1975), but that case stands for the unremarkable proposition that rights will not vest pursuant to permits that were improperly granted. *Id.* (holding owners of building

²⁴ At oral argument, IECG asserted that denying the Motion would constitute a “flashing red light” to energy companies interested in doing business in Maine. While that may or may not be the case, the visual is useful. Here, the evidence establishes that upon commencement of construction, both in January and May 2021, Plaintiffs themselves were faced with a flashing red light about the risks of proceeding with the Project.

²⁵ Plaintiffs concede that since permits can be vacated on appeal, developers run the risk of proceeding with commencement of construction before the end of the relevant appeal periods (or before the end of litigation appealing grant of the permits). Although Plaintiffs argue that with a permit in hand they are at least shielded from the risk posed by subsequent changes in the law, Plaintiffs tacitly concede that even under their argument, rights do not completely vest upon issuance of a permit.

who incurred expenditures in adding apartments to building did not acquire vested rights because their initial conditional use permit was improperly granted). *Harding* cannot reasonably be construed to cabin the analysis to that one scenario.

Contrary to NECEC's position, at least one trial court in Maine has held that the right to build under a permit does not vest while that permit is on appeal. *Conservation Law Found., Inc. v. State*, No. AP-98-45, 2002 Me. Super. LEXIS 15 at *11 (Jan. 28, 2002) (holding that vested rights in permit do not exist "simply by virtue of its issuance because it was challenged in a timely and procedurally correct fashion"). Courts in other states agree with this approach. *See, e.g., Powell v. Calvert Cty.*, 795 A.2d 96, 1010 (Md. 2002) (holding that until all necessary approvals are final, "nothing can vest or even begin to vest"). The case of *Donadio v. Cunningham*, 277 A.2d 375, 382 (N.J. 1971), is particularly instructive. In *Donadio*, the McDonald's Corporation argued that it attained the equitable right to build a restaurant by initiating construction immediately following a successful trial over a zoning ordinance but long before the time for appeal had expired. *Id.* That court held that it was in the public interest that "no such overriding rights may be acquired when the acts relied upon are done prior to the end of the appeal period" and chastised the McDonald's Corporation for attempting to "thwart that public interest . . . by winning an unseemly race." *Id.* This Court finds persuasive the approach and reasoning of these cases. In order to merit protection as a vested right, under the unique facts presented here, the permits relied upon must be final and not subject to appeal.

In this case, NECEC acquired the last permit required for construction on the Project to begin, the Presidential Permit, on January 14, 2021, and began construction shortly thereafter, on January 18, 2021. Thus, NECEC did commence construction pursuant to a validly issued permit. However, the Presidential Permit was not final. Although it was permissible for NECEC to begin construction in reliance on the Permit, it did so at its own risk because the Permit was timely appealed. NECEC's rights to complete construction, insulated from any change in the law brought about by the Initiative, did not vest.

Of course, although the Presidential Permit was the last permit needed, it was not the only permit required. NECEC commenced construction while several of the permits required for the Project were subject to pending appeals by an administrative agency or court. For instance, the appeal of the DEP order to the DEP is still pending, and the DEP Commissioner recently suspended the DEP permits pending the outcome of this litigation. Similarly, the appeal of the ACE Permit is still pending at the First Circuit. The uncertain outcome regarding the fate of all these permits cuts against vesting.

There is also the question of the BPL Lease. In *Black v. Cutko*, the Business and Consumer Court reversed the grant of the BPL Lease, finding no competent evidence that BPL fulfilled its statutory and constitutional obligations before issuing the lease to NECEC. BCD-CV-2020-00009, 2021 WL 3700685, at *5 (Me. B.C.D. Aug. 10, 2021). The language of *Sahl*, which focuses on vested rights in the context of changes in zoning and other governmental ordinances, requires a validly issued

permit. 2000 ME 180, ¶ 12, 760 A.2d 266. The analysis, however, applies equally well to the BPL Lease. The BPL Lease is indisputably a critical element in the Project, and therefore functions equivalently to a permit. As it stands at the moment, the BPL Lease is considered void. Without the BPL Lease, the Project cannot be completed. Accordingly, NECEC's rights to complete the Project will not vest unless or until the BPL Lease is finally approved. There is no question that NECEC had the right to begin construction under all these circumstances and did so in good faith. But because NECEC began work on the Project before all necessary approvals were final, it did so at the risk that a change in the law would imperil completion of the Project, as Avangrid acknowledged in its 10-K reports.

Intervenor Maine State Chamber of Commerce argues that if NECEC or any developer must wait until all permits and approvals are final before rights will vest, then big, complicated, projects will never be undertaken or completed in Maine. The Chamber certainly has a well-founded concern, and the Court acknowledges that the permitting and approval process for the Project has been daunting. But whether the conclusion reached here will forestall other significant projects, is speculative.²⁶ Not

²⁶ To be clear about the conclusion on this point, the Court is not saying that final permits are always and everywhere needed to support a vested rights argument, but that in some circumstances they may be—because of the equitable nature of the vested rights inquiry. This case presents such circumstances, and the Court's analysis is (as it must be) tied to the facts of this case. Equity follows the law, as the Maine State Chamber of Commerce noted at oral argument, but it does not work in a vacuum. A developer's extensive knowledge about comprehensive efforts to change the law in a way that would adversely impact a project, as the Law Court has said, complicates the vested rights analysis. This does not mean, as Plaintiffs and supporting Intervenors protest, that permits are not worth the paper they are written on. Such a claim would misinterpret the result of this decision. It does mean that if at or around the start of substantial construction developers are aware of events rising to the existential level of "strategic risk factors," as were Plaintiffs in this case, they might not later be able to claim vested rights without final permits in hand.

all big, complicated projects may be met with the widespread public opposition attendant to this Project. Even here, NECEC may yet prevail and complete the corridor. And ultimately the Legislature can respond to any undue chilling effect by, among other steps, streamlining the approval process. On the facts of this case, however, two out of the three *Sahl* factors have not been satisfied, and NECEC's rights to complete the Project despite subsequent, retroactive changes in the law, did not vest.

B. Separation of Powers

NECEC also argues that the Initiative violates the separation of powers principles enshrined in both the United States and Maine Constitutions. *See* U.S. Const. arts. I-III.; Me. Const. art. III §§ 1-2. Specifically, NECEC claims that the Initiative usurps both executive and judicial authority.

“The more that the ‘independence of each department, within its constitutional limits, can be preserved, the nearer the democratic system of government will approach the perfection of civil government, and the security of civil liberty.” *Avangrid*, 2020 ME 109, ¶ 24 (quoting *Lewis v. Webb*, 3 Me. 326, 329 (1825)). Maine law requires “strict separation of powers between the three branches of government.” *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985). Under Maine’s Constitution, the separation of powers requirement is “more rigorous” than is its federal counterpart. *Id.* When determining whether a separation of powers violation has occurred, the court must ask: “Has the power in issue been explicitly granted to one branch and no other?” *Id.* If so, then another branch cannot exercise it. *Id.*

1) The Initiative Does Not Usurp Executive Power.

NECEC's first argument is that the Initiative's enactment would usurp the power of Maine's executive branch because it voids—or has the effect of voiding—final executive agency determinations and improperly authorizes the Legislature to cancel construction of a project already underway. Additionally, NECEC claims that the Initiative provides an end run around the Maine Constitution's presentment requirement by allowing the Legislature to approve a project of the kind contemplated by the Initiative without offering the Governor the opportunity to veto that approval.²⁷

Power to execute law is vested in the Governor. Me. Const. art. V, pt. 1, § 1; *In re Opinion of the Justices of the Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution* (“*Opinion of the Justices*”), 2015 ME 27, ¶ 5, 112 A.3d 926. In her role as the supreme executive, the Governor is required to “take care that the laws be faithfully executed.” Me. Const. art. V, pt. 1, § 12; *Opinion of the Justices*, 2015 ME 27 at ¶ 5, 112 A.3d 926. The executive branch of Maine's government consists of the Governor's office as well as executive agencies, including BPL and PUC. *See Opinion of the Justices*, 2015 ME 27 at ¶ 5, 112 A.3d 926.

In a prior, related decision on the validity of the 2020 initiative, the Law Court held that legislation cannot direct an executive agency to reverse a particular final decision as this would unconstitutionally interfere with the agency's executive

²⁷ As to this last argument, the Initiative requires only that certain linear projects obtain the requisite approval of the Legislature. Nothing prohibits the Legislature from then presenting the approval to the Governor for a signature or veto.

functions. *Avangrid*, 2020 ME 109, ¶¶ 35-36, 237 A.3d 882. NECEC urges the Court to find that the Initiative draws from the same poisoned well. It argues that the Initiative, by retroactively requiring legislative approval of certain types of construction endeavors which include the Project, effectively reverses the PUC's grant of a CPCN, just as the 2020 initiative purported to do, and is unconstitutional on the same basis as the holding in *Avangrid*.

The flaw in NECEC's reasoning is that unlike the initiative addressed by *Avangrid*, the present Initiative does not reverse a particular final agency decision. NECEC objects to the Initiative as squarely targeting the Project and this Court cannot disagree that the Project was the impetus for and focus of the referendum. Throughout their campaign, supporters of the Initiative consistently emphasized that voting for it would block the Project corridor. The advertising in support of the Initiative was so targeted that a voter would be forgiven for not realizing the law would have any effect *other* than obstructing the Project.

But campaign advertising is not the issue. Rather, this Court must look to the language of the Initiative's proposed law. It is axiomatic that statutory interpretation is fundamentally based on a reading of the statute itself. *See Stone v. Bd. of Registration in Med.*, 503 A.2d 222, 224 n.4 (Me. 1986) (exhorting interpreting court to "read the statute!"). There is nothing in the plain language of the Initiative that suggests it is anything other than a statute of general applicability affecting various linear projects and regulating high-impact electric transmission lines in Maine.²⁸ It

²⁸ Indeed, LD 1295 does not appear to be different in kind from the original implementing legislation, 12 M.R.S. § 598 & 589-A.

does not reverse any specific agency decision but rather places new, retroactive requirements on a category of decisions. This is supplementation of existing law, not usurpation of executive power.

It is both legal and logical that a new law may be directly motivated by a given entity or activity and enacted with the intent of imposing requirements or restrictions on that entity or activity; so long as the law itself is one of general applicability, it will not be invalidated for including its target in its effect. *See Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 15, 91 A.3d 601 (holding it is within scope of citizens' initiative power to block sale of city park via legislation creating new category of land bank property, retroactively including park in question, and placing new requirements on the disposition of property in the land bank). Motivated by NECEC's Project, the people of Maine have expressed their strong desire to safeguard public lands from linear construction projects. It would be unjust to refuse, as a matter of course, to apply the new law to the perceived threat which inspired it.

2) The Initiative Does Not Usurp Judicial Power.

The judicial power of this State is vested in the Supreme Judicial Court and such other courts as the Legislature establishes. Me. Const. art. 4, § 1. A final judgment by the judiciary in a case is "a decisive declaration of the rights between the parties, and the Legislature cannot disturb the decision . . . as to the parties in that action." *L.V.I. Group*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960. NECEC argues that the Initiative reverses a final judgment by requiring the PUC to vacate a CPCN already affirmed by the Law Court in *NextEra*, allowing the Legislature to veto the

Project attached to that CPCN, and thereby vacating the holding of *NextEra*. See *NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117. But *NextEra* only addressed the specific issue of whether the PUC erred procedurally or factually in issuing the CPCN, finding that it had not. *Id.* The mere fact that a law impacts a court decision does not equate to an exercise of judicial power. See *MacImage of Maine, LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 27, 40 A.3d 975. Where a piece of legislation has wide effect and is an expression of public policy, it does not usurp the court’s adjudicatory function. *Id.* ¶ 29.

For broadly the same rationale as explained above in relation to the executive power, the Initiative is not an unconstitutional usurpation of judicial power. It is rooted in a policy determination by the people of Maine that the disposition or lease of public lands requires heightened scrutiny by the Legislature. It does not reverse or vacate a specific judicial decision but rather imposes additional requirements for a category of linear projects, including the one for which the PUC issued the CPCN at issue in *NextEra*. The Law Court’s holding in *NextEra* stands. For all of these reasons, the Initiative does not violate separation of powers principles.

The Court also briefly addresses Intervenor HQUS’ arguments that the Initiative usurps the judiciary’s constitutional interpretive authority. Specifically, HQUS posits that the Initiative’s attempt to define the constitutional phrase “uses substantially altered” found in article IX, section 23, as being inclusive of “high impact transmission lines, poles, landing strips, pipelines and railroad tracks” usurps the constitutional interpretive powers reserved for the judiciary. In support, HQUS

cites *Wagner v. Sec'y of State*, 663 A.2d 564, 567 (Me. 1995), which purports to identify two instances when an initiative exceeds the power the people granted to themselves: when it usurps (1) the enacting powers of the Legislature; or (2) the interpretive powers of the judiciary.

The Court is unconvinced that the Initiative does the latter. The statute at issue in *Wagner* was much more restrictive than the Initiative here and attempted to define and limit the number of constitutionally protected classes who are entitled to equal protection under Maine laws. *Id.* at 566 n.3. Despite this attempt to define constitutionally protected classes in full, the Law Court still allowed it on the ballot—holding that such an exercise did not present the Court with “subject matter beyond the electorate's grant of authority.” *Id.* at 567.

In contrast, the Initiative here attempts to do even less than the initiative in *Wagner* and, in the Court's mind, is inclusive. The Initiative merely specifies structures included within article IX, section 23's phrasing and does not foreclose the inclusion of others. Thus, the Court is unpersuaded by HQUS' argument that the Initiative usurps the judiciary's interpretive authority.

C. Contracts Clause

The U.S. and Maine Constitutions both prohibit the impairment of contracts. U.S. Const. art. I, § 10; Me. Const. art. I, § 11. NECEC argues that the Initiative unconstitutionally impairs a valid contract for the lease of a 0.9-mile stretch of land through the West Forks Plantation and Johnson Mountain Township, executed first in 2014 and amended and restated in 2020. Specifically, NECEC contends that the

Initiative’s empowerment of the Legislature to effectively cancel the BPL lease—should the Legislature not approve it by a 2/3 majority—is an unconstitutional impairment.

To determine whether the application of a statute results in an unconstitutional impairment of a contract, Maine courts utilize a three-part test. *American Republic Ins. Co. v. Superintendent of Ins.*, 647 A.2d 1195, 1197 (Me. 1995) (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)). The threshold question is whether the law “operates as a substantial impairment of a contractual relationship.” *Id.* If so, the State must have “a significant and legitimate public purpose” for the regulation, such as remedying a broad, general social problem. *Id.* (citing *Energy Reserves Group*, 459 U.S. at 411-412). In addition, the adjustment of the contracting parties' rights and responsibilities that results from the new law must be based on reasonable conditions and “of a character appropriate” to the purpose that justified its adoption. *Id.* (citing *Energy Reserves Group*, 459 U.S. at 412).

As noted earlier, in August 2021, this Court determined that BPL entered into the 2020 Lease without authority, and thus the Lease is void. The Law Court has taken the issue up on appeal and if it affirms the Court’s holding, there will have been no valid lease to impair. Conversely, should the Law Court determine that the lease is valid, NECEC’s Contracts Clause argument is still hampered by the language of the BPL Lease, which explicitly provides that NECEC “shall be in compliance with all Federal, State, and local statutes, ordinances, rules, and regulations, *now or*

hereinafter enacted which may be applicable to [NECEC] in connection to its use of [the leased public lands]” (emphasis added). The newly enacted Initiative, which creates additional requirements for construction such as the Project, likely cannot impair a contract which anticipates such legislation.

The foreseeability of new regulations at the time of contracting also impacts whether a law can be said to impair a contract. *All. of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 115 (D. Me. 2004) (holding that regulation which parties should have foreseen did not impair contract). Not only is land use heavily regulated at the state and local level such that new regulations are generally foreseeable, *Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183, but NECEC entered the purported BPL Lease amid intense public scrutiny, legal challenges, and a popular ballot initiative to block the Project. As of June 23, 2020, the date that the amended and restated 2020 BPL Lease was executed, NECEC was on notice of efforts to stop construction on the public lands by subjecting the lease to new requirements, and should have foreseen the potential success of an initiative.

Even where legislation does substantially impair a contract, such impairment is permissible if it serves a significant and legitimate public purpose. *See American Republic Ins. Co.*, 647 A.2d at 1197. Courts are reluctant to defer to legislative judgments of whether the purpose is legitimate and the impairment reasonable and necessary when the State itself is a party to the contract “because the State’s self-interest is at stake.” *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); *see Kittery Retail Ventures, LLC*, 2004 ME 65, ¶ 38, 856 A.2d 1183. This self-interest is

not implicated where, as here, the impairment does not actually accrue financial benefit to the State. *See Seven Up Pete Venture v. Montana*, 114 P.3d 1009, 1023 (Mont. 2005) (holding heightened Contract Clause scrutiny inapplicable where voter initiative “caused the State to forego the opportunity to receive royalty payments,” meaning its interests as party to contract “were actually diminished” by passage of initiative). NECEC argues that the State of Maine will allegedly benefit from the completion of the Project via lowered electricity costs, reduced greenhouse gas emissions, job creation, and hundreds of millions of dollars of value in rate relief, economic development, education, and property taxes. It cannot also argue that the State’s self-interest is implicated by a law which will block the Project.

The Initiative, as a public referendum, represents a democratic expression of the public’s determination that the additional regulations are in the public interest and this determination is worthy of the Court’s deference. The citizens of Maine believe that it is in the interest of the State to restrict high-impact transmission lines in the Upper Kennebec Region, to provide additional protections to public lands in the context of certain linear construction projects, and to require stricter scrutiny of certain transmission line projects. Requiring two-thirds legislative approval of defined types of construction projects, paralleling Maine’s constitutional condition for substantial alterations of public land, is an appropriate and reasonable method of enforcing this public interest. *See American Republic Ins. Co.*, 647 A.2d at 1197; Me. Const. art. IX, § 23.

II. Irreparable Injury

The second factor in the Court's preliminary injunction analysis is whether this Court's failure to grant the requested injunction would result in irreparable injury to the movant. NECEC rests their assertions of irreparable harm on two distinct allegations. First, that a prospective constitutional violation constitutes *per se* irreparable injury, and second, that the failure to grant an injunction will result in further delay of the NECEC project, resulting in significant economic harm and potentially threatening the Project's completion.

"[P]roof of irreparable injury is a prerequisite to the granting of injunctive relief." *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980). Irreparable injury is defined as "injury for which there is no adequate remedy at law." *Stanley v. Town of Greene*, 2015 ME 69, ¶ 13, 117 A.3d 600.

A. Constitutional Violation as *per se* Irreparable Harm

The Court first addresses NECEC's contention that it will suffer irreparable harm because of the alleged threat of various constitutional violations. In support of this contention, NECEC cites case law from other jurisdictions which finds irreparable injury when a constitutional violation has been alleged. *See Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013); *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997). As discussed below, however, all of those cases are distinguishable from the facts presented here.

In *Gordon*, the D.C. Circuit Court of Appeals held that the plaintiff had made a sufficient showing of irreparable injury when he established a prospective violation

of a constitutional right. *Gordon*, 721 F.3d 638 at 653. In that case, the challenged law threatened the plaintiff's right to due process because it forced him to pay what he alleged were unconstitutional taxes, or risk incurring civil and criminal penalties. *Id.* The *Gordon* court reasoned that the alleged constitutional violation, combined with the threat of criminal and civil liability, was enough to warrant a finding of irreparable harm. *Id.*

In *Am. Trucking Ass'ns*, the 9th Circuit similarly held that a prospective violation of constitutional rights may constitute irreparable injury. *Am. Trucking Ass'ns*, 559 F.3d at 1057. In a similar set of facts to those the *Gordon* court had before it, the *Am. Trucking Ass'ns* court relied not just on the threatened constitutional violation to come to this conclusion, but also on the imminent threat of civil or criminal liability that the party seeking an injunction faced. *Id.*

The District Court for the District of Maine's decision in *Condon* is no different than the aforementioned. While it is true that the *Condon* court recognized the jurisprudential practice of finding irreparable injury where a constitutional violation is alleged, it only found the existence of irreparable injury because the "Plaintiff [was] faced with the decision of either complying with regulations that are unconstitutional or violating his Town's laws . . . risk[ing] fines or other penalties." *Condon*, 961 F. Supp. at 331.

The Defendants rebuff NECEC's assertion of *per se* irreparable injury where a constitutional violation is threatened by citing their own set of cases from other jurisdictions that limit application of Plaintiffs' *per se* rule to certain specific areas of

constitutional jurisprudence. *See Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (“The only area[s] of constitutional jurisprudence where . . . a . . . [constitutional] violation constitutes irreparable injury [are] the area[s] of first amendment and right of privacy jurisprudence.”); *Pub. Serv. Co. of N.H. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (holding that cases equating a threatened deprivation of a constitutional right with irreparable injury are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which “temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief”).

Plaintiffs’ argument fails under either line of cases. This Court has not found any constitutional violations, threatened or otherwise. Further, although Plaintiffs raise several ways in which the Initiative may offend certain constitutional principles, none of the threatened offenses are accompanied by imminent civil or criminal penalties like in *Gordon*, *Am. Trucking Ass’ns*, and *Condon*, nor are the alleged violations of the type that other courts have found sufficient to make a showing of irreparable injury. Although NECEC notes that various executive agencies may seek to enforce the Initiative’s provisions, the language of the legislation itself does not suggest any imminent civil action will be brought against them. Accordingly, Plaintiffs’ alleged constitutional violations do not constitute irreparable injury *per se*.

B. Economic Harm and Project Delay

The Court next addresses NECEC's contention that this Court's failure to enter an injunction would significantly delay the Project's timeline and potentially threaten its completion.

Economic harm is generally not considered sufficient to constitute irreparable injury, and any alleged injury must be more than merely speculative. *OfficeMax Inc. v. Quick Print, Inc.*, 709 F. Supp. 2d 100, 113 (D. Me. 2010). Speculative injury "does not constitute a showing of irreparable harm." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*. 839 F. Supp. 68, 74 (D. Me. 1993).

In the instant case, the harm NECEC reports it will suffer from an adverse decision is almost entirely economic in nature and speculative. NECEC asserts that, should the Initiative take effect on its designated date, each day that this proceeding progresses corresponds to one day of delay in construction. This delay, the Plaintiffs assert, would "threaten the cancellation of the Project altogether." The specter of undue delay, however, is unsupported by the record, and speculative.

NECEC's own Motion illustrates the speculative nature of such predictions by asking the Court to "assume" a two-year delay in construction for the purposes of demonstrating possible harm. But such an assumption is unreasonable based on the evidence. The State courts that have considered the various legal challenges and obstacles to the Project have acted with alacrity, frequently holding hearings and issuing decisions on a greatly expedited basis. Here, the Court is issuing a decision on Plaintiffs' Motion a mere six weeks after Plaintiffs initiated their action, and

several days before the Initiative is scheduled to take effect. The Court anticipates the Law Court will also move swiftly if presented with the case on appeal or by report.

Even in the unlikely event the litigation moves at the pace forecast by Plaintiffs, and begins to bump up against or threaten the contractual deadline of August 23rd, 2025, Plaintiffs do not adequately explain why they cannot amend the current agreement or negotiate a new contractual deadline for Project completion. NECEC itself has noted that such delays in transmission line projects are “common, if not inevitable.” The land beneath the proposed corridor is not going anywhere.

While Plaintiffs stand to lose significant financial investment should they ultimately be unsuccessful, the Court is not convinced that a failure to enjoin the Initiative from taking effect in the short term will result in irreparable injury. The Plaintiffs have failed to establish any *per se*, non-speculative, and non-economic harm that will result from denying them an injunction while this litigation is pending.

III. Balancing of Harms

The third prong of a Court’s review of a request for injunctive relief is a balancing of the harms that either party will face from an adverse result. Put simply, this Court must determine who will suffer more harm: NECEC if an injunction is not entered, or Defendants if NECEC’s request is granted.²⁹

The moving party bears the burden of establishing that its alleged irreparable harm outweighs any harm the granting of an injunction would cause to other parties.

²⁹ Here, since Defendants consist of public agencies and legislative bodies, the Court considers harm to the public as synonymous with harm to Defendants. *See, e.g., Nken v. Holder*, 556 U.S. 418, 435 (2009).

Alliance for Retired Americans, 2020 ME 123, ¶ 11, 240 A.3d 45. At the outset of this analysis, the Court notes that Plaintiffs’ potential success is weakened by the Court’s conclusion that they will not suffer irreparable injury. *See, e.g., Pie v. Cotton St. Dev.*, No. CV-07-198, 2007 Me. Super. LEXIS 115 at *6, (Me. Super. Ct. June 12, 2007) (holding that because the movant had failed to establish irreparable injury, they also failed to establish that “any harm [the plaintiff] might suffer . . . outweighs the impact that the injunction would have on [the defendant]”).

In their Motion, the Plaintiffs allege that the “likely cancellation of a billion dollar project”—the apparent result of a failure to enter an injunction—outweighs the harm that would be caused to the Defendants by withholding enactment of the Initiative. They also detail the negative climate impact of failing to grant an injunction, alleging that not doing so would worsen an already grave climate crisis. Intervenors supporting the Project raise similar allegations and detail the particularized harm they—and the stakeholder groups they represent—would incur.³⁰

In response, Defendants raise their own arguments focused primarily on the direct environmental impact that continued construction will have on the land the Project runs through. They also raise concerns about the deprivation of Project

³⁰ Intervenor Industrial Energy Consumer Group alleges that enactment of the Initiative will upset the public’s confidence in Maine’s utility regulatory paradigm and will hinder the effort to fight climate change. Intervenor Maine State Chamber of Commerce claims that if the Initiative takes effect, it will discourage future investment in similar permit heavy projects. Intervenor International Brotherhood of Electrical Workers asserts that the Initiative will end employment for some of its members and stymie future employment because investors will avoid funding projects like the NECEC. Intervenor Cianbro makes several supporting arguments and also claims that the Corridor will have a direct impact on their construction business and their involvement in future projects like NECEC.

benefits to the Maine people should an injunction be entered, construction completed, and the Initiative found constitutional. In this scenario, the Defendants assert that what would result is a constructed, non-operational corridor without the corresponding bargained-for benefits aimed at enhancing the energy consumption experience for Mainers.

The Court appreciates the impassioned advocacy of all parties involved but, in this case, finds that the harm from issuing a preliminary injunction would outweigh the harm of denying NECEC's request. To understand this conclusion, context is important. To decide the Motion, this Court's charge is to balance the equities in the short term, not to balance them in the long term. The question now is not whether climate change or direct construction poses a greater environmental threat; nor is the question what impact the Initiative will have on future economic investment in Maine. The question is whether, during the likely short lived litigation period, the harm from entering or refusing to enter a preliminary injunction will be worse.

With the relevant time frame in mind, the Court notes that the preliminary injunction factors are not considered in isolation from each other. The Court has already determined that Plaintiffs have not demonstrated a substantial possibility of prevailing on the merits, and that Plaintiffs will not suffer irreparable injury (in the short term). The Court further finds that if Plaintiffs are allowed to complete construction of the Project while the litigation is pending—and then lose—the existence of a completed, non-operational corridor would inflict at least some harm on the environment. Under all of these circumstances, without the State's highest

court first having a chance to weigh in, the blow that granting an injunction would deal to the public's confidence in Maine's direct initiative process and the institution of participatory democracy further tips the scales. Accordingly, the balance of the harm falls in favor of Defendants.

IV. Public Interest

The fourth and final consideration in the Court's preliminary injunction analysis is the effect granting the injunction will have on the public interest. The public interest factor asks this Court to "inquire whether there are public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief." *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 193 (D. Me. 2005) (citing *United States v. Zenon*, 711 F.2d 476 (1st Cir. 1983)). Here the answer is resoundingly affirmative.

The broad purpose of Maine's direct initiative process is to encourage the people's engagement in participatory democracy. *Allen v. Quinn*, 459 A.2d 1088, 1102 (Me. 1983). The process, governed by article IV, section 18 of Maine's Constitution, became effective on January 6th, 1909, and represented a "fundamental change in the existing form of government in so far as legislative power was involved." *Farris ex rel. Dorsky*, 143 Me. 227, 230, 60 A.2d 908 (1948). Previously, the power to legislate had been vested only in the House of Representatives and the Senate, but by the thirty-first amendment to Maine's Constitution, the "sovereign which is the People [took] back . . . a power which the people vested in the Legislature when Maine

became a State.” *Id.* at 231. “The significance of this change must not be overlooked.” *Id.*

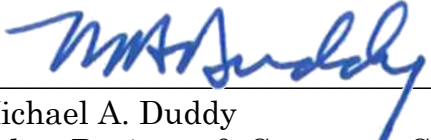
In the instant case, the Plaintiffs’ request for an injunction asks this Court to block the enactment of a ballot initiative dutifully presented to the 130th legislature and voted through by the Maine electorate after the Legislature’s failure to act. Thus, in the Court’s view, the people of Maine have declared their interest in this litigation. The public’s directive, as announced by 59% of Maine voters, is clear: enact LD 1295, i.e., the Initiative, by way of ballot question one. A decision to issue an injunction foreclosing the Initiative’s enactment would directly affect this public interest. Accordingly, an analysis of the fourth preliminary injunctive factor again supports a denial of NECEC’s request.

CONCLUSION

For the reasons set forth herein, the Court concludes that Plaintiffs have not satisfied their burden to demonstrate that all four criteria necessary for a preliminary injunction have been satisfied. To the contrary, the Court concludes Plaintiffs have not shown any of the criteria to be met. Consequently, Plaintiffs have not established their entitlement to a preliminary injunction. Plaintiffs’ Motion for Preliminary Injunction is denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case. So Ordered.

Dated: 12/16/2021



Michael A. Duddy
Judge, Business & Consumer Court

EXHIBIT D

TO

PLAINTIFFS' VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA §1852, sub-§4, as enacted by PL 1997, c. 678, §13 and amended by PL 2013, c. 405, Pt. A, §24, is further amended to read:

4. Lease of public reserved land for utilities and rights-of-way. The bureau may lease the right, for a term not exceeding 25 years, to:

- A. Set and maintain or use poles, electric power transmission and telecommunication transmission lines and facilities, roads, bridges and landing strips;
- B. Lay and maintain or use pipelines and railroad tracks; and
- C. Establish and maintain or use other rights-of-way.

Any such poles, transmission lines and facilities, landing strips, pipelines and railroad tracks under this subsection are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23, and a lease or conveyance for the purpose of constructing and operating such poles, transmission lines and facilities, landing strips, pipelines and railroad tracks under this subsection may not be granted without first obtaining the vote of 2/3 of all the members elected to each House of the Legislature.

Notwithstanding Title 1, section 302 or any other provision of law to the contrary, this subsection applies retroactively to September 16, 2014.

Sec. 2. 35-A MRSA §3131, sub-§4-A, as enacted by PL 2009, c. 655, Pt. A, §3, is amended to read:

4-A. High-impact electric transmission line. "High-impact electric transmission line" means a transmission line greater than 50 miles in length ~~that is not located in a statutory corridor, as defined in section 122, subsection 1, paragraph F 4, or a petitioned corridor, as defined in section 122, subsection 1, paragraph D 1, and that is:~~

- A. Constructed to transmit direct current electricity; or
- B. Capable of operating at 345 kilovolts or more and:
 - (1) Is not a generator interconnection transmission facility as defined in section 3132, subsection 1-B; and
 - (2) Is not constructed primarily to provide electric reliability, as determined by the commission.

Sec. 3. 35-A MRSA §3132, sub-§6-A, as enacted by PL 2009, c. 655, Pt. A, §5, is amended to read:

6-A. High-impact electric transmission line; certificate of public convenience and necessity. The commission shall evaluate and render a decision on any petition for a certificate of public convenience and necessity for a high-impact transmission line ~~in accordance with section 122, subsection 1 D.~~

Sec. 4. 35-A MRSA §3132, sub-§6-C is enacted to read:

6-C. High-impact electric transmission line; legislative approval. In addition to obtaining a certificate of public convenience and necessity, a high-impact electric transmission line may not be constructed anywhere in the State without first obtaining the

approval of the Legislature, except that any high-impact electric transmission line crossing or utilizing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and must be approved by the vote of 2/3 of all the members elected to each House of the Legislature.

Sec. 5. 35-A MRSA §3132, sub-§6-D is enacted to read:

6-D. High-impact electric transmission line; geographic prohibition. Notwithstanding subsection 6-C, a high-impact electric transmission line may not be constructed in the Upper Kennebec Region. For the purpose of this subsection, "Upper Kennebec Region" means the approximately 43,300 acres of land located between the Town of Bingham and Wyman Lake, north along the Old Canada Road, Route 201, to the Canadian border, and eastward from the Town of Jackman to encompass Long Pond and westward to the Canadian border, in Somerset County and Franklin County.

Sec. 6. 35-A MRSA §3132, sub-§6-E is enacted to read:

6-E. Retroactivity. Notwithstanding Title 1, section 302 or any other provision of law to the contrary, subsections 6-C and 6-D apply retroactively to September 16, 2020 and apply to any high-impact electric transmission line the construction of which had not commenced as of that date.

SUMMARY

This initiated bill requires the approval of the Legislature for the construction of high-impact electric transmission lines and provides that high-impact electric transmission lines crossing or utilizing public lands must be approved by 2/3 of all the members elected to each House of the Legislature. This initiated bill also prohibits the construction of high-impact electric transmission lines in the Upper Kennebec Region. These provisions apply retroactively to September 16, 2020, the date of filing of this initiative.

This initiated bill also requires the approval of 2/3 of all the members elected to each House of the Legislature for any use of public lands for transmission lines and facilities and certain other projects. This provision applies retroactively to September 16, 2014.

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION AND
FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF REPRESENTATIVES,

Defendants.

**VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

NOW COME Plaintiffs NECEC Transmission LLC (“NECEC LLC”) and Avangrid Networks, Inc. (“Avangrid”), and hereby complain against Defendants the Bureau of Parks and Lands, Maine Department of Agriculture, Conservation and Forestry (“BPL”); the Maine Public Utilities Commission (“PUC”); the Maine Senate; and the Maine House of Representatives, and seek declaratory and injunctive relief regarding “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 Construction of Certain

Transmission Lines in the Upper Kennebec Region” (hereafter, the “Initiative”), enacted on November 2, 2021, as follows:

1. After years of regulatory proceedings resulting in the issuance of all necessary siting, environmental, and land use permits, NECEC LLC undertook physical construction of the New England Clean Energy Connect transmission line corridor (“NECEC” or “Project”) in January 2021. The NECEC represents a billion dollar investment in the clean energy future of New England. It will reduce greenhouse gas (“GHG”) emissions by the equivalent of removing 700,000 cars from the road each year the Project is in service. To date, NECEC LLC has expended approximately \$449.8 million dollars on the Project, and substantial physical construction has occurred: approximately 124 miles of right-of-way along the corridor for the direct current (“DC”) line has been cut (over 80%); clearing along the corridor for the alternating current (“AC”) is complete; over 120 structures have been erected along the DC, AC, or network upgrade portions of the Project, collectively; over 3 miles of conductor has been strung along the network upgrade line; and site preparation and component construction for a converter station is well advanced. Despite the granting of permits for the Project, the environmental and economic benefits of the Project, and the substantial progress in transmission line construction, opponents of the Project – funded by electric generators in New England who burn fossil fuels – have now successfully pursued passage of legislation via direct initiative specifically targeted at the Project that would, if enforced, retroactively ban the completion and operation of the NECEC.

2. This Initiative represents an extraordinary attempt to deprive a private party of vested rights in the construction and operation of a multi-year development project. “[A] statute which has retrospective application is unconstitutional if it impairs vested rights.” *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977). NECEC LLC has commenced significant, physical

construction of the Project in good faith, with the intention to carry it through to completion, pursuant to valid permits. Because NECEC LLC has undertaken good faith construction of the Project, NECEC LLC has a vested right to complete and to operate the Project. Any other conclusion would render any major development project in the State – in fact, any effort by any person or business in the State to build any project, no matter how big or how small – vulnerable to discriminatory and prejudicial efforts to kill the project by after-the-fact changes to the law. Such retroactive deprivation of vested rights is contrary to the fundamental principles of fairness and equity embodied in Maine law.

3. The Initiative also represents a nearly unparalleled violation of separation of powers principles enshrined in the Maine Constitution. The framers adopted a system of separated powers because they were “well acquainted with the danger of subjecting the determination of the rights of one person to the ‘tyranny of shifting majorities.’ . . . It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” *I.N.S. v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring); see THE FEDERALIST NO. 47 (James Madison), 1788 WL 461, at *3. The separation of powers doctrine thus seeks to prevent unfair applications of the law to specific individuals. *Carter v. Lehi City*, 269 P.3d 141, 152 (Utah 2012). This structure is reflected not only in the U.S. Constitution, but also the Maine Constitution. Accordingly, the decisions of state executive agencies and the judiciary applying the law to particular individuals based on specific facts and circumstances cannot be reversed by legislative action. Nevertheless, opponents of the Project have now twice sought to reverse final executive and judicial actions via initiative – first through an initiative, struck down as unconstitutional by the Law Court, that singled out the Project by name, and, now, through an initiative that is designed to accomplish the same end through retroactive application to the Project.

4. The Initiative is also flawed because it would cause the reopening and voiding of a lease with the BPL, contrary to the provisions in the Maine and United States Constitutions protecting the sanctity of contracts. The State cannot unilaterally cancel its lease with NECEC LLC.

5. Because the Initiative violates NECEC LLC's vested rights as well as basic constitutional protections provided by the Maine and United States Constitutions, the Initiative cannot lawfully be applied retroactively to the Project.

PARTIES

6. NECEC Transmission LLC is a Delaware limited liability corporation with a place of business at One City Center, Portland, Cumberland County, Maine. NECEC LLC is a clean energy development company that owns the Project currently under construction.

7. Avangrid Networks, Inc. is a Maine corporation with a place of business at One City Center, Portland, Cumberland County, Maine. Avangrid Networks is the indirect parent company of Central Maine Power Company ("CMP"), an electric transmission and distribution utility that serves more than 620,000 customers in central and southern Maine. Avangrid Networks also wholly owns NECEC LLC.

8. Defendant Bureau of Parks and Lands, Maine Department of Agriculture, Conservation and Forestry, is an agency of the State of Maine with its principal office in Augusta, Kennebec County, Maine.

9. The BPL is the agency responsible to enforce those aspects of the Initiative that modify Title 12 of the Maine Revised Statutes, specifically Section 1.

10. Defendant Maine Public Utilities Commission is an agency of the State of Maine with its principal office in Hallowell, Kennebec County, Maine.

11. The PUC is the agency primarily responsible to enforce those aspects of the Initiative that modify Title 35-A of the Maine Revised Statutes, specifically Sections 4-6.

12. Defendant Maine Senate is a branch of the Maine Legislature, which is located in Augusta, Kennebec County, Maine.

13. Defendant Maine House of Representatives is a branch of the Maine Legislature, which is located in Augusta, Kennebec County, Maine.

14. If valid, Section 4 of the Initiative retroactively imposes a new requirement of affirmative votes by the Senate and the House of Representatives for approval of the Project.

JURISDICTION

15. Jurisdiction is appropriate in this Court pursuant to 4 M.R.S. § 105.

16. Venue is appropriate pursuant to 14 M.R.S. § 505, as NECEC LLC and Avangrid have an established place of business in Cumberland County.

FACTS

17. The NECEC is a clean energy project, already under construction, that will bring 1,200 megawatts of clean hydropower from Québec into Maine and the New England electric grid. The NECEC includes a 145-mile high voltage direct current (“HVDC”) transmission line from the Canadian border to a new converter station located at Merrill Road in Lewiston, Maine and necessary network upgrades, including AC transmission lines, required to interconnect the Project to the New England electric grid (the “Network Upgrades”).

18. The NECEC including the necessary Network Upgrades represents an investment of approximately \$1 billion for new electricity transmission infrastructure in Maine. This investment has produced hundreds of jobs (and will produce thousands of jobs, direct and indirect) in Maine during construction of the Project; funds approximately \$250 million in rate relief,

economic development, carbon reduction, education, and other benefits for Maine; and results in approximately \$18 million in additional property taxes annually for the host communities. Of the approximately \$250 million in benefits to Maine, approximately \$18 million has already been paid out; and approximately \$3.4 million in property taxes have been paid, beginning in September 2021. The NECEC and the clean hydropower it will deliver to Maine also will significantly lower the cost of electricity in Maine and across the New England region, and remove upwards of 3.6 million metric tons of carbon emissions annually from the Earth's atmosphere (the equivalent of removing 700,000 cars from the road) by decreasing New England's reliance on fossil fuels for the region's electricity needs.

19. Based on these numerous benefits, the PUC found the Project to be in the public interest and issued a Certificate of Public Convenience and Necessity ("CPCN"). After rigorous review, the Project also received the necessary permits from the Maine Department of Environmental Protection ("DEP"), the U.S. Army Corps of Engineers ("Corps"), and the United States Department of Energy ("DOE").

20. The permitting process was substantially delayed by opponents of the Project, including electric generators in New England that burn fossil fuels, such as NextEra Energy Resources, LLC ("NextEra"), Calpine Corporation ("Calpine"), and Vistra Energy ("Vistra"). These fossil fuel burning electric generators oppose the NECEC Project because it will significantly lower their revenues and reduce New England's reliance on the more expensive electricity they produce, which electricity adds carbon to the atmosphere and exacerbates climate change.

a. Among others, NextEra, Calpine and Vistra were active intervenors before the PUC opposing the issuance of a CPCN for the NECEC, submitting testimony from

multiple witnesses arguing that the NECEC was not in the public interest and would negatively impact their thermal generation facilities and the regional transmission grid in New England. *See Central Maine Power Company Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Quebec-Maine Border to Lewiston (NECEC) and Related Network Upgrades*, Docket No. 2017-00232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation (May 3, 2019). NextEra was the sole intervenor to appeal the PUC's order granting the CPCN. NextEra's appeal was rejected by the Law Court. *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 43, 227 A.3d 1117.

b. NextEra was an active intervenor before the Massachusetts Department of Public Utilities ("MA DPU") opposing the MA DPU's approval of the NECEC power purchase agreements and cost recovery for the NECEC transmission services agreements. NextEra submitted testimony from multiple witnesses and argued that the MA DPU should deny the requested approvals on the grounds that the Project and the related agreements did not comply with Massachusetts law. By order dated June 25, 2019, the MA DPU rejected NextEra's arguments and granted the requested approvals. *See Petition of NSTAR Electric Company d/b/a Eversource Energy for approval by the Department of Public Utilities of a long-term contract for procurement of clean energy generation, pursuant to Section 83D of An Act Relative to Green Communities, St. 2008, c. 169, as amended by St. 2016, c. 188, § 12*, D.P.U. 18-64 (Jun. 25, 2019). NextEra was the sole intervenor to appeal the MA DPU's order to the Massachusetts Supreme Judicial Court. That court rejected

NextEra's appeal in a decision dated September 3, 2020. *NextEra Energy Res., LLC v. Dep't of Pub. Utils.*, 152 N.E.3d 48, 65 (Mass. 2020).

c. NextEra also was an active intervenor in the consolidated proceedings before the Maine Land Use Planning Commission ("LUPC") and the DEP and an active party in the proceedings before the Corps, submitting testimony and numerous motions and other filings opposing the issuance of the requested LUPC certification and DEP and Corps permits for the NECEC. *See Site Location of Development Act Certification*, Docket No. SLC-9, Maine Land Use Planning Comm'n, Dep't of Agric., Conservation & Forestry, Bureau of Parks & Lands (Jan. 8, 2020); *DEP Findings of Fact and Order*, Docket No. L-27625, Maine Dep't of Env't. Prot. (May 11, 2020); U.S. Army Corps of Engineers, New England Dist. Regulatory Division, File No. NAE-2017-01342 (Initial Proffered Permit Aug. 19, 2020).

d. After the LUPC granted the certification for the Project on January 8, 2020 and the DEP issued the requested permits on May 11, 2020, NextEra appealed the DEP order to the Maine Superior Court, Kennebec County. NextEra's appeal and those asserted by other intervenors are consolidated before the Maine Board of Environmental Protection and remain currently pending. *See NextEra Energy Res., LLC v. State of Maine, Dep't. of Env't Prot.*, Docket No. KEN-AP-27 (Kennebec Co. Sup. Ct., June 9, 2020), consolidated with SOM-AP-20-04 and remanded to Bd. of Env't Prot. (Aug. 11, 2020).¹

¹ NextEra has also refused to commit to the timely replacement of a circuit breaker at its Seabrook Nuclear plant in New Hampshire identified by ISO-NE as a necessary Network Upgrade to permit the interconnection of the NECEC. On October 13, 2020, NECEC LLC filed a complaint against NextEra before the Federal Energy Regulatory Commission ("FERC") pursuant to Sections 206, 210 and 306 of the Federal Power Act ("FPA"), alleging that, among other things, NextEra has been unlawfully attempting to delay and unreasonably increase the costs of circuit breaker replacement to impede the NECEC. By an order dated September 7, 2021, FERC established briefing procedures regarding issues concerning NextEra's obligations under Seabrook's Large Generator Interconnection Agreement to replace the circuit

e. Calpine on January 30, 2020 filed a belated Request for Leave to Intervene Out-of-Time and Comments in Opposition to Application before the U.S Department of Energy in Docket No. PP-438 concerning the petition for a Presidential Permit for the NECEC Project. The motion to intervene was ultimately denied.

21. Though delayed by its opponents, NECEC LLC has performed substantial construction on the Project in reliance on its valid permits. By November 2, 2021, approximately \$449.8 million – 43% of the total current project cost estimate – had been spent on the Project. Among other construction activities, approximately 124 miles of corridor had been cut; approximately 70 structures installed on the DC portion of the Project, along with foundations installed for an additional 4 structures; approximately 54 structures installed along the AC and Network Upgrade portions of the Project; over 3 miles of conductor has been strung; and converter station construction is well underway. Hundreds of other custom-designed poles had been delivered to Project lay-down yards, along with millions of feet of DC and AC conductor and fiber, and tens of thousands of insulators required for the Project.

22. Opponents of the Project (primarily the political action committees No CMP Corridor and Mainers for Local Power) have pursued two citizen initiatives to block completion of the Project. Opponents first sought to place an initiative on the ballot in 2020 (the “2020 Initiative”) that purported to reverse the decision of the PUC to issue a CPCN for the Project. The Law Court held that the 2020 Initiative was unconstitutional because it exceeded the scope of the legislative powers reserved by the people. Accordingly, the 2020 Initiative did not appear on the

breaker and instituted a proceeding under FPA Section 206 to determine whether certain provisions in ISO-NE’s Tariff may be unjust and unreasonable because they may not impose any obligation on generators like NextEra to construct upgrades identified as necessary for the interconnection of elective transmission upgrades, such as the NECEC. *See NECEC Transmission LLC v. NextEra Energy Res., LLC*, 176 FERC ¶ 61, 148 (Sept. 7, 2021) (Order Establishing Additional Briefing and Instituting Section 206 Proceeding).

ballot. *Avangrid Networks, Inc. v. Sec’y of State*, 2020 ME 109, ¶ 2, 237 A.3d 882. Only after that unsuccessful effort, opponents then undertook the present Initiative. Because of their prior missteps, however, the opponents could not have the Initiative placed on the ballot until November 2021 – long after NECEC had undertaken physical construction of the Project, in good faith, and in reliance on its valid permits.

