

**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 CUMBERLAND COUNTY SUPERIOR COURT

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
SECRETARY OF STATE**

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ARGUMENT

The issues on appeal have been thoroughly briefed by the parties and supplemented by a number of helpful amicus briefs. Accordingly, the Secretary will highlight only three points in reply.

- 1. The Legislature does not have authority to mandate reversal of a final adjudicatory decision of the Maine Public Utilities Commission – and neither do Maine’s electors acting in their capacity as citizen-legislators.**

As the Amicus brief filed by three former members of the Maine Public Utilities Commission (PUC) articulates well, there is nothing unique about the PUC as an executive branch agency, or its relationship to the Legislature, that alters the separation of powers principles underlying this appeal. The Legislature created the PUC in 1913 and delegated certain powers to it by statute. *See Former PUC Commissioners’ Br.* at 4. At any point, the Legislature may amend those statutes to redefine the scope of the PUC’s authority, change the statutory criteria that govern issuance of certificates of public convenience and necessity (CPCNs) or other forms of PUC approval, modify the legal standards applicable to certain types of projects, and even review the PUC’s major substantive rules, but it is the PUC’s responsibility to determine the facts and apply the statutory criteria to those facts in any given case. *See id.* at 8.

No legislative body has authority to mandate that the PUC Commissioners reverse their factual findings and conclusions of law reached in a particular case as set forth in an order that it issued after an adjudicatory hearing, when that order has become final and has been upheld by this Court. *See id.* at 25-26; and *id.* at 8-9 and n.3 (discussing distinction between adjudicatory role of PUC and standard-setting role of Legislature). This is a fundamental principle of administrative law that is based on separation of powers principles, as this Court held in *Grubb v. S.D. Warren*, 2003 ME 139, ¶ 11, 837 A.2d 117.

Mainers for Local Power and Maine Voters (“MLP”) have asserted that the PUC is somehow different from other executive branch agencies, and that its decisions are subject to reversal by the Legislature, or the citizens acting as legislators. MLP Br. at 7-8, 23-26. Their argument is effectively rebutted by the former PUC Commissioners. *See, e.g.*, Former PUC Commissioners’ Br. at 12 (discussing finality of decisions and limitations on power to reconsider prior orders).

The serious concerns raised by the former Commissioners about the implications of this Initiative are compelling, and the Secretary urges the Court to carefully consider them. *See id.* at 16-20.

2. Whether the Initiative is outside the scope of the citizens' power to legislate under Section 18 because it is inherently and fundamentally not legislative in nature is a question that can and should be resolved by this Court before the election.

The text of the Initiative expressly and unambiguously directs an executive branch agency to reverse certain factual and legal conclusions that it reached in a specific final order that it issued after an adjudicatory hearing, where that order has been reviewed and upheld on appeal by this Court. The Initiative is not legislative in nature because, as the Maine State Chamber of Commerce (MSCC) explained, it “attempt[s] to exercise powers plainly belonging to the executive and judicial branches” and is thus “constitutionally different from any valid exercise of the legislative authority under Article IV.” MSCC Br. at 6. The question properly before this Court is whether this inherent aspect of the Initiative places it beyond authority given to the Legislative branch under Me. Const. art. III, § 2, and, therefore, also beyond the citizens' power to legislate under Me. Const. art. IV, pt. 3, § 18 (“Section 18”).

The provision of Section 18(2) stating that a proposed initiative “shall be submitted to the electors” “unless enacted without change by the Legislature” deprives the Legislature of the power to prevent the initiative from going to the voters. *See, e.g., Wagner v. Sec'y of State*, 663 A.2d 564, 566 n. 3 (Me. 1995); *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996). As

noted by several other parties, however, the use of the word “shall” in this context does not restrict the power of the judicial branch, or preclude the Court from determining the threshold issue of whether the Initiative is a form of legislation within the scope of Section 18. *See, e.g.*, MSCC Br. at 21; IECG Br. at 20-21.

Considering such constitutional questions is a core judicial function. The initiative in *Wagner* was deemed to be legislative in nature, as was the term limits initiative considered in the 1996 *Opinion of the Justices*, and for that reason both initiatives were within the scope of Section 18 and were required to be submitted to the electors. The same is not true here, however, and the Superior Court did not fully grapple with this distinction. App. 18.

Under the prudential rules of ripeness, the Court should answer the question posed above before the election for at least two reasons. First, the controversy over the citizens’ power to legislate in this manner is “concrete, certain and immediate” now, and does not depend on development of any facts or the occurrence of any events post-election, because it is presented plainly on the face of the Initiative. Second, the ramifications of this Initiative, as articulated by several parties and amici, make the question presented of crucial importance to the ability of private parties to rely on the finality of

executive branch agency and court decisions. *See* MSCC Br. at 25; IECG Br. at 30; and Former PUC Commissioners' Br. at 23-26.

3. A declaratory judgment without an injunction is not an advisory opinion, and denial of injunctive relief in this case would not subject all administrative agency decisions to nullification by referendum.

The concern raised by MSCC that the Secretary's position on injunctive relief "would essentially make the Court's decision an advisory opinion in a circumstance in which the advice may be expected to be ignored" (MSCC Br. at 24) is not well founded. Entry of a declaratory judgment without an injunction, as recommended by the Secretary, would inform Maine voters that the Initiative will not be enforceable, if enacted, because the subject matter is beyond the citizens' power to legislate. Such a ruling by this Court would provide the voters with crucial information about the Initiative, in the Secretary's view.

The effect of such a ruling would be to render the referendum advisory, but not the Court's ruling. *See* IECG Br. at 20. There is no basis to claim that such a judgment would be ignored even if a ballot question for the Initiative were presented to the voters.

MSCC's concern that denial of injunctive relief would render "vulnerable to nullification by referendum every permitting decision by every

administrative agency, even after affirmance in this Court” (MSCC Br. at 4) is also unfounded. A declaratory judgment in favor of Avangrid on its first claim would establish that this type of resolve (unique in the history of the initiative and referendum process in Maine to date) is not a proper form of initiative. If presented with a similar initiative in the future, the Secretary would rely on this precedent to deny the application for a petition form, pursuant to 21-A M.R.S.A. § 901, and any frustrated applicant would have the right to appeal that denial in accordance with 21-A M.R.S.A. § 901(7). Although it is not within the Secretary’s purview to make *de novo* determinations about the constitutionality of initiatives, *see Wyman v. Sec’y of State*, 625 A.2d 307, 310-11 (Me. 1993), the Secretary relies on judicial interpretations to guide the execution of his statutory duties. A declaratory judgment issued in this case, therefore, would prevent the reoccurrence of this type of initiative feared by intervenors MSCC and IECG and certain amici.

Whether or not the Court decides to keep the Initiative off the ballot in November, the Secretary believes that it is critical for the Court to answer whether the Initiative is within the scope of the people’s power to legislate under Section 18.

CONCLUSION

For the foregoing reasons, and those set forth in the Secretary's initial brief, the Secretary urges the Court to vacate the trial court's order of dismissal and remand for entry of a declaratory judgment that the Initiative exceeds the scope of the legislative powers reserved to the people under Article IV, Part 3, Section 18 of the Maine Constitution. *See* App. 36.

Dated: July 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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