

**STATE OF MAINE  
CUMBERLAND, ss**

**BUSINESS AND CONSUMER COURT**  
Location: Portland  
Docket No.: BCD-CV-2306

FRIENDS OF MERRYMEETING BAY, )  
KATHLEEN MCGEE, ED FRIEDMAN, )  
and COLLEEN MOORE )

Plaintiffs )

v. )

CENTRAL MAINE POWER COMPANY )

Defendant )

**MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF AND  
FOR EXTENSION OF TIME**

The Maine Rules of Civil Procedure and the Business and Consumer Docket Procedural Rules (M.R. Civ. P. Rules 130-140) neither authorize nor prohibit the filing of an amicus brief by a non-party in the Business and Consumer Court (“BCC”) when it serves as a trial court. Though not applicable at the trial court level, the Rules of Appellate Procedure permit amicus curiae briefs to be filed if parties to the appellate proceeding consent "or by leave of the Law Court." M.R. App. P. 7A(e)(1)(A).

Accordingly, the Environmental Health Trust now comes before the BCC to move for leave to file its amicus curiae brief and, in light of the procedural status of the case, for an extension of time to do so.

**1. The interest of amicus curiae:**

The Environmental Health Trust (“EHT”) is a non-profit 501(c)(3) scientific and educational organization whose mission is to safeguard human health and the environment through state-of-the-art research, education, policy and advocacy<sup>1</sup>. EHT works directly with various constituencies to understand and mitigate public health and

<sup>1</sup> See <https://ehtrust.org> for EHT’s comprehensive website and its letters, testimony and briefing described therein.

environmental risks. EHT has no parent corporation, and no publicly-held company has a 10% or greater ownership interest in the organization.

EHT has a substantial and compelling interest in this case. Its participants and contributors are directly affected in the state of Maine, some of whom reside in the affected area, and nationally, by the public safety, health, environmental and jurisdictional issues presented in this case. EHT has submitted extensive research, peer-reviewed studies, and comments during regulatory and court proceedings pertaining to the Federal Communication Commission (“FCC”) and other federal agencies in connection with their safety guidelines regarding consumers’ and the general public’s exposure levels to radiofrequency and electromagnetic fields (“RF/EMF”) emitted from wireless devices and other equipment. Those submissions, largely containing research completed since 1996, focused on significant health and environmental risks of RF/EMF that the FCC’s now obsolete regulations, did not take into account. Similarly, the Federal Aviation Administration (“FAA”) guidelines provide recommendations concerning the installation of lighting. This lighting can be harmful and the FAA offers no recourse to aggrieved parties affected by the invasive lighting at issue in this case. EHT believes that many of the issues raised in the case – both regarding state tort law and the type of harm alleged, include matters of first impression for the BCC. EHT is therefore uniquely interested in assisting the court in understanding: (1) the statewide and national implications of a ruling that federal agency guidance and outdated safety recommendations preempt state tort law claims for nuisance; and (2) the grave and unique public health and environmental effects Defendant’s conduct is alleged to be causing.

## **2. Why amicus curiae filing is desirable:**

Although there are rules governing the participation of amicus curiae on appeal, there is no provision in the Maine Rules of Civil Procedure “as to the conditions under which a trial court should permit amicus briefing.” *Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 306 (D. Me. 2003). Nevertheless, courts have consistently held that a trial court “retains ‘the inherent authority’ to appoint amicus curiae ‘to assist it in a proceeding.’” *Id.* (quoting *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (D. Me. 1991)). An amicus is not a party and “does not represent the parties but participates only for the benefit of the court.” *Resort Timeshare*, 764 F. Supp. at 1501 (quoting *News and Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988)). Granting amicus status remains “within the sound discretion of the court.” *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Generally, amicus status is granted “only when there is an issue of general public interest, the amicus provides supplemental assistance to existing counsel, or the amicus insures a complete and plenary presentation of difficult issues so that the court may reach a proper decision.” *Alliance*, 297 F. Supp. 2d at 307 (internal punctuation and citation omitted).

In the circumstances presented, it is appropriate for the BCC to consider issues raised by amicus filing for several reasons. First, at issue is the integrity and legitimacy of this court's jurisdiction over state tort claims when a federal agency has not made a legally enforceable determination or otherwise “occupied the field” enabling relief to aggrieved parties-in-interest when no other relief exists, a foundational element in tort claims. There is therefore an issue of general public interest. Second, as discussed below, the information relevant and underlying the dispute in this case serves as a basis for the

unique and significant harm suffered by those who cannot seek relief from the federal agencies that purport to regulate the activity in question. The harm alleged is in the form of needless light and radio frequency invasion and the harmful health and environmental effects that occur or may occur and is the subject of inquiry into difficult and complex technical issues. As a leader in state-of-the art scientific research into the areas of harm alleged, EHT can ensure a complete and plenary presentation of the issues before the court.

