

STATE OF MAINE
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
MATTHEW DUNLAP,

Defendant-Appellee,

NEXTERA ENERGY RESOURCES, LLC. and
MAINERS FOR LOCAL POWER AND MAINE VOTERS,

Intervenors-Appellees.

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TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT.....3

Avangrid’s constitutional challenges are not ripe for adjudication.....3

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

League of Women Voters v. Secretary of State, 683 A.2d 769 (Me. 1996)

Maine Equal Justice Partners v. Commissioner, Dept. of Health & Human Services, 2018 ME 127

Maine Sugar Indus., Inc. v. Maine Indus. Bldg. Auth., 264 A.2d 1 (Me. 1970)

McGee v Sec’y of State, 2006 ME 50, 896 A.2d 933

National Hearing Aid Ctrs., 376 A.2d 456 (Me. 1977)

Opinion of Justices, 2017 ME 100, 162 A.2d 188

Opinion of the Justices, 2004 ME 54, 850 A.2d 1145

Opinion of the Justices, 673 A.2d 693 (Me. 1996)

Wagner v. Secretary of State, 663 A.2d 564 (Me. 1995)

Maine Constitution

Me. Const. art. IV, pt. 3 § 18(2)

Statutes

5 M.R.S. § 11001

21-A M.R.S. § 905

INTRODUCTION

The New England Clean Energy Connect Transmission (“NECEC”) is proposed as an approximately 145-mile, 1,200 megawatt high-voltage direct current transmission line project that starts at the Québec/Maine border and ends in Lewiston, Maine. In response to NECEC, Maine voters signed a petition to place on the November ballot a citizen initiative titled “Resolve, To Reject the New England Clean Energy Connect Transmission Project” (the “Initiative”). The purpose of Initiative is to have Maine voters decide whether NECEC is in the Maine public interest and constitutes a Maine public need. On March 4, 2020, the Secretary of State (“Secretary”) determined that the Initiative was valid. On March 13, 2020, pursuant to 21-A M.R.S. § 905, 5 M.R.S. § 11001, and M.R. Civ. P. 80C, Delbert A. Reed filed a Petition in Superior Court seeking judicial review of the Secretary’s determination. On April 1, 2020, after additional investigations and review of additional information submitted by Petitioner Reed, the Secretary confirmed that the Initiative was valid. On April 13, 2020, the Superior Court, and, thereafter, on May 7, 2020, the Law Court upheld the Secretary’s determinations that the Initiative was valid. At no time during the judicial review pursuant to 21-A M.R.S. § 905 did any party challenge the constitutionality of the Initiative.

On May 12, 2020, Appellant Avangrid Networks, Inc. (“Avangrid”) filed a Complaint collaterally attacking the Initiative, requesting that the Initiative be

declared unconstitutional and enjoined from appearing on the November ballot.¹ Avangrid's challenge, however, is contrariwise to the weight of Maine precedent that a constitutional challenge to a citizen initiative is not ripe until the initiative is enacted into law by the voters.² After a full briefing by the parties and oral argument, the Superior Court (Warren, J.), based on the straightforward application of the plain language of the Maine Constitution and Maine precedent, held that pre-election judicial review of an Article IV, Pt. 3 § 18(2) citizen's initiative is not, as a matter of law, available to Avangrid, and, accordingly, dismissed the Complaint. Order 7-9, 13.

¹ Appellants Industrial Energy Consumers Group and Maine State Chamber of Commerce filed similar complaints. The Appellants' positions will be referred to collectively as those of the lead Appellant, Avangrid.

² NextEra takes no position on the merits of the constitutionality of the Initiative if enacted into law. Indeed, the court need not opine on the constitutionality of the Initiative as the Complaint before it is not ripe. Further, NextEra's briefing of ripeness addresses neither the merits nor the public policy underlying the citizen initiative; rather NextEra's position is based solely on well-settled Maine precedent and a plain language reading of the applicable sections of the Maine Constitution and statutes.

ARGUMENT

Avangrid's constitutional challenges are not ripe for adjudication.

Avangrid summarily avers that “[a]n actual justiciable controversy exists between the parties regarding the constitutionality of the Initiative under the Maine Constitution.” (Appendix at 36, Complaint ¶57.) The Superior Court properly held that as matter of Maine law Avangrid’s challenge was not presently reviewable, and, therefore, must be dismissed. The Superior Court’s decision should be affirmed.

Unique among state constitutions, the Maine Constitution expressly provides the people the right to propose legislation through a citizen initiative. *McGee v Sec’y of State*, 2006 ME 50, ¶¶ 21-39, 896 A.2d 933 (people’s right to legislate through a citizen’s initiative added to Maine’s Constitution in 1909); Me. Const. art. IV, pt. 3, § 18. With this understanding, the Superior Court concluded:

. . . the wording of the Maine Constitution and prior opinions expressed by members of the Supreme Judicial Court indicate that pre-election review is not available to consider challenges to the validity of proposed initiative legislation if it were to be enacted. Article IV, Pt. 3 § 1 8(2) of the Maine Constitution states that the legislation proposed by initiative, unless enacted without change by the Legislature, ‘shall be submitted to the electors’ (emphasis added). On several occasions Justices of the Supreme Judicial Court have expressed the view that this requires placement of an initiative on the ballot regardless of whether the proposed initiative legislation would be unconstitutional if enacted.

