

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-416

NECEC TRANSMISSION LLC, et al.,

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,

Defendant-Appellees

On Report from Business and Consumer Court
Docket No.: BCD-CIV-2021-00058

**BRIEF OF AMICUS CURIAE
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INTEREST OF AMICUS

Amicus curiae Robert J. Weiner is a Professor of International Business, Public Policy and Public Administration in the School of Business and Elliott School of International Affairs at George Washington University. He serves as Director of the Business School's Master's Program in International Business. He was formerly Director of the Elliot School's Master's Program in International Trade and Investment Policy, and Associate Director of the Global and Entrepreneurial Finance Research Institute. He taught Economics at Brandeis University from 1987-1994. From 2001-2005 and 2013-2016, he was Chairman of George Washington University's International Business Department, ranked #1 in the USA by the *Financial Times*. He was also a member of the Harvard Energy Security Program at the Kennedy School of Government at Harvard University from 1982-1985 and 1987-1994, which produced one of the early books on energy security (Alm and Weiner, 1984).¹ His academic interests focus on energy, including political risk and energy security. He has published extensively on these topics over the last four decades, and teaches graduate and undergraduate courses on energy, covering political risk, investment, and energy security. He received his B.A, M.A., and Ph.D. from Harvard University.

¹ Alm, Alvin L., and Robert J. Weiner, *Oil shock: Policy response and implementation*, Ballinger, Cambridge (1984).

As a political economist focused on energy, investment, political risk and energy security, he has an interest in ensuring that courts understand how their decisions may or may not impact energy, investment, political risk, and energy security. Specifically, he is interested in providing his opinion to the Court on the potential consequences of its decision with respect to economic consequences of the Initiative's retroactive provisions as they apply to the New England Clean Energy Connect (NECEC) transmission line project.

SUMMARY OF ARGUMENT

By reversing government approval for the NECEC project after substantial investment has been made and substantial construction has been completed, the Initiative at issue before the Court has negative economic effects. These effects result from reduced investment arising from political risk. Political risk is the risk that government action will adversely affect an investment. It discourages future investment and leads to a decrease in economic activity. The negative effects of increased political risk are severe, and even more so for industries like energy that have high up-front costs. The Initiative will likely discourage investment in Maine, in particular in the energy sector, leading to decreased economic activity and hampering efforts to address climate change.

Upholding the Initiative will also diminish energy security. Lower investment in renewable energy resulting from increased political risk will leave

Maine more dependent on petroleum (oil and natural gas), which will, in turn, harm energy security by leaving the state more exposed to petroleum price shocks, which are of particular concern in New England. Such price shocks harm consumers and often precede recessions. The NECEC project would address energy security by reducing Maine’s reliance on petroleum, in addition to advancing the goal of addressing climate change.

ARGUMENT

A. Upholding the Initiative Would Increase Political Risk and Discourage Energy Investment

Political risk is the risk that government action will adversely affect the value of a company’s investment. This could come about in a variety of ways: in the form of outright expropriation – i.e., confiscation of the investment – or in the form of “creeping expropriation,” where changes in regulation or taxation diminish the value of an investment or adversely impact future earnings from it.

