

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Cum-20-181

AVANGRID NETWORKS, INC., et al.,

Plaintiffs-Appellants

v.

SECRETARY OF STATE, et al.,

Defendants-Appellees

On Appeal from the Cumberland County Superior Court
Docket No. CV-2020-206

**BRIEF OF FORMER COMMISSIONERS
OF THE MAINE PUBLIC UTILITIES COMMISSION
AS *AMICI CURIAE***

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INTRODUCTORY STATEMENT OF AMICI CURIAE

Amici curiae are three former Commissioners of the Maine Public Utilities Commission (PUC or Commission) with approximately 35 years of combined experience adjudicating cases coming before the Commission. Thomas L. Welch served 15 years as a Commissioner on the PUC and served as its chair from 1993-2005 and again from 2011 to 2014. William M. Nugent served 12 years as a Commissioner on the PUC, during which time he also served an extended term as President of the National Association of Regulatory Utility Commissioners. Mark A. Vannoy served 7 years as a Commissioner and served as its chair from 2014-2019. Mr. Vannoy was sitting as chair throughout the 2017-2019 PUC proceeding that underlies the citizen's initiative at issue here and thus directly participated in the adjudicative process that resulted in the order that proponents of the initiative seek to amend.¹

Amici have reviewed the briefs filed by the parties in the Superior Court action and are familiar with the issues that are currently before this Court. As

¹ In addition to their experience as Commissioners on the Maine PUC, *Amici* routinely lend their expertise to regional, national, and international organizations that require assistance in matters of public utility regulation. For example, Mr. Nugent, while a Maine commissioner and thereafter, has *pro bono* assisted the U.S. Agency for International Development (USAID) in instructing regulators in Egypt and several eastern European states. He further served all New England state commissioners as executive director for the New England Conference of Public Utility Commissioners. Mr. Vannoy has been called on to present to regulators in Bosnia, Herzegovina, and Moldova on behalf of the USAID. Likewise, through the USAID and the National Association of Regulatory Utility Commissioners, Mr. Welch has assisted regulatory commissions throughout the world, including Albania, Bosnia, Moldova and other eastern European states, Barbados, Rwanda, and southern Africa.

former PUC Commissioners, they are well suited and feel duty-bound to weigh in and offer their unique perspective. They are not opining on the specific project or decision before the Commission. Their purpose in submitting this amicus brief is to preserve and protect the integrity of the institution and the Commission's deliberative adjudication process. This Court has already affirmed the Commission's order granting a certificate of public convenience and necessity (CPCN) to the project at issue. The former Commissioners, as *amici curiae*, are concerned that the citizens' initiative (the "Initiative"), if placed on the ballot in November, would seriously impinge upon the Commission's independence and its impartial adjudicatory process and could radically alter and degrade the Commission's institutional role.

Indeed, *Amici* believe that the Initiative, if allowed to become effective, would be inconsistent with the ethical obligations sworn to by PUC Commissioners when they take their oath as Commissioners. The Orwellian implications of the Legislature, or the electors in its stead, dictating to the PUC Commissioners, as adjudicators, findings of fact and conclusions of law that are contrary to—and in fact the exact opposite of—their own findings and resulting legal conclusions that were determined based upon the evidentiary record in a particular case, are unprecedented in the former Commissioners' experience and in Maine jurisprudence. It is imperative that the Court preserve and maintain

the integrity of the Commission's adjudicatory rule, the judicial appeal process, and the settled finality of orders. *Amici* also have an interest in ensuring that the Court has a full understanding of the broader Maine economic framework in which the Commission operates—the important role that repose in PUC decisions and the resulting predictability play with respect to investments in public utilities benefitting Maine—and the effect on settled expectations that are implicated by the people's Initiative.

The former Commissioners thank the Court for allowing them to participate as *amici curiae* and will focus this brief on presenting their views on the areas that they believe might be most helpful to the Court: (1) a brief history of the PUC; (2) the PUC's adjudicatory function; (3) the potential impact the initiative could have on the integrity of the PUC as an institution; and (4) further policy concerns that merit consideration.

DISCUSSION

I. The Establishment and Role of the PUC

The PUC has played a vital role in regulating public utilities for more than a century. During that time, it has adjudicated countless cases on the merits. To the knowledge of *Amici*, never once has the Legislature interfered in a particular case and dictated the result after a final decision, nor would such an act be fair to the litigants or proper under Commission rules of adjudicatory procedure.

