STATE OF MAINE
CUMBERLAND, SS

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CIV-2021-58

NECEC TRANSMISSION LLC et al.,

Plaintiffs,

v.

BUREAU OF PARKS AND LANDS, MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY et al.,

Defendants.

STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On November 2, 2021, after a fierce $40 million political campaign, the people of Maine were asked to decide whether to impose significant new safeguards on the construction of electric transmission lines and on the use of public reserved lands for utility projects. The initiated bill included language that would seem to cause it to apply to the New England Clean Energy Connect project (the "Corridor")—a 145-mile electric transmission line that would cut through 53 miles of remote Maine forest, a portion of which is owned by the public. The ballot question presented to Maine voters highlighted that the bill would apply "retroactively." Faced with this choice, Maine voters approved Question 1 by a wide margin.

Plaintiffs NECEC Transmission LLC and Avangrid Networks, Inc. (collectively "NECEC") now ask this Court to thwart the will of Maine voters by entering an injunction that would allow NECEC to continue construction of its Corridor. The estimates provided by NECEC's own witnesses show that such an injunction would likely allow NECEC to complete or nearly complete construction of the Corridor while this lawsuit remains pending. If the injunction is granted, clearing of Maine's forests will continue. Erection of poles will continue.

NECEC's request seeks to make the Corridor a *fait accompli* before the Court has the opportunity to determine whether NECEC's various constitutional claims have merit.

And their claims lack merit. NECEC focuses primarily on the doctrine of "vested rights." Yet even assuming this municipal-zoning doctrine applies to state legislation under the police power, NECEC's "right" to build never vested because it commenced construction before completion of agency and judicial review of the necessary permits and with full knowledge of the risk the initiative posed to the project. Moreover, a pending Law Court appeal threatens to invalidate the lease of public reserved lands that NECEC needs to complete the project under existing permits, potentially mooting both its vested rights claim and its related Contracts Clause claim. And, NECEC's separation-of-powers claim is based largely on its overreading of the Law Court's decision in *Avangrid Networks, Inc. v. Secretary of State*, 2020 ME 109, 237 A.3d 882, turning that narrow holding into a generalized prohibition of any legislative action that affects existing permits. None of these claims are likely to succeed on the merits.

Because NECEC has not met its burden of establishing entitlement to a preliminary injunction, the motion should be denied.

Facts

The Corridor, according to the permit issued by the Department of Environmental Protection (DEP), is primarily a 145.3-mile long high voltage direct current transmission line running from Beattie Township at the Canadian border to Lewison. Affidavit of Jonathan Bolton, dated November 24, 2021 ("Bolton Aff."), Ex. A at 3. Plaintiff NECEC Transmission LLC, an indirect subsidiary of Plaintiff Avangrid Networks, Inc. (which also owns Central Maine Power (CMP)), is currently responsible for building and operating the Corridor, having taken over that responsibility from CMP. Compl. ¶¶ 6–7, 29.

The Corridor is divided into five segments. Bolton Aff., Ex. A at 3–6. The first and most controversial of those segments, Segment 1, is a 53.1-mile long transmission line that will run from Beattie Township to the Forks Plantation. *Id.* at 3. Segment 1 "involve[s] creation of a new corridor through a forested area in western Maine," consisting mostly of commercial timberland. *Id.* at 54. According to the DEP Permit, Segment 1 would cross "480 freshwater wetlands; 280 rivers, streams, or brooks, of which 237 contain coldwater fisheries habitat, including the Upper Kennebec River, which is an Outstanding River Segment; six Inland Waterfowl and Wading Bird Habitats (IWWH) with 8.23 acres of conversion; and six Significant Vernal Pools." *Id.* at 4. Segments 2 and 3 of the Corridor will require widening of existing corridors and will also cross various wetlands, rivers, streams, and brooks. *Id.* at 5. Segments 4 and 5 make improvements to connect the Corridor from Lewiston to Wiscasset. *Id.* at 5–6.

Lease of Public Reserved Lands

A portion of Segment 1 of the Corridor passes through public reserved lands administered by Defendant Bureau of Parks and Lands (BPL). Compl. ¶ 75; *see* 12 M.R.S.A. § 1803(1)(B) (Westlaw Nov. 24, 2021). Specifically, the Corridor travels 0.9 miles through a parcel of public reserved lands at West Forks Plantation and Johnson Mountain Township. Compl. ¶ 75. As authorized by 12 M.R.S. § 1852(4), BPL and CMP entered a lease agreement for a 300-foot-wide transmission line corridor through this parcel on June 23, 2020 (the "BPL Lease"). *Id*. ¶ 75 & Ex. B. That lease agreement terminated a prior lease that BPL had issued to CMP on December 15, 2014. *Id.* at Ex. B, ¶ 23. The terms of the BPL Lease provide that NECEC "shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to [NECEC] in connection to its use of the Premises." *Id.* ¶ 6(m). The BPL Lease further provides that BPL shall have the right

to request amendment of the Lease "if any Lease term is found not to comply with Maine state law regarding public reserved lands." *Id.* ¶ 14.

On June 23, 2020, Senator Russell Black filed an action in Superior Court. *Black v. Cutko*, CV-2020-29, 2021 WL 3700685, at *5 (Me. B.C.D. Aug. 10, 2021). The complaint, as amended, sought judicial review of the issuance of the BPL Lease, claiming among other things that it required two-thirds approval of the Legislature under Article IX, § 23, of the Maine Constitution. *Id.* In an Order dated March 17, 2021, this Court issued a preliminary ruling that leases issued under 12 M.R.S.A. § 1852(4) are not categorically exempt from legislative approval. *Id.* Then, in a Decision and Order dated August 10, 2021, this Court reversed BPL's decision to issue the BPL Lease. *Id.* at *15. BPL and NECEC are currently appealing that decision to the Law Court. Compl. ¶ 78. Although that decision is automatically stayed pending appeal under M.R. Civ. P. 62(e), the Law Court has issued an agreed-upon order prohibiting NECEC from construction activities on the leased property. *Id*.

Agency Proceedings Regarding the Corridor

NECEC has been required to participate in various agency proceedings to obtain permits and other permissions needed for the Corridor, the most relevant of which are described below:

Public Utilities Commission (PUC) Permit. A company seeking to build a transmission line of 69 kilovolts or more must obtain a certificate of public convenience and necessity (CPCN) from the PUC. 35-A M.R.S.A. § 3132. CMP filed its petition for a CPCN with the PUC on September 27, 2017. Bolton Aff., Ex. B at 13. On May 3, 2019, the PUC issued the CPCN. Compl. ¶ 36. The Law Court affirmed the PUC Order on March 17, 2020. *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117.

Department of Environmental Protection (DEP) Permit. NECEC was also required to

obtain a permit from DEP (the "DEP Permit"). *See* 38 M.R.S.A. §§ 480-C, 483-A. NECEC submitted its application to the DEP on September 27, 2017. Bolton Aff., Ex. A at 3. Twenty-two parties intervened. *Id.* at 9–10. Over multiple days of hearings, the testimony of the parties and the public focused on the impacts of Segment 1. *Id.* at 13. On May 11, 2020, the DEP approved NECEC's permit application with 38 conditions.[1] *Id.* at 109–113.

Board of Environmental Protection (BEP) Appeal. One of the intervenors, Natural Resources Council of Maine (NRCM) appealed the DEP's decision to the Board of Environmental Protection (BEP) on June 10, 2020. Compl. ¶ 55; Bolton Aff., Ex. C. NextEra Energy Resources and a group of intervenors led by West Forks Plantation filed an appeal in the Superior Court, but that appeal was remanded to the BEP. Compl. ¶ 55; *see NextEra Energy Res., LLC v. Maine Dep't of Envtl. Prot.*, KEN-AP-20-29, slip op. at 6 (Me. Super. Ct., Ken. Cnty., Aug. 11, 2020). Those appeals remain pending before the BEP. Compl. ¶¶ 55, 58.

