STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCDWB-CV-2020-29

RUSSELL BLACK, *et al.*,)
)
Plaintiffs,)
)
v.)
)
ANDY CUTKO, *et al.*)
)
Defendants.)

ORDER REGARDING THE DECLARATORY JUDGMENT RECORD AND 80C RECORD

Plaintiffs in this action challenge the Bureau of Parks and Lands' ("BPL") 2014 and 2020 decisions to lease to Central Maine Power Company[1] ("CMP") portions of two parcels of public reserved land in Somerset County to construct part of the New England Clean Energy Connect transmission corridor. The Court has issued a number of procedural and substantive orders in this case. This Order determines the factual record upon which the Court will rely for purposes of the Rule 80C appeal and addresses the Plaintiffs' request for development of a factual record in the Declaratory Judgment count. Before addressing those issues, a brief review of how the case has reached this point is in order.

On December 21, 2020, the Court denied motions to dismiss filed by BPL and CMP and permitted this case to proceed in Count I as a declaratory judgment action (with some limitations) and as a Rule 80C action in Count III. At the direction of the Court, Plaintiffs filed an all-encompassing motion regarding the state of the record on January 7, 2021. In that motion Plaintiffs sought to strike from the record as an impermissible post hoc justification a September 24, 2020 memo to the "Public Lands Lease Files" authored by BPL Director Andy Cutko and Director of

[1] CMP assigned the 2020 lease to NECEC Transmission LLC in early 2021. NECEC Transmission was joined as a defendant in this case. The Court will refer to them collectively as CMP for the sake of consistency with prior orders in the case.

Real Property Management David Rodrigues. Plaintiffs also sought to add additional documents to the record. BPL and CMP each opposed Plaintiffs' motion on January 15, 2021. The Court viewed an issue highlighted by BPL in its opposition as potentially dispositive of the case and ordered the parties to brief that legal issue.[2]

On March 17, 2021, the Court issued an order on that legal question. It concluded that leases pursuant to 12 M.R.S. § 1852(4) were not categorically exempt from application of Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598-598-B. The Court also concluded that the Legislature had entrusted to BPL the obligation of making a determination in the first instance whether a proposed action on public reserved land would reduce or substantially alter the uses for which the State holds that public reserved land in trust for the public. That decision was grounded in two conclusions. First, the Court concluded that the language in the Constitution and enabling statute is clear. Second, and no less important, the Legislature's unique constitutional prerogative to have final say over how public lands are used in certain instances does not and cannot be effectuated unless a decision is made – one way or the other – by BPL as to whether a proposed use of designated public lands results in "substantial alteration" as defined by the Legislature.

Following that decision the Court held a conference with counsel on March 24, 2021, and ordered the parties to file by April 2, 2021, their positions supplementing arguments regarding the record and to restate proposed remedies. After reviewing those filings, the Court determined it was necessary to issue an order regarding the state of the record before proceeding to the next stage in this case. This prompted the Court to have another conference with the parties on April 9. Plaintiffs requested an opportunity to object to two documents BPL sought to add to the record as

[2] Deadlines regarding the record were stayed while the Court addressed the legal issue.

overlooked. Thus, the Court gave Plaintiffs until April 12 to file a brief objection, BPL and CMP until April 14 to respond to the brief objection, and Plaintiffs until April 14 to seek to add anything else to the record that might come across their radar by way of Freedom of Access Act responses from BPL in the interim. After consideration of all filings regarding the state of the record, the Court issues this order.

ANALYSIS

The Court will first address the issues for the record in the Rule 80C appeal and it will then address the issues for the record in the Declaratory Judgment count.

