

**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)

**AMICUS CURIAE
ENVIRONMENTAL HEALTH
TRUST’S REPLY TO
DEFENDANT’S OPPOSITION
TO MOTION FOR LEAVE TO
FILE AMICUS CURIAE BRIEF**

The Environmental Health Trust (“EHT”) respectfully submits this reply in response to Defendant’s opposition (“Opposition”) to EHT’s motion for leave to file an amicus brief and for extension of time (“Motion for Leave”). Defendant Central Maine Power’s (“CMP”) Opposition appears to center around a number of speculative assertions that amicus briefing moved for in this case must not be allowed because: (1) EHT is a co-petitioner in federal appellate litigation in the U.S. Court of Appeals for the D.C. Circuit; (2) CMP has determined that briefing in *this* case is “already complete” and that additional briefing would result in some delay in the proceedings; (3) EHT’s amicus brief may include “opinion” or “expert testimony,” and (4) EHT’s briefing will not add to what Plaintiff has already done. As discussed more fully below, Defendant’s Opposition fails because even if all of these assertions are true, none will cause EHT’s Motion to fail the criteria for amicus status established by well settled law.

I. THE LEGAL STANDARDS GUIDING THE COURT’S DISCRETION

In assessing criteria that guide the Court’s discretion in granting leave, courts have often drawn on three requirements from Federal Rule of Appellate Procedure

29(a)(3) (a rule also cited by the Defendant in Opposition). These criteria include: (1) an adequate interest, (2) desirability, and (3) relevance.¹ Although not directly applicable to the state trial court, the federal appellate Rule 29(a)(3) supplies an analytic framework to fully evaluate amicus status and would seem especially applicable here, where Defendant has raised several new concerns in opposition. This coheres with the reasoning of many courts who have suggested that in the absence of specific procedural rules, an approach that balances these criteria with certain concerns is desirable.² EHT believes it has demonstrated the adequacy of its interests, the desirability of its counsel, and the relevance of its interests in its Motion for Leave. Accordingly, EHT replies to Defendant's Opposition concerns as follows:

II. REPLY ARGUMENT

First, in opposition, the Defendant fails to sufficiently differentiate another, separate matter - appellate litigation in the U.S. Court of Appeals for the D.C. Circuit, and the FCC's appellate briefing in that case - from well established criteria for granting amicus status in this case set forth above. By ignoring the policy issues and legislative facts of statewide and national public interests that underlie the focus of EHT's motion,

¹ *Portland Pipeline Corporation et al. v. City of South Portland*, (D. Me. January 9, 2017) (2:15-cv-00054-JAW, Order on Motion to File Briefs as Amicus Curiae, Document 135, ("Portland Pipeline Amicus Order") at page 13.) *See also Animal Prot. Inst. v. Martin*, (D. Me. Feb. 23, 2007) (No. CV-06-128 BW, Order on Motion for Leave to Participate as Amicus Curiae, ("Animal Prot. Order")).

² The concerns that generally weigh against allowing the participation of amicus have been summarized as: "(1) inundating the judge with extraneous reading, (2) making an end run around court-imposed limitations on the parties, including discovery restrictions, the rules of evidence, and the length and timing of the parties' briefs, (3) increasing the cost of litigation, (4) creating side issues not generated directly by the parties, and (5) injecting interest group politics into the federal judicial process." *See: Portland Pipeline Amicus Order* at 12 (granting multiple requests for amicus briefing after balancing such concerns).

Defendant suggests that FCC briefing (and only FCC briefing)³ in another case is somehow dispositive of EHT's prospective status as amicus here. The Opposition thus ignores the applicable legal standard for amicus status - the adequacy, relevance and desirability of amicus interest - and sets a far higher bar for amicus participation than courts have applied in recent cases.

Second, here EHT's interest is also in ensuring that the court is fully informed on the state and national implications of federal preemption of state nuisance law and on state and federal redress for the unique and technically complex harms and injuries alleged in this case.⁴ This special interest, coupled with its national and global advocacy and education efforts in legal, technical and policy forums, underscores the adequacy and relevance of its interests and the desirability of its briefing to the Court. Defendant's central opposition point, its "Exhibit A", in fact supports EHT's request to participate here, and nothing in that matter or in EHT's motion departs from the legal requirements for amicus briefing.

