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	)

INTERVENOR NATURAL RESOURCES COUNCIL OF MAINE'S POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT

Pursuant to the First Procedural Order, and the Hearing Officer's email dated October 20, 2021, the Natural Resources Council of Maine ("NRCM") submits this post-hearing brief and proposed findings of fact in support of its request that the Commissioner suspend the Department of Environmental Protection's ("Department" or "DEP") May 11, 2020 Order (the "Order"). The Commissioner correctly determined that the Superior Court's August 10, 2021 decision in *Black v. Cutko* created a change in circumstance. Central Maine Power Company ("CMP") and NECEC Transmission LLC ("NECEC LLC") (collectively, the "Licensees") refuse to take this change of circumstance seriously, instead wrongly arguing that their appeal of *Black v. Cutko* somehow negates the Commissioner's prior determination. Unable to connect the NECEC Project under the currently permitted route, and having failed to present a single viable alternative, Licensees race to clear and construct a transmission corridor to nowhere, even while an appeal sits pending before the Department's Board of Environmental Protection ("Board") and a referendum looms.

Critically, as part of the licensing process, the Department determined that the NECEC Project would not comply with State environmental laws absent permit conditions that included *three* different types of conditions: on-site avoidance and mitigation; off-site mitigation; and decommissioning. *See* Order at 2, 80-82, 106. Licensees argue that the Department should

nonetheless allow them to construct a line that they cannot connect, so long as they comply with the on-site conditions and promise to "consider" a timeline for decommissioning if current conditions hold and the project can never be connected. *See, e.g.*, Dickinson Pre-Filed Direct Testimony at 19. This would incur all of the environmental harms without any of the off-site mitigation that the Department determined necessary to comply with State environmental laws, harms that would be compounded should Licensees subsequently seek to construct the same project on a different route.

Licensees' utter refusal to take seriously the current changed circumstance—that they cannot lawfully connect the corridor as permitted by the Department—and their disregard for the current suspension proceedings and contempt for the conservation restrictions on surrounding lands, means that the Department must suspend the permits until such time as Licensees can show that they have a viable path to connecting the corridor. For all of the reasons presented at the Department's suspension hearing on October 19, 2021, as well as all of the reasons set forth below, Licensees' inability to connect the corridor warrants an immediate suspension of the Order—or at the very least, an immediate partial suspension of the Order prohibiting construction and clearing in Segments 1 and 2.

The need for such a suspension becomes even more compelling should the referendum that is being voted on today pass. Among other things, it prohibits a transmission line like the NECEC Project from being built in the Upper Kennebec Region. Although it seems likely that Licensees will challenge the law should it pass, unless and until they obtain a court decision allowing them to proceed, the Department should not allow continued clearing and construction of a route barred by statute.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the Order, the Department approved the NECEC Project, which involves 145 miles of high-voltage direct current transmission line from Beattie Township to Lewiston, as well as a converter station in Lewiston, a new substation in Pownal, additions to other substations, and upgrades to existing transmission lines. NRCM filed an appeal of the Order to the Board on June 10, 2020. As of the date of this submission, that appeal has not yet been acted upon and is still pending before the Board.

On August 12, 2021, the Commissioner determined that the Superior Court's decision in *Black v. Cutko* vacating Licensees' lease of parts of two public lots created a change in circumstance. The Commissioner explained that, in reference to the 0.9 mile portion of the permitted transmission line crossing the public lands, that "[w]hile this portion of the transmission line is only a small part of the overall project, *this portion is necessary to the overall project purpose* of delivering electricity from Quebec to the New England grid." (Emphasis added). The Commissioner initiated this suspension proceeding pursuant to 38 M.R.S. § 342(11-B)(E) and Chapter 2, § 27(E).

On August 27, 2021, Licensees requested a hearing under Chapter 2, § 25(D). Intervenor status was granted to NRCM, Friends of Boundary Mountains, West Forks Plantation et al., and the Industrial Energy Consumer Group. Marybeth Richardson was appointed as the Presiding Officer and identified five hearing topics. The parties as well as the public had an opportunity to submit pre-filed testimony on each of the five hearing topics in advance of the hearing. The suspension hearing was held on October 19, 2021, and this post-hearing brief follows in accordance with the Hearing Officer's direction.

ARGUMENT

During the pendency of Licensees' appeal of *Black v. Cutko,* the Law Court ordered that Licensees could not clear or construct on the public lands. Bennett Pre-Filed Direct Testimony, Exhibit A. Thus, the critical change in circumstance that has occurred since the Department issued permits for the NECEC Project is that the Licensees cannot connect the route that was permitted. The only ways that Licensees will be able to overcome this fatal deficiency are if: (1) the Law Court reverses the Superior Court's decision or Licensees somehow obtain a new lease after the decision is affirmed; or (2) the Licensees obtain Department approval for a reroute of the NECEC Project.