Army Corps of Engineers Permit. NECEC was also required to obtain a permit from the U.S. Army Corps of Engineers under certain federal laws (the "ACE Permit"). Compl. ¶ 59. NECEC applied for the ACE Permit on September 29, 2017. *Id.* After various proceedings, the Corps issued a permit on November 6, 2020. *Id.* ¶ 61. On October 27, 2020, various groups filed suit in U.S. District Court for the District of Maine, requesting in an amended complaint that the Court vacate the ACE Permit. *Id.* ¶ 62. As the result of an injunction pending appeal issued in that case, NECEC was prohibited from starting construction of Segment 1 until May

[1] In a decision dated November 23, 2021, the DEP Commissioner suspended the DEP Permit unless and until NECEC obtains a preliminary injunction in this case or, if no injunction is granted, NECEC prevails on the merits. *See* https://www.maine.gov/dep/ftp/projects/necec/SuspensionProceeding/2021-11-23Final%20Order%20Revised.pdf. The Commissioner on the same day also denied a motion to stay the DEP Permit while it is on appeal to the BEP. Undersigned expects the stay decision will be posted to https://www.maine.gov/dep/land/projects/necec/ by early next week.

13, 2021. *See* Compl. ¶ 64. Although the injunction was lifted, *see Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395, 407 (1st Cir. 2021), litigation remains pending in District Court. *Id.* ¶ 65.

Municipal Approvals. NECEC concedes it has not yet obtained necessary local permits from Caratunk, Pownal, Durham, and Auburn. *Id.* ¶ 71.

Citizen Initiatives

On August 29, 2020, a group of voters led by Thomas Saviello and Sandra Howard filed an application for a citizen's initiative that was styled as a resolve directing the PUC to reopen its CPCN Order, make new findings of fact, and reverse the decision. Compl. ¶ 79 & Ex. C. The Secretary of State certified the initiative for the November 2020 ballot on May 12, 2020. *Id.* ¶ 81. Avangrid challenged the initiative as an improper exercise of the initiative power. *See Avangrid Networks*, 2020 ME 109, ¶ 1, 237 A.3d 882. On August 5, 2020, the Law Court held that the initiative was "not legislation" because it required the PUC to "reverse its findings and reach a different outcome in an already-adjudicated matter." *Id.* ¶ 36.

Around September 15, 2020, a group of voters again led by Saviello and Howard filed their application for the citizen's initiative at issue here (the "Initiative" or "IB 1"). Compl. ¶ 83. The Secretary of State issued the petition, allowing for signature-gathering to begin, on October 30, 2020. *Id.* ¶ 92. On the same day, Avangrid Networks' parent company filed its 10-Q report with the Securities and Exchange Commission (SEC). Bolton Aff., Ex D, at 76. In discussing the Corridor, the 10-Q disclosed to investors that the application had been filed. *Id.* at 56. It concluded "[w]e cannot predict the outcome of this citizen initiative." *Id.*

On February 22, 2021, the Secretary of State certified that the proponents of the Initiative had gathered enough signatures for submission of the initiative to the Legislature. Compl. ¶ 98.

On March 1, 2021, Avangrid Network's parent filed its 10-K with the SEC for 2020. Bolton Aff., Ex. E at 173. In discussing "strategic risk factors," Avangrid disclosed to investors "new legislation or citizen referendums or ballot initiatives impacting or challenging the necessary approvals and permits . . . could impact our ability to make these investments and have an adverse effect on the success of the NECEC project and our financial condition and prospects." *Id.* at 28. The 10-K also describes the latest developments with the Initiative and again notes "[w]e cannot predict the outcome of this citizen initiative." *Id.* at 50.

Both supporters and opponents of the Initiative spent large sums to influence the campaign. According to the most recent data published by Maine's campaign-finance regulator, a PAC established by CMP and NECEC spent over $17 million and a ballot question committee funded by NECEC spent nearly $5 million, while supporters of IB 1 spent over $17 million. Bolton Aff., Ex. F & G. On November 2, 2021, roughly 59% of voters approved the Initiative, with 243,943 votes in favor and 168,143 opposed. Bolton Aff., Ex. H. The ballot question made clear to voters that the Initiative would apply retroactively. *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 7, 256 A.3d 260.

Effect of the Initiated Bill

IB 1 contains two main parts. *See* Compl., Ex. D. First, § 1 amends the statute governing BPL's authority to lease public reserved lands. Under current law, BPL can issue leases of public reserved land for terms of 25 years for various utility projects, including transmission lines, with no statutory requirement for legislative approval. 12 M.R.S.A. § 1852(4) (Westlaw Nov. 24, 2021). IB 1 amends that statute to provide that certain leases, including transmission-line leases, must receive two-thirds legislative approval, retroactive to September 16, 2014.

Second, IB 1 adds three new provisions to the statute administered by the PUC governing

electric transmission lines. Section 4 provides that construction of a high-impact electric transmission line must receive legislative approval, with two-thirds approval required if the line uses or crosses public lands. Section 5 bans construction of high-impact electric transmission lines in a defined region of Franklin and Somerset Counties. Section 6 provides that these new restrictions on transmission lines are retroactive to September 16, 2020.

Construction

NECEC's verified complaint indicates that it commenced clearing and construction activities on Segments 2–5 of the Corridor on January 18, 2021, and on Segment 1 of the Corridor sometime after May 13, 2021. Compl. ¶¶ 117–18. NECEC has not engaged in any clearing or construction on the public reserved lands. PI Mot. at 32 n.26; Compl. ¶ 78.

Impacts of Corridor Construction During Litigation

The various permitting decisions discussed above, while ultimately approving the Corridor, identified various impacts that it would impose. The PUC issued a CPCN, but found that the Corridor "will have adverse impacts on the scenic and recreational values in certain communities in Somerset and Franklin counties, as well as the associated tourism and recreation-based economy in these communities," which were mitigated "to some extent" by certain CMP concessions. Bolton Aff., Ex. B, at 68–69. The DEP Permit notes effects on certain scenic resources. Bolton Aff., Ex. A at 26–30, 43–47, 50, 53, 94. The DEP Permit also noted effects on wildlife. *Id.* at 80. And, the DEP required CMP to create a "decommissioning plan" for Segment 1 of the Corridor to ensure that, if the Corridor ceases operation, CMP would be obligated dismantle and remove the Corridor so it does not "adversely affect the scenic character and natural resources of the region." *Id.* at 106.

As a result of these and other impacts, DEP required CMP to take steps to mitigate the

environmental impact of the Corridor. These steps include, most notably, conserving 40,000 acres near Segment 1. *Id.* at 81. NECEC does not intend to preserve this land if the Corridor is cancelled. Affidavit of Thorn C. Dickinson, dated November 3, 2021 ("Dickinson Aff.") ¶ 34b.

The PUC issued a CPCN that contained stipulations obliging NECEC and H.Q. Energy Services ("HQUS") to provide certain benefits to Maine. Dickinson Aff. ¶ 33. These benefits include over $200 million in payments spread out over many years to various funds for rate relief and other benefits. *Id.* ¶ 33. NECEC asserts that suspension of the Corridor may "place in permanent jeopardy" these benefits that were negotiated as part of the permitting process. *Id.*

Argument

A preliminary injunction is an "an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case." *Saga Commc'ns of New England, Inc. v. Voornas*, 2000 ME 156, ¶ 19, 756 A.2d 954 (quoting Andrew M. Horton & Peggy L. McGehee, *Maine Civil Remedies* § 5.1, at 5-2 to 5-3 (1991)). A party seeking a preliminary injunction bears the burden of establishing four criteria: "that (1) it will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; (3) it has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the injunction." *Bangor Historic Track, Inc. v. Dep't of Agric*., 2003 ME 140, ¶ 9, 837 A.2d 129. The Court should deny the requested injunction if any of the four factors are not met. *Id.* ¶ 10.

