

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

NECEC TRANSMISSION LLC, et al.,

Plaintiffs-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,

Defendants-Appellees

On Report from the Business and Consumer Court
Docket No. BCDWB-CV-2021-00058

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

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INTRODUCTORY STATEMENT OF AMICI CURIAE

Amici curiae are five former Commissioners of the Maine Public Utilities Commission (“PUC” or “Commission”) with 45 years of combined experience, spanning more than three decades, adjudicating cases coming before the Commission. Dr. Kenneth Gordon served 5 years as chair of the PUC from 1988 until 1992. William M. Nugent served 12 years as a Commissioner on the PUC from 1991 to 2003, during which time he also served an extended term as President of the National Association of Regulatory Utility Commissioners. Thomas L. Welch served 15 years as a Commissioner on the PUC and served as its chair from 1993 to 2005 and again from 2011 to 2014. Sharon M. Reishus served 7 years as a Commissioner on the PUC and served as its chair from 2008 to 2010. Dr. R. Bruce Williamson served on the PUC for 6 years from 2015 to 2021.¹ Dr. Williamson participated in the 2017 to 2019 PUC proceeding in which the PUC determined the “public need” for the New England Clean

¹ In addition to their experience as Commissioners on the Maine PUC, *Amici* routinely lend their expertise to regional, national, and international organizations that require assistance in matters of public utility regulation. For example, Mr. Nugent, while a Maine commissioner and thereafter, has *pro bono* assisted the U.S. Agency for International Development (USAID) in instructing regulators in Egypt and several eastern European states. He further served all New England state commissioners as executive director for the New England Conference of Public Utility Commissioners. Dr. Kenneth Gordon also served on the Massachusetts Department of Public Utilities for three years and was a senior vice president of the National Economic Research Associates. Mr. Welch has assisted regulatory commissions throughout the world, including Albania, Moldova, Romania and other eastern European states, as well as Barbados, Jamaica, Rwanda, Ghana and Botswana. Ms. Reishus has served as a board member of the Regional Greenhouse Gas Initiative (RGGI), a past president of New England Conference of Public Utilities Commissioners, a member of the Joint Special Task Force on Smart Grid, NARUC & FERC, and other memberships and national and regional roles addressing energy matters.

Energy Connect (“NECEC”) project and issued a Certificate of Public Convenience and Necessity under Title 35-A, Section 3132 (the “CPCN”).

Former commissioners Welch and Nugent previously submitted a brief as *amici curiae* in Law Court Docket No. CUM-20-181, *Avangrid Networks, Inc. v. Secretary of State*, 2020 ME 109, 237 A.3d 882 (“*Avangrid*”). The Court in *Avangrid* addressed a 2020 initiative requiring that the PUC reverse the 2019 CPCN. The former commissioners as *Amici* cautioned that any such legislative undoing of a CPCN would interfere with and denigrate the PUC’s deliberative and independent adjudicatory and regulatory process, a process Maine has relied upon for more than a century in regulating public utilities.

This Court in *Avangrid* recognized these concerns and held that the 2020 initiative was unconstitutional because it “direct[ed] the Commission, in exercising its executive adjudicatory powers, to reverse its findings and reach a different outcome in an already adjudicated matter.” *Id.* ¶ 36. As former Commissioners, *Amici* welcome the Court’s thoughtful decision which correctly recognized the role of the Commission, as well as the fundamental necessity for avoiding interference with PUC decisions by the Legislature.

Amici now offer comment and renew their concerns with respect to the 2021 initiative (the “Initiative”) at issue in this appeal. Although the Initiative is different from the 2020 initiative in design, the Initiative’s retroactivity

provisions make it equal in its effect. As explained below, in the view of *Amici*, the retroactive application of the Initiative would vitiate the Commission’s duly issued CPCN—affirmed by this Court—and is no less a *post hoc* legislative interference with the Commission’s deliberative process than if the Initiative expressly reversed the PUC’s CPCN. In granting the CPCN following an extensive adjudicatory process, the PUC found the utility had met all of the statutory requirements to construct the line under Title 35-A, Section 3132, and determined a public need for the transmission line. This Court affirmed the Commission’s order granting the CPCN and upheld the Commission’s decision that the applicant had met all statutory requirements for its issuance under Section 3132. *NextEra Energy Resources LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, 227 A.3d 1117.