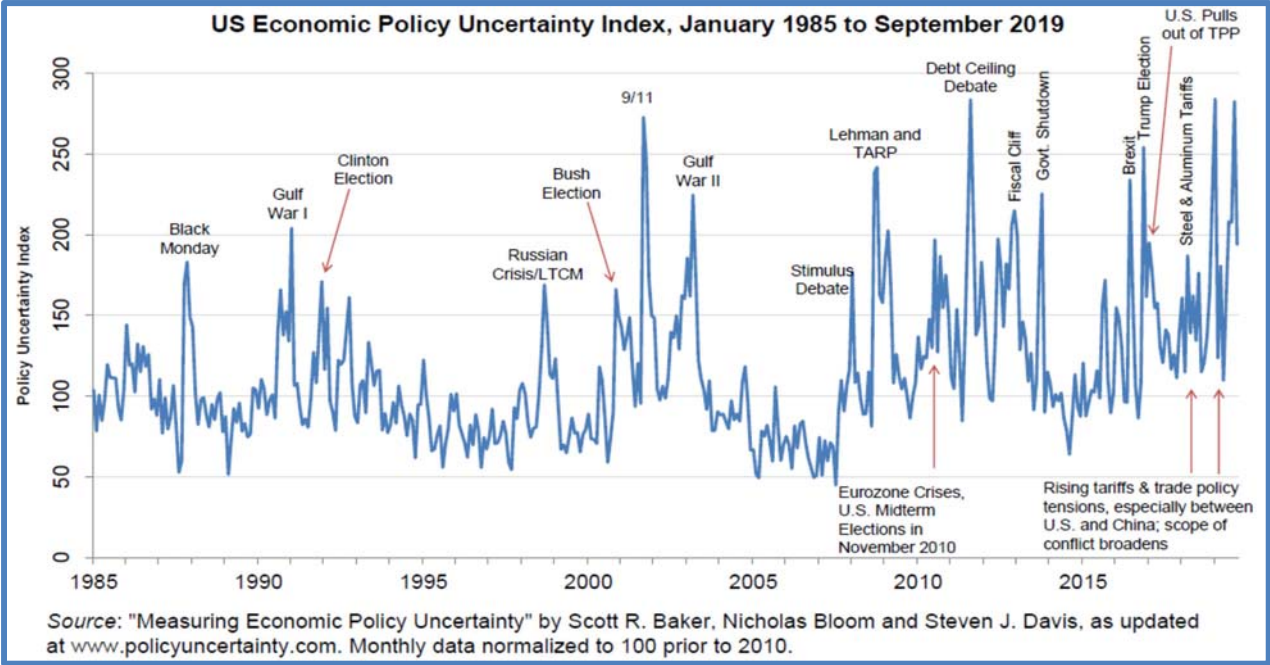
Expropriation can occur, as the Initiative does here, through retroactive regulation. Governments can ameliorate political risk by providing protection for property rights, including through judicial enforcement of statutory or constitutional rules, which makes it difficult and costly to expropriate investments.

In recent years, the level of political risk in the United States has risen. There are a variety of ways to measure political risk. One common way is to focus on *policy uncertainty*, the uncertainty about actions a government may take in the

future. Another is to examine the strength of *property-rights protection*, the degree to which laws (whether constitutions, statutes, or common law) protect private property rights, and the degree to which those laws are enforced. As shown in Figures 1a and 1b, below, both measures point to a rise in political risk.

