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

REPLY BRIEF OF APPELLANTS NECEC TRANSMISSION LLC AND AVANGRID NETWORKS, INC.

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, Maine 04101
(207) 791-1100

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

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Fossil fuel companies and their allies have opposed the NECEC at every turn: first via futile regulatory opposition and permit appeals, then via a facially unconstitutional initiative, and now via a new retroactive Initiative. This most recent effort is as flawed as those that preceded it. Maine law bars retroactive application of legislation that deprives a person of vested rights. The Initiative therefore cannot apply to the Project unless the Court curtails the vested rights doctrine, either by holding that it does not constrain state laws or by accepting opponents' "success by failure" theory – that seriatim unsuccessful appeals and legislative opposition prevented NECEC LLC's right to complete the Project from vesting, despite substantial construction. Further, because Maine law recognizes that final executive and judicial decisions cannot be reversed legislatively, the Initiative cannot apply to the Project unless the Court also somehow concludes that the Initiative does not compel the PUC and BPL to reverse their prior final actions even though it retroactively revises the criteria governing those actions. This Court should instead enforce Maine law on vested rights and separation of powers, and hold that the Initiative is unenforceable as applied to the NECEC.

I. The Court should consider the "entire case" under Rule 24(c).

Pursuant to Rule 24(c), the Court should consider "the entire case" presented on report. *State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981). First, State Appellees agree that NECEC LLC has raised "important and novel legal questions" justifying a report under Rule 24(c). State Br. at 11. There is no straight-faced argument

that this case does not involve questions of importance and doubt, as found by the Business Court, A.13, and demonstrated by the parties' briefs.[1] Second, there are no other dispositions that would avoid the need to resolve these questions, as the Business Court's vested rights ruling turned on purely legal issues and the parties did not dispute the relevant facts. A.14, 41-50. Third, in at least one alternative, a resolution of the issues presented would dispose of the existing action; even NextEra concedes that affirmance will end this case as currently pled. NextEra Br. at 53; *see* A.15. Finally, the Court's decision would not be advisory. Because the Initiative purports to bar construction of the Project, NECEC LLC may seek a declaration of its rights prior to enforcement. *Nat'l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 459 (Me. 1977).

II. The Court should reject Appellees' request to curtail the vested rights doctrine.

A. The Court should not overrule centuries of case law treating vested rights as a constitutional doctrine applicable to state legislation.

There is no question that this Court has historically recognized vested rights as a constitutional due process doctrine.[2] *Warren v. Waterville Urb. Renewal Auth.*, 235 A.2d 295, 304 (Me. 1967) (vested rights is a "[c]onstitutional restriction[] of due process"); *see Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981). There also is no question that this Court has treated vested rights as a constraint on state legislation.

[1] These important questions concern not only likelihood of success on the merits but also, contrary to State Appellees' claim, *see* State Br. at 11, the legal errors committed by the Business Court in addressing the other preliminary injunction factors (such as the relevance of constitutional violations). NECEC LLC Br. at 50-55.

[2] Any suggestion this argument was waived ignores the record below. NECEC LLC expressly asserted its constitutionally guaranteed vested rights in its pleadings, as well as briefing and oral argument in the trial court. A.127, ¶ 144; A.175; Reply in Supp. of Prelim. Inj. Motion, at 3 (Dec. 8, 2021); Mot. Tr. at 7-8 (Dec. 15, 2021).

Fournier v. Fournier, 376 A.2d 100, 101-02 (Me. 1977); *Sabasteanski v. Pagurko*, 232 A.2d 524, 526 (Me. 1967).[3] Thus, the only question is whether the Court should overturn this precedent because (1) other states treat vested rights as a common law doctrine, (2) federal due process standards have shifted, or (3) other precedent is claimed to have implicitly overruled these cases. None of these arguments withstands scrutiny.

First, cases from other states describing vested rights as a common law doctrine are not relevant in Maine. In some states, vested rights is a matter of common law, *see, e.g.*, *Friends of Yamhill Cnty., Inc. v. Bd. of Comm'rs of Yamhill Cnty.*, 264 P.3d 1265, 1277 (Or. 2011), while in other states it stems from specific constitutional anti-retroactivity provisions, *see, e.g.*, N.H. Const. pt. 1, art. 23. But many states, in cases Appellees ignore, recognize vested rights as a constitutional due process doctrine. NECEC LLC Br. at 18 n.7 (citing cases). Maine is one such state, as *Warren* shows. Vested rights is thus not an anachronistic municipal doctrine; it is instead a basic principle of Maine law.

Second, because this Court never grounded Maine's vested rights doctrine in federal precedent stemming from *Lochner v. New York*, 198 U.S. 45 (1905), the evolution of case law interpreting the Fourteenth Amendment has no bearing on Maine's constitutional doctrine. This Court has a constitutional tradition of substantive judicial

[3] NRCM misconstrues these cases. NRCM Br. at 41-42. *Fournier* did not hold that deprivation of vested property rights is consistent with due process. Instead, after recognizing that due process protects vested rights, it held that no vested rights had been disturbed. 376 A.2d at 101-02. And *Sabasteanski* recognized that state law cannot constitutionally disrupt vested rights. 232 A.2d at 525. NRCM's criticism that cases decided prior to adoption of article I, section 6-A did not mention that provision, meanwhile, ignores the Court's history of treating article I, section 1 as providing co-extensive due process protections. NECEC LLC Br. at 18 n.7. Finally, none of the cases applying the vested rights doctrine to municipalities have limited the doctrine to that context. To the contrary, like Maine, other states routinely apply vested rights to state laws. *Id.* at 19 n.8.

review of state laws infringing on vested rights that dates back to its very earliest days, before the Fourteenth Amendment was adopted. *See* David M. Gold, *The Tradition of Substantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence*, 52 Me. L. Rev. 355, 359-61, 363-70 (2000) (discussing, among other cases, *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275 (1823) and *Adams v. Palmer*, 51 Me. 480 (1863)). This Court neither "incorporated laissez-faire economic theory into constitutional doctrine" during the *Lochner* era nor later "relinquish[ed] powers of substantive judicial review that dated back to the beginning of statehood." *Id.* at 377. Maine's vested rights doctrine thus owes nothing to *Lochner* and remains unaffected by its decline. *See Fournier*, 376 A.2d at 101-02 (affirming, in 1977, vested rights cases from 1823, 1858, 1885, and 1967).