23. The political action committees formed by opponents of the Project to advance these initiatives targeting the Project have received approximately \$27 million dollars in support from NextEra, Calpine, and Vistra. These fossil fuel burning electric generators have funded various groups in Maine, including Mainers for Local Power and No CMP Corridor, for the purpose of advocating against and attempting to block the construction of the NECEC.

24. As promoted by the fossil fuel burning electric generators and their funded allies, the Initiative obtained passage at the ballot box on November 2, 2021.

25. The Initiative, if allowed to apply retroactively, would prevent completion of the Project even though NECEC has expended hundreds of millions of dollars lawfully constructing the Project pursuant to validly-issued permits.

The NECEC Project

26. In 2017, Massachusetts electric distribution companies (“EDCs”) issued a request for proposal (“RFP”) for clean energy pursuant to the Commonwealth of Massachusetts’ Green Communities Act, 2008 MASS. ACTS ch. 169, § 83D, as amended by 2016 MASS. ACTS ch. 188.

27. CMP, together with an affiliate of Hydro-Québec, submitted a joint proposal in response to the RFP. This joint proposal called for the construction of a 1,200 MW HVDC transmission line to connect the existing transmission systems in Québec and New England, with the NECEC constituting the U.S. portion of the line. Under the proposal, the NECEC would enable

the delivery of 1,090 MW of clean hydropower from Québec to the New England electric grid, through a corridor consisting largely of land already devoted to power transmission, for at least twenty (20) years upon the Project’s commercial operation date (expected in December 2023).²

28. In early 2018, the CMP/Hydro-Québec proposal was selected the winner of the RFP. CMP, Hydro-Québec (through a U.S. based affiliate, H.Q. Energy Services (U.S.) Inc. (“HQUS”)), and the EDCs then entered into a series of transmission service agreements (“TSAs”) contractually obligating CMP to provide 1,200 MW of transmission service on the NECEC to HQUS and the EDCs for a period of forty years. In turn, HQUS and the EDCs entered three Power Purchase Agreements (“PPAs”) under which HQUS agreed to sell 1,090 MW of energy (equivalent to 9,450 MWh per year) to the EDCs for the first 20 years of the useful life of the NECEC Project. This energy supply will serve a significant portion of Massachusetts’ electric load during the contract term and is intended to assist the Commonwealth achieve its climate change objectives. Hydro-Québec can use the remaining transmission capacity (110 MW in years 1-20 and 1,200 MW in years 21 to 40) to sell additional energy into the New England electricity markets. In fact, on July 9, 2020, HQUS entered an agreement with Governor Janet Mills to sell Maine 500,000 MWh of electricity a year for 20 years using the available excess transmission capacity on the NECEC at a \$4.00/MWh discount to market prices.

² CMP submitted a second proposal in response to the RFP jointly with NextEra and another generation developer. This proposal called for the construction of a 1,200 MW high voltage alternate current (“HVAC”) transmission line to connect new wind and solar generation projects to be developed in Western Maine and Canada, utilizing the same corridor as the one proposed for the NECEC and consisting of an overhead transmission line of almost the same length as the NECEC and interconnecting in Lewiston, Maine. NextEra and the other developer agreed that this overhead line, which had analogous environmental impacts to the NECEC given its size and configuration, was the optimal solution to interconnect their proposed projects and to compete in the RFP.

29. To protect CMP ratepayers from risks associated with the Project, as required by the PUC, on January 4, 2021, CMP transferred the NECEC (including the TSAs) to NECEC LLC. NECEC LLC is constructing the NECEC, and will operate the NECEC.

30. The NECEC consists of a 145-mile long 320 kV HVDC transmission line running from the U.S./Canada border at Beattie Township, Maine to a new DC to AC converter station to be located on Merrill Road in Lewiston, Maine. On its northern end, this HVDC line will interconnect to a new HVDC line to be constructed by Hydro-Québec running from a new AC to DC converter station at the existing Appalaches substation in Thetford Mines, Québec to the border. The Merrill Road converter station in Lewiston will be connected to the existing Larrabee Road Substation in Lewiston by a new 1.2-mile 345 kV high voltage AC transmission line. To permit this interconnection, the Project also requires the construction and operation at NECEC LLC's expense of certain "Network Upgrades" determined by ISO-New England under its Tariff in Maine and New Hampshire, including an additional 345 kV transmission line between Windsor and Wiscasset, certain rebuilt 115 kV AC transmission lines, and other substation equipment. CMP will own and operate the Network Upgrades located in Maine.

31. The Project is depicted on the map included as **Exhibit A**. As shown on the map, the Project is divided into five segments. Segment 1 consists of the portion of the HVDC line running along a new, approximately 53-mile transmission corridor, the vast majority of which runs through privately owned commercial forest land used for growing and harvesting trees; Segment 2 consists of the portion of the HVDC line running along the existing transmission corridor from The Forks Plantation to the existing Wyman Hydropower station in Moscow; Segment 3 consists of the portion of the HVDC line running along the existing transmission corridor from the Wyman Hydropower station to the new Converter Station in Lewiston and other facilities in the Lewiston

area; and Segments 4 and 5 consist of the Network Upgrades located in Maine. Along the DC line, the Project includes installation of 832 structures (some mono-poles and others requiring multiple poles).

32. In the TSAs, the parties agreed that the commercial operation date for the NECEC Project would be December 13, 2022, but such commercial operation date could be extended (i) due to delays in the EDCs receiving necessary Massachusetts approvals, and (ii) up to an additional two years at the request of CMP or HQUS with the posting of additional security. The current project schedule calls for the NECEC to achieve commercial operation on December 13, 2023, with the contractual deadline for commercial operation now August 23, 2024. CMP and HQUS have the right to extend this deadline to August 23, 2025 by posting additional security.

33. CMP had full site control for the Project by July 2017. Most of the corridor consists of land within existing transmission line rights-of-way. NECEC LLC subsequently acquired the necessary property interests from CMP.

Permits and Approvals

34. NECEC LLC and CMP have all state and federal permits and approvals needed for construction of the Project. NECEC LLC and CMP also possess local permits and approvals from 20 of the 24 municipalities in which Project facilities will be constructed, in accordance with the project schedule. NECEC LLC and CMP will obtain the local permits and approvals from the final municipalities at the time contemplated by the project schedule. NECEC LLC is authorized to work in 14 unincorporated townships or plantations through the approval obtained from the LUPC.³

³ Certain of the permits were obtained by CMP and subsequently transferred to NECEC LLC.

Public Utilities Commission

35. On September 27, 2017, CMP filed with the PUC a petition for a CPCN to construct the NECEC. The PUC thereafter engaged in a review lasting over nineteen (19) months. Thirty-one (31) parties participated in the PUC proceeding. There were multiple rounds of pre-filed testimony (which included thousands of pages of testimony and supporting materials), with written discovery and technical conferences held after every phase of testimony. The PUC held six (6) days of evidentiary hearings and three (3) public witness hearings.

36. In a 101-page order (“PUC Order”) dated May 3, 2019, the PUC granted CMP’s petition. *Cent. Me. Power Co.*, Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, No. 2017-00232, Order (Me. P.U.C. May 3, 2019).⁴ In the PUC Order, the PUC found that the NECEC is in the public interest and that there is a public need for the Project. Accordingly, the PUC issued a CPCN.

37. In the PUC Order, the PUC weighed the benefits and costs of the NECEC to the ratepayers and residents of the State of Maine. As required by 35-A M.R.S. § 3132, these included the effects of the NECEC on economics; reliability; public health and safety; scenic, historic, and recreational values; and state renewable energy goals. Based on its consideration of these factors, the PUC found that the NECEC is in the public interest.

38. Among other things, the PUC Order stated that, “[b]ecause the NECEC-enabled power will be delivered into Maine, . . . significant benefits will accrue to Maine electricity consumers through operation of the regional wholesale market. These benefits are expected to

⁴ The PUC Order, together with its accompanying stipulation and exhibits, is publicly accessible at: <https://mpuc-cms.maine.gov/CQM.Public.WebUI/MatterManagement/MatterFilingItem.aspx?FilingSeq=102054&CaseNumber=2017-00232>

accrue for a period of at least 20 years.” PUC Order, at 6. Specifically, the PUC concluded that the “NECEC will result in substantial benefits to Maine electricity customers because of the effect it will have on reducing energy and capacity prices in the wholesale market.” *Id.* at 24.

39. The PUC Order further stated that, “[i]n addition to the wholesale electricity price reductions that will result from the NECEC, the Project will also enhance system reliability and fuel security within Maine and the ISO-New England (ISO-NE) region.” PUC Order, at 6. The PUC found that “the system upgrades required by (and provided by) the NECEC will provide extra redundancy and reliability to the Maine system during normal operations modes.” *Id.* at 39.

40. The PUC Order also stated that “the NECEC will provide environmental benefits by displacing fossil fuel generation in the region, and associated greenhouse gas (GHG) production, and will provide substantial benefits to the Maine economy through the more than 1,600 jobs expected to be created during the NECEC construction phase, and on an ongoing basis through property taxes.” PUC Order, at 6. Specifically, the PUC concluded that (1) “the NECEC will result in significant incremental hydroelectric generation from existing and new resources in Québec,” thereby reducing “overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region,” *id.* at 71; (2) the Project would create not only 1,600 jobs during construction, but also approximately 300 additional jobs during operation, and, *id.* at 6, 45-46; and (3) “a \$1 billion investment in a project located entirely in Maine, with the resulting employment and taxes it will produce, would result in substantial macroeconomic benefits to the State,” *id.* at 47.

41. The PUC Order also found that the Project’s adverse effects on scenic and recreational values, and associated impacts on tourism and the economies of communities in

proximity to the Project, were outweighed by “the ratepayer, economic, and environmental benefits of the NECEC.” PUC Order, at 6-7.

42. In sum, the PUC concluded “that the benefits from the development and operation of the NECEC to Maine ratepayers and citizens significantly outweigh the costs and detriments of the Project,” PUC Order, at 98, and, as a result, granted CMP’s requested CPCN, *id.* at 98-99.

43. As part of the PUC Order, the PUC also approved a settlement stipulation, to which 11 parties joined including the Governor’s Energy Office and the Maine Office of Public Advocate, providing certain ratepayer protections against the costs and financial risks associated with NECEC; reimbursement to ratepayers for prior costs associated with the Project; and a package of benefits for Maine totaling approximately \$250 million over 40 years (in addition to those arising from the construction and operation of the NECEC), including support for electric rate relief, low-income customers, the expanded availability of electric vehicles and charging infrastructure, heat pumps and broad band service in Maine, education programs, and economic development. The stipulation also reflects the commitment of NECEC LLC, and its contractors working on the construction of the NECEC, to give preference to hiring Maine workers, all other factors being equal and consistent with applicable law and applicable labor agreements.

44. The following figure reproduced from the PUC Order summarizes the NECEC Project’s impacts and benefits:

Figure I.1

Summary of NECEC Impacts			
Wholesale Market Effects	Description	Value to Maine	
		Nominal	Present Value
Energy Market Prices	Energy price suppression effect	\$14-\$44 million annually	\$122-\$364 million
Capacity Market Effect	Estimated capacity market price reduction	\$19 million annually for first 10 years	\$101 million
Reliability and Fuel Security	Enhancements to transmission reliability and supply reliability and diversity	Not quantified*	Not quantified*
Macroeconomic Effects	Description	Value to Maine	
		GDP is reported in chained 2009 dollars	
During Construction Period	Positive impact on Maine GDP	Annual average, 2017-2022: \$94-\$98 million	
During Operations	Positive impact on Maine GDP. Includes effect of wholesale energy and capacity market savings.	Annual average, 2023-2027: \$25-\$29 million	
Regional Environmental and Local Community Impacts		Value	
Effects on Host Communities	Detrimental impact on scenic, historic and recreational values, associated tourism and local economy	Not quantified	
GHG Emissions Reductions	Reduction in regional carbon emissions	3.0 to 3.6 million metric tons/year	
Stipulation Conditions	Description	Value to Maine	
		Nominal	Present Value
Stipulation provisions	Benefits package included in Stipulation	Total \$250 million over 40 years	\$72-\$85 million
*As discussed in the Concurring Opinion of Commissioner Williamson, ISO-NE has provided estimates that suggest that fuel security and reliability benefits could provide value to Maine of approximately \$9.8 million annually for the years 2023-2024 and 2024-2025.			

PUC Order, at 7.

45. On May 7, 2019, NextEra, an intervenor in the PUC proceeding and owner of the oil-fired Wyman generation facility in Yarmouth, Maine (among other generation facilities in New England), appealed the PUC Order granting the CPCN to construct the NECEC. In its appeal, NextEra argued, among other things, that the PUC improperly found that the Project was in the public interest and that there is a public need for the NECEC.

46. In an opinion issued March 17, 2020, the Law Court denied NextEra's appeal and affirmed the grant of the CPCN for the Project. *NextEra Energy Res., LLC*, 2020 ME 34, ¶ 43, 227 A.3d 1117. Specifically, the Law Court concluded that it “discern[ed] no error in the

Commission’s determination that the NECEC project meets the applicable statutory standards for a CPCN.” *Id.* ¶ 1.

47. Among other things, the Law Court concluded that the PUC appropriately found the “public need” requirement to be satisfied. *Id.* ¶¶ 28-38. It noted as follows:

In its comprehensive order, the Commission discussed the factors set out in section 3132(6), including the issues raised by NextEra concerning scenic and recreational values and Maine’s renewable energy generation goals. The Commission found that the value to Maine resulting from the NECEC’s energy price suppression effect would amount to \$14 - \$44 million annually, and capacity market price reduction for Maine residents in the amount of \$19 million annually over the first ten years. It found that there would be enhancements to transmission reliability and supply reliability and diversity. The Commission also found that the project would result in a reduction of greenhouse gas emissions. Further, it found that the project would have a positive impact on Maine’s gross domestic product, averaging \$94-\$98 million during the project’s construction period.

Id. ¶ 30 (footnote omitted). The Law Court went on to hold: “All of these findings are supported by significant record evidence.” *Id.*

48. The Law Court affirmed the PUC’s Order because the PUC “reasonably interpreted and applied the relevant statutory mandates in arriving at its decision to grant CMP a certificate of public convenience and necessity for the NECEC Project.” *Id.* ¶ 43.

Department of Environmental Protection and Land Use Planning Commission

49. On September 27, 2017, CMP submitted applications for the necessary DEP Site Location of Development Law (“Site Law”) and Natural Resources Protection Act (“NRPA”) permits, as well as the LUPC Site Law Certification of Compliance. The LUPC and DEP conducted their proceedings concerning these applications in a coordinated manner, with joint public hearings held before both agencies. Thirty-nine parties, including CMP, participated in the DEP’s and LUPC’s reviews of the Project, filing thousands of pages of sworn testimony from dozens of witnesses, participating in six (6) days of evidentiary hearings which included cross-

examination of those witnesses, and filing thousands of additional pages of evidence and argument concerning issues relevant to the DEP's review and permitting of the Project and concerning issues relevant to the LUPC's review and certification of the Project. In addition to those parties, hundreds of Maine citizens testified during two public hearings and submitted written comments.

50. Thereafter, on May 11, 2020, the DEP issued a 236-page Findings of Fact and Order ("DEP Order") that thoroughly analyzed the environmental impacts of and alternatives to the Project, and granted the requested permits. *In re Cent. Me. Power Co.*, New England Clean Energy Connect, L-27625-26-A-N, Findings of Fact and Order (Me. DEP May 11, 2020).⁵

51. The DEP Order stated as follows:

The applicant's stated purpose for this project is to provide renewable electricity from Quebec to the New England grid. The Department applied the statutes and regulations it administers in this Order to approve the least environmentally damaging alternative available to achieve that purpose. The Order puts in place a comprehensive set of conditions designed to avoid and minimize the project's impacts to the extent possible, while also requiring substantial offsite compensation for those impacts that remain. So conditioned, the project fully satisfies the Department's permitting standards.

DEP Order, at 2.

52. In the DEP Order, which sets forth specific conditions to avoid impacts and to minimize and mitigate unavoidable impacts, the DEP made numerous findings regarding the Project's effect on the environment, including the following: the Project (1) will not have an unreasonable adverse effect on scenic uses or character of the surrounding area, DEP Order, at 56; (2) will not unreasonably interfere with existing uses, including recreation or navigational uses, *id.* at 58; (3) adequately provides for protection of wildlife and fisheries, unusual natural areas, significant wildlife habitat, and freshwater wetlands, *id.* at 90; (4) will not have an adverse effect

⁵ The DEP Order, together with its attachments, is publicly accessible at: <https://www.maine.gov/dep/ftp/projects/necec/2020-05-11-final-department-order.pdf>.

on the preservation of any historic sites, *id.* at 94; and (5) otherwise complies with Maine environmental laws, *id.* at 97, 101-04.

53. The DEP also took into consideration the Project’s effect on GHG emissions. The DEP concluded:

Climate change . . . is the single greatest threat to Maine’s natural environment. It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts.

DEP Order, at 105. The DEP cited the PUC’s finding that “the NECEC [project] will result in significant incremental hydroelectric generation from existing and new sources in Quebec and, therefore, will result in reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region.” *Id.* (alteration in original). The DEP accepted this finding and found the adverse effects of the Project reasonable in light of the “project purpose and its GHG benefits, provided the project is constructed in accordance with the terms and conditions of this Order.” *Id.*

54. In addition to its review of the project, the DEP incorporated into its Order, as required by statute, the LUPC’s 42-page Site Law Certification of the portion of the Project located in the unorganized and de-organized areas of the State, issued on January 8, 2020, in which the LUPC found that the NECEC is an allowed use within the sub-districts in which it is proposed and that the Project complies with all of the LUPC’s applicable land use standards not considered in the DEP’s review. DEP Order, at App. H.

55. Thereafter, several parties – including NextEra, the Natural Resources Council of Maine (“NRCM”), and a group of towns and individuals residing in the West Forks area (the “West

Forks Petitioners”) appealed the DEP Order both before the Maine Board of Environmental Protection (“BEP”) and the Maine Superior Court.

56. Around the time of the filing of their appeals, West Forks Petitioners and NRCM moved that the DEP and BEP, respectively, stay the effectiveness of the DEP Order pending their appeals. Those requests were denied.

57. On November 2, 2020, NRCM (later joined by the West Forks Petitioners) moved the Superior Court for a stay of the DEP Order. On January 11, 2021, the Superior Court (Murphy, J.) entered an order denying NRCM’s motion, concluding that the movants had not met their burden to show that they have a substantial likelihood of success on the merits. *See Order on NRCM’s Motion to Stay DEP Commissioner’s Order, NextEra Energy Res., LLC v. Dep’t of Env’t. Prot.*, Dkt Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Sup. Ct. Jan. 11, 2021).

58. The appeal of the DEP Order to the BEP remains pending.

U.S. Army Corps of Engineers

59. On September 29, 2017, CMP applied for a permit from the Corps under Section 404 of the Clean Water Act; CMP subsequently further sought Corps approval for the Project under Section 10 of the Rivers & Harbors Act. The Corps considered the testimony from hundreds of members of the public, as well as the thousands of pages of sworn pre-filed testimony from dozens of witnesses, presented at the six (6) days of evidentiary hearings conducted by the DEP and LUPC. The Corps also attended the DEP hearings related to the Project, took into consideration testimony and other written submissions to the DEP, issued numerous information requests of CMP, accepted written comments over a 10-month public comment period, held its own public hearing attended by over 300 members of the public, and analyzed the thousands of

pages of evidence and argument concerning issues relevant to its review of the NECEC pursuant to the National Environmental Policy Act (“NEPA”).

60. On July 7, 2020, the Corps completed an Environmental Assessment (“EA”) for the Project.⁶ The EA included a Finding of No Significant Impact (“FONSI”), *i.e.*, that the NECEC will not have a significant impact on the human environment. Specifically, in the EA/FONSI, the Corps found that the Project will be constructed, operated, and maintained so as to meet all safety standards; that the Project does not significantly impact waters of the United States or other unique characteristics; that there is no substantial technical or scientific dispute over the Project’s effects on the human environment; that the Project’s impacts are not uncertain; and that the Project is unlikely to adversely affect listed species or critical habitat. EA/FONSI, at 160-62. The Corps also found that operation of the NECEC “would likely result in a reduction in greenhouse gas (GHG) emissions, specifically carbon dioxide emissions, in New England and neighboring markets.” *Id.* at 122. The Corps completed an addendum to the EA on November 4, 2020.⁷

61. On November 6, 2020, after completing the EA/FONSI and its addendum, the Corps signed a permit for the Project under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

62. On October 27, 2020, Sierra Club, NRCM, and Appalachian Mountain Club (collectively “Sierra Club”) sued the Corps in the U.S. District Court for the District of Maine, alleging, among other things, that the Corps review under NEPA was insufficient and that the Corps should be ordered to complete a full Environmental Impact Statement (“EIS”) for the

⁶ The Corps’ EA is publicly available as a reference document on the website for the DOE’s Office of NEPA Policy and Compliance at: <https://www.energy.gov/sites/default/files/2021/01/f82/usace-ea-2020-07-07.pdf>.

⁷ The addendum to the Corps’ EA is publicly available as a reference document on the website for the DOE’s Office of NEPA Policy and Compliance at: <https://www.energy.gov/sites/default/files/2021/01/f82/usace-ea-addendum-2020-11-04.pdf>.

NECEC, rather than an EA/FONSI. After the issuance of the Corps permit, Sierra Club amended its complaint to add a challenge to the Corps permit, requesting the District Court to vacate the permit and enjoin the Corps from authorizing project construction and operation.

63. On November 11, 2020, Sierra Club moved for a preliminary injunction to bar construction of the NECEC. On December 16, 2020, the District Court (Walker, J.) denied Sierra Club's motion for preliminary injunction in a 49-page order, finding, among other things, that Sierra Club is not likely to prevail on the merits of its claims. *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 2:20-cv-00396-LEW, 2020 WL 7389744 (D. Me. Dec. 16, 2020).

64. After the Sierra Club filed an emergency appeal, the First Circuit issued a partial injunction pending appeal on January 15, 2021, which temporarily prohibited construction activities in Segment 1 of the Project. On May 13, 2021, however, the First Circuit vacated the temporary injunction and affirmed the District Court's order, finding that Sierra Club was not likely to succeed on the merits of its challenges to the Corps EA and permit. *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021).

65. The Sierra Club's lawsuit remains pending in the District Court.

Department of Energy

66. On July 27, 2017, CMP applied to the DOE for a Presidential Permit for the NECEC Project. Under Executive Order 10,485, as amended by Executive Order 12,038, a Presidential Permit from the DOE is necessary for the construction, operation, maintenance, or connection of electric transmission facilities at the U.S. international border. In considering this application, DOE developed its own administrative record, in collaboration with the Corps, and prepared its own EA and FONSI for the NECEC.

67. On January 14, 2021, the DOE issued an EA and FONSI for the Project, along with the Presidential Permit. *NECEC Transmission LLC*, OE Docket No. PP-438, Presidential Permit (DOE Jan. 14, 2021); *New England Clean Energy Connect*, DOE/EA-2155, Environmental Assessment (DOE Jan. 14, 2021); *New England Clean Energy Connect*, Finding of No Significant Impact (DOE Jan. 14, 2021).⁸ In the Presidential Permit, DOE stated as follows:

[T]he proposed project has been reviewed and approved by the Maine Public Utilities Commission, Maine Land Use Planning Commission, and Maine Department of Environmental Protection. In addition, the U.S. Army Corps of Engineers (USACE) prepared an EA regarding those portions of the proposed project within its jurisdiction and issued a Finding of No Significant Impact (FONSI). . . . USACE concluded that the proposed project did not pose the potential for significant environmental impacts. . . . DOE issued its NECEC EA . . . for the proposed project on January 14, 2021. . . . DOE determined that issuance of a Presidential permit to the Applicant to construct, connect, operate, and maintain a new electric transmission line at the U.S.-Canada border in Beattie Township, Maine would not have a significant effect on the human environment.

Presidential Permit, at 4.

68. The DOE under President Biden continues to support the completion of the NECEC as it furthers the Biden Administration's clean energy, infrastructure, and climate change policies and objectives.

69. Sierra Club has amended its complaint in *Sierra Club v. United States Army Corps of Engineers* to assert claims relating to DOE's issuance of the Permit, EA, and FONSI. Sierra Club did not seek a preliminary injunction in relation to the DOE's issuance of the Presidential Permit.

⁸ The DOE Permit is publicly accessible at: https://www.energy.gov/sites/prod/files/2021/01/f82/PP-438%20NECEC%20LLC%20_1-14-21-FINAL.pdf. The EA, together with its attachments, is publicly accessible at: <https://www.energy.gov/nepa/downloads/doeea-2155-environmental-assessment>. The FONSI is publicly accessible at: <https://www.energy.gov/sites/default/files/2021/01/f82/fonsi-ea-2155-necec-2021-01-14.pdf>.

Municipal Approvals

70. In addition to the state and federal permits and approvals discussed above, the NECEC requires various local permits and approvals from the municipalities in which the project facilities will be constructed, such as, where applicable, shoreland zoning permits, building permits, flood hazard development permits, conditional use / rezoning approvals, site plan approvals, driveway / entrance permits, demolition permits, and utility location permits. Many of these permits and approvals have a short duration and must be obtained close in time to the commencement of construction activities in the particular municipality, or be renewed prior to their expiration.

71. To date, the NECEC Project has received necessary local permits and approvals from the following municipalities: Starks, Moscow, Farmington, Lewiston, Leeds, Industry, Anson, Windsor, Wilton, Livermore Falls, Embden, New Sharon, Woolwich, Greene, Chesterville, Jay, Whitefield, Wiscasset, Buxton, and Alna. NECEC LLC has already applied for the necessary permits and approvals from Caratunk. CMP will seek permits and approvals from Pownal, Durham, and Auburn – the remaining Maine municipalities that the Project will cross – as needed and in accordance with the project schedule.

72. In the event a municipality denies, fails to timely process an application for, or unreasonably conditions a needed local permit or approval, the PUC, under 30-A M.R.S. § 4352(4), has the authority to exempt in whole or in part real estate to be used by a public utility for a transmission facility from a local ordinance when the PUC determines, after a petition, notice, and public hearing that the exemption is “reasonably necessary for public welfare and convenience.” This statute applies to the NECEC because NECEC LLC is a public utility under Maine law and the PUC has found that a public need exists for the Project through the PUC Order.

73. Under the applicable rule, the PUC must make the following findings with respect to the impact of a municipal ordinance on the NECEC in order to grant an exemption:

- a. The whole or partial exemption of the municipal ordinance is necessary to allow the NECEC to be developed, to render the NECEC Project economic, or to avoid a significant increase in the costs of the project.
- b. The interests of the general body of ratepayers with respect to the NECEC outweigh the interests represented by the municipal ordinance.

65-407 C.M.R. ch. 885, § 5.

74. If necessary, NECEC LLC and CMP would seek exemptions of local land use/permitting ordinances from the PUC for the NECEC.

Bureau of Parks and Lands Lease

75. Approximately 0.9 miles (representing only 0.6%) of the new corridor is on State of Maine public reserved lots in Johnson Mountain Township and West Forks Plantation,⁹ which the BPL leased to CMP pursuant to 12 M.R.S. § 1852, which authorizes the BPL to enter into leases for various purposes, including to “[s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips.” The terms of the lease are described in a June 23, 2020 amended and restated lease (the “BPL Lease”) that CMP assigned to NECEC LLC on January 4, 2021.¹⁰ The BPL Lease is attached hereto as **Exhibit B**.

⁹ Public reserved lots are a specific type of public reserved lands. When Maine separated from the Commonwealth of Massachusetts, Maine took title to lots previously reserved by Massachusetts, which had a long-standing policy of, upon the sale of townships, reserving average quality lots for the support and development of the town. The Articles of Separation, a compact between Maine and Massachusetts setting forth the preconditions to Maine’s statehood, specifically required that Maine continue to use the public reserved lots for beneficial public uses and to continue to make such reservations as land was sold. The Johnson Mountain Township and West Forks Plantation public lots were each reserved by Massachusetts in 1793.

¹⁰ Originally, CMP and BPL entered a lease for this segment of the corridor in 2014, which lease was terminated by the amended and restated lease in 2020.

76. The NECEC passes across the public reserved lands in Johnson Mountain Township and West Forks Plantation because this route is the least environmentally damaging practicable alternative path for the Project to minimize overall impacts, including impacts to scenic, recreational, and natural resources. The primary use of these particular public reserved lands is for timber management, and the lots already contain an existing transmission line. There is no viable, practicable alternative route for the NECEC that is less environmentally damaging than the existing route through the public reserved lands that would allow the Project to be permitted and constructed in accordance with the deadlines and financial terms set forth in the TSAs.

77. On June 26, 2020, opponents of the NECEC sued BPL and CMP challenging the BPL Lease on the grounds that it is *ultra vires* because the Maine Legislature had not approved the lease by a 2/3 vote in accordance with article IX, section 23 of the Maine Constitution, which provides:

State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

The BPL and NECEC LLC deny that the BPL Lease is unlawful and contend that it does not reduce or substantially alter the uses of the leased public reserved lands, particularly since the construction and operation of transmission facilities have long been among the statutorily permitted uses of public reserved lands under 12 M.R.S. § 1852(4).

78. On August 10, 2021, the Superior Court (Murphy, J.) issued an order reversing the BPL's issuance of the BPL Lease. The BPL and NECEC LLC timely appealed the order on August 13, 2021, thereby automatically staying the Superior Court's judgment pending appeal. M.R. Civ.

P. 62(e). After opponents filed a motion to lift the stay, the Law Court entered an order leaving the stay in place, with NECEC LLC to refrain from construction activities on the leased property during the pendency of the appeal. The appeal is currently pending before the Law Court. This temporary bar to construction activities on the leased property only will not prevent or materially interfere with completion of the Project according to contractual deadlines.

First Citizens' Initiative Targeting the NECEC (2019-2020)

79. While the permitting of the NECEC proceeded, on August 29, 2019, a group of voters led by former state senator Thomas Saviello and Sandra Howard filed an application for a citizens' initiative (the 2020 Initiative) that sought to direct the PUC to reverse its May 3, 2019 CPCN Order to "find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project," notwithstanding the PUC's Order finding to the contrary based on substantial evidence, and the Law Court's Order affirming that decision, and therefore to deny a CPCN for the Project. A copy of the 2020 Initiative is attached hereto as **Exhibit C**.

80. Mainers for Local Power, a political action committee funded at the time by Calpine and Vistra, two energy companies that operate natural gas fired power plants in Maine and elsewhere in New England, spent in excess of \$600,000 to collect signatures to place the initiative on the November 2020 ballot.

81. On May 12, 2020, after the Secretary of State certified the initiative for inclusion on the November 2020 ballot, Avangrid filed a complaint for declaratory judgment challenging the constitutionality of the 2020 Initiative and seeking an injunction preventing the Secretary of State from including the initiative on the November 2020 ballot. NextEra and Mainers for Local Power intervened to defend the 2020 Initiative.

82. In an August 13, 2020 opinion, the Law Court held “that the initiative fails to meet the constitutional requirements for inclusion on the ballot because it exceeds the scope of the people’s legislative powers conferred by article IV, part 3, section 18 of the Maine Constitution.” *Avangrid Networks, Inc. v. Sec’y of State*, 2020 ME 109, ¶ 2, 237 A.3d 882. As a result, the 2020 Initiative did not appear on the November 2020 ballot.

Second Citizens’ Initiative Targeting the NECEC (2020-2021)

83. On or about September 15, 2020, approximately five weeks after the Law Court’s decision striking down the 2020 Initiative as unconstitutional, a group of voters led again by Thomas Saviello and Sandra Howard, and funded by Mainers for Local Power and NextEra, filed an application for a second citizens’ initiative targeting the NECEC.

84. Rather than specifically call the NECEC out by name again after their failed effort with the 2020 Initiative, the proponents of the new Initiative seek to bar completion of the NECEC by amending retroactively Titles 12 and 35-A of the Maine Revised Statutes in three distinct, substantive respects. A copy of the Initiative is attached hereto as **Exhibit D**.

85. Section 1 of the Initiative amends 12 M.R.S. § 1852(4) to mandate that any lease of public reserved land by the BPL for transmission lines and facilities is automatically deemed to substantially alter the use of the lease land within the meaning of article IX, section 23 of the Maine Constitution and requires approval by a 2/3 vote of all members elected to each House of the Legislature. This requirement applies retroactively to September 16, 2014.

86. Section 4 of the Initiative amends 35-A M.R.S. § 3132 to require legislative approval of the construction of “high impact electric transmission lines,” and that any high impact electric transmission line crossing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and requires approval by a 2/3 vote of all

members elected to each House of the Legislature. This requirement applies retroactively to September 16, 2020.

87. Section 5 of the Initiative amends 35-A M.R.S. § 3132 to ban the construction of “high impact electric transmission lines” in the “Upper Kennebec Region” as that term is defined in the Initiative, which includes approximately 43,300 acres of land in Somerset County and Franklin County. This requirement applies retroactively to September 16, 2020.

88. By design, each of the changes in the Initiative retroactively applies to the NECEC Project, requiring legislative approval for the BPL Lease and the Project itself, by 2/3 vote of all members elected to each House of the Legislature, and prohibiting the construction of the Project in its current route through the “Upper Kennebec Region,” which as defined may include some portion of Segment 1 of the NECEC.

89. As with the 2020 Initiative, this Initiative through its retroactive application is specifically targeted at the NECEC and intended to block completion of the Project.

90. One of the primary political action committees supporting the Initiative, No CMP Corridor, has repeatedly stated that the purpose of the Initiative is to stop the NECEC. No CMP Corridor has stated the following on its website, nocmpcorridor.com:

HELP US STOP THE CMP CORRIDOR

Mainers don't benefit from CMP's destructive transmission corridor project, and they have made it clear every step of the way that they don't want it, **but their voices haven't been heard by bureaucrats in Augusta**. That's why a group of concerned citizens banded together to form No CMP Corridor. We are a grassroots, volunteer-driven organization with a simple goal: give the people of Maine a voice through a citizens' referendum.

Nobody thought we, everyday citizens, could go toe-to-toe with CMP and their foreign investors. But against all odds (and in the dead of winter), we collected more than enough signatures to bring this issue to a statewide vote in November of 2020.

Then the highest judicial Court of Maine sided with CMP and ruled our 2020 referendum unconstitutional, effectively silencing Mainers' voice in the matter.

While we had lost the battle, we knew the war was far from over. So we filed another referendum and are now gathering signatures to get on the ballot in 2021. Our new referendum is worded in a way that, we are confident, completely constitutional and allow Mainers to express their choice about this project.

To read a short summary about our new initiative, click [HERE](#).

To read the full petition language, click [HERE](#).

We did not and will not stand idly by while a large, untrustworthy corporation degrades our best resources for their exclusive financial gain. **We are more than an extension cord for Massachusetts.**

The bottom line is that CMP has failed to reliably deliver power right here in Maine, and their constant drive to put profits ahead of ratepayers has resulted in poor customer service, multiple state investigations and their dubious reputation as the lowest rated power utility company in the nation.

So while they spend record sums of money on fancy ad campaigns to deceive the voters, we will continue to fight them every step of the way. CMP cannot be trusted, and we will not allow them to permanently alter our way of life to make millions of dollars off the backs of rural Mainers.

This is a bad deal for Maine! We hope you will join us in putting an end to this destructive project once and for all.

- Sandi Howard, No CMP Corridor

91. In a September 16, 2020 press release, No CMP Corridor stated the following:

Opponents of the Central Maine Power's (CMP) proposed corridor filed ballot initiative language today to begin the process of allowing Maine voters an opportunity to weigh in on this incredibly unpopular project. After ballot initiative language is approved by the Maine Secretary of State, Maine registered voters will be collecting the required signatures to place this initiative on the ballot in 2021.

Former State Senator and State Representative Tom Saviello filed the language today with the Secretary of State. He was joined by five other Maine voters who were deeply concerned about the impacts of this project and the inability of all Mainers to have a say when it comes to this for-profit project.

See https://www.nocmpcorridor.com/9_16_20_press_release2.

92. On October 30, 2020, the Secretary of State accepted the application for the Initiative and issued the form petition for it.

93. On that same day, No CMP Corridor issued a press release stating the following:

A new statewide effort to stop Central Maine Power's 145-mile transmission line through Maine began today in Augusta. This new referendum includes a three part question that would restore the voice of the people by:

1. Requiring legislative approval for any high impact electrical transmission line that is more than 50 miles (Retroactive to 9/16/2020)
2. Putting a geographic prohibition on building high impact electrical transmission lines in the Upper Kennebec region (Retroactive to 9/16/2020)
3. Reaffirming the Maine Constitution's requirement that the Legislature approves leases, like CMP's, that cross public lands if they significantly alter the use of those lands. (retroactive to 9/16/2014)

Former State Senator and State Representative Tom Saviello filed paperwork in September to begin a new statewide initiative campaign. Today, the Maine Secretary of State provided the paperwork necessary for signature collection to begin.

"As I've said from the very beginning, this transmission project is a bad deal for Maine and for Maine people," Saviello said.

See https://www.nocmpcorridor.com/10_30_20_press_release.

94. No CMP Corridor also stated the following in a newsletter dated November 1, 2020: "Two days ago was the official launch of our new referendum effort to stop CMP's destructive corridor project" See https://www.nocmpcorridor.com/11_1_newsletter.

95. On January 21, 2021, the proponents of the Initiative submitted petitions to the Secretary of State signed by Maine voters.

96. That same day, No CMP Corridor issued a press release stating the following:

Sandi Howard, the leader of the No CMP Corridor PAC, Thomas Saviello, a former state legislator, and Darryl Wood, an activist from New Sharon today delivered over 100,000 signatures to Secretary of State Shenna Bellows. These signatures reflect a successful citizens' signature collection effort that overcame challenges posed by winter weather and Covid 19 protocols, ensuring that voters will be able to have the final say on CMP's unpopular NECEC Corridor later this year.

"An Act To Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserve Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" will be on the ballot this November. If enacted, the new law will be retroactive and therefore effectively will block the project.

See https://www.nocmpcorridor.com/1_21_21_press_release.

97. No CMP Corridor posted the following photograph on its web page when it filed the petitions for the Initiative with the Secretary of State:



98. On February 22, 2021, the Secretary of State certified the Initiative to be submitted to the Maine Legislature in accordance with constitutional and statutory requirements.

99. The Legislature did not enact the Initiative without change prior to adjourning its first regular session *sine die* on March 30, 2021.

100. On April 8, 2021, the Governor issued her proclamation declaring that the Initiative would be placed on the ballot for the November 2021 election.

101. After the Secretary of State issued final wording for the question to be placed on the November 2021 ballot for the Initiative, No CMP Corridor issued a press release stating: “No CMP Corridor would like to thank the Secretary of State for drafting a question that we feel is straightforward and easy to understand. More than 80,000 voters initiated this question, and come

November, the people of Maine will finally have the opportunity to vote on the fate of the destructive CMP Corridor.” See https://www.nocmpcorridor.com/5_24_21_press_release.

102. Throughout the subsequent campaign, proponents of the Initiative continued to make it clear that the Initiative targets the NECEC.

a. In April 2021, No CMP Corridor published a Facebook post authored by Sandi Howard that stated, “we are adjusting our messaging to encourage supporters to share the news that a YES vote on the ballot referendum in November is to REJECT the CMP Corridor.” See <https://www.facebook.com/NoCMPCorridor/posts/485236602917224>.

b. On June 14, 2021, No CMP Corridor posted a “Vote Yes to Reject the CMP Corridor” graphic to its Facebook page:



See <https://www.facebook.com/NoCMPCorridor/posts/532389861535231>.

c. On July 13, 2021 No CMP Corridor released an ad which featured cartoon animals stating, in part “We must reject CMP’s Corridor,” and ending with the statement “vote yes to reject the CMP corridor this fall. It’s a bad deal for Maine.” See <https://youtu.be/zu-5Jl6ljf8>.

d. On July 15, 2021, Sandi Howard posted images of an anti-NECEC door hanger, paid for by Mainers for Local Power, on the Say No to NECEC Facebook group, asking “Will you vote YES to ban the CMP Corridor on November 2, 2021?”:



See <https://www.facebook.com/groups/SayNOtoNECEC/posts/983110092445327/>.

e. On August 8, 2021, No CMP Corridor published its weekly newsletter, which contained the following statement from Sandi Howard: “We can VOTE YES ON #1 this November to finally put an end to this madness. That’s where you come in. It’s time to spread the word that this November, we need to vote YES on Question 1 to protect the Upper Kennebec region, which includes our public lands, from being exploited by CMP.” Ms. Howard also wrote: “please, channel any frustration you may be feeling into action, because ultimately, Maine votes will have the final say this November, so the time to take action is now. Vote Yes on #1 to reject, ban and stop the CMP Corridor!” See https://www.yestorejectcmpcorridor.com/8_8_21_newsletter.

f. On September 20, 2021, an attorney with the law firm representing the political action committees promoting the Initiative (No CMP Corridor and Mainers for Local Power), as well as NextEra, publicized on a radio show that “the only project that is going to be affected . . . is the CMP corridor project.” *See* <https://www.wvomfm.com/episode/ghrt-rewind-09-20-adam-cote-1315/>.

g. On September 22, 2021, that same attorney publicized on a radio show that “this referendum essentially is aimed to defeat the CMP corridor.” *See* <https://soundcloud.com/newsradio-wgan/adam-cote#t=0:00>.

h. In September 2021, Mainers for Local Power published an ad stating “Make no mistake. Question 1 is about CMP’s corridor and it’s a bad deal for Maine. Vote yes on 1 to ban the corridor. *See* https://www.youtube.com/watch?v=2hq_3CHhibI.

i. In October 2021, Mainers for Local Power paid for an ad featuring Maine Guide Ed Buzzell, wherein Mr. Buzzell states, “there’s a lot of confusion about Question 1, so let’s clear it up. First, politicians didn’t write it. 80,000 Mainers put Question 1 on the ballot, and we did it for one reason: to stop CMP’s corridor.” *See* <https://host2.adimpact.com/admo/viewer/5071026>.

j. In October 2021, Mainers for Local Power sent a mailer urging voters to “Vote Yes on 1 To Ban CMP’s Corridor,” and stating that “Voting Yes on Question 1 gives Maine people the power to ban CMP’s Corridor and reject CMP’s bad deal.”



103. The anti-NECEC campaign has been substantially funded by NextEra, Calpine, and Vistra, all seeking to preclude the introduction of cleaner, less expensive energy into New England.

a. According to filings with the Maine Commission on Governmental Ethics & Election Practices (the “Ethics Commission”), No CMP Corridor has received approximately \$479,193 in cash contributions as of November 1, 2021. The single largest donor to No CMP Corridor has been Mainers for Local Power, which has given \$310,000.

b. According to filings with the Ethics Commission, since its formation in December 2019, Mainers for Local Power has received approximately \$26,814,746 in cash and \$1,451,647 of in-kind contributions as of November 1, 2021. Virtually that entire amount has been contributed by NextEra (\$20,025,000); Vistra (\$2,866,323); and Calpine (\$2,688,823). Thus, the contribution from Mainers for Local Power to No CMP Corridor has come directly from the NECEC’s fossil fuel competitors whose business will be adversely affected by the construction and operation of the Project.

c. In addition to cash contributions it received from Mainers for Local Power, No CMP Corridor also received \$88,000 of in-kind contributions from Clean Energy for ME, LLC, an entity otherwise known as Stop the Corridor. These contributions from Stop the Corridor to No CMP Corridor were made between December 2019 and March 2020

and consisted primarily of staff time for campaign coordination and volunteer recruitment related to the 2020 Initiative targeting the NECEC. Upon information and belief, the majority of funding for Stop the Corridor came from NextEra.¹¹

d. Mainers for Local Power has been the chief organizer and primary funding source for both the 2020 Initiative and the present Initiative targeting the NECEC. Mainers for Local Power hired Revolution Field Strategies to gather the signatures necessary to place the Initiative on the ballot at a cost of more than \$2.1 million. As of November 1, 2021, Mainers for Local Power has spent an additional \$14.3 million on television advertisements, \$3.45 million on social media and online advertisements and \$346,000 on telephonic outreach opposing the NECEC.

104. Following the anti-NECEC campaign funded by fossil fuel burning energy companies, the Initiative was approved by the voters on November 2, 2021.

105. The Initiative will take effect on or about December 12, 2021.

106. After the Initiative takes legal effect, the relevant agencies will likely begin enforcement actions. Proceedings in the PUC will likely begin with issuance of an order to show

¹¹ Given Stop the Corridor's significant contribution of in-kind staff time to No CMP Corridor and its significant expenditures of television and digital advertising when signatures were being collected for the 2020 Initiative targeting the NECEC, and for other reasons, the Ethics Commission voted in March 2020 to investigate whether Stop the Corridor violated Maine Election Law for failing to file as a political action committee or ballot question committee. Filing with the Ethics Commission would require Stop the Corridor to identify the source(s) of its fiscal contributions. Over the course of the Ethics Commission investigation, Stop the Corridor has refused to provide un-redacted documents to the Ethics Commission, challenged the scope of multiple subpoenas issued by the Ethics Commission, and ignored specific requests in those subpoenas asking for documents related to its funding. Stop the Corridor also filed suit claiming that the Ethics Commission did not have the authority to conduct the investigation, a suit that was dismissed in December 2020. The investigation, which is still ongoing, has been drawn-out for more than twenty months. Even if the Ethics Commission determines that Stop the Corridor should have registered as a political action or ballot question committee, Stop the Corridor's delaying tactics ensured that no information about its funding sources was available to Maine voters in advance of Election Day of 2021.

cause why the proceedings relating to the CPCN should not be reopened. The BPL will likely issue a letter regarding potential modification or termination of the BPL Lease.

107. In addition, after the Initiative takes legal effect, NECEC LLC will be required to obtain the approval of the Legislature for the Project, which may not be sufficient if the PUC determines that the Project route goes through the Upper Kennebec Region, where high-impact electric transmission lines are prohibited pursuant to the Initiative.

Construction of the NECEC

108. Construction of a large transmission project like the NECEC is a complex and lengthy process, which involves the work of numerous consultants and specialized contractors, and the procurement of significant quantities of supplies, materials, and equipment, all of which must be planned and managed with a detailed project schedule to track all necessary project tasks in sequence, and a detailed project budget to track expenses. The NECEC project schedule currently contemplates the Project achieving commercial operation on December 13, 2023.