The Maine Legislature created the Commission in 1913 through “An Act to Create a Public Utilities Commission, Prescribe its Powers and Duties, and Provide for the Regulation and Control of Public Utilities.” P.L. 1913, ch. 129 (the “Act”). Since then, the State has “require[d] every public utility to ‘furnish safe, reasonable and adequate facilities,’ and its rates and charges to be reasonable and just, based upon a fair return on the fair value of the property devoted to the public use.” *In re Searsport Water Co.*, 118 Me. 382, 108 A. 452, 455 (1919) (quoting R.S. ch. 55, § 16 (1916)).

In passing the Act, “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). The PUC thus has both “the power and . . . duty to enforce the provisions of this act and all other laws relating to public utilities.” P.L. 1913, ch. 129, § 8. By legislative design, the purpose of the PUC was “to place the entire regulation and control of all public service corporations . . . in the hands of a board or commission which can investigate conditions, hear parties, and grant relief much more expeditiously and fairly than the Legislature itself.” *In re Searsport Water Co.*, 108 A. at 457.

The Commission was established to consist of commissioners who were “experts” and who would “be on the same footing with the judges of the

Supreme Court.” Legis. Rec. 885 (1913).² The PUC would make “final decision[s]” on questions of fact, while questions of law were to “go up to the Supreme Court in the same manner in which questions of law go from other courts.” Legis. Rec. 907. The Act “in effect creat[ed] another great court.” Legis. Rec. 1038.

Indeed, the “whole intention” underlying the Act was “to keep this thing out of politics. . . . arranging a tribunal which is proposed to be in a way made up of experts along certain lines.” Legis. Rec. 1039-40. To that end, the Act was “a broad bill, giving discretionary power to the commission” and paying the Commissioners “to have some discretion” and so “they should have some rights and be able to use their judgment as to whether a public utility is doing its duty by the people or not.” Legis. Rec. 903.

As this Court noted more than a century ago, the Commission that was established is “a body specially clothed with all the authority of the state for the

² Since its inception, the Commission has been composed of three members, nominated by the Governor and confirmed by the Legislature (originally nominated by the Governor and approved by the Council), and, according to the legislative history:

the three commissioners to be appointed by the Governor and Council are to be on the same footing with the judges of the Supreme Court, by their standing and by their salaries, experts to do the business in a dignified way, and we wish to put into their hands and keeping the public utilities of the State for the benefit of the people, and we believe they should have power, power enough to regulate utilities and conduct them for the benefit of the whole people of the State.

Legis. Rec. 885.

performance of an important governmental function” *In re Searsport Water Co.*, 118 Me. 382, 108 A. at 459. That important governmental function continues today, as the Commission “regulates electric, natural gas, telecommunications and water utilities to ensure that Maine consumers enjoy safe, adequate and reliable services at rates that are just and reasonable for both consumers and utilities.” “About MPUC,” Office of the Me. Pub. Utils. Comm’n website, <https://www.maine.gov/mpuc/about>. These overarching principles—ensuring that Mainers have safe, adequate and reliable services at just and reasonable rates—are what guide the PUC Commissioners in making their decisions.

These principles are enunciated in and furthered by the current Act in Title 35-A, as amended since 1913, which delegates broad adjudicatory powers to the Commissioners, including the authority to make findings of fact, recognizing their specialized knowledge, and their control and regulation of all public utilities. *See* 35-A M.R.S. § 103(2) (“All public utilities and certain other entities as specified in this Title are subject to the jurisdiction, control and regulation of the commission and to applicable provisions of this Title.”); *id.* § 104 (“The provisions of this Title shall be interpreted and construed liberally to accomplish the purpose of this Title. The commission has all implied and inherent powers

under this Title, which are necessary and proper to execute faithfully its express powers and functions specified in this Title.”).

As former Commissioners, *Amici* can attest to the diligent efforts the Commission undertakes to meet these obligations to the public, whether by the Commissioners, the Commission staff of experts, or those parties who appear before the Commission. Of critical importance is the adjudicatory role of the Commission in serving the public. The Initiative affects that crucial aspect of the Commission’s obligations in regulating public utilities—the function of being an impartial adjudicator of a case before the Commission and of settling the rights and obligations of the parties, especially those of the utilities who must make investments and incur expenses to ensure that they provide safe, adequate and reliable service. It is this role, the adjudicatory role of the Commission, that *Amici* ask the Court to consider closely.