I. THE RULE 80C APPEAL RECORD

1. The issues in the Rule 80C appeal.

From the beginning of this case, BPL and CMP have argued that this is at most a Rule 80C appeal from a final agency action. They claim that the final agency actions are the two leases to CMP to use portions of public reserved land in Johnson Mountain Township and West Forks Plantation.[3] For purposes of ruling on the Rule 80C record, after considering the pleadings and arguments made to this point, the Court can identify four issues it will be asked to decide:[4]

- Whether there is competent evidence in the record to support BPL's contention that a determination regarding substantial alteration was made prior to entering into the leases;
- Whether there is competent evidence in the record to support BPL's contention that the leases to CMP of Johnson Mountain Township and West Forks Plantation do not

[3] Both BPL and CMP filed motions to dismiss as noted. The Bureau did not move for dismissal of the Rule 80C appeal, but CMP has maintained that Plaintiffs do not have standing.

[4] The Court does not intend to suggest that the parties cannot make arguments on issues other than those listed; the parties are certainly free to argue the issues as they see them. In addition, the Court's characterization of the issues does not discuss, for purposes of this Order, burdens of proof or the Court's standard of review. All of those issues can be fleshed out by the parties in merits briefing.

substantially alter the uses for which the State holds the land;

- Whether BPL entered into the leases without the necessary authority to do so; and
- Whether BPL's decisions to enter into the leases violated Article IX, Section 23 of the Maine Constitution.

The above issues will therefore be the starting point for consideration of the parties' arguments as to what should or should not be included in the record. *Cf. FPL Energy Hydro Maine, LLC v. Bd. of Envtl. Prot.*, No. AP-08-15, 2009 Me. Super. LEXIS 53, at *2 (Feb. 9, 2009) ("Although it is premature to delve into the merits of the 80C petition at this juncture, some discussion is necessary to understand the context of the proffered evidence to determine whether it should be added to the record."). Plaintiffs have sought to add information to the record they claim supports their contention that BPL never made a determination regarding substantial alteration. BPL has also sought to correct the record to add a few more documents relevant to the decisions to lease.

The parties seem to agree on one central fact: there exists no contemporaneous written decision or written findings of fact applying the standard of substantial alteration that predate BPL's decision to enter into a lease either in 2014 or 2020. Therefore, the Court will have to determine whether the record contains competent evidence that such a determination was nevertheless made, as BPL continues to insist. Thus, it is necessary for the record to include any information BPL relied on prior to its decision to enter into the leases in 2014 and/or 2020, any information that rebuts or contradicts BPL's assertions about the determination process, and any information that supports or contradicts BPL's assertions that it acted properly within its authority when it entered into the leases with CMP.

2. <u>The parties' positions regarding the Rule 80C record.</u>

Plaintiffs seek to exclude BPL's September 24, 2020 memo on the basis that it is an

impermissible post hoc justification for BPL's prior actions. They also seek to add twelve specific exhibits to the record and to provide additional testimony from various individuals (such as the testimony of Director Andy Cutko and David Rodrigues). The exhibits Plaintiffs seek to add include the following:

(1) Assistant Attorney General Lauren Parker's July 25, 2018 memorandum to the BPL Director.

(2) The April 24, 2020 Authorization for Outside Counsel regarding the authority of attorneys at Verrill to represent BPL.

(3) The Certificate of Public Convenience and Necessity ("CPCN") issued for the NECEC project.

(4) The May 2020 Department of Environmental Protection permit for the NECEC.

(5) L.D. 1893, titled "An Act To Require a Lease of Public Land To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes," and Amendment A thereto.

(6) A Bangor Hydro Memorandum of Intent dated March 24, 2005.

(7) Correspondence from the fall of 2019 between former Deputy Director Alan Stearns and Director Andy Cutko regarding the Bureau's former approach to legislative approval of leases.

(8) Testimony of BPL Director Andy Cutko and others, including David Rodrigues, both before the Legislature regarding the lease transactions, as well as Director Cutko's testimony as a private citizen before the Department of Environmental Protection regarding the NECEC (before he became the Director of BPL).

(9) The attachments to Plaintiffs' Complaint, including the press clippings and the

summaries of legislative resolves relating to conveyances of public lands.

