STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

AVANGRID NETWORKS, INC., *et al.*,

Plaintiffs – Appellants

v.

BUREAU OF PARKS AND LANDS, *et al.*,

Defendants – Appellees

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

BRIEF FOR *AMICI CURIAE* NSTAR ELECTRIC COMPANY d/b/a EVERSOURCE ENERGY, MASSACHUSETTS ELECTRIC COMPANY AND NANTUCKET ELECTRIC COMPANY, each d/b/a NATIONAL GRID, AND FITCHBURG GAS AND ELECTRIC LIGHT COMPANY d/b/a UNITIL

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I. INTERESTS OF THE AMICI

NSTAR Electric Company d/b/a Eversource Energy ("Eversource"), Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid ("National Grid"), and Fitchburg Gas and Electric Light Company d/b/a Unitil ("Unitil") are electric distribution companies (collectively, the "Companies") that operate in the Commonwealth of Massachusetts that have executed contracts for the purchase of hydroelectric power proposed to be transmitted from Quebec into Maine over a new, 145-mile transmission line (the "NECEC Project"). As the Court is aware, the NECEC Project would start at the United States border at Beattie Township, Maine, and terminate at a new converter station in Lewiston, Maine, where the electricity would be delivered into the regional transmission grid. Specifically, the Companies have each acquired portions of an annual aggregate quantity of 9,554,940 megawatt-hours ("MWh") of hydroelectric generation and associated environmental attributes from H.Q. Energy Services (U.S.) Inc. ("HQUS"), an affiliate of Hydro Quebec ("HQ"), to be delivered into New England (and, ultimately, to their customers in Massachusetts) by the NECEC Project. As part of the project, the Companies have also secured transmission rights on a direct current line.

Over the past several years, the Companies have conducted a state-sanctioned solicitation process, evaluated competing proposals, engaged in detailed

negotiations, executed comprehensive contractual agreements, sought and obtained all necessary regulatory approvals from Massachusetts regulators, *see Petition of NSTAR Electric Company d/b/a Eversource Energy, Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, and Fitchburg Gas and Electric Light Company d/b/a Unitil for Approval of Long-Term Contracts for Procurement of Clean Energy Generation Pursuant to Section 83D*, D.P.U. 18-64/18-65/18-66, at 115-18 (June 25, 2019) ("*MADPU Final Order*"), and vigorously defended those approvals on appeal in Massachusetts state courts, *see Nextera Energy Resources, LLC v. Dep't. of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48 (2020). These actions were taken in reliance upon the continuing orderly, fair, and normal functioning of the state and local permitting and legal requirements associated with the NECEC Project in the state of Maine. However, after all permits were issued for the NECEC Project and construction was moving forward in earnest, a ballot initiative in Maine was adopted that purports to retroactively invalidate the necessary state authorizations, thereby threatening the completion of the NECEC Project and the successful delivery of reliable, clean energy to the Companies and their Massachusetts electricity customers.

The recent decision of the Business Court (*Duddy, J.*), denying a preliminary injunction to halt the effect of this ballot initiative and to allow the resumption of construction, substantially and specifically affects the interests of the Companies and

their customers. Given the integrated, regional nature of energy supply in New England, all players, including electric distribution companies in Massachusetts and neighboring states, require regulatory certainty to ensure a reliable and economic energy supply for their customers and to implement critically important renewable energy, decarbonization and climate change goals. This includes coordination and cooperation on large investments in interstate transmission projects, like the NECEC Project. Given the enormous scale of the environmental challenge on a global and regional basis, projects like the NECEC Project are essential to facilitating the achievement of these overarching system reliability requirements and clean energy goals in Massachusetts and throughout New England. Accordingly, the Companies request that the Court give careful consideration to the broader significance of these fundamental energy and environmental mandates in the context of the important legal issues presented by the Appellants NECEC Transmission LLC and Avangrid Networks, Inc. and the supporting Intervenor Appellant HQUS.

II. STATEMENT OF FACTS

To promote judicial economy, the Companies adopt the statement of facts set forth by the Appellants as if fully set forth herein. *See* Procedural Order, Docket No. BCD-21-416 at 2 (Jan. 3, 2022) (encouraging joint briefs to the extent possible "to avoid unnecessary duplication of effort and argument"). For additional perspective to the Court, the Companies provide further background, below, on the

factual and legal aspects of the power purchase agreements ("PPAs") executed by the Companies that depend on the NECEC Project.