II. The Commissioners’ Role as Adjudicators

A. General Procedure

Like a court, the Commission adjudicates cases and it may take testimony, subpoena witnesses and records, issue decisions or orders, hold public and evidentiary hearings, and encourage participation by all affected parties, including utility customers. 35-A M.R.S. §§ 1301-1318. The entire statutory and regulatory scheme is designed to (a) ensure that decisions of the Commissioners

in adjudicating a case before the Commission are founded entirely upon the evidence presented in a given case, (b) follow existing law, and (c) result in decisions devoid of outside political influences. To further that end, the Commission staff comprises subject matter experts, including accountants, engineers, lawyers, financial analysts, consumer specialists, and administrative and support staff.

Having created the Commission, the Legislature can, of course, limit or modify the Commission's role and can set standards by legislative directive for the Commission to follow. The Legislature likewise must approve substantive rules promulgated by the Commission. But once such standards and rules are adopted and approved, the Commission's obligation in any adjudicatory proceeding is to apply those rules and standards to the facts in a particular case and render a decision on the merits; the Legislature has no role to play in deciding the outcome of a given case before the Commission. *See In re Searsport Water Co.*, 118, Me. 382, 108 A. at 457 (noting the broad language vesting such authority in the PUC "unless limited in some manner by the terms of the act, or the state has previously suspended its regulatory powers"). This distinction is critical to understanding *Amici's* concerns about the current Initiative.³

³ A closer look at the substantive issue at the heart of the underlying case helps clarify the longstanding distinction between the adjudicatory role of the Commission and the standard-setting role of the

The impartial adjudicatory process followed by the Commission is consistent with court actions in that any PUC proceeding must adhere to Commission procedural rules, similar to the Maine Rules of Civil Procedure, including the taking of testimony and submission of evidence in accordance with the Maine Rules of Evidence. 65-407 C.M.R. ch. 110, §§ 8-10 (2012). Like court rules, there are provisions governing the procedure in any case before the PUC, including party participation and intervention, the Commission's subpoena authority, stipulations and dismissals, prehearing practice, protective orders, discovery (which is conducted in accordance with the Maine Rules of Civil Procedure), and post-hearing practice, including the filing of briefs and oral argument. *Id.* §§ 8-9, 10(f), 11. The Commission rules, like court rules, prohibit outside interference with Commission decisions, restrict *ex parte*

Legislature. Specifically, the Legislature statutorily sets out the standards by which the Commission is to approve a request to build a transmission line and is to issue a certificate of public convenience and necessity ("CPCN"). The Legislature directs the Commission to make specific findings of fact in any adjudicatory order approving or denying the requested CPCN. 35-A M.R.S. § 3132 ("a person may not construct any transmission line . . . unless the commission has issued a certificate of public convenience and necessity approving construction"); *id.* § 3132(6) ("In its order, the commission shall make specific findings with regard to the public need for the proposed transmission line."). The process to be followed in requesting and approving a transmission line, including the evidence that must be presented by the petitioner, is set forth in detail in the Commission's rules, which rules were approved by the Legislature as substantive rules. 65-407 C.M.R. ch. 330 (2012) (*see also* substantive rulemaking procedures at 5 M.R.S. §§ 8051-8064). The Commission's role in adjudicating whether the Legislature's standards have been met in a particular case, however, falls within the agency's adjudicatory function and traditionally has been fulfilled outside any influence or further input from the Legislature. The Legislature sets the standards, but then it falls solely to the Commissioners of the PUC to apply those standards to the facts in a given case.

communications, *id.* § 8(G), require testimony to be recorded, and require a record of all evidence presented, *id.* § 8(H)(1) and (2).

Importantly, any decision of the Commission must rest solely upon the evidentiary record in the proceeding. *Id.* §§ 8(H), 11(C) (“All material, including records, reports and documents in the possession of the Commission, that it desires to use in making a decision, shall be offered and made a part of the record as evidence. Factual information shall be considered in rendering a decision only if such information is in the record as evidence.”). Once the record is complete, Commissioners are obligated to make their decisions based upon the record before them, and nothing else:

Every Commission decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be sent to each party to the proceeding or its attorney or representative of record. Written notice of the party’s rights to obtain review of the decision within the Commission or to appeal to the Supreme Judicial Court, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right to review or appeal, shall be given to each party with the decision.