The Initiative would retroactively impose two new requirements under Section 3132: (1) the Initiative’s requirement in Section 4 for legislative approval of “high impact electric transmission lines,” and (2) the Initiative’s outright prohibition in Section 5 of the construction of such lines in the “Upper Kennebec Region”. Both requirements, if applicable and upheld by this Court, would effectively reverse the Commission’s determinations in granting the CPCN.

The impact of legislatively reversing the Commission’s lawful orders in this manner, if permitted, reaches well beyond the targeted CPCN. It affects the

foundation of the regulatory framework upon which all those doing business before the Commission must rely—including the authority of the regulator to adjudicate and the finality of its orders.

Given the implications of the Initiative’s retroactive effect on a prior final decision of the Commission, as well as the broader negative implications of that retroactivity on the regulation of utilities in Maine, *Amici* decided to weigh in again to offer their unique perspectives as former commissioners.² *Amici* offer no views in this brief on the vote or the project at issue. Rather, they are deeply concerned that retroactive application of the Initiative, if in effect permitted to overturn the Commission’s prior lawful order upheld by this Court, would impinge upon the Commission’s ability to effectively regulate Maine utilities, degrade the regulatory scheme upon which the Commission acts and parties rely, and undermine the Commission’s institutional role in Maine.

In the view of *Amici*, it is imperative that the Court preserve and maintain the integrity of the PUC’s role, the judicial appeal process, and the settled finality

² The former commissioners offer these comments on their own behalf as their personal views. Like any former public servant, the former commissioners have a lifelong interest in preserving the integrity of the regulatory body upon which they once served, and based on their prior experience, offer their perspective on significant matters that may affect the integrity of the institution or impact those who may rely upon the institution. Former Commissioner Welch wishes to take the additional measure of informing the Court that he recently joined an advisory council to Avangrid Networks in Maine. This role had no influence on his independent, personal views expressed as a former commissioner in joining his fellow former commissioners in this brief, views entirely consistent with the views Mr. Welch previously expressed in an amicus filing to this Court in the challenge to the earlier initiative targeting the NECEC.

of agency orders. The Commission’s ability to properly regulate Maine utilities and adjudicate cases coming before the agency demands this much. *Amici* also have an interest in ensuring that the Court has a full understanding of the broader Maine economic framework in which the Commission operates—the important role that repose in PUC decisions and the resulting predictability plays with respect to investments in public utilities benefitting Maine—and the effect on settled expectations, and future behavior, that are implicated by the Initiative.

The former Commissioners thank the Court for allowing them to participate as *amici curiae*, and focus this brief on presenting their views on the areas that they believe might be most helpful to the Court: (1) a brief history of the PUC; (2) the PUC’s role in determining a Certificate of Public Convenience and Necessity; (3) the potential impact the Initiative’s retroactive application on a prior final order of the PUC and thus the integrity of the Commission as an institution; and (4) further policy concerns that merit consideration.

DISCUSSION

I. The Establishment and Role of the PUC

The PUC has played a vital role in regulating public utilities for more than a century. During that time, it has adjudicated countless cases on the merits. To the knowledge of *Amici*, never once has the Legislature interfered in a particular case and dictated the result after a final decision or changed the law

to impose a different criterion to be met after the case has been fully adjudicated using the criteria established at the time of the PUC decision. Such an act would be unfair to the litigants and contrary to the regulatory framework in which the Commission regulates utilities and adjudicates matters that come before it.