109. The current estimate of the total capital expenditures to complete the Project is approximately \$1.04 billion. Through the end of 2020, approximately \$153.3 million had been expended on the Project. Approximately \$408.8 million had been expended on the Project through September 30, 2021; approximately \$449.8 million is estimated to have been expended on the Project through November 2, 2021. Of the \$449.8 million, as contemplated by the stipulation approved by the PUC as part of the CPCN, NECEC LLC has paid out approximately \$8.5 million in benefits between January 2021 and October 1, 2021. (HQUS has paid an additional \$9.5 million in benefits to Maine). To date, NECEC LLC has paid out approximately \$3.4 million in property taxes related to the Project.

Contractors

110. Construction of the NECEC requires the participation of numerous contractors, each of which are responsible for certain portions of the Project. Burns & McDonnell has been providing permitting management services for the Project since 2017. Black & Veatch Corporation provides project management services, pursuant to a contract dated September 18, 2018. TRC Engineers LLC provides design services, according to a contract dated September 5, 2018.

111. In addition to these management and design services contractors, construction and supply contracts have been entered into for the Project: a contract with Northern Clearing Inc. (“NCI”) was executed on September 15, 2020; an HVDC transmission line construction contract with Irby Construction Inc., to be implemented through a joint venture with Cianbro Corporation, (“Cianbro/Irby”) was executed on October 15, 2020; the AC transmission line construction contract with Sargent Electric Company was executed on February 17, 2021; a contract with The H.D.D. Company, Inc. was executed on February 8, 2021 to drill the segment of the NECEC HVDC line that will run under the Kennebec River; an Engineering, Procurement and Construction (“EPC”) contract with ABB Inc. (now ABB Enterprise Software Inc., doing business as Hitachi ABB Power Grids) (“HAPG”) for the converter station in Lewiston was executed on August 19, 2019; and steel pole supply contracts were executed with TransAmerican Power Products, Inc. (“TAPP”) on September 14, 2020 and New Nello Operating Co., LLC (“Nello”) on April 15, 2020.

112. There are numerous other contracts relating to construction of the Project, including contracts for round wood poles awarded on December 28, 2020 and laminated wood poles on February 19, 2021; several contracts entered in Spring 2020 with Maine sawmills for the manufacture of timber mats to be used to prevent environmental degradation of the transmission

corridor during construction; several contracts with third-party environmental inspectors awarded on January 14, 2021; and a contract for the autotransformer for the Larrabee Road substation.

Construction Progress

113. Construction of a major utility transmission corridor like the NECEC requires substantial construction-related expenditures, including for engineering, permitting, and environmental compliance, and program management, which must begin long before activities in the field may commence and will continue until the Project achieves commercial operation.¹² For the NECEC, these construction-related expenditures proceeded as follows:

a. In 2014, CMP began acquiring the additional real estate interests necessary to construct a transmission corridor along the Project path.

b. Following the acquisition of the bulk of the real estate rights needed for the Project, development efforts were initiated in late 2016, when the Project's transmission planners and engineers established the optimal technical configuration for the NECEC in coordination with Hydro-Québec. This included the confirmation of the proposed route, the selection of the location for the converter station and the preliminary engineering for the main project components. In parallel with this effort, and with support from external consultants, the project team developed a preliminary project schedule that defined the timing for the implementation of the multiple project activities necessary to construct the project, establishing the proposed project in-service date of December 2022.

¹² The costs relating to these activities were approximately \$65.6 million as of February 21, 2021; \$70.9 million as of April 8, 2021; \$92.2 million as of June 30, 2021; \$97.3 million as of September 30, 2021; and \$99.2 million as of November 2, 2021. For purposes of this Verified Complaint, legal fees are not included.

c. In the spring of 2017, the project team added additional resources to support the permitting processes, including natural resource surveying and application development and filing.

d. In the spring of 2018 and upon the selection of the Project in the Massachusetts RFP, the project team added a large number of project management and engineering personnel, both internal and external, to initiate the detailed planning phase of the Project. This included the implementation of all project controls (budget, schedule, and risk management), quality and safety protocols, and the development of project-detailed engineering, for which external consultants were hired.

e. With the permitting processes underway, in late 2018, the project team initiated the procurement of the Project's major material and construction services, launching the RFPs to the market and awarding its key contracts as early as mid-2019, when the approximately \$200 million "Engineering, Procurement and Construction" (EPC) contract for the converter station in Lewiston was awarded to HAPG. The award of this contract was necessary at this time due to the long lead-time to construct the components that make up the converter station, and this contract triggered the mobilization of a large team of project engineers to prepare detailed transmission studies and detailed engineering plans ahead of the manufacturing of the custom converter station components.

f. During 2020, and as earlier described, other multiple large contracts were awarded to different contractors and manufacturers for project components. This included contracts for the main construction contractors and the mobilization and initiation of pole production by the transmission structure manufacturers. In preparation for the start of construction during the second half of 2020, the project team continued to grow with the

gradual addition of construction management, safety, and environmental compliance resources to provide the adequate levels of oversight during construction.

g. All of these engineering, permitting, environmental compliance, and program management- and construction-related activities were necessary to permit the NECEC project team to formally mobilize construction contractors and for construction activities to start in the field.

114. The construction of long, linear transmission projects like the NECEC also requires careful construction sequencing, which takes into account time-of-year restrictions to protect vulnerable wildlife, environmental limitations, weather conditions, access considerations, and the participation of numerous contractors with specialized expertise. The process begins with corridor clearing, followed by the erection of the structures, and the stringing of the electrical conductor. Concurrently, substation work needed to permit the interconnection of the new transmission line to the existing transmission system must be accomplished. For the NECEC, this substation work most notably includes the construction of the converter station in Lewiston whereby the DC power transmitted on the HVDC line is converted to AC for injection into the transmission system. Network Upgrade work also requires detailed outage sequence plans that have additional time-of-year restrictions; for example, certain elements can only be removed from service in a specific 2-week window for the entire year.

115. Pursuant to a notice to proceed issued in November 2020, CMP's clearing contractor NCI was instructed to mobilize its team in order to prepare sufficient corridor beginning in late 2020 or early 2021 for the transmission line contractors (Cianbro/Irby) to begin erecting the HVDC transmission line.

116. Upon the issuance of the notice to proceed, NCI recruited and mobilized its crews to be ready to start work once NECEC LLC approved commencement of construction. During this mobilization phase, NCI performed required site surveys, installed protected/natural resource flagging, prepared lay down areas along Segments 1 and 2 of the project route for supplies and equipment including the timber construction mats and poles, and retained and located necessary equipment.

117. After issuance of the Presidential Permit, the final major permit required for the Project, on Thursday, January 14, 2021, NECEC LLC instructed NCI to commence its clearing and other construction activities on Monday, January 18, 2021.

118. Project plans called for clearing to begin at The Forks Plantation and progress both north into Segment 1 and south into Segments 2 and 3; however, due to the injunction temporarily delaying construction activities in Segment 1 between January 15, 2021, and May 13, 2021, NCI began clearing trees and laying mats on the northern end of Segment 2 on January 18, 2021 (starting at The Forks Plantation and heading south along the Project route). NCI began clearing Segment 1 on May 15, 2021, two days after the First Circuit lifted the injunction on construction activities in that segment of the Project. Subject to restrictions on cutting during the months of June and July under the Corps permit to mitigate impacts on a federally-listed bat species, NCI has continued clearing the corridor (as well as installing construction mats as necessary to conduct the clearing) since January 18, 2021, as contemplated by the project schedule.

119. In 2020, to prepare for structure installation after sufficient clearing had occurred, CMP authorized its steel pole supplier, TAPP, to begin construction of steel poles for the Project. Each steel pole is custom designed and constructed specifically for the Project, according to

engineering design specifications. The first steel poles from TAPP were delivered to lay-down yards by January 18, 2021.

120. On February 1, 2021, Cianbro was given partial authorization to mobilize and begin clearing and site development work at the converter station in Lewiston. Due to delays in a minor revision to the DEP permit, crews were put on standby and ultimately the full authorization to prepare that site for construction was granted on May 28, 2021. Clearing work at the site was finalized on May 31, 2021, to avoid time-of-year clearing constraints in June and July. Initial work completed includes site and road clearing, road and site grubbing, site cut and fill, and erosion control. Additional work partially completed includes drilling, blasting, and rock processing (approximately 86%); access road installation (approximately 80%); and pad subgrade installation (approximately 87%). The overall site preparation is over 72% complete. In addition, HAPG had constructed numerous custom components for the converter station site, including four transformers and valves, to allow the necessary lead time before installation at the converter station. By November 2, 2021, the total amount paid to HAPG for the construction of the Lewiston converter station was approximately \$100 million. Of that \$100 million, approximately \$28 million was paid to HAPG for construction and construction-related work at the converter station site.

121. A true and accurate picture of the converter station site (taken August 26, 2021) is included below:



122. A true and accurate picture of one of the custom-manufactured transformers for the converter station (taken on October 6, 2021) is included below:



123. On February 9, 2021, after NCI had conducted sufficient clearing to permit the process of installing the HVDC line to begin, Cianbro/Irby installed the first structure in Segment 2. Below is a true and accurate picture of the installation of the first structure (Structure 516).



124. By February 22, 2021, the date the Secretary of State certified the signatures for the Initiative, NCI had cut over 10 miles of corridor, laying over 1,000 mats for access, and performed approximately \$8.3 million of clearing and related construction activities. Cianbro/Irby had installed 9 structures on the HVDC line, at a cost of approximately \$15 million. TAPP had delivered 24 poles to lay-down yards at a cost of approximately \$7.4 million (including engineering and raw materials). The total amount capital expenditures on the NECEC from inception to February 22, 2021, inclusive of project management costs, was approximately \$199 million.¹³

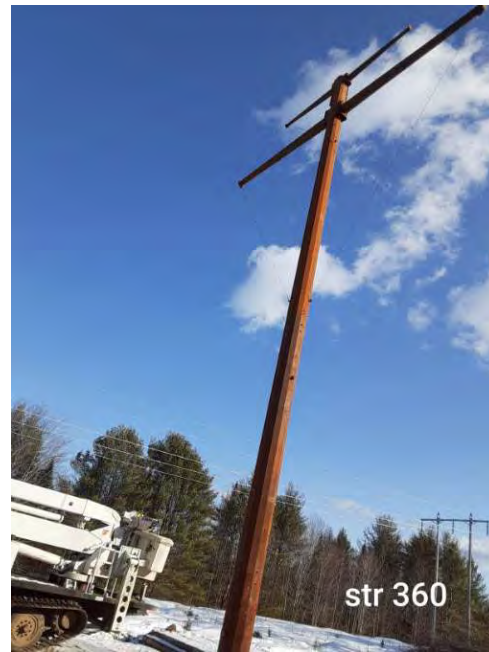
125. A true and accurate picture of the base of Structure 372 (taken on February 21, 2021) and Structure 371 (taken on February 15, 2021), both set in February, are included below:

¹³ The February 22, 2021, capital expenditure sum is based on the monthly accruals through the month of February. Accruals consider work executed through the 20th of each month.



126. By March 30, 2021, the end of the first quarter of 2021 and the date the Legislature adjourned *sine die* without adopting the legislation proposed via the Initiative, NCI had cut over 25.5 miles of corridor, laying over 5,727 mats for access, and performed approximately \$13 million of clearing and related construction activities. Cianbro/Irby had installed 15 structures on the HVDC line, at a cost of approximately \$20.6 million. TAPP had delivered 33 poles to lay-down yards at a cost of approximately \$8.4 million. The total capital expenditures on the NECEC from inception to March 30, 2021, inclusive of project management costs, was approximately \$248.5 million.

127. A true and accurate picture of the base of Structure 359 (taken on March 3, 2021) and Structure 360 (taken on March 3, 2021), both set in March, are included below:



128. By April 8, 2021, the date the Governor issued the proclamation declaring that the Initiative would be placed on the November 2021 ballot, NCI had cut approximately 36 miles of corridor, laying over 5,727 mats for access, and performed approximately \$14.3 million of clearing and related construction activities. Cianbro/Irby had installed 15 structures on the HVDC line, at a cost of approximately \$21.2 million.¹⁴ TAPP had delivered 33 poles to lay-down yards at a cost of approximately \$8.4 million. The total capital expenditures on the NECEC from inception to April 8, 2021, inclusive of project management costs, was approximately \$250.2 million.

129. By June 30, 2021, the end of the second quarter of 2021, NCI had cut over 80 miles of corridor, laying over 25,328 mats for access, and performed approximately \$25.6 million of clearing and related construction activities. Cianbro/Irby had installed 15 structures and two additional bases, at a cost of approximately \$27.3 million. TAPP had delivered 116 poles to lay-down yards at a cost of approximately \$9.5 million. Further, beginning in June 2021, work began

¹⁴ Costs related to structure installation increased over March 30, 2021, although no additional structures had been installed because the contractor continued to do additional preparatory work for structure installations (including, for instance, pole assembly and site work).

on the AC portion of the Project, specifically, the Network Upgrade line in Segment 3. By June 30, 2021, 15 structures had been installed and 2 modified along the AC line, at a cost of approximately \$6.6 million. The total capital expenditures on the NECEC from inception to June 30, 2021, inclusive of project management costs, was approximately \$349.6 million.

130. A true and accurate picture of structure 425 (taken on July 29, 2021) and the installation of structure 426 (taken on July 28, 2021), along the DC line, are included below:



131. True and accurate pictures of installation of structures along the AC line (taken on August 4, 2021 and August 16, 2021) are included below:



132. As of November 2, 2021, Election Day, NCI had cut approximately 124 miles (85.5%) of the Project corridor and performed approximately \$43.1 million of clearing and other construction activities. Cianbro/Irby had installed approximately 70 structures, representing approximately 8.4% of the total HVDC transmission line structures, for a total cost of approximately \$38.5 million. In addition, Cianbro/Irby had set bases for 10 more direct imbed structures and installed caisson foundations for 4 more structures. TAPP had delivered 484 poles to lay-down yards for a cost of approximately \$25 million and Nello had delivered an additional 86 poles for a cost of approximately \$13 million.¹⁵ In all, more than 55% of the custom-manufactured steel poles that will be used for the HVDC transmission line had been delivered by the end of September 2021. Along the AC portion of the line, specifically Segment 3 and Segment

¹⁵ In addition, other materials delivered through November 2, 2021 included 344 reels of DC conductor (total length of over 3.1 million feet) at a cost of approximately \$6.7 million; 136 reels of DC fiber (total length of over 1.65 million feet) at a cost of approximately \$1.4 million; 74,100 DC insulators at a cost of approximately \$4.5 million; 109 wood poles for the AC line, at a cost of over \$1.8 million; 169 reels of AC conductor (over 1,420,00 feet) at a cost of approximately \$2.6 million; 28 reels of AC fiber at a cost of approximately \$310,000; 22 reels of AC Shieldwire at a cost of approximately \$45,000; and over 34,000 AC insulators at a cost of approximately \$832,000.

5 (the 26-mile Network Upgrade between Coopers Mills and Maine Yankee), approximately 54 structures had been installed and 2 modified, at a cost of approximately \$18.4 million. In addition, approximately 3 miles of conductor had been strung in Segment 5. The total capital expenditures on the Project from inception through November 2, 2021, inclusive of project management costs, is estimated to be approximately \$449.8 million, which represents 43% of the total project cost estimate.¹⁶

133. True and accurate pictures of installed structures on the DC line (taken on October 8, 2021) are included below:



134. A true and accurate picture of NECEC LLC's contractor Sargent installing new wire at Structure 377 (taken on September 27, 2021) is included below:

¹⁶ The November 2, 2021, capital expenditure sum is based on the monthly accruals through the month of October.



135. As of November 2, 2021, approximately 600 workers are working on the Project (the significant majority of them from Maine).

Construction Scheduling

136. In order to complete construction on the Project in time to achieve timely commercial operation as contractually required, it was necessary for NECEC LLC to begin construction activities in early 2021 and continue thereafter. Based on a commercial operation date of May 31, 2023, project plans called for construction to start during 2020, anticipating construction as soon as the required state and federal approvals were obtained. The delay in obtaining some of these authorizations (due in part to the delays caused by Project opponents) impacted the timing planned for certain construction activities and required the project team to make certain adjustments to the project schedule to maintain the target completion date agreed with Hydro-Québec.¹⁷ Starting construction as soon as the authorizations were received was

¹⁷ Hydro-Québec and NECEC LLC have established a Joint Development Board that governs the joint

critical to maintain the targeted commercial operation date. It is critical that the Project enter commercial operation as soon as is feasible in order to, among other things, (1) realize Project benefits; and (2) ensure financial viability of the Project, which is impacted by incremental investment costs associated with Project extension, such as escalation costs, change orders associated with delays and resequencing, and delays in transmission revenues which do not start until commercial operation is achieved.

137. If construction activities are not allowed to proceed during this legal challenge to the Initiative, the Project likely would not achieve commercial operation before the contractual deadline of August 23, 2024, or even the extended deadline of August 23, 2025. The current project schedule calls for a commercial operation date of December 13, 2023, which allows schedule float of approximately 8 months with respect to the contractual deadline. As of today, the Project has been in construction for nearly 10 months and there are just over two more years of construction and commissioning ahead. If construction is not allowed to continue during the legal challenge, the impact on the commercial operation date will be, at a minimum,¹⁸ one day per each day that construction is on hold. Assuming for instance, a 2-year stoppage, construction would not be allowed to resume until the fall of 2023 and the in-service date would be pushed out to at least the end of 2025, making completion and operation of the Project unlikely.

development of the two transmission projects (NECEC LLC's NECEC Project in the U.S. and Hydro-Québec's Appalaches - Maine Transmission Project in Canada). The parties must agree on and synchronize the project development milestones that are common to each other, such as the interconnection at the Canada-U.S. border, the testing and commissioning, and the commercial operation date.

¹⁸ The actual schedule impact would depend on seasonal constraints (such as winter versus summer construction) as well as the timing necessary for remobilization of the construction crews and transmission outages and commissioning activities as permitted by ISO-NE.

Public Notice of Construction Progress

138. The beginning of construction on the NECEC was publicized by NECEC LLC via a host of platforms, including earned media, social media, interviews, and the *Clearing the Air* podcast. For example, initial construction efforts were publicized in the following:

- a. Clearing the Air, Season 2, Episode 13: Construction Begins [January 29, 2021]:
https://www.youtube.com/watch?v=TEdr_DfzUyE
- b. NECEC Press Release [February 8, 2021]:
<https://www.necleanenergyconnect.org/neccec-milestones/2021/2/9/hundreds-of-mainers-go-to-work-as-construction-begins-on-the-new-england-clean-energy-connect>
- c. NECEC Facebook Page [February 9, 2021]:
<https://www.facebook.com/NECCleanEnergyConnect/photos/2802844983265937>
- d. News Center Maine [February 9, 2021]:
<https://www.newscentermaine.com/video/news/cmp-begins-work-on-the-transmission-line-tuesday/97-696a3adc-52a8-40b4-9c13-b6797467cd41>
- e. Portland Press Herald [February 9, 2021]:
<https://www.pressherald.com/2021/02/09/poles-go-up-on-disputed-cmp-transmission-corridor/>
- f. WVOM, Interview with Thorn Dickinson [February 10, 2021]:
<https://www.wvomfm.com/episode/ghrt-rewind-02-10-neccec-thorn-dickinson-1215/>
- g. NECEC Twitter Account [February 11, 2021]:
https://twitter.com/NECEC_ME/status/1359894402848620549
- h. Morning Sentinel [February 15, 2021]:
<https://www.centralmaine.com/2021/02/15/many-locals-wary-as-cmp-corridor-breaks-ground-near-the-forks/>

139. Media coverage continued throughout the construction effort, describing progress on the Project. For example:

- a. Bangor Daily News [May 17, 2021]:
<https://bangordailynews.com/2021/05/17/business/cmp-project-takes-shape-fast-despite-legal-and-political-risks/>

- b. Bangor Daily News [October 14, 2021]:
<https://bangordailynews.com/2021/10/14/business/75-percent-of-trees-cleared-along-cmp-corridor/>

140. Throughout construction, NECEC LLC continued to provide public updates concerning construction progress by regular updates to the NECEC Project’s webpage, regular social media posts on Facebook, periodic *Clearing the Air* podcasts concerning project status and developments, periodic press releases and press events, political advertisements opposing the Initiative on television and social media, and the electronic distribution of at least monthly progress reports to the Project’s distribution list and republication of the same through social media.

141. From the outset of construction, Project opponents tracked construction progress and regularly posted photos, press reports, and hundreds of other updates on the public “Say No to NECEC” Facebook page and other Facebook pages as reflected in the following links:

- a. Scott Robertson [February 10, 2021]:
<https://www.facebook.com/groups/SayNOtoNECEC/permalink/889714595118211>
- b. Denise Caron-Rancourt [February 8, 2021]:
<https://www.facebook.com/groups/SayNOtoNECEC/permalink/888618368561167>
- c. Todd Burbank [February 12, 2021]:
<https://www.facebook.com/groups/SayNOtoNECEC/permalink/891116364978034>
- d. Susannah Warner [January 28, 2021]:
<https://www.facebook.com/photo?fbid=4112532368776445&set=g.279944929428517>
- e. Mark Turek [January 25, 2021]:
<https://www.facebook.com/photo?fbid=464252898289872&set=g.279944929428517>

142. Based on these and other public updates, construction progress was well publicized from the outset.

COUNT I
(Declaratory Judgments Act – Vested Rights)

143. Plaintiffs repeat and restate the allegations contained in the foregoing Paragraphs as if fully set forth herein.

144. Retroactive application of legislation is unconstitutional if it impairs vested rights. *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981).

145. Rights to a project vest upon: (1) actual, physical commencement of significant and visible construction, (2) undertaken in good faith, with the intention to continue construction and carry it through to completion, (3) pursuant to a valid permit. *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266. Rights to a project may also vest upon a showing of governmental bad faith. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 25, 856 A.2d 1183.

146. NECEC LLC has undertaken actual, physical commencement of significant and visible construction on the Project, as described above.

147. NECEC LLC has undertaken construction in good faith, with the intention to complete the Project. The Project complies with all state and federal laws in place at the time construction on the NECEC began. NECEC LLC is contractually obligated to complete the Project pursuant to the TSAs entered into with HQUS and the EDCs. The Project was initially planned to achieve commercial operation by December 13, 2022. At the time construction began, the project schedule called for a commercial operation date in May 2023, which has been extended in the last few months. The current project schedule calls for the NECEC Project to achieve commercial operation on December 13, 2023, with the contractual deadline for commercial operation now August 23, 2024. NECEC LLC only has the right to extend this deadline to August 23, 2025 by posting additional security. NECEC LLC needed to promptly begin construction after receiving

all necessary state and federal permits in order to maintain its Project schedule and achieve commercial operation in accord with the TSAs.

148. NECEC LLC has undertaken construction pursuant to valid permits. NECEC has obtained all necessary project-wide state and federal permits, including from the PUC, DEP, Corps, and DOE. The CPCN issued by the PUC has been upheld by the Law Court. The Superior Court has denied a request to stay effectiveness of the DEP permit because opponents of the Project have failed to show substantial likelihood of success on the merits of their challenges to that permit. The U.S. District Court for the District of Maine has likewise denied preliminary injunctive relief in relation to the Corps permit because opponents of the Project have failed to show substantial likelihood of success on the merits of their challenges to the Corps permit, and this ruling was affirmed by the First Circuit.

149. The Initiative directly targets the NECEC, and constitutes an untimely and bad faith effort to bar completion of the Project. The Initiative's proponents began gathering signatures for this referendum only after the Law Court concluded that their 2020 Initiative, which targeted the NECEC by name, was unconstitutional. The Initiative's proponents have stated that the Initiative has the same purpose as the 2020 Initiative, in that it will "stop CMP's destructive corridor project" and "effectively will block the project." The political action committees behind the Initiative are funded by corporate interests that would be adversely affected by the NECEC. The Initiative is specifically designed to retroactively change the law to defeat a particular project, namely, the NECEC.

150. The Initiative unlawfully deprives NECEC LLC of its vested rights in the Project by purporting to prohibit construction of the Project.

151. In addition, existing property interests are protected vested rights. *See Fournier v. Fournier*, 376 A.2d 100, 102 (Me. 1977); *see also Sebasteanski v. Pagurko*, 232 A.2d 524, 525-26 (Me. 1967).

152. NECEC LLC has existing leasehold interests in portions of the Johnson Mountain Township and West Forks Plantation public reserved lots by virtue of the BPL Lease.

153. The Initiative unlawfully deprives NECEC LLC of its vested rights in the BPL Lease by purporting to revoke the BPL Lease and by purporting to prohibit the construction of transmission lines in contravention of the terms of the BPL Lease.

154. An actual justiciable controversy exists between the parties regarding the retroactive application of the Initiative to the Project.

155. An order from this Court declaring that retroactive application of the Initiative to the Project would wrongly deprive NECEC LLC of its vested rights would terminate the uncertainty and controversy giving rise to this proceeding.

156. This Court has authority pursuant to 14 M.R.S. §§ 5951 *et seq.* to declare the rights of NECEC LLC with respect to the Initiative.

COUNT II
(Declaratory Judgments Act – Separation of Powers)

157. Plaintiffs repeat and restate the allegations contained in the foregoing Paragraphs as if fully set forth herein.

158. The retroactive application of legislation is impermissible if it violates constitutional provisions. *MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 23 n.10, 40 A.3d 975.

159. The Maine Constitution provides for strict separation of powers: “No person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any

of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.” Me. Const. art. III, § 2.

160. Under the Maine Constitution, if a power has been granted to one branch of state government, another branch of state government may not exercise that power. *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985).

161. Under well-established separation of powers principles, the legislative power does not include the power to require reversal of prior agency actions, such as the issuance of a permit following a quasi-judicial administrative process. *Avangrid*, 2020 ME 109, ¶ 35, 237 A.3d 882. Likewise, the legislative power does not extend to the reversal of judicial decisions. *Lewis v. Webb*, 3 Me. 326, 329 (1825).

162. The Initiative violates article III, section 2 of the Maine Constitution because it would usurp judicial and executive power in retroactively targeting the NECEC.

163. Retroactive application of the Initiative to the NECEC would usurp executive powers in violation of article III, section 2 of the Maine Constitution. Retroactive application of Section 1 of the Initiative to the NECEC would usurp executive power by purporting to authorize cancellation of a lease previously granted by the BPL. Retroactive application of Section 4 of the Initiative to the NECEC would usurp executive powers because by purporting to authorize the Legislature to cancel construction of a project already permitted and authorized by the appropriate executive agencies. Retroactive application of Section 5 of the Initiative to the NECEC would likewise usurp executive powers because that section purports to directly prohibit construction of a project already permitted and authorized by the appropriate executive agencies. If retroactively applied, therefore, the Initiative would improperly require executive agencies to revoke

previously-issued valid permits for the Project. Because the Initiative would require executive agencies to vacate and reverse final administrative decisions, the Initiative is unconstitutional.

164. Retroactive application of Sections 4 and 5 of the Initiative to the NECEC would usurp judicial powers in violation of article III, section 2 of the Maine Constitution. The Initiative would effectively reverse a final judgment rendered in a previous action, as to the individual parties to that action, because it would require the PUC to vacate a permit that has been affirmed by the Law Court. In force and effect, therefore, the Initiative would vacate the Law Court’s decision in *NextEra Energy Resources, LLC v. Maine Public Utilities Commission*, 2020 ME 34, 227 A.3d 1117.

165. Section 4 of the Initiative also violates article III, section 2 because it purports to authorize the Legislature to exercise a veto over agency approval of any high-impact electric transmission line project in the State without satisfying the presentment requirement of article IV, part 3, section 2. Such a legislative veto would deprive the executive of powers vested in the office of Governor by the Constitution.

166. Section 1 of the Initiative would also violate article III, section 2 of the Maine Constitution by usurping the executive function of applying the constitutional “substantial alteration” standard to particular circumstances. Section 1 purports to determine that certain specified activities “are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23.” The application of article IX, section 23 to specific circumstances cannot be finally determined by legislation, and, in fact, Sections 1 and 4 are inconsistent with the flexible and fact-specific standard, to be administered by the executive branch, set forth in the Constitution. The determination of whether a particular lease would result

in a “substantial alteration” of the uses of land is constitutionally vested in the executive branch, namely, the BPL.

167. Sections 1 and 4 of the Initiative also violate article III, section 2 of the Maine Constitution by usurping the judicial function of interpreting the constitutional “substantial alteration.” Section 1 purports to determine that certain specified activities “are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23,” while Section 4 purports to determine that “any high-impact electric transmission line crossing or utilizing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land.” The meaning of the Constitution cannot be finally determined by legislation and, in fact, Sections 1 and 4 are inconsistent with the flexible and fact-specific standard set forth in the Constitution. The final determination whether a particular action constitutes a substantial alteration under article IX, section 23, as initially applied by the executive branch, is reserved solely to the judiciary.

168. An actual justiciable controversy exists between the parties regarding the retroactive application of the Initiative to the Project.

169. An order from this Court declaring that retroactive application of the Initiative to the Project would be unconstitutional under Me. Const. art. III, § 2 would terminate the uncertainty and controversy giving rise to this proceeding.

170. This Court has authority pursuant to 14 M.R.S. §§ 5951 *et seq.* to declare the rights of NECEC LLC with respect to the Initiative.

COUNT III
(Declaratory Judgments Act – Contracts Clause)

171. Plaintiffs repeat and restate the allegations contained in the foregoing Paragraphs as if fully set forth herein.

172. The United States Constitution and the Maine Constitution prohibit the impairment of contracts. U.S. Const. art. I, § 10; Me. Const., art. I, § 11.

173. Under the BPL Lease, BPL is contractually obligated to lease property to NECEC LLC for the purpose of constructing a transmission line.

174. Retroactive application of the Initiative would substantially impair the BPL Lease because it purports to authorize cancellation of the BPL Lease on a retroactive basis and because it purports to prohibit the construction of transmission lines in contravention of the terms of the BPL Lease.

175. Retroactive application of the Initiative does not serve a significant and legitimate state purpose and is neither reasonable nor necessary. The purported state interest, namely, ensuring that conveyances of interests in public lands are presented for approval to the Legislature, existed at the time that the contractual obligation was incurred and thus cannot justify retroactive cancellation of that obligation.

176. Moreover, discriminatory targeting of the NECEC via the Initiative's retroactivity provisions is *per se* unreasonable.

177. An actual justiciable controversy exists between the parties regarding the retroactive application of the Initiative to the Project.

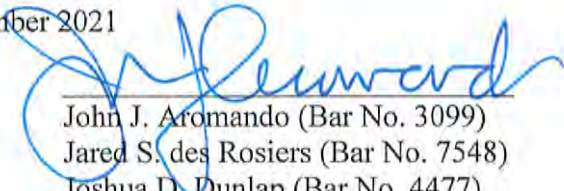
178. An order from this Court declaring that retroactive application of the Initiative to the Project would be unconstitutional under Article 1, § 10 of the United States Constitution and article 1, section 11 of the Maine Constitution would terminate the uncertainty and controversy giving rise to this proceeding.

179. This Court has authority pursuant to 14 M.R.S. §§ 5951 *et seq.* to declare the rights of NECEC LLC with respect to the Initiative.

WHEREFORE, NECEC Transmission LLC prays for the following relief:

- 1) A declaratory judgment that the Initiative unconstitutionally deprives NECEC LLC of its vested right under federal and state permits to construct and operate the Project;
- 2) A declaratory judgment that the Initiative violates article III, section 2 of the Maine Constitution by usurping powers reserved to the executive and judicial branches;
- 3) A declaratory judgment that the Initiative violates Article 1, § 10 of the United States Constitution and article I, section 11 of the Maine Constitution because it substantially impairs the contract between the State and NECEC LLC;
- 4) Injunctive relief preventing retroactive enforcement of the Initiative to the Project as follows: Section 1 by the Bureau of Parks and Lands; Section 4 by the Maine Senate, Maine House of Representatives, and the Public Utilities Commission; and Section 5 by the Public Utilities Commission; and
- 5) All other and further relief as this Court deems just and appropriate.

Dated at Portland, Maine this 3rd day of November 2021



John J. Aromando (Bar No. 3099)
Jared S. des Rosiers (Bar No. 7548)
Joshua D. Dunlap (Bar No. 4477)
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*Attorneys for NECEC Transmission LLC,
Inc.*

VERIFICATION

I, Thorn C. Dickinson, as the authorized agent of NECEC Transmission LLC, declare under penalty of perjury that the factual allegations of the foregoing Complaint are true and correct, based on my personal knowledge, except where alleged on information and belief in which case I believe them to be true. Such personal knowledge includes information from records of the regularly conducted activities of Avangrid Networks, Inc., NECEC Transmission LLC, and Central Maine Power Co., made at or near the time of such activities, by or from information transmitted by persons with knowledge, kept in the regular course of such activities, and of which it is the regular practice of Avangrid Networks, NECEC LLC, and CMP to make such records.

Executed on November 3, 2021, at Portland, Maine.

NECEC Transmission LLC.

By: 
Thorn C. Dickinson
President & CEO
As its authorized agent

STATE OF MAINE
Cumberland, ss

Personally appeared before me the above-named Thorn C. Dickinson, as the duly authorized representative of NECEC Transmission LLC, and made oath that the statements made and verified by him herein are true.

DATED: November 3, 2021


Notary Public
My Commission Expires: _____
HEATHER JAYNE STEVENS
NOTARY PUBLIC - State of Maine
My Commission Expires
October 25, 2023

EXHIBIT B

TO

PLAINTIFFS' VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

**AMENDED AND RESTATED
TRANSMISSION LINE LEASE**

BETWEEN

**DEPARTMENT OF AGRICULTURE, CONSERVATION AND
FORESTRY
BUREAU OF PARKS AND LANDS**

and CENTRAL MAINE POWER COMPANY

This Amended and Restated Transmission Line Lease ("Lease") is made by and between the State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, (the "Lessor"), acting pursuant to 12 M.R.S. § 1852(4), and Central Maine Power Company, a Maine corporation with its principal place of business at 83 Edison Drive, Augusta, Maine (the "Lessee"). For the considerations hereinafter set forth, the Lessor hereby leases to Lessee, and Lessee hereby takes from the Lessor, the non-exclusive use of that portion of the West Forks Plantation and Johnson Mountain Township (T2 R6 BKP WKR) Public Reserved Lands in Somerset County, Maine described in Exhibit "A" and shown on Exhibit "B" attached hereto and incorporated herein, being a three hundred (300) foot wide transmission line corridor containing 32.39 acres and located on a portion of the aforementioned Public Reserved Lands. The described transmission line corridor, together with the improvements now or hereafter to be placed thereon, is referred to as the "Property" or "Premises," and is subject to the following terms and conditions:

1. Term:

- a. This Lease shall be in effect from the date of execution of this instrument for a term of twenty-five (25) years, which term expires on March 31, 2045.
- b. Lessor reserves the right to terminate this Lease at any time during the term hereof to the extent permitted under the provisions contained in paragraph 13 Default.
- c. Lessee has the right to terminate this Lease upon at least ninety (90) days prior written notice to Lessor, or such lesser notice period as agreed to by Lessor in writing.
- d. Any notice required by this paragraph, whether by Lessee or Lessor, shall be sent postage pre-paid, registered or certified mail, return receipt requested, to the party at the address set forth in paragraph 24.

2. Rent. Lessee shall pay to the Lessor rental as follows:

An annual payment of \$65,000.00. The first payment shall be due on the date of execution of this Lease (the "Initial Payment") and subsequent annual payments shall be made on or before April first of each following year. Lessee shall, within the first twelve months of this Lease, commission an appraisal of the Premises and of the fair market value of the annual rent for the Premises. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. In the event the appraised fair market value of the annual rent for the Premises is higher than the Initial Payment set forth above, then the parties shall amend this Lease to retroactively increase the Initial Payment due hereunder to the fair market value indicated by the appraisal. Lessee agrees to pay the cost of the appraisal.

The annual payment shall be adjusted each year in accordance with the increase in the Consumer Price Index as published by the Bureau of Labor Statistics, United States Department of Labor over the preceding one year period; provided, however, that in no event shall the annual payment for any given Lease year be less than the annual payment for any previous Lease year. As used herein, the "Consumer Price Index" means the Consumer Price Index for All Urban Consumers (CPI-U), All items in U.S. city average, all urban consumers, not seasonally adjusted, Base Period 1982-84=100. Such Index shall be adjusted as necessary to properly reflect all changes in the Base Period, using such conversion factors as may be available from the United States Government. In the event the Consumer Price Index shall not be published by the United States Government, the successor or substitute index published by the United States Government shall be used for the foregoing computation.

In addition, Lessee shall pay to Lessor the negotiated market price of the timber present on the Premises based on mill scale and stumpage value at time the corridor is harvested for the construction of the utility corridor.

3. Use. The Property shall be used by the Lessee as follows: to erect, construct, reconstruct, replace, remove, maintain, operate, repair, upgrade, and use poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity ("Facilities"), all as the Lessee, its successors and assigns, may from time to time require upon, along, and across said Property; to enter upon the Property at any time with personnel and conveyances and all necessary tools and machinery to maintain the Premises and Facilities; the non-exclusive right of ingress to and egress from the Premises over and across roads and trails crossing the adjacent land of the Lessor, in accordance with paragraphs 5.a and 6.k below; to transmit electricity and communication, as conditioned below, over said wires, cables, or apparatus installed on Lessee's Facilities. All such use by Lessee shall be in compliance with the State of Maine Public Utilities Commission Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation dated May 3, 2019 (Docket No. 2017-00232) (the "CPCN"). Lessee shall own all communication facilities and such facilities shall be for Lessee's use in its business as a public utility and Lessee may also provide communication facilities and services consistent with the Broadband Benefit set forth in the May 3, 2019 Stipulation approved as part of the CPCN. In the event Lessee desires to provide capacity to others on Lessee's communication facilities, Lessee shall first obtain Lessor's written approval, which shall not be unreasonably withheld. Lessor may adjust the rent at such

time as Lessee provides communication capacity to others. The rent adjustment is to be determined by an appraisal paid for by Lessee. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. Lessee shall engage the agreed upon Appraiser within ninety (90) days of said agreement. Lessee shall ensure that Lessor is provided with a copy of the appraisal within ten (10) days of receiving completed appraisal. Lessee shall not sub-lease or contract the communication facilities for any other commercial use. The Lessor further grants to said Lessee the right to establish any and all safety and reliability regulations applicable to said transmission line corridor which said Lessee deems necessary and proper for the safe and reliable construction and maintenance of said structures, wires, and apparatus and for the transmission of electricity.

4. Quiet Enjoyment. So long as Lessee pays the rent, performs all of its non-monetary obligations, and otherwise complies with the provisions of this Lease, the Lessee's possession of the Premises for its intended use will not be disturbed by the Lessor, its successors and assigns except as otherwise provided under the terms of this Lease. Notwithstanding any provision to the contrary herein, Lessor reserves the right to enter onto the Premises at any time and from time to time to inspect the Premises.

5 Access:

- a. It is agreed by the parties to this Lease that Lessor is under no obligation to construct or maintain access to the Premises, notwithstanding any provisions of any federal, state, and local law to the contrary. However, the Lessee shall be allowed to cross Lessor's abutting land by using Lessor's Forest Management Roads for access to the Premises for construction, maintenance, and repairs, subject to reasonable restrictions and regulations imposed by Lessor, and the rights of others using said roads. Upon reasonable advance notice to Lessee, Lessor reserves the right to close, lock, or otherwise restrict access along or through the Forest Management Roads at any time it appears reasonably necessary to protect the safety of persons or property. Such situations include, but are not limited to, spring mud season or periods of high fire danger. Lessee shall immediately repair to the Lessor's satisfaction any damage to the road caused by Lessee at Lessee's sole cost and expense. Lessor is under no obligation to provide maintenance to the road. If Lessee wishes to undertake performing repairs or upgrades to the Forest Management Roads, Lessee must acquire prior written approval from Lessor. Lessee shall acquire Lessor's prior written approval for the construction or use of any other access location across Lessor's land abutting the Premises.
- b. The Lessor expressly reserves the right for itself or its guests, servants, or agents to pass and repass over the described Premises at any and all times with machinery and equipment necessary for the operation or conduct of Lessor's uses as such uses may from time to time exist, provided that: said uses will comply with the above referenced safety regulations, and will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies; that the Lessor shall provide Lessee with at least three business days prior written notice if Lessor will be on the Premises with construction or logging equipment; and that such use will not unreasonably interfere with the rights of Lessee herein conveyed.

6. Lessee Covenants. The Lessee covenants as follows:

- a. No buildings, either permanent or temporary, may be constructed or placed upon the described Premises, except temporary structures during construction of the Facilities, such as field trailers.
- b. Crossing mats for stream or wetland crossings shall not be made of ash or hemlock, so as to avoid introduction of invasive pests associated with these species.
- c. No hazardous or toxic waste substance or material, residual pesticides or fertilizers, other than organic compost, shall be used or kept upon the Premises, nor shall any livestock or poultry be kept temporarily or permanently thereon. Pesticides, herbicides, and chemical defoliant registered for use in Maine may be applied to the Premises only after acquiring prior written approval from Lessor and only by trained applicators working under the supervision of applicators licensed by the State of Maine in formulations and dosages approved by the Environmental Protection Agency and Lessor. One month prior to all pesticide applications, Lessee shall provide information to Lessor, including, but not limited to pesticides, herbicides, and chemical defoliant to be used, dates and methods of application, application locations, and reasons for use.
- d. There shall be no vegetation removal that would result in less than 50% aerial coverage of woody vegetation and stream shading within 25 feet of a stream.
- e. There shall be no vegetation maintenance or disturbance within a 50-foot radius around the high water boundary of a significant vernal pool from March 15 – July 15; provided, however, that Lessee may take all appropriate actions with regards to vegetation management to ensure that Lessee is in compliance with all federal and state laws, rules, and regulations imposed upon Lessee as the owner and operator of the Facilities.
- f. Lessee shall not make any strip or waste of the Premises or of any other lands of Lessor. Vegetation clearing within the Premises for Lessee's Facilities shall be limited to standards approved by the Maine Public Utilities Commission and shall encourage a ground cover of woody species with a maximum mature height approaching but not exceeding 15 feet. Lessee shall make every effort to minimize clearings and cutting of vegetation.
- g. Lessee acknowledges that lease of the Premises by the Bureau of Parks and Lands, Department of Agriculture, Conservation and Forestry is unique, and that in authorizing the Lease under 12 M.R.S. § 1852(4)(A), Lessor requires that Lessee shall make every reasonable effort within the Premises to be in conformance with the Maine Department of Inland Fisheries and Wildlife "Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects", "Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects", "Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects", and "Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW

Projects”, all dated March 26, 2012, copies of which are attached to this Lease, or the publication’s most current version.

- h. Lessee shall not kindle any outside fires on the Premises or any other land of the Lessor. Lessee agrees to assist with any means at Lessee’s disposal in putting out fires occurring on the Premises or adjacent areas, and to report promptly such fires to Lessor or the manager of the Bureau’s Western Public Lands Office and to the appropriate authorities.
- i. Lessee agrees to maintain the Premises in a neat and sanitary manner and so as not to be objectionable or detract from the aesthetic values of the general area. Lessee shall not discharge on the Premises, including into any body of water, wetland, or groundwater, any untreated or partially treated sewage, wash water, black water, gray water, or slop water. No non-forest waste including, but not limited to, broken equipment, spilt fuels, fluids and lubricants, fluid and lubricant containers, equipment parts, tires, debris, garbage, or trash shall be deposited, discharged, dumped, or buried upon the Premises or other property of Lessor. In addition, Lessee covenants that it bears the responsibility for any noncompliance with all federal, state, and local laws and regulations governing septic and other waste disposal resulting from Lessee’s activities and Lessee shall indemnify and hold harmless Lessor from and against any and all actions, suits, damages, and claims by any party by reason of noncompliance by Lessee with such laws and regulations. Such indemnification shall include all Lessor’s costs, including, but not limited to reasonable attorney fees.
- j. Forest woody waste (e.g., wood chips and stumps) may be disposed of on the Premises, but may not be disposed of in piles. Stumps shall be buried in “stump dump” holes, except that small numbers of stumps (four or less) may be left aboveground.
- k. Lessee shall not build permanent roads on the Premises without obtaining prior written approval from the Lessor; provided, however, that Lessee may construct one (1) temporary road to facilitate the construction of the transmission line (tree clearing, pole setting, wiring) substantially in the location depicted in Exhibits “C-1”, “C-2” and “C-3” attached hereto and incorporated herein. At the time construction is completed, the temporary road shall be dismantled and put to bed or converted to permanent access trails. All access trails shall be built to Best Management Practices (BMP) standards as shown in the “Maine Motorized Trail Construction and Maintenance Manual” written by the Bureau of Parks and Lands Off-Road Vehicle Division, dated May 2011 and all roads shall be built pursuant to those Best Management Practices (BMPs) standards pertaining to forest management and road construction practices set forth in the publication entitled, “Best Management Practices for Forestry: Protecting Maine’s Water Quality,” prepared by the Maine Department of Agriculture, Conservation and Forestry, Maine Forest Service, in such publication’s most current version at the time of the grant of this Lease, and as the same may be further amended, supplemented or replaced after the date of the execution of this Lease.

Prior to start of construction, Lessee shall provide an Access and Maintenance Plan to Lessor for review and approval. This plan shall provide details and maps on

proposed roads, permanent and temporary, access points, temporary trails, and maintenance access, and descriptions of any proposed bridges, temporary or permanent.

- l. Natural Plant Community, wetland and Significant Vernal Pool field surveys of the Premises must be conducted by Lessee or Lessee's designee prior to any construction on the Premises. Lessee shall send to Lessor and to the Maine Department of Inland Fisheries and Wildlife a copy of all completed surveys before commencing any construction on the Premises.
- m. Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises. Lessee further shall not construct, alter, or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This Lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 30 days in which to cure such failure.
- n. In the event of the following:
 - a) Lessee constructs an electric transmission line on the Premises; and
 - b) Lessee has determined, in its sole discretion, to rebuild the existing transmission line (the "Jackman Tie Line") located on that part of the existing 100-foot wide utility corridor described in a lease dated July 9, 1963 and recorded in the Somerset County Registry of Deeds, Book 679, Page 37 (the "Jackman Tie Line Lease") that is located westerly of the Premises and easterly of Route 201; and
 - c) Lessee receives all permits and regulatory approvals necessary to rebuild the line in such new location including, but not limited to, approvals of the Maine Public Utilities Commission and the Maine Department of Environmental Protection; then

Lessee agrees to relocate said Jackman Tie Line from the above described portion of the Jackman Tie Line Lease to a location on the Premises and such other corridor as acquired by the Lessee from others. Upon completion of any such relocation of the Jackman Tie Line or its functional replacement pursuant to this section and removal of Lessee's facilities from that portion of the Jackman Tie Line Lease lying westerly of the Premises, Lessor and Lessee agree to amend the Jackman Tie Line Lease to delete from the lease area that portion of the Jackman Tie Line Lease lying westerly of the Premises. All other terms and conditions of the Jackman Tie Line Lease shall remain in full force and effect. The term "rebuild" as used in this paragraph, shall not include routine repair or replacement of poles, crossarms, insulators, braces or conductor.

