

Testimony to the DEP

From: Orlando E. Delogu, Emeritus Professor of Law

Subject: Whether the DEP's permit approving NECEC LLC's project (May, 2020) should be suspended and all construction stopped because the lease of a small area of state owned land was deemed invalid by a Maine Superior Court (August, 2021).

Date: October 19, 2021

Facts:

(1) Over a 40 month period (September, 2017—January 2021) CMP obtained all required Federal, State, and local government permits approving the NECEC project, and thereby the right to commence construction. These permits were later assigned to NECEC Transmission LLC (henceforth, NECEC LLC) as the Avangrid entity that will construct and own the NECEC project.

(2) Throughout the DEP approval process (September, 2017—May, 2020) the DEP deemed that NECEC LLC met the “right, title, and interest” (RTI) requirements of Maine law with respect to all land the NECEC corridor would traverse (including the now disputed state land leased by BPL to NECEC LLC).

(3) On the merits, the DEP approved NECEC LLC's project (with conditions) in May, 2020. In June, 2020 The *Black* suit was filed raising the impropriety of the BPL lease, and thereby raising RTI issues. The Superior Court, focusing on the meaning and intent of the Maine Constitution, Art. IX, Section 23, deemed the lease invalid. NECEC LLC immediately appealed the court's decision and the issue is now before the Law Court; briefing schedules have been ordered.

(4) Rule 62(e) of the Maine Rules of Civil Procedure states that: “...the taking of an appeal from a [Superior Court] judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal...” In other words a lower court's holding is automatically held in abeyance, until the Law Court's review of the underlying issues is decided; exceptions to this rule do not apply here.

((5) Counsel for *Black*, ignoring Rule 62(e), relying solely on the Superior Court holding has triggered these proceedings by asserting that CMP no longer meets Maine's RTI requirements; that the DEP's approval permit should be suspended and all construction should be halted.

(6) In papers submitted to the Law Court NECEC LLC committed to halt construction in/on the leased land. The Law Court has confirmed that commitment in an order.

Argument:

For over 200 years, see *Marbury v. Madison*, 5 U.S. 137 (1803) “The second section of the third article of the [U.S.] constitution gives this court [the U.S. Supreme Court] appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States... The term “appellate jurisdiction” is to be taken in its largest sense, **and implies in its nature the right of superintending the inferior tribunals.**” *Id.* at 147.

In the same vein, Maine's Constitution clothes Maine's Law Court with final appellate jurisdiction, see *Beckley v. Town of Windham*, 683 A2d 774 (Me. 1996) “When the Superior Court acts as an intermediate appellate court and reviews an administrative agency decision, **we [the Law Court] review the agency's decision** directly for abuse of discretion, errors of law, or findings unsupported by substantial evidence in the record.” *Id.* at 775; also, *Jones v. Sec'y of State*, 238 A3d 982 (Me. 2020) “**We [the Law Court] interpret Maine's Constitution and statutes de novo** as questions of law.” *Id.* at 986; and *Avangrid v. Sec'y of State*, 237 A3d 882, 2020 ME 109 ¶ 13 “**This appeal requires us [the**

Law Court] to construe the Maine Constitution to determine whether the initiative should be declared invalid.... We review the legal issues presented on appeal de novo.”

In short, the Law Court, not the Superior Court, ultimately determines the meaning and scope of provisions in Maine’s Constitution and statutes such as those relied upon by the BPL to lease a tract of state owned land to NECEC LLC. This deference to the State’s highest court has been in place since statehood. For over 200 years the Law Court has consistently held that its review of lower court holdings is “**de novo.**”¹ Deference is even more fully warranted in the present setting where Maine Rules of Civil Procedure hold Superior Court decisions in abeyance when a decision is appealed and pending in the Law Court, and when the issues raised are of first impression, controversial, and of immense economic and public policy importance.

Given these realities, it follows that the status quo, the DEP’s approved permit and the disputed lease by BPL to NECEC LLC should remain in place pending the Law Court’s disposition of the appeal. **The Law Court (not the Superior Court or the DEP) is the final arbiter of the validity or invalidity of the lease.**

Respectfully Submitted for distribution to the DEP and public,
O. E. Delogu, Emeritus Professor of Law

¹ De novo review occurs **when a court decides an issue without deference to a previous court's decision.** Trial de novo occurs when a court decides all issues in a case, as if the case was being heard for the first time.