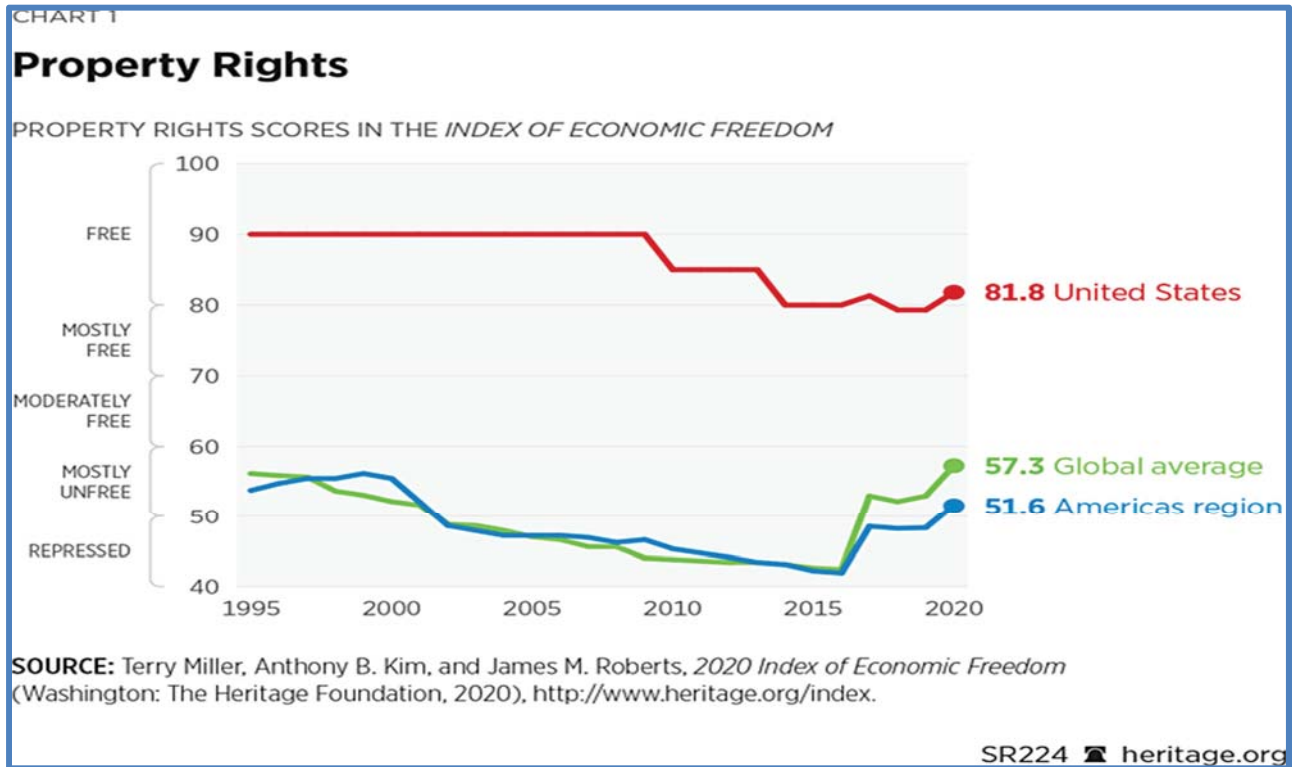
As shown in Figure 1a, below, policy uncertainty has been rising in the United States.

Figure 1a: Policy uncertainty in the USA was rising, even before COVID.



At the same time, as shown in Figure 1b, below, property rights protection in the United States has been weakening.

Figure 1b: Property-rights protection falling in the USA.