I. NECEC Is Unlikely to Succeed on the Merits

In considering likelihood of success, the Court should start with the axiom that a direct initiative, like all legislation, enjoys a "heavy presumption of constitutionality, and the burden of overcoming that presumption rests on the challenger." *League of Women Voters v. Sec'y of*

State, 683 A.2d 769, 771 (Me. 1996). Here, NECEC has not shown that it can meet that burden.

A. NECEC's Claims Are Barred by Sovereign Immunity

"The immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty." *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978). Thus, "a claim against the State will be dismissed 'unless the State, acting through the Legislature, has given its consent that the present action be brought against it.'" *Waterville Indus. v. Fin. Auth. of Maine*, 2000 ME 138, ¶ 21, 758 A.2d 986 (quoting *Drake*, 390 A.2d at 543–44); *see also Alden v. Maine*, 1998 ME 200, ¶ 6, 715 A.2d 172, *aff'd*, 527 U.S. 706 (1999). The doctrine bars not just claims for damages but claims for declaratory relief as well. *Bell v. Town of Wells*, 510 A.2d 509, 515 (Me. 1986); *Cushing v. Cohen*, 420 A.2d 919, 922 (Me. 1980).

While Maine courts have recognized a narrow exception to sovereign immunity for suits seeking purely prospective relief against state officials, that exception does not extend to suits against state agencies, and certainly not to constitutionally established branches of government. *See Olfene v. Bd. of Trs.*, No. CV-08-155, slip op. at 9, 2008 WL 6742635 (Me. Super. Ct. Dec. 4, 2008) (Jabar, J.). Because all of the named defendants enjoy sovereign immunity from the claims in this suit, NECEC is unlikely to prevail on the merits.

B. NECEC Is Unlikely to Succeed on Its Vested Rights Claim

1. *"Vested Rights" Is Not the Proper Analysis for Retroactive State Legislation*

NECEC's primary legal theory as to why the initiated law cannot be applied to the Corridor is that application would interfere with NECEC's "vested rights" in constructing the corridor. The Court should hold that the vested rights analysis is inapplicable to an exercise of the state police power to protect the environment.

The vested rights doctrine has been applied by the Law Court primarily in the context of

municipal land-use disputes.[2] In that context, the Law Court has held that property owners engaged in ongoing construction projects for which they have obtained validly issued building permits may, depending on the circumstances, be protected from changes in municipal ordinances that occur after construction has begun.

But decisions of the Law Court have suggested that a "vested rights" claim cannot be brought against legislation enacted under the state's police power. For example, In *Baxter v. Waterville Sewerage District*, 79 A.2d 585 (Me. 1951), residents of Waterville claimed that a state law establishing a sewerage district that would charge fees for sewage disposal violated their vested rights. *Id.* at 587. In rejecting the claim, the Law Court explained:

> Where the public health, safety, or morals are concerned, the power of the state to control under its police powers is supreme and cannot be bargained or granted away by the Legislature. **The exercise of the police power in such cases violates no constitutional guaranty against the impairment of vested rights** or contracts.

Id. at 589 (quoting *In re Searsport Water Co.,* 108 A. 452, 455 (Me. 1919)) (emphasis added).

Following *Baxter*, the Law Court occasionally suggested that state laws impairing vested rights might be somehow unconstitutional. *See, e.g.*, *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981). But in *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986), *abrogated on other grounds by DeMello v. Dep't of Envtl. Prot.*, 611 A.2d 985 (Me. 1992), the Law Court cast doubt on its earlier statements. The *Norton* Court explained that limitations on retroactive state laws "can only arise from the United States Constitution or the Maine

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[2] *See, e.g., Sahl v. Town of York*, 2000 ME 180, ¶ 4, 760 A.2d 266 (town zoning ordinance); *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 780 (Me. 1989) (town moratorium on landfill construction); *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 162 (Me. 1988) (city ordinance); *Thomas v. Zoning Bd. of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978) (town zoning ordinance).

Constitution." *Id.* at 1061 n.5. It acknowledged "confusion" arising from its prior statements, which were "inconsistent" with this principle. *Id.* Among the inconsistent prior statements cited in *Norton* was the Court's statement in *Merrill*—relied upon by NECEC, PI Mot. at 13—that retroactive application of a statute is unconstitutional if it "impairs vested rights or imposes liabilities." *Id.* *Norton* criticizes *Merrill* for making that statement "without identifying the source of the asserted constitutional prohibition." *Id.* *Norton* concludes its discussion by explaining "[i]f the Legislature intends for a statute to apply retroactively . . . the statute will be so applied unless a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature." *Id.*

The Law Court reaffirmed *Norton*'s repudiation of "vested rights" as a stand-alone cause of action against retroactive state legislation in *State v. LVI Group*, 1997 ME 25, 690 A.2d 960. In that case, the plaintiff holding company ("LVI") challenged the Legislature's decision to retroactively amend the definition of "employer" in a severance pay statute for the specific purpose of abrogating a Law Court decision that held that LVI was not an "employer" under the statute. *Id.* ¶¶ 1–7. In analyzing LVI's claim, the Law Court explained that, in *Norton*, "we clarified the proper analysis concerning the retroactive application of statutes." *Id.* ¶ 9. The Court then quoted *Norton*'s exhortation that limitations on the Maine Legislature's power to regulate retroactively "can only arise from the United States Constitution or the Maine Constitution." *Id.* (quoting *Norton*, 511 A.2d at 1056 n.5).

To be sure, the Law Court has continued to apply the concept of "vested rights" against municipalities. But that practice in no way repudiates its proclamation that challenges to retroactive *state* laws must be brought under specific constitutional provisions. As many courts have recognized, the concept of "vested rights" arises from the common law. *See Heber v.*

Lucerne-in-Maine Vill. Corp., 2000 ME 137, ¶ 10, 755 A.2d 1064 (observing that "[a]t common law, an individual has a vested right in an accrued cause of action").[3] Unlike the Legislature, which may abrogate the common law by clear statutory enactment, *see Ziegler v. Am. Maize-Prod. Co.*, 658 A.2d 219, 222–23 (Me. 1995), municipalities' home-rule powers to legislate are constrained by the "general law." Me. Const., art VIII, pt. 2, § 1; 30-A M.R.S.A. § 3001. Maine municipalities are thus presumably bound by any common law vested rights that builders may acquire. Because the state legislative power is not similarly constrained, a common-law vested rights claim cannot stand against an exercise of legislative power that, as here, is clearly intended to abrogate common-law rights. *See generally Foss v. Maine Tpk. Auth.*, 309 A.2d 339, 342 (Me. 1973) (recognizing that the Legislature can authorize municipalities to regulate property in a manner that would otherwise make municipalities liable for nuisance or trespass).[4]

The Court should follow *Norton* and *LVI* and decline to recognize "vested rights" as an independent cause of action against state legislation enacted under the police power unless a specific provision of the state or federal constitution prohibits such action by the Legislature.

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[3] *See also Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs of Yamhill Cty.*, 264 P.3d 1265, 1277 (Or. 2011) (analyzing whether ordinance affected developer's "common law vested right."); *Andalucia Dev. Corp. v. City of Albuquerque*, 234 P.3d 929, 937 (N.M. Ct. App. 2010) (distinguishing statutory rights from "common law vested rights"); *Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350, 355 (Colo. App. 1996) (noting that legislative enactment contained language indicating that it did not supplant or supersede "the common law doctrine of vested rights or equitable estoppel"); *Est. of Kadin v. Bennett*, 557 N.Y.S.2d 441, 442 (N.Y. App. Div. 1990) (city ordinance "does not codify or abolish the common-law doctrine of vested rights").