7. Liability and Insurance.

a. Lessee shall without unreasonable delay inform Lessor of all risks, hazards, and dangerous conditions caused by Lessee which are outside of the normal scope of constructing and operating the Facilities of which Lessee becomes aware with regards to the Premises. Lessee assumes full control of the Premises, except as is reserved by Lessor herein, and is responsible for all risks, hazards, and conditions on the Premises caused by Lessee.

b. Except for the conduct of Lessor and Lessor's guests and agents, Lessor shall not be liable to Lessee for any injury or harm to any person, including Lessee, occurring in or on the Premises or for any injury or damage to the Premises, to any property of the Lessee, or to any property of any third person or entity. Lessee shall indemnify and defend and hold and save Lessor harmless, including, but not limited to costs and attorney fees, from: (a) any and all suits, claims, and demands of any kind or nature, by and on behalf of any person or entity, arising out of or based upon any incident, occurrence, injury, or damage which shall or may happen in or on the Premises that is caused by the Lessee or its Agents; and (b) any matter or thing arising out of the condition, maintenance, repair, alteration, use, occupation, or operation of the Premises, the installation of any property thereon or the removal of any property therefrom that is done by the Lessee or its Agents. Lessee shall further indemnify Lessor against all actions, suits, damages, and claims by whoever brought or made by reason of the nonobservance or nonperformance of Lessee or its Agents of: (a) any obligation under this Lease; or (b) any federal, state, local law or regulation pertaining to Lessee's use of the Premises.

c. The Lessee shall obtain and keep in force, for the duration of this Lease, a liability policy issued by a company fully licensed or designated as an eligible surplus line insurer to do business in this State by the Maine Department of Professional & Financial Regulation, Bureau of Insurance, which policy includes the activity to be covered by this Lease with adequate liability coverage over at least one million dollars for each occurrence and two million dollars in annual aggregate in general commercial liability coverage to protect the Lessee from suits for bodily injury and damage to property. Nothing in this provision, however, is intended to waive the immunity of the Lessor. Upon execution of this Lease, the Lessee shall furnish the Lessor with a certificate of insurance as verification of the existence of such liability insurance policy.

8. Lessee's Liability for Damages. Lessee shall be responsible to Lessor for any damages caused directly or indirectly by Lessee or its guests, servants, or agents, including, but not limited to, interference or meddling with any tools, machinery, equipment, gates, buildings, furniture, provisions, or other property of the Lessor, its agents, employees, or guests on the Premises.

9. Tax Proration. Lessee shall pay when due all taxes levied on the personal property and improvements constructed by Lessee and located on the Premises. Lessor shall have no ownership or other interest in any of the Facilities on the Property.

10. Lease Assignment, Sublease, and Colocation: Lessee shall not assign or sublease in whole or part without prior written consent of Lessor, which consent shall not be unreasonably withheld. Lessor may lease the Premises for other compatible uses and colocation of other utilities so long as such rights do not extend to access to the Facilities, said uses will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies, and such use will not interfere with the rights herein conveyed, including the right to build such additional Facilities as may be accommodated on the Premises using transmission line spacing standards approved by the Maine Public Utilities Commission. Notwithstanding the forgoing, Lessee may assign its interest in this Lease to NECEC Transmission LLC, a Delaware limited liability company ("NECEC") without Lessor consent, so long as Lessee gives written notice of such assignment to Lessor, together with a copy of the executed assignment, and so long as the assignment expressly provides that NECEC has assumed all of the Lessee's obligations under this Lease. Upon delivery of such notice and such executed assignment, Central Maine Power Company shall be released from any obligations under this Lease from and after the effective date of such assignment. NECEC is related to Lessee and under common ownership with Lessee.
11. Lessee's Removal of Structures: Lessee must obtain Lessor's advance written consent, which consent shall not be unreasonably withheld, delayed, or conditioned, to the method and timing of removal before any structures or improvements are removed from the Premises.
12. Surrender. Upon termination of this Lease for any reason, Lessee shall deliver the Premises to Lessor peaceably, without demand, and in reasonably good condition clear of all trash and debris, unusable equipment, unregistered vehicles, and abandoned equipment and structures, located on the Premises. If such trash and debris and other unusable equipment, unregistered vehicles, and abandoned equipment and structures are not removed within one hundred eighty days (180) days of the termination of this Lease, the Lessor shall thereafter have the right to remove it and Lessee shall reimburse Lessor for the costs of such removal and disposal. Any other personal property, fixture, or structure on the Premises belonging to Lessee shall be removed by Lessee, unless Lessor requests in writing, that the other personal property, fixture, or structure may remain and Lessee agrees in writing not to remove it. If the Lessee fails to remove such other personal property, fixture, or structure such items shall be deemed the property of the Lessor two hundred and ten days (210) days after termination of the Lease and the Lessor shall thereafter have the right to remove it and charge the Lessee with the costs of such removal and disposal. In the event that any of this other personal property, fixtures, or structures on the Premises are incapable of being removed within one hundred eighty days (180) days, Lessee may be allotted up to one year to remove the items, with prior written approval from Lessor, which approval shall not be unreasonably, delayed, or conditioned. Any holding over by Lessee without Lessor's prior written consent shall be considered a tenancy at sufferance.
13. Default.
 - a. The following constitutes a default under this Lease: (1) Lessee's failure to perform any of its monetary or nonmonetary obligations under this Lease; (2) the filing of any bankruptcy or insolvency petition by or against Lessee or if Lessee makes a general assignment for the benefit of creditors which is not resolved or withdrawn within 30

days of such petition being filed; (3) an execution, lien, or attachment issued against the Lease, the Premises, or Lessee's property on the Premises, unless Lessee provides Lessor with satisfactory assurances and evidence that such execution, lien, or attachment will be released within a reasonable time not to exceed thirty (30) days, unless a shorter period of time is provided for by any applicable law or proceeding for the removal thereof, in which case the more restrictive time limitation applies; (4) the assignment or sublease of this Lease to any third party other than as permitted pursuant to Section 10 above; or (5) the violation of any state, federal or local law, rule, regulation, or ordinance; or (6) Lessee's abandonment of the Premises.

b. Upon the occurrence of any such event of default and subject to any applicable cure period as defined in paragraph 6(m), above, Lessor may, in addition to (and not instead of) any other remedies available at law or in equity, terminate this Lease with notice or demand to Lessee and enter and take possession of the leased Premises. Lessee shall be liable to Lessor for loss and expense, including reasonable attorney fees, incurred by reason of such default or termination hereof Lessor will provide Lessee with written notice of an event or occurrence of default under paragraph 13(a)(1) and Lessee shall have a reasonable period of time, as determined by Lessor, to cure said default which period shall not exceed thirty (30) days; provided, however, that if Lessee satisfies to Lessor that Lessee has undertaken the appropriate actions to cure said default and such default has not been cured within the said time permitted, the Lessor may exercise its sole discretion to extend the cure period.

14. Statutory Authority Over Public Lands. Lessor shall have the right to request that this Lease be amended from time to time and throughout the term of this Lease if any Lease term is found not to comply with Maine state law regarding public reserved lands. Lessor shall send notice to Lessee of the proposed revision. Upon receipt of such notice, Lessee shall have the option to either terminate the Lease by notifying Lessor in writing within thirty (30) days of receipt of notice or negotiate an amendment to the Lease in order to bring such term in compliance with said state law. Except as provided in this Lease, neither Party shall have the right to terminate this Lease unless the resulting non-compliance constitutes a default under Section 13 hereof, in which case Section 13 shall govern.
15. Mechanics Lien. If any notice is filed at the county registry of deeds of a builder's, supplier's or mechanic's lien on the Premises, arising out of any work performed by or on behalf of Lessee, Lessee shall cause such lien to be discharged or released immediately and shall indemnify Lessor against any such claim or lien, including all costs and attorney fees that Lessor may incur in connection with the same.
16. Succession; No Partnership. This Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors in interest, and assigns of the parties hereto. Nothing in this agreement shall be construed to create an association, joint venture, trust or partnership covenant, obligation, or liability on or with regards to any of the parties to this agreement.
17. Waiver. Any consent, express or implied, by Lessor to any breach by Lessee of any covenant or condition of this Lease shall not constitute a waiver by the Lessor of any prior or succeeding breach by Lessee of the same or any other covenant or condition of this Lease.

Acceptance by Lessor of rent or other payment with knowledge of a breach or default by Lessee under any term on this Lease shall not constitute a waiver by Lessor of such breach or default.

18. Force Majeure. Except as expressly provided herein, there shall be no abatement, diminution, or reduction of the rent or other charges payable by Lessee hereunder, based upon any act of God, any act of the enemy, governmental action, or other casualty, cause, or happening beyond the control of the parties hereto.
19. Eminent Domain. In the event that the Premises or any portion thereof shall be lawfully condemned or taken by any public authority, Lessor may, in its discretion, elect either: (a) to terminate the Lease; or (b) to allow this Lease to continue in effect in accordance with its terms, provided, however, that a portion of the rent shall abate equal to the proportion of the Premises so condemned or taken. All condemnation proceeds shall be Lessor's sole property without any offset for Lessee's interests hereunder.
20. Holding Over. If Lessee holds over after the termination of this Lease, said hold over shall be deemed to be a trespass.
21. Lessor Protection. Lessor expressly retains and nothing contained herein shall be construed as a release or limitation by Lessor of any and all applicable liability protections under Maine law. Lessor specifically retains any and all protections provided under Maine law to owners of land, including but not limited to those provided under the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118.
22. Cumulative Remedies. The remedies provided Lessor by this Lease are not exclusive of other remedies available by current or later existing laws.
23. Entire Agreement; Supersedes 2014 Lease. This Lease sets forth all of the covenants, promises, agreements, conditions, and understandings between Lessor and Lessee governing the Premises. There are no covenants, promises, agreements, conditions, and understandings, either oral or written, between them other than those herein set forth. Except as herein provided, no subsequent alterations, amendments, changes, or additions to this Lease shall be binding upon the Lessor or Lessee unless and until reduced to writing and signed by both parties. This Lease supersedes the Transmission Line Lease between Lessor and Lessee dated December 15, 2014, as amended by Lease Amendment dated June 22, 2015 (as amended, the "2014 Lease"), and the parties acknowledge that the 2014 Lease is terminated as of the effective date of this Lease.
24. Notices. All notice, demands, and other communications required hereunder shall be in writing and shall be given by first class mail, postage prepaid, registered or certified mail, return receipt requested; if addressed to Lessor, to:

State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of
Parks and Lands,
22 State House Station, Augusta, ME 04333-0022, Attn: Director;

and if to Lessee, to;

Central Maine Power Company, Real Estate Services
83 Edison Drive, Augusta, Maine 04364, Attn. Supervisor, Real Estate

25. General Provisions:

- a. Governing Law. This Lease shall be construed and interpreted in accordance with the laws of the State of Maine.
- b. Savings Clause. The invalidity or unenforceability of any provision of this Lease shall not affect or impair the validity of any other provision. To the extent any provision of this Lease is inconsistent with applicable state statute, the statute is deemed to govern.
- c. Paragraph Headings. The paragraph titles herein are for convenience only and do not define, limit, or construe the contents of such paragraph.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the dates set forth below.
For purposes of this Lease, an electronic signature shall be deemed an original.

Lessor:

STATE OF MAINE

Department of Agriculture, Conservation, and Forestry
Bureau of Parks and Lands

By: ANDREW CYTKO
Print: Andrew Cytko
Its: DIRECTOR

Dated: June 23, 2020

Randy Charlette
Witness

Lessee:

CENTRAL MAINE POWER COMPANY

By: Douglas A. Herling
Print: Douglas A. Herling
Its: President and CEO

Dated: June 15, 2020

Bhonda C. Mullispiet
Witness

EXHIBIT A

Leased Premises
Department of Agriculture, Conservation and Forestry
Bureau of Parks and Lands and
Central Maine Power Company

A non-exclusive lease over a portion of the Lessor's land located in Johnson Mountain Township (T2 R6 BKP WKR), and West Forks Plantation, Somerset County, Maine, more particularly described as follows:

A strip of land 300 feet in width beginning at the southerly line of the Maine Public Reserved Lot located on the northerly line of West Forks Plantation at a ¾" iron rebar that is the northwest corner of an easement conveyed by Weyerhaeuser Company to Central Maine Power Company in a deed dated November 17, 2016 and recorded in the Somerset County Registry of Deeds in Book 5099, Page 247;

thence N 0°17'-05'29" W across the land of the Lessor a distance of 4702.99 feet, more or less, to a ¾" iron rebar on the northerly line of the Maine Public Reserved Lot located in Johnson Mountain Twp., said iron rebar also being the southwesterly corner of an easement conveyed to Central Maine Power Company by Weyerhaeuser Company in a deed dated November 17, 2016 and recorded in said Registry in Book 5099, Page 237;

thence N 78°-58'-32" E along the north line of said Johnson Mountain Twp. Public Lot a distance of 301.69 feet, more or less, to a ¾" iron rebar at the southeast corner of said easement described in Book 5099, Page 237;

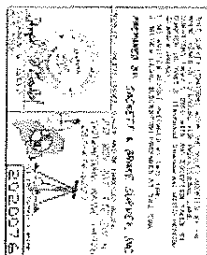
thence S 0°17'-05'29" E across land of the Lessor a distance of 4702.81 feet, more or less, to a ¾" iron rebar at the southerly line of said West Forks Plantation Public Lot and the northeast corner of said easement described in Book 5099, Page 247;

thence S 78°-56'32" W along the southerly line of said West Forks Plantation Public Lot a distance of 301.67 feet, more or less, to the point of beginning, said lease area containing 32.39 acres, more or less.

Bearings are referenced to Grid North, Maine West Zone. For reference, see a survey by Sackett & Brake Survey, Inc. #2020076, dated March 23, 2020, to be recorded in said Registry.

All above referenced iron rebars are capped with a red plastic cap inscribed "S.W. Gould PLS 2318".

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Temporary Road Location

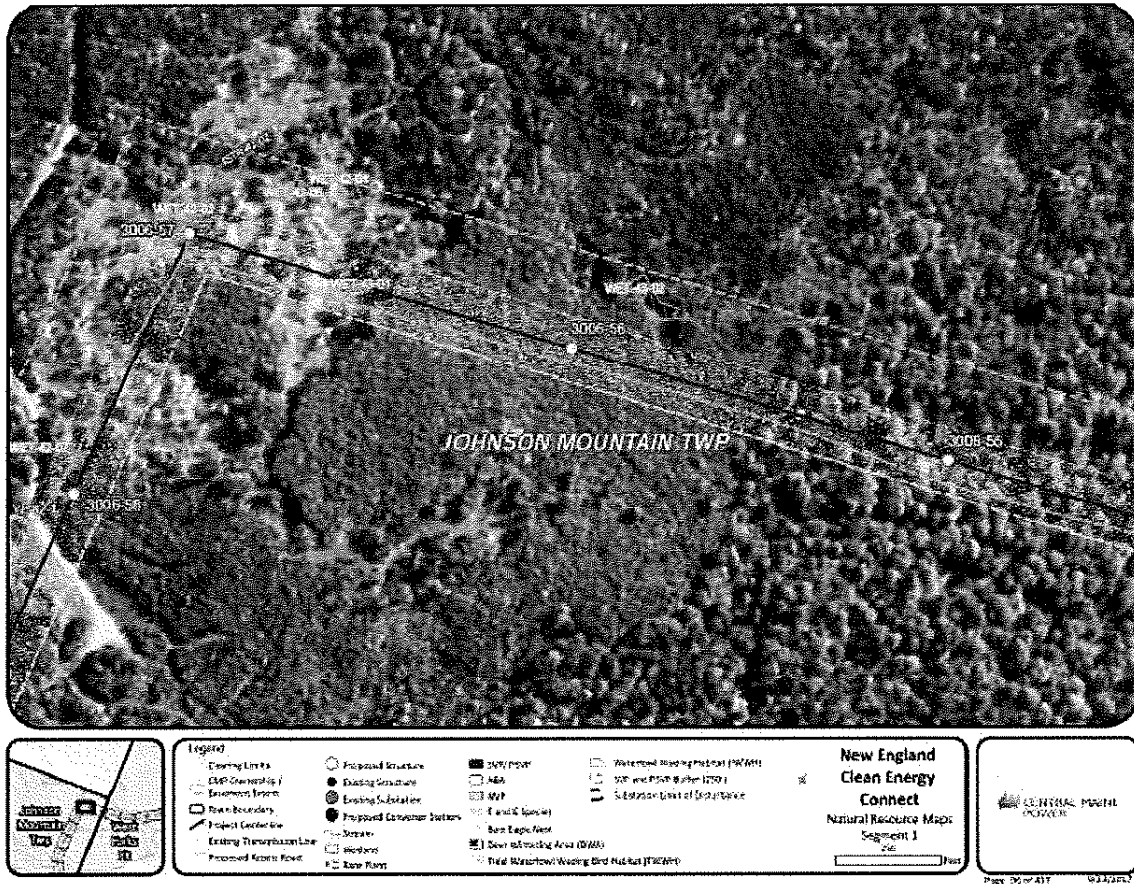
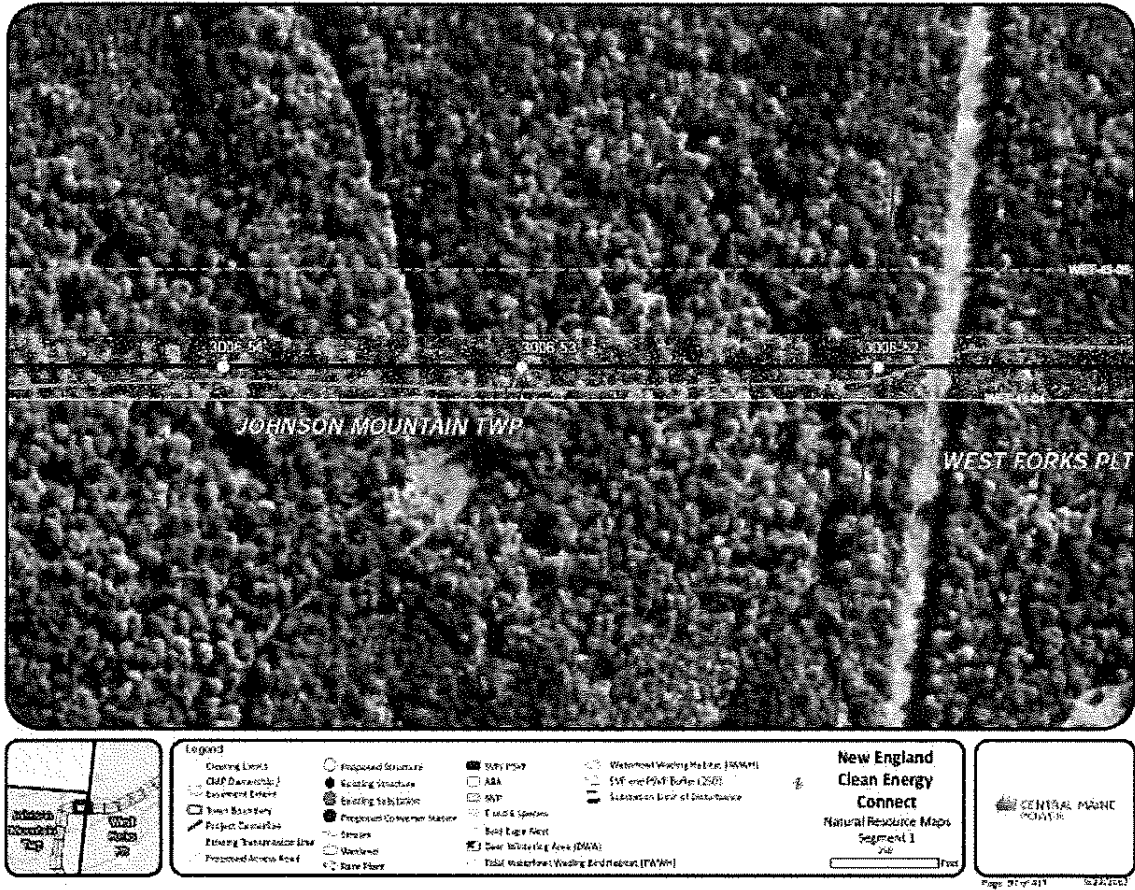
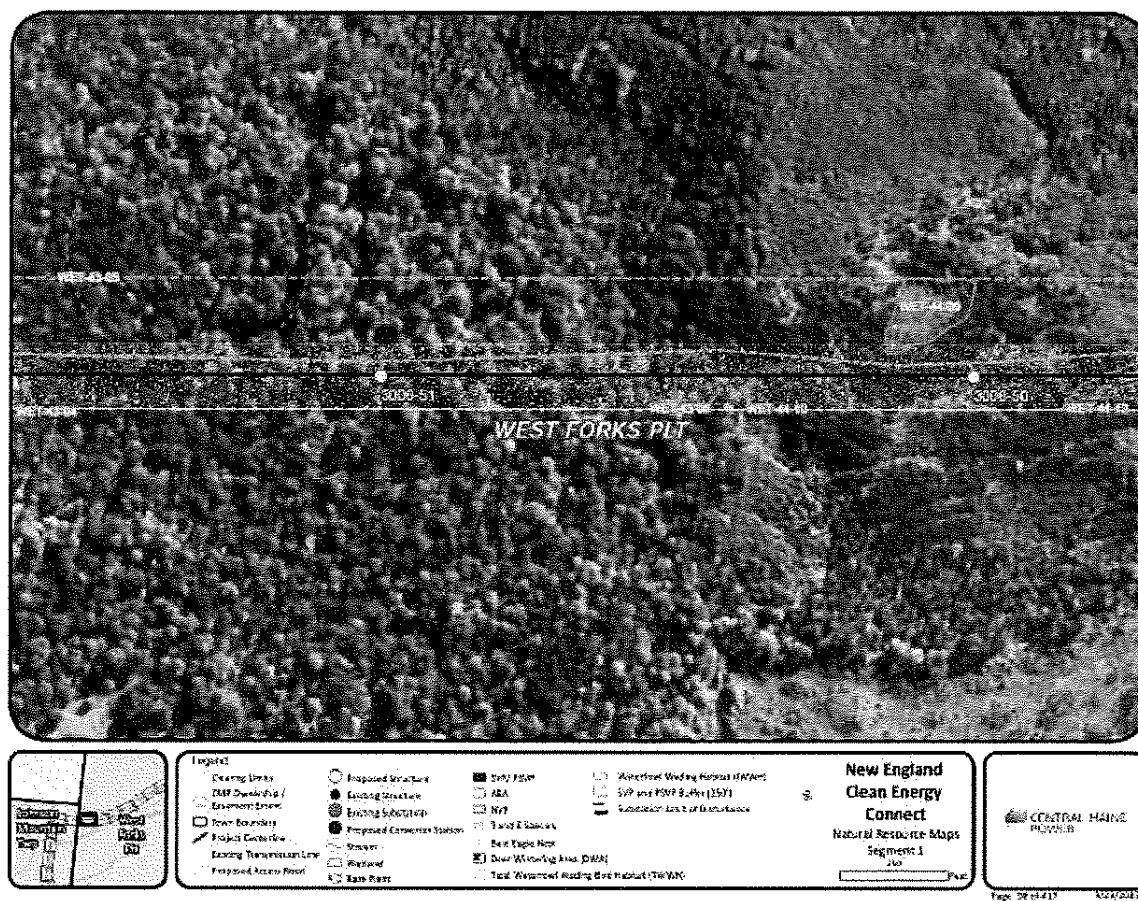


EXHIBIT C-2
Temporary Road Location



Temporary Road Location



ADDITIONAL ATTACHMENTS:

- Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects
- Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects
- Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects
- Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW Projects



STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
CIVIL ACTION
DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION LLC, and
AVANGRID NETWORKS, INC.,

Plaintiffs

v.

BUREAU OF PARKS AND LANDS,
et al.,

Defendants

**MOTION TO REPORT
INTERLOCUTORY RULING
PURSUANT TO M.R. APP. P. 24(c)**

NOW COME Plaintiffs NECEC Transmission LLC and Avangrid Networks, Inc., by and through counsel, and request that this Court report this case to the Law Court pursuant to M.R. App. P. 24(c) so that the questions of law addressed in this Court's Order Denying Plaintiffs' Motion for Preliminary Injunction ("Order") may be determined by the Law Court before any further proceedings occur. In support of this motion, Plaintiffs state as follows.

BACKGROUND

On November 3, 2021, Plaintiffs filed a Verified Complaint for Declaratory Judgment and Injunctive Relief seeking to prevent the retroactive application of a recently-enacted citizens' initiated referendum (the "Initiative") imposing new requirements for the construction of high-impact electric transmission lines on the New England Clean Energy Connect Project ("NECEC"). The same day, Plaintiffs filed a Motion for Preliminary Injunction (the "Motion"), with supporting evidence, asserting that they had demonstrated a substantial possibility of prevailing on the merits of three claims: that retroactive enforcement of the Initiative to the NECEC unconstitutionally deprives Plaintiffs of their vested rights protected by the Due Process Clause because Plaintiffs completed actual, physical construction and made substantial expenditures to construct the

NECEC in good faith, in reliance on valid permits; that retroactive enforcement of the Initiative to the NECEC violates the separation of powers doctrine in the Maine Constitution; and that retroactive enforcement of the Initiative impairs Plaintiffs' lease with the Bureau of Public Lands in violation of the Contract Clauses of the Maine and United States Constitutions.

After prompt transfer to the Business and Consumer Court, the Parties, including multiple Intervenor both supporting and opposing Plaintiffs' claims, briefed Plaintiffs' Motion on an expedited basis. The Defendants filed their Opposition and all Intervenor filed responses on November 24, 2021. Plaintiffs filed their reply memorandum in support of Plaintiffs' Motion and Defendants filed their reply to the responses of supporting Intervenor on December 8, 2021. No party requested an evidentiary hearing on Plaintiffs' Motion. This Court held oral argument via Zoom on December 15, 2021.

By Order dated December 16, 2021, this Court denied Plaintiffs' Motion. In its Order, the Court concluded that "[t]he vested rights doctrine does not apply, and to the extent it does, Plaintiffs' rights to continue building the [NECEC] corridor did not vest." Order at 2. This Court also concluded that "the Initiative does not violate Separation of Powers principles or the Contracts Clause. Plaintiffs have not demonstrated a substantial possibility of prevailing on the merits." *Id.* This Court's Order denying injunctive relief rested on legal conclusions regarding, among others, the applicability of the vested rights doctrine to state legislation; the relevant vested rights analysis; and the separation of powers and Contracts Clause. *See* Order at 21-43.

Despite denying the Plaintiffs' Motion, the Court noted that "[t]he applicable law . . . is uncertain on many disputed points" and that "this case presents many difficult questions." Order at 2. The Court noted that "the questions of law presented by this case are important and ought to be determined by the Law Court." *Id.* at 3 (internal quotation marks omitted). The Court

acknowledged that “[t]he Law Court may interpret its precedents differently,” *id.*, and further concluded:

If the Law Court determines that allowing the Initiative to become law works a constitutional violation on any basis, that determination would likely change the trajectory of the case. On remand (or directly by the Law Court), the finding of a constitutional violation would likely satisfy the requirement for irreparable harm, supersede the will of the voters, and change the balance of harms in favor of Plaintiffs. Under those circumstances, staying the Initiative would be appropriate.

Id. at 3-4. Accordingly, the Court stated that if Plaintiffs sought a report to the Law Court pursuant to M.R. App. P. 24(c), that “this Court will expeditiously grant the motion to report.” *Id.* at 3.

ARGUMENT

Rule 24(c) of the Maine Rules of Appellate Procedure provides as follows: “If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose.” In considering an interlocutory report under Rule 24(c), courts consider the following factors:

(1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions; and (3) whether a decision on the issue would, in at least one alternative, dispose of the action.

Littlebrook Airpark Condo. Ass’n v. Sweet Peas, LLC, 2013 ME 89, ¶ 8, 81 A.3d 348 (quotation marks omitted). Although Rule 24 operates as an exception to the final judgment rule and should not be lightly invoked, *see Payne v. Sec’y of State*, 2020 ME 110, ¶ 12, 237 A.3d 870, these factors all support a report of this case to the Law Court.

Sufficient Importance and Doubt. “The question of law reported must be of sufficient importance *and* doubt to justify the report.” *Despres v. Moyer*, 2003 ME 41, ¶ 14, 827 A.2d 61 (internal quotation marks omitted). In assessing this factor, courts consider “whether the issue is

novel and capable of repetition.” *Littlebrook Airpark Condo Ass’n*, 2013 ME 41, ¶ 10, 81 A.3d 348; *see Despres*, 2003 ME 41, ¶ 15, 827 A.2d 61. This factor is easily satisfied here.

This case presents numerous questions of great importance, including, but not limited to, (1) whether the vested rights doctrine applies to state laws, and (2) whether and to what extent knowledge of pending changes in law prevents the vesting of property rights during the pendency of permit appeals. The answers to these questions will determine the fate of a billion dollar infrastructure project that is the subject of multiple pending legal proceedings, including an appeal in the Law Court regarding a lease issued by the Bureau of Parks and Lands; separate appeals pending in the Superior Court and the Board of Environmental Protection concerning project approvals by the Department of Environmental Protection; and an appeal pending in the U.S. District Court for the District of Maine of the permits issued by the Army Corps of Engineers and the Department of Energy. All of these cases are interrelated with this proceeding, which counsels for resolving the key legal issues presented in this case early in the proceeding. *See generally Roque Island Gardner Homestead Corp. v. Town of Jonesport*, 2021 ME 21, ¶ 6, 248 A.3d 953 (judicial economy exception to the final judgment rule applies where there are unique circumstances, such as “multiple pending proceedings involving the same party”).

The legal questions in this case also present issues that are in doubt. As this Court acknowledged, “it may be a better reading of [Maine] precedent to apply the vested rights doctrine to consideration of state-wide laws, and to conclude that the vesting factors are satisfied.” Order at 3. Moreover, these issues are novel questions of first impression in Maine. *See Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 7, 957 A.2d 94 (questions involving novel issues of law support a finding of importance and doubt); *Despres*, 2003 ME 41, ¶ 15, 827 A.2d 61 (same). For instance, the Law Court has never held that the vested rights doctrine does

not apply to state laws; and Plaintiffs have presented serious and novel questions regarding the retroactive application of legislation to bar the construction of a project that had obtained all relevant permits under the separation of powers doctrine. Again, as succinctly stated by this Court, “[t]he applicable law . . . is uncertain on many disputed points” and “Plaintiffs have legitimate counter arguments on all disputed points of law.” *Id.* at 2.

Finally, these issues are capable of repetition – indeed, they have recurred already. *See Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 9, 61 A.3d 1242 (appropriate to report a question recurring before courts); *Baker v. Farrand*, 2011 ME 91, ¶ 9, 26 A.3d 806 (appropriate to report a question that will affect others in similar recurring situations). Vested rights cases recur before the Law Court with some regularity. *See, e.g., Kittery Retail Ventures, LLC*, 2004 ME 65, 856 A.2d 1183; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266. And a similar challenge to a citizens’ initiative under the separation of powers doctrine was brought just last year. *See Avangrid Networks, LLC v. Sec’y of State*, 2020 ME 109, 237 A.3d 882. It is entirely likely, if not certain, that future projects will be affected by the scope and applicability of retroactive legislation. As aptly addressed by multiple Intervenors supporting Plaintiffs’ Motion, the answers to the questions presented in this case will resolve legal principles applicable to all future infrastructure projects in Maine, including those necessary to combat the climate crisis, among others. A ruling on the “uncertain” legal issues in this case will resolve important issues of Maine law. Order at 2.

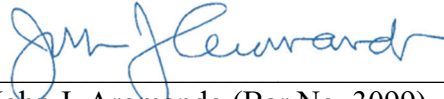
Other Possible Dispositions. Although the possibility that “factfinding or determination of a preliminary issue . . . may render” a reported question moot weighs against a report, *Littlebrook Airpark Condo. Ass’n*, 2013 ME 89, ¶ 12, 81 A.3d 348; *Baker*, 2011 ME 91, ¶ 12, 26 A.3d 806, no such threshold issues exist here. The important, doubtful questions of law presented by the Order, including for example whether the vested rights doctrine applies to state law, whether

knowledge of a pending legislative change precludes vesting of rights despite substantial construction, and whether retroactive application of a law to prevent a project that possesses permits from the relevant executive agencies violates separation of powers, are determinative questions in this case. No fact finding will render these issues irrelevant; and no other legal issues, such as statute of limitations issues, will moot the primary merits questions presented. In short, the important issues presented by the Order are central to the case, and cannot be avoided.

Dispose of the Action in One Alternative. The final factor considered in a report of an interlocutory order, namely, whether a decision would in at least one alternative dispose of the action, is not a strict requirement. *Littlebrook Airpark Condo. Ass’n*, 2013 ME 89, ¶ 13, 81 A.3d 348. Nevertheless, it is satisfied here. A decision on appeal by the Law Court affirming the Order in all respects would ultimately be determinative of the pending claims. There is no plausible basis on which Plaintiffs can prevail on the claims pled in the Verified Complaint if the legal conclusions set forth in the Order are all correct as a matter of Maine law. Plaintiffs contest those legal conclusions, but it is only if Plaintiffs prevail, in whole or in part, that their case as currently pleaded may proceed.

WHEREFORE, Plaintiffs NECEC Transmission LLC and Avangrid Networks, Inc. request that this Court promptly “report the case to the Law Court,” M.R. App. P. 24(c), in its entirety, *see State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981) (a report presents the Law Court “with the entire case”), for the Law Court to determine the questions of law presented in the Order before any further proceedings are taken.

Dated at Portland, Maine this 22nd day of December 2021



John J. Aromando (Bar No. 3099)
Jared S. des Rosiers (Bar No. 7548)
Joshua D. Dunlap (Bar No. 4477)
Sara A. Murphy (Bar No. 5423)
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1100

*Attorneys for NECEC Transmission LLC and
Avangrid Networks, Inc.*

NOTICE

Matters in opposition to this Motion pursuant to M.R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION AND
FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF REPRESENTATIVES,

Defendants.

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
WITH INCORPORATED
MEMORANDUM OF LAW**

Plaintiffs NECEC Transmission LLC (“NECEC LLC”) and Avangrid Networks, Inc. (“Avangrid”), pursuant to M.R. Civ. P. 65(b), hereby move this Court for a preliminary injunction prohibiting retroactive enforcement of the citizen initiative titled “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 Construction of Certain Transmission Lines in the Upper Kennebec Region” (“Initiative”) against the New England Clean Energy Connect project (“NECEC” or “Project”). The Initiative was designed for one purpose: to kill the NECEC. The NECEC, which will reduce greenhouse gas (“GHG”) emissions by the equivalent of removing 700,000 cars from the road in an effort to combat climate change, represents a billion dollar investment into New England’s clean energy future. Nevertheless, opponents of the Project – funded by competing electric generators in New England which burn fossil fuels – successfully promoted passage of the Initiative to retroactively ban the NECEC, despite completion of substantial construction, in good faith, pursuant to valid permits.

The Initiative is an extraordinary, unlawful attempt to deprive a developer of vested rights in a multi-year project already well underway. NECEC LLC has invested approximately \$450 million dollars in capital expenditures, including physical construction of over 124 miles of right-of-way cut and over 120 structures erected, in a good faith effort to complete the Project in a timely manner under its contract and pursuant to valid permits. To now deprive NECEC LLC of its right to complete the Project, lawful at the time of that massive investment, constitutes an impairment of its vested rights forbidden by Maine law. To permit such a retroactive application of the Initiative would render any development in the State, no matter how big or how small, or how far progressed, vulnerable to discriminatory efforts to kill the project by after-the-fact changes to the law, and inevitably chill future economic development in Maine.

The Initiative is also unconstitutional as applied to the NECEC for other reasons. First, it violates fundamental separation of powers principles enshrined in the Maine Constitution. Opponents of the Project have twice sought to reverse via direct initiative final executive and judicial actions authorizing the Project – through a prior initiative singling out the Project by name that the Law Court struck down as unconstitutional, and, now, through an initiative designed to accomplish the same end via retroactive application. Final decisions of executive agencies and the judiciary applying the law to specific parties cannot be reversed after-the-fact by legislative action. Second, the Initiative unlawfully impairs a pre-existing lease with the State for land used by the Project, contrary to the provisions in the U.S. and Maine Constitutions protecting the sanctity of contracts. The Initiative cannot retroactively bar completion of the Project in this manner.

BACKGROUND¹

The NECEC is a clean energy project that will bring 1,200 megawatts of hydropower into New England. Compl. ¶ 17. The NECEC was originally proposed by Central Maine Power Company (“CMP”) and Hydro-Québec in response to a request for proposal by Massachusetts electric distribution companies (“EDCs”) for clean energy. *Id.* ¶¶ 26-27. After the proposal was selected, CMP, Hydro-Québec (through a U.S. affiliate, H.Q. Energy Services (U.S.) Inc. (“HQUS”)), and the EDCs entered into transmission service agreements (“TSAs”) contractually obligating CMP to provide 1,200 MW of transmission service on the NECEC to HQUS and the EDCs for a period of forty years. *Id.* ¶ 28. CMP subsequently transferred the NECEC (including

¹ The facts stated in this motion are supported by the Verified Complaint (“Compl.”), as well as the affidavits of Thorn Dickinson (“Dickinson Aff.”), Patrick McGeehin (“McGeehin Aff.”), and William Berkowitz (“Berkowitz Aff.”), filed herewith. See *Bangor Historic Track, Inc. v. Dep’t of Agric.*, 2003 ME 140, ¶ 10, 837 A.2d 129. The agency orders and permits related to the Project are incorporated in the Verified Complaint, and are subject to judicial notice. See *Town of Mount Vernon v. Landherr*, 2018 ME 105, ¶ 14, 190 A.3d 249; *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 2017 ME 17, ¶ 2 n.2, 154 A.3d 1185.

the TSAs) to NECEC LLC, which will construct and operate the Project.² *Id.* ¶ 29. As found by the Public Utilities Commission (“PUC”), this billion-dollar investment will lower the cost of electricity in Maine; reduce GHG emissions by over 3.6 million metric tons annually; fund over \$250 million in rate relief, economic development, education, and other benefits for Maine; and result in approximately \$18 million in property taxes annually. *Id.* ¶¶ 37-44; Dickinson Aff. ¶ 32.

The NECEC is a massive, multi-year project requiring substantial advance planning. The NECEC, which is divided into five segments, primarily consists of (1) a new 145-mile long, 320 kV high-voltage direct current (“HVDC”) transmission line running from the Canadian border to Lewiston; (2) a new converter station; and (3) network upgrades to CMP’s existing infrastructure necessary to support the Project, including an additional 345 kV transmission line and rebuilt 115 kV AC transmission lines. Compl. ¶¶ 30-31. CMP had full site control of the Project corridor, most of which consists of land already devoted to power transmission, by July 2017. *Id.* ¶ 33. Approximately 0.9 miles of the corridor is on public reserved lands; in 2020, the Bureau of Parks and Lands (“BPL”) issued an amended and restated lease (the “BPL Lease”) to CMP, superseding a prior 2014 lease, allowing construction of electric transmission facilities. *Id.* ¶ 75. Permitting began over four years ago, in 2017, with an application to the U.S. Department of Energy (“DOE”). *Id.* ¶ 66. After years of rigorous agency review, CMP obtained all project-wide permits, including a Certificate of Public Convenience and Necessity (“CPCN”) from the PUC, and permits from the Department of Environmental Protection (“DEP”), U.S. Army Corps of Engineers (“Corps”), and DOE. *Id.* ¶¶ 36, 50-54, 60-61, 67. This process was substantially delayed by Project opponents, including electric generators in New England that burn fossil fuels, such as NextEra Energy Resources LLC (“NextEra”), which will lose revenue if the Project is completed. *Id.* ¶ 20.

² CMP and NECEC LLC are both subsidiaries of Avangrid. Compl. ¶ 7.

The NECEC has been twice targeted by direct initiatives – both of which were funded by NextEra and other fossil fuel burning electric generators, who donated approximately \$27 million to political action committees to advocate against the Project. *Id.* ¶¶ 22-23. In 2020, opponents proposed an initiative (the “2020 Initiative”) that purported to direct the PUC to revoke its CPCN for the Project. The Law Court concluded that the 2020 Initiative was unconstitutional. *Id.* ¶¶ 79-82; see *Avangrid Networks, Inc. v. Sec’y of State*, 2020 ME 109, ¶ 2, 237 A.3d 882. After that failed initial effort, the same opponents pursued the present Initiative. Compl. ¶¶ 83-89. The Initiative’s sponsors filed an application for the Initiative on or about September 15, 2020, five weeks after the Law Court’s *Avangrid* decision. *Id.* ¶ 83. Because of the time they wasted pursuing the facially unconstitutional 2020 Initiative, however, the sponsors could not have the new Initiative placed on the ballot until November 2021 – long after NECEC had undertaken physical construction of the Project, in good faith, and in reliance on its valid permits (as described *infra*). The Secretary of State certified the Initiative to be submitted to the Legislature on February 22, 2021; the Legislature adjourned *sine die* without enacting the Initiative on March 30, 2021; and the Governor issued her proclamation placing the Initiative on the November 2021 ballot on April 8, 2021. *Id.* ¶¶ 98-100. The Initiative will take effect on or about December 12, 2021. *Id.* ¶ 105.

Rather than specifically call the NECEC out by name as in the failed 2020 Initiative, the second Initiative seeks to bar completion of the NECEC by retroactively amending Titles 12 and 35-A of the Maine Revised Statutes in three respects. First, Section 1 of the Initiative mandates that any lease of public reserved land by the BPL for transmission lines and facilities is automatically deemed to substantially alter the use of the lease land within the meaning of article IX, section 23 of the Maine Constitution and requires approval by a 2/3 vote of all members elected

to each House of the Legislature. This requirement applies retroactively to September 16, 2014. *Id.* ¶ 85. Second, Section 4 of the Initiative amends 35-A M.R.S. § 3132 to require legislative approval of the construction of “high impact electric transmission lines,” and that any high impact electric transmission line crossing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and requires approval by a 2/3 vote of all members elected to each House of the Legislature. This requirement applies retroactively to September 16, 2020. *Id.* ¶ 86. Third, Section 5 of the Initiative amends 35-A M.R.S. § 3132 to ban the construction of “high impact electric transmission lines” in the “Upper Kennebec Region” as that term is defined in the Initiative, which includes approximately 43,300 acres of land in Somerset County and Franklin County. This requirement applies retroactively to September 16, 2020. *Id.* ¶ 87. Each of the changes in the Initiative retroactively applies to the NECEC Project, requiring legislative approval for the BPL Lease and the Project itself by 2/3 vote of all members elected to each House of the Legislature, and prohibiting the construction of the Project in its current route through the “Upper Kennebec Region,” which as defined may include some portion or portions of Segment 1 of the NECEC. The Initiative’s retroactive provisions were crafted to specifically reach back in time to target the NECEC. *Id.* ¶¶ 88-89.

The Initiative’s targeting of the NECEC is patent, based on not only the timing of the Initiative, following the sponsors’ failed 2020 Initiative, and its retroactivity, but also the express statements of Initiative proponents. The political action committees supporting the Initiative have repeatedly stated that the purpose of the Initiative is to end the NECEC. The No CMP Corridor website declares its purpose is to “Stop the CMP Corridor.” *Id.* ¶ 90. When the Secretary of State accepted the application for the Initiative, No CMP Corridor issued a press release stating that “[a] new statewide effort to stop Central Maine Power’s 145-mile transmission line through Maine

began today.” *Id.* ¶¶ 92-93. When proponents submitted signatures for the Initiative, No CMP Corridor issued a press release stating that “voters will be able to have the final say on CMP’s unpopular NECEC Corridor” and that, “[i]f enacted, the new law will be retroactive and therefore effectively will block the project.” *Id.* ¶¶ 95-96. The campaign for the Initiative used “Vote Yes to Reject the CMP Corridor” as its theme. *Id.* ¶ 102. Ads, flyers, and other campaign materials urged voters to “reject CMP’s Corridor” and to “ban the CMP Corridor.” *Id.* Even the attorney for the political action committees promoting the Initiative (No CMP Corridor and Mainers for Local Power) stated that “this referendum essentially is aimed to defeat the CMP corridor.” *Id.* ¶ 102(f), (g). This anti-NECEC campaign was funded by energy companies that burn fossil fuels whose business will be adversely affected by the NECEC. *Id.* ¶ 103.

The vote on the Initiative came well after NECEC LLC undertook substantial construction on the NECEC. The current estimate of the total capital expenditures to complete the Project is approximately \$1.04 billion. *Id.* ¶ 109. By November 2, 2021, about \$449.8 million – 43% of the total cost estimate – has been spent on the Project. *Id.*; McGeehin Aff. ¶¶ 10, 16 & Sched. 2. Of the approximately \$250 million in benefits to Maine, about \$18 million has already been paid out (including \$8.5 million by NECEC LLC), and approximately \$3.4 million in property taxes related to the Project has been paid to municipalities. Compl. ¶¶ 43, 109; Dickinson Aff. ¶ 18.

Expenditures on the Project began well before 2021. Acquisition of additional property rights for the transmission corridor began in 2014. Compl. ¶ 113(a). In 2016, the project team established initial technical configurations for the Project, along with a preliminary project schedule with a proposed in-service date of December 2022. *Id.* ¶ 113(b). In 2017, the project team undertook permitting processes, and began using Burns & McDonnell for permitting management services. *Id.* ¶¶ 110, 113(c). In 2018, upon selection of the Project, a large number

of project management and engineering personnel were added to the project team and undertook detailed planning, including, in September 2018, through a project management services contract with Black & Veatch Corporation and a design services contract with TRC Engineers LLC. *Id.* ¶¶ 110, 113(d). Due to the long lead-time to construct converter stations, an engineering, procurement, and construction contract with ABB Inc. (now ABB Enterprise Software Inc., d/b/a Hitachi ABB Power Grids) (“HAPG”) was entered into for the converter station in August 2019; this triggered mobilization of engineers to prepare detailed plans. *Id.* ¶¶ 111, 113(e). Beginning in 2020, numerous construction and supply contracts were executed.³ *Id.* ¶¶ 111-112, 113(f). The project team continued to grow with the addition of construction management, safety, and environmental compliance resources. *Id.* ¶ 113(f). All of these activities were necessary to begin construction. *Id.* ¶ 113(g); Berkowitz Aff. ¶¶ 38-39. Through the end of 2020, approximately \$155 million in capital expenditures had been spent on the Project. Dickinson Aff. ¶ 18.

