New Initiative to Block CMP's NECEC Project Is Unconstitutional

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The title of the new initiative, and the whereas clauses referencing Art. IX. Sec 23 of the Maine Constitution, seem to limit the proposed legislation to state-owned land. That said, the initiated legislation is redundant — it provides no greater safeguards than those already provided in Maine's constitution.

The body of the proposed legislation, however, extends beyond state-owned land. Title 35-A MRS § 3132, sub-§ 6-C, requires the developer of a "high-impact electric transmission line" (HETL) to obtain a "certificate of public convenience and necessity" (CPCN) from the PUC. This requirement already exists. Beyond the CPCN, the proposed legislation requires the developer of a HETL "anywhere in the State" to obtain the approval of 2/3 "of the members elected to each House of the Legislature."

Sub-§ 6-D goes a step further and prohibits any HETL in a relatively small geographic area of the state, the precise area in which CMP's NECEC transmission line is located. These provisions, coupled with the retroactive provision, sub-§ 6-E, evidence the true motive of the initiated legislation. It is not general legislation aimed at protecting the state from development that poses "a unique threat to the environment." It is legislation aimed at a single developer, CMP and its NECEC project. The violation of equal protection and separation of powers principles is palpable.

In the recently decided *Avangrid* case,[1] the court struck down opponent's first initiative because it was "outside the scope of the people's [constitutional] right to initiate legislation. ..." Though the court could not have anticipated a new initiative, the *Avangrid* court's reasoning was in many respects prescient — it strongly suggests that this new initiative is also constitutionally defective.

For example, though "equal protection," issues were not directly an issue in *Avangrid*, the Law Court noted that "the Legislature may not enact a private resolve singling out an individual for unique treatment."[2] Proponents of the new initiative would avoid a "singling out" charge by imposing the 2/3 legislative approval requirement of HETL's to projects "anywhere in the State," and by their amendment of 12 MRS § 1852 (4) imposing the 2/3 legislative approval requirement not just to transmission lines, but to "similar linear facilities." But carefully read, this broadening language is more form than substance.

If this initiative is a piece of general legislation why is it limited to only one type/category of development (HETL's)? Why does the broadening language addressing similar linear facilities and requiring 2/3 legislative approval apply only to projects involving the sale or lease of public lands? Why doesn't the 2/3 legislative approval requirement apply to similar linear facilities anywhere in the State? And why is the initiative limited to "linear" facilities that pose a unique threat to the environment?

Many non-linear types of development pose an identical "threat", e.g., sanitary landfills, hazardous waste disposal facilities, new manufacturing or mining facilities, expanded port facilities, etc. The answer to these questions is clear — this initiative is not general legislation. Other than CMP and its NECEC project, its specific provisions omit all (or almost all) other large-scale industrial development projects in the state that pose a threat to the environment.

Further evidence that the new initiative is not general legislation is found in the last sentence of the proposal — it is a retroactive provision reaching back six years to the earliest date of the NECEC project. Without naming CMP, the corporation is singled out for unique treatment. This provision circumvents existing Maine law, 1 MRS § 302, lim-

iting *ex post facto* laws. But initiated laws cannot circumvent constitutional safeguards against *ex post facto* laws found in the U.S. Constitution, see Art. 1, Sec. 9, clause 3: "No Bill of Attainder or *ex post facto* law shall be passed."

Maine's Constitution, contains similar language.[3] Though limited reach-back provisions have been allowed in unique settings, they are seldom longer than a few months or a year. No Maine court has ever sustained a six-year reach-back provision aimed at a single corporation circumventing both the U.S. and state constitutions.

Another example of the *Avangrid* court's prescience is found in its articulation of legislative powers. "The Legislature may not disturb a decision rendered in a previous [PUC] action, as to the parties to that action; to do so would violate the doctrine of separation of powers."[4] Contrary to *Avangrid*, this is precisely what the new initiative would allow. This initiative is aimed at a single project, a single developer, CMP, and it impermissibly clothes the Legislature with powers it does not have. As such, it is unconstitutional.

Finally, a reading of the new initiative makes clear that it does not alter the rule making, executive, or quasi-judicial functions and powers of the PUC. More importantly, beyond the showings made by a HETL applicant to the PUC in order to obtain a CPCN, the new initiative does not lay out any new or additional legislative guidelines or standards, supporting data or information that a HETL applicant must present, and that the Legislature must consider, in determining whether to grant the 2/3 legislative approval needed. The new initiative confers unfettered discretion on the Legislature to overturn a PUC order granting a CPCN.

Maine and national case law holds this to be unconstitutional on any of several grounds, e.g., separation of powers, equal protection, and due process. See *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, "The failure to spell out standards reduces the property owner to a state of total uncertainty and amounts to depriving him of the use of his property. Without definite standards an ordinance [or statute] becomes an open door to favoritism and discrimination. ..."[5] *Waterville Hotel* also notes that: "The view that the legislative authority cannot delegate to itself or to another municipal board an unfettered discretion to issue or not issue permits appears to be accepted by the text writers who have been concerned with the subject."[6]

In sum, it must be recognized that HETL's are an essential use of private property. Maine's and the nation's electrical grid system could not function without them. It follows that these lines must exist somewhere. An existing statutory and regulatory process allows proposed HETL projects to be submitted to the PUC where applicable guidelines, limitations, and standards (expanded and refined over the years by legislative enactments and agency rule making) are applied to determine whether a CPCN should be granted. If granted, and when other required approvals are obtained, the proposed project may go forward.

Avangrid (and prior Maine case law) hold that the Legislature may not order the PUC to reverse a quasi-judicial decision it has made, and (without further standards) it may not itself reverse a quasi-judicial decision of the PUC. To do either is an unconstitutional violation of due process, equal protection, and separation of powers principles. *Ergo*, for any/all of the reasons noted, the new initiative is unconstitutional.

ENDNOTES

[1] 20 ME 109 ¶22.

[2] See 20 ME 109 ¶36 fn.10.

[3] Me. Const. Art.1, § 11.

[4] Id. ¶35.

[5] 241 A2d 50 (Me. 1968) at pg.53.

[6] *Id.* The court then cites national treatises, *Yokley on Zoning Law & Practice*, Vol. 1, § 62;09 McQuillan, Municipal Corporations, § 26.114, page 267; 3 Antieau, *Municipal Corporation Law*, § 24.08, page 377. See also *Cope v. Town of Brunswick*, 464 A2d 223 (Me. 1983) and *Wakelin v. Town of Yarmouth*, 523 A2d 575 (Me. 1987).

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