The Companies are electric distribution companies subject to the plenary jurisdiction of the Massachusetts Department of Public Utilities ("MADPU") under M.G.L. c. 164, § 1.[1] Eversource serves approximately 1.4 million residential, commercial, and industrial customers in 139 cities and towns in the Commonwealth of Massachusetts. Eversource's service area includes large swaths of eastern Massachusetts from the City of Boston and its western suburbs, all the way to Cape Cod and Martha's Vineyard. Eversource also serves large areas of western Massachusetts, including the City of Springfield and surrounding communities, extending west to the New York border and north to the Vermont border. For its part, National Grid provides retail electric distribution service to approximately 1.3 million residential, commercial, and industrial customers in 172 cities and towns in Massachusetts in a service territory covering 3,870 square miles. The geographic area served by National Grid includes the North Shore of Massachusetts, the areas surrounding the cities of Worcester and Brockton, as well as the Island of Nantucket. Unitil serves over 30,000 customers in the City of Fitchburg and the Towns of

[1] Among other things, the MADPU has broad and comprehensive jurisdiction over electric distribution companies to review and set rates, define and enforce service quality standards, and oversee planning and energy procurement. *See*, *e.g.*, *Massachusetts Elec. Co. v. Dep't. of Pub. Utils.*, 469 Mass. 553, 555, 15 N.E.3d 176, 180 (2014); *Southern Union Co. v. Dep't. of Pub. Utils.*, 458 Mass. 812, 819, 941 N.E.2d 2633, 639 (2011); *Attorney General v. Dep't. of Telecomm. and Energy*, 438 Mass. 256, 267, 780 N.E.2d 33, 42 (2002).

Ashby, Townsend, and Lunenburg. Together, the Companies serve 315 out of the 351 municipalities within Massachusetts.

Like Maine and other New England states, Massachusetts has enacted extensive and far-reaching energy and environmental policies to counter the emerging devastating effects of climate change, including, *inter alia*, An Act Relative to Green Communities, the Global Warming Solutions Act, the Energy Diversity Act, the Clean Energy Act, and An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy. Each of these is discussed in more detail below. In concert, these statutes demand that Massachusetts strive to achieve environmental and energy goals that include the efficient use of electricity, decreased reliance on fossil fuels, and a growing and sustained emphasis on clean energy initiatives such as renewable sources to combat global climate change.[2] Electric distribution companies, such as Eversource, National Grid, and Unitil, are charged with planning, developing and operating their electric transmission and distribution systems in a reliable, economic, and safe manner and, at the same time, to achieve these bold objectives in supplying power to customers consistent with the legal directives ensuring diverse and clean sources of energy.

[2] Massachusetts is already among the ten U.S. states with the lowest energy consumption on a per capita basis and uses less energy to produce a dollar of gross domestic product than all but two other states. *See* Massachusetts State Energy Profile Analysis, U.S. Energy Information Administration ("EIA") (Sep. 16, 2021), https://www.eia.gov/state/analysis.php?sid=MA.

Green Communities Act

A critical legislative first step in Massachusetts for purposes of the current appellate proceeding in Maine was the passage of An Act Relative to Green Communities, St. 2008, c. 169 (the "Green Communities Act") in 2008. The Green Communities Act is a comprehensive, multi-faceted energy reform bill to encourage energy and building efficiency, promote renewable energy, create green communities, implement elements of the Regional Greenhouse Gas Initiative ("RGGI"),[3] and provide market incentives and funding for various types of clean energy sources. *MADPU Final Order* at 1.

In 2016, the Green Communities Act was further amended to add Section 83D, requiring the execution of long-term contracts to purchase hydroelectric generation and associated environmental attributes. *Id*. at n.1. Section 83D requires each electric distribution company in Massachusetts to jointly and competitively solicit proposals for eligible clean energy generation resources[4] and to enter into cost-effective long-term contracts to facilitate the financing of such resources equal to approximately 9,450,000 MWh by December 31, 2022. *Id*. at 1-2; Section

[3] RGGI is a cooperative effort of eleven Eastern states, including Maine and Massachusetts, to reduce carbon emissions from power generating facilities. 38 M.R.S. § 580; M.G.L. c. 21A, § 22.

[4] For the purpose of Section 83D, the term "clean energy generation" is defined as (1) firm service hydroelectric generation from hydroelectric generation alone; (2) new Class I Renewable Portfolio Standard ("RPS") eligible resources that are firmed up with firm service hydroelectric generation; or (3) new Class I RPS-eligible resources. St. 2008, c. 169, § 83B; 220 Code Mass. Regs § 24.02.

83D(a), (b); 220 Code Mass. Regs. § 24.03. Pursuant to Section 83D, the MADPU must approve a long-term contract before it can become effective. *MADPU Final Order* at 2; Section 83D(e); 220 Code Mass. Regs. § 24.03.

Global Warming Solutions Act

On August 7, 2008, then-Massachusetts Governor Deval L. Patrick signed into law the Global Warming Solutions Act ("GWSA") (c. 298 of the Acts of 2008), which established aggressive greenhouse gas ("GHG") emissions reduction targets of twenty-five percent from 1990 levels by 2020 and eighty percent from 1990 levels by 2050. M.G.L. c. 21N, §§ 3, 4. Among other provisions, the GWSA obligates administrative agencies, in evaluating and issuing permits, to consider reasonably foreseeable climate change impacts (*i.e.*, additional GHG emissions) and related effects (*e.g.*, sea level rise). Overall, the GWSA was "designed to make Massachusetts a national, and even international, leader in the efforts to reduce the greenhouse gas emissions that cause climate change," and "establishes significant, ambitious, legally binding, short- and long-term restrictions on those emissions" (quotation omitted). *Nextera*, 485 Mass. at 597 n.3; *New England Power Generators Ass'n, Inc. v. Dept. of Envtl. Protection*, 480 Mass. 398, 399, 105 N.E.3d 1156, 1158 (2018).