Because Maine's vested rights doctrine has never depended on federal law, it does not merely reflect federal due process standards. Historically, state constitutional provisions have "provid[ed] protection for vested rights against retrospective legislation that the federal constitution did not." James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 107 (1993). It is therefore unsurprising that Maine law extends greater protection to vested rights. The Court should continue to independently protect vested rights under the Maine Constitution consistent with Maine's "separate jurisprudential history" on vested rights, as the primacy doctrine demands. *State v. Flick*, 495 A.2d 339, 343 (Me. 1985).[4]

[4] Because this Court has determined that federal law does not control the scope of the Maine Constitution, *State v. Fleming*, 2020 ME 120, ¶ 17 n.9, 239 A.3d 648, and has independently developed the vested rights

The Maryland Supreme Court adopted just such an independent approach in a series of cases that Appellees neglect to mention. *See* NECEC LLC Br. at 22 (citing cases).

The history of Maine's vested rights doctrine makes it clear that this Court has applied a categorical rule, rather than a rational basis test, in the context of retroactive laws affecting legally acquired vested rights. *See* Bam Br. at 26. This Court has never applied rational basis review for legally acquired vested rights, even after federal courts abandoned *Lochner*. *See Sabasteanski*, 232 A.2d at 526; *cf. Kittery Retail Ventures LLC v. Town of Kittery*, 2004 ME 65, ¶ 32, 856 A.2d 1183 (suggesting, in dicta, that rational basis review may apply to equitable claims). In contrast, this Court does apply rational basis review when mere economic expectations are at stake in the context of a traditional due process claim. *See State v. L.V.I. Grp.*, 1997 ME 25, ¶¶ 9-10, 690 A.2d 960. As in Maryland, "this Court has consistently taken the position that retroactive legislation, depriving persons or private entities of vested rights, violates the . . . Constitution, regardless of the reasonableness or 'rational basis' underlying the legislation." *Dua v. Comcast Cable of Md., Inc.*, 805 A.2d 1061, 1072-76 (Md. 2002). This approach is logical because there is no need to determine whether a right has vested if vested rights have no more protection than prospective economic expectations. Bam Br. at 27-28. The rational basis test would render the constitutional vested rights doctrine superfluous.

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doctrine, Fourteenth Amendment cases, *see e.g.*, *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547 (8th Cir. 1997), are irrelevant. Decisions from other states that march in lockstep with federal law, *see, e.g.*, *Nobrega v. Edison Glen Assocs.*, 772 A.2d 368, 382 (N.J. 2001), or that lack independent vested rights jurisprudence, *see, e.g.*, *Powell v. State*, 243 P.3d 798, 803 (Or. Ct. App. 2010), also fail to provide useful guidance.

Third, contrary to Appellees' arguments, this Court has not overruled its prior decisions establishing the constitutional vested rights doctrine. *Baxter v. Waterville Sewerage District* signaled no retreat from vested rights. That case did not involve a retroactive law at all; rather, it simply addressed whether a law creating a sewerage district and authorizing it to charge fees *on a prospective basis* violated the Contracts Clause. 79 A.2d 585, 586-87, 589 (Me. 1951). Though it mentioned vested rights in passing, the Court held only that a municipality cannot enter into a contract for services that bars the State from creating a different entity to provide those services in the future. *Id.* at 589. *Baxter* did not abrogate the doctrine of vested rights because that "constitutional guaranty," *id.*, did not apply. *See also In re Searsport Water Co.*, 108 A. 452, 455, 458 (Me. 1919) (prospective rate regulation did not impair vested rights).

Further, *Norton v. C.P. Blouin, Inc.* did not hold that the vested rights doctrine lacks any constitutional basis. 511 A.2d 1056 (Me. 1986). The question in *Norton* was whether the Workers' Compensation Commission needed to apply a new law to a pending claim. *Id.* at 1057-58. A single commissioner concluded that the law applied because it was procedural and thus, by definition, had no impermissible retroactive effect. *Id.* at 1060. The Court rejected this conclusion, but still held that the law applied because the Legislature intended it to have retroactive effect. *Id.* at 1061 & n.6. The Court included a footnote seeking to clarify the now-defunct procedural / substantive dichotomy as a means of determining whether a law is retroactive, and criticizing in dicta some of its prior cases dealing with that issue, *id.* at 1060 n.5; but, notably, it did

not criticize its statement in *Warren* that the vested rights doctrine is a "[c]onstitutional restriction[] of due process" applicable to retroactive laws, 235 A.2d at 304. State Appellees make a basic error by mistaking *Norton*'s dicta, addressing a different issue, for a holding that controls this case. State Br. at 19. It is impossible to read *Norton* as addressing the scope of Maine's Due Process Clause. The Court specifically stated that it had "no occasion" to consider that clause, because it had not been raised. 511 A.2d at 1061 n.7. Appellees' arguments strain *Norton* beyond its breaking point.

Once *Norton* is properly understood, it becomes clear that *L.V.I. Group* also did not overrule the Court's prior vested rights cases. There is simply no basis to interpret a case in which the plaintiff did not plead a vested rights claim at all, *see* 1997 ME 25, ¶¶ 7, 15, 690 A.2d 960, to hold that such claims are not constitutional in nature. *L.V.I. Group* never mentioned *Warren*, *Fournier*, *Sabasteanski*, or other vested rights decisions. The Court should decline to find that this line of cases has been overruled *sub silentio* via a case in which the Court did not consider, and had no reason to consider, these decisions. *City of S. Portland v. State*, 476 A.2d 690, 698 n.13 (Me. 1984). Moreover, *L.V.I. Group* does not suggest that vested rights claims involving substantial reliance interests, like this case, are governed by rational basis review. That case involved only the question of whether a new statutory definition of "employer" could be applied retroactively to make a company responsible for severance pay. 1997 ME 25, ¶¶ 1-6, 690 A.2d 960. Because the case dealt only with economic expectations, and not vested property rights, it does not control this case. Bam Br. at 13.

Thus, as Professor Bam explains, this Court has consistently (1) recognized constitutional limits on state laws affecting vested property rights and (2) applied a categorical test that accords appropriate respect to both state interests and vested property rights. *Id.* at 10-18, 26-29. There is no sound legal or policy reason to change course, thereby undermining predictability and the rule of law in Maine and, as a result, discouraging investment in major state-wide infrastructure projects.

B. The Court should not, for the first time, hold that rights cannot vest until all potential judicial and legislative challenges are past.