Physical construction of the NECEC began in early 2021. The timing of construction was driven by contractual deadlines and permitting delays largely caused by Project opponents. Compl. ¶ 20; Berkowitz Aff. ¶¶ 35, 41, 56. Under the TSAs, the parties agreed that the commercial operation date for the NECEC would be December 13, 2022, but allowed for limited extensions of this deadline with posting of additional security. Compl. ¶ 32. Early project plans had called for construction to start during 2019, but delays in the permitting process, including appeals and lawsuits filed by Project opponents, required adjustments to the project schedule. *Id.* ¶¶ 20, 46,

³ These included a contract with Northern Clearing Inc. (“NCI”) for clearing the transmission corridor in September 2020; a contract with Irby Construction Company, to be implemented through a joint venture with Cianbro Corporation, (“Cianbro/Irby”) to construct the HVDC transmission line in October 2020; and a contract with Sargent Electric Company to construct the AC transmission line in February 2021. Compl. ¶ 111. Other contracts include pole manufacturing contracts with TransAmerican Power Products, Inc. (“TAPP”) and New Nello Operating Co., LLC (“Nello”), and contracts for timber mats with Maine-based timber manufacturers. *Id.* ¶¶ 111-112.

55, 62, 77; Berkowitz Aff. ¶¶ 26, 35, 56. In addition, permit requirements and restrictions for construction, court-imposed limitations, weather factors, sequencing with project contractors, and required coordination with various regulators has affected the construction schedule and in-service date. Compl. ¶¶ 114, 118; Berkowitz Aff. ¶¶ 45-46, 49, 52, 57. The current project schedule calls for the NECEC to achieve commercial operation on December 13, 2023, with the contractual deadline for commercial operation now August 23, 2024.⁴ Compl. ¶ 147; Berkowitz Aff. ¶¶ 35, 57. Starting construction as soon as the final permits were received was essential to maintain the targeted commercial operation date. Compl. ¶ 136; Berkowitz Aff. ¶ 59. It is critical that the Project enter commercial operation as soon as is feasible in order to, among other things, (1) realize Project benefits, and (2) ensure financial viability of the Project, which is impacted by incremental investment costs associated with Project extension. Compl. ¶ 136. Accordingly, as soon as DOE issued the final major permit for the Project, NECEC LLC instructed NCI to commence clearing and other construction activities on January 18, 2021.⁵ *Id.* ¶ 117; Berkowitz Aff. ¶¶ 41-43.

The construction of linear transmission projects like the NECEC requires careful sequencing, taking into account time-of-year restrictions to protect wildlife, environmental limitations, weather conditions, access considerations, and the participation of numerous contractors. Compl. ¶ 114. The process begins with clearing, followed by the erection of the structures, and the stringing of electrical conductor. *Id.*; Berkowitz Aff. ¶¶ 17-18. Concurrently, substation work needed to connect the new transmission line to the existing transmission system must be accomplished. Compl. ¶ 114. For the NECEC, this work most notably includes the

⁴ This deadline may be extended up to August 23, 2025, with posting of \$10.9 million in additional security. Dickinson Aff. ¶ 13.

⁵ NCI had previously mobilized pursuant to a notice to proceed. Compl. ¶ 115. Thus, NCI had already performed required site surveys, installed flagging, prepared lay down areas, and retained equipment. *Id.* ¶ 116. Other preparatory work also began before January 18, 2021; for example, TAPP, a pole supplier, had already begun construction of poles, and delivered the first poles by January 18, 2021. *Id.* ¶ 119.

construction of the converter station in Lewiston. *Id.* Network Upgrade work also requires detailed service outage sequence plans that have additional time-of-year restrictions; for example, certain elements can only be removed from service in a specific 2-week window in a year. *Id.*

Construction of the NECEC has reflected this pattern. NCI began clearing trees and laying mats on the northern end of Segment 2 on January 18, 2021 (starting at The Forks Plantation and heading south along the Project route).⁶ *Id.* ¶¶ 117-118. On February 9, 2021, after NCI had conducted sufficient clearing to permit the process of installing the HVDC line to begin, Cianbro/Irby installed the first structure in Segment 2. *Id.* ¶ 123. Meanwhile, on February 1, 2021, Cianbro was given partial authorization to mobilize and begin clearing and site development work at the converter station; full authorization to prepare that site for construction was granted on May 28, 2021, after a minor revision to the DEP permit. *Id.* ¶ 120. Work on the AC portion of the Project, specifically, the Network Upgrade line in Segment 3, began in June 2021. *Id.* ¶ 129.

As of November 2, 2021, Election Day, the total amount of capital expenditures spent on the Project from inception, inclusive of project management costs, is estimated to be approximately \$449.8 million. Compl. ¶ 109; McGeehin Aff. ¶ 10. NCI had cut approximately 124 miles (85.5%) of the Project corridor and performed approximately \$43.1 million of clearing and other construction activities. Compl. ¶ 132. Cianbro/Irby had installed approximately 70 structures, set 10 more direct imbed bases, and installed caisson foundations for four more, for a total cost of approximately \$38.5 million. *Id.* TAPP and Nello had delivered 570 poles to lay-down yards at a cost of approximately \$38 million. *Id.* In all, more than 55% of the custom-manufactured steel

⁶ Other than during June and July, during which clearing was restricted under the Corps permit in order to mitigate impacts on a federally-listed bat species, NCI has continued clearing the corridor (as well as installing construction mats as necessary to conduct the clearing) since that date, as contemplated by the Project schedule. Compl. ¶ 118. NCI began clearing Segment 1 on May 15, 2021, two days after the First Circuit lifted the injunction it had placed on construction activities in that segment of the Project. *Id.*

poles that will be used for the HVDC transmission line had been delivered by the end of September 2021. *Id.* Further, all transmission related material for the construction of the HVDC line, including conductor, insulators, and fiber optic, has been received and is stored at laydown yards along the Project route.⁷ Dickinson Aff. ¶ 17(b). Along the AC portion of the line, including Segment 3 and Segment 5 (the 26-mile Network Upgrade between Coopers Mills and Maine Yankee), approximately 54 structures had been installed and 2 modified, at a cost of approximately \$18.4 million. Compl. ¶ 132. In addition, approximately 3 miles of conductor had been strung in Segment 5. *Id.* Further, more than 72% of the converter station site preparation had been completed, and critical converter station components (including custom-designed transformers) constructed, at a cost of approximately \$100 million. *Id.* ¶ 120. NECEC LLC had also made total future purchase commitments of over \$312 million. McGeehin Aff. ¶ 13 & Sched. 1.

ARGUMENT

I. Plaintiffs' Claims Are Ripe for Adjudication.

This declaratory judgment action challenging the retroactive application of the Initiative is ripe. 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. Cape Elizabeth*, 2020 ME 100, ¶ 30, 237 A.3d 200. Here, the issues are fit for judicial review, as “[t]he statute is certain to become effective” and “[i]t is presumed that the [agencies] will take steps to enforce the provisions of the statute.” *Nat’l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 459 (Me. 1977) (declaratory judgment action challenging the validity of a new statute

⁷ Materials delivered through November 2, 2021 included 344 reels of DC conductor (total length of over 3.1 million feet) at a cost of approximately \$6.7 million; 136 reels of DC fiber (total length of over 1.65 million feet) at a cost of approximately \$1.3 million; 74,100 DC insulators at a cost of approximately \$4.5 million; 161 wood poles for the AC, at a cost of over \$750,000; 112 reels of AC conductor (over 977,000 feet) at a cost of approximately \$1.9 million; and 25 reels of AC fiber at a cost of approximately \$273,000. Compl. ¶ 132 n.14.

commenced “before [its] effective date” was “ripe for decision”).⁸ Further, Plaintiffs would be harmed if review is delayed, as they need certainty regarding construction of the Project and further investment. NECEC LLC is expending hundreds of millions of dollars constructing the Project under demanding timelines. Compl. ¶ 137; McGeehin Aff. ¶ 13 & Sched. 1; Dickinson Aff. ¶¶ 19-23. Thus, this action satisfies both ripeness requirements.

II. Plaintiffs Are Entitled to a Preliminary Injunction.

The party seeking a preliminary injunction must demonstrate: (1) it will suffer irreparable injury absent an injunction; (2) such injury would outweigh any harm from an injunction; (3) it has a substantial possibility of success on the merits, and (4) the public interest will not be harmed by an injunction. *Bangor Historic Track, Inc. v. Dep’t of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129.

A. Plaintiffs will suffer irreparable injury unless an injunction issues.

An “irreparable injury” is one “for which there is no adequate remedy at law.” *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980). Because “a prospective violation of a constitutional right constitutes irreparable injury,” *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (quotation marks omitted), courts find irreparable harm if a constitutional violation is threatened, *see Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009); *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997). Likewise, because real property interests are unique, loss of vested rights results in irreparable harm. *See K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (“Real estate has long been thought unique, and thus, injuries to real estate interest frequently come within the ken of the chancellor.”); *South Lyme Prop. Owners Ass’n v. Town of Old Lyme*, 121 F. Supp. 2d 195, 204-05 (D. Conn. 2000); *Wal-Mart Stores, Inc. v. County of Clark*,

⁸ By contrast, an action brought to *enforce* a statute prior to its effective date is not ripe, given both the presumption that agencies will enforce a statute and the fact that the statute does not yet have legal force.

125 F. Supp. 2d 420, 429 (D. Nev. 1999). As described below, retroactive application of the Initiative to the Project during the duration of this litigation would likely result in cancellation of the Project for failure to comply with the contractual in-service date for the NECEC, depriving Plaintiffs of their vested rights in violation of the Maine Constitution.

Retroactive application of the Initiative to the Project constitutes *per se* irreparable harm. As explained in more detail in the Background section *supra* and Part II.B *infra*, retroactive application of the Initiative to the Project violates the doctrine of vested rights because it would prohibit completion of the Project, even though NECEC LLC has commenced substantial construction, in good faith, with the intention to continue construction and carry it through to completion, pursuant to valid permits; it would also violate the separation of powers doctrine. Absent an injunction, therefore, irreparable injury would occur in the form of deprivation of vested rights and a constitutional violation. *See City of Evanston v. Barr*, 412 F. Supp. 3d 873, 886 (N.D. Ill. 2019) (violation of separation of powers constituted irreparable harm); *Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429 (finding irreparable harm from deprivation of vested rights in property use).

The deprivation of the vested property right is particularly severe here because it would likely be permanent; delay in construction would threaten cancellation of the Project altogether, along with the many benefits it will provide to Maine. If construction activities are not allowed to proceed during the legal challenge to the Initiative, the Project likely would not achieve commercial operation before the contractual deadline of August 23, 2024, or even the extended deadline of August 23, 2025. Compl. ¶ 137; Dickinson Aff. ¶¶ 24-31. The current project schedule calls for a commercial operation date of December 13, 2023, which allows schedule float of only 8 months with respect to the contractual deadline. Compl. ¶ 137. As of Election Day, the Project has been in construction for nearly 10 months and there are just over two more years of

construction and commissioning ahead. *Id.* If construction is not allowed to continue during the legal challenge, there will be a corresponding day-for-day delay of completion, if not longer due to the effects of demobilization and the need to re-mobilize. *Id.* ¶ 137; Dickinson Aff. ¶¶ 26-27. Assuming for instance, a 2-year stoppage, construction would not be allowed to resume until the fall of 2023 and the contract deadline for the Project’s in-service date could not be achieved, even if the legal challenge succeeds. Compl. ¶ 137; Dickinson Aff. ¶¶ 30-31; Berkowitz Aff. ¶ 61. Thus, irreparable injury would result absent an injunction.

B. Plaintiffs are likely to succeed on the merits.

1. Retroactive application of the Initiative to the NECEC would deprive Plaintiffs of their vested rights under Maine law to construct the Project.

“The legislature has no constitutional authority to enact retroactive legislation if its implementation impairs vested rights.” *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981); see *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977) (“It is established in this State that a statute which has retrospective application is unconstitutional if it impairs vested rights.”). A vested right is one that “cannot be impaired or taken away without the person’s consent.” *Vested Right*, Black’s Law Dictionary (11th ed. 2019). A right to construct a project vests where there has been (1) actual, physical commencement of significant and visible construction, (2) undertaken in good faith, with the intention to continue construction and carry it through to completion, (3) pursuant to a valid permit. *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266 (citing *Town of Sykesville v. West Shore Comm’cns, Inc.*, 677 A.2d 102, 104 (Md. 1996)). A right to construct a project may also vest where the Legislature seeks to prohibit construction in “bad faith” or through “discriminatory enactment.” *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 25, 856 A.2d 1183. Plaintiffs’ right to construct the Project has vested, because NECEC LLC has, with good faith intent to see the Project through to completion,

undertaken significant, visible construction before the Initiative became law. Moreover, the Initiative was undertaken in bad faith, as it specifically targets the Project. Accordingly, retroactive application of the Initiative would deprive Plaintiffs of their vested rights.

- a. **NECEC LLC timely commenced construction of the Project in good faith, with intent to continue and complete construction.**
- i. **Project construction has occurred pursuant to a project schedule and contractual obligations.**

NECEC LLC undertook construction “in good faith . . . with the intention to continue with the construction and carry it through to completion.” *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quoting *Town of Sykesville*, 677 A.2d at 104). In the context of vested rights, good faith is simply “the absence of proof of bad faith.” *Town of Sykesville*, 677 A.2d at 113.⁹ “Bad faith” manifests itself as a “deliberate false start” – *i.e.*, efforts to make it appear that construction has begun, when in reality it has not. *Id.* at 113-116. Thus, “good faith” focuses on “whether the act of commencing construction is undertaken with the intention of continuing and finishing the job.” *Id.* at 116. The decision to “seize the day” by beginning construction with knowledge of a potential change in law is not “bad faith.” *Id.* at 118-120. NECEC LLC has already completed substantial construction in accord with project schedules and contractual commitments. Compl. ¶ 132; Berkowitz Aff. ¶¶ 43-55, 56-60, 63. It began construction in the field on January 18, 2021, Compl. ¶ 117, and undertook preparatory activities for construction starting much earlier than that, *id.* ¶ 113.

NECEC LLC began construction with the intent to finish it. Efforts to obtain necessary real estate interests started in 2014, initial design in 2016, permitting in 2017, and detailed planning in 2018. *Id.* ¶ 113. Further, NECEC LLC’s commencement of construction in January 2021, as soon as the last required federal permit for the Project was issued, was both contemplated by the

⁹ “Maine law is in accord with” *Town of Sykesville*’s description of the law on vested rights. *Sahl*, 2000 ME 180, ¶ 13, 760 A.2d 266.

construction schedule and necessary to comply with NECEC LLC's contractual obligations. NECEC LLC began construction in January 2021 in order to achieve timely commercial operation under the TSAs, which include a contractual deadline of August 23, 2024. *Id.* ¶ 136. Based on the extended commercial operation date of May 31, 2023, project plans called for a start date in 2020, anticipating construction as soon as required state and federal permits were obtained; delays in obtaining these permits impacted the timing of construction. *Id.*; Berkowitz Aff. ¶¶ 56-57. Starting construction as soon as all state and federal authorizations were received was critical to maintain the targeted commercial operation date,¹⁰ realize Project benefits, and ensure financial viability of the Project. Compl. ¶ 136. Specifically, it was necessary for NECEC LLC to move forward with construction promptly to meet its contractual commitments given preceding delays in permitting and allowance for future unknown events, such as procurement delays, weather, unforeseen ground conditions, and other events. Berkowitz Aff. ¶¶ 58-59, 63.¹¹ Further, NECEC LLC's initiation of construction was not a "false start"; rather, construction has continued continuously since then, subject to permit restrictions. Compl. ¶ 118; Berkowitz ¶ 49. This continuous construction has entailed massive investments by NECEC LLC. Not only has it incurred approximately \$450 million in capital expenditures, but it has also made over \$312 million in purchase commitments to comply with the TSAs. McGeehin Aff. ¶ 13 & Sched. 1; Berkowitz Aff. ¶¶ 58-60. NECEC LLC's efforts to comply with the TSAs by maintaining the Project schedule, and its expenditures in furtherance of that effort, demonstrates its good faith.

¹⁰ As of January 2021, the project schedule called for commercial operation on May 31, 2023. Berkowitz Aff. ¶ 56. The commercial operation date in the baseline schedule was December 13, 2022. *Id.* ¶¶ 9, 56.

¹¹ Construction immediately experienced delays because of an injunction initially entered and then lifted by the U.S. Court of Appeals for the First Circuit. Berkowitz Aff. ¶ 46. NECEC LLC was unable to begin clearing both north along Segment 1 and south along Segment 2, as planned; instead, clearing could only begin in Segment 2, *id.*; Compl. ¶ 118, leading to adjustments to the planned installation of poles, Berkowitz Aff. ¶ 52. The injunction thus led to a further delay of the expected commercial operation date to December 13, 2023. *Id.* ¶ 57. This highlights NECEC LLC's need to start construction as soon as possible. *Id.* ¶ 59.

ii. Proposal of the Initiative did not vitiate good faith.

NECEC LLC's good faith intent to complete the Project is not undermined by opponents' decision to pursue the Initiative. *Town of Sykesville* provides useful guidance. There, the court found that a developer's right to construct a telecommunications tower had vested where the developer obtained all necessary permits and began construction prior to amendment of the zoning law. 677 A.2d at 105-08, 118-120. The court found that the developer's knowledge of the pending change in law did not mean that the developer commenced construction in bad faith. *Id.* Likewise here, where NECEC LLC possessed all necessary land rights and permits and began construction with the intent to complete it, there is "nothing wrong with acting expeditiously to commence construction knowing" of the possible change in law. *Id.* at 120. Thus, all of NECEC LLC's construction efforts up through adoption of the Initiative were conducted in good faith. Any other conclusion would allow opponents of a project to bring construction to a halt simply by proposing a new law, even though that proposal may never be adopted. Property owners who undertake construction of a permitted project have the right to rely on existing law, and to not be held hostage through mere proposal of a new law. *Id.* at 118 ("there is no absence of good faith in the commencement of construction . . . with full knowledge that legislation was then pending").

Distinguishable from the case at hand are the Law Court's decisions in *Kittery Retail* and *City of Portland v. Fisherman's Wharf Associates II*, where the developer had not yet even obtained a permit or any of the necessary property interests, and no construction had occurred, before learning of the pending changes in law. In *Kittery Retail*, the developer failed to establish vested rights "because it did not begin construction," and also failed to establish vested rights as a result of governmental bad faith in part because the developer knew of the pending change in the law before it obtained a permit and rights to land. 2004 ME 65, ¶¶ 4-6, 9, 856 A.2d 1183.

Likewise, in *Fisherman's Wharf*, vested rights were not established where no construction had occurred, and governmental bad faith could not be shown absent “discriminatory treatment,” where the developer knew of the pending change in the law before it acquired title to property or obtained a permit. *Fisherman's Wharf Assocs. II*, 541 A.2d 160, 161-62, 164 (Me. 1988). Neither of those cases supports the conclusion that mere knowledge of a pending change, proposed after necessary land and permits have been obtained and construction has begun, vitiates good faith.¹²

Although it may be equitable to conclude that rights do not vest where a developer has notice of a pending change to the law prior to obtaining any of the necessary land and permits, and therefore prior to beginning construction, the equities are far different where the developer secures necessary permits and undertakes construction in reliance on existing law before any change in the law is even formally submitted to a legislative body for consideration, much less adopted. This is particularly true for statewide, multi-year developments such as the NECEC, which are more likely to attract opposition and are more vulnerable to threatened legal changes than local projects. It simply is not reasonable to subject major projects to the paralysis that would result if the first sign of opposition operated to deprive the developer of good faith in proceeding with the project.

Here, full site control for the Project had been obtained by July 2017, and all project-wide permits had been obtained between May 3, 2019 and January 14, 2021. Compl. ¶¶ 33-69. Physical construction began by January 18, 2021. *Id.* ¶¶ 117-118. All of these events occurred before the State took any action to place the Initiative on the ballot.¹³ The Initiative was not officially

¹² Significantly, in *Kittery Retail*, the Law Court acknowledged the continuing vitality of its prior decision in *Sahl* by expressly distinguishing that case on the basis that the facts before it in *Kittery Retail* demonstrated that the developer had not begun construction before formal legislative action. 2004 ME 65, ¶ 32, 856 A.2d 1183. *Sahl* therefore remains controlling precedent for projects involving pre-legislative actual construction. 2000 ME 180, ¶¶ 11-14, 760 A.2d 266 (holding that rights had vested because the developers had begun construction prior to the zoning amendment).

¹³ At the very least, all of NECEC's construction efforts prior to completion of the official state actions necessary to place the Initiative on the November 2021 ballot were conducted in good faith. Even if *Kittery*

proposed for consideration by the electorate until the Secretary of State certified petition signatures on February 22, 2021; the Legislature adjourned *sine die* without putting forward a competing measure on March 30, 2021; and the Governor issued the proclamation placing the Initiative on the ballot on April 8, 2021. *Id.* ¶¶ 98-100. Under the *Town of Sykesville* standard endorsed in *Sahl*, all construction prior to Election Day must be considered for purposes of vested rights.

b. NECEC LLC has commenced actual construction on the Project that is visible and significant.

NECEC LLC has undertaken “actual physical commencement of some significant and visible construction” on the Project. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quotation marks omitted). As the Law Court has observed, “a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development.” *Id.* (quoting *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1064 (1996)). This “substantial construction” standard is measured in terms of “whether the amount of completed construction is *per se* substantial in amount, value or worth.” *AWL Power, Inc. v. City of Rochester*, 813 A.3d 517, 522 (N.H. 2002); *see Town of Sykesville*, 677 A.2d at 316 (requiring “substantial change of position”); *Tantimonaco v. Zoning Bd. of Review of Town of Johnston*, 232 A.2d 385, 387 (R.I. 1967).¹⁴ Construction on the NECEC easily meets this threshold, at any

Retail and Fisherman’s Wharf stood for the proposition that a pending change in law may vitiate good faith for a permitted project under construction, which they do not, there must at the least be some “official action,” *i.e.*, “actual introduction of a proposal to the appropriate . . . authorities,” that could lead to a change in law before that change becomes concrete enough to be considered in the good faith analysis. *1350 Lake Shore Assocs. v. Healey*, 861 N.E.2d 944, 954 (Ill. 2006) (considering “good faith” in light of pending legal change where no permits had been obtained and no construction had occurred). Any other rule “could lead to manipulation” by those opposing a project, thereby “discourag[ing] property owners from seeking to develop their property.” *Id.* at 953.

¹⁴ A “substantial completion” requirement, as opposed to a “substantial construction” standard, “unfairly burdens developers with large or complex plans”; thus, “where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost of the project.” *AWL Power*, 813 A.2d at 521-22 (internal quotation marks and citations omitted).

relevant date. *See Sahl*, 2000 ME 180, ¶¶ 12, 14, 760 A.2d 266 (rights vested where there were “substantial changes” and “substantial expenses”); *Town of Orangetown*, 665 N.E.2d at 1064-65 (rights vested where, after a permit issued, developer spent over \$4 million on improvements).

By the date the Initiative was adopted, November 2, 2021, NECEC LLC had undertaken substantial construction on the Project. The clearing contractor, NCI, had cut approximately 124 miles (85.5%) of the corridor, at a cost of \$43.1 million; contractors had installed approximately 70 structures along the HVDC line, along with additional bases and foundations, at a cost of \$38.5 million; an additional 54 structures had been installed along the AC line, at a cost of \$18.4 million; 3 miles of conductor had been strung; and contractors had largely completed site preparation for the converter station, along with construction of critical converter station components (such as transformers), at a cost of approximately \$100 million. Compl. ¶¶ 120, 132. In addition, millions of dollars of additional materials had been delivered through Election Day. *Id.* ¶ 132 & n.14. In all, total capital expenditures are estimated to be approximately \$449.8 million – 43% of the total Project cost estimate. *Id.* ¶ 132; McGeehin Aff. ¶ 10. NECEC LLC had incurred additional costs of approximately \$39.1 million, including operating expenses and allowance for funds used during construction. McGeehin Aff. ¶ 13 & Sched. 1. If this does not constitute substantial construction and substantial expenditures, the vested rights doctrine is meaningless.

Even measured against earlier dates likely to be advocated by the Project’s opponents as a “cutoff” for the construction undertaken by NECEC in good faith, NECEC LLC’s construction efforts and expenditures were still more than sufficiently substantial.

On April 8, 2021, the Governor issued a proclamation placing the Initiative on the ballot, completing the process for presenting an initiative to voters. By that date, capital expenditures on the Project, inclusive of project management costs, totaled approximately \$250.2 million. Compl.

¶ 128. By April 8, NCI had cut approximately 36 miles of corridor, laying over 5,727 mats for access, and performed approximately \$14.3 million of clearing and related construction activities. Cianbro/Irby had installed 15 structures on the HVDC line, at a cost of approximately \$21.2 million. *Id.* TAPP had delivered 33 poles to lay-down yards at a cost of approximately \$8.4 million. *Id.* In addition to capital expenditures, other Project costs as of March 31, 2021, totaled approximately \$18.9 million. McGeehin Aff. ¶ 13 & Sched. 1.

February 22, 2021, the date the Secretary of State certified the petition signatures in support of the Initiative, was the earliest possible date by which NECEC LLC had notice of formal action proposing the Initiative as legislation.¹⁵ Even as far back as that date, the amount of capital expenditures on the Project, inclusive of project management costs, was approximately \$199 million. Compl. ¶ 124. NCI had cut over 10 miles of corridor, laying over 1,000 mats for access, and performed approximately \$8.3 million of clearing and related construction activities. Cianbro/Irby had installed 9 structures on the HVDC line, at a cost of approximately \$15 million. *Id.* TAPP had delivered 24 poles to lay-down yards at a cost of approximately \$7.4 million. *Id.* In addition to capital expenditures, other Project costs as of February 28, 2021, totaled approximately \$16.9 million. McGeehin Aff. ¶ 13 & Sched. 1.

c. NECEC LLC's construction of the Project has been undertaken pursuant to valid permits.

Finally, for rights to vest construction must have been conducted pursuant to valid permits. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. Construction on the NECEC did not begin until all project-wide permits had been obtained. Compl. ¶ 117. After obtaining the initial permit

¹⁵ Prior to February 22, 2021, it was unknown whether opponents had gathered enough signatures to place the Initiative on the ballot. Under Maine law, any five voters may take out a petition for an initiative, 21-A M.R.S. § 901, but they must obtain signatures totaling no less than 10% of the votes cast in the prior gubernatorial election to place the initiative on the ballot. Me. Const. art. IV, pt. 3, § 17. Until the Secretary certifies that sufficient signatures have been obtained, therefore, the possibility of an initiative is inchoate.

necessary for the Project on May 3, 2019, the final permit necessary to begin construction was obtained on January 14, 2021, and construction began promptly thereafter on January 18, 2021. *Id.* ¶¶ 33-69, 117. Further, local municipal permits have been obtained in a timely manner in accordance with the Project schedule. *Id.* ¶ 71. All of these permits are valid. The Law Court has affirmed the PUC’s grant of the CPCN, *see NextEra Energy Res., LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, 227 A.3d 1117; the Superior Court has denied opponents’ motion for stay of the DEP permit, *see NextEra Energy Res., LLC v. Dep’t of Env’t Prot.*, Dkt Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Sup. Ct. Jan. 11, 2021); and the First Circuit has found that opponents of the Project are not likely to succeed in their challenge to the Corps permit, *Sierra Club v. Army Corps of Eng’rs*, 997 F.3d 395 (1st Cir. 2021). As these decisions show, NECEC LLC was justified in starting construction under the permits lawfully issued for the Project.

d. The Initiative’s proponents targeted the Project in bad faith and a dilatory manner.

NECEC LLC can also demonstrate its vested rights based on governmental bad faith. The Law Court has acknowledged that rights may vest, even absent any construction, if a law is “enacted primarily to thwart the applicant’s plans for development.” *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231, 1233 (Me. 1982).¹⁶ The question in such cases is whether the law was “directed” or “aimed” at a particular project. *Kittery Retail*, 2004 ME 65, ¶¶ 26, 28, 856 A.2d 1183 (citing *Thomas*, 381 A.2d at 644, 647, and *Commercial Props, Inc. v. Peternel*, 211 A.2d 514, 519 (Pa. 1965)). Here, the Initiative was targeted at a single project, the NECEC. Further, the Project has reached its advanced stage of development prior to adoption of the Initiative because of the opponents’ delay in wasting a year on the 2020 Initiative declared unconstitutional

¹⁶ *See Kittery Retail*, 2004 ME 65, ¶¶ 23, 25, 856 A.2d 1183 (examining whether rights vested based on bad faith, absent construction); *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 782 (Me. 1989) (same); *Thomas v. Zoning Bd. of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978) (same).

by the Law Court while the Project justifiably and lawfully proceeded through its planning phases into construction. *Avangrid*, 2020 ME 109, ¶ 2, 237 A.3d 882. This dilatory behavior, and the resulting late hour at which the Project opponents have pursued the Initiative’s targeted retroactive agenda, magnify their bad faith and the unfairness of applying the Initiative to the NECEC.

Both the context of and the campaign for the Initiative makes it clear that it targets the NECEC. The Initiative’s sponsors, Thomas Saviello and Sandra Howard, previously pursued the 2020 Initiative that would have revoked the CPCN for the Project. Compl. ¶¶ 79-82. Only after that initiative was struck down did Saviello and Howard begin pursuing the present Initiative – which, because of their decision to pursue the facially unconstitutional 2020 Initiative, could not be enacted or even placed on the ballot before construction began. *Id.* ¶¶ 22, 83. The Initiative is a transparent effort to carry on the 2020 Initiative’s anti-NECEC efforts; indeed, its sponsors admit that the retroactivity provisions are targeted at the NECEC, illustrating that it is simply the 2020 Initiative in new garb. *Id.* ¶¶ 89-97, 101-102. When the petitions for the Initiative were submitted, the political action committee “No CMP Corridor” stated that the law was designed to “be retroactive” so that it would “block the project.” *Id.* ¶¶ 95-96. The Initiative campaign used the slogan “Vote Yes to Reject the CMP Corridor.” *Id.* ¶ 102. Indeed, the attorney representing No CMP Corridor publicly stated that “this referendum essentially is aimed to defeat the CMP Corridor.” *Id.* ¶¶ 102(f), (g). The initiatives were funded with about \$27 million from competing energy companies operating natural gas fired power plants, which would suffer if lower-cost, clean hydropower were introduced into the New England grid. *Id.* ¶ 103. In sum, the campaign for the Initiative made itself clear: its purpose was to “Stop the CMP Corridor.” *Id.* ¶¶ 90, 102.

There can be no clearer example of targeting. Because the Initiative was not timely pursued and was passed to defeat a single development project after a campaign funded by fossil fuel

burning energy companies that would be competitively harmed by that project, NECEC LLC has a vested right to construct the Project.

2. Retroactive application of the Initiative to the NECEC would violate article III, section 2 of the Maine Constitution.

Article III, section 2 of the Maine Constitution states: “No person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers belonging to either of the others, except in the cases herein expressly directed or permitted.” Me. Const. art. III, § 2. Maine law thus requires “strict separation of powers between the three branches of government.” *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985).¹⁷ “The more that the ‘independence of each department, within its constitutional limits, can be preserved, the nearer the system will approach the perfection of civil government, and the security of civil liberty.’” *Avangrid*, 2020 ME 109, ¶ 24, 237 A.3d 882 (quoting *Lewis v. Webb*, 3 Me. 326, 329 (1825)).

Under the Maine Constitution, the separation of powers doctrine is “more rigorous” than under the U.S. Constitution. *N.E. Outdoor Ctr. v. Comm’r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 9, 748 A.2d 1009 (quoting *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982)). “[S]eparation of powers issues must be dealt with in a formal rather than functional manner.” *Bossie*, 488 A.2d at 480. “The resulting test under the Maine Constitution is a narrow one: ‘has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.’” *Id.* (quoting *Hunter*, 447 A.2d at 800); see *In re Dunleavy*, 2003 ME 124, ¶ 6, 838 A.2d 338. Thus, the Legislature may not exercise powers granted to the executive, including agencies, *N.E. Outdoor Ctr.*, 2000 ME 66, ¶ 10, 748

¹⁷ The framers were “well acquainted with the danger of subjecting the determination of the rights of one person to the ‘tyranny of shifting majorities.’ . . . It was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” *I.N.S. v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring).

A.2d 1009, or to the judiciary, *State v. L.V.I. Group*, 1997 ME 25, ¶ 11 n.4, 60 A.3d 960. The Initiative usurps the powers of both the executive and the judiciary.

a. Retroactive application of the Initiative to the Project would usurp executive powers by prohibiting construction of a project already authorized by executive agencies.

The power to execute the law is vested in the Governor. *Opinion of the Justices*, 2015 ME 27, ¶ 5, 112 A.3d 926 (citing Me. Const. art. V, pt. 1, §§ 1, 12). The Initiative usurps this executive power via an attempted end-run around the Law Court’s decision in *Avangrid*, which struck down the 2020 Initiative that would have expressly required the PUC to revoke the CPCN for the Project. The Initiative, although weakly camouflaged with general standards of prospective application, would again reverse final agency action through its attempted retroactive application to NECEC, which – as the Project opponents have boldly acknowledged – is the sole intended purpose of the Initiative. Retroactive application of Section 1 of the Initiative to the NECEC usurps executive power by purporting to authorize cancellation of the BPL Lease, while retroactive application of Section 4 of the Initiative to the NECEC would usurp executive power by purporting to authorize the Legislature to cancel construction of a project already authorized by the appropriate executive agencies; likewise, retroactive application of Section 5 to the NECEC would usurp executive power because that section directly prohibits construction of a project approved by the PUC.

Maine law is clear: legislation may not be used to reverse a final executive agency determination. *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882; *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117. In *Avangrid*, the Law Court considered the constitutionality of the 2020 Initiative that would have directed the PUC to reverse its order granting the CPCN for the Project. 2003 ME 139, ¶¶ 1, 5, 237 A.3d 882. The 2020 Initiative was unconstitutional because the PUC is an executive agency with quasi-judicial powers, and the 2020 Initiative would have “dictat[ed] the [PUC]’s exercise of its quasi-judicial executive-agency function in a particular proceeding,”

and would have “interfer[ed] with and vitiat[ed] the [PUC]’s fact-finding and adjudicatory function – an executive power” *Id.* ¶¶ 33, 35. The Law Court held that “the Legislature would exceed its legislative powers if it were to require the [PUC] to vacate and reverse a particular administrative decision the [PUC] had made.” *Id.* ¶ 35. In so holding, the court applied its prior precedent in *Grubb*. In that case, the court considered the retroactive application of a new statutory standard for calculating worker benefits, and held that it could not be applied to a final benefits determination. The court observed that the new statutory standard “d[id] not, nor could it, change the result of a previous decision,” even though it could be applied retroactively to pending benefit applications. *Grubb*, 2003 ME 139, ¶ 11. The court observed that the “Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers.” *Id.*¹⁸ Taken together, these cases establish that separation of powers prohibits retroactive application of new legislation to final agency determinations.

Kittery Retail and *Fisherman’s Wharf* are not to the contrary. In both cases, the Law Court upheld municipal initiatives that changed zoning ordinances to bar development projects. *See Fisherman’s Wharf*, 541 A.2d at 165; *Kittery Retail*, 2004 ME 65, ¶¶ 4-6, 856 A.2d 1183. Neither case, however, upheld retroactive reversal of a final agency permit. In *Fisherman’s Wharf*, the building permit was still pending when the initiative was adopted, 541 A.2d at 161-62; likewise, in *Kittery Retail*, the initiative was adopted after the town had accepted a site plan application for review, but the town had not yet approved or denied the application, 2004 ME 65, ¶¶ 4-6, 856 A.2d

¹⁸ In *Morrisette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, the Law Court concluded – consistent with its prior decisions – that a new legislative standard may be applied retroactively to benefits determinations regarding prior injuries when an agency proceeding is still pending. *Id.* ¶¶ 12-13, 15; *see MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 23, 40 A.3d 975 (a statute may be applied retroactively to “a pending proceeding”); *Bernier v. Data Gen. Corp.*, 2002 ME 2, ¶ 17, 787 A.2d 144 (same). There is no pending proceeding here – the PUC’s determination is final, and has been affirmed by the Law Court. *NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117. The BPL’s lease determination is likewise final, though it is currently subject to challenge in the Law Court.

1183. Maine courts have never approved reversal of final agency permits via legislation, and *Avangrid* and *Grubb* foreclose such an outcome.

Applying this well-settled law, retroactive application of Sections 1, 4, and 5 of the Initiative to the Project are unconstitutional. The new prohibition in Section 5 on construction in the Upper Kennebec Region cannot be applied retroactively to the PUC's final decision granting a CPCN for the Project; likewise, the new standard in Section 1 cannot be applied retroactively to the BPL Lease. Further, the requirement in Section 4 that the Legislature must retroactively approve a project previously permitted by the PUC authorizes that which the Law Court held to be unconstitutional in *Avangrid*: direct legislative prohibition of a specific project that has been finally approved by executive agencies. In effect, requiring legislative approval of the BPL Lease and construction of the NECEC – after a completed process in both executive agencies – is the same as directly revoking the CPCN, as the 2020 Initiative, found unconstitutional in *Avangrid*, purported to do. The Legislature cannot constitutionally disapprove prior executive approvals.

b. Retroactive application of Sections 4 and 5 of the Initiative would also usurp judicial powers by reversing the outcome of a final judgment of the Law Court.

All judicial powers are vested in the Supreme Judicial Court and other courts established by the Legislature. Me. Const. art. VI, § 1. The Initiative usurps this power because it would effectively reverse a final judgment rendered in a previous action, as to the individual parties to that action, by requiring the PUC to vacate a CPCN that has been affirmed by the Law Court and permitting the Legislature to veto the project after affirmance of the CPCN. *See NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117. In force and effect, the Initiative would vacate *NextEra*.

It is well established under Maine law that it violates the separation of powers for the Legislature to reverse a final judgment as to the parties in that action. *L.V.I. Group*, 1997 ME 25, ¶ 11 n.4, 60 A.3d 960 (“[A] final judgment in a case is a decisive declaration of the rights between

the parties, and the Legislature cannot disturb the decision . . . as to the parties in that action.”); *Lewis*, 3 Me. at 332; see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-27 (1995) (citing *Lewis*).¹⁹ In *Lewis*, the Law Court held that the Legislature cannot “set aside a judgment or decree of a Judicial Court, and render it null and void,” even via a law that did not expressly require an outcome different than that reached by the court. 3 Me. at 337. As these cases establish, therefore, legislation may not reopen a proceeding subject to a final judicial decision.

Retroactive application of Sections 4 and 5 to the Project would violate this principle by reversing the outcome of a final judgment from the Law Court that expressly affirms the PUC’s issuance of a CPCN for the NECEC. In *NextEra*, the Law Court concluded that CMP had met the statutory requirements for a CPCN and thus affirmed the grant of the CPCN. 2020 ME 34, ¶ 43, 227 A.3d 1117. Section 5 of the Initiative seeks to unravel that final judgment by requiring the PUC to reopen its proceedings and revisit its previous determination that was affirmed by the Law Court. Indeed, and even more egregiously than in *Lewis*, the Initiative makes it clear that the prior outcome – approval of the Project – must be reversed. Section 4 of the Initiative, moreover, allows the Legislature to disapprove the Project even though the Law Court has affirmed that the Project satisfies the then applicable requirements of Title 35-A. By imposing new requirements *after* the Law Court’s decision, the Initiative renders an essential function of Maine’s judiciary futile.

c. Retroactive application of Section 4 of the Initiative violates separation of powers because it authorizes a legislative veto of executive action, without requiring presentment.

Section 4 of the Initiative also violates separation of powers even as to its prospective application because it purports to authorize the Legislature to exercise a veto over agency approval

¹⁹ The same is true of agency determinations. See *Grubb*, 2003 ME 139, ¶¶ 9, 11, 837 A.2d 117 (noting that final Workers’ Compensation Board decisions are subject to the rules of res judicata, and finding that the Legislature could not disturb such a decision); see also *Quirion v. Pub. Utils. Comm’n*, 684 A.2d 1294, 1296 (Me. 1996) (res judicata applies in the context of a final PUC decision).

of any high-impact electric transmission line project in the State without satisfying the presentment requirement of article IV, part 3, § 2 of the Maine Constitution. Such a legislative veto deprives the Governor of the executive powers vested in the office of Governor by the Maine Constitution.

The Maine Constitution specifically provides that “[e]very bill or resolution, having the force of law, to which the concurrence of both Houses may be necessary, except on questions of adjournment, which shall have passed both Houses, shall be presented to the Governor.” Me. Const. art. IV, pt. 3, § 2. Under the plain language of this provision, any bill or resolution that would have the force of law must be presented to the Governor for consideration and potential veto. *Opinion of the Justices*, 231 A.2d 617, 619 (Me. 1967) (bills with referendum provisions must be presented to the Governor); see *Opinion of the Justices*, 571 A.2d 1169, 1180 (Me. 1989).

Retroactive application of Section 4 runs afoul of this presentment requirement, and is therefore unconstitutional. *Chadha*, 462 U.S. at 951-59.²⁰ There is no serious question that the legislative approval of high-impact electric transmission lines required by Section 4 would have the force of law – if the Legislature withheld approval, the transmission line could not be built. This is the quintessential nature of a law. Cf. *Opinion of Justices*, 261 A.2d 53, 57 (Me. 1970) (a resolution proposing a constitutional amendment is not an exercise of the power to make laws because it has no binding effect). Accordingly, any legislative act approving or withholding approval for a high impact electric transmission line would have to be submitted to the Governor. Section 4, however, does not allow for or contemplate such presentment. Instead, Section 4, retroactively applied, operates as a purely legislative veto of executive agency approvals by the

²⁰ *Blank v. Dep’t of Corrections*, 611 N.W.2d 530, 536-38 (Mich. 2000) (requirement that legislature approve new agency rules “violate[d] the enactment and presentment requirements, usurps the Governor’s role in the legislative process, and violates the separation of powers provision”); *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 593 (W. Va. 1995) (legislative veto violated separation of powers requirement because it “encroache[d] upon the executive branch’s obligation to enforce the law”); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772-73 (Alaska 1980); *Opinion of the Justices*, 83 A.2d 738, 741 (N.H. 1950).

PUC. Retroactive application of Section 4, therefore, would allow the Legislature to interfere with the Governor’s constitutional mandate to faithfully execute the law – all without the participation by the Governor in the legislative process contemplated by the Maine Constitution.²¹

3. Retroactive application of the Initiative to the NECEC would violate article I, section 11 of the Maine Constitution and Article I, § 10 of the United States Constitution.

“Giving statutes retroactive effect may be unconstitutional in a variety of circumstances, including when the legislation would substantially impair a contractual relationship in violation of the Contracts Clause.” *MacImage of Me., LLC*, 2012 ME 44, ¶ 23 n.10, 409 A.3d 975.²² Both the U.S. Constitution and the Maine Constitution prohibit the impairment of contracts. U.S. Const. art. I, § 10; Me. Const., art. I, § 11. Under the Contracts Clause, “[t]he first question ‘is whether the state law has operated as a substantial impairment of a contractual relationship.’” *United Auto., Aerospace, Agr. Implement Workers of Am. Int’l Union v. Fortuno*, 633 F.3d 37, 41 (1st Cir. 2011) (quoting *Energy Res. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)) (quotation marks and alterations omitted). If there has been a substantial impairment, the second

²¹ The fact that a project could be disapproved simply by legislative *inaction* makes no difference. Legislative veto of executive approval of a project by legislative inaction is the same as legislative veto by legislative action. In both instances, the Legislature has arrogated to itself powers vested in the executive branch, while evading the presentment requirement. *Hechler*, 462 S.E.2d at 590-93 (holding that “outright veto power” on the part of the Legislature to block implementation of proposed agency regulations through the Legislature’s failure to act constitutes an “intrusion into the Executive branch’s ability to effectuate its mandated responsibilities”).

²² In this case, the prohibition on retroactive application of laws that would substantially impair a contract is closely related to the principle that “a law would be unconstitutional if, when applied retrospectively, it would alter or impair the nature of a person’s title in property.” *Fournier*, 376 A.2d at 102. Property rights are “constitutionally protected right[s].” *Id.*; see *Sabasteanski v. Pagurko*, 232 A.2d 524, 525-26 (Me. 1967) (no constitutional power to retrospectively alter vested rights in property). Here, the relevant contract gives NECEC LLC a leasehold interest, *i.e.*, a property right. See *H&B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 13, 246 A.3d 1176 (leases are contracts and property conveyances). Thus, the vested rights principle that a law may not retrospectively impair a person’s title in property is directly at issue, and strengthens NECEC LLC’s interest in the impaired contract. See *Fournier*, 376 A.2d at 102 (citing *Portland Sav. Bank v. Landry*, 372 A.2d 573 (Me. 1977) (prohibiting retroactive application of law shortening the redemption period available to a mortgagor after default, applying Contracts Clause analysis)).

question is whether that impairment was “reasonable and necessary to serve an important government purpose.” *Id.*; see *Kittery Retail*, 2004 ME 65, ¶ 38-41 & n.7, 856 A.2d 1183 (describing Contracts Clause analysis). As other courts have found, voiding a lease on state lands unconstitutionally impairs the contract rights of the leaseholders, here, NECEC LLC. See, e.g., *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F3d 494, 514 (5th Cir. 2001).²³

First, retroactive application of the Initiative to the Project would substantially impair NECEC LLC’s BPL Lease. NECEC LLC has obtained a lease for approximately 0.9 miles of public reserved lands in Somerset County for 25 years. Compl. ¶ 75. The lease gives NECEC LLC the right to construct poles, towers, wires, switches, and all other structures necessary for the transmission of electricity. *Id.* at Ex. B. Retroactive application of the Initiative would directly affect the lease by authorizing termination of the lease and prohibiting the construction of transmission facilities, completely depriving NECEC LLC of the benefit of the lease. Such an outcome is not contemplated by the terms of the lease, which do not permit the State to unilaterally terminate the lease.²⁴ Thus, the Initiative would substantially impair the BPL Lease by authorizing unilateral termination, contrary to its terms.

Second, retroactive application of the Initiative to the BPL Lease is not reasonable and necessary to serve an important state purpose. Where the State is a contracting party, courts will not defer to legislative judgments regarding whether impairment of a contract is reasonable and

²³ The legality of the lease under Maine law has been challenged. However, at this time, the lease is still in full force and effect pending appeal to the Law Court. Compl. ¶ 78; see M.R. Civ. P. 62(e).

²⁴ The lease expressly provides that the State only “reserves the right to terminate” the lease “to the extent permitted under the provisions contained in paragraph 13 Default.” Compl. Ex. B. Therefore, absent default by NECEC LLC – which has not happened here – the lease does not contemplate termination by the State. The lease instead only allows for “amendment” of the lease if any term of the lease is found not to comply with Maine state law. *Id.* If a term of the lease were found to violate state law, the State only has the right to propose a revision of the lease; NECEC LLC has the power to then either terminate the lease or negotiate an amendment. *Id.*

necessary because the State’s self-interest is implicated. *Fortuno*, 633 F.3d at 41; *Kittery Retail*, 2004 ME 65, ¶ 38, 856 A.2d 1183. Further, courts have held that an impairment is not “reasonable” if the “problem sought to be resolved by [the] impairment of the contract existed at the time the contractual obligation was incurred.” *Univ. of Haw. Prof’l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (quoting *Mass. Community Coll. Council v. Massachusetts*, 659 N.E.2d 708 713 (Mass. 1995)). Here, the purported state interest is ensuring that leases of public lands are approved by the Legislature. This same interest, however, existed when the BPL Lease was entered into no less than it does now. It is *per se* unreasonable to terminate the BPL Lease in service of an interest that existed at the time it was authorized. *See Cayetano*, 183 F.3d at 1107.