Providing a tort remedy is one of the most basic and traditional of state functions. The idea behind “federal preemption” asserted by the Defendant in this case is not to replace state tort remedies with federal remedies. Such remedies do not exist under the laws and regulations governing the FCC or FAA. It is to leave harmed victims with no recourse at all and no ability to be compensated, while providing legal immunity to the companies that do harm. Thus, what it proscribes - the invalidation of state law by federal law - has profound significance for public health and the environment statewide and nationally. EHT therefore maintains a strong interest in the proper resolution of this case, and believes its unique perspective will provide additional insight into the issues before the Court, rather than merely duplicating the efforts of counsel for the parties.

### **3. The posture of the case and the timing of the submittal:**

EHT recognizes that an amicus brief should be filed as promptly as possible to avoid prejudicing the parties. However where, as here, the case is postured in such a manner that the only pleadings that have been filed are a complaint, motion to dismiss, and response to the motion to dismiss, the court, and amici, must consider the timing of Defendant’s sur reply to Plaintiff’s Response, now due on November 9. Counsel for EHT

has been recently retained (yesterday) and given the depth and breadth of the case will need sufficient time to prepare the brief for the court.

In looking to the Maine Rules of Appellate Procedure for guidance, an amicus curiae brief is filed by the date on which the appellee's brief is due to be filed, unless the court, for good cause shown, grants leave for later filing. M.R. App. P. 7A(e)(1)(A). M.R. App. P. 7(b)(1) further allows for amicus briefing schedule of 28 days with a response schedule of 14 days. This timing is consistent with recent Maine Supreme Court (acting as the Law Court) invitations for amicus briefing. *See e.g.* [https://www.courts.maine.gov/maine\\_courts/supreme/amicus\\_invites/sheltra/index.html](https://www.courts.maine.gov/maine_courts/supreme/amicus_invites/sheltra/index.html) ("Law Court invites amicus briefs on timing of appeals in subsidiary "proceedings" within informal probate proceedings," a request by Matthew Pollack, Clerk of the Law Court dated March 13, 2020.). At present, the only responsive pleading due is Defendant's sur reply to Plaintiff's Response to Motion to Dismiss in four (4) days, well under the timing typically allowed for amicus briefing. Accordingly, EHT is respectfully requesting the court grant a reasonable period of time, within these guidelines, to allow sufficient time for amicus brief submittal<sup>2</sup> and party response as follows:

1. November 30, 2020 - twenty five (25) days - to file amicus curiae briefing;
2. December 14 – fourteen (14) days – for any party to file a response to any new issue that may be raised in amicus briefing.

The grant of an extension of the date EHT must serve its Amicus Brief will not prejudice the existing parties, or significantly delay the proceedings because the Parties and the Court have not yet engaged in case management, the commencement of

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<sup>2</sup> EHT has been contacted by other "friends of the court" expressing a desire to either join or submit their own amicus briefing in the context of the issues raised in this case. As with the routine practice of the Law Court cited above, an invitation to solicit amici briefing may be appropriate here as well.

discovery or other procedural aspects of the case. Amicus involvement or participation at this stage does not delay any trial or pre-trial schedule because none exists, in part due to the Defendant's tactic of answering the complaint with a motion to dismiss and the removal of the case to the BCC, a new judicial venue.

Therefore, EHT requests an extension of the date it must serve its Amicus Brief for a period of twenty five (25) days to and including November 30, 2020 and a fourteen (14) day reply period for party response briefing.

**4. The position of the parties regarding the amicus briefing:**

Counsel for EHT has contacted the parties in connection with this motion. Plaintiff has no opposition to the motion or its proposed time schedule and consents. Defendant, Central Maine Power does not consent to the motion and has indicated it does not believe the proceedings should be delayed for amicus briefing.

\* \* \*

WHEREFORE, the Environmental Health Trust requests that the court grant this Motion for Leave to File Amicus Curiae Brief and for an Extension of Time to do so.

Respectfully submitted at Portland, Maine this November 5, 2020.

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### **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on November 5, 2020, a true and correct copy of the foregoing **ENVIRONMENTAL HEALTH TRUST'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND FOR EXTENSION OF TIME** was filed electronically and simultaneously electronically copied to the parties' counsel set forth below. A signed, paper copy was also deposited in first-class mail, postage-prepaid, addressed to the Business and Consumer Court.

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