[4] NECEC may point to *Heber v. Lucerne-in-Maine Vill. Corp.*, 2000 ME 137, 755 A.2d 1064, as an example of the Law Court, post-*Norton* and post-*LVI*, seemingly taking at face value a vested-rights claim involving a state law. But, unlike IB 1, the enactment in *Heber* contained no clear indication that the Legislature intended the law to apply retroactively. *Id.* ¶ 5. The Law Court thus properly invoked "common law principles" concerning vested rights to determine whether the right acquired prior to enactment of the law had vested. *Id.* ¶ 10. Here, in contrast, the retroactive intent of IB 1 is clear from the statutory language.

2. *NECEC's Right to Build the Corridor Has Not Vested*

Assuming *arguendo* that IB 1 should be analyzed like a municipal zoning ordinance, NECEC must meet a three-part test to establish that IB 1 infringes its vested rights: (1) "there must be the actual physical commencement of some significant and visible construction;" (2) "the commencement must be undertaken in good faith . . . with the intention to continue with the construction and to carry it through to completion;" and (3) "the commencement of construction must be pursuant to a validly issued building permit." *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266; (quoting *Town of Sykesville v. West Shore Commc'ns, Inc.*, 677 A.2d 102, 104 (Md. Ct. Spec. App. 1996)). Under this test, a plaintiff cannot establish vested rights merely because it "(1) filed an application for a building permit; (2) was issued a building permit; (3) relied on the language of the existing ordinance; or (4) incurred preliminary expenses in preparing and submitting the application for a permit." *Id.* at ¶ 13.

a) NECEC's Rights Did Not Vest Because It Took a Calculated Risk to Begin Construction While its Permits Were Under Agency and Judicial Review

NECEC's vested rights claim fails because at least two of its necessary permits are still undergoing direct agency or judicial review. Most significantly, while the DEP Permit was final agency action allowing NECEC to start construction, that permit remains on appeal to the BEP. That appeal is a *de novo* proceeding in which the BEP need not defer to either the DEP's factual findings or its legal conclusions. 38 M.R.S.A. § 341-D(4)(A); *Champlain Wind, LLC v. Bd. of Env't Prot*., 2015 ME 156, ¶ 14, 129 A.3d 279. Meanwhile, the ACE Permit was challenged in court before commencement of construction and the outcome of that challenge remains pending. Compl. ¶¶ 62, 65. While NECEC may have been free to start construction under this state of affairs, it could not have acquired vested rights by doing so.

The Superior Court has recognized that permits do not vest while they remain on appeal.

In *Conservation Law Foundation, Inc. v. Maine*, No. AP-98-45, 2002 WL 34947097 (Me. Super. Jan. 28, 2002), the holder of a contested DEP permit for a pier constructed the pier after favorable determinations by the DEP and BEP but while Rule 80C appeals of those decisions were pending. *Id.* at *2. In rejecting the vested rights claim, the court explained that recognizing a vested right to the permit would allow the permittee to "go ahead and act on that permit and retain the benefit so conferred as a matter of right, even though it is subject to a timely and legally sanctioned process to attack its issuance." *Id.* at *3.

Other jurisdictions have recognized that the same principle applies when intervening legislation affects a permit that is on appeal. In *Donadio v. Cunningham*, 277 A.2d 375, 382 (N.J. 1971), the New Jersey Supreme Court considered whether a fast-food restaurant's decision to commence construction after prevailing at the trial-court level in a legal challenge to its building permit immunized it against the town's decision, before expiration of the appeal period, to change its zoning ordinance to prohibit such establishments. *Id.* at 379. The Court concluded that existence of the plaintiffs' appeal right at the time of the amendment precluded any such argument, explaining:

> A landowner should not be able to thwart that public interest by a "bootstrap" operation and by winning an unseemly race. This should be so whether or not the issuance of the building permit is subsequently sustained in the litigation. And, of course, an owner can acquire no additional rights by starting or continuing construction after an appeal has been taken. What we have said represents the general rule, . . . as well as the holdings and rationale of our own cases.

Id. at 382–83 (citations omitted); *see also Meridian Dev. Corp. v. Edison Twp.*, 220 A.2d 121, 124 (N.J. Super. Ct. 1966) (developer's rights against citizen's initiative did not vest where developer's permit was still undergoing judicial review).

The Maryland Supreme Court has also held that "until all necessary approvals, including

all final court approvals, are obtained, nothing can vest or even begin to vest." *Powell v. Calvert Cty.*, 795 A.2d 96, 101 (Md. 2002). Applying this rule, the *Powell* court held that a zoning board should have applied an amended zoning ordinance to a landowner's permit after a court vacated and remanded the permit for further consideration. *Id.* at 98–99. The court reasoned "until all litigation concerning the [permit] is final," persons proceeding under it "are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process." *Id.* at 101.[5]

Although the Law Court has apparently not had occasion to consider this doctrine,[6] it has recognized its underpinnings by holding that a right that is "purely contingent" cannot vest. *Fournier v. Fournier*, 376 A.2d 100, 102 (Me. 1977) (holding that property rights under divorce laws did not vest until the divorce had been granted). Other courts have described vested rights as rights that are "fixed, settled, absolute, *and not contingent upon anything*." *Big John's Billiards, Inc. v. State*, 852 N.W.2d 727, 741 (Neb. 2014) (emphasis added); *accord Antoon v. Cleveland Clinic Found.*, 71 N.E.3d 974, 982 (Ohio 2016). Here, NECEC's right to construct

[5] Other state courts have reached similar conclusions. *See Ebzery v. City of Sheridan*, 982 P.2d 1251 (Wyo. 1999) (expenditures undertaken during appeal of zoning variance "are inherently unreasonable" and a "calculated risk" that do not vest rights); *Hussey v. Town of Barrington*, 604 A.2d 82, 85 (N.H. 1992) ("landowners who decide to proceed with their projects heedless of serious questions about the legality of their actions may be deemed to have taken a 'calculated risk,' rather than to have relied in good faith [on a zoning variance]"); *Bowman v. City of York*, 482 N.W.2d 537, 546 (Neb. 1992) ("one who builds in accordance with a zoning variance which is appealed take the risk that it will have to tear down what it has built"); *Kauai County v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982) (holding that construction is a "speculative business risk" until the developer receives "final discretionary approval"); *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 124 N.W.2d 809, 817 (Wis. 1963) ("Once the appellants received notice of this appeal and the claim that the permit violated the zoning ordinance, they thereafter proceeded at their peril in incurring expenditures in reliance on the permit."); *Columbus Bd. of Zoning Appeals v. Wetherald*, 605 N.E.2d 208, 210 (Ind. Ct. App. 1992) (plaintiff builder "proceeded to build at his own peril prior to a final resolution of the variance issues.").

[6] The doctrine could have been raised by the prevailing defendant in *Thomas*, but apparently was not. *See* 381 A.2d at 644–45.

and operate the Corridor was and is entirely contingent upon a successful outcome of the BEP appeal, and, beyond that, favorable judicial review of that outcome and of its ACE Permit. As long as the NECEC's entitlement to its permits remain under agency and judicial review, it would be incongruous to hold that its rights to construct pursuant to those permits have nonetheless somehow vested. Rather, NECEC has taken a calculated risk to commence construction during ongoing agency and judicial review.[7]

b) NECEC's Rights Did Not Vest Because It Took a Calculated Risk to Begin Construction with Knowledge of the Initiative

NECEC's indisputable knowledge of the threat IB 1 posed to the Corridor at the time it began construction should also bar any claim that it had vested rights to the project.

The Law Court has recognized the salience of a developer's knowledge of opposition to its projects and potential changes to the law to the vested rights analysis in *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 27, 856 A.2d 1183, and *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988)—both cases that, as here, involved direct initiatives. In *Kittery Retail Ventures*, the Law Court took into account the developer's "knowledge of the pending amendment and opposition to the development," in determining whether the builder had an equitable basis to assert vested rights. 2004 ME 65, ¶ 28, 856 A.2d 1183. And in *Fisherman's Wharf* the Court considered that the developer had "knowledge of the contents of the proposed ordinance and its retroactive provisions" prior to acquiring title to the property. 541 A.2d 160, 164 (Me. 1988).