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

In passing the Act, “the Legislature delegated its entire authority to regulate and control public utilities to the Public Utilities Commission.” *Mech. Falls Water Co. v. Pub. Utils. Comm’n*, 381 A.2d 1080, 1090 (Me. 1977). The PUC thus has both “the power and . . . duty to enforce the provisions of this act and all other laws relating to public utilities.” P.L. 1913, ch. 129, § 8. By legislative design, the purpose of the PUC was “to place the entire regulation and control of all public service corporations . . . in the hands of a board or commission which can investigate conditions, hear parties, and grant relief much more

expeditiously and fairly than the Legislature itself.” *In re Searsport Water Co.*, 118 Me. 382, 108 A. at 457.

The Commission was established to consist of commissioners who were “experts” and who would “be on the same footing with the judges of the Supreme Court.” Legis. Rec. 885 (1913).³ The PUC would make “final decision[s]” on questions of fact, while questions of law were to “go up to the Supreme Court in the same manner in which questions of law go from other courts.” Legis. Rec. 907 (1913). The Act “in effect creat[ed] another great court.” Legis. Rec. 1038 (1913).

Indeed, the “whole intention” underlying the Act was “to keep this thing out of politics . . . arranging a tribunal which is proposed to be in a way made up of experts along certain lines.” Legis. Rec. 1039-40 (1913). To that end, the Act was “a broad bill, giving discretionary power to the commission” and paying the Commissioners “to have some discretion” so “they should have some rights

³ Since its inception, the Commission has comprised three members, nominated by the Governor and confirmed by the Legislature (originally nominated by the Governor and approved by the Council), and, according to the legislative history:

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

Legis. Rec. 884-885 (1913).

and be able to use their judgment as to whether a public utility is doing its duty by the people or not.” Legis. Rec. 903 (1913).

As this Court noted more than a century ago, the Commission that was established is “a body specially clothed with all the authority of the state for the performance of an important governmental function” *In re Searsport Water Co.*, 118 Me. 382, 108 A. at 459. That important governmental function continues today, as the Commission “regulates electric, natural gas, telecommunications, and water utilities to ensure that Maine consumers have access to safe, adequate and reliable services at rates that are just and reasonable for both consumers and utilities.” “About MPUC,” Office of the Me. Pub. Utils. Comm’n website, <https://www.maine.gov/mpuc/about> (last visited Mar. 11, 2022). These overarching principles—ensuring that Mainers have safe, adequate and reliable services at just and reasonable rates—are what guide the PUC Commissioners in making their decisions.

These principles are enunciated in and furthered by Title 35-A, as amended since 1913, which delegates broad adjudicatory powers to the Commissioners, including the authority to make findings of fact, recognizing their specialized knowledge as well as their control and regulation of all public utilities. *See* 35-A M.R.S. § 103(2)(A) (“All public utilities and certain other entities as specified in this Title are subject to the jurisdiction, control and

regulation of the commission and to applicable provisions of this Title.”); *id.* § 104 (“The provisions of this Title shall be interpreted and construed liberally to accomplish the purpose of this Title. The commission has all implied and inherent powers under this Title, which are necessary and proper to execute faithfully its express powers and functions specified in this Title.”).

As former Commissioners, *Amici* can attest to the diligent efforts the Commission undertakes to meet these obligations to the public, whether by the Commissioners, the Commission staff of experts, or those parties who appear before the Commission. This role is especially vital to the State of Maine when the PUC evaluates and adjudicates a petition to construct a transmission line under 35-A M.R.S. § 3132.

II. The Commission’s Role In Approving the Construction of Transmission Lines Under 35-A M.R.S. § 3132

When a utility seeks to construct a transmission line in Maine, the PUC is charged with evaluating and adjudicating the need for the transmission line, whether the line is in the public interest, and whether the utility proposing the line has met each of the regulatory and statutory obligations set forth under 35-A M.R.S. § 3132. The Legislature has statutorily set out the standards by which the Commission is to approve a request to build a transmission line and is to issue a Certificate of Public Convenience and Necessity. The Legislature directs

the Commission to make specific findings of fact in any adjudicatory order approving or denying the request. 35-A M.R.S. § 3132 (“a person may not construct any transmission line . . . unless the commission has issued a certificate of public convenience and necessity approving construction”); *id.* § 3132(6) (“In its order, the commission shall make specific findings with regard to the public need for the proposed transmission line.”).