Licensees have refused to meaningfully engage and explain how they might resolve the current change in circumstances. Instead, Licensees advance the incorrect and over-technical position that, because of the automatic stay provision of the Court's rules, their lease remains in effect and accordingly their circumstances have not changed. Relying on this false security, Licensees cynically delayed resolution of their appeal by refusing to expedite, and likewise refused in this proceeding to advance any plausible prospect of a reroute that does not cross conservation lands that prohibit the NECEC Project. Licensees argue that they should be able to build a line to nowhere because the line, if it were ultimately connected, would bring climate change benefits. These purported climate benefits are disputed and the subject of an appeal pending before the Board. But one thing is clear: a transmission line to nowhere can have no climate benefits. It can, however, have harms. Indeed, it will have all of the same harms that the Department determined would require off-site mitigation, but Licensees are not committing to that mitigation unless their line becomes operational. The Licensees must not be allowed to scar the State with a line to nowhere.

As set forth below, the evidence and testimony presented during the suspension hearing demonstrate that the change in circumstance resulting from the Superior Court's decision in *Black v. Cutko* warrants an immediate suspension of the Order—or at the very least, an immediate partial suspension of the Order prohibiting construction and clearing in Segments 1 and 2.

I. Black v. Cutko is a change in circumstance, and the timing of any resolution and the range of possible outcomes of that litigation counsel in favor of suspension.

Licensees are wrong to assert that their appeal somehow negates the change in circumstances identified by the Commissioner in her August 12, 2021 letter. To the contrary, the undisputed evidence and testimony established that the critical change in circumstance—that the Licensees cannot build across the public lands as permitted—will remain in effect for at least several more months and may permanently remain in effect if the Law Court affirms the Superior Court's decision.

The fact that the Licensees filed an appeal of the Superior Court's decision does not alter the change in circumstance. This is true for two reasons. First, while the Licensees' appeal to the Law Court "operate[s] as a stay of execution upon the judgment", M.R. Civ. P. 62(e), their appeal does not enable them to build across the public lands. Second, the Law Court entered an Order that prohibits the Licensees from all construction activities and vegetation removal on the public lands during the pendency of the appeal. Bennett Pre-Filed Direct Testimony, Exhibit A; Dickinson Pre-Filed Direct Testimony at 3. The Licensees went to great lengths to state that they agreed not to construct on the public lands during the pendency of the appeal; however, their agreement is immaterial. What matters for purposes of the suspension proceeding is that there is a Law Court Order that prohibits Licensees from engaging in all construction activities and vegetation removal during the pendency of the appeal. To conclude that anything else matters, such as Mr. Dickinson's insistence that the "lease remains in effect" would put form over

substance. Licensees' position seems to be entirely dependent on the Law Court dissolving the current order and allowing Licensees to build:

> Attorney Kilbreth: "So if the [Law Court] decision doesn't take place until the summer 2022, and if it's upheld, and if it's then going to take you several more years to develop as Ms. Johnston just testified an alternative route, why isn't that a change in circumstances that requires suspending the permit?"
>
> Mr. Dickinson: "Well again the lease is active and in place and we believe as laid out in my testimony the various outcomes possible in the Law Court are going to allow this project to move forward."

NECEC Suspension Hearing Video, Morning Session, at 1:03:35-1:04:18 (*available at* https://www.maine.gov/dep/ftp/projects/necec/SuspensionProceeding/). The critical issue for the Commissioner here has nothing to do with whether the lease is "active": unless and until the Law Court reverses the Superior Court's decision, the Licensees cannot construct over the public lands.[1] Consequently, they cannot connect the NECEC Project as permitted and, thus, cannot achieve the overall project purpose.

It is also undisputed that it will likely be early summer before the Law Court issues a decision on the appeal. Dickinson Pre-Filed Direct Testimony at 4; *see also* Bennett Pre-Filed Direct Testimony, Exhibit B. Accordingly, the current prohibition on all clearing and construction activities on the public lots and, thus, the bar to Licensees connecting the NECEC Project on the currently permitted route, will remain in effect for at least several more months. For reasons the Licensees refused to explain, they opposed expedition of the Law Court appeal. While Mr.

[1] Alternatively, the Licensees could try to obtain a new lease to cross the public lands. The Licensees suggested at the hearing that they would not pursue any alternative until after the decision by the Law Court. Mr. Dickinson testified in passing that the Licensees may consider pursuing a new lease with the Bureau of Public Lands to cross under the public lands using HDD. There was no evidence or testimony to suggest the likelihood of this happening. For example, it is unknown whether the Bureau would consider entering into such a lease, whether crossing the public lands underground would be practicable, whether crossing the public lands underground would require two-thirds legislative approval, or how long it would take to assess these issues and execute a new lease.

Dickinson and Mr. Mirable testified that Licensees may not be able to achieve commercial operation by their contractual deadline if they cannot construct all other portions of the Project during the pendency of the appeal, the Licensees are subject to the Law Court's timeline by their own choosing. In a situation such as this, where the Licensees could have agreed to expedite the Law Court's timeline but objected to doing so, the fact that they may not be able to meet their contractual deadlines is a problem of their own making and is a wholly unsympathetic and unpersuasive reason to allow them to continue constructing a Project that may never be able to be connected. If Licensees were genuinely concerned about being able to meet their contractual deadlines, then they should have agreed to expedite the Law Court appeal or made more than a perfunctory attempt to identify a potentially feasible alternative route.