(10) Legislative Resolves relating to leases and to matters Plaintiffs contend were much less significant in stature than CMP's proposed transmission line.

(11) The Legislature's request for documents and BPL's response thereto in connection with L.D. 1893.

(12) CMP's lease with the Passamaquoddy for lands for the Corridor.

Plaintiffs' April 2 letter seeks to add the following additional information to the record:[5]

(A) L.D. 471 in the current session, which proposes two amendments to 12 M.R.S § 1852(4) in response to BPL's arguments in this case.

(B) The testimony of Director Cutko in opposition to L.D. 471 on March 18, 2021 (available at https://www.youtube.com/watch?v=RbZB3pl-QAU start time 13:08, end time 33:50)

(C) A letter from the Agriculture, Conservation and Forestry ("ACF") Committee dated March 29, 2021, to the Commissioner of the Department of Agriculture, Conservation and Forestry and Director Cutko in response to the Director's testimony.

(D) A BPL-produced video regarding public reserved lands (available at https://www.youtube.com/watch?v=Im-uBEaTtEA).

Further, on April 14, Plaintiffs proposed to add six email chains to the record relating to the 2020 version of the lease. These email chains complete or provide context to email chains that already exist in the record filed by BPL in November 2020 and were just recently obtained – within the past two weeks or so – by Plaintiffs pursuant to a Freedom of Access Act request.

CMP contends the Court should not strike the September 24, 2020 memo from the record

[5] Plaintiffs identified the first set of exhibits with numbers in the January 7 filing and with letters in the April 2 filing. The Court is using the numbers and letters identified by Plaintiffs.

but, to the extent the Court does so, it should remand this matter to BPL to make a new decision concerning the substantial-alteration-of-use question. CMP also objects to Plaintiffs' proposed exhibits 1-3 and 5-11 being added into the record. Further, CMP contends the Court should not admit proposed exhibits 4 and 12 into the record but should remand to BPL for its determination if the Court finds these documents necessary for consideration; the Court should not admit into the record any of the proposed testimony Plaintiffs outline in their Motion but, to the extent the Court believes this testimony should be considered, the Court should remand the matter to BPL for consideration of it and a renewed decision; and the Court should not require Director Cutko or David Rodrigues to testify or be deposed, and should not hold a de novo hearing. Lastly, CMP objects to adding Director Cutko's March 18, 2021 testimony before the Legislature to the record.

BPL also takes the position that the Court should consider the September 24, 2020 memo as a permissible explication of what is already in the record. If the Court determines the memo is an impermissible post hoc justification, BPL contends the Court must remand the matter to BPL to make a new determination regarding substantial alteration after public notice; acceptance of public comments for fourteen days on the issue of substantial alteration; consider all such evidence received; prepare new written findings; and submit to this Court such material, including the 5 additional documents offered by BPL, as a supplement to the administrative record.[6] The 5 documents offered by BPL as corrections to the record pursuant to 5 M.R.S. § 11006(2) are as follows:

(a) The Bureau's 1985 Prescription Review and Multiple Use Coordination Report for the 1986-87 commercial timber harvest of the West Forks Plantation public reserved lands.

[6] While the parties' arguments regarding the record are tethered to the remedies they are seeking, the Court will as part of this Order provide a briefing schedule to enable them to make any arguments they wish which would include any remedy provided for under the Maine Administrative Procedure Act.

(b) The Bureau's March 2006 Prescription Review and Multiple Use Coordination Report with Harvest Map for the 2006-07 commercial timber harvest of the West Forks Plantation and Johnson Mountain Township public reserved lands.

(c) Bureau staff notes, dated August 14, 2014, related to CMP's request for a conveyance of a property interest over public reserved lands for an electric power transmission line.

(d) An internal marked-up copy of the 2014 lease dated September 22, 2014.

(e) A Department of Administrative and Financial Services, Bureau of General Services, Professional Service Pre-Qualification List identifying Dwyer Associates, which appraised the leased premises, as pre-qualified to provide property appraisal services for state agencies.