It is essential for the PUC and all parties involved in the proceedings to know at the time of the adjudicatory process what are the statutory standards and requirements for constructing a line under Title 35-A. These are not insubstantial criteria that can be retroactively changed or applied without real consequences to the litigants, to the PUC’s adjudication of the application, or to the Commission’s determination in granting a CPCN to build the proposed transmission line. Importantly, any order will include a determination as to whether the applicant has satisfied the statutory requirements, and if not, what additional requirements must be satisfied under Title 35-A before the line may be built. All such determinations are reviewable on appeal and form the basis for all subsequent actions by the parties.

It is critical to the integrity of the PUC process and ultimately the PUC’s decision that the Commission and all parties in the case know precisely what the legal standards are before the case is decided.

Like a court, the Commission adjudicates cases and it may take testimony, subpoena witnesses and records, issue decisions or orders, hold public and evidentiary hearings, and encourage participation by all affected parties, including utility customers based on the facts and law existing at the time. 35-A M.R.S. §§ 1301-1318. The entire statutory and regulatory scheme is designed to (a) ensure that decisions of the Commissioners in adjudicating a case before the Commission are founded entirely upon the evidence presented in a given case, (b) follow the then-existing law, and (c) result in decisions devoid of outside political influences. To further that end, the Commission staff comprises subject matter experts, including economists, accountants, engineers, lawyers, financial analysts, consumer specialists, and administrative and support staff.

Having created the Commission, the Legislature can, of course, by statute limit or modify the Commission's role and set standards for the Commission to follow. The Legislature likewise may approve substantive rules promulgated by the Commission. But once such standards and rules are enacted and approved, the Commission's obligation in any adjudicatory proceeding is to apply those standards and rules to the facts in a particular case and render a decision on the merits; the Legislature has no role to play in deciding the outcome of a given case before the Commission. *See In re Searsport Water Co.*, 118 Me. 382, 108 A. at 457 (noting the broad language vesting such authority in the PUC "unless

limited in some manner by the terms of the act, or the state has previously suspended its regulatory powers”).

For any decision of the Commission, including any decision to allow the construction of a transmission line, to be upheld on appeal, this Court must find: (1) that the Commission’s decision adhered to the law, and (2) that there existed substantial evidence in the record to support the Commission’s findings of fact and conclusions of law, including any finding that the applicant had met the statutory legal requirements for building the proposed line in the case of an adjudication under Section 3132. This is the essence of finality of a fully adjudicated matter before the PUC, a finality relied upon by the Commission and all parties to a proceeding before it.

Amici are aware of no situation in which the Legislature has added or changed a legal standard to be met by a party litigant *after* the case has been fully adjudicated, the PUC has issued a final agency order with respect to the matter, and this Court has upheld that order on appeal. As discussed below, as former commissioners who have reviewed and decided numerous petitions for construction of transmission lines under Section 3132, *Amici* are deeply concerned that this is what the Initiative’s retroactive provisions would accomplish. If new standards are imposed on a particular project after the Commission’s decision concerning that project, the legitimate expectations of

the Commission and all the parties will be shattered, and both the Commission and the parties that appear before the PUC will be left to wonder whether future decisions, and their efforts to satisfy the statutory standards in effect at the time of those future decisions, will be similarly subject to a retroactively imposed standard, and rendered pointless.

Amici caution against allowing any such precedent to stand.

III. The NECEC Transmission Project Case

Without commenting on the CPCN decision itself, based on the *Amici*'s review of the Commission's order granting the CPCN for the NECEC transmission project, it is evident that the PUC followed the above-described adjudicatory process in the case giving rise to the Initiative. *See Central Maine Power, Request for Approval of CPCN, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation, Docket No. 2017-00232, 2019 WL 2071571 (Me. P.U.C. May 3, 2019) (the "Order").*