Id. § 11(C).

Thus, like a court, any adjudicatory proceeding requires adherence to Commission rules governing the taking of testimony, submission of evidence, the participation of parties interested or affected by the outcome, including

members of the Legislature and the public, evidentiary hearings and a public deliberation by the Commissioners regarding their decisions. The Commission adjudicates facts and reaches conclusions of law based only upon the record before the Commission.⁴

Once adjudicated, a party who disagrees with the Commission’s decision has the option to request that the Commission rescind or reconsider its order pursuant to 35-A M.R.S. § 1321 (and upon such request the Commission may take further evidence and provide an opportunity of the parties to be heard) or appeal the Commission decision to the Law Court pursuant to 35-A M.R.S. § 1320.⁵

For any decision of the Commission to be upheld on appeal, this Court must find that the Commission’s decision adhered to the law, and that there

⁴ *Amici* are compelled to address the claim made by Mainers for Local Power before the Superior Court below that recently enacted legislation, “Resolve, To Require the Approval by the Public Utilities Commission of a Proposal for a Long-term Contract for Deep-water Offshore Wind Energy would if lawful would have an effect contrary to the Commission’s ruling in *Long Term Contracting for Offshore Wind Energy and Tidal Projects*, Docket No. 2010-00235, Order (Me. P.U.C. Aug. 6, 2018).” Rather than standing for the proposition that the Legislature can intervene in an adjudicatory process and require Commissioners to make findings of fact that are contrary to their findings based upon the record, the resolve actually supports the comments that *Amici* are making here. When the Legislature wishes for the Commission to apply a different standard, it does so prospectively. With respect to the resolve cited by Mainers for Local Power, the PUC had not yet acted and so—unlike in the instant matter—was not being compelled to contradict a finding it had already made. Further, the Commission in that instance reopened its own proceeding to make findings following the Legislature’s directive to apply a different standard; the Initiative proposed now contains no such allowance.

⁵ There is a third option available to public utilities—to apply to the Legislature for redress pursuant to 35-A M.R.S. § 1323. Such application, which is only available after exhausting all rights before the Commission, might result in the Legislature enacting new standards going forward that would apply to future CPCN applications.

existed substantial evidence in the record to support the Commission's findings of fact and conclusions of law.

The fact that the PUC has the power to reopen the matter in limited circumstances does not mean that the PUC's issuance of the CPCN is not a "final order." See 35-A M.R.S. § 1320(1) (only an appeal from a "final decision" may be taken to this Court); *Conservation Law Found. v. Pub. Utils. Comm'n*, 2018 ME 120, ¶ 9, 192 A.3d 596 (equating final decisions with orders of the Superior Court, which would become final after being affirmed on appeal or if no appeal was taken); *Quirion v. Pub. Utils. Comm'n*, 684 A.2d 1294, 1296 (Me. 1996) (holding that PUC decisions are final and therefore may not be collaterally attacked). Moreover, this Court noted in *Mechanic Falls Water Co.*, 381 A. 2d at 1106, the reopening of a prior order is a matter which rests within the sound discretion of the Commission. In *Lincolnton Networks, Inc., et al.*, Docket Nos. 2012-00218, 2012-00219, 2012-00220, and 2012-00221, Order Denying Motion to Amend at 4 (Me. P.U.C. Jul. 26, 2013), for example, the Commission, recognizing that such discretion must be carefully exercised, denied a motion to amend an order of the Commission while the case was on appeal to this Court, noting that, while it had the authority to amend its original order under Section 1321, it was not appropriate to amend the order in that particular instance. In making this decision, the Commission recognized that, if it were to amend an

order in such a substantive way that it would “chang[e] the grounds for appeal,” it could result in an endless loop of appeals that may function to avoid any meaningful opportunity for judicial review of Commission action. *Id.*

As explained below, the proposed Initiative would effectively dismantle this adjudicatory process, followed in countless cases before the Commission, with respect to a single case, Docket No. 2017-00232.