The soonest the parties will know whether circumstances change again and the Licensees can connect the Project is when the Law Court issues a decision in the appeal, which is expected to be in or around June 2022. If the Law Court affirms the Superior Court, then it will be even longer before anyone knows whether Licensees can connect the Project. As Ms. Johnston and Mr. Dickinson testified, Licensees will not even begin the work of locating an alternative route until after the decision in *Black v. Cutko.* *See, e.g.*, NECEC Suspension Hearing Video, Morning Session, at 56:15-57:43, 1:05:32-1:05:51. And even after they identify a potentially feasible alternative, it would take several more months if not years to obtain all of the necessary approvals and land rights for an alternative route. *See, e.g.*, Johnston Pre-Filed Rebuttal Testimony at 3-4 ("Mr. Reardon states the obvious when he testifies that 'any such re-route would necessarily be significant and require extensive permitting procedures and a new alternatives analysis of prospective routes and their impacts on fish, wildlife, aquatic and scenic resources . . . "); Dickinson Pre-Filed Direct Testimony at 10 ("Implementing either of these alternatives would

require the acquisition of additional real estate rights, consideration of potential limitations and/or natural resources impacts, additional engineering and design work, and additional permitting.").

Until the Licensees can demonstrate that they have a lawful way to connect the line—either by a reversal of *Black v. Cutko* or permitting an alternative route—Licensees should not be allowed to continue constructing the corridor.

II. Due to the nature of linear project construction, and the lack of a viable alternative route, all or most of the Order must be suspended.

In a linear project such as the NECEC, when a portion in the middle of the project is called into question, then a potentially larger portion of the project may need to be rerouted. That is precisely what the evidence and testimony in this matter demonstrates.

The portion of the Project that has been called into question by the Superior Court's decision in *Black v. Cutko* is the 0.9 mile stretch over the public lands. While the 0.9 mile stretch may be small relative to the overall size of the Project, the Project's linear nature means that the potential reroute may be significant. More specifically, the least environmentally damaging practicable alternative route that would be able to connect the starting and ending points of the linear Project may be in a dramatically different location than the original route even though only a small portion of the original route is in question.[2]

[2] Licensees' proposed alternatives illustrate the point. Option 1 would require 14.5 miles of the project to be rerouted and Option 2 would require 3.8 miles of the project to be rerouted. *See* Dickinson Pre-Filed Rebuttal Testimony, Exhibit NECEC LLC-1-F. As Mr. Reardon testified during the hearing, he is in agreement with Mr. Dickinson and Ms. Johnston that there may be other alternatives besides Options 1 and 2 that could be considered (but that were not presented as part of the proceeding). Yet he believed that any such alternatives would likely entail greater deviations from the current route than Options 1 and 2. For example, Mr. Reardon testified during the hearing that another alternative may be the previously rejected Alternative 2 identified in the licensing proceeding that parallels the Kibby Wind Farm generator lead line to the Bigelow substation and then follows an existing powerline to the Wyman Hydro Station. That re-route would eliminate virtually all of Segments 1 and 2.

In this context, Licensees' failure to identify a feasible reroute speaks volumes. Licensees failed to identify a single reroute that could plausibly allow them to connect the line in a manner that could take advantage of some or all of the existing permitted route. Instead, the testimony established that Licensees are proceeding at a breakneck pace to build a line to nowhere, and imposing all of the environmental harm identified by the original NECEC Order, under the misplaced idea that subsequent decommissioning could retroactively negate this harm.

a. Licensees' treatment of alternatives demonstrate that their witnesses have no credibility, and their testimony cannot be believed.

In their original pre-filed testimony, Licensees did not attempt to map even a single alternative, instead vaguely—and it turns out disingenuously—stating that if they could not go through the public lands, then they could either go to the east, or to the west. Dickinson Pre-Filed Direct Testimony at 9-10. At the same time, NRCM submitted testimony demonstrating that there was no viable alternative to the east because of the Moosehead Region Conservation Easement ("MRCE") held by the Forest Society of Maine ("FSM"), with Third Party rights of enforcement held by the Bureau of Parks and Lands. Reardon Pre-Filed Direct Testimony at 3-4 and Exhibit B. The Department ordered Licensees to submit maps, which they belatedly did as part of their rebuttal testimony, and completely ignored the prohibitions of the MRCE. When asked about whether Licensees had talked to the FSM, Mr. Dickinson responded as follows:

> Attorney Kilbreth: "Have you talked to the Forest Society of Maine the easement holder about this Mr. Dickinson?"
>
> Mr. Dickinson: "The - I have a long conversation with Forest Society. Uh on this specific there was an email sent. I do not agree. Our review it from a legal perspective and my perspective is that we do not agree with that interpretation."

NECEC Suspension Hearing Video, Morning Session, at 1:08:55-1:09:16.

The "email sent" was later admitted into the record, over Licensees' counsel's objection, which showed it had been sent to Mr. Dickinson and Attorney Manahan. In the email, FSM

explained that these structures would be prohibited by the MRCE and that Mr. Dickinson was flat-out wrong that any portion of the Jackson Tie Line was within the property protected by the MRCE, and asked that Mr. Dickinson "correct" his testimony. Not only did Mr. Dickinson not correct his testimony, he never even acknowledged that he had been asked to do so by the easement holder.

Moreover, Mr. Dickinson's response of "I have" to Attorney Kilbreth's question of whether he had talked to FSM appears to have been entirely fabricated. FSM said that it would be happy to discuss the matter with Mr. Dickinson but as Ms. Tilberg, President and CEO of the FSM, testified during the public session, FSM never received a response.