As stated in the Order, the Commission conducted its adjudicatory proceedings in accordance with its rules and processes (explained above) and reached a decision based upon the evidentiary record before it. That record, developed over eighteen months, contained a substantial volume of data requests and testimony filed by more than twenty intervenors, technical conferences and expert testimony, a 38-page stipulation agreed to by eleven

parties (including the Office of the Maine Public Advocate), six evidentiary hearings, three public witness hearings, and over 1,350 public comments. The PUC hearing examiners issued a 162-page report and recommendations, to which a number of parties filed exceptions and comments. After deliberation, a month later, the PUC Commissioners issued a 100-page Order granting the requested CPCN. In doing so, the Commission—based on the record before it—found that a public need existed for the project and determined that the applicant had met the then-existing statutory requirements set forth in Section 3132.

The Commission’s Order was then appealed in accordance with 35-A M.R.S. § 1320. On appeal, this Court reviewed the PUC’s findings of fact and conclusions of law in the same manner it has done in countless appeals from the Commission and concluded that in this instance the Commission’s determination and findings of fact and application of the law were supported by that record. *NextEra Energy Resources LLC*, 2020 ME 34, 227 A.3d 1117.

IV. Concerns Raised by the Initiative’s Retroactive Provision Affecting a Prior CPCN

As discussed more fully below, *Amici* are concerned that the Initiative’s retroactive provisions—imposing new statutory requirements to build a transmission line in Maine under 35-A M.R.S. § 3132 to a project already

approved by the PUC under that statute—would have serious and adverse ramifications for the Commission’s regulatory framework that extend well beyond a single CPCN. The former commissioners indeed offer these comments, not in respect to the project itself, but because of the broader implications. If the retroactive legislation is permitted to thwart and counteract a prior order of the Commission in this manner, *Amici* believe, this will have a lasting detrimental impact on the Commission’s ability to regulate and to meet its regulatory obligations to ensure safe and reliable utility services at just and reasonable rates. It will also make it more difficult for Maine utilities to attract capital on reasonable terms—and thereby raise the cost of utility services—and gravely undermine the Commission’s regulatory framework in ways that extend well beyond the CPCN at issue in this particular matter. For these reasons, *Amici* urge this Court to reject targeted efforts to legislate *post hoc* a different outcome than that adjudicated, ordered and upheld on appeal pursuant to previously established rules and standards. To do otherwise will forever degrade the Commission’s credibility and its authority to regulate and will erode public confidence in its orders.

First, by mandating changes to 35-A M.R.S. § 3132 retroactive to September 16, 2020, the Initiative purports to undercut the foregoing described framework, the Commission’s authority, and the finality of the Commission’s

orders concerning the construction of lines and their necessity. This is no small matter, and unprecedented in the experience of *Amici*.

The evaluation and adjudication of requests to build transmission lines under 35-A M.R.S. § 3132 is among the PUC's most vital roles. As explained above, the PUC requires each applicant to meet the regulatory and statutory requirements and then the PUC makes an independent determination of whether there is a need for the line, that the proposal is in the public interest, and that the applicant has met the statutory requirements under the utility statute. 65-407 C.M.R. ch. 330 (2012). In issuing the CPCN giving rise to the Initiative, the PUC determined the applicant met the then-existing criteria for approval of the CPCN under Section 3132 and further determined the project was in the public interest. The Initiative would require the PUC to reverse course by retroactively (i) imposing a prohibition on the construction of high impact electric transmission lines in the Upper Kennebec Region, as that term is defined in the Initiative (Section 5), and (ii) requiring "approval of the Legislature" of any such lines in addition to the CPCN. Retroactive application of these new requirements to the NECEC project effectively reverses the Commission's CPCN Order, just as the 2020 initiative, which this Court found invalid in *Avangrid*, sought to do.

In granting the CPCN in 2019, the PUC found that the project satisfied all of the requirements then in existence for the construction of a high impact electric transmission line, and this Court affirmed the PUC's decision. *NextEra Energy Resources LLC*, 2020 ME 34, 227 A.3d 1117. The retroactive application of the Upper Kennebec Region prohibition to the NECEC project would necessarily force the PUC to revoke its prior lawful final Order because the NECEC, in part, crosses that area of Maine, making the Commission's authorization of the construction of the project contrary to Section 3132, as amended by the Initiative.