1. Permit appeals do not preclude a claim for legally acquired vested rights.

Opponents have appealed all of the Project's major permits, and have failed to demonstrate likelihood of success on any. NECEC LLC Br. at 35. The Court should reject Appellees' argument that these unsuccessful appeals bar Appellants' rights from vesting. That argument rests on cases involving inapplicable policy considerations and starkly different facts, and would, as a practical matter, render the vested rights doctrine a dead letter for major development projects. Given its contractual obligations and the delays occasioned by opponents, NECEC LLC could not wait for years to begin construction, and should not be punished for relying on its valid permits to proceed.

Appellees rely heavily on *Donadio v. Cunningham*, 277 A.2d 375 (N.J. 1971), a case which has little similarity to this one. *Donadio* held that rights cannot vest pending appeal, reasoning that this rule prevents landowners from engaging in an "unseemly race" to avoid a new legal standard. *Id.* at 382. *Donadio* involved a minor project

(construction of a McDonald's), and a short 45-day appeal period. *Id.* at 379. In this case, by contrast, there was no "race." Due largely to significant delays caused by Project opponents, NECEC LLC began construction long after it had planned, and needed to start as soon as all necessary permits were in place to meet contractual deadlines. A.123-24, ¶ 136; A.234, ¶ 24; A.245 ¶ 59. Indeed, unlike construction of a McDonald's, the lead time for transmission line construction makes a race virtually impossible. *See* A.233-34, ¶¶ 22-23; A.255-56, ¶¶ 9-10. Further, the Project's federal permits are subject to appeals for six years, 28 U.S.C. § 2401(a), rendering it impracticable to wait for appeal periods to expire. It makes no difference that appeals were ongoing when NECEC LLC began construction; had it waited for all pending appeals to run their course, it still would have risked violating its contractual deadlines.[5] *Donadio*'s approach is too narrow to account for the realities of major projects.[6]

Town of Sykesville v. W. Shore Commc'ns, Inc., 677 A.2d 102 (Md. Ct. Spec. App. 1996), a case cited by this Court in support of its formulation of the vested rights

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[5] A year and a half after opponents appealed the federal permits, there is still no end of that case in sight; the agency records have not even been finalized. *Sierra Club v. U.S. Army Corps of Eng'rs*, 2:20-cv-00396, Procedural Order, ECF No. 105 (D. Me. Mar. 7, 2022). Years of litigation remain, notwithstanding the First Circuit's holding that the opponents are unlikely to succeed on the merits. Likewise, the BEP appeal has been pending almost two years, and will finally be heard on May 17-18, 2022; judicial appeals will almost certainly follow, despite the Superior Court's prior decision that opponents are unlikely to succeed on the merits. A.91, ¶ 57.

[6] As State Appellees concede, NECEC LLC does not contend that construction moots appeals of its permits. State Br. at 21-22. Thus, most of Appellees' cases are inapposite because they only stand for the proposition that construction does not moot a permit appeal. *See, e.g.*, *Conservation Law Found., Inc. v. Maine*, 2002 WL 34947097, at *2-3 (Me. Super. Ct. Jan. 28, 2002); *Ebzery v. City of Sheridan*, 982 P.2d 1251, 1257 (Wyo. 1999); *Hussey v. Town of Barrington*, 604 A.2d 82, 85 (N.H. 1992); *Bowman v. City of York*, 482 N.W.2d 537, 547 (Neb. 1992); *Harding v. Bd. of Zoning Appeals of City of Morgantown*, 219 S.E.2d 324, 332 (W. Va. 1975). In any event, preliminary rulings on the permit appeals demonstrate that opponents are unlikely to succeed. NECEC LLC Br. at 35. Although the Superior Court has agreed with opponents on the validity of the BPL Lease, NECEC LLC began construction in good faith well before that ruling issued, and the BPL agrees that it remains valid.

doctrine, *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266, provides the better rule by holding that appeals do not prevent vesting of rights. *See* NECEC LLC Br. at 36-37. This approach protects property owners from the Hobson's choice of either (1) constructing under lawful permits, while risking the possibility of a total loss simply because opponents file meritless appeals and then seek a retroactive change to the law, or (2) breaching their contractual deadlines while waiting for repose. The *Town of Sykesville* rule remains good law. The Maryland Supreme Court held in *Powell v. Calvert County* that a new law must be applied after a permit is vacated, but in so doing did not establish the broader rule that the mere fact of an appeal bars vested rights. 795 A.2d 96, 98-99, 101 (Md. 2002); *see Sherwood Hill Improvement Assoc. v. TTV Props. III, LLC*, 2018 WL 566466, at *8 (Md. Ct. Spec. App. Jan. 26, 2018).[7] Although projects remain subject to the risk of appeals under the law in effect when necessary permits were granted, they are rightly protected from the risk of new laws passed only after rights have vested, whether or not appeals under existing law are still pending.

2. Knowledge of legislative opposition does not preclude a claim for legally acquired vested rights.

The Court should also reject Appellees' argument that knowledge of the Initiative in its formative stages somehow precludes vested rights. Appellees blur the clear distinction in Maine law between legal and equitable vested rights claims, and

[7] The State misunderstands *Powell*'s holding, State Br. at 25, and NRCM fails to mention that the county approval in *Powell* was vacated, NRCM Br. at 32. Maryland law after *Powell* still recognizes that rights may vest during an appeal. *Sherwood Hill*, 2018 WL 566466, at *8. Further, the decision in *75-80 Props., LLC v. Rale, Inc.* is inapposite because it deals with equitable estoppel, not vested rights. 236 A.3d 545, 566-67, 571 (Md. 2020).

wrongly suggest that mere knowledge of a proposal which may never reach the ballot, much less be approved, bars vested rights.

Because the vested rights claim asserted by NECEC LLC is legal in nature, its knowledge of legislative opposition is irrelevant. NRCM is flatly incorrect in stating that the vested rights doctrine is purely equitable. NRCM Br. at 43. In *Kittery Retail*, this Court distinguished between "equitably acquired" vested rights claims premised on governmental bad faith and "legally acquired" vested rights claims premised on construction. 2004 ME 65, ¶¶ 24-25, 32, 856 A.2d 1183. Appellees wrongly conflate these claims in relying on *Kittery Retail* and *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988), both of which involved equitable claims, for the proposition that knowledge of potential legislation is relevant to legal claims. This Court has never so held. NECEC LLC Br. at 28-29; *see Kittery Retail*, 2004 ME 65, ¶ 27, 856 A.2d 1183 (knowledge relevant only because the plaintiff "request[ed] an equitable remedy"). In legally acquired vested rights claims, vested rights are measured *as of the date the law is enacted*, not some earlier date. *Town of Sykesville*, 677 A.2d at 105-08, 118-20. Accordingly, this Court should measure vested rights as of November 2, 2021.