Subsequently, Governor Charles Baker also established a goal of net-zero GHG emissions for the Commonwealth by 2050 and set emissions limits under the

GWSA at a level of statewide greenhouse gas emissions that is not greater than 85 percent below 1990 levels. Governor Baker's initiative is predicated on the belief that the net-zero plan is "necessary to adequately protect the health, economy, people and natural resources of the Commonwealth and maintain Massachusetts' critically important role as a national and international leader in the global effort to reduce greenhouse gas emissions that cause climate change in a manner consistent with the goals of the GWSA." *See* Executive Office of Energy and Environmental Affairs, *Determination of Statewide Emissions Limit for 2050* (April 22, 2020), https://www.mass.gov/doc/final-signed-letter-of-determination-for-2050-emissions-limit/download. In 2020, the Baker Administration also issued a "Clean Energy and Climate Plan for 2030" and "2050 Decarbonization Roadmap" published on the same date, creating new emissions target levels of forty-five percent below 1990 levels in 2030. These aggressive policies are an integral part of an overall directive to develop and implement both short-term and long-term significant reductions in emissions in the Commonwealth.

Energy Diversity Act

On August 8, 2016, Governor Baker signed into law An Act to Promote Energy Diversity (the "Energy Diversity Act"). St. 2016, c. 188. The Energy Diversity Act is a multi-faceted energy-focused bill that, among other things, facilitates the procurement and integration of renewable energy generation

resources, including new offshore wind energy generation, firm service hydroelectric generation, and other new clean energy resources. *Id.* § 12. This law specifically required electric distribution companies, such as Eversource, National Grid and Unitil, to competitively solicit and contract for approximately 1,200 megawatts ("MW") of clean energy generation, such as base load hydropower, onshore wind and solar supported by hydropower, standalone onshore wind, solar, and other renewable resources. The law also required the procurement by electric distribution companies in Massachusetts of approximately 1,600 MW of offshore wind.[5] These requirements recognize that hydropower and renewable energy generation must necessarily cross state lines to achieve the GHG gas emissions goals of the GWSA.

Clean Energy Act

Two years after the Energy Diversity Act, on August 9, 2018, Governor Baker signed into law An Act to Advance Clean Energy (the "Clean Energy Act"). St. 2018, c. 227. The Clean Energy Act, among other provisions, amends the Energy Diversity Act to expand the scope of energy efficiency programs, further the development of energy storage facilities, and create a new portfolio standard for retail electricity supplies, to be implemented by electric distribution companies such

[5] Currently, electric distribution companies in Massachusetts have already signed contracts for 1,600 MW of offshore wind power and are presently in the process of negotiating and executing contracts for another 1,600 MW of offshore wind.

as Eversource, National Grid and Unitil. *Id.* § 20. As part of the Clean Energy Act, a "Clean Peak Standard," the first of its kind in the United States, was developed, encouraging additional clean resources during periods of peak demand to help meet energy system needs.

The Climate Act

Most recently, on March 26, 2021, Governor Baker signed Chapter 8 of the Acts of 2021, "An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy" (the "Climate Act"). The Climate Act codified the Baker Administration's commitment to net-zero emissions by 2050 and advances and extends the goals of the GWSA by, *inter alia*, establishing rigorous interim goals for emissions reductions and authorizing an energy efficient building code for municipalities. The interim goals mandate that, by 2030, emissions must be fifty percent lower than they were in Massachusetts in 1990, and by 2040, they must be seventy-five percent lower. In addition, the Climate Act authorizes the procurement of a cumulative total of 5,600 MW of offshore wind energy by Massachusetts' electric distribution companies by 2027.

Consistent with the above statutory and regulatory enactments, and pursuant to the specific requirements of Section 83D, the Companies and the Massachusetts

Department of Energy Resources ("DOER")[6] jointly requested proposals for clean energy generation resources using a competitive solicitation process. In consultation with the Massachusetts Attorney General, the Companies and DOER developed a Request for Proposals ("RFP"), which the Companies and DOER issued to approximately 600 potential bidders on March 31, 2017. A total of forty-six bids, with fifty-three distinct project proposals, were received and thoroughly evaluated by an evaluation team that included the Companies and DOER, as well as a third-party Independent Evaluator retained by DOER and the Attorney General. After this comprehensive solicitation for qualifying clean energy projects, the NECEC Project was selected as the proposal that best satisfied various criteria, including price, energy and reliability benefits, project viability and permitting schedule, as established by the joint evaluation team.

