STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

NECEC TRANSMISSION LLC,

and

AVANGRID NETWORKS, INC.,

Plaintiffs,

v.

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

MAINE PUBLIC UTILITIES COMMISSION,

MAINE SENATE,

and

MAINE HOUSE OF REPRESENTATIVES,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH INCORPORATED MEMORANDUM OF LAW

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

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

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

BACKGROUND[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55, 62, 77; Berkowitz Aff. ¶¶ 26, 35, 56. In addition, permit requirements and restrictions for construction, court-imposed limitations, weather factors, sequencing with project contractors, and required coordination with various regulators has affected the construction schedule and in-service date. Compl. ¶¶ 114, 118; Berkowitz Aff. ¶¶ 45-46, 49, 52, 57. The current project schedule calls for the NECEC to achieve commercial operation on December 13, 2023, with the contractual deadline for commercial operation now August 23, 2024.[4] Compl. ¶ 147; Berkowitz Aff. ¶¶ 35, 57. Starting construction as soon as the final permits were received was essential to maintain the targeted commercial operation date. Compl. ¶ 136; Berkowitz Aff. ¶ 59. It is critical that the Project enter commercial operation as soon as is feasible in order to, among other things, (1) realize Project benefits, and (2) ensure financial viability of the Project, which is impacted by incremental investment costs associated with Project extension. Compl. ¶ 136. Accordingly, as soon as DOE issued the final major permit for the Project, NECEC LLC instructed NCI to commence clearing and other construction activities on January 18, 2021.[5] *Id.* ¶ 117; Berkowitz Aff. ¶¶ 41-43.

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

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

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

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

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

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

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

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

ARGUMENT

I. Plaintiffs' Claims Are Ripe for Adjudication.

This declaratory judgment action challenging the retroactive application of the Initiative is ripe. Ripeness involves a two-part inquiry: "(1) whether the issues are fit for judicial review, and (2) whether hardship to the parties will result if the court withholds review." *Pilot Point, LLC v. Cape Elizabeth*, 2020 ME 100, ¶ 30, 237 A.3d 200. Here, the issues are fit for judicial review, as "[t]he statute is certain to become effective" and "[i]t is presumed that the [agencies] will take steps to enforce the provisions of the statute." *Nat'l Hearing Aid Ctrs., Inc. v. Smith*, 376 A.2d 456, 459 (Me. 1977) (declaratory judgment action challenging the validity of a new statute

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

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

II. Plaintiffs Are Entitled to a Preliminary Injunction.

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

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

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

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

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

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

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

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

B. Plaintiffs are likely to succeed on the merits.

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

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

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

a. NECEC LLC timely commenced construction of the Project in good faith, with intent to continue and complete construction.

i. Project construction has occurred pursuant to a project schedule and contractual obligations.

NECEC LLC undertook construction "in good faith . . . with the intention to continue with the construction and carry it through to completion." *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quoting *Town of Sykesville*, 677 A.2d at 104). In the context of vested rights, good faith is simply "the absence of proof of bad faith." *Town of Sykesville*, 677 A.2d at 113.[9] "Bad faith" manifests itself as a "deliberate false start" – *i.e.*, efforts to make it appear that construction has begun, when in reality it has not. *Id.* at 113-116. Thus, "good faith" focuses on "whether the act of commencing construction is undertaken with the intention of continuing and finishing the job." *Id.* at 116. The decision to "seize the day" by beginning construction with knowledge of a potential change in law is not "bad faith." *Id.* at 118-120. NECEC LLC has already completed substantial construction in accord with project schedules and contractual commitments. Compl. ¶ 132; Berkowitz Aff. ¶¶ 43-55, 56-60, 63. It began construction in the field on January 18, 2021, Compl. ¶ 117, and undertook preparatory activities for construction starting much earlier than that, *id.* ¶ 113.