> Ms. Tilberg: "*We have submitted a letter and we have offered to meet with CMP-NECEC team. To date they have not called us.* So I just want to emphasize that we are reluctant to be here. We take our obligation to enforce the terms of our easements very, very seriously and we will, we strongly contend that the clear terms of this easement prohibit a transmission line of this nature across the Moosehead Region Conservation Easement."

NECEC Suspension Hearing Video, Public Session, at 2:11:39-2:12:15 (emphasis added); *see also id.* at 2:13:00-2:13:11. Apparently, Mr. Dickinson completely invented the testimony that he had had any conversation, let alone a "long conversation" with FSM. The only communication appears to have been in one direction: an e-mail to Mr. Dickinson and Mr. Manahan identifying flaws in Mr. Dickinson's testimony and asking that he correct it before the Department, with not even a return-call from Licensees. Instead, Mr. Dickinson doubled-down on his false testimony and attempted to mislead the Department about his (nonexistent) conversations with FSM.

Intervenor Industrial Energy Consumer Group has likewise lost all credibility. In a completely inappropriate attempt to blindside Senator Bennett and pit him against his father on the issue of the NECEC Project, Attorney Buxton tried to suggest that Senator Bennett's father had submitted a letter to the Bangor Daily News in support of the NECEC Project. Not only was this line of questioning completely irrelevant, but it reflected a complete lack of diligence and even the

most cursory investigation. Like the Licensees, Mr. Buxton failed to approach this proceeding with the care and attention it deserves. Unlike Licensees, who apparently can never make, much less admit, a mistake, Mr. Buxton at least apologized for his attempt to besmirch Senator Bennett and his father without any basis.

b. The failure to identify re-routing alternatives, with no feasible alternative location that could reuse portions of the permitted route shows that the Commissioner should suspend the Order.

By their own admission, Licensees are waiting on the outcome of the Law Court appeal before seriously considering alternative routes and, once an alternative route is identified if necessary after an affirmance of the Superior Court's decision, it will take several months if not years for Licensees to obtain all of the necessary approvals and land rights. *See, e.g.*, NECEC Suspension Hearing Video, Morning Session, at 56:15-57:4; Johnston Pre-Filed Rebuttal Testimony at 3-4. The two alternative routes belatedly mapped by the Licensees are a farce: each would require crossing conservation lands that have restrictions that would prohibit the NECEC Project, and neither presents a feasible crossing of critical waterbodies, nor any demonstration that HDD would be environmentally possible.

1. Licensees' proposed alternative Option 1 is not viable.

Option 1 is not feasible for several reasons, including because it would require the NECEC Project—a long-distance high-voltage direct current transmission line—to cross the Pierce Pond Watershed Trust's ("PPWT") conservation easement and/or fee lands in Bowtown Township. PPWT learned of the Licensees' proposal to cross their conservation easement and possible fee lands in Bowtown Township from Mr. Dickinson's pre-filed testimony in this proceeding. Upon learning of that proposal, PPWT immediately contacted the DEP in a letter dated October 14, 2021. In its letter, PPWT informed the DEP of its position as easement holder, that the conservation

easement, which covers lands along the west side of the Kennebec River and the south side of the Dead River, prohibits structures and commercial development. PPWT also stated that "[i]t is clear that a transmission line on or above these easement lands would be inconsistent with the purpose and terms of the conservation easement." PPWT's interpretation as easement holder is consistent with the plain language of the conservation easement. *See* PPWT's Pre-Filed Written Testimony, which includes the Conservation Easement on Dead River and Kennebec River in Bowtown Township, recorded in the Somerset County Registry of Deeds at Book 2607, Page 239-240 (prohibiting, among other things, commercial or residential uses).

In response to PPWT's letter to the DEP raising the conservation easement, Licensees, in closing, stated that if structures are prohibited on this protected land, then Licensees could just go underground. However, that is incorrect for two reasons. First, the conservation easement considers things such as "old cellar holes", which by definition are underground, to be structures. *See id.* at Book 2607, Page 240 ("At the time of this grant there are no structures located on the Protected Property except for an old bridge abutment, old cellar holes and boundary markers. No additional structures may be located on the Protected Property without the prior written consent of TPL or successor holder of the Conservation Easement . . . ."). Second, as set forth in more detail below, the Maine Attorney General has recently taken the position that the term "structure" when used in a conservation easement should be read consistently with the Land Use Planning Commission's definition of structure to include "anything constructed or erected with a fixed location on or in the ground." Tom Saviello Pre-Filed Public Testimony at 4-5 and Letter from Assistant Attorney General Lauren Parker dated September 27, 2021 at 3 (attached thereto).

In addition to the PPWT's conservation easement's prohibition on the NECEC Project, there are several other reasons outlined in Mr. Reardon's pre-filed testimony that explain why Option 2 is not a viable alternative. Reardon Pre-Filed Direct Testimony at 3-5.

2. Licensees' proposed alternative Option 2 is not viable.

Option 2 is not viable because it would require the NECEC Project to cross the Forest Society of Maine's Moosehead Region Conservation Easement, which expressly prohibits projects like the NECEC. *See, e.g.*, NECEC Suspension Hearing Video, Public Session, at 2:09:48-2:11:38; 2:16:15-2:17:01 (Ms. Tilberg's and Mr. Metzler's testimony on behalf of FSM that the MCRE clearly prohibits the NECEC Project).