Second, the Initiative's retroactive requirement of legislative approval for the NECEC would have substantially the same effect on the PUC's deliberations under Section 3132 and the CPCN as *Amici* found troubling and the Law Court found unconstitutional in *Avangrid*. The 2020 initiative sought to expressly nullify the PUC adjudicatory process and the Commission's determinations in granting the CPCN by requiring, via legislation, the Commission to reverse the CPCN and thus its findings. This Court in *Avangrid* determined the 2020 initiative unconstitutional because it "direct[ed] the Commission, in exercising its executive adjudicatory powers, to reverse its findings and reach a different outcome in an already-adjudicated matter." *Avangrid Networks, Inc.*, 2020 ME

109, ¶ 36, 237 A.3d 882. Among those findings was the PUC determination that the applicant had met all of the statutory requirements under Section 3132.

While the Initiative at issue now does not expressly require the PUC to reverse its prior CPCN, it has the same underlying apparent intent and effect on the CPCN Order and determination of the PUC in the matter. Should the Legislature disapprove of the project, the Commission's prior determination that all statutory requirements for construction had been met and prior authorization to construct the line would be superseded by the Legislature's decision. In this circumstance, the Commission's prior authorization to construct the line would be rendered unenforceable and futile, thereby negating the Commission's prior conclusion that the project had met the statutory requirements to construct the line under Section 3132 and could proceed under the terms of the CPCN. In this way, the retroactive application of the legislative veto mandated by Section 4 of the Initiative to the NECEC project is effectively a legislative directive to reverse the CPCN, an action this Court found unconstitutional in *Avangrid*.

Likewise, the Initiative's retroactivity provisions would directly and substantively interfere with the PUC's deliberative process—as that process has been understood and applied for over a century—by permitting the Legislature to dictate *post hoc* a particular result in a single case, even after that case has already been finally decided by the Commissioners, appealed, and upheld by

this Court. Allowing the Legislature to dictate a particular outcome in a particular case, directly or indirectly, would undermine the integrity of the adjudicatory process itself. Parties participate in a PUC adjudicatory process with the understanding that the case will be decided on the evidence presented and laws in effect at the time the case is adjudicated. Indeed, that is why parties present evidence—to demonstrate that a project meets or does not meet the requirements known to the parties and the public for constructing transmission lines. The PUC was created in order to reduce politicization of particular projects, *see* Legis. Rec. 1039-40 (1913); contrary to that core vision, the Initiative would authorize a retroactive political veto of a final PUC decision.

The heretofore legitimate expectation of parties to a PUC adjudication should not be sacrificed to accommodate a disappointed political point of view. Indeed, permitting *post hoc* additions to the requirements for constructing a transmission line in Maine would invite, with no time limit, future initiative or legislative attempts to prevent its construction or operation. With such a dismal prospect, the Commission and litigants might well wonder whether investing time and treasure in furtherance of their obligations under *existing* law in Maine is worth the trouble.

Finally, as outlined at the outset, the PUC has a responsibility to ensure that the people of Maine enjoy safe, adequate, and reliable services at just and

reasonable rates, and to fulfill that obligation, the Commission must make sure that the public utilities providing those services have the wherewithal to accomplish that aim.

Experience with the PUC has taught *Amici* that investment occurs within a certain framework: when public utilities are given permission to do something following an adjudicatory proceeding following a known set of rules and requirements, people and companies invest in the project, and the project can be built and the service provided. If, at any point in the future, that relied-upon permission can be revoked—by legislative action or by ballot initiative—the trust and integrity of this framework and the adjudication of cases giving rise to a Commission order would be seriously threatened. As a result, in the opinion of *Amici*, rational investors would quickly see a significant flaw in Maine’s regulatory framework and likely would avoid investing, or increase their price to invest, in Maine opportunities which rely on Commission orders that could be subject to retroactive legislative revocation or modification. Either outcome is harmful for Maine ratepayers, as needed energy infrastructure investments are delayed or the ratepayers are forced to pay more for the investments that move forward.