B. The NECEC Transmission Project Case

Without commenting on the decision itself, based on *Amici*'s review of the Commission's order granting the CPCN for the NECEC transmission project, it is evident that the PUC followed the above-described adjudicatory process in the case giving rise to the Initiative. *See* Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, Docket No. 2017-00232 (Me. P.U.C. May 3, 2019) (the “Order”). Indeed, Mr. Vannoy, one of the *amici curiae*, directly participated in the process as the PUC's chair so he has firsthand knowledge of the process that was followed.

As stated in the Order, the Commission conducted its adjudicatory proceedings in accordance with its rules governing the conduct of adjudication explained above and reached a decision based upon the evidentiary record before it. The record, which spanned over eighteen months, contained a “substantial” volume of data requests and testimony filed by more than twenty

intervenors, technical conferences and expert testimony, a 38-page stipulation agreed to by eleven parties, six evidentiary hearings, three public witness hearings, and over 1,350 public comments. The PUC hearing examiners issued a 162-page report and recommendations, to which a number of parties filed exceptions and comments. After deliberation, a month later, the PUC Commissioners issued a 100-page Order granting the requested CPCN based on the record before the Commission.

The Commission's Order was then appealed in accordance with 35-A M.R.S. § 1320 and, on appeal, this Court reviewed the findings of fact and conclusions of law in the same manner it has done on countless occasions involving appeals from the Commission by ruling on whether the Commission's determination and findings of fact were supported by that record.

To make this point clear, and to put these comments in the context giving rise to the Initiative, it is instructive to examine this Court's decision on the appeal in *NextEra Energy Resources LLC v. Maine Public Utilities Commission et al.*, 2020 ME 34, 227 A.3d 1117. In its appeal from the PUC Order granting the CPCN, NextEra Energy Resources LLC, a participant in those proceedings, challenged the sufficiency of the factual findings and conclusions of law determined by the Commission in rendering its decision that the applicant for the CPCN had met its burden and that a public need existed as required under

statute. 35-A M.R.S. § 3132. This Court reviewed the record, the Commission’s legal conclusions and the factual findings supporting its conclusions and finding of a public need, to wit:

We now consider whether the record supports the Commission’s finding of a public need. Section 3132(6) requires the Commission to make specific findings with regard to the public need for a proposed transmission line. “In determining public need, the Commission shall, at a minimum, take into account economics, reliability, public health and safety, scenic, historic and recreational values, state renewable energy generation goals, the proximity of the proposed transmission line to inhabited dwellings and alternatives to the construction of the transmission line” 35-A M.R.S. § 3132(6).

NextEra, 2020 ME 34, ¶ 28, 227 A.3d 1117.

The next nine pages of the Court’s decision examine the Commission’s application of the criteria imposed by Section 3132(6) to the facts in the record, after which the Court concluded as follows:

The Commission followed the proper procedure and there is sufficient evidence in the record to support the findings it made. In short, the Commission 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 and in its decision to approve the stipulation. *See* 35-A M.R.S. § 3132.

NextEra, 2020 ME 34, ¶ 43, 227 A.3d 1117. The foregoing decision brings clarity to the adjudicatory process the Commission and the Court follow under existing law. As former Commissioners charged with adjudicating cases and enforcing its orders under existing statute and Commission regulations, *Amici* would have

considered the Order final upon this Court’s decision upholding the factual findings and conclusion of the Commission that a public need existed.

III. Concerns Raised by the Initiative

Given the above context, *Amici* find the Initiative concerning. It would require the Commission to ignore its own findings of fact in the case—upheld as supported by sufficient evidence in the record by this Court—and substitute a different set of findings not found in or supported by the record, but rather dictated by a political initiative that has been proposed to appear on the ballot in November. The full text of the proposed resolve states:

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.

Resolve, To Reject the New England Clean Energy Connect Transmission Project, Me. Secretary of State website/Corps., Elections &

Comm'ns/Elections & Voting/Citizen Initiatives & Peoples Veto (last visited July 13, 2020) (emphasis added).⁶

This Initiative directs the PUC to take the following actions:

- To amend its “Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation,” entered on May 3, 2019 for the NECEC transmission project;
- To conclude that the PUC now “find[s] 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”; and
- To deny the request for a certificate of public convenience and necessity for the NECEC transmission project.