In response to BPL's attempted correction of the record, Plaintiffs objected to the two Prescription Review and Multiple Use Coordination Reports noted above on the basis that they "were not considered by the Bureau at the time it allegedly made a substantial alteration determination . . . ." (Pl.s' Obj. p. 2 (Apr. 12, 2021).)

As it pertains to Plaintiffs' proposed exhibits, BPL does not object to 1-3, 5-7, 8 (pages 201-243 only), and 9-11 from the January 7 filing. BPL does object to Plaintiffs' proposed exhibits 4, 8 (pages 1-200), 12, and the six proposed affidavits. In its April 2 filing, BPL stated that,

> [s]hould the Plaintiffs, through their contemporaneous letter to this Court, ask the Court to supplement the administrative record with materials in addition to those identified in Plaintiffs' motion, the Court should deny that request absent confirmation from the Bureau that the Bureau considered same. If, however, the Court determines that any such additional proposed documents are material to the issues on review, this Court should remand the matter to the Bureau pursuant to 5 M.R.S. § 11006(1)(B). Any proffered legislative materials would not trigger a remand because, regardless of whether the Bureau considered such, the parties are free to cite legislative materials for permissible purposes. *See Wawenock v. Dep't of Transp.*, 2018 ME 83, ¶¶ 13, 15, 187 A.3d 609.

3. The Court's rulings on the contents of the Rule 80C record.

Generally, "[j]udicial review shall be confined to the record upon which the agency decision was based . . . ." 5 M.R.S. § 11006(1). Only in certain limited circumstances can the reviewing court permit additions to the record. As relevant here those circumstances are "[i]n the case of the failure or refusal of an agency to act or of alleged irregularities in procedure before the agency which are not adequately revealed in the record, evidence thereon may be taken and determination made by the reviewing court"; "[i]n cases where an adjudicatory proceeding prior to final agency action was not required, and where effective judicial review is precluded by the absence of a reviewable administrative record, the court may either remand for such proceedings as are needed to prepare such a record or conduct a hearing de novo"; and when "[t]he reviewing court . . . require[s] or permit[s] subsequent corrections to the record." *Id.* § 11006(1)(A), (D), (2).

Plaintiffs have argued for the application of the first two for their proposed documentation and BPL has argued for application of the third for its proposed documentation. In addition to their contention that the Court can conduct a full evidentiary hearing because this is truly a declaratory judgment action, Plaintiffs have been insistent throughout that this Court may hold a de novo hearing under section 11006(1)(D) because there was no adjudicatory proceeding prior to BPL entering into the leases and effective judicial review is precluded by the absence of a reviewable administrative record. Both parties have referenced the adequacy of the administrative record at different junctures and for different reasons. However, there is a difference between having a reviewable record that can be meaningfully reviewed, and having a record that maximizes the chances of one party or the other prevailing on what might be in the record.[7] The Court

[7] In support of their arguments for the different remedies the parties seek, they have all – to varying degrees and at different junctures – asserted that there is no reviewable record before the Court. However, because BPL has insisted throughout this litigation that it did make a determination prior to both leases that neither

concludes there is a reviewable record here. The question presented then for purposes of the Rule 80C appeal is whether that record supports the final agency actions taken by BPL.

Plaintiffs' April 2 letter to the Court also contends, "Plaintiffs have made a prima facie showing of the Bureau's failure to act (i.e. make a substantial alteration determination) and of procedural irregularities." (Pl.s' Apr. 2 Ltr. p. 5.) The Law Court has only applied the "procedural irregularities" prong of section 11006(1)(A) in instances when "a showing of bad faith or improper behavior is strong enough to justify intrusion into the administrator's province." *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984). Plaintiffs have not really attempted to make a showing of bad faith or improper behavior, and the Court does not find that the Plaintiffs have made a sufficient showing of bad faith or improper behavior given the Law Court's language in *Cutler*. However, the Court does find that Plaintiffs have made a prima facie showing that BPL failed to act by not making a determination regarding substantial alteration prior to entering into the leases.

