

September 13, 2021

Via Email: NECEC.DEP@maine.gov

Maine Department of Environmental Protection
ATTN: James Beyer
106 Hogan Road, Suite 6
Bangor, ME 04401

IN THE MATTER OF: NEW ENGLAND CLEAN ENERGY CONNECT
L-27625-26-A-N/L-27625-TG-B-N/
L-27625-2C-C-N/L-27625-VP-D-N/
L-27625-IW-E-N

Dear Mr. Beyer:

Enclosed is the Natural Resources Council of Maine's Petition to Intervene in the above-captioned proceeding.

Sincerely,

James T. Kilbreth

James T. Kilbreth

JTK/sab

Enclosure

cc: BEP Service List (w/enclosure) (Via Email)
Melanie Loyzim, Commissioner, Maine DEP (w/enclosure) (Via Email)
Matthew D. Manahan, Esq. (w/enclosure) (Via Email)
Lisa A. Gilbreath, Esq. (w/enclosure) (Via Email)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NEW ENGLAND CLEAN ENERGY CONNECT)
L-27625-26-A-N/L-27625-TG-B-N/)
L-27625-2C-C-N/L-27625-VP-D-N/)
L-27625-IW-E-N)

NATURAL RESOURCES COUNCIL OF MAINE’S PETITION TO INTERVENE

Pursuant to the Maine Department of Environmental Protection’s (the “Department”) Notice of Public Hearing, 5 M.R.S. § 9054, and 06-096 C.M.R. ch. 3, § 11, the Natural Resources Council of Maine (“NRCM”) files this petition to intervene in the above captioned proceeding. As set forth in more detail below, NRCM and its members will be substantially and directly affected by the suspension proceeding and, therefore, requests that the Department grant this petition for NRCM to intervene as a full party to the proceeding.

I. Natural Resources Council of Maine

NRCM is a non-profit membership organization and is Maine’s largest environmental advocacy group with more than 25,000 supporters. NRCM is dedicated to protecting, restoring, and conserving Maine’s environment, and has been working to do so since 1959. NRCM’s environmental protection efforts have been statewide and include a number of efforts in Maine’s north woods and western mountains. NRCM’s initial focus in 1959 and through the 1960s was working to protect the Allagash River, and the organization helped create the Allagash Wilderness Waterway. In the early 2000s, NRCM worked with the Penobscot Indian Nation and other conservation groups to restore the Penobscot River and improve access to the river for sea-run fish that feed Maine communities and wildlife. From 2005 to 2012, NRCM worked to protect the Moosehead Lake region from the largest development proposal Maine had ever seen

and ensured that the final development plan included more conservation land, concentrated development near existing communities, stayed away from remote ponds, and reduced the number of shorefront lots. NRCM remains actively involved in regional planning to protect the natural character of the Moosehead Region.

Most recently, NRCM has worked to protect the Upper Kennebec Region, including the public reserved lands of Johnson Mountain Township and West Forks Plantation, from the substantial and irreparable harm that the New England Clean Energy Connect (“NECEC”) will cause to the environment as well as to NRCM’s members who use the lands that would be cleared and constructed upon for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides. As part of its efforts to prevent such harm to the environment and its members, NRCM has participated as a party in the DEP’s licensing proceeding for NECEC as well as a plaintiff in *Black v. Cutko*, No. BCD-CV-2020-29 (along with other individual members of NRCM including Edwin Buzzell, Cathy Johnson, Ron Joseph, and Todd Towle).

II. NRCM’s Specific Contentions Regarding the Possibility of a Suspension and the Relevant Statutory Criteria

The statutory and regulatory criteria relevant to the suspension or revocation of CMP’s¹ license is whether “[t]here has been a change in any condition or circumstance that requires revocation or suspension of a license.” 38 M.R.S. § 342(11-B); 06-096 C.M.R. ch. 2, § 27(E). The answer here is unequivocally yes. The Superior Court’s decision in *Black v. Cutko*, vacated the public lands lease between the Bureau of Parks and Lands (“BPL”) and CMP for a portion of the NECEC. Accordingly, absent that decision being reversed on appeal or CMP obtaining 2/3

¹ References to CMP throughout this motion refer collectively to Central Maine Power Company and NECEC Transmission LLC.

legislative approval as the Court described, CMP simply cannot connect the transmission line across the public lands as planned and thus cannot meet the project purpose of bringing power from Quebec to New England.

CMP contends that because it appealed the *Black v. Cutko* decision to the Law Court, the decision is automatically stayed pursuant to Maine Rule of Civil Procedure 62(e) and “[t]he Superior Court’s decision therefore is effective only if the Law Court *affirms* that decision or appellees take some other action to remove the stay of that decision.” Response of Central Maine Power Company and NECEC Transmission LLC to Initiation of a Suspension Proceeding and Request for a Hearing (hereinafter, “Response to Suspension Proceedings”) at 1-2, n.1. As NRCM has previously pointed out, at the time CMP made that contention to the Commissioner, counsel for CMP was aware that the plaintiffs in *Black v. Cutko*, including NRCM, had taken action to lift the automatic stay. See Letter from James Kilbreth to Commissioner Loyzim dated August 30, 2021. As of the date of this petition, the Law Court has not issued a decision on the plaintiffs’ motion to lift the automatic stay and when it will issue a decision is unknown.

In any case, the Law Court’s decision with respect to the automatic stay does not have any bearing on the issue whether there has been a change in circumstance. CMP has represented to the Law Court as well as the plaintiffs in *Black v. Cutko* that it will not engage in any construction activities on the public lands, including clearing, during the pendency of the appeal. Thus, the issue of the automatic stay is irrelevant, since CMP will not clear or construct during the appeal.