In 2018, as a result of the solicitation process, the Companies entered into PPAs with HQUS for the clean, renewable electricity to be transmitted over the NECEC Project. Pursuant to a series of transmission service agreements, the NECEC Project would provide for the delivery of 9,554,940 MWh of firm clean energy during all contract years, which would supply over eighteen percent of Massachusetts' electricity demand and over eight percent of New England's total

[6] DOER was created by M.G.L. c. 25A, § 1 and is responsible for overseeing and participating in the solicitation process for long-term contracts of Massachusetts electric distribution companies for offshore wind and other qualifying renewable energy resources. St. 2008, c. 169, §§ 83C, 83D.

electricity demand. *See* ISO-NE, *Annual Generation and Load Data for ISO NE and the Six New England States* (Sep. 28, 2021), gen_nel_iso_states.xlsx (live.com). This electricity will be offered into the regional electricity market, which is overseen and operated by ISO New England, Inc. ("ISO-NE"), and, among other things, will provide the regional electricity market with a "hedge" during times of natural gas supply constraints to mitigate gas and electricity price spikes throughout New England. *MADPU Final Order* at 76. Specifically, the electricity delivered by the NECEC Project would reduce the amount of natural gas-fired generation (the primary fuel for New England electricity generation) required to meet regional electricity demand, thereby adding to system reliability and reducing winter electricity price spikes, and thus, the cost of electricity charged to electricity consumers throughout New England. *MADPU Final Order* at 76-77. The Companies' PPAs contemplate the successful completion of the NECEC Project by December 13, 2022. *MADPU Final Order* at 6.

To that end, on July 23, 2018, the Companies filed petitions with the MADPU for approval of their long-term PPAs and associated cost recovery for the hydroelectric power to be transmitted over the NECEC Project. *MADPU Final Order* at 1, 151. In its review of the Companies' PPAs, the MADPU conducted an extensive proceeding with a wide array of intervenors including: the Attorney General, DOER, Acadia Center, Central Maine Power Company, Champlain VT

LLC d/b/a TDI New England, Conservation Law Foundation, Low-Income Weatherization and Fuel Assistance Program Network, and NextEra Energy Resources, LLC ("NextEra").[7] *Id*. at 2. Additionally, limited participant status was granted to: Associates Industries of Massachusetts, Emera Inc., HQUS, New England Power Generators Association, Inc., Northern Pass Transmission LLC, RENEW Northeast, Inc., Sierra Club and Vineyard Wind LLC. *Id*. DOER and the Attorney General jointly selected a third-party Independent Evaluator to provide a report analyzing the solicitation and bid selection processes in a fair and unbiased manner. *Id*. at 3. The MADPU held three days of evidentiary hearings with testimony from eleven witnesses from the Companies, the Attorney General and DOER. *Id*. at 3-4. In total, the record contained 376 exhibits, including responses to 329 information requests and five record requests. *Id*. at 4. The PPAs were approved by the MADPU in a 153-page decision on June 25, 2019, as consistent with statutory requirements, cost effective and in the public interest. *MADPU Final Order*, at 115-18. NextEra appealed the MADPU's decision to the Massachusetts Supreme Judicial Court, where it was affirmed in 2020. *Nextera*, 485 Mass. at 616, 152 N.E.3d at 35.

[7] NextEra's interests include fossil-fuel burning electric generators that must compete with the inexpensive, clean energy that would be supplied into New England via the NECEC Project. (A.76-79.) Accordingly, NextEra has actively participated in proceedings in multiple jurisdictions opposing the NECEC Project. (A.76-79.)

For its part, the NECEC Project team began the permitting process in 2017. (A.110, 112, ¶¶ 110, 113(c).) In 2018, upon selection of the NECEC Project and execution of the PPAs by the Companies, NECEC added personnel and retained the necessary consultants to conduct detailed planning and engineering design. (A.110, 112, ¶¶ 110, 113(d).) Initial plans called for construction to start during 2019, but delays in permitting, largely caused by project opponents, required adjustments to the schedule. (A.76-79, 97, ¶¶ 20, 77; A.234, 237, 244, ¶¶ 26, 35, 56.) Construction of the NECEC Project ultimately began in early 2021. Under the PPAs, the NECEC Project's commercial operation date was set as December 13, 2022. (A.83, ¶ 32.) At the time that construction on the NECEC Project began, the schedule set by the PPAs included a commercial operation date of May 31, 2023, with an August 23, 2024 contractual deadline. (A.237, 244.)

III. STATEMENT OF THE ISSUE

Whether it is legal and proper for a citizens' initiative enacted by Maine voters to retroactively nullify a fully permitted and thoroughly vetted regional transmission line project that would reliably and economically deliver clean, renewable hydropower into New England, and thereby provide significant environmental benefits by reducing greenhouse gas emissions while bolstering the supply and reliability of the overall regional electric transmission grid.

IV. SUMMARY OF THE ARGUMENT

The State of Maine does not act in a vacuum with respect to the issues at stake in this appeal. Given the integrated, regional nature of energy supply, all participants, including electric distribution companies in Massachusetts, Maine, and neighboring states, as well as the millions of people and businesses they serve, require legal certainty to implement necessary energy reliability and environmental policies. This includes close coordination and cooperation on the substantial investments in interstate transmission projects necessary to ensure that regional system reliability and related energy and environmental goals are met. Indeed, no single state can guarantee the achievement of these objectives or fight climate change alone. And, conversely, no one state should be able to frustrate these vitally important regional energy and environmental objectives, or worse, sabotage those established objectives retroactively, scuttling the implementation of these policies not only for Maine itself, but also for Massachusetts, its electric distribution companies, and their customers.