C. The balance of harms favors entering an injunction.

The balance of hardships also favors entry of an injunction.²⁵ A constitutional violation, not to mention interference with vested property rights amounting to the outright destruction of those rights, outweighs any injury from temporarily precluding the retroactive application of the Initiative. *See Gordon*, 721 F.3d at 653 (potential deprivation of constitutional right outweighs countervailing interests); *Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429 (because county defendant would not incur monetary loss, while failure to enter injunction permitting construction would cause construction delays and increased costs). Plaintiffs face the prospect of the likely cancellation of a billion dollar project if the Initiative is enforced.

At the very least, Plaintiffs would confront substantial delays and massively escalated costs to remedy those delays should construction be halted during this litigation. *Dickinson Aff.* ¶ 28;

²⁵ The severity of the irreparable harm and the substantial likelihood of success in this case lessens the need to demonstrate that the balance of harms supports an injunction. *See Waldron v. George Weston Bakeries, Inc.*, 575 F. Supp. 2d 271, 278 (D. Me. 2008) (“[T]he more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff’s position.” (quoting *Ty, Inc. v. Jones Grp. Inc.*, 237 F.3d 891 (7th Cir. 2001))). Nevertheless, this factor also favors an injunction.

Berkowitz Aff. ¶¶ 61-62. These delays and increased costs would result from NECEC LLC's obligation and commitment to comply with permit requirements and environmental standards, as well as demobilization and remobilization costs and additional project administration costs. Dickinson Aff. ¶¶ 26-27. For example, NCI would need to remove all construction mats, triggering an additional period of restoration on the same land. *Id.* ¶ 26. Moreover, any pause in construction would entail an extensive demobilization and remobilization effort. *Id.* ¶ 27. It is estimated that an 18-month delay in construction would be approximately \$113 million, and the increased costs resulting from a 24-month delay would be \$147 million. *Id.* ¶ 28. This range of delay-driven costs would threaten the financial viability of the Project. *Id.* In addition, because the Project's revenues only begin after it reaches commercial operation, the delay in receipt of revenues would further threaten the financial viability of the Project. *Id.* ¶ 29. On the other hand, the State would not incur any monetary loss or harm by the issuance of an injunction.

Further, no irreparable harm would result from continued construction. Clearing of the corridor is almost complete; over 140 miles of the DC line corridor will be cut by year-end 2021, representing 97% of the entire corridor.²⁶ *Id.* ¶ 20. The minimal clearing that remains is being conducted in accordance with lawful permits issued after the exercise of rigorous governmental oversight and imposition of extensive conditions to safeguard the environment. Compl. ¶¶ 51-52. The primary construction activities that remain involve, among other things, placing structures, stringing conductor, and constructing the converter station on the prepared site. *Id.* ¶ 114; Dickinson Aff. ¶ 20. None of these activities will result in irreversible harm. The balance of harms thus sharply favors NECEC LLC. *See Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429.

²⁶ The clearing excludes the land leased from the BPL. Due to the Law Court's order precluding clearing on that section during the pendency of the appeal pertaining to the BPL Lease, clearing on that portion of the corridor will not be completed until after the Law Court's ruling on the validity of the BPL Lease. Compl. ¶ 78.

D. The public interest would be served by an injunction.

The public interest also favors an injunction. “It is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation.” *Condon*, 961 F. Supp. at 331. To the contrary, it “is clearly in the public’s interest” to enjoin a constitutional violation such as “the separation of powers doctrine.” *City of Evanston*, 412 F. Supp. 3d at 887. It is likewise in the public interest to avoid the loss of property rights. *Abrams v. Blackburne & Sons Realty Cap. Corp.*, 2020 WL 5028877 (C.D. Cal. June 16, 2020) (“the public interest nearly always weighs in favor of protecting property rights”). Thus, an injunction will promote the public good by enforcing the Constitution and protecting property rights.

Moreover, allowing the Project to move forward will, as the PUC and the Law Court have found, benefit Maine through economic investment, energy reliability, and decreased GHG emissions. Compl. ¶¶ 37-48; Dickinson Aff. ¶ 32-34. Specifically, the Project represents a \$1 billion investment that is and will (1) produce 1,600 jobs annually during construction and 300 jobs during operation, (2) enhance transmission and supply reliability and security, (3) lower electricity costs, (4) remove upwards of 3.6 million metric tons of carbon emissions annually from the atmosphere (the equivalent of removing 700,000 cars from the road) in an effort to fight climate change and (5) provide approximately \$250 million in rate relief, economic development, climate supporting and education related benefits to Maine and its residents. Dickinson Aff. ¶¶ 32-33.

The jobs provided by the NECEC have already directly benefited Maine workers, hundreds of whom are currently working on the Project. Compl. ¶ 135. Suspension of the Project would jeopardize the more than 600 direct jobs already created by the Project, the anticipated 300 additional direct jobs to be implemented, and the hundreds of resulting indirect jobs that the Project supports. Dickinson Aff. ¶ 32(a). Protecting and creating new jobs is strongly in the public

interest. *See The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (harm from forced lay-offs of workers weighed against injunction), *overruled in part on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *W. Watersheds Proj. v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1003-04 (D. Nev. 2011) (public interest favored allowing project to proceed because it created hundreds of jobs), *aff'd* 443 F. App'x 278 (9th Cir. 2011).

Ensuring reliable electricity supplies is also in the public interest. The NECEC and associated Network Upgrades will increase the reliability of the Maine transmission system by delivering baseload energy to replace retiring baseload resources, as well as other reliability and fuel security benefits. Dickinson Aff. ¶ 32(d). A delay in construction would threaten these improvements. *Id.* ¶ 32. This public interest also supports permitting the Project to proceed. *See Columbia Gas Transmission, LLC v. 1.092 Acres of Land in Tp. of Woolwich*, 2015 WL 389402, at *5 (D.N.J. Jan. 28, 2015) (noting that public interest in “overall reliability of the energy infrastructure” supported allowing project to move forward).

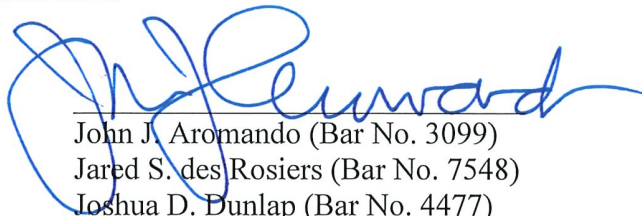
Further, the reduction in GHG emissions will directly benefit Maine. The DEP found that climate change is creating ongoing harm to Maine, including to brook trout habitat and habitat for “iconic species such as moose,” and constitutes “the single greatest threat to Maine’s natural environment.” Compl. ¶ 53. The DEP further concluded that any delay in addressing the issue “will exacerbate” negative environmental impacts. *Id.* This, too, supports the conclusion that the public interest would be promoted by an injunction. *W. Watersheds Proj. v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (“goal of increasing the supply of renewable energy and addressing the threat posed by climate change” was properly weighed in public interest analysis); *W. Watersheds Proj.*, 774 F. Supp. 3d at 1103 (noting public interest in project because it would “decreas[e] green house gas emissions” and thereby promote important “clean energy goals”).

In addition, the stipulation approved by the PUC in conjunction with granting the CPCN provides Maine with a package of benefits totaling approximately \$250 million (in addition to those arising from the construction and operation of the NECEC), including support for electric rate relief, low-income customers, the expanded availability of electric vehicles and charging infrastructure, heat pumps and broad band service in Maine, education programs, and economic development. Compl. ¶¶ 43-44; Dickinson Aff. ¶ 33. These benefits have already begun to be paid out to Maine, along with property taxes. Compl. ¶ 18. Allowing construction to move forward will allow these benefits to continue to flow to Maine. This, too, supports a finding that the public interest is promoted by allowing the project to move forward. *W. Watersheds Proj.*, 774 F. Supp. 3d at 1103 (millions in dollars of taxes supported finding that allowing the project to proceed was in the public interest).

CONCLUSION

The issue in this proceeding is straightforward: is it permissible to legislatively deprive a developer of the right to complete a project, after all federal and state executive agencies have issued final permits (and, in certain instances, affirmed by the Law Court) and after substantial construction has occurred and substantial expenditures have been made? Under Maine law, the answer is “No.” To hold otherwise would be to subject property owners to the whim of targeted, retroactive legislation, regardless of their reliance on existing law as well as executive and judicial approvals. The vested rights and separation of powers doctrines, and the prohibition against impairment of contracts, are all designed to prevent such an inequitable outcome. Because the Initiative contravenes these basic constitutional protections, this Court should grant a preliminary injunction allowing the Project to proceed.

Dated at Portland, Maine this 3rd day of November 2021



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Avangrid Networks, Inc.*

NOTICE

Matters in opposition to this Motion pursuant to M.R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

EXHIBIT A

TO

PLAINTIFFS' VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

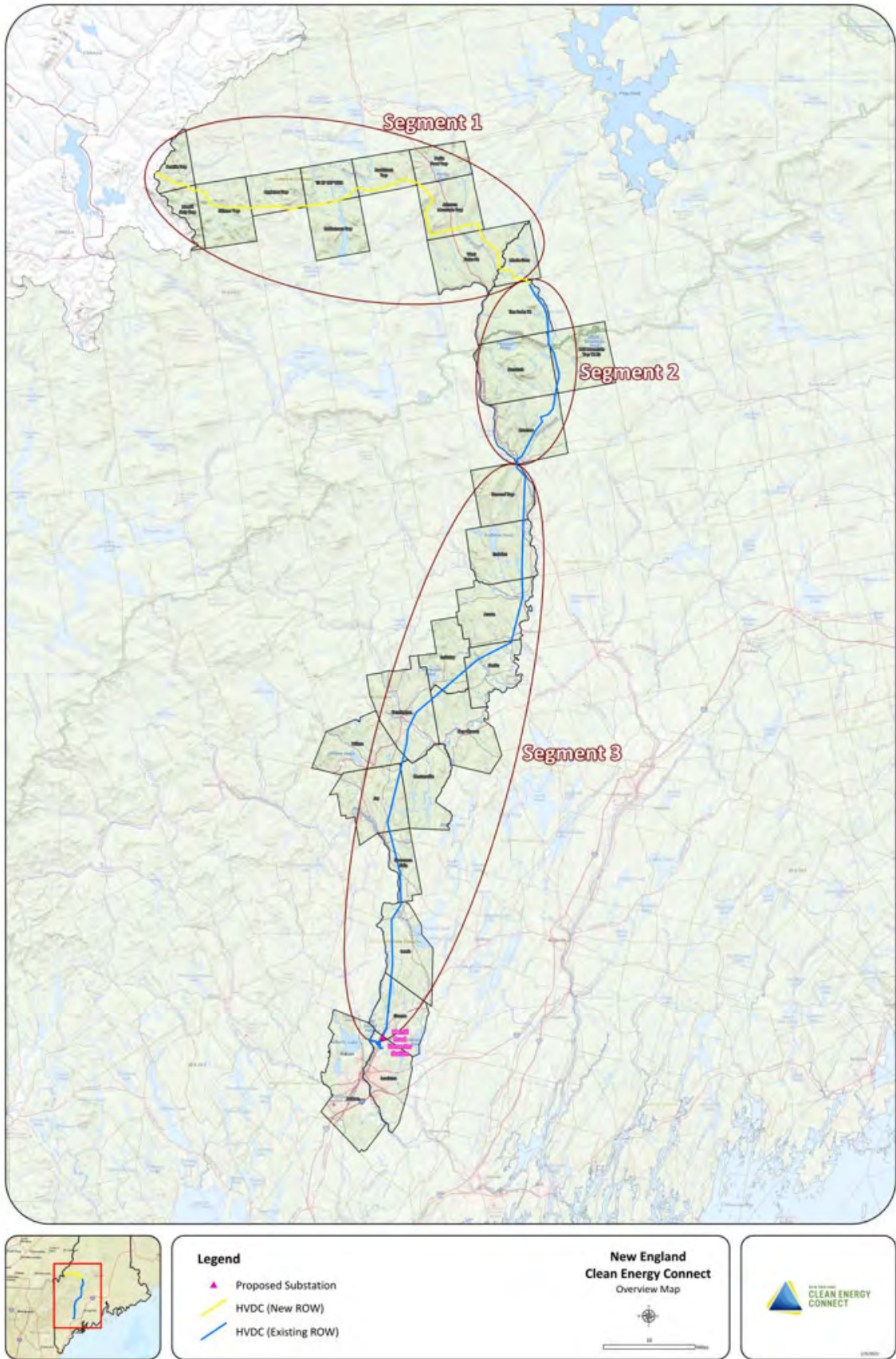


EXHIBIT C

TO

PLAINTIFFS' VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF



Sec. 1. Amend order. Resolved: That within 30 days of the effective date of this resolve and pursuant to its authority under the Maine Revised Statutes, Title 35-A, section 1321, the Public Utilities Commission shall amend "Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation," entered by the Public Utilities Commission on May 3, 2019 in Docket No. 2017-00232 for the New England Clean Energy Connect transmission project, referred to in this resolve as "the NECEC transmission project." The amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project. There not being a public need, the amended order must deny the request for a certificate of public convenience and necessity for the NECEC transmission project.

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION
AND FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF
REPRESENTATIVES,

Defendants.

**AFFIDAVIT OF PATRICK A.
MCGEEHIN IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Patrick A. McGeehin, being over the age of 18 years and duly sworn, state as follows:

Background and Scope of Affidavit

1. I am a Senior Managing Director ("SMD") with FTI Consulting, Inc. ("FTI")

and one of the Senior Leaders in its Construction Solutions Group. As set forth in more detail in my attached resume (Attachment A), I am a licensed Certified Public Accountant and have spent my entire career, which spans in excess of forty-five (45) years, working in the Public Accounting and consulting fields on accounting and cost allocation issues.

2. I have considerable experience in assisting clients and law firms in assignments that relate to disputes and, on many occasions, these disputes are part of more formal litigation-support assignments, where expert testimony is provided. The majority of these occasions involve the construction industry, and many of them are focused in the area of power-related projects. I have also authored book chapters and other articles over my career, have conducted client seminars, and participated as a speaker at industry events on many occasions. (A listing of my publications is also included as part of Attachment A.)

3. Given my background and focus, I have testified as an expert witness, either in deposition or live court/arbitration appearances, on over 200 occasions. Many of these expert appearances relate to construction related projects, including power-related contracts. In my attached resume, I have included a listing of my expert appearances. (Attachment A)

4. I have been retained as an expert by NECEC Transmission LLC ("NECEC LLC") and Avangrid Networks, Inc. (collectively, "the Plaintiffs") in connection with this lawsuit and their Motion for a Preliminary Injunction in particular. The scope of services

requested by the Plaintiffs from me and my accounting/pricing group at FTI relate to the review of financial information maintained by the Plaintiffs allocable to their performance of the New England Clean Energy Connect ("NECEC" or "Project"). I am the lead professional at FTI responsible for the content of this affidavit, and other professionals of FTI assisting me on this assignment work at my direction and under my control. More specifically, and as discussed further, I was asked to review contemporaneously maintained cost and financial/accounting records, to summarize the total expenditures of the Plaintiffs at specific points in time based on these records. In addition, in conjunction with Mr. Berkowitz, we were asked to overlay the cumulative actual costs with selected significant events in order to demonstrate the relationship of the overall progress of the Project to the costs being incurred. (See Exhibit 1.)

5. Concurrent with the filing of this affidavit, Mr. William Berkowitz, an SMD at FTI who focuses his practice on the construction industry, and, more specifically, in power-related projects, is issuing an affidavit relating to certain project performance events at select intervals of time. His conclusions also address the reasonableness and necessity of the Plaintiff's actions in progressing the Project at certain points of time. The opinions outlined in this affidavit supplement Mr. Berkowitz's conclusions with respect to the issues outlined in his affidavit.

Accounting Records of Plaintiffs and Key Dates Referenced by the Plaintiffs

6. In performing our work, we requested access to certain accounting records

of the Plaintiffs that would provide detail as to the expenditures that the Plaintiffs have made from the inception of the Project through a currently selected cut-off date. The total costs discussed throughout this affidavit are those recorded through September 30, 2021 and forecasted through October 31, 2021.

7. In forming the opinions contained in this affidavit, I have been made aware of, had access to, and have reviewed the information that I believe is necessary to make the statements set forth in this affidavit, including the financial records of the Plaintiffs. These records include project cost reports, project forecasts, purchase orders, labor records, project status reports, and project transactional cost detail. Experts addressing accounting and cost allocation issues such as those addressed in this affidavit reasonably rely on these types of financial records, facts, or data in forming accounting and cost allocation opinions.

8. More specifically among the accounting and project reporting records maintained by the Plaintiffs of relevance to our effort were the following:

- A) "NECEC Actual-Forecast Report (September)" i.e., actual cost to date as of September 30, 2021 and Forecast to Complete;
- B) "Commitment" i.e., detailed listing of purchase order and subcontract commitments;
- C) "NECEC Time Reporting 10112021" i.e., detailed listing of internal labor hours by person by date;

D) “Actuals” i.e., annual data downloads of project cost transactions (cost code balances through 2018 recorded as cumulative transfer entries).

9. Based on our discussions with representatives of the Plaintiffs, the aforementioned reports and records were maintained by the Plaintiffs throughout the period of Project performance. As such, and as referenced above, I consider them to be reliable source documents that are typically relied upon by experts in accumulating costs and other financial commitments when forming opinions on costs incurred and project allocation/assignment for large scale construction projects.

10. The following are the dates that the Plaintiffs have designated as points in time to summarize the total costs incurred on the Project. The reason for the selection of these dates is outlined in the Plaintiffs’ Motion for Preliminary Injunction, and will not be repeated here.

A) February 22, 2021

B) March 30, 2021

C) April 8, 2021

D) November 2, 2021

Because accounting data is reported as of month end, I have based my review on those months-ending nearest the above dates as shown in the table below¹:

¹ As referenced in paragraph 6 above, the amounts through October 31, 2021 include actual amounts through September 30, 2021 and forecasted amounts for the month of October 2021.

	Cumulative Amounts Through:				
	January 31, 2021	February 28, 2021	March 31, 2021	June 30, 2021	October 31, 2021
Capital Expenditures (CAPEX) -					
Accrual Basis	\$ 183,143,061	\$ 199,021,039	\$ 248,516,088	\$ 349,564,282	\$ 449,814,060
Other Costs					
Allowance for Funds Used During					
Construction (AFUDC)	12,711,825	14,349,279	16,174,098	22,821,776	34,542,448
Operating Expense (OPEX)	2,491,421	2,537,882	2,710,358	3,034,878	4,548,397
Total Other Costs	\$ 15,203,246	\$ 16,887,161	\$ 18,884,456	\$ 25,856,654	\$ 39,090,845
Total	\$ 198,346,307	\$ 215,908,200	\$ 267,400,544	\$ 375,420,936	\$ 488,904,905

Conclusions and Summaries of Costs Incurred

11. In summarizing the total amount spent on a large scale, multi-year project like the one at issue, there are various ways to look at the total amount incurred. These include actual amounts actually paid to third parties and employees as of a certain date (cash basis); amounts accrued for work performed, but not necessarily paid (accrual basis); and amounts committed in the form of subcontracts and other contractual arrangements that can not necessarily be avoided without additional financial costs or other liabilities accruing to the entity at issue (total commitment basis). Companies developing long-term projects typically maintain most, if not all, of this type of information in summary and detailed form as part of the accounting and reporting systems; as discussed further, the Plaintiffs also have maintained this type of information as part of their systems.

12. From an accountant's perspective, absent some specific request for information limited to cash actually spent, financial information and statements are

maintained and presented on an accrual basis.² Typically, this means that invoices and other charges are recorded when received, or when an obligation is created for work performed or goods delivered, as is the case for the information maintained by the Plaintiffs for the NECEC Project.

13. In Schedule 1 of this affidavit, I have summarized the total accrual basis costs incurred for the dates indicated in the table above, as well as the commitment basis totals as of those dates. The costs include capital expenditures (CAPEX), Allowance for Funds Used During Construction (AFUDC), and Operating Expenses (OPEX). Capital expenditures represent the direct and necessary costs to plan, develop and construct the Project (e.g., design, engineering, outreach, project management, labor, materials, equipment, etc.), which represent the majority of the overall costs of the Project. The other cost types are discussed below.

14. In addition to subcontract and purchase commitments, the Plaintiffs have a commitment to the Maine Public Utilities Commission to fund specific initiatives (e.g., low-income customer, rate relief, broad band, etc.). The agreement to fund these initiatives is included as part of the February 21, 2019 Stipulation with the Maine Public Utilities Commission regarding the Certificate of Public Convenience and Necessity ("CPCN") for the NECEC Project.

² Under Generally Accepted Accounting Principles, the use of cash-basis or accrual basis accounting is allowed; however, for publicly traded companies, accrual-basis accounting is not only required, but preferred. Accrual-basis accounting recognizes transactions when they occur rather than when cash is received or remitted.

15. It is important to understand that, in the construction industry, there can be a large difference between the actual work completed to date and billed by a subcontractor and the amount of commitment a company has made to the subcontractor in terms of the total amount of the subcontract, even if not performed to date. The subcontracting arrangements often carry termination liabilities that a company must pay if they do not go forward with the balance of a subcontractor's effort; as such, the amount of total commitments is an important factor for a company to consider as part of its long-term development efforts.

16. In Schedule 2 of this affidavit, I have summarized the total capital expenditure amounts incurred to date (accrual basis) as of October 31, 2021 identifying the costs for certain major subcontractors and vendors, in order to give the reader a sense of the amount of cost incurred, the scope of the work performed to date, and the type of work that the vendors/subcontractors were, and are, performing.

17. As indicated above, Mr. Berkowitz's affidavit addresses the reasonableness of the Plaintiffs' actions over the course of the Project to date. In my experience in analyzing construction projects, it is necessary to incur costs for project management and planning early on in the course of a project, prior to the actual commencement of construction operations in the field. Project management costs include personnel for project planning and oversight, permitting, environmental assessments, procurement, insurances, design and engineering and other "front end" project-related costs. These

types of costs are necessarily incurred before construction begins in earnest.

18. In Schedule 3 of this affidavit, I have summarized the total amounts incurred to date (accrual basis) as of October 31, 2021 for Other Project-Related costs. These costs include AFUDC and OPEX. AFUDC represents the financing costs associated with construction of a capital asset, which are capitalized in the total costs of the asset. Capitalization of financing costs for self-constructed assets is required under U.S. Generally Accepted Accounting Principles. I understand that in the utility industry the capitalized amount is partially determined by the approved rate of return on equity financing established by the applicable regulator.³ The OPEX costs represent additional costs that were incurred by the Plaintiffs in support of the Project; are not capital in nature; were identified after the CPCN was reached; and were not part of the agreed-to capital budget amount. As such, they are accounted for separately.

³ For example, the Maine Public Utilities Commission Examiner's Report, dated January 9, 2020, addresses the process utilized to determine the overall rate of return and specifically the return on equity. In this instance, the Maine Public Utilities Commission determined a return on equity rate of 9.25%.

Dated this 1st day of November 2021



Patrick A. McGeehin

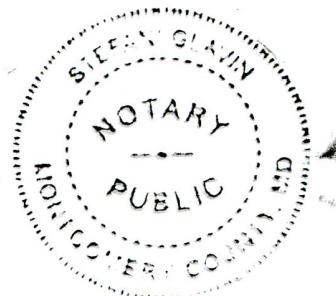
STATE OF MARYLAND
MONTGOMERY COUNTY

Personally appeared before me the above-named Patrick A. McGeehin and made oath that the above-stated facts are true based upon his own personal knowledge.

Before me, STEFAN GLAVIN

Dated Nov 1, 2021


Notary Public
My Commission Expires: Aug 13, 2022





Patrick A. McGeehin

Senior Managing Director
Forensic & Litigation Consulting

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+1 561 302 4678
Patrick.McGeehim@fticonsulting.com

Education

B.S. Accounting, University of Scranton, *summa cum laude*

M.B.A., Procurement and Contracting, George Washington University

Certifications

Certified Public Accountant, Maryland
Certified in Financial Forensics, AICPA

Associations

American Bar Association
American Institute of Certified Public Accountants (AICPA)
Florida Institute of Certified Public Accountants (FICPA)

Patrick A. McGeehin is one of the senior leaders of the company's Construction, Environmental and Government Contracts Practice. He is based in Bethesda, MD, New York City, NY, and Palm Beach, FL.

Mr. McGeehin consults on construction, government contract, and litigation support matters, and provides contract claims assistance and litigation support services relating to the calculation of and approach to damages. These damages include breach of contract, lost profits, requests for equitable damages in delay and disruption cases, and fraud-related issues. His primary emphasis is in the construction and government contracts industries, although he has experience consulting and testifying in other business sectors.

Mr. McGeehin regularly testifies on claim pricing, cost allocation and other damages issues on construction and government contract projects performed throughout the world. He has provided expert testimony in both court and board/arbitration forums, including appearances in international arbitration settings before the ICC, and before US Boards of Contract Appeals, State Circuit Courts and Federal District Courts in the United States. He has also testified before binding and advisory DRB panels on power, industrial, and large civil construction projects performed throughout the world. He is annually listed as a Thought Leader – Global Elite by Who's Who – Legal, and was named its Construction Expert of the Year in 2017, the inaugural year of this award.

He is the accounting editor of "Construction Accounting – A Guide for Attorneys and Other Professionals," and co-authored a chapter in the book, published by the American Bar Association's Forum on the Construction Industry. He authored a chapter in "The Comprehensive Guide to Lost Profits Damages for Experts and Attorneys," published by Business Valuation Resources. His articles have been published in the American Bar Association's Public Contract Law Journal, the Government Contract Costs, Pricing & Accounting Report, the CPA Statement, and in the Construction Business Review).

Mr. McGeehin has conducted seminars to select client groups on various accounting topics, and has been a guest speaker on cost accounting issues at conferences held throughout the country, including presentations at the annual Construction SuperConference, and on behalf of Federal Publications Inc., the National Contract Management Association (NCMA), the Construction Management Association of America (CMAA), the Construction Owners Association of America (COAA), and state associations of lawyers and certified public accountants.

Prior to joining FTI Consulting in 2008, Mr. McGeehin was a Co-Founder and Shareholder of Rubino & McGeehin. (R&M) for over 25 years. Prior to establishing R&M, he was employed by Coopers & Lybrand in the firm's Washington, DC and Philadelphia offices, and he served on the audit staff of the company's Philadelphia office.

Mr. McGeehin is a Certified Public Accountant; he graduated *summa cum laude* from the University of Scranton and received a M.B.A. from The George Washington University.

**LISTING OF EXPERT TESTIMONY
DURING THE PREVIOUS FOUR YEARS**

<u>Plaintiff</u>	<u>Defendant</u>	<u>Forum</u>	<u>Type of Project *</u>
<i>Comstock Loudoun Station, L.C.</i>	AU Loudoun Station, L.L.C., et. al.	McCammon Group Arbitration (Oct. 2017) (2); (Nov. 2017) (1)	H/J
<i>Suffolk Construction Company, Inc.</i>	United States of America	Civilian Board of Contract Appeals (October 2017) (1)	A/E
<i>South State, Inc.</i>	State of New Jersey, Department of Transportation	Superior Court of New Jersey Law Division: Burlington County (January 2018) (2)	B
First Kuwaiti Trading and Contracting W.L.L.	<i>U.S. Department of State</i>	United States Civilian Board of Contract Appeals, Washington, D.C. (April 2018) (2)	A/E
<i>Strabag SE</i>	The State of Libya	The International Centre for Settlement of Investment Disputes, London, UK (July 2018) (1) (3)	B/F
Lone Star Industries, Inc. D/B/A Buzzi Unicem USA, Claimant and Counter Respondent	<i>Thyssenkrupp Industrial Solutions (USA), Inc., Respondent and Counterclaimant</i>	American Arbitration Association (June 2018, August 2018) (1) (2)	J
Najlaa International Catering Services	<i>Kellogg Brown & Root Services, Inc.</i>	International Centre for Dispute Resolution (AAA) (August 2018) (1)	E/K
<i>Seattle Tunnel Partners, a Washington joint venture, and Washington State Department of Transportation, Plaintiffs</i>	Great Lakes Reinsurance (UK) PLC, a foreign insurance company; et al	Superior Court of the State of Washington In and For the County of King (October 2018) (2) (November 2018) (2)	F/J
Hitachi Zosen U.S.A. Ltd., Intervenor- Plaintiff			
Washington State Department of Transportation	<i>Seattle Tunnel Partners, as joint venture; Tutor Perini Corporation; Dragados USA, Inc.</i>	Superior Court of the State of Washington In and For the County of Thurston (November 2018) (2)	F/J
<i>Turner Construction Company</i>	Washington Metropolitan Area Transit Authority (WMATA)	United States District Court for the Eastern District of Virginia, Alexandria Division (Dec. 2018) (2)	F/J

Italics indicates client in the case:

- (1) Indicates live testimony/presentation.
- (2) Indicates deposition testimony.
- (3) Indicates written, pre-trial testimony.
- (4) Indicates written, pre-trial testimony in a bid protest matter.
- (5) Legend identifying type of project follows

**LISTING OF EXPERT TESTIMONY
DURING THE PREVIOUS FOUR YEARS**

<u>Plaintiff</u>	<u>Defendant</u>	<u>Forum</u>	<u>Type of Project *</u>
United States of America	<i>Evans Landscaping, Inc., Doug Evans, and Jim Bailly</i>	United States District Court for the Southern District of Ohio, Western Division (Dec. 2018) (1)	L
<i>Bourbon Marble, Inc.</i>	Pepper Construction Company, et al.	Circuit Court of Cook County, Illinois, (Jan. 2019) (2) (March 2019) (1)	A/K
Vee-Jay Cement Contracting Company, Inc.	<i>Ceco Concrete Construction, LLC</i>	Circuit Court of Sebastian County, Arkansas (February 2019) (2)	A/K
McLean Phase 1 L/CAL, LLC	<i>Hoar Construction, LLC</i>	Circuit Court for Fairfax County (April 2019) (2)	A/K
Siemens, S.A. de C.V.	<i>Dowell Schlumberger de Mexico, S.A. de C.V.</i>	International Chamber of Commerce (May 2019) (3)	J
<i>Anchorage, a Municipal Corporation</i>	The United States	United States Court of Federal Claims (July 2019) (2)	J/E
O'Connor Corporation	<i>Iberdrola Energy Projects, Inc.</i>	American Arbitration Association (Int'l Arbitration); (August 2019) (1)	I
ADF International, Inc.	<i>Suffolk Construction Company, Inc.</i>	Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (August 2019) (2) (September 2019) (1)	J
Kenny Construction Company	<i>Iberdrola Energy Projects, Inc.</i>	American Arbitration Association (Int'l Arbitration); (November 2019) (1)	I
Washington State Department of Transportation	<i>Seattle Tunnel Partners, as joint venture; Tutor Perini Corporation; Dragados USA, Inc.</i>	Superior Court of the State of Washington In and For the County of Thurston (November 2018) (2) (December 2019) (1)	F/J
<i>Zachry Industrial Inc.</i>	<i>Technip USA, Inc.</i>	American Arbitration Association (January 2020) (2)	H/J

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- (5) Legend identifying type of project follows

**LISTING OF EXPERT TESTIMONY
DURING THE PREVIOUS FOUR YEARS**

<u>Plaintiff</u>	<u>Defendant</u>	<u>Forum</u>	<u>Type of Project *</u>
Singhal & Company, Inc.	<i>VersaTech, Inc.</i>	United States District Court for the District of Maryland, Northern Division (June 2020) (2)	E/P
McInnis Cement Inc.	<i>Thyssenkrupp Industrial Solutions (USA), Inc.</i>	American Arbitration Association (November 2020) (1)	P
<i>Pond Security Service, GMBH</i>	The United States	United States Court of Federal Claims (December 2020) (2)	E
James Carnicelli, Jr., Derivatively on Behalf of The Gateway Development Group, Inc.	<i>Gateway Kensington, LLC</i>	American Arbitration Association (December 2020) (1)	H
<i>JDS Development LLC d/b/a JDS Development Group and JDS Construction Group LLC</i>	Park Side Construction Builders Corp. and Allied World Insurance Co.	Supreme Court of the State of New York, County of New York (February 2021) (2)	A
<i>Anchorage, a Municipal Corporation</i>	The United States	United States Court of Federal Claims (February 2021) (1)	J/E
<i>Iberdrola Energy Projects Inc.</i>	Footprint Power Salem Harbor Development, LP	American Arbitration Association International Centre for Dispute Resolution (March 2021) (1)	I/K
ACC Construction – McKnight Joint Venture, Inc.	<i>U. S. Department of State</i>	United States Civilian Board of Contract Appeals (March 2021) (2)	A/E
Walsh Global, LLC	<i>The United States</i>	United States Court of Federal Claims (March 2021) (3)	A/E
<i>DVL, Inc. and DVL Kearney Holdings, LLC</i>	Congoleum Corporation and Bath and Iron Works Corporation	United States District Court for the District of New Jersey (May 2021) (2)	A/J
MasTec Renewables Puerto Rico, LLC	<i>Mammoth Energy Services, Inc. and Cobra Acquisitions, LLC</i>	United States District Court for the Southern District of Florida (May 2021) (2)	P

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- (5) Legend identifying type of project follows

**LISTING OF EXPERT TESTIMONY
DURING THE PREVIOUS FOUR YEARS**

<u>Plaintiff</u>	<u>Defendant</u>	<u>Forum</u>	<u>Type of Project *</u>
<i>Zachry Industrial, Inc.</i>	Technip USA, Inc.	American Arbitration Association (June 2021) (1)	J
<i>U.S. Express, Inc.</i>	Hub Group, Inc., Christopher Keller, Nate Wilson, Ryan Bristol, and Rob Simmons	Common Pleas Court, County of Lucas, State of Ohio July 28, 2021 (2)	P
<i>Blue Goose Growers dba Blue Goose Construction</i>	South Florida Water Management District	Fifteenth Judicial Circuit in and for Palm Beach County, Florida August 19, 2021 (2)	F/J/K

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- (4) Indicates written, pre-trial testimony in a bid protest matter.
- (5) Legend identifying type of project follows

**LISTING OF EXPERT TESTIMONY
DURING THE PREVIOUS FOUR YEARS**

Legend for Type of Matter/ Project for Which Testimony Was Given:

- | | |
|--|---|
| A - Building/Hotel/Condominium/
Parking Garage Construction | I - Power Plant Construction Project |
| B - Highway Construction | J - Miscellaneous Construction Project or
Contractor |
| C - Bridge Construction | K - Termination / Contract Breach |
| D - Employment Dispute | L - Civil or Criminal Fraud Related |
| E - Federal Government Contract / Related | M - Malpractice Issues |
| F - State, Local, or Foreign Government Contract | N - Bid Protest |
| G - Environmental Clean Up Action/Related | O - Class Action |
| H - Other Commercial Litigation | P - Lost Profits Issue |
| | Q - Intellectual Property related |

Italics indicates client in the case:

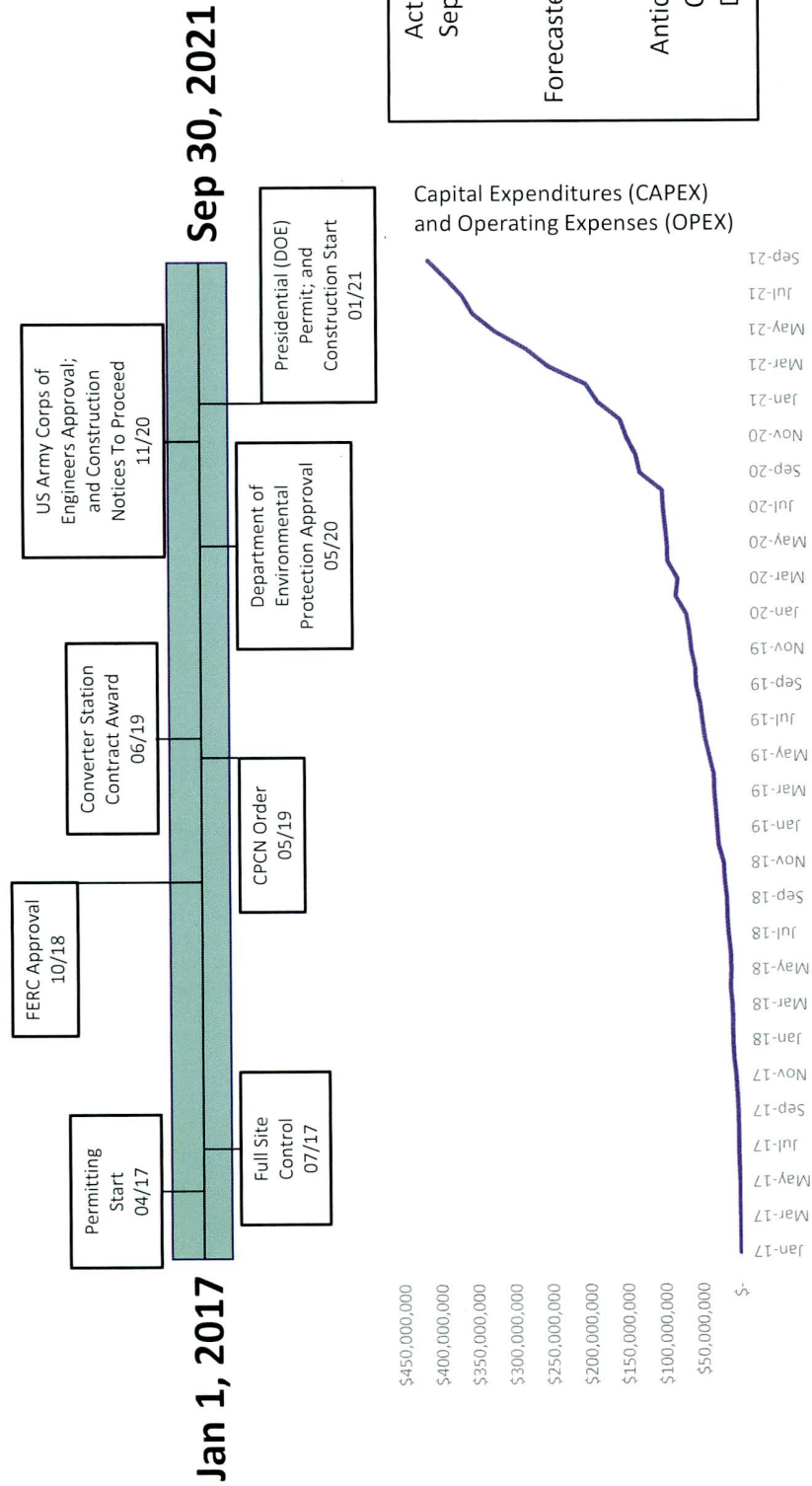
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**PUBLISHED ARTICLES
DURING THE PAST TEN YEARS**

<u>Title</u>	<u>Date of Publication</u>
"Avoiding False Claim Allegations in Pricing" (published in <i>Construction Litigation</i> , a publication of the American Bar Association Section of Litigation); co-author Margie Collins, FTI Consulting	March 2013
"The Comprehensive Guide to Economic Damages," 4 th Edition (contributing author), published by Business Valuation Resources	July 2016
"Coronavirus Delay and Disruption Claims" (published in <i>The Construction Lawyer</i> , a publication of the American Bar Association Forum on Construction Law); co-author John I. Spangler, III, Alston & Bird.	May 2021

Actual NECEC Project Costs at Select Project Event Dates

Exhibit 1



Schedule: Project Costs Incurred and Commitments as of Specific Dates

	Cumulative Amounts Through:				
	January 31, 2021	February 28, 2021	March 31, 2021	June 30, 2021	October 31, 2021
Capital Expenditures (CAPEX) - Accrual Basis (Sch. 2)	\$ 183,143,061	\$ 199,021,039	\$ 248,516,088	\$ 349,564,282	\$ 449,814,060
Other Costs					
Allowance for Funds Used During Construction (AFUDC)	12,711,825	14,349,279	16,174,098	22,821,776	34,542,448
Operating Expense (OPEX)	2,491,421	2,537,882	2,710,358	3,034,878	4,548,397
Total Other Costs (Sch. 3)	\$ 15,203,246	\$ 16,887,161	\$ 18,884,456	\$ 25,856,654	\$ 39,090,845
Total	\$ 198,346,307	\$ 215,908,200	\$ 267,400,544	\$ 375,420,936	\$ 488,904,905

Purchase Commitments					
Total Commitments	\$ 305,364,429	\$ 537,165,025	\$ 560,024,603	\$ 621,635,864	\$ 670,163,215
Less: Related Amounts Incurred to Date	(144,130,268)	(158,540,694)	(199,319,690)	(286,047,133)	(357,704,855)
Difference (Future Commitments)	\$ 161,234,161	\$ 378,624,331	\$ 360,704,913	\$ 335,588,731	\$ 312,458,360
Other Committed Amounts					
NECEC Agreement with Public Utilities Commission (Note 2)	\$ 72,050,000	\$ 71,487,500	\$ 71,487,500	\$ 71,487,500	\$ 64,875,000
Total Future Commitments	\$ 233,284,161	\$ 450,111,831	\$ 432,192,413	\$ 407,076,231	\$ 377,333,360

Notes:

- Costs as of October 31, 2021 include actual costs through September 30, 2021 and forecasted costs for October 2021 totaling \$41,010,680.
- The NECEC Agreement PUC costs represent a commitment to fund selected specified initiatives. As those initiatives are undertaken the costs are removed from the committed amount and are shown as incurred as part of the Capital Expenditures.

Schedule: CAPEX Costs Incurred as of Specific Dates

Vendor/Description	Scope of Work	Cumulative Amounts Through:				
		January 31, 2021	February 28, 2021	March 31, 2021	June 30, 2021	October 31, 2021
Capital Expenditures						
ABB Enterprise Software Inc.	System design and construction of High Voltage Direct Current (HVDC) Converter Station.	\$ 46,077,612	\$ 56,790,795	\$ 72,653,022	\$ 92,417,025	\$ 102,846,390
APAR Industries Limited	Supply cables, conductors, and accessories.	-	2,062,935	4,739,973	9,973,623	10,283,317
Black & Veatch Corporation	Project management support.	10,997,696	11,778,166	13,515,153	20,764,920	21,187,043
Clean Energy Matters	NECEC project outreach.	17,359,140	17,359,140	20,550,140	25,485,140	36,740,140
Irby Construction Company/ Cianbro Corporation	Transmission line construction.	13,148,330	14,663,472	18,374,222	26,474,326	33,664,796
Northern Clearing Inc.	Clearing and site restoration.	5,235,711	9,040,859	13,072,850	30,036,304	52,244,576
Oxford Timber Inc.	Supply of timber mats.	3,587,000	3,587,000	5,316,878	5,316,878	5,316,878
Transamerican Power Products Inc.	Fabrication and delivery of steel poles.	11,749,420	7,644,674	11,975,181	14,630,003	22,953,743
TRC Engineers LLC	Detailed design engineering for transmission line and substation.	5,206,570	4,872,988	5,274,683	6,074,091	6,146,723
Project Management (Other than Black & Veatch)	Internal labor and overhead, permitting, insurance, and other.	44,485,068	45,513,481	49,915,968	61,478,869	68,035,772
Outreach (other than Clean Energy Matters)	Outreach, PACs, Settlements.	13,902,551	14,390,589	14,401,097	14,506,097	25,346,472
Other Equipment and Materials		10,068,742	9,633,140	16,813,750	26,327,540	43,282,014
Other Engineering, Construction and Transfer Costs		1,325,222	1,683,800	1,913,171	16,079,466	21,766,196
Total Capital Expenditures		\$ 183,143,062	\$ 199,021,039	\$ 248,516,088	\$ 349,564,282	\$ 449,814,060

Notes:

1. Costs as of October 31, 2021 include actual costs through September 30, 2021 and forecasted costs for October 2021. The forecasted portion (i.e., costs for the month of October 31, 2021) totals \$41,010,680.

Schedule: Other Project-Related Costs Incurred as of October 31, 2021

Other Project-Related Cost	Description	Cumulative Amounts Through:				
		January 31, 2021	February 28, 2021	March 31, 2021	June 30, 2021	October 31, 2021
Allowance for Funds Used During Construction (AFUDC)	Cost associated with the financing of the capital project computed in accordance FERC Code of Regulations Electric Plant Instruction 3(17).	\$ 12,711,825	\$ 14,349,279	\$ 16,174,098	\$ 22,821,776	\$ 34,542,448
Operating Expense (OPEX)	These costs represent other costs incurred by NECEC LLC in support of the project and have been determined to be non-capital in nature. They include certain project management and outreach costs.	2,491,421	2,537,882	2,710,358	3,034,878	4,548,397
Total Other Project-Related Costs		\$ 15,203,246	\$ 16,887,161	\$ 18,884,456	\$ 25,856,654	\$ 39,090,845

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION
AND FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF
REPRESENTATIVES,

Defendants.

**AFFIDAVIT OF WILLIAM D.
BERKOWITZ IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, William D. Berkowitz, being over the age of 18 years and duly sworn, state as follows:

Background and Scope of Affidavit

1. I am a Senior Managing Director ("SMD") of FTI Consulting, Inc. ("FTI") in

the Construction Solutions Group at FTI. As set forth in more detail in my attached resume (Appendix 1), I am a licensed Professional Engineer in the State of New York and have spent my entire career, which spans in excess of forty (40) years, working in the construction and consulting fields in project management with specific focus on schedule and productivity-related issues.

2. I have over 30 years of experience in assisting clients and law firms on matters involving schedule and productivity related issues. On many occasions, these disputes are part of more formal litigation-support assignments, where I have provided expert testimony. All of the assignments I have been involved in are in the construction industry, and many of them are focused in the area of power-related projects, including transmission line construction. Prior to entering the consulting field I designed transmission lines for a utility company and was a project manager on several construction projects in the New York area. I have conducted client seminars and participated as a speaker at industry events.