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

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

construction schedule and necessary to comply with NECEC LLC's contractual obligations. NECEC LLC began construction in January 2021 in order to achieve timely commercial operation under the TSAs, which include a contractual deadline of August 23, 2024. *Id.* ¶ 136. Based on the extended commercial operation date of May 31, 2023, project plans called for a start date in 2020, anticipating construction as soon as required state and federal permits were obtained; delays in obtaining these permits impacted the timing of construction. *Id.*; Berkowitz Aff. ¶¶ 56-57. Starting construction as soon as all state and federal authorizations were received was critical to maintain the targeted commercial operation date,[10] realize Project benefits, and ensure financial viability of the Project. Compl. ¶ 136. Specifically, it was necessary for NECEC LLC to move forward with construction promptly to meet its contractual commitments given preceding delays in permitting and allowance for future unknown events, such as procurement delays, weather, unforeseen ground conditions, and other events. Berkowitz Aff. ¶¶ 58-59, 63.[11] Further, NECEC LLC's initiation of construction was not a "false start"; rather, construction has continued continuously since then, subject to permit restrictions. Compl. ¶ 118; Berkowitz ¶ 49. This continuous construction has entailed massive investments by NECEC LLC. Not only has it incurred approximately $450 million in capital expenditures, but it has also made over $312 million in purchase commitments to comply with the TSAs. McGeehin Aff. ¶ 13 & Sched. 1; Berkowitz Aff. ¶¶ 58-60. NECEC LLC's efforts to comply with the TSAs by maintaining the Project schedule, and its expenditures in furtherance of that effort, demonstrates its good faith.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of any high-impact electric transmission line project in the State without satisfying the presentment requirement of article IV, part 3, § 2 of the Maine Constitution. Such a legislative veto deprives the Governor of the executive powers vested in the office of Governor by the Maine Constitution.

The Maine Constitution specifically provides that "[e]very bill or resolution, having the force of law, to which the concurrence of both Houses may be necessary, except on questions of adjournment, which shall have passed both Houses, shall be presented to the Governor." Me. Const. art. IV, pt. 3, § 2. Under the plain language of this provision, any bill or resolution that would have the force of law must be presented to the Governor for consideration and potential veto. *Opinion of the Justices*, 231 A.2d 617, 619 (Me. 1967) (bills with referendum provisions must be presented to the Governor); *see Opinion of the Justices*, 571 A.2d 1169, 1180 (Me. 1989).

Retroactive application of Section 4 runs afoul of this presentment requirement, and is therefore unconstitutional. *Chadha*, 462 U.S. at 951-59.[20] There is no serious question that the legislative approval of high-impact electric transmission lines required by Section 4 would have the force of law – if the Legislature withheld approval, the transmission line could not be built. This is the quintessential nature of a *law*. *Cf. Opinion of Justices*, 261 A.2d 53, 57 (Me. 1970) (a resolution proposing a constitutional amendment is not an exercise of the power to make laws because it has no binding effect). Accordingly, any legislative act approving or withholding approval for a high impact electric transmission line would have to be submitted to the Governor. Section 4, however, does not allow for or contemplate such presentment. Instead, Section 4, retroactively applied, operates as a purely legislative veto of executive agency approvals by the

[20] *Blank v. Dep't of Corrections*, 611 N.W.2d 530, 536-38 (Mich. 2000) (requirement that legislature approve new agency rules "violate[d] the enactment and presentment requirements, usurps the Governor's role in the legislative process, and violates the separation of powers provision"); *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 593 (W. Va. 1995) (legislative veto violated separation of powers requirement because it "encroache[d] upon the executive branch's obligation to enforce the law"); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772-73 (Alaska 1980); *Opinion of the Justices*, 83 A.2d 738, 741 (N.H. 1950).

PUC. Retroactive application of Section 4, therefore, would allow the Legislature to interfere with the Governor's constitutional mandate to faithfully execute the law – all without the participation by the Governor in the legislative process contemplated by the Maine Constitution.[21]

3. Retroactive application of the Initiative to the NECEC would violate article I, section 11 of the Maine Constitution and Article I, § 10 of the United States Constitution.

"Giving statutes retroactive effect may be unconstitutional in a variety of circumstances, including when the legislation would substantially impair a contractual relationship in violation of the Contracts Clause." *MacImage of Me., LLC*, 2012 ME 44, ¶ 23 n.10, 409 A.3d 975.[22] Both the U.S. Constitution and the Maine Constitution prohibit the impairment of contracts. U.S. Const. art. I, § 10; Me. Const., art. I, § 11. Under the Contracts Clause, "[t]he first question 'is whether the state law has operated as a substantial impairment of a contractual relationship.'" *United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 41 (1st Cir. 2011) (quoting *Energy Res. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)) (quotation marks and alterations omitted). If there has been a substantial impairment, the second

[21] The fact that a project could be disapproved simply by legislative *in*action makes no difference. Legislative veto of executive approval of a project by legislative inaction is the same as legislative veto by legislative action. In both instances, the Legislature has arrogated to itself powers vested in the executive branch, while evading the presentment requirement. *Hechler*, 462 S.E.2d at 590-93 (holding that "outright veto power" on the part of the Legislature to block implementation of proposed agency regulations through the Legislature's failure to act constitutes an "intrusion into the Executive branch's ability to effectuate its mandated responsibilities").