Interstate investments and energy planning require regulatory certainty and effective coordination to encourage the scope and scale of investments needed, including for more transmission to increase reliability and bring clean energy to the region. In both Maine and Massachusetts, the administrative review of the NECEC Project and its accompanying contracts has been governed by legislatively imposed

standards, applied in legislatively created processes that are assigned to highly-specialized quasi-judicial bodies whose decisions—also by legislative design—are subject to judicial review by the highest courts in their respective jurisdictions. The judicial review of these administrative decisions in both states has recognized the expertise and integrity of these agencies by according them substantial deference. Accordingly, the NECEC Project, and the Companies' PPAs for the clean hydropower to be transmitted over the proposed transmission line, are seminal examples of cooperative actions across regulatory jurisdictions that are essential to achieve these critical regional imperatives.

V. ARGUMENT

A. The NECEC Project Will Enhance Reliability to the New England Transmission System.

1. The Existing Electric Grid in New England Is Currently Subject to Significant Reliability Risk.

Maine's ballot initiative to scuttle the NECEC Project places the reliability of the region's existing electric grid at grave risk because it prevents a substantial renewable energy resource from coming online, as needed, to supplement New England's electricity supply and to displace the use of fossil fuels for electricity generation. The New England region's electricity grid is overseen by ISO-NE, a "regional transmission organization authorized by the Federal Energy Regulatory Commission to operate New England's power grid, administer New England's

wholesale-electricity markets, and ensure that New England's electricity needs are met through power-system planning." *See NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 37 n.17, 227 A.3d 1117. ISO-NE has indicated that:

> Energy-security risks may be more acute in New England than in most other regions because New England is "at the end of the pipeline: when it comes to natural gas and other fuels used most often to generate the region's power. New England has no indigenous fossil fuels and therefore, fuels must be delivered by pipeline, ship, truck, or barge from distant places.[8,9]

New England's location, at the end of the fossil fuel pipeline and without fossil fuel resources of its own, makes states like Maine and Massachusetts particularly vulnerable because of the heavy reliance on fossil fuel for electric power generation. Gordon van Welie, Chief Executive Officer of ISO-NE, recently stated:

> [W]e are not trying to alarm the region, but we would not be doing our job if we did not highlight the region's vulnerabilities . . . . *the problem is our dependence on a resource mix and fuel infrastructure that are insufficient to meet electricity demand under various scenarios that include severe weather and coincident contingencies.* . . . The current [power generation] fleet and its fuel supply have become increasingly constrained. The fleet has seen significant retirements in recent years, as well as significant delays in the development of new resources. At the same time, the fuel supply that serves the fleet has not adapted to meet the growth in demand.

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[8] *See Natural Gas Infrastructure Constraints*, ISO New England, https://www.iso-ne.com/about/what-we-do/in-depth/natural-gas-infrastructure-constraints (last visited March 28, 2022).

[9] This reliance on outside fuel sources has been echoed by the U.S. EIA: "Markets in the New England region rely entirely on the delivery of petroleum products from outside the region, primarily delivered to coastal ports by marine tanker and barge but also, to a lesser degree, by rail and truck from New York and Canada." *East Coast and Gulf Coast Transportation Fuels Markets* at 5, ISO New England, https://www.iso-ne.com/static-assets/documents/2020/02/2020_reo.pdf, (Feb. 2016).

Correspondence, van Welie to NEPOOL Participants Committee, Jan. 31, 2022, pp. 1-2 (emphasis in original). Mr. van Welie added that, among other things, near-term solutions to these power shortage problems "will require more transmission and firm commitments from Hydro Quebec." *Id.* at 4. The 2020 ISO-NE Regional Energy Outlook confirms this:

> [A]dditional transmission (and distribution) system upgrades will be needed to accommodate large amounts of diverse clean energy sources—from large-scale offshore wind, remote Canadian hydropower, and hundreds of thousands of distributed solar and storage sources. . . . because of local opposition and other factors, transmission investments can take a long time to come to fruition in New England. To achieve decarbonization goals, the region must be proactive in developing infrastructure that aligns with supply growth and is available when needed.

See 2020 Regional Energy Outlook, ISO-New England, https://www.iso-ne.com/static-assets/documents/2020/02/2020_reo.pdf (last visited March 28, 2022).

The more recent 2021 ISO-NE Regional Energy Outlook adds:

> As recent events in California, Texas, and parts of the South and Midwest demonstrate, climate change will continue to challenge all of us and result in extreme weather that will threaten power system reliability. These events have also shown that our historical assumptions about resource performance and energy adequacy are no longer sufficient to ensure system reliability—so we need to plan and prepare. It is vital that we work together as a region to maintain a sound energy foundation throughout the clean energy transition. We will need robust wholesale markets, regulatory standards, and energy supply infrastructure to meet the future climate change challenges.

See 2021 Regional Energy Outlook, ISO-New England, https://www.iso-ne.com/static-assets/documents/2021/03/2021_reo.pdf (last visited March 28, 2022). In fact, ISO-NE has warned that "[o]pposition to infrastructure, coupled with the rapid transformation of the energy-resource mix, will only exacerbate the region's energy-security constraints." *See 2019 Regional Energy Outlook*, ISO-New England, https://www.iso-ne.com/static-assets/documents/2019/03/2019_reo .pdf (last visited March 28, 2022).