Order at 7.

More specifically, the Superior Court opined that in the 1996 and 2004 *Opinion of Justices* cases, the Justices concluded that under Maine law regardless of whether the proposed initiative could be considered unconstitutional, the initiative must be placed on the ballot. *See Opinion of the Justices*, 2004 ME 54, ¶ 37, 850 A.2d 1145; *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996). In the 1996 *Opinion of the Justices* case, the unanimous court concluded:

The Maine Constitution provides that

The [initiated bill] thus proposed, unless enacted without change[] by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both.

Me. Const. art. IV, pt. 3, § 18, cls. 2 (1985). The word shall is a mandatory directive to submit the question to referendum. The clause contains no exceptions to such a directive. See *Wagner v. Secretary of State*, 663 A.2d 564, 566 n. 3 (Me.1995) (stating, prior to addressing the substantive constitutional challenges to a proposed initiative, that “[s]ince the Legislature has not enacted the initiative without change, it must be referred to the electors.”).

Opinion of the Justices, 673 A.2d at 697 (Emphasis added).

Similarly, in the 2004 *Opinion of the Justices* case, while all of the Justices acknowledged that the constitutionality of an initiative did not present a “live controversy,” Justices Clifford, Rudman, and Alexander put it plainly:

Because the proposed law is yet to be voted on by the people, there is no matter of ‘live gravity’ and no question of sufficient immediacy and

seriousness to create a solemn occasion justifying our answer. It is important to distinguish between a question of live gravity and one that is of potential live gravity. Our constitution requires that we respond to the former and forbids us from responding to the latter.

Opinion of the Justices, 2004 ME 54, ¶ 33.

Therefore, Superior Court correctly concluded that the 1996 and 2004 *Opinion of Justices* cases were consistent with the holding in *Wagner v. Secretary of State*, 663 A.2d 564 (Me. 1995):

In this instance, the initiative may never become effective. Thus, we are not presented with a concrete, certain, or immediate legal problem. See *National Hearing Aid Ctrs.*, 376 A.2d at 459 (issue of constitutionality of statutory provisions enacted but not yet effective was ripe for decision when statute was certain to become effective and provisions would be enforced by Department of Health); *Maine Sugar Indus., Inc. v. Maine Indus. Bldg. Auth.*, 264 A.2d 1, 5 (Me. 1970) (declaratory judgment statute permitted court to address the effect of enacted but not yet effective statutory amendment).

* * *

Any determinations about the constitutionality of the initiative if enacted would be premature at this time and more appropriately left for specific challenges in the future.

Id. at 567-568 (emphasis added; citations and footnote omitted).

Accordingly, through a straightforward application of the *Opinion of Justices* cases and *Wagner* to the instant case,³ the Superior Court properly dismissed

³ The Superior Court also properly found that Avangrid’s challenge did not fall within the limited exceptions set forth in *Wagner*. See Order at 8-9 (“This case does not present an instance where a procedure specified in the Constitution is inconsistent with the use of the initiative process. What remains are plaintiffs’ substantive challenges, which under *Wagner* are not ripe for review because the initiative might not pass and might never become effective.”), citing *Wagner*, 663 A.2d at 567.

Avangrid's Complaint as wholly inconsistent with settled Maine law that citizen initiatives, such as the instant one, are not ripe for judicial review prior to being placed on the ballot and passing.⁴ Order at 9.

Unlike Appellants, NextEra is not seeking a change in law or the reinterpretation of precedent. NextEra simply asks this Court to apply its precedent to the instant case and rule that Avangrid's Complaint is not ripe for pre-election adjudication.

CONCLUSION

For the reasons set forth above, NextEra respectfully requests that the Court affirm the Order from the Superior Court holding that Appellants' constitutional challenges to the Initiative are not subject to judicial review unless and until the Initiative is enacted by the electorate.

⁴ Post-election, if a citizen's initiative is enacted into law, pursuant to article IV, Section 3 of the Maine Constitution, the Legislature or Governor can request that the Law Court provide an opinion on the constitutionality of the new law. *See, Opinion of Justices*, 2017 ME 100, ¶¶ 1-3, 162 A.2d 188, *see also League of Women Voters v. Secretary of State*, 683 A.2d 769, 770 (Me. 1996) (challenge to constitutionality of Term Limitation Act made after passage of initiative and following enforcement by Secretary of State). A future Legislature could also repeal the Initiative after it is enacted. *Maine Equal Justice Partners v. Commissioner, Dept. of Health & Human Services*, 2018 ME 127, ¶15.

Dated at Portland, Maine this 13th day of July, 2020.



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