Third, Under the criteria set forth in *Portland Pipeline*, Defendant has raised no other legitimate concerns that otherwise weigh against granting EHT amicus status.

³ Should the Court wish to fully understand the merits of appellate D.C. Circuit case it should have the benefit of *all* the briefing and not just Respondent FCC's response brief. However, EHT has no interest in further burdening the Court, and provides the Court with reference to EHT's (and co-petitioner's) briefing in that matter. Copies of all of EHT's briefing in the FCC case can be found here: <http://ehtrust.org/eh-takes-the-fcc-to-court/>.

⁴ Court decisions today frequently turn on questions of "legislative fact" i.e. generalized facts that are not limited to any specific case. These types of factual questions are familiar. *e.g.* Do violent video games harm child brain development? *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738-39 (2011); does racial diversity have educational benefits? *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013); is a partial birth abortion ever medically necessary? *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007); or here – do lighting and radar emissions harm individuals and the environment? The evidence the courts use to answer these questions is not limited in any respect and facts and opinion can come to the Court's attention in a variety of ways: on the record, presented by the parties, found by the Court on its own, and, of interest here, increasingly presented through briefs of amicus curiae.

(a) Amicus Briefing will not inundate the Court with extraneous pleadings. As an initial matter, it is Defendant’s Opposition that demonstrates one of the major drawbacks with the amicus process. By EHT’s count, Defendant has filed five (5) pages of opposition argument, and one eighty seven (87) page exhibit totaling ninety two (92) pages. This exhibit, which Defendant appears to solely rely on to cast aspersion on the apparent motives or interests of EHT, is a respondent brief from an appeal of an FCC order, an appeal that EHT participates in as co-petitioner.⁵ Further, on closer inspection, Defendant’s Opposition “Exhibit A” does not go to the merits of whether EHT has met its amicus threshold *here*, but is about whether the FCC can defend its own administrative action in *another* case. EHT does not object to Defendant bringing the federal appellate case to this Court’s attention. But this appears to be is exactly the kind of tactic that underlies the concern about inundating the court with extraneous legal memoranda. It is not, however, dispositive of EHT’s potential amicus status.⁶ To the contrary, EHT submits that the specific FCC order and circumstances under which it is being appealed - and a *complete* record of the co-petitioner’s and respondent’s briefing - only serve to demonstrate the adequacy and relevance of EHT’s interests in this matter.

(b) Due to the status of the case there are no court-imposed discovery or evidentiary limitations to be addressed or impaired, only those established by the parties themselves. In the absence of an answer and any case management order, there are no Court imposed limitations that can be circumvented or undermined by amicus briefing. EHT is aware of only one limitation, newly pointed out by Defendant in its

⁵ *Environmental Health Trust et al. v. FCC*, No.s 20-1025 (lead); 20-138 (consolidated) (D.C. Cir.). A hearing has been scheduled and will be live streamed on January 25, 2021.

⁶ See *Portland Pipeline Amicus Order* at 15, 16 (court granting multiple motions for leave to file amicus despite concerns over increased burden of extraneous pleadings and costs to litigation).

Opposition, where there appears to be an agreement among the parties to “stay discovery for the rest of this year.”⁷ *Thus, the only discovery limitation is a delay established by the parties themselves.* This side bar agreement to delay discovery undermines any real concern Defendant may have that amicus briefing will cause any further, material delay.

There are also no ripe evidentiary issues before the Court. Even so, Defendant CMP has raised the concern about whether EHT will offer external expert or opinion testimony for the Court’s consideration.⁸ Even if true, this too is in no way improper. Most courts welcome amicus briefing as it affords an opportunity for the Court to take notice of legislative facts, expert opinion and other facts that may be relevant outside of the pleadings.⁹ Here, in light of the limited purpose of EHT’s briefing, set forth in its motion, EHT is not raising any new legal arguments that were not preserved by the Plaintiffs in their complaint. This is precisely what it is supposed to do.¹⁰ Defendant’s Opposition asserts exactly the opposite – EHT should be denied amicus status because it will address or may duplicate the legal arguments made by the plaintiff. However, in similar cases, courts have correctly granted amicus status to parties with interests similar to EHT’s and that overlap issues raised by the plaintiff.¹¹

⁷ *Opposition* at 3.