[22] In this case, the prohibition on retroactive application of laws that would substantially impair a contract is closely related to the principle that "a law would be unconstitutional if, when applied retrospectively, it would alter or impair the nature of a person's title in property." *Fournier*, 376 A.2d at 102. Property rights are "constitutionally protected right[s]." *Id.*; *see Sabasteanski v. Pagurko*, 232 A.2d 524, 525-26 (Me. 1967) (no constitutional power to retrospectively alter vested rights in property). Here, the relevant contract gives NECEC LLC a leasehold interest, *i.e.*, a property right. *See H&B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 13, 246 A.3d 1176 (leases are contracts and property conveyances). Thus, the vested rights principle that a law may not retrospectively impair a person's title in property is directly at issue, and strengthens NECEC LLC's interest in the impaired contract. *See Fournier*, 376 A.2d at 102 (citing *Portland Sav. Bank v. Landry*, 372 A.2d 573 (Me. 1977) (prohibiting retroactive application of law shortening the redemption period available to a mortgagor after default, applying Contracts Clause analysis)).

question is whether that impairment was "reasonable and necessary to serve an important government purpose." *Id.*; *see Kittery Retail*, 2004 ME 65, ¶ 38-41 & n.7, 856 A.2d 1183 (describing Contracts Clause analysis). As other courts have found, voiding a lease on state lands unconstitutionally impairs the contract rights of the leaseholders, here, NECEC LLC. *See, e.g.*, *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F3d 494, 514 (5th Cir. 2001).[23]

First, retroactive application of the Initiative to the Project would substantially impair NECEC LLC's BPL Lease. NECEC LLC has obtained a lease for approximately 0.9 miles of public reserved lands in Somerset County for 25 years. Compl. ¶ 75. The lease gives NECEC LLC the right to construct poles, towers, wires, switches, and all other structures necessary for the transmission of electricity. *Id.* at Ex. B. Retroactive application of the Initiative would directly affect the lease by authorizing termination of the lease and prohibiting the construction of transmission facilities, completely depriving NECEC LLC of the benefit of the lease. Such an outcome is not contemplated by the terms of the lease, which do not permit the State to unilaterally terminate the lease.[24] Thus, the Initiative would substantially impair the BPL Lease by authorizing unilateral termination, contrary to its terms.

Second, retroactive application of the Initiative to the BPL Lease is not reasonable and necessary to serve an important state purpose. Where the State is a contracting party, courts will not defer to legislative judgments regarding whether impairment of a contract is reasonable and

[23] The legality of the lease under Maine law has been challenged. However, at this time, the lease is still in full force and effect pending appeal to the Law Court. Compl. ¶ 78; *see* M.R. Civ. P. 62(e).

[24] The lease expressly provides that the State only "reserves the right to terminate" the lease "to the extent permitted under the provisions contained in paragraph 13 Default." Compl. Ex. B. Therefore, absent default by NECEC LLC – which has not happened here – the lease does not contemplate termination by the State. The lease instead only allows for "amendment" of the lease if any term of the lease is found not to comply with Maine state law. *Id.* If a term of the lease were found to violate state law, the State only has the right to propose a revision of the lease; NECEC LLC has the power to then either terminate the lease or negotiate an amendment. *Id.*

necessary because the State's self-interest is implicated. *Fortuno*, 633 F.3d at 41; *Kittery Retail*, 2004 ME 65, ¶ 38, 856 A.2d 1183. Further, courts have held that an impairment is not "reasonable" if the "problem sought to be resolved by [the] impairment of the contract existed at the time the contractual obligation was incurred." *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (quoting *Mass. Community Coll. Council. v. Massachusetts*, 659 N.E.2d 708 713 (Mass. 1995)). Here, the purported state interest is ensuring that leases of public lands are approved by the Legislature. This same interest, however, existed when the BPL Lease was entered into no less than it does now. It is *per se* unreasonable to terminate the BPL Lease in service of an interest that existed at the time it was authorized. *See Cayetano*, 183 F.3d at 1107.