Id. Complying with this mandate would force the current PUC Commissioners, including two who participated in the Order at issue, to contradict the prior findings of the Commission itself. In the opinion of *Amici*, such a directive raises serious concerns and might irreparably damage the integrity of the PUC as an adjudicatory body for several reasons.

⁶ Contrary to the assertions made by Mainers for Local Power before the Superior Court, the Initiative goes beyond saying that the NECEC transmission project “is not in the public interest.” See MLP Super. Ct. Mem. in Opp’n to Pl.’s Mot. for Preliminary Injunction and Judgment and in Support of Intervenor’s Cross-Mot. to Dismiss, Docket No. 20-206, at 13 (“A legislative decision that the NECEC is not in the ‘public interest’ would not conflict with the judicial judgment in *NextEra*.”). It also goes further than simply revoking the CPCN. Instead, the Initiative states that the Commission must issue an order finding that the NECEC transmission project is not in the public interest. It is the opinion of *Amici* that a legislative act cannot and should not require the PUC, or any other tribunal, court or other entity acting in an adjudicatory capacity, to amend and issue an order that is contrary to the PUC’s true findings and conclusions in a specific matter.

First, having taken an oath to follow the law and having followed the law as they are sworn to do, the Commissioners would now be required to make contrary findings and reach a different conclusion on exactly the same record if the Initiative were to take effect. This mandate puts the Commission and the current Commissioners in an absurd and self-contradictory position. The Initiative does not require—or even allow—the re-opening of the record for new facts based on a change in circumstances or reexamination under a new standard (both of which themselves could be problematic and poor policy⁷); it instead directs the PUC Commissioners to sign their names to a specific decision which the Commission, including two of its current members, has already concluded would be contrary to the law they have sworn to uphold.

In its 100-page Order, the PUC made a specific finding that granting the CPCN was “in the public interest.” The Commission interpreted the non-legislatively-defined “public need” standard, as it had the right and expertise to do, and had that interpretation upheld by this Court. *NextEra*, 2020 ME 34, ¶ 26, 227 A.3d 1117. The Initiative, if enacted, would require the PUC—without any new evidence, change in circumstances (other than the Initiative itself), or additional legislative clarification of the meaning of “public need”—to issue an

⁷ See, e.g., *Lewis v. Webb*, 3 Me. 326 (1825) (holding that a legislative resolve directing the judiciary to reopen and hear a closed case violated separation of powers principles and thus was unconstitutional).

“amended” order finding that granting a CPCN would not be in “the public interest.” Moreover, the Initiative would require Commissioners to make factual findings—not solely based on the record as is required but—directly contrary to the record. The Commissioners, who are appointed to serve as experts in their tribunal, would be forced to ignore their own judgment and reach a different conclusion. In effect, after having concluded that $2+2=4$, they would now be ordered to conclude, despite facts to the contrary and their own judgment, that $2+2=9$ (or some other equally incorrect and unsupported number). This is antithetical to the oath that PUC Commissioners take when they commence Commission service.⁸

Second, the Initiative would directly and substantively interfere with the deliberative process by permitting the Legislature to dictate a particular result in a single case, even after that case has already been decided by the Commissioners, appealed, and upheld by this Court. Allowing legislation to

⁸ The abhorrence of this idea was well illustrated in the United States Congressional hearings on the nomination of Thurgood Marshall to the United States Supreme Court. In a line of questioning, Senator Strom Thurmond asked Justice Marshall to “suppose” that the U.S. Supreme Court Justices were asked to decide the case of who was President of the United States from 1861-1865 and, even though they were presented with evidence that Abraham Lincoln was President, “the Supreme Court declares that the President during this period was Stephen A. Douglas.” Nomination of Thurgood Marshall, of New York, To Be an Associate Justice of the Supreme Court of the United States: Hr’g Before the U.S. Senate, Comm. on the Judiciary, p.174 (1967). Unable to opine on the merits of the question, Justice Marshall responded: “Well, I say, respectfully, Senator, I can’t suppose it. I think that Government officials who take their oaths obey their oaths, and that goes for all Government officials.” *Id.* at 175. That is precisely the concern of these *Amici Curiae*: requiring the PUC Commissioners, having taken an oath, to violate that oath simply cannot—to paraphrase Justice Marshall—be “supposed.”

dictate a particular outcome not supported by the record in a case would erode, not just the trust the Commission has enjoyed from its inception, but the integrity of the adjudicatory process itself. Parties participate equally with the understanding that the case will be decided on the evidence presented. Indeed, that is why they present evidence. By causing the PUC triers of fact to find what does not exist in the evidentiary record, the Initiative would take the Commission on a course in this State never before ventured, a course that would fundamentally dissolve any sense of trust and reliance a party has on the deliberative adjudication of cases that come before the Commission. Moreover, such a course could seriously undermine the PUC's regulatory authority by encouraging other entities to seek approval or disapproval of public utility projects through the initiative process, without ever going before the PUC.