In any event, on the facts of this case, there is no basis to equate knowledge of mere legislative opposition with lack of good faith – which is the relevant standard under *Sahl*. 2000 ME 180, ¶ 12, 760 A.2d 266. In *Kittery Retail*, the Court did not equate knowledge of risk with bad faith; instead, it simply treated it as a general equitable consideration. 2004 ME 65, ¶ 27, 856 A.2d 1183. Lack of good faith, properly

construed, demands something more than knowledge of risk, such as a "false start" designed solely to maintain a permit. *Town of Sykesville*, 677 A.2d at 113-16. The record provides no basis for concluding that NECEC LLC lacked good faith in pursuing construction.[8] To the contrary, NECEC LLC was pressed to meet contractual deadlines after suffering substantial delay caused by these same Project opponents' prior unsuccessful challenges. This Court should not rule, for the first time, that beginning construction lawfully under valid permits is somehow *per se* bad faith simply because the developer knows the law may – or may not – change in the future.

Even if knowledge is relevant to claims for legally acquired vested rights and can at some point be equated with bad faith, there is no sound basis to accept Appellees' maximalist argument that the earliest sign of legislative opposition – even if the potential legislation may never be voted on – suffices to divest the developer of good faith. If knowledge is relevant, the Court should adopt the rule espoused in *Kauai Cnty. v. Pac. Standard Life Ins. Co.*, which sensibly concluded that expenditures prior to certification of an initiative are in good faith. 653 P.2d 766, 777-79 (Haw. 1982). Prior to certification, there is no certainty – despite Appellees' *ipse dixit* assurances – that an initiative will ever make it to the ballot. *Fisherman's Wharf* does not reject *Kauai County*'s

[8] Because there is no evidence of an unseemly race in this case, State Appellees' criticism of *Town of Sykesville* as creating a "Darwinist" rule permitting "hasty" efforts, State Br. at 28-29, misses the mark. For the same reason, Appellees' cases involving such gamesmanship provide them with little help. *See, e.g.*, *Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, 775 N.W.2d 283, 286, 293 (Wis. Ct. App. 2009); *Koontz v. Davidson Cnty. Bd. of Adjustment*, 503 S.E.2d 108, 110 (N.C. Ct. App. 1998); *Town of Hillsborough v. Smith*, 170 S.E.2d 904, 910 (N.C. 1969). Nor is this a case in which knowledge of pending legislation arose prior to the purchase of the property, suggesting that the developer never had any basis at all to believe that it could construct the project. *See, e.g.*, *Kittery Retail*, 2004 ME 65, ¶ 27, 856 A.2d 1183; *Biggs v. Town of Sandwich*, 470 A.2d 928, 931 (N.H. 1984).

rule, as no construction occurred in that case, 541 A.2d at 161; accordingly, this Court has not addressed whether pre-certification construction expenditures are in good faith.

February 22, 2021, is the earliest date by which vested rights should be measured, assuming knowledge of a possible legal change is relevant. Pre-certification steps related to the Initiative did not deprive NECEC LLC of good faith.[9] Filing of an initiative application on September 15, 2020 reflected the opinion of just five voters. Issuance of a petition on October 30, 2020 reflected nothing more, as it was a purely ministerial act that the Secretary of State was required to perform. *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993). Finally, the proffering of signatures on January 21, 2021 is irrelevant because the Secretary could have rejected them. *Jones v. Sec'y of State*, 2020 ME 113, ¶ 35, 238 A.3d 982. Nothing of any legal significance occurred before February 22, 2021; only then was it knowable the Initiative would appear on the ballot.[10]

C. Appellees' remaining vested rights arguments also fail.

Appellees' other arguments are unavailing. NRCM claims, without support, that the vested rights doctrine does not apply to Section 1 of the Initiative, which affects the BPL Lease. NRCM Br. at 14. To the contrary, a lease conveys a property interest during its term, *Stewart v. Aldrich*, 2002 ME 16, ¶ 14, 788 A.2d 603, and thus can give rise to vested rights, *see Sabasteanski*, 232 A.2d at 525-26 (fee interest treated as vested

[9] Knowledge of machinations resulting in no actual legislation, NRCM Br. at 4-5, and opponents' failed attempt to get an unconstitutional initiative on the ballot, A.45, certainly did not deprive NECEC LLC of good faith.
[10] Appellees have not developed any argument that NECEC LLC's construction as of February 22, 2021, was insubstantial. State Appellees briefly suggest, in a footnote, that there is a "question" on this point, State Br. at 31 n.6, but this reference does not preserve the argument. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290.

right); *People's Ferry Co. v. Casco Bay Lines*, 115 A. 815, 817 (Me. 1922) (lease treated as vested right). Further, the fact that construction has not occurred in parts of the 145-mile long transmission line does not prevent NECEC LLC from vesting rights in the entire Project. NRCM Br. at 44. Unlike, for instance, mobile home parks, which require separate permits for each home, the Project is a unified whole. *Cf. Leighton v. Town of Waterboro*, 2005 WL 2727094, at *2 (Me. Super. Ct. May 4, 2005) (no vested rights where developer had not obtained permits for specific individual home locations). Because a transmission line is not divisible, the permits contemplated construction of the whole. A.84, 89, 92, 94, ¶¶ 36, 50, 61, 67. Accordingly, beginning construction along the corridor created a vested right to the whole. *Sahl*, 2000 ME 180, ¶ 14, 760 A.2d 266 (construction on first phase of a project vested right to build second phase).

III. The Court should reject Appellees' invitation to hold, for the first time, that final agency and judicial actions may be legislatively reversed.

The Separation of Powers Clause prohibits any branch of government from exercising "*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 (emphases added). Thus, the Legislature's power to "make and establish all reasonable laws . . . not repugnant to this Constitution, nor to that of the United States," *id.* art. IV, pt. 3, § 1, does not give the Legislature *carte blanche* to invalidate final actions by co-equal branches.