NECEC argues that these two cases are distinguishable because the plaintiffs had not begun construction when the law changed. PI Mot. at 16. But neither case clearly indicates

[7] NECEC acknowledges it has yet to acquire needed permits from four municipalities Compl. ¶ 71. This fact further underscores that NECEC's right to build the Corridor has not vested.

whether the outcome of the Court's analysis would have been different had the plaintiff commenced construction. What the cases do establish is that knowledge of pending legal changes can, at least in some circumstances, properly be considered in the vested-rights analysis.

Other caselaw more directly supports the view that a builder's awareness of a likely change in law renders any commencement of a construction a "calculated risk," and thus not "good faith" commencement of construction. For example, the Supreme Court of North Carolina has observed that good faith is not present where a landowner

> with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him

Town of Hillsborough v. Smith, 170 S.E.2d 904, 910 (N.C. 1969). Similarly, the Supreme Court of Arizona has held that a builder acquired no vested rights when he learned of a proposed zoning change and then "proceeded [with construction] on the theory either that the ordinance would not be passed, or that, if passed, it was void." *City of Tucson v. Arizona Mortuary*, 272 P. 923, 928–29 (Ariz. 1928). The Court explained that, "having taken that chance, [the builder] may not now be heard to set up any loss to it which arose from its actions after it had knowledge that the ordinance was being considered." *Id.*

The Hawai'i Supreme Court has squarely considered whether a developer's knowledge of a pending referendum to block its development might preclude it from asserting "zoning estoppel" based on its obtaining of permits and expenditure of costs. *Kauai Cty. v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 773 (Haw. 1982). *Kauai County* affirmed that "expenditures made toward commencing construction before the referendum vote were not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine

the referendum process." *Id.* at 778. While *Kauai County* used the date of petition certification for the initiative for deciding when reliance ceased to be in good faith, *id.* at 777, *Fisherman's Wharf* makes clear that, under Maine law, reliance becomes unreasonable once the developer has knowledge of the initiative, even if signature-gathering remains ongoing.[8] 541 A.2d at 161, 164.

The Court should adopt the reasoning of these cases to find that NECEC's commencement of construction on January 18, 2021 was a calculated risk, and thus not in good faith reliance on the permits. NECEC did not commence construction of the Corridor until January 18, 2021. Compl. ¶ 117. By that point, the effort to place IB 1 on the ballot was well underway. The Secretary of State had issued the petition months earlier. Compl. ¶ 92. NECEC was alerting investors of the risks posed by IB 1 as early as October 30, 2020. *See* Bolton Aff., Ex. D at 56. By January 18, 2021, NECEC's political action committee had spent nearly $2.4 million to oppose the new initiative. Bolton Aff., Ex. I. And given that Initiative was proposed by the same individuals who spearheaded the 2020 initiative, Compl. ¶¶ 80–81, NECEC had every reason to expect that proponents would again succeed in gathering the needed signatures. NECEC's decision to begin construction under these circumstances was not good-faith reliance on its permits but a calculated risk that the initiative "would not be passed, or that, if passed, [] was void," *City of Tucson*, 272 P. at 928–29.

NECEC relies on a single case, from an intermediate court in Maryland, for the proposition that a builder acts in good faith even if it "seizes the day" by intentionally

[8] Even if certification of the petition is the appropriate date, NECEC has not established that it engaged in sufficient construction of the Corridor—as opposed to mere site preparation—by the February 22, 2021 certification date. *See Leighton v. Town of Waterboro*, No. CIV. A. AP-02-068, 2005 WL 2727094, at *2 (Me. Super. May 4, 2005) (holding that "site preparation" activities were insufficient to create vested rights). As of February 22, 2021, NECEC had erected only 9 of 832 planned structures. Compl. ¶¶ 31, 124. The Court should hold as a matter of law that this is insufficient to vest any rights.

commencing construction for the purpose of vesting its rights before an anticipated change in the law. *Town of Sykesville*, 677 A.2d at 104. Given the contrary authority cited above, and the failure of the *Town of Sykesville* court to cite a single authority endorsing its reasoning,[9] that decision appears to be an outlier. And, contrary to NECEC's suggestion, PI Mot. at 14 n.9, *Town of Sykesville*'s "seize the day" holding was not held by the Law Court to be "in accord with" Maine law. Rather, the Law Court cited that case for a different legal proposition. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266.

In any event, the Court should reject the notion that a developer that commences construction of a controversial project in the teeth of a petition drive for a citizen's initiative that would stop the project can somehow acquire vested rights against the will of the people expressed through the initiative process. In the words of the *Donadio* court, recognizing such a rule would promote an "unseemly race" between developer and the citizenry acting as legislature, in which the developer could engage in a "bootstrap" operation to thwart the public interest. *Donadio*, 277 A.2d at 382–83.

c) The Commencement of Construction May Not Have Been Through a "Validly Issued" Permit

A permit cannot vest rights if it was not valid when issued. *Corey Outdoor Advert., Inc. v. Bd. of Zoning Adjustments of City of Atlanta*, 327 S.E.2d 178, 185 (Ga. 1985); *Kauai Cty.*, 653 P.2d at 778. In this case, there is lingering legal uncertainty concerning the validity of both the DEP Permit and the ACE Permit due to the ongoing judicial and agency proceedings challenging those permits. Moreover, an agreement crucial for the Corridor's construction—the BPL

[9] *Town of Sykesville* cites *Prince George's Cty. v. Equitable Tr. Co.*, 408 A.2d 737, 743 (Md. Ct. Spec. App. 1979), in support of its "seize the day" theory, but that decision does not discuss the issue.

Lease—has been ruled by this Court to be invalid. *See Black*, 2021 WL 3700685. Without the BPL Lease, NECEC will be unable to construct the Corridor in the form approved by regulators.

Defendant BPL does not agree with the holding in *Black* and is appealing that decision and vigorously defending the BPL Lease. Defendants are obliged to bring the ruling in *Black* to the Court's attention. Should that ruling be affirmed by the Law Court, NECEC never had a valid lease to build the Corridor over public reserved lands, and therefore could not have acquired any vested rights to build the Corridor in the form proposed to regulators. The existence of the decision in *Black*, as well as the legal uncertainty concerning the validity of the DEP Permit and the ACE Permit, should be considered by the Court in assessing NECEC's likelihood of success on the merits.

d) There Has Not Been "Actual Physical Commencement" of Construction of the Portion of the Corridor Regulated by § 1 of IB 1

NECEC claims that it has met the "actual physical commencement of construction" requirement because it has cleared land and erected poles on various segments of the Corridor running over private land. But NECEC has not engaged in any construction on the public reserved land subject to § 1 of IB 1. PI Mot. at 32 n.26. Thus, even if NECEC's rights have vested with regard to the remainder of IB 1, they have not vested against application of § 1.

For a right to vest, the commenced construction must be "pursuant to" the permit in question. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. The vested rights analysis must therefore focus on whether construction has commenced on the specific parcel that is subject to the changed permitting law. For example, where the owner of a mobile home park obtained a permit for the park and had installed "infrastructure" for the park, his rights to build specific homes within the park nevertheless did not vest to the extent he failed to acquire the necessary permits for, and commence construction of, the homes themselves. *Leighton*, 2005 WL 2727094, at *1.

A similar analysis applies here. NECEC obtained various government approvals allowing construction of the Corridor. But § 1 of IB 1 changes the law regarding only the BPL Lease. The construction that NECEC undertook on portions of the Corridor on private land is analogous to the *Leighton* plaintiff's construction of infrastructure in the mobile home park as a whole. Such construction was not sufficient to vest the owner's right to construct particular mobile homes since those homes required an additional, more specific permit. Similarly, NECEC's construction on other parts of the Corridor should be deemed insufficient to vest its rights to construct on the land covered by the BPL Lease.