Third, the Initiative states that the revised order would be made pursuant to 35-A M.R.S. § 1321, which, by its terms, allows the Commission to revisit a prior order only if it gives written notice to the parties and an opportunity to be heard. 35-A M.R.S. § 1321. If different factual findings are to be made, the parties would have the opportunity to present new evidence or argument. This provision thus contemplates a revision or amendment supported by the record, not contrary to the record as the Initiative would mandate. That is because, like other adjudicatory bodies, the Commission is bound to reach its conclusions

based upon an evidentiary record. The Initiative would strip the Commissioners of their ability to fulfill that obligation.

Fourth, the Commission's rules of adjudicatory procedure call for a precise process for reaching finality of Commission decisions so that parties may rely upon the outcome. This process allows parties to rely upon Commission orders—whether they be proponents and their investors and lenders who rely upon an order granting a CPCN when developing projects or they be opponents of the project who have prevailed in their opposition and can rely upon an order denying a CPCN. The Initiative would disturb that finality in the instant case. And the precedent the Initiative would establish if allowed to go forward as proposed would destroy the principles of finality and repose in all future decisions in matters before the PUC. Indeed, what would stop a citizens group five years in the future from placing on the ballot a citizens initiative directing the Commission to further amend its Order and reverse itself yet again and find that there was a public need all along?

Finally, it is worth noting that, from a practical standpoint, the Initiative, if allowed to become law, would put the Justices of this Court in the untenable position of potentially being forced to redecide the *NextEra* case. Any order made pursuant to Section 1321 is appealable to this Court. 35-A M.R.S. § 1320. This Court, having already determined that the prior findings of the Commission and

conclusions of law were substantiated by the record, could not ignore its prior determinations. Courts undertaking judicial review of final agency actions, like the Order or any “amended” order, reverse administrative decisions if the findings, inferences, conclusions or decisions (1) violate constitutional or statutory provisions, (2) exceed the agency’s statutory authority, (3) are made upon unlawful procedure, (4) are affected by an error of law, (5) are unsupported by substantial evidence on the whole record, or (6) are arbitrary, capricious, or are an abuse of discretion. 5 M.R.S. § 11007. Because the proposed Initiative requires the Commission to essentially disregard the existing facts of the case and make new findings (with no new evidence) in order to reach the opposite conclusion, it sets this Court up with the inevitable need to reject the amended order as arbitrary, capricious, and unsubstantiated by the written record. The Court has already held that the written record supported the PUC’s decision in the 100-page Order to grant a CPCN. For the Commission to comply with the Initiative and issue an amended order denying the CPCN and stating only that the PUC “find[s] 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” would be the very definition of an arbitrary and capricious decision that is not supported by evidence on the whole

record. Given this posture, it would seem that the Initiative, even if implemented by the Commission, could not sustain appeal.

IV. Additional Policy Implications

As outlined at the outset, the PUC has a responsibility to ensure that the people of Maine enjoy safe, adequate, and reliable services at just and reasonable rates, and to fulfill that obligation, the Commission must make sure that the public utilities providing those services have the wherewithal to accomplish that aim.

Experience on the PUC has taught that investment occurs within a certain framework: when public utilities are given permission to do something following an adjudicatory proceeding, people and companies invest in the project, and the project can be built and the service provided. If, at any point in the future, that relied-upon permission can be revoked—not because of a change in legislative standards, but by a ballot initiative dictating different findings in a specific given case—the trust and integrity of this framework and the adjudication of cases giving rise to a Commission order would be undermined. As a result, in the opinion of *Amici*, rational investors would quickly see a significant inconsistency in Maine’s regulatory process and likely would avoid investing, or increase their price to invest, in Maine opportunities which rely on Commission orders that could be subject to initiative-triggered revocation or modification.