Maine is familiar with the perils of being "at the end of the pipeline," as evidenced by the decisions of both the Maine Public Utilities Commission ("MEPUC") and state courts. The MEPUC acknowledged Maine's geographic limitations in a 1998 decision on natural gas expansion in the state thusly: "Whereas Maine has been at the end of the national natural gas transmission system with one established local distribution company (LDC), it now enjoys the prospect of two new international pipelines bringing new gas supplies through, and to, much of Maine's developed area." *Central Maine Power Company*, Request for Approval to Furnish Gas Service In and To Areas Not Currently Receiving Natural Gas Service, No. 96-786, Order at 1 (Me. P.U.C. Aug. 17, 1998). Decisions of this Court, including one affirming the MEPUC's grant of a certificate of public convenience and necessity for the NECEC Project, have acknowledged the constrained nature of fuel supply in Maine during peak periods, affirming regulatory decisions designed to ensure that

supply. *See NextEra Energy Resources, LLC*, 2020 ME 34, ¶ 30, 227 A.3d 1117; *No Tanks Inc. v. Pub. Utils. Comm'n*, 697 A.2d 1313, 1316 (1997).

Massachusetts state regulators and courts have also recognized the region's unique energy position. The MADPU found over twenty years ago that "Massachusetts' gas load is and will remain weather sensitive…. Massachusetts is located at the end of the pipeline and has historically been capacity-constrained." *Investigation by the Department of Telecommunications and Energy Upon Its Own Motion Commencing a Notice of Inquiry pursuant to 220 C.M.R. § 2.00 et seq. into Unbundling of All Natural Gas Local Distribution Companies' Services*, D.T.E. 98-32-B at 9 (Feb. 1, 1999). More recently and specifically, in its approval of the Companies' PPAs, the MADPU acknowledged that these fossil fuel limitations:

> cause winter electricity price spikes because firm heating customers retain priority access to limited regional pipeline delivery capacity and may fully utilize their capacity during cold snap conditions. Many electricity generators have lower priority non-firm delivery arrangements and are unable to access gas supply and/or are forced to arrange higher cost alternative fuel supplies during those same peak demand conditions. In response, the region experiences short-duration spikes in wholesale electricity prices.

MADPU Final Order, at 76 n.50. The Massachusetts Supreme Judicial Court has frequently reviewed laws and policies to reduce and mitigate natural gas and electricity supply volatility, including upholding the MADPU's approval of the PPAs associated with the NECEC project. *See, e.g.*, *Nextera*, 485 Mass. at 616, 152 N.E.3d at 65; *ENGIE Gas & LNG LLC v. Dept. of Pub. Utils.*, 475 Mass 191, 193-

94, 56 N.E.3d 740, 742-744 (2016); *Boston Gas Co. v. Dept. of Pub. Utils.*, 367 Mass 92, 95, 324 N.E.2d 372, 374 (1975).

Thus, as a region, New England is already facing a future demand for electricity supply that fossil fuel-based generation cannot and will not fully meet, and that regional and state energy and environmental policies are specifically designed to supplant. Canadian hydropower represents a unique source of carbon-free electricity, which is otherwise scarcely available and proximately located to the New England grid. The final element required to unlock this potential source of clean, affordable, reliable electricity is new transmission infrastructure to deliver such resources into the region – like that offered by the NECEC Project. The sudden halting of construction of the NECEC Project does far more than negatively affect the interests of one project in isolation; it upsets and contravenes the carefully developed and diligently pursued policy objectives and expectations of Maine and its New England neighbors.

2. The NECEC Project Will Enhance Reliability by Providing a New, Diverse Source of Electricity to New England.

Through the Companies' PPAs, a substantial amount of new baseload hydropower will be delivered to New England over the NECEC Project, resulting in enhanced reliability and lower electricity costs during winter periods driven by spikes in natural gas prices and the increased risk of gas shortages. The regulators of both Maine and Massachusetts have reached the same conclusion with regard to

the reliability benefits to the region associated with NECEC Project. The MEPUC found that:

> Because the NECEC-enabled power will be delivered into Maine, however, *significant benefits will accrue to Maine electricity consumers through operation of the regional wholesale market*. These benefits are expected to accrue for a period of at least 20 years. In addition to the wholesale electricity price reductions that will result from the NECEC, *the Project will also enhance system reliability and fuel security within Maine and the ISO-New England (ISO-NE) region*.

Central Maine Power Company, 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. 2017-232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation at 1 (Me. P.U.C. May 3, 2019) (emphases added) ("*MEPUC Order*"). The MADPU similarly stated that the NECEC Project:

> will deliver hydroelectric generation over firm transmission service into the New England transmission system at the Larrabee Road substation in Lewiston, Maine. In addition, NECEC will interconnect under the Capacity Capability Interconnection Standard and provide transmission system upgrades to allow for firm deliveries into New England at that location. The [MADPU] has found that, *because Massachusetts is part the ISO-NE regional electric system, an improvement in reliability in one area of the regional system will help to bolster the reliability of the system as a whole* and this will provide enhanced electricity reliability in Massachusetts.