The plain language of the MRCE clearly prohibits the NECEC Project. As Ms. Tilberg told Mr. Dickinson directly in an email dated October 15, 2021: "I am expressing FSM's view, as easement holder, that a powerline would NOT be permitted on the easement lands as depicted in the Rebuttal testimony." Ms. Tilberg quoted various sections of the MRCE including language from the MRCE's section on "Prohibited Land Uses and Structures on Protected Property." Ms. Tilberg explained that pursuant to the MRCE, "[t]he following land uses are prohibited on the Protected Property *unless expressly permitted elsewhere* in this Conservation Easement . . . commercial, industrial, private . . . uses." (Emphasis added). Where the NECEC Project is a commercial, industrial, and private use, and there is nothing elsewhere in the easement that expressly permits a high-voltage direct current transmission line to traverse or transect the Protected Property, it is a prohibited land use. The analysis could stop here but there are other sections of the MRCE that further demonstrate the NECEC Project is prohibited from crossing the MRCE.

As Ms. Tilberg further quoted, "*[w]ithout limiting the generality of the foregoing*, the following Structures are all specifically prohibited on the Protected Property unless otherwise expressly permitted in this Conservation Easement . . . new long-distance energy or telecommunications distribution systems that traverse or transect the Protected Property . . . ." (Emphasis added). In their closing argument, Licensees argued that this express prohibition does not apply because they are building a transmission line and not a distribution line. This argument is nonsensical. First, the quoted provision applies to "new long-distance energy or telecommunications distribution *systems*" and not simply distribution lines. Second, a transmission line is by definition larger and more impactful than a distribution line and, therefore, it would not make any sense for the MRCE to expressly prohibit a distribution line but allow a transmission line.

Mr. Dickinson's emphasis on the definition of "Utility Transmission Structures" in his Pre-Filed Rebuttal Testimony and during cross-examination misses the mark. He testified that the MRCE's definition of "Utility Transmission Structures" does not apply to the NECEC Project because it is a long-distance and not a local transmission line. This is accurate. The MRCE's definition of Utility Transmission Structures applies to "the local distribution of telecommunication or electric power services, including distribution lines, cables, poles and related equipment." Reardon Pre-Filed Direct Testimony, Exhibit B at 8. However, neither of the prohibitions discussed above—for commercial, industrial, and private uses, and long-distance energy or telecommunications distribution systems—rely on this definition. If anything, the definition of "Utility Transmission Structures", which includes distribution, suggests that the transmission structure is inclusive of the distribution services, lines, cables, poles and related equipment.

Mr. Dickinson also incorrectly testified in his Pre-Filed Rebuttal Testimony at 3 that "it is clear transmission lines are permitted to cross land protected by the Conservation Easements, as evidence by the existing Jackman Tie Line. *See* map at Reardon Direct Exhibit B, Exhibit A-2, Bk. 2165, Pg. 103. This map clearly shows the existing transmission line passing for approximately 2.3 miles through Conservation Easement land (longer than the Option 2 alternative NECEC route.)" This is simply false. The Jackman Tie Lie is excluded from the MRCE and pre-dates the MRCE. Tilberg Pre-Filed Written Testimony at 2; Reardon Pre-Filed Direct Testimony, Exhibit B, Exhibit A-1. Ms. Tilberg informed Mr. Dickinson of this in her email dated October 15, 2021. Rather than correcting this at the hearing, Mr. Dickinson repeated this incorrect information at the hearing.

The fact that the Licensees would cursorily draw a couple of lines on a map and claim that they could construct over protected lands is concerning in and of itself. It is even more concerning that after being contacted by FSM, the Licensees refused to correct the inaccurate information in their testimony, and as Ms. Tilberg testified, refused to talk with her about her concerns despite her attempts to do so.

3. Licensees' discussion of HDD during the hearing.

In the face of the fatal problems with the Licensees' proposed alternative routes, the Licensees raised for the first time the possibility of using Horizontal Directional Drilling ("HDD") to go underneath various conservation easements. The possibility of using HDD was not raised in any of the pre-filed testimony but instead was raised for the first time during the hearing. As Mr. Reardon explained during the hearing, HDD is not always feasible from a construction standpoint and there are a number of factors including among others the height of the adjacent lands and the nature of the soils and underlying geology that go into figuring out whether HDD is feasible in any

particular location. Mr. Reardon used the Maritimes Pipeline project as an example and explained that only one of the two proposed crossings of the Sheepscot was actually technically feasible. Similarly, the major issue in the Maritimes proceeding was the location of the crossing of the Kennebec. The feasibility of the crossing determined the route there, just as here a new crossing of the Kennebec will have to be identified that is both technically and legally feasible before a new route can be identified. Contrary to the Licensees' suggestion that they could simply use HDD to go underground in any number of places, including under the public lands, under the MRCE, or under Bowtown Township, there is no evidence whatsoever to show that HDD is feasible at any of those locations.