CMP has, however, represented that it intends to continue construction on all other areas of the NECEC. Absent a suspension, NRCM expects that CMP will have completed a significant portion of the NECEC, including construction up to the borders of the public lands,

before it is even determined whether CMP's lease of public lands is valid and thus whether CMP can construct the NECEC over the public lands. NRCM's expectation is based in part on CMP's intention to execute a construction schedule that will enable it to achieve commercial operation of NECEC by mid-December 2023. Affidavit of Thorn C. Dickinson in Support of NECEC LLC's Opposition to Appellees/Cross-Appellants' Motion to Lift Automatic Stay Pending Appeal at ¶ 13.

As the Commissioner recognized in her letter initiating the suspension proceeding, the decision in *Black v. Cutko* means that unless that decision is reversed on appeal, or a new lease is entered into over the same public lots the Court addressed, CMP simply cannot connect the transmission line as planned and thus cannot meet the project purpose of bringing power from Quebec to New England. Alternatively, CMP must identify and obtain a permit for an alternative route. Thus, the fundamental question that must be answered is whether there is a sufficient likelihood of any of those eventualities occurring to permit CMP's continued clearing of a corridor permitted to a width of 150 feet and already cut to a width of at least 100 feet, which the Commissioner has already observed, and construction of 100 foot tall towers up to the borders of the public lands.

There is no such likelihood of any of these eventualities occurring in the near term. With respect to a final Law Court decision, because both BPL and CMP oppose expediting the appeal if the automatic stay remains in place, it will likely be at least 8 months before the Law Court issues its decision on the appeal. With respect to a new lease being entered into, the Legislature has made clear on numerous occasions that it views a lease of public land for NECEC as requiring the approval of 2/3 of the Legislature; whatever one surmises about the outcome of such a legislative vote, the Legislature will not be back in session until January and the timing of

any legislative consideration cannot be predicted. Finally, the issue of a reroute requires a permit amendment. That poses the question whether there are any alternative routes that CMP can use to construct the NECEC if it ultimately cannot go across the public lands that would involve the same clearing and construction by CMP and avoid the environmental harm of clearing and constructing two significant, fragmenting corridors instead of one. Based on the alternative routes CMP previously considered, and the fact that all of the land to the east of the public lands is conservation land, it is unclear where CMP would be able to reroute and which portions of the currently planned NECEC would be able to be utilized as part of any such reroute. Under these circumstances, it makes no sense to allow CMP to continue constructing the NECEC up to the borders of the public lands that it may not ever be able to cross or in areas that may not ever be able to be utilized if a reroute is necessary.

III. The Decision to Suspend or Not Suspend the License Will Substantially and Directly Affect NRCM

If CMP's license is not suspended until the Law Court issues a decision reversing the Superior Court or until it obtains all of the requisite approvals for a reroute, then CMP will continue clearing land and erecting poles and wires across lands that may not ultimately be utilized. Under these circumstances, NRCM's interests in protecting the environment and its members' use and enjoyment of Maine's lands will be directly and substantially affected because lands that cannot be used as part of the NECEC will be cleared and constructed upon. For example, the portions of the NECEC route leading up to and bordering the public lands will be cleared and constructed upon—harming among other things wildlife habitats and local ecosystems, and preventing NRCM's members from the full use and enjoyment of such lands—only to be abandoned in the likely event that CMP has to reroute the NECEC around the public lands. The same clearing and construction would have to happen for a reroute and, thus, would

result in duplicative environmental destruction. The only way to prevent such gratuitous and unnecessary environmental destruction is to suspend CMP's license until there is a definitive route for the NECEC (i.e. until there is a decision from the Law Court in *Black v. Cutko*, until CMP obtains a new and valid lease of public lands, or until CMP obtains an approved reroute).²

The above exemplifies NRCM's specific contentions regarding the significant and direct impact of the suspension decision on NRCM's environmental interests and its members. NRCM is continuing the process of reviewing additional impacts of the suspension decision and, therefore, the contentions listed above should in no way be considered exclusive or otherwise limiting of NRCM's participation in Department hearings on this matter.

IV. Name and Contact Information of NRCM's Spokesperson and Ability to Participate in the Proceeding

James Kilbreth, counsel for NRCM, will be NRCM's spokesperson at the hearing and is able to participate in the hearing scheduled for October 19, 2021. Mr. Kilbreth's contact information is: Drummond Woodsum, 84 Marginal Way, Suite 600, Portland, ME 04101; 207-772-1941; jkilbreth@dwmlaw.com.

V. NRCM's List of Proposed Topics to be Addressed through Testimony

- A. Why the Superior Court's decision in *Black v. Cutko* is correct and is likely to be affirmed and why CMP is unlikely to get 2/3 legislative approval for a lease of public lands for the NECEC (e.g. the history and significance of the public lands, the process of adopting a constitutional amendment, the specific constitutional amendment in this case, why 2/3 legislative approval is important, and why the Legislature adopted its recent resolution).
- B. CMP's agreement not to engage in construction activities on the public lands during the pendency of the *Black v. Cutko* appeal and the environmental and practical reasons why the cessation of construction activities must extend beyond the public lands until the issues in that case are fully and finally decided.

² Even if Department were to determine that NRCM and its members will not be substantially and directly affected by the proceeding, the Department should allow NRCM to participate as an "interested person" pursuant to 5 M.R.S. § 9054(2). Based on NRCM's stated interests as well as its prior involvement at the agency level and in other litigation, it is clearly an interested party.

- C. The likely need for CMP to reroute the NECEC, the lack of viable possible alternative routes, and the issues with various possible alternative routes including but not limited to legal, environmental, and practical challenges associated with such alternatives.

Dated: September 13, 2021

/s/ James T. Kilbreth

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