⁸ *Opposition* at 4.

⁹ The prevailing view appears to be that the expertise-providing role for amicus curiae is a good thing. *See e.g.* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decision making*, 76 U. Chi. L. Rev. 965, 987 (2009) (“There has been no shortage of praise in the legal literature for the ability of amicus briefs to ‘inform the court of implications of a decision’ ...[and] provide relevant factual information not offered by the parties.”); James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 Pol. Res. Q. 365, 365-66 (1997) (“... conventional wisdom suggests that courts often rely on factual information or analytical approaches offered by amici, but not otherwise advanced by the parties to the case.”).

¹⁰ *United States v. Wahchumwah*, 710 F.3d 862, 865 (9th Cir. 2013).

¹¹ *See Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003)(citing *Strasser* and granting amicus leave to participate in a constitutional challenge to a state statute); *See also Animal Prot. Inst. v. Martin*, No. CV-06-128 BW (D. Me. Feb. 23, 2007).

Further, the legal authorities that the Defendant cites in support of its evidentiary concern are inapplicable given the speculative nature of what EHT's brief will or will not in fact contain. As the court noted in *Martin*:

At the time of the motion, the court can rarely assess the potential benefit of an *amicus* brief, since the brief has not yet been filed. If denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. *If beneficial, the court will be edified; if not, the brief will be disregarded. Thus, it is "preferable to err on the side of granting leave."*¹²

Here, the balance of interests that support granting leave weighs more heavily in EHT's case than in *Gwadosky* or *Martin*. The Defendant's failure to even mention these decisions, let alone explain why EHT should be treated differently than the amici in those cases, underscores the weakness of its opposition.

(c) Amicus briefing will not materially burden the parties and is timely here.

Even though there is always the question of the delay and costs that may be occasioned by *amicus* briefing, the timing here is optimal for the Court to grant leave. In similar cases containing issues of sufficient complexity, courts have provided an additional compelling reason to allow *amicus*. As the Court in *Portland Pipeline* stated:

The only answer is that it is more efficient in the long run to have the trial court make the right decision; in general, it is preferable to have the right decision a bit later than the wrong decision a bit earlier. *If the amici help guide the Court to the correct decision, it will save the parties the trouble and expense not of an appeal, which the Court views as inevitable, but of a remand.*¹³

EHT asserts that given the limitations it has proposed,¹⁴ and the early stage of this litigation, it is doubtful that the proposed briefing will be a material burden compared to

¹² *Animal Prot. Order* at 3 (quoting *Neonatology Assocs., P.A. v. CIR*, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J.)) (emphasis supplied).

¹³ *Portland Pipeland Order* 14-15 (emphasis supplied).

¹⁴ A Proposed Order was supplied to the Court with limitations on, among other things, format, length and timing of briefing. These proposed limitations demonstrate that EHT is cognizant of the potential burden of additional briefing and has proposed limitations to mitigate that burden.

the potential costs of re-trying an issue or the entire case on remand. Similarly, the Court has a compelling interest in granting leave for amicus, namely the prospective benefit the Court may obtain in reaching the best decision possible.

III. CONCLUSION

In dealing with amicus motions, courts balance the concerns articulated above with the benefits of receiving additional briefing on the issues before the court. In *Portland Pipeline*, the court concluded that it “could grant the motion for leave to file an amicus brief and take the brief for what it is worth.”¹⁵ Under this framework, EHT has easily cleared the bar of demonstrating an adequate, relevant and desirable interest and has also taken steps to mitigate any potential concerns that may be balanced by the Court. Its Motion for Leave should be granted.¹⁶

Respectfully submitted at Portland, Maine this November 30th, 2020.

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¹⁵*Portland Pipeline Order* at 12,13.

¹⁶ EHT agrees with Defendant CMP’s proposal that amicus have 30 days to submit amicus briefing from the date of entry of the order and the parties have 14 days to respond subject to the format and other considerations set forth in EHT’s Proposed Order. EHT has included a Revised Proposed Order with this Reply to reflect its consent with Defendant’s proposed timeline.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 30, 2020, a true and correct copy of the foregoing **AMICUS CURIAE ENVIRONMENTAL HEALTH TRUST'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** 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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