The Court emphasizes two points about this finding. First, the Court understands that this is not a prima facie showing of a *typical* failure of an administrative agency to act at all because there does seem to be final agency action here (the leases). However, as the Court held in its March 17, 2021 order, the unique constitutional and statutory structure applicable to public reserved lands requires a preliminary action prior to the final agency action. It is this preliminary action for which Plaintiffs have made a prima facie showing that BPL failed to take by way of their January 7, 2021 motion. And second, this is only a prima facie showing and is not a decision on the merits of the issue.

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would result in substantial alteration of the public reserved lands at issue, and because BPL filed a voluminous record, the Court intends to review the record and adjudge the Rule 80C issues based upon it.

a. The September 24, 2020 memo.

The Court first addresses what has become a contentious issue in the case: the September 24, 2020 memo. This memo – authored more than 6 years after entering into the 2014 lease, 3 months after entering into the 2020 lease, and while this case was being actively litigated – contends as follows:

> [i]n reviewing the project in 2014, the Bureau made the following findings and determinations, although not reduced to writing, with respect to the 2014 Lease based on field observations and its consideration and interpretation of applicable statutes. In 2020, the Bureau confirmed and made again these same findings and determinations, although not reduced to writing, with respect to the 2020 Amended and Restated Lease . . . ."

(A.R. I0069.) The memo asserts, on one hand, that BPL believed it was not constitutionally and statutorily obligated to make a determination regarding whether entering into the leases of the public reserved land with CMP would result in a substantial alteration to the uses of the land. On the other hand, notwithstanding the fact that BPL believed it did not have to make any determination regarding substantial alteration, the memo contends that BPL actually *did* make such determinations in both 2014 and 2020, even though BPL has to concede that it did not contemporaneously document any aspects of such determinations either in late 2014 or early summer 2020.

This memo is highly peculiar in the realm of administrative action. It reads like a legal brief; it purports to document findings, determinations, and conclusions made but not contemporaneously reduced to writing not only once, but twice; and it even goes out of its way to identify two legislators who happen to be named plaintiffs in this case and who would have received annual reports from BPL in which the already-executed 2014 lease to CMP was noted in order to explain that BPL "understood and interpreted this to mean that no legislative approval . .

. was required." (A.R. I0069.) As the Court noted in the December 21, 2020 order on the motions to dismiss, the September 24, 2020 memo appears to be a post hoc justification of BPL's actions in 2014 and 2020.

BPL contends that post hoc rationalizations are permissible additions to administrative records, citing three D.C. Circuit Court cases. These D.C. Circuit Court cases stand for the following propositions:

> Courts "review an agency action based solely on the record compiled by the agency when issuing its decision, not on some new record made initially in the reviewing court. . . . [R]eviewing courts [are permitted] to rely on post hoc declarations in certain situations when the declarations have come from the relevant agency decisionmaker. . . . [Courts are] barred consideration of post hoc materials when they present an entirely new theory, or when the contemporaneous record discloses no basis for the agency determination whatsoever. [Courts] can permit consideration of post hoc materials when they illuminate the reasons that are already implicit in the internal materials.

Rhea Lana, Inc. v. Dep't of Labor, 925 F.3d 521, 524 (D.C. Cir. 2019) (alterations from original, citations, and quotation marks omitted); *cf. Maine v. Shalala*, 81 F. Supp. 2d 91, 94 (D. Me. 1999) ("[I]t is . . . a well-settled rule of law that the agency must have provided a valid basis for its action at the time the action was taken."). BPL cites *Rhea Lana* and contends the "memo is a fuller explanation of the Bureau's reasoning at the time it acted, and is rooted in the Bureau's record and legislative interactions . . . ." (BPL Opp. to Mot. re: Record p. 17 (Jan. 15, 2021).) However, in *Rhea Lana*, "the Declaration largely echoe[d] the rationale contained in the contemporaneous record." *Rhea Lana*, 925 F.3d at 524.