MADPU Final Order at 90 (internal citations omitted) (emphasis added).

The NECEC Project would significantly ease the reliability and security problems threatening the New England power grid by bringing large amounts of new, renewable Canadian hydropower to New England. The NECEC Project is exactly the kind of transmission line that ISO-NE is calling for, and it delivers these benefits at a demonstrably superior price. Specifically, the costs for energy and Environmental Attributes[10] under the PPAs are projected to provide a nominal $3,962 million in below-market costs (*i.e.*, benefits) to the Companies' customers over the long term. *MADPU Final Order* at 114. As found by the MEPUC, the electric price savings produced by the NECEC Project are not limited to Massachusetts' customers, as Maine's own electricity customers will realize millions of dollars of savings annually due to the reduction in energy prices resulting from the project. *MEPUC Order* at 6-7, 24, 30. (A.84-85, 87.)

As part of the NECEC Project, there will also be significant upgrades to the existing transmission system in Maine, which will allow for more reliable operation of the electric grid by delivering baseload energy to replace retiring baseload resources. (A.75, 196, 265.) The transmission system upgrades planned by the NECEC Project will increase the amount of power that can flow on a critical interface between its point of delivery in Maine and Massachusetts operations as

[10] "Environmental attributes" are NEPOOL GIS certificates and any other present or future environmental benefits associated with the firm service hydroelectric generation. *MADPU Final Order* at 5 n.10.

well as various unscheduled system outage events. (A.75, 196, 265.) Moreover, enhancing fuel diversity through the introduction of a substantial source of hydroelectric power in the region via the NECEC Project will inevitably increase system reliability and lower costs to customers. *Massachusetts Electric Company et al.*, D.P.U. 17-117/17-118/ 17-119/17-120, at 33 (2018); *MEPUC Order* at 30, 39-41.

Based upon the above, the NECEC Project will promote reliability and lower electricity prices throughout New England, including in Maine and Massachusetts. Careful, thorough regulatory reviews, such as the proceedings conducted in Maine and Massachusetts, are critical to ensuring that proposed facilities, such as the NECEC Project, are needed to ensure reliability, consistent with the values of the jurisdictions they will serve and are responsibly implemented. Allowing the ballot initiative to remain in effect would effectively nullify the Massachusetts legislation applied by the MADPU and subsequently upheld by the Massachusetts Supreme Judicial Court. Surely, voters in Maine should not be able to unilaterally cause such a sweeping negative effect on the regulation and reliability of the regional electricity grid.

B. The NECEC Project Will Enable Massachusetts To Meet Aggressive Climate Goals for the Benefit of the Commonwealth and the Region.

The NECEC Project is integral to meeting regional clean energy goals through significant reductions in GHG emissions associated with, in part, fossil-fuel electricity generation. The Massachusetts Supreme Judicial Court has articulated that the basis for the state law authorizing the Companies' PPAs "was to generate clean electricity that meets the energy demands of the Commonwealth, thus reducing greenhouse gas emissions and achieving other environmental goals." *NextEra*, 485 Mass. at 610, 152 N.E.3d at 60, citing St. 2008, c. 169, preamble; *Kain v. Dept. of Envtl. Protection*, 474 Mass. 278, 281-82, 49 N.E.3d 1124, 1129 (2016). Each component of the Commonwealth's suite of climate change statutes "addresses a separate but related piece of the clean energy economy," and "provide policymakers with a broad array of tools, including 'targeted and technology-specific policies[,] ... economy-wide and market-based mechanisms,' and renewable energy portfolio standards and energy efficiency improvements, to advance a clean energy economy while reducing emissions and addressing the unique threats that climate change poses to the Commonwealth." *Nextera*, 485 Mass. at 597, 152 N.E.3d at 51 n.3; *Kain*, 474 Mass. at 282, 49 N.E.3d at 1129, quoting Report of the Senate Committee on Global Warming and Climate Change, No Time to Waste, at 10 (Feb. 13, 2015); Executive Office of Energy and Environmental Affairs, Massachusetts Clean Energy

and Climate Plan for 2020, Executive Summary, at 7 (Dec. 29, 2010). The Companies' PPAs for the clean hydroelectricity to be transmitted over the NECEC Project are a principal example of those statutorily-mandated measures.

Acting separately, but with a commonality in goals, the Maine and Massachusetts regulatory agencies reviewing the NECEC Project and the resulting PPAs found that there would be significant GHG reductions associated with the delivery of such clean energy to the heart of New England. The MEPUC found that the NECEC Project will reduce GHG emissions by up to 3.6 million metric tons annually, the equivalent of removing 700,000 cars from the road, to combat climate change. (A.87, ¶ 44.) Similarly, the MADPU found that the NECEC Project "is projected to provide 36.61 million metric tons of carbon dioxide equivalents." *MADPU Final Order* at 32. These benefits do not inure to a single state or voter base – they extend to Maine, Massachusetts, and the broader region by ensuring that the integrated electricity supply network is developed and operating in concert to reduce carbon emissions. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (noting the increasing regionalization of generation and transmission of electricity); *Massachusetts v. E.P.A.*, 549 U.S. 497, 518-21 (2007) (recognizing the far-reaching and widespread nature of climate change in finding state has jurisdiction to challenge federal laws governing air emissions).