This Court enforces a "strict separation of powers," *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985), by taking a "formal approach to separation of powers questions," *State*

v. Hunter, 447 A.2d 797, 799 (Me. 1982). This "formal" inquiry does not foreclose as-applied challenges by limiting analysis to the statute's words rather than its effect. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117; *Lewis v. Webb*, 3 Me. 326, 331 (1825) ("[D]id the legislature exercise a judicial power . . . .? In *form* they did not, but if it was such in *substance and effect*, it would clearly be a violation of the spirit if not of the very language of the constitution." (emphases added)); *see also Bossie*, 488 A.2d at 479-81 (looking to the "undeniable effect" of retroactive law in finding a constitutional violation). Rather, a formal analysis requires bright line distinctions between the various branches of government, requiring those three branches to be "entirely free from the control or coercive influence, direct or indirect, of either of the others." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).[11] Maine's separation of powers doctrine, therefore, is "formal" in the sense that it forecloses *any* encroachment by the Legislature—or the people exercising the legislative power—into another branch's functions without asking if it encroached *too much*. *Hunter*, 447 A.2d at 799-800.

Accordingly, the Separation of Powers Clause is not automatically satisfied

[11] Formalism "presumes that a trespass by one branch into another's functions is unconstitutional without asking whether it threatens to hamstring government or concentrate excess power in a particular case." Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 92 (1995). Because the U.S. Constitution does not explicitly require separation of powers, the federal doctrine differs. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions-A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 489 (1987) (noting the Supreme Court's vacillation "between using a formalistic approach . . . grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened" (footnote omitted)). Because Maine's separation of powers doctrine "is much more rigorous" than the federal doctrine, *Hunter*, 447 A.2d at 799, it does not allow for the lenient approach used by federal courts and urged by Appellees.

merely because the Initiative is dressed up as a statute of general applicability. This Court has barred, on separation of powers grounds, retroactive application of generally applicable laws that reverse final agency actions. *See Grubb*, 2003 ME 139, ¶¶ 11-12, 837 A.2d 117. State Appellees complain that NECEC LLC, in relying on *Grubb*, fails to provide a "limiting principle" for this rule. State Br. at 34-35. But *Grubb*, the real target of State Appellees' complaint, does provide a clear limiting principle. *Grubb* bars retroactive legislative reversal of prior executive orders; it does not bar the Legislature from adopting prospective standards that would govern the parties' conduct under those orders. To take State Appellees' example, the Legislature can impose reasonable prospective standards for a transmission line's safe operation, but it *cannot* undo final agency approval of that line. The Initiative is invalid because it does the latter.

A. As retroactively applied to the NECEC, the Initiative unconstitutionally reverses final executive actions.

The PUC's issuance of a CPCN and the BPL's issuance of a lease for the Project are both final decisions of executive agencies. *See* 35-A M.R.S. § 3132(2), (6); 5 M.R.S. §§ 8002, 9051-9064, 11002. By retroactively creating a new standard applicable to the CPCN for the Project (Section 5) and authorizing the Legislature to disapprove the CPCN and BPL Lease (Sections 1 and 4), the Initiative violates separation of powers.

The Initiative unconstitutionally interferes with the PUC's decision to grant the CPCN. "In its wisdom the Legislature delegated its entire authority to regulate and control public utilities to the Public Utilities Commission." *Mech. Falls Water Co. v. Pub.*

Utils. Comm'n, 381 A.2d 1080, 1090 (Me. 1977). Although the PUC's legislative authority through rulemaking derives from the Legislature, *Auburn Water Dist. v. Pub. Utils. Comm'n*, 163 A.2d 743, 744-45 (Me. 1960), the PUC functions in an executive capacity when it issues a CPCN, *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 34, 237 A.3d 882. Having created the PUC, the Legislature only has the authority to limit its authority *before* the agency takes a final action. *See, e.g.*, *In re Searsport Water Co.*, 108 A. at 457 (stating that the PUC's authority is limited when "the state has *previously* suspended its regulatory powers" (emphasis added)); *Auburn Water*, 163 A.2d at 743 (legislative charter established prior to PUC determination). This Court has never held that after-the-fact reversals of final agency decisions comport with separation of powers principles; indeed, *Avangrid* held to the contrary. 2020 ME 109, ¶ 36, 237 A.3d 882.[12]

As retroactively applied to the NECEC, Section 5 plainly "require[s] the Commission to vacate and reverse a particular administrative decision the Commission had made." *Id.* ¶ 35; *see Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117. The notion that the CPCN remains intact because the PUC need not enforce Section 5 is absurd.[13] The Initiative amends Title 35-A – the title which establishes the PUC and grants the PUC

[12] NRCM's reliance on *I.N.S. v. Chadha*, 462 U.S. 919 (1983), for a contrary conclusion is misplaced. NRCM Br. at 20. As discussed *supra* n.11, the federal separation of powers doctrine is less rigorous than Maine's. Moreover, immigration is an area in Congress holds "unreviewable authority." *Chadha*, 462 U.S. at 940.

[13] So, too, is the notion that none of the Initiative provisions even "address[] the CPCN." NRCM Br. at 48. Section 5 of the Initiative retroactively amends the CPCN statute, 35-A M.R.S. § 3132, to prohibit construction of high-impact electric transmission lines in the "Upper Kennebec Region," as defined, "the construction of which had not commenced as of [September 16, 2020]." A.70. The Project's current permitted route includes this region, and NECEC LLC began physical construction of the Project on January 18, 2021. A.114, ¶ 117. On its face, the CPCN violates this retroactive prohibition. *See also* 35-A M.R.S. § 3132(6) ("If the commission orders or allows the erection of the transmission line, the order is subject to all other provisions of law . . . .").

"jurisdiction, control and regulation" over public utilities and the NECEC. 35-A M.R.S. § 103. The PUC is statutorily *mandated* to "[e]nforce this [Title 35-A] and all other laws relating to public utilities." *Id.* § 115(1)(C).