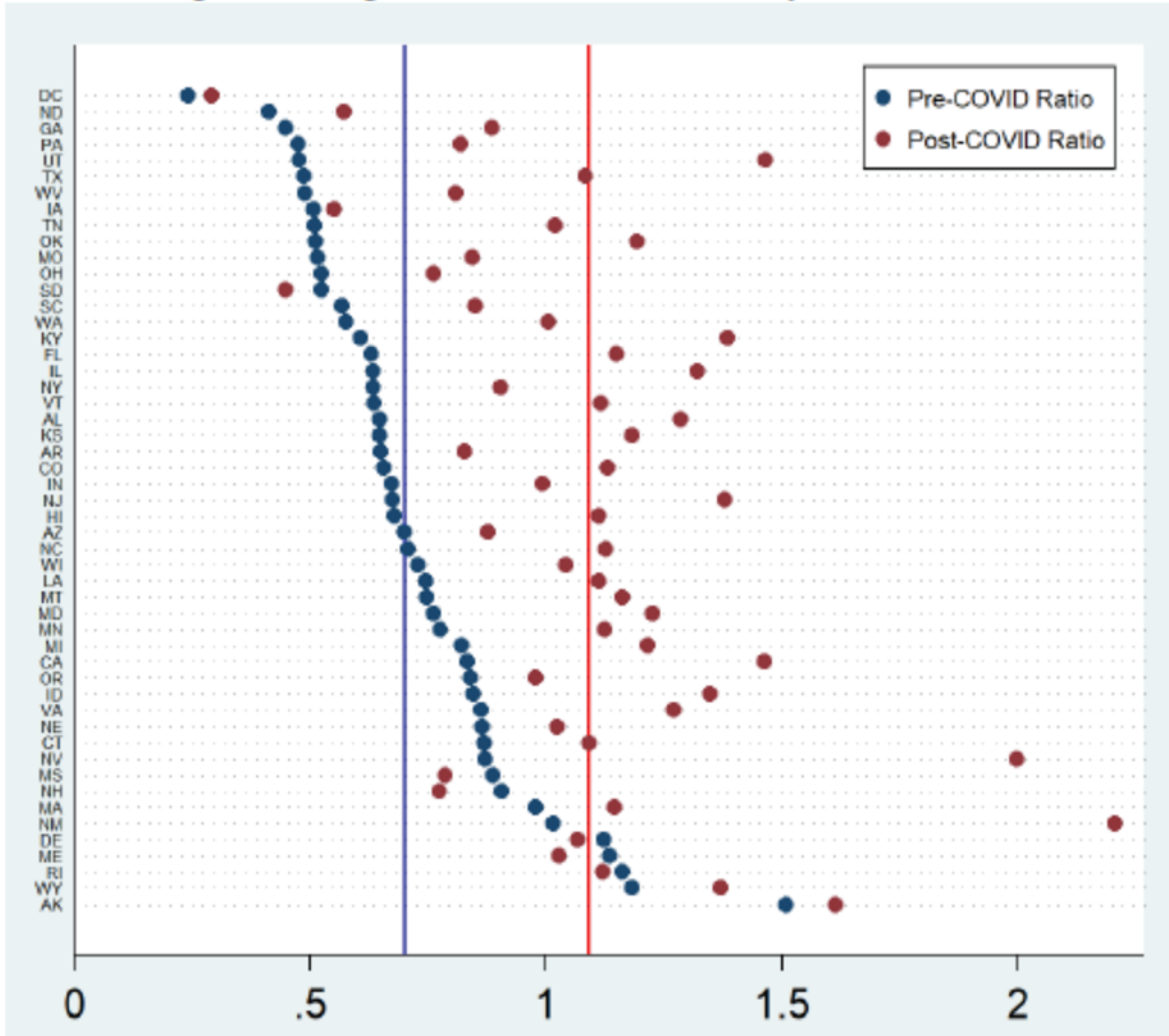


The level of political risk is high in Maine. Before the Covid-19 pandemic, Maine ranked fourth among the states in terms of the level of political risk arising from policy uncertainty at the state and local level (relative to uncertainty from national-level policy), as shown in Figure 2, below.²

² Baker, Scott R., Steven J. Davis, and Jeffrey A. Levy. *State-Level Economic Policy Uncertainty*, National Bureau of Economic Research, Working Paper 29714 (2022).

Figure 2: Ranking of US states from lowest to highest level of pre-COVID policy uncertainty. Maine ranks 4th highest.³

Figure 7: Average Ratio of *EPU-S* to *EPU-N* by State and Period



Notes: Red dots show average monthly ratios of *EPU-S* to *EPU-N* by state in the post-COVID period from March 2020 to June 2021. Blue dots show average (*EPU-S*/*EPU-N*) values in the pre-COVID period before March 2020. Sample start dates in the pre-COVID period vary across states from 1985-2006, as listed in Appendix Table A.1. We order states by the average pre-COVID values of (*EPU-S*/*EPU-N*).

³ EPU-S refers to policy uncertainty at the state and local level, EPU-N to policy uncertainty at the national level.

Political risk discourages investment. A recent survey of executives with decision-making authority for risk management confirmed that the most widespread method to manage political risk is to simply avoid investing in jurisdictions with high political risk.⁴ Other studies confirm that, in fact, companies invest less in jurisdictions with weak property-rights protections.⁵

Consistent with these findings, other studies show that political risk reduces the value of investments because of its effect on future earnings and because of the possibility that the investment may be seized or its profits diminished by government action.⁶ This effect is particularly acute for investments with high upfront costs, like energy, which typically require capital investments in infrastructure. Renewable energy has particularly high upfront costs, even when compared to the costs of fossil fuel power plants. The expensive part of renewable energy production is, for example, building dams, installing solar panels, constructing windmills, and constructing related transmission infrastructure. The actual generation of renewable electricity is much less expensive because it does

⁴ Giambona, Erasmo, John R. Graham, and Campbell R. Harvey. "The management of political risk." *Journal of International Business Studies* 48, no. 4 (2017): 523-533.