C. The balance of harms favors entering an injunction.

The balance of hardships also favors entry of an injunction.[25] A constitutional violation, not to mention interference with vested property rights amounting to the outright destruction of those rights, outweighs any injury from temporarily precluding the retroactive application of the Initiative. *See Gordon*, 721 F.3d at 653 (potential deprivation of constitutional right outweighs countervailing interests); *Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429 (because county defendant would not incur monetary loss, while failure to enter injunction permitting construction would cause construction delays and increased costs). Plaintiffs face the prospect of the likely cancellation of a billion dollar project if the Initiative is enforced.

At the very least, Plaintiffs would confront substantial delays and massively escalated costs to remedy those delays should construction be halted during this litigation. Dickinson Aff. ¶ 28;

[25] The severity of the irreparable harm and the substantial likelihood of success in this case lessens the need to demonstrate that the balance of harms supports an injunction. *See Waldron v. George Weston Bakeries, Inc.*, 575 F. Supp. 2d 271, 278 (D. Me. 2008) ("[T]he more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." (quoting *Ty, Inc. v. Jones Grp. Inc.*, 237 F.3d 891 (7th Cir. 2001)). Nevertheless, this factor also favors an injunction.

Berkowitz Aff. ¶¶ 61-62. These delays and increased costs would result from NECEC LLC's obligation and commitment to comply with permit requirements and environmental standards, as well as demobilization and remobilization costs and additional project administration costs. Dickinson Aff. ¶¶ 26-27. For example, NCI would need to remove all construction mats, triggering an additional period of restoration on the same land. *Id.* ¶ 26. Moreover, any pause in construction would entail an extensive demobilization and remobilization effort. *Id.* ¶ 27. It is estimated that an 18-month delay in construction would be approximately $113 million, and the increased costs resulting from a 24-month delay would be $147 million. *Id.* ¶ 28. This range of delay-driven costs would threaten the financial viability of the Project. *Id.* In addition, because the Project's revenues only begin after it reaches commercial operation, the delay in receipt of revenues would further threaten the financial viability of the Project. *Id.* ¶ 29. On the other hand, the State would not incur any monetary loss or harm by the issuance of an injunction.

Further, no irreparable harm would result from continued construction. Clearing of the corridor is almost complete; over 140 miles of the DC line corridor will be cut by year-end 2021, representing 97% of the entire corridor.[26] *Id.* ¶ 20. The minimal clearing that remains is being conducted in accordance with lawful permits issued after the exercise of rigorous governmental oversight and imposition of extensive conditions to safeguard the environment. Compl. ¶¶ 51-52. The primary construction activities that remain involve, among other things, placing structures, stringing conductor, and constructing the converter station on the prepared site. *Id.* ¶ 114; Dickinson Aff. ¶ 20. None of these activities will result in irreversible harm. The balance of harms thus sharply favors NECEC LLC. *See Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429.

[26] The clearing excludes the land leased from the BPL. Due to the Law Court's order precluding clearing on that section during the pendency of the appeal pertaining to the BPL Lease, clearing on that portion of the corridor will not be completed until after the Law Court's ruling on the validity of the BPL Lease. Compl. ¶ 78.

D. The public interest would be served by an injunction.

The public interest also favors an injunction. "It is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation." *Condon*, 961 F. Supp. at 331. To the contrary, it "is clearly in the public's interest" to enjoin a constitutional violation such as "the separation of powers doctrine." *City of Evanston*, 412 F. Supp. 3d at 887. It is likewise in the public interest to avoid the loss of property rights. *Abrams v. Blackburne & Sons Realty Cap. Corp.*, 2020 WL 5028877 (C.D. Cal. June 16, 2020) ("the public interest nearly always weighs in favor of protecting property rights"). Thus, an injunction will promote the public good by enforcing the Constitution and protecting property rights.