Accordingly, the PUC must enforce Section 5 of the Initiative. The CPCN statute, 35-A M.R.S. § 3132, requires a petitioner to "submit a map" of the project with its application, which must "indicate the proposed corridor . . . of the transmission line." *Id.* § 3132(4)(B). The petition must also include a "justification for adoption of the route selected," *id.* § 3132(2-C)(B), to enable the PUC to make a determination on the public need for the transmission line, taking into account "scenic, historic and recreational values . . . [and] the proximity of the proposed transmission line to inhabited dwellings," *id.* § 3132(6). The PUC approved the Project's proposed corridor; now, the route authorized under section 3132 is statutorily prohibited. Accordingly, it is not merely a possibility that the PUC will vacate and reverse its CPCN decision; it is a certainty. *See* PUC Comm'rs Br. at 24 (stating that the Initiative "compel[s] the Commission to reverse a prior determination and to contradict its own record-supported findings that the applicant had met the statutory requirements").[14]

Because the Initiative amends Title 35-A and because the PUC reviewed and approved the Project route in granting the CPCN, NextEra's argument that enforcement of Section 5 falls to the DEP fails. NextEra Br. at 13-17. The DEP

[14] The fact that the PUC has not yet begun enforcement proceedings pending this action, which could moot the need for such proceedings, is entirely unsurprising and irrelevant to the separation of powers analysis.

enforces the provisions of Title 38, which is not amended by the Initiative. Because the DEP has no jurisdiction over CPCN decisions, *see* 35-A M.R.S. §§ 103, 3132, the DEP cannot usurp the PUC's mandate to enforce Title 35-A. Nor has the DEP purported to exercise such jurisdiction; its suspension order states that the Project's DEP permit is only suspended "unless and until [a] court grants [Appellants'] request for a preliminary injunction" or Appellants succeed on the merits of their challenge. *Cent. Me. Power Co. & NECEC Trans. LLC*, License Suspension Proceeding, Decision and Order 1-2 (Me. D.E.P. Nov. 23, 2021).[15] NextEra's argument is a transparent attempt to revise the plain language of the Initiative to avoid a fatal flaw.[16]

Sections 1 and 4 similarly interfere with final agency actions. Section 4 would allow the Legislature to invalidate the CPCN by disapproving construction of the Project, while Section 1 authorizes the Legislature to invalidate the BPL Lease. Both sections therefore impermissibly authorize the Legislature to "change the result" of final agency actions. *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117. Regardless of whether *prospective* legislative approval requirements are constitutional (and there are good

[15] NECEC LLC therefore did not need to appeal the order in order to preserve its previously-filed claims in this case. NRCM Br. at 48. It is entirely circular for Appellees to argue that the separation of powers challenge is moot based on a suspension order that automatically disappears if that challenge is successful.

[16] The history of Project opponents' efforts to kill the Project is telling. After unsuccessfully opposing the Project before regulatory agencies, Project opponents drafted an initiative that was so targeted at the CPCN that it did not even qualify as legislation. They tried to remedy that failure by drafting an initiative amending the CPCN criteria in Title 35-A, but, in so doing, failed to consider that *Grubb* forecloses the invalidation of final agency actions through retroactive laws of "general applicability." NECEC LLC Br. at 44-45. Accordingly, Project opponents now seek to re-write the Initiative by arguing that it must be enforced as part of the pending appeal of the DEP permit (or, even more remarkably, in *municipal* proceedings) and thus survives a separation of powers challenge. Project opponents cannot remedy their latest error through this revisionist reading.

arguments that they are not, *see* HQUS Br. at 18-36; Legislators Br. at 13-17), such requirements may not be applied retroactively to annul final agency actions.

Section 1, governing the BPL Lease, is equally unconstitutional. The BPL's approval of the Lease is final. 5 M.R.S. § 8002(4). The fact that the BPL Lease is being challenged in *Black v. Cutko* does not make the relevant action any less final; statutorily, judicial review can only be taken from a *final* agency action. *Id.* § 11001. It therefore does not change the separation of powers analysis. Neither *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, nor *MacImage of Me., LLC v. Androscoggin Cnty.*, 2012 ME 44, 40 A.3d 975, supports a contrary conclusion. In *Morrissette*, the retroactive standards adopted by the Legislature applied because the agency had reopened the proceeding. 2003 ME 138, ¶ 12, 837 A.2d 123. In *MacImage*, there was no final executive action at issue at all; the case instead involved retroactive application of a statute to a judicial proceeding that was ongoing (*i.e.*, not yet final) when the Legislature enacted new legislation affecting that case. 2012 ME 44, ¶¶ 14, 27-29, 40 A.3d 975. Neither case involved legislative reversal of final decisions of a co-equal branch.[17]

Grubb controls this case. 2003 ME 139, ¶ 11, 837 A.2d 117. It held that general legislation, as retroactively applied to a final workers' compensation award, violated separation of powers. *Id.* The same conclusion holds here. Subject to constitutional

[17] Further, Appellees cite nothing to support their argument that BPL's final decision is entitled to less protection from legislative interference because the BPL did not act in a "quasi-judicial" capacity. *See* State Br. at 36. Such a proposition flips the formal versus functional analysis on its head by wrongly focusing on the extent to which legislative interference would disrupt executive functions. *See Hunter*, 447 A.2d at 499.

restraints, the Legislature may enact prospective general legislation for the benefit of the public. The Constitution forbids the Legislature, however, from reversing final executive actions through targeted "legislation," *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882, *or* through generally applicable laws, *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117.

B. As retroactively applied to the NECEC, the Initiative unconstitutionally reverses a final judicial decision.

In *NextEra Energy Resources, LLC v. Maine Public Utilities Commission*, this Court affirmed the PUC's decision that the NECEC met all of "the applicable statutory standards for a CPCN." 2020 ME 34, ¶ 1, 227 A.3d 1117. *NextEra* expressly held that the PUC "reasonably interpreted and applied the relevant statutory mandates" in granting the CPCN. *Id.* ¶ 43. Retroactive application of Sections 4 and 5 of the Initiative would render that holding void, contrary to the Constitution. *L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960 (stating "a final judgment in a case is a decisive declaration of the rights between the parties" that "the Legislature cannot disturb").

Contrary to State Appellees' arguments, the Legislature may not constitutionally invalidate final judgments so long as the enacted legislation is "policy-based." *See* State Br. at 38 (citing *MacImage*). Recognizing a "policy-based" trump card would give the Legislature (or the people exercising the legislative power) unchecked power to overturn final judicial decisions. Because it involved a *pending* judicial proceeding, *MacImage* does not overrule the Court's clear statements regarding the limitation of legislative power to reverse final judicial decisions. 2012 ME 44, ¶ 27, 40 A.3d 975; *see*

L.V.I. Grp., 1997 ME 25, ¶ 11 n.4, 690 A.2d 960; *Lewis*, 3 Me. at 332-33.