In addition to the feasibility issues associated with HDD, there are legal issues. Despite Licensees taking the position that a conservation easement's prohibition against structures does not apply underground, the Maine Attorney General, who is charged with certain enforcement and interpretation authorities for conservation easements in Maine, has taken a contrary position. Thus, the pronouncements by Licensees' counsel, such as if the Pierce Pond Watershed Trust prohibits structures, the Project could just go underground, are not only arrogant but also legally inaccurate.

As set out in more detail in Thomas Saviello's written testimony:

> The Attorney General has moved to intervene in a case against the City of Belfast where the Attorney General opines that water pipes that will be buried underground are "structures" within the meaning of a conservation easement that prohibits structures in the intertidal zone. The Attorney General's motion to intervene (which is attached) itself attaches a letter from Assistant Attorney General Lauren Parker to the City of Belfast, which letter on page 3 takes the position that the term "structure" when used in a conservation easement should be read consistently with the Land Use Planning Commission's definition of structure to include "<u>anything constructed or erected with a fixed location</u> on or <u>in the ground</u>". (Emphasis added). The Attorney General's motion has not yet been acted upon by the Court, but if granted, the Attorney General has filed, together with its motion to intervene, the attached Complaint that they propose to file if their intervention is granted. In that

> Complaint in paragraphs 16-18, the Attorney General of the State of Maine takes the position that underground pipes are "structures" within the meaning of a conservation easement's prohibition on structures.
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> The Maine Department of Environmental Protection should credit the interpretation expressed by the Attorney General of the State of Maine of the meaning of the word "structure" when used in a conservation easement, and should not credit the contrary interpretation advanced by the attorneys for CMP, which has no basis in law or in fact. Constructing a high impact transmission line under conservation lands is plainly something "constructed or erected with a fixed location on or in the grounds" that, in the view of the Maine Attorney General, is prohibited by a conservation easement's prohibition on "structures" within the protected property.

In accordance with the Attorney General's interpretation that the word "structure" when used in a conservation easement includes anything constructed in the ground, the Licensees' use of HDD would be prohibited by the plain terms of PPWT's and FSM's conservation easements. Due to both the feasibility and legal issues surrounding HDD, Licensees have failed to demonstrate that they could use HDD as part of an alternative route.

4. Cold Stream Forest is not a practicable alternative.

The Licensees did not propose running the NECEC Project through the highly sensitive lands of Cold Stream Forest as one of their alternative options; however, in his Pre-Filed Rebuttal Testimony, Mr. Dickinson asserted that the Project could be rerouted through Cold Stream Forest without Licensees first obtaining 2/3 legislative approval. Dickinson Pre-Filed Rebuttal Testimony at 3. In support of this contention, Mr. Dickinson relies upon a memorandum from Assistant Attorney General Lauren Parker. However, in doing so, Mr. Dickinson completely disregards the fact that the analysis he relies upon in that memo is subject to the Law Court appeal of *Black v. Cutko*. In other words, if the Law Court affirms the Superior Court's decision, then the Bureau of Parks and Lands would have to have a public process to determine whether the NECEC Project would reduce or substantially alter Cold Stream Forest, make a written determination, and then upon finding a reduction or substantial alteration, seek 2/3 legislative approval, or upon a finding

of no reduction or substantial alteration, give the public and the Legislature an opportunity to seek judicial review of the determination.

Furthermore, because Cold Stream Forest was acquired with Land for Maine's Future funds, there is an open legal question as to whether any lease between Licensees and the Bureau of Parks and Lands of Cold Stream Forest would be subject to 12 M.R.S. § 598-A or 5 M.R.S. § 6209. If the Lands for Maine's Future statute governs, then any such lease would require 2/3 legislative approval independent of any constitutional analysis. *See* 5 M.R.S. § 6209(6) ("land acquired under this chapter may not be sold or used for purposes other than those stated in this chapter, unless approved by a 2/3 majority of the Legislature").

In light of all of the practical and legal issues with the Licensees' proposed alternatives in Options 1 and 2, HDD, and Cold Stream Forest, it is clear that it would be years before all of these issues could be sorted out.

III. The status of construction activities, including portions completed, current activities, and construction plans for the upcoming months show that the Commissioner should suspend all or most of the Order.

Notwithstanding the change in circumstances and the nature of linear project construction, the Licensees have continued to pursue their efforts to construct all portions of the current NECEC Project route with the exception of the portion that crosses the public lands. And they are pursuing construction at a fast pace. As Mr. Dickinson testified, he would have to confirm that the construction overview map dated October 13, 2021 was still accurate as of October 19, 2021, and that he expects all clearing to be complete in mid-late December 2021. NECEC Suspension Hearing Video, Morning Session, at 1:43:37-1:43:58, 1:45:10-1:45:25. This is so even though, as Mr. Dickinson testified in response to Mr. Beyer's questions, if Licensees pursued Option 1, then the permitted route between Route 201 and the northern end of Segment 2 would be abandoned, and if they pursued Option 2 then a portion of the permitted route between Route 201 and the

northern end of Segment 2 would be abandoned. NECEC Suspension Hearing Video, Morning Session, at 1:41:30-1:42:23.