3. *The People of Maine Did Not Act in Bad Faith by Enacting IB 1*

NECEC also seeks to invoke the vested-rights analysis that applies to enactments of legislation in "bad faith." The 243,943 Maine citizens who voted "Yes" on Question 1 cannot be presumed to have acted in bad faith.

The Law Court has observed that while it is theoretically possible for a party to established equitably acquired vested rights, parties in practice have had "difficulty in proving the requisite bad faith or discriminatory enactment." *Kittery Retail Ventures*, 2004 ME 65, ¶ 25, 856 A.2d 1183 (citing cases). *Kittery Retail*, which also declined to find bad faith, has striking similarities to this case. There, town voters enacted by referendum an amendment to block construction of a planned "retail outlet mall." *Id.* ¶¶ 4, 5. When the town planning board approved the developer's application despite the referendum vote, town voters enacted a second amendment by referendum, identical to the first except with an express retroactivity provision. *Id.* ¶ 6. Despite the voters' obvious intent to block the construction of the mall, the Superior Court rejected the developer's equitable vested rights claim, observing that there can be no bad faith when "persistent local citizens consistently oppose large-scale retail developments and finally win." *Kittery Retail Ventures, LLC v. Town of Kittery*, No. CIV.A. CV-02-162, 2003 WL

21386952, at *3 (Me. Super. May 29, 2003). On appeal, the Law Court affirmed this holding, pointing both to the developer's early knowledge of "discussions" about the applicable zoning law and the lack of any evidence of bad faith by "town officials." 2004 ME 65, ¶¶ 27–28, 856 A.2d 1183.

The *Kittery Retail* analysis disposes of NECEC's bad faith claim. Like the developer there, NECEC was well aware that construction of the Corridor was fraught with legal obstacles. It has faced extensive opposition in the various permitting processes, in the Legislature, and through not one but two direct initiatives. It cannot have been taken by surprise by the proposal or enactment of IB 1.

More importantly, *Kittery Retail* makes clear that, in the case of a citizen initiative, the Court should not even consider whether voters (or initiative proponents) acted in bad faith. Rather, the *Kittery Retail* Court focused only on whether *town officials* acted in bad faith. *Id.* ¶ 31. Applying that analysis here, the relevant legal question is whether officials with BPL or the PUC acted in bad faith by "engag[ing] in delaying tactics" or similar misconduct with regard to BPL lease or CPCN, such that they should now be prohibited from enforcing IB 1. Since NECEC makes no such arguments, and there is no evidence whatever of any such bad faith, NECEC's equitable claim must fail.

Finally, assuming *arguendo* that could ever be proper to consider whether referendum voters voted in bad faith, there is no basis for such an assumption here. IB 1 raises major public policy issues of statewide significance upon which people of good faith can disagree.

C. IB 1 Does Not Violate the Separation of Powers

NECEC also argues that IB 1 was an exercise of both executive and judicial powers and therefore violated the separation of powers clause in the Maine Constitution.

The legislative power, whether exercised through the Legislature or directly by the

people through the citizen initiative process is substantial: "the Maine Constitution vests in the Legislature the 'full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.'" *MacImage of Maine, LLC v. Androscoggin Cty*., 2012 ME 44, ¶ 28, 40 A.3d 975 (quoting Me. Const. art. IV, pt. 3, § 1). Moreover, the Law Court has recognized that "the regulation of public utilities lies with the Legislature and not with the Executive or Judiciary." *Auburn Water Dist. v. PUC*, 163 A.2d 743, 744 (Me. 1960). Although the Legislature has delegated its authority over the regulation of public utilities, it has not "surrendered" that power by doing so. *Id.*; *Avangrid Networks*, 2020 ME 109, ¶ 32, 237 A.3d 882.

1. *IB 1 Is Not an Exercise of Executive Power*

NECEC argues that IB 1's retroactive ban on the construction of high-impact electric transmission lines in § 4 and the legislative approval requirements in § 1 and § 5 amount to the revocation of permits already issued by executive branch agencies. PI Mot. at 24. NECEC cites the Law Court's decision in *Avangrid*, which held that the 2020 initiative to revoke NECEC's CPCN was not a proper exercise of legislative power. *Avangrid Networks*, 2020 ME 109, ¶ 36, 237 A.3d 882. That initiative was styled as a "resolve" requiring the PUC to reopen its CPCN decision, make particular findings of fact against the applicant, and then deny the application. *Id.* ¶ 5. The Law Court explained that because the purpose and effect of the initiative was to "dictate the Commission's exercise of its quasi-judicial executive-agency function in a particular proceeding," the resolve would interfere with executive power. *Id.* ¶ 35.

IB 1, however, is nothing like the resolve at issue in *Avangrid.* The fatal flaw in that bill was that it purported to direct an executive agency as to how it ought to apply various existing legal standards. IB 1, in stark contrast, does not purport to reverse the PUC's judgment as to whether NECEC met the then-existing legal criteria or BPL's judgment as to whether to issue a

lease. Rather, it enacts new statutory restrictions on building high-impact electric transmission lines and obtaining leases of public reserved lands. These restrictions apply not just to the Corridor, but to all high-impact electric transmission line projects and utility leases of public reserved lands. Enacting generally applicable criteria or legislative approval requirements for construction of infrastructure projects is an act quintessentially legislative in character. That act cannot somehow become executive merely because it includes provisions allowing for retroactive application. Were that the case, any legislation affecting permits or other government benefices previously granted by the executive branch would violate the separation of powers.

Indeed, *Avangrid* lists nine factors relevant to determination of whether an act is legislative in character. *Avangrid*, 2020 ME 109, ¶ 30, 237 A.3d 882 (quoting *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 13 n.7, 91 A.3d 601). IB 1 fits nearly every listed characteristic. It "makes new law, rather than executes existing law." *Id.* It "proposes a law of general applicability." *Id.* It "relates to subjects of a permanent or general character." *Id.* It does not "implement[] existing policy" or "deal[] with a small segment of an overall policy question." *Id.* It "requires only general knowledge." *Id.* It does not involve a subject matter that has been delegated "for local implementation." *Id.* It "is an amendment to a legislative act." *Id.* And, while it may not technically be a "zoning law[]," it is the statewide equivalent of one, placing a particular region of the state off-limits for a particular type of project.

NECEC also relies on *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 3, 837 A.2d 117. PI Mot. at 25. But IB 1 differs markedly from the amended workers compensation statute at issue there. While the injured worker in *Grubb* was seeking to apply the new statute by re-opening and reversing the outcome of a quasi-judicial proceeding, 2003 ME 139, ¶ 5, 837 A.2d 117, IB 1's amendments to 35-A M.R.S.A. § 3132 do not require the re-opening of the CPCN

proceeding in order to affect the Corridor. Section 4 of IB 1 requires legislative approval "[i]n addition to obtaining a [CPCN]," and thus cannot be characterized as requiring reopening or reversal of the CPCN. Similarly, § 5 is an outright ban on transmission lines in the Upper Kennebec Region. No reopening or reversal of the CPCN proceeding is required for NECEC to be barred from construction of any portion of the Corridor located within that region. Rather, the provision is phrased to have the force of law independent of the CPCN.

Nor can § 1 of IB 1 be said to infringe upon executive power in the same way as the law in *Grubb*. BPL leases are not issued via a quasi-judicial proceeding, as was at issue in *Grubb.* In any event, language in the BPL Lease requires NECEC to comply with any laws "hereinafter enacted" relating to the leased premises. Compl., Ex. B ¶ 6(m). The BPL Lease thus expressly incorporated the possibility of future legislative action imposing additional conditions or obligations on NECEC.

2. *IB 1 Is Not an Exercise of Judicial Power*

Similarly without merit is NECEC's contention that §§ 4–5 of IB 1 would usurp judicial power by "revers[ing]" the "final judgment" issued by the Law Court in *NextEra*. PI Mot. at 26.