Nor can the Initiative withstand challenge based on *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 429 (1855) ("*Wheeling Bridge*"); that case did not turn on a public / private distinction, and applies only to prior injunctive orders having prospective effect. In *Wheeling Bridge*, the Supreme Court held that Congress could legalize a bridge over the Ohio River, despite the Court's earlier injunctive decree that the bridge be raised or removed. *Id.* at 430-32. The legality of Congress' action did not turn on the nature of the right at issue. Although the case dealt with a "public right common to all," *id.* at 431, the decision turned on the *nature of the relief* awarded. The Court stressed that because the injunctive remedy was "a continuing decree," it could be modified by subsequent legislation. *Id.*[18] Over a century later, the Court confirmed that its holding from *Wheeling Bridge* was that Congress may "alter[] the *prospective effect of injunctions*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (emphasis added).[19]

Thus, "the character of the right involved has nothing to do with the separation-of-powers issue . . . . [*Wheeling Bridge*] stands for the proposition that when Congress alters the substantive law on which an injunction is based, the injunction may be enforced only insofar as it conforms to the changed law." *Gavin v. Branstad*, 122 F.3d

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[18] This Court did not adopt the public/private distinction in *Frost v. Washington C.R. Co.*, 51 A. 806, 809 (Me. 1901). NextEra Br. at 28. *Frost* involved an unsuccessful claim for public nuisance; it did not involve legislative interference with a prior judgment and thus did not raise any separation of powers issue.

[19] The case law uniformly recognizes *Wheeling Bridge* is limited to injunctions. *Benjamin v. Jacobson*, 172 F.3d 144, 160–62 (2d Cir. 1999); *Mount Graham Coal. v. Thomas*, 89 F.3d 554, 556-57 (9th Cir. 1996); *Georgia Assoc. of Retarded Citizens v. McDaniel*, 855 F.2d 805, 812 (11th Cir. 1988); *McGrath v. Potash*, 199 F.2d 166, 167-68 (D.C. Cir. 1952); *W. Union Tel. Co. v. Int'l Bhd. of Elec. Workers*, 133 F.2d 955, 958 (7th Cir. 1943); *Hodges v. Snyder*, 261 U.S. 600, 602 (1923); *The Clinton Bridge*, 77 U.S. 454, 463 (1870).

1081, 1086, 88-89 (8th Cir. 1997); *see Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1166 (10th Cir. 2004) (applying new law to prior settlement agreement entered by the court that enjoined logging). The legislative authority to adopt laws affecting the prospective application of injunctions is akin to the legislative authority to change the substantive law applicable to pending proceedings where neither branch of government has taken any final action. *See Morrissette*, 2003 ME 138, 837 A.2d 123; *MacImage*, 2012 ME 44, 40 A.3d 975. In neither situation does the law disrupt a truly final decision.

Wheeling Bridge and its progeny do not apply here. The remedy afforded in *NextEra* did not involve prospective injunctive relief, and there is no pending proceeding regarding the CPCN. Rather, *NextEra* involved an action at law, wherein this Court affirmed the issuance of a CPCN. Accordingly, that final judicial decision cannot be disturbed through legislation. *Plaut*, 514 U.S. at 219-27; *Lewis*, 3 Me. at 332.

IV. This Court should not allow the Initiative to void retroactively NECEC LLC's contract with the State in violation of the Contracts Clause.

The BPL Lease is a valid contract that the Initiative substantially impairs without reasonable justification. Unless this Court affirms the decision in *Black v. Cutko*, a result that both the BPL and Appellants oppose, *see* State Br. at 43, the BPL lease is valid and in effect because execution of the judgment has been stayed. *See* M.R. Civ. P. 62(e).[20]

[20] NRCM's reliance on *Bartlett v. Pullen*, 586 A.2d 1263 (Me. 1991), for the proposition that *res judicata* bars Appellants from arguing they have a valid lease is wholly misplaced. NRCM Br. at 23. In *Bartlett*, the Court held that the defendants waived an affirmative defense based on the plaintiff's failure to raise a compulsory counterclaim in an earlier suit. In so doing, the Court observed that, "under principles usually analogized to *res judicata*, a [party] who fails to interpose a compulsory counterclaim . . . is precluded from later maintaining another action on the claim after rendition of judgment." 586 A.2d at 1265. Appellants neither waived anything related to the validity of the lease in *Black* nor are they now trying collaterally to litigate any such issues here.

Contrary to Appellees' arguments, the Initiative substantially impairs the Lease by abrogating it, contrary to its terms. The lease does not contemplate the Initiative merely because NECEC LLC agreed to comply with state laws "hereinafter enacted" related to its "use" of the leased land. A.142, ¶ 6(m). Paragraph 6(m) contemplates prospective legislation governing operation of the NECEC; it certainly does not contemplate a retroactive statute authorizing unilateral termination of the lease.[21] An interpretation that NECEC LLC agreed to incorporate all retroactive, targeted laws intended to kill the Project is an untenably broad interpretation of the lease's terms.

No deference is owed to the State's determination that the Initiative is "reasonable" to serve an important state purpose because the "State . . . is a contracting party." *Kittery Retail*, 2004 ME 65, ¶ 38, 856 A.2d 1183. This Court has never limited this rule to apply only when the State's *financial* self-interest is at stake. Nor should there be more lenience for initiatives, which are unconstrained by any veto power. "Voters may no more violate the Constitution . . . than a legislative body may do." *Citizens Against Rent Control/Coal. For Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981). Finally, because the purported goal of requiring legislative approval for public land leases existed when the parties entered into the BPL Lease, the impairment caused by

[21] In this respect, the cases cited by Appellees are distinguishable. *See KHK Assocs. v. Dep't of Hum. Servs.*, 632 A.2d 138, 141 (Me. 1993) (where state contract stated that it was "subject to available budgetary appropriations," court held that there "can be no violation of the contract clause . . . when, as here, . . . the legislature decides not to appropriate funds for the lease"); *SC Testing Tech., Inc. v. Dep't of Env't Prot.*, 688 A.2d 421, 423 (Me. 1996) (state contract incorporated a provision stating "[i]n the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the Contractor").

the Initiative is *per se* unreasonable regardless of the level of deference afforded. *See Univ. of Haw. Pro. Assemb. v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999).