It is not, however, too late for a suspension to be meaningful. Substantial portions of Segments 1 and 2 are not yet impacted. Thus, at a minimum, it is imperative that the Licensees cease construction in Segments 1 and 2, until there is certainty as to whether and where the Project will be able to be connected. This is because the yet to be cleared areas of Segments 1 and 2 are particularly sensitive areas and, contrary to the Licensees' contention, will be harmed by clearing and construction even if the Project is decommissioned. As discussed in more detail below, the Order requires three types of mitigation to ensure adequate protection of the environment—on-site, off-site, and decommissioning. *See, e.g.*, Order at 2, 80-82, 106. Even assuming Licensees perform the on-site mitigation and decommissioning, by failing to complete the off-site mitigation, the environment in Segments 1 and 2 will not be adequately protected.

Thus, the substantial portions of Segments 1 and 2 that have not yet been cleared and constructed upon should remain untouched until it is certain that the Licensees will be able to connect the Project. As of October 13, 2021, Licensees had not started any clearing in the sensitive wildlife areas of 4, 5, 7, 8, 9, 10, 11, 12, and possibly 6. Licensees' Construction Overview Map dated October 13, 2021; Reardon Exhibit H. In addition, as of that date, there were not any structures (*i.e.* poles installed or in progress) north or west of the public lands. Licensees' Construction Overview Map dated October 13, 2021. Between Moxie Township and the Wyman Substation, there were 11 structures installed or in progress. *Id.* Where Licensees are rapidly constructing all portions of the Project, an immediate suspension of at least Segments 1 and 2 is required before any further unnecessary and potentially pointless environmental harm occurs.

IV. Licensees did not present any evidence that justifies allowing them to continue constructing a transmission line that may never be able to be connected.

a. There are no climate benefits to clearing a line to nowhere.

Rather than address the actual topic identified by the Hearing Officer—what happens when a portion of a linear project is called into question—the Licensees attempted to use this hearing topic to identify the asserted benefits of *completing* the linear project. Thus, the Licensees introduced evidence and testimony related to the purported climate benefits of the NECEC Project and argued that delaying construction would delay the climate benefits. These purported climate benefits are disputed and the subject of an appeal currently pending to the Board—which is not bound to accept any of the Department's findings as to potential climate benefits. More critically, however, this argument skips over the practical reality that no climate benefits can be achieved if the Project cannot be connected—a fact Mr. Dickinson conceded on cross-examination. Removing carbon-sequestering trees for a power line to nowhere obviously has a negative climate impact. There can be no climate benefits to a linear project that cannot be built. As of right now, Licensees cannot build over the public lands and there is no viable alternative route, let alone an alternative route that is even close to receiving all of the necessary approvals and obtaining all of the necessary land rights. Thus, the discussion of a delay in purported climate benefits is premature and will only become relevant if and when the NECEC Project can be connected.

b. Licensees overstate the financial impact, which they could avoid.

Licensees argue that they will incur significant costs and may not be able to meet their contractual deadline for commercial operation if the Order is suspended. Mirable Pre-Filed Direct Testimony at 4; Dickinson Pre-Filed Direct at 13. To the extent that the financial impact on the Licensees is even relevant to the topic of the effect on the project if the Order is suspended, the Licensees have overstated it. They testified about the potential cost of a 12-month suspension of

the entire permit. Yet if the Law Court issues a decision in Licensees' favor in June 2022, which Mr. Dickinson testified he is confident will happen, then the permit would only be suspended for 8 months (Nov-June). The Licensees' estimated cost also does not take into account the possibility of a partial suspension of the Order. And they failed to calculate the costs of the "decommissioning" they said they would undertake if they ultimately could not connect so that a meaningful cost comparison could be made. Finally, as discussed above, the fact that Licensees may not be able to meet their contractual deadline of commercial operation is a problem of their own making. If they were concerned about this, they could have agreed to expedite the Law Court appeal or they could have proposed and pursued an alternative route that was actually feasible and legal. They did not do either.

c. The practical requirements of any measures that would be necessary to protect the environment if the permit were to be suspended are minimal.

There is nothing about the practical requirements that would be necessary to protect the environment that suggest the Order should not be suspended as a result of the change in circumstances. Contrary to the Licensees' testimony, there is no evidence that they "would have to take extraordinary and expensive measures to protect the environment during the period of suspension." Mirable Pre-Filed Direct Testimony at 4. The list of measures that they would have to take are actually quite ordinary and include things like "installing temporary erosion control devices such as silt socks, hay bales, erosion control mix, and erosion blankets" and removing crane mats and conducting weekly inspections. *Id.* at 4-5. The costs that Mr. Mirable attributed to these measures are actually the costs to Licensees of suspending the entire project for a 12-month period. *See id.* at 4 ("As indicated in Mr. Dickinson's testimony, the NECEC project management team estimates that costs as a result of a 12-month delay in overall project construction of the NECEC LLC components would be approximately $67 million.").