The institution of the PUC and the rules and procedures by which it operates are designed to establish and protect the rights of the parties that come

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

Part of the reason public utilities commissions like Maine’s PUC exist is to provide a degree of predictability, transparency, and certainty for utilities and their investors as well the consuming public. Once the PUC determines a project complies with the statutory prerequisites for construction under Section 3132, and this Court affirms that decision to permit a particular project, all parties have the right to rely on that decision. Applicants and potential investors cannot wait indefinitely to see if that once-granted permission will be directly or effectively revoked. The prohibition against retroactive ratemaking is an example of how commissions and courts have consistently applied this principle. For example, where rates are put in place subject to refund (as is often done by the Federal

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

Having been established and “specially clothed with all the authority of the state for the performance of an important governmental function,” the PUC should be allowed to operate as the independent adjudicatory body it is when it is acting in its quasi-judicial capacity. *Avangrid*, 2020 ME 109, ¶ 33, 237 A.3d 882 (“The Commission has an administrative adjudicatory role that is traditionally regarded as a quasi-judicial function of a State agency in executing the law.”). While legislation created the Commission, once the PUC was established, it has never been within the realm of the Legislature to directly

intervene in a case to force the Commissioners to reverse the findings of fact and conclusions of law made in a final Commission order. The Legislature might modify the standards for future CPCN proceedings and otherwise weigh in on the PUC through prospective statute enactment and review of substantive rulemaking, but it is not the Legislature's role to determine the rights of specific applicants in an adjudicatory proceeding, and it therefore should not be able to do so retroactively by adding new statutory criteria to be met after the PUC has already adjudicated a petition and determined that all statutory criteria have been met under then-existing law. There is a fundamental difference between enacting a law that will apply to an entire industry prospectively⁴ and reaching back in time to alter a single decision relating to a single actor, as the Initiative would do.

CONCLUSION

For more than a century, the Maine Public Utilities Commission and its appointed and sworn Commissioners have occupied a certain defined place in the regulatory, judicial, and economic framework of the State. *Amici* believe that maintaining the Commission's independent role as an adjudicatory body, which the public utility industry and private citizens have come to rely on for

⁴ As the Legislature did when it enacted the An Act to Restructure the State's Electricity Industry (P.L. 1997, ch. 316). Even in that instance, it should be noted that careful attention was paid to ensure that the law did not result in any takings or otherwise disturb previously settled expectations.

over a century, is crucial. For all the reasons discussed above, *Amici* fear that the Initiative, if allowed to apply retroactively, would fundamentally undermine that role. The PUC is an institution created to be devoid of political influence in the adjudicatory process and charged with deciding cases on the evidentiary record and applying the law existing at the time of that adjudicatory process. By purporting to retroactively apply new requirements in Section 3132, the Initiative is intended to alter this construct and compel the Commission to reverse a prior determination and to contradict its own record-supported findings that the applicant had met the statutory requirements under Title 35-A for constructing a transmission line. This will upset the legitimate and Law Court-confirmed expectations of the parties who participated in the Commission's adjudicatory process, including the subsequent appeal in this Court. By imposing the after-the-fact statutory requirements on a previously decided matter, the Initiative will undermine the essential purpose, value and adjudicatory role of the Commission.

The PUC is the agency entrusted with ensuring safe, reliable electric service in Maine at just and reasonable rates. For the Commission to accomplish this vital and essential function the integrity of the institution and the Commission's adjudicatory process must be preserved; and for this to occur

there must be finality to its orders based on laws that exist at the time those orders are issued.

As former Commissioners of this institution, *Amici* respectfully request that this Court carefully consider these concerns as it decides this case.

Dated: March 30, 2022

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CERTIFICATE OF SERVICE

I, James L. Costello, certify that pursuant to agreement of the parties, on March 30, 2022, I caused a copy of the foregoing Brief of Former Commissioners of The Maine Public Utilities Commission as Amici Curiae to be served on counsel listed below, by email only, as follows:

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