The institution of the PUC and the rules and procedures by which it operates are designed to establish and protect the rights of the parties that come before it. Parties to PUC proceedings are entitled to expect that all evidence was heard and considered, that the argued issues were analyzed, and that the findings and conclusions contained in PUC orders represent careful deliberation from the three sitting experts in the field. The Initiative has the power to forever upset that expectation. If parties cannot rely on the institutional rules and decisions of the Commission—if PUC orders can be reversed in a given case on the whim of an electorate that has no expertise and did not hear the evidence and did not make specific findings supported by the record—then the Commission cannot fulfill its vital role to the public in regulating public utilities in Maine.

Part of the reason public utilities commissions like Maine's PUC exist is to provide a degree of predictability and certainty for utilities and their investors as well the consuming public. Once a decision to permit a particular project is confirmed by this Court, all parties have the right to rely on that decision—applicants and potential investors cannot wait indefinitely to see if that once-granted permission will be revoked. The prohibition against retroactive ratemaking is an example of how commissions and courts have consistently applied this principle. For example, where rates are put in place subject to refund

(as is often done by the Federal Energy Regulatory Commission (FERC)), all parties are on express notice that a future decision by the Commission may unwind the transactions undertaken during the period subject to refund. Absent such express notice, however, the rates found to be just and reasonable by the Commission remain in effect and cannot be retroactively changed. *See First Hartford Corp. v. Central Me. Power Co.*, 425 A.2d 174 (Me. 1981) (holding that Commission has no power to revise rates retroactively); *Maine Pub. Advocate v. Pub. Utils. Comm'n*, 476 A.2d 178, 183 (Me.1984) (holding that even past errors that resulted in unjust or unreasonable rates cannot be remedied retroactively, because “[i]t is well established that errors made in the calculation of a utility’s base rates may be remedied only prospectively”). Any subsequent Commission order thus has only prospective application.

Having been established and “specially clothed with all the authority of the state for the performance of an important governmental function,” the PUC should be allowed to operate as the independent adjudicatory body it is when it is acting in its quasi-judicial capacity. While legislation created the Commission, once the PUC was established, it has never been within the realm of the Legislature to directly intervene in a case to force the Commissioners to reverse the findings of fact and conclusions of law made in a prior Commission order. The Legislature might modify the standards for CPCNs and otherwise weigh in

on the PUC through prospective statute enactment and review of substantive rulemaking, but it is not the Legislature's role to determine the rights of specific applicants in an adjudicatory proceeding. That is the province of the PUC Commissioners, who apply the laws and rules and precedent to the facts in a given case independent of the Legislature. There is a fundamental difference between enacting a law that will apply to an entire industry⁹ and reaching back in time to alter a single decision relating to a single actor, as the Initiative would do.

CONCLUSION

For more than a century, the Maine Public Utilities Commission and its appointed and sworn Commissioners have occupied a certain defined place in the regulatory, judicial, and economic framework of the State. *Amici* believe that maintaining the Commission's independent role as an adjudicatory body, which the public utility industry and private citizens have come to rely on for over a century, is crucial. For all the reasons discussed above, *Amici* fear that the Initiative is fundamentally at odds with that role. The PUC is an institution created to be devoid of political influence in the adjudicatory process and

⁹ As the Legislature did when it enacted the An Act to Restructure the State's Electricity Industry (P.L. 1997, ch. 316). Even in that instance, it should be noted that careful attention was paid to ensure that the law did not result in any takings or otherwise disturb previously settled expectations.

charged with deciding cases on the evidentiary record and applying the law. The purportedly legislative act of the Initiative at issue here is designed to force the Commission to contradict its own record-supported findings, and it will upset the legitimate and Law Court-confirmed expectations of the parties who participated in the Commission's adjudicatory process. The Initiative will thus undermine the essential purpose and value of the Commission. As former Commissioners of this institution, *Amici* respectfully request that the Court carefully consider these concerns and ensure that the integrity of the Commission is protected. While *Amici* refrain from offering any measure of opinion regarding the Order, they offer their strong opinion on preserving and protecting the adjudicatory process from which the Order arose and rests, and *Amici* respectfully urge this Court to do the same in considering these comments.

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