

**MATTHEW D. MANAHAN**

Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101

P 207.791.1189  
F 207.791.1350  
C 207.807.4653  
mmanahan@pierceatwood.com  
pierceatwood.com

November 7, 2019

Admitted in: MA, ME, NH

Everett Worcester, Chair  
Land Use Planning Commission  
Department of Agriculture, Conservation and Forestry  
22 State House Station  
Augusta, ME 04333

RE: NECEC – LUPC Decision

Dear Chairman Worcester:

I am writing to make two requests on behalf of Central Maine Power Company (CMP). First, we request that the Commission schedule a meeting in December to consider the Site Law certification for the NECEC Project. Second, we request that Commissioner Pray review the LUPC record materials so that he may participate in the Commission's decision. The reasons for these requests are as follows.

With respect to the first request, that the Commission schedule a meeting in December to consider the Site Law certification for the NECEC Project, CMP hopes to move forward with the Project as expeditiously as possible. The application has been pending since September 2017, and we believe it is ready for final resolution, once the record closes on November 26. We acknowledge that our September 18 petition to reopen the record for evidence relevant to the Merrill Strip alternative route caused additional delay, but we believe that reopening the record for that limited purpose has simplified the Commission's decision, because it removed the only significant objection the Commissioners discussed at the Commission's September 11 meeting. We believe that for the Commission's next consideration of the Project Commission staff can use the draft decision document prepared for the September 11 meeting, modified to reflect the elimination of the Beattie Pond P-RR subdistrict crossing and the additional record materials that address that change. We recognize that staff will need to have the modified document ready one week in advance of the Commission's meeting, but we are hopeful that the revision could be completed in time to allow the Commission to meet in December, although possibly not on the customary second Wednesday of the month.

With respect to the second request, that Commissioner Pray review the LUPC record materials so that he may participate in the Commission's decision, it is important that as many eligible commissioners as possible participate (if they do not have a conflict of interest), given the Commission's unique quorum requirement. As you know, that quorum requirement for the transaction of business is five members, and no action may be taken by the Commission "unless upon approval by a vote of 5 members." 12 M.R.S. § 684. Given

Everett Worcester  
November 7, 2019  
Page 2

that one member has a conflict, and there is one vacancy, there are only seven potential voting members for this matter, so having all remaining members participate will increase the likelihood that the Commission will be able to take action on this matter.

Although Commissioner Pray was not appointed until after the hearings in this matter earlier this year, he is nonetheless eligible to participate, as long as he reviews the relevant record materials. *See Green v. Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612 (concluding that “due process does not require that the decision-maker in an administrative hearing hear or read all the testimony” especially where statutory authority authorizes the use of hearing officers to build a factual record); *New England Telephone and Telegraph Co. v. PUC*, 448 A.2d 272, 280 (Me. 1982) (noting that it is “generally true that officials charged by statute with the duty of making a decision must consider and appraise the evidence on which their decision is based” but that “due process does not require that they hear or read all the testimony, and they may be properly aided by reports of subordinates”).

In fact, LUPC commissioners are not required to attend public hearings. The Commission’s rules require just one Commission member to be present at a hearing on a permit application. LUPC Reg. 5.05(2). LUPC’s enabling statute similarly provides for the use of staff members throughout the hearing process:

Whenever the commission is required or empowered to conduct a hearing pursuant to any provision of law, the hearing may be held and conducted by the commission or by any member of the commission or by any qualified employee or representative of the commission as the commission chair may determine. If the hearing is conducted by a single commissioner or qualified employee or representative, the commissioner, employee or representative shall report the findings of fact and conclusions to the commission together with a transcript of the hearing and all exhibits. The findings of fact and conclusions become a part of the record. The commission is not bound by the findings or conclusions when acting upon the record, but shall take action, issue orders and make decisions as if it had held and conducted the hearing itself.

12 M.R.S. § 684. In other words, Commission members do not need to attend the hearing prior to participating in a decision. Thus, Commissioner Pray may participate in the Commission’s decision in this case.

Thank you for your consideration of these requests. Please let me know if you have questions or need additional information.

Sincerely,



Matthew D. Manahan

cc: LUPC and DEP Service Lists