V. The Court should correct the Business Court's legal errors on the remaining preliminary injunction factors.

The Business Court also committed legal errors in assessing the other preliminary injunction factors. This Court has never, and should not now, find that only certain constitutional violations create irreparable harm. NECEC LLC Br. at 51. Even if it did, due process violations, including deprivation of property rights, certainly qualify given the importance of these rights. *Id.* Further, State Appellees' claim that NECEC LLC faces no imminent threat of civil or criminal liability is unsupported. If NECEC LLC continued construction, it would face fines for violating state law. 35-A M.R.S. § 1508-A. Unless Appellees are prepared to concede that NECEC LLC can construct the Project despite the Initiative, they cannot credibly argue otherwise. Given NECEC LLC's strong showing on the merits, it has satisfied all remaining preliminary injunction factors. *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 743 (1st Cir. 1996).

CONCLUSION

Project opponents have repeatedly tried and failed to kill the NECEC, including through baseless regulatory opposition and an unconstitutional initiative. This Initiative is likewise fundamentally flawed. It cannot be applied retroactively to the NECEC and thereby deprive the people of Maine of the significant economic, energy reliability, and climate benefits the Project will provide.

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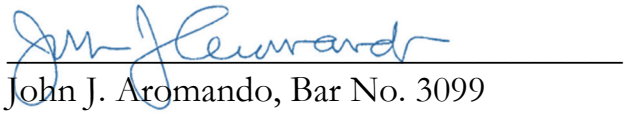

John J. Aromando, Bar No. 3099
Jared S. des Rosiers, Bar No. 7548
Joshua D. Dunlap, Bar No. 4477
Sara A. Murphy, Bar No. 5423
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jaromando@pierceatwood.com
jdesrosiers@pierceatwood.com
jdunlap@pierceatwood.com
smurphy@pierceatwood.com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

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

CERTIFICATE OF SERVICE

I, John J. Aromando, Esq., hereby certify that pursuant to agreement of the parties, a copy of this Reply Brief of Appellants NECEC Transmission LLC and Avangrid Networks, Inc. was served via email only upon counsel at the address set forth below on April 20, 2022:

Jonathan R. Bolton, Esq. — Jonathan.bolton@maine.gov
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Philip M. Coffin III, Esq. — pcoffin@lambertcoffin.com
Jeffrey D. Russell, Esq. — jrussell@lambertcoffin.com
Cyrus E. Cheslak, Esq. — ccheslak@lambertcoffin.com
Lambert Coffin
PO Box 15215
Portland, Maine 04101

James Kilbreth, Esq. — jkilbreth@dwmlaw.com
David M. Kallin, Esq. — dkallin@dwmlaw.com
Jeana M. McCormick, Esq. — jmccormick@dwmlaw.com
Sara P. Cressey, Esq. — scressey@dwmlaw.com
Oliver Mac Walton, Esq. — owalton@dwmlaw.com
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

Timothy Woodcock, Esq. — twoodcock@eatonpeabody.com
P. Andrew Hamilton, Esq. — ahamilton@eatonpeabody.com
Jonathan A. Pottle, Esq. — jpottle@eatonpeabody.com
Casey M. Olesen, Esq. — colesen@eatonpeabody.com
Eaton Peabody
80 Exchange Street
P.O. Box 1210
Bangor, ME 04402

Sigmund D. Schutz, Esq. sschutz@preti.com
Anthony W. Buxton, Esq. abuxton@preti.com
Robert B. Borowski, Esq. rborowski@preti.com
Jonathan G. Mermin, Esq. jmermin@preti.com
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546
Portland, ME 04112

Benjamin K. Grant, Esq. bgrant@mcteaguehigbee.com
McTeague Higbee
P .0. Box 5000
Topsham, ME 04086

Robert Cheverie, Esq. rcheverie@cheverielaw.com
Robert M. Cheverie & Associates, P.C.
333 East River Drive, Suite 101
East Hartford, CT 06108

Gerald F. Petruccelli, Esq. gpetruccelli@pmhlegal.com
Petruccelli Martin & Haddow, LLP
P.O. Box 17555
Portland Maine 04112

Christopher Roach, Esq. croach@rrsblaw.com
Roach Ruprecht Sanchez & Bischoff, P.C.
527 Ocean Avenue, Suite 1
Portland, Maine 04103

Dmitry Bam dmitry.bam@maine.edu
Professor of Law
University of Maine School of Law
246 Deering Ave.
Portland, Maine 04102

Orlando E. Delogu orlandodelogu@maine.rr.com
Emeritus Professor of Law
22 Carroll Street, Unit #8
Portland, ME 04102

David Gardiner
Senior Advisor
3100 Clarendon Blvd., Suite 800
Arlington, VA 22201
rgramlich@gridstrategiesllc.com

Richard Barringer, Ph.D.
22 Hancock St. Unit A-208
Portland ME 04101
richard.barringer@maine.edu

Timothy A. Pease, Esq.
Jonathan P. Hunter, Esq.
Rudman Winchell
84 Harlow Street, P.O. Box 1401
Bangor, Maine 04402-1401
tpease@rudmanwinchell.com
jhunter@rudmanwinchell.com

Brett D. Baber, Esq.
Lanham Blackwell & Baber, PA
133 Broadway
Bangor, ME 04401
bbaber@lanhamblackwell.com

Stacy O. Stitham, Esq.
Eamonn R.C. Hart, Esq.
Brann & Isaacson
184 Main St., Box 3070
Lewiston, Maine 04243-3070
sstitham@brannlaw.com
ehart@brannlaw.com

Timothy Norton, Esq.
Shea H. Watson, Esq.
Kelly, Remmel & Zimmerman
53 Exchange Street
Portland, ME 04101
tnorton@krz.com
swatson@krz.com

David S. Rosenzweig, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, Massachusetts 02110
drosen@keeganwerlin.com

James L. Costello, Esq. jcostello@curtisthaxter.com
Jason J. Theobald, Esq. jtheobald@curtisthaxter.com
Curtis Thaxter LLC
One Canal Plaza / P.O. Box 7320
Portland, Maine 04112

Elizabeth A. Boepple, Esq. eboepple@mpmlaw.com
Sean R. Turley, Esq. sturley@mpmlaw.com
Murray Plumb & Murray
75 Pearl Street
Portland, ME 04101

Paul W. Hughes, Esq. phughes@mwe.com
Andrew A. Lyons-Berg, Esq. alyonsberg@mwe.com
McDermott Will & Emery LLP
500 North Capitol Street, NW
Washington, D.C. 20001

Dated: April 20, 2022

John J. Aromando, Bar No. 3099
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
jaromando@pierceatwood.com
(207) 791-1100

Attorney for Appellants NECEC Transmission LLC and Avangrid Networks, Inc.