⁵ Lin, Leming, Atanas Mihov, Leandro Sanz, and Detelina Stoyanova. "Property rights institutions, foreign investment, and the valuation of multinational firms." *Journal of Financial Economics* 134, no. 1 (2019): 214-235.

⁶ Bekaert, Geert, Campbell R. Harvey, Christian T. Lundblad, and Stephan Siegel. "Political risk and international valuation." *Journal of Corporate Finance* 37 (2016): 1-23.

not involve purchasing, transporting, and burning fossil fuels, such as coal or petroleum.

One study showed that, on average, moving an energy investment from a low political-risk jurisdiction to a high political-risk jurisdiction can destroy over half of its value.⁷ The concentrated cost up-front at the investment stage makes renewable energy particularly sensitive to political risk.

The acute effect of political risk on investments in energy has resulted in dramatically less investment in energy in politically-risky countries. A worldwide comparison of foreign investment in petroleum, mining and quarrying found that the low-risk countries of North America and Western Europe have attracted about ten times more foreign investment per square kilometer than in other parts of the world. This is the case even though it is likely that underinvestment in politically-risky countries means that they are likely to provide more-attractive opportunities for investment.⁸

Political risk that results from policy uncertainty also has negative effects on economic activity.⁹ In particular, an “upward shock” that affects policy uncertainty

⁷ Click, Reid W., and Robert J. Weiner, “Resource nationalism meets the market: Political risk and the value of petroleum reserves,” *Journal of International Business Studies* 41, no. 5 (2010): 783-803.

⁸ Ross, Michael L., *The oil curse*, Princeton University Press (2012).

⁹ Baker, Scott R., Steven J. Davis, and Jeffrey A. Levy, *State-Level Economic Policy Uncertainty*, National Bureau of Economic Research, Working Paper 29714 (2022).

“foreshadows weaker economic activity,” as measured by higher state-level unemployment.¹⁰ Elections, because they can affect economic policies, can create political risk that results in decreased investment.¹¹ This increased political risk is magnified where, as here, an election purports to retroactively change investment regulations.

From an economics perspective, based on Figure 2 above, even prior to the Initiative, Maine already had higher political risk resulting from state and local policy than all but three of the United States. To the extent to which the Initiative is applied retroactively, it will raise the level of political risk in Maine by reducing property-rights protection and raising policy uncertainty. Elevated political risk will likely discourage investment in Maine, particularly in the energy sector, damaging the state’s economy and hampering efforts to address climate change.¹² In contrast, enforcing rules limiting retroactive application of new legal standards reduces political risk in Maine and thereby encourages investment, improving the economic climate.

¹⁰ *Id.*

¹¹ Jens, Candace E., “Political uncertainty and investment: Causal evidence from US gubernatorial elections,” *Journal of Financial Economics* 124, no. 3 (2017): 563-579.