BPL has not pointed to – nor has the Court been able to find – anything in the record that expresses a contemporaneous rationale of the kind referred to in *Rhea Lana*, either in 2014 or 2020. More fundamentally, the Court is not aware of any Maine court that has permitted post hoc

justifications such as the September 24, 2020 memo; BPL has not cited one. BPL is essentially asking this Court to create new substantive law about the nature of permissible review by the Superior Court in reviewing agency actions, and the Court declines BPL's request to do so. The Court therefore strikes it from the administrative record. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___US___, 140 S. Ct. 1891, 1909 (2020) (alterations, citations, and quotation marks omitted) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target.").

b. The remainder of proposed modifications and corrections to the record.

As all parties seem to agree, legislative materials can be cited for permissible purposes as part of the merits briefing. CMP objects to Plaintiffs' use of Director Cutko's recent testimony before the Legislature, particularly Plaintiffs' unofficial transcript. However, Plaintiffs also linked to the video of that testimony, which would be the best evidence of it in any event. Therefore, because the parties can cite to the relevant legislative information as part of the merits briefing as it is and because it is clearly relevant to what is looming in the merits briefing, the Court permits the record to be supplemented with the legislative material proposed by Plaintiffs in the April 2 letter (Exhibits A-C). In addition, because the six email chains offered by Plaintiffs on April 14 simply complete email chains that already exist in the record filed by BPL or provide context for others, the Court accepts those as corrections to the record pursuant to section 11006(2).[8]

[8] BPL objected (and CMP joined the objection) to Exhibit 6 (an email string running from June 24-25, 2020) from the April 14 filing because

> [t]he Bureau's 2020 lease to CMP took effect on June 23, 2020, which is the date the Bureau executed the lease. (A.R. I0012.) No part of Plaintiffs' proposed Exhibit 6 existed at the time the Bureau executed the lease.

Further, although CMP objects to most of the proposed documents offered by Plaintiffs to be added to the record in the January 7 motion, BPL – the pertinent agency actor here – does not. The Court accepts BPL's position regarding the numbered exhibits. Therefore, Plaintiffs' proposed exhibits 1-3, 5-7, 8 (pages 201-243 only), and 9-11 from the January 7 filing are part of the record. The Court agrees with BPL that Exhibits 4 (the DEP permit that is not specifically limited to Johnson Mountain Township and West Forks Plantation and encompasses a different issue than that before BPL), pages 1-200 of Exhibit 8 (Andy Cutko's testimony before the DEP as a private citizen before he became Director of BPL as well as other transcribed testimony before the DEP), and Exhibit 12 (CMP's lease with the Passamaquoddy Tribe for a different portion of the corridor) are not proper for inclusion in the record. Additionally, the Court does not find Plaintiffs' proposed Exhibit D from Plaintiffs' April 2 letter to be appropriate for inclusion in the record. Because the Court is not modifying the record on the basis of section 11006(1)(D), and because Plaintiffs have not made a prima facie showing of "procedural irregularities" as the Law Court has defined that concept in the *Carl L. Cutler* case, the proposed affidavits and deposition testimony are not proper additions to the record.

Finally, though BPL offered them in the event the Court were to deny Plaintiffs' request to strike the September 24, 2020 memo, the Court nonetheless permits the correction of the record offered by BPL with the five documents listed in its April 2 filing, including the two Prescription

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> Consequently, the Bureau could not have considered that email string with respect to the 2020 lease and did not consider that email string with respect to the 2020 lease.

(BPL Obj. pp. 1-2 (Apr. 16, 2021).) However, BPL itself included in its filing of the certified record a July 30-August 3, 2020 email chain – among a few other post-June 23 items – in which David Rodrigues emailed BPL's Western Region Lands Manager to ask if there were "any constructed recreational facilities on" West Forks Plantation and Johnson Mountain Township. (A.R. VIII0109.) BPL very clearly could not have considered such information with respect to the 2020 lease, yet it has asked the Court to include that information, nonetheless. The Court finds BPL's position on this issue to be without merit.