The Law Court's most recent discussion of this concept shows that IB 1 is not the sort of legislative enactment that exercises judicial power. In *MacImage of Maine, LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 29, 40 A.3d 975, the Law Court considered legislation that retroactively altered the obligations of counties to respond to bulk records requests, enacted following a Superior Court decision against the counties under the previous statute. *Id.* ¶ 14. After observing that "[t]he constitutional separation of powers is not always undermined when the Legislature passes legislation that "affects cases that are pending in the judicial system," the Court emphasized that, by characterizing the retroactive legislative action as "an attempt to overturn a decision in a private dispute," the plaintiffs were "underestimat[ing] the *public*

interests at stake." *Id.* ¶ 27 (emphasis in original). The Court discussed the broad sweep of the legislation, noting that it "served more broadly to balance the public and private interests involved in fee-setting for counties' electronic copying of registry land records and indexes." *Id.* ¶ 29. It concluded that because the legislation was "policy-based," it did not "usurp the adjudicatory power of the courts." *Id.*

IB 1 is similarly policy based. It imposes new legislative approval requirements for a whole range of utility projects throughout the State. It bans construction of an entire class of transmission line in a delimited area of the State. It makes various clarifying changes to general PUC statutes. Its retroactivity provisions are no more objectionable than the retroactivity provisions affirmed in *MacImage*, which were plainly intended to reverse a decision of the Superior Court. *See id.* ¶¶ 7, 14. The fact that IB 1 may indirectly affect the CPCN is insufficient to make IB 1 an improper exercise of judicial power.

3. *NECEC's Presentment Claim Is Not Justiciable*

NECEC next argues that § 4 of IB 1 violates the presentment requirement of article IV, part 3, § 2 of the Maine Constitution because, according to NECEC, it "does not allow for or contemplate such presentment." PI Mot. at 27. NECEC is unlikely to succeed on this claim because it is not ripe.

For a claim to be ripe, "the controversy must present a 'concrete, certain, or immediate legal problem.'" *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 21, 221 A.3d 554 (quoting *Johnson v. Crane*, 2017 ME 113, ¶ 10, 163 A.3d 832). NECEC's claim depends entirely on its assumption that the Legislature might grant approval to a transmission line project, but then refuse to submit that approval to the Governor for signature or veto. But NECEC has no basis for this supposition. The text of IB 1 merely requires a transmission line to "obtain[] the approval of the Legislature." Contrary to NECEC's assertion, PI Mot. at 28, nothing in that

language prohibits the Legislature from presenting any such approval to the Governor for signature. Indeed, when the Legislature applies a similar statute that requires "approval of the Legislature" for certain leases of public reserved land, 12 M.R.S.A. § 1852(7), the Legislature sends the resulting legislative instrument to the Governor for signature. *See, e.g.*, Resolves 2013, ch. 56. There is no reason to expect it will act differently here.

In addition, even if its claim were ripe, NECEC would not have standing to pursue it, for two reasons. First, the Corridor crosses public land, which means it is subject to the two-thirds approval requirement in § 4 of IB 1, and not the "approval of the Legislature" requirement. Second, if NECEC were correct on its theory, the remedy would be to interpret the statute to require presentment. *See State v. Hutchinson*, 2009 ME 44, ¶ 32, 969 A.2d 923 ("we will seek to interpret any statute in a way that is consistent with the constitution"). That remedy would not provide NECEC any relief, since it increases the difficulty of obtaining the needed approval.

D. NECEC's Contracts Clause Claim Is Not Likely to Succeed on the Merits

Finally, NECEC argues that IB 1 violates the Contracts Clause by "authorizing termination of the [BPL] lease and prohibiting the construction of transmission facilities, completely depriving NECEC LLC of the benefit of the lease." PI Mot. at 30.

In order to establish a violation of the Contracts Clause, NECEC must establish three elements. First it must show that IB 1 resulted in a "substantial impairment of a contractual relationship." *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)). Second, if there is a substantial impairment, it must show impairment is not justified as "reasonable and necessary to serve an important public purpose." *Id.* (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). Third, "the adjustment of the parties' contractual rights and responsibilities 'must be [based] upon reasonable conditions' and be 'of a character appropriate' to the purpose of the legislation." *Id.*

(quoting *U.S. Trust*, 431 U.S. at 22).

1. *IB 1 Does Not Substantially Impair the BPL Lease*

The most obvious problem with NECEC's assertion that IB 1 impairs its rights under the BPL Lease is that this Court has reversed BPL's issuance of the Lease. *See Black*, 2021 WL 3700685, at *15. If the trial court's decision is affirmed by the Law Court, NECEC will have had no valid lease in place on November 2, 2021 and thus no alleged contract for IB 1 to impair.

The second problem with NECEC's theory is that the lease agreement expressly provides that NECEC is required to comply with state laws "now or hereinafter enacted." Compl., Ex. B ¶ 6(m). IB 1 is a "hereinafter enacted" state law that requires NECEC to obtain two-thirds legislative approval to maintain its lease. Because the lease agreement expressly requires NECEC to comply with future statutory changes, a law enacting just such a new condition cannot be said to impair its contract. *See KHK Assocs. v. Dep't of Hum. Servs.*, 632 A.2d 138, 141 (Me. 1993) (rejecting Contracts Clause claim where lease contained a clause stating that it was "subject to available budgetary appropriations" and Legislature declined to appropriate funds); *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 463 (Cal. Ct. App. 2001) (rejecting claim that citizen-initiated ban on oil-drilling violated Contracts Clause in part because lease required lessee to comply with all applicable laws).

Indeed, the Law Court has held that, even absent such an explicit provision, contracts between the State and private parties cannot be understood as binding the state not to exercise its legislative powers over the subject matter of the contract. In *SC Testing Tech., Inc. v. Department of Environmental Protection*, 688 A.2d 421, 424 (Me. 1996), the Court explained that, "[w]hen a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties." *SC Testing*

Tech, 688 A.2d at 424.

In addition, the substantial impairment analysis must consider the extent to which the future regulation was foreseeable to the parties at the time of contracting. *See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete*, 125 F.3d 9, 13 (1st Cir. 1997); *see Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183. A regulation that the parties "should have foreseen" cannot impair a contract. *All. of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 115 (D. Me. 2004) (quoting *Chrysler Corp. v. Kolosso Auto Sales, Inc*., 148 F.3d 892, 879 (7th Cir.1998)). Given that land use is "an area that has traditionally been regulated by the state and municipalities," *Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183, future land use regulations are more likely to be foreseeable to contracting parties. Regulation of leases of public land is, if anything, even more foreseeable, since such leases impact the uses of lands held in a public trust. *See* 12 M.R.S.A. § 1846(1).

Here, at the time the lease was entered into on June 23, 2020, opponents of the Corridor were in the midst of a ballot initiative campaign to revoke the PUC's issuance of a CPCN. While that effort ultimately failed, it would still have been foreseeable to NECEC when it signed the BPL Lease that its efforts to build the Corridor might be thwarted by a citizen's initiative.

2. *If A Substantial Impairment Exists, IB 1 Satisfies the Legal Standards for Legislation Impairing Contracts*

Should the Court find that a substantial impairment has occurred, it should nevertheless conclude that IB 1 is permissible under the state and federal contracts clauses.

The Court should defer to the citizens' determination that IB 1 is reasonable and necessary to achieve an important public purpose. While the U.S. Supreme Court has recognized that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" when the State modifies its "own financial obligations" under a contract, *U.S. Trust*,

431 U.S. at 25, that rule does not apply here. IB 1 is not an attempt to by the State to "reduce its financial obligations" under the BPL lease. *Id.* at 26. Rather, it is an exercise of the police power that reflects a policy determination by the citizens of Maine that leases of land held in trust ought to receive legislative approval before issuance. Deference to the judgment of the voters is therefore warranted. *See Seven Up Pete Venture v. State*, 114 P.3d 1009, 1023 (Mont. 2005) (applying deferential review to citizen initiated mining ban because ban "did not act to benefit the State's self-interest"); *Hermosa Beach Stop Oil Coal.*, 86 Cal. App. 4th at 565 (applying deferential review to citizen initiated oil-drilling ban where city was not "attempting to repudiate debts it has incurred under a contract").