Instead, the evidence shows that as a matter of fact and law the environment will be harmed if the Project has to be rerouted or cannot be connected. Licensees are incorrect when they say that there will be no harm to the environment because they will decommission the Project. Dickinson Pre-Filed Direct Testimony at 19; Mirable Pre-Filed Direct Testimony at 6. The Order requires Licensees to complete three different types of mitigation so that the environment is adequately protected—on-site, off-site, and decommissioning. Licensees have discussed their on-site mitigation as well as their commitment to decommissioning the Project if it cannot go forward; however, they have been completely silent about off-site mitigation. The Order states that: "[t]he Order puts in place a comprehensive set of conditions designed to avoid and minimize the project's impacts to the extent possible, *while also requiring substantial offsite compensation for those impacts that remain*. *So conditioned, the project fully satisfies the Department's permitting standards.*" Order at 2 (emphasis added). The Order further explains "[b]ecause of the impacts to wildlife, even with on-site mitigation, the Department finds additional, off-site, mitigation in the form of land conservation is required to ensure the applicant has made adequate provision for the protection of wildlife in the region affected by the project." Order at 80. Specifically, the Department found that 40,000 acres of conservation land was reasonable and appropriate. Order at 81. Licensees have until sometime prior to commercial operation of the Project to complete this off-site mitigation requirement. Order at 81.

There is no evidence or testimony in the record about this required off-site mitigation. Instead, all of the evidence and testimony from Licensees suggests that they view decommissioning the Project as the sole remediation necessary for any construction they complete but cannot ultimately utilize. This is not true as a matter of fact. *See, e.g.*, Merchant Pre-Filed Rebuttal Testimony at 2-5 (discussing the length of time it takes for a forest to regenerate and the

differences between forest regeneration in the case of a clearcut versus forestation). It is also not true as matter of law based on the requirements of the underlying permit. If the Department does not suspend the Order, the Licensees are going to continue to construct all portions of the Project, and if they cannot complete it, they will decommission it, but they will not complete the off-site mitigation and, thus, the environment will be harmed under the terms of the Order.

PROPOSED FINDINGS OF FACT

In accordance with Chapter 3, Section 23, of the Department's Rules, NRCM proposes the following findings of fact.

1. Licensees cannot clear or construct on the public lands during the pendency of the Law Court appeal. Until that circumstance changes, they cannot meet the project purpose of bringing hydropower down from Quebec to Massachusetts.

2. Licensees have made no attempt to obtain a new lease for the public lands and will not do so until after the Law Court decision in the appeal of *Black v. Cutko*, if it is affirmed.

3. Licensees have proposed two alternative routes to justify being allowed to continue construction.

4. Alternative 2 runs through lands encumbered by the Moosehead Region Conservation Easement ("MRCE"), a conservation easement held by the Forest Society of Maine ("FSM").

5. The MRCE grants to the State of Maine, acting through its Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, Third Party rights of enforcement defined therein.

6. The MRCE prohibits structural development for commercial, industrial or private uses.

7. The MRCE defines "Structure" as "anything constructed or erected with a fixed location on or in the ground, or attached to something having a fixed location on or in the ground."

8. The MRCE authorizes certain defined Utility Transmission Structures for local distribution that would not include NECEC utility structures or uses.

9. In addition to the general prohibition, the MRCE specifically prohibits long-distance energy or telecommunications distribution systems.

10. The Jackman Tie Line is adjacent to but does not cross any lands encumbered by the MRCE and predates the MRCE by over three decades.

11. The easement holder, FSM, has made clear that NECEC would not be allowed under the MRCE.

12. Because Licensees will be unable to reroute around the public lands by going east through the MRCE as Alternative 2 proposed, they will have to abandon at least that part of Segment 1 slightly west of Route 201 down to the northern part of Segment 2 in the Forks.

13. Abandoning that part of Segment 1 will require locating a new crossing of the Kennebec.

14. Alternative 1 proposed a new crossing of the Kennebec right below the Forks where the Dead River runs into the Kennebec, and a crossing of the Dead River, both Outstanding River Segments. It would run through lands owned in fee and/or lands encumbered by a conservation easement held by the Pierce Pond Watershed Trust ("PPWT").

15. The purpose of that conservation easement is "to restrict development and subdivision of the Protected Property . . ." and prohibits structures and commercial development.

16. PPWT's conservation easement does not define structures. The Attorney General recently filed a complaint taking the position that the word "structure" when used in a conservation easement but not defined therein should be read consistent with a definition of structure as anything with a fixed location on or under the ground.

17. The easement holder, PPWT, has made clear that the NECEC Project would not be allowed under their conservation easement.

18. Licensees have no rights to the land protected by conservation easements and have not indicated an ability or willingness of any of the landowners to negotiate their land rights.

19. Substantial portions of Segment 1 have yet to be cleared.

20. No structures have been erected north or west of the public lands.

21. The Licensees have not made a showing that they would be able to reuse any portions of Segment 1 as part of any viable reroute.

22. The Order requires three types of mitigation to ensure adequate protection of the environment—on-site, off-site, and decommissioning.

23. If Licensees are unable to connect the NECEC Project, they have committed to submit a decommissioning plan but they have not committed to perform the off-site mitigation set forth in the Order.

24. Unless Licensees complete each of the three types of mitigation—on-site, decommissioning, *and* off-site, then the environment will not be adequately protected.

25. Any climate benefits from the NECEC Project can only be realized if the project can be connected.

26. The practical requirements of protecting the environment during a suspension of the Order are minimal and there is no evidence that the costs of doing so would be prohibitive.

CONCLUSION

For all of the foregoing reasons, NRCM requests that the Commissioner immediately suspend the Order, or at the very least, prohibit any further construction and clearing in Segments 1 and 2 until final resolution of *Black v. Cutko*.

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/s/ *James T. Kilbreth*

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