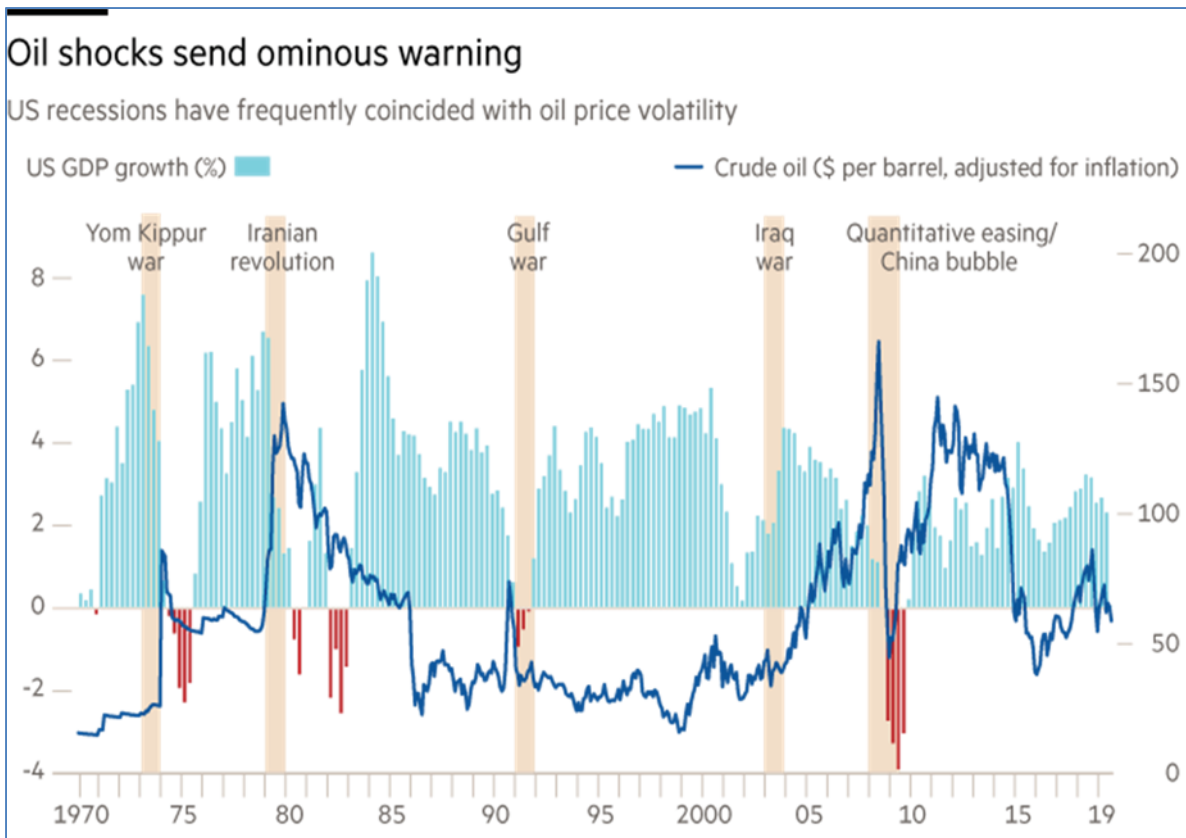
¹² Maine has a Climate Action Plan that includes a goal to “[a]chieve by 2030 an electricity grid where 80% of Maine’s usage comes from renewable generation.” Maine Climate Counsel, “Maine Won’t Wait, A Four-Year Plan for Climate Action,” https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/MaineWontWait_December2020.pdf (December 2020): 12.

B. Upholding the Initiative Would Damage Energy Security, Particularly in New England

Energy security means security of energy supply in petroleum-importing nations.¹³ The importance of energy security is highlighted by the fact that a petroleum shock – an upward spike in petroleum prices – preceded each of the recessions in the United States in the last 50 years. Figure 3 shows this history.

Figure 3: US recessions preceded by oil-price spikes¹⁴

Note: red bars show negative economic growth



¹³ Energy security can also refer to military access to energy. This brief does not address this topic.

¹⁴ Riding, Siobhan, "Saudi strikes and spiking oil price raise spectre of 'black swan'," *Financial Times* (28 September 2019).

Unexpectedly high petroleum prices hit consumers in two ways. First, consumers have less spending power available because more of their income goes to pay for goods and services affected by petroleum prices. For example, consumers' income goes to pay for electricity from oil- or gas-fired power plants, gasoline and diesel fuel, and food. Second, uncertainty about petroleum prices shakes consumer confidence, leading consumers to delay making investments in energy-using items such as automobiles, furnaces, and homes.