Under that deferential review, IB 1 easily passes muster. IB 1 reflects a judgment by the people of Maine to provide that uses of public land involving transmission lines—as well as landing strips, pipelines, and railroad tracks—constitutes substantial alteration of that land and thus requires legislative approval. Limiting large-scale development on Maine's public reserved land is plainly an important public purpose, and a two-thirds legislative approval requirement for major infrastructure projects passing over that land is a reasonable and necessary means to accomplish that purpose. In addition, the approval requirement is a reasonable condition and of an appropriate character, since it is the same condition spelled out in the Constitution.

II. The Remaining Injunction Factors Favor Defendants

The remaining injunction factors are largely contingent upon the Court's assessment of likelihood of success on the merits. NECEC's claim of irreparable harm is grounded in an assumption that it will prevail on the merits. But if NECEC's claims are likely to fail, NECEC will merely be throwing good money after bad by continuing construction during the litigation. On the other hand, continued construction of a Corridor that will never go into operation will make the harms IB 1 was attempting to prevent largely a *fait accompli*, but without the offsetting

benefits that an operational Corridor might provide to Maine.

Irreparable Harm to NECEC. "[E]conomic harm in and of itself is not sufficient to constitute irreparable injury." *OfficeMax Inc. v. Cty. Qwick Print, Inc.*, 709 F. Supp. 2d 100, 113 (D. Me. 2010) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F.Supp. 68, 74 (D. Me. 1993)). NECEC makes two arguments as to why it would nevertheless be irreparably injured if not allowed to build the Corridor during this litigation.

First, NECEC asserts that injuries to its vested rights are "per se" irreparable injury.[10] PI Mot. at 12. To undersigned's knowledge, Maine courts have never recognized such a concept. Moreover, other courts have limited the concept of per se constitutional injury to a narrow band of constitutional injuries surrounding the First Amendment and the right to privacy. *See, e.g.*, *Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1225 (11th Cir. 2021) (rejecting claim that property-based constitutional claim was a "per se" irreparable injury). The First Circuit, in the specific context of an energy project, has expressly rejected the notion that "any restraint on any interest in real property is per se irreparable injury." *Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 381 (1st Cir. 1987) (affirming denial of preliminary injunction that would have blocked obligation of power company to remove utility poles). The Court should follow these federal decisions.

Second, NECEC claims that it will be irreparably harmed because any significant delay in construction of the Corridor will "create[] serious doubt" as to whether the Corridor could be finished by the final contractual deadline of August 23, 2025. Dickinson Aff. ¶ 25; *see* PI Mot.

[10] NECEC makes a similar point as to its separation of powers claim, although, given that separation of powers is not an individual constitutional right at all, it is difficult to see how it could fit into the rubric of a "per se" constitutional injury. *See Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020) (separation of powers violation not per se irreparable injury); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (same).

at 12. However, "[s]peculative injury does not constitute a showing of irreparable harm." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6–7 (1st Cir. 1991) (quoting *Pub. Serv. Co. of N.H.*, 835 F.2d at 383). NECEC's claims are based on a series of estimates regarding the time needed for remaining construction, mobilization, and demobilizations, and how long this litigation will take to be completed. *Id.* ¶ 30a–e. It acknowledges that, under more optimistic assumptions, the project could be completed before the contractual deadline. *Id.* ¶ 30c. Moreover, it is entirely unclear from the record that, in the event NECEC prevails and resumes construction of the Corridor, though not in time to meet the August 23, 2025 deadline, such deadline would not be renegotiated. Notably, NECEC's own expert, in explaining why construction allegedly must continue, does not predict outright cancellation of the Corridor if current deadlines are not met. Affidavit of William Berkowitz, dated November 1, 2021, at ¶ 61.

Balance of Harms/Public Interest. When the government is the party opposing the injunction, the remaining two factors—injury to the defendant and adverse effect on the public interest—merge into a single factor. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The harms to the public if NECEC's proposed injunction is granted are substantial, especially where, for the reasons shown in Part I, NECEC is unlikely to prevail on the merits. NECEC indicates that, on its current schedule, the Corridor is slated to be completed by December 2023. Compl. ¶ 32. Taking NECEC's own estimate of 18–24 months to complete litigation, that means NECEC could conceivably *build the entire Corridor* during the pendency of litigation, only to have IB 1 ultimately prevent its operation if it is upheld by the Court. NECEC will thus fully inflict the harm that IB 1 sought to prevent—construction of a high-impact transmission line across Maine's forests and public reserved lands—while the public will

not receive the benefits that might accrue from its actual operation.[11] In contrast to the scenario in which NECEC fails to gain an injunction, wins, and then may have to race against the clock or attempt to renegotiate its TSAs to avoid cancellation of the project, the harms in the scenario in which an injunction is issued but NECEC loses the case are not speculative: according to its complaint, NECEC will *definitely* have spent millions of dollars for nothing and Maine people will *definitely* be left with a (finished or unfinished) 145-mile long inoperable transmission-line corridor. *See* Compl. ¶ 1 (IB 1 would "ban completion and operation of" the Corridor).

In addition, should the Corridor be cancelled, Maine will not receive many of the various benefits that NECEC and HQUS agreed to in the various permitting processes. Most notably, NECEC apparently does not intend to conserve the 40,000 acres of wilderness that was a condition for issuance of its DEP Permit. Dickinson Aff. ¶ 34b. Similarly, many of the various payments to the State will apparently be placed "in jeopardy." *Id.* ¶ 33. The potential loss of those benefits—which are supposed to offset the harms caused by the Corridor—tilts the equities strongly in favor of not permitting NECEC to build the entire Corridor during the pendency of this case if there is a substantial probability that it will ultimately be barred from operating it.

Finally, in balancing the harms, the Court should take into account the extraordinary calculated risk that NECEC undertook by commencing construction while a key permit was still under review by the BEP, while its ACE permit was in litigation, while opponents were gathering signatures for IB 1, and while the validity of its BPL Lease was under threat through litigation and potential legislative action. NECEC made a high-risk business decision and is now

[11] NECEC notes that 97% percent of the Corridor has already been cleared. However, construction also involves erecting 832 HVDC transmission line structures along the Corridor route. Compl. ¶ 31. According to NECEC, only 8.4% of the planned structures had been erected by the time this suit was filed. Compl. ¶ 132.

asking the Court to protect it from the foreseeable consequences of that decision. In such a circumstance, the balance of equities cuts against injunctive relief. *See Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006).

III. The Proposed Injunction Against the Legislature Violates the Separation of Powers

Finally, in the event the Court is otherwise inclined to grant an injunction, it should still deny NECEC's request for an injunction barring the Maine House and Senate from "retroactive enforcement" of § 4 of IB 1. PI Mot., Prop. Order at 4. Since the Legislature does not enforce law, this request can only be understood as seeking to enjoin the Legislature from enacting legislation. Any such injunction would be an unprecedented intrusion by the judicial branch into a function expressly delegated in the Maine Constitution to the legislative branch. *See* Me. Const. art. IV, pt. 3, § 1. It would thus be a clear violation of article III, § 2, of the Maine Constitution. Courts in other states have squarely held that such injunctions exceed the judicial power. *See, e.g.*, *Fla. Senate v. Fla. Pub. Emps. Council 79, AFSCME*, 784 So. 2d 404, 408 (Fla. 2001) (holding that court order prohibiting legislative hearing violated separation of powers); *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 36, 387 Wis. 2d 511, 537, 929 N.W.2d 209, 222 ("the judiciary lacks any jurisdiction to enjoin the legislative process"). The Court should follow these decisions.

Conclusion

For the above reasons, the motion for a preliminary injunction should be denied.

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