Review and Multiple Use Coordination Reports objected to by Plaintiffs. The harvests referenced by the two Prescription Review and Multiple Use Coordination Reports are discussed in the Upper Kennebec Region Management Plan that is already part of the record. (*E.g.*, A.R. II0093.)

4. Advancing to merits briefing on the Rule 80C appeal.

BPL and CMP contend that the Court must remand the matter to BPL should the Court admit any additional documents into the record or strike the September 24, 2020 memo. *See* 5 M.R.S. § 11006(1)(B). However, as the Court advised the parties in the last conference, no party should be expected to make meaningful arguments about the multiple issues presented in this appeal, including arguments about proposed remedies which could include remand, until that party knows what the administrative record contains. It is the intent of this Order to provide such notice to the parties.

II. THE DECLARATORY JUDGMENT RECORD

From the beginning of this litigation the Plaintiffs have insisted that the Court should develop the factual record not only in their Rule 80C appeal, but also because it has brought a Declaratory Judgment count which survived BPL and CMP's motions to dismiss it. As stated above, now that the parties have before them the administrative record, they are free to make any arguments they wish regarding what the Court should order in the Rule 80C appeal, including what if any remedies are appropriate under Maine law.

However, with respect to the Declaratory Judgment count, the Court limited the scope of that claim in its December 21, 2020 Order on Defendants' Motions to Dismiss Count 1 and 2. In that Order the Court concluded that, with respect to the 2014 lease, Plaintiffs should be permitted to argue that it is void for lack of a CPCN and, as to the constitutional claims it was making, whether a constitutional violation occurred before any administrative process was available to

them. In addition, with respect to both leases, the Court permitted the Plaintiffs to argue that, given the unique constitutional provision at issue, BPL was required to provide a meaningful administrative process to them but failed to do so. Further, the Court permitted the Plaintiffs to argue in the declaratory judgment portion that, as a matter of law, Legislative approval of both leases was constitutionally required.[9]

These arguments by the Plaintiffs, as understood by the Court, are legal arguments. The Court has concluded that these arguments can be decided based upon appropriate motions made by any party, and the briefing schedule below shall provide for such legal arguments.

The entry is:

1. The administrative record is modified and corrected as detailed in this order.
2. The Court establishes the following briefing schedule for merits briefing on the Rule 80C claim as well as on motion for judgment on the Declaratory Judgment claim:
    a. Plaintiffs shall file their merits brief on the Rule 80C claim and, if they wish, for judgment on the Declaratory Judgment claim by May 5, 2021. If BPL and/or CMP wish to file a motion for judgment on that claim they shall do so by May 5, 2021, as well.
    b. BPL and CMP shall file their respective opposing Rule 80C merits briefs and opposition to any motion brought by Plaintiffs regarding the Declaratory Judgment by May 19, 2021. Plaintiffs shall file their opposition to any motion for judgment on the Declaratory Judgment claim by that date as well.
    c. Plaintiffs shall file any reply merits brief on the Rule 80C claim by May 26, 2021. Any reply by any party to any motion brought for judgment on the Declaratory Judgment shall be filed on that date as well.
    d. Oral argument shall be held on June 4, 2021, by Zoom at 10:00 am. Clerk shall send notice to counsel of record.
3. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

[9] With respect to this last issue as framed by the Court, it is understood and expected that the parties will disagree as to whether such a constitutional claim is duplicative of any relief provided under the Maine Administrative Procedure Act (MAPA). However, should the Court conclude that BPL was required in 2014 to provide an administrative process as a matter of law but failed to do so, Plaintiffs would be unable to seek a remedy under MAPA but could be entitled to a remedy under the Maine Constitution given the unique constitutional relationships between BPL and the Maine Legislature at work in this case.

Dated: 4/21/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court