3. Given my background and focus, I have testified as an expert witness, either in deposition or live court/arbitration appearances on a wide variety of construction disputes, including transmission line projects. In my attached resume, I have included a listing of my expert appearances. (Appendix 1)

4. I have been retained as an expert by NECEC Transmission LLC ("NECEC LLC") and Avangrid Networks Inc. (collectively, "the Plaintiffs") in connection with this

lawsuit and their Preliminary Injunction. The scope of services requested by the Plaintiffs from me and my construction/schedule analysis team at FTI relate to a review of the performance of NECEC LLC on the New England Clean Energy Connect (“NECEC” or the “Project”); specifically, I was asked to assess and offer my opinion regarding how NECEC LLC executed the work in comparison to its planned schedule, what types of construction efforts have occurred, the impacts of delay on the Project and why it was necessary to proceed with construction as soon as all permits were received. I am the lead professional at FTI responsible for the content of this affidavit, and the work of other professionals of FTI assisting me on this assignment work at my direction and under my control. In my role as expert, I have reviewed the planned schedule (the Baseline Schedule statused as of March 23, 2018) for the Project, the construction of the Project against that planned schedule, and the reasonableness and necessity of NECEC LLC’s actions in progressing the Project in the manner in which it did; I have summarized my findings in this affidavit.

5. Concurrent with the filing of this affidavit, Mr. Patrick McGeehin, an SMD at FTI who focuses his practice in the construction and accounting industry, is issuing an affidavit relating to project expenditures at select intervals of time.

Information Reviewed

6. In performing our work under this assignment, we requested access to certain project documents of the Plaintiffs that would provide detail as to the original

planning for execution of the Project (referred to as a planned schedule), from the inception of the Project through October 27, 2021. The analysis of the performance of the project discussed throughout this affidavit are those recorded through October 27, 2021.

7. Among the schedule and project reporting records maintained by the Plaintiffs of relevance to our effort were the following:

- The Transmission Service Agreements (“TSAs”)
- The planned or Baseline Schedule
- Periodic Schedule updates
- Weekly Progress Reports
- As-built information for construction of the transmission line updated periodically by the client (referred to as a “wall chart”)
- Permits and permit-related documentation

8. Based on our discussions with representatives of the Plaintiffs, the aforementioned reports and records were maintained by the Plaintiffs throughout the period of Project performance. As such, I consider them to be reliable source documents that are typically relied upon by experts in performing an evaluation of the performance on a project such as this.

Project Background and Summary of Baseline Schedule

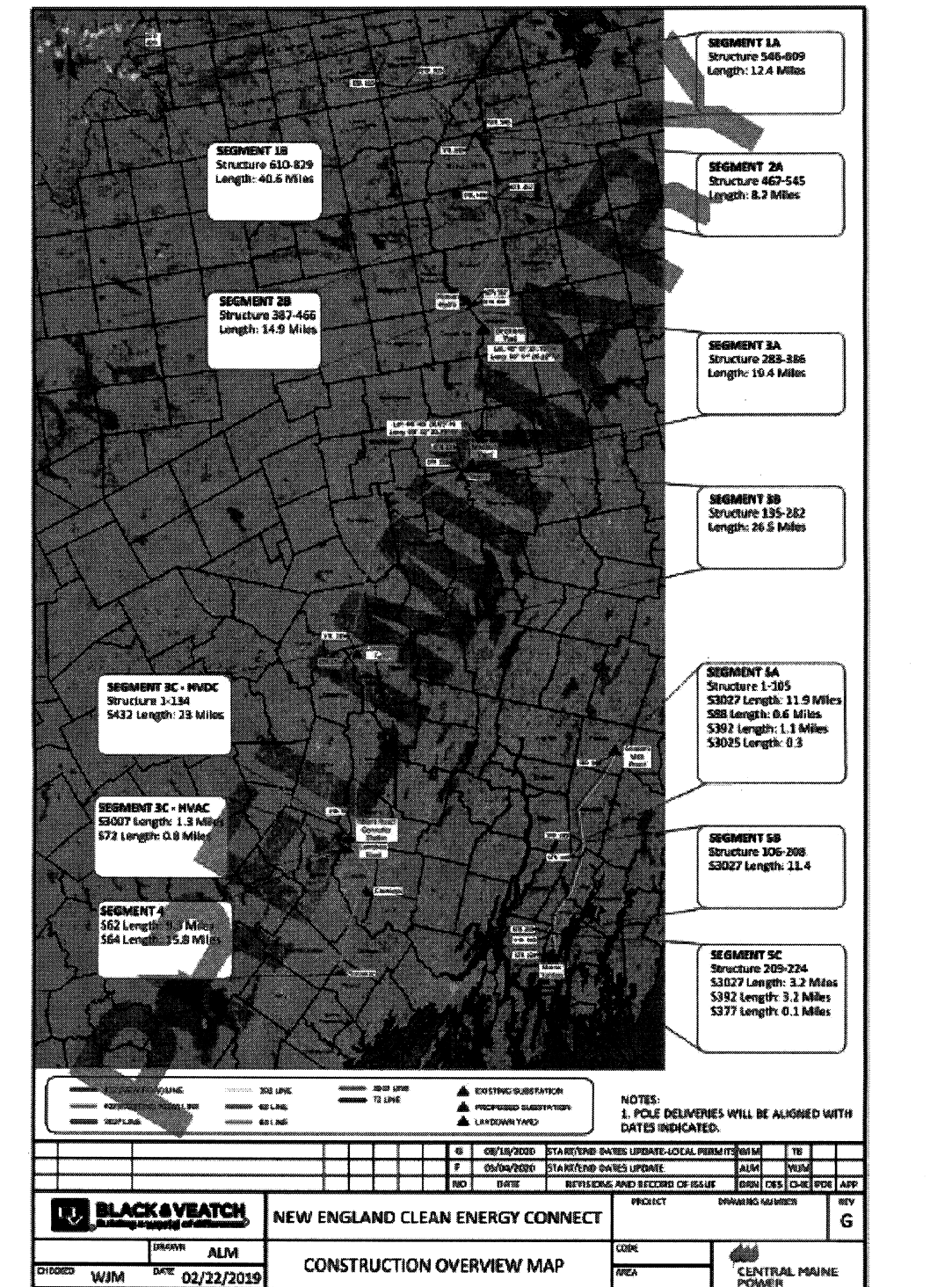
9. NECEC LLC entered into a series of TSAs in which the parties agreed that the Commercial Operation Date for the NECEC project would be December 13, 2022. As

such, the Plaintiffs were compelled to proceed with the Project expeditiously in order to meet their contractual commitments. Attachment B to the TSAs contain a series of “Critical Milestones” and Attachment E is the Baseline Schedule for the Project (Owner’s Preliminary Project Schedule). The Critical Milestones and Baseline Schedule are essential for understanding both the plan for and the execution of the Project.

10. The NECEC consists of a 145 mile long +/- 320 kV HVDC transmission line running from the U.S./Canadian border in Beattie Township, Maine to a new DC to AC converter station at Merrill Road in Lewiston, Maine. The Merrill Road converter station in Lewiston will be connected to the existing Larrabee Road Substation in Lewiston by a new 1.2-mile 345 kV HVAC transmission line. The Project also includes Network Upgrades, including a new 26.5-mile 345-kV AC transmission line from the existing Coopers Mills Substation in Windsor to the existing Maine Yankee substation in Wiscasset. A map depicting the components of the NECEC Transmission Line is shown below.¹

¹ Third TSA Amendment.

11. The Project is divided into five segments as shown in the figure below:



12. Segment 1 (1A and 1B): Approximately a 53-mile portion of the HVDC line

running along a new right-of-way;

13. Segment 2 (2A and 2B): Approximately 23 miles of the HVDC line running along an existing transmission line corridor from the Forks Plantation to the existing Wyman Hydropower station in Moscow;

14. Segment 3 (3A, 3B and 3C): Approximately 69 miles of the HVDC line running along an existing transmission line corridor from the Wyman Hydropower station to the Merrill Road converter station;

15. Segments 4 and 5: Network Upgrades, including a 26.5-mile 355 kV AC transmission line from the existing Coopers Mills substation in Windsor to the existing Maine Yankee substation in Wiscasset.

Analysis of Project Performance

The Baseline Schedule

16. In performing an analysis of NECEC LLC's performance on the Project, we first look to the party's plan to execute the work on the Project. This is referred to as a "planned" or "baseline" schedule. As noted above, the Baseline Schedule for the Project is included as Attachment E to the TSAs.

17. As with other transmission line projects, the construction of the transmission line portion of this Project requires a series of interrelated activities, beginning with right of way clearing, followed by excavation and setting foundations for the transmission line structures, erection of the transmission line structures, installation

of the conductors and groundwire, splicing, and finally testing and commissioning.

18. The construction of a transmission line is often referred to as “linear construction” because the most efficient way to construct a transmission line is to proceed in a linear fashion, beginning at one end, sometimes referred to as the kick-off point, with cutting followed by the other construction activities outlined above (including excavation, setting of foundations, tower erection, and stringing of the conductors). Given schedule constraints on certain projects, however, construction is often planned concurrently starting at different segments of the line. This was the case on this Project.

19. The Baseline Schedule envisioned significant effort on the Project subsequent to the successful completion of the RFP process. Prior to this, work had already begun on real estate acquisition and basic engineering, including permitting. A summarized version of the Baseline Schedule is included as Appendix 2.

20. Although some permitting activities had begun during the Massachusetts RFP process, the critical activities upon completion of the RFP process were regulatory approval of the project-related agreements, including the TSAs, by the Massachusetts Department of Public Utilities (“Massachusetts DPU”) and the Federal Energy Regulatory Commission (“FERC”). The Massachusetts DPU approval was anticipated to occur on January 25, 2019. Other permits from the State of Maine and the Federal Government were also pursued during this period; the last anticipated permit was from the U.S. Department of Energy (the “Presidential Permit”), which was anticipated to be

issued on May 15, 2019.

21. Article 4.1(e) of the TSAs states that time extensions would be granted for delays to receipt of the Massachusetts DPU approval. However, time extensions would not be automatically granted for delays to other required permits at the federal, state, and municipal level. This means that a critical period in the baseline schedule is the time allotted between the regulatory approval from the Massachusetts DPU and the completion of construction work: that is, from January 25, 2019 to July 31, 2022. This is a span of 1,283 calendar days and represents the time available for completion of permitting and engineering activities and all construction related to the Project.

22. Subsequent to the Massachusetts DPU approval, detailed engineering for the Project was planned to be completed. In my experience in both designing transmission lines and in analyzing transmission line projects such as this, there is an extensive number of “front-end” activities that must be performed prior to the start of actual construction. For example, detailed engineering of each of the transmission line structures (both the foundation and structure itself) must be performed to account for such items as wind and ice loading, clearance of the transmission line to the ground (which dictates the height of each structure), and preparation of plan and profile drawings. In accordance with the Baseline Schedule, this work was planned to occur over an 18-month period from July 2017 until March 2019.

23. In addition to permitting and engineering activities, environmental

assessments must be performed and procurement of the various pieces of equipment must be undertaken to ensure the timely delivery of such equipment supports the construction schedule.

24. The actual construction of the transmission line itself begins with clearing of the right-of-way and construction of access roads, followed by construction of the transmission line, substations and ancillary work. In this case, construction was planned to begin with the issuance of a Notice to Proceed on December 4, 2019. This would initiate all construction activities, including not only the new transmission line and converter station, but the necessary network upgrades to existing facilities identified in the TSAs. Construction was forecast to be substantially complete by July 31, 2022; this was to be followed with testing and commissioning activities, culminating in a Commercial Operation Date of December 13, 2022. This is the basis of the completion date specified in Article 1.1 of the TSAs.

25. Construction work, which is subject to many contingencies in the field, would have to be completed in accordance with the durations set forth in the Baseline Schedule.

26. As it relates to the Baseline Schedule for the construction of the HVDC transmission line, NECEC LLC anticipated beginning construction on December 4, 2019 concurrently in the Northern and Southern Sections of the Project as shown in the figure below.

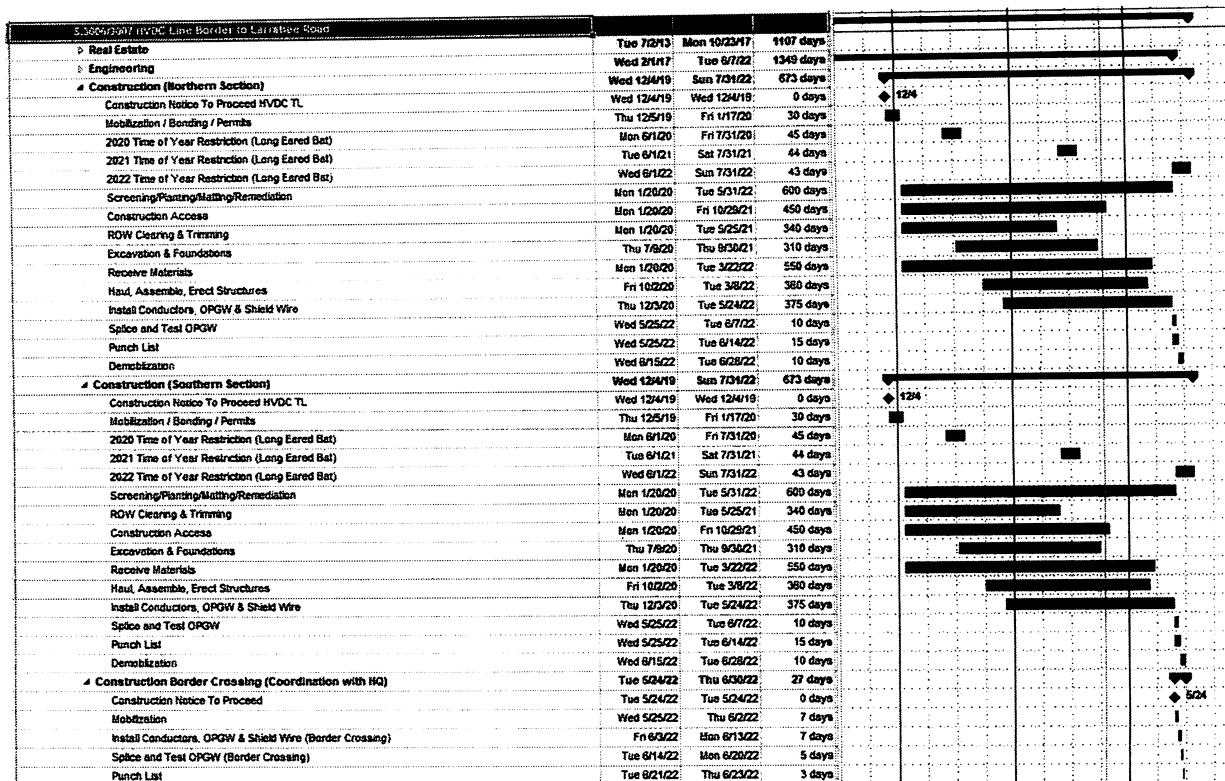


Figure 1: Baseline Construction Schedule – Segments 1, 2 and 3.

27. There are a total of 832 structures to be erected on the Project in Segments 1 – 3. The Southern Section of the transmission line comprises structures 1 to 541 and the Northern Section comprises structures 542 to 829. Construction of the transmission line portion of the Project in Segments 1 – 3 was planned to be performed over the period beginning in December 2019 and ending in July 2022 in order to meet the original target Commercial Operation Date of December 13, 2022.

28. The Network Upgrade work for the 345 kV Line from Coopers Mills Rd to Maine Yankee substation was planned to be performed concurrently with the HVDC line work, from August 24, 2020 until June 24, 2021.

29. The NECEC project also includes the construction of the converter station at Merrill Road. The Baseline Schedule for this work is shown in the figure below.

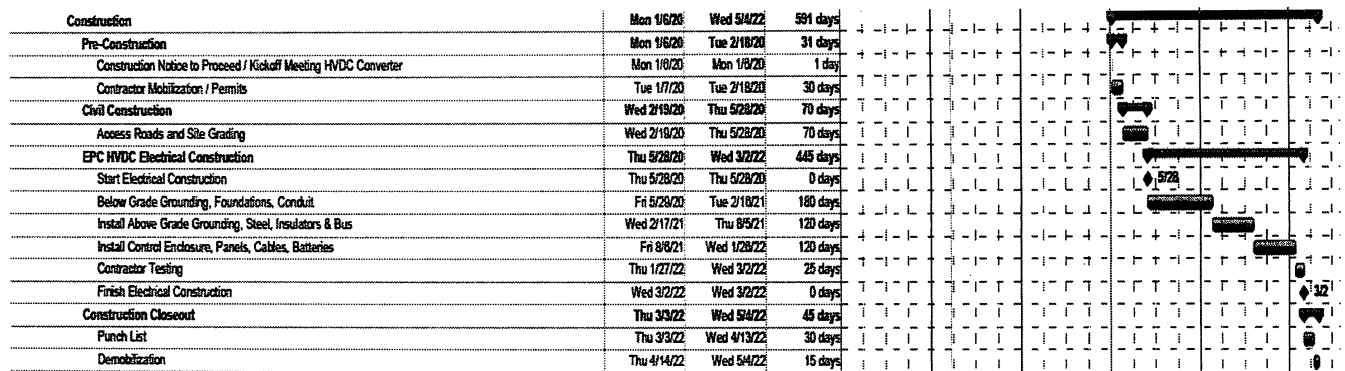


Figure 2 – Converter Station Baseline Schedule

30. The converter station was planned to be constructed from January 2020, starting with site grading and access roads, until May 2022.

31. The Baseline Schedule also takes into account time-of-year restrictions to protect vulnerable wildlife (i.e., the Long-eared Bat, which affects June and July of each year), weather conditions (i.e., mud conditions in the spring), and access considerations. During the time-of-year restrictions, construction activities are limited and therefore it is both necessary and prudent to get as much work done prior to the time-of-year restrictions and in advance of the mud conditions in the spring.

32. Finally, on its northern end, the HVDC line interconnects to a new HVDC line to be constructed by Hydro-Québec. Thus, NECEC LLC also had to interface with and coordinate its construction of the transmission line with Hydro-Québec so that it could interconnect with Hydro-Québec's transmission line at the border.

33. Finally, NECEC LLC also had to account for delays associated with winter construction. As such, NECEC LLC had to carefully plan its work, taking the various known restrictions and interfaces into account, in order to complete the Project in accordance with the Baseline Schedule.

Actual Performance

34. Appendix 3 is a summarized Planned vs. As-built Schedule for the Project, divided into three sections, Regulatory/Permitting, Engineering, and Construction.

Permitting and Engineering

35. As is evident from Appendix 3, the Project suffered significant delays to the permitting process due to the greatly extended period required for regulatory approval and permitting. The Massachusetts DPU approval, anticipated to occur on January 25, 2019, was not received until October 5, 2020, a delay of 619 days. As a result of the delay to the regulatory approval, the contract completion deadline was extended until August 23, 2024. (This is based on 619-day delay to the Massachusetts DPU approval, which extended the Commercial Operation Date from December 13, 2022 until August 23, 2024.) The last permit to be received (other than the municipal permits) was the Presidential Permit, received on January 14, 2021, over 1 ½ years later than planned. This permit ultimately became the critical permit to the start of construction. This means that the current obligatory completion date is predicated on completion of construction within the baseline durations, without any contingency.

36. In my experience, this is optimistic at best because in transmission line construction there are typically impacts to the schedule from a variety of factors, including permitting revisions which may require re-routes of certain sections of the line, delayed procurement of equipment and material, and construction delays due to weather conditions. Moreover, this Project involved additional scheduling challenges because NECEC LLC also had to coordinate the interconnection of its transmission line with the transmission line being constructed by Hydro-Québec, and plan its work around various outage restriction windows.

37. Given all of the above constraints and interfaces that exist on this Project, it was incumbent upon NECEC LLC to begin construction at the earliest opportunity.

38. It was also incumbent upon NECEC LLC to begin pre-construction activities as early as possible. The start of construction is dependent not only on obtaining permits for the Project but also upon the completion of detailed engineering and procurement of major equipment and material. As shown in Appendix 3, during the permitting phase of the Project, the project entered the detailed engineering and planning phase. As discussed previously, the detailed engineering for a transmission line is a time-consuming process as each tower must be individually designed for a given set of parameters. This phase also included the award of large contracts to different contractors and manufacturers, such as the fabricator of the transmission line poles.

39. This engineering and procurement work was necessary to permit NECEC

LLC to mobilize its construction contractors and begin construction in a timely and efficient manner.

40. Detailed engineering for the transmission line was completed in June 2020 and notice to proceed was provided to the transmission line contractor (Cianbro and Irby) on December 15, 2020. This enabled the construction contractors to mobilize on the project. However, actual physical work in the field was not started until January 18, 2021 following the issuance of the Presidential Permit by the U.S. Department of Energy.

Construction

41. Upon receipt of the Presidential Permit, NECEC LLC was compelled to move forward with construction promptly in order to meet its contractual commitments, particularly given the predecessor delays to permitting and allowance for future unknown events, which inevitably occur on every project, such as procurement delays, weather, unforeseen ground conditions, and local permitting issues.

42. It is my experience that projects of this nature are subject to many uncertainties once they move into construction; therefore, NECEC LLC had no time to lose once the Presidential Permit was obtained on January 14, 2021 and had to proceed with construction immediately, particularly given the approaching mud season and time-of-year restrictions associated with the long-eared bats, which as discussed below, it did.

43. The Notice to Proceed was issued to the clearing contractor, NCI, in November 2020 so that preparations could be made for clearing work during the winter;

this would enable cutting to begin promptly upon receipt of the last permit, in order that the transmission line contractors (Cianbro/Irby) could begin work on installation of poles as soon as possible thereafter.

44. Upon issuance of the Notice to Proceed, NCI performed site surveys, installed required environmental protection and prepared lay down for receipt of supplies and equipment.

45. As shown in Appendix 3, following the issuance of the Presidential Permit on January 14, 2021, NCI began construction, including matting and access road installation immediately on January 18, 2021 and cutting on January 19, 2021 in the northern end of Segment 2 (the Southern portion of the transmission line) and headed south, over one year later than indicated in the Baseline Schedule (Figure 1 above).

46. Due to the temporary injunction prohibiting work in Segment 1 that was issued on January 15, 2021 by the U.S. Court of Appeals for the First Circuit, just as NECEC LLC was mobilizing to begin cutting, NECEC LLC was unable to proceed with construction in the northern segment as planned. Instead, it was restricted to proceeding with construction in the southern section. Segment 2 had 23 miles of clearing work that could be done while the injunction was pending in Segment 1.

47. Unlike building construction, clearing work on a transmission line is a major undertaking. The contractor must first construct access roads through different terrain and then prepare the right-of-way to receive heavy-haul equipment. The

contractor then mobilizes heavy equipment to perform the right-of-way clearing (i.e., cutting trees) and grading, which takes place over the entire length of the transmission line (in this case the 145-mile long HVDC line). In accordance with the Baseline Schedule, this work was planned to occur over a 16-month time period and be performed concurrently in the northern and southern sections. Once sufficient right-of-way is cleared and graded, contractors can then begin actual erection of the transmission line structures.

48. In preparation for pole installation as soon as possible, transmission line poles began to be delivered by the fabricator (TAPP) on January 18, 2021.

49. Cutting has proceeded steadily since it began. Cutting continued in Segment 2 until the week ending March 24, 2021, at which time the mud season and road closings started to slow progress. This is one of the many issues that NECEC LLC had to manage and plan for and highlights the need to start construction as soon as possible. Hand cutting in Segment 3 began during the week of March 24, 2021. NCI began hand felling in Segment 1B on May 15, 2021, immediately after the injunction on construction activities in that segment was lifted and hand felling and cutting has continued to date. However, cutting was restricted shortly thereafter in June and July 2021 as there is a prohibition on cutting trees over a certain diameter during the time-of-year restrictions associated with the long-eared bats. This is another issue that NECEC LLC had to manage and plan for.

50. As of the week ending February 24, 2021, NCI had cut approximately 10 miles of right of way in the southern section of the transmission line. As of April 8, 2021, NCI had cut approximately 36 miles of right of way in the southern section. By June 30, 2021, NCI had cut approximately 80 miles in the southern segment. Finally, as of October 27, 2021 NCI had cut approximately 123 miles. NCI also completed 100% (555 acres) of hand-felling.

51. Once sufficient clearing had occurred, the process of installing poles began. On February 9, 2021, Cianbro/Irby installed the first structure in Segment 2 (structure 516).

52. As discussed above, NECEC LLC planned to construct the transmission line in a linear fashion as this is the most efficient method of construction. Once pole erection began, however, the project team recognized that it would have to perform the construction in a non-linear fashion due to several issues, including: the temporary injunction in Segment 1, lack of municipal permits in certain sections of Segment 2, lack of certain steel poles (fabrication and transportation/delivery issues from the fabricator TAPP), time of year restrictions, delays from a minor revision to the Corps and DEP permits, and the mud season.² However, beginning pole work did enable NECEC LLC to progress the overall Project, albeit in a different manner than originally planned.

53. As of the week ending February 24, 2021, Cianbro/Irby installed 9

² The construction of the northern segment of the transmission line did not require local permits.

structures. TAPP had delivered 24 poles as of that date. As of April 8, 2021, Cianbro/Irby installed 15 structures in the southern section. TAPP delivered 33 poles as of that date. As of June 30, 2021, following delays, Cianbro/Irby had installed 15 structures and installed 2 additional structure bases. TAPP had delivered 115 poles and the project team reassigned 427 poles to the AC pole manufacturer (NELLO) to mitigate the risk of delay in pole production. Finally, as of October 26, 2021, Cianbro/Irby had installed 68 structures in the Southern Section and TAPP/NELLO had delivered 570 poles.

54. Construction also proceeded along the AC Network Upgrade portion of the Project, which includes Segments 3C and 5. Construction of the Network Upgrade portion requires detailed outage sequence plans as certain elements can only be removed from service in specific outage windows. As of October 26, 2021, cutting for the AC Network Upgrade portion of the Project was 100% complete, and the AC transmission line construction contractor Sargent had installed a total of 49 structures, demolished 29 existing structures, and stringing was underway. All steel poles had been delivered and delivery of wood poles was in progress.

55. Finally, site development work at the converter station began in February 2021 starting on the converter station driveway and relocation of some roadside distribution facilities. Cutting and access road construction began in June 2021. Rock blasting and excavation began in mid-July 2021 and continues as of the date of this affidavit. In addition, all four converter transformers, which are long-lead items, were in

fabrication by Hitachi ABB Power Grids and reported to be, on average, 80% complete. The fabrication of the valves is complete and the valves are ready to be shipped.

Conclusions

56. In the fall of 2020, given the delay in receipt of the regulatory permit and anticipated time-of-year restrictions, the project team recognized that the planned commercial operation date would have to be extended from December 13, 2022. The September 2020 schedule update indicates the Commercial Operation Date was extended to May 31, 2023. Accordingly, as of the time construction began, the project team was targeting completion by that date.

57. Events did not allow the project team to maintain this Commercial Operation Date. As shown in Appendix 3, the current project schedule shows a forecast date for achievement of commercial operation on December 13, 2023, assuming no further delays to construction are encountered. This was based upon additional delay encountered after the start of construction, including the temporary injunction in the northern section of the Project and permit revisions by the DEP and the U.S. Army Corps of Engineers.

58. Such delays are not atypical. It is my experience that delays in transmission line construction inevitably occur given the uncertainties such as weather, timely attainment of municipal permits, labor issues and timely procurement of equipment and material. For this Project, delays could ultimately threaten NECEC LLC's contractual

deadlines under the TSAs.

59. It was therefore prudent for NECEC LLC to start construction as soon as possible. The inevitability of delays, including the delays actually experienced in this Project, highlights the need for NECEC LLC to attempt to construct the Project in accordance with its plan to the extent feasible. Indeed, it was imperative for NECEC LLC to begin construction as soon as possible after the receipt of permits and approvals in the areas that were not impacted by the temporary injunction, in order provide contingency in the schedule and maintain the planned commercial operation date.

60. Moreover, it was prudent for NECEC LLC to continue with its construction plans despite the temporary injunction on construction in Segment 1. The temporary injunction was issued just as NECEC LLC was mobilizing to begin construction in the northern segment. The Baseline Schedule indicated that NECEC LLC planned to start construction in the northern and southern sections concurrently, and therefore it was prudent and reasonable for NECEC LLC to at least begin construction in the southern segment of the Project prior to the time-of-year restrictions and also take advantage of the learning curve, which is the time necessary for the crews to become familiar with the Project, including logistics and Project specific requirements. Waiting for the temporary injunction to be lifted would have delayed the Project even further.

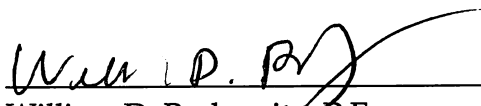
61. Moreover, stopping construction during a post-election legal challenge to the Initiative would in all likelihood prevent the Project from achieving commercial

operation by the contractual deadline of August 23, 2024. I understand that the Plaintiffs would be liable for significant penalties in the event that the transmission line was not capable of operating at or above 1,200 MW as of the Commercial Operation Date.

62. Delaying the start of construction or stopping construction would also likely result in increased costs due to escalation, change orders to subcontractors for schedule delay, increased costs due to demobilization and remobilization of construction crews, increased costs associated with environmental compliance issues, and delay in transmission revenue, which does not begin until commercial operation.

63. As a result, it is my opinion that it was both reasonable and necessary for NECEC LLC to proceed with construction as soon as possible in the areas that were available to it, given the delays that had already occurred and inevitable future delays, and not simply wait to pursue construction, particularly since all necessary permits, which were the subject of public debate, were in hand.

Dated this 1st day of November 2021



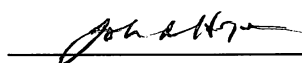
William D. Berkowitz, P.E.

STATE OF New York
Nassau County, ss

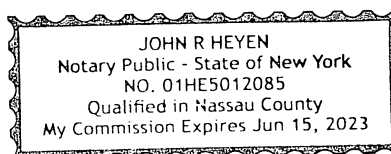
Personally appeared before me the above-named William D. Berkowitz and made oath that the above-stated facts are true based upon his own personal knowledge.

Before me,

Dated 11-1-2021



Notary Public
My Commission Expires: 06-15-2021



Education

B.A., Science in Civil
Engineering, Cooper Union
M.S., Construction
Management, The
Polytechnic Institute of
New York

William Berkowitz was a principal and founding member at Alliance Construction Consultants, prior to joining FTI Consulting in February 2013. Since 1988, Mr. Berkowitz has been a professional consultant specializing in construction dispute resolution. He has prepared and presented claims on behalf of general contractors, construction managers and specialty contractors and evaluated and refuted claims on behalf of owners, engineers and contractors.

Certifications

Professional Engineer in
the State of New York

Royal Institution of
Chartered Surveyors

Mr. Berkowitz has had in-depth involvement in all aspects of dispute resolution, including, pre-contract review of plans and specifications, schedule analysis, labor productivity analysis, damages calculations, work changes and preparation of comprehensive reports. He has provided these services on power generation, large petrochemical facilities, off-shore platforms, hydroelectric projects and infrastructure projects worldwide. Mr. Berkowitz has qualified as an expert witness, prepared expert reports and testified in ICC Arbitration, AAA Arbitration, State and Federal Courts and numerous mediations. Recent assignments have included projects associated with power generation, large petrochemical facilities, hydroelectric facilities and commercial facilities.

Expertise

Claims Management
Construction Solutions
Contract Administration &
Disputes
Expert Testimony
Forensic Litigation
Consulting

Prior to founding Alliance Construction Consultants, Mr. Berkowitz gained experience managing public and private sector construction projects, preparing and defending claims, and developing construction schedules. He was a project manager for a general contractor for five years, and was responsible for the management, scheduling and coordination of several large public works projects. Prior to entering the field of general construction, Mr. Berkowitz worked in the power generation field as a civil engineer on several power plant facilities.

Industries

Construction
Energy, Power & Products
Real Estate

Expert Testimony Experience

Mr. Berkowitz has provided expert witness testimony in the areas of delay analysis, labor productivity analysis, disputed extra work and quantum. He has provided expert witness testimony in the following matters heard in Arbitration:

- *Conproca SA de CV v. PEMEX; Mexico* (ICC Arbitration) – Expert Testimony – Delay and Disruption
- *CIISA v. CFE; Mexico* (ICC Arbitration) – Expert Testimony – Delay and Disruption
- *U.S. Contractors, Ltd. v. Parsons/Technip JV; Texas* (AAA Arbitration) – Expert Testimony – Delay and Disruption
- *Cajun Constructors Inc. v. Technip USA Corp.; Texas* (AAA Arbitration)

- *Songer* (AAA Arbitration) – Expert Testimony – Delay and Disruption
- *Consortio GyM S.A - Conciviles vs. Contugas S.A.C. and Empresa de Energia de Bogota* (ICC Arbitration) – Expert Testimony - Delay, Disruption and Quantum
- *Strabag SE v. Libya – (Arbitration)* – Expert Testimony – Delay and Disruption
- *Subsea 7 S.A. de C.V. vs Pemex Exploracion y Produccion* (ICC Arbitration) – Expert Testimony – Delay and Disruption
- *Siemens S.A. de C.V. (Mexico) vs. Dowell Schlumberger de Mexico* (ICC Arbitration) – Expert Report – Delay, Disruption and Quantum
- *JTM Construction v Fifth and Columbia Investors* – Expert Report
- *TSK Electronica y Electricidada and MTU America, Inc. vs. Prima Energia Quickstart* – Expert Testimony

Mr. Berkowitz provided expert witness testimony in the following matters in Litigation:

- *Mid-Mountain Contractors v. King County*; Washington (Litigation) – Expert Testimony- Delay
- *Bayou on the Bend, Ltd. V Atlas Comfort Systems USA*; Texas (Litigation)
- *Stone & Webster Inc. v. AES Frontier L.P., et al*; Texas (Litigation)
- *T&D Power Inc. v. PPL Electric Utilities Corp.*
- *USPL v. Northern Natural Gas*
- *Capital Rail Constructors v. Midasco*
- *US Pipeline Inc. vs Rover Pipeline LLC*
- *JDS Development LLC v. Parkside Construction Builders Corp.*

Mr. Berkowitz has participated in the following matters heard in various forms of Alternative Dispute Resolution:

- *Turner v. Sound Transit – U240 Capital Hill Station*
- *The Mark – 5th & Columbia*
- *Baggage Handling Facility (FKI v. Massport)*; USA –
- *Taichung Power Plant*; Taiwan –
- *US Airways Maintenance Hanger* (USA)
- *Santa Teresa Water Treatment Plant* (USA)
- *Cerro Negro Production Facilities* (Venezuela)
- *Cuisiana Full Field Development Project* (Columbia, SA)
- *East Windsor Cogeneration Facility* (Toronto, Canada) –Designated delay, loss of productivity and disputed change order expert
- *Flint Hills Hydrogen Project* (USA)

- Kendal Power Station (South Africa)
- Thames Cogeneration Project (USA)
- Horizon Upgrader Hydrogen Project (Canada)
- American Acryl Bayport Project (USA)

Speaking Engagements

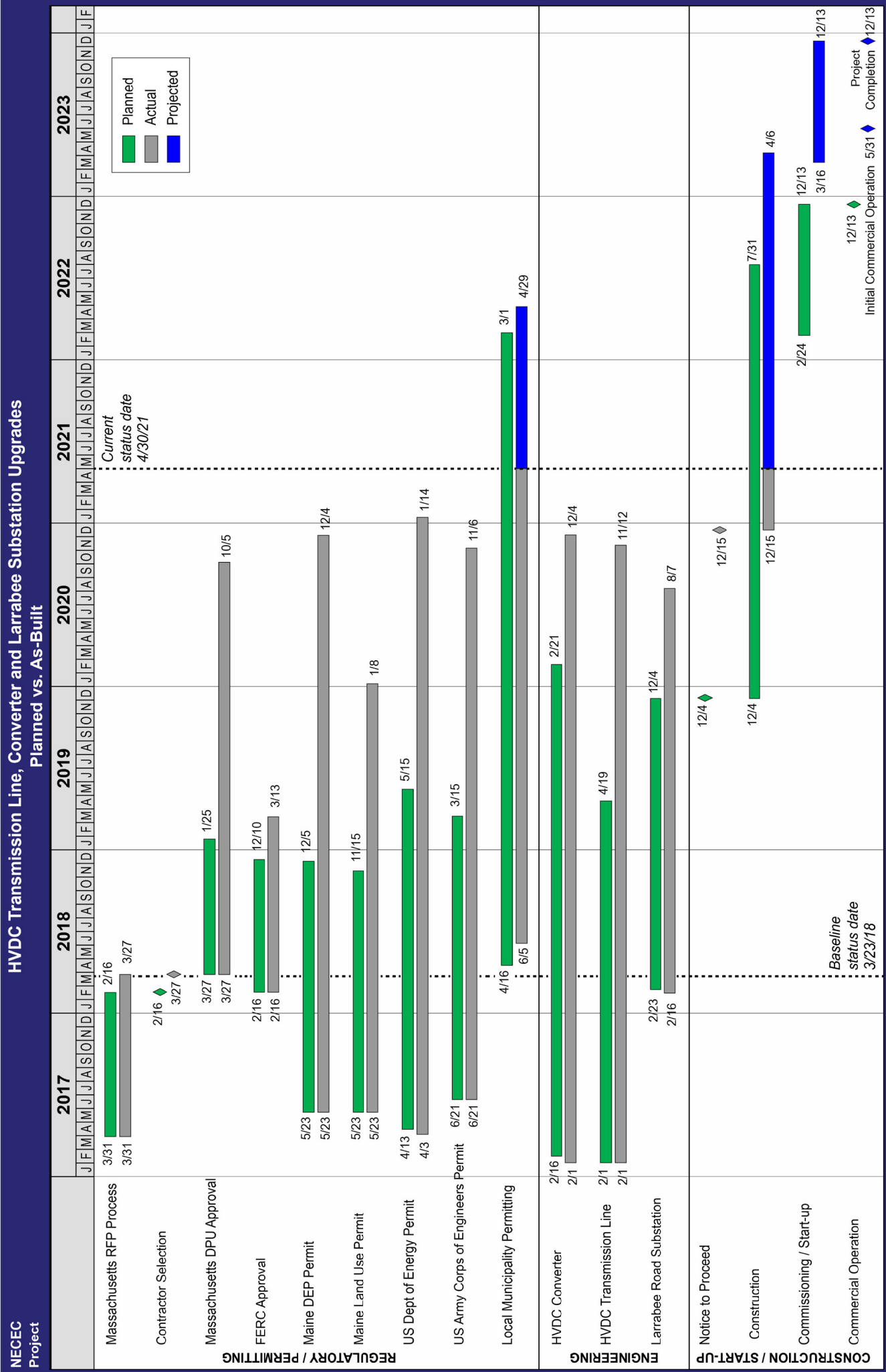
Mr. Berkowitz conducts seminars to select client groups on various claims issues and he has been a guest speaker at the following:

- ABA Section of Dispute Resolution, “Call in the Experts”, 2011
- Lorman Educational Seminars – Dispute Resolution
- Columbia University, Lecturer - Construction Management
- ICPMA Annual Meeting, “Management of Risk on Construction Projects”, 2010; Portugal
- ICPMA Annual Meeting, “Managing the Dispute Resolution Process” – 2011; Vienna, Austria
- ICPMA/ICAA Joint Meeting – “Scheduling Issues in Construction Disputes, 2013; Germany
- 10th International Symposium on Tunnel Construction, “Methods to Quantify Delay and Disruption on Tunneling Projects”, 2011; Slovenia
- In-house Seminars/Training for a variety of clients

APPENDIX 2 - Affidavit of W. Berkowitz

[illegible]

APPENDIX 3 - Affidavit of W. Berkowitz



STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION, LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION AND
FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF REPRESENTATIVES,

Defendants.

**AFFIDAVIT OF THORN C.
DICKINSON IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I, Thorn C. Dickinson, being over the age of 18 years and duly sworn, state as follows:

1. I am the President and CEO of NECEC Transmission LLC ("NECEC LLC"). In my position, I oversee the planning, scheduling, permitting, and construction of the New England Clean Energy Connect transmission project (the "NECEC Project" or "Project").
2. Avangrid Networks, Inc. ("Avangrid") wholly owns NECEC LLC.
3. I provide this affidavit in support of NECEC LLC and Avangrid's Motion for Preliminary Injunction.

Background

4. NECEC LLC has begun significant, physical construction of the NECEC Project that will bring clean, hydro-generated energy from Québec, Canada into Maine and the New England electric grid. The NECEC Project includes a 145-mile direct current (“DC”) transmission line from the Canadian border to a new converter station located at Merrill Road in Lewiston, Maine, and an alternate current (“AC”) transmission line from the converter station to the point of interconnection of the Project at Central Maine Power Company’s (“CMP”) Larrabee Road substation in Lewiston, Maine, (collectively referred to as “Segments 1, 2 and 3” of the Project). The NECEC Project also includes certain “Network Upgrades” to the existing AC transmission system needed to permit the interconnection of these facilities in accordance with the operative provisions of the ISO-NE Open Access Transmission Tariff that CMP, a subsidiary of Avangrid and an affiliate of NECEC LLC, as the interconnecting transmission owner, is constructing at NECEC LLC’s expense (referred to as “Segments 4 and 5” of the Project).

5. NECEC LLC and CMP as applicable have obtained all state and federal permits and approvals necessary to build the NECEC Project, including approval of the long-term contracts for energy and transmission service over the NECEC Project from the Massachusetts Department of Public Utilities; a Certificate of Public Convenience and Necessity (“CPCN”) from the Maine Public Utilities Commission (“PUC”); a Site Location of Development Law Certification from the Land Use Planning Commission of the Maine Department of Agriculture, Conservation & Forestry (applicable to the 14 townships and plantations within the unorganized and de-organized areas of Maine); in a single order, a Site Location of Development Act permit, Natural Resources Protection Act permit, and Water Quality Certification from the Maine Department of Environmental Protection (“DEP”) (the “DEP Order”); a United States Army Corps of Engineers

(“Corps”) permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, based upon an Environmental Assessment and Finding of No Significant Impact previously issued by the Army Corps; and a Presidential Permit, together with an Environmental Assessment and Finding of No Significant Impact, issued by the United States Department of Energy.

6. Additionally, NECEC LLC and CMP as applicable have obtained local permits and approvals from 20 of the 24 municipalities in which the Project facilities will be constructed, in accordance with the project schedule. They will obtain the local permits and approvals from the final municipalities at the time contemplated by the project schedule, prior to construction in those municipalities.

7. All of the foregoing permits and approvals remain in full force and effect today.

8. NECEC LLC will not own the energy that the NECEC Project ultimately will carry from Canada into the United States. Instead, NECEC LLC has contracted to transmit into the United States energy generated by Hydro-Québec from its portfolio of hydro-power generators in Québec, and seeks to build the NECEC Project to facilitate those transmission obligations. The energy delivered by the NECEC Project will be sold to customers in Massachusetts and Maine to serve the New England region’s electricity needs, and this electricity supply represents an important component of efforts to reduce reliance on fossil fuels and increase reliance on renewable energy resources.

Construction

9. Long linear transmission projects like the NECEC Project require careful, sequential planning and the synchronization of work from a variety of contractors. The construction of the NECEC Project is implemented following the guidelines defined in the

Project's schedule, which establishes the chronological execution of multiple workstreams throughout the Project's lifecycle. The Project's schedule provides for integrated delivery of the planning, permitting, engineering, procurement and construction activities, and factors in seasonal, environmental, and other Project-related constraints that may have an impact on the ability to perform the work.

10. NECEC LLC must coordinate the work of contractors providing services related to the deployment of erosion and sedimentation controls; vegetation removal; the fabrication, transport, and erection of structures; the stringing of the electrical conductor; and the construction of electrical substations. Additionally, work for the Project requires the procurement of significant quantities of custom supplies, materials, and equipment, all of which must be planned and managed with a detailed project schedule. All of this work must proceed in accordance with various legal, regulatory, and practical factors, ranging from permitting requirements to weather conditions.

11. The original project schedule contemplated a commercial operation date for the NECEC Project of December 13, 2022. This date was established in the applicable transmission service agreements ("TSAs") governing NECEC LLC's construction and operation of the NECEC Project.

12. Various permit requirements and restrictions for construction, including increased protection for certain habitats and species; weather factors; court-imposed construction limitations; sequencing with project contractors; and required coordination with federal, state, and local regulators and ISO-NE, the federally regulated operator of the New England Transmission system and wholesale electricity markets, in addition to prolonged, intense opposition for the Project at various permit proceedings and related appeals, impacted the commencement of construction, construction schedule, and the in-service date for the NECEC Project.

13. Pursuant to the TSAs, NECEC LLC must achieve commercial operation of the NECEC Project by August 23, 2024, which date may be extended by up to 12 months (*i.e.*, August 23, 2025) only by NECEC LLC posting up to \$10.9 million in additional security, which funds would be lost in the event the NECEC Project does not achieve commercial operation.

14. The project schedule currently contemplates the NECEC Project achieving commercial operation on December 13, 2023. This date is in advance of the August 23, 2024, contractual deadline, but represents a one-year delay from the original commercial operation date called for in the TSAs.

15. With construction of the NECEC Project underway, NECEC LLC is in the midst of executing a carefully-timed construction schedule that balances all of the foregoing factors to achieve commercial operation by mid-December 2023.

16. In order to complete construction of the Project and achieve timely commercial operation, it was necessary for construction activities to begin in early 2021 and continue in earnest thereafter. Clearing activities for the NECEC Project are restricted during the months of June and July to protect a federally-listed bat species. Additionally, the Section 404 permit requires clearing activities to be conducted between October 16 and April 19th “to the maximum extent practicable.” These restrictions are intended to minimize impacts to wetlands and other environmentally sensitive resources. Therefore, it was necessary for the clearing / access contractor Northern Clearing, Inc. (“NCI”) to work diligently to conduct clearing activities as soon as all project-wide permits were granted, the last being the Presidential Permit issued on January 14, 2021, and before the restrictions on Project clearing activities took effect in June and July, and before April 19 to the maximum extent practicable. Without sufficient clearing activities, the transmission line contractors (Cianbro Corp. and Irby Construction Inc. (“Cianbro/Irby”)) would not have been able

to either start or complete the same amount of construction originally planned during this timeframe as set by the project schedule. Without sufficient work, Cianbro/Irby would have needed to standby, or demobilize and then remobilize. The approximate cost to standby Cianbro/Irby is \$742,000 per week and to demobilize is \$1,542,000. Demobilization would also likely have resulted in layoffs of construction crew members.

17. To date, NECEC LLC has expended hundreds of millions of dollars on construction activities to clear the DC and AC transmission corridors, erect structures, string conductor, and complete the necessary site work at the converter station location in Lewiston. All of this work was done in good faith and with the intent to carry construction through to completion.

a. NECEC LLC began construction of the DC line on January 18, 2021. NECEC LLC started with clearing activities on Segment 2 (starting at The Forks Plantation and heading south along the Project route), followed by structure installation on this same segment shortly after. During the following weeks and months, construction began on the remaining DC transmission line segments. By November 2, 2021, approximately 124 miles of right of way in Segments 1, 2, and 3 of the Project had been cleared and 70 structures had been installed.

b. All transmission related material for the construction of the DC transmission line, including conductor, insulators, and fiber optic, has been received and is stored at multiple laydown yards along the Project route. Additionally, more than 55% of the custom-manufactured steel poles that will be used for the DC transmission line structures have been delivered. The remaining poles continue to be manufactured and will be delivered in accordance with the Project's construction schedule. In the spring of 2021, NECEC LLC started construction at the Merrill Road converter station in Lewiston, Maine,

with work starting on the driveway and the relocation of some roadside distribution facilities. Site grading, drilling, and blasting have progressed in the last few months.

c. Construction of the AC components of the Project, including the Network Upgrades, is likewise underway. Starting in June 2021, work began in Lewiston on certain 115kV and 345kV transmission lines. Work has been completed on CMP's transmission line Sections 268 and 61. CMP's transmission line Section 72 has been relocated to its new alignment and re-energized and the old alignment has been removed. In connection with the new 345kV AC transmission line in Segment 5 between substations in Windsor and Wiscasset, Maine, all necessary clearing activities are complete, approximately 54 structures have been erected and approximately 3 miles of conductor has been strung.