Higher product and transportation costs, combined with downturns in consumer spending, lead to unemployment in affected industries, such as the auto industry and construction. Workers in those industries cannot quickly and easily shift to sectors of the economy that benefit from high petroleum prices.

The severity of the effect of high petroleum prices depends on the share of petroleum expenditures in the United States. The higher the level of oil expenditures, the greater the effect of price shocks.¹⁵ The severity of the effect of high petroleum prices also depends on the share of petroleum consumption that is

¹⁵ Baumeister, Christiane, and Lutz Kilian, "Lower Oil Prices and the U.S. Economy: Is This Time Different?", *Brookings Papers on Economic Activity* (Fall 2016): 287–336 ("Economic vulnerability increases with the share of oil expenditures in U.S. GDP. How much this gasoline price shock matters to U.S. consumers depends on the share of expenditures on gasoline and other motor fuels in overall consumer expenditures. For a given unexpected increase in the real price of gasoline, the higher this expenditure share, the higher the potential reduction in consumers' discretionary income, because income spent on gasoline cannot be spent on other goods").

imported. For example, petroleum price shocks have smaller effects now than in earlier eras, when a higher fraction of US petroleum consumption was imported.¹⁶ The vulnerability of the United States economy to the effect of price shocks from petroleum imports led every U.S. president since Richard Nixon to advocate for policies to make the United States self-sufficient – “energy independent.”

New England is especially vulnerable to petroleum price shocks, because it is not a petroleum-producing region. New England imports the majority of its petroleum products. This vulnerability is so severe that the U.S. Department of Energy maintains the Northeast Home Heating Oil Reserve to protect against oil-product price shocks in New England. Maine is even more vulnerable to price shocks than New England as a whole.¹⁷

The NECEC project, which is understood to be a 1,200 megawatt transmission line that would provide a predictable flow of renewable energy, is of sufficient magnitude to increase energy security in New England, as the Maine Public Utilities Commission found in its order granting a certificate of public

¹⁶ *Economic Report of the President Together with the Annual Report of the Council of Economic Advisers* (2016): 15; see also Hamilton, James D., and Valerie A. Ramey, “Comments and Discussion,” *Brookings Papers on Economic Activity* (2016): 337-357.

¹⁷ ISO-NE, “Oil Infrastructure,” https://www.iso-ne.com/static-assets/documents/2021/04/oil_infrastructure.pdf.

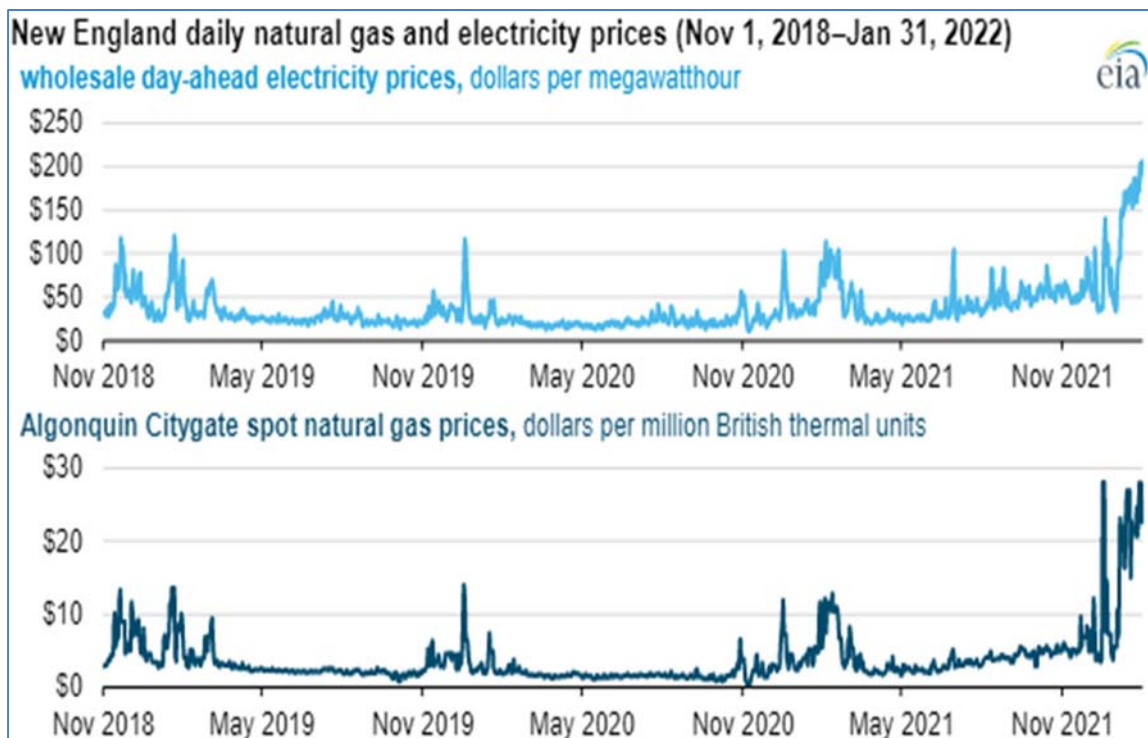
convenience and necessity for the project.¹⁸ Substituting renewable energy resources in place of petroleum resources reduces the share of consumer expenditures on petroleum (and imported petroleum).