This notion – that what is good for New England is also beneficial to her individual states – is common in energy regulation in general[11] and climate change initiatives in particular. For example, Maine and Massachusetts are part of RGGI, which has established a regional cap on emissions and, since its start in 2005, "RGGI emissions have reduced by more than 50 percent -- twice as fast as the nation as a whole." REGIONAL GREENHOUSE GAS INITIATIVE, FACTSHEET 1 (Sep. 2021), https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf. The Massachusetts Green Communities Act codified certain aspects of RGGI and the Maine Legislature unanimously passed a law to keep Maine in RGGI through 2030. *See* 38 M.R.S. §§ 579, 580-B.

The enormous benefits that will accrue to states from renewable energy sources are monitored on a regional basis, which has been acknowledged by both Maine and Massachusetts regulators with respect to the NECEC Project and the Companies' PPAs. Renewable energy sources and their dispatch in the region are monitored and accounted for by the New England Power Pool Generation Information System ("NEPOOL GIS"), a regional body that "issues and tracks certificates for all MWh of generation and load produced in the ISO New England control area, as well as imported MWh from adjacent control areas." NEPOOL

[11] As discussed above, the Federal Energy Regulatory Commission ("FERC") regulates transmission systems on a regional basis through the use of Independent System Operators ("ISO"). In New England, this is achieved through the role of ISO-NE.

GENERATION INFO. SYS., https://www.nepoolgis.com/ (last visited March 28, 2022). With regard to the Companies' PPAs, the qualified clean energy to be transmitted via the NECEC Project will be tracked regionally using the NEPOOL GIS. The MADPU's order notes that: "The PPAs are unambiguous that (1) the Companies must purchase qualified clean energy; (2) the qualified clean energy must be generated by hydroelectric resources; and (3) as discussed further below, the qualified clean (hydroelectric) energy must be tracked in the NEPOOL GIS to ensure a unit-specific accounting of the delivery of qualified clean (hydroelectric) energy." *MADPU Final Order* at 56.

Given these features, the MADPU found that the "Companies will purchase qualified clean energy from hydroelectric generation alone." *Id*. Thus, while individual states do not track increments of renewable energy themselves or solely within their own borders, monitoring and confirmation of renewable energy occurs through the regional oversight of NEPOOL GIS tracking. Hence, the MEPUC's own finding "that the promotion of incremental hydroelectric generation for import into *the New England market* supports the 'state renewable energy generation goals'" of Maine. *MEPUC Order* at 16 (emphasis added).

Based on the above, the NECEC Project and the PPAs that provide a long-term revenue stream for the clean hydroelectric power to be transmitted over the new

transmission line are critical to the state climate change goals of Massachusetts, Maine, and the entire New England region.

C. To Halt the NECEC Project Now Will Impede the Development of Future, Large-Scale Energy Projects.

Affirming the Business Court's denial of a preliminary injunction will have a devastating, chilling effect on large-scale development in Maine specifically and on energy infrastructure regionally. Retroactively thwarting the NECEC Project, which has received all necessary approvals in Maine, executed contracts for the sale of the power to be transmitted, and is well underway with substantial construction completed at a cost of hundreds of millions of dollars, would be an unprecedented step for a state court to take that would reverberate across time and industry. As demonstrated above, Maine does not operate as an electrical island; it is interconnected to Canada and other states in the New England region, is regulated regionally (*i.e.*, the FERC), relies on regional institutions for its energy infrastructure to function (*e.g.*, ISO-NE) and participates in regional climate change initiatives (*e.g.*, RGGI). For Maine to unilaterally undermine these integrated and coordinated efforts to ensure energy reliability would necessarily cause its regional partners to question the nature of these important relationships. Certainly, other industries are watching as well and there could be far-reaching and unintended consequences on the very important Maine economic interests in marine manufacturing, seafood/agriculture and tourism.

Such effects are not limited to Maine. If the ballot initiative is upheld, this would have serious deleterious effects on the development of other similar projects that will be needed in the future to meet energy needs in the region and the very substantial capital investments required for financing such projects. The process for designing, developing, permitting, and bringing large energy projects to commercial operation already requires a significant investment in time and funds. To then add the unpredictable element of retroactive law changes that can undo years of development and substantial construction would seriously jeopardize the necessary investments in these kinds of projects in the future. The proper functioning of the electric industry and the required investments in new infrastructure to achieve system reliability for customers, as well as the achievement of environmental goals for the public good, would become a practical impossibility in the face of such an enormous and unpredictable risk. And if Maine can take such an unprecedented step, how could developers possibly assess the potential for such a risk in other states?

These are very real consequences to Maine, New England and beyond, that would negatively affect the way the energy industry, and economic development more broadly, operate for decades to come.

VI. CONCLUSION

For the reasons set forth above and in the Appellants' briefs, because the NECEC Project is so essential to the achievement of necessary electric reliability and aggressive climate change goals across New England, this Court should vacate the Order and direct the Business Court to enter a preliminary injunction.

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