18. The current estimate of the total capital expenditures to complete the project is approximately \$1.04 billion. Through the end of 2020, the total spent for capital expenditures on the Project was approximately \$155 million. Through November 2, 2021, the total spent on capital expenditures was approximately \$449.9 million. In addition, NECEC LLC had paid over \$4 million in operating expenses and \$3.4 million in property taxes for the completed portions of the Project.

Future Construction Plans

19. Construction will continue to ramp up in the upcoming weeks and months, in accordance with the Project's construction sequence and the construction conditions imposed by the DEP and Corps. This will lead to nearly 300 new direct jobs. The Project and the Network Upgrades currently directly employ approximately 600 workers. These numbers do not include the indirect jobs that have been and will be created in connection with the construction of the Project and the Network Upgrades.

20. Clearing, access road construction, and environmental controls installation and maintenance activities will continue in the coming months. NECEC LLC expects that over 140 miles of the DC line corridor will be cut by year-end 2021, representing 97% of the entire corridor.

21. With respect to the construction of the DC transmission line, a second crew of approximately 100 workers will be added at the start of next year to support and increase ongoing structure-erection operations as well as conductor stringing. These efforts will continue throughout 2022, with an anticipated completion of all transmission line construction work by the summer of 2023 before the Project's testing and commissioning process starts in September 2023.

22. At the Merrill Road converter station in Lewiston, once site development is completed in the next few weeks, foundation work is expected to begin. This will be followed in 2022 by above ground installations, assembly of the converter station buildings and installation of all major components (transformers, valve hall, etc.), which have been manufactured and tested over the last year. Completion of the converter station, including testing and commissioning, is expected in the fall of 2023.

23. The Project will enter the testing and commissioning stage in September 2023 and is expected to achieve commercial operation by mid-December of 2023.

Impacts of Construction Suspension

24. Retroactive application of the 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 Construction of Certain Transmission Lines in the Upper Kennebec Region," adopted on November 2, 2021 ("Initiative"), to the NECEC Project during this lawsuit—preventing any

further construction—would create grave risks to the continued viability of the Project and the many benefits it will provide Maine and its residents.

25. While execution of the current construction schedule will allow NECEC LLC to complete the NECEC Project by the currently expected commercial operation date of mid-December 2023, any delay in construction, in addition to causing layoffs of hundreds of workers currently constructing the Project, will make it impossible to complete the Project by that date. Any significant delay in construction, in fact, will make it impossible to complete the Project by the current contractual deadline of August 23, 2024 and creates serious doubt as to whether the Project could even be completed by the ultimate contractual deadline of August 23, 2025 (which extended deadline would require NECEC LLC to post an additional \$10.9 million as security).

26. Any pause in project construction would result in a complex demobilization process given NECEC LLC's obligation and commitment to comply with all permit requirements and environmental standards. For example, due to permitting requirements, NCI—the principal contractor responsible for tree clearing, access roads, and environmental controls—would need to remove all currently installed construction mats, triggering an additional period of restoration on the same land.

27. Moreover, resuming construction activities after any material suspension of construction would require several weeks, if not several months, to remobilize all of NECEC LLC's contractors. This remobilization, which could not begin until the issuance of the final court order lifting any suspension, entails, among other activities, reobtaining any expired permits and approvals; re-engaging the applicable contractors; and having the contractors re-hire the construction crews and other necessary employees (which may be particularly challenging given current labor shortages), and contract for and mobilize necessary equipment and materials, to

resume construction activities as soon as possible. Overall, this demobilization and remobilization would result, in many cases, in a complete re-work of construction activities already completed to date.

28. These demobilization and remobilization activities, together with additional project management activities and associated costs, and other fixed costs that the Project would incur before the in-service date, would impose significant additional expenses on NECEC LLC. The NECEC project management team estimates that the increased costs resulting from an 18-month delay in project construction of the NECEC Project, including the necessary Network Upgrades, would be approximately \$113 million and the increased costs resulting from a 24-month delay would be approximately \$137 million. This range of delay-driven costs, which reflects just increased project investment costs, represents an increase in the overall project budget of between 11 and 13%, and threatens the financial viability of the Project.

29. Because the NECEC Project's revenues only begin when the Project achieves commercial operation, any significant delay in the commercial operation date resulting from a construction suspension would also delay the Project's receipt of anticipated revenues by at least the same amount of time. This delay would cause further significant adverse impacts on the financial viability of the Project.

30. The dangers that a suspension in construction poses to the NECEC Project are evident if one considers the following:

- a. Under the current project schedule, as of December 2021, there would remain approximately 24 months of additional activities necessary for the Project to achieve commercial operation (21 months for construction activities and 3 months for commissioning activities).

- b. If construction is barred pending this action in the Superior Court and an ensuing appeal to the Law Court, and one assumes that these court proceedings take just 18 months to complete, and all remobilization activities can be accomplished within just 3 months of the Law Court's final decision, construction activities could only resume in October 2023.
- c. This would mean that that NECEC Project would not achieve commercial operation until September 2025, approximately a month after the extended contract deadline of August 23, 2025, unless the necessary remaining construction and commissioning activities could be accelerated.
- d. Such acceleration would be challenging because the sequence and duration of construction activities are subject to numerous constraints, including weather and seasonal conditions and restrictions (such as mud season and road closures), permit requirements and restrictions, and ISO-NE-imposed restrictions on transmission outages and commissioning activities. In any case, even if feasible, such acceleration would undoubtedly further increase Project costs, and the absence of any remaining "float" in the project schedule would mean the timely completion of the Project would be in serious danger should it suffer any other unexpected delays.
- e. Should this litigation through appeal take 24 months, then there would be no practical way that the NECEC Project could be completed before the extended contractual deadline if construction is barred during that time.

31. Thus, if the Initiative is retroactively applied to the NECEC Project to prevent further construction for any significant period of time, NECEC LLC and Avangrid would face the prospect of the cancellation of the NECEC Project. At the very least, the project delay,

significantly increased project costs, and delayed project revenues would gravely harm NECEC LLC's and Avangrid's billion dollar investment in the Project.

32. Suspension of construction on the Project due to the Initiative would also, at a minimum, delay the realization of the many benefits the Project will provide as found by the PUC in its May 3, 2019 Order granting the CPCN for the Project ("PUC Order"). These benefits would be lost completely in the event the Project must be cancelled should a suspension mean the Project can no longer be timely constructed to achieve commercial operation by the contractual deadline in a financially viable manner. These benefits include:

a. *Job Creation.* Suspension of Project construction will put in jeopardy the more than 600 direct jobs created by the Project to date. Most of the personnel hired to work on the construction of the Project could be impacted by layoffs. Additionally, the anticipated additional 300 direct new jobs to be implemented because of the increase workload scheduled for the coming months would not be realized in the short term. It would also place at risk the hundreds of resulting indirect jobs that the Project supports.

b. *Property Taxes.* Once fully constructed, the Project is expected to provide approximately \$18 million annual incremental municipal tax revenues. During construction, property taxes for specific Project components are being calculated and paid based on the accrued investment. (PUC Order at 45.) As of today, NECEC LLC has paid approximately \$3.4 million in property taxes related to the Project. If construction is suspended, the expected increase in property tax revenues would be, at a minimum, deferred. If the Project does not achieve commercial operation municipalities would lose this incremental property tax revenue. Municipalities that have already projected an increase in property tax revenue from the Project in the coming years would be impacted.

c. *Electricity Price Reduction.* The import of energy at the full 1,200 MW capacity of the NECEC is expected to reduce locational marginal prices in the ISO-NE market on average by \$3.70/MWh. These price reductions are expected to result in savings to Maine electricity customers of between \$14 million to \$44 million per year relative to what customers would have paid but for the NECEC. (PUC Order at 25.) The reduction in energy costs for businesses and consumers is expected to lead to an estimated \$573 million growth in employment and Maine's Gross Domestic Product (\$25 million - \$29 million per year). (PUC Order at 44.) Again, a suspension of construction would, at a minimum, delay the realization of these benefits and, if the Project does not achieve commercial operation, these benefits would not be realized.

d. *Enhanced Reliability.* The NECEC Project and associated Network Upgrades will increase the reliability of the Maine transmission system by delivering baseload energy to replace retiring baseload resources, as well as other reliability and fuel security benefits associated with the NECEC's providing an additional intertie between ISO-NE and Québec and transmission system upgrades that will deliver non-fossil fuel fired generation, especially during winter months when natural gas supplies may be constrained. CMP, as the interconnecting transmission owner, is constructing the Network Upgrades in Maine at the sole cost of NECEC LLC. These Network Upgrades not only permit the interconnection of the NECEC Project, but also provide important reinforcements to the existing transmission system in Maine, which benefit the development of new renewable generation resources in the State. Suspension of construction of the NECEC Project threatens the timely completion of these upgrades. A delay in the construction or the cancellation of the Network Upgrades would negatively

impact the other renewable resources looking to interconnect to the New England region and take advantage of the increase in transfer capacity at the Surowiec-South Interface to no less than 2,600 MW resulting from the NECEC Project and these upgrades.

e. *Greenhouse gas emissions reductions.* In granting the necessary environmental permits to the NECEC Project, the DEP specifically recognized:

Climate change . . . is the single greatest threat to Maine's natural environment. It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts. (DEP Order at 105.)

The NECEC Project represents a tremendous, tangible action Maine and the New England region can take to combat climate change. As the PUC found in the PUC Order, once constructed and in service the NECEC will reduce greenhouse gas emissions (GHG) in the region by approximately 3.0 to 3.6 million metric tons per year, which, is equivalent to removing approximately 700,000 passenger vehicles from the road. (PUC Order at 70.) These climate benefits would be delayed by a suspension of construction and would be lost entirely if the Project cannot be completed.

33. In addition to these benefits, the suspension of the NECEC Project would, at a minimum, delay, if not place in permanent jeopardy, the \$250 million of the additional project benefits funded by NECEC LLC and H.Q. Energy Services (U.S.) Inc. ("HQUS") provided for in the stipulation dated February, 21 2019 and approved by the PUC through the PUC Order ("NECEC I Stipulation"). A summary of these additional benefits and the applicable payment terms are provided in the chart below.

<u>NECEC Benefit Fund</u>	<u>Amounts</u>	<u>Payee</u>
NECEC Low Income Customer Benefits Fund	Starting on January 4, 2021, \$312,500 quarterly payments for 40 years (\$50,000,000 in total)	HQUS
NECEC Rate Relief Fund	Starting on January 4, 2021, \$500,000 quarterly payments for 40 years (\$80,000,000 in total)	HQUS
NECEC Rate Relief Fund	Starting on January 4, 2021, \$375,000 quarterly payments for 40 years (\$60,000,000 in total) as consideration for the transfer of the Project from CMP to NECEC LLC. CMP allocates those funds to the NECEC Rate Relief Fund	NECEC LLC
NECEC Broadband Fund	Starting on January 4, 2021, \$500,000 quarterly payments for 5 years (\$10,000,000 in total)	HQUS
NECEC Heat Pump Fund	HQUS – Starting on January 4, 2021, \$500,000 quarterly payments for 5 years (\$10,000,000 in total) NECEC LLC- Starting after the payments of HQUS conclude, \$500,000 quarterly payments up to a total of \$5,000,000	HQUS NECEC LLC (years 6 through 8)
Dirigo EV Fund	\$5,000,000 contribution	NECEC LLC
Hydro-Québec EV Fund	Starting on January 4, 2021, \$500,000 quarterly payments for 5 years (\$10,000,000 in total)	HQUS
NECEC Franklin County Host Communities Fund	Starting on January 4, 2021, \$125,000 quarterly payments for 10 years (\$5,000,000 in total)	NECEC LLC
NECEC Education Grant Fund	Starting on January 4, 2021, \$125,000 quarterly payments for 10 years (\$5,000,000 in total).	NECEC LLC

HQUS’s payment obligations for these benefits are governed by a PUC-approved support agreement dated December 29, 2020 (the “Support Agreement”). Pursuant to the terms of the stipulation dated July 30, 2020, approved by the PUC on October 22, 2020 in Docket No. 2019-00179 (“NECEC II Stipulation”), NECEC LLC and HQUS agreed to accelerate the performance

of their payment obligations related to these additional benefits so that payments would start during the construction phase of the Project as opposed to after commercial operation. As of October 1, 2021, NECEC LLC and HQUS have made payments of about \$18 million to the different NECEC benefits funds. Suspension of construction of the Project due to the Initiative may lead to the suspension of the benefit funds payments in accordance with the terms of the NECEC II Stipulation and the Support Agreement. Similarly, if the Project is terminated prior to commercial operation, all future payments to the NECEC benefits funds would terminate, thereby denying the State of Maine and its residents these benefits.

34. A suspension of construction of the Project that risks its continued viability would also jeopardize several other Project benefits, including the following:


a. *Fiber Optic Infrastructure.* Pursuant to the NECEC I Stipulation, NECEC LLC has committed that the final design for the NECEC transmission lines will include the necessary facilities and equipment to provide additional fiber optic capacity on, among other, the DC transmission line for the benefit of the State of Maine and to construct the necessary fiber optic infrastructure to provide access to this fiber optic capacity at major road crossings or other appropriate access points along the NECEC Project route. The suspension of the NECEC Project will, at a minimum, delay the implementation of these fiber optic commitments that are intended to benefit communities along the Project route and, if the Project is terminated, the benefits of additional fiber optic capacity to the host communities would be lost.

b. *Conservation of 40,000 Acres of Land.* Pursuant to the DEP Order, NECEC LLC must permanently conserve 40,000 acres of land in the vicinity of Segment 1 of the Project to promote habitat connectivity and conservation of mature forest areas. If the

Project is cancelled because it cannot be timely constructed, the conservation of this very significant area of land would not be realized.

I, Thorn C. Dickinson, as the authorized agent of NECEC Transmission LLC, declare under penalty of perjury that the factual allegations of the foregoing Complaint are true and correct, based on my personal knowledge, except where alleged on information and belief in which case I believe them to be true. Such personal knowledge includes information from records of the regularly conducted activities of Avangrid Networks, Inc., NECEC Transmission LLC, and Central Maine Power Co., made at or near the time of such activities, by or from information transmitted by persons with knowledge, kept in the regular course of such activities, and of which it is the regular practice of Avangrid Networks, NECEC LLC, and CMP to make such records.

Dated this 3rd day of November, 2021



Thorn C. Dickinson

STATE OF MAINE
CUMBERLAND, ss

Personally appeared before me the above-named Thorn C. Dickinson, as the duly authorized representative of NECEC Transmission LLC, and made oath that the statements made and verified by him herein are true.

Before me,

Dated: November 3, 2021


Notary Public
My Commission Expires:

HEATHER JAYNE STEVENS
NOTARY PUBLIC - State of Maine
My Commission Expires
October 25, 2023

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
CIVIL ACTION

Location: Portland

DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION LLC, and)

AVANGRID NETWORKS, INC)

Plaintiffs)

v.)

BUREAU OF PARKS AND LANDS,)
MAINE DEPARTMENT OF)
AGRICULTURE, CONSERVATION AND)
FORESTRY,)

MAINE PUBLIC UTILITIES)
COMMISSION,)

MAINE SENATE, and)

MAINE HOUSE OF REPRESENTATIVES,)

Defendants.)

**AFFIDAVIT OF
SENATOR RUSSELL BLACK**

I, Russell Black, depose and state as follows:

1. I am a lifelong resident of Wilton, Maine. I am currently serving my second term in the Maine State Senate representing District 17. This district includes all municipalities and unorganized territories in Franklin County, as well as Belgrade, Fayette, Mount Vernon and Vienna in Kennebec County. I serve on the Agriculture , Conservation and Forestry Committee and also the Inland Fisheries and Wildlife Committee. Prior my service in the Senate, I represented District 114 in the Maine House of Representatives for four consecutive terms. While in the House I served as the Ranking Minority Member of the Agriculture, Conservation and Forestry Committee.

2. I introduced LD 1893 in December of 2019 after hearing from some of my constituents that CMP's proposed high-impact transmission line was going to cross two public lots which had been leased to it by BPL without seeking legislative approval. I was particularly concerned that the rental for the property was \$3800 a year, when there were reports that the Passamaquoddies were receiving millions for a much smaller lease.

3. After the hearing and the testimony of Director Cutko, as well as reviewing the memorandum prepared by Assistant Attorney General Parker regarding an identical issue, the ACF Committee determined that an amendment was appropriate and Committee Amendment A was drafted at the direction of then-Representative and House Chair Hickman. That amendment canceled the CMP lease and stated that any lease of public lands for the NECEC required 2/3 legislative approval, as set out in the Affidavit of Senator Hickman.

4. Although the Committee unanimously approved LD 1893 as amended, the Legislature adjourned in March 2020 because of Covid before the Legislature had an opportunity to vote on it. I am confident given the strength of the Committee recommendation that if the Legislature had been afforded the opportunity, LD 1893 as amended would have been enacted. Subsequently, I became the lead plaintiff in *Black v. Cutko*, which was filed on June 23, 2020.

5. When the new Legislature convened, I introduced LD 471 to make clear that a transmission line like NECEC worked a substantial alteration to the uses of the public lands and required 2/3 legislative approval. Specifically, LD 471 deemed any lease of public lands for transmission lines and similar facilities to effect a substantial alteration to the uses of the public lands so as to require the approval of 2/3 of the Legislature. It was made retroactive to 2014 to correct the Bureau's misapplication of the law. A copy of LD 471 is attached as Exhibit A.

6. During the hearing on LD 471, which took place a day after the decision in *Black v. Cutko* rejecting BPL's interpretation that section 1852 exempted utility leases from the Constitution, Director Cutko opposed LD 471 and reaffirmed BPL's position that, notwithstanding the clear statement from the Legislature during the previous session and Justice Murphy's decision, nonetheless legislative approval of leases like the NECEC lease were not subject to the requirement of legislative approval.

7. As a result of that testimony, the Committee voted 12-1 to send a letter to Director Cutko and the Commissioner of Agriculture reiterating its view that the NECEC lease required legislative approval. A copy of that letter is attached hereto as Exhibit B.

8. The provision in the recent initiative that "any high-impact electric transmission line crossing or utilizing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and must be approved by the vote of 2/3 of all the members elected to each House of the Legislature" thus merely confirms the existing state of the law—and in particular the sense of the ACF Committee expressed in LD 1893 and the letter from the Committee to Director Cutko.

9. The Office of Policy and Legal Analysis suggested that LD 471 might be a competing measure requiring submission to the voters along with Question 1, so, although the Committee passed it (12-1), it was tabled and carried over to the next session of the Legislature.

DATED: 11/18/21, 2021


Senator Russell Black

STATE OF MAINE
Franklin COUNTY, ss.

Dated: November 18 2021

Personally appeared the above-named Senator Russell Black and made oath that the above statements are true and accurate and are based on his own personal knowledge.

Before me,

Cheryl A. Osborne
Notary Public/Attorney-at-Law

Cheryl A. Osborne
Name Typed or Printed

My Commission Expires: July 14, 2027

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
CIVIL ACTION
Location: Portland
DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION LLC, and)

AVANGRID NETWORKS, INC.,)

Plaintiffs,)

v.)

BUREAU OF PARKS AND LANDS,)
MAINE DEPARTMENT OF)
AGRICULTURE, CONSERVATION AND)
FORESTRY,)

MAINE PUBLIC UTILITIES)
COMMISSION,)

MAINE SENATE, and)

MAINE HOUSE OF REPRESENTATIVES,)

Defendants.)

**AFFIDAVIT OF
SENATOR CRAIG HICKMAN**

I, Craig Hickman, depose and state as follows:

1. I am a State Senator representing Chelsea, Farmingdale, Gardiner, Hallowell, Manchester, Monmouth, Pittston, Randolph, Readfield, West Gardiner and Winthrop. I previously served in the Maine House of Representatives for eight years, sponsoring and fighting for measures that promote food sovereignty, protect individual rights and civil liberties, combat poverty and hunger, and support rural economic development. I served as House Chair of the Legislature's Committee on Agriculture, Conservation and Forestry ("ACF") from 2014-2016 and from 2018-2020. I was elected to the Senate in a special election on March 9, 2021.

2. In December 2019, Senator Black introduced LD 1893, which was referred to the ACF Committee. The ACF Committee is the Committee of the Legislature with oversight responsibility for the Bureau of Parks and Lands (“BPL”) within the Department of Agriculture, Conservation and Forestry. As originally proposed, LD 1893 sought to address perceived deficiencies in BPL’s calculation of fair market value for leases of public lands. A copy of the original LD is attached as Exhibit A.

3. More than 17 people testified at the public hearing on January 21, 2020, including a representative from CMP. The Committee also heard from BPL Director Cutko several times. Among the things Director Cutko told the Committee was that the reason BPL had not sought legislative approval for the 2014 lease with CMP was its belief that 12 M.R.S. §1852 –the authority to lease public lands for utility transmission lines-- somehow exempted the lease from the requirement that it be approved by 2/3 of the Legislature; according to Director Cutko, section 1852 was “the primary legal guidance” BPL relied on in entering the 2014 lease. Cutko Transcript at 7, 10 (attached hereto as Exhibit B).

4. The Committee also reviewed a memorandum from Assistant Attorney General Parker from 2018 about BPL’s authority to lease public lands for utility transmission lines. That memorandum in no uncertain terms stated that BPL was required to make a determination about whether there was a substantial alteration to the uses of the lands and if there was, seek the approval of 2/3 of the Legislature. A copy of that memorandum is attached as Exhibit C.

5. After considering the testimony and comments the Committee received, the apparent failure of the Bureau to follow the advice of the Attorney General’s office, and in reviewing the proposed legislation with others on the Committee, it became apparent to me that the real issue the Committee needed to address was the constitutional issue of the substantial

alteration of public lands effected by NECEC. I felt strongly that the Bureau had erroneously interpreted the Constitution and statutes and that a lease for a project like the NECEC was subject to the constitutional requirement that such a lease be approved by 2/3 of the Legislature. Accordingly, I drafted Committee Amendment A, attached hereto as Exhibit D, which provides in pertinent part:

That the Legislature finds that any lease of state park land, public lots or other real estate held by the State for conservation or recreation purposes and designated under the Maine Revised Statutes, Title 12, section 598-A to Central Maine Power Company for the purposes of the transmission corridor project for the transmission line described in Public Utilities Commission Docket No. 2017-00232 constitutes a substantial alteration of the use of such real estate under the Constitution of Maine, Article IX, Section 23 requiring the approval of the lease by a vote of 2/3 of all the members elected to each House of the Legislature.

6. On February 18, 2020, the ACF Committee voted unanimously to recommend to the Legislature that LD 1893 ought to pass, as amended by Committee Amendment A. In my experience in both the House and the Senate, unanimous committee actions are virtually never rejected by the full Legislature and typically are passed under the hammer. But because the Legislature was forced to adjourn because of COVID on March 17, 2020, LD 1893 did not get a vote in either chamber. I firmly believe it would have passed overwhelmingly had there been an opportunity to vote to pass it.

7. In this way, the provision in the recent initiative that “any high-impact electric transmission line crossing or utilizing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and must be approved by the vote of 2/3 of all the members elected to each House of the Legislature” merely confirms the existing state of the law, as reflected by the unanimous vote of the ACF Committee on LD 1893 on February 18, 2020.

DATED: November 19, 2021

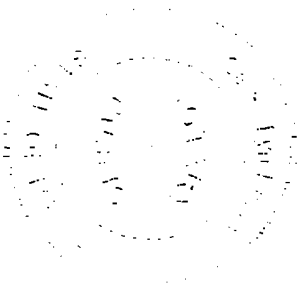
Craig Hickman
Senator Craig Hickman

STATE OF MAINE

Kennebec COUNTY, ss.

Dated: November 19, 2021

Personally appeared the above-named Senator Craig Hickman and made oath that the above statements are true and accurate and are based on his own personal knowledge.



Before me,

Sarah Lyn Emery
Notary Public/Attorney-at-Law

Sarah Lyn Emery
Name Typed or Printed

My Commission Expires: 7/8/2028

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
CIVIL ACTION
Location: Portland
DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION LLC, and)

AVANGRID NETWORKS, INC)

Plaintiffs)

v.)

BUREAU OF PARKS AND LANDS,)
MAINE DEPARTMENT OF)
AGRICULTURE, CONSERVATION AND)
FORESTRY,)

MAINE PUBLIC UTILITIES)
COMMISSION,)

MAINE SENATE, and)

MAINE HOUSE OF REPRESENTATIVES,)

Defendants.)

AFFIDAVIT OF SANDRA HOWARD

I, Sandra Howard, depose and state as follows:

1. I am a Professor of Music and Chair of the Music Department at Keene State College in Keene, New Hampshire. I also am a Registered Maine Recreation Guide and Level II Whitewater Guide.-Since 1997, I have resided during the summer months in Caratunk, Maine and worked in the Upper Kennebec region as a commercial guide for 25 years.

2. I was horrified to learn of the proposed CMP corridor (called the "New England Clean Energy Connect" (NECEC) project) cutting through the region I love with its fragmentation, scarring of the land, and damage to critical wildlife habitat. Accordingly, in 2018

I formed and serve as the director of Say No to NECEC, a 501(c)3 grassroots environmental, education, advocacy group opposing large-scale industrial development in western Maine .

3. Prior to adoption of Question 1 on November 2, over 25 towns had voted to oppose the CMP corridor or had rescinded their support, as indicated below:

Opposed

- Alna (select board)
- Anson (98-12)
- *Caratunk (select board)*
- Chesterville (105-5)
- Dennistown (11-0)
- Durham (190-8)
- Eustis (103-4)
- Farmington (262-102)
- Greenville (290-58)
- Industry (select board)
- Jackman (78-11)
- Jay (showing of hands, no more than 5 supporting)
- Livermore Falls (43-5)
- Moose River (24-0)
- Moscow (35-9)
- New Sharon (82-4) & Moratorium vote 101-1
- Pownal (76-27)
- Rome (27-2)
- Starks (42-15)
- The Forks (residents 16-9; tax payers 30-3)
- West Forks (25-7)
- Wilton (162-1) & Moratorium vote 83-4
- Woolwich

Rescinded Support

- Embden
- Wiscasset
- Franklin County Commissioners
- Androscoggin County Commissioners

Moratoriums

- Caratunk
- Wilton

- New Sharon
- Embden

4. I am familiar with the proposed legislation submitted to the Secretary of State on September 16, 2020. Although that legislation would affect CMP's corridor, it was always intended to apply to any similar project, not just CMP's NECEC Corridor. For example, the submitted legislation contained several "whereas" clauses that stated:

Whereas, high-impact transmission lines present a unique threat to the environment, and the recreational and commercial opportunities central to the State's health and well-being;

Whereas, the Upper Kennebec Region contains critical cold-water fisheries, deer wintering yards, and many other important wildlife resources, provides crucial recreational opportunities for visitors from Maine and elsewhere which are vital to the economy of the region, as well as sustainable timber harvesting;

Whereas, Article IX, section 23 of the Maine Constitution was enacted to protect the State's public lands by requiring the approval of 2/3 of the Legislature for any conveyance of public land that substantially alters its use;

Whereas, transmission lines and similar linear facilities by definition substantially alter the uses and enjoyment of these critical public lands; and

Whereas, the People of the State of Maine wish to ensure that conveyances of interests in public lands for such uses are presented for approval to the Legislature,

Exhibit A attached hereto.

5. The summary of the legislation also described it in similar terms:

In recognition of the potential impacts to the environment and people of Maine from high-impact transmission lines, this initiated bill requires the approval of the Legislature for the construction of such lines, except for high-impact transmission lines utilizing public lands, which must be approved by 2/3 of the Legislature. High-impact transmission lines are already defined in existing law.

This initiated bill also exercises the Legislature's zoning authority to prohibit high-impact transmission lines in the Upper Kennebec Region because of that region's high value wildlife, recreation and logging values.

6. In order to comply with Maine Campaign Finance laws, another activist, Darryl Wood (Treasurer) and I established the No CMP Corridor political action committee in 2019, for which I serve as the Principal Officer. Our grassroots volunteer activists quickly mobilized- and were actively involved in collecting the over 95,000 signatures submitted to the Secretary of State on January 21, 2021, to put this proposed legislation, which became Question 1, on the ballot.

7. Once the Secretary of State had verified over 80,000 signatures and submitted the proposed legislation to the Legislature on February 22, 2021, No CMP Corridor volunteers mounted a major effort to persuade voters to pass the measure. That effort was successful, with over 59% of the voters approving Question 1. 15 of Maine's 16 counties approved it, and in eight counties the measure passed in every town. It carried in Franklin and Somerset Counties, the two counties most affected by NECEC, by 2-1. The will of the people was made overwhelmingly clear – they want to reject the CMP corridor and other such projects.

8. Avangrid and NECEC argue that the referendum must be unconstitutional because it allegedly targeted the CMP corridor. As noted above, although I and Say No to NECEC have opposed the project since 2018, and we certainly were motivated to form No CMP Corridor to support the referendum because it would, if adopted, stop CMP's project, the statute is much broader. Avangrid relies on various Facebook posts, press releases, and ads to make its claim, but those are standard political campaign arguments. If Avangrid's claim about the statute targeting NECEC were accurate, it and its proxies certainly would not have made the argument that the statute's retroactivity provisions threatened gun rights, the Affordable Care Act, and numerous other popular laws or that it affected 350 other leases.

9. For example, former Chief Justice Daniel Wathen, who works at CMP's law firm, was sent out to various media events and interviews to argue that the referendum if adopted would affect many more things than just the CMP project:

Wathen WVOM interview:

<https://www.wvomfm.com/episode/ghrt-rewind-10-01-hon-daniel-wathen-1345/>

"... all of those would be required under this law to be approved by a 2/3 vote of the Legislature. And the Aroostook Technologies is the perfect example of this. It is a telecommunications facility lease granted in 2020. And there's another one, another commercial lease was granted in 2017 for a telecommunication line to a summer camp, was granted in 2017. Here's two perfect examples of leases that would be rendered void if this were to pass. Bureau of Public Lands has issued a lot of leases, I haven't examined all of them, I've only looked at these two, but I'm sure that there's some unintended consequences kicking around, and that's just one illustration of this assertion that you need not worry about this because it applies to nothing except the clean energy corridor is patently false."

...and there's a saying that judges use, how do you interpret a statute? 'You read the statute, you read the statute, and you read the statute.' This one really requires reading and re-reading in order to make sense of what it is, but there's no question that it has application beyond the Clean Energy Corridor..."

Wathen on WMTW Channel 8:

<https://www.wmtw.com/article/supporters-opponents-of-question-1-argue-about-retroactive-language-in-referendum/37810601#>

"These leases would be rendered void if this referendum passed," retired Maine Supreme Court Chief Justice Dan Wathen said. "The assertion that this will never affect anybody, have no impact in anybody in the state of Maine except the Clean Energy Corridor, is patently false."

10. Similarly, Newall Auger, one of CMP's attorneys, argued that "Anything from your back deck to a highway is now at risk." (Note: that quote is in the text of the article, not in the

news clip). <https://www.wmtw.com/article/maines-fall-political-campaign-season-will-focus-on-controversial-power-transmission-line/37478045>.

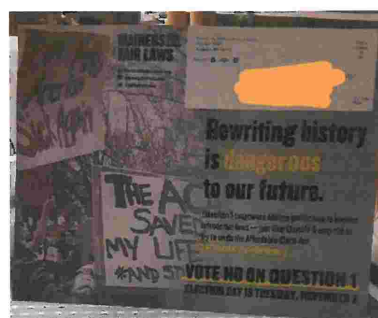
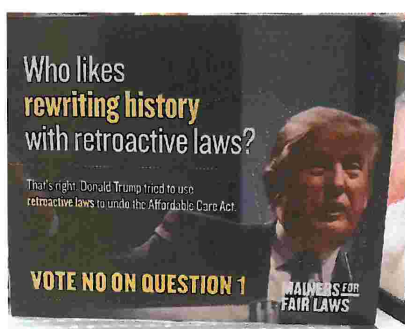
11. Mainers for Fair Laws, a PAC supporting the project and funded by Avangrid and its subsidiaries reiterated the point in a September 30 press release:

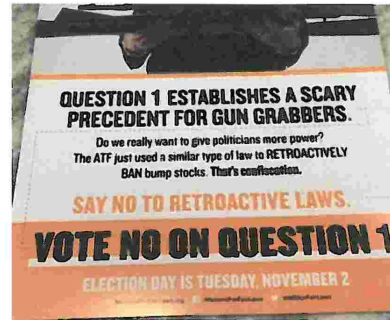
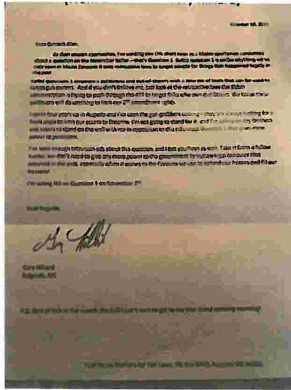
“Section 1 of the actual law that would be enacted if Question 1 passes...is not limited to the Clean Energy corridor. It would go back in time to require two-thirds approval by the legislature of any lease issued by the State... to use public lands for electric or telecommunications facilities, landing strips, pipelines and railroad tracks. In short, Section 1 of the law retroactively changes BPL’s authority to lease public lands for many uses and is not limited to just high impact transmission lines.”

“Because of the law's retroactive provisions, two currently valid leases between the Bureau of Parks and Lands will be invalidated if Question 1 is passed. One is between BPL and a telecommunications company, Aroostook Technologies, and the other between BPL and a summer camp in Jackman. Neither of these leases has any connection to the Corridor project.”

“This lease is likely just the tip of the iceberg as the Maine Bureau of Parks and Lands has issued hundreds of other leases to individuals, towns, and businesses across the state for many uses, including utility rights-of-way and residential camps. Some of these leases may also be impacted by the referendum.”

12. And direct mailers from the Mainers for Fair Laws PAC compared the referendum to President Trump’s attempts to take away healthcare rights under the Affordable Care Act (see attached as Exhibit B) or even taking away Second Amendment gun rights:





13. No CMP Corridor PAC was involved in the previous referendum campaign, as well as Question 1. I am aware of polling that was done during both referenda campaigns, including one public poll published the week before the election, that showed a thirteen-point lead for the Yes on 1 side; all the polling I am aware of similarly showed at least a thirteen-point lead.

14. I am also aware of the fact that CMP/NECEC/Avangrid and its proxies like Clean Energy Matters, Mainers for Fair Laws, etc. conducted polling throughout both campaigns, as reflected in campaign finance reports. Unless those polling numbers were wildly inaccurate, on information and belief CMP and its allies must have understood from the beginning of the first campaign in 2020 that they were likely to lose.

DATED: November 22 2021

Sandra Howard
Sandra Howard

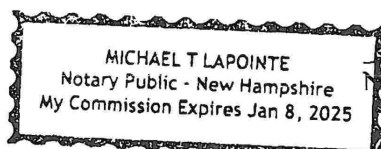
STATE OF NEW HAMPSHIRE

Cheshire COUNTY, ss.

Dated: 11/22/ 2021

Personally appeared the above-named Sandra Howard and made oath that the above statements are true and accurate and are based on her own personal knowledge.

Before me,



Michael LaPointe
Notary Public/Attorney-at-Law

Michael LaPointe
Name Typed or Printed

My Commission Expires: 01/08/2025

An Act To Ensure Legislative Approval of Certain Transmission Lines and Other Linear Projects on Public Land

Whereas, high-impact transmission lines present a unique threat to the environment, and the recreational and commercial opportunities central to the State's health and well-being;

Whereas, the Upper Kennebec Region contains critical cold-water fisheries, deer wintering yards, and many other important wildlife resources, provides crucial recreational opportunities for visitors from Maine and elsewhere which are vital to the economy of the region, as well as sustainable timber harvesting;

Whereas, Article IX, section 23 of the Maine Constitution was enacted to protect the State's public lands by requiring the approval of 2/3 of the Legislature for any conveyance of public land that substantially alters its use;

Whereas, transmission lines and similar linear facilities by definition substantially alter the uses and enjoyment of these critical public lands; and

Whereas, the People of the State of Maine wish to ensure that conveyances of interests in public lands for such uses are presented for approval to the Legislature,

Now, therefore, be it enacted by the People of the State of Maine as follows:

Sec. 1. 35-A MRSA §3131, sub-§4-A is amended to read:

4-A. High-impact electric transmission line. "High-impact electric transmission line" means a transmission line greater than 50 miles in length ~~that is not located in a statutory corridor, as defined in section 122, subsection 1, paragraph F-4, or a petitioned corridor, as defined in section 122, subsection 1, paragraph D-1,~~ and that is:

A. Constructed to transmit direct current electricity; or

B. Capable of operating at 345 kilovolts or more and:

(1) Is not a generator interconnection transmission facility as defined in section 3132, subsection 1-B; and

(2) Is not constructed primarily to provide electric reliability, as determined by the commission.

Sec. 2. 35-A MRSA §3132, sub-§6-A is amended to read:

6-A. High-impact electric transmission line; certificate of public convenience and necessity. The commission shall evaluate and render a decision on any petition for a certificate of public convenience and necessity for a high-impact transmission line ~~in accordance with section 122, subsection 1-D.~~

Sec. 3. 35-A MRSA §3132, sub-§6-C is enacted to read:

6-C. High-impact electric transmission line; legislative approval. In addition to obtaining a certificate of public convenience and necessity, no high-impact transmission line may be constructed anywhere in the State of Maine without first obtaining the vote of 2/3 of all the members elected to each House of the Legislature.

Sec. 4. 35-A MRSA §3132, sub-§6-D is enacted to read:

6-D. High-impact electric transmission line; geographic prohibition. Notwithstanding section 6-C, no high-impact transmission line may be constructed in the Upper Kennebec Region. For the purpose of this section, "Upper Kennebec Region" means the approximately 43,300 acres of lands located between the town of Bingham and Wyman lake, north along the Old Canada Road (US 201) to the Canadian border, and eastward from Jackman to encompass Long Pond and westward to the Canadian border, in Somerset and Franklin Counties.

Sec. 5. 35 MRSA §3132, sub-§6-E is enacted to read:

6-E. Retroactivity. Notwithstanding 1 MRSA §302 or any other law, sections 6-C and 6-D are retroactive to September 16, 2020, and apply to any high-impact electric transmission line the construction of which had not commenced as of that date.

Sec. 6. 12 M.R.S. §1852 (4) is amended to read:

4. Lease of public reserved land for utilities and rights-of-way. The bureau may lease the right, for a term not exceeding 25 years, to:

- A. Set and maintain or use poles, electric power transmission and telecommunication transmission lines and facilities, roads, bridges and landing strips;

- B. Lay and maintain or use pipelines and railroad tracks; and
- C. Establish and maintain or use other rights-of-way,

provided, however, that any such poles, transmission lines and facilities, , landing strips, pipelines, and railroad tracks shall be deemed to substantially alter the uses of the land within the meaning of Article IX, section 23 of the Maine Constitution and no lease or conveyance for the purpose of constructing and operating such facilities may be granted without first obtaining the vote of 2/3 of all the members elected to each House.

Notwithstanding 1 MRSA §302 or any other law, this section is retroactive to September 16, 2014.

SUMMARY

In recognition of the potential impacts to the environment and people of Maine from high-impact transmission lines, this initiated bill requires the approval of 2/3 of the Legislature for the construction of such lines. High-impact transmission lines are already defined in existing law.

This initiated bill also exercises the Legislature's zoning authority to prohibit high-impact transmission lines in the Upper Kennebec Region because of that region's high value wildlife, recreation and logging values.

These provisions are made retroactive to September 16, 2020, the date of filing of this initiative.

This initiated bill also requires the approval of 2/3 of the Legislature for any use of public lands for transmission lines and similar linear projects, as required by Article IX, section 23 of the Maine Constitution and reflected in the historic practices of the Bureau of Parks and Lands.

This provision is made retroactive to September 16, 2014, to ensure that any leases or other conveyance of public lands for these purposes within the six-year statute of limitations period has been properly presented to the Legislature and will be henceforth.

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. BCD-CIV-2021-58

NECEC TRANSMISSION, LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS,
MAINE DEPARTMENT OF
AGRICULTURE, CONSERVATION AND
FORESTRY,

MAINE PUBLIC UTILITIES
COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF REPRESENTATIVES,

Defendants.

**SECOND AFFIDAVIT OF
THORN C. DICKINSON IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

I, Thorn C. Dickinson, being over the age of 18 years and duly sworn, state as follows:

1. I am the President and CEO of NECEC Transmission LLC ("NECEC LLC"). In my position, I oversee the planning, scheduling, permitting, and construction of the New England Clean Energy Connect transmission project (the "NECEC Project" or "Project").
2. Avangrid Networks, Inc. ("Avangrid") wholly owns NECEC LLC.
3. I provide this affidavit in support of NECEC LLC and Avangrid's Motion for Preliminary Injunction (the "Motion").

4. Effective on November 19, 2021, around 5 p.m., NECEC LLC voluntarily suspended construction of the Project pending the Court's ruling on the Motion in response to a request from Governor Janet Mills.

5. On November 23, 2021, the Commissioner of the Maine Department of Environmental Protection ("DEP") issued a decision and order suspending the DEP permits¹ for the NECEC Project effective immediately. This order also stopped Project construction so long as the DEP permits remain suspended. I understand that a copy of this suspension order was provided as Attachment 5 to Intervenor NextEra's brief in opposition to the Motion.

6. In accordance with its terms, the suspension order remains in effect unless and until a court grants Plaintiffs' Motion or otherwise enters final judgment in Plaintiffs' favor on their legal challenge to the 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 Construction of Certain Transmission Lines in the Upper Kennebec Region," adopted on November 2, 2021 ("Initiative").

7. As a result of the DEP's suspension order, NECEC LLC made public its intent to suspend the benefit payments called for under the terms of stipulation dated February 21, 2019 in the PUC CPCN proceeding (Docket No. 2017-00232) ("NECEC I Stipulation") in accordance with its rights to do so provided under the terms of the stipulation dated July 30, 2020 in PUC Docket No. 2019-00179 ("NECEC II Stipulation"). I understand HQUS has also suspended its benefits payments under the NECEC I Stipulation and the NECEC II Stipulation and related Support Agreement while construction is prohibited.

¹ The DEP Order dated May 11, 2020 granted the project-wide Site Location of Development Law and Natural Resources Protection Act permits for the NECEC.

8. If the Court grants the preliminary injunction and the DEP permits are restored in accordance with the terms of the suspension order, NECEC LLC and HQUS will resume the benefits payments, with the next quarterly benefits payments totaling \$2,937,500 and due on January 4, 2022.

9. If construction of the NECEC Project proceeds, NECEC LLC will also comply with all conditions in the DEP permits according to their terms and requirements, including the condition requiring the permanent conservation of 40,000 acres of land in western Maine. If the preliminary injunction is not granted, and the suspension of the DEP permits remains in place, such that construction of the Project is barred, the conservation of these lands and many other public benefits of the Project will be delayed and potentially lost permanently if the Project is cancelled because it cannot be timely constructed.

10. To date, Plaintiffs have cut 139.2 miles (96%) of the Project's DC corridor (Segments 1, 2 and 3 of the Project). Of these 139.2 miles, clearing activities have been completed along 113.7 miles of the corridor; along the remaining 25.5 miles, trees have been felled but certain clearing activities, including the disposal of trunks, brush and debris, must occur. Pursuant to DEP requirements, such clean-up will take place regardless of whether construction is prohibited.

11. To accommodate further work on the DC line corridor, Plaintiffs will not construct any new permanent access roads. The Plaintiffs will utilize existing permanent access roads used for forest management and other purposes along the route and make minor modifications/improvements as necessary. The additional temporary access needed for construction purposes will be built mainly utilizing timber mats which will be removed and the area revegetated post construction pursuant to DEP permit requirements. It is also worthwhile to note that many of these existing permanent access roads have already been utilized and improved

for the purposes of clearing. Similarly, many of these temporary access routes have already been established previously for clearing operations.


12. Plaintiffs also have installed 107 pole bases (*i.e.* first section of steel pole that is embedded or concrete foundation) along the DC corridor, and, while they must install 834 more pole bases, the expected total surface area to be excavated to install these incremental pole bases amounts to only 0.5 acres. The vast majority of the remaining poles are directly imbedded into the ground and do not require pouring of concrete for foundations.

13. If the Initiative is ultimately upheld, the Project will be decommissioned and the area allowed to return to its original state (which, along Segment 1, is primarily commercially harvested timberland) in accordance with the terms of the DEP permits.

14. Attached as Exhibit A is a true and correct copy of a letter from Melanie Loyzim, Commissioner of the DEP, to Elizabeth Boepple and James Kilbreth dated November 24, 2021, denying the requests of Natural Resources Council of Maine (dated November 4, 2021) and the West Forks Intervenors (dated November 9, 2002) to stay the DEP permits because of the Initiative.

I, Thorn C. Dickinson, as the authorized officer of NECEC Transmission LLC, declare under penalty of perjury that the factual allegations of the foregoing Complaint are true and correct, based on my personal knowledge, except where alleged on information and belief in which case I believe them to be true. Such personal knowledge includes information from records of the regularly conducted activities of Avangrid Networks, Inc., NECEC Transmission LLC, and Central Maine Power Company, made at or near the time of such activities, by or from information transmitted by persons with knowledge, kept in the regular course of such activities, and of which it is the regular practice of Avangrid Networks, Inc., NECEC Transmission LLC, and Central Maine Power Company to make such records.

Dated this 7th day of December, 2021

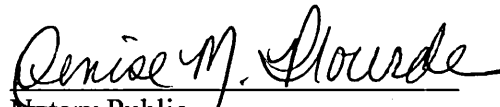

Thorn C. Dickinson

STATE OF MAINE
CUMBERLAND, ss

Personally appeared before me the above-named Thorn C. Dickinson, as the duly authorized representative of NECEC Transmission LLC, and made oath that the statements made and verified by him herein are true.

Before me,

Dated: December 7, 2021


Notary Public
My Commission Expires:

DENISE M. PLOURDE
Notary Public, Maine
My Commission Expires April 1, 2028

CERTIFICATE OF SERVICE

I, John J. Aromando, Esq., hereby certify that a copy of this Appendix was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on February 16, 2022:

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Dated: February 16, 2022



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