Moreover, allowing the Project to move forward will, as the PUC and the Law Court have found, benefit Maine through economic investment, energy reliability, and decreased GHG emissions. Compl. ¶¶ 37-48; Dickinson Aff. ¶ 32-34. Specifically, the Project represents a $1 billion investment that is and will (1) produce 1,600 jobs annually during construction and 300 jobs during operation, (2) enhance transmission and supply reliability and security, (3) lower electricity costs, (4) remove upwards of 3.6 million metric tons of carbon emissions annually from the atmosphere (the equivalent of removing 700,000 cars from the road) in an effort to fight climate change and (5) provide approximately $250 million in rate relief, economic development, climate supporting and education related benefits to Maine and its residents. Dickinson Aff. ¶¶ 32-33.

The jobs provided by the NECEC have already directly benefited Maine workers, hundreds of whom are currently working on the Project. Compl. ¶ 135. Suspension of the Project would jeopardize the more than 600 direct jobs already created by the Project, the anticipated 300 additional direct jobs to be implemented, and the hundreds of resulting indirect jobs that the Project supports. Dickinson Aff. ¶ 32(a). Protecting and creating new jobs is strongly in the public

interest. *See The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (harm from forced lay-offs of workers weighed against injunction), *overruled in part on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *W. Watersheds Proj. v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1003-04 (D. Nev. 2011) (public interest favored allowing project to proceed because it created hundreds of jobs), *aff'd* 443 F. App'x 278 (9th Cir. 2011).

Ensuring reliable electricity supplies is also in the public interest. The NECEC and associated Network Upgrades will increase the reliability of the Maine transmission system by delivering baseload energy to replace retiring baseload resources, as well as other reliability and fuel security benefits. Dickinson Aff. ¶ 32(d). A delay in construction would threaten these improvements. *Id.* ¶ 32. This public interest also supports permitting the Project to proceed. *See Columbia Gas Transmission, LLC v. 1.092 Acres of Land in Tp. of Woolwich*, 2015 WL 389402, at *5 (D.N.J. Jan. 28, 2015) (noting that public interest in "overall reliability of the energy infrastructure" supported allowing project to move forward).

Further, the reduction in GHG emissions will directly benefit Maine. The DEP found that climate change is creating ongoing harm to Maine, including to brook trout habitat and habitat for "iconic species such as moose," and constitutes "the single greatest threat to Maine's natural environment." Compl. ¶ 53. The DEP further concluded that any delay in addressing the issue "will exacerbate" negative environmental impacts. *Id*. This, too, supports the conclusion that the public interest would be promoted by an injunction. *W. Watersheds Proj. v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) ("goal of increasing the supply of renewable energy and addressing the threat posed by climate change" was properly weighed in public interest analysis); *W. Watersheds Proj.*, 774 F. Supp. 3d at 1103 (noting public interest in project because it would "decreas[e] green house gas emissions" and thereby promote important "clean energy goals").

In addition, the stipulation approved by the PUC in conjunction with granting the CPCN provides Maine with a package of benefits totaling approximately $250 million (in addition to those arising from the construction and operation of the NECEC), including support for electric rate relief, low-income customers, the expanded availability of electric vehicles and charging infrastructure, heat pumps and broad band service in Maine, education programs, and economic development. Compl. ¶¶ 43-44; Dickinson Aff. ¶ 33. These benefits have already begun to be paid out to Maine, along with property taxes. Compl. ¶ 18. Allowing construction to move forward will allow these benefits to continue to flow to Maine. This, too, supports a finding that the public interest is promoted by allowing the project to move forward. *W. Watersheds Proj.*, 774 F. Supp. 3d at 1103 (millions in dollars of taxes supported finding that allowing the project to proceed was in the public interest).

CONCLUSION

The issue in this proceeding is straightforward: is it permissible to legislatively deprive a developer of the right to complete a project, after all federal and state executive agencies have issued final permits (and, in certain instances, affirmed by the Law Court) and after substantial construction has occurred and substantial expenditures have been made? Under Maine law, the answer is "No." To hold otherwise would be to subject property owners to the whim of targeted, retroactive legislation, regardless of their reliance on existing law as well as executive and judicial approvals. The vested rights and separation of powers doctrines, and the prohibition against impairment of contracts, are all designed to prevent such an inequitable outcome. Because the Initiative contravenes these basic constitutional protections, this Court should grant a preliminary injunction allowing the Project to proceed.

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

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NOTICE

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