The NECEC project will also help insulate New England from rises in costs when the price of petroleum rises, because Hydro-Quebec's power purchase agreements have a fixed price that does not depend on the price of petroleum.

Unlike hydropower, petroleum price increases are passed through to electricity consumers. As seen in Figure 4, these consumers were paying much higher prices than during the pandemic, even before the current petroleum price spike due to the Russian invasion of Ukraine.

¹⁸ Cent. Me. Power Co., Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, No. 2017-00232, Order at 39-40 (Me. P.U.C. May 3, 2019).

Figure 4: New England electricity price increases mirror natural-gas price spikes



Source: U.S. Energy Information Administration, “New England natural gas and electricity prices increase on supply constraints, high demand” (February 2, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=51158>.

The NECEC project thus will reduce the impact of petroleum price shocks on the region’s economy, thereby reducing the likelihood and severity of petroleum-price-induced recession.

In contrast, the Initiative, if it stands, would increase New England’s vulnerability to price shocks and resulting recessions. The negative effects of the Initiative will likely be even greater at a time when the United States has committed to strict climate change goals and in light of current geopolitical tensions, which highlight the importance of questions of security of energy supply.

CONCLUSION

As set out above, the Initiative – and the resultant potential end to the NECEC project – has two distinct negative effects from an economics standpoint: increased political risk, which will result in lower investment in Maine (including in renewables, thus undermining the climate change goals of the United States in general and Maine in particular), and decreased energy security. The latter is particularly important, at times like the present, when the Russian invasion of Ukraine has caused huge petroleum price spikes. The resolution of the conflict is unknown, but in any case, natural gas prices are expected to remain over \$5/million BTU for the next year, more than double the level of a year ago.¹⁹

These two negative effects interact to magnify the economic harm from applying the Initiative retroactively to bar the NECEC project. For example, energy security can be increased by increased investment to move energy reliance from imported petroleum to resources not impacted by global petroleum markets. But increased political risk makes it more likely for investors to make such investments in other, less politically risky areas.

Thus, from an economics perspective, voiding the Initiative would reduce policy uncertainty and political risk in Maine, by sending a positive signal to

¹⁹ Price expectations are based on futures prices prevailing 25 March 2022. *See* CME Group, “Henry Hub Natural Gas,” <https://www.cmegroup.com/markets/energy/natural-gas/natural-gas.quotes.html>.

current and potential investors about property-rights protection in the state. In contrast, upholding the Initiative as applied to the NECEC project would send the opposite signal, with deleterious economic consequences for the state's economy